UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	)	
	)	
BLAKE VAN LEER, II	)	Case No. 99 6 2043 JS
	)	
Debtor	)	
	)	
_____	)	

MEMORANDUM IN SUPPORT OF MOTION REQUESTING LEAVE TO WITHDRAW FILED PROOF OF CLAIM, TO FILE LATE CLAIM FOR CAUSE PURSUANT TO BANKRUPTCY RULE 3003(C), AND TO AMEND CLAIM DEEMED FILED PURSUANT TO 11 U.S.C. §1111(a)

This Memorandum is submitted in support of the Motion filed herein by Richard N. Moseman requesting leave to withdraw filed proof of claim, to file late claim for cause pursuant to Bankruptcy Rule 3003(c), and to amend claim deemed filed pursuant to 11 U.S.C. §1111(a).

Factual Background

Prior to the commencement of the chapter 11 case, Moseman filed a complaint against Van Leer in the Circuit Court for Anne Arundel County, Case No. C 97 36120, in order to collect and enforce promissory notes [hereinafter the "Notes"] dated 1/31/96 in the original principal amounts of $212,997 and $69,000. True and correct copies of the Notes are attached hereto as **Exhibits A and B**. The maturity date of the Notes was 1/31/97. The Notes contain a provision which permits Moseman to collect reasonable attorneys fees incurred in connection with the collection and enforcement of the Notes.

The amount claimed in the Circuit Court complaint, including principal and accrued interest through 2/1/97, was $479,812.80. The Circuit Court case was pending as of the commencement of the chapter 11 case on 9/15/99.

As of the commencement of the chapter 11 case, the amounts due under the Notes, including principal, accrued interest, and attorneys' fees, was $588,199.11, as follows:

$212,997 Note:

Principal	212,997.00	
Interest	217,315.20	
		430,312.20

$69,000 Note:

Principal	69,000.00	
Interest	84,922.91	
		153,922.91
		584,235.11
Attorneys' fees [1]		3,964.00
		588,199.11

Van Leer originally scheduled Moseman's Note claim in the amount of $450,000 in his Schedule F filed on 10/17/99 [Docket No. 12]. This claim was scheduled as not contingent, unliquidated, or disputed. Moseman's claim was also listed as not disputed in the Debtor's Amended List of Creditors Holding 20 Largest Unsecured Claims filed on

[1] Attorneys' fees incurred in connection with the enforcement and collection of the Notes are evidenced by invoices from counsel to Moseman during the period 2/17/98 – 9/15/99.

10/18/99 [Docket No. 12]. Consequently, Moseman was appointed to the official creditors' committee in this case.

Subsequently, on 11/16/99, Van Leer filed an amended Schedule F, which listed Moseman's claim in the amount of $450,000 as disputed [Docket No. 26]. However, the Court's docket reflects that Van Leer failed to give Moseman notice of the filing of the amended schedules, as required by Bankruptcy Rule 1009 and Local Bankruptcy Rule 1009-1. In fact, as stated in his Affidavit, Moseman had no knowledge that the Debtor disputed his Note claims until June 2007, when the Debtor filed a second Amended Schedule F and gave notice thereof to creditors affected thereby, including Moseman.

The claims bar date in this case was 1/18/00.

On 1/18/00, Moseman filed a proof of claim in the amount of $22,000,000 (Claim No. 34). The basis of this claim was the complaint filed by Moseman and Daniel Rousseau against Van Leer and various corporate entities affiliated with Van Leer, in the U.S. District Court for the District of Maryland, *Moseman et al v. Van Leer et al*, Civ. No. 98–cv–00434 WMN. The federal district court complaint alleged securities fraud and other violations of the securities laws arising out of the Debtor's purchase of plaintiffs' stock ownership interests in certain corporate entities involved in the development of the King George, VA landfill project. Moseman's filed proof of claim did not include his Note claims.

This Court entered an order lifting stay which allowed proceedings in the securities litigation to continue, in order to determine the Debtor's liability for the alleged

securities law violations. Ultimately, the federal district court dismissed Moseman's complaint on a motion for summary judgment, and the dismissal was affirmed by the Fourth Circuit Court of Appeals. The Debtor did not schedule the contingent and disputed securities litigation claim on his original Schedule F, or any amendment thereto. However, this litigation is separately listed in the Debtor's Statement of Financial Affairs (Item 4) [Docket No. 12]. The Statement of Financial Affairs does not list a dollar amount for this claim.

On 5/11/07, the Debtor filed an objection to Moseman's filed proof of claim. Because the Debtor prevailed in the securities litigation, Moseman conceded in his response to the objection that his filed claim is not allowable. Moseman now requests leave to withdraw his filed proof of claim, pursuant to Bankruptcy Rule 3006.

On 6/14/07, seven (7) years after the claims bar date, Van Leer filed another amended Schedule F, again listing Moseman's Note claim as disputed [Docket No. 608]. This time the Debtor did comply with the rules and gave Moseman notice of the filing of the amended schedule [Docket Nos. 609, 610]. As stated above, this is when Moseman first learned that the Debtor disputed his Note claim.

Moseman has served continuously on the Official Creditors' Committee throughout this case. As a result of the Committee's efforts, the Debtor's principal asset – the King George landfill royalty income stream, has been sold, and the Committee's plan of reorganization has been confirmed. The Committee members' hard work and

perseverance over the past eight (8) years has benefited all creditors by substantially enhancing the value of the Debtor's estate.

Argument

Moseman was not required to file a proof of claim with respect to the Notes because his claim was listed in the Debtor's original Schedule F as not unliquidated, contingent, or disputed.

Section 1111(a) of the Bankruptcy Code provides that a claim that is listed in the Debtor's schedules is "deemed filed", unless the claim is scheduled as disputed, contingent, or unliquidated. Bankruptcy Rule 3003(a), which applies in chapter 9 and 11 cases, complements §1111(a). This Rule states that the Debtor's schedules of liabilities shall constitute *prima facie* evidence of the validity and amount of creditor claims, except to the extent they are scheduled as disputed, contingent, or unliquidated. The Rule provides further that creditors whose claims are not disputed, contingent, or unliquidated, need not file a proof of claim. Because the Debtor listed Moseman's claim in his original Schedule F as neither disputed, contingent, nor unliquidated, Moseman's scheduled claim based on the Notes was deemed filed *and* allowed. *In re Dynamic Brokers, Inc.*, 293 B.R. 489 B.A.P. 9th Cir. 2003). Moseman was not required to file a proof of claim with respect to the Notes.

The Debtor's 11/16/99 amendment to Schedule F was ineffective as to Moseman.

It has only recently come to Moseman's attention that the Debtor filed an amended Schedule F on 11/16/99 which listed his Note claim as disputed. Ordinarily, the filing of the amended schedule would have triggered the requirement that Moseman file a

proof of claim, *see* Bankruptcy Rule 3003(c)(2). However, the Debtor's failure to comply with Bankruptcy Rule 1009 and Local Bankruptcy Rule 1009-1 rendered the filing of the Debtor's amended Schedule F ineffective as to Moseman.

Bankruptcy Rule 1009 requires the debtor to give notice of the filing of an amended schedule to the trustee and to any entity *affected* thereby. Local Bankruptcy Rule 1009-1 sets forth detailed requirements for the giving of notice to creditors whose status is changed by the filing of an amended schedule:

> **Rule 1009-1. amendments to lists and schedules.**
>
> * * * * *
>
> (b) Notice to creditors. The debtor must send to each creditor added or *whose status is changed* by the amended schedule.
>
> (1) a copy of the amended schedule;
> (2) a copy of the original Notice for Meeting of Creditors; and
> (3) a copy of each order that establishes or extends a bar date for claims or for complaints to determine the dischargeability of debts.
>
> (c) Certificate of compliance. With the amended schedule, the debtor must file a certificate of compliance with this Rule, together with a dated and clearly titled supplemental mailing matrix that lists only the names and correct mailing addresses of all newly scheduled creditors.

Obviously, Moseman was affected by the Debtor's amendment to Schedule F because the amendment changed the status of his claim from not disputed to disputed, thereby triggering the requirement that he file a timely proof of claim. This Court's docket reflects, however, that the Debtor failed to file a certificate of compliance with Local Bankruptcy Rule 1009-1 respecting the amended Schedule F filed on 11/16/99.

Accordingly, this Court may reasonably conclude that the Debtor, in fact, did not comply with the Rules, and did not give Moseman notice of the filing of the Amended Schedule F.

Moseman's Affidavit filed herein states that he was never served with a copy of the Debtor's 11/16/99 amended Schedule F, and prior to the claims bar date had no knowledge that the Debtor had changed the status of his Note claim from not disputed to disputed.

Moseman was clearly prejudiced by the Debtor's 11/16/99 stealth filing of an amended Schedule F without notice to affected creditors. Moseman was prejudiced because he reasonably believed, based on the original Schedules filed just a month earlier, that his Note claim was not disputed, and that he was therefore not required to file a proof of claim. The Debtor's failure to give Moseman notice of the filing of the amended Schedule F was a serious violation of Moseman's due process rights. *See In re ATD Corporaiton*, 352 F.3d 1062 (6th Cir. F2003). For this reason, the Debtor's 11/16/99 amended Schedule F was ineffective as to Moseman, and should not negate or preclude allowance of his claim as listed in the Debtor's original 10/17/99 schedules.

Because the Debtor's second amended Schedule F was filed after the claims bar date, Moseman should be permitted to file a late claim for cause, pursuant to Bankruptcy Rule 3003(c)

On 6/14/07, seven years after the claims bar date, the Debtor filed a second amended Schedule F, again listing Moseman's Note claim as disputed. The Debtor evidently served the second amended Schedule F on affected creditors, including

Moseman, as reflected in the Debtor's certificate of compliance with Local Rule 1009-1 filed herein. Because the Debtor's second Amended Schedule F was filed long after the claims bar date, Moseman should be permitted to file and therefore requests leave to file a late claim for cause, in order to preserve the "deemed filed" status of his Note claims, pursuant to Bankruptcy Rule 3003(c)(3). [2] Under the circumstances, refusal to find cause to allow Moseman to file a late claim would amount to an evisceration of §1111(a) of the Bankruptcy Code and would create a major opportunity for an unscrupulous debtor to lull creditors into complacency by scheduling them with §1111(a) "deemed filed" status and then amending its schedules after it is too late to file a claim. *See In re Dynamic Brokers, Inc., supra*.

Moseman should be permitted and therefore requests leave to amend his "deemed filed" Note claim.

Amendments to scheduled claims which are "deemed filed" pursuant to 11 U.S.C. §1111(a) are permissible. *See In re Sleepy Giant, Inc.*, 120 B.R. 6 (Bankr. D. Conn. 1990); *In re Candy Braz, Inc.*, 98 B.R. 375 (Bankr. N.D. Ill. 1988). The courts consider two factors when determining whether to allow an amended claim filed after the bar date for proofs of claim. The court first determines whether the claim is an amendment of a timely filed claim, or is in substance a "new" claim. An amendment that arises out of the same transaction as the timely claim and is reasonably within the amount of the original claim is said to "relate back" to the original claim, and is allowable. An amendment

[2] Bankruptcy Rule 3003(c)(3) permits the court in chapter 11 cases for cause shown to extend the time within which proofs of claim may be filed.

which asserts a "new" claim does not "relate back", and is generally not allowable. *In re Rains*, 139 B.R. 159 (Bankr. D. Md. 1992); *In re City of Capitals*, 55 B.R. 634, 637 (Bankr. D. Md. 1985). *See also Fyne v. Atlas Supply Co*., 245 F.2d 107 (4th Cir. 1957)(creditor may file amended claim after the deadline has passed provided sufficient notice of the claim has been given in the course of the bankruptcy proceeding).

If the amended claim "relates back", the court next considers whether allowance of the amended claim will result in undue prejudice to the opposing party. *In re City of Capitals, supra*. When determining prejudicial effect, "the court considers such elements as bad faith or unreasonable delay in filing the amendment, impact on other claimants, reliance by the debtor or creditors … and change of the debtor's position" *Id.* at 637. Prejudice involves more than simply having to litigate the merits of, or to pay, a claim. There must be some legal detriment to the party opposing the amendment, *e.g., In re JSJF Corp.*, 344 B.R. 94 (9th Cir. BAP 2006). Thus, the fact that other creditors will receive smaller distributions than they would receive if the amendment was disallowed does not establish prejudice. Undue prejudice typically involves an irrevocable change in position or some other detrimental reliance on the status quo, *e.g.*, *In re Dietz*, 136 B.R. 459 (Bankr. E.D. Mich. 1992).

Claim amendments may be made at any stage of the proceedings, *In re Farmland Industries, Inc.*, 305 B.R. 497 (Bankr. W.D. Mo. 2004); *United States v. Johnston*, 267 B.R. 717 (N.D. Tex. 2001)(post confirmation amendments permissible). Moreover, amendments which increase the amount of the original claim are permissible, *In re*

Callery, 274 B.R. 51 (Bankr. D. Mass. 2002)(amendments which merely increase claim amount not considered "new" claims); *In re Hanscom Retail Foods, Inc.*, 96 B.R. 33 (Bankr. E.D. Pa. 1988); *In re Tanaka Bros. Farms, Inc.*, 36 F.3d 996 (10th Cir. 1994)(fourfold increase in claim amount allowed); *In re Telephone Company of Central Florida*, 308 B.R. 579 (M.D. Fl. 2004).

The requested claim amendment "relates back".

Although the Debtor's Schedule F lists Moseman's claim in the liquidated amount of $450,000, and further indicates that the claim is not disputed, Schedule F does not indicate the basis of or consideration for the claim. There can be no dispute, however, that the undisputed claim listed in Schedule F is the claim based on the Notes. Moseman's Affidavit states that the only monetary claims which he had against Van Leer individually as of the commencement of this case were (1) the liquidated litigation claim to collect the Notes filed in the Circuit Court for Anne Arundel County, and (2) the contingent and unliquidated claims asserted in the federal district court securities litigation. [3]

The requested amendment to Moseman's Note claim increases the claim amount from $450,000.00 to $588,199.11. The amended claim states the corrected amount due

[3] As noted above, the Debtor listed the pending securities litigation separately in his Statement of Financial Affairs (Item 4) [Docket No. 12]. The Debtor did not list the case pending in the Circuit Court for Anne Arundel County in response to Item 4. Although the Statement of Financial Affairs indicates claim amounts for all of the other law suits pending against Van Leer as of the commencement of the chapter 11 case, it does not indicate a claim amount respecting the securities litigation.

under the Notes by calculating unpaid principal, accrued interest and costs as of the commencement of the chapter 11 case on 9/15/99. An amendment which calculates interest and costs on a promissory note "relates back" because the amended claim arises out of the same transaction as the scheduled claim, *i.e.*, the Notes, *see City of Capitals, supra*. *See also In re PT-1 Communications, Inc.*, 292 B.R. 482 (Bankr. E.D. .N.Y. 2003)(amendment arises out of same conduct, transaction, or occurrence if amendment cures defect in original claim, describes the claim with greater particularity, or pleads new theory of recovery on facts set forth in original claim); *Accord*, *In re Macmillan, Inc.*, 186 B.R. 49 (Bankr. S.D.N.Y. 1995); *In re Spiegel, Inc.*, 337 B.R. 816 (Bankr. S.D.N.Y. 2006) [4]

Allowance of Moseman's amended claim will not result in undue prejudice to any party in interest

There is no conceivable way in which any creditor or party in interest will be unduly prejudiced if Moseman's amended Note claim is allowed. No creditor or party in interest has relied to its detriment on the scheduled amount of Moseman's unsecured claim. Furthermore, no distributions have yet been made to general creditors pursuant to the confirmed Plan, and the Committee is still in the process of filing objections to claims, as it is permitted to do under the confirmed plan . Therefore, allowance of Moseman's amended claim will have no impact on other general creditors, other than to

[4] Pre-petition attorneys' fees incurred in connection with the enforcement and collection of an unsecured promissory note is an allowable claim if the note requires the debtor to pay such fees. In re *Smith*, 206 B.R. 114 (Bankr. D. Md. 1997)

reduce the amounts they might otherwise receive. The fact that other general unsecured creditors may receive a smaller distribution if the amended claim is allowed does not constitute undue prejudice. *See In re Dietz, supra*. On the contrary, if Moseman's amended claim is disallowed, other general creditors will receive a windfall to which they are not entitled on the merits.

Finally, it is noted that Moseman's service on the Creditors' Committee during the past eight (8) years has contributed to the Committee's success in obtaining confirmation of a plan of reorganization and sale of the Debtor's interest in the King George Landfill royalty stream, the Debtor's principal asset and funding source for the confirmed plan. As a court of equity, this Court applies the equitable principles that "fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper v. Litton*, 308 U.S. 295 (1939). Moseman respectfully suggests that his service on the Committee has been a benefit to the estate, and that under the circumstances his Committee service is an equitable factor that this Court may take into account when determining whether to permit him to file a late claim and claim amendment.

Moseman may withdraw his filed proof of claim without prejudice to his right to assert his claim based on the Notes

Claim withdrawals are governed by Bankruptcy Rule 3006, which provides, *inter alia*, that leave to withdraw must be obtained if the request to withdraw is made after an objection is filed thereto:

> A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto … or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee … appointed pursuant to §1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of the plan.

Since the general policy under Bankruptcy Rule 7041(a) is to permit dismissal, withdrawal of a proof of claim should in most instances be permitted unless the result is legal harm to another party in interest. *See In re Armstrong*, 215 B.R. 730 (Bankr. E.D. Ark. 1997). *See also In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995, *cert. denied*, 517 U.S. 1243 (1996). Moseman believes and therefore avers that withdrawal of his filed proof of claim will not prejudice any other party.

Moseman's filed proof of claim did not supercede, *see* Bankruptcy Rule 3003 (c)(4) [5], the claim which was deemed filed pursuant to §1111(a) of the Bankruptcy Code. This is because the filed proof of claim is for a debt (*i.e.*, claims alleging violations of the federal securities law) that is different than the "deemed filed" claim which is based on the Notes. A proof of claim for a new, unscheduled claim is not within the scope of Rule 3003(c)(4). *See In re Candy Braz, Inc.*, 98 B.R. 375 (Bankr. N.D. Ill 1988); *In re McConahey*, 192 B.R. 187 (Bankr. S.D. Ill 1996); *Chicago Southshore & South Bend*

[5] Bankruptcy Rule 3003(c)(4) provides that a filed proof of claim supersedes any scheduling of that claim pursuant to §521 of the Code.

Railroad v. Itel Rail Corporation, 658 N.E. 2d 624 (Ind. App. 1995). Accordingly, withdrawal of his filed proof of claim is without prejudice to Moseman's right to assert his Note claims.

Conclusion

For all of these reasons, Moseman respectfully requests that this Court

(A) Grant him leave to withdraw his filed proof of claim relating to the federal district court securities litigation without prejudice to his right to assert his claim based on the Notes;

(B) Grant him leave to file a late claim pursuant to Bankruptcy Rule 3003(c) for cause in order to preserve the "deemed filed" status of his claims based on the Notes;

(C) Grant him further leave to file an amended claim based on the Notes;

(D) Allow the amended proof of claim in the amount of $588,199.11; and

(D) For such other and further relief as justice may require.

Date: 8/7/07

_/s/_____

James P. Koch
1101 St. Paul St.
Suite 404
Baltimore, MD 21202
410 539 7816
Attorney for Richard N. Moseman