

10	In re]	Case No. 97-56350-ASW
]	
11	Ron McNiel, Sr.]	Chapter 7
]	
12	Debtor.]	
]	

Before the Court is an objection by three creditors in this Chapter 7¹ case to a claim filed by another creditor in the case. The objection ("Objection") is by Maria Teresa DeSaracho; Eureka Canners Group, S.A.; and Eureka Mexicana, S.A. (collectively, "Objectors"). The claim ("Claim") was filed by Behram DeSai ("DeSai"), as trustee of several trusts. Susan L. Uecker is the trustee of the Chapter 7 case ("Chapter 7 Trustee"), and has joined in the Objection. This Memorandum Decision resolves the motion for summary judgment filed by Objectors seeking to subordinate the Claim because it was filed after the claims bar date.

27

MEMORANDUM DECISION ON
MOTION FOR SUMMARY JUDGMENT

1 of Samuel E. Goldstein & Associates. The Chapter 7 Trustee is
2 represented by Randy Michelson, Esq. of Bingham McCutchen LLP. The
3 matter was briefed and argued, and the Court stated its findings of
4 fact and conclusions of law on the record. Post-hearing, the Court
5 requested additional briefing from the parties. This Memorandum
6 Decision supersedes the findings and conclusions stated on the
7 record by this Court at the hearing and shall constitute the
8 Court's findings of fact and conclusions of law, pursuant to Rule
9 7052 of the Federal Rules of Bankruptcy Procedure.

10
11 I.

12 FACTS

13 The relevant facts are undisputed.

14 On July 30, 1997, Ron McNiel, Sr. ("Debtor") commenced this
15 bankruptcy case by filing a petition under Chapter 11. On
16 August 4, 1997, the Court issued a notice announcing that
17 December 16, 1997 was the last day for filing claims in the
18 Chapter 11 case.

19 On October 27, 2000, the bankruptcy case was converted to
20 Chapter 7. The Chapter 7 Trustee was appointed on November 9,
21 2000. On February 2, 2001, the Chapter 7 Trustee issued a notice
22 announcing that March 7, 2001 was the last day for filing claims in
23 the Chapter 7 case ("Claims Notice"). The Claims Notice was served
24 by mail on Debtor, and on DeSai at his correct address. The Claims
25 Notice also was served on counsel representing Ron McNiel, Jr.
26 ("Ron") in an adversary proceeding pending during the Chapter 7
27 claim filing period.

1 Pre-petition, Debtor created three trusts for the benefit of
2 Aln J. McNiel ("Aln"): the Aln J. McNiel Education Trust-1982
3 ("1982 Trust"), created by the Debtor on February 16, 1982; the
4 Aln J. McNiel Trust-1988 ("1988 Trust"), created by Diane Barbara
5 McNiel ("Diane") on November 30, 1988; and the Aln J. McNiel Trust-
6 1989 ("1989 Trust"), created by the Debtor and Diane on
7 December 22, 1989. On June 1, 2000, Dale Dawson resigned as
8 trustee of the three trusts and Ron subsequently became trustee of
9 the trusts. Ron resigned his trusteeships on October 23, 2000.
10 Debtor appointed himself trustee of the 1982 Trust on October 23,
11 2000. On October 30, 2000, Aln petitioned the Superior Court of
12 California, County of Santa Cruz ("State Court"), inter alia, to
13 appoint DeSai as trustee of the three trusts.

14 On March 1, 2001, the State Court conducted a hearing on Aln's
15 petition. On or about that date, a minute order ("Minute Order")
16 was issued in the State Court case,² reciting that Aln and DeSai
17 were among those who appeared at the hearing, and stating as
18 follows:

19 The Parties address [sic] the issue(s) now before the
20 Court.

21 The Court grants the Petition to Remove Trustees, Appoint
22 Successor Trustee, Impose Equitable Lien on Trust Property.

23 The Court appoints Mr. DeSai as temporary trustee.

24 Mr. DeSai is directed to prepare the order pursuant to
25 California Rule of Court 391.

26 ² It is the Court's understanding that (1) the State Court records the oral rulings of the court
27 in minute orders created by the courtroom clerk and placed in the file; and (2) the State Court does
28 not create permanent minutes of its proceedings. The courtroom clerk is advised to place a minute
order in the file as soon after the hearing as feasible. See Declaration of Samuel E. Goldstein in
Response to Court Order re Motion for Summary Judgment filed on May 6, 2005, ¶¶ 6-8, and
uncontested on these points.

1 On March 15, 2001, the Minute Order was amended to delete the
2 second paragraph. DeSai acknowledges being present at the hearing
3 on March 1, and hearing the State Court's ruling as reflected in
4 the Minute Order.

5 Following the March 1, 2001 hearing and before a written order
6 was signed, DeSai wrote and sent several letters asserting his role
7 as trustee of the 1982 Trust, 1988 Trust and 1989 Trust and seeking
8 to take possession of all the records and assets of the trusts and
9 to have certain accountings performed for those trusts.

10 On April 11, 2001, the State Court issued a written order
11 ("Written Appointment Order") appointing DeSai as "sole temporary
12 trustee" of the 1982 Trust, 1988 Trust, and 1989 Trust.

13 On April 20, 2001, DeSai filed the Claim in the Bankruptcy
14 Court, identifying the claimant as himself in the role of "Trustee
15 for: Aln J. McNiel Education Trust - 1982 / Aln J. McNiel Trusts:
16 1988 & 1989" and annotating the claim form to state "THIS IS A
17 COURT APPOINTED TRUSTEE CLAIM*****". The basis for the Claim is
18 stated as "IRREVOCABLE TRUSTS HAVE ASSETS IN PARTNERSHIPS FOR
19 BENEFICIARY Aln J. McNiel / (SEE EXHIBIT - 1) /For Partnerships
20 (registered & recorded) SEE EXHIBITS 2, 3 & 4. / PROBATE LITIGATION
21 IN PROGRESS AT: SUPERIOR COURT, COUNTY OF SANTA CRUZ". The amount
22 claimed is stated to be "\$5 MILLION". The Claim is described as
23 being secured by real property and rental income; the description
24 also refers to an "EXHIBIT 1", which is a copy of the Written
25 Appointment Order. The value of the secured claimant's collateral
26 is shown as "\$15.5 MILLION + Contingent non-liquidated debt. Trust
27 income to beneficiary Aln J. McNiel".
28

1 The Objectors first filed an objection to the Claim in 2002,
2 asserting that the Claim had been filed late and should therefore
3 be allowed only as provided by §726(a)(3), which subordinates late
4 claims to timely claims and those filed late by claimants who
5 lacked either notice or actual knowledge of the bankruptcy case in
6 time to meet the bar date. The Objectors received summary
7 judgment, which was appealed by DeSai. On June 13, 2003, the
8 United States District Court for the Northern District of
9 California issued an order ("District Court Order") reversing this
10 Court's decision, and remanding the matter "for further findings
11 consistent with this order". The District Court Order states the
12 following findings and conclusions:

13 Based on its review of the entire record in this case,
14 as well as on the briefs filed in this appeal, the Court
15 concludes that there are genuine issues of material fact as
16 to whether DeSai was Trustee of any of the Aln McNiel
17 Trusts during the claim filing period of December 7, 2000
18 to March 7, 2001. The Court finds that it cannot conclude
19 from the record that Appellees satisfied their burden to
20 show that DeSai was the legally appointed Trustee during
21 the claim filing time since the record is devoid of any
22 trust documents for either the 1982 or 1989 Aln McNiel
23 Trusts.³ Rather, the record contains only the Aln McNiel
24 1988 Trust. The 1988 Trust documents clearly state that,
upon resignation of the Trustee, certain named individuals
may succeed as Trustee. Neither Ron McNiel, Sr. nor
Michael Leath are listed as permissible successor trustees
under the 1988 Trust. Although Ron McNiel, Jr. is listed
as a permissible successor trustee, the record relied upon
by Appellees to support their argument indicates that Ron
McNiel, Jr. resigned as Trustee on October 23, 2000. This
resignation was prior to the new claims period. Further,
the record does not show that Ron McNiel, Jr. was served
with notice of the new claims period, even assuming he had
not resigned as Trustee of the 1988 Trust.

25 In addition, the Court agrees with DeSai that it
26 cannot rely on the letter allegedly filed by DeSai in June
27 of 2000 for several reasons. First, the letter is not
properly authenticated. However, even assuming for

28 ³ A copy of the trust document for the 1982 Trust is included in the moving papers for this
summary judgment motion. DeSai has withdrawn his claim based on the 1989 Trust.

1 purposes of this motion that DeSai was the author of the
2 letter, the 1988 Trust documents do not permit DeSai to
3 succeed as successor trustee without court approval.
4 Therefore, even if DeSai purported to act on behalf of the
5 1988 Trust, the only trust for which the Court has
6 documentation, such representation was invalid without
7 court approval.

8 In addition, the record is devoid of any proof that
9 DeSai made court appearances on behalf of the Trusts.
10 Again, however, assuming the truth of this argument for
11 purposes of this motion, DeSai was without legal and proper
12 authority to make such court appearances without court
13 approval and appointment as the legal trustee.

14 Appellees next argue that, even assuming that DeSai
15 was not the proper trustee for the Aln McNiel Trusts, his
16 predecessor trustees had notice of the claims filing period
17 and failed to file timely claims. A review of the trust
18 documents in the record before the Court reveals, however,
19 that Dale Dawson resigned as trustee for the 1988 Trust on
20 June 1, 2000. The Debtor did not convert the bankruptcy
21 from a Chapter 11 to a Chapter 7 bankruptcy until
22 October 27, 2000, after the date that Dale Dawson resigned.

23 As noted above, DeSai, even if he misrepresented
24 himself as the trustee of the Aln McNeil Trusts after
25 October 27, 2000, was not the properly appointed trustee
26 and could not, therefore, have legally filed a claim on
27 behalf of the trusts. Dale Dawson has resigned as trustee
28 and could not, therefore, file a legal claim on behalf of
the trusts. Based on the 1988 Trust documents, neither Ron
McNiel, Sr. nor Michael Leath could serve as successor
trustees. Finally, although Ron McNiel, Jr. could have
served as a successor trustee, the record indicates that
Ron McNiel, Jr. resigned as Trustee on October 23, 2000.
This resignation was prior to the new claims period.
Further, the record does not show that Ron McNiel, Jr. was
served with notice of the new claims period, even assuming
he had not resigned as Trustee of the 1988 Trust. For all
of these reasons, the Court grants DeSai's appeal.

On March 24, 2004, Objectors deposed DeSai. In his deposition,
DeSai authenticated the letter he sent to the bankruptcy court in
June 2000. DeSai also acknowledged that he had actual knowledge of
Debtor's bankruptcy case before the claims bar date. DeSai also
acknowledged that on March 19, 2001, he wrote letters to his
predecessor trustee (the Debtor) and to Aln's step-mother's lawyer
where DeSai states that "as of March 1, 2001 I am the sole court

1 appointed successor trustee" for the 1982 Trust, 1988 Trust and
2 1989 Trust.⁴

3 On May 11, 2004, DeSai purported to amend the Claim by filing a
4 new claim identifying the claimant as himself "as Trustee of the
5 1982 and 1988 Lynedt McNiel Trusts and the 1982 and 1988 Mickey
6 McNiel Trusts -- See Attached" and checking the box for "amends"
7 and annotating the claim form to state "See Attached."⁵ The basis

8
9 ⁴ In his deposition, Desai testified:

10 Q. Right. I am going to hand you Exhibit 22.

A. Okay.

(Whereupon, Exhibit 22 [March 19, 2001 letter from DeSai to Debtor]
was marked for identification.)

12 MR. KEEGAN: Q. Exhibit 22, I think this might have been the letter you were fishing for.

A. I am sorry?

13 Q. I think this might have been the letter you were fishing for for Ron McNiel?

A. Oh, that's right. That's the one. Credibility guaranteed here, isn't it?

14 Q. How so?

A. That's the one, sir.

15 Q. Okay. So as of March 19th -- well, as of March 19th putting this together with your
16 former testimony, is it correct then that as of March 19th, 2001 you were still under the impression
17 that you could operate as a sole trustee based upon the oral order that you heard in Court on March
18 1st?

A. That is a correct statement.

18 Q. So then we can deduce that sometime after March 19th, 2001 is when Union Bank
rebuffed your request because you did not have a formal order yet?

A. That's true.

19 Q. And I'll hand you Exhibit 23.

(Whereupon, Exhibit 23 [March 19, 2001 letter from DeSai to Michael
20 Gurev, Aln's step-mother's lawyer] was marked for identification.)

21 MR. KEEGAN: Q. Exhibit 23 is a letter to Michael Gurev Dated [sic] also the same date,
22 March 19th, 2001, where you say the same thing that you did to Mr. McNiel; namely, that on March
1st, 2001 -- I am looking at the third paragraph, "I became the sole appointed temporary trustee for
the referenced Aln McNiel Trusts," right?

A. Right, right.

23 Q. And on the top of the next page you say on the second line, "I am quite right -- I am quite
24 in my right as a court appointed sole trustee to make sure to protect the trust property, to see it
remains productive," right?

A. Thank you, Counsel. That is a correct statement.

25
26 DeSai Deposition at 116:20-118:11 (Exhibit B to the Keegan Declaration in Support of
Motion for Summary Judgment or Partial Summary Judgment on Claim Re-Classification)

27 ⁵ The Objection objects only to the Claim and does not object to the Amended Claim. At the
28 hearing, DeSai asked how the Court's ruling applied to the Lynedt McNiel Trusts and the Mickey
McNiel Trusts. The Lynedt McNiel Trusts and Mickey McNiel Trusts were not part of Objectors'
motion for summary judgment and the Court makes no express ruling regarding those trusts.

1 for the claim is stated as "claimant incorporates his claim of
2 4/20/2001." The date the claimed debt was incurred states "prior
3 to the date of conversion to Chapter 7 on October 27, 2000." The
4 amount claimed is stated to be "SAME AS PRIOR CLAIM - \$5 MILLION -
5 See Attached" and "THIS CLAIM IS NOT INTENDED TO ADD TO THE
6 ORIGINAL CLAIM OF \$5 MILLION FILED 4/20/2001 - See Attached." The
7 claim is marked as an "UNSECURED NONPRIORITY CLAIM" and "See
8 Attached" is entered. The attachment states:

9 The following explanation and information is provided
10 in connection with the Amended Proof Of Claim of Behram
DeSai, Trustee and is part of the Amended Proof of Claim.

11 DESAI'S APPOINTMENT AS TRUSTEE

12 Subsequent to the passage of the claims deadline of
13 March 7, 2001, Claimant, Behram DeSai became trustee of the
14 1982, 1988, and 1989 Aln McNiel Trusts by the Order of the
Santa Cruz County Probate Court entered on April 11, 2001,
15 in Case No. PR-41902. Claimant DeSai filed his Proof of
Claim on or about April 20, 2001, as trustee of the 1982,
1988, and 1989 Aln McNiel Trusts.

16 On December 5, 2001, in Case No. PR-42293, the Santa
17 Cruz County Probate Court entered its order appointing
Claimant DeSai as Trustee of the 1982, 1988, and 1989
18 Lynedt McNiel Trusts.

19 On January 15, 2002, the parties to Santa Cruz Probate
Court Case No. PR-42361 stipulated on the record to
20 Claimant DeSai's appointment as trustee of the 1982, 1988,
and 1989 Mickey McNiel Trusts. The court entered its order
21 to that effect on or about January 15, 2002.

22 Following entry of the three orders, Claimant DeSai
was the trustee of nine trusts: the 1982, 1988, and 1989
23 Aln McNiel Trusts; the 1982, 1988, and 1989 Lynedt McNiel
Trusts; and the 1982, 1988, and 1989 Mickey McNiel Trusts.

24 EFFECT OF THIS AMENDMENT OF PROOF OF CLAIM

25 This Amendment to Proof of Claim is intended to make
the following changes and modifications of Claimant Behram
26 DeSai's initial claim filed with this court on or about
April 20, 2001:

27 Withdrawal of Claim as Trustee of the 1989
28 Aln McNiel Trust - The claim of Claimant DeSai in
his capacity as trustee of the 1989 Aln McNiel

Trust is withdrawn. No other withdrawals of claims are intended by this Amendment to Proof of Claim.

Claim as Trustee of the 1982 and 1988 Lynedt McNiel Trusts - The claims of Behram DeSai in his capacity as trustee of the 1982, 1988, and 1989 Aln McNiel Trusts asserted in the Original Proof of Claim are reasserted by as [sic] claims of Behram DeSai in his capacity as trustee of the 1982 and the 1988 Lynedt McNiel Trusts.

Claim as Trustee of the 1982 and 1988 Mickey McNiel Trusts - The claims of Behram DeSai in his capacity as trustee of the 1982, 1988, and 1989 Aln McNiel Trusts asserted in the Original Proof of Claim are reasserted by as [sic] claims of Behram DeSai in his capacity as trustee of the 1982 and the 1988 Mickey McNiel Trusts.

Original Amount Of Claim Unchanged - The original claim amount of \$5 million shall not be changed by this Amended Proof of Claim.

On May 18, 2004, Objectors filed a motion for summary judgment seeking to re-classify the Claim as subordinate to the timely-filed claims of other unsecured creditors.

II.

ANALYSIS

A. LAW OF THE CASE DOCTRINE

DeSai asserts that the District Court's denial of the prior summary judgment motion is the law of the case. Denial of a prior motion for summary judgment establishes law of the case only when the court in the prior motion "clearly intended to decide the issues at hand." Fed. Ins. Co. v. Scarsella Bros., Inc., 931 F.2d 599, 601 n.4 (1991).⁶

⁶ At oral argument, DeSai cited cases asserting that the mandate rule, related to the law of the case doctrine, requires this Court to adhere to certain conclusions rendered by Judge Ware in the District Court Order. The Court finds it inappropriate to raise new issues for the first time at oral argument. Even if the Court were to consider DeSai's arguments, the Court finds that none of the cases cited by DeSai involve a situation where an appellate court reversed an order granting a

Here the District Court held that the record before it was insufficient to carry the Objectors' burden for summary judgment because it left material factual issues in dispute and remanded the matter to this Court. That appears to this Court to be all the District Court decided. The District Court did not decide the legal issues of whether an oral appointment of a trustee is sufficient to empower him to file a claim in a bankruptcy case for the trust and did not decide the factual issues of what notice and/or knowledge DeSai actually had regarding the bankruptcy case. Thus, the law of the case doctrine does not limit this Court's analysis on Objectors' current motion for summary judgment.

B. MOTION FOR SUMMARY JUDGMENT

Objectors move for summary judgment on three grounds. First, DeSai's appointment as trustee was effective as of the March 1, 2001 hearing in State Court -- and by that time he knew of the claims bar date. Alternatively, Debtor was appointed trustee of the 1982 Trust as of October 23, 2000, so if DeSai was not the

motion for summary judgment (because it found that factual issues precluded summary judgment on the record then before the trial court) and remanded the matter for further proceedings. U.S. v. Bell, 988 F.2d 247 (1st Cir. 1993), involved the remand of a criminal sentence where the defendant sought to readdress issues not raised in the original appeal. Magnesystems, Inc. v. Nikken, Inc., 933 F.Supp. 944 (C.D. Cal. 1996), involved applying determinations made in granting a prior motion for summary judgment to a motion for leave to file an amended answer and counterclaim. In re Fraschilla, 235 B.R. 449 (9th Cir. BAP 1999), involved a change of law between the remand from the bankruptcy appellate panel and trial in the bankruptcy court.

Those cases are distinguishable from the present situation where an appellate court has reversed a motion granting summary judgment based on finding "genuine issues of material fact as to whether DeSai was Trustee of any of the Aln McNiel Trusts during the claim filing period of December 7, 2000 to March 7, 2001." District Court Order at 5:24-6:2. The District Court found that the summary judgment order that was on appeal was erroneous because, on the record as it then existed, there were genuine issues of material fact precluding summary judgment. The record now has been augmented by depositions and document authentication, and is now different than it was when the prior order was appealed. This summary judgment decision is based on the new expanded record.

1 trustee, Debtor was between October 23, 2000 and April 9, 2001 and
2 had knowledge of the claims bar date. Alternatively, Ron did not
3 receive permission from Aln to resign his trusteeships over the
4 1982 Trust and 1988 Trust, so his resignation was ineffective and
5 Ron had knowledge of the claims bar date.

6 1. Appointment of DeSai

7 It is undisputed that DeSai was appointed trustee of the
8 1982 Trust, 1988 Trust, and 1989 Trust at a State Court hearing on
9 March 1, 2001, that he was present in court, and knew of the
10 appointment at that time. The parties dispute the legal effect of
11 the State Court orally appointing DeSai as temporary trustee of the
12 three trusts. Determining the legal effect of the State Court oral
13 ruling requires this Court to interpret California law and is not
14 an exercise of this Court's discretion.

15 Objectors contend that DeSai's appointment was effective upon
16 the oral ruling of the State Court, citing Cauhape v. Barnes, 135
17 Cal. 107 (1901) ("Cauhape"). DeSai contends that because the
18 Minute Order directed DeSai "to prepare the [written] order
19 pursuant to California Rule of Court 391," DeSai's appointment was
20 not effective until the written order was entered, citing Cuenllas
21 v. VRL Int'l, Ltd., 92 Cal.App.4th 1050 (2001) ("Cuenllas"), where
22 the court addressed the impact of a minute order on the timeliness
23 of an appeal under California Rule of Court 2 ("Rule 2").

24 In Cauhape, a trustee was appointed in 1884 under a will to
25 operate a butchering business. That trustee retired, another was
26 appointed, and, on April 13, 1887, the third trustee, defendant
27 Barnes, was appointed trustee according to the minutes of the
28 court. Barnes was present in court at the time he was appointed

1 and commenced acting as trustee at that time. The validity of
2 Barnes' appointment was not contested until October 1895. The
3 California Supreme Court held that Barnes had authority to act at
4 the date of a minute order even without a signed written order:

5 There was therefore no legal impediment against Barnes
6 entering upon the duties as trustee at the date of the
7 minute order, which, as a matter of fact, he did, and from
8 that time he performed the duties as trustee; and his acts
9 as such were not even questioned by any one until a short
10 time before the trial of this cause in the court below.

11 Cauhape, at 110.

12 Rule 2 and California Rule of Court 391 ("Rule 391"), as
13 argued by DeSai, are inapplicable and do not contradict Cauhape.
14 Rule 2 addresses when an order is effective for the purposes of
15 determining the period in which to file an appeal.⁷ Rule 391

16 ⁷ Rule 2, as of March 1, 2001, provided in relevant part:

17 (a) Except as otherwise provided by Code of Civil Procedure section 870 or other
18 statute or rule 3, a notice of appeal from a judgment shall be filed on or before the
19 earliest of the following dates:

20 (1) 60 days after the date of mailing by the clerk of the court of a
21 document entitled "notice of entry" of judgment;

22 (2) 60 days after the date of service of a document entitled "notice of
23 entry" of judgment by any party upon the party filing the notice of
24 appeal, or by the party filing the notice of appeal; or

25 (3) 180 days after entry of judgment.

26 For the purposes of this subdivision, a file-stamped copy of the judgment may be
27 used in place of the document entitled "notice of entry".

28 (b) For purposes of this rule:

(1) The date of entry of a judgment shall be the date of its entry in the
judgment book or, in a county following the procedure specified in
Code of Civil Procedure section 668.5 in lieu of maintaining a
judgment book, the date of filing the judgment with the clerk pursuant
to that section.

(2) The date of entry of an appealable order which is entered in the
minutes shall be the date of its entry in the permanent minutes, unless
the minute order entered expressly directs that a written order be

1 addresses the procedure for preparing and serving proposed written
2 orders.⁸ DeSai asserts that the Minute Order that expressly
3 directed DeSai to prepare a written order pursuant to Rule 391
4 means that the Written Appointment Order is the only order
5 appointing Desai as trustee, citing Cuenllas:⁹

6 As recognized in Hughey v. City of Hayward (1994) 24
7 Cal.App.4th 206, 209 [30 Cal.Rptr.2d 687], the plain
8 language of rule 2(b) "requires us to conclude that even

9 prepared, signed, and filed, in which case the date of entry shall be the
10 date of filing of the signed order.

11 (3) The date of entry of an appealable order which is not entered in the
12 minutes shall be the date of filing of the order signed by the court.

13 (4) The date of entry of a decree of distribution in a probate
14 proceeding shall be the date of its entry at length in the judgment book
15 or other permanent record of the court.

16 The fact that a written order is to be prepared under the provisions of rule 391 or a
17 similar local rule does not constitute an express direction in the minute order that a
18 written order be "prepared, signed, and filed" within the meaning of (2) above.

19 ⁸ Rule 391 provides:

20 (a) Unless the parties waive notice or the court orders otherwise, the party prevailing
21 on any motion shall, within five days of the ruling, mail or deliver a proposed order
22 to the other party for approval as conforming to the court's order. Within five days
23 after the mailing or delivery, the other party shall notify the prevailing party as to
24 whether or not the proposed order is so approved. The opposing party shall state any
25 reasons for disapproval. Failure to notify the prevailing party within the time
26 required shall be deemed an approval. Code of Civil Procedure section 1013, relating
27 to service of papers by mail, does not apply to this rule.

28 (b) The prevailing party shall, upon expiration of the five-day period provided for
approval, promptly transmit the proposed order to the court together with a summary
of any responses of the other parties or a statement that no responses were received.

(c) If the prevailing party fails to prepare and submit a proposed order as required by
(a) and (b) above, any other party may do so.

(d) This rule shall not apply if the motion was unopposed and a proposed order was
submitted with the moving papers, unless otherwise ordered by the court.

⁹ DeSai also cites County of Nevada v. Superior Court, 183 Cal.App.3d 806 (1986)
("County of Nevada"), but that case does not deal with Rule 391 or Rule 2. In County of Nevada,
the court held that a complaint filed within 30 days of the entry of a written order granting relief
from the claim requirement, but more than 30 days after the minute order, was timely filed under
Cal. Govt. Code §946.6.

1 though preparation of a written order is now contemplated
2 in the ordinary course of events, the date of entry remains
3 the date the order is entered in the permanent minutes
4 unless the minute order expressly directs the preparation
5 of a written order.

6 Cuenllas, at 1052. The Court disagrees with DeSai's analysis.

7 In Cuenllas, the trial court took a motion to quash under
8 submission on October 13, 1999 and granted the motion pursuant to a
9 minute order sent to the parties on October 20, 1999. The minute
10 order did not require that a formal order be prepared and presented
11 to the court for signature. A proposed judgment of dismissal was
12 circulated on October 29, 1999. The parties disputed the form of
13 order and a formal order was signed and entered on November 23,
14 1999. A notice of appeal was filed on January 20, 2000. An
15 objection to the timeliness of the appeal was made, based on the
16 fact that the appeal was noticed more than 60 days after the entry
17 date of the minute order. The California Court of Appeal applied
18 Rule 2 and determined that, because the minute order was not titled
19 "notice of entry," the time period for appeal fell under Rule
20 2(a)(3) and the notice of appeal had to be filed within 180 days of
21 the minute order, which it was.

22 DeSai would have this Court determine that the Minute Order
23 directing DeSai to prepare a written order pursuant to Rule 391
24 precludes the State Court's oral ruling appointing DeSai as
25 temporary trustee on March 1, 2001 and the subsequent Minute Order
26 from taking immediate effect. However, the complete language of
27 Rule 2 does not support such an interpretation. The language of
28 Rule 2(b) specifically provides that a minute order that is entered
in the permanent minutes of the court is the appealable order
irrespective of a subsequent written order later filed pursuant to

1 Rule 391. Rule 2 means that a state court minute order can be the
2 effective order of the court -- irrespective of a subsequent
3 written order -- and such an interpretation is consistent with
4 Cauhape. Moreover, there is no indication either Rule 2
5 (addressing deadlines for appealing an order) or Rule 391
6 (addressing procedures for preparing and submitting proposed
7 written orders to the court) were intended to displace the
8 authority and effect of oral rulings issued by the State Court and
9 this Court declines to rewrite state law in this fashion.

10 Thus, DeSai occupied the capacity of trustee of the 1982 Trust,
11 1988 Trust and 1989 Trust as of March 1, 2001, and he knew that he
12 did, and he had the power to act for them as of that date. DeSai
13 was authorized to assume the duties of the Trustee prior to entry
14 of the Written Appointment Order, and in fact did so. DeSai stated
15 in his deposition that he understood that he was sole temporary
16 trustee of all three trusts as of the March 1, 2001 hearing and
17 believed that it was in his power to safeguard the assets of the
18 trusts to the maximum limit based on the oral order. DeSai even
19 took actions consistent with this understanding including writing
20 letters to the predecessor trustee and to Aln's step-mother's
21 lawyer based on the March 1, 2001 Minute Order. Thus, the March 1,
22 2001 Minute Order was all the authority DeSai needed to file a
23 claim and there was no need to wait for a written order.¹⁰

24
25
26 ¹⁰ There is no requirement in California trust law that a trustee must first have a written
27 signed order before he can undertake any action to protect a trust's interest; nor is there any
28 requirement that a person claiming to be a trustee of a private trust have a formal signed order
evidencing such authority prior to filing a claim in a Chapter 7 case. Moreover, the filing of a claim
in a Chapter 7 bankruptcy case can be very informal. A letter written to the Chapter 7 trustee prior
to the claims bar date may well have sufficed. See In re Holm, 931 F.2d 620, 622 (9th Cir. 1991).

DeSai specifically acknowledges having actual knowledge of the bankruptcy case before his appointment. He said at his deposition that he may not have received the Chapter 7 Trustee Claims Notice regarding a claims bar date of March 7, 2001, set in the converted Chapter 7 case, but he also testified that the proof of service showed his correct address. Under In re Bucknum, 951 F.2d 204 (9th Cir. 1991), DeSai is presumed to have received the notice and has not attempted to rebut that presumption, so, at a minimum, he had constructive notice of the bankruptcy case.

Section 726(a)(2)(C) provides:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed -

. . . .

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is -

. . . .

(C) tardily filed under section 501(a) of this title, if --

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim.

DeSai had both actual knowledge and constructive notice of the bankruptcy case, and either one is sufficient to subordinate the late claim pursuant to §726(a)(2)(C). DeSai argues that the notice occurred before he became trustee, but cites no authority for the proposition that the knowledge he possessed when he was appointed trustee should not be imputed to him after his appointment.

1 The Claim was not filed until after the bar date, despite DeSai
2 having had both actual knowledge of the bankruptcy case and notice
3 of the bar date in time to file a timely claim. The Claim must be
4 subordinated to claims that were filed timely and to claims that
5 were filed late by those who lacked either notice or actual
6 knowledge in time to meet the bar date because there are no
7 exceptions and equitable considerations do not apply under Ninth
8 Circuit authority. In re Edelman, 237 B.R. 146, 152-53 (9th Cir.
9 BAP 1999); In re Coastal Alaska Lines, Inc, 920 F.2d 1428, 1432-33
10 (9th Cir. 1990).

11 Accordingly, this is not a matter for this Court's exercise of
12 its discretion. As a matter of binding law, the Objection must be
13 sustained and the Claim allowed only to the extent provided by
14 §726(a)(3),¹¹ as a late claim filed by a creditor with notice or
15 knowledge of the case in time to meet the bar date. Such claims
16 are subordinate to timely claims and to late claims that are filed
17 by creditors without notice or knowledge of the case in time to
18 meet the bar date.

19 2. Self-designation of Debtor as Trustee of 1982 Trust

20 Objectors argue that even if DeSai was not appointed as trustee
21 effective March 1, 2001, Debtor became trustee of the 1982 Trust
22 when Ron resigned on October 23, 2000 and was trustee when the
23 proof of claim needed to be filed. The record reflects that Debtor
24 was listed on the proof of service of the Claims Notice and knew of
25 the claims bar date in sufficient time to file a proof of claim.
26

27
28 ¹¹ Section 726(a)(3) provides: "third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title other than a claim of the kind specified in paragraph (2)(C) of this subsection."

DeSai asserts that Debtor was legally precluded from acting as trustee of any trust under California Probate Code §15643(f) because Debtor was a debtor in a bankruptcy case at the time he was allegedly appointed trustee.¹² Objectors assert that because Debtor did not file his bankruptcy petition while he was trustee, California Probate Code §15643(f) does not apply.

The Court agrees with DeSai that a fair reading of the California Probate Code §15643(f) would preclude a debtor in a pending bankruptcy case from assuming a trusteeship. While on its face the statute states that a trustee vacates his trusteeship only upon the filing of a bankruptcy petition, the Court finds that it would be inconsistent with the legislative intent to allow a debtor in an active bankruptcy case to become a trustee when that person would have to resign from the trusteeship if he filed a bankruptcy

¹² California Probate Code §15643 provides:

There is a vacancy in the office of trustee in any of the following circumstances:

- (a) The person named as trustee rejects the trust.
- (b) The person named as trustee cannot be identified or does not exist.
- (c) The trustee resigns or is removed.
- (d) The trustee dies.
- (e) A conservator or guardian of the person or estate of an individual trustee is appointed.
- (f) The trustee files a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or a petition filed against the trustee for any of these purposes is approved.
- (g) A trust company's charter is revoked or powers are suspended, if the revocation or suspension is to be in effect for a period of 30 days or more.
- (h) A receiver is appointed for a trust company if the appointment is not vacated within a period of 30 days.

petition after becoming a trustee. Objectors argue that DeSai's interpretation would mean that any person who had ever filed a bankruptcy petition could never again be appointed a trustee. However, the Court does not construe the statutory language to be a permanent bar. If an individual is a debtor in a pending bankruptcy case, permitting that individual to accept a trusteeship would violate the intent of California Probate Code §15643(f). Thus, the Court accepts DeSai's argument that Debtor could not have replaced Ron as trustee of the 1982 Trust when Ron resigned.

3. Resignation of Ron as Trustee of 1988 Trust

Objectors assert that Ron's signing a piece of paper saying that Ron was resigning as trustee did not effectuate Ron's resignation. California Probate Code §15640¹³ provides that when a trust agreement fails to set forth a method for resignation, the

¹³ California Probate Code §15640 provides:

A trustee who has accepted the trust may resign only by one of the following methods:

- (a) As provided in the trust instrument.
- (b) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.
- (c) In the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the consent is sought. If a beneficiary has a conservator, the conservator may consent to the trustee's resignation on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to consent to the trustee's resignation, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to consent to the trustee's resignation, the attorney in fact may consent to the resignation.
- (d) Pursuant to a court order obtained on petition by the trustee under Section 17200. The court shall accept the trustee's resignation and may make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee.

1 trustee of an irrevocable trust can only resign with the consent of
2 all beneficiaries or by petitioning the court for permission to
3 resign. DeSai submitted copies of Ron's resignation letter for the
4 1982 Trust and 1989 Trust after the hearing. Neither party
5 submitted a copy of Ron's resignation letter for the 1988 Trust.

6 Objectors argue that because the 1982 Trust and 1988 Trust¹⁴
7 provide only that the trustee can resign and do not set forth a
8 manner in which that resignation must occur, the trust documents do
9 not provide a method for the resignation of a trustee and Ron's
10 attempt to resign did not comply with the statute.¹⁵ DeSai argues
11 that the language in the 1982 Trust and 1988 Trust provide that the
12 trustee could resign and that is sufficient to permit Ron to resign
13 pursuant to his letters.

14 Assuming arguendo that DeSai was not appointed until the filing
15 of the Written Appointment Order, this Court finds that Ron was the

17 ¹⁴ DeSai is asserting the Claim only on behalf of the 1982 Trust and 1988 Trust -- he has
18 withdrawn his Claim against Debtor's estate on behalf of the 1989 Trust, so the Court will not
address that trust.

19 ¹⁵ Section 7.01 of the 1982 Trust provides:

20 The Trustee shall have the right to resign at any time and on such
21 resignation or in the event of the Trustee's death or other inability to
22 serve as Trustee, the Trustor shall appoint a successor Trustee. In the
23 event of the failure, refusal, or inability of the Trustor to appoint a
successor Trustee, the Trustee or any beneficiary of the Trust may
secure, at the expense of the Trust, the appointment of a successor
Trustee by a court of competent jurisdiction.

24 Section 7.01 of the 1988 Trust provides:

25 The Trustee shall have the right to resign at any time. In the event
26 the Trustee is unable to act or ceases to act, then RONALD McNIEL
27 JR., MICKEY McNIEL, LYNEDT McNIEL, MICHAEL JOHN
CROMAN, BENJAMIN JAMES CROMAN, or such as are willing
28 and able, shall act as successor trustees. In the event none of the
above qualify or is willing to act, the Superior Court of the State of
California shall appoint a successor trustee.

1 trustee of the 1982 Trust and 1988 Trust during the time that a
2 proof of claim in Debtor's Chapter 7 case needed to be filed on
3 behalf of the 1982 Trust and 1988 Trust. Section 7.01 of both
4 trusts provides that the trustee can resign, but does not set forth
5 any manner in which that resignation is to take place. Since the
6 1982 Trust document and 1988 Trust document are silent as to how a
7 trustee can resign, the Court finds that Ron could not resign
8 unilaterally pursuant to California Probate Code §15640(a) and,
9 thus, his purported resignation on October 23, 2000 was
10 ineffective.

11 The parties do not dispute that Ron received the Claims Notice
12 via service of that notice on his attorneys of record, and thus had
13 notice of the claims bar date. Accordingly, arguendo, if DeSai was
14 not appointed trustee of the 1982 Trust and 1989 Trust until
15 April 11, 2001 when the Written Appointment Order was filed, notice
16 of the Chapter 7 claims bar date was still properly given to the
17 1982 Trust and 1988 Trust via the notice mailed to Ron who remained
18 the trustee of those trusts. Under those circumstances, as
19 explained above, the Objection must be sustained and the Claim
20 allowed only to the extent provided by §726(a)(3), as a late claim
21 filed by a creditor with notice or knowledge of the case in time to
22 meet the bar date.

23
24 CONCLUSION

25 For the reasons set forth above, Objectors' motion for summary
26 judgment is granted. The Claim is allowed only to the extent
27 provided by §726(a)(3), as a late claim filed by a creditor with
28 notice or knowledge of the case in time to meet the bar date.

1 Counsel for Objectors shall submit a form of order in
2 accordance with this Memorandum Decision after review as to form by
3 counsel for DeSai.

4
5 Dated:

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8 ARTHUR S. WEISSBRODT
9 UNITED STATES BANKRUPTCY JUDGE
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UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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