

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: FF ACQUISITION CORP., d/b/a FLEXIBLE-FLYER

CASE NO. 05-16187

DANIEL IRONS, ET AL., on behalf of themselves  
and all others similarly situated

PLAINTIFFS

VERSUS

ADV. PROC. NO. 07-1193

FF ACQUISITION CORP., d/b/a FLEXIBLE-FLYER

DEFENDANT

OPINION

On consideration before the court is the motion to dismiss filed by the defendant, FF Acquisition Corp., d/b/a Flexible-Flyer, (hereinafter FF Acquisition or debtor); response to said motion having been filed by Daniel Irons, et al., (hereinafter plaintiffs); and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (B), and (O).

II.

FF Acquisition filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on September 9, 2005. The deadline for non-governmental creditors to file proofs of claim was July 13, 2007, which was five days prior to the date scheduled for the confirmation hearing of the debtor's second amended Chapter 11 plan. The proof of claim bar date was set forth in the notice of the confirmation hearing.

The 195 plaintiffs listed in the complaint, which was filed on November 1, 2007, are former employees of the debtor who were terminated on September 9, 2005, when FF Acquisition closed. The plaintiffs allege that they were not given the 60 day statutory notification of the closing as required by the Worker Adjustment and Retraining Notification Act (“WARN Act”).

FF Acquisition has filed its motion to dismiss based on the plaintiffs’ failure to timely file proofs of claim. The plaintiffs, in their response to the motion, ask that their complaint be accepted as an informal proof of claim.

### III.

There are basically two reasons that a court can allow a claimant to file a late proof of claim: 1. the claimant’s due process rights were violated, and 2. the claimant can establish “excusable neglect” for the untimely filing of the proof of claim. *See, Collier on Bankruptcy 15<sup>th</sup> Ed. Rev.* ¶501.02[b][ii] and [c].

The court will first discuss the due process requirements that interface with the deadlines and bar dates that are established pursuant to the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. “A creditor’s claim can be barred for untimeliness only upon a showing that it received reasonable notice.” *Oppenheim, Appel, Dixon & Co. v. Bullock (In re Robintech, Inc.)*, 863 F.2d 393, 396 (5<sup>th</sup> Cir. 1989), *cert. denied*, 493 U.S. 811, 110 S.Ct. 55 (1989).

Determining whether a creditor received reasonable notice depends on the facts and circumstances of each case. *In re Robintech* at 393, 396. Due process requires notice that is “reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response.” *Id.* The plaintiffs in their

response assert that they had no notice of the proof of claim bar date. A lack of notice of the bar date is something this court takes very seriously. If the plaintiffs can establish that the disallowance of the filing of a late proof of claim would be a violation of due process, the court can and will allow an untimely filing. *See, In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 735 (5<sup>th</sup> Cir. 1995).

In this case, the most recent notice of the hearing on the confirmation of the debtor's second amended Chapter 11 plan was dated May 25, 2007. It set forth the proof of claim bar date and was disseminated by debtor's counsel on June 1, 2007, to "all creditors and parties-in-interest as list (sic) on the matrix on file with the Clerk of the Court." (Emphasis supplied. See the debtor's certificate of service.) This was at least the third notice that was mailed to creditors, since the case filing, advising of the deadline to file proofs of claim.

The court examined the matrix to determine if the 195 plaintiffs were indeed noticed of the bar date. This examination revealed that the plaintiffs can be broken down into three categories: Category 1 - plaintiffs who are on the mailing matrix and who received notice of the proof of claim bar date (listed on attached Exhibit "A"); Category 2 - plaintiffs whose names appear on the matrix, but discrepancies exist in the addresses reflected on the matrix as compared to the addresses appended to the complaint (listed on attached Exhibit "B"), and Category 3 - plaintiffs who are not on the matrix and who did not receive notice of the proof of claim bar date (listed on attached Exhibit "C").

The court is of the opinion that the 136 plaintiffs listed in category 3 can clearly establish that the inability to file a late proof of claim would be a violation of due process. Therefore, as to these plaintiffs, the filing of the complaint will be treated as an informal proof of claim. These

plaintiffs meet the requirements of the five-part test to permit the filing of an informal proof of claim developed by the Fifth Circuit Court of Appeals in the case of *In re Nikoloutsos*, 199 F.3d 233 (5<sup>th</sup> Cir. 2000), to-wit: “[T]o qualify as an informal proof of claim: (1) the claim must be in writing; (2) the writing must contain a demand by the creditor on the debtor’s estate; (3) the writing must evidence an intent to hold the debtor liable for such debt; (4) the writing must be filed with the bankruptcy court; and (5) based upon the facts of the case, allowance of the claim must be equitable under the circumstances.” *Id.* at 236. Although the claims of the plaintiffs in category 3 are deemed timely filed by the court, this determination in no way forecloses the right of FF Acquisition to challenge the validity and ultimate allowability of these claims.

The 16 plaintiffs listed in category 2 may or may not have received either actual or constructive notice of the proof of claim bar date. Because of the discrepancies in the addresses, the court cannot presume that these plaintiffs received adequate notice. Counsel for the debtor will be afforded an opportunity to test the sufficiency of the notice for each of these plaintiffs. The decision to do so must be made within 15 days of the date of this opinion. If a decision is made to test the sufficiency, the testing process must be completed within 60 days of the date of this opinion unless extended, for cause, by the court. Once the testing process is completed, the court will conduct an evidentiary hearing to resolve any continuing disputes. If the debtor’s counsel elects not to test the sufficiency of the notice as to any plaintiff in category 2, that plaintiff shall be treated in the same manner as those plaintiffs in category 3, that is, the filing of the complaint shall be considered as an informal filing of a timely proof of claim, the validity and allowability of which may thereafter be challenged by the debtor.

The 43 plaintiffs in category 1 do not have any due process grounds that would require the court to consider the complaint as an informal proof of claim. These plaintiffs are listed on the matrix, and there are no discrepancies regarding their addresses. The notice of the confirmation hearing was presumptively disseminated to them as noted hereinabove. The only reason to allow the filing of an informal late proof of claim for these plaintiffs would be for “excusable neglect” as contemplated by Rule 9006(b)(1), Federal Rules of Bankruptcy Procedure.

The United States Supreme Court in the case of *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S.Ct. 1489 (1993), stated that the determination of whether a party’s neglect of a deadline was excusable neglect is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* at 1498. The Supreme Court enumerated certain factors that lower courts could consider in determining whether the neglect would be “excusable,” including the danger of prejudice to the debtor, whether the neglect was within the reasonable control of the movant, the length of the delay and its potential impact on the proceedings, and whether the movant acted in good faith. (The court notes that FF Acquisition does not contend that these 43 plaintiffs or their counsel acted in bad faith.)

The prejudice to FF Acquisition, if this court were to consider the claims of the category 1 plaintiffs as timely filed, is significant. These claims were not filed or considered when the second amended plan was negotiated, confirmed, or even consummated. The Fifth Circuit in *Eagle Bus, supra.*, differentiated between situations in which a plan was negotiated and confirmed after receipt and notice of late filed proofs of claim and situations where the plan was negotiated and confirmed before the late claims were ascertained. The Fifth Circuit cited

opinions which had determined that there would be prejudice to the debtor in the latter scenario. *Eagle Bus*, 62 F.3d at 737-38; citing, *In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1007 (S.D. N.Y. 1993); *In re Alexander's Inc.*, 176 B.R. 715, 722 (Bankr. S.D. N.Y. 1995). The second amended plan in this case was filed on May 8, 2007, and the confirmation hearing was set for July 19, 2007. Multiple objections to the plan were filed. After several months of negotiations with various creditors, the plan was finally confirmed on October 23, 2007. In consummating the plan after confirmation, the debtor made substantial distributions, approximating \$3,500,000.00, to holders of allowed claims pursuant to the plan, satisfying 59% of these creditors' claims. "Acceptance of a substantial late claim after consummation of a vigorously negotiated claims settlement and plan of reorganization thereon, and a distribution of a major part of the assets thereunder would disrupt the economic model on which the creditors, the debtor and the stockholders reached their agreements." *In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1007 (Bankr. S.D. N.Y. 1993). Based upon these reasons, the court finds that allowing the late claims of the category 1 plaintiffs would be prejudicial to the debtor. (Parenthetically, the court observes that this prejudice may be mitigated somewhat by the fact that the plaintiffs in category 3, and perhaps some of the plaintiffs in category 2, may have to be factored into the remaining distribution process if their claims are ultimately validated and allowed.)

Next, the court will consider the reason for the delay. The alleged violations of the WARN Act took place on September 9, 2005. The category 1 plaintiffs waited approximately two years before hiring counsel to represent them to file a complaint. Many of these plaintiffs, who were receiving proceeding notices, attended several hearings that were scheduled and

conducted during the administration of the case. They were specifically instructed by the court from the bench on more than one occasion that they should consider employing the services of an attorney to investigate any potential WARN Act violations. The court finds that this length of delay and inaction does not support a finding of excusable neglect.

The final factor to be considered is the reason for the delay, including whether it was within the category 1 plaintiffs' reasonable control. The failure to timely file proofs of claims by the plaintiffs, who were listed correctly on the matrix and who received notices throughout the pendency of this case, was not beyond their control. They could have filed proofs of claim at any time after the first notice of the filing of the bankruptcy case, which was dated September 30, 2005, but, for whatever reason, they did not do so. Based upon the factors enunciated in *Pioneer*, the category 1 plaintiffs have not established "excusable neglect" in order for the court to permit the untimely filing of an informal proof of claim through their complaint.

The motion to dismiss filed by FF Acquisition is well taken as to the category 1 plaintiffs and will be sustained. As to the category 2 plaintiffs, there must be further investigation, as noted herein, concerning whether these plaintiffs received either actual or constructive notice of the proof of claim bar date. The motion is not well taken as to the plaintiffs listed in category 3 and will be overruled as to those plaintiffs.

A separate order will be entered contemporaneously herewith.

This the 23<sup>rd</sup> day of April, 2008.

/s/ David W. Houston, III  
DAVID W. HOUSTON, III  
UNITED STATES BANKRUPTCY JUDGE  
CATEGORY 1

## NOTICE

Daniel Irons  
Lucy Bennett  
Sherry Billips  
Vera Blake  
Jerry Bluit  
Deborah Brown  
Vivian Chandler  
Jettie P. Collins  
Mary C. Dyson  
Rosie Mary Hall  
Clytee Harris  
Willie Mae Hawkins  
Fannie Hopkins  
Brenda Hosey  
Herman Humphries  
John W. Jefferson  
Johnny Jones  
Eva Jones  
Johnathan Kilby  
Eva Lyons  
Bernice Manning  
Josephine Moore  
William M. Mott  
Terry L. Petty  
James Pruitt  
Rosie Rambus  
Cora L. Robinson  
Perry Robinson  
Jeardine Smith  
Willie M. Spraggins  
Joseph Spraggins  
Margaret Sykes  
Fred Tate  
Etta Thompson  
Debbie S. Turner  
George Walker  
Catrina White  
Callie P. White  
April Wofford  
Willie Martin  
David Mason  
Denisha McCotry  
Elizabeth McFarland

EXHIBIT "A"

CATEGORY 2

## ADDRESS DISCREPANCIES

Thanuras Brown (street address and zip code different–city and state same)  
Wanda D. Bush (last name listed as Rush on creditor matrix at same address)  
Elois Carothers (zip code different–street address, city and state same)  
Danny Carothers (street number different–name of street, city, state and zip same)  
Victor Chism (street name different-listed as Tibbee on matrix and Ebbec in adversary)  
Terry Clay (creditor matrix lists P.O. Box 11–adversary states 233 Fifth St.)  
Bobby J. Crowley (creditor matrix lists Rt. 1 Box 242--adversary states P.O. Box 46)  
Hazel E. Cunningham (street no. different–creditor matrix lists 905, adversary lists 902)  
Leasha G. Davidson (address completely different except for state)  
Delores Doss (street no. different–creditor matrix lists 2505, adversary lists 2503)  
Walter Kelly, Jr. (Walter W. Kelly at completely different address listed on matrix)  
Frankie Lane (street no. and name different–matrix lists 703 Kalora, adversary states 702 Kalura)  
John Lee Manning (John J. Manning at same address listed on matrix)  
Angela Roberson (street address different–city, state and zip same)  
Ruby J. Smith (Ruby R. Smith at completely different address listed on matrix)  
King D. Watkins, Sr. (King K Watkins listed at different P.O. Box #–city, state & zip same)

CATEGORY 3  
NO NOTICE

David D. Angles  
Grady Barclay  
Megan Bibbs  
Pearly Billups  
Romell Black  
Ruthie Bordes  
Thelma D. Boyd  
Kendrick Bradford  
Thomas Bradshaw  
Gary Brewer  
Demtria A. Brooks  
Debra Brookshire  
Leuveina Brown  
Troy Brown  
Arnexica Buford  
Martha Louise Bynum  
Luerena Calmes  
Dennis Cannon  
Bernice Carr  
Stephanie Terry Carter  
Gloria A. Cherry  
Sanreca Clay  
William R. Clayton  
Diane W. Coggins  
Annie Cole  
Annette J. Collins  
Kejuan Collins  
Charles Cox  
Terria Davidson  
Tanisha Davis  
Bernice C. Davis  
Christopher L. Deans  
Nakish Deavens  
Derrick Dupree  
Mable F. Eacholes  
Lou Ann Edwards  
Queen E. Eggerson  
Angela Elliott  
Perry Evans  
Carnell Evans

Kayla L. Ewing  
Karl E. Felton  
Mattie Fountain  
Mona Lisa Franks  
Kendrick Franks  
Jamica Green  
Demetrius D. Harrell  
Camilya Harris  
Martha Harris  
Barbara L. Harris  
Barbara A. Harris  
Iguster Harris  
Annales Henderson  
Loria Henderson  
Elsie Hill  
Mary Louise Hogan  
Eddie B. Holder  
Addie Hosey  
Stephanie Hosey  
Harmond Humphries  
Derrick M. Humphries  
Melvin Irons  
Jerry C. Ivy  
Mary K. Johnson  
Mary L. Johnson  
Rashuad Jones  
Jonathan P. Jones  
Mary L. Jones  
Wanda Jones  
Warren Shotwell, Jr.  
Charles H. Elliott, Jr.  
Jimmy King  
Sandra King  
Harrison Landon  
Alonzo Larry  
Debra Lawrence  
LaTanya Ledbetter  
Lucy Lewis  
Shirley Lofton  
Arlesha Mabe  
Mary L. Moore  
Lisa Moore  
Willie T. Morton  
Trannie H. Owen  
Terry B. Petty  
Rango Poe  
James E. Powell  
Natoya Powell  
L. C. Powell

Amelia Prescott  
Rose Marie Randle  
Demerel Reives  
Terry Rice  
Franklin Richardson  
Lois Riddle  
Demetrice Roberson  
Georgia Robinson  
Laura Mae Ross  
Minnie Rupert  
Dettrick Shelton  
Tonya Shelton  
Elizabeth A. Shields  
Richard Smith  
Curtis Smith  
Roderick Smith  
Earl Stewart  
Denise Swain  
Eddie D. Swift  
Eliza Tallie  
Shandra Thompson  
Alan Tinkel  
Julia B. Vance  
Kenneth Walker  
Lizzie Walker  
Sierina Walker  
Shirleta Walker  
Erica Walker  
Annie Ward  
Jimmy Washington  
Alice L. Westbrook  
Mildred D. White  
Mary D. White  
John Robert Williams  
Mary M. Williams  
Scott Wolanek  
Machelle Yates  
Alfreda Young  
Brenda Marshall  
Mamie L. Martin  
Jimmie McCarter  
Emma S. McFarland  
Sandra McLemore  
Woodrow M. McNeil  
Eddie Miller  
Barbara Mitchell