

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
PAPP INTERNATIONAL,	)	CASE NO. BK94-81297
	)	
DEBTOR	)	A94-8129
	)	
THE ESTATE OF JOSEPH PAPP, JR.,	)	
	)	CH. 11
Plaintiff	)	
vs.	)	
	)	
DONALD L. ROSER,	)	
	)	
Defendant	)	

MEMORANDUM

Hearing was held on Motions for Summary Judgment filed by The Estate of Joseph Papp, Jr., and by Donald Roser. Appearances: T. Randall Wright for plaintiff; William Bianco for defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

**Background**

After the filing of an involuntary petition, an order for relief under Chapter 11 of the Bankruptcy Code was entered against the debtor, Papp International, Inc. on August 12, 1991. The defendant, Donald L. Roser (Roser), filed a proof of claim in the bankruptcy case on October 28, 1991. The Estate of Joseph Papp, Jr. (the Estate), which represents the heirs of the founder of the debtor and which may have an interest in the debtor, filed this adversary proceeding to challenge Roser's claim.

During the 1960s, Roser and Joseph Papp, Jr. (Papp) entered into a general partnership agreement which later became Environetics, Inc. (Environetics), a California corporation based in California, whose purpose was to invent, develop, manufacture, sell, license and distribute a fuel combustion engine that was invented by Papp (the Papp engine). The Papp engine turned atomic energy into kinetic energy by mixing noble gases and other chemical agents. The anticipated benefits of the Papp engine over a conventional engine were: efficiency, the creation of a long-lasting fuel source, cost savings, and zero pollution emissions. A working prototype of the Papp engine was completed during the

late 1960s, but no production efforts were realized by Environetics. The primary asset of Environetics was the patent for the Papp engine, which was registered under patent numbers 3,670,494 on Aug. 1, 1972 and 3,680,431 on June 20, 1972 and which was entirely assigned to Environetics [hereinafter "Patent I" shall refer to the patent assigned to Environetics].

Roser provided Environetics with thousands of dollars in capital to develop the Papp engine and to pay Papp's personal expenses, and Roser oversaw the business aspects of the company. Roser and Papp had a falling out over the management of the company, and Papp took all of the research materials on the Papp engine and took the prototype engine. A lawsuit between Roser and Papp ensued over the ownership of the Papp engine.

On December 21, 1973, in the Superior Court of California, a judgment was entered which defined the parties' interests in and to Patent I and to the potential benefits that Patent I could yield in the future [hereinafter "Judgment" shall refer to the California state court's 1973 ruling]. The Judgment ordered the following relief:

(1) Dissolution proceedings initiated by Papp were withdrawn and terminated by the court;

(2) Papp was enjoined from dissolving or attempting to cause the dissolution of Environetics;

(2) The July 12, 1968 agreement which formed the general partnership was declared valid and enforceable, as was the subsequent assignment of the partnership assets to Environetics;

(3) Environetics was declared to be the owner of Patent I and the owner of all benefits realized from the technology utilized in Patent I, including: all rights, designs, models, engines, formulas, secrets, materials, reagents, procedures, systems, conditions, pre-preparation, know-how, improvements, developments and research connected therewith and any patents and amendments relating thereto [hereinafter "the Papp engine" will refer to all of the assets granted to Environetics in the Judgment].

(4) Should Environetics "be dissolved, or its assets distributed, or should ownership of said inventions revert to plaintiff Roser and defendant Papp," ownership of Patent I and all such developments therefrom were determined to

revert to a trust for the benefit of Papp and Roser personally, and a trustee or receiver was to "be appointed by this court or a court having jurisdiction over such matter....";

(5) Papp was enjoined from exploiting Patent I and the Papp engine without the participation of and an accounting to Roser, or in any manner injure the value of Patent I and the Papp engine;

(6) Papp, who had possession of the research supporting Patent I and the Papp engine, was ordered to hold such property in trust for Environetics;

(7) Papp was ordered to turnover to Environetics full and complete disclosure of all formulas, designs and plans for Patent I, thus far completed.

(8) John R. Phillips was appointed as a provisional director of Environetics, Inc. to break the management deadlock between Roser and Papp.

**Ex. A**, Judgment, Papp v. Roser, Nos. 969-831, 986-383 (Super. Ct. Cal., Dec. 21, 1973). Papp's subsequent appeal of the Judgment was dismissed on November 19, 1974. **Ex. B**, Aff. Richard Spencer, ¶ 2.

Papp ignored the Judgment, moved to Lincoln, Nebraska, and began to independently promote the Papp engine. On August 11, 1980, Papp formed the debtor, a Nebraska corporation, to facilitate the promotion of the Papp engine. Papp became the majority shareholder of the debtor, but several other parties were granted shares of stock in the debtor at the time of incorporation in exchange for capital contributions. A new patent was granted on January 31, 1984 as patent number 4,428,193 and was assigned to the debtor by Papp [hereinafter the patent owned by the debtor is Patent II]. Whether Patent II is subject to the terms of the California judgment is assumed for the purpose of these motions.

Papp died in Florida in 1989. From 1980 until his death, Papp convinced many individuals and companies across the country to invest additional sums which totaled in excess of several million dollars. Whether Papp was acting on behalf of the debtor, other corporate entities or himself during these transactions, or whether the contributors became owners of the technology, creditors of Papp or interest holders in an entity related to Papp is still being disputed in the bankruptcy case. Despite his gift for attracting investors in the Papp engine, Papp did not make any apparent

progress on commercializing the Papp engine during this time, but he did manage to spend all of the investor's money.

Several of the parties who invested in the debtor instigated this involuntary bankruptcy case with the desire to settle or set aside all claims to Patent II and its technology so the remaining parties can pursue the commercial potential of the technology prior to the impending expiration of Patent II.

Environetics was suspended by the California Franchise Tax Board in 1979 for failure to pay the required franchise taxes and remains suspended to this date. No trustee or receiver has been appointed to oversee Environetics's assets, nor has any other action been taken by Roser, Papp, or Phillips on behalf of Environetics. Aff. Richard Spencer, June 12, 1995.

Roser took independent action for the first time to enforce the Judgment on August 7, 1989, by causing the Judgment to be filed with the probate court overseeing Papp's probate estate in Florida, and a representative of Roser contacted the agents of the debtor to inform the debtor that Roser intended to enforce the Judgment.

Roser is listed on the bankruptcy matrix several times and received notice of the bankruptcy case in several capacities: as president of Environetics, as an individual, through his attorney, and through John Phillips, the provisional direct of Environetics. BK91-81297, filing no. 9. Roser filed a proof of claim which asserted a personal claim against the debtor on October 28, 1991, well before the claims bar date expired on December 19, 1991, but no proof of claim has been filed on behalf of Environetics.

### **The Motions**

The Estate brought this adversary proceeding on behalf of the debtor to challenge Roser's proof of claim. On March 2, 1995, the Estate filed a Motion for Summary Judgment. The motion requests summary judgment on the following grounds: (1) the Judgment was against Papp, not the debtor, and since the debtor was formed seven years after the Judgment was entered, the debtor is not liable for the Judgment; (2) Roser failed to bring a cause of action based on the Judgment within the five year limitation for foreign judgments as set forth under Nebraska law.

Roser resisted the Motion for Summary Judgment on the following grounds: (1) the five year statute of limitations on foreign judgments does not apply to the Judgment; (2) Roser has a cause of action against the debtor because Papp could not convey any greater interest to the corporation than he possessed, and therefore, the debtor's interest in Patent II is subject to Roser's interest. In addition, Roser filed his own Motion for Summary

Judgment based on the argument that the Judgment is valid as a matter of law.

At the hearing on the motion for summary judgment, the Estate and Roser were each ordered to brief, among other subjects, the issue of their respective standing to be parties to this adversary proceeding.

### **Decision**

1. Plaintiff is granted summary judgment on the basis that Roser does not have standing to file a proof of claim in the bankruptcy case, and therefore, Roser's proof of claim is not allowed.

2. Defendant's motion for summary judgment is denied.

### **Discussion**

#### **A. Standard for Summary Judgment**

The standard for granting a summary judgment pursuant to Bankruptcy Rule 7056(c) and Federal Rule of Civil Procedure 56(c) is:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (emphasis added)

FED. BANKR. R. 7056(c); FED. R. CIV. P. 56(c).

The burden is on the moving party to show that no genuine dispute exists on a material fact, City of Mt. Pleasant, Iowa v. Association Electric Corp., 838 F.2d 268, 273 (8th Cir. 1988), and once this burden is met, the non-moving party must show that there is genuine dispute over a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548 (1986). When evaluating the motion, inferences drawn from the underlying facts are to be decided in the light most favorable to the non-moving party. United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1976).

#### **B. Standing**

##### **1. Estate**

On July 18, 1995, the Estate was approved as the substitute for the trustee as a real party in interest. Filing no. 39.

Therefore, the issue of standing with respect to the Estate is moot.

## 2. Roser

Whether Roser has standing to file a proof of claim in the bankruptcy case is a more complex issue. The Judgment created two constructive trusts. The first constructive trust addressed the fact that Papp was in possession of the assets of Environetics and stated that Papp possessed said property as a trustee for Environetics, the beneficiary [hereinafter this constructive trust shall be called Trust I]. The second constructive trust made Roser and Papp beneficiaries of the assets of Environetics, but only if Environetics was dissolved or was otherwise wound up [hereinafter this trust shall be Trust II].

Since the Judgment determined that Environetics owned the Papp engine, Roser has standing as a beneficiary of Trust II if the suspension of Environetics was the equivalent of a dissolution. In the alternative, if Environetics is still the legal owner of the Papp engine pursuant to the Judgment, Roser may have standing as a shareholder of Environetics to sue the debtor pursuant to Trust I.

To determine Roser's rights, a detailed discussion of California corporate law concerning suspended corporation is required because Roser's rights depend on the corporate status of Environetics. On June 1, 1979, Environetics was suspended by the Franchise Tax Board of California for failure to pay franchise taxes. In California, corporations are suspended for nonpayment of Franchise Taxes pursuant to Section 23301 of the California Revenue and Tax Code. CAL. REV. & TAX CODE § 23301 (Deering 1995).<sup>1</sup> Different states treat the failure of a corporation to pay taxes differently. Some states suspend the corporation, but leave the corporation intact to some degree; some states suspend the

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<sup>1</sup> Minor amendments were made to § 23301 in 1983, 1984, 1988, 1990, 1991, and 1993, but the amendments did not alter the substance of the text that was in place during 1979, which is the year that Environetics was suspended. Compare current text with CAL. REV. & TAX CODE § 23301, History (Deering 1995).

Due to limited resources, the Court did not have available a genuine copy of the California Code in effect in 1979. However, the Deering Annotated California Code contains a listing of all amendments made since enactment and the contents of those amendments. Therefore, even though citations are to the 1995 California Code, the version of the section followed by the Court is the version in effect at the time the section was applicable to this case. Amendments are noted after each citation to alert the reader to these changes.

corporation, but treat it as though it were dissolved; and some states dissolve the corporation altogether. 9 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §4240 and accompanying footnotes (Perm. ed. 1991 & Cumm. Supp. 1994). California law is applicable in the bankruptcy court to determine Environetics's interest in this bankruptcy case because the capacity of a corporation to sue or be sued is determined by the law of its domicile. FED. R. CIV. P. 17(b); Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120, 127-28, 58 S. Ct. 125, 82 L. Ed. 147 (1937) (holding that bankruptcy court was prohibited from altering the operation of state laws which limit or dissolve corporate existence); Fidelity Metals Corp. v. Risley, 175 P.2d 592, 594 (Cal. Ct. App. 3d Dist. 1946); Community Elec. Serv. of Los Angeles, Inc. v. National Elec. Contractors Ass'n, Inc., 869 F.2d 1235, 1239 (9th Cir. 1989).

a. Dissolution

Under California statutes, a corporation's existence is perpetual after the articles of incorporation are filed unless otherwise provided by law or in the articles of incorporation. CAL. CORP. CODE §200(c) (Deering 1995).<sup>2</sup> To dissolve a corporation, either the shareholders must elect to dissolve the corporation, or, if the corporation has not engaged in business for five years prior to the resolution to dissolve, the board of directors may approve the dissolution of the corporation. CAL. CORP. CODE §§ 1900(a) & (b)(2), 1903(a) (Deering 1995).<sup>3</sup>

After an election to dissolve has been approved, the corporation must follow Section 1905 of the California Corporations Code, which orders the directors of the corporation to sign and verify a certificate of dissolution. CAL. CORP. CODE § 1905 (Deering 1995).<sup>4</sup> Specifically, the corporation must either pay any

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<sup>2</sup> Section 200(c) has not been amended since § 200 was approved by the California legislature in 1975. CAL. CORP. CODE § 200, History (Deering 1995); see also CAL. CORP. CODE § 308 (Deering 1995).

<sup>3</sup> These sections have not been amended since they became effective in 1977. CAL. CORP. CODE §§ 1900(a) & (b)(2), History, § 1903(a), History (Deering 1995).

<sup>4</sup> Section 1905 was amended in 1978 and 1991. Current subdivision (a)(3), which requires a third party to assume the tax liability prior to dissolution, was not added until 1991, and provides that the certificate of dissolution shall state:

That a person or corporation assumes the tax liability, if any, of the dissolving corporation as security for the issuance of a

outstanding tax liabilities or have a third party agree to assume the liability before a corporation can be dissolved. See, supra, note 4; CAL. TAX & REV. CODE § 23334 & History (Deering 1995) (providing that a corporation may not be dissolved by any entity unless a tax clearance certificate was first obtained from the Franchise Tax Board).<sup>5</sup>

b. Suspension

In California, failure to pay franchise taxes to the Franchise Tax Board results in suspension of corporate powers. CAL. REV. & TAX CODE § 23301 (Deering 1995).<sup>6</sup> However, Sections 23305 and 23305a permit a corporation to cancel the suspension and revive full

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tax clearance certificate from the Franchise Tax Board and is responsible for additional corporate taxes, if any, that are assessed and that become due after the date of the assumption of the tax liability.

CAL. CORP. CODE § 1905(a)(3) (Deering 1995).

Prior to the passage of current (a)(3) and during 1979, a different version of subdivision (b) was in effect, which was similar to current subdivision (a)(3) and stated:

The certificate of dissolution shall be filed and therupon [sic] the corporate existence shall cease, except for the purpose of further winding up if needed. However, before any corporation taxed under the Bank and Corporation Tax Law ... may file a certificate of dissolution it shall file or cause to be filed the certificate of satisfaction of the Franchise Tax Board that all taxes imposed under the Bank and Corporation Tax Law have been paid or secured.

CAL. CORP. CODE § 1905, History & Amendments: 1991 (Deering 1995).

<sup>5</sup> Section 23334 was amended in 1991, but the amendments do not affect the substance of the portion of § 23334 which is applicable to this opinion. CAL. REV. CODE § 23334, History (Deering 1995).

<sup>6</sup> Section 23301 was amended several times since 1979, 1983, 1988, 1990, 1991, 1993. However, the amendments have not changed the general procedures and effect of § 23301, which is to suspend corporate powers, rights and privileges for failure to pay taxes, including franchise taxes pursuant to the § 23300 series.

corporate powers. CAL. REV. & TAX CODE §§ 23305, 23305a (Deering 1995).<sup>7</sup>

In addition to containing specific procedures for suspension and dissolution, the California Code distinguishes suspension of corporate powers from dissolution for other purposes as well. For example, California's Code of Civil Procedure at Section 411 provides for service upon suspended corporations, which is different from the procedure followed to serve notice upon dissolved corporations under California's Corporations Code at Sections 3305-06. Lewis v. LeBaron, 254 Cal. App. 2d 270, 275, 61 Cal. Rptr. 903, 907 (Cal. Ct. App. 3d Dist. 1967). Similarly, while a dissolved corporation has a right to prosecute a cause of action under Section 5400 of the Corporations Code, that right does not extend to corporations suspended under Section 23301. Fidelity Metals Corp. v. Risley, 175 P.2d at 595.

Suspended corporations are not deemed to be dissolved under California law. See Pacific Atlantic Wine, Inc. v. Duccini, 245 P.2d 622, 628 (Cal. Ct. App. 1st Dist. 1952). The purpose of Section 23301 is to prohibit delinquent corporations from enjoying the ordinary privileges of going concerns in order to put pressure on the delinquent corporations to pay franchise taxes. Boyle v. Lakeview Creamery Co., 68 P.2d 968, 969-70 (Cal. 1937); Belle Vista Inv. Co. v. Hassen, 227 Cal. App. 2d 837, 840, 39 Cal. Rptr. 184, 187 (Cal. Ct. App. 2d Dist. 1964), overruled on other grounds, Traub Co. v. Coffee Break Serv., Inc., 425 P.2d 790 (Cal. 1967); Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 503 P.2d 285, 286 (Cal. 1972).

Under prior statutory law in California, corporations which failed to pay franchise taxes forfeited their charters, which caused the corporation to be dissolved, and a trustee was appointed to protect shareholder interests in the former corporation's property. Rossi v. Caire, 199 P. 1042, 1044 (Cal. 1921); Ransome-Crummey Co. v. Superior Court, 205 P. 446, 447-48 (Cal. 1922); California Nat'l Supply Co. v. Flack, 190 P. 634 (Cal. 1920); Damato v. Slevin, 214 Cal. App. 3d 668, 672, 262 Cal. Rptr. 879, 881 (Cal. Ct. App. 1st Dist. 1989). However, the legislature relaxed prior law by passing the current version of Section 23301,

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<sup>7</sup> Section 23305 was amended three times since Environetics was suspended in 1979: 1984, 1990, 1991, but the amendments did not substantially alter the procedure for relief from suspension. CAL. REV. & TAX CODE § 23305, History & Notes:Amendments (Deering 1995).

Section 23305a was amended in 1990 and 1991, but did not alter the right of a suspended corporation to revive its corporate powers. CAL. REV. CODE § 23305a, History & Notes: Amendments (Deering 1995).

which does not relieve the corporation of any substantive right, but instead, suspends the corporation's power to assert those rights. Traub, 425 P.2d at 791-92; Electronic Equip. Express, Inc. v. Donald H. Seiler & Co., 122 Cal. App. 3d 834, 846, 176 Cal. Rptr. 239, 246 (Cal. Ct. App. 1st Dist. 1981). Upon revival and reinstatement of the corporate charter, a suspension for delinquent taxes is treated as a mere irregularity. Damato, 214 Cal. App. 3d at 673.

When a corporation is suspended for failure to pay taxes, it is prohibited from prosecuting or defending itself in a lawsuit once that lawsuit has been commenced against the corporation. Weinstock v. Sinatra, 379 F. Supp. 274, 275 (C.D. Cal. 1974); Reed v. Norman, 309 P.2d 809, 812 (Cal. 1957); Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 317 P.2d 649, 651 (Cal. Ct. App. 3d Dist. 1957); Boyle v. Lakeview Creamery Co., 68 P.2d at 969; Schwartz v. Magyar House, Inc., 335 P.2d 487, 490-91 (Cal. Ct. App. 2d Dist. 1959); Belle Vista, 227 CA.2d at 840, 39 Cal. Rptr. at 186; Mather Constr. Co. v. United States, 475 F.2d 1152, 1155 (1973). Suspended corporations are barred from litigating in federal courts as well as California courts. See In re Christian & Porter Aluminum Co., 584 F.2d 326, 331 (9th Cir. 1979) (barring suspended corporation from filing a federal appeal); Community Elec. Serv. of Los Angeles, Inc. v. National Elec. Contractors Ass'n, 869 F.2d at 1239.

Since the intent of Section 23301 is to pressure corporations into paying delinquent taxes and not to bar suspended corporations from defending themselves in a lawsuit altogether, a suspended corporation is entitled to the limited right to move for a continuance in a trial in order that it may revive itself, which will validate prior acts taken while suspended, and thereafter, defend itself in an action. United States v. 2.61 Acres of Land, More or Less, 791 F.2d 666, 668-69 (9th Cir. 1985). Revival validates the corporation's actions taken prior to a judgment and permits a corporation to proceed with the cause of action without prejudice. Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 503 P.2d at 287.

An important exception to the rule of revival without prejudice is that an applicable statute of limitation is not tolled if it accrues before the corporation revives itself. Welco Constr., Inc. v. Modulux, Inc., 47 Cal. App. 3d 69, 73-74, 120 Cal. Rptr. 572, 575 (Cal. Ct. App. 1st Dist. 1975); Community Elec. Serv., 869 F.2d at 1240. In addition, an agent of the corporation may not circumscribe suspension through an assignment. Assignees of a corporation are subject to same incapacities as the suspended corporation. Cleveland v. Gore Bros., Inc., 58 P.2d 931 (Cal. Ct. App. 2d Dist. 1936).

c. Roser's Standing Pursuant to Trust II

A corporation which is suspended under California law is not regarded as dissolved. Roser did not, therefore, have standing to file a proof of claim in the bankruptcy case as a beneficiary of Trust II. The Judgment stated that Environetics owned Patent I and provided that the related technology would pass to Roser and Papp as beneficiaries of Trust II only if Environetics was dissolved, the assets distributed, or ownership was otherwise passed onto Roser and Papp. None of these contingencies have occurred, and therefore, Environetics, pursuant to the Judgment, was not stripped of the ownership of its assets by the suspension. Roser is not, therefore, a beneficiary of a trust consisting of the assets of a dissolved Environetics.

Corporations are suspended to force them to pay their tax liabilities. A statutory condition precedent to dissolution of a corporation is payment of the corporation tax liability or to have a third party assume responsibility for the liability. If this Court were to recognize Roser's right to file a claim, it would be ignoring the intent of the California legislature by permitting Roser to avoid taking responsibility for unpaid franchise taxes, while permitting him to enjoy the benefits of Environetics's assets. Therefore, in addition to the legal authority which states that a suspended corporation is not dissolved, there is also no equitable reason to treat Environetics as dissolved, solely for the purpose of benefitting Roser.

d. Roser's Standing Pursuant to Trust I

Roser's only potential interest in this bankruptcy case is as a shareholder of Environetics. Roser has submitted authority in favor of finding standing for shareholders to file actions against third parties on behalf of a corporation. Lewis v. LeBaron, 254 Cal. App. 2d 270, 61 Cal. Rptr. 903 (Cal. Ct. App. 3d Dist. 1967) (citations omitted). California law, however, only permits shareholders to bring derivative causes of action for fraud on behalf of a corporation if the shareholder can show that the damage done to the shareholder was peculiar to that shareholder, and not suffered by the corporation. Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 470-71 (Cal. 1969); see also Reed v. Norman, 309 P.2d 809 (Cal. 1957) (holding that in an instance of fraud by an insider of a suspended corporation, equity may require that the shareholder be granted standing to sue on behalf of the corporation so that the assets can be saved before they are dissipated.). The issue of whether Roser suffered an injury unique from Environetics is a fact question.

Assuming for summary judgment purposes that Roser could establish that he suffered an injury unique from Environetics, Roser is still subject to the suspended status of Environetics. California does not permit the revival of a corporation to affect

the tolling of a statute of limitation. Since state law determines the substantive rights of a corporation, it follows that even if Environetics did revive itself, the claims bar date in the bankruptcy case, which is the equivalent of a statute of limitations, expired on December 19, 1991, and Environetics not only failed to file a proof of claim before that date, but it has yet to file a claim. To have a valid claim as a shareholder, Environetics, the corporation, would have to have a valid claim in the bankruptcy case. Reed, 309 P.2d at 812 ("hence a bar to an action by the corporation would be a bar to an action by the stockholders for the corporation." (citations omitted)).

On the other hand, Roser could point to Reed, supra at 10, as an example, if a case in which the California courts have permitted a shareholder of a suspended corporation to sue the suspended corporation and a wrongdoing shareholder for wrongdoing. However, the debtor in this case did not cause or play any role in the suspension of Environetics, and therefore, the logic of Reed does not apply in this case. In addition, the fact that Environetics probably does not have an allowable claim because of the claims bar date, which would bar a shareholder's action, is an independent issue from the fact that Environetics is suspended under California law. Roser is really arguing that Environetics assigned its right to an interest in the debtor to Roser, and it is impermissible for a suspended corporation to assign its interest in a cause of action to another party. See Gore Bros., supra at 11.

Finally, Roser does not have an automatic right to file a derivative shareholder's action against the debtor. California Corporations Code at Section 800 sets forth the conditions precedent which must be followed before a shareholder may bring an action on behalf of a corporation. See CAL. CORP. CODE § 800 (Deering 1995).<sup>8</sup>

e. Conclusion re: Roser's Standing in Bankruptcy Case

Environetics is the owner of Patent I and all derivative technology, and therefore, Environetics was the proper party to file a proof of claim in this case, not Roser. Since Environetics failed to do so before the claims bar date, Roser cannot not have standing as shareholder of Environetics because there is no underlying valid claim belonging to Environetics, and summary judgment is granted in favor of the Estate. Roser's proof of claim is not allowed in the bankruptcy case.

Separate journal entry to be filed.

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<sup>8</sup> Since § 800 became effective in 1977, it was amended in 1982. Since no shareholder derivative suit has been instigated by Roser, the current version of the act would thus apply. See CAL. CORP CODE § 800, History & Notes: 1982 Amendment (Deering 1995).

DATED: September 25, 1995

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

BIANCO, WILLIAM	397-8450
WRIGHT, T. RANDALL	345-0965
CRAWFORD, DAVID	493-7005

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
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DEBTOR(S) )  
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THE ESTATE OF JOSEPH PAPP, JR.) CH. 11  
Plaintiff(s) ) Filing No.  
vs. ) JOURNAL ENTRY  
)  
DONALD L. ROSER, )  
)  
\_\_\_\_\_  
Defendant(s) ) DATE: September 25, 1995  
HEARING DATE: May 11,  
1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motions for Summary Judgment.

APPEARANCES

T. Randall Wright, Attorney for plaintiff  
William Bianco, Attorney for defendant

IT IS ORDERED:

The motion for summary judgment filed by Estate is granted. The claim of Donald Roser is disallowed. He lacks standing to file a claim in this bankruptcy case.

The motion for summary judgment filed by Roser is denied. See memorandum filed this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

BIANCO, WILLIAM	397-8450
WRIGHT, T. RANDALL	345-0965
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