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United States District Court, S.D. New York

In re: BGI, INC., f/k/a Borders Group Inc., Debtor. ERIC BEEMAN, JANE FREIJ, and ROBERT TRAKTMAN, Appellants, -against- BGI CREDITORS' LIQUIDATING TRUST and CURTIS R. SMITH, Trustee, Appellees.

12 Civ. 7714 (ALC), 12 Civ. 7715 (ALC), 13 Civ. 0080 (ALC)
May 22, 2013.

MEMORANDUM & ORDER

Andrew L. Carter, Jr., District Judge

I. Introduction

These three related actions are appeals from the United States Bankruptcy Court for the Southern District of New York (Glenn, J.) denying Eric Beeman, Jane Freij, and Robert Traktman (collectively "Appellants") leave to file untimely proofs of claim in the underlying bankruptcy case and denying Appellants' motion to certify a class action.[fn1] Appellants hold unused gift cards to Borders Bookstores ("Borders" or "Debtor"), which were typically issued in exchange for cash and redeemable for Borders merchandise. Appellants argue the Bankruptcy Court erred in finding they are unknown creditors of Borders and notice of the deadline to file claims by publication was sufficient to meet due process requirements. For the reasons set forth below, these appeals are moot, precluding the Court from granting Appellants' requested relief.

II. Background

Borders filed for Chapter 11 bankruptcy in the Southern District of New York on February 16, 2011. At that time, the company operated 642 bookstores across the country under the Borders, Waldenbooks, Borders Express, and Borders Outlet brand names, as well as Borders-branded airport stores and an e-commerce website. When Borders initially filed for bankruptcy, it planned to reorganize through a sale of its assets to another entity.[fn2] In June of 2011, Borders attempted to sell substantially all of its operating assets as a going concern to BB Brands, a wholly-owned subsidiary of Direct Brands, LLC. (Appellant Br., Ex. E, Dkt. No. 5-5.) The transaction was never consummated, and with no other prospective buyers, Borders closed its remaining stores and liquidated its assets through going out of business sales.

A. *The Gift Card Program*

In 1998, Borders implemented the gift card program, whereby it sold and issued gift cards that could be redeemed for Borders merchandise. Customers could purchase gift cards at a Borders location, from other retailers such as Walgreens and Safeway, or through Borders's website. In addition to purchasing gift cards with cash, check, or credit or debit card, Borders also issued gift cards as store credit when customers returned merchandise without a receipt.

After the final store closed in September of 2011, Borders's books and records reflected approximately 17.7 million outstanding gift cards with unredeemed balances of $210.5 million.[fn3] (Appellee Br. in Opp'n to Stay, Ex. H ¶ 12, Dkt. No. 8-9.) The gift cards do not contain any information that would allow Borders to identify the purchaser or recipient of the gift card if it was given as a gift. (Appellee Br. in Opp'n to Stay, Ex. G ¶ 6, Dkt. No. 8-8.) Moreover, Borders did not maintain a database that matches identifying information of gift cards **[*2]** with the names, street addresses, or email addresses of gift card holders. (*Id.*)

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i. *Databases Maintained by Borders*

Four separate databases were utilized by Borders to track purchases and store customer information. In its First Data database, Borders stored the value and history of all gift cards issued to Borders customers. (*Id. ¶ 8.*) This information included the date of activation, balance, and redemption records. (*Id. ¶ 9.*) Each gift card had a sixteen digit number printed on the back, which was used to identify the account associated with the gift card. When this sixteen digit number was presented, information in the database such as individual transaction amounts, the location of transactions, dates and times of transactions, and the remaining balance was matched to the gift card. (*Id.*) Although records of the transactions involving gift cards were readily available, the database did not contain any information that could personally identify the purchaser or holder of the gift card. (*Id.*)

The Point of Sale database contained information about all items purchased at Borders stores, including the specific items sold, the method of payment, and the date, time, and location of the transaction. (*Id. ¶ 10.*) This database did not include any personal information of customers. (*Id.*) If the purchaser, however, elected to identify himself or herself as a member of the Border Rewards program, the purchaser's ten digit Borders Rewards number would be included with the transaction. (*Id.*) Additionally, if the purchaser bought or used a gift card, the sixteen digit gift card number would be stored in the database. (*Id.*)

Customers who joined the Borders Rewards program[fn4] were asked to submit their name, email address, and seven digit phone number (without area code) when signing up for the program. (*Id. ¶ 11.*) This information was stored in the Borders Rewards database. Members were not required to provide a street address unless they elected to do so, in which case the address would also be stored. (*Id.*) Borders did not verify the accuracy of personal information submitted by members and only updated contact information if it was provided. (*Id.*) The database incorporated members' purchase history, including gift cards, and their Borders Rewards points balance. (*Id. ¶ 12.*)

For customers who bought items on Borders's website, the Data Warehouse database recorded information about online purchases.[fn5] This database contained the name, phone number, billing and shipping addresses, and email address provided by the purchaser. (*Id. ¶ 15.*) If a gift card was used to pay for merchandise, it also stored the first and last four digits of the sixteen digit gift card number. (*Id.*) If a gift card was purchased online, Borders did not retain the sixteen digit gift card number in this database. (*Id.*)

Appellees claim the Debtor had no method of cross-referencing these four databases to identity gift card purchasers and did not do so in the ordinary course of business. The scope of such a project, according to Appellees, would be massive. The First Data database alone contains 249 million transaction **[*3]** records since October of 1998. (Appellee Br., Ex. W ¶ 11, Dkt. No. 13-24.) The Point of Sale database contains substantially more records. Appellees acknowledge it may be possible to cross-reference Borders's databases in an attempt to ascertain personal information of those who purchased or used gift cards, but they argue it would be prohibitively time-consuming and expensive.

B. ***The Bankruptcy Proceedings***

Subsequent to the initiation of the Chapter 11 proceedings, the Bankruptcy Court entered an order dated April 8, 2011 ("Bar Date Order"), establishing June 1, 2011 ("Bar Date") as the deadline for all non-governmental creditors to file claims against the Debtor. (Appellee Br., Ex. G at 2, Dkt. No. 13-8.) The Order also directed the Debtor to serve notice on all known creditors by first-class mail and publish notice in the New York Times at least twenty-eight days prior to the Bar Date for all unknown creditors. (*Id. at 6-7.*) The notice required by the Bar Date Order was deemed "fair and reasonable and will provide good, sufficient, and proper notice to all creditors of their rights and obligations in connection with Claims they may have against the Debtors in these chapter 11 cases[.]" (*Id. at 8.*)

The Bar Date passed and no proofs of claim were filed by any of the millions of gift card holders. The bankruptcy case moved forward. When the sale of the business as a going concern was no longer an option, the decision was made to liquidate all of Borders's remaining assets. Once liquidation was completed, the proceeds were held in a Trust

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administered by Defendant-Trustee Curtis Smith. This course of conduct was memorialized in the First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors ("Distribution Plan" or "Plan"). (Appellee Br., Ex. Y, Dkt. No. 13-26.) In accordance with § 1125 of the Bankruptcy Code, the Debtor filed the Distribution Plan and the accompanying Disclosure Statement with the Bankruptcy Court on November 10, 2011. Notably, the Distribution Plan included a $50 de minimus provision, stating all claims with a final distribution of less than $50 will revert to the Trust for distribution to other allowed creditors. (*Id. at 25-26*.) The Bankruptcy Court approved dissemination of the Disclosure Statement, Distribution Plan, and notice of the hearing to confirm the Plan, which was scheduled for December 20, 2011. Notice of the confirmation hearing was also published in the New York Times on November 16, 2011.

On December 21, 2011, the Bankruptcy Court confirmed the Distribution Plan, which became effective on January 12, 2012 ("Effective Date"). Attorney Krislov stated he was retained by Appellants on December 29, 2011. (Appellee Br., Ex. S ¶ 3, Diet. No. 13-20.) He was apparently first contacted by Appellants on or around December 5, 2011. (Appellee Br., Ex. I ¶ 17, Dkt. No. 13-10.) After he initially spoke to Appellants, "Counsel [Krislov] immediately began analyzing the bankruptcy docket (which includes over 2000 docket entries), and . . . learned that the Plan had been submitted for vote." (*Id.*) Notwithstanding **[*4]** Appellants entry into the case in December, they did not challenge confirmation of the Plan by objecting to it, seeking reconsideration after it was confirmed, or appealing the December 21 confirmation order.[fn6]

On January 4, 2012, Appellants Beeman and Freij moved the Bankruptcy Court to allow the filing of late proofs of claim for the unredeemed balances on their gift cards. Five days later, Appellants moved to have a class of all gift card holders certified pursuant to Bankruptcy Rule 7023 and Rule 23 of the Federal Rules of Civil Procedure. The Trust filed its objections to both of Appellants' motions, and the Bankruptcy Court ordered limited discovery. (Bankr. Dkt. No. 2734.) Specifically, James Toner, former Senior Associate General Counsel for Borders, and Kate Matson of BDO Consulting, the financial advisor to the Trust, were deposed on June 20.

The Bankruptcy Court denied Appellants' motions for leave to file late proofs of claim and class certification on August 14, 2012.[fn7] In his opinion, Judge Glenn found Appellants, and gift card holders more generally, were unknown creditors because Borders did not maintain a database that could match gift cards with the purchaser's contact information. In re BGI, Inc., f/k/a Borders Group Inc., 476 B.R. 812, 821 (Bankr. S.D. N.Y. 2012) ("Borders Group"). Moreover, even if such information was reasonably ascertainable, which the Bankruptcy Court found it was not, the purchaser likely would not be the current holder of the gift card. Id. Since, for these reasons, gift card holders were unknown creditors, they were not entitled to actual notice of the Bar Date. Id. at 820. Judge Glenn also held publication in the New York Times was reasonable and adequate to satisfy due process requirements of notice to unknown creditors. Id. at 824. Given that adequate constructive notice of the Bar Date was available, Appellants failed to demonstrate excusable neglect for their inability to file timely proofs of claim. Id. at 826. Therefore, the Bankruptcy Court denied Appellants' request for leave to file late claims, and the class certification motion was denied as moot.[fn8] Importantly, the Bankruptcy Court also found the Distribution Plan had been substantially consummated, and allowing claims from all potential gift card holders would severely affect other creditors. Id. at 825. Appeal was taken from Judge Glenn's August 14 decision, which was docketed in this Court on October 16, 2012.

The Trust filed a motion in the Bankruptcy Court on September 27, 2012 seeking entry of an order authorizing the Trustee to make interim distributions to holders of allowed unsecured claims. Appellants opposed the motion and sought a stay from the Bankruptcy Court of any interim distributions pending resolution of their appeal to this Court. By order dated November 2, 2012, the Bankruptcy Court authorized the interim distributions requested by the Trust and denied Appellants' motion for a stay, reasoning that Appellants were collaterally attacking the Distribution Plan even though the time to do so had expired under the Bankruptcy Code. **[*5]** In re BGI. Inc., f/k/a Borders Group Inc., *No. 11-10614 (MG)*, [2012 BL 297097], 2012 WL 5392208, at *3-4 (Bankr. S.D. N.Y. Nov. 2, 2012). Furthermore, Judge Glenn found Appellants did not meet the standard for a stay pending appeal as set forth in Bankruptcy Rule 8005. Id. at *5-6.

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After the denial of the stay by the Bankruptcy Court, Appellants filed a motion to stay further distributions with this Court on November 13, 2012. Upon filing, Appellants did not request consideration of their motion on an expedited basis. They did, however, file a motion for expedited oral argument on January 7, 2013. At oral arguments held on April 30, 2013, Appellants' counsel stated, "[T]he funds that are there [in the Trust at this time] are sufficient to pay them [the claims of the proposed gift card holder class]." (Apr. 30, 2013 Tr. at 31.)

To date, the Trust has distributed over $80 million for administrative expenses, to priority claim holders, and to general unsecured creditors. (*Id. at 50.*) There is approximately $61 million remaining in the Trust for distribution. (*Id. at 50-51.*) Appellants note the pot of money should grow as the Trustee pursues avoidance actions for preferential transfers in the Bankruptcy Court. (*Id. at 31-32.*) The parties dispute the potential value of gift card holder claims if Appellants prevail on appeal and are permitted to move forward with class certification. Appellants suggest $20-30 million would satisfy the claims of all gift card class members, whereas Appellees argue the value of the claims will be substantially more. (*Id. at 30.*)

III. Discussion

Appellants offer several arguments to support their appeals. First, they assert the Bankruptcy Court should have found excusable neglect for their failure to file timely proofs of claim. More directly, Appellants were not given adequate notice of the Bar Date in accordance with due process requirements. With respect to the adequacy of notice, Appellants challenge the Bankruptcy Court's finding that they were unknown creditors, and even if they were unknown creditors, Appellants contend notice by publication was still insufficient under the circumstances. Since Appellants were allegedly not given proper notice of the bankruptcy proceeding, they contend they are not bound by subsequent action in the case, including the $50 de minimus provision of the Distribution Plan. Lastly, the Bankruptcy Court erred in not granting the motion for class certification.

Appellees claim these appeals are equitably moot because the Distribution Plan has been substantially consummated, which was acknowledged by the Bankruptcy Court. Further, Appellant Beeman is the sole individual with standing because only he has a pecuniary interest in the outcome of the litigation. Appellees also question Appellants' ability to raise certain issues they allegedly did not raise before the Bankruptcy Court or in their statement of the issues required by Bankruptcy Rule 8006. On the merits, Appellees argue the Bankruptcy Court properly denied Appellants' request for leave to file untimely proofs of claim because Appellants received adequate **[*6]** notice of the Bar Date and did not demonstrate excusable neglect. Given that Appellants no longer have claims themselves, the Bankruptcy Court also properly held they could not represent the proposed class.

A. *Standard of Review*

District courts have jurisdiction over appeals from the bankruptcy courts pursuant to 28 U.S.C. § 158(a). See also Fed. R. Bankr. P. 8013 ("On an appeal the district court. . . may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings."). This Court reviews the Bankruptcy Court's findings of fact under a clearly erroneous standard and reviews conclusions of law de novo. Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs. Inc.), 922 F.2d 984, 989 (2d Cir. 1990). The abuse of discretion standard is applied to the Bankruptcy Court's denial of a request to file untimely proofs of claim. Midland Cogeneration Venture Ltd, P'ship v. Enron Corp, (In re Enron Corp.), 419 F.3d 115, 124 (2d Cir. 2005),

B. *Equitable Mootness*

Equitable mootness is a prudential doctrine that permits reviewing courts to dismiss bankruptcy appeals when implementing effective relief would be inequitable based on the particular facts of a case. R^2 Invs., LDC v. Charter Commc'ns (In re Charter Commc'ns, Inc.), 691 F.3d 476, 481 (2d Cir. 2012); Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm, of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.), 988 F.2d 322, 325 (2d Cir. 1993) ("Chateaugay I"). In this context, equitable mootness "is concerned with whether a particular remedy can be granted without unjustly upsetting a debtor's [Chapter 11] plan . . . . [It] thus requires the

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district court to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." Charter Commc'ns, 691 F.3d at 481.

If a Chapter 11 plan has been substantially consummated, the appeal is presumed equitably moot in this Circuit. Id. at 482; Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944, 952 (2d Cir. 1993) ("Chateaugay II"). A plan has been substantially consummated when there is a transfer of all or substantially all of the property as proposed by the plan, the successor to the debtor has assumed the business or management of all or substantially all of the property, and distribution has commenced. 11 U.S.C. § 1101(2); see also Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005) ("[A] plan is 'substantially consummated' upon [i] transfer of substantially all of the property proposed by the plan to be transferred; [ii] the reorganized debtor's assumption of the debtor's business; and [iii] commencement of distribution under the plan."). The presumption of mootness, however, can be overcome if all five of the following factors are met:

(a) the court can still order some effective relief; (b) such relief will not affect 'the re-emergence of the debtor as a revitalized corporate entity'; (c) such relief will not unravel intricate transactions so as to 'knock the props out from under the authorization for every transaction that has taken place' and 'create an unmanageable, uncontrollable situation for the Bankruptcy Court'; (d) the 'parties who would be **[*7]** adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings'; and (e) the appellant 'pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from[.]'

Chateaugay II, 10 F.3d at 952-53 (internal citations omitted). "Only if all five Chateaugay factors are met, and if the appellant prevails on the merits of its legal claims, will relief be granted." Charter Commc'ns, 691 F.3d at 482.

i. *Application of Equitable Mootness to this Case*

In its order dated August 14, 2012, the Bankruptcy Court found the Distribution Plan has been substantially consummated: .

Here, the Plan has been substantially consummated because: (i) the Plan transferred all of the property proposed to be transferred by the Plan from the Debtors to the Trust on the Effective Date; (ii) the Trust, as successor to the Debtors under the Plan, is managing the assets and liabilities, and administering claims dealt with by the Plan as of the Effective Date; and (iii) the Trust has begun making distributions to holders of allowed administrative and priority claims pursuant to the Plan and, to date, has made distributions to holders of allowed administrative and priority claims totaling at least $17 million (including the Trust's administrative costs).

Borders Group, 476 B.R. at 825. Appellants have provided no evidence and there is nothing in the record to suggest this finding is clearly erroneous. Moreover, since August of 2012, even more money has been distributed, including a round of distributions to allowed claims by unsecured creditors. Appellants acknowledge these transactions have occurred and, indeed, admit they did not oppose the consummation of the Plan in the bankruptcy proceedings below. (Apr. 30, 2013 Tr. at 21.) Therefore, the appeals are presumed moot.

Even though substantial consummation of a Chapter 11 plan is a "momentous event[,]" it does not necessarily make it inequitable for this Court to grant to relief. Chateaugay II, 10 F.3d at 952. If Appellants can establish each of the five Chateaugay factors necessary to rebut the presumption of mootness, they may prevail in obtaining relief. Nevertheless, in this case, Appellants fail to carry that burden, particularly in connection with the fourth and fifth factors.

Regarding the first Chateaugay factor, Appellants argue effective relief can still be fashioned. The Court agrees. The crux of Appellants' argument is that notice was insufficient with respect to gift card holders and therefore, should be re-done only in relation to that group. They suggest emails could be sent to Borders Rewards members for whom the Debtor had email addresses.[fn9] In the alternative, Borders could use Facebook or Twitter to notify gift

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card holders of the opportunity to assert claims. While there is room for debate regarding how notice should be sent to gift card holders if the Court reopens the period to file claims, it seems apparent a solution could be devised to provide notice that is **[*8]** more targeted than publication. Whether an email to Borders's broader customer base, social media platforms, or some other form of communication would appropriately meet due process requirements is an open question. The existence of that question, however, presupposes the Court's ability to grant relief.

All parties agree the second Chateaugay factor is inapplicable because the Debtor has liquidated its assets and will not re-emerge as a new corporate entity.

The Bankruptcy Court explained the impact of Appellants' proposed relief on the bankruptcy proceedings and the other parties thereto in its August 14, 2012 order:

[I]t is clear that allowing the Gift Card Holders to file late claims and certifying a class of Gift Card holders would have a disastrous effect on the remainder of the Debtors' estates and the final distributions of the Plan. As of June 2011, "the Debtors' books and records indicated the existence of approximately 17.7 million outstanding gift cards with unredeemed balances aggregating approximately $210.5 million." The Trust currently has approximately $110 million in cash and, after paying all administrative and priority claims and pursuing other avenues to collect assets, does not expect to have more than $90 million to pay unsecured creditors. Allowing the late filed claims of the Gift Card Holders and the certification of the Proposed Class would result in massive prejudice to the estate because the distributions to general unsecured creditors who filed timely proofs of claim would be severely impacted. Specifically, under the Plan, Class 3, general unsecured claims, totaled approximately $812 to $850 million. Class 1, priority non-tax claims, totaled approximately $300,000 to $400,000. The Debtors estimated that general unsecured creditors would only receive a 4%-10% recovery under the Plan while priority non-tax claimants would receive a 100% recovery under the Plan. If the Court granted the motions, an additional $210.5 million in claims would be added to either Class 1 (if the Court found that the Gift Card claims were entitled to priority treatment under 11 U.S.C. § 507(a)(7)) or Class 3. This would drastically change the estimated recovery for unsecured creditors and warrant a modification of the Plan and a re-solicitation of votes.

Borders Group, 476 B.R. at 825 (internal citations omitted). The third Chateaugay factor requires the Court to carefully examine the effects of Appellants' requested relief on transactions that have already occurred in addition to transactions that Will occur in the future as the bankruptcy proceedings move forward. Appellants suggest the Bankruptcy Court overstates its concerns because no transactions would have to be "unwound[.]" There is no exit funding from under which the requested relief would "knock the props out[.]" Thus, since this is a liquidation, the transactions are austere and allowing a class of potentially 17 million people would only minimally effect the administration of the Debtor's estate.

An intellectually honest analysis of the consequences flowing **[*9]** from opening the door to a class of gift card holders demonstrates the situation is not as simplistic as .Appellants suggest. The Bankruptcy Court described the prejudice to the estate if class certification is permitted as follows: "certifying a class of Gift Card holders would have a *disastrous effect* on the remainder of the Debtors' estates and the final distributions of the Plan"; "[a]llowing the late filed claims of the Gift Card Holders and the certification of the Proposed Class would result in *massive prejudice* to the estate"; "the distributions to general unsecured creditors who filed timely proofs of claim would be *severely impacted"*; [t]his would *drastically change* the estimated recovery for unsecured creditors and *warrant a modification of the Plan and a re-solicitation of votes.*" Id. (emphasis added). It is not hard to discern why the Bankruptcy Court held this view. There is as much as $210.5 million in unredeemed gift card balances. While the parties agree it is highly unlikely that even half of this amount would be claimed through the proposed class, the financial consultant to the Trust estimates roughly $50 million would satisfy the class claims.[fn10] (Appellee Br., Ex. W ¶ 10, Dkt. No. 13-24.) If the class is eligible for priority treatment, as Appellants argue, the remaining funds in the Trust would be nearly eviscerated. Likely, no more distributions would be made to any unsecured creditors, and some creditors would have no recovery whatsoever on their claims.

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Although the transactions in this case lack the level of sophistication and complexity that may be present in other cases, the concerns articulated by Bankruptcy Court and Appellees are not insignificant. The Distribution Plan was confirmed with the understanding that based on the Disclosure Statement, unsecured creditors would receive a 4-10% recovery on their claims. (Appellee Br., Ex. O at 9, Dkt. No. 1.3-16.) Appellants assert since this is a pot plan, none of the unsecured creditors are entitled to a specified amount of recovery. Even still, creditors might have voted differently or submitted objections if they had known priority claims would engulf an additional $50 million, as opposed to the $300,000 to $400,000 contemplated under the Plan. As the Bankruptcy Court implied, it would be inequitable to bind unsecured creditors to a Distribution Plan they voted for under vastly different circumstances without re-soliciting votes. Appellants respond the priority of claims set forth by the Bankruptcy Code cannot be changed by a vote of the creditors, so there is no unfairness if unsecured creditors get nothing because they are at the back of the collection line. No one disputes that timely filed, allowable priority claims are among the first to get paid. Yet, it is also indisputable that Appellants' requested relief seeks a significant alteration of the current Distribution Plan to the tune of $50 million. To suggest it is of no moment to add the proposed class of millions of gift card holders to the bankruptcy proceedings is disingenuous at best, making **[*10]** the third factor a much closer question.

The gravity of the proposed relief also informs the fourth Chateaugay factor. The parties who will be adversely impacted by Appellants' requested modification are the general unsecured creditors. Appellants presume the Trustee, counsel for the Trust, or the Official Committee of Unsecured Creditors notified the unsecured creditor class of the appeal and represents their interests. (Apr. 30, 2013 Tr. at 19.) However, Appellants carry the burden of establishing the Chateaugay factors. Compania International Financiera S.A. v. Calpine Corp. (In re Calpine Corp.), 390 B.R. 508, 518 (S.D. N.Y. 2008). They offer nothing more than assumptions without any evidence to support their position.[fn11] (*Id. at 19-20*.) They point to no provision in the Trust Agreement that obligates the Trustee to notify all unsecured creditors of the appellate proceedings, offer no affidavits from any unsecured creditors that they received notice thereof, and provide no testimony about their own attempts to notify unsecured creditors, presumably because they made none. As previously discussed, unsecured creditors who filed timely claims could be stripped of their entire recovery if the proposed class is certified. Accordingly, they were entitled to notice of this appeal, and Appellants have not established they received it. See Rm 18 Corp. v. Aztex Assocs. (In re Malese 18 Corp.), 426 B.R. 44, 51 (E.D. N.Y. 2010) (finding the fourth Chateaugay factor was not met where an "obviously affected third-party" was not given notice and an opportunity to participate in the appeal).

Appellants also fail to meet the fifth Chateaugay factor. While they did pursue a stay of the distributions scheduled for the end of 2012 in the Bankruptcy Court and this Court, the records indicates Appellants did not pursue their claims with all diligence. For example, Appellants' counsel began reviewing the case in early December and was retained by the end of December. Yet, Appellants did not appear at the confirmation hearing or file any objections to the Plan. After the Plan was confirmed, Appellants did not seek reconsideration of or appeal the confirmation order or seek a stay of the Effective Date.[fn12] Meanwhile, the Distribution Plan was substantially consummated. The fact that no stay of distributions was sought by Appellants until almost a year after they entered the bankruptcy litigation and the Plan was confirmed indicates the lack of diligence with which Appellants moved. See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.), 94 F.3d 772, 775-76 (2d Cir. 1996) ("Chateaugay III") ("[C]ourts presume that it will be inequitable or impractical to grant relief after substantial consummation of a plan . . . [unless, among other things,] the entity seeking relief has diligently pursued a stay of execution of the plan throughout the proceedings[.]").

The Second Circuit has clearly held rebutting the presumption of mootness requires a proponent of the appeal to meet all of the Chateaugay factors. See Chateaugay II, 10 F.3d at 952 ("[E]quitable considerations dictate that substantial consummation will not moot an appeal if **[*11]** *all* of the following circumstances exist. . . .") (emphasis added); Charter Commc'ns, 691 F.3d at 482 ("Only if *all* five Chateaugay factors are met. . . will relief be granted.") (emphasis added). Since Appellants have failed on at least two of the five factors, namely the fourth and fifth factors, their appeals are moot.

ii. *Equitable Mootness in Liquidation Cases*

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In a final attempt to resurrect their appeals, Appellants argue equitable mootness should. not apply to this case because it involves a liquidation, rather than a reorganization. To the extent Appellants argue equitable mootness cannot be employed in cases outside of the Chapter 11 reorganization context, there is authority in this Circuit to the contrary. See Cadle Co. II, Inc. v. PC Liquidation Corp. (In re PC Liquidation Corp.), *No. CV-06-1935 (SJF)*, *2008 WL 199457*, at *5 (E.D. N.Y. Jan. 17, 2008) (finding "the doctrine of equitable mootness is not limited to appeals of orders confirming reorganization plans") (collecting cases); ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 367 B.R. 84, 96 (S.D. N.Y. 2007) (applying equitable mootness where the "Debtors have been liquidated and effectively cease to exist"); Allstate Ins. Co. v. Hughes, 174 B.R. 884, 890 (S.D. N.Y. 1994) (ruling an appeal was equitably moot where the debtors were not involved in a reorganization).

The Court is not aware of any binding precedent from the Second Circuit that excludes the application of equitable mootness in cases where the Debtor ultimately liquidates instead of reorganizing. Nor would such a restriction be apparent in light of the Chateaugay factors. Analyses pursuant to the Chateaugay factors already take into account the diverse circumstances surrounding liquidation and reorganization. For example, one district court highlighted these differences in stating,

[U]nraveling a substantially consummated reorganization plan can be difficult and inequitable — difficult in that it requires reversing multiple, often complex, future-looking transactions (securing financing, issuing equity, contracting with producers and/or suppliers, etc.) and inequitable in that it shifts the tables on non-adverse third parties (such as investors, financiers, etc.) who have acted in reliance on the debtor emerging from bankruptcy in accordance with the particulars of the reorganization plan. . . . [I]n a liquidation context, . . . the plan transactions tend to be discrete and relatively simple transactions aimed at disposing of the debtor's assets in the short term (sale or disposal of assets, services contracts to sustain the debtor through liquidation, etc.) and the non-adverse third narties transacting with the debtor are not doing so with any particular interest in debtor's future condition, let alone relying on debtor's future condition as contemplated by the particulars of any chapter 11 plan.

Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.), 407 B.R. 576, 587-88 (D. Del. 2009) (internal citations omitted). The third Chateaugay factor, examining whether relief will unravel intricate transactions and create an unmanageable situation for the Bankruptcy **[*12]** Court, encompasses the above listed considerations and provides a mechanism for evaluating the varying intricacies of a liquidation or reorganization plan based on the particular facts of the case. In sum, formulating a per se rule prohibiting equitable mootness in liquidation cases defeats the flexibility required to undertake an in-depth factual inquiry, which is critical to the Chateaugay analysis. In addition, such a prohibition would be superfluous because the Chateaugay factors already focus attention on the attendant circumstances that separate liquidations from reorganizations.

Based on the foregoing, Appellants' contention that the doctrine of equitable mootness should not apply to these appeals because they involve a liquidation of assets is unpersuasive. Careful consideration of the facts bear on whether the appeals are moot, and liquidation, by itself, is not dispositive of the availability of equitable relief.

IV. Conclusion

The appeals from the orders of the Bankruptcy Court denying leave to file untimely proofs of claim, denying the motion for class certification, and granting the objection to Appellant Traktman's proof of claim as untimely filed are moot. Since the appeals are moot, the Court need not reach the merits of the Motion to Stay, the Motion to Dismiss in the Traktman case, or the parties' remaining arguments. The Clerk of Court is respectfully directed to close the three related appeals, *Nos. 12 Civ. 7714*, *12 Civ. 7715*, and *13 Civ. 0080*, and to enter judgment consistent with this Order.

SO ORDERED.

[fn1] *Case No. 12 Civ. 7714* is an appeal by Appellants Beeman and Freij from the Bankruptcy Court order denying the Motion to Allow and Deem Timely Filed Gift Card Claims. In re BGI, Inc., f/k/a Borders Group Inc., *No. 11-10614 (MG)* (Bankr. S.D. N.Y. Aug. 14, 2012) (Bankr. Dkt. No. 2814). Case No. *12 Civ. 7715* is an appeal by Appellants

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Beeman, Freij, and Traktman from the Bankruptcy Court order denying the Motion for Entry of an Order (I) Pursuant to Rule 9014(c) Making Rule 7023 Applicable to the Allowance and Priority of the Class Proof of Claim (II) Certifying the Class of all Holders and Purchasers of Gift Cards (III) Allowing the Class Claim and (IV) Granting the Class Claim Priority Status. In re BGI, Inc., f/k/a Borders Group Inc., *No. 11-10614 (MG)* (Bankr. S.D. N.Y. Aug. 14, 2012) (Bankr. Dkt. No. 2815). *Case No. 13 Civ. 0080* is an appeal by Appellant Traktman from the Revised Order Approving the BGI Creditors' Liquidating Trust's Twenty-Fifth Omnibus Objection to the Allowance of Certain Claims sustaining the Trust's objection to Traktman's proof of claim as untimely filed and discharging the claim. In re BGI, Inc., f/k/a Borders Group Inc., *No. 11-10614 (MG)* (Bankr. S.D. N.Y. Nov. 26, 2012) (Bankr. Dkt. No. 2697). Due to the closely related legal and factual issues, all three appeals are resolved by this Order.

[fn2] Recognizing that preserving its customer base could attract potential buyers, Borders filed an immediate motion with the Bankruptcy Court seeking permission to honor pre-petition customer programs, such as gift cards. (Appellant Br., Ex. B, Dkt. No. 5-2.) In explaining the importance of the gift card program, Borders stated in its motion, "Honoring the Customer Programs is critical to the Debtors' ability to retain valuable relationships which, in turn, will help strengthen and preserve the Debtors' business and maintain their brand name." (*Id. ¶ 29*.)

[fn3] Borders continued to accept gift cards as payment for merchandise after it filed for bankruptcy until the last store closed. There were also several news articles and advertisements in the media encouraging customers to use their gift cards throughout 2011 and warning that since Borders was in bankruptcy, the gift cards may become unredeemable after the final stores closed. (Appellee Br. in Opp'n to Stay, Ex. H ¶ 12, Dkt. No. 8-9.)

[fn4] The Borders Rewards program was wholly independent of the gift card program. If a customer signed up for the Borders Rewards program, he or she would receive discounts and other benefits from Borders.

[fn5] The Data Warehouse database primarily contained information from May of 2008 to September of 2011. Prior to 2008, Amazon filled Borders's online orders. (Appellee Br., Ex. EE ¶ 2, Dkt. No. 13-32.) When the relationship ended, Amazon gave information for approximately 30,000 customers to Borders. (*Id.*) The information did not include what products or items were purchased or whether a gift card was used. (*Id.*)

[fn6] When asked why Appellants did not challenge the Distribution Plan prior to or shortly after its confirmation, Attorney Krislov stated, "I'm not a bankruptcy counsel. We contacted the Perkins Coie firm and . . . we did get on file with our motion [for leave to file late proofs of claim] before the effective date [of the Distribution Plan]. So that Mr. Buechler's clients and Court was [sic] aware of our existence at the time . . . We did not move to enjoin them [Appellees] at that point." (Apr. 30, 2013 Tr. at 21.) Attorney Krislov's explanation that he is not familiar with bankruptcy proceedings is less than compelling, especially in light of Appellants' numerous references to the Sharper Image case — a bankruptcy class action that also dealt with gift card holders represented by Attorney Krislo v. See generally In re TSIC. Inc., f/k/a Sharper Image Corp., *No. 08-10322 (KG)* (Bankr. D. Del. Sept. 9, 2008) ("Sharper Image"); (Appellant Br. at 37) ("Krislov & Associates, Ltd. is an experienced class counsel in consumer cases and its attorneys represented a similar Gift Card Holder class in Sharper Image, obtaining full recovery for all those who retained their gift cards.").

[fn7] Appellant Traktman did not join the motion for leave to file late claims, *Supra* n.1. Rather, Traktman filed an untimely proof of claim on February 4, 2012. The Bankruptcy Court sustained the Trust's objection to Traktman's proof of claim on November 26, 2012 as untimely filed and discharged the claim. (Bankr. Dkt. No. 2967.)

[fn8] Since Appellants were not permitted to file late proofs of claim, their claims were effectively extinguished. The Bankruptcy Court reasoned that if Appellants had no claims themselves, they could not serve as class representatives. Borders Group, 476 B.R. at 826-27.

[fn9] On July 21, 2011, Borders CEO Mike Edwards sent an email to Borders Rewards members informing them, among other things, gift cards would be honored throughout the liquidation sales. (Appellant Br., Ex. H, Dkt. No. 5-8.) Appellants argue email communication was far more likely to reach gift card holders than a single publication in the

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New York Times. Appellants and Appellees disagree about the availability of this medium to provide notice. Appellees claim after selling the Borders Rewards database to Barnes & Noble in September of 2011, they can no longer access the email addresses to provide notice as Appellants propose. Appellants believe Appellees still have access to the information in the database based on some assertions contained in court documents filed in June of 2012. Appellants also argue the database could be discoverable from Barnes & Noble by court order, and there is nothing in the record to establish the Borders Rewards database is no longer available.

[fn10] Appellants argue the amount is sufficiently less, proposing S20-30 million would satisfy the claims of the proposed class. When the Court inquired of Appellants at oral arguments as to how they reached this figure, Appellants' counsel responded, "[W]e all, I think, can rely on Ms. Matson's firm's calculation [of $49 million] . . . subject to, of course, diminution over time, which we'vebeen another year or so, and the number of people that actually made claims, which is never, if we get to 50%, it's a good day. And that's why we're figuring that the $20 million is likely . . . ." (Apr. 30, 2013 Tr. at 56.) The number Appellants propose is exceedingly speculative.

[fn11] For example, when asked by the Court for evidence demonstrating the fourth Chateaugay factor has been met, Appellants' counsel made the following statements: "[T]he trust has had notice of this proceeding since the beginning. And the largest creditors sit on this trust. And they have to be well aware of what's going on." (Apr. 30, 2013 Tr. at 19); "[I]t would be incredibly surprising to me if all of the major constituents did not know what was going on." (*Id.*); "I don't know specifically what other information the trust provides or the trustees . . . provide to the general creditor body . . . [b]ut clearly if they're making distributions to these people, if they're in communication with them, then it's their burden and obligation to keep them informed . . . ." (*Id. at 19-20*); "[T]hey [the Trust] had notice, as the representative of all the creditors in this case, and they are well apprised of what our position is. So I can't think in any circumstance that any creditor would be able to say, I was completely unaware of this because my agent knew about this but he didn't communicate it with me." (*Id. at 20*); "In effect, . . . notice to Mr. Buechler [counsel for the Trust] is in effect notice to those people [the unsecured creditors]." (*Id.*)

[fn12] Even though Appellants did not appeal confirmation of the Distribution Plan, their requested relief is tantamount to a collateral attack because of the drastic changes to the distributions that would be implicated.

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General Information

Result(s)	Appeal Dismissed
Related Docket(s)	1:12-cv-07714 (S.D.N.Y.); 1:12-cv-07715 (S.D.N.Y.); 1:13-cv-00080 (S.D.N.Y.)
Topic(s)	Bankruptcy Law
Industries	Retail Business & Services

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