



**IT IS ORDERED as set forth below:**

**Date: December 17, 2007**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:

CASE NOS. 04-78434 through 04-78436  
Jointly Administered

Rhodes, Inc., et al.,

CHAPTER 11

Debtors.

JUDGE MASSEY

Collezione Europa USA, Inc.,

Movant,

v.

CONTESTED MATTER

Joel H. Dugan, as Liquidating Agent,

Respondent.

ORDER ON MOTION FOR (I) AUTHORITY TO FILE PREPETITION CLAIM LATE;  
(ii) AUTHORITY TO FILE ADMINISTRATIVE EXPENSE CLAIM LATE;  
(iii) ALLOWANCE OF UNSECURED CLAIM; AND  
(iv) ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM

Collezione Europa USA, Inc. ("Movant") supplied Debtor Rhodes, Inc. with furniture case goods ("Goods") for many years prior to November 4, 2004, when Rhodes filed this Chapter 11 case. Shortly prior to the petition date, Debtor Rhodes, Inc. cancelled orders of Goods placed

prepetition. Rhodes placed further orders for Goods postpetition and thereafter cancelled some of those orders. Movant asserts that it suffered damages as a result of these cancellations of orders.

In the course of the case, the Court set deadlines for filing proofs of prepetition claim and proofs of claims for postpetition administrative expenses. Movant failed to file a proof of a prepetition claim or to file a motion for allowance of an administrative expense or a proof of claim for such expenses by the respective deadlines. It moves for leave to file these claims late pursuant to Fed.R. Bankr. P. 9006(b)(1) on the ground of excusable neglect. Joel Dugan, who serves as the liquidating agent for the estate of Rhodes, Inc. under the confirmed plan, (“Respondent”) opposes the motion.

Based upon stipulated facts and matters of which the Court takes judicial notice as set forth below, the Court holds that Movant has established that its failure to file a timely proof of claim and a timely motion for allowance of, or proof of claim for, an administrative expense was due to excusable neglect within the meaning of Bankruptcy Rule 9006(b)(1).

A.

The parties filed a stipulation of the material facts necessary to decide this dispute (the “Stipulation”) (Document Nos. 2838-2839), which facts are incorporated in this Order by reference. Although the Court does not discuss all of the stipulated facts in this Order, it has considered carefully them in deciding this dispute. The Court held a hearing on the motion on December 13, 2007, at which counsel for the parties agreed that there were no disputed material facts concerning the motion. The parties submitted no additional evidence but did clarify some factual points about which the Court inquired.

There remains a dispute over the respective amounts of the prepetition claim and the postpetition expenses, which this Order does not address. If and when the administrative expense claim is allowed, it will be limited, as the parties have stipulated, to offsetting the amount of the judgment, if any, that Respondent obtains against Movant in Adversary Proceeding No. 06-6470 (the “Collezione Adversary”) in which Respondent as plaintiff seeks to recover alleged preferences pursuant to 11 U.S.C. § 547. Movant stipulated that it seeks no recovery from the estate and would be limited to using any allowed claim defensively to offset any claim Respondent may have against Movant. Such a use depends, of course, on whether a right of offset exists. (The Court has informed the parties of its tentative ruling in the Collezione Adversary that a prepetition claim of a creditor against a debtor cannot be used to offset a postpetition claim of that debtor’s trustee against that creditor.)

B.

The Federal Rules of Bankruptcy Procedure regulate the filing of proofs of prepetition claims. Bankruptcy Rule 3003 applies to proofs of claims in Chapter 11 cases. Subparagraph (b)(1) of that Rule provides:

The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

The Court takes judicial notice that Rhodes did not schedule any prepetition claim of Movant, although it did list Movant as a party to an executory contract on Schedule G.

Bankruptcy Rule 3003(b)(3), applicable in Chapter 11 cases and entitled “Time for Filing,” provides:

The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

The Court entered an Order on February 22, 2005 fixing March 31, 2005 as the deadline for filing proofs of claims against the Debtors. On May 23, 2006, the Court entered an order confirming the amended plan in which June 26, 2006 was fixed as the deadline for filing administrative expense claims against Rhodes and its estate.

The mailing list used by Rhodes' noticing agent, The BMC Group, included Movant at its New Jersey address. The parties stipulated that BMC mailed to Movant a copy of the notice of the bar date for filing prepetition claims and the notice of the plan confirmation that contained the bar date for filing proofs of claims for administrative expenses. They further stipulated that Movant "cannot confirm or deny" that it received those notices. Movant did receive certain other notices.

C.

Bankruptcy Rule 9006(b)(1) provides:

(b) Enlargement.

(1) In general.

Except as provided in paragraphs (2) and (3) of this subdivision, when 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 (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) 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.

The issue presented by the motion is whether Movant's failure to act by timely filing a proof of its prepetition claim and its failure to act by timely filing a motion for allowance of, or proof of, its postpetition administrative expense claim was "the result of excusable neglect."

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Court held that an attorney's inadvertent failure to file a proof of claim can constitute excusable neglect under Bankruptcy Rule 9006(b)(1). *Id.* at 382-84, 113 S.Ct. at 1492. Interpreting the plain meaning of the phrase "excusable neglect," the Court concluded, "Congress plainly contemplated that the courts would be permitted, [when] appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388, 113 S.Ct. at 1495.

*Advanced Estimating System, Inc. v. Riney*, 77 F.3d 1322, 1324 (11<sup>th</sup> Cir. 1996).

In *Pioneer*, the claimant's attorney failed to file a proof of claim by a deadline announced in the notice of the meeting of creditors in a Chapter 11 case. Agreeing with the Court of Appeals for the Sixth Circuit, the Supreme Court observed "that the 'peculiar and inconspicuous placement of the bar date in a notice regarding a creditors[] meeting,' without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification." *Pioneer*, 507 U.S. at 398 (footnote and citation omitted). That circumstance excused the failure of the attorney to discover the deadline, but the outcome, said the Court, would have been different had there been "any evidence of prejudice to petitioner [the debtor] or to judicial administration in this case, or any indication at all of bad faith." *Id.*

The steps to be taken in determining whether a bankruptcy court may properly exercise discretion to permit the late filing of a proof of claim are (1) to determine whether the late filing was due to circumstances beyond the filer's control or was caused by inadvertence, mistake or carelessness and if so, (2) whether the neglect was excusable. The latter determination is "at

bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission [, including] . . . 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.” *Pioneer*, 507 U.S. at 395 (footnote and citation omitted).

D.

The first step is to decide whether Movant’s failure to timely file its claims was the result of “neglect.” Although the parties agree that Movant cannot confirm that it received the bar date notices, they also agree that it cannot deny receipt. The un rebutted presumption is that it did receive the notices. *In re East Coast Brokers and Packers, Inc.*, 961 F.2d 1543, 1545 (11<sup>th</sup> Cir. 1992). Notwithstanding that un rebutted presumption, Movant was unaware until after it hired an attorney to defend the Collezione Adversary that it could file a claim and indeed was under the mistaken belief that it would suffer little or no loss, even taking into account the loss on the sale in late 2005. Stipulation ¶¶ 25-29 and 41-43. (This last point concerning the aggregate sales made by Movant was clarified at the December 13 hearing.)

Movant and Rhodes had a long relationship conducted for all practical purposes on handshakes. They had no written agreement other than two unsigned one page documents attached as Exhibit A to the Stipulation, which may or may not describe the entire agreement governing the cancelled orders. Movant endeavored to sell Goods as to which Rhodes, Inc. had cancelled orders. It knew that it had suffered a loss of \$192,202.40 in late 2005 in connection with the sale of some of the Goods for which orders were made and cancelled postpetition, but as mentioned above, it believed it would ultimately have little or no monetary loss. There is no

evidence that the parties were hostile to each other. From the summer of 2005 through early 2006, Movant and Rhodes discussed payment of orders for certain postpetition goods. Stipulation, ¶ 30. The confirmed plan provided in part that among the causes of action that Respondent would have the right to bring a preference action against Movant, but there is no evidence that the plan was ever served on Movant or that, if Movant received a copy of the plan, any of its officers or agents was aware of its exposure to a preference action until it received the complaint in the Collezione Adversary. There is no contention that any of the officers or employees of Movant was an attorney or that Movant obtained any legal advice prior to service of the complaint in the Collezione Adversary. The Court infers from these circumstances that Movant was unsophisticated in dealing with financial risk and less than competent in recognizing legal issues and uncertainty.

The Court concludes that Movant's failure to file timely claims was the result of (1) its mistaken belief held until late 2006 that it would suffer little or no monetary loss after it sold all of the Goods ordered by Rhodes and (2) its carelessness in failing to treat the bar notices as important legal communications, to educate itself about what claims it might have filed, and to seek legal advice concerning the notices in light of the fact that the cancelled orders involved millions of dollars of Goods. These mistakes and carelessness constitute neglect for purposes of Bankruptcy Rule 9006(b)(1).

E.

The Court further holds that Movant's neglect is excusable for purposes of Bankruptcy Rule 9006(b)(1), based upon the following analysis of the circumstances generally and of the four

factors specifically referenced by the Supreme Court in *Pioneer* as key considerations in weighing the equities. *Pioneer*, 507 U.S. at 395.

First, Respondent, who stands in the shoes of Rhodes, Inc. and its estate for these purposes, has not shown that any prejudice would result from permitting Movant to file late claims. The fact that the deadline for objecting to claims has passed does not prejudice Respondent because he may object to Movant's claims in view of this ruling.

Respondent asserted in his response to the motion that had Movant timely asserted its claim, he would have taken different positions with respect to settlements reached on other claims. But he offered no evidence at the December 13 hearing to prove either that he would have taken other positions or that had he done so, the net value of the assets he is administering would have been larger as a result.

Respondent further contends that prejudice would result if Movant's late claims are allowed because holders of unsecured claims will receive smaller distributions than they would otherwise receive. See Stipulation ¶ 46(2) and (3). If Respondent is unsuccessful in the preference action, the granting of the motion will have no effect (other than legal costs in opposing the motion) on distributions, because Movant seeks to use any allowed claim only for the purpose of offsetting the amount of a preference judgment. The allowance of any late claim in any case would necessarily and obviously have the effect of reducing the amount available for distribution to other creditors. The absence of any mention in *Pioneer* of the obvious effect of allowing a late claim on the amounts of distributions to other claimants shows that the Supreme Court did not consider this effect by itself to be an indicator of prejudice to the estate. Unsecured creditors may receive less than they would otherwise receive and thereby be "prejudiced" as they



would be to the extent any other claim in the same or higher class is allowed, but the analysis under Rule 9006(b)(1) pursuant to *Pioneer* is concerned with possible prejudice to the estate only.

Respondent contends that the allowance of Movant's claim would "call into question the integrity of the Claims Bar Dates with regard to other parties with claims similar to Collezione."

Stipulation ¶ 46(1). But Respondent has not identified any other party in a similar posture.

Moreover, the methodology for deciding whether to excuse neglect in failing to file a timely claim is an equitable one and very fact specific. If another party contended its neglect should be excused, that contention would, if challenged, be subject to the same scrutiny applied to Movant's motion. If such a party exists, it has not come forward, making this objection hypothetical and of no consequence. The notion that creditors lacking any equitable grounds to support excusable neglect would file similar motions is speculative, particularly since any such creditor would incur significant costs in the process.

Second, the factor of the length of the delay and its potential impact on judicial proceedings has minimal significance for the following reasons. This case was filed on November 4, 2004. The deadline for filing a proof of an administrative expense was June 26, 2006. Movant raised its claim for damages arising from the postpetition cancellation of orders for Goods in a counterclaim filed in the Collezione Adversary on January 2, 2007 and filed its motion to allow the late claims in this Chapter 11 case on March 6, 2007. Thus, a little more than eight months elapsed from the June 26, 2006 bar date to the date the motion under consideration was filed. It is undisputed that during most of that time, Movant believed it was not going to suffer a significant loss and was, in any event, unaware that it might have filed a claim. (Contrary to the suggestion made by Respondent in his brief, being unaware of a right to file a claim does not

preclude a belief that one has not suffered damages and therefore would have no claim in this Chapter 11 case and vice versa.)

Respondent has offered no evidence to show that allowing the filing of Movant's claims eight months after the last deadline would result in substantial delay. Respondent points to the efforts made thus far in resolving claims objections. It is true that Rhodes, Inc. and Respondent have done an admirable job in completing that aspect of the administration of this case. Delay is important, however, only to the extent that distributions to creditors and the closing of the case are postponed for a significant period of time. The fact that much work has been completed on objections to claims does not prove that distributions could be made and the case could be closed sooner than if Movant were not permitted to file late claims.

The possibility of delay in closing a case is not as forceful an argument as it might other be if the fiduciary has not proceeded with alacrity in disposing of other matters that must be resolved before the case can be closed. The Court takes judicial notice that there have been 71 adversary proceedings filed in connection with this case, the vast majority of which were filed on October 31, 2006 to recover allegedly voidable preferences. The limitations period for filing preference claims expired three days later, two years after the petition was filed just after midnight on November 4, 2008. 11 U.S.C. § 546(a)(1)(A). Of the 71 adversary proceedings filed by the Debtor and Respondent, more than 20 of them remain open.

It may be that during the first year at least of this case, personnel of the Debtor and its counsel were too busy with other pressing business to worry about preference claims. Gathering all of the necessary information, including possible new value defenses, might have been time consuming. It would seem likely, however, that obtaining a check register or disbursement

journal for the 90 days preceding the petition date and sorting the payees by name to determine who received the largest aggregate transfers should not have been too tough. It would have been easy to spot those preference actions in which big money, say more than \$500,000, was at stake. If time is of the essence, Rhodes could have prosecuted at least the large preference actions much sooner, as could have Respondent when he took over.

To bring home this point, the Court takes judicial notice that in Adversary Proceeding No. 06-6500, filed on October 31, 2006, the summons and complaint naming “Soft Line Group” as the defendant were served on November 9, 2006. Then, the plaintiff (Respondent here) filed an amended complaint on December 13, 2006, changing the defendant from “Soft Line Group” to “Leather Bella, LLC,” no answer having been filed prior to the amendment. In both versions of the complaint, Respondent sought to recover \$1,641,060.86 in alleged preferences. From December 13, 2006 until now, no answer has been filed in this Adversary Proceeding. On August 3, 2007, approximately nine months after the amended complaint was filed, Leather Bella, LLC moved to dismiss the complaint on the ground that it never dealt with Rhodes, which Respondent promptly conceded.

Respondent as plaintiff in the Leather Bella action knew (or should have known) that he had a claim against somebody for more than \$1.6 million at least as early June 26, 2006. (Mr. Dugan was CEO and Chief Financial Officer of Rhodes. Second Amended Disclosure Statement, p. 30, Document No. 1529.) He required four months until October 31, 2006 to bring the adversary proceeding, knew or should have known that there was a default in answering an amended complaint as of mid-January 2007, and did nothing for more than eight months thereafter, until the second defendant called his attention to the fact it never dealt with Rhodes.

Five of those eight plus months elapsed *after* Movant filed its motion to file late claims. Under these circumstances and in the absence of any evidence to show that it is likely to take longer to resolve Movant's claims against the estate than it will take to resolve the estate's claims against Movant and against other entities, the argument that granting Movant's motion to allow late claims is likely to cause delay lacks merit.

Third, it was within the reasonable control of Movant to determine the existence of the deadlines for filing claims, the consequences of not meeting those deadlines and the procedure for preserving its claims. Legal representation in connection with a bankruptcy case prior to the deadlines would constitute reasonable control over the claim filing process if the notices were clear. *Pioneer*, 507 U.S. at 398-399. Movant was unrepresented until October 2006, but the lack of legal representation alone is not enough to excuse neglect. *Cf. Belcher v. Columbia University (In re Belcher)*, 293 B.R. 265, 268 n. 4 (Bankr. N.D. Ga. 2001). Movant, like any lay person, had the ability to obtain and read the notices and then to conclude that its officers lacked sufficient legal knowledge to decide whether it needed to act or to realize that it should file something, particularly in view of the dollar size of the aborted transactions with Rhodes. As Respondent points out, Movant could have and should have filed proofs of contingent claims. Thus, this factor favors Respondent's position that the motion should be denied.

The question is what weight to give to this factor. In the last analysis, not much. The neglect of the claimant in *Pioneer* was deemed excusable, in spite of the fact that the claimant was represented by an attorney. If Respondent could show prejudice to the estate, a materially adverse impact on this case, or bad faith on Movant's part, the result would be different. The primary error committed by Movant was a mistake of fact in thinking it would come out whole or nearly

so. Respondent stipulated to that fact. Being blissfully unaware of the bath it would take, Movant had little incentive to be more diligent. If this kind of mistake were judged to be inexcusable, even though no other harm or misconduct were shown, the equitable underpinning of *Pioneer* would be emasculated.

Respondent's primary argument for being rough on Movant is that it should have recognized that it had a contingent claim. Yet, Rhodes did not list the prepetition claim of Movant in Schedule F. Respondent states that Rhodes listed the contract, meaning the two unsigned pages attached as an exhibit to the Stipulation, in Schedule G out of "an abundance of caution." Stipulation ¶ 2. Presumably, caution was needed because Rhodes was unsure whether the contract was executory. Whether or not the contract was executory, however, Movant plainly held on November 4, 2004 a contingent claim with respect to the cancelled prepetition orders. To the extent the contract was executory, Movant's claim was contingent on its not being rejected. Rhodes, Inc. was represented by counsel; Movant was not. The Court concludes that Movant's failure to realize that it had a contingent claim in time to file such a claim is not fatal to its position that its neglect should be excused.

Fourth, there is the factor of good faith, which Respondent concedes Movant meets.

#### Conclusion

In summary, Movant has shown that through mistakes in fact and law and through carelessness that is unsurprising in the light of the informal and undocumented relationship it had with Rhodes, Inc. for more than ten years involving sales contracts worth millions of dollars, its failure to file timely claims in this case was due to "neglect" within the meaning of that word in Bankruptcy Rule 9006(b)(1). Under all of the circumstances stipulated by the parties and noticed

by the Court, that neglect was excusable in that (1) there is no prejudice to Respondent in permitting the filing of the claims asserted by Movant, (2) there is little likelihood that the granting of the motion will result in delay in the final administration of this case or otherwise have an adverse impact on the administration of this case, and (3) Movant acted in good faith. Movant's failure to recognize that it had a claim and that it could file that claim prior to the bar date is excusable in light of the other factors under the circumstances described above, including Rhodes' own failure to recognize the contingent nature of Movant's prepetition claim by not listing it on Schedule F.

For these reasons, the portion of the motion of Collezione Europa, USA, Inc. seeking authority to file a prepetition claim late and to file an administrative expense claim late is GRANTED, provided that such claims must be filed and served on Respondent on or before January 2, 2008. Respondent shall have until January 15, 2008 to file an objection to such claims. The balance of the motion seeking allowance of the claims is deferred until trial of any objection to the claims filed by Respondent. Respondent retains all defenses he may have to the claims. The Court directs the parties to submit on or before February 1, 2008, a proposed scheduling order to be filed in this case and in Adversary Proceeding No. 06-6470, setting out the deadlines for completing discovery and filing dispositive motions in the anticipated contested matter concerning the amounts of Movant's claims and in the Adversary Proceeding. The discovery period is limited to March 31, 2008, including the filing of motions to compel discovery, unless both parties agree to a longer period. Dispositive motions will be due 30 days after discovery ends.

\*\*\*END OF ORDER\*\*\*