

DENIED  
MOOT

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

Jan 28, 2014

*Kathy A. Surratt - States*

KATHY A. SURRATT-STATES  
Chief United States Bankruptcy Judge

In re:	)	Case No. 12-51502-659
	)	
Patriot Coal Corporation, <i>et al.</i> ,	)	JOINTLY ADMINISTERED
	)	UNDER CHAPTER 11
Debtors.	)	
	)	Objection Deadline: September 17, 2013
	)	at 4:30 p.m. CDT
	)	Hearing Date: September 24, 2013
	)	Hearing Time: 10:00 a.m. CDT
	)	Location: Courtroom 7 North

**MICHELIN NORTH AMERICA, INC.'S MOTION FOR LEAVE TO AMEND ITS PROOF OF CLAIM OR, IN THE ALTERNATIVE, FOR EXTENSION OF THE DEADLINE TO TIMELY FILE CLAIM UNDER BANKRUPTCY CODE SECTION 503(B)(9) IN THE CASE OF DEBTOR PATRIOT COAL SERVICES, LLC, CASE NO. 12-52102**

PLEASE TAKE NOTICE THAT the undersigned, on behalf of Michelin North America, Inc. ("Michelin"), does hereby file its Motion for Leave to Amend its Proof of Claim or, in the alternative, for Extension of the Deadline to Timely File Claims under Bankruptcy Code Section 503(b)(9) in the Case of Debtor Patriot Coal Services, LLC, Case No. 12-52102 ("Motion"). Michelin seeks to amend its timely filed proof of claim in order to assert the priority status of a portion of its claim pursuant to 11 U.S.C. § 503(b)(9) ("Section 503(b)(9)") or, in the alternative, an extension of the deadline within which to timely file its claim under Section 503(b)(9). In support of its Motion, Michelin states as follows:

**STATEMENT OF FACTS**

1. On July 9, 2012 ("Petition Date"), Patriot Coal Corporation and numerous affiliates entities (collectively, the "Debtors") filed their Petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S. C. § 101 *et seq.* ("Bankruptcy Code"). The cases

were administratively consolidated and subsequently transferred from the United States Bankruptcy Court for the Southern District of New York to this Court.

2. Michelin is a party to a Supply Agreement with the Debtor Patriot Coal Services, LLC (“Patriot Coal Services”) under which Michelin supplies and Patriot Coal Services purchases, as agent for various affiliated mining companies, certain of Michelin’s tire products. The term of the Supply Agreement is from July 1, 2011 through December 31, 2016. (See Affidavit of Cindy Boggs (“Boggs Aff.”) at ¶ 3, attached hereto as **Exhibit A.**)

3. As of the Petition Date, Patriot Coal Services owed Michelin \$837,167.94 for tires which were delivered pre-petition, pursuant to seven invoices dated June 7, 2012 through June 28, 2012. (Boggs Aff. ¶ 4.) Of this amount, five of the invoices, totaling \$604,710.26, were for goods delivered within the 20 day period preceding the Petition Date. (*Id.*)

4. Shortly after the Petition Date, on July 13, 2012, Michelin filed its proof of claim (“Proof of Claim”), GCG Claim # 2, against Patriot Coal Services in the total amount of \$837,167.94.<sup>1</sup> Michelin attached a Statement of Account to its Proof of Claim detailing the item shipment date, item number, and balance due along with the underlying invoices for the goods. A true a correct copy of the Proof of Claim is attached hereto as **Exhibit B.**

5. On July 12, 2012, Michelin filed its reclamation demand pursuant to 11 U.S.C. 546(c)(1) for goods delivered within 45 days of the Petition Date. On November 28, 2012, the Debtors mailed Michelin a notification that their Reclamation Demand did not provide adequate information. Michelin received this notification on December 3, 2012, and filed its amended reclamation claim (“Reclamation Claim”) on December 13, 2012, which included a breakdown of the invoices, delivery date, and invoice amounts for the goods being sought for reclamation,

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<sup>1</sup> Apparently the proof of claim was filed in duplicate and the duplicate proof of claim, CGG Claim # 252, was expunged by Court Order dated May 22, 2013 (docket no. 4041).



along with copies of the underlying invoices. A true a correct copy of the Reclamation Demand is attached hereto as **Exhibit C**. On November 28, 2012, the Debtors rejected Michelin's Reclamation Demand, and certain other creditors, in their Reclamation Report and Notice of Objection Procedures docket no. 1651. Receipt date by Michelin of this notification is uncertain. According to the Debtor, it rejected Michelin's Reclamation Demand in their Reclamation Report and Notice of Objection Procedures (docket no. 1651) because the goods were consumed or not identifiable (\$600,884), subject to a prior security interest (\$234,741), and insufficient documentation (\$1,543).

6. On October 18, 2012, the Court entered its Order establishing December 14, 2012, as the deadline for proofs of claim, including claims under Section 503(b)(9).

7. Michelin completed its Proof of Claim *pro se* and Cindy Boggs, the employee responsible for preparing the Proof of Claim, was not familiar with Bankruptcy Code Section 503(b)(9) or the necessity to assert such a claim. (Boggs Aff. ¶ 6.) Moreover, Ms. Boggs does not recall receiving the receiving the Notice of Deadlines for Filing Proofs of Claim for the Debtors' cases and Michelin does not have a copy in its file for the Debtors' case, though it would as a matter of practice retain a copy of such a notice. (Boggs Aff. ¶ 7.)

8. On June 13, 2013, Michelin engaged counsel to review the status of its executory contract with Patriot Coal Services and discovered it held a claim under Section 503(b)(9). (Boggs Aff. ¶ 9.) After identifying counsel in this District, this Motion promptly followed.

### **ARGUMENT**

#### **I. Michelin Should be Allowed to Amend its Timely Proof of Claim to Assert Priority State under Section 503(b)(9).**

Michelin respectfully requests this Court to grant it leave to amend its timely Proof of Claim in order to assert priority status under Section 503(b)(9) for the \$604,710.26 in goods

which were delivered within the 20 day period preceding the Petition Date. A copy of the proposed amended proof of claim is attached hereto as **Exhibit D**. In the Eighth Circuit, creditors may generally file amendments to proofs of claims after the bar date and courts are liberal in awarding amendments. See In re Best Refrigerated Express, Inc., 195 B.R. 503, 505-506 (Bankr. D. Neb. 1996) (citing, *inter alia*, In re Donovan Wire & Iron Co., 822 F.2d 38 (8th Cir. 1989)); see also First Am. Bank & Trust of Minot v. Butler Mach. Co. (In re Haugen Constr. Servs., Inc.), 876 F.2d 681, 682 (8th Cir. 1989). In deciding whether to allow an amendment to a proof of claim, bankruptcy courts apply Bankruptcy Rule 7015, which incorporates Federal Rule of Civil Procedure 15 and which the Court may apply to contested matters under Bankruptcy Rule 9014(c). See Best Refrigerated, 195 B.R. at 506; United States v. Johnston, 267 B.R. 717, 721 (N.D. Tex. 2001); In re City of Capitals, Inc., 55 B.R. 634 (Bankr. D. Md. 1985); In re Enron Corp., 328 B.R. 75, 87-88 (Bankr. S.D.N.Y. 2005). Under Federal Rule of Civil Procedure 15(a)(2), the “court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Moreover, applying Federal Rule of Civil Procedure 15(c)(1)(B), bankruptcy courts allow amendments to proofs of claim to relate back to the date of the original claim filing where the amended claim “arose of the same conduct, transaction, or occurrence set forth – or attempted to be set forth – in the original [proof of claim].” Fed. R. Civ. P. 15(c)(1)(B); see Best Refrigerated, 195 B.R. at 506; City of Capitals, 55 B.R. at 637; Enron, 328 B.R. at 33. Amendments have been permitted to cure a defect in the claim as originally filed, describe the claim with greater particularity, or plead a new theory of recovery based on the same facts. United States v. Johnston, 267 B.R. at 722. Courts do not allow creditors to assert a “new” claim under the guise of an amendment and consider the degree of prejudice to the debtor caused by the amendment. Id.



In the instant case, it cannot be disputed that the proposed Section 503(b)(9) claim arises out of the same transactions as the original Proof of Claim because the five invoices comprising the Section 503(b)(9) claim were included in the Proof of Claim. Michelin is not seeking to assert a new claim for additional invoices; rather, it is seeking to correctly assert Section 503(b)(9) priority status for those invoices in the original Proof of Claim which were for goods delivered within twenty days of the Petition Date.<sup>2</sup> In addition, the proposed amendment does not prejudice the Debtors. Pursuant to its Proof of Claim and the Reclamation Demand, the Debtors received notice that Michelin had a claim for goods delivered within twenty days of the Petition Date and the identity of the goods, delivery dates, invoices, and amounts which comprised Michelin's potential Section 503(b)(9) claim. Nor is the amount Michelin's Section 503(b)(9) claim material given the size of the Debtors' bankruptcy cases. See Best Refrigerated, 195 B.R. at 507 (stating amount of the purported amended tax claim was not significant based on the total amount of the filed tax claims and therefore the amendment would not injure the estate or its creditors).<sup>3</sup> Further, the Debtors have not yet filed their plan of reorganization and therefore have sufficient time to address the consequences of Michelin's amended claim (if any). Consequently, Michelin should be granted leave to amend its timely filed Proof of Claim in order

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<sup>2</sup> Though some courts have found that assertion of priority status constitutes a new claim under the particular facts before them, other courts recognize that existing claims may be amended to correctly claim priority status. See In re Channakhon, 465 B.R. 132, 142 n.8 (Bankr. S.D. Ohio 2012) (noting difference in Fifth and Sixth Circuit law on this issue); In re Orion Refining Corp., 317 B.R. 660 (Bankr. D. Del. 2004) (finding that proposed amendment from general unsecured to priority status did not assert a new claim). Unlike cases which have disallowed an amendment to assert priority status, Michelin is not changing its theory of recovery in order to obtain priority, but is relying on invoices which were included in its original Proof of Claim.

<sup>3</sup> In addition, Michelin does not know if the Patriot Coal Services will seek to assume the Supply Agreement, but to the extent it does the pre-petition balance should be paid in any event and, consequently, the proposed amendment is not prejudicial.

to assert priority status under Section 503(b)(9) for the \$604,710.26 in goods which were delivered within the 20 day period preceding the Petition Date.

**II. In the Alternative, Michelin Should be Granted an Extension of the Deadline within which to File its Section 503(b)(9) Claim.**

Although Michelin believes it should be allowed to amend its prior Proof of Claim under Bankruptcy Rule 7015, to the extent the Court disagrees, Michelin alternatively seeks an extension of the deadline within which to file its Section 503(b)(9) claim. Bankruptcy Code Section 503(a) states the Court may only allow a tardily filed request “for cause.” Further, Bankruptcy Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure provides a party may not be relieved from an expired deadline unless, on motion, the Court orders otherwise “for cause” where “the failure to act was the result of excusable neglect.” Fed. R. Bankr. P. 9006(b)(1). In Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395, 113 S. Ct. 1489 (1993), the Supreme Court identified the following factors for identifying whether excusable neglect was present: (1) “the danger of prejudice to the debtor, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was in the reasonable control of the movant, and (4) whether the movant acted in good faith.” While the third factor weighs heavily in favor of a finding of excusable neglect, the first, second and fourth factors must also be determined to be in the claimant's favor to find excusable neglect. If the third factor weighs against the claimant but the first, second and fourth factors are in favor of the claimant, the court may find excusable neglect if the facts and circumstances of the case so require. In re Laclede Cab Co., 186 B.R. 688, 690 (Bankr. E.D. Mo. 1995) (citing Pioneer, 113 S. Ct. at 1499-1500).

As set forth above, allowing Michelin to assert its Section 503(b)(9) claim results in little prejudice to the Debtor. Moreover, the length of the delay is only six months and should have

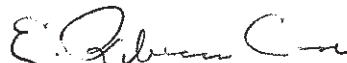


little impact on this proceeding, as the Debtor's plan has not yet been filed and it will have a sufficient opportunity to address the claim prior to confirmation. The reason for the delay is that Michelin's proof of claim was completed *pro se*, and the individual completing the claim form for Michelin was not familiar with Section 503(b)(9) or the necessity to assert such a claim. Michelin acted diligently in filing its claim right after the Petition Date, but this had the unintended result of it using the using the Official Form B (12/08), which does not reference a priority claim under Section 503(b)(9), rather than the modified form for this case which had a section for asserting Section 503(b)(9) claims and short explanation of such claims. Although Michelin does not have a record of receiving the Notice of Deadlines for Filing Proofs of Claim for the Debtors' cases, even if it did receive the notice, its employee would not have believed that it was necessary to respond to such notices since she had already filed the Proof of Claim. Further, Michelin acted in good faith and Michelin do not delay asserting its Section 503(b)(9) claim in order to gain some unfair advantage. Consequently, the relevant factors under Pioneer favor Michelin and it should be granted an extension of time within which to file its Section 503(b)(9) claim for cause due to its excusable neglect Rule 9006(b)(1) or for cause under Bankruptcy Code Section 503(a).

WHEREFORE, the undersigned prays before this Court for its proper Order granting Michelin leave to amend its timely filed proof of claim in the case of Debtor Patriot Coal Services, LLC, Case No. 12-52102 in order to assert the priority status of a portion of its claim pursuant to 11 U.S.C. § 503(b)(9) or, in the alternative, an extension of the deadline within which to timely file its claim under Section 503(b)(9), and for such other and further relief as may be just and equitable.

NELSON MULLINS RILEY &  
SCARBOROUGH, L.L.P.

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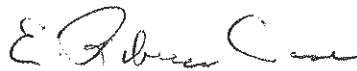
*Attorneys for Michelin North America, Inc.*

*Attorneys for Michelin North America, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via first class, United States mail, postage prepaid and/or electronic notice on August 2, 2013 to:

1. The parties on the Core Parties List No. 4 dated July 15, 2013 (D.E. #4306).
2. The parties on the Master Notice List No. 4 dated July 15, 2013 (D.E. #4306).
3. All creditors and parties in interest that are receiving electronic notice in this case.



E. Rebecca Case