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8 COBBS TRUST

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**UNITED STATES COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA**

In re: MARY CUMMINS-COBB,  Debtor	)	Appeal No. 2:20-cv-02149-AB  Bankruptcy Case No. 2:17-bk-24993-RK Adv. Proc. No. 2:18-ap-01066-RK
KONSTANTIN KHIONIDI, as Trustee of the COBBS TRUST,  Plaintiff,  vs.  MARY CUMMINS-COBB, Defendant.	)	APPELLEE'S <i>EX PARTE</i> APPLICATION TO (1) STRIKE APPELLANT'S OPENING BRIEF AND TO SUMMARILY AFFIRM THE BANKRUPTCY COURT'S JUDGMENT AND  (2) STAY THIS APPEAL PENDING A RULING ON THIS <i>EX PARTE</i> APPLICATION

**[IMMEDIATE STAY REQUESTED]**

Hon. Andre Birrote, Jr.

**APPELLANT IS HEREBY NOTIFIED THAT ANY RESPONSE MUST BE FILED  
WITHIN 24 HOURS OR ONE COURT DAY AFTER SERVICE**



1 frivolous.

## 2 ARGUMENT

### 3 I.

#### 4 **CUMMINS HAS FAILED TO PROVIDE ANY ADEQUATE RECORD ON APPEAL**

5 As the appellant, Cummins has the obligation to present an adequate record on  
6 appeal to enable this Court’s review. An appellant bears the burden of filing an adequate  
7 record to allow review of a judgment on appeal. *In re Hamel*, 2009 Bankr. LEXIS 4521, at  
8 \*17 (B.A.P. 9<sup>th</sup> Cir. Apr. 16, 2009).

9 Rule 8018 (b) of the Federal Rules of Bankruptcy Procedure states that an appellant  
10 “must serve and file with its principal brief excerpts of the record as an appendix.”  
11 Fed.R.Bankr.P. 8018 (b). Federal Rule of Bankruptcy Procedure 8009(b)(5) requires that in  
12 any appeal to a bankruptcy appellate panel there be an appendix of excerpts of the record  
13 that includes the “opinion, findings of fact, or conclusions of law filed or delivered orally”  
14 by the court. Fed. R. Bankr. P. 8009(b)(5). “This is also mandatory, not optional.” *In re*  
15 *McCarthy*, 230 B.R. 414, 417 (B.A.P. 9<sup>th</sup> Cir. 1999). “The appellant's appendix omits the  
16 findings and is, as a matter of law, incomplete.” See *In re Kritt*, 190 B.R. 382, 386 (9<sup>th</sup> Cir.  
17 BAP 1995); *In re Burkhardt*, 84 B.R. 658, 661 (9<sup>th</sup> Cir. BAP 1988). The burden is on the  
18 appellant.

19 The purpose of requiring an appendix in every appeal is obvious; appellants need to  
20 provide the court with “those parts of the record material to the questions presented and  
21 which it is essential for the judges of the court to read in order to decide these questions.”  
22 *Columbus Wood Preserving Co. v. United States*, 209 F.2d 153, 154 (6<sup>th</sup> Cir. 1953).  
23 “Failure to supply necessary documents goes to the heart of [the] court's decision-making  
24 process.” *Hill v. Porter Mem'l Hosp.*, 90 F.3d 220, 226 (7<sup>th</sup> Cir. 1996). Consequently,  
25 “appellants bear the responsibility to file an adequate record, and the burden of showing  
26 that the bankruptcy court's findings of fact are clearly erroneous.” *In re Kritt*, 190 B.R. 382,  
27 387 (B.A.P. 9<sup>th</sup> Cir. 1995). “The appellant’s failure to provide the one document that would  
28 directly identify the manner in which the bankruptcy court exercised its discretion entitles

1 us to dismiss this appeal.” *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9<sup>th</sup> Cir.  
2 1991).<sup>1</sup>

3 Hence, appellant’s failure “to provide a sufficient record to support an informed  
4 review of the trial court's determinations may result in either dismissal of the appeal or  
5 summary affirmance of the trial court's judgment based upon the appellant’s inability to  
6 demonstrate error.” *In re Hamel*, 2009 Bankr. LEXIS 4521, at \*10 (B.A.P. 9<sup>th</sup> Cir. Apr. 16,  
7 2009); *In re O'Brien*, 312 F.3d 1135, 1136-37 (9<sup>th</sup> Cir. 2002); *In re Perez*, 30 F.3d 1209,  
8 1217-18 (9<sup>th</sup> Cir.1994).

9 In this case, Cummins failed to include even the most fundamental parts of the record  
10 on appeal, such as the Bankruptcy Court’s Summary Judgment orders or the evidence  
11 presented in support of and opposition to those Orders. The failure to submit an adequate  
12 record on appeal is grounds enough for dismissal of the appeal with prejudice.

13 However, Cummins also failed to order either of the transcripts of the oral arguments  
14 on the Motions for Summary Judgment, which is also a violation of Rule 8018 and grounds  
15 for dismissal. *Hall v. Whitley*, 935 F.2d 164, 165 (9<sup>th</sup> Cir. 1991) (“Because we review the  
16 district court’s decision de novo, we must read the transcript of the trial court  
17 proceedings.”); *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9<sup>th</sup> Cir. 1991)(“we have  
18 held that failure to provide relevant portions of a transcript may require dismissal of the  
19 appeal.”). “When an appellant fails to supply a transcript of a district court proceeding, we  
20 may dismiss the appellant's appeal or refuse to consider the appellant's argument.” *Portland*  
21 *Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 789 (9<sup>th</sup> Cir. 1989),  
22 citing *Thomas v. Computax Corp.*, 631 F.2d 139, 143 (9<sup>th</sup> Cir. 1980) (dismissing appellant's  
23 *pro se* appeal when she failed to include in the record a transcript to support her claim that  
24 the trial court's finding and judgment was unsupported by the evidence).

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27 <sup>1</sup> As an example, Cummins states in her Opening Brief, p. 12 that “The above acts of  
28 judicial misconduct or the error in excluding evidence would constitute an error” but she  
fails to identify any evidence that was improperly excluded.

1 Finally, even ignoring Cummins' failure to provide this Court with *any* record on  
2 appeal, Cummins' Opening Brief does not cite to any evidence in the record at all or  
3 explain how any of the Findings of Fact or Conclusions of Law are erroneous.  
4 Fed.R.Bankr.P. 8014(a)(6); *In re Morrissey*, 349 F.3d 1187 (9<sup>th</sup> Cir. 2003). Moreover, as to  
5 her appeal of the Bankruptcy Court's denial of her motion for summary judgement based on  
6 "unclean hands," the Bankruptcy Court's finding is reviewed for abuse of discretion. *Seller*  
7 *Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9<sup>th</sup>  
8 Cir. 2010) and Cummins has not cited to a single piece of evidence contained in the record  
9 to show that the Bankruptcy Court abused its discretion. "[J]udges are not like pigs, hunting  
10 for truffles buried in briefs." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1066 (9<sup>th</sup> Cir.  
11 2009).

12 Cummins' "Argument" section of the brief – filed on August 10, 2020, has no  
13 argument whatsoever – merely an identification of the sections that she believes are  
14 appropriate, unsupported by either argument, case law or citation to the record. Cummins  
15 attempts to make up for her deficiencies in her Opening Brief by stating that she will file a  
16 more complete Opening Brief or Reply Brief. However, Cummins misses the entire point.  
17 Matters not fully briefed in the Opening Brief are waived. Moreover, it has been almost a  
18 month and Cummins has failed to even make an effort to correct her completely deficient  
19 Opening Brief, nor has she made any effort to provide this Court with any sort of record  
20 from which to determine her appeal. Accordingly, in accordance with this Court's July 13,  
21 2020 admonition to Cummins, the Opening Brief should be stricken and the Bankruptcy  
22 Court's judgment summarily affirmed.

## 23 II.

### 24 **THE UNDERLYING CASE DEMONSTRATES THE ABJECT LACK OF MERIT** 25 **OF THIS APPEAL**

26 If this Court does not dismiss, this Court is "entitled to presume that the appellant  
27 does not regard the court's findings of fact and conclusions of law as helpful to his appeal."  
28 *In re McCarthy*, 230 B.R. 414, 417 (B.A.P. 9<sup>th</sup> Cir. 1999) citing *In re Gionis*, 170 B.R. 675,

1 680-81 (9<sup>th</sup> Cir. BAP 1994), *aff'd mem.*, 92 F.3d 1192 (9<sup>th</sup> Cir. 1996). “Here, we will  
2 exercise our discretion to examine what record we have been provided. In doing so, we  
3 look for any plausible basis upon which the bankruptcy court might have exercised its  
4 discretion to do what it did. If we find any such basis, then we must affirm.” *McCarthy*, 203  
5 B.R. at 417.

6 Appellee has a defamation judgment against Cummins, that with interest is now in  
7 excess of \$10 million. After Cummins was required to produce numerous documents in the  
8 state court by the judgment creditor, Cummins filed her Chapter 7 petition. Her stated  
9 reason for doing so was to avoid the state court judgment for over \$6 million. See ECF 165  
10 (“This \$10,000,000 judgment is the only reason and judgment Defendant is trying to  
11 discharge.”). A discharge under 11 U.S.C. § 727 does not discharge an individual debtor  
12 from “any debt for willful and malicious injury by the debtor to another entity or to the  
13 property of another entity.” 11 U.S.C. § 523(a)(6). A defamation judgment is just such a  
14 debt. *In re Sicroff*, 401 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2005).

15 Although the facts of the underlying Texas judgment and Texas Court of Appeals  
16 decision affirming that judgment are fully set forth in the Bankruptcy Court’s Findings of  
17 Fact and Conclusions of Law Granting Summary Adjudication of Issues entered on May  
18 24, 2019 (ECF 82)(“SJ Order I”), attached to the Stillman Decl. as Exhibit 1 and in its  
19 Findings of Fact and Conclusions of Law Denying Cummins’ Motion for Summary  
20 Judgment and Entering Summary Judgment for Plaintiff, entered on February 10, 2020  
21 (ECF 118) (“SJ Order II”), attached to the Stillman Decl. as Exhibit 2, those findings will  
22 be briefly summarized here so that the Court gets a full picture of just how meritless this  
23 appeal is.

24 1. **The Texas Trial Court Held That Cummins’ Defamation of Lollar was**  
25 **“Egregious, Malicious As Well As Intentional.”**

26 First, after the bench trial, in making his oral ruling from the bench at the conclusion  
27 of the trial and before the written form of judgment had been prepared, the trial court ruled  
28 that “the plaintiff has clearly proven that a defamation in this case was egregious as well as

1 *malicious* as well as *intentional*.” SJ Order I, Finding of Fact No. 3. In addition, the trial  
2 court included a list of all of the defamatory statements that, as part of the Final Judgment,  
3 Cummins was ordered to take down. *Id.* No. 4.

4 2. **The Texas Court Of Appeal Found The Evidence “Left No Doubt” That**  
5 **Cummins Had A Specific Intent To Cause Substantial Injury.**

6 Second, after reviewing the trial record, the Texas Court of Appeals held that “The  
7 comments she made about Lollar leave no doubt that she had a specific intent to cause  
8 substantial injury or harm to Lollar.” *Cummins v. Bat World Sanctuary*, 2015 Tex. App.  
9 LEXIS 3472, at p.73 (Tex. App. Apr. 9, 2015); SJ Order I, No. 8. In reviewing the issue of  
10 whether sufficient evidence supported that finding, the Texas Court of Appeals stated  
11 “Clear and convincing evidence also supports a finding that Cummins published statements  
12 on the internet with actual malice.” *Cummins v. Bat World Sanctuary*, 2015 Tex. App.  
13 LEXIS 3472, at p. 73 (Tex. App. Apr. 9, 2015); SJ Order I, No. 9. The Texas Court of  
14 Appeals further stated:

15 Cummins posted a flood of statements about Lollar accusing her of all manner  
16 of serious wrongdoings, including crimes, and she published her statements to  
17 as wide of an audience as she could, including to numerous law enforcement  
18 agencies. The statements were designed to ruin Lollar’s professional and  
19 personal reputation locally and nationally. . . . Lollar showed by clear and  
20 convincing evidence that Cummins acted with malice as that term is used in  
21 chapter 41 and with the actual malice required under the First Amendment.  
22 The evidence supports a conclusion that Cummins engaged in a *persistent,*  
23 *calculated* attack on Lollar with *the intention to ruin both Lollar’s life’s work*  
24 *and her credibility and standing in the animal rehabilitation community.*

25 Cummins posted innumerable derogatory statements about Lollar impugning  
26 her honesty and her competency, and she repeatedly and relentlessly reported  
27 Lollar to multiple government agencies. The comments she made about Lollar  
28 leave no doubt that she had a specific intent to cause substantial injury or harm

1 to Lollar.

2  
3 *Cummins v. Bat World Sanctuary*, 2015 Tex. App. LEXIS 3472 (Tex. App. Apr. 9, 2015),  
4 p. 71. A “persistent, calculated attack on Lollar with the intention to ruin both Lollar's life's  
5 work and her credibility and standing in the animal rehabilitation community” made with  
6 actual malice can *only* be consistent with “the actual intent to cause injury” sufficient to  
7 establish the “willfulness” prong of § 523(a)(6).

8 **3. Exemplary Damages In A Defamation Case Establishes “Actual Malice.”**

9 Third, the trial court awarded \$3 million in “exemplary damages.” SJ Order I, No. 14.  
10 As the Court of Appeals held, “We hold that the record supports a finding of malice—both  
11 of the malice required for an award of exemplary damages under Texas law and of actual  
12 malice as required for an award of exemplary damages in defamation actions.” *Cummins v.*  
13 *Bat World Sanctuary*, 2015 Tex. App. LEXIS 3472, at p. 75 (Tex. App. Apr. 9, 2015); SJ  
14 Order I, No. 15. “Malice” in this context means “a specific *intent* by the defendant to cause  
15 substantial injury or harm to the claimant.” *Id.* at p. 70, citing Tex. Civ. Prac. & Rem. Code  
16 Ann. § 41.001(7)(defining malice).

17 Since the Final Judgment – affirmed on appeal – determined that Cummins made the  
18 defamatory statements with “actual malice,” Plaintiff has established that Cummins’  
19 defamation was intentional and establishes the “willfulness” prong of a § 523(a)(6)  
20 nondischargeability action. SJ Order II, pp. 24-25.

21 **4. Cummins Made Knowingly False Statements About Lollar.**

22 The Court of Appeals’ Opinion exhaustively recounts the intentional smear campaign  
23 by Cummins against Lollar, grouping Cummins’ defamatory *per se* statements into several  
24 categories. “Most of statements fall into one of three categories: allegations that Lollar  
25 committed animal cruelty, allegations that Lollar committed fraud, and allegations that  
26 Lollar violated a law, rule, standard, or regulation.” *Cummins v. Bat World Sanctuary*,  
27 2015 Tex. App. LEXIS 3472, at pp. 33-34 (Tex. App. Apr. 9, 2015); SJ Order I, No. 16. As  
28 to each of the statements, the Court determined that the evidence established that the

1 statements Cummins made and published on the internet were false. *Id.* at pp. 34-69. SJ  
2 Order I, No. 17.

3 As set forth above, after reviewing the evidence with specificity, the Court of  
4 Appeals concluded that “The evidence supports a conclusion that Cummins engaged in a  
5 persistent, calculated attack on Lollar with the intention to ruin both Lollar's life's work and  
6 her credibility and standing in the animal rehabilitation community.” *Cummins v. Bat*  
7 *World Sanctuary*, 2015 Tex. App. LEXIS 3472, at pp. 71-73 (Tex. App. Apr. 9, 2015); SJ  
8 Order I, No. 12.

9 The trial court also found that Cummins repeatedly lied at trial. SJ Order I, No. 18.  
10 “For example, with regard to Cummins's statements about Lollar's dogs, the evidence  
11 supported a finding that Cummins was not telling the truth.” *Id.* at 73-74; regarding a video  
12 she posted, Cummins “had no basis for asserting as fact what was at best speculation and at  
13 worst total fabrication. But she posted her version as fact, not speculation, and then she  
14 spread her version as far and wide as she possibly could,” *Id.* at p. 74; regarding Lollar’s  
15 allegedly illegal use of an anaesthetic, “the trial court's determination that Cummins was  
16 not credible was a reasonable one . . . Based on these credibility determinations, clear and  
17 convincing evidence supports the trial court's finding that Cummins made statements on  
18 these matters with actual malice.” *See* SJ Order I, Nos. 18-19.

19 “Not telling the truth,” “asserting as fact what is at best speculation and at worst a  
20 total fabrication,” and Cummins telling “as many people as she could that Lollar was  
21 illegally obtaining and administering Isoflurane and rabies vaccines and that she made  
22 these representations as facts,” when the trial court found her not credible, all demonstrates  
23 beyond any burden of proof that Cummins acted “willfully.” Her appeal is therefore  
24 frivolous and should be summarily affirmed without requiring Appellee to expend yet more  
25 attorney’s fees to prepare an Answering Brief.

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27  
28 **III.**



1 **PROOF OF SERVICE**

2 I, the undersigned, certify under penalty of perjury that on September 4, 2020 or as  
3 soon as possible thereafter, copies of the foregoing was served electronically by the Court's  
4 ECF notice to all persons/entities requesting special notice or otherwise entitled to the  
5 same.

6  
7 By: /s/ Philip H. Stillman

8 Attorneys for Appellee Kostantin Khionidi as Trustee  
9 of the Cobbs Trust.

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