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U.S. BANKRUPTCY COURT

New Mexico

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Memorandum Opinion on Debtor's Objection to Proof of Claim 6 Filed by Tom Sanchez (RE: related document(s)[235] Objection to Claim). (jeb)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
ALLIED DISCOUNT CORPORATION,
Debtor.

No. 11-03-11697 SA

**MEMORANDUM OPINION ON DEBTOR'S OBJECTION
TO PROOF OF CLAIM 6 FILED BY TOM SANCHEZ**

This matter is before the Court on the Debtor's Objection to Tom Sanchez's Proof of Claim Number 6 (doc 235). Debtor is represented by Moore, Berkson & Gandarilla, P.C. (Bonnie Gandarilla). Tom Sanchez and Fannie Sanchez ("Sanchez") are represented by Chris Lucero. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B)¹. For the reasons set forth below, the Court finds that the objection should be overruled.

FACTS

Sometime in late 2002 Sanchez obtained judgment in a state court case against Debtor and the Estate of Melvin Rueckhaus². That court awarded \$150,000 in compensatory damages against Debtor and the probate estate, and another \$150,000 in punitive damages against Debtor only. This Chapter 11 case was filed on March 5, 2003. (Doc 1). Schedule D lists Sanchez as a disputed secured creditor in the amount of \$326,000.00 secured by a

¹This case was filed prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 so those changes do not impact this case.

²Melvin Rueckhaus was the sole owner of the stock of Debtor. Michael Rueckhaus is Melvin's son. Michael served as the personal representative of Melvin's estate starting from when Melvin died in 1995, and also inherited the stock of Debtor.

judgment lien on an apartment complex in Albuquerque. (Doc 18). On May 29, 2003, Debtor filed an adversary proceeding against Sanchez seeking to avoid the judgment lien as preferential and to subordinate \$150,000.00³ of their claim as an exemplary damage claim. See Adversary 03-1248, doc 1.

Debtor filed a Chapter 11 Plan and Disclosure Statement on December 14, 2005. Docs 89, 90. At the hearing on the Disclosure Statement on February 6, 2006, the Court ordered the Debtor to file a Motion for Summary Judgment in the Adversary proceeding and an Amended Plan and Disclosure statement by February 24, 2006. See Minutes, doc 96. Debtor complied. See docs 99 (hereafter, the "Plan"), 100, Adv. No. 03-1248 doc 27. Sanchez did not respond to the Summary Judgment motion; the Court adopted Debtor's Statement of Material Facts and awarded Debtor summary judgment on March 13, 2006, ruling in part that the punitive damages claims be subordinated to payments of other allowed unsecured non-priority claims. See Adv. 03-1248 doc 37.

On March 14, 2006, Sanchez filed a Motion for Order Lifting Stay or of Non-Applicability of Stay (doc 102) seeking to continue a state court lawsuit against Michael Rueckhaus to pierce the corporate veil of Debtor to collect their judgment

³The state court judgment was affirmed on appeal, and a \$150,000 bond posted by the Estate of Melvin Rueckhaus was awarded to Sanchez, leaving only the punitive damage award against Debtor. See Disclosure Statement, doc 90, Art. 3.

from Michael Rueckhaus. Debtor objected to the stay motion (doc 104), and the Court held a preliminary hearing on March 5, 2007. The Court requested briefs but no further action was taken on the motion⁴.

Debtor's Plan and Disclosure Statement were not noticed out until August 31, 2006. On September 29, 2006, Sanchez timely filed an Objection to the Disclosure Statement that states, in part:

Tom Sanchez's Claim: Tom Sanchez has a pre-petition claim against the Debtor in the amount of \$150,000 plus interest, a Class V Claim. [Debtor's Schedule F [sic⁵]].

On October 11, 2006, the Court ordered Debtor to supplement the amended disclosure statement. See Minutes, doc 118. Debtor did. Doc 121. Sanchez timely filed an Objection to the supplemented Disclosure Statement that states, in part:

Tom Sanchez's Claim: Tom Sanchez has a pre-petition claim against the Debtor in the amount of \$150,000 plus interest, a Class V Claim. [Debtor's Schedule F [sic]].

Doc 131. Debtor filed yet another addendum to the disclosure statement on January 12, 2007 (doc 137) and the disclosure statement was approved by Order entered February 9, 2007. Doc 142.

⁴Sanchez also filed other stay motions. See doc 169 and Adv. 03-1248 doc 29.

⁵Sanchez was originally listed on Schedule D as secured.

Sanchez filed two objections to confirmation of the Plan. The first, doc 153, is combined with an objection to the proof of claim of Michael Rueckhaus, as personal representative of the estate of Melvin Rueckhaus. It states, in part:

COMES NOW TOM SANCHEZ, holder of a judgment against Debtor in the amount of \$150,000, plus judgment interest running at 15%, by and through his attorney, Chris Lucero Jr., and submits the following objection to Debtor's Chapter 11 Plan ...

Attached find a copy of the Special Verdict form entered by the jury in Sanchez v. Allied Discount, et al, CV 97-03813, which shows the jury made special findings holding the two Defendants Estate of Melvin Rueckhaus, and Allied Discount Corporation, guilty of constructive fraud and negligent misrepresentation against the Sanchez plaintiffs.

The second, doc 154, is combined with an objection to the proof of claim of the Rodey Law Firm. It contains language similar to doc 153 and sets out a claim of \$150,000 plus interest at 15%.

Sanchez also vigorously participated in other aspects of this bankruptcy case by, among other things, filing other objections to the Rueckhaus and Rodey claims. See docs 163, 165⁶. Sanchez's attorney appeared regularly at hearings in the case.

⁶The estate of Melvin Rueckhaus objected to Sanchez's objections to claims on the ground that they lacked standing for failure to file a proof of claim. Doc 185. Sanchez responded that, among other things, they should be "deemed to have filed a Proof of Claim by their vigorous participation in this case by the filing of motions, objections and the like; and by the Debtor and other creditor's recognition of the Sanchez position as a creditor." Doc 190.

The Court conducted a confirmation hearing on March 29, 2007 at which Sanchez and the United States Trustee orally withdrew their objections to confirmation. See Order Confirming Plan, doc 172, entered April 2, 2007.

Plan ¶ 1.1.12 defines the "Effective Date" of the Plan as "[t]he first day of the first month next following the date upon which an Order confirming this Plan becomes final." Therefore, the Effective Date was May 1, 2007. Plan ¶ 9.1 provides:

All creditors holding claims classified as Class II, Class III, Class IV or Class V and which are listed by the Debtor as disputed ... shall be required to file proof of such claims, and to serve complete copies of such proof of claims on Debtor's counsel. If an earlier date has not been established by the Court during this Proceeding, proof of such claims shall be filed and served no later than the latter of (1) the Effective Date, or (2) the tenth day after service of a notice of disputed claim by the Debtor. Claims for which proof is not timely filed and served shall be deemed disallowed as to the Debtor, and shall not receive a dividend from the Settlement Funds.

Debtor disputed the Sanchez claim, so Sanchez had to file a proof of claim by the Effective Date. Sanchez filed their proof of claim on September 19, 2007, well past the deadline. Debtor has objected to allowance of the Sanchez claim solely on the basis that it was not timely filed. Doc 235.

CONCLUSIONS

"The concept of an informal proof of claim is well established in bankruptcy jurisprudence." In re Boudinot, 237 B.R. 413, 417-18 (Bankr. S.D. Ohio 1999) (Holding that creditors

actions did not rise to level of informal proof of claim.) (Citations omitted.) The purpose is to permit creditors with untimely formal proofs of claim to participate in the case so long as the creditor can demonstrate that it participated in the case prior to the bar date and indicated that the creditor intended to hold the debtor liable for the claim. Id. The Court of Appeals for the Tenth Circuit stated a five part test regarding informal proofs of claim:

1. the proof of claim must be in writing;
2. the writing must contain a demand by the creditor on the debtor's estate;
3. the writing must express an intent to hold the debtor liable for the debt;
4. the proof of claim must be filed with the Bankruptcy Court; and
5. based on the facts of the case, it would be equitable to allow the amendment.

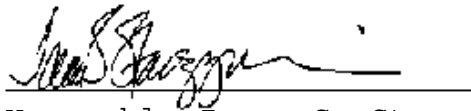
Clark v. Valley Federal Savings and Loan Ass'n. (In re Reliance Equities, Inc.), 966 F.2d 1338, 1345 (10th Cir. 1992).

Sanchez's actions before the Effective Date constitute an informal proof of claim. First, stay motions and objections and responses were all in writing. Second, they contain demands on the Debtor's estate to pay the \$150,000 punitive damage claim. Third, they express an intent to hold the Debtor liable. Fourth, they were all filed with the Bankruptcy Court. And, fifth, the Court finds that it would be inequitable to not allow the amendment. Debtor knew of the Sanchez claim from the beginning of the case, as evidenced by Schedule D. Debtor knew of the

unsuccessful appeal, which should have resolved the "disputed" nature of the claim. Debtor knew of the payment of the \$150,000 in compensatory damages, as evidenced by the complaint in the adversary proceeding. Debtor caused the remaining claim to be subordinated. Debtor cannot claim surprise. See also The Charter Co. v. Dioxin Claimants (In re The Charter Co.), 876 F.2d 861, 864 (11th Cir. 1989)(A motion for relief from stay constituted an informal proof of claim because it apprised the court of the existence, nature and amount of the claim and it made clear the claimants' intent to hold debtor liable.)

CONCLUSION

The Court finds that Sanchez's actions in this case constituted an informal proof of claim, made before the Effective Date of the Plan. Proof of Claim 6 therefore relates back to the timely earlier informal proof of claim. Because the Debtor objected only to the timeliness of the claim, Debtor's objection to Claim 6 should be overruled. A separate Order will enter.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: March 17, 2008

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