

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:)	Chapter 11
FANSTEEL, INC. et al.,)	Case No. 02-10109 (JJF)
)	
Debtors.)	Jointly Administered
)	

MEMORANDUM OF LAW IN SUPPORT OF FISHER-ANDERSON'S
MOTION TO ENLARGE BAR DATE TO ALLOW A LATE FILED
PROOF OF CLAIM

Fisher-Anderson, LC ("Fisher-Anderson" or "Fisher"), by and through its undersigned counsel, submits the following Memorandum of Law in Support of its Motion to Enlarge The Bar Date To Allow a Late Filed Proof of Claim (the "Motion"), and respectfully states:

I. STATEMENT OF FACTS

1. The deadline for filing a proof of claim was September 23, 2002. Debtor sent notice of this deadline to the service list attached to Debtor's Declaration of Service regarding Notice of Deadline for Creditors to File Proofs of Claim (the "Declaration"). According to this Declaration, Debtor sent Fisher's notice of the deadline to "Fisher-Anderson LC, PO Box 660-631, Dallas, TX, 75266-0631."

2. Fisher did not receive notice of the deadline. The address that Debtor used is an American Express payment center address. At one point in time, American Express

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was servicing the Lease, and if American Express received the notice, it failed to forward notice of the bar date to Fisher.

3. Debtor's counsel also failed to send notice of the claims bar date to Fisher's counsel, even though counsel was actively engaged in negotiations prior to the bar date and knew that Fisher had representation in the bankruptcy case.

4. Fisher believed that it was not required to file a proof of claim, since its position was that the Lease was a "true lease" which the Debtor was required to assume or reject, and since the Debtor had not yet assumed or rejected the Lease, it did not have a claim. In the summer of 2003, Fisher changed its counsel from the law firm of Coston & Lichtman to FagelHaber LLC.

5. Fisher filed a proof of claim in the amount of \$99,413.28 on September 15, 2003. The Motion is to request that the bar date be enlarged to allow the late filed proof of claim.

II. MEMORANDUM OF LAW

A. Introduction

6. Fisher meets the "excusable neglect" standard as set forth by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993). The *Pioneer* standard "requires inquiry into whether the failure to file resulted from neglect and then whether that neglect is excusable." *In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS 882, 6 (Bankr. E.D. Pa., 2003) discussing *Pioneer*. Fisher meets both parts of this standard.

7. In addition, Debtor's counsel knew that Fisher was represented by counsel. Therefore, even if this Court finds that "excusable neglect" standard of *Pioneer*,

does not apply to this case, the Model Rules of Professional Conduct require communications to be sent to counsel, not directly to Fisher. *In re Grand Union Company*, 204 B.R. 864, 875 (Bankr. Del. 1997). Debtor's counsel was actively involved in negotiations with counsel for Fisher prior to the bar date, yet chose to send notice to a payment servicing center instead. Under *Grand Union*, counsel had an ethical and legal obligation to send notice of the bar date to counsel for Fisher.

B. Fisher Made a Faultless Omission

8. The failure to file was based on Fisher's failure to receive notice and the assumption that the Lease was a "true lease" and not a financing agreement. The court in *In re Spring Ford, supra.*, found that neglect encompasses both simple, faultless omissions to act and, more commonly, omissions caused by 'carelessness'. *In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS at 6 quoting *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. at 388. At the time notice of the bar date was sent, Fisher's counsel and Debtor's counsel were engaged in negotiations as to whether the Lease would be assumed or rejected by the Debtor. Debtor's counsel maintained that the Lease was not a "true lease" but a financing agreement. Fisher maintained that the Lease was in fact a "true lease", which needed to be assumed or rejected by the Debtor. As such, Fisher believed that it was not required to file a proof of claim. The assumption that the Lease was a true lease and not a financing agreement constitutes a faultless omission to act.

C. The Neglect is Excusable

9. Based on the four-prong "excusable" test set forth in *Pioneer*, Fisher's omission to file a timely proof of claim is excusable. In discussing this test, the court in

In re Spring Ford stated, "The determination of whether the neglect is excusable is 'at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission. These include... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS at 6-7 quoting *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. at 395. Each prong of the test weighs in Fisher's favor.

10. First, there is no danger of prejudice to the debtor by allowing Fisher's proof of claim to be filed late. Prior to the claims bar date, Fisher's counsel and Debtor's counsel discussed whether the Lease would be assumed or rejected by the Debtor. Debtor's counsel has been aware of the Debtor's default under the Lease for over a year. The Debtor's awareness of Fisher's claim is sufficient for the Debtor not to be prejudiced by an untimely proof of claim. See *In re McKissick*, 2003 Bankr. LEXIS 1103, 10 (Bankr. W.D. Pa., 2003, where the court noted that "Debtor is and has been throughout the course of this case fully aware of the nature and amount of CIT's claims. CIT's claim is not a surprise.")

11. Second, while the length of the delay is substantial, Fisher filed its proof of claim at the point in time during negotiations it was ready to concede that the Lease was not a true lease but rather a financing agreement. As a true lease, Fisher would not have been required to file a proof of claim, as the lease would have been assumed or rejected in bankruptcy. Therefore, soon after Fisher's concession, Fisher promptly filed its proof of claim.

12. Allowing Fisher's late proof of claim will not interfere with the judicial proceeding. In *Pioneer*, in allowing the claimant to file the late proof of claim, the court found, "that there was no danger of prejudice to the debtor or the administration of judicial proceedings, as the claim, though untimely, was accounted for in the reorganization plan and was filed prior to the plan's effective date." *In re McKissick*, 2003 Bankr. LEXIS at 9 discussing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380. Similarly, Fisher's proof of claim has now been filed since September 12, 2003. If the Debtor has not already accounted for Fisher's claim in its Reorganization Plan (the "Plan"), then the Debtor should account for Fisher's claim, since Fisher's claim was filed well before confirmation of the Plan and its Effective Date.

13. Third, Fisher has a valid reason for the delay in filing its proof of claim. Fisher did not receive effective notice of the proof of claims deadline. The Debtor sent Fisher's notice of this deadline to a post office box belonging to a Fisher payment center. While Fisher knew that Debtor had filed for bankruptcy and a bar date for claims would be set, courts have found that claimants need not seek out information regarding the claims bar date, but rather, a debtor must provide reasonable and effective notice. In *In re Spring Ford*, in granting claimants' additional time to file a proof of claim, the court stated that, "While it is true that Claimants knew of the bankruptcy case, they had no duty to inquire about the claims bar date." *In re Spring-Ford Industries, Inc.*, 2003 Bankr. LEXIS at 8.

14. The responsibility does not lie with creditors or claimants to search out what is required procedurally of them in this regard. The bankruptcy rules provide them with a right to appropriate and effective notice. *In re Spring Ford Industries, Inc.*, 2003

Bankr. LEXIS at 9 quoting *Dahlkemper Co. v. Liberatore (In re Dahlkemper Co.)*, 170 B.R. 853, 861 (Bankr. W.D. Pa., 1994).

15. Fourth, Fisher acted in good faith. As stated above, Fisher did not initially file a proof of claim because it believed that the Lease was a "true lease" and it did not receive notice of the bar date. However, once it conceded during negotiations between counsel that the Lease was a financing agreement, Fisher filed its proof of claim.

D. Debtor's Counsel Had an Obligation to Send Notice to Fisher's Counsel

16. Debtor also failed to send notice of the claims bar date to Fisher's counsel. Debtor's counsel was aware that Fisher was represented since Debtor's counsel and Fisher's counsel were engaging in negotiations over the Lease. Debtor's counsel's knowledge of the fact that Fisher was represented by counsel is evidenced by a letter dated June 20, 2002, from Fisher's counsel to Debtor's counsel. This was clearly prior to the mailing of the notice of the bar date, since the Declaration states that it was mailed on July 24, 2002.

17. The Model Rules of Professional Conduct require communications to be sent to counsel, not directly to Fisher. The court in *In re Grand Union Company*, 204 B.R. 864, 875 (Bankr. Del. 1997) granted motions to file late claims due to debtor's counsel's failure to send notice to claimant's counsel, even though the claimants were represented by counsel in the bankruptcy case but did not file a formal written notice of appearance. The instant case is similar in that there were active settlement discussions with Debtor's counsel as to the nature and extent of Fisher's lien, whether the claim was a secured claim, and as mentioned above, whether the Lease was a financing agreement.

Notice of the claims bar date should have been sent to Fisher's counsel at the time, Coston & Litchman.

WHEREFORE, for the foregoing reasons Fisher-Anderson, LC, the movant, prays that this Court enter an order enlarging the bar date to allow Fisher-Anderson, LC's late filed proof of claim and for such additional relief that this Court deems equitable and just.

Dated: November 14, 2003

Respectfully Submitted,

FERRY, JOSEPH & PEARCE, P.A.



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DOC ID.: 343955.3

Miscellaneous:02-10109-JJF Fansteel Inc.**U.S. Bankruptcy Court****District of Delaware**

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Memorandum of Law *In Support Of Fisher-Anderson's Motion To Enlarge The Bar Date To Allow A Late Filed Proof Of Claim [Re: Docket No.1603]* Filed by Fisher-Anderson, LC (Attachments: # (1) Certificate of Service # (2) Service List) (Tacconelli, Theodore)

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Document description:Main Document

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02-10109-JJF Notice will be electronically mailed to:

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