IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
ADAM AIRCRAFT INDUSTRIES, INC.,	)	Case No. 08-11751 MER
Debtor.	)	Chapter 7
	)	
	)	
ROBERT SCOGGIN, on behalf of himself and all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 08-1366 MER
	)	
ADAM AIRCRAFT INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR LEAVE TO APPEAL

Plaintiff Robert Scoggin, through his undersigned counsel, on behalf of himself and a putative class of similarly situated persons, and pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001(b), submits this Motion for Leave to Appeal.

Plaintiff requests leave to pursue an interlocutory appeal of the Order of Bankruptcy Judge Michael E. Romero entered on March 20, 2009, which, among other things: (1) denied Plaintiff's Motion for Class Certification in Adversary Proceeding No. 08-1366 MER; (2) granted in part the Trustee's Objection to the Plaintiff's Class Proof of Claim in Bankruptcy Case No. 08-11751 MER; and (3) denied Plaintiff's Motion Pursuant to Bankruptcy Rule 9014 Seeking Application of Rule 7023 to the Class Proof of Claim ("the Order"). A copy of the Order is attached as Exhibit A hereto.

I. PRELIMINARY STATEMENT

Plaintiff and 800 of his co-workers were laid off without warning a few days before their employer, Defendant Adam Aircraft Industries, Inc., filed a chapter 7 bankruptcy petition. Plaintiff filed this class action adversary proceeding ("the Adversary Proceeding") and a Class Proof of Claim in the underlying chapter 7 case ("the Main Case"). In both cases, Plaintiff seeks 60 days back pay on behalf of himself and other similarly situated former co-workers under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et. seq*. ("the WARN Act").

The Court's Order denied Plaintiff's Motion for Class Certification in the Adversary Proceeding and denied application of Rule 7023 to Plaintiff's Class Proof of Claim in the Main Case. The Court's Order was entered in both cases.

On March 30, 2009, Plaintiff filed separate Notices of Appeal in the Adversary Proceeding and in the Main Case with regard to the Order. Today, Plaintiff is filing a separate Motion for Leave to Appeal in each of the cases. Although separate Motions are procedurally required, the Motions for Leave to Appeal are substantially identical so the Court will only have to read one of the Motions in order to rule on both Motions. Because the class issues in the Adversary Proceeding and the Main Case are similar and intertwined, granting interlocutory appeal in both cases would be appropriate to avoid piecemeal litigation of closely related claims and issues. Plaintiff intends to file a motion to consolidate the appeals in the near future to eliminate the need for separate court filings in parallel proceedings.

In summary, interlocutory review of the Court's Order is appropriate for three reasons, each one of which alone is sufficient to justify such review. First, the Court's Order

sounds the death knell to Plaintiff's case, as his costs of litigation will far exceed his damages. Second, the Order denying class certification in the Adversary Proceeding is manifestly erroneous in holding that: (1) a class of 800 potential members fails to meet the numerosity requirement; and (2) although Plaintiff's claim is substantively indistinguishable from the claims of the absent class members, Plaintiff's claim is atypical because he filed his claim with the Court and they did not. Third, the Order declining to apply Bankruptcy Rule 7023 to Plaintiff's Class Proof of Claim in the Main Case involves several unresolved issues of law that require clarification. Given the lack of authority for key elements of the Order and the profound impact the Order will have on Plaintiff's ability to prosecute this case cost-effectively, an interlocutory appeal is warranted.

II. STATEMENT OF FACTS

1. Until February 11, 2008, Defendant was in the business of manufacturing and assembling aircraft and had its corporate headquarters at 12876 E. Adam Aircraft Circle, Englewood, Colorado.

2. On or about February 11, 2008, Defendant terminated approximately 800 similarly situated employees who would come within the proposed class definition.

3. On February 15, 2008, Defendant petitioned for relief in this Court under Chapter 7 of Title 7 of the United States Bankruptcy Code.

4. None of Defendant's employees received 60 days' advance written notice of their terminations as required by the WARN Act. *See* Declaration in Support of Motion for Class Certification in the Adversary Proceeding ("Declaration"). Because Plaintiff and the putative class members were not given proper notice of termination as required by the WARN Act, they are entitled to relief.

5. The modest size of each individual's claims (estimated to be around $10,000 each), their financial situations (having recently been laid off), and costs of attorneys' fees leaves the putative class members unable to pursue their claims as individual litigants. Plaintiff believes other class members would find bringing individual WARN claims prohibitively expensive and unfeasible. *See* Declaration.

6. Because the circumstances of the termination of Plaintiff are the same as those of the other former employees laid off on or about February 11, 2008, the factual and legal issues bearing on Plaintiff's WARN Act claims and the WARN Act claims of the other class members (except for the amount of damages) are the same. *See* Declaration.

7. On May 9, 2008, Plaintiff filed his class action Complaint in this Adversary Proceeding. The Complaint alleges a Rule 23 class claim arising from Defendant's violation of the WARN Act**.** *See* Complaint ¶¶ 20-27. The Complaint alleges that Defendant employed more than 100 employees who worked at least 4,000 hours per week; and that Defendant effected "mass layoffs" or "plant closings" at its Facilities, which resulted in the loss of employment for at least 50 employees and at least 33% of the employees at the Facilities, excluding part-time employees, as defined by the WARN Act. *See* Complaint ¶¶ 29-33.

8. The Complaint further alleges that Plaintiff and the other similarly situated former employees terminated on or around February 11, 2008, worked at the Facilities and were discharged without cause; that all of these former employees, as well as other employees who suffered a loss of employment as the reasonably foreseeable consequence of the mass layoff or plant closing are "affected employees," as defined by 29 U.S.C. §2101(a)(5); that these former employees did not receive from Defendant 60 days' advance

written notice, as required by the WARN Act; and that Defendant failed to pay them 60 days' wages and fringe benefits, as required by the WARN Act. *See* Complaint ¶¶ 34-39.

9. The Complaint further alleges that the proposed class meets the requirements of Federal Rule of Civil Procedure 23 and that there are common questions of law and fact that are applicable to all members of the Class; that the Class is so numerous as to render joinder of all members impracticable; that Plaintiff's claims are typical of the claims of the other Class Members; that Plaintiff will fairly and adequately protect and represent the interests of the Class; that Plaintiff have the time and the resources prosecute this action; and that they have retained counsel who have extensive experience in matters involving federal employment class actions and the WARN Act. *See* Complaint ¶¶ 21-25.

10. The Complaint further alleges that the questions of law and fact common to the class members predominate over any questions affecting only individual members; that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; particularly in the context of WARN Act litigation, where individual Plaintiff and Class Members may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate Defendant. *See* Complaint ¶¶ 26-27.

11. On June 12, 2008, the Trustee for Defendant ("Trustee") filed an Answer to the Complaint.

12. The bar date for filing notices of claims in the Main Case was June 30, 2008. On that date, Plaintiff filed a timely Class Proof of Claim on behalf of the putative class of WARN Act claimants.

13. Also on June 30, 2008, Plaintiff filed in the Adversary Proceeding a Motion for Class Certification and Other Relief, to which the Trustee filed an Objection.

14. On July 21, 2008, the Trustee filed in the Adversary Proceeding a Motion for Summary Judgment on its "liquidating fiduciary" defense, to which Plaintiff filed an Opposition.

15. Also on July 21, 2008, the Trustee filed in the Main Case an Objection to Plaintiff's Class Proof of Claim.

16. On July 29, 2008, the Trustee requested in the Adversary Proceeding a stay of discovery pending disposition of the motions for class certification and summary judgment. Plaintiff objected to the requested stay of discovery. On August 19, 2008, the Court granted the stay of discovery over Plaintiff's objection.

17. On August 25, 2008, Plaintiff filed in the Main Case a Motion under Bankruptcy Rule 9014, requesting the Court to apply Bankruptcy Rule 7023 (which incorporates Federal Rule of Civil Procedure 23 ("Rule 23")) to his Class Proof of Claim. The Trustee filed an Objection.

18. A combined oral argument on Plaintiff's motion for class certification in the Adversary Proceeding, Plaintiff's motion to apply Rule 7023 in the Main Case, and the Trustee's objection to Plaintiff's Class Proof of Claim in the Main Case was held on September 29, 2008.

19. On March 20, 2009, the Court entered its Order.

III. QUESTIONS FOR APPEAL

1. Did the Bankruptcy Court abuse its discretion or err as matter of law in denying class certification in the Adversary Proceeding?

a. Did the Court err or abuse its discretion in holding that a proposed class of 800 persons fails to satisfy the numerosity requirement of Rule 23?

b. Did the Court err or abuse its discretion in holding that Plaintiff's claim was not typical of the class claims for the sole reason that Plaintiff filed a timely proof of claim, while other class members did not?

2. Did the Bankruptcy Court abuse its discretion or err as matter of law when it declined to apply Bankruptcy Rule 7023 to the Class Proof of Claim in the Main Case?

a. Did the Bankruptcy Court err or abuse its discretion in declining to apply Rule 7023 because a class claim would allow recovery to class members who failed to file individual claims by the claims bar date?

b. Did the Bankruptcy Court err or abuse its discretion in declining to apply Rule 7023 because Plaintiff had not contacted absent class members or obtained any authority to file a claim on their behalf?

c. Did the Bankruptcy Court err or abuse its discretion in declining to apply Rule 7023 because Plaintiff did not request the Court to do so until 35 days after the Trustee objected to a timely class proof of claim?

IV. REASONS TO GRANT AN INTERLOCUTORY APPEAL

With regard to the Adversary Proceeding, an interlocutory appeal is authorized by Federal Rule of Civil Procedure 23(f) (made applicable by Bankruptcy Rule 7023), and by

28 U.S.C. § 158(a)(3). With regard to the Main Case, interlocutory appeal is authorized by 28 U.S.C. § 158(a)(3).

Under Rule 23(f), interlocutory review is generally appropriate in three types of cases: (1) "death knell cases," which refers to situations in which a questionable class certification order is likely to force either a plaintiff or a defendant to resolve the case based on considerations independent of the merits; (2) the certification decision involves an unresolved issue of law relating to class actions that is likely to evade end-of-case review, and this issue must be significant to the case at hand, as well as to class action cases generally; and (3) when the lower court's ruling in class certification is manifestly erroneous. *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009). As will be shown, all three of these alternative criteria are satisfied.

Under 28 U.S.C. § 158(a)(3), an interlocutory appeal is appropriate when the appealed order involves a controlling question of law for which there is substantial ground for difference of opinion and the immediate resolution of the issue will materially advance the ultimate termination of the litigation. *In re McCarn*, 218 B.R. 154, 157 (10th Cir. BAP 1998). This standard is also readily satisfied in this case.

A. Requiring Plaintiff to litigate his case individually sounds the "death knell" of the case, given the high litigation costs relative to his alleged damages.

Interlocutory appeal is appropriate when the lower court's class certification order is likely to force either a plaintiff or a defendant to resolve the case based on considerations independent of the merits. *Vallario*, 554 F.3d at 1263. For example, where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims. *Id.*

It is readily apparent that in this case, Plaintiff's litigation costs will exceed his claimed damages of approximately $10,000. Because the denial of class certification makes it impossible for the Plaintiff to prosecute his case cost-effectively, interlocutory appeal is warranted.

The potential of an additional 42 WARN Act claimants (who did not receive original notice of the bar date and were ordered to receive notice of a new bar date) does not alter this conclusion. Plaintiff predicts that few if any of the additional 42 individuals will have the time or resources to run the risk of bringing individual WARN Act claims against Defendant. Few if any attorneys would agree to represent such individuals – particular if the attorney reviews the Court's files and learns that the Trustee's counsel will obviously fight the claim vigorously at every possible turn. As the Seventh Circuit has aptly observed, for claimants who face overwhelming costs to prosecute an individual action, the options are "a class action or nothing." *In re American Reserve,* 840 F. 2d 485, 491 (7th Cir. 1988).

Because the Court's Order sounds the economic "death knell" of Plaintiff's individual claim, interlocutory review is proper without regard to any other factor.

B. <u>The denial of class certification in the Adversary Proceeding was an error of law and an abuse of discretion.</u>

For employees with small statutory back pay claims, "the ultimate effectiveness of the federal remedies . . . may depend in large measure on the applicability of the class action device." In such instances, the interests of justice require that any error, if there is to be one in a doubtful case, should be committed in favor of allowing the class action. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968). "[E]ven in doubtful cases the maintenance of the class action is favored." *Alemeda Oil Co. v. Ideal Basic Industries,* 326 F. Supp. 98, 102 (D.

Colo. 1971). Here, the Bankruptcy Court erred in declining to grant class certification in the Adversary Proceeding. This ruling deprives out-of-work employees of their ability to enforce important statutory remedies.

1. <u>The proposed class of 800 persons is sufficiently numerous as a matter of law.</u>

Rule 23(a)(1) requires the proposed class to be so numerous that joinder of all class members is rendered impracticable. It is hornbook law that 800 potential class members exceeds the threshold for practical joinder. Indeed, when the number of potential litigants reaches into the hundreds, this factor alone can satisfy Rule 23(a)(1). 1 H. Newberg & A. Conte, *Newberg on Class Actions*, § 3:5, at 243-45 (4th ed. 2002). The Sixth Circuit has held that a class of some 800 employees was "a number well beyond the point that joinder would be feasible." *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 570 (6th Cir. 2004). Although it might be theoretically possible to join hundreds of plaintiffs, it would not be practical or in the interest of judicial economy to do so. *Cannon v. Gunnallen Fin., Inc.*, 2008 U.S. Dist. LEXIS 86623, 2008 WL 4279858 (M.D. Tenn. Sept. 15, 2008) ("the sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)"; where the number was 200-300 individuals, numerosity was demonstrated).

In the case of ex-employees seeking benefits, the joinder of 800 retirees was deemed impractical especially given the size of the individual claims and the inconvenience of trying individual suits. *Trull v. Dayco Prods, LLC*, 214 F.R.D. 394, 397 (W.D.N.C. 2003). As impractical as it would be for 800 retirees on a fixed income to prosecute their actions for benefits individually, so here is it impractical to imagine 800 recently-terminated employees,

in this economy, litigating individually. When claims are too small to warrant undertaking individual actions, as few as forty class members can render joinder impractical. *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396-98 (N.D. Ill. 2006) (court cited the difficulty retirees, who are on a fixed income, would have in prosecuting the actions individually).

"[T]he WARN Act seems particularly amenable to class litigation," given that its applicability is limited to companies which employ more than 100 employees and which lay off employees in groups of 50 or more. *See Finnan v. L.F. Rothschild & Co., Inc.*, 726 F.Supp. 460, 465 (S.D.N.Y. 1989) (citing 29 U.S.C. § 2101(a)(1) and finding numerosity met where class size of 127 employees was alleged). In the WARN Act context, both in and out of bankrutpcy, the alleged class size of approximately 800 terminated employees clearly meets the greater-than-forty requirement of most circuits. *See, e.g., In re Kaiser Group Int'l*, 278 B.R. 58, 64 (Bankr. D. Del. 2002) (discussing the law of "numerosity" and finding that a class of approximately 47 members was sufficiently numerous to justify certification); *Brady v. Thurston Motor Lines*, 726 F.2d 136 (4th Cir. 1984) (certifying class of 74 persons); *Grimmer v. Lord Day & Lord*, 1996 WL 139649 (S.D.N.Y. 1996) (certifying class of 92 persons); *In re Spring Ford Ind.*, 2004 Bankr. LEXIS 112, *24, 51 (Bankr. E.D. Pa. 2004) (the alleged class size of 150 to 270 terminated employees clearly meets the greater-than-forty requirement of the Third Circuit).

In this case, the Court concluded that, while 800 class members is a "large number," Plaintiff failed to demonstrate that joinder of over 800 persons was impracticable. Apparently, the Court expected Plaintiff to put on some sort of testimony or other evidence that the management of a case with over 800 plaintiffs is completely unwieldy and impracticable. The Court erred in failing to recognize that numerosity exists *as a matter of*

law when the class size is over 800. Plaintiff's counsel is aware of no case – and certainly the Order cites no case – in which a class of such magnitude was held too small to satisfy Rule 23. It should be obvious to all officers of the Court that attempting to solicit, join, and manage over 800 individual plaintiffs in a case – especially when there exists a streamlined class action process as an alternative – is absurd on its face. No extrinsic proof of this common sense fact should be necessary.

Moreover, the Court was aware that only 42 out of 800 employees filed wage claims of any kind in the Main Case, and none but Mr. Scoggin filed a WARN Act claim. This demonstrates that there are not sufficient incentives for individuals to hazard the risks and costs of litigation and pursue WARN Act claims in these circumstances.

Finally, the Court's Order implies that a determination of numerosity should be based not on the total number of class members who have claims arising from the Defendant's unlawful conduct, but rather on the subset of persons who "wish to participate" individually in the proceeding. This imposes a novel and unwarranted requirement upon a class representative to contact all putative class members in order to determine the number who "wish to participate." This would completely undermine the efficacy of class actions because it would require a class representative to contact hundreds or potentially thousands of class members in order to determine whether numerosity exists. Moreover, the more appropriate a case is for class action treatment – because individual claims are too small to warrant individual participation in the action – the less available class certification would become because very few people would choose to participate individually. Class actions would, in effect, be limited to situations where they are least needed – where individual claims are large enough to provide incentives for individual participation. It is not surprising

that neither Rule 23 nor any case law supports determining numerosity based on how many class members "wish to participate" in the case individually.

Because the proposed class of over 800 individuals satisfies the numerosity requirement as a matter of law, the Court erred and abused its discretion by concluding otherwise.

2. Plaintiff's claim is typical of the class claim.

Federal Rule of Civil Procedure 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Commonality and typicality are similar in that the focus is on what the plaintiff and the class claimants share with regard to the underlying allegations. *Antonson v. Robertson,* 141 F.R.D. 501, 505 (D.Kan. 1991). A typicality inquiry focuses on the nature of the claims of the representative, not the individual characteristics of the named plaintiff. *In re Urethane Antitrust Litig*., 251 F.R.D. 629, 640 (D. Kan. 2008).

"[T]ypicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the alleged damages." *Antonson,* 141 F.R.D. at 506**,** *citing In re Four Seasons Securities Laws Litigation,* 59 F.R.D. 667, 681 (W.D. Okla. 1973), *rev'd on other grounds*, 502 F.2d 834 (10th Cir. 1974) (*citation omitted*). Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory. *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981) (typicality is met when the representative plaintiffs' claims arise from a course of conduct by

defendants that also gives rise to the claims of other class members based on the same legal theory); 1 *Newberg, On Class Actions* at §3:13 at 326 (4th edition 2002) ("Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought").

Here, the Plaintiff asserts a WARN Act claim of the exact same type as the proposed class claim. Plaintiff alleges that neither he nor any other class member received the 60 days' notice of termination as required by the WARN Act. Thus, the factual situation of the class representative and the legal theory upon which his action is grounded are not only typical of the entire class, but are identical. If Plaintiff were to prevail in proving that a WARN violation occurred with respect to himself, it would automatically follow that Defendant violated WARN with respect to every putative class member. Thus, Plaintiff plainly satisfies the typicality requirement of Rule 23(a)(3).

The Court concluded that Plaintiff failed to satisfy the typicality requirement because "[Plaintiff's] claim is the only proof of claim asserting the WARN Act." The Court cited no authority for this novel approach to determining typicality, and Plaintiff's counsel are aware of no such authority. The Court's approach would effectively preclude all class actions because the representative plaintiff (who by definition has filed a judicial claim) is always atypical of absent class members (who by definition have not filed a judicial claim) by this measure. The Court erred and abused its discretion by defining typicality in a manner that is unsupported by established case law and which would make class certification impossible.

C. The Court's refusal to apply Bankruptcy Rule 7023 to the Class Proof of Claim in the Main Case involves unresolved issues of law.

Interlocutory review is justified when it facilitates the development of the law. *Vallario*, 554 F.3d at 1263. In the context of class certification appeals, the interlocutory review must involve an unresolved issue of law that is likely to evade end-of-case review and is significant to the case at hand, as well as to class action cases generally. *Id*.

In this case, the Court denied Plaintiff's request to apply Rule 7023 to the Class Proof of Claim for three reasons: (1) class treatment would allow recovery to employees who personally failed to file a claim before the claims bar date; (2) Plaintiff provided no evidence that he contacted the absent class members or had any authority to file a claim on their behalf; and (3) Plaintiff did not request the Court to apply Rule 7023 to the Class Proof of Claim until 35 days after the Trustee objected to the Class Proof of Claim. Here – unlike with the Court's rulings on the numerosity and typicality issues in the Adversary Proceeding – it cannot be said that the Court's reasoning is flatly inconsistent with well-established law. Rather, because the law surrounding the discretionary application of Rule 7023 is still very much under development, the most that can be said here is that the Court's ruling is not supported by well-established law. An interlocutory appeal would provide much needed guidance in this area.

1. May the class include persons who failed to file a claim by the bar date?

The Court in this case held, following *In re Protected Vehicles*, 397 B.R. 339, 347 (Bankr. D. S.C. 2008), that "to open the class to all employees, without regard to the timely filing of a proof of claim by each employee, would render proof of claim deadlines in bankruptcy cases meaningless." While there is some support in the case law for this

approach, it would render meaningless the very concept that "there may be class proofs of claims in bankruptcy." *Amdura*, 170 B.R. at 450. To eliminate non-filing individuals from a class of bankruptcy creditors is tantamount to holding that in bankruptcy there shall be no class claim of the modern type provided in Rule 23, where class representatives pursue claims on behalf of *absent* class members.

Moreover, Plaintiff believes that the claims bar date would not be rendered meaningless by granting class certification in this case, because the Class Proof of Claim (and the class action Adversary Proceeding, for that matter) was filed prior to the expiration of the bar date. The Trustee, the Court, and all interested creditors of Defendant's estate thus had timely notice of the 800 WARN Act claims against the estate. The purpose of the bar date was thus satisfied, not frustrated.

Plaintiff believes that a claims bar date in bankruptcy is directly analogous to a non-bankruptcy statute of limitation. It is well-settled that when a class representative files an action with class claims prior to the expiration of the limitation period, the statute is tolled or satisfied with regard to the absent class members. *See generally State Farm Mut. Auto. Ins. Co. v. Boellstorff,* 540 F.3d 1223, 1228-29 (10th Cir. 2008). The same result should obtain with regard to a bankruptcy bar date.

An interlocutory appeal would be extremely useful in clarifying these issues regarding the unsettled relationship between the bankruptcy claims bar date and the availability of class claims in bankruptcy.

2. Is a class representative required to contact absent class members and obtain their authorization for a class claim?

The Court in this case found it significant that Plaintiff failed to show he was acting under any authority from the other former employees, and indeed, there was no evidence that Plaintiff had attempted to contact the absent class members. Again, there is some support in the case law for the Court's approach. *See In re Protected Vehicles, Inc*. 397 B.R. at 346-47 (the Rules do not allow the filing of claims by one creditor for other creditors, absent a prior determination that a class claim may be filed). Contrary authority exists, however, in *Amdura,* where the court held that a putative representative who files the class proof of claim becomes the "authorized agent" if the bankruptcy judge certifies a class. 170 B.R. at 450. The Court in this case dismissed this conclusion in *Amdura* as *dictum* and held that the class proof of claim is ineffective unless the class representative has been pre-certified or otherwise has been authorized to file the class proof of claim. *See* Order at 7 n.22. An interlocutory appeal would be extremely useful in clarifying the law in this regard.

3. When must a class claimant file a Rule 9014 motion to apply Rule 7023 to the class claim?

In this case, the Court found it significant that Plaintiff did not move for application of Rule 7023 to the Class Proof of Claim until 56 days after the bar date (and 56 days after the Class Proof of Claim was filed). Again, there is some support in the case law for the Court's concern over the timing of the Rule 9014 Motion. *See In re Computer Learning Centers, Inc.*, 344 B.R. 79, 89 (Bankr. E.D. Va. 2006) (motion should be filed as soon as practicable and should be denied if it comes so late as to prejudice any party). There is no support in the case law, however, for declining to apply Rule 7023 where, as here, the class proof of claim is filed prior to the expiration of the bar date, the Rule 9014 motion is filed

less than two months later, and there is no evidence of any resulting delay in the proceedings or other prejudice as a result of the timing of the Motion. Indeed, Plaintiff's filing of his class action Adversary Proceeding put the parties and Court on notice that he sought class treatment of his WARN Act claims approximately two months before the bar date.

Rule 9014 expressly allows bankruptcy judges to apply Rule 7023 to "any stage" in contested matters. *See In re American Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988). Plaintiff's class proof of claim did not become a contested matter until July 21, 2008, when the Trustee objected to the class proof of claim. Plaintiff filed his Rule 9014 motion seeking application of Rule 7023 on August 25, 2008 – only 35 days after the matter became contested. As noted, there was no prejudice whatever from the timing of the Rule 9014 motion. There is certainly no legal requirement for a bankruptcy court to refuse to apply Rule 7023 in these circumstances, and the legal authority for such a refusal is unsettled and debatable at best. An interlocutory appeal would be useful to clarify whether a bankruptcy court abuses its discretion under Rule 9014 when it denies a motion to apply Rule 7023 on account of a minor, inconsequential interval between the objection to a timely class proof of claim and the filing of the motion.

VI. CONCLUSION

For the reasons set forth above, Plaintiff requests leave to pursue an interlocutory appeal of the Bankruptcy Court's Order.

Respectfully submitted this 6th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2009, I served the foregoing **PLAINTIFF'S MOTION FOR LEAVE TO APPEAL** electronically via the Court's ECF/PACER system upon:

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s/ F. Brittin Clayton III
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