

JUN 05 2014

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-13-1385-JuTaKu
	)	BAP No. EC-13-1387-JuTaKu
DANA C. ANDREWS,	)	BAP No. EC-13-1388-JuTaKu
	)	BAP No. EC-13-1389-JuTaKu
Debtor.	)	(consolidated)
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JOHN R. ROBERTS, Chapter 7	)	BAP No. EC-13-1403-JuTaKu
Trustee; Dana C. Andrews,	)	(cross-appeal)
	)	Bk. No. 07-21846
Appellants,	)	Adv. No. 07-2119
v.	)	
ANDREWS FAMILY REVOCABLE	)	
TRUST; FRANK P. ANDREWS, JR.,	)	M E M O R A N D U M*
as successor co-trustee of the	)	
Andrews Family Revocable	)	
Trust; ESTHER LOU ANDREWS, as	)	
successor co-trustee of the	)	
Andrews Family Revocable	)	
Trust; BRENT H. ANDREWS, as	)	
successor co-trustee of the	)	
Andrews Family Revocable	)	
Trust; F & L ANDREWS	)	
PROPERTIES, L.P.,	)	
	)	
Appellees.	)	

Argued and Submitted on May 15, 2014  
at Sacramento, California

Filed - June 5, 2014

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

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

1 Appearances: Walter R. Dahl, Esq., of Dahl & Dahl, argued for  
2 appellant Dana C. Andrews; Byron Lee Lynch, Esq.,  
3 argued for appellant John R. Roberts, Chapter 7  
Trustee; James Joseph Banks, Esq., of Banks &  
4 Watson, argued for appellees.

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5 Before: JURY, TAYLOR, and KURTZ, Bankruptcy Judges.

6 In these consolidated appeals – an appeal filed by  
7 chapter 7 trustee,<sup>1</sup> John R. Roberts, and a cross-appeal filed by  
8 debtor, Dana C. Andrews – trustee and debtor appeal from two  
9 separate judgments granting partial summary judgment in favor of  
10 The Andrews Family Revocable Trust (Trust), Frank P. Andrews,  
11 Jr., Esther Lou Andrews (Louise), Brent H. Andrews, as successor  
12 trustees of The Andrews Family Revocable Trust, and F&L Andrews  
13 Properties, L.P. (collectively, defendants).

14 In granting partial summary judgment, the bankruptcy court  
15 decided that the first through eighth claims for relief asserted  
16 by trustee in his fifth amended complaint (FAC) and by debtor in  
17 his second amended complaint in intervention (SACII) were  
18 seeking to address the same primary right and injury as debtor  
19 asserted in a prior state court lawsuit (Trust Contest) in which  
20 he was barred from contesting his rights as a beneficiary under  
21 the Trust due to a previously executed settlement agreement and  
22 mutual release between Louise and debtor. As a result, the  
23 bankruptcy court concluded that the requirements for application  
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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure and "Civil Rule" references are to the Federal Rules of  
Civil Procedure.

1 of the doctrine of claim preclusion<sup>2</sup> under California law were  
2 met. Therefore, trustee and debtor were barred from proceeding  
3 on their respective complaints as a matter of law. Trustee and  
4 debtor filed post-judgment motions which the bankruptcy court  
5 denied. Discerning no error, we AFFIRM the bankruptcy court's  
6 orders and judgments in total.

7 **I. FACTS**

8 **A. Prepetition Facts**

9 **1. The Trust Agreement And First Amendment**

10 On July 7, 1999, Louise and Franklyn P. Andrews, Sr.  
11 (Frank) established the Trust by executing a Declaration of  
12 Trust (Trust Agreement). Under its terms, debtor was an equal  
13 beneficiary with his three adult siblings.

14 Five years later Frank became terminally ill. Before his  
15 passing, Louise decided to amend the Trust Agreement. Frank's  
16 attorney, Gary Perry, advised Louise that she could not  
17 unilaterally amend the Trust as any amendments required Frank's  
18 signature. Given Frank's illness, Perry suggested that Louise  
19 could sign the amendment on behalf of Frank using his power of  
20 attorney (POA). Upon retrieving Frank's POA, Louise discovered  
21 that his signature page was missing. However, Louise allegedly  
22 thought that Perry had a copy.

23 On August 1, 2004, Louise executed an amendment to the  
24 Trust Agreement (First Amendment), reducing debtor's rights as a

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25  
26 <sup>2</sup> We use the term "claim preclusion" which has "supplanted  
27 the term 'res judicata' that was traditionally used in a  
28 now-obsolete, non-generic sense. . . ." The Alary Corp. v. Sims  
(In re Associated Vintage Grp., Inc.), 283 B.R. 549, 555 (9th  
Cir. BAP 2002) (discussing res judicata terminology).

1 beneficiary, and signed Frank's name as his attorney-in-fact.  
2 Louise modified the Trust Agreement to provide that upon the  
3 death of both spouses, a specific asset known as the Auto  
4 Wreckers property would be allocated to debtor, with the income  
5 from that property to be paid 50% to debtor and 50% to debtor's  
6 children. The property itself was to be distributed to debtor  
7 when the youngest of his children reached the age of 22. The  
8 amendment also stated that debtor was not to be considered as a  
9 child of Frank and Louise so that he would not have any rights  
10 as a potential beneficiary other than with respect to the Auto  
11 Wreckers property.

12 Frank died on August 25, 2004, after Louise signed the  
13 First Amendment.

## 14 **2. The Dealership Lawsuit and Settlement**

15 Late in 2004, debtor filed a lawsuit in the Placer County  
16 Superior Court (Dealership Lawsuit) against Louise, in her  
17 personal capacity and in her capacity as representative of the  
18 Estate of Franklyn P. Andrews Sr., and against Andrews  
19 Enterprises, Inc. (Corporation), d/b/a Andrews Lincoln-Mercury.  
20 In the complaint, debtor asserted that he was entitled to a 20%  
21 interest in the Andrews Lincoln-Mercury dealership that Louise  
22 owned. Debtor alleged causes of action for breach of fiduciary  
23 duty, rescission, unjust enrichment/constructive trust and  
24 declaratory relief based on the following alleged facts.

25 Debtor generally alleged that he worked as the sales  
26 manager for the dealership from 1983 to 1996. In 1996, debtor  
27 was promoted to the position of general manager, and Frank  
28 approached him about acting as the designated registered dealer

1 principal (RDP). The RDP is the individual responsible for  
2 making binding business decisions on behalf of the dealership.  
3 In the latter part of 1996, Frank and Louise, acting in their  
4 capacity as officers and directors of the Corporation, gifted  
5 shares of the Corporation to debtor in an amount equal to a 20%  
6 shareholder interest. In 1997, Ford changed its records to  
7 reflect that debtor was the RDP for the dealership.

8 Debtor further asserted that in the 1995 through 1997 time  
9 frame, Frank and Louise falsified the corporate books to show  
10 that the Corporation loaned \$265,000 to debtor. Debtor  
11 maintained there was no loan and that this amount was actually  
12 compensation that the Corporation had paid debtor for his  
13 services as general sales manager and general manager.  
14 According to the complaint, Frank and Louise desired to  
15 characterize this compensation as a loan on the Corporation's  
16 books to gain more favorable tax treatment for the Corporation.

17 The complaint also alleged that in 1997, a third party  
18 creditor obtained a judgment against debtor and sent notice to  
19 debtor and the Corporation that he was placing a lien on  
20 debtor's stock interest in the Corporation. Debtor asserted  
21 that a few months after the notice, Frank approached him and  
22 demanded that debtor execute a security agreement encumbering  
23 his stock in connection with the \$265,000 loan. Debtor  
24 objected, contending there was no loan. According to the  
25 allegations, Frank insisted that debtor encumber his stock so  
26 that the Corporation's lien would be superior to any claim by  
27 the third party creditor and allegedly threatened to disinherit  
28 debtor and eject him from property known as "The Ranch." Debtor

1 executed the security agreement and Frank allegedly backdated it  
2 to 1998 so it would predate the third party creditor's lien.

3 Finally, the complaint stated that in December 2002, Frank  
4 demanded that debtor surrender his shares in the Corporation, in  
5 accord with the invalid security agreement, and further  
6 threatened to disinherit debtor and eject him from "The Ranch"  
7 if debtor did not execute the document surrendering his shares.

8 In mid-August 2004, debtor made a shareholder's demand to  
9 inspect the corporate books and records, which Louise denied.  
10 Debtor then filed the lawsuit, seeking rescission of the  
11 surrender of his shares and asking the state court to impose a  
12 constructive trust over the shares and adjudicate the respective  
13 rights of the shareholders.

14 **a. The Restated Trust Agreement**

15 On January 3, 2005, while the lawsuit was pending and  
16 unbeknownst to debtor, Louise executed a Restated Trust  
17 Agreement (Restated Trust Agreement), which further modified the  
18 Trust Agreement. It confirmed the provision of the First  
19 Amendment that debtor was not to be considered a child of Frank  
20 and Louise and explicitly stated that Louise had intentionally  
21 omitted to provide for debtor or his issue, except as otherwise  
22 provided. The Restated Trust Agreement further provided that  
23 out of the income from the Auto Wreckers property, \$3,500 per  
24 month would be paid to debtor's children until the youngest  
25 reached the age of 22, at which point the Auto Wreckers property  
26 would be distributed to the living issue of Frank and Louise,  
27 rather than to debtor and his issue. In essence, the Restated  
28 Trust Agreement disinherited debtor from any beneficial interest

1 in the Trust.

2 **b. The Settlement Agreement**

3 In June 2005, debtor and Louise executed a Settlement  
4 Agreement and Mutual Release (Settlement Agreement) to resolve  
5 the Dealership Lawsuit. The Settlement Agreement contained a  
6 complete release of claims and matters raised in the Dealership  
7 Lawsuit complaint (the 2005 release). In exchange, debtor  
8 received \$139,000 and debt forgiveness of approximately  
9 \$500,000. The release provided:

10 Dana Andrews hereby releases and discharges ESTHER  
11 LOUIS ANDREWS, individually and as the Representative  
12 of the ESTATE OF FRANK ANDREWS, SR., and ANDREWS  
13 ENTERPRISES, INC., together with their agents,  
14 employees, attorneys and assigns, from any claim,  
15 demand, damages, debt, liability, account, obligation,  
16 cost, expense and any and all causes of action whether  
17 know or unknown, suspected or unsuspected, fixed,  
18 liquidated, or contingent, or otherwise arising from  
19 the Complaint or the matters raised therein, except as  
20 specifically set forth in this Settlement Agreement  
21 and Mutual Release.

22 Paragraph 14 stated:

23 The parties acknowledge that each may hereafter  
24 discover facts different from or in addition to those  
25 now known or believed to be true with respect to  
26 possible claims against each other. Each agrees that  
27 this Settlement Agreement and Mutual Release shall be  
28 and remain valid, final and in full force and effect  
in all respects, notwithstanding the existence or  
belief respecting any such different or additional  
facts. Specifically the parties waive any rights  
pursuant to [California] Civil Code Section 1452 which  
states:

A general release does not extend to claims  
which the creditor does not know or suspect  
to exist in his favor at the time of  
executing the release, which if known by him  
must have materially affected his settlement  
with the debtor.

27 On July 8, 2005, the state court approved the Settlement  
28 Agreement and the Dealership Lawsuit was dismissed with

1 prejudice.

2 **3. The Trust Contest**

3 In December 2005, in connection with the estate of Frank,  
4 debtor filed a petition in the Placer County Superior Court  
5 contesting the validity of the First Amendment and seeking an  
6 accounting (Trust Complaint). Debtor alleged that the First  
7 Amendment was not valid because it (1) was contrary to the terms  
8 of the Trust and the true wishes of his father; (2) was the  
9 result of undue influence; and (3) was procured by the fraud of  
10 others by misrepresenting facts and conduct of the parties.

11 Louise denied the allegations and filed a motion seeking an  
12 order for a separate trial on her special defense of claim  
13 preclusion pursuant to Cal. Civil Code § 597. Louise argued  
14 that debtor was precluded from contesting his rights as a  
15 beneficiary under the Trust because of the 2005 release  
16 contained in the Settlement Agreement, which was confirmed by  
17 the state court in the Dealership Lawsuit.

18 Her trial brief filed in support of the motion argued that  
19 debtor's entitlement to any inheritance was raised in the  
20 Dealership Lawsuit and that these issues were addressed and  
21 fully resolved by the Settlement Agreement. Louise asserted  
22 that the possibility of disinheritance was a fact raised in the  
23 Trust Complaint at ¶¶ 19, 20, 26, 27, 33, 34, 51 and 52.

24 Louise further maintained that debtor's counsel insisted that  
25 his inheritance was an integral part of the Dealership Lawsuit  
26 and that the estate documents were available to debtor and his  
27 counsel when the Dealership Lawsuit was filed, but they did  
28 nothing to obtain them. Last, Louise pointed out that debtor's



1 special interrogatories numbered 133-137 served in the  
2 Dealership Lawsuit sought information about Frank's estate.  
3 Louise argued that these interrogatories plainly sought  
4 information based on the allegation in the complaint that Frank  
5 threatened to disinherit debtor.

6 **a. Perry's Deposition**

7 Six months after the Trust Contest was filed, on  
8 July 12, 2006, debtor's attorney took the deposition of Perry.  
9 In response to questions pertaining to Frank's POA, Perry  
10 testified that his copy of Frank's POA was missing page 4, which  
11 was the signature page. Perry further testified that he  
12 witnessed Frank's signature on the document, that his notary  
13 witnessed it, but that somehow page 4 was lost. In response to  
14 questions about the recorded POA, which debtor had located after  
15 his father's death,<sup>3</sup> Perry explained that he needed Frank's POA  
16 to record transfers of real property requested by Louise.  
17 Therefore, he put together Frank's signature page from his  
18 durable health care power of attorney with the POA so as to  
19 create a recordable document. Perry opined that although there  
20 was not a copy of the signature page that Frank had signed, this  
21 fact did not revoke the POA. Instead, he was simply doing what  
22 he needed to do to comply with the recoding statutes to make the  
23 deeds recordable. Accordingly, Perry recorded the POA with the  
24 signature page of the durable health care power attached to  
25 Frank's POA in Placer County after Frank's death.

26  
27 \_\_\_\_\_  
28 <sup>3</sup> The recorded POA was attached as an exhibit to the Trust Contest.

1                   **b.     The State Court's Decision to Apply Claim**  
2                   **Preclusion**

3                   The Trust Contest was scheduled for trial on  
4 February 21, 2007. Prior to the trial, the state court  
5 considered Louise's special defense. The court found that the  
6 Dealership Lawsuit complaint overlapped with the claims asserted  
7 in the Trust Complaint because of allegations that included  
8 Frank's threats of disinheritance. The court concluded that the  
9 Settlement Agreement, which included the 2005 release, barred  
10 debtor's claims asserted in the Trust Contest. As a result, the  
11 court deemed a trial on the merits was unnecessary and entered  
12 judgment in favor of Louise and the Trust on June 4, 2007 (Trust  
13 Contest Judgment). Debtor appealed (Trust Contest Appeal).

14                  Debtor in the meantime had filed a chapter 11 petition on  
15 March 19, 2007.

16                  **B.     The Adversary Proceeding**

17                  On April 30, 2007,<sup>4</sup> debtor filed an adversary proceeding  
18 against defendants and Perry, which included claims based upon  
19 the allegedly forged POA and invalid First Amendment.  
20 Defendants filed a motion to dismiss, which was granted in part  
21 with leave to amend. The bankruptcy court ordered that if  
22 debtor filed an amended complaint, the matter would be stayed  
23 pending resolution of the Trust Contest Appeal. Debtor filed an  
24 amended complaint and the court entered an order staying the  
25 adversary proceeding.

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27                  <sup>4</sup> About a month after the adversary proceeding was filed,  
28 Louise died.

1 In October 2007, debtor's case was converted to a chapter 7  
2 and Roberts was appointed the chapter 7 trustee. Trustee became  
3 the plaintiff in the adversary proceeding and filed a third and  
4 then fourth amended complaint.

5 In October 2008, trustee intervened in the Trust Contest  
6 Appeal, in his capacity as the chapter 7 trustee and successor  
7 of debtor, and was substituted as the real party in interest.  
8 Thereafter, trustee filed a "Notice of Abandonment of Appeal" in  
9 the state appellate court for the purpose of obtaining a  
10 dismissal of the appeal. Debtor moved to have the trustee  
11 abandon the Trust Contest Appeal under § 554; the bankruptcy  
12 court denied this motion without prejudice. In December 2008,  
13 trustee agreed with defendants to dismiss the Trust Contest  
14 Appeal, and it was dismissed.

15 After the Trust Contest Appeal was dismissed, and the stay  
16 of the adversary proceeding was lifted, trustee filed the FAC  
17 alleging that debtor remained a beneficiary of the Trust because  
18 the POA used by Louise was a forgery and thus the First  
19 Amendment was invalid. The FAC contained ten claims for relief,  
20 eight of which are at issue in this appeal: (1) Declaratory  
21 Judgment to Determine the Respective Interests of the Plaintiff  
22 and the Debtor in and to the Trust Estate; (2) Turnover of  
23 Property Pursuant to § 543; (3) Recovery of Property Pursuant to  
24 the Plaintiff's Avoidance Powers under § 544; (4) Accounting for  
25 the Debtor's Alleged Beneficial Interest in the Trust;  
26 (5) Cancellation of the Durable Power of Attorney;  
27 (6) Cancellation of the First Amendment; (7) Avoidance of Post  
28 Petition Transfer of Estate Property Pursuant to § 549; and

1 (8) Breach of Fiduciary Duty by Louise as Trustee for the Trust.  
2 The ninth and tenth claims for relief were against Perry. In  
3 May 2012, the bankruptcy court approved a compromise between  
4 Perry and trustee whereby Perry paid \$33,000 to the estate.  
5 Subsequently, Perry was dismissed from trustee's FAC and the  
6 ninth and tenth claims were dismissed.

7 Defendants answered the FAC by asserting general denials  
8 and affirmative defenses, including, among others, that the FAC  
9 was barred under the doctrines of claim and issue preclusion due  
10 to the entry of the Trust Contest Judgment in favor of Louise  
11 based on the 2005 release contained in the Settlement Agreement.

12 Debtor, a named defendant in the FAC, was permitted to  
13 intervene as a plaintiff in the adversary proceeding. Debtor  
14 filed the SACII on October 25, 2010, which contained thirteen  
15 claims for relief. The first through eighth claims for relief  
16 essentially mirrored those in trustee's FAC. However, the SACII  
17 included new claims in the ninth through thirteenth claims for  
18 relief: (9) civil conspiracy under Cal. Civil Code § 1714.10;  
19 (10) violation of Cal. Probate Code § 16061.7; (11) constructive  
20 fraud; and (12) and (13) avoidance of fraudulent transfer under  
21 § 548. The bankruptcy court later dismissed these claims  
22 without leave to amend on the grounds that they were new claims  
23 not brought in trustee's FAC and debtor lacked prudential  
24 standing to assert them.

25 **1. Defendants' Motion For Summary Judgment**

26 On January 8, 2013, defendants filed a motion for summary  
27 judgment (MSJ) based on the affirmative defenses of claim and  
28 issue preclusion asserted in their answers to the FAC and SACII.

1 Defendants maintained the Trust Contest Judgment barred trustee  
2 and debtor from proceeding on the first through eighth claims  
3 for relief in their respective complaints as a matter of law.  
4 Defendants also asserted that the debtor was not entitled to any  
5 distribution from the Trust based on the plain language in the  
6 First Amendment and Restated Trust Agreement as a matter of law.

7 On March 19, 2013, the bankruptcy court entered a civil  
8 minute order granting defendants' MSJ. In its findings of fact  
9 and conclusions of law (FFCL), the court found that all the  
10 requirements for application of claim preclusion were met under  
11 California law and thus trustee and debtor were barred from  
12 proceeding on their respective complaints. Because claim  
13 preclusion applied, the court found it unnecessary to address  
14 other grounds for relief asserted in defendants' MSJ. On  
15 May 15, 2013, the bankruptcy court entered separate judgments  
16 against trustee and debtor.

## 17 **2. Trustee's Post-Judgment Motions**

18 Trustee subsequently filed a motion to amend the judgment  
19 under Civil Rule 59(e), incorporated by Rule 9023, or,  
20 alternatively, for reconsideration under Civil Rule 60(b)(4) and  
21 (6), incorporated by Rule 9024. Trustee maintained  
22 reconsideration was appropriate because the POA was a forgery  
23 rendering the First Amendment void ab initio. Trustee further  
24 argued that, even assuming that the First Amendment was not  
25 void, debtor retained an interest in the Trust after the First  
26 Amendment was signed, and it was not until Louise signed the  
27 Restated Trust Agreement that debtor's beneficial rights in the  
28 trust estate were completely eliminated. Trustee asserted that

1 debtor did not discover the forgery or the Restated Trust  
2 Agreement until after the Trust Contest Judgment had been  
3 entered, and, therefore, under the newly discovered facts  
4 exception in Allied Fire Prot. v. Diede Const., 127 Cal.App.4th  
5 150 (Cal. Ct. App. 2006), claim preclusion did not apply.  
6 Finally, citing Groves v. Peterson, 100 Cal.App.4th 659 (Cal.  
7 Ct. App. 2002), trustee contended that the Trust Contest  
8 Judgment could not have a preclusive effect when the matter was  
9 decided on procedural rather than substantive grounds.

10 In early July, the bankruptcy court issued its FFCL denying  
11 trustee's motions. On July 26, 2013, and August 2, 2013, the  
12 court entered the orders denying trustee's motions.

13 On August 8, 2013, trustee filed a notice of appeal (NOA)  
14 with respect to four orders: (1) a March 19, 2013 civil minute  
15 order granting partial summary judgment based on claim  
16 preclusion in favor of defendants; (2) a May 15, 2013 judgment  
17 on the FAC filed by trustee in this adversary proceeding; (3) a  
18 July 26, 2013 civil minute order denying trustee's motion to  
19 amend findings; and (4) an August 2, 2013 civil minute order  
20 sustaining the defendants' objections to trustee's motion to  
21 amend findings. The NOA was transmitted to the BAP by four  
22 separate notices of referral. As a result, four separate appeal  
23 numbers were assigned: EC-13-1385, EC-13-1387, EC-13-1388, and  
24 EC-13-1389. The Clerk's office subsequently issued an Order  
25 stating that since all four orders on appeal were listed in the  
26 same NOA, it appeared that consolidation was appropriate. The  
27 parties filed a non-opposition and the court entered an order  
28 consolidating the four matters.

1           **3. Debtor's Post-Judgment Motion**

2           On May 28, 2013, debtor filed a motion to alter or amend  
3 the bankruptcy court's judgment. Debtor argued that trustee's  
4 dismissal or compromise of the Trust Contest Appeal was done  
5 without notice and thus there was a violation of due process.  
6 Debtor further argued that trustee failed to adequately  
7 represent his interest by dismissing the Trust Contest Appeal  
8 and by failing to plead a fraudulent conveyance action under  
9 § 548, which would have permitted trustee to avoid the 2005  
10 release as a fraudulent conveyance. Finally, debtor maintained  
11 that the doctrine of claim preclusion could not apply to those  
12 claims for relief for which the bankruptcy court has exclusive  
13 original jurisdiction, such as claims based on §§ 543, 544, 549,  
14 548.

15           On July 2, 2013, the bankruptcy court entered its FFCL  
16 denying debtor's motion and on August 7, 2013, entered an order  
17 consistent with its decision. Debtor filed a timely appeal.

18                           **II. JURISDICTION**

19           The bankruptcy court had jurisdiction over this proceeding  
20 under 28 U.S.C. §§ 1334 and 157(b)(2)(E), (H) and (O). We have  
21 jurisdiction under 28 U.S.C. § 158.

22                           **III. ISSUES**

23           A. Whether the bankruptcy court erred in determining that  
24 claim preclusion barred the first through eighth claims for  
25 relief pled in trustee's FAC and debtor's SACII; and

26           B. Whether the bankruptcy court abused its discretion in  
27 denying trustee's and debtor's post-judgment motions.

28           ///

1 **IV. STANDARDS OF REVIEW**

2 We review summary judgment de novo. Grenning v. Miller-  
3 Stout, 739 F.3d 1235, 1238 (9th Cir. 2014). We also review de  
4 novo the preclusive effect of a judgment. Bankruptcy Recovery  
5 Network v. Garcia (In re Garcia), 313 B.R. 307, 310 (9th Cir.  
6 BAP 2004).

7 We review decisions regarding relief from judgment under  
8 Rules 9023 and 9024, which incorporate Civil Rules 59(e) and  
9 60(b), for abuse of discretion. Bateman v. U.S. Postal Serv.,  
10 231 F.3d 1220, 1223 (9th Cir. 2000); Morris v. Peralta  
11 (In re Peralta), 317 B.R. 381, 385 (9th Cir. BAP 2004). A  
12 bankruptcy court abuses its discretion if it bases a decision on  
13 an incorrect legal rule, or if its application of the law was  
14 illogical, implausible or without support in inferences that may  
15 be drawn from the facts in the record. United States v.  
16 Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009) (en banc).

17 **V. DISCUSSION**

18 A bankruptcy court may grant summary judgment when the  
19 pleadings and evidence demonstrate "that there is no genuine  
20 issue as to any material fact and that the moving party is  
21 entitled to a judgment as a matter of law." Celotex Corp. v.  
22 Catrett, 477 U.S. 317, 322 (1986). The preclusive effect of a  
23 prior state court judgment may serve as the basis for granting  
24 summary judgment. In re Imperial Corp. of Am., 92 F.3d 1503  
25 (9th Cir. 1996); Khaligh v. Hadaegh (In re Khaligh), 338 B.R.  
26 817, 832 (9th Cir. BAP 2006). Because the Trust Contest  
27 Judgment was entered in a court in California, we apply  
28 California claim preclusion law to determine its preclusive



1 effect. See Marrese v. Am. Academy of Orthopaedic Surgeons,  
2 470 U.S. 373, 380 (1985); 28 U.S.C. § 1738 (requiring federal  
3 courts to give "full faith and credit" to state court  
4 judgments).

5 Under California law, "claim preclusion precludes the  
6 relitigation of a cause of action that previously was  
7 adjudicated in another proceeding between the same parties or  
8 parties in privity with them." Mycogen Corp. v. Monsanto Co.  
9 28 Cal.4th 888, 896 (Cal. 2002). For claim preclusion to apply,  
10 three requirements must be satisfied: (1) the second lawsuit  
11 must involve the same "cause of action" as the first lawsuit;  
12 (2) the first lawsuit must have resulted in a final judgment on  
13 the merits; and (3) the party to be precluded must have been a  
14 party, or in privity with a party, to the first lawsuit. San  
15 Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys.,  
16 568 F.3d 725, 734 (9th Cir. 2008) (SDPOA v. SDCERS); Bullock v.  
17 Philip Morris USA, Inc., 198 Cal.App.4th 543, 557 (Cal. Ct. App.  
18 2011). On occasion, California courts have inquired into  
19 fairness and public policy before applying the doctrine of claim  
20 preclusion, but unlike issue preclusion, the inquiry is not  
21 mandatory. See Kopp v. Fair Pol. Practices Com., 11 Cal.4th  
22 607, 620-622 (Cal. 1995) (public policy considerations may  
23 warrant an exception to the claim preclusion aspect of res  
24 judicata, at least where the issue is a question of law rather  
25 than of fact).

26 Here, only the first element is at issue: whether the FAC  
27 and SACII involve the same "causes of action" as those alleged  
28 in the Trust Contest. Neither trustee nor debtor claim a lack

1 of privity nor do they contend that the Trust Contest Judgment  
2 is not final. In any event, as noted by the bankruptcy court, a  
3 bankruptcy trustee stands in privity with a debtor for purposes  
4 of preclusion in cases involving a debtor's property rights.  
5 See In re Montgomery Ward, LLC, 634 F.3d 732, 737 (3d Cir.  
6 2011); Comty. Bank v. Torcise, 162 F.3d 1084, 1087 n.7 (11th  
7 Cir. 1998). Further, the Trust Contest Judgment entered on  
8 June 4, 2007, ordered that debtor "take nothing away" from the  
9 Trust Contest and entered judgment in favor of Louise and the  
10 Trust. Debtor appealed the judgment, but the trustee took  
11 control of the litigation when debtor's case was converted and  
12 trustee subsequently stipulated to dismiss the appeal.  
13 Accordingly, the Trust Contest Judgment is final. See Sullivan  
14 v. Delta Air Lines, Inc., 15 Cal.4th 288, 303-304 (Cal. 1997).

15 **A. Identity of Claims**

16 In assessing claim preclusion, California courts examine  
17 whether the two actions concern a single "cause of action" under  
18 the primary rights theory. SDPOA, 568 F.3d at 734; Boeken v.  
19 Philip Morris USA, Inc., 48 Cal.4th 788, 787 (Cal. 2010);  
20 Mycogen Corp., 28 Cal.4th at 924. Under this theory, a cause of  
21 action comprises the plaintiff's primary right, the defendant's  
22 corresponding primary duty, and the defendant's wrongful act in  
23 breach of that duty. Mycogen Corp., 28 Cal.4th at 904.

24 As far as its content is concerned, the primary right  
25 is simply the plaintiff's right to be free from the  
26 particular injury suffered. It must therefore be  
27 distinguished from the legal theory on which liability  
28 for that injury is premised: 'Even where there are  
multiple legal theories upon which recovery might be  
predicated, one injury gives rise to only one claim  
for relief.' The primary right must also be  
distinguished from the remedy sought: 'The violation

1 of one primary right constitutes a single cause of  
2 action, though it may entitle the injured party to  
3 many forms of relief, and the relief is not to be  
confounded with the cause of action, one not being  
determinative of the other.'

4 Id. Thus, while a "cause of action" for pleading purposes  
5 focuses on the legal theory for recovery, i.e., breach of  
6 contract, negligence, conversion, a "cause of action" under the  
7 primary rights theory considers the broader question of the  
8 injury or harm suffered. "The most salient characteristic of a  
9 primary right is that it is indivisible: the violation of a  
10 single primary right gives rise to but a single cause of  
11 action." Id. In sum, "[i]f an action involves the same injury  
12 to the plaintiff and the same wrong by the defendant then the  
13 same primary right is at stake even if in the second suit, the  
14 plaintiff pleads different theories of recovery, seeks different  
15 forms of relief and/or adds new facts supporting recovery."  
16 Eichman v. Fotomat Corp., 147 Cal.App.3d 1170, 1174 (Cal. Ct.  
17 App. 1983).

18 Defendants' MSJ was directed at the first through eighth  
19 claims for relief<sup>5</sup> asserted in the FAC and SACII.<sup>6</sup> As the  
20 bankruptcy court observed, a comparison of the eight claims for  
21 relief in the FAC and SACII shows that they are identical, and  
22 the allegations contained in the SACII with respect to these

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24 <sup>5</sup> Because the federal pleading system deals in claims we use  
25 the term "claim for relief" rather than the state law concept of  
26 "causes of action." This difference between the federal and  
27 state pleading systems does not matter for purposes of applying  
the primary rights theory under California law.

28 <sup>6</sup> As previously noted, the remaining claims in the FAC and  
SACII were resolved outside defendants' MSJ.

1 claims mirror those in the FAC.

2 **1. The Primary Rights And Harm Suffered Are The Same**

3 Here, the bankruptcy court determined that the first  
4 (Declaratory Judgment to Determine the Respective Interests of  
5 the Plaintiff and the Debtor in and to the Trust Estate), fourth  
6 (Accounting for the Debtor's Alleged Beneficial Interest in the  
7 Trust), fifth (Cancellation of the Durable Power of Attorney),  
8 sixth (Cancellation of the First Amendment); and eighth (Breach  
9 of Fiduciary Duty by Louise as Trustee for the Trust) claims for  
10 relief alleged in the FAC and SACII were barred by the doctrine  
11 of claim preclusion because they were based on the same primary  
12 right and harm suffered by debtor in the Trust Contest. Under  
13 our de novo review, we agree.

14 A comparison of the Trust Contest allegations and those in  
15 the above-mentioned claims for relief reveal that debtor seeks  
16 vindication of the same primary right, namely, his right to be  
17 free from any wrongful reduction in his rights as a beneficiary  
18 under the Trust. In addition, both the Trust Complaint and the  
19 first, fourth, fifth, sixth and eighth claims for relief in the  
20 FAC and SACII seek redress for the same harm – the wrongful  
21 reduction of debtor's rights as a beneficiary under the Trust.

22 In the Trust Contest, debtor claimed that he had a  
23 substantial interest in the Trust and alleged Louise  
24 "purportedly acting as agent under [Frank's] Attorney-In-Fact,  
25 amended the Trust." A copy of the POA was attached to the Trust  
26 Complaint. The Trust Complaint further alleged that the First  
27 Amendment was invalid because, among other things, it was  
28 procured "as a result of fraud of others by misrepresenting

1 facts and conduct of the parties.” The difference between the  
2 fraud alleged in the Trust Contest and the fraud alleged as part  
3 of the first, fourth, fifth, sixth and eight claims for relief  
4 in the FAC and SACII is the allegation that Frank’s POA was  
5 forged thereby making the First Amendment invalid. Although  
6 debtor contends otherwise, this “new fact” does not alter the  
7 application of the primary rights analysis when debtor seeks  
8 redress of the same harm – the wrongful reduction of his rights  
9 as a beneficiary under the Trust. See Eichman, 147 Cal.App.3d  
10 at 1174.

## 11 **2. Trustee’s Arguments**

12 On appeal, trustee makes many of the same arguments  
13 advanced in his post-judgment motions which relied upon  
14 exceptions to claim preclusion of an earlier judgment.

15 First, trustee seeks to avoid the application of the claim  
16 preclusion doctrine by invoking the newly discovered facts  
17 exception set forth in Allied Fire with respect to the POA and  
18 Restated Trust Agreement. That exception applies when the  
19 plaintiff discovers new facts after filing his or her complaint,  
20 and those facts give rise to a new claim or cause of action that  
21 is not set forth in the complaint.

22 Before discussing the applicability of the newly discovered  
23 facts exception to this case, we note that trustee concedes that  
24 he did not specifically plead the Restated Trust Agreement in  
25 his FAC. Despite this failure, in addition to their claim  
26 preclusion argument, defendants asserted in their MSJ that if  
27 the First Amendment and the Restated Trust Agreement were given  
28 effect according to their terms, debtor had no beneficial

1 interest in the Trust. However, when ruling on the MSJ, nowhere  
2 does the bankruptcy court mention the Restated Trust Agreement  
3 in its FFCL. Instead, the court found it unnecessary to address  
4 the other grounds for relief asserted in defendants' MSJ after  
5 concluding the doctrine of claim preclusion applied. Moreover,  
6 the bankruptcy court rejected trustee's arguments regarding the  
7 newly discovered facts exception in its FFCL in connection with  
8 trustee's post-judgment motions without ever mentioning the  
9 Restated Trust Agreement. Accordingly, because the Restated  
10 Trust Agreement was neither pled in trustee's FAC nor addressed  
11 by the bankruptcy court in any of its rulings, we do not make  
12 any determinations about the agreement for the first time on  
13 appeal.

14 In any event, we do not find the holding in Allied Fire  
15 applicable under these circumstances. Nowhere in the case does  
16 the court mention the primary rights theory. Although not  
17 stated explicitly, it appears the court applied federal rather  
18 than California preclusion law.<sup>7</sup> Because California claim  
19 preclusion law applies to this case, we are bound to follow  
20 California Supreme Court precedent that uses the primary rights  
21 theory. See Werthan Bag Corp. v. Agnew, 202 F.2d 119, 124-25  
22 (6th Cir. 1953). As previously stated in our discussion  
23 applying the primary rights theory, debtor did not obtain a "new  
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25 <sup>7</sup> Applying federal preclusion law would have been proper.  
26 The state court was considering the preclusive effect of a  
27 federal judgment on state court litigation. See Younger v.  
28 Jensen, 605 P.2d 813, 822 (Cal. 1980) ("A federal judgment has  
the same effect in the courts of this state as it would have in a  
federal court.").

1 claim" that could be litigated in a new lawsuit when he  
2 discovered that Frank's POA was allegedly fraudulent after  
3 filing the Trust Contest. Rather, the forgery was simply a "new  
4 fact" that supported debtor's claim in the Trust Contest that  
5 the amendment was procured by fraud.<sup>8</sup> This fact, like the  
6 others alleged, sought redress of the same harm or primary right  
7 – the wrongful reduction of his rights as a beneficiary under  
8 the Trust.

9 We also note that the state court in the Trust Contest  
10 applied claim preclusion based on the release in the Dealership  
11 Lawsuit. Therefore, it would not matter what "new facts" or  
12 "new claims" debtor could have alleged. The state court's  
13 interpretation of the broad scope of the release would have  
14 ended the Trust Contest. Accordingly, analysis under both the  
15 primary rights theory and the release itself demonstrate that  
16 Allied Fire does not apply under these circumstances.

17 Next, citing Groves, 100 Cal.App.4th 659, trustee argues  
18 that when a matter is decided on procedural as opposed to  
19 substantive grounds, there is no preclusive effect. According  
20 to trustee, the state court in the Trust Contest decided the  
21 case by a motion, without giving debtor an opportunity to  
22 present evidence showing that the POA was a forgery, or that he  
23 first discovered the forgery after the Trust Contest was filed.

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25 <sup>8</sup> We also do not countenance debtor's position that the  
26 forged POA was a "newly discovered fact" after the filing of the  
27 Trust Contest when the record suggests otherwise. The POA  
28 attached to the Trust Complaint reveals the alleged fraud on its  
face: Pages one and two are from the general durable POA and  
pages three and four are from the healthcare POA.

1 Trustee concludes that in similar circumstances, the Groves  
2 court held that there is no preclusive effect. As an add-on  
3 argument, trustee contends that debtor was denied due process of  
4 law.<sup>9</sup> We are not persuaded.

5 The Groves decision set forth the narrow rule that  
6 collateral estoppel, or issue preclusion, will not be applied to  
7 facts found in connection with a motion to set aside a default  
8 judgment where the motion was decided on declarations only, and  
9 there was no oral testimony. Id. at 668-69. On its face,  
10 Groves does not apply since we are dealing with claim preclusion  
11 and not issue preclusion. Moreover, the Trust Contest did not  
12 involve a motion to set aside a default judgment which was  
13 decided on declarations only. Rather, Louise filed her motion  
14 under Cal. Civ. Code § 597 seeking to have the trial court  
15 decide her special defense of claim preclusion before a trial on  
16 the merits. Accordingly, Groves does not support trustee's  
17 position.

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19 <sup>9</sup> Although somewhat unclear, trustee's due process argument  
20 appears based on §26(1)(d) of the Restatement Second of Judgments  
21 which states as follows:

21 (1) When any of the following circumstances exists, the  
22 general rule of [section] 24 [claim preclusion] does  
23 not apply to extinguish the claim, and part or all of  
24 the claim subsists as a possible basis for a second  
25 action by the plaintiff against the defendant:

24 . . .

25 (d) The judgment in the first action was plainly  
26 inconsistent with the fair and equitable implementation  
27 of a statutory or constitutional scheme, or it is the  
28 sense of the scheme that the plaintiff should be  
permitted to split his claim.

28 Restatement (Second) of Judgments § 26(1)(d) (1982).



1 Trustee's due process argument is also not persuasive. At  
2 the hearing on this matter, trustee argued that the state  
3 court's granting of Louise's motion in limine to exclude  
4 evidence of the forgery deprived debtor of due process.  
5 However, we fail to see how the court's granting of the motion  
6 could deprive debtor of due process when the court previously  
7 found the release to encompass all future claims. Under these  
8 circumstances, evidence of the forgery would not matter. In any  
9 event, if the trustee perceived an error in the court's ruling  
10 on the motion in limine, the trustee's remedy was to pursue the  
11 appeal in the state appellate court.

12 Trustee's remaining arguments and supporting analysis are  
13 similarly unhelpful. Trustee argues that the POA and First  
14 Amendment are "void ab initio" due to fraud and that both the  
15 state court and the bankruptcy court lacked subject matter  
16 jurisdiction to "ratify" such documents. Trustee's "void ab  
17 initio" argument is nothing more than a legal conclusion that  
18 flows from the alleged forgery, the merits of which neither the  
19 state court nor the bankruptcy court addressed. Further,  
20 trustee cites no authority for the proposition that applying  
21 claim preclusion equates to a "ratification" of the allegedly  
22 void documents. Moreover, the state court's decisions were  
23 premised on the Settlement Agreement and Release, which did not  
24 flow from the POA. Finally, trustee's argument that the state  
25 court lacked subject matter jurisdiction over the Trust Contest  
26 is not supported by any of the authorities cited. In the end,  
27 trustee has provided no basis for reversal of the orders and  
28 judgment on appeal.

1           **3. Debtor's Arguments**

2           First, debtor argues that the bankruptcy court erred when  
3 it determined the Settlement Agreement in the Dealership Lawsuit  
4 barred debtor's recovery. The bankruptcy court made no such  
5 determination. It was the Placer County Superior Court which  
6 determined the effect of the Settlement Agreement in the Trust  
7 Contest. Believing that decision was wrong, debtor  
8 appropriately appealed the Trust Contest Judgment. However, the  
9 appeal has since been dismissed and the judgment is now final.  
10 Debtor is bound by that judgment.

11           Second, citing Allied Fire, debtor contends the doctrine of  
12 claim preclusion cannot bar claims that arise after the initial  
13 complaint is filed. We reject debtor's assignment of error on  
14 this ground for the same reasons we rejected trustee's.

15           Third, debtor asserts that the bankruptcy court erred when  
16 it determined that claim preclusion applied to his second  
17 (Turnover of Property Pursuant to § 543), third (Recovery of  
18 Property Pursuant to the Plaintiff's Avoidance Powers under  
19 § 544), and seventh (Avoidance of Post Petition Transfer of  
20 Estate Property Pursuant to § 549) claims for relief because  
21 they arose under the bankruptcy code. However, the bankruptcy  
22 court did not so rule, instead finding that the claims under  
23 § 543, 544, and 549, were premised on the same facts and  
24 circumstances as those alleged in the first, fourth, fifth,  
25 sixth and eighth claims for relief. Because the court concluded  
26 that neither debtor nor his estate could recover an interest  
27 from the Trust, the court reasoned that there was no corpus to  
28 which trustee's § 544 lien could attach. The bankruptcy court

1 found the second and seventh claims for relief failed for the  
2 same reason. We agree with the bankruptcy court's assessment  
3 that without an interest in the Trust, there could be no claim  
4 for turnover of property of the estate under § 543 as a matter  
5 of law nor could there be a claim for avoidance of a  
6 postpetition interest in property of the estate under § 549.  
7 Therefore, the bankruptcy court properly granted summary  
8 judgment in favor of defendants on these claims.

9       Next, debtor resurrects his twelfth and thirteenth claims  
10 for relief alleged in the SACII based on § 548 fraudulent  
11 transfer law, arguing that the bankruptcy court erred by  
12 determining that claim preclusion barred those claims. Again,  
13 the court did not make that ruling. Instead, the bankruptcy  
14 court previously dismissed those claims on the ground that those  
15 were new claims not pled by trustee in the FAC and debtor had no  
16 prudential standing to assert them. The bankruptcy court's  
17 determination that debtor lacked independent standing was not  
18 error.

19       Debtor also argues that the bankruptcy court erred when it  
20 determined that he lacked standing to prosecute the Trust  
21 Contest Appeal. Debtor asserts the error occurred because under  
22 the spendthrift provisions of the Trust and § 541(c)(2),  
23 debtor's interest in the Trust did not become property of the  
24 estate. Debtor fails to make the connection between this  
25 alleged error and the instant appeal, as nowhere in the court's  
26 rulings on the MSJ or the post-judgment motions do we find any  
27 reference to, or a ruling on, debtor's standing to prosecute the  
28 Trust Contest Appeal. Rather, the record shows that the

1 bankruptcy court dismissed, without prejudice, debtor's  
2 application to deem the appeal abandoned property because  
3 trustee had not filed a motion that complied with § 554 and  
4 debtor had not met his burden under § 554. As far as we can  
5 tell, debtor never renewed his request for abandonment and the  
6 Trust Contest Appeal was dismissed on February 6, 2009. Also,  
7 debtor did not appeal the dismissal order, which is final. The  
8 propriety of that order is not before us in this appeal.  
9 Accordingly, this alleged assignment of error cannot be a basis  
10 for reversing the bankruptcy court's decision granting partial  
11 summary judgment to defendants.

12 Finally, debtor did not raise any specific arguments  
13 concerning the bankruptcy court's denial of his post-judgment  
14 motion in this appeal. Therefore, any challenges debtor may  
15 have to that order are waived. Dilley v. Gunn, 64 F.3d 1365,  
16 1367 (9th Cir. 1995).

## 17 VI. CONCLUSION

18 For the reasons stated, we AFFIRM the bankruptcy court's  
19 decision in all respects.  
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