The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 10, 2009 **United States Bankruptcy Judge**

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

IN RE:	§	
	§	
SPIRIT OF PRAYER MINISTRIES, INC.	§	
Debtor.	§	
	§	CASE NO. 07-43858-DML-7
	§	

MEMORANDUM ORDER

Before the court is that *Motion to Allow Late-Filed Proof of Claim* (the "Motion") filed by Ernestine Cohee ("Cohee") acting in her capacity as executrix of the Estate of Ernest Hodges. The above-named Debtor filed a response in opposition to the Motion. On August 27, 2009, the court held a hearing on the Motion during which, in addition to hearing the parties argue, it received testimony from Scott Moseley ("Moseley") as well as admitting into evidence certain

exhibits (most of them part of the court's record and subject to judicial notice) identified as necessary below.[1]

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (O). This memorandum order embodies the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052 and 9014.

By the Motion, Cohee asks that the court allow a claim to be filed in these cases some 17 months after the bar date. Cohee claims her failure to file a claim timely was due to excusable neglect. *See* Fed. R. Bankr. P. 9006(b); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); 9 COLLIER ON BANKRUPTCY ¶ 3003.03[4][b] (15th ed. rev. 2009).

Cohee, together with James Griffin ("Griffin"), acting in his capacity as executor of the estate of Hazel Hodges (together with Ernest Hodges, the "Hodges"), is the owner of a judgment taken by the Hodges against Debtor in March 2007. Hazel Hodges died, with the judgment outstanding and unsatisfied, on June 28, 2007. Ernest Hodges died on September 3, 2007, the same day Debtor filed for relief under chapter 11 of the Bankruptcy Code (the "Code")[2]. Griffin was appointed as the executor for the estate of Hazel Hodges on August 16, 2007. Cohee was appointed executrix of the estate of Ernest Hodges on February 11, 2008 and qualified as such by filing bond on March 6, 2008. Moseley has served (and continues to serve) in the Hodges' two probate proceedings as counsel to both Griffin and Cohee since their respective appointment.

Following commencement of its case (which apparently was triggered by the Hodges' judgment), Debtor's meeting pursuant to Code § 341 was set for October 10, 2007, and the bar

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[1] The court also considers prior proceedings in this case. *See In re Mirant Corp.*, 354 B.R. 113, 120 n. 4 (Bankr. N.D. Tex. 2006) (citing *Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs. Ltd.)*, 61 F.3d 197, 203 (3d Cir. 1995)).

[2] 11 U.S.C. §§ 101 *et seq.*

date for filing claims pursuant to Fed. R. Bankr. P. 3003(c) in this chapter 11 case was set for January 8, 2008. The record reflects that the notice of the bar date and section 341 meeting was mailed by Debtor's counsel to:

> Hodges, Hazel et al
> Estate of Earnest [sic] Hodges
> 4505 South Hughes Avenue
> Fort Worth, TX 76103
> . . . .
> Scott Moseley, Attorney
> 2263 Eighth Avenue
> Fort Worth, TX 76110

Debtor Rebuttal Exhibit C. Debtor also reflected the Hodges' estates' creditor status (as disputed[3]) on its schedule D:

> Creditor # : 3
> Hodges, Hazel et al
> Estate of Earnest [sic] Hodges
> 4505 South Hughes Avenue
> Fort Worth TX 76103
>
> Representing:
> Hodges, Hazel et al
> Scott Moseley
> 2263 Eighth Avenue
> Fort Worth TX 76110

Debtor Rebuttal Exhibit A.

Griffin, through the agency of Moseley, timely filed a proof of claim for the full amount of the Hodges' judgment. *See* Claim #4. Cohee, however, did not file a claim timely. In September of 2008, Debtor objected to Griffin's claim on various bases, including that Griffin may assert only one-half of the Hodges' judgment.[4] Debtor's objection came on for hearing on

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[3] As the debt owed the Hodges was liquidated by a judgment of a state court that is final and not subject to appeal, the court questions the propriety of showing the debt as disputed.

[4] Debtor filed an amended objection to Griffin's claim in April 2009 and a second amended objection to Griffin's claim in July 2009.

July 13, 2009, at which time the court took that matter under advisement. The court expects to rule on that objection in the near future.

Apparently fearful that the court might find merit in Debtor's theory that either of the Hodges (or either of their estate representatives) could assert only half the judgment, on August 11, 2009, Cohee filed the Motion. Debtor contests Cohee's assertion that the bar date should be extended for her on the basis of her "excusable neglect."

Although Rule 3003(c)(3) provides that the court may, after the fact, extend the bar date in a chapter 11 (or chapter 9) case "for cause" to allow a late-filed proof of claim, the Supreme Court has held that that rule permits expansion of the bar date to allow a claim filed out of time only on the basis of the excusable neglect of the claimant. *See Pioneer*, 507 U.S. at 380; Rule 9006(b)(1). In *Pioneer*, the court provided an inclusive list of factors for determining whether a claimant's failure to comply with the bar date was due to excusable neglect. Those factors are:

1. the danger of prejudice to the debtor,
2. the length of 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, 507 U.S. at 395.

The parties quite properly have focused on the question of whether Cohee has delayed unreasonably in filing the Motion.[5] Cohee insists that Debtor's failure to give her proper notice of the bar date is dispositive and warrants her failure to assert her claim until long after the bar date. Debtor argues that (1) it gave notice to Ernest Hodges' estate as evidenced by Debtor's

[5] *I.e.*, the length of the delay, the reason for it and whether the delay was within the party's control. The court is not prepared to find that Cohee acted other than in good faith. Whether there is prejudice to Debtor depends largely on the court's ruling on its argument that the Hodges' judgment must be halved for purposes of this case between Griffin and Cohee. If Debtor is correct, half its obligation under the judgment will be discharged without satisfaction. However, clearly Debtor cannot argue it was surprised to learn of Cohee's claim.

Rebuttal Exhibit C; (2) notice to Moseley was sufficient to put Cohee on notice; and (3) at the latest, Cohee knew that she needed to file her own claim when Debtor first raised the issue of the split in the judgment in September of 2008. Apparently dividing his persona much as Debtor would divide the Hodges' judgment, Moseley testified that his knowledge of Debtor's case did not amount to Cohee knowing of it – and, anyway, Cohee could not have filed a claim—acted on behalf of the Estate – until her qualification as executrix by posting bond. Finally, as Moseley testified, Cohee argues Debtor had other, proper ways to give notice to the estate of Ernest Hodges[6]; having failed to utilize those means of notice, Debtor failed to give Cohee legally sufficient notice[7].

The court sees no merit in Cohee's arguments. First, Debtor clearly provided actual notice to representatives of the estate of Ernest Hodges – whoever they might be – by mailing notice of the section 341 meeting and bar date to the Hodges' address. Second, notice to Moseley[8] in one capacity – as counsel to Griffin - was sufficient to place him on notice, in his later capacity as counsel to Cohee. *See In re Terex Corp*., 45 B.R. 290 (Bankr. N.D. Ohio 1985) (notice to decedent's wife constituted notice to her as executrix of her husband's subsequently reopened estate); *In re Pioneer Inv. Servs. Co.*, 106 B.R. 510, 516 (Bankr. E.D. Tenn. 1989) (notice received by president of corporation was notice as to partnership in which corporation was a general partner), *aff'd* 507 U.S. 380**.** That notice went to Moseley and the Hodges'

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6 According to Moseley, Debtor should have petitioned the probate court to appoint a special representative for the estate of Ernest Hodges to receive notice. The court notes that, more than a month prior to the bar date, Moseley, fully aware of Debtor's case, was seeking Cohee's recognition by the probate court as Ernest Hodges'estate representative.

7 The need for formal notice, as opposed to actual knowledge of a chapter 11 case, is evidenced by *Reliable Electric Co., v. Olson Construction Co.*, 726 F.2d 620, 622 (10th Cir. 1984).

8 Moseley testified he did not recall receiving the notice of the section 341 meeting, but the court finds that the notice was sent and therefore deems it received by Moseley. 9 COLLIER ON BANKRUPTCY ¶ 2002.02[4] (15th ed. rev. 2009) ("Mailing creates a presumption of receipt under Federal Rule of Evidence 601 and Rule 9006(e).").

address as opposed to Cohee is not material in the instant analysis of whether the failure to file a claim representing the interest of Ernest Hodges in the judgment was a result of excusable neglect.[9]

Second, Debtor could not have given Cohee in her executrix capacity notice of the bar date. According to Moseley, Cohee was not appointed until *after* the bar date. Thus, notice to Cohee of the bar date before it passed would have been no more effective than the notices Debtor actually gave.

Third, by Fall of 2008 at the latest Moseley – and, if Moseley is assumed as a licensed attorney to be Cohee's zealous advocate, Cohee – knew Debtor sought disallowance as a claim of half the Hodges' judgment because Cohee had not filed a proof of claim. Even if Debtor's notice to Moseley and to the Hodges' address was so technically deficient as to fail to afford Cohee with due process, from that point she must have known of the potential need to file a claim, and the delay from then until the filing of the Motion is clearly inexcusable.

In sum, the court holds that notice of the bar date was sufficient to require that a claim have been timely filed on behalf of the estate of Ernest Hodges. Even if the notice was technically deficient, however, the court holds that Cohee's failure to address the need to file a claim in Debtor's case[10] until nearly a year and a half after the bar date cannot, under the totality of the circumstances in this case, be attributed to excusable neglect.

Before concluding, the court is compelled to comment on the inappropriateness of the Motion. Cohee's theory of why she was entitled to relief borders on the preposterous. This is

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[9] Notably, Moseley, not Griffin, is listed on the certificate of mailing as having received the notice of section 341 meeting, and that notice was sufficient to trigger filing of a claim by Griffin. For Moseley to contend that the same notice was insufficient as to Cohee is disingenuous at best.

[10] The court, in the context of Debtor's objection to Griffin's claim, will later address whether Cohee needed to file a claim at all.

not the first time in this case that the counsel acting for Cohee (and Griffin) have filed a pleading that did not even meet the so-called "red face test." At one point, for example, Griffin, through the same counsel, sought to prevent discharge by Debtor of the debt represented by the Hodges' judgment under Code § 523(a)(6), though it is clear from Code § 1141(d) that section 523(a)(6) could have no application in Debtor's case – and though at least one of the attorneys representing Griffin (and Cohee) has considerable experience and expertise in bankruptcy law.

Nor has counsel for Debtor been innocent of similar conduct. Leaving aside certain of the theories propounded in Debtor's objection to Griffin's claim, for example, Debtor's counsel sought disqualification of Griffin's ballot rejecting Debtor's plan of reorganization on the basis that the ballot was filed *two minutes* out of time – even though the ballot was, in any event, irrelevant, as Griffin's claim was separately classified and so, absent Griffin's acceptance of the plan, would require treatment under Code § 1129(b). *See In re M. Long Arabians*, 103 B.R. 211 (B.A.P. 9th Cir. 1989); 9 COLLIER ON BANKRUPTCY ¶ 3018 (15th ed. rev. 2009).

The court cautions all counsel in this case against adopting and pressing frivolous positions in the future. The court may invoke Fed. R. Bankr. P. 9011 on its own motion. *See Cruz v. Conseco Fin. Serv. Corp (In re Crofford)*, 317 B.R. 779, 782 (B.A.P. 8th Cir. 2004); *Chase v. Kosmala (In re Loyd)*, 304 B.R. 372, 374 (B.A.P. 9th Cir. 2003); *In re Hill*, 39 B.R. 599, 601 (Bankr. N.D. Minn. 1984). While it is reluctant to pursue such a course, it is equally reluctant to see its time and estate funds (and, for that matter, funds of the Hodges' probate estates) expended unnecessarily in dealing with requests for relief and arguments that are so facially defective that they should be rejected at the outset by counsel as competent as are those appearing in the instant matter.

For the reasons given above, the Motion will be DENIED.

It is so ORDERED.

END OF ORDER # # #