

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-12287-JMD  
Chapter 11CGE Shattuck, LLC,  
Debtor

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**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

On October 23, 2000, the Court commenced hearings on confirmation of the Debtor's Sixth Amended Joint Plan of Reorganization dated August 23, 2000 (the "Plan") filed by CGE Shattuck, LLC (the "Debtor") and Torrance Family Limited Partnership ("TFLP") (collectively the "Plan Proponents"). At the hearing the votes of creditors Callaway Golf ("Callaway") and The Hartford Courant ("Hartford") were objected to by Banc of America Commercial Finance Corporation f/k/a NationsCredit Commercial Corporation ("NCC") on the grounds that neither creditor was entitled to vote. Due to the numerous objections raised with regard to the ability of various creditors to vote on the Plan, the Court utilized the balance of the October 23, 2000 hearing as a pre-hearing conference to review the issues surrounding the

voting status of all creditors whose votes were subject to objection. At the conclusion of the hearing, the Court indicated that it would deal with the objections to the votes of Hartford and Callaway without further hearing. A procedural order was entered setting a briefing schedule for the parties. See Doc. No. 371.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. FACTS**

On July 17, 1999, an involuntary petition under Chapter 11 of the Bankruptcy Code was filed against the Debtor. The Court entered an order for relief on August 20, 1999. See Doc. No. 25. The order for relief having been granted, the claims bar date was established as December 20, 1999, approximately 120 days after the order for relief was entered. See Doc. No. 33. On September 13, 2000 the Court entered an order approving the Plan Proponents’ disclosure statement regarding the Chapter 11 Plan, which set the deadline for voting on the Plan as October 16, 2000 at 5:00 p.m. See Doc. No. 319.

### **A. Callaway**

Callaway was not listed as a creditor in the Debtor’s schedules. Despite not being listed as a creditor, Callaway filed a proof of claim in this case on August 9, 2000, some eight months after the December bar date established by the Court. See Claim No. 33. Having filed a proof of claim in the case, Callaway was sent a copy of the disclosure statement and Plan along with a ballot to vote on the Plan. Unfortunately, Callaway’s trend of being late continued and its ballot was not received until approximately two days after the voting deadline of October 16, 2000. See Doc. No. 381. NCC has objected to the ability of Callaway to vote on the Plan on the grounds that both Callaway’s proof of claim and vote were submitted after the respective deadlines had passed.

### **B. Hartford**

Unlike Callaway, Hartford was listed in the Debtor's schedules. The Debtor listed Hartford as an unliquidated and disputed claim that the Debtor valued at \$0. See Doc. No. 36. Although listed as unliquidated and disputed, Hartford has never filed a proof of claim in this case. Despite the fact that its claim was listed as unliquidated and disputed and despite not having filed a proof of claim, Hartford submitted a ballot and voted to accept the Plan. NCC has objected to Hartford's vote on the grounds that no proof of claim was ever filed and the claims bar date has now since passed.

After discovering that Hartford had voted to accept the Plan, the Plan Proponents have since filed a motion to file a proof of claim on Hartford's behalf. See Doc. No. 383. NCC has objected to the Plan Proponents' motion to file a proof of claim on Hartford's behalf on the grounds that it is not timely. See Doc. No. 399.

### **III. DISCUSSION**

Under the Bankruptcy Code, a creditor is required to file a proof of claim in order to have an allowed claim, except that in Chapter 11 cases a creditor whose claim is listed as undisputed, non-contingent, and liquidated in the debtor's schedules is not required to file a proof of claim in order to have an allowed claim. See Fed. R. Bankr. P. 3002(a) and 3003(b)(1). However, a creditor in a Chapter 11 case whose claim is listed as disputed, contingent, or unliquidated must file a proof of claim, or such creditor will not be treated as a creditor for the purposes of voting and distribution. See Fed. R. Bankr. P. 3003(c)(2). If a creditor fails to file a proof of claim the debtor or the trustee may do so any time after the first meeting of creditors and up until thirty days after the expiration of the claims bar date. See Fed. R. Bankr. P. 3004.

Only holders of allowed claims are entitled to vote on a plan of reorganization. See 11 U.S.C. § 1126(a). Under section 502(a) of the Bankruptcy Code, a proof of claim is deemed allowed unless a party in interest objects. Once a proof of claim is deemed allowed under section 502 a creditor is entitled to vote, either accepting or rejecting a plan. Id.

Under Federal Rule of Bankruptcy Procedure (hereinafter “Rule”) 9006(b) the Court may, with certain exceptions not applicable here, extend deadlines, after those deadlines have passed, when the deadlines have not been met due to excusable neglect. The United States Supreme Court has established the standard for excusable neglect under Rule 9006(b)(1) in Chapter 11 cases. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395 (1993). In Pioneer the Court stated that the determination of what constitutes excusable neglect is an equitable inquiry that must take into account all of the relevant circumstances surrounding the failure of the party to meet the established deadline. Id. The Court went on to state that the types of circumstances that should be examined 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. Id.

#### **A. Callaway**

In accordance with the Court’s procedural order, the Plan Proponents submitted a memorandum of law supporting their position that Callaway does have a right to vote on the Plan. See Doc. No. 381. Attached to the memorandum is an affidavit from the Vice President of Credit for Callaway Golf, Ann Barthelmess (“Barthelmess”). Barthelmess states that Callaway has no record of receiving notice of the Debtor’s bankruptcy filing or the claims bar date until May of 2000 when Callaway called the Debtor regarding an outstanding invoice. Barthelmess also states that Callaway submitted a proof of claim on August 4, 2000. Barthelmess further states that the Plan, disclosure statement, and ballot did not arrive at Callaway until October 16, 2000, as the Debtor did not put a complete address on the package. Upon realizing that the voting deadline was October 16, 2000, Barthelmess states that she immediately executed the ballot and had the legal department send the ballot by overnight mail.

In order to determine Callaway’s eligibility to vote, the Court must first determine whether Callaway has an allowed proof of claim under section 502(a). The Court has examined the Debtor’s schedules and the service list and finds that Callaway was not listed. While the Court realizes that the proof

of claim was filed almost eight months after the claims bar date, the Court notes that Callaway submitted its proof of claim within 120 days of discovering that the Debtor was in Chapter 11 bankruptcy. The Court finds that all other creditors were given 120 days after being notified of the Chapter 11 bankruptcy and, therefore, sees no reason why Callaway should not be given such time as well.

More importantly, however, the Court finds that Callaway has met the standard for excusable neglect as set forth in Pioneer. In this case, there is no danger of prejudice to the Debtor. In fact it is the Debtor that is asking that Callaway be allowed to vote. Callaway's delay in filing its claim did not impact any judicial proceeding. Further, the delay was not within the reasonable control of Callaway, as no notice of the bankruptcy petition was given to Callaway until May of 2000. Finally, Callaway appears to have acted in good faith and did indeed file a proof of claim within a reasonable time after learning of the bankruptcy petition. Accordingly, the Court finds that the time for Callaway to file its proof of claim is extended under Rule 9006(b)(1) to the date their proof of claim was filed and that Callaway is entitled to a vote on the Plan.

Having established that Callaway is entitled to vote, the next line of inquiry is whether Callaway's vote may be counted when it was received after the voting deadline. Once again, the Court must apply the excusable neglect standard set out in Pioneer. The Court finds that Callaway's reason for submission of a late vote also meets the Pioneer standard for excusable neglect. Here to, there is no danger of prejudice to the Debtor as the vote was only two days late and arrived in time to be counted before the scheduled confirmation hearing. As was indicated, the delay was only two days and did not and does not prejudice any judicial proceeding. Further, the reason for the delay was not in control of Callaway, as Callaway had no control over how the Debtor addressed its package. Finally, Callaway acted promptly and in good faith by immediately casting its ballot and sending it by overnight mail once the ballot had been received.

While NCC has objected to the counting of Callaway's vote, NCC has cited no rule or case that shows that the standard for excusable neglect has not been met under the facts of this case. NCC argues that Callaway has not requested an extension of the deadlines for filing either claims or ballots and counsel

for the Plan Proponents or the Debtor may not represent Callaway. However, nothing in Rule 9006(b)(1) suggests that Callaway is the only entity with standing to file such a motion. The Debtor is a party in interest who may raise, appear and be heard on any issue in a Chapter 11 proceeding. See 11 U.S.C. § 1109(b). The Court, therefore, finds that Callaway's lateness in voting is excusable and will allow Callaway's vote to be counted.

#### **B. Hartford**

The Plan Proponents admit that Hartford does not have an allowable claim as no proof of claim has been filed for Hartford and Hartford was listed as an unliquidated and disputed claim in the Debtor's schedules. See Doc. No. 381. However, the Plan Proponents have filed a motion seeking leave to file a proof of claim on behalf of Hartford under Rules 3004 and 9006(b)(1). The Plan Proponents claim that although they did not file a proof of claim within the 30 days required under Rule 3004, the Court should allow them to do so now under the excusable neglect standard in Rule 9006(b)(1).

The Plan Proponents claim that their failure to file a proof of claim on behalf of Hartford is excusable because it was reasonable for the Debtor to believe that Hartford would file a proof of claim if it wanted to vote and take part in distribution since the Debtor had listed the claim as disputed and unliquidated in its schedules. The Debtor further claims that it could not have anticipated that Hartford would want to vote its claim. The Debtor points out that Hartford's failure to follow the rules of establishing a claim was an event that was out of the control of the Debtor. Finally, the Debtor argues that there will be no prejudice to the Debtor, no delay in the judicial proceedings, and that the Debtor acted in good faith by acting once Hartford had voted and it was apparent that Hartford was not filing its own claim.

As was noted earlier, the standard of excusable neglect is an equitable one that is to be based upon all of the circumstances surrounding the action. See Pioneer, 507 U.S. at 395. After reviewing the Plan Proponents' reasons, the Court finds that the standard for excusable neglect has not been met. The Court finds that it would be inequitable to allow the Debtor and/or the Plan Proponents to file a proof of claim at this date. The Debtor had thirty days after the claims bar date in which it could have filed a claim on

Hartford's behalf. The Debtor, however, was content to do nothing, thus allowing Hartford's claim to be discharged without payment upon future confirmation of a plan of reorganization. Only after Hartford submitted a ballot accepting the Plan, and after it became apparent that the Debtor might need Hartford's accepting vote in order to gain confirmation, did the Debtor become concerned about filing a proof of claim on Hartford's behalf. It would not be equitable to allow the Debtor to sit on its hands and thereby gain the benefit of having one less claim to pay, and then later, when it becomes advantageous to the Debtor, allow the Debtor to file a proof of claim in order to gain approval of its Plan. The Debtor made its decision in January of 2000 concerning the claim of Hartford and may not now change its mind simply because it is now clear that the Debtor made an unwise decision. The Court finds that the Debtor and/or the Plan Proponents have not met the requirements of excusable neglect and may not file a proof of claim on behalf of Hartford. As the Plan Proponents have admitted that Hartford does not have a claim unless the Debtor is allowed to file a proof of claim on Hartford's behalf, which motion the Court has denied, it follows that Hartford may not vote on the Plan.

#### **IV. ORDER**

In accordance with this memorandum opinion, it is hereby ORDERED that:

1. The proof of claim filed by Callaway is deemed timely filed under Rule 9006(b)(1) and is deemed allowed.
2. The vote of Callaway is deemed timely filed under Rule 9006(b)(1) and will be counted.
3. The motion by the Plan Proponents to file a proof of claim on behalf of Hartford is denied.
4. Hartford has no claim and its vote on the Plan will not be counted.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 1<sup>st</sup> day of December, 2000, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge