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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE SUNDBY, Trustee, Plaintiff-Appellant, v. MARQUEE FUNDING GROUP, INC.; et al., Defendants-Appellees.	No. 21-55504 D.C. No. 3:19-cv-00390-GPC-AHG MEMORANDUM*

DALE SUNDBY, Trustee, Plaintiff-Appellee, v. MARQUEE FUNDING GROUP, INC.; et al., Defendants-Appellants.	No. 21-55582 D.C. No. 3:19-cv-00390-GPC-AHG

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Submitted September 30, 2022**

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges
Dissent by Judge SILVERMAN

Dale Sundby appeals *pro se* from the district court's summary judgment in this action, in which Sundby, as trustee of the Dale H. Sundby and Edith Littlefield Sundby, Trust No. 1989-1 dated January 26, 1989, brought claims relating to the refinancing of a property in La Jolla, California. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review summary judgment de novo. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1072 (9th Cir. 2018). We vacate and remand.

A trustee may not represent a trust *pro se* in federal court. *See C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987). The rationale behind this rule has "been the law for the better part of two centuries[.]" *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–02 (1993) (discussing 28 U.S.C. § 1654). This issue was not brought before the district court, and courts ordinarily do not consider arguments raised for the first time on appeal. *See S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001). However, the rule that artificial entities must have licensed counsel protects the integrity and functioning of the federal courts. *See C.E. Pope*, 818 F.2d at 698. Moreover, the rule safeguards the interests of unrepresented trust beneficiaries. *Cf. Simon v. Hartford Life, Inc.*, 546 F.3d 661, 667 (9th Cir. 2008). Therefore, this

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without oral argument. *See* Fed. R. App. P. 34(a)(2).

argument is not one that the parties may waive.

The dissent contends that this argument has been waived, as the Defendants did not raise it in the trial court and because the Defendants have not been prejudiced by Sundby's *pro-se* representation. In support, the dissent cites *Church of the New Testament*, where we applied our general rule—without much analysis—after finding that the court lacked subject-matter jurisdiction. *See Church of the New Testament v. United States*, 783 F.2d 771, 773–74 (9th Cir. 1986). That case does not prevent us from deviating from our general rule, as here, unlike in *Church of the New Testament*, there is jurisdiction and the interests of other trust beneficiaries may be adversely affected by a layperson's spurious legal musings. *See Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 673 (9th Cir. 2005) (holding that a court's statements made after concluding that there was no subject-matter jurisdiction were dicta). Allowing a trust's adversary to waive the trust's statutory obligation to proceed through counsel would undermine 28 U.S.C. § 1654 and the interests that it protects. *See Johns v. Cnty. of San Diego*, 114 F.3d 874, 876–77 (9th Cir. 1997).

As Sundby, in his capacity as trustee, purports to represent a trust *pro se*, such representation is not permitted. Therefore, we vacate and remand to the district court to afford the trust an opportunity to obtain legal representation and to develop facts to determine in the first instance whether Sundby is the beneficial owner of the trust or whether the trust transferred any interests to Sundby. All pending motions are

denied. Each side shall bear its own costs.

VACATED AND REMANDED.

Sundby, Trustee v. Marquee Funding Group, Inc., 21-55504+

SILVERMAN, Circuit Judge, dissenting:

Arguments challenging the jurisdiction of the court may be raised for the first time at any stage of the case, even after the district court proceedings have concluded and the matter is on appeal. Most all other arguments, however, are waived if not previously made in the district court. In fact, we applied that very rule in a case similar to the current one. *See Church of the New Testament v. U.S.*, 783 F.2d 771, 774 (9th Cir. 1986). ("The issue of whether the Church was properly represented was raised for the first time on appeal by Ginn's letter to this court seeking leave to represent all the plaintiffs on this appeal. We entered an order acknowledging Ginn's right to represent himself on appeal but deferred the issue of his representing the other plaintiffs. However, we need not address this issue at this juncture because the issue was not raised before the trial court and cannot now be raised for the first time on appeal. *Trans Container Services v. Security Forwarders, Inc.*, 752 F.2d 483, 487 (9th Cir.1985).")

It is true that plain error can be raised for the first time on appeal even if not preserved below, but that requires a showing that the rights of the Johnny-come-

lately were substantially affected. *Rosales-Mireles v. U.S.*, 138 S.Ct.1897 (2018). In our case, the defendant has not even mentioned the plain error doctrine, much less alleged that it has been prejudiced in any way by the plaintiff's pro se representation. That's not surprising: The general rule requiring a trust to be represented by counsel is to protect the trust's beneficiaries, not a defendant accused of cheating them. Nor is there any explanation for why this issue wasn't raised before, or why this failure should be excused.

I would hold that the argument about the trustee's pro se representation cannot be raised for the first time now, particularly in the absence of any claim that the plain error doctrine applies or that the court is without jurisdiction. I would proceed to consider the merits of the appeal and cross-appeal, and therefore, respectfully dissent.

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DALE SUNDBY, Trustee, Plaintiff-Appellant, v. MARQUEE FUNDING GROUP, INC.; et al., Defendants-Appellees.	No. 21-55504 D.C. No. 3:19-cv-00390-GPC-AHG ORDER

DALE SUNDBY, Trustee, Plaintiff-Appellee, v. MARQUEE FUNDING GROUP, INC.; et al., Defendants-Appellants.	No. 21-55582 D.C. No. 3:19-cv-00390-GPC-AHG

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.

Judges Wallace and Fernandez voted to deny the petition for panel rehearing. Judge Silverman voted to grant the petition for panel rehearing.

Judges Wallace, Fernandez, and Silverman recommend denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing

en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.