NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-10-1022-PaDNo and CC-09-1393-PaDNo (Cross-Appeals)
EDWARD WILLIAMS CUTTER, II,	
Debtor.	Bk. No. SV-05-14744-KT
EDWARD WILLIAMS CUTTER, II; JOHN F. CUTTER, Guardian ad Litem for Edward Williams Cutter aka Trip Cutter,	Adv. No. 06-01249-KT
Appellants/Cross-Appellees,	
v.	**M E M O R A N D U M**[1]
DAVID SEROR, Chapter 7 Trustee,	
Appellee/Cross-Appellant,	
ZORAN VUJIC,	
Appellee/Cross-Appellee.	

Argued[2] and Submitted on September 23, 2010
at Pasadena, California

Filed - October 21, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Kathleen H. Thompson, U.S. Bankruptcy Judge, Presiding

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Counsel for Appellants/Cross-Appellees did not appear at oral argument and their position is deemed submitted on their briefs. Counsel for Appellee/Cross-Appellant appeared and was heard.

Appearances: Russell H. Rapoport argued for Appellee/Cross-Appellant David Seror

Before: PAPPAS, DUNN and NOVACK,[3] Bankruptcy Judges

Edward Williams Cutter, II ("Cutter") and John F. Cutter, Guardian ad Litem ("Guardian") for Edward Williams Cutter aka Trip Cutter ("Trip") (together, the "Cutter Parties") appeal the judgment of the bankruptcy court denying Cutter's discharge under 11 U.S.C. § 727(a)(2),(3),(4) and (6),[4] determining that his debt to the Probate Estate of Alberta Patricia McNamara ("McNamara") is nondischargeable under § 523(a)(2),(4) and (6), and quieting title in the Thurston property in the bankruptcy estate. Chapter 7 Trustee David Seror ("Trustee") cross-appeals the bankruptcy court's ruling quieting a one-third interest in the Whipple property in Trip. We AFFIRM the decision of the bankruptcy court in all respects.

FACTS

Cutter filed a petition under chapter 7 on July 12, 2005, and Trustee was appointed chapter 7 trustee.

On Cutter's schedule A, he indicated that he owned no real property assets; on schedule B, that he owned no interests in any

[3] The Honorable Charles D. Novack, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

[4] Unless otherwise indicated, all chapter, section and rule references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

trust created for his own benefit; and on the Statement of Financial Affairs, that he held no property for another and that he had "zero" income in 2005. The bankruptcy court would later determine that all of these statements were false.

Cutter listed only one unsecured creditor, the Estate of Alberta Patricia McNamara, for approximately $430,000, and he indicated that the claim was contingent, unliquidated, and disputed. The executor of the McNamara estate, Zoran Vujic ("Executor"), sought and was granted relief from the automatic stay on August 24, 2005, to prosecute and liquidate the McNamara claims in the state court action Zoran Vujic v. Arthur Lewis Cole et al., in which Cutter is a named defendant.[5]

On the petition date, it was undisputed that Cutter was trustor and trustee of The Edward Williams Cutter 2nd Inter-Vivos Trust dated May 23, 1989 (the "Trust"), and that the Trust held title to four parcels of improved real property (the "Trust Properties"). Among those was a property on Whipple Street, North Hollywood, California (the "Whipple" property). The bankruptcy court would ultimately determine that Cutter had contributed all of these properties to the Trust with the exception of a one-third interest in the Whipple property that was conveyed to the Trust by John J. Ermatinger ("Ermatinger," and the one-third portion is referred to as the "Ermatinger Third"). Another property, not one of the Trust Properties, was located on Thurston Circle in Los Angeles (the "Thurston" property); on the petition date, "Edward W. Cutter, a Single Man" held title to the Thurston property.

[5] The judgment ultimately rendered in the state court action would be valued at almost $15 million.

On September 6, 2006, Trustee and Executor commenced the adversary proceeding against Cutter and the Trust from which this appeal arises, seeking the following relief: denial of Cutter's discharge under § 727(a)(2) and (4); determinations under § 523(a)(2),(4) and (6) that the McNamara judgments were nondischargeable; quiet title of the real properties alleged to be part of the bankruptcy estate; declaratory relief settling the bankruptcy estate's rights in the assets of the Trust; an accounting, turnover and/or damages relating to rents, issues and profits from the real properties; and appointment of a receiver to protect assets of the Trust.

The Receiver and the Contempt Proceeding

As a debtor in a bankruptcy case, Cutter was ineligible under state law to continue to serve as trustee of the Trust. CAL. PROBATE CODE § 15643(f). At Trustee's request, the bankruptcy court therefore appointed a temporary receiver for the Trust on September 8, 2006, without notice to Cutter, and issued an order to Cutter requiring him to turn over to the receiver possession of the real properties and assets of the Trust, as well as all keys, books, documents, tax returns, leases, rent rolls, unpaid bills and records relating to the property and assets of the Trust. On September 28, 2006, after a hearing, Samuel R. Biggs ("Receiver") was appointed permanent receiver of the Trust.

Shortly thereafter, Cutter and Trip, without notice to Trustee, Executor or Receiver, obtained a state court order appointing a Successor Trustee of the Trust, Ilbert A. Philips, to succeed Cutter. Philips then asked the bankruptcy court to vacate the receivership, and it did so on December 11, 2006.

Executor and Trustee moved on November 17, 2006 for an order to show cause why Cutter should not be held in contempt for his failure to cooperate with Receiver, or to comply with the bankruptcy court's instructions to turn over Trust documents and records to the Receiver. An OSC was issued on November 28, 2006, and Cutter filed an opposition. A hearing on the contempt motion was held over the course of three days beginning January 18, 2007.

The bankruptcy court issued its Memorandum Decision on March 1, 2007. In it, the bankruptcy court found Cutter in civil contempt under § 105(a) on three grounds. It found:

1. "The Debtor's statement to Biggs on October 9, 2006 that there were no trust accounts was a deliberate falsehood which was a knowing and direct violation of the court's orders."

2. "The Debtor's failure to turn over information about the homeowner's association on [one of the four properties], contact information for Terrance M. Cooney, and all documents received from lenders on trust assets after October 1, and the ID and password information on the Trust account were deliberate and knowing violations of the court's orders."

3. "The Debtor's transfers out of the Trust Account on and after October 24, 2006, were deliberate and knowing violations of the court's orders."

In addition to the contempt finding, the bankruptcy court determined that Cutter

> demonstrated without doubt that he is neither a truthful man nor a trustworthy one. During the first day of trial, the Debtor testified that the condominium in Portland, Oregon, in which he lives with his son Trip, was purchased with his son's assets and his son's credit. During the final day of trial, documents offered to impeach the Debtor forced his admission that

> the lender on the Portland condominium was given false documents. More specifically, the lender was given a W-9 form (Request for Taxpayer Identification Number and Certification) in the name of Edward W. Cutter, using Trip's social security number, but signed by the Debtor. In addition, the lender was given copies of 1040 U.S. Tax Return forms for 2004 and 2005, both in the name of Edward W. Cutter, using Trip's social security number, showing income from the Debtor's accountancy practice.

Memorandum Decision on Contempt at 14.

On January 24, 2007, Guardian filed a complaint in intervention in the adversary proceeding, asserting that Trip held title to the Thurston property. Guardian also disputed Trustee's claims that the bankruptcy estate had any ownership interest in the Trust corpus. The bankruptcy court approved the parties' stipulation allowing the intervention of Guardian.

The Summary Judgment Motion and First BAP Appeal

On March 27, 2007, Executor and Trustee filed a motion seeking summary judgment on the claims in the adversary complaint for denial of discharge, nondischargeability of the McNamara claims, to quiet title in Trustee as to the Thurston and the Trust Properties, and to determine that the Trust was a self-settled, irrevocable spendthrift trust designed solely to benefit Cutter. Cutter opposed the summary judgment motion. Guardian also opposed the motion, arguing that Trip was the owner of Thurston, and challenging Trustee's powers to take the Trust Properties into the bankruptcy estate.

The hearing on the summary judgment motion occurred on September 21, 2007. The bankruptcy court entered findings of fact and conclusions of law and an order granting summary judgment on certain claims on November 2, 2007. The bankruptcy court agreed with Executor and Trustee that the Trust Properties belonged to

the bankruptcy estate, and granted partial summary judgment in favor of Trustee and Executor. However, it denied summary judgment as to the Ermatinger Third and Thurston because genuine issues of material fact remained for trial. It did not act on the objections to discharge and nondischargeability claims. A judgment on certain claims was entered by the bankruptcy court on January 7, 2008.

Cutter appealed, and on September 4, 2008, the BAP issued a published Opinion. Cutter v. Seror (In re Cutter), 398 B.R. 6 (9th Cir. BAP 2008) (amended opinion). The Panel described Cutter's Trust as a "failed asset protection scheme." It published to call attention to the fundamental fallacy inherent in that scheme, that is, the cornerstone of the scheme is a self-settled trust that identifies only unnamed "surviving" descendants of the trustor as beneficiaries, but leaves in the trustor the power to deplete the trust of all of its assets for his own benefit. The Panel generally affirmed the bankruptcy court, but remanded to the bankruptcy court with instructions to order transfer of an additional one-third interest in the Whipple property to Trustee.

On November 17, 2008, Trustee amended the adversary complaint to add two new claims for relief and the imposition of a "resulting trust" as to the Thurston property. According to Trustee, if it were determined that Trip was the holder of title to Thurston, but that Cutter paid for the property, a resulting trust arose under California law in favor of Cutter, and Thurston would then be property of the bankruptcy estate, citing RESTATEMENT 3D, TRUSTS § 9.

The Renewed State Court Action

At some point not clear in the record, the Executor's claims against Cutter were overturned on appeal in state court, remanded to the state trial court, and then once again determined in favor of Executor. On June 30, 2008, the Los Angeles Superior Court entered judgment against Cutter in favor of Executor for $14,992,225.89. Among the state court's findings and conclusions were the following:

1. The state court action against Cutter was for financial elder abuse, professional negligence (as an accountant), and breach of fiduciary duty. Alberta McNamara was an elderly lady with no living relatives. She and her brother were orphans. Her brother, who was successful in business, predeceased her, leaving her a multimillion dollar estate. The day after her brother's death, Alberta signed a document authorizing Arthur Cole to handle all of her business affairs. Cole then referred Cutter to Alberta.

2. Alberta was interested in helping orphans. Taking advantage of this interest, the state court found, Cutter and Cole set up sham charities, with names such as "It's Christmas Morning, Inc." ("ICM"), and that "[t]here was massive undisputed evidence that most of Alberta's money was funneled into the sham charities and Cole and Cutter were the only individuals who benefitted from them."

3. The state court found Cutter to be "totally without credibility." It cited similar findings by the bankruptcy court and the probate court. Cutter asserted his Fifth Amendment rights during the state court proceedings regarding his involvement in the McNamara estate.

4. Cutter, a CPA, prepared tax returns for Alberta, was her estate planner, and "as such owed to her as a fiduciary the highest of good faith dealings on her behalf."

5. "The conduct of Cutter and Cole was well beyond negligence and by clear and convincing evidence the court [found] malice and fraud as to the despicable conduct of Cutter and his intentional misrepresentations and deceit."

6. Cutter placed Alberta's real property in escrow without her knowledge.

7. ICM, controlled by Cutter, sold property from McNamara's estate for $533,000 and the money disappeared.

8. Cutter is liable for "Financial Elder Abuse" in violation of Cal. Probate Code § 859, and Welfare and Institutions Code § 15657.5(a). Cutter took, secreted and appropriated Alberta's savings and inheritance.

9. "Cutter breached his fiduciary duties to Alberta in multiple instances. The improper payment of a non-existent annuity, failing to provide documents or written explanations to Alberta, he had various conflicts of interest in his dealings with Alberta, he did not explain the operations of the various charitable corporations, he did not disclose his relationship to Fairhaven and CMS [two charitable conduits set up by Cutter], there are no corporate records regarding the corporations, only Cole and Cutter benefitted from the alleged charitable corporations. No charity was ever operated, there are no corporate minutes regarding disbursement of funds, Cutter failed to make numerous disclosures to Alberta, and the corporations made gifts for non-charitable purposes."

The state court found Cutter liable under Cal. Probate Code § 850(a)(2), and he was ordered to restore probate estate property in the amount of $3,636,372.67. Pursuant to Cal. Probate Code § 3294, the state court awarded the McNamara estate double exemplary damages of $7,272,745.34. And pursuant to Welfare and Institutions Code § 15657.5(a), Cutter was ordered to pay $4,083,107.88 in attorney's fees.

The Adversary Proceeding Trial and this Appeal

After a series of procedural skirmishes, the parties prepared for trial. Cutter filed a trial brief on February 3, 2009, in which he argued that: (1) the Superior Court judgment for fraud did not meet the standards of § 523 for nondischargeability; (2) Thurston was Trip's property, but would revert to Ermatinger if challenged; (3) only one-sixth of Whipple was property of the bankruptcy estate; and (4) the alleged nondisclosures of Cutter's assets were not sufficient to deny him a discharge.

There was one significant in limine dispute. Cutter and Guardian challenged Trustee's resulting trust theory on the grounds that the four-year statute of limitation for such claims had expired before Trustee filed his supplemental complaint. Trustee responded that the statute does not begin to run until Trustee repudiates the existence of the Trust.

Trial was held on March 9, 2009. The bankruptcy court issued a detailed Memorandum of Decision on Trial containing fact findings and legal conclusions on August 29, 2009. It found that Cutter had failed to disclose in his schedules the legal and equitable interests he held in various properties, and that his non-disclosure was intentional and done with intent to delay and

defraud creditors. The bankruptcy court therefore denied Cutter's discharge under § 727(a)(2).

The bankruptcy court referred to its Memorandum Decision of March 1, 2007 in the contempt hearing. The bankruptcy court found that Cutter failed to keep numerous records as trustee of the Trust, and that as a CPA, Cutter knew the importance of those records. Cutter's explanation that he was "disorganized" was not credible, so the bankruptcy court also denied his discharge under § 727(a)(3).

The bankruptcy court found that Cutter had made numerous false oaths in his schedules and statement of financial affairs, that he made them knowingly and with intent to deceive creditors and Trustee, and denied discharge under § 727(a)(4).

Again referring to the contempt trial, the bankruptcy court observed that it had held Cutter in contempt on three grounds, that those acts all represented deliberate and intentional refusals to obey lawful orders of the court, done to defraud creditors and hinder the Trustee's administration of the case. The bankruptcy court therefore denied Cutter a discharge under § 727(a)(6).

The bankruptcy court took judicial notice of the proceedings in state court and the judgment issued against Cutter on June 30, 2008. The court analyzed the appropriate sections of the California Civil and Probate Codes, and took note of the detailed factual findings of the state court. Based upon the state court's findings, it concluded that the judgment debts owed by Cutter to the McNamara estate were nondischargeable under § 523(a)(2),(4) and (6).

The bankruptcy court observed that it had previously found that Cutter had purchased the Thurston property with his own resources and credit in 2003, and that Cutter had offered nothing during the trial to change the court's previous findings. Moreover, the bankruptcy court found that even if Cutter and Ermatinger intended Trip to be the owner of Thurston, no third party purchaser would have constructive or inquiry notice that Trip, and not Cutter, was the owner. The bankruptcy court accordingly ruled that Trustee, in his status as a BFP under § 544(a)(3), could prevail over Trip's purported interest in Thurston.

Finally, the bankruptcy court noted that the one-third interest in the Whipple property had been transferred by the Trust to "Edward Williams Cutter, Fils." Although the term "fils" may have been intended to obscure ownership, it was nevertheless "an anomaly" that should draw attention by others. The bankruptcy court found Ermatinger's testimony was persuasive regarding the intent of the transferors to convey this interest to Trip. Therefore, the bankruptcy court found that constructive notice was given to others by the name listed in the recorded deed, and that such notice defeated the Trustee's position as a hypothetical BFP.

The bankruptcy court entered a judgment on October 30, 2009. Cutter and Guardian filed a timely notice of appeal on November 4, 2009. Trustee filed a cross-appeal as to the bankruptcy court's ruling concerning Trip's interest in the Whipple property on November 10, 2009.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (I) and (J). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court erred in denying Cutter a discharge under § 727(a)(2),(3),(4) and (6).
2. Whether the bankruptcy court erred in determining that Cutter's debt to McNamara was excepted from discharge under § 523(a)(2),(4) and (6).
3. Whether the bankruptcy court clearly erred in ruling that Trustee, as BFP, prevailed over Trip's interest in Thurston, but not as to the Ermatinger Third.

STANDARDS OF REVIEW

On appeal of a denial of discharge under § 727(a), the bankruptcy court's determinations of the historical facts are reviewed for clear error; its selection of the applicable legal rules under § 727 is reviewed de novo; and its application of the facts to those rules requiring the exercise of judgments about values animating the rules is reviewed de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997)(en banc); Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004).

Whether a claim is nondischargeable under § 523(a) also presents mixed issues of law and fact and is reviewed de novo. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008); Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230, aff'd in part & dismissed in part, 551 F.3d 1092 (9th Cir. 2008), citing In re Bammer, 131 F.3d at 792.

In applying § 544(a)(3), state law determines whether the trustee's BFP status will defeat the rights of another claiming an interest in real property, and "[w]hether the circumstances are sufficient to require inquiry as to another's interest in property for the purposes of [California Civil Code] section 19 is a question of fact." Robertson v. Peters (In re Weisman), 5 F.3d 417, 420-21 (9th Cir. 1993).

We review determinations of questions of fact for clear error. Rule 8013; Wall St. Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006). "Under the 'clear error' standard, we accept findings of fact unless the findings leave 'the definite and firm conviction that a mistake has been committed by the trial judge.'" In re Beverly, 374 B.R. at 230, citing Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

DISCUSSION

I.

Motion to Strike Cutter Parties' Opening Brief and Excerpts of Record

In his brief, Trustee requested that the Cutter Parties' "Amended Brief" and excerpts of record be stricken, and that the appeal be dismissed for failure to provide necessary transcripts of the trial in the bankruptcy court. In the Panel's Order of July 19, 2010, we denied the motion to dismiss. Trustee's motion to strike the brief was taken under advisement. Before addressing the merits of these appeals, we first consider the motion to strike the Amended Brief and excerpts of record.

A brief review of the papers filed in this appeal aids in that analysis. The BAP Clerk issued a briefing order on February 5, 2010, requiring the Cutter Parties to file their

opening brief by March 18, 2010, and warning that since the appeals had been pending over 60 days, no further extensions of time would be granted "absent written proof of compelling circumstances." On February 24, the Cutter Parties filed their First Motion for extension, asserting that they had not yet received a copy of the state court transcripts and that Cutter, a CPA, was not available for consultation with his counsel until after tax season ended on April 15. A Panel judge reviewed the First Motion and granted an extension to April 22, 2010, warning that no further extension would be allowed "absent proof of exceptional circumstances."

On April 5, the Cutter Parties filed a Second Motion for extension of time to file the opening brief, simply repeating their earlier argument that they had not obtained the state court transcripts and counsel could not confer with his client during tax season. The Second Motion was reviewed by a Panel judge, who denied that motion on April 16, because it did not demonstrate the extraordinary circumstances required in the earlier order, and directed that the Cutter Parties' opening brief and excerpts be filed "no later than April 22, 2010" (emphasis in order).

Apparently ignoring the April 16 order,[6] the Cutter Parties filed their Third Motion to extend time for filing opening brief on April 19, 2010. Here, they requested the extension to "allow

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[6] Later, in his Declaration of Exigent Circumstances filed on August 5, 2010, counsel for the Cutter Parties asserts that he was unaware of the Panel's order of April 16 when he filed the Third Motion on August 19. Even if true, it would not excuse counsel's neglect of his "affirmative duty" to monitor the appellate docket. Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 187 (9th Cir. BAP 2002).

sufficient time to obtain certification of the appeals by the Bankruptcy Appellate Panel . . . to the Ninth Circuit Court of Appeals." The Third Motion indicated that the stipulation would be submitted on or about April 22, 2010, but no stipulation was ever filed. Instead, on April 22, the Cutter Parties filed their opening brief and a single excerpt from the record, thus mooting the Third Motion. But as they acknowledged later, the Cutter Parties' opening brief filed on April 22 was knowingly incomplete.

On May 21, 2010, without permission of the Panel, the Cutter Parties filed what they called an "Amended and Supplemental Opening Brief" and excerpts of record. On June 7, 2010, Trustee filed a timely responsive brief and moved to strike the Cutter Parties' amended brief and excerpts and to dismiss the appeal.

Rules 8009 and 8010 provide that the appellant in a bankruptcy appeal must file a timely brief and excerpts of record. Via BAP Rule 8009(a)-1(b)(1), the Panel may allow extensions of time to file briefs if requested in a timely manner. The consequences of failure to file briefs or extensions timely can be severe. BAP Rule 8009(a)-1(b)(3) ("The Panel is under no obligation to consider a late brief."); FED. R. APP. P. 31(c) (appellee may move to dismiss appeal if appellant fails to file a brief within the time provided by rule, or within an extended time).

The Cutter Parties' First Motion requesting time to file a brief was supportable and approved, but the Second Motion was not. A fair reading of the record in this appeal, as of April 22, 2010, suggests that the Cutter Parties filed the Third Motion on April 19, and the incomplete brief on April 22, only as a

"placeholder" to comply with the filing deadline and to prevent the appeal from being dismissed for failure to prosecute before they could arrange a direct appeal to the Ninth Circuit. Put another way, as of April 22, it appears the Cutter Parties had no intention of filing their opening brief in this appeal, as evidenced by the last paragraph of their April 22 brief:

> This Preliminary Opening Brief will be supplemented and amended by Appellants [] upon the BAP granting the requested [Third Extension] until May 21, 2010 to file Appellants' Opening Brief in the Ninth Circuit if the stipulation for certification for direct appeal to the Ninth Circuit is granted by the BAP – and if consolidation with Ninth Cir. No. 09-60014 (of BAP appeals No. 09-1393 and 10-1022) is approved. (Emphasis added.)

Nothing in the Third Motion or the brief filed on April 22 evidences a request to extend time to file an opening brief "in parts" in this appeal. Rather, the Cutter Parties stated that they would file an amended and supplemental opening brief in their direct appeal to the circuit. Thus, as of April 22, the Cutter Parties' opening brief had been filed, the Panel considered the Third Motion moot, and the Panel was expecting an imminent stipulation between the parties to send the appeal to the circuit.

Apparently, the parties failed to agree to the stipulation for a direct appeal to the circuit, and the Cutter Parties filed their "Opening Brief [Amended and Supplemental]" on May 21, 2010. On this record, we conclude that this filing was not timely.

First, Cutter Parties concede that the brief they filed on April 22 was incomplete: "The 'amended and supplemental brief' addresses all of appellant's [complete] appellate issues which were not included in opening brief filed on 4/22/10 (because of inadequate time to do so.)." Declaration of Exigent

Circumstances at 4. Both the bracketed word “complete” and the parenthetical “because of inadequate time to do so” are in the Cutter Parties’ Declaration at 4. Thus, Cutter Parties knew and admit at the time they filed the Third Motion and the April 22 brief that the brief was not complete.

Second, the Cutter Parties cite no authority allowing them to file an opening brief “in parts” before the filing of Appellee’s reply brief, and we know of none. On the contrary, Rule 8009(a)(3) allows the filing of additional briefs after the reply briefs and then only "with leave of the district court or bankruptcy appellate panel." Smith v. Kennedy (In re Smith), 1998 WL 2017633 *2 (C.D. Cal. 1998) (sitting as a bankruptcy appellate tribunal, striking "supplemental" brief not filed with leave of the court). The Cutter Parties never sought leave of this Panel to file the Amended Brief – they simply filed that brief without explanation or accompanying motion.

Third, filing a supplemental brief by the Cutter Parties shortly before the deadline for filing the Trustee’s brief prejudiced Trustee’s rights to reply adequately. The Rules provide that the filing of the appellant’s opening brief triggers the time within which the appellee must file its brief. Under the generous briefing schedule in this appeal, that was a 45-day window. By filing Cutter Parties’ opening brief on April 22, Trustee was required to file his brief on or before June 8, 2010. Trustee filed a timely brief on June 7, 2010. However, Trustee justifiably protested that he had only received the Amended Brief of Cutter Parties on May 25. Thus, Trustee did not have the benefit of knowing Cutter Parties’ position in this appeal for the

45-day period allowed by the Rules and the Panel's briefing schedule. Indeed, Trustee did not even have the fourteen-day minimum period guaranteed an appellee by Rule 8009(a)(1).

For the above reasons, we conclude that the Cutter Parties' May 21, 2010 "amended" brief was not timely filed, and that the untimely filing of the Amended Brief prejudiced Trustee. As can be seen from the above schedule of events, the Cutter Parties have attempted to circumvent the rules, failed to file a completed opening brief in a timely fashion, and have seriously prejudiced Trustee by their actions. Moreover, the untimely "amended" brief they filed on May 21 woefully fails to satisfy the requirements of Rule 8010.[7] Consequently, for all the foregoing reasons, we order that the Cutter Parties' amended brief is STRICKEN.

Besides Cutter Parties' amended brief, we strike four of their six excerpts of record. The Notice of Motion to Dismiss the [Supplemental] Complaint, attached to the April 22 partial brief, is materially different from the true document submitted to the bankruptcy court and is STRICKEN. Three excerpts attached to the May 21 amended brief – the Declaration of Judith Gold, the partial

[7] Even putting the two parts of the brief together, the completed brief did not comply with the required elements of an opening brief in Rule 8010: there was no presentation of a standard of review for each of the issues presented; there was no statement of the case, discussion of the nature of the case, the proceedings or disposition in the bankruptcy court; there were only two citations to case law authority in twelve pages of argument; and the few citations to the record were mostly to excerpts or transcripts not in the record. Under Ninth Circuit precedent, the BAP may strike the brief for failure to substantially comply with Rule 8010 or Fed. R. App. P. 28(a). Sekiya v. Gates, 508 F.3d 1198 (9th Cir. 2007) ("[W]hen writing a brief, counsel must provide an argument which must contain 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies'.").

transcript of the state court proceedings, and Trip's tax returns for 2003–05 — were not part of the record in the bankruptcy court and thus cannot be part of the record on appeal or excerpts of record and are STRICKEN. Rule 8006.

Besides submitting and citing to unreviewable excerpts, Cutter Parties failed to comply with most provisions of Rule 8009(b) regarding those excerpts.[8] The failure to comply with Rule 8009(b) is yet another example of neglect, and could constitute a basis for us to affirm summarily the bankruptcy court's rulings. Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991) (failure to provide an adequate record may be grounds for affirmance). Luckily for the Cutter Parties, in our view, the omitted excerpts are not essential to the Panel's resolution of the disputes in this appeal. This is because all issues in this appeal were carefully addressed by the bankruptcy court in its decision memoranda, and essential exhibits submitted to the bankruptcy court at the trial were included on its docket. The Panel therefore exercises its discretion to reach the merits on appeal by independently reviewing the electronic docket of the adversary

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[8] Cutter Parties failed to include the following required documents in the excerpts: (1) the complaint and answer, per Rule 8009(a)(1); (2) orders relevant to the appeal, including at least the order to show cause and memorandum re contempt (related to § 727 issues) and the order of the state court(related to § 523 issues), per Rule 8009(a)(4); (3) the findings of fact related to contempt, per Rule 8009(a)(5); (4) numerous motions and responses on which the court rendered decision, per Rule 8009(a)(6); (5) the notice of appeal, per Rule 8009(a)(7); and (6) the transcripts of the contempt hearing and the trial, to which Cutter Parties refer in challenging findings of the bankruptcy court, per Rule 8009(a)(9).

proceeding, and the imaged documents attached thereto. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989). We have done our best to reconstruct what transpired without the benefit of the missing transcripts. See generally Ehrenberg v. Cal. State Fullerton (In re Beachport Enters.), 396 F.3d 1083, 1087-88 (9th Cir. 2005).

II.

The bankruptcy court did not err in denying Cutter's discharge under § 727(a)(2),(3),(4) and (6).

§ 727(a)(2)

The bankruptcy court must deny a discharge if:

> the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition.

§ 727(a)(2). To deny discharge under this Code provision, the objector must prove, by a preponderance of the evidence, that: (1) the debtor transferred or concealed property; (2) the property belonged to the debtor; (3) the transfer occurred within one year of the bankruptcy filing; and (4) the debtor executed the transfer with the intent to hinder, delay or defraud a creditor. Aubrey v. Thomas (In re Aubrey), 111 B.R. 268, 273 (9th Cir. BAP 1990); see also, Grogan v. Garner, 498 U.S. 279, 284 (1991); Rule 4005. Any of the three alternatives, either intent to hinder or to delay or to defraud creditors, and proof of mere intent to hinder or delay may lead to denial of discharge. Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 731-32 (9th Cir. BAP 1999), aff'd 5 Fed. Appx. 743 (9th Cir. 2001) (adopting the Panel's opinion).

In this case, after a trial, the bankruptcy court found that Cutter failed to disclose the various legal and equitable interests he held in several pieces of real property on Schedule A; his interests in the Trust on Schedule B; and the property he allegedly held for Trip in his statement of financial affairs. The bankruptcy court also found that Cutter's concealment of these assets over which he maintained control, and from which he received benefits, was intentionally done to delay and defraud his creditors and the bankruptcy estate.

The bankruptcy court's findings of fact are based upon substantial, competent evidence, and are supported with direct references to the record. The bankruptcy court correctly identified the law, did not clearly err in finding the relevant facts, and did not err in denying discharge to Cutter under § 727(a)(2).

§ 727(a)(3)

The bankruptcy court must deny discharge if:

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

§ 727(a)(3). While this Code provision is straightforward, two elements are stressed in the case law. First, the debtor's manner of bookkeeping must be reasonable under the circumstances. Cox v. Lansdowne (In re Cox), 904 F.2d 1399, 1402 (9th Cir. 1990). Second, the more sophisticated the debtor is in financial matters, creditors have the right to expect "greater and better" record keeping. Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva), 550 F.3d 755, 761 (9th Cir. 2008).

The bankruptcy court conducted an evidentiary hearing regarding the motion for contempt against Cutter focusing in significant part on Cutter's alleged failure to turn over important records to the Receiver. The Trust included four properties, some of which were rental properties. The bankruptcy court determined that numerous documents from Cutter's caretaker period were either missing or "do not exist," including "cancelled checks, check registers, work papers, correspondence, mortgage statements, notices from lenders, ledgers, financial statements, and contact information for lenders and homeowners' associations." The bankruptcy court was particularly concerned that Cutter "could not or would not" produce notices from lenders received after his bankruptcy filing and during the contest over his real estate interests. The bankruptcy court observed that Cutter was a Certified Public Accountant, and was "most certainly aware" that such documents would reveal important information about his financial condition.

"When a debtor is sophisticated and carries on a business involving substantial assets, creditors have an expectation of greater and better record keeping." In re Caneva, 550 F.3d at 761 (9th Cir. 2008) (quoting with approval Peterson v. Scott (In re Scott), 172 F.3d 959, 969 (7th Cir. 1999)). The bankruptcy court made the required findings, supported by the evidence, that Cutter failed to preserve recorded information from which his financial condition might be ascertained. Based upon this evidence, the bankruptcy court could properly infer that Cutter's conduct was unjustified under the circumstances of the case. Given the extensive record, the bankruptcy court did not err in denying Cutter a discharge under § 727(a)(3).

§ 727(a)(4)

Section 727(a)(4)(A) provides for denial of discharge to a debtor who "knowingly and fraudulently, in connection with the [bankruptcy] case . . . made a false oath or account . . . ." A false statement in, or an omission from, the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath. Searles v Riley (In re Searles), 317 B.R. at 368, 377 (9th Cir. BAP 2004). "The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information without having to conduct costly investigations." Fogal Legware of Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir. BAP 1999).

Here the bankruptcy court found four statements in Cutter's schedules and statement were false: that he had no equitable or legal interests in real property (Schedule A); that he had no contingent or non-contingent interests in any trust (Schedule B); that his 2005 gross income from employment was "$0" (Statement of Financial Affairs); and that he did not control any property owned by another person (Statement of Financial Affairs). The bankruptcy court compared the inconsistent statements about his finances made by Cutter in two documents executed under penalty of perjury, his bankruptcy schedules/SOFA, and his federal tax return. The bankruptcy court determined that the false statements were made by Cutter in his bankruptcy papers knowingly and fraudulently. Again, given this record, the bankruptcy court did not err in denying Cutter a discharge under § 727(a)(4).

§ 727(a)(6)

Under § 727(a)(6(A), the bankruptcy court must deny discharge if: "the debtor has refused, in the case . . . to obey any lawful

order of the court, other than an order to respond to a material question or to testify[.]" There is no doubt that the orders issued by the bankruptcy judge to provide information and turn over trust records in this case were lawful. 28 U.S.C. §§ 1334 and 157; Maness v. Meyers, 419 U.S. 449, 459 (1975) ("an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."). Cutter has not challenged the jurisdiction of the bankruptcy court to issue such orders or that they were lawful orders. Moreover, the Ninth Circuit has observed that the bankruptcy court has broad discretion to find a particular violation of the court's orders so serious as to require denial of discharge. Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751 (9th Cir. 1985).

After the three-day contempt trial, the bankruptcy court found Cutter had committed civil contempt for his violation of three orders of the court:

> (1) [Cutter's] statement to Biggs on October 9, 2006 that there were no trust accounts was a deliberate falsehood which was a knowing and direct violation of the court's orders; (2) [Cutter's] failure to turn over information about the homeowner's association on [one of the four properties], contact information for Terrance M. Cooney, and all documents received from lenders on trust assets after October 1, and the ID and password information on the Trust account were deliberate and knowing violations of the court's orders; and (3) [Cutter's] transfers of funds out of the Trust Account on and after October 24, 2006, were deliberate and knowing violations of the court's orders.

Memorandum of Decision on Trial at 5. The bankruptcy court cited to the original contempt memorandum, which in turn cited to the orders that the court issued in the presence of Cutter. The court made those findings in a trial context and after examining

witnesses, including Cutter. The bankruptcy court found that Cutter lacked credibility. Such credibility findings are entitled to special deference. Rule 8013; Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

Clearly, Cutter violated the bankruptcy court's lawful orders. Accordingly, the bankruptcy court did not err in finding that his conduct justified denial of discharge under § 727(a)(6).

§ 523(a)(4)

The bankruptcy court ruled that Cutter's debt to the McNamara probate estate was excepted from discharge under § 523(a)(2), (4) and (6). However, unlike its treatment of the four sections of § 727, the court did not enter separate findings of fact nor analyze the subsections of § 523(a) separately. However, on this record, it is unnecessary to remand this matter to the bankruptcy court for findings concerning all subsections, because it is beyond cavil that § 523(a)(4) applies in this context.

Section 523(a)(4) provides that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt — . . .(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." In an action to except a debt from discharge under § 523(a)(4), there are three elements: (1) that an express trust existed between the debtor and creditor; (2) that the debt was caused by the debtor's fraud or defalcation; and (3) that the debtor was a fiduciary to the creditor at the time the debt was created. In re Niles, 106 F.3d 1456, 1459 (9th Cir. 1997); Jacks v. Jacks (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001). The standard of proof for discharge exceptions is preponderance of the evidence. Retz v. Samson

(In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

The bankruptcy court's memorandum decision, coupled with the state court's findings and judgment, are sufficient to establish the existence of an express trust. An ongoing relationship between Cutter and McNamara existed to provide tax and financial advisory services before any alleged wrongdoing by Cutter. The funds handled by Cutter were understood by the parties to be used for charitable purposes, specifically for the benefit of orphans, and the funds were the identifiable assets of McNamara. In re Thornton, 544 F.2d 1005, 1007 (9th Cir. 1976)(listing elements of an express trust in California law).

Moreover, the state court found that the actions of Cutter amounted to fraud. Fraud in California law means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." CAL. CIV. CODE § 3294(c)(3). The bankruptcy court found that the state court provided detailed findings of the scheme in which Cutter made false representations to McNamara which Cutter knew to be false at the time he made them; that he intended McNamara to rely upon those representations; and that she did justifiably and reasonably rely on those representations, and as a result, was harmed and damaged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (citing Hackethal v. Nat'l Cas. Co., 189 Cal. App. 3d 1102, 1105 (Cal. Ct. App. 1987) for the elements of fraud in California law: false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages).

Whether a relationship is a fiduciary one within the meaning of § 523(a)(4) is a question of federal law. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986). Whether a fiduciary is a trustee chargeable under § 523(a)(4) is determined by reference to state law. Id. at 796. Under California law, an accountant and financial advisor is a fiduciary. Stokes v. Henderson, 217 Cal. App. 3d 187, 189 (Cal. Ct. App. 1990). Both the state court and bankruptcy court, applying Stokes, made the express finding that Cutter is a fiduciary.

Consequently, the record amply supports the conclusion that Cutter's debt to the McNamara estate was nondischargeable under § 523(a)(4): an express trust existed between Cutter and McNamara for the provision of tax and estate planning services, the judgment and resulting debt was the result of Cutter's fraud, and Cutter was a fiduciary to McNamara at the time the debt was created. The bankruptcy court did not err in determining that the debt Cutter owed the McNamara estate was excepted from discharge under § 523(a)(4).

III.

The bankruptcy court did not clearly err in determining that Trustee was a BFP of the Thurston property but not a BFP as to the one-third of the Whipple property owned by Trip.

Trustee's cross-appeal involves his invocation of what is known as the "strong arm power," which vests a bankruptcy trustee with,

> as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such

> transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

§ 544(a)(3). A trustee is deemed to have conducted a title search, paid value for the real property, and perfected its interest as a legal title holder as of the date of commencement of the bankruptcy. In re Bridge, 18 F.3d 1152 (3d Cir. 1994); 5 COLLIER ON BANKRUPTCY ¶ 544.05 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2010). A trustee may exercise the strong arm powers without regard to his or her actual knowledge. Huber v. Danning (In re Thomas), 147 B.R. 526, 529 (9th Cir. BAP 1992), aff'd 32 F.3d 572 (9th Cir. 1994).

However, state law governs the extent to which the trustee exercises BFP powers under § 544(a)(3). Tleel v. Tleel (In re Tleel), 876 F.2d 769, 772 (9th Cir. 1989). And it is clearly established that Trustee's rights as a hypothetical BFP are limited by any constructive notice that such a purchaser would have under state law. Deuel v. Chase Manhattan Bank, N.A. (In re Deuel), 361 B.R. 509 (9th Cir. BAP 2006).

Constructive notice under California law is defined in Cal. Civ. Code § 19: "Constructive Notice. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry, he might have learned such fact." The Ninth Circuit has held that "[w]hether the circumstances are sufficient to require inquiry as to another's interest in property for the purposes of [California Civil Code] § 19 is a question of fact, even where there is no

dispute over the historical facts." Robertson v. Peters (In re Weisman), 5 F.3d 417, 421 (9th Cir. 1993) (quoted in In re Cutter, 398 B.R. at 18).

Two questions regarding the BFP power of Trustee arise in this appeal and cross-appeal. The bankruptcy court held that using his § 544(a)(3) powers, Trustee could defeat any possible interest of Trip in the Thurston property. As of the date of filing of Cutter's bankruptcy petition, record title to Thurston was in the name of "Edward W. Cutter, a Single Man." Arguably, though, the name in the deed could refer to either Cutter or Trip. Both Cutter and Trip argue on appeal that the name on title references Trip. Trustee argues that it is Cutter.

In its summary judgment decision, the bankruptcy court had concluded that Cutter purchased the Thurston property in 2003 with funds borrowed in Cutter's name from a third party. The court found that nothing presented at the adversary proceeding trial would persuade it to change its previous findings on that issue. The bankruptcy court acknowledged that there was some evidence that Ermatinger and Cutter intended Trip to be the owner. Nevertheless, the court cited various grounds for its conclusion that Cutter was the "Edward W. Cutter, a Single Man" referenced in the deed.[9] Cutter purchased Thurston in 2003 with his own credit and warranted to the seller that Cutter was the purchaser. Although there were several shifts of title, and it was possible that Ermatinger and Cutter may have intended "on some level" that

[9] From the record, it appears that in 2003, when Thurston was purchased, far from being what one generally would consider "a single man," Trip was an eleven-year old boy.

Thurston be used to benefit Trip, the bankruptcy court concluded that they did not intend to put Thurston in Trip's name. The bankruptcy court found and concluded that:

> [Cutter] dealt with Thurston as his own property before and after the bankruptcy case, made representations to third parties that Thurston was his own property, and used proceeds from Thurston to support himself. The court finds that the assertion of ownership in the Son is a convenient fiction designed to shield Thurston from creditor claims but is without substance in fact. The court further finds that neither legal nor beneficial title to Thurston ever passed to the Son. Thurston is property of the bankruptcy estate.

We agree with the bankruptcy court that, considering the history of title to the property, and record title in "Edward W. Cutter, a Single Man," no third party purchaser would be able to discern the fact or be on constructive or inquiry notice that title was not held by Cutter himself. Because this inquiry involves a question of fact, the bankruptcy court's choice among competing credible facts cannot be clear error. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985). Therefore, we conclude that the bankruptcy court did not clearly err in deciding that Trustee, in his BFP status under § 544(a)(3), held Thurston free and clear of any interest of Trip.

The answer is different, however, for the cross-appeal. There, Trustee asserts that the "Edward Williams Cutter, Fils" identified in a deed to a one-third interest in Whipple refers to Cutter. While the bankruptcy court agreed with Trustee that this was likely another case where Cutter attempted to "obfuscate the true identity of a transferee", the court found that the term "fils" is an "anomaly that draws attention to itself and puts a

purchaser on constructive notice that inquiry is appropriate."[10] The bankruptcy court's decision presented the facts supporting Trip's ownership, and noted that it found the testimony of Ermatinger that he intended the word "fils" to indicate a conveyance to Trip, was persuasive. The bankruptcy court therefore concluded that Trip was the owner of one-third of the Whipple property.

Trustee argues that, even if he had constructive notice by the term "fils" in the recorded deed, Trustee could have assumed as a matter of law that Cutter was an owner who could convey good title to a BFP because Cutter was in possession of the property and title was consistent with possession, citing Robertson v. Peters (In re Weisman), 5 F.3d 417, 421 (9th Cir. 1993) ("There is no duty to inquire upon a subsequent purchaser regarding any unknown claims or interests by a person in possession of real property where the occupant's possession is consistent with the record title. [Multiple California citations omitted]"). Trustee takes this parenthetical quotation from Weisman out of context. It was the second in a series of legal arguments, the third of which is more appropriate to this appeal: "Where possession is inconsistent with the record title and thereby creates a duty to

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[10] The Oxford English Dictionary gives the primary meaning of the word "fils" in English as: "The son, junior: appended to a name to distinguish between a father and son of the same name." O.E.D. (Oxford University Press, 2nd ed. 1989). This is consistent with American English usage. Webster's Collegiate Dictionary (Merriam-Webster, Inc., 11th ed. 2004) ("Son—used after a family name to distinguish a son from his father"). We also note that Justice Breyer used the term "fils" in this meaning in his dissent to Eldred v. Ashcroft, 537 U.S. 186, 255 (2003) ("Or (to change the metaphor) is the argument that Dumas fils would have written more books had Dumas père's Three Musketeers earned more royalties?").

inquire, a prospective purchaser is charged with constructive notice of all facts that would be revealed by a reasonably diligent inquiry[.]" (Emphasis added.) Id.

Contrary to Trustee's position, Weisman dealt with an inconsistency between record title and possession. Peters was listed on the recorded deed to a property with his former wife, Weisman, although he was living there with his present wife, Neergard. The Weisman court ruled that the discrepancy between recorded title and possession required the trustee to make "a reasonable inquiry into the true ownership of the property." Id. at 422.

Here, too, there is inconsistency between recorded title and the party in possession. The name on the deed, "Edward Williams Cutter, Fils, A Single Man" is not presumptively the same as Cutter. As the bankruptcy court ruled, the deeded name with the "Fils" incorporated was an anomaly that in itself raised the duty of inquiry. Trustee's argument that he had no duty of inquiry because of a perceived identity between the recorded name and Cutter is meritless.[11]

In short, the term "Fils" is an anomaly that draws attention to itself and puts a purchaser on constructive notice that inquiry is appropriate. By Trustee's own cited authority, that

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[11] Trustee failed to make an inquiry which under the circumstances of this case he was required to do. Nevertheless, Trustee speculates that, even if he had made inquiry, "it would have revealed nothing different than Debtor's ownership, right and power to convey fee title to all three thirds of the Whipple property." Trustee's Br. at 8. Trustee fails to explain how this position is consistent with the evidence before the bankruptcy court that Ermatinger, a grantor of the deed and certainly a target for any "reasonable inquiry," intended that Trip was Fils and owner of the one-third interest in Whipple.

constructive notice requires reasonable inquiry into ownership of the property. Trustee made no such inquiry, and his justification for failure to make the required inquiry is without merit.

Again, the bankruptcy court was presented with two plausible interpretations of the facts, and its choice between them cannot be clearly erroneous. Anderson, 470 U.S. at 573 (1985). The bankruptcy court did not clearly err in deciding that constructive notice to third parties was provided by the word “fils” in the deed, and therefore, defeated Trustee’s position as BFP of the one-third interest in Whipple owned by Trip.

CONCLUSION

We AFFIRM the bankruptcy court in all respects.