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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
Hava Snak Food Service, Inc. ,  
Debtor.

Case No. 94-57565

Chapter 11

**SBE'S MOTION FOR EXTENSION OF  
APPEAL PERIOD**

**FACTS**

The Court issued and filed its Memorandum Decision and Order Thereon on Friday, April 19, 1996 and served it on counsel on Monday, April 22, 1996. The Court entered the Memorandum Decision and Order Thereon on the docket on April 24, 1996, starting the running of the 10-day appeal period under B.R. 8002(a). The appeal period expired on Monday, May 6, 1996.

Counsel for the SBE received a copy of the court's order on April 24, 1996 and forwarded it to the SBE, requesting direction. She contends that "due to the press of other business," she thereafter "neglected to contact SBE" until May 3, 1996, when SBE requested that she file an appeal on its behalf prior to the expiration of the appeal period on May 6, 1996. Counsel filed the motion for extension of the appeal period on May 9, 1996.

**FINAL APPEALABLE ORDER**

Counsel for the SBE questions whether the Court's Memorandum Decision and Order Thereon is a final, appealable order since the document fails to comply with B.R. 9021, which requires that every judgment entered in an adversary proceeding or contested matter be set forth on a separate document.

1 In In re Cahn, 188 B.R. 627 (BAP 9th Cir. 1995), a party seeking leave to file an untimely appeal argued  
2 that the bankruptcy court's order granting summary judgment in an adversary proceeding was not a final,  
3 appealable order because it was not set forth in a separate document to be entered on the court's docket.

4 The BAP held that a disposition is a "final order" if it contains a "full adjudication of the issues  
5 at bar, and clearly evidences the judge's intention that it be the court's final act in the matter." Cahn, 188  
6 B.R. at 629. The purpose of the separate judgment requirement of FRCP 58 is to clarify when the time  
7 for appeal begins to run. Id. Where it is evident that the order that was entered contains language  
8 disposing of the pending matter, and counsel received a copy of the order, such an order is final and  
9 appealable. Id. at 630.

10 The Memorandum Decision and Order Thereon is sufficient as a final, appealable order that  
11 clearly disposes of the debtor's objection to the SBE's claim and states on its face that it constitutes the  
12 Court's order in the contested matter.

#### 13 14 **EXCUSABLE NEGLIGENCE**

15 The Court turns now to the issue whether the facts and circumstances of this case support a  
16 finding of excusable neglect sufficient for this court to extend the appeal period under B.R. 8002(c).

17 The United States Supreme Court has given court's recent guidance in making a determination  
18 of excusable neglect in Pioneer Investments Services v. Brunswick Assoc., 113 S. Ct. 1489 (1993). The  
19 Supreme Court set forth the factors a court should consider to determine whether there has been  
20 excusable neglect:

- 21 1) danger of prejudice to the debtor;
- 22 2) Length of delay and potential impact on judicial proceedings;
- 23 3) Reason for delay, including whether it was within reasonable control of movant; and
- 24 4) whether the movant acted in good faith.

25 These factors as applied to this case do not support a finding of excusable neglect. Determination  
26 of this claim has a significant impact on the progress of this case. Of particular significance to the court  
27 is that a delay in adjudication of the SBE's claim will continue to preclude the debtor from proposing and  
28 confirming a chapter 11 plan, which delay will prejudice the debtor as well as all other creditors of the

1 estate. The SBE cited as the reason for its delay in filing a notice of appeal "the press of other business."  
2 However, the Court notes that the SBE instructed its counsel to file a notice of appeal prior to the  
3 expiration of the 10-day appeal period. In Pioneer Investment, the Supreme Court, in addressing the  
4 issue of culpability of counsel, gave little weight to the fact that counsel in that case was experiencing an  
5 upheaval in his law practice at the time of the claims bar date. Counsel cited a "major and significant  
6 disruption in his professional life caused by his withdrawal from his former law firm." Instead, the Court  
7 focused on the inadequacy of the notice itself in making its finding of the absence of counsel's culpability.  
8 Notwithstanding the unsupported assertions of debtor's counsel, the Court does not find any indication  
9 of bad faith on the part of the SBE. Moreover, the SBE is not likely to be prejudiced because, in view  
10 of the Ninth Circuit's recent ruling in MacFarlane, 96 CDOS 3363 (9th Cir. 5/13/96), the SBE is unlikely  
11 to prevail on appeal.

12 Based on these reasons, the SBE's motion must be denied.  
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