

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
SII LIQUIDATION COMPANY,)	Case No. 10-60702-rk
)	(Jointly Administered)
Debtor.)	
)	Judge Russ Kendig

**CREDITOR TRUSTEE’S RESPONSE IN OPPOSITION TO MOTION
OF BEST AGGREGATE CARRIERS, INC., P.G. BULK, INC. AND
FAST FLORIDA FREIGHT, INC. (I) FOR LEAVE TO FILE
LATE ADMINISTRATIVE EXPENSE CLAIMS *INSTANTER*, AND (II) FOR
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS**

John B. Pidcock, not individually but as the trustee (the “*Creditor Trustee*”) of the Schwab Industries, Inc. Creditor Trust (the “*Creditor Trust*”) appointed in the above-captioned chapter 11 bankruptcy cases (the “*Bankruptcy Cases*”), hereby submits his response (the “*Response*”) in opposition to the motion of Best Aggregate Carriers, Inc. (“*BACP*”), P.G. Bulk, Inc. (“*PGBI*”) and Fast Florida Freight, Inc. (“*FFFF*” and together with BACI and PGBI, “*Best Aggregate*”) (i) for leave to file late administrative expense claims *instanter* (the “*Motion for Leave*”) and (ii) for allowance and payment of administrative expense claims (the “*Motion for Allowance*” and together with the Motion for Leave, the “*Motions*”). In support of this Response, the Creditor Trustee respectfully states as follows.

BACKGROUND

The Chapter 11 Cases

On February 28, 2010 (the “*Petition Date*”), the above-captioned debtors and debtors-in-possession (the “*Debtors*”) each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “*Bankruptcy Code*”) in the United States Bankruptcy Court for the Northern District of Ohio (the “*Court*”).

On December 15, 2010, the Court entered an order (the “*Confirmation Order*”) confirming the *First Amended Joint Plan of Liquidation Dated October 26, 2010* (the “*Joint Plan*”), which was proposed jointly by the Official Committee of Unsecured Creditors and the Debtors. Pursuant to the Joint Plan and the *Schwab Industries, Inc. Creditor Trust Agreement* (the “*Creditor Trust Agreement*”) entered into between the Debtors, the Committee and John B. Pidcock, the initial Creditor Trustee appointed under the Joint Plan, most of the remaining property of the Debtors’ estates vested in a creditor trust (the “*Creditor Trust*”), pursuant to which the Creditor Trustee will liquidate such assets, pursue various causes of action and distribute all resulting proceeds to the Debtors’ creditors in accordance with the Joint Plan.

The Joint Plan included a schedule of unpaid administrative claims, which totaled \$1,326,216.63 (the “*Allowed Administrative Claims*”), as set forth in Schedule 1.6 of the Joint Plan. The Debtors and the Committee prepared Schedule 1.6 based upon, among other things, the Debtors’ books and records and administrative expense claims filed in accordance with the Bar Date Order (defined below), and in order to evaluate the feasibility of the Joint Plan. In particular, Schedule 1.6 was intended to guide the Creditor Trustee in making a determination as to whether sufficient assets would be available to pay, *inter alia*, the Allowed Administrative Claims, such that the Joint Plan could go effective. Pursuant to the Plan, if such a determination cannot be made, the Creditor Trustee will invoke the structured dismissal provision of the Joint Plan and proceed to a dissolution in the courts of the State of Ohio. *See* Joint Plan, Section 7.20.

The Administrative Claims Bar Date

On July 9, 2010, the Court entered an order (the “*Bar Date Order*”) fixing a deadline of August 12, 2010 (the “*Initial Bar Date*”) for all persons and entities, excluding government entities, to file proofs of claim against the Debtors.¹

This Initial Bar Date applied not only to general unsecured but also claims for unpaid administrative expenses incurred by the Debtors on or prior to July 13, 2010, including

any claims arising under sections 503(b), 507(a)(8), 507(b) or 546(c)(2), including without limitation: (i) fees payable under 28 U.S.C. § 1930, (ii) actual and necessary costs and expenses incurred in the ordinary course of the Debtors’ business, (iii) actual and necessary costs and expenses of preserving the Estate or administering these Chapter 11 Cases (specifically excluding any professional fee claims to the extent allowed by final order of this Court).

Docket No. 529, at ¶ 5.

The Bar Date Order further provided that proofs of claim filed thereunder, including administrative claims of the nature described above, were to be filed so as to be received by the Debtors’ claims and noticing agent, The Garden City Group, Inc. (“*Garden City*”), by the Initial Bar Date.

Pursuant to the Certificate of Service [Docket No. 552] with respect the Bar Date Order, Best Aggregate received notice of the Initial Bar Date by mail at 12164 Tamiami Trail, Punta Gorda, Florida 33955.²

¹ Additionally, the Confirmation Order provided for a supplemental administrative claims bar date of January 14, 2011 (the “*Supplemental Bar Date*”) for those Other Administrative Expense Claims (as defined in the Joint Plan) arising after July 12, 2010. Based upon the documentation attached to the Motions, however, it appears that Best Aggregate’s alleged administrative expense claims relate only to trucking services provided prior to July 12, 2010.

² Indeed, the Certificate of Service discloses that three copies of the notice of the Initial Bar Date were sent to Best Aggregate at the referenced address – one copy to BACI and two copies to PGBI.

Best Aggregate's Motion and the Creditor Trustee's Omnibus Administrative Claims Objection

On January 7, 2011, Best Aggregate filed a *Motion for an Order Limiting Notice of Best Aggregate's Motion for Leave and Motion for Allowance* (the "*Motion to Limit Notice*").

On February 7, 2011, the Creditor Trustee filed his *First Omnibus Objection to Claims (Objection to Overstated and Misclassified Administrative Claims, Duplicative Administrative Claims, Late Filed Administrative and Priority Claims, Improper Section 503(b)(9) Claims and Resolved or Withdrawn Administrative and Secured Claims* (as amended, the "*Administrative Claims Objection*").

Although Best Aggregate filed its Motion to Limit Notice on January 7, 2011, Best Aggregate did not actually file the Motion for Leave and the Motion for Allowance until February 23, 2011. By the Motion for Leave, Best Aggregate seeks authority to file late administrative expense claims (the "*Best Aggregate Administrative Claims*") based upon excusable neglect, pursuant to Rule 9006(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*"). The Motion for Allowance seeks allowance of the Best Aggregate Administrative Claims, totaling \$102,784.10, for trucking services provided to the Debtors for the period from April 30, 2010 through June 5, 2010.

DISCUSSION

For the reasons set forth below, the Creditor Trustee submits that the Motion for Leave should be denied, as Best Aggregate's basis for failing to timely file its Administrative Claims does not constitute excusable neglect. Additionally, the Creditor Trustee submits that the information provided to support the Motion for Allowance is insufficient to determine the amount and extent of the Best Aggregate Administrative Claims.

A. Best Aggregate’s Bases for Failing to Timely File the Administrative Claims Do Not Constitute Excusable Neglect.

Bankruptcy Rule 9006(b) provides that, subject to certain exceptions:

[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Whether to allow a late filed claim based upon excusable neglect lies within the discretion of the Bankruptcy Court and requires a balancing of the equities. *See In re Transue & Williams Stamping Co.*, 242 B.R. 363, 36 (Bankr. N.D. Ohio 1999). As set forth in the Supreme Court’s decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, the circumstances relevant in a party’s failure to timely file a claim include (i) the danger of prejudice to the debtor, (ii) the length of the delay and its potential impact on judicial proceedings, (iii) the reason for the delay, including whether it was within the reasonable control of the movant, and (iv) whether the movant acted in good faith. 507 U.S. 380, 395 (1993). The movant bears the burden of proving its failure to timely file a claim is the result of excusable neglect. *In re Peninsular Oil Corp.*, 399 B.R. 532, 537 (Bankr. M.D. Fla. 2008).

The Creditor Trustee submits that, applying the factors enumerated in *Pioneer* to the circumstances present in this matter requires this Court to find that Best Aggregate’s failure to file its Administrative Claims prior to the Initial Bar Date is not the result of excusable neglect.

i. The Danger of Prejudice.

The danger of prejudice not only analyzes the potential prejudice to the debtor, but includes the prejudice to other parties. *In re Intelligent Medical Imaging, Inc.*, 262 B.R. 142, 145 (Bankr. S.D. Fla. 2001). Here, given the structure of the Joint Plan, the late filing of the Best Aggregate Administrative Claims “would produce substantial prejudice to the other creditors in

the case, in that it would greatly reduce the distribution to unsecured creditors.” *See id.* (holding that a claim more than \$50,000 above the scheduled amount could have caused impaired classes to reject the plan of liquidation with knowledge that the higher claim would decrease the amount available for distribution).

Best Aggregate’s Administrative Claims would undoubtedly cause substantial prejudice to *all* of Debtors’ creditors, as it would result in an additional \$100,000 of Allowed Administrative Claims that must be paid before any distribution could be made to pre-petition unsecured creditors. More importantly, the allowance of Best Aggregate’s Administrative Claims – which are in an amount sufficient to result in a significant increase in the overall Administrative Claims pool – may result in a serious disruption in the Creditor Trustee’s ability to determine that sufficient cash proceeds will exist to satisfy Allowed Administrative Claims such that the Joint Plan can go effective. The result of dismissal, and a state court dissolution of the estates’ remaining assets, would unquestionably cause substantial prejudice to all creditors of the Debtors, as any potential recovery would be delayed and possibly reduced or eliminated by such dismissal.

ii. The Length of Delay and Potential Impact on Judicial Proceedings.

The impact of the length of delay on efficient court administration is another “compelling factor.” *In re Specialty Equipment Companies, Inc.*, 159 B.R. 236, 240 (Bankr. N.D. Ill. 1993). Allowing a claim filed after the confirmation of the Plan to be deemed timely filed will adversely affect the administration of the case. *In re Intelligent Medical Imaging*, 262 B.R. at 146. Indeed, “[w]ithout a final claims deadline, participants in the reorganization process would be hindered by undue caution in their negotiations and in voting on the plan.” *Id.* (citing *In re Trump Taj Mahal Assoc.’s*, 156 B.R. 928, 938 (Bankr. N.J. 1993); and compare *In re Freightway Corp.*, 171 B.R. 41, 43 (Bankr. N.D. Ohio 1994) (finding excusable neglect did not exist where, *inter*

alia, the Court had already approved a plan of reorganization and reconsidering claims would “further delay the DIP’s reorganization”) *with In re Sterling Rubber Products Co.*, 316 B.R. 485, 490 (Bankr. S.D. Ohio 2004) (finding no prejudice because no plan was filed in reliance on a disallowed claim and creditors did not rely on the disallowance of a claim in voting on a plan).

Best Aggregate waited over six months after the Initial Bar Date to assert its Administrative Claims – a period that courts have previously found to be an “egregious length of time beyond the bar date.” *In re Specialty Equipment Companies*, 159 B.R. at 240. Additionally, the Plan was confirmed more than two months before Best Aggregate filed its Motion for Leave, and the Creditor Trustee submits that the Plan was prepared and the creditors voted on the Plan in reliance on the claim amounts that existed as of the Initial Bar Date, which did not include the substantial Best Aggregate Administrative Claims. Further, allowing the Best Aggregate Administrative Claims at this time would adversely impact the judicial proceedings, as it would add more than \$100,000 to the substantial chapter 11 administrative claims that must be paid before the Effective Date of the Plan can occur. Indeed, as discussed above, allowing the Best Aggregate Administrative Claims to be deemed timely filed could result in the conditions to the Effective Date not being met, the consequence of which will be a dismissal of this case and a liquidation of the estates in the Ohio state courts.

iii. The Reason for the Delay.

Many circuits consider the reason for the delay to be the preeminent factor in the *Pioneer* analysis. *In re Sterling Rubber Products Co.*, 316 B.R. at 490 (citing *In re Kmart Corp.*, 381 F.3d 709, 715 (7th Cir. 2004); *U.S. v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Graphic Comm. International Union v. Quebecor Printing Proficence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (9th Cir. 2000); *Allied Domecq Retailing USA v. Schultz*, 254 B.R. 149, 153 (6th Cir. B.A.P. 2000)). Generally speaking, this factor

focuses on the blameworthiness of the moving party. *In re Payless Cashways, Inc.*, 230 B.R. 120, 139 (8th Cir. B.A.P. 1999). Courts are most willing to find excusable neglect where the movant failed to comply with a deadline because, through no fault of its own, it had no notice of the deadline. *In re Ryan*, 350 B.R. 632, 634 (D. S.C. 2006) (citing *In re Jackson*, 98 B.R. 738, 742 (Bankr. D. Md. 1986)).

The basis offered for Best Aggregate's failure to timely file its Administrative Claims is that the Debtors' representatives told Best Aggregate that payment for its services was "guaranteed."³ Motion for Leave, ¶ 16(c); J.T. Young Affidavit, ¶ 6. Notably, however, the Motion for Leave acknowledges that the individual that supposedly "guaranteed" the payment of Best Aggregate's Administrative Claims is David Landrip, the *former* senior vice president of the Debtors. Motion for Leave, ¶ 7. Accordingly, Best Aggregate's basis for excusable neglect is the statements of a person that was not employed by the Debtors at the time he made the statements. Assuming *arguendo* that Mr. Landrip's statements are attributable to the Debtors, this would still not amount to excusable neglect, as Best Aggregate "chose its own course of action, rather than following the clear directives of this court" See *In re Oakton Beach & Tennis Club Real Estate Ltd.*, 9 B.R. 201, 205 (Bankr. E.D. Wis. 1981) (holding that creditor's reliance on supposed misstatements of the court clerk, rather than explicit court orders, was insufficient to establish excusable neglect).

iv. The Movant's Good Faith.

The movant's good faith is the final factor expressly enumerated in *Pioneer*. The Creditor Trustee has no basis to believe Best Aggregate is not pursuing the Motion for Leave in good faith, but it is inexplicable why Best Aggregate filed the Motion for Leave over six months

after the Initial Bar Date, two months after the Confirmation Order and more than one month after its counsel filed an appearance in these bankruptcy cases.

B. The Motion for Allowance Does Not Allow the Creditor Trustee to Sufficiently Evaluate the Best Aggregate Administrative Claims.

The Motion for Allowance attaches over twenty pages of accounts receivable aging reports (the “AR Reports”) that purportedly evidence the Best Aggregate Administrative Claims. The AR Reports, however, include pre-petition charges dating back as early as January 30, 2010. Therefore, in the event that this Court deems the Administrative Claims timely filed, the Creditor Trustee requests that Best Aggregate be required to provide copies of the invoices listed in the AR Reports to reconcile the asserted claim with the Debtors’ records.

CONCLUSION

For the reasons set forth above, the Creditor Trustee submits that the Motion for Leave must be denied, as Best Aggregate’s bases for not timely filing its Administrative Claim do not constitute excusable neglect. Additionally, the Motion for Allowance should be denied, as Best Aggregate fails to provide sufficient evidence to prove the amount of that claim.

³ Best Aggregate also alludes to the fact that it was not represented by counsel until recently. Motion for Leave, ¶ 9; J.T. Young Affidavit, ¶ 3. This justification has been rejected by other courts. *See e.g., In re Payless Cashways, Inc.*, 230 B.R. at 139; *In re Peninsular Oil Corp.*, 399 B.R. 532, 538 (Bankr. M.D. Fla. 2008).

Dated: March 16, 2011

**JOHN B. PIDCOCK, NOT INDIVIDUALLY
BUT AS CREDITOR TRUSTEE OF THE
SCHWAB INDUSTRIES, INC. CREDITOR
TRUST**

By: /s/ Thomas R. Fawkes
One of His Attorneys

Aaron L. Hammer, Esq.
Thomas R. Fawkes, Esq.
FREEBORN & PETERS LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677
Telephone: 312.360.6000
Facsimile: 312.360.6573