IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

In re: VEG LIQUIDATION, INC., Debtor **No. 5:13-bk-73597**
Ch. 7

ORDER

Before the Court is the debtor's *Joint Omnibus Objection of Debtors and Buyer to Certain Claims Asserted Pursuant to Bankruptcy Code Section 503(b)(9)* filed on May 2, 2014, at docket entry [895]; the response and countermotion filed by creditor D & T Farms on May 12, 2014, at docket entry [906]; and the reply filed by the debtor on June 9, 2014, at docket entry [985]. The parties agreed to have the Court decide the matter based on those pleadings. For the reasons stated below, the Court sustains the debtor's objection to D & T Farms's claim for administrative expenses under 11 U.S.C. § 503(b)(9).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Section 503(b)(9) designates an administrative claim for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." The debt in question arose from D & T Farms's sale of sweet potatoes to the debtor, who is in the business of producing canned vegetables for retail. The debtor does not dispute that part of the debt owed to D & T Farms was incurred within 20 days prior to the date it filed bankruptcy and in the ordinary course of its business. However, the debtor argues that the debt owed to D & T Farms is not entitled to administrative claim status because D & T Farms did not file a proof of claim designating the debt as an

administrative expense prior to the Court-established deadline.

BACKGROUND

On December 3, 2013, the Court entered an order establishing January 10, 2014, as the bar date for administrative expense claims under § 503(b)(9) to be filed with the Court. The 10-page order included a two-page notice, with a blank proof of claim form attached as an exhibit. The order set forth the deadline, the addresses to which the claims should be sent to the debtor, and the statement that

> [a]ny creditor of the Debtors holding a 503(b)(9) Claim that fails to file a 503(b)(9) Claim by the 503(b)(9) Claims Bar Date and in accordance with this order shall be forever barred, estopped, and permanently enjoined from asserting a claim under 503(b)(9) of the Bankruptcy Code against the Debtors or their estates. Further, that creditor shall not be entitled to receive any distribution from the Debtors' estate on account of it 503(b)(9) Claim . . . .

The two-page notice reiterated the deadline in capitalized and boldfaced text and included a separate section entitled "Consequences of failure to file section 503(b)(9) claim request" that stated:

> **ANY PERSON OR ENTITY HOLDING A 503(B)(9) CLAIM THAT FAILS TO FILE A 503(B)(9) CLAIM REQUEST SO THAT IT IS RECEIVED ON OR BEFORE THE BAR DATE AND IN THE MANNER DESCRIBED IN THIS NOTICE SHALL BE FOREVER BARRED AND ESTOPPED FROM ASSERTING A 503(B)(9) CLAIM AGAINST THE DEBTORS, ITS ESTATE, OR THE PROPERTY OF THE DEBTORS OR ITS ESTATE, ABSENT FURTHER ORDER OF THE COURT.**

The attached blank proof of claim form also advised of the January 10 deadline in two separate places.

On December 20, D & T Farms timely filed a PACA proof of claim in the amount of $86,505.96, alleging that the debt in question was entitled to PACA trust protection. However, D & T Farms did not file a separate § 503(b)(9) claim for the portion of that debt that was incurred within 20 days prior to the debtor's bankruptcy filing. Andrew M.

Jackson, counsel who was handling D & T Farms's claim in the debtor's bankruptcy at that time, stated that he was under the mistaken belief that he could not file both a PACA claim and a § 503(b)(9) claim for amounts arising from the same sale transactions. (Jackson Aff. ¶ 10.) He based this assumption on language in the November 27, 2013 order establishing PACA claim deadlines that stated that "[n]o creditor will be permitted double recovery." (Jackson Aff. ¶ 10.)

On January 20, ten days after the § 503(b)(9) claim deadline passed, Jackson contacted the debtor's counsel by telephone to discuss D & T Farms's PACA claim. During that conversation, Jackson asserts that he told the debtor's counsel that D & T Farms was also entitled to a § 503(b)(9) claim. (Jackson Aff. ¶ 5.) According to Jackson, the debtor's counsel responded that "he was open to settlement discussion" after discovery. (Jackson Aff. ¶ 6.) On February 3, Jackson again broached the subject of a § 503(b)(9) claim while discussing D & T Farms's PACA claim with the debtor's counsel, but no settlement was offered then or later. (Jackson Aff. ¶ 7.) D & T Farms did not attempt to file a late § 503(b)(9) claim despite its apparent conviction that it was entitled to administrative claim status for some of the debt.

The debtor subsequently filed an omnibus objection to multiple PACA proof of claims, including that of D & T Farms. At the March 24 hearing on the debtor's objection to D & T Farms's PACA claim, present counsel for D & T Farms argued that if the Court found that the debt was not entitled to PACA trust protection due to defective notice, the debt instead should be treated as an administrative claim under § 503(b)(9). The Court entered an order on April 14 sustaining the debtor's objection to D & T Farms's PACA claim, finding that the debt owed to D & T Farms was not entitled to PACA trust protection, and noting that it was not making a determination on D & T Farms's alternative argument that the debt should be considered an administrative claim under § 503(b)(9).

On May 12, D & T Farms formally petitioned the Court to consider its alternative argument by filing a combined response and countermotion [countermotion] to the debtor's motion to sustain objections to various § 503(b)(9) claims.[1] In its countermotion, D & T Farms argued that its administrative claim should be allowed under three legal theories: (1) by extension of the § 503(b)(9) claim deadline under Rule 9006 due to excusable neglect, (2) as an amendment to its PACA claim, which was filed prior to the § 503(b)(9) claim deadline, and (3) as an informal proof of claim established through pleadings filed with the court and correspondence with the debtor. As an exhibit, D & T Farms attached a prepared (but not separately filed) § 503(b)(9) proof of claim in the amount of $63,363.73, signed by Jackson and dated May 9, 2014. On June 9, the debtor and Sager Creek Acquisition Corp., the purchaser of substantially all of the debtor's assets, filed a response to D &T's countermotion, urging the Court to deny D & T's request. The Court will address each of D & T Farms's arguments below.

A. Extension of time to file a proof of claim under Rule 9006(b)

Federal Rule of Bankruptcy Procedure 9006(b)(1) provides that where there is a deadline to act, the Court has the discretion to enlarge the deadline after its expiration if the party requesting the enlargement shows that the failure to timely act was the result of excusable neglect. In a case factually similar to the case currently before this Court, the Supreme Court considered Rule 9006(b) and the standard of "excusable neglect" in the context of a late-filed proof of claim. *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship et al.*, 507 U.S. 380 (1993). The Court determined that the ordinary meaning of "neglect" necessarily contemplates inadvertence, mistake, and even carelessness. *Id.* at 388. However, the requirement that the neglectful behavior also be "excusable" prevents Rule 9006(b) from, effectively, rendering deadlines open-ended and unenforceable. *Id.* at 395.

[1]Although D & T Farms had not filed a § 503(b)(9) claim, the debtor formally objected to D & T Farms's asserted claim.

The Supreme Court adopted a balancing test for determining whether an instance of neglect is "excusable," noting the equitable nature of the determination and providing the following list of non-exclusive factors to be considered: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) whether the movant acted in good faith; and the (4) reason for the delay and whether it was within the reasonable control of the movant. *Id.* The 8th Circuit has stated that these four factors are not equally weighted, and that the fourth factor–the reason for the delay–is key. *Gaydos v. Guidant Corp.* (*In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*), 496 F.3d 863, 867 (8th Cir. 2007).

In its countermotion, D & T Farms addresses each of the elements set forth by the Supreme Court. It alleges that the delay in asserting its administrative claim was minimal[2] and that the debtor will suffer little or no prejudice for several reasons: its administrative claim in the amount of $63,363.73 is relatively small, the debtor has been aware of the claim (at least in some form) since D & T Farms filed its PACA claim on December 20, 2013, and the debtor already has set aside $86,505.96 pending determination of D & T Farms's PACA claim. D & T Farms also argues that the late claim will have a minimal impact on judicial proceedings because the debtor has not yet proposed a plan.[3] Finally, D & T Farms pleads that a good faith misunderstanding is to blame rather than any intent to ignore deadlines or flout procedure. Jackson explained that when he filed D & T Farms's PACA claim, he believed that pursuing alternative recovery under § 503(b)(9) would amount to "double dipping" in contravention of the November 27 order, which stated that "[n]o creditor will be permitted double recovery." (Jackson Aff. ¶ 10.) According to Jackson, he also assumed that the debtor would

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[2] D & T Farms asserts that the delay was only 24 days because on February 3, D & T Farms filed a response to the debtor's omnibus objection to PACA claims in which it defended its contention that its claim was entitled to PACA trust protection and also raised the alternative argument that part of the debt was a § 503(b)(9) claim.

[3] The debtor converted to a chapter 7 case on June 6, 2014, making this assertion irrelevant.

ultimately negotiate the administrative claim if the PACA claim was disallowed because "it was clear D & T Farms sold goods to Debtor within the 20 day period prior to the petition date." (Jackson Aff. ¶ 11.)

Clearly, D & T Farms's failure to file a § 503(b)(9) claim was a mistake and qualifies as "neglect" under Rule 9006(b). In determining whether it was also "excusable," the Court's primary focus is on the reason for delay. Jackson's explanation for why he failed to file a § 503(b)(9) claim–that he misunderstood the language in the November 27 order that stated "[n]o creditor will be permitted double recovery"–is problematical. First, this language was the last sentence of a paragraph that specifically addressed the effect filing a PACA claim has on a creditor who also may have another type of claim under bankruptcy law. The first sentence of the paragraph states:

> Nothing in this PACA Order prevents a PACA Claimant from moving for allowance and payment of any claim not subject to PACA under the Bankruptcy Code, including but not limited to claims under 11 U.S.C. § 503(b)(9), nor shall this PACA Order in any way be deemed to prevent the allowance of any claim not under PACA, regardless of whether or not those claims are based on the sale of produce.

(Nov. 27 Order, ¶ 22.) When read together with the sentence on which Jackson purportedly relied, the meaning is clear: while a creditor may have reason to file more than one claim for the same debt, the creditor can recover only once. The language specifically contemplates a creditor who may have both a PACA claim and a § 503(b)(9) claim–like D & T Farms. Jackson's reliance on a small part of that paragraph, taken out of context, is not reasonable. In addition, as the debtor argued, while multiple creditors in this case had both PACA and § 503(b)(9) claims, D & T Farms apparently was the only creditor that misinterpreted this language to its detriment.

Second, the separate § 503(b)(9) order is unequivocal regarding the filing deadline and the potential consequences of failing to timely file a proof of claim. That order warns that failure to file an administrative claim by the January 10 deadline would result in the creditor being "forever barred, estopped, and permanently enjoined" from pursuing its

claim. This and similar language appears more than once, in a prominent manner designed to catch the reader's eye. D & T Farms does not allege that it was unaware of the deadline, nor does it attempt to explain how it could be unsure of the meaning of that order. Even if, as D & T Farms argues, the language of the PACA order was viewed as ambiguous by D & T Farms's counsel, the language in the separate § 503(b)(9) order should have caused D & T Farms to make inquiries to ensure it had done everything necessary to preserve its claim prior to the deadline.

In the light of the Court finding against D & T Farms for the most heavily weighted factor, the other three factors cannot persuade the Court that D & T Farms's failure to timely file its § 503(b)(9) claim was the result of excusable neglect. Accordingly, the Court denies D & T Farms's request for extension of the proof of claim deadline under Rule 9006(b).

D & T Farms also cites to the language of § 503(a), the section governing administrative claims, which states that "[a]n entity may timely file a request for payment of an administrative expense, *or may tardily file such request if permitted by the court for cause*." (Emphasis added.) D & T Farms argues that this is a separate basis by which the Court has the authority to permit the late-filed claim. However, because "cause" is not defined in § 503(a), some courts rely on the "excusable neglect" standard of Rule 9006(b) to determine whether a tardily filed administrative claim should be permitted. *West Delta Oil Co. v. Hof* (*In re West Delta Oil Co.*), No. Civ. 01-1163, 2002 WL 506814, at *4 (March 28, 2002). While this Court recognizes that "for cause" and "excusable neglect" are different standards, the Court is satisfied that it would reach the same result under § 503(a) as it has under Rule 9006(b).

B. Amendment of a Previously filed Proof of Claim

D & T Farms alternatively requests the Court to allow it to amend its PACA proof of claim to instead reflect an administrative claim under § 503(b)(9). Generally, "' amendment to a claim is freely allowed where the purpose is to cure a defect in the claim

as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.'" *In re Fischer*, 109 B.R. 384, 387 (Bankr. E.D. Mo. 1989) (quoting *U.S. v. International Horizons, Inc.* (*In re International Horizons, Inc.*), 751 F.2d 1213, 1216 (11th Cir. 1985)). However, a court must scrutinize the request "'to assure that there [is] no attempt to file a new claim under the guise of an amendment.'" *Id.* The inquiry should be whether the purpose of the amendment is to set forth wholly new grounds of liability. *U.S. v. Kolstad* (*In re Kolstad*), 928 F.2d 171, 175 (5th Cir. 1991), *cert. denied*.

The Court can find no case law regarding the amendment of a non-administrative proof of claim to reflect an administrative expense. However, courts have found that where a requested amendment seeks to change the very nature of a proof of claim, such as from unsecured to secured, the change would constitute a new claim rather than an amendment. *See, e.g., Highlands Ins. Co., Inc. v. Alliance Operating Corp.* (*In re Alliance Operating Corp.*), 60 F.3d 1174, 1175 (5th Cir. 1995); *In re Wrenn Ins. Agency of Mo., Inc.*, 178 B.R. 792, 799 (Bankr. W.D. Mo. 1995); *In re Brown*, 159 B.R. 710, 715 (Bankr. D.N.J. 1993); *In re Metro Trans. Co.*, 117 B.R. 143, 148 (Bankr. E.D. Penn. 1990). In the present case, D & T Farms seeks the Court to convert a claim made pursuant to non-bankruptcy PACA law to an administrative expense under § 503(b)(9). The Court finds that this transformation would change the claim's nature and constitute an entirely new claim.[4] This finding is supported by the fact that two separate claims

[4] Some courts, finding that a requested amendment constitutes a new claim, examine whether the late-filed claim nevertheless should be allowed according to equity. *In re Brown*, 159 B.R. 710, 715 (Bankr. D.N.J. 1993); *In re Fischer*, 109 B.R. 384, 388 (Bankr. E.D. Mo. 1989). Five factors, originating from a tax case, are commonly considered. *See In re Miss Glamour Coat*, 1980 WL 1668, 80-2 U.S.T.C. (CCH), ¶ 9737, at 85, 431 (S.D.N.Y. Oct. 8, 1980). However, this equitable determination is only pertinent where the moving party is without fault as to the late-filed claim. *In re Fischer*, 109 B.R. at 389. As already determined by this Court in the analysis of Rule 9006(b), D & T Farms's failure to timely file its § 503(b)(9) was the result of its own oversight. Therefore, the equitable balancing test is not applicable here.

processes–including separate orders and separate deadlines– were established for administrative expenses and for debts entitled to PACA trust status. Therefore, the Court denies D & T Farms's request to amend its PACA claim to reflect a § 503(b)(9) claim.

C. Informal Proof of Claim

Finally, D & T Farms's third argument is that it previously established an informal proof of claim, and that a formally filed proof of claim should relate back to the informal proof of claim as an amendment. D & T Farms asserts that a combination of interactions and filings provided the debtor notice of its claim. These included:

- its PACA claim filed on December 20, 2013, which included invoices dated within 20 days prior to the date the debtor filing bankruptcy
- Jackson's telephone conversation with the debtor's counsel on January 20, 2014
- Jackson's telephone conversation with the debtor's counsel on February 3, 2014
- its February 3, 2014 response to the debtor's omnibus objection to PACA claims, in which it first argued to the Court that part of its PACA claim should be recognized as an administrative expense

The Eighth Circuit, recognizing informal proofs of claims, has stated the following:

> Great liberality in permitting amendments of claims in bankruptcy proceedings is proper, but the statute requiring that a proof of claim in writing be filed is clear, positive, and unambiguous and it must not be nullified in the name of equity. If the record made within the statutory period, *formal or informal*, disclosed facts showing an assertion of a claim against the estate and an intention by the claimant to share in its assets, there would be a basis for the proposed amendment.

In re Donovan Wire & Iron Co., 822 F.2d 38, 39 (8th Cir. 1987) (quoting *Tarbell v. Crex Carpet Co.*, 90 F.2d 683, 685-86 (8th Cir. 1937)). Therefore, the elements to be considered for an informal proof of claim are whether a document (1) was filed within the bar period, (2) explicitly states the nature and amount of the claim, and (3) evidences an intent to pursue the claim and hold the debtor liable. *In re Phillips*, 166 B.R. 129, 131 (Bankr. S.D. Iowa 1994).

Of the two instances of D & T Farms providing *written* notice of its administrative claim, only the PACA claim filed on December 20 occurred prior to the bar date of January 10, 2014.[5] The Court has already determined in the prior section that amendment of the PACA claim to reflect an administrative claim is improper. Analyzing the proposed amendment under the framework of an informal proof of claim provides the same result. The PACA claim did not explicitly provide notice of D & T Farms's intention to pursue an administrative claim or the amount of that administrative claim. The fact that the PACA claim included invoices from which the Court, the debtor, or any interested party could deduce, upon careful inspection, that D & T Farms was also entitled to an administrative claim is not sufficient to meet the requirements of an informal proof of claim. Accordingly, the Court finds that D & T Farms's did not establish an informal proof of claim.

Conclusion

For the foregoing reasons, the Court sustains the debtor's objection to D & T Farms's asserted § 503(b)(9) claim. While the Court is not unsympathetic to D & T Farms's circumstances, D & T Farms is not entitled to a late-filed or amended claim for administrative expenses.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 08/29/2014

[5] The two telephone calls also occurred after the § 503(b)(9) deadline passed. In addition, the Eighth Circuit's statement of law emphasizes that a claim–whether formal or informal–must be established by written record.

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