

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **11-03216-hb**

ORDER ON MOTION TO WITHDRAW PROOF OF CLAIM

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
06/06/2012**



Entered: 06/06/2012

A handwritten signature in black ink, appearing to read "John L. Currie".

US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

TMG Liquidation Company,

Debtor(s).

C/A No. 11-03216-HB

Chapter 11

**ORDER ON MOTION TO
WITHDRAW PROOF OF CLAIM**

THIS MATTER came before the Court for hearing upon the *Motion to Withdraw Proof of Claim Number 25-1 with Prejudice Pursuant to Fed. R. Bankr. P. 3006* (“Claim Motion”) filed by National Patent Development Corporation (“National Patent”).¹ National Patent filed its Proof of Claim on October 6, 2011, in the amount of \$128,258.81.

Thereafter on December 14, 2011, the Unsecured Creditors’ Committee appointed in this case filed a lawsuit in this Court against several defendants, including National Patent, captioned *Official Comm. of Unsecured Creditors v. Nat’l Patent Dev. Corp., et al.*, Adv. Pro. No. 11-80212-hb (“Lawsuit”). The Complaint in the Lawsuit includes allegations of fraudulent transfers and breach of fiduciary duty. The Lawsuit asserts that this Court has jurisdiction over the causes of action therein and that it involves core proceedings.² The Lawsuit *did not* mention or reference the Proof of Claim or the alleged debt asserted in the Proof of Claim, nor did it appear to rely on the existence or filing of the Proof of Claim as a basis for the adjudication of the matter in this Court.

Debtor’s Chapter 11 liquidating plan was confirmed by the Court on December 16, 2011.³ That plan provides certain payment terms for a class of creditors, which

¹ Doc. No. 889, filed Apr. 25, 2012.

² Doc No. 1 at 2, ¶¶ 1-2, Adv. Pro. No. 11-80212-hb.

³ See Doc. No. 657.

includes any allowed claim of National Patent, appoints J.H. COHN, LLP, as the Plan Administrator, and provides separately that the Plan Administrator will pursue the Lawsuit on behalf of creditors.⁴

In the Lawsuit, National Patent filed an Answer that did not raise any issues related to the Proof of Claim,⁵ and also filed a Jury Demand.⁶ The Lawsuit names four defendants—National Patent and three individuals. Other Defendants in the Lawsuit have also asserted a right to trial by jury.⁷ A Motion for Withdrawal of Reference was filed by the other defendants on January 31, 2012, pursuant to 28 U.S.C. § 157(d) and Fed. R. Bankr. P. 5011(a). National Patent filed pleadings supporting that request, and the Plan Administrator objected. That request was pending before the U.S. District Court for the District of South Carolina at the time this hearing was held.⁸

On April 6, 2012, the Plan Administrator filed an Objection to the Proof of Claim, disputing the amount and validity of the claim, and asserting that the claim should be disallowed as a result of the pending Lawsuit.⁹ The Plan Administrator also filed a

⁴ A *Motion to Confirm Substitution of Plan Administrator as Plaintiff and Designate Form of Caption* is currently pending before the Court. (Doc. No. 29, Adv. Pro. No. 11-80212-hb, filed Feb. 6, 2012).

⁵ See Nat's Patent's Am. Answer (Doc. No. 55, Adv. Pro. No. 11-80212-hb, filed Mar. 1, 2012).

⁶ See Nat'l Patent's Demand for Jury Trial (Doc. No. 52, Adv. Pro. No. 11-80212-hb, filed Feb. 29, 2012).

⁷ See Individ. Defs.' Demand for Jury Trial (Doc. No. 20, Adv. Pro. No. 11-80212-hb, filed Jan. 31, 2012) (filed by Defendants Jay Baker, E. Fort Wolf, Jr. and Caleb C. Fort, who are collectively referred to as the "Individual Defendants" in this matter and the related adversary proceeding).

⁸ Since the hearing, the district court entered its Order denying the request for withdrawal. The district court directed that reference of this matter shall remain with the bankruptcy court as to all pretrial matters, including dispositive motions, which this Court may determine by submitting proposed findings of fact and conclusions of law to the district court. That Order provides that this Court is to decide whether any defendant has a right to jury trial and, if a defendant is ultimately found to have such a right, that defendant may move to withdraw the reference once the case is ready for trial. See Doc. No. 73, Adv. Pro. No. 11-80212-hb, entered June 4, 2012.

⁹ Doc. No. 850 (asserting that National Patent's claim should be disallowed pursuant to 11 U.S.C. § 502(d) because of the pending Lawsuit, which asserts claims under 11 U.S.C. §§ 548, 550, and 551, unless National Patent pays the amount or turns over the property for which the Plan Administrator asserts it is liable. The Objection also disputes the validity and amount of the claim because National Patent failed to establish that the Debtor is obligated to pay the claim).

Motion to Consolidate,¹⁰ asking the Court to consolidate the Objection to National Patent's Proof of Claim with the Lawsuit in the interests of judicial economy. Thereafter, National Patent filed this Claim Motion on April 25, 2012, seeking withdrawal of its Proof of Claim. If withdrawal is allowed, consolidation of the Lawsuit with litigation over the allowance of National Patent's claim will no longer be necessary.

Fed. R. Bankr. P. 3006 provides:

If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, *the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to . . . § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. . . .*

Fed. R. Bankr. P. 3006 (emphasis added). In deciding whether to permit such withdrawals, courts have applied the standards adopted under Fed. R. Civ. P. 41(a), which govern voluntary dismissals. *See* Advisory Comm. Note to Fed. R. Bankr. P. 3006.

Fed. R. Civ. P. 41(a)(2) provides:

an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection ***only if the counterclaim can remain pending for independent adjudication.*** Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P. 41(a)(2) (emphasis added). Although the decision is within the Court's discretion, the "purpose of Rule 41(a)(2) is freely to allow voluntary dismissals unless the parties will be unfairly prejudiced." *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). Therefore, the Court should grant a Rule 41(a)(2) motion "absent plain legal

¹⁰ Doc. No. 851, filed Apr. 6, 2012.

prejudice to the defendant.” *Ellett Bros. Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001).¹¹

Here, the Lawsuit serves as the “counterclaim” mentioned in Fed. R. Civ. P. 41(a)(2). The Plan Administrator argues that withdrawal of the Proof of Claim should not be allowed because it will adversely affect its rights to continue with the causes of action set forth in the Lawsuit independently in this Court.¹² However, the Lawsuit was filed in this Court without any reliance on or mention of the Proof of Claim as a basis for adjudicating the matter here. The Proof of Claim is not referenced in the Complaint and counsel for the Plan Administrator admitted at the hearing that the Plaintiff was not aware of the Proof of Claim before it filed the Lawsuit.¹³ There is no evidence that the Plan Administrator relied on the Proof of Claim in any way to support an independent adjudication of the issues raised in the Lawsuit. Applying Fed. R. Civ. P. 41(a)(2) to these facts, the rule does not prevent withdrawal of the Proof of Claim. Further, the Plan

¹¹ The context of who serves the roles as “plaintiff” and “defendant” vary from traditional civil actions in adversary proceedings, such as the instant matter, where the debtor or the estate files a counterclaim against a creditor who filed a proof of claim in the bankruptcy case.

In this context, the debtor is the party most analogous to the traditional civil action defendant who is filing an answer and counterclaim in response to the claimant's proof of claim. . . . In other words, the claimant—the Rule 41 plaintiff—files a proof of claim that is in the nature of a complaint. The debtor—the Rule 41 defendant—files an objection to the proof of claim that is in the nature of an answer. Pursuant to the provisions of F.R.B.P. 3007, the debtor must file that objection (or answer) in an adversary proceeding when the debtor joins the objection with a claim for other relief. In applying the provisions of F.R.Civ.P. 41(a)(2) to the adversary proceeding claims objection situation, therefore, it is the claimant who is the “plaintiff” within the meaning of the rule and the debtor who is the “defendant” within the meaning of the rule, notwithstanding the fact that the debtor filed the adversary proceeding and is therefore called the plaintiff.

The Acad., Inc. v. James, Hoyner, Newcomer, & Smiljanich, P.A., et al. (In re The Acad., Inc.), 289 B.R. 230, 233-34 (Bankr. M.D. Fla. 2003).

¹² Doc. No. 938, filed May 11, 2012.

¹³ Due to claim volume, the Debtor in the case employed an independent claims agent for the filing of claims rather than maintaining all claims on the Court’s electronic docket. *See* Order Auth. Debtors to Employ & Retain Kurtzman Carson Consult., LLC as Claims, Noticing & Balloting Agent (Doc. No. 51, entered May 20, 2011); *see also* Notice of Filing of Claims Register by Plan Admin. (Doc. No. 840, filed Mar. 29, 2012). However, the Court’s records indicate that an electronic claim was filed on this Court’s docket at 4:09 p.m. on October 6, 2011, by attorney Joshua Farmer at No. 25 on the claims register. The register contains 32 claims to-date.

Administrator did not call the Court's attention to facts sufficient to prove any legal prejudice that would prevent withdrawal. *See In re Varona*, 388 B.R. 705, 727 (Bankr. E.D. Va. 2008) ("It is the objecting party's burden to demonstrate that he would be legally prejudiced if a creditor is permitted to withdraw a proof of claim."). Therefore, the Court concludes that National Patent's Claim Motion shall be allowed.

Any withdrawal of the Proof of Claim is with prejudice to National Patent since the bar date for filing claims in the bankruptcy case has passed. Therefore, the Proof of Claim cannot hereafter be timely filed or asserted. *See The Acad., Inc. v. James, Hoyner, Newcomer, & Smiljanich, P.A., et al. (In re The Acad., Inc.)*, 289 B.R. 230, 234 (Bankr. M.D. Fla. 2003) (requiring that defendants' withdrawal of claims be with prejudice since the claims bar date in the bankruptcy case had run and it was in the interest of finality to prevent defendants from being able to revive their claims against the plaintiff in the future).

Further, the Proof of Claim remains a part of the Court's records, whether withdrawn or not. Withdrawal does not remove this event from the history of this case and any consequences flowing from the fact that it was filed may be considered by the Court in future decisions, if appropriate.¹⁴

IT IS THEREFORE ORDERED that National Patent's *Motion to Withdraw Proof of Claim Number 25-1 with Prejudice Pursuant to Fed. R. Bankr. P. 3006* is **granted**. Proof of Claim No. 25-1 is hereby deemed withdrawn with prejudice. As a result, the Plan Administrator's *Motion to Consolidate Objection to Proof of Claim filed*

¹⁴ The Court notes that National Patent's Demand for Jury Trial is of record in the Lawsuit and remains for consideration at the appropriate time.

*by National Patent Development Corporation Matter with Pending Adversary Proceeding*¹⁵ is moot.

AND IT IS SO ORDERED.

¹⁵ Doc. No. 851.