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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
MIRANT CORPORATION, <u>et al.</u> ,	§	CASE NO. 03-46590 (DML)
	§	JOINTLY ADMINISTERED
	§	CHAPTER 11
Debtors.	§	
	§	Hearing Date and Time:
	§	February 18, 2004 at 12:00 p.m.

**MOTION OF THE UNITED STATES OF AMERICA PURSUANT TO RULE 8002 OF
THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR ENLARGEMENT OF
TIME TO FILE NOTICE OF APPEAL**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE LYNN:

The United States of America, on behalf of the Bonneville Power Administration (“BPA”), a power marketing administration within the United States Department of Energy, moves pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure for an order enlarging the time for filing a notice of appeal of the Court’s December 23, 2003 Order Denying Modification of the Automatic

Stay entered December 23 and 29, 2003 (Docket Nos. 2335 and 2351).

JURISDICTION AND PARTIES

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. On or about July 14, 2003, Debtor Mirant Americas Energy Marketing, L.P. (“MAEM”) filed a voluntary petition under chapter 11 of title 11 (the “Bankruptcy Code”), and pursuant to an order granted July 16, 2003 (Docket No. 38), its case is jointly administered with the above referenced bankruptcy case.

FACTUAL BACKGROUND

3. On December 5, 2003, BPA filed its Motion Pursuant to 11 U.S.C. § 362(d) and Rule 4001(a) of the Federal Rules of Bankruptcy Procedure for an Order Modifying the Automatic Stay Retroactively to Permit Termination of a Confirmation Agreement (the “Lift Stay Motion”) (Docket No. 2046) seeking relief from the automatic stay in order terminate the Confirmation Agreement.

4. By order dated December 23, 2003 (the “Lift Stay Order”), the Court denied the Lift Stay Motion. The Lift Stay Order was entered on December 23, 2003 (Docket No. 2335) and then entered again December 29, 2003 (Docket No. 2351).

5. On December 23, 2003, counsel for BPA received via facsimile copies of the Court’s (1) Memorandum Opinion and (2) the Lift Stay Order. Declaration of Matthew J. Troy, executed January 22, 2004 (“Troy Decl.”) at para. 4.

6. The Lift Stay Order did not reflect the date of entry but, instead, bore a stamp stating that “THE DATE OF ENTRY IS ON THE COURT’S DOCKET.”

7. When BPA counsel departed the office on the afternoon of December 23, 2003, the Order had not been entered on the Court's docket. Id. at para. 5.

8. From December 24, 2003 through January 2, 2004, BPA counsel was on annual leave during which he traveled to Roanoke, Virginia, and Alpharetta, Georgia, to visit family for the Christmas holidays. Id. at para. 6.

9. When BPA counsel returned home on December 31, 2003, he used his home computer to access remotely his electronic mail on his office computer. Id. at para. 7. One of the reasons he did so was to ascertain if the Lift Stay Order had been entered. Id. One of the e-mails was a notification from the Court's electronic filing system (CM/ECF) of the entry of the Lift Stay Order on December 29, 2003 (Docket No. 2351). Id. Having received and reviewed this e-mail, BPA counsel did not review the voluminous other e-mail notifications from the Court's CM/ECF regarding Debtors' cases. Id.

10. BPA counsel did not access the docket or any filings in Debtors' cases from December 23, 2003 to December 31, 2003. Id. at para. 8.

11. On January 1, 2004, BPA counsel accessed Docket Number 2351 to confirm the entry of the Lift Stay Order on December 29, 2003. Id. at para. 9.

12. In reliance on Docket Number 2351, BPA filed a notice of appeal of the Lift Stay Order (the "Notice of Appeal") (Docket No. 2434) on January 8, 2004. Id. at para. 10. If the December 29, 2003 entry date was valid, the Notice of Appeal was timely filed. Fed. R. Bankr. P. 8002(a).

13. On January 8, 2004, the same day BPA filed the Notice of Appeal, Docket No. 2434 was modified to reflect that the order entered December 29 (Docket No. 2351) was a duplicate of the Lift Stay Order entered December 23, 2003 (Docket No. 2335).

14. Counsel for BPA was not notified of the modification to Docket No. 2351. Troy Decl. at para. 12.

15. Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure and as reflected in Docket No. 2434, the designation of items to be included in the record on appeal for the Notice of Appeal were due January 20, 2003.

16. On January 20, 2003, BPA filed timely its designation of items to be included in the record on appeal (the “Designation”) (Docket No. 2621) and its statement of issues to be presented on appeal (“Statement of Issues”) (Docket No. 2622).

17. In drafting the Designation on January 20, 2004, counsel for BPA discovered for the first time that Docket No. 2351 had been modified and that the Lift Stay Order had been entered on the Court’s docket on December 23, 2003. Id. at paras. 13 and 14.

18. On January 21, 2003, counsel for BPA reviewed the items in the “Deleted Items” folder of his Microsoft Outlook electronic mail system. Id. at para. 15. At that time, he discovered a deleted e-mail message from the Court’s CM/ECF system with the subject line “03-46590-dml11 ‘Order on motion for relief from stay’” that was sent at 2:18 p.m. EST and received at 3:01 p.m. EST on December 23, 2003. Id. The body of this e-mail indicated a document had been entered in Debtors’ cases at Docket Number 2335 with the following docket text “Order denying motion for relief from stay.” Counsel for BPA does not recall having seen or read this e-mail prior to January 21, 2003. Id.

DISCUSSION

19. Preliminarily, BPA’s Notice of Appeal is timely regardless of the entry of the Lift Stay Order on December 23, 2003. While that docket entry began the ten day period for filing a notice of

appeal, Fed. R. Bankr. P. 8002(a), that period started anew once the same order was reentered on the docket December 29, 2003 (Docket No. 2351). The modification to Docket Number 2351 did not negate, void or remove that entry—it stated that the document at Docket Number 2351 was duplicative of the document at Docket Number 2335. Hence, the deadline for filing a notice was not January 2, 2004, but rather, January 8, 2004, and the Notice of Appeal is timely without resort to the relief under Rule 8002(c)(2) requested here. Cf. Gravel & Shea v. Vermont Nat’l Bank, 162 B.R. 969 (D. Vt. 1993) (holding that incorrect docket entry did not start appeals period and that period began once corrected entry was made). However, to preserve its appeal rights and without conceding that its Notice of Appeal is not timely filed, BPA files this motion seeking relief pursuant to that rule.

20. Rule 8002(c) permits a bankruptcy judge to extend the time for filing a notice of appeal. Subsection (c)(2) provides in relevant part that:

A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect.

Fed. R. Bankr. P. 8002(c)(2).¹

21. Assuming the use of the December 23, 2003 docket entry date, the time for filing a notice of appeal of the Lift Stay Order expired on January 2, 2004. Accordingly, BPA is filing this motion within twenty days of that date as provided in Rule 8002(c)(2).

22. The determination of excusable neglect “is at bottom an equitable one, taking account of all

¹ Rule 9006(b)(3) permits the enlargement of time for filing a notice of appeal under Rule 8002 “to the extent and under the conditions stated in those rules.” Fed. R. Bankr. P. 9006(b)(3).

relevant circumstances surrounding the party's omission. ... includ[ing] ... [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 within the reasonable control of the movant, and [4] whether the movant acted in good faith.” Pioneer Investment Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 395 (1993). The Pioneer standard for “excusable neglect” applies to bankruptcy appeals. Christopher v. Diamond Benefits Life Ins. Co. (In re Christopher), 35 F.3d 232, 236 (5th Cir. 1994).

23. Application of the Pioneer standard supports a finding of excusable neglect here. First, Debtors have suffered no prejudice. BPA’s Notice of Appeal was timely filed assuming a December 29, 2003 entry date, and BPA subsequently filed timely its Designation and Statement of Issues. Docket Nos. 2621 and 2622. Debtors have had to take no action with respect the Notice of Appeal prior to this request.²

24. Second, the length of the delay is minimal. BPA filed its Notice of Appeal only six days after the January 2, 2004 deadline for filing a notice of appeal of the Lift Stay Order assuming a December 23, 2003 entry date. Similarly, BPA filed this motion within two days of having learned that the December 29, 2003 docket entry had been modified. Troy Decl. at paras. 13 and 14. Hence, the length of the delay is negligible and has had, and will have, no impact on BPA’s appeal or Debtors’ cases.

25. Third, the reason for the delay was not in BPA’s control. The Lift Stay Order bears a stamp

² Being “subject to an appeal of a favorable judgment that the fortuity of the late filing has rendered final” is not prejudice under the Pioneer standard. Sonders v. Mezvinsky (In re Mezvinsky), 2001 WL1403525 (Bankr. E.D. Pa. 2001). As noted in paragraph 19., BPA does not concede that the Lift Stay Order is nonappealable or that its Notice of Appeal is not timely.

indicating that the date of entry is reflected on the Court's docket. BPA counsel received an affirmative notification that the Lift Stay Order was entered on December 29, 2003 (Docket No. 2351). Troy Decl. at para. 7. Once notice of that docket entry was received, counsel for BPA had no reason to review the docket to determine if the order had been entered previously. To stop upon finding the apparently valid docket entry for which one is searching is reasonable and, at the least, is the absence of neglect. In reasonable reliance on Docket Number 2351, BPA filed timely its Notice of Appeal on January 8, 2004. That docket entry was not modified until the day BPA filed its Notice of Appeal, and BPA received no notice of that modification, *id.* at para. 12. BPA promptly filed this motion once it learned of the modification to that docket entry.

26. Fourth, BPA has acted in good faith in seeking this enlargement. It filed timely its Notice of Appeal, Designation and Statement of Issues based on its justified reliance of the December 29, 2003 docket entry. Upon learning of the modification of that docket entry, BPA promptly filed this motion.

27. Moreover, the reason for this request was not the result of “[i]nadvertence, ignorance of the rules, or mistakes construing the rules.” *Pioneer*, 507 U.S. at 392. Rather, it was the result of an docket entry stating that the Lift Stay Order was entered on December 29, 2003—an entry not modified until the day BPA had timely filed the Notice of Appeal in reliance on that docket entry. Moreover, the date of the modification occurred after the deadline for filing a notice of appeal if the December 23, 2003 docket entry controlled.

28. Finally, Rule 9022 of the Federal Rules of Bankruptcy Procedure does not apply here. That rule provides, in relevant part, that “[l]ack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed,

except as permitted in Rule 8002.” Fed. R. Bankr. P. 9022. BPA’s counsel was monitoring the docket in this case and received affirmative notice, via electronic mail from the Court’s CM/ECF, that the Lift Stay Order was entered on the docket on December 29, 2003. Troy Decl. at para. 7. This docket entry was not modified until January 8, 2004.

CONCLUSION

For the foregoing reasons, BPA respectfully requests that the Court enter an order deeming its Notice of Appeal timely filed or, in the alternative, (1) enlarging to January 8, 2004, the time within which to file a notice of appeal of the Lift Stay Order and (2) deeming BPA’s Notice of Appeal timely filed.

This 22nd day of January 2004.

Respectfully submitted,
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CERTIFICATE OF CONFERENCE PURSUANT TO N.D. TX L.B.R. 9014.1

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE LYNN:

Pursuant to N.D. TX L.B.R. 9014.1, the undersigned counsel for the United States of America, in connection with its motion, on behalf of the Bonneville Power Administration (“BPA”), pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure for an Enlargement of Time to File Notice of Appeal (the “Motion”), hereby certifies compliance with Local Civil Rule 7.1(a) of the Local Rules of the United States District Court for the Northern District of Texas and N.D. TX L.B.R. 9014.1.

On January 21, 2004, I spoke with counsel for Debtors, Robin E. Phelan, concerning the relief requested in the Motion. Mr. Phelan stated that Debtors would not consent to the relief in the Motion and would oppose it.

This 22nd day of January 2004.

Respectfully submitted,
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