

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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In re:) Case No. 10-60702
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SII LIQUIDATION COMPANY,) *Chapter 11*
)
Debtor.) JUDGE RUSS KENDIG
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)
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_____)

REPLY TO CREDITOR TRUSTEE'S RESPONSE IN OPPOSITION TO BEST
AGGREGATE CARRIERS, INC., P.G. BULK, INC. AND FAST FLORIDA FREIGHT,
INC.'S MOTION FOR LEAVE TO FILE LATE ADMINISTRATIVE EXPENSE
CLAIMS INSANTER

Best Aggregate Carriers, Inc., P.G. Bulk, Inc. and Fast Florida Freight, Inc. (hereinafter collectively referred to as "Movants"), by and through undersigned counsel, hereby submits its Reply to the Creditor Trustee's Response in Opposition to Movants' Motion for Leave to File Late Administrative Expense Claims. In support of this Reply, said creditor respectfully represents as follows:

DISCUSSION

1. Movants' only desire in filing its Motion for Leave and Motion for Administrative Expense Claims is to be treated equally like all of the other entities who provided services to Debtor who allowed the Debtor to be sold as a going concern.

2. While the Creditor Trustee does point out that many circuits focus on the reason for the delay as the preeminent factor in deciding excusable neglect, the Creditor Trustee's response seems to focus on two of the other three factors.

3. For the reasons set forth below, Movants request that this court enter an order allowing Movants to file a late administrative claim because its failure to file its claims were the result of excusable neglect.

The Danger of Prejudice

4. The Creditor Trustee's focus on the danger of prejudice to all of the Debtor's creditors is a red herring and only meant as misdirection for the court.

5. Most courts that have addressed the issue of prejudice conclude that the only relevant inquiry is whether the debtor, not other creditors, would be prejudiced as the result of permitting a late claim. Accordingly, in a liquidating plan there is very little danger of prejudice. See, e.g., *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730 (5th Cir.1995); *In re Pappalardo*, 210 B.R. 634 (Bankr. S.D. Fla. 1997); *In re Smith*, 200 B.R. 135 (Bankr. S.D. Miss. 1996); *In re Sacred Heart Hospital of Norristown*, 186 B.R. 891 (Bankr. E.D. Pa. 1995). Obviously, every late claim, if allowed, will dilute the recovery to other creditors. If such circumstances were to be recognized as prejudice, then it would be virtually impossible to ever grant relief to extend the time to file proofs of claim. *In re Premier Membership Services, LLC*, 276 B.R. 709 at 714 (Bankr. S.D. Fla. 2002).

6. In the present case, as the Creditor Trustee has pointed out, the scheduled unpaid administrative claims totaled \$1,326,216.63. In the sale of Debtor to Old Castle, at least \$1,400,000.00 was allowed for administrative expenses alone in Old Castle's bid for the Debtor. That fails to take into account the \$850,000.00 unsecured creditor base carve out and around

another \$600,000.00 from the 15% “gift” from the secured lenders to the unsecured creditors for the amount recovered by the secured lenders over \$51,000,000.00. Movants’ administrative expense claims for \$102,784.10 are a mere drop in the bucket of an almost \$58,000,000.00 bankruptcy, not to mention that the services provided allowed the Debtor to be sold as a going concern.

7. Movants provided invoices to the Debtor throughout the time it was providing services. Movants believed its services would be scheduled and paid in the ordinary course of business. See affidavit of JJ Young.

8. Debtors were aware or at least should have been aware of these claims when they were provided.

9. In the plan of reorganization, the administrative claimants are scheduled to be paid 100% of their administrative claims.

10. The inclusion of Movants claims should not change that so long as the Creditor Trust is administered efficiently.

11. The Creditor Trustee only now objects after the Creditor Trust has been repeatedly flogged by professional fees and there is some concern that all administrative fees may not get paid.

The Length Delay and Potential Impact on Judicial Proceedings

12. The Creditor Trustee cites that Movants’ Motions were filed over six months after the Initial Bar Date.

13. However, “the mere length of delay alone is not in any way dispositive, except to the extent that the delay affects judicial proceedings.” *Id.* at 715 citing *Sacred Heart Hospital*, 186 B.R. at 895 (even a long and logically unjustified delay which has no significant impact on the

debtor's case should often be deemed excusable). Other courts have permitted late claims as much as two years after the bar date where there was no effect on judicial administration. See, e.g., *In re Beltrami Enterprises, Inc* , 178 B.R. 389 (Bankr.M.D.Pa.1994).

14. In our case, the Court has just recently confirmed the Debtors' Plan and the Creditor Trustee has just begun filing objections to claims. The delay in filing will not have any impact on the judicial proceedings and this case still has a long way until it is concluded.

The Reason for the Delay

15. The Creditor Trustee is correct; many circuits consider the reason for delay the most important factor in determining excusable neglect and it is for this reason, this Court should find that Movants filing late is excusable neglect.

16. The Creditor Trustee has mentioned that counsel for Movants filed its initial Motion to Limit Notice on January 7, 2011 and filed this Motion on February 23, 2011. This period of time was necessary to get counsel up to speed on the legal issues and facts surrounding Movants claims, not to mention that the Creditor Trustee has shown no prejudice with that delay.

17. Movants were told by David Landtrip ("Landtrip") that payment for its services were guaranteed and unconditional. See Affidavit of JT Young.

18. Movants believed that these payments would be in the ordinary course of business, like the payments they received had always been. Movants provided invoices throughout the period of time they were providing services. See Affidavit of JT Young.

19. At the time Landtrip initially made his representation that the payments were guaranteed, he was a senior vice president for the Debtor. Movants conversations with Landtrip months later when Landtrip began working with Old Castle were merely confirming the

conversations wherein Landtrip guaranteed payment for services when he worked for the Debtor. See Affidavit of JT Young.

20. The implication of the guaranteed payment was that it was unconditional. Unconditional in that it was not reliant on any further judicial proceedings or filings. Guaranteed to be paid no matter what. Movants relied on Landtrip's guarantee.

21. While Movants were providing the services, Movants asked Landtrip when they would be paid for services, and Landtrip, while still employed, reconfirmed that the payments were guaranteed and that Debtor needed Movants to keep providing services.

22. Even more so, it was reasonable for Movants to believe that they would be paid in the ordinary course of business without further judicial proceedings or filings because during the time Movants were providing trucking services, almost all of Debtor's other suppliers were being paid in the ordinary course of business.

23. Movants provided invoices, so it is reasonable to believe that Movants would be scheduled because Debtor knew about the services.

24. According to the cash flow projection in the Debtor's DIP financing motions, during the time Movants provided the services, Debtor was projected to spend around \$4,300,000.00 during the 6 weeks Movants provided services. See attached as Exhibit A; Schwab Industries, Inc. Cash Flow Forecast, Document No. 44, Operating Disbursements, Line Item - Purchases, Freight and Fuel.

25. However, according to Schedule 1.6 of the Joint Plan, only \$63,310.71 in approved and filed post petition accounts payable are scheduled to be paid.

26. Either all of the providers were paid in the ordinary course of business or the schedule was completely unreasonable to rely on.

27. The Creditor Trustee relies heavily upon *In re Intelligent Medical Imaging, Inc.*, 262 B.R. 142 (Bankr. S.D. Fla. 2001). However, in that case, the reason for delay was an attorney error. Here, it is a layman's reliance on a guarantee of payment by the debtor.

28. Movants are composed of three trucking companies, and they are not attorneys. They relied on the guarantee for payment of the senior vice president of the Debtor and they should not be punished for this reliance.

Movants' Good Faith

29. Finally, as acknowledged by both parties, Movants have acted in good faith in filing its Motion for Leave there is no reason to believe they have not. In fact, counsel for Movants called the counsel for the Creditor Trustee on January 6, 2011 to discuss this issue and never got a call back until the week before the scheduled hearing date.

INVOICES FOR MOVANTS' MOTION FOR ALLOWANCE

30. Additionally, the Creditor Trustee had issues with the Movants' Aging Reports to demonstrate the services that were provided. In an attempt to correct this issue, attached are the invoices that correspond with the AR reports that were attached to the original Motion for Allowance. Invoices for PG Bulk, Inc. attached as Exhibit B, for Best Aggregate Carriers, Inc. attached as Exhibit C and Fast Florida Freight, Inc. attached as Exhibit D.

31. The sections of the invoices that are physically crossed out are for deliveries made to Old Castle after the sale.

CONCLUSION

WHEREFORE, for the foregoing reasons Best Aggregate Carriers, Inc., P.G. Bulk, Inc. and Fast Florida Freight, Inc., respectfully request that this Court enter an Order granting

Best Aggregate Carriers, Inc., P.G. Bulk, Inc. and Fast Florida Freight, Inc. Leave to File Late Administrative Claims and such additional relief that the Court deems equitable and just.

Dated: March 21, 2011

Respectfully submitted,
FINLEY & CO., L.P.A.

/S/ Matthew Thomas

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CERTIFICATE OF SERVICE

I certify that on March 21, 2011, the foregoing ***Reply to Creditor Trustee's Response in Opposition to Best Aggregate Carriers, Inc., P.G. Bulk, Inc. and Fast Florida Freight, Inc.'s MOTION for leave to file late Administrative Expense Claims Instantly*** was filed electronically with this Court's CM/ECF system. It was electronically transmitted via the Court's CM/ECF system to the following who are listed on the Court's Electronic Mail Notice List:

Notice will be electronically mailed to:

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