

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

Hearing Date: December 17, 2013 at 10:00 a.m.  
Objection Date: December 10, 2013 by 5:00 p.m.

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In the Matter of

MIDDLE BAY GOLFERS' ASSOCIATION, INC.,

Chapter 7

Case No.: 13-70361-dte

Debtor.  
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**TRUSTEE'S MOTION (a) DETERMINING THAT CERTAIN CREDITORS WITH  
TARDILY FILED CLAIMS ARE ENTITLED TO RECEIVE DISTRIBUTION ON  
THEIR CLAIMS IN ACCORDANCE WITH 11 U.S.C. § 726(a)(2)(C); (b)  
AUTHORIZING THE TRUSTEE TO MAKE DISTRIBUTIONS TO THOSE  
CREDITORS; and (c) GRANTING SUCH OTHER AND FURTHER RELIEF AS THE  
COURT DEEMS JUST AND PROPER**

**TO: THE HONORABLE DOROTHY T. EISENBERG,  
UNITED STATES BANKRUPTCY JUDGE**

Kenneth Kirschenbaum, the Chapter 7 Trustee (the "Trustee") for the estate (the "Estate") of Middle Bay Golfers' Association, Inc. (the "Debtor"), by and through his attorneys, Kirschenbaum & Kirschenbaum, P.C., moves for entry of an order pursuant to 11 U.S.C. §§ 105(a), 502 and 726(a)(2)(C): (a) determining that certain creditors with tardily filed claims are entitled to receive distribution on their claims in accordance with 11 U.S.C. § 726(a)(2)(C); (b) authorizing the Trustee to make distribution to those creditors; and (c) granting such other and further relief as the Court deems just and proper.

1. On January 23, 2013, the Debtor filed a voluntary petition for relief (the "Petition") pursuant to Chapter 7 of the Bankruptcy Code. Kenneth Kirschenbaum was appointed as the Chapter 7 Trustee, in which capacity he was duly qualified and continues to serve.

2. On January 25, 2013, the Clerk of Court issued the “Notice of Discovery of Assets”, and April 25, 2013 was fixed as the date by which all proofs of claims were required to be filed against the Debtor’s bankruptcy estate (the “Bar Date”).

3. A review of the Claims Register for the Debtor shows that approximately eighteen creditors filed claims against the Debtor’s Estate subsequent to the Bar Date. Eleven of those creditors (collectively, the “Late Filing Creditors”) contacted the Trustee’s counsel regarding their claims. The Late Filing Creditors are:

<u>Name of Creditor</u>	<u>Claim Number</u>	<u>Amount of Filed Claim</u>	<u>Date Claim Filed</u>	<u>Basis for Claim</u>
Louis Perlman	101	\$4,600.00	May 8, 2013	Bondholder
Albert Leon Fuhrman	102	\$4,600.00	May 1, 2013	Bondholder
Choice Strategies, A Division of WageWorks	105	\$1,516.92 <sup>1</sup>	May 21, 2013	Prepetition Creditor
Joseph Rothchild	106	\$4,600.00	June 3, 2013	Bondholder
Estate of Stanley J. Hartman	108	\$4,600.00	June 14, 2013	Bondholder
Melvin Katz	109	\$4,600.00	June 20, 2013	Bondholder
Rachelle Cotler	112	\$1,500.00	August 14, 2013	Bondholder
Herbert V. Friedman	113	\$4,600.00	August 20, 2013	Bondholder
Florence Solaric	115	\$2,500.00 <sup>2</sup>	August 26, 2013	Bondholder
Fred Lamon	116	\$4,600.00	September 3, 2013	Bondholder
Weeping Willow	117	\$20,958.13	September 27, 2013	Prepetition Creditor

4. The Late Filing Creditors, with the exception of Albert Leon Fuhrman, informed the Trustee’s counsel that they did not learn of the Debtor’s bankruptcy filing until after the passage of the Bar Date.

<sup>1</sup> Pursuant to Stipulation, Choice Strategies consented to a reduction of its claim to the sum of \$923.26 as that was the pre-petition portion owed by the Debtor to Choice Strategies.

<sup>2</sup> Pursuant to Stipulation, Florence Solaric consented to a reduction of her claim to the sum of \$1,500.00 because the Debtor’s schedules listed that sum as the amount of her bond, and not the sum of \$2,500.00.

5. Albert Leon Fuhrman (“Fuhrman”) informed the Trustee’s counsel that he learned of the Debtor’s bankruptcy filing a day or two before the passage of the Bar Date. Fuhrman’s claim was filed on May 1, 2013. However, due to the timing of Fuhrman learning of the Debtor’s bankruptcy filing, and the date that his claim was filed, counsel for Fuhrman and counsel for the Trustee agreed, pursuant to stipulation, for Fuhrman’s claim to be deemed timely filed and reduced to the sum of \$2,000.00. The stipulation precluded the need for Fuhrman to file a motion with the Bankruptcy Court to have his claim allowed in its entirety.

6. The Trustee’s counsel reviewed the Debtor’s Petition, the Debtor’s mailing matrix, the Court’s certificate of mailing for the “Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines” and the Court’s certificate of mailing for the “Notice of Discovery of Assets” (collectively, the “Notice Documents”). The review of the Notice Documents established that none of the Late Filing Creditors were provided with formal notice of the Debtor’s bankruptcy filing. The Late Filing Creditors informed the Trustee’s counsel that they did not learn of the Debtor’s bankruptcy filing until after the passage of the Bar Date.

7. Upon consideration of the underlying facts, the Trustee’s counsel was instructed by the Trustee to enter into stipulations (the “Stipulations”) with each of the Late Filing Creditors that would allow the Late Filing Creditors’ claims to be deemed timely filed claims against the Debtor’s Estate.

8. The Stipulations obviated the need for each of the Late Filing Creditors to have to file separate motions with the Court to have their claims be deemed allowed against the Estate. If the Late Filing Creditors engaged in such motion practice, then the time and effort spent by the Trustee and his counsel in addressing the various motions would have resulted in the Estate

incurring additional costs and expenses that would have exceeded the efforts spent in resolving the issues amicably pursuant to the Stipulations.

9. The Stipulations were signed by the Trustee's counsel and the respective Late Filing Creditor or their counsel. The Stipulations were subject to being "So Ordered" by the Bankruptcy Court. Upon the Stipulations being "So Ordered", the respective creditors holding the late filed claims will be entitled to receive distribution from the Estate *pari passu* with those creditors holding timely filed general unsecured claims against the Estate in accordance with 11 U.S.C. § 726(a)(2)(C).

10. Prior to the filing of this motion with the Court, Chief Bankruptcy Judge Carla E. Craig issued a decision in *In re Jemal*, 2013 Bankr. LEXIS 3745 (Bankr. E.D.N.Y. Sept. 9, 2013).

11. In *In re Jemal*, a creditor of the debtors, BNY Mellon, N.A. ("BNY"), filed a motion seeking an extension of time to file a proof of claim against the debtors' estate after the expiration of the bar date. *Id.* at \*1. The parties did not dispute that BNY did not have knowledge of the bankruptcy filing until after the bar date passed and that no distribution had been made in the case that would have barred payment of the claim. Addressing Rule 3002(c) of the Federal Rules of Bankruptcy Procedure, Judge Craig stated:

[A] proof of claim in a Chapter 7 case is "timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code," unless one of six enumerated exceptions applies. Pursuant to Bankruptcy Rule 9006(b)(3), the Court may enlarge the time set under Bankruptcy Rule 3002(c) "only to the extent and under the conditions stated [in that rule]." *See in re Bell*, 225 F.3d 203, 210 n. 8 (2d Cir.2000) (*citing Zidell, Inc. v. Forsch (In re Alaska Coastal Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990)) ("[N]o equitable power exists to depart from the mandate of Rule 9006(b)(3).").

*Id.* at \*3.

12. Judge Craig noted that the listed exceptions did not allow for the Court to extend the time for BNY to file its claim after the bar date, and therefore, the Court did not have the “authority to deem BNY’s claim timely filed.” *Id.* However, Judge Craig held that this did not preclude a late filed claim from sharing *pari passu* with timely filed claims if the claim met the requirements of § 726(a)(2)(C). *Id.* (noting that BNY “in substance, sought to have its tardily filed claim receive distribution with timely filed claims in accordance with § 726(a)(2)(C).”).

13. Section 726 governs the distribution of property of the estate, and provides that once claims entitled to priority under § 507 are paid, then the estate property will be distributed:

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is--

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if--

- (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
- (ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection....

11 U.S.C. § 726(a)(2)(C) (2013).

14. Pursuant to section 726(a)(2)(C), a late filed claim can receive distribution *pari passu* with timely filed claims if: (1) the holder of the claim did not have notice or actual knowledge of the bankruptcy case prior to the bar date; and (2) the claim is filed in time to allow for payment to be made on the claim. These elements were established by BNY in *In re Jemal* because BNY did not have notice and there was still time for distribution to be made on the claim. 2013 Bankr. LEXIS 3745, \*4. Therefore, Judge Craig granted BNY’s motion and stated that its claim was entitled to distribution pursuant to section 726(a)(2)(C). *Id.* at \*7.

15. In light of Judge Craig's decision in *In re Jemal*, the Trustee submits that the Late Filing Creditors' claims are entitled to distribution *pari passu* with the timely filed § 726(a)(2)(A) and (B) claims as the elements of 11 U.S.C. §726(a)(2)(C) have been met.<sup>3</sup> The Stipulations entered into between the Trustee and all of the Late Filing Creditors, with the exception of Albert Leon Fuhrman (as discussed above), contained representations from the Late Filing Creditors that the creditors were unaware of the Debtor's bankruptcy filing prior to the passage of the bar date. Furthermore, distribution has not been made yet in this case to the remaining outstanding creditors.

16. No prior application for the relief requested herein has been made to this Court or any other court.

WHEREFORE, it is respectfully requested that the Court grant the relief requested in its entirety.

Dated: Garden City, New York  
November 14, 2013

KIRSCHENBAUM & KIRSCHENBAUM, P.C.  
Attorneys for the Trustee

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<sup>3</sup> Additional late filing creditors that may be entitled to distribution pursuant to 11 U.S.C. § 726(a)(2)(C) may contact the Trustee or his counsel after the filing of the instant motion and prior to the hearing date. Therefore, the Trustee reserves the right to supplement the list of late filing creditors contained herein.