APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Debtors, ——— KIERAN BUCKLEY, Appellant, v. DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Appellees.	No. 20-60021 BAP No. 16-1277 MEMORANDUM* (Filed Aug. 12, 2021)

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brand, Jury, and Faris, Bankruptcy Judges, Presiding

In re: DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Debtors,	No. 20-60023 BAP No. 19-1016

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

KIERAN BUCKLEY,

Appellant,

v.

DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER,

Appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Taylor, Faris, and Brand, Bankruptcy Judges, Presiding

In re: DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER,

Debtors,

No. 20-60024

BAP No. 16-1277

DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER,

Appellants,

v.

KIERAN BUCKLEY,

Appellee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Brand, Jury, and Faris, Bankruptcy Judges, Presiding

Argued and Submitted July 29, 2021
San Francisco, California

Before: McKEOWN and NGUYEN, Circuit Judges, and HUCK,** District Judge.

As partners, David and Kate Bartenwerfer renovated a house in San Francisco, California and sold it to Kieran Buckley. Shortly after the sale, Buckley alleged defects in the house and sued the Bartenwerfers in California state court for (1) breach of contract, (2) negligence, (3) nondisclosure of material facts, (4) negligent misrepresentation, and (5) intentional misrepresentation. The jury found in Buckley's favor on his breach of contract, negligence, and nondisclosure of material facts claims and against him on his remaining claims and awarded him damages. The Bartenwerfers filed for bankruptcy.

In the bankruptcy court, Buckley initiated an adversary proceeding against the Bartenwerfers, arguing that the state court judgment against the Bartenwerfers could not be discharged in bankruptcy under 11 U.S.C. § 523(a)(2)(A), which provides that a debtor cannot discharge debt that was obtained through fraud. The bankruptcy court agreed and held that the portion of the state court judgment that was traceable to Buckley's nondisclosure claim was nondischargable. The bankruptcy court found that the Bartenwerfers intended to deceive Buckley and held

** The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

that Mr. Bartenwerfer had actual knowledge of the false representations made to Buckley and that Mr. Bartenwerfer's fraudulent conduct could be imputed onto Mrs. Bartenwerfer because of their partnership relationship. Additionally, the bankruptcy court declined to apply collateral estoppel in favor of the Bartenwerfers based on the jury's findings of no intentional fraud. On appeal, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's collateral estoppel ruling, but, adopting the Eight Circuit's "knew or should have known" standard from *Walker v. Citizens State Bank*, 726 F.2d 452 (8th Cir. 1984), remanded the imputed liability finding and instructed the bankruptcy court to determine whether Mrs. Bartenwerfer "knew or should have known" of Mr. Bartenwerfer's fraud. On remand, after an evidentiary hearing, the bankruptcy court held that Mr. Bartenwerfer's fraud could not be imputed onto Mrs. Bartenwerfer because she did not know of the fraud. The BAP affirmed.

Buckley appeals the BAP's decision affirming the bankruptcy court's nondischargeability judgment in favor of Mrs. Bartenwerfer. On cross-appeal, the Bartenwerfers argue that collateral estoppel should apply to bar Buckley's § 523(a)(2)(A) claim. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm in part and reverse in part.

We begin with the Bartenwerfers' cross-appeal. The Bartenwerfers argue that collateral estoppel applies because the state court jury found in their favor on Buckley's intentional misrepresentation

claim. The jury found in favor of Buckley on his nondisclosure of material facts claim against the Bartenwerfers, but not on his intentional misrepresentation claim. These two findings are conflicting, or at least ambiguous, which weigh against applying collateral estoppel. *See In re Kelly*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995) ("Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect."), *aff'd*, 100 F.3d 110 (9th Cir. 1996). We affirm on this issue.

In his appeal, Buckley argues that the bankruptcy court erred by failing to apply binding Supreme Court and Ninth Circuit precedent to the question of whether to impute Mr. Bartenwerfer's fraud onto his partner, Mrs. Bartenwerfer, and by holding that the fraud was not imputed. Buckley is correct. Applying basic partnership principles,

> if, in the conduct of partnership business, . . . one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons, . . . his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when . . . the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business.

Strang v. Bradner, 114 U.S. 555, 561 (1885); *see also In re Cecchini*, 780 F.2d 1440, 1444 (9th Cir. 1986)

(holding a partner responsible for a tortfeasor/partner's fraud when the fraud was performed "on behalf of the partnership and in the ordinary course of the business of the partnership"), *overruled in other part by Kawaauhau v. Geiger*, 523 U.S. 57 (1998). Mrs. Bartenwerfer's debt is nondischargeable regardless of her knowledge of the fraud. By rejecting *Strang* and *Cecchini*, in favor of the "knew or should have known" standard, the bankruptcy court applied the incorrect legal standard for imputed liability in a partnership relationship. We reverse the bankruptcy court's judgment regarding imputed liability against Mrs. Bartenwerfer under § 523(a)(2)(A), and we remand to the bankruptcy court with instructions to enter judgment in favor of Buckley and against Mrs. Bartenwerfer.

We need not address the remaining issues raised on Buckley's direct appeal.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Debtors.	BAP No. NC-19-1016-TaFB NC-19-1025-TaFB (Cross Appeals)
	Bk. No. 3:13-bk-30827
	Adv. No. 3:13-ap-031850
KIERAN BUCKLEY, Appellant/Cross-Appellee, v. DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Appellees/Cross-Appellants.	MEMORANDUM*

Argued and Submitted on March 26, 2020

Filed – April 23, 2020

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

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* 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 8024-1.

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Janet Marie Brayer argued on behalf of appellant/cross-appellee; Iain A. Macdonald of Macdonald Fernandez LLP argued on behalf of appellees/cross-appellants.

Before: TAYLOR, FARIS, and BRAND, Bankruptcy Judges.

INTRODUCTION

In earlier cross-appeals,[1] we reviewed the bankruptcy court's judgment determining that the debt from a state court judgment owed to Kieran Buckley was excepted from the discharge of David and Kate Bartenwerfer ("Debtors") under § 523(a)(2)(A).[2] While we affirmed the exception to Mr. Bartenwerfer's discharge, we vacated the portion of the judgment excepting the debt from Mrs. Bartenwerfer's discharge because the bankruptcy court imputed Mr. Bartenwerfer's fraud to her for purposes of § 523(a)(2)(A) without finding that she "knew or had reason to know" of his fraud, as required by *Sachan v. Huh (In re Huh)*, 506 B.R. 257 (9th Cir. BAP 2014) (en banc). We remanded for findings in that regard.

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[1] BAP Nos. NC-16-1277-BJuF and NC-16-1299-BJuF.

[2] Unless specified otherwise, chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and "Civil Rule" references are to the Federal Rules of Civil Procedure.

On remand, the bankruptcy court found that Mrs. Bartenwerfer did not "know or have reason to know" of her husband's fraud, and, thus, it could not impute his fraudulent intent to her. And it declined to address Mr. Buckley's alternative theory of her direct liability for fraud. It entered judgment in favor of Mrs. Bartenwerfer.

Both sides appealed. Mr. Buckley requests reversal. He argues that the bankruptcy court erred by interpreting our mandate as precluding it from considering Mrs. Bartenwerfer's direct liability, by declining to enter judgment against Mrs. Bartenwerfer on imputed and direct liability bases, and in its conduct of the trial. We only agree insofar as we hold that our mandate did not preclude the bankruptcy court from deciding whether she was directly liable for fraud. Nevertheless, we AFFIRM because the bankruptcy court's findings sufficiently support the judgment.[3]

FACTS

A. Prepetition Events

Prepetition, Debtors purchased a home in San Francisco, California ("Property") to remodel and sell at a profit. They lived elsewhere during the remodel. Unemployed, Mr. Bartenwerfer assumed full responsibility for managing the remodel and supervising the

[3] Debtors cross-appealed, arguing that the bankruptcy court abused its discretion in reopening the record. Because we affirm, we do not consider the cross-appeal.

contractors and subcontractors. And he did so even though he lacked construction experience or a contractor's license.

After the remodel, Debtors sold the Property to Mr. Buckley. In connection with the sale, they signed a Cal. Civ. Code § 1102 *et seq*. transfer disclosure statement and a supplement thereto (collectively, the "TDS"), that purported to detail the Property's physical condition. The TDS, however, contained false representations regarding, *inter alia*, water leaks, defective window conditions, open permit issues, and fire escape non-compliance ("Defects").

Mr. Buckley discovered the Defects after the sale. Thus, he sued Debtors in state court on various theories including intentional fraud or deceit and willful failure to disclose information in the TDS.

After a 19-day trial, the jury found in Mr. Buckley's favor on his failure to disclose claims and others that facially would not support a nondischargeability claim. As to the failure to disclose determination, the jury found: (1) Debtors did not disclose information that they "knew or reasonably should have known" about the Defects; (2) Mr. Buckley did not know and could not have reasonably discovered the Defects; (3) Debtors knew or reasonably should have known that he did not know and could not have reasonably discovered the Defects; (4) the Defects affected the Property's value; (5) Mr. Buckley was harmed; and (6) Debtors' failure to disclose the Defects was a substantial factor in causing his harm.

The jury awarded Mr. Buckley damages for, *inter alia*, nondisclosure of the Defects but awarded him $0 for "intentional fraud" and no punitive damages. The state court entered judgment accordingly.

B. The Adversary Complaint and Pretrial Motions

Then Debtors filed their chapter 7 bankruptcy, and Mr. Buckley filed a § 523(a)(2)(A) adversary complaint to except from their discharge the debt owed to him under the state court judgment. Mr. Buckley alleged that Debtors knowingly failed to disclose information that they knew was material to him with the intent to induce him to purchase the Property in reliance on the nondisclosures. He alleged that he justifiably relied on the nondisclosures and suffered damages as found by the jury.

Mr. Buckley and Debtors filed cross-motions for summary judgment, each arguing that the doctrine of issue preclusion entitled them to judgment as a matter of law. The bankruptcy court denied the motions because it could not determine from the record whether a finding of actual fraud was necessary to the state court judgment—the jury could have found Debtors liable on Mr. Buckley's failure to disclose claim on the basis of actual fraud *or* something requiring a lower scienter standard.

C. The Adversary Trial

The bankruptcy court held a two-day trial to determine the sole disputed issue of whether Debtors fraudulently failed to disclose the Defects to Mr. Buckley ("Trial").

Once Mr. Buckley rested his case-in-chief, Debtors moved for judgment on partial findings under Civil Rule 52(c) as to Mrs. Bartenwerfer. They asserted that there was no evidence that she knew of the Defects and intentionally failed to disclose them or that she knew anything represented in the TDS was false. In the absence of such evidence, they posited that Mr. Buckley was relying on an agency theory in which she could nevertheless be held vicariously liable for the fraud of her agent, Mr. Bartenwerfer. But they contended that she could not be held so liable, arguing that Mr. Buckley failed to prove: (1) the existence of an agency relationship; and (2) any culpable conduct by Mrs. Bartenwerfer.

The bankruptcy court denied Debtors' motion on the sole basis that there was an agency relationship between Debtors arising from their partnership in the remodel project.

D. The Judgment I

After the Trial, the bankruptcy court entered its memorandum decision, *Buckley v. Bartenwerfer (In re Bartenwerfer)*, 549 B.R. 222 (Bankr. N.D. Cal. 2016)

("*Bartenwerfer I*"), finding in favor of Mr. Buckley and against Debtors on Mr. Buckley's § 523(a)(2)(A) claim.

It found that Debtors had the requisite knowledge and intent to deceive Mr. Buckley by failing to disclose the Defects in the TDS. *Id.* at 229. It issued extensive findings regarding Mr. Bartenwerfer's actual knowledge of the falsity of the TDS representations and his lack of credibility. *Id.* at 229-32. But it did not do the same with regard to Mrs. Bartenwerfer. It simply: (1) observed in a footnote that Mr. Bartenwerfer's fraudulent conduct could be imputed to her based on Debtors' partnership in the remodel project; and (2) found that the misrepresentations belong to her because she signed the TDS. *Id.* at 225 n.3 & 227.

Accordingly, the bankruptcy court entered a judgment in favor of Mr. Buckley and against Debtors. It later amended the amount of the judgment to add attorneys' fees and interest ("Judgment I").

E. The First Cross-Appeals

Cross-appeals followed.[4] We affirmed the Judgment I as to Mr. Bartenwerfer because there was ample evidence in the record that he knowingly and intentionally concealed the Defects from Mr. Buckley. *Bartenwerfer v. Buckley (In re Bartenwerfer)*, BAP Nos. NC-16-1277-BJuF, NC-16-1299-BJuF, 2017 WL

[4] The attorneys' fees and interest included in the Judgment I were part of these cross-appeals but are not at issue in the current cross-appeals.

6553392, at *10 (9th Cir. BAP Dec. 22, 2017) ("*Bartenwerfer II*"). However, as to Mrs. Bartenwerfer, while we agreed with the bankruptcy court's agency finding, we concluded that it erred by imputing Mr. Bartenwerfer's fraudulent intent to her on the sole basis of agency. *Id.* at *9. Therefore, we vacated Judgment I, in part, and remanded for further findings, as follows:

> To deny Mrs. Bartenwerfer's Civil Rule 52(c) motion, the court had to also find that she "knew or had reason to know" of Mr. Bartenwerfer's fraudulent omissions. *Sachan v. Huh (In re Huh)*, 506 B.R. 257, 271–72 (9th Cir. BAP 2014) (en banc). The court made no such finding. Accordingly, we REMAND this issue for further findings as to Mrs. Bartenwerfer's actual knowledge.
>
> In addition, because the bankruptcy court appears to have imposed judgment against Mrs. Bartenwerfer solely on the basis of her agency relationship with Mr. Bartenwerfer, we VACATE the portion of the Second Amended 523 Judgment determining that Buckley's debt was nondischargeable under § 523(a)(2)(A) as to Mrs. Bartenwerfer.

Id. at *10.

F. The Hearing on Remand

On remand,[5] the bankruptcy court reopened the record and held an evidentiary hearing to determine Mrs. Bartenwerfer's knowledge of the fraud ("Hearing"). During the Hearing, Mr. Buckley extensively examined Mrs. Bartenwerfer, which did nothing for his case. She testified repeatedly that Debtors treated the remodel as Mr. Bartenwerfer's job while she worked elsewhere. Consequently, she testified, she was absent from the Property, did not engage the professionals handling the remodel, was unaware of the day-to-day activities at the Property, and was not involved in obtaining permits. She testified she lacked access to, or knowledge of, sources of information concerning the remodel, including where or how to access the budget, plans, permits, and other documents for the remodel.

She also testified that she played a minimal role in preparing the TDS; she merely verified whatever information she could by visually inspecting the Property and relied on her husband to confirm the accuracy of everything else disclosed in the TDS. She acknowledged that she did not take any steps to confirm what he told her but also testified that she had no reason to question what he said.

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[5] Before we issued our mandate, both parties appealed to the Ninth Circuit. *See* Nos. 18-60001 and 18-60007. They voluntarily dismissed these appeals.

G. The Judgment II

After the Hearing, the bankruptcy court issued a memorandum decision, *Buckley v. Bartenwerfer (In re Bartenwerfer)*, 596 B.R. 675 (Bankr. N.D. Cal. 2019) ("*Bartenwerfer III*"). Therein, it defined the remand issue as "limited to whether Mrs. Bartenwerfer knew or should have known of her husband's fraud, such that it can be imputed to her for purposes of section 523(a)(2)(A)." *Id*. at 682. After noting that the parties "no longer seriously dispute[d] that Mrs. Bartenwerfer had no actual knowledge of Mr. Bartenwerfer's fraud," it addressed what it characterized as the only remaining dispute on remand: "whether she 'should have known' of his fraud." *Id*. at 681.

Addressing this issue, it found that Mr. Buckley failed to prove that Mrs. Bartenwerfer knew of but ignored any facts that would require investigation into Mr. Bartenwerfer's conduct, and it concluded that Mr. Bartenwerfer's fraud could not be imputed to her. *Id*. at 686.

It declined to address arguments that it perceived as beyond the scope of the remanded issue, including Mr. Buckley's argument that Mrs. Bartenwerfer could be held directly liable for the misrepresentations.

On January 7, 2019, the bankruptcy court entered judgment in favor of Mrs. Bartenwerfer and against Mr. Buckley ("Judgment II"). These timely cross-appeals followed.

JURISDICTION

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

ISSUES

Did the bankruptcy court err by not imputing Mr. Bartenwerfer's fraud to Mrs. Bartenwerfer for purposes of § 523(a)(2)(A)?

Did the bankruptcy court abuse its discretion by not ruling on whether Mrs. Bartenwerfer was directly liable for fraud for purposes of § 523(a)(2)(A)?

Did the bankruptcy court abuse its discretion in its conduct of the Hearing?

STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). A finding of fact is clearly erroneous if it is illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). When factual findings are based on credibility determinations, we must give even greater deference to the bankruptcy court's findings. *Id.* at 575.

We review the bankruptcy court's evidentiary rulings for an abuse of discretion. *See Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1452 (9th Cir. 1997). A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in the record. *See TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 832 (9th Cir. 2011).

We review de novo whether the bankruptcy court complied with our mandate on remand. *de Jong v. JLE-04 Parker, L.L.C. (In re de Jong)*, 588 B.R. 879, 888 (9th Cir. BAP 2018), *aff'd*, 793 F. App'x 659 (9th Cir. 2020). We review the bankruptcy court's decision to consider an issue on remand that the mandate does not foreclose for an abuse of discretion. *Id*.

We may affirm on any basis supported by the record. *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008).

DISCUSSION

A. The bankruptcy court did not err in its determination that Mr. Bartenwerfer's fraud cannot be imputed to Mrs. Bartenwerfer.

Mr. Buckley contends that the bankruptcy court erred by failing to impute Mr. Bartenwerfer's fraud to Mrs. Bartenwerfer for purposes of § 523(a)(2)(A). We disagree; the bankruptcy court identified and appropriately applied the applicable legal standard in *Bartenwerfer III*.

The bankruptcy court correctly indicated that *In re Huh*, 506 B.R. at 266 adopted the rule announced in *Walker v. Citizens State Bank (In re Walker)*, 726 F.2d 452 (8th Cir. 1984), for determining whether to impute liability, as follows: "imputation of an agent's fraud to the agent's principal requires proof of the principal's culpability, i.e., that the principal knew or should have known of the agent's fraud." *Bartenwerfer III*, 596 B.R. at 683. As *Huh* does not set forth efforts Mrs. Bartenwerfer *must* have taken to avoid a finding that she "should have known" of her agent's fraud, the bankruptcy court appropriately consulted cases where courts imputed liability under the *Huh* and *Walker* "should have known" rule for guidance in determining if she "should have known" of Mr. Bartenwerfer's fraud. It noted commonalities among these cases: "[i]n each of the foregoing cases, the debtor knew of—but ignored—facts and circumstances that should have prompted him to investigate the truth of representations made by his agent" and "the debtor's willful refusal to pay minimal attention to the activities of their agents amounted to reckless indifference." *Id.* at 685.

The bankruptcy court then distinguished these cases, finding Mrs. Bartenwerfer's conduct reasonable with respect to the representations made in the TDS. *Id.* at 686. Specifically, it found that she credibly testified that she visually confirmed whatever information she could and asked Mr. Bartenwerfer to confirm the veracity of the other disclosures. *Id.* at 679. It found that her reliance on his knowledge to make the disclosures was neither reckless nor unreasonable

given that it was his full-time job to supervise the construction in her physical absence. *Id.* at 686.

We find no error in the bankruptcy court's findings, especially in light of the special deference we must give its credibility determinations. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).

B. The bankruptcy court did not commit reversible error by declining to rule on whether Mrs. Bartenwerfer was directly liable for fraud.

Mr. Buckley also contends that the bankruptcy court erred by failing to hold Mrs. Bartenwerfer directly liable for fraud. He argues she can be held directly liable because she allegedly showed reckless indifference to the facts that she represented in the TDS. To demonstrate her reckless indifference, he claims that she failed to examine sources of knowledge that lay at her hand and that she signed the TDS certifying that the representations were true and correct to the best of her knowledge with no reasonable ground to believe that they were true. And Mr. Buckley contends, in the alternative, that the bankruptcy court could have held her directly liable for fraud under California common law, statutory law, and contractual law imposing a duty to disclose.

When confronted with such arguments, the bankruptcy court simply stated: "[t]he court respectfully declines to address arguments beyond the Remanded Issue. The BAP did not invite the parties to offer or this

court to consider new theories relating to Mrs. Bartenwerfer's knowledge or intent." *Bartenwerfer III*, 596 B.R. at 682. Accordingly, as a threshold issue, we must address whether the bankruptcy court had the discretion to determine whether Mrs. Bartenwerfer was directly liable for fraud and, if so, whether it was obliged to do so. This requires us to first consider the extent to which our mandate was binding on the bankruptcy court.

1. Our mandate did not preclude the bankruptcy court from deciding whether Mrs. Bartenwerfer was directly liable for fraud.

Under the "rule of mandate," on remand, a trial court cannot vary or examine the appellate court's mandate for any purpose other than executing it. *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016). It "commits 'jurisdictional error' if it takes actions that contradict the mandate." *Id*. But the rule of mandate does not preclude a trial court from deciding anything not foreclosed by the mandate. *Id.* "[A]ny issue not expressly or impliedly disposed of on appeal is available for consideration by the trial court on remand." *Id.* (internal quotation marks and citation omitted).

We remanded for the bankruptcy court to issue further findings regarding Mrs. Bartenwerfer's intent, *and* we vacated Judgment I, because the bankruptcy court appeared to have denied her Civil Rule 52(c) motion *and* found her liable for fraud on the sole basis

of the existence of an agency relationship between Debtors without examining whether she "knew or should have known" of Mr. Bartenwerfer's fraud. *See Bartenwerfer II*, 2017 WL 6553392, at *10. Neither of the parties argued, nor did we conclude, that the bankruptcy court ruled on whether Mrs. Bartenwerfer could be held directly liable for fraud. Therefore, we did not expressly or impliedly dispose of the issue in *Bartenwerfer II*. Thus, it was available for consideration by the bankruptcy court on remand so long as Mr. Buckley had not waived the issue. We conclude that he did not.

2. Mr. Buckley did not waive the issue of Mrs. Bartenwerfer's direct liability for fraud.

Mr. Buckley did not limit his theory of Mrs. Bartenwerfer's liability to imputed liability in his complaint and trial brief. Neither document even mentions imputed liability. While Debtors posited during the Trial that he was relying on an agency theory to establish her liability, he argued that he needed to prove either that she knew or should have known of Mr. Bartenwerfer's fraud *or* that "she was recklessly indifferent" to the facts. Despite this, as discussed *supra*, the bankruptcy court appeared to have imposed the initial judgment against Mrs. Bartenwerfer solely on the basis of Debtors' agency relationship.

This brings us to the first cross-appeals. In his appellate briefing, Mr. Buckley defended the bankruptcy court's Judgment I and denial of Debtors' Civil Rule 52(c) motion without arguing that the bankruptcy court could have, and should have, alternatively found Mrs. Bartenwerfer directly liable for fraud. *See* BAP No. NC-16-1277-BJuF, ECF No. 19. Neither did he include the issue in his cross-appeal of the Judgment I. *Id.* He could have done so. *See St. John v. United States*, 951 F.2d 232, 233 n.1 (9th Cir. 1991). But he was not required to do so to preserve his argument in this appeal. *See In re de Jong*, 588 B.R. at 892.

3. The bankruptcy court abused its discretion in declining to rule on Mrs. Bartenwerfer's direct liability for fraud, but the error is harmless.

As Mr. Buckley preserved the issue of Mrs. Bartenwerfer's direct liability for fraud and the issue was never addressed by the bankruptcy court or on appeal, the bankruptcy court was incorrect in its conclusion that it could not and need not decide the issue. Thus, it misapprehended its powers and applied an incorrect legal standard on remand.

But we need not vacate Judgment II and remand for additional findings regarding Mrs. Bartenwerfer's intent because Judgment II is sufficiently supported by the record. *See Shanks*, 540 F.3d at 1086. While Mr. Buckley asserts that Mrs. Bartenwerfer failed to examine accessible sources of knowledge, knew that

the status of the permits as disclosed on the TDS was inaccurate, and knew of other defects not disclosed on the TDS, the evidence at Trial indicated that she did not have such access or knowledge of such facts. The bankruptcy court found that she consistently and credibly testified that she verified what she could in the TDS and relied on Mr. Bartenwerfer to confirm anything that she did not know in completing the TDS. It found that her conduct was reasonable "and certainly not reckless" with respect to the representations made in the TDS, notwithstanding any specialized knowledge she may have had regarding TDS documents at the time as a real estate broker. These findings are inconsistent with Mr. Buckley's theory of Mrs. Bartenwerfer's direct liability for fraud. Her actions and attitude toward the truth were simply not found to be "reckless" or "indifferent," but reasonable. And the record supports the bankruptcy court's view of the evidence as set forth in its findings.

Accordingly, we affirm the bankruptcy court's conclusion that Mrs. Bartenwerfer is not liable for fraud for purposes of § 523(a)(2)(A). We do so notwithstanding Mr. Buckley's objections to the bankruptcy court's conduct of the Hearing, which we will now address.

C. The bankruptcy court did not abuse its discretion in denying Mr. Buckley rebuttal time.

By way of background, *at the parties' suggestion*, the bankruptcy court ordered the remanded issue of Mrs. Bartenwerfer's knowledge to be addressed through briefing. Mr. Buckley then changed his mind and requested that the bankruptcy court reopen the record should it find the record lacking as to her knowledge. The bankruptcy court entered an order ("Scheduling Order") reopening the record for the limited evidentiary hearing on Mrs. Bartenwerfer's knowledge.

The Scheduling Order provided that each side would be limited to 90 minutes of time on the record and could only introduce new exhibits (that were not already admitted during the Trial) if solely for impeachment or rebuttal. At a status conference before the Hearing, the bankruptcy court reiterated these time and exhibit limitations and explained that Mr. Buckley could reserve part of his 90 minutes for rebuttal. Mr. Buckley's counsel agreed that 90 minutes would be adequate.

Despite the narrow scope of the Hearing and the bankruptcy court's clear instructions regarding its time and exhibit limitations, Mr. Buckley attempted to present extraneous evidence for purposes other than impeachment or rebuttal and to consume more time than he was allotted. Rather than save any time for rebuttal as explicitly authorized by the bankruptcy

court, he consumed his entire 90 minutes, plus an additional five minute extension, in his case-in-chief. Now he complains that the bankruptcy court should have allowed him even more time to rebut Mrs. Bartenwerfer's cross-examination testimony because she allegedly provided "false testimony" during cross-examination pertaining to whether she was on title to the Property and received proceeds from the sale of the Property.

Courts have broad discretion to impose time. *See Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001). The bankruptcy court in this case did not abuse its discretion. Mr. Buckley had no time for rebuttal due to his poor time management during the Hearing and not by fault of the bankruptcy court. And if any of Mrs. Bartenwerfer's testimony was indeed false, the bankruptcy court apparently did not rely on such evidence in reaching its decision, as such evidence was relevant only to the resolved issue of Debtors' agency relationship. *See Bartenwerfer III*, 596 B.R. at 682.

D. The bankruptcy court appropriately limited the introduction of additional evidence for impeachment and rebuttal purposes.

Mr. Buckley further complains that the bankruptcy court improperly prohibited him from refreshing Mrs. Bartenwerfer's recollection with a writing as permitted by Fed. R. Evid. 612. We disagree; the bankruptcy court merely limited the universe of

exhibits to those admitted during the Trial and any additional exhibits to the extent used for impeachment and rebuttal purposes. Mr. Buckley was free to impeach Mrs. Bartenwerfer with her prior testimony or the exhibits admitted during the Trial, at which he had a full opportunity to prove his case against her.

E. The bankruptcy court appropriately weighed discovery responses.

At the Hearing, Mrs. Bartenwerfer testified that she was unaware of the Defects. Mr. Buckley attempted to impeach her testimony by confronting her with her contradictory interrogatory responses, executed under penalty of perjury as true of her own knowledge. The bankruptcy court addressed the conflict between her testimony and discovery responses, as follows:

> She claimed that she intended her responses—which were clearly drafted as hers and hers alone—to be interpreted as both hers and Mr. Bartenwerfer's. This feeble explanation does nothing for her credibility.
>
> All of that said, the court believes that Mrs. Bartenwerfer told the truth on the stand.

Id. at 681.

Mr. Buckley asserts that the bankruptcy court was obliged to accept her discovery responses over her testimony for two reasons. First, he argues that her testimony is akin to a self-serving declaration contrary

to prior sworn testimony that is proffered in an attempt to defeat a summary judgment motion in violation of the "sham affidavit" doctrine. *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) ("When confronted with the question of whether a party should be allowed to create his own issue of fact by an affidavit contradicting his prior deposition testimony . . . [the purported issues of fact created by a plaintiff's contradictory declaration] are sham issues which should not subject the defendants to the burden of a trial."). But this is not a summary judgment case. Mr. Buckley has failed to cite authority holding that the "sham affidavit" doctrine compels a trial court to reject a witness's trial testimony in the face of contradictory discovery responses.

Even if the doctrine applied, an affidavit is not considered a "sham" if: (1) it merely elaborates, explains, or clarifies prior testimony; or (2) the witness was confused when giving the prior testimony and is providing an explanation for the confusion. *See Messick v. Horizon Indus., Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995); *Pac. Ins. Co. v. Kent*, 120 F. Supp. 2d 1205, 1213 (C.D. Cal. 2000).

Next, citing to Civil Rules 26(e) and 37(c)(1), Mr. Buckley argued in his reply brief and at oral argument that the bankruptcy court should not have considered Mrs. Bartenwerfer's testimony because it improperly modified her discovery responses. He waived this argument by failing to object to her testimony during the Hearing and by failing to include this argument in

his opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

We conclude that the bankruptcy court admitted and gave due consideration of the discovery responses and it did not abuse its discretion in believing Mrs. Bartenwerfer's testimony over the responses.

F. The bankruptcy court appropriately limited the evidence to the issues.[6]

Nor did it abuse its discretion in deeming inadmissible documents about Mrs. Bartenwerfer's marketing of real estate other than the Property. Mr. Buckley failed to explain why the documents were relevant to her knowledge regarding the TDS misrepresentations. He submitted that the documents showed that she was involved in the business of "flipping" properties. While this may have been relevant to the issue of whether an agency relationship existed between Debtors, that was a non-issue at the time of the Hearing.

Even if the bankruptcy court erred in deeming the documents inadmissible, there is no indication that the evidentiary exclusion, or the bankruptcy court's other evidentiary rulings, prejudiced Mr. Buckley's case. The

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[6] Debtors moved to strike portions of Mr. Buckley's excerpts of record on the ground that certain documents were not part of the record below. We grant the motion to the extent unopposed. To the extent opposed, we consider the documents for the purpose of deciding whether the bankruptcy court erred in deeming them inadmissible.

best indication of Mrs. Bartenwerfer's intent was her live testimony and the bankruptcy court's contemporaneous assessment of her credibility. Nothing in the excluded evidence was likely to have altered its finding regarding her intent. Thus we discern no reversible error.

CONCLUSION

Based on the foregoing, we AFFIRM.

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: KATE MARIE BARTENWERFER Debtor ——— KIERAN BUCKLEY Appellant v. KATE MARIE BARTENWERFER; DAVID WILLIAM BARTENWERFER Appellees	BAP No. NC-19-1016-TaFB Bankr. No. 3:13-bk-30827 Adv. No. 13-03185 Chapter 7 April 23, 2020

JUDGMENT

(Filed Apr. 23, 2020)

ON APPEAL from the United States Bankruptcy Court for California Northern—San Francisco.

THIS CAUSE came on to be heard on the record from the above court.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is AFFIRMED.

FOR THE PANEL,

Susan M Spraul
Clerk of Court
By: Cecil Lizandro Silva, Deputy Clerk

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:	)	Case No. 13-30827 HLB
DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER,	)	Chapter 7
Debtors.	)	
KIERAN BUCKLEY,	)	Adv. Proc. No. 13-03185 HLB
Plaintiff,	)	
v.	)	
DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER,	)	
Defendants.	)	

JUDGMENT FOLLOWING REMAND

Pursuant to the court's Memorandum Decision Following Remand entered on January 4, 2019 (Dkt. 200), the court hereby enters judgment on Plaintiff Kieran Buckley's complaint in favor of Defendant Kate Marie Bartenwerfer and against Mr. Buckley.

****END OF JUDGMENT****

Court Service List

[None]

APPENDIX E

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Debtors.	Case No. 13-30827 HLB Chapter 7
KIERAN BUCKLEY, Plaintiff, v. DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Defendants.	Adv. Proc. No. 13-03185 HLB (Filed Jan. 4, 2019)

MEMORANDUM DECISION FOLLOWING REMAND

On December 22, 2017, the Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") issued a decision (Dkt. 179; the "BAP Decision") that, among other things, vacated and remanded in part this court's judgment of April 19, 2016 (Dkt. 70, as amended by Dkt. 125 and Dkt. 143; the "Judgment"). The Judgment declared a debt owed to Mr. Kieran Buckley by Chapter

7 Debtors David and Kate Bartenwerfer nondischargeable under section 523(a)(2)(A)[1]. The BAP Decision affirmed the Judgment as to Mr. Bartenwerfer but vacated and remanded the Judgment as to Mrs. Bartenwerfer so that the court could determine whether Mrs. Bartenwerfer "knew or had reason to know of Mr. Bartenwerfer's fraudulent omissions" in connection with the sale of a house to Mr. Buckley (the "Remanded Issue"). [BAP Decision, 22:23-25.]

After a delay caused by the parties' respective appeals from the BAP Decision and this court's need for additional briefing, the court reopened the evidentiary record to accept additional testimony on the Remanded Issue, which the parties elicited at a trial conducted on December 12, 2018.

A. Background

For the sake of brevity, the court will not repeat but incorporates by reference the relevant facts set forth in its Memorandum Decision of April 1, 2016 (Dkt. 69), which explain the origins and nature of the parties' dispute. The court also incorporates by reference (to the extent relevant) the BAP Decision's recitation of the procedural posture of this action.

[1] Unless otherwise indicated, all statutory citations shall refer to Title 1 of the United States Code, aka the "Bankruptcy Code."

B. Jurisdiction

This proceeding requests a determination of the dischargeability of a debt under section 523(a)(2)(A) and constitutes a core proceeding in which this court may enter a final judgment. 28 U.S.C. § 1334(b); 28 U.S.C. § 157(a); 28 U.S.C. § 157(b)(2)(I); General Order No. 24 of the United States District Court for the Northern District of California.

C. Findings of Fact as to Remanded Issue

When Mr. and Mrs. Bartenwerfer acquired the home located at 549 28th Street, San Francisco, California (the "Property"), they intended to remodel it. At first, their plans were relatively modest. Later, however, after Mr. Bartenwerfer became (according to Mrs. Bartenwerfer) "inspired," those plans morphed into a gargantuan project that involved tearing off the back wall of the Property and increasing its square footage by approximately one third. Mr. Bartenwerfer assumed full-time responsibility for managing these extensive renovations, even though he had no training or education in construction and did not possess a contractor's license.

At all times relevant to this action, Mrs. Bartenwerfer worked elsewhere. She currently works at Genentech. At the time of the original trial of this action, she had worked at McKesson for approximately ten years. Her work at both places was and remains largely the same. She works in Genentech's Law Department, assisting with licensing and regulatory

issues. She has no specialized legal training, other than that which she might have obtained through her on-the-job experience.

In 2008, Mrs. Bartenwerfer obtained a California real estate broker's license. She obtained this license after studying books and other materials she obtained from some unspecified source; she attended no classes. After completing the required coursework, she took an exam. Although she failed this exam the first time she took it, she ultimately passed and received her license.

Mrs. Bartenwerfer never "used" her broker's license, explaining that she never associated her license with a real estate agency and never once acted as a broker for any buyer or seller of real property. She viewed the real estate business as too unstable and too risky to pursue as a profession. And although she originally wanted to obtain this license so that she could earn a commission on the sale of the Property, she came to view herself as too inexperienced to take part in what she believed to be a "complicated" real estate transaction. When she and Mr. Bartenwerfer sold the Property to Mr. Buckley, they engaged Mr. Peter Monti as their agent. Mrs. Bartenwerfer no longer holds an active broker's license.

Mr. and Mrs. Bartenwerfer lived in the Property until approximately April 2007, when the renovations made continued use of the Property as a residence impossible. Mrs. Bartenwerfer could not recall setting foot on the Property between April 2007 and approximately November 2007, when they put the Property on

the market. This means that she never used the renovated Property as her residence. She never kept clothes in the new master closet, never slept in the new master bedroom, etc.

Managing the renovation of the Property was Mr. Bartenwerfer's full-time job. Mrs. Bartenwerfer never interacted with or gave instructions to laborers or contractors; never met with or gave instructions to architects; never wrote checks to contractors; etc. Mr. Henry Karnilowicz, a consultant employed to assist Mr. Bartenwerfer with obtaining necessary construction permits, abating violations, and obtaining approval of the construction at the Property, corroborated this aspect of Mrs. Bartenwerfer's testimony. Mr. Karnilowicz only ever dealt with Mr. Bartenwerfer – never with Mrs. Bartenwerfer – regarding the many outstanding permits and notices of violations pertaining to the Property.

In November 2007, as they prepared to market the Property for sale, Mr. and Mrs. Bartenwerfer executed a Real Estate Transfer Disclosure Statement, as well as a supplement thereto (Plaintiff's Ex. 2; the "TDS")[2]. Mrs. Bartenwerfer admitted that she understood that the purpose of the TDS was to disclose any defects or problems associated with the Property of which a potential purchaser might want to be aware. She also understood that her signature on the document

[2] When Mr. and Mrs. Bartenwerfer executed the TDS, they had not yet married, so Mrs. Bartenwerfer is identified in and executed the TDS as Kate Pfenninger.

constituted her representation that the information disclosed in the TDS was true and correct. And she understood that she had a duty to update the TDS if any new material information came to light.

Even though Mr. and Mrs. Bartenwerfer attested in the TDS that they answered the questions therein in "an effort to fully disclose all material facts relating to the Property" and certified that "the information provided [was] true and correct," the TDS failed to disclose numerous significant problems. As detailed in the court's April 1, 2016 Memorandum Decision, the TDS failed to disclose several leaks, quite a few open permits, at least one notice of violation, several malfunctioning windows, and a missing fire escape. [Dkt. 69; pp. 11-19.]

The TDS is a "check-the-box" form, with only a very few places in which narrative information can be added. For example, item A requires the seller to disclose whether the given property has certain fixtures, systems, or features. The seller accomplishes this by checking a box next to each specified feature or fixture that exists in the property to be sold. For example, if the property has "Washer/Dryer Hookups," the seller will check the box next to that feature. He or she will do the same for other features or systems, such as smoke detectors, garbage disposal, dishwasher, fireplace(s), sump pump, central heating, etc.

The TDS also requires the seller to disclose whether he or she is aware of certain defects or problems by checking either a box marked "yes" or a box

marked "no." If the seller checks the "yes" box – thereby confirming the existence of a particular defect or problem – he or she then must check other boxes that indicate the area where the problem exists, such as "roof(s)" or "windows" and then describe the problem in a short section that allows for a narrative answer.

In response to all questions relevant to this dispute, i.e., all questions that afforded Mr. and Mrs. Bartenwerfer an opportunity to disclose the numerous defects from which the Property suffered, they answered "no." Their omission from the TDS of these significant issues gave rise to a decade of litigation.

During the December 12 trial, Mrs. Bartenwerfer's testimony revealed that she did not remember much about when and how the TDS was prepared, other than that she did not play any significant role in doing so. She did not, for example, remember signing the TDS, authorizing Mr. Bartenwerfer to prepare the TDS, or even whether it was Mr. Bartenwerfer who did so.

During the court's original trial, which took place on January 19 and 22, 2016, Mr. Bartenwerfer denied having completed the TDS on his wife's behalf. This directly contradicted the testimony he gave during the 19-day state court trial that preceded the bankruptcy litigation, in which he admitted that he prepared the TDS on behalf of himself and Mrs. Bartenwerfer. The court sees no need to revisit its prior finding that Mr. Bartenwerfer completed the TDS. The question, however, is what did Mrs. Bartenwerfer do, if anything, to verify the information disclosed in the TDS and then,

assuming she tried to verify those disclosures, whether that effort was sufficient to insulate her from a finding of nondischargeability due to Mr. Bartenwerfer's fraudulent omission of material information.

During the December 12 trial, Mrs. Bartenwerfer testified that, to the best of her recollection, the TDS was prepared during a visit to the Property in November 2007, at which she, Mr. Bartenwerfer, and their agent, Mr. Monti, were present. She consistently and credibly testified that she verified whatever information she could by visually inspecting the Property during that visit, such as, for example, confirming visually that the Property had a dishwasher and a range. For everything else, she relied on Mr. Bartenwerfer to confirm orally the accuracy of the information disclosed in the TDS.

Mr. and Mrs. Bartenwerfer also signed a sales contract, in which they represented that they had "no knowledge or notice that the Property has any material defects other than as disclosed . . . in the [TDS] or other writing before Acceptance or as soon thereafter as practicable." [Plaintiff's Ex. 1, ¶ 19.] Mrs. Bartenwerfer admitted that she understood paragraph 19 of the sales contract when she signed it.

Mrs. Bartenwerfer did not take any steps to confirm what Mr. Bartenwerfer told her. She did not, for example, ask to see any construction plans or drawings pertaining to the renovation of the Property, which might have revealed the missing fire escape. She did not ask to review any of the permits pertaining to the

construction work done on the Property nor did she speak to Mr. Karnilowicz (the permit consultant), which might have revealed the falsity of the affirmative representations in the TDS that there were no open permits pertaining to the renovation. She did not review quotes or invoices from contractors working on the Property, which might have revealed that, just a month prior to their execution of the TDS, Mr. Bartenwerfer had received a quote for work to repair existing leaks and to prevent their recurrence.

When asked whether she saw any problems with the Property's windows, Mrs. Bartenwerfer simply said she "was not aware of any problems." The court infers from this testimony that Mrs. Bartenwerfer might have asked Mr. Bartenwerfer whether there were any problems with the windows, but that she did not attempt to open or shut the windows herself, which might have revealed that they did not operate properly.

Other than the information she confirmed with a visual inspection, Mrs. Bartenwerfer based her attestations in the TDS on what Mr. Bartenwerfer told her. Unfortunately, much of what Mr. Bartenwerfer told her – and much of the information disclosed in the TDS – was false, and Mr. Bartenwerfer knew it was false when he prepared the TDS. He also did nothing to correct the TDS over the ensuing months, as they marketed the Property, or when Mr. Buckley made an offer to and ultimately did purchase the Property, or after that transaction closed.

Mrs. Bartenwerfer's reliance on Mr. Bartenwerfer continued through discovery in this proceeding. For example, Mr. Buckley served Mrs. Bartenwerfer with interrogatories, one of which asked her to "[p]lease explain in detail why [she] did not believe [her] representations regarding water leaks at the Property were false when the representations were made." [Plaintiff's Ex. 37, pp. 13-14 (Interrogatory No. 1 and Response).] In response, Mrs. Bartenwerfer stated: "During construction, a problem was discovered with the roofing material above the master bedroom closet. That problem was resolved during the construction process and the responding party did not consider the problem to be a 'leak' of the sort for which disclosure was required since it occurred during the construction of the Property and was resolved during the construction of the Property. Responding party was not aware of any other problem [sic] related to water intrusion or leaks." [Id.]

Similarly, Interrogatory No. 11 asked Mrs. Bartenwerfer to "[p]lease explain in detail why [she] did not believe that [she] failed to disclose the true status of permits at the Property with the intention and purpose of deceiving [Mr. Buckley]." [Plaintiff's Ex. 37, p. 16.] Mrs. Bartenwerfer responded: "Responding party believes the true status of the permits at the Property was disclosed to [Mr. Buckley]. Responding party was not obligated to provide copies of the final permits and, in any event, unable to provide copies of the permits to [Mr. Buckley] because responding party need [sic] to maintain control of the same were for [sic] the City and

County of San Francisco to provide final approval of the permits." [Id.]

Mrs. Bartenwerfer verified under penalty of perjury that her responses to Mr. Buckley's interrogatories were "true of my own knowledge, except as to matters which are therein stated upon my information and belief, and as to those matters, I believe them to be true." [Plaintiff's Ex. 37, p. 22.] Mrs. Bartenwerfer did not qualify her responses to Interrogatory Nos. 1 and 11 as based on information and belief; thus, one should be able to accept her responses as based on her own personal knowledge. Except that – assuming one believes her testimony – they were not.

If one accepts Mrs. Bartenwerfer's testimony as truthful, these responses could not have been based on her personal knowledge. She never lived in the renovated Property; she never saw and did not possess or maintain the construction permits; she never interacted with contractors, laborers, architects, or consultants; she never asked for or reviewed construction plans or drawings; and she never asked for or reviewed invoices or estimates for construction work. According to Mrs. Bartenwerfer's testimony, Mr. Bartenwerfer served as her sole source for information concerning the Property, other than what she could verify visually.

When confronted with her responses to the foregoing written discovery during the December 12 trial, Mrs. Bartenwerfer waffled. She claimed that she intended her responses – which were clearly drafted as hers and hers alone – to be interpreted as both hers

and Mr. Bartenwerfer's. This feeble explanation does nothing for her credibility.

All of that said, the court believes that Mrs. Bartenwerfer told the truth on the stand. She answered questions earnestly, taking care to ask for clarification when needed. And she consistently, clearly, and credibly maintained – perhaps to her detriment – that, when confronted with a question concerning the Property about which she had no personal knowledge and as to which she could not determine an answer based on her visual inspection, she asked Mr. Bartenwerfer and relied unflinchingly on whatever he told her.

D. Conclusions of Law as to Remanded Issue.

Mr. Buckley's complaint contained a single cause of action, based on section 523(a)(2)(A). Section 523(a)(2)(A) excepts from discharge any debt obtained by "false pretenses, a false representation, or actual fraud." To obtain a finding of nondischargeability under section 523(a)(2)(A), a creditor must prove by a preponderance of the evidence that: (1) the debtor made a fraudulent misrepresentation or omission, or engaged in deceptive conduct; (2) the debtor knew of the falsity or deceptiveness of his or her statements or conduct; (3) the debtor made the representation with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor suffered damage as a proximate result of the debtor's fraudulent statements or conduct. In re Slyman, 234 F.3d 1081, 1085 (9th Cir. 2000).

The BAP affirmed this court's conclusion that Mr. Buckley succeeded in proving all of the foregoing elements as to Mr. Bartenwerfer. [BAP Decision, 23:16-19.] As relevant to this decision, the BAP vacated this court's Judgment as to the Remanded Issue.

In their supplemental briefing on the Remanded Issue, it became clear that the parties no longer seriously dispute that Mrs. Bartenwerfer had no actual knowledge of Mr. Bartenwerfer's fraud. They remain in dispute as to whether she "should have known" of his fraud. And they both offered argument that strayed from the Remanded Issue.

Mr. Buckley characterizes Mrs. Bartenwerfer's attitude toward the truth about the Property's condition as "indifferent". He points out (correctly) that the court received no evidence that Mrs. Bartenwerfer could not have reviewed the permits, construction drawings, invoices, or other relevant documents; or that she could not have spoken to contractors or to others, such as Mr. Karnilowicz, concerning the Property. According to Mr. Buckley, had Mrs. Bartenwerfer paid "minimal attention" to the facts to which she attested, she would have become aware of their falsity.

Mr. Buckley also contends that Mrs. Bartenwerfer can be held directly liable for the misrepresentations made to Mr. Buckley because she: (a) signed the TDS without doing the proper due diligence; and (b) failed to disclose that many of the representations she made in the TDS were not based on personal knowledge. [Plaintiff's Scienter Brief re Kate Bartenwerfer, Dkt.

187, pp. 19-24.] According to Mr. Buckley, this "grossly reckless" behavior satisfies section 523(a)(2)(A)'s scienter requirement and affords a basis upon which to render the debt nondischargeable that does not require imputation of Mr. Bartenwerfer's fraud to Mrs. Bartenwerfer. The court respectfully declines to address arguments beyond the Remanded Issue. The BAP did not invite the parties to offer or this court to consider new theories relating to Mrs. Bartenwerfer's knowledge or intent.

Mrs. Bartenwerfer characterizes herself as an "honest but unfortunate" debtor. She believes she acted reasonably by asking Mr. Bartenwerfer to confirm the representations he made (and that she adopted as her own) and argues that this constituted the "minimal attention" required of her under relevant caselaw. She maintains that she would not have known, for example, how to read construction drawings or permits even if she had asked for them, so doing so would not have enabled her discovery of the falsity of Mr. Bartenwerfer's representations as to the Property's condition.

Mrs. Bartenwerfer also continues to argue that she and Mr. Bartenwerfer were not partners. [Defendants' Brief re Knowledge and Intent of Kate Bartenwerfer, Dkt. 189, pp. 9-12.] This, too, strays from the Remanded Issue and ignores the BAP's express affirmance of this court's finding that Mr. and Mrs.

Bartenwerfer were partners with respect to the Property. [BAP Decision, 22:9-20.][3]

The Remanded Issue is limited to whether Mrs. Bartenwerfer knew or should have known of her husband's fraud, such that it can be imputed to her for purposes of section 523(a)(2)(A). The seminal case in the Ninth Circuit on the issue of imputation of fraud is In re Huh, 506 B.R. 257 (9th Cir. BAP 2014) (*en banc*). Huh involved an action under section 523(a)(2)(A) that arose from the sale of a retail market. The debtor, Mr. Huh, was a licensed real estate broker and operated a real estate and business brokerage. Mr. Kim worked as a part-time sales agent associated with Mr. Huh's brokerage. Mr. Kim served as the seller's agent in the transaction involving the market.

During the negotiations leading up to the sale, Mr. Kim made numerous misrepresentations to the buyer as to the profitability of the market and the extent of its inventory. He also failed to disclose that local authorities had cited the market for several fire and

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[3] "We agree with the bankruptcy court's agency finding. Mrs. Bartenwerfer's partnership/agency relationship with Mr. Bartenwerfer was established by not only her co-ownership of the Property, which is a factor tending to establish partnership, but also because she signed the TDS and sales contract and she stood to benefit from the successful completion of the project and sale of the Property. That she participated little in the project and delegated authority to Mr. Bartenwerfer to manage it does not defeat the forming of a partnership. A partnership can exist as long as the parties have the right to manage the business, even though in practice one partner relinquishes the day-to-day management to the other partner." (citations omitted)

health code violations and that, unless the buyer took immediate and expensive corrective measures, he would be unable to obtain a license to operate the business.

After the worst-case scenario played itself out and the buyer was forced to sell the market at a substantial loss, he sued Mr. Kim in state court and won. During post-trial litigation, the buyer succeeded in adding Mr. Huh as a defendant and in obtaining a judgment against him in an amount that exceeded $900,000. Mr. Huh then filed a petition for relief under Chapter 7.

The buyer/judgment-creditor commenced an adversary proceeding in which he asked the bankruptcy court to except his judgment from Mr. Huh's discharge. After trial, the bankruptcy court concluded that Mr. Kim was Mr. Huh's agent but declined to impute Mr. Kim's fraud to Mr. Huh. In support of its conclusion, the bankruptcy court noted, among other things, that Mr. Huh had never communicated directly with the buyer; had never made any affirmative misrepresentations to the buyer or instructed Mr. Kim to make any misrepresentations on his behalf; that Mr. Huh knew nothing about the market; and that Mr. Huh had not even been aware of the market or its purchase until after that transaction closed. The bankruptcy court entered judgment in favor of Mr. Huh.

The BAP affirmed. 506 B.R. at 259. The BAP held that imputation of an agent's fraud to the agent's principal requires proof of the principal's culpability, i.e., that the principal knew or should have known of the

agent's fraud. Id. at 271-272. Considering the factual findings made by the bankruptcy court as to Mr. Huh's lack of knowledge of the transaction and of Mr. Kim's fraud, the BAP concluded that the bankruptcy court had correctly decided that the buyer's state court judgment should not be excepted from discharge. Id. at 272.

Huh does not explicitly obligate a debtor to pay "minimal attention" to his or agent's representations or conduct to avoid imputation of the agent's fraud. In fact, Huh does not discuss what efforts, if any, a debtor must make to avoid a finding that he or she *should have known* of the agent's fraud and does not describe what Mr. Huh did or did not do to supervise Mr. Kim's conduct. The caselaw followed by Huh, however, provides some meaningful guidance.

Huh adopted the rule announced by the Eighth Circuit Court of Appeals in Matter of Walker, 726 F.2d 452 (8th Cir. 1984). Walker involved an action under section 523(a)(2)(A) against a debtor whose wife made fraudulent misrepresentations to a bank for the purpose of inducing the bank to loan more money than it otherwise would have to the debtor's business. The parties did not dispute that the debtor's wife served as his agent.

The bankruptcy court held that this agency relationship, as well as the fact that both husband and wife enjoyed the benefit of the fraudulently obtained funds, justified imputation of the wife's fraud to her debtor/husband. The district court disagreed, reasoning that, in order hold a debtor liable for his agent's

fraud, the party seeking a declaration of nondischargeability must prove that the debtor knew or should have known of the fraud. The Eighth Circuit agreed with the district court's "knew or should have known" standard but reversed and remanded because it found the factual record developed in the bankruptcy court inconclusive as to that issue. 726 F.2d at 454.

In discussing the "should have known" component of the standard to which it adhered, the Eighth Circuit briefly examined cases in which courts had imputed an agent's fraud to a debtor. It found that in each such case, the debtors were found to be "recklessly indifferent" and possessed "no reason, good or bad, for their lack of knowledge." Id. (citations omitted). The Eighth Circuit held that "[t]he debtor who abstains from all responsibility for his affairs cannot be held innocent for the fraud of his agent if, had he paid minimal attention, he would have been alerted to the fraud." Id. Huh quotes this language and adopts wholesale Walker's "knew or should have known" standard,[4] so it is fair to say that the BAP also approves of the guidance offered by Walker as to whether a debtor "should have known" of his or her agent's fraud.

The court could find no caselaw from within the Ninth Circuit that discusses the "should have known" prong of the Walker rule. Decisions from courts in other jurisdictions that follow Walker and/or its "knew

[4] Huh, 506 B.R. at 266.

or should have known" standard, however, prove helpful.

Helena Chem. Co. v. Richmond (In re Richmond), 429 B.R. 263 (Bankr. E.D. Ark. 2010) involved a creditor's demand for (among other things) a declaration of nondischargeability under section 523(a)(2)(A). The creditor had loaned money to one or more of the debtor's businesses, which the debtor's son managed. The Debtor orally relinquished managerial responsibility to his son, rather than documenting that delegation in accordance with the applicable corporate governance documents. The debtor did this because he knew of his son's serious financial problems and wished to conceal those problems from creditors.

Unfortunately, the debtor's son persisted in his financial misconduct while running his father's businesses. He made material misrepresentations to the plaintiff/creditor concerning the existence and ownership of certain equipment that was to serve as the creditor's collateral; fraudulently inflated cash, inventory, and receivables; and willfully failed to disclose intercompany debt. He also concealed the businesses' insolvency through an elaborate check-kiting scheme.

While the bankruptcy court received some evidence that proved the father's direct involvement in a small portion of his son's fraudulent activities, for the most part the debtor did little to supervise his son. He signed whatever checks and other documents his son placed before him; failed to monitor bank accounts; and never attempted to verify the accuracy of tax returns,

financial statements, loan applications, and other documents his son prepared on his behalf.

The creditor argued that the bankruptcy court should impute the son's fraud to his father/debtor. The debtor attempted to distance himself from his son's misconduct, pleading ignorance to most of it. The bankruptcy court agreed with the creditor, emphasizing that the debtor knew of his son's insolvency, tax problems, and pattern of financial mismanagement but nevertheless gave him carte blanche. Richmond, 429 B.R. at 290-291. According to the bankruptcy court, this justified a judgment in favor of the creditor under section 523(a)(2)(A). Id. at 295.

In Warthog, Inc. v. Zaffron (In re Zaffron), 303 B.R. 563 (Bankr. E.D.N.Y. 2004), a creditor that had leased a large conference center to an entity through which the debtor and his partner conducted business demanded a judgment of nondischargeability under section 523(a)(2)(A) as to the debt arising from the lease. Prior to execution of the lease, the debtor's partner made numerous misrepresentations concerning financing commitments he and the debtor had received from banks and other investors; commitments from alleged clients as to use of the conference center; and as to the debtor's experience as an investment banker. The partner made some of these misrepresentations the debtor's presence, but the debtor made no effort to correct them. As to the partner's other false statements, the debtor claimed ignorance.

The bankruptcy court declared the debt nondischargeable. The court found it "difficult to believe that based on the actual facts as the Debtor knew them to be" the creditor would have leased such large premises to the debtor and his partner without representations as to financing. It also noted the debtor's failure to correct the false representations made in his presence. This "reckless indifference" to the truth justified a judgment in favor of the creditor under section 523(a)(2)(A). Id. at 572-573.

In Am. Inv. Bank, N.A. v. Hosking (In re Hosking), 89 B.R. 971 (Bankr. S.D. Fla. 1988), the debtor obtained a loan from a bank so that he could invest in an oil drilling venture. The debtor authorized his financial advisor and accountant to prepare the documents required by the bank, which the debtor understood would include a financial statement and loan application. The debtor's agents prepared the necessary documents, but they contained numerous materially false representations. The debtor maintained that he did not read or sign the documents his agents prepared but admitted to asking his agents to prepare those documents; admitted to needing the loan to invest in the oil drilling venture; and admitted to acknowledging in writing that the bank's decision to extend credit was based in part on a loan application and his financial status.

The bankruptcy court did not believe the debtor's testimony that he did not sign the loan application or financial statement. But even accepting that testimony as true, the court found ample evidence upon which to conclude that the debtor knew or should have known

of his agents' fraud. The court emphasized the debtor's intelligence and experience as a businessman, as well as his admissions concerning the documentation required by the bank. By abandoning his responsibilities as a loan applicant and paying no attention to the activities of his agents, the debtor behaved recklessly, which justified a judgment in favor of the bank. Hosking, 89 B.R. at 977.

In each of the foregoing cases, the debtor knew of – but ignored – facts and circumstances that should have prompted him to investigate the truth of representations made by his agent. In Hosking, the debtor knew that obtaining a loan would require a financial statement and loan application and authorized his agents to prepare them, but made no effort to find out what those documents actually said. In Richmond, the debtor knew of his son's history of financial mismanagement but nevertheless signed whatever documents the son placed before him without verifying their accuracy. In Zaffron, the debtor understood that the lessor would require proof of significant financial backing and knew that his company did not have such backing, but made no effort to investigate the representations made by his partner. In each of these cases, the debtor's willful refusal to pay minimal attention to the activities of their agents amounted to reckless indifference. Under Walker, such culpability justifies imputation of the agents' fraud to the debtors and a finding of nondischargeability under section 523(a)(2).

The case before this court does not follow the foregoing pattern. Mrs. Bartenwerfer did not live at the

Property after the relevant renovations started. Once she moved out, she did not visit the Property again until she, Mr. Bartenwerfer, and Mr. Monti met there to prepare the TDS. She never met with or gave instructions to any of the laborers, contractors, architects, or other professionals hired by Mr. Bartenwerfer. She played no role in obtaining permits for the construction or in working with municipal authorities with respect to those permits. She and Mr. Bartenwerfer agreed that he would assume full-time responsibility for the Property and its renovation and they stuck to that arrangement.

In light of their arrangement, the court finds Mrs. Bartenwerfer's conduct reasonable with respect to the representations made in the TDS. She confirmed visually whatever information she could. As to disclosures that were not subject to visual verification, she asked Mr. Bartenwerfer to confirm their veracity. It was, after all, his full-time job to supervise the construction.

While Mr. Bartenwerfer did not possess a contractor's license and had no training in construction, the court does not believe these facts render Mrs. Bartenwerfer's conduct any less reasonable, and certainly not reckless. Mr. Bartenwerfer devoted himself full-time to the Property; Mrs. Bartenwerfer logically assumed that his first-hand knowledge provided the most immediate and accurate source of information concerning its condition.

And the court received no evidence whatsoever that suggested Mrs. Bartenwerfer might have received

any hint of defects in the Property through other channels. Put another way, Mr. Buckley did not prove that Mrs. Bartenwerfer knew of but ignored facts that should have prompted her to investigate the representations set forth in the TDS beyond asking Mr. Bartenwerfer to confirm the accuracy of information she could not verify herself by visual inspection.

And finally, the court does not believe that the fact Mrs. Bartenwerfer could have asked, but did not, to review permits, construction drawings, invoices, checks, or other documents requires a difference result. Nothing in Huh, Walker, or any of the other relevant caselaw requires a debtor to independently verify each and every representation made by his or her agent. If debtors were held to such a standard, it would render debtors liable for all misrepresentations made by their agents – a standard the BAP has rejected. Huh, 506 B.R. at 266. The Walker standard implicitly acknowledges that a principal must be able to trust and rely on his or her agent unless the principal knows or has reason to know of cause not to, and rightfully so. Otherwise, there would be little point to principal-agent relationships. It is only where a debtor learns of facts that require investigation into the agent's conduct but fails to undertake such an inquiry that a court can find that the debtor "should have known" of the agent's fraud and can impute such fraud to the debtor. Mr. Buckley failed to prove that Mrs. Bartenwerfer knew of any such facts.

E. Conclusion

For the foregoing reasons, the court will render judgment on Mr. Buckley's complaint in favor of Mrs. Bartenwerfer.

****END OF ORDER****

Court Service List

[None]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Debtors, --------------------------------------- KIERAN BUCKLEY, Appellant/Cross-Appellee, v. DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Appellees/Cross-Appellants.	Nos. 20-60021, 20-60023, 20-60024 BAP No. 16-1277 ORDER (Filed Sep. 24, 2021)

Before: McKEOWN and NGUYEN, Circuit Judges, and HUCK,* District Judge.

Judges McKeown and Nguyen have voted to deny the petition for rehearing en banc, and Judge Huck has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has

* The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition is DENIED.