

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF DELAWARE

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In re Chapter 11
Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., et al., (Jointly Administered)
Debtors. Objection Deadline: Nov. 18, 2003 @ 4:00 pm
Hearing Date: Nov. 25, 2003 @ 9:30 am
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**MOTION OF ROBERT S. AND KATHLEEN E. MOSS
FOR AN ORDER ENLARGING THE BAR DATE**

Robert S. and Kathleen E. Moss (jointly, “Mosses”), by and through the undersigned counsel, hereby move this Court for entry of an order enlarging the bar date previously established in the above-captioned cases to allow the Mosses’ proof of claim to be deemed timely filed. In support of this Motion, the Mosses state as follows:

Background

1. On April 1, 2003, the above-captioned debtors (“Debtors”) each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (“Bankruptcy Code”).
2. The Mosses were lessors of non-residential real property under lease number PA-247-CL (“Lease”) between the Mosses and Fleming Companies, Inc., one of the Debtors. The Lease is for premises located in Corry, Erie County, Pennsylvania.
3. By Stipulation and Order entered on August 19, 2003, the Mosses and the Debtors agreed that the Debtors would immediately pay the post-petition amounts due under the Lease and that the Lease would be deemed rejected as of August 19, 2003.
4. By order of this Court, the deadline to file claims against the Debtors was September 15, 2003 (“Bar Date”).
5. On September 17, 2003, less than 30 days following the rejection of the Lease, the

Debtors' claims agent received a proof of claim submitted by the Mosses ("Claim"). The Claim asserts an unsecured claim in the amount of \$72,085.32, for damages resulting from the Debtors' rejection of the Lease, and an administrative claim in the amount of \$22,990.41, for post-petition charges due under the Lease. A copy of the Claim is attached hereto as Exhibit A.

Relief Requested

6. The Mosses respectfully request that the Court enlarge the Bar Date by two days and deem the Mosses' Claim timely filed.

7. Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") states that the court "for cause shown may extend the time within which proofs of claim or interest may be filed." Further, Bankruptcy Rule 9006(b)(1) provides that when a motion is filed after the bar date has passed, then the claimant must demonstrate excusable neglect. The United States Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993), held that whether neglect is excusable is an equitable determination which depends on examining all of the relevant circumstances. Further, the Court identified four elements to consider in assessing whether neglect is excusable: (i) danger of prejudice to the debtor; (ii) length of time that has passed and potential impact on the judicial proceedings; (iii) reason for the delay, including whether it was outside the creditor's control; and (iv) whether the creditor has acted in good faith. *Id.* at 395; *see also Jones v. Chemetron Corp.*, 212 F.3d 199, 203 (3d Cir. 2000).

Danger of Prejudice to the Debtors

8. "Prejudice, probably the most important factor for disallowing a late filing is not present here." *See In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS, 683 *10 (Bankr.

E.D. Pa. 2003) (finding that the absence of prejudice is a “compelling” reason to allow a late filed claim). As set forth above, the Mosses submitted their Claim only two days after the Bar Date and less than the usual (for the District of Delaware) 30 day period to assert rejection damage claims against a debtor. This minimal delay will not prejudice the Debtors. “Prejudice occurs when allowance of a late claim would injure or damage the debtor.” *See In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS, 882 *15 (Bankr. E.D. Pa. 2003). In determining whether there will be prejudice to a debtor, the courts have considered the following factors: (i) the size of the claim relative to the size of the debtor’s estate; (ii) any adverse impact on the judicial administration of the case; and (iii) whether a plan has been formulated, filed or confirmed. *Id.* All of these factors weigh in favor of allowing the Mosses’ Claim. The Claim alleges an unsecured claim in the amount of \$72,085.32 and an administrative claim in the amount of \$22,990.41, which are small relative to the size of the Debtors’ estates. The delay of only two days will not adversely impact or delay the administration of these cases. And, the Debtors have not yet filed a plan of reorganization. *See, e.g., Jones*, 212 F.3d 199 (denied a late filed claim filed four years after the bar date because the debtor’s plan of reorganization has been confirmed.). The Debtors will not be prejudiced by the allowance of the Mosses’ Claim.

Length of Delay

9. As set forth above, the delay here is minimal. The Debtors’ claims agent received the Mosses’ Claim only 2 days after the Bar Date. *See In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS, 882 *14 (holding that the relevant time period to consider is the time from the bar date to the date the late claim is filed). Given the insignificant delay, and the fact that the Debtors have not yet filed a plan of reorganization, this element weighs in favor of allowing the

Mosses' Claim. *Id.* *15 (allowing the late filed claim based, *inter alia*, upon a finding that the delay of approximately two months was minimal and that the filing occurred before a plan of reorganization was filed).

Reason for Delay in Filing Claim

10. The reasons for the brief delay in filing the Mosses' Claim were that the Mosses' Pennsylvania counsel was unable to communicate concerning the details of the proof of claim and the potential damages where the negotiations for releasing of the premises were ongoing up to and through the Bar Date, until October 4, 2003, and the Mosses were not available to review the proof of claim after the time of receipt of the Stipulation and Order rejecting the Lease, on August 22, 2003, and the releasing of the premises. Because the negotiations regarding releasing the leased property were projected to result in complete or significant mitigation of the Claim, the Mosses were not sleeping on their rights with respect to the Claim and should not be penalized for their efforts to mitigate the Claim.

Good Faith

11. Further, the Mosses have acted in good faith. The Mosses promptly filed their Claim, resulting in a delay of only two days. Consideration of the promptness of the action taken once a missed deadline is discovered must also be considered. *See In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS, 683 *17 (finding that the movant acted promptly where the delay was from late July to early August). Moreover, the Mosses' good faith is further demonstrated by their prompt filing of this Motion seeking to have their late filed claim allowed. *See In re Spring Ford Industries, Inc.*, 2003 Bankr. LEXIS, 882 *11 (holding that a movant's good faith is manifest where the movant promptly seeks to have the bar date enlarged and its late filed claim

allowed).

12. Under an application of the *Pioneer* factors, especially in light of the very minimal delay and lack of prejudice to the Debtors, the Bar Date should be enlarged and the Mosses' Claim should be deemed timely filed.

WHEREFORE, for all the foregoing reasons, the Mosses respectfully request that this Court enlarge the Bar Date and deem the Mosses' Claim timely filed.

Dated: October 22, 2003

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UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF DELAWARE

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In re

FLEMING COMPANIES, INC., et al.,

Debtors.

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Chapter 11

Case No. 03-10945 (MFW)

(Jointly Administered)

Related to Docket No. _____

**ORDER GRANTING THE MOTION OF ROBERT S. AND
KATHLEEN E. MOSS FOR AN ORDER ENLARGING THE BAR DATE**

Upon consideration of the Motion of Robert S. and Kathleen E. Moss for an Order Enlarging the Bar Date (“Motion”) and any and all responses to the Motion; and upon finding that notice of the Motion was adequate and proper, and it appearing that no other or further notice of the Motion is required; and, upon finding, after due deliberation, that the relief requested in the Motion is appropriate; it is hereby

ORDERED, that the Bar Date (as defined in the Motion) is hereby enlarged as necessary so as to allow the proof of claim filed by Robert S. and Kathleen E. Moss (“Claim”) to be timely filed; and it is further

ORDERED, that the Claim is hereby deemed timely filed.

Dated: _____, 2003

United States Bankruptcy Judge