

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
RS LEGACY CORPORATION, <i>et al.</i> , ¹)	
)	Case No. 15-10197 (BLS)
Debtors.)	
)	(Jointly Administered)

**STATE OF TEXAS’S MOTION FOR ENTRY OF AN ORDER COMPELLING THE
DEBTORS TO PROVIDE ACTUAL NOTICE TO KNOWN CONSUMER
PURCHASERS OF UNREDEEMED GIFT CARDS**

COMES NOW the State of Texas (“Texas”), by and through the Texas Attorney General’s Office, files this *Motion for the Entry of an Order Compelling the Debtors to Provide Actual Notice to Known Consumer Purchasers of Unredeemed Gift Cards* (the “Motion”), and in support respectfully states as follows:

I. INTRODUCTION

The Debtors, despite having 2.9 million customers holding unredeemed gift cards worth \$46,000,000—including approximately 16,700 customers who were sold gift cards on the eve of the Debtors’ bankruptcy in January 2015—have failed to provide any of them actual notice of the proceedings in this case. The Debtors have acknowledged that they are in possession of the names,

¹ The Debtors are the following eighteen entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): RS Legacy Corporation (f/k/a RadioShack Corporation) (7710); Atlantic Retail Ventures, Inc. (6816); Ignition L.P. (3231); ITC Services, Inc. (1930); Merchandising Support Services, Inc. (4887); RS Legacy Customer Service LLC (f/k/a RadioShack Customer Service LLC) (8866); RS Legacy Global Sourcing Corporation (f/k/a RadioShack Global Sourcing Corporation) (0233); RS Legacy Global Sourcing Limited Partnership (f/k/a RadioShack Global Sourcing Limited Partnership) (8723); RS Legacy Global Sourcing, Inc. (f/k/a RadioShack Global Sourcing, Inc. (3960); RS Ig Holdings Incorporated (8924); RSIgnite, LLC (0543); SCK, Inc. (9220); RS Legacy Finance Corporation (f/k/a Tandy Finance Corporation) (5470); RS Legacy Holdings, Inc. (f/k/a Tandy Holdings, Inc.) (1789); RS Legacy International Corporation (f/k/a Tandy International Corporation) (9940); TE Electronics LP (9965); Trade and Save LLC (3850); and TRS Quality, Inc. (5417). The address of each of the Debtors is 300 RadioShack Circle, Fort Worth, Texas 76102.

mailing addresses and zip codes of “at least some but not all” of those gift card purchasers. Further, the Debtors have taken the position that if a gift card claim is entitled to priority it will be paid in full in cash.² Accordingly, regardless of whether some of the claims of these identifiable purchasers are entitled to priority, it seems clear that applicable bankruptcy law and prior Orders of this Court, discussed *infra*, mandate that the Debtors be required to give these known creditors notice including a proof of claim form and the Debtors’ chapter 11 plan of liquidation and disclosure statement. Since the Debtors have further taken the position that State attorneys general do not have standing to appear on behalf of these consumers, requiring the Debtors to provide actual notice is all the more important to protect these individuals’ fundamental due process rights.³

II. ARGUMENT AND AUTHORITIES⁴

A. Due Process Requires Notice

1. The notice provisions of the Federal Rules of Bankruptcy Procedure strike a delicate balance between each potential claimant’s due process rights and “one of the principal purposes of bankruptcy law, to secure within a limited period the prompt and effectual

² See Motion to Dismiss, Docket Information (“D.I.”) 7, at p. 18, Adversary Proceeding No. 15-50870, *State of Texas v. Radio Shack Corporation, et al.*

³ The Debtors have now asserted in their Cross-Motion for Summary Judgment in Adversary Proceeding No. 15-50870, *State of Texas v. Radio Shack Corporation, et al.*, that no gift card claims are entitled to priority and, alternatively, only consumer “purchasers” of unredeemed gift cards still in possession of those cards are entitled to priority status of their claims under 11 U.S.C. § 507(a)(7) [Case No. 15-50870, D.I. 16]. While the State of Texas believes that certain consumers holding unredeemed gift cards are entitled to priority status, under the Debtor’s theory of the law as discussed below, at a minimum known consumer purchasers are entitled to actual notice.

⁴ The State of Texas surmises that the Court is already well-aware of the relevant factual and procedural background of this case and accordingly the State has included a discussion of the factual and procedural background specifically as it relates to this Motion in Appendix A and the exhibits attached thereto, which are hereby incorporated by reference as though fully set forth herein.

administration and settlement of the debtor’s estate.” *In re Nortel Networks, Inc.*, 531 B.R. 53, 62 (Bankr. D. Del. 2015) (citing *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (“*Chemetron I*)). “Due process requires notice that is reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for a response.” *Chemetron I*, 72 F.3d at 346.

B. The Debtor Can Identify Gift Card Purchasers and Should Be Required to Amend Its Schedules to List Identifiable Gift Card Purchasers as Known Creditors of the Estate

2. Under 11 U.S.C. § 521, debtors are required to file a list of all known creditors with the bankruptcy court.

3. The law regarding whether a creditor is known or unknown is well-settled and discussed at length by the United States Court of Appeals for the Third Circuit in *Chemetron I*. A known creditor “is one whose identity is either known or ‘reasonably ascertainable by the debtor.’” *Chemetron I*, 72 F.3d at 346 (quoting *Tulsa Prof’l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988)). An unknown creditor “is one whose ‘interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].’” *Id.* (quoting *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 317 (1950)). The Third Circuit further explained the “reasonably ascertainable” standard as follows:

A creditor’s identity is reasonably ascertainable if that creditor can be identified through reasonably diligent efforts. Reasonable diligence does not require impracticable and extended searches . . . in the name of due process. A debtor does not have a duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.

Id. at 346–47 (internal quotation marks and citations omitted).

4. Ultimately, a debtor “need not be omnipotent or clairvoyant,” *In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 46 (Bankr. D. Del. 2012), or conduct “a vast, open-ended investigation,” *Chemetron I*, 72 F.3d at 346. The focus is instead on whether the debtor did what was “reasonable under the circumstances to provide notice to ascertainable creditors.” *New Century*, 465 B.R. at 46.

5. Moreover, the Southern District of New York in the case *In re XO Communications, Inc.* provided the following discussion of the reasonable diligence standard:

Reasonable diligence in ferreting out known creditors will, of course, vary in different contexts and may depend on the nature of the property interest held by the debtor. Applying Mullane’s “reasonable under the circumstances” standard, due process requires a reasonable search for contingent or unmatured claims so that ascertainable creditors can receive adequate notice What is reasonable depends on the particular facts of each case. . . . A debtor is obligated, however, to undertake more than a cursory review of its records and files to ascertain its known creditors.

301 B.R. 782, 793–94 (Bankr. S.D.N.Y. 2003) (quoting *In re Drexel Burnham Lambert Group, Inc.*, 151 B.R. 674, 681 (Bankr. S.D.N.Y. 1993)). *See also In re Crystal Oil Co.*, 158 F.3d 291, 297 (5th Cir. 1998) (holding that “in order for a claim to be reasonable ascertainable, the debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.”).

6. In their response to Texas’s discovery requests and Response to Texas’s Motion for Summary Judgment, the Debtors admit that they received the names, mailing addresses and zip codes from at least some of the purchasers of the 2.9 million unredeemed gift cards. Further, the Debtors admit that they can identify all Stock Keeping Unit (“SKU”) numbers used to associate payment information (tender type and tender amount) with the purchase of gift cards.

7. Accordingly, the Debtors have acknowledged that they have information in their possession that reasonably suggests the claim for gift card purchasers, *see* D.I. 1097 and 1108, and

the Debtors have admitted that they have at least some specific information with which the identity of the individuals to whom the Debtors may be liable for those claims can be ascertained. *See* “Exhibit E” attached to **Appendix A**, Debtors’ Response to Texas Discovery Request Nos. 3, 5, 6, 7, 8, and 16. As a result, the Debtors should be compelled to amend their schedules to list these known creditors of the estate in accordance with their obligations to do so under 11 U.S.C. § 521.

C. As Known Creditors, Gift Card Purchasers Are Entitled to Actual Written Notice of the Disclosure Statement, Plan and All Related Hearings

8. The Notice Procedures Order governs and supersedes all provisions of the Bankruptcy Code or the Local Rules [D.I. 166, at ¶ 6]. Under the Notice Procedures Order, the Debtors are required to serve notice on all parties in interest of the time fixed for filing objections to and the hearing to consider approval of a disclosure statement, and the hearing to consider confirmation of a chapter 11 plan [D.I. 166, at p. 4].

9. Pursuant to the Affidavit of Service of Prime Clerk, the Combined Hearing Order was served on the Master Service List on June 26, 2015 [D.I. 2582]. Since the Debtors’ Schedules do not list any consumer gift card purchasers as known creditors, these creditors received neither actual notice as required by the Notice Procedures Order of the time fixed for filing objections to and the Combined Hearing on the Debtors’ Amended Disclosure Statement and Plan, nor actual notice of any of the other deadlines required to be served on all parties in interest.

10. Due process requires that these gift card purchasers are entitled to actual notice of the confirmation proceedings so that they receive all required information and are given a reasonable time for a response in order to meaningfully participate in the confirmation process in this case. *See Chemetron I*, 72 F.3d at 346; *see also* 11 U.S.C. § 1128(b) (“A party in interest may object to confirmation of a plan.”). In the event the Debtors are not required to give notice to

known gift card purchasers until after plan confirmation, it will be too late for these consumers to meaningfully protect their rights.

11. Moreover, under the Amended Disclosure Statement and Plan, no distribution whatsoever will be provided to a gift card purchaser whose claim is less than \$10 in the aggregate [D.I. 2749, at pp. 58–59; D.I. 2751, at p. 36]. At this point, the Debtors have failed to clarify the dollar amount or the number of gift card purchasers that will be affected by this provision. In any case, these consumers are entitled to notice that the Debtors’ Plan will completely cutoff their right to any disbursement. In light of the Debtors’ proposed treatment, post-confirmation notice to these consumers is meaningless.

12. While various State Attorneys General have sought to file claims⁵ on behalf of consumer gift card purchasers which might have mitigated the Debtors’ failure to give notice, the Debtors objected to the Attorneys General’s standing stating that: “[u]ltimately, holders of gift card claims will need to assert their claims [individually] to collect any money they are entitled to receive.” *See* Motion of RS Legacy Corporation and RS Legacy Customer Service LLC (I) to Dismiss Plaintiff’s Complaint or, in the alternative, (II) for Court to Decline Jurisdiction at p. 7, *State of Texas v. RS Legacy Corp., et al.* [D.I. 7, Case No. 15-50870-BLS]. Having sought to deny the State Attorneys General standing on behalf of consumers, the Debtors should now be compelled to give these same consumers actual notice as required under the Bankruptcy Code.⁶

⁵ As of the filing of this Motion, the following State Attorneys General have filed proofs of claim on behalf of consumer gift card purchasers: Arkansas, Hawaii, Indiana, Maryland, Massachusetts, Oregon, Tennessee and Texas. The Commonwealth of Virginia has filed a proof of claim related to unclaimed property for unredeemed gift cards.

⁶ To clarify, in order to save postage costs, the State of Texas does not suggest that the Debtors should be required to mail hard copies of the Amended Disclosure Statement and Amended Plan to the identifiable portion of the 2.9 million gift card holders. Rather, the Debtors should accomplish the requisite notice by mailing a post card to gift card purchasers as shown on the Debtors’ books and records and/or sending email notice to those customers directing them to the Prime Clerk website where copies of the Amended

III. RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully requests that the Court grant the instant Motion and enter an order compelling the Debtors to: (i) amend their schedules to disclose all consumer gift card purchasers identifiable from their books and records as known creditors, and (ii) provide these known creditors with actual written notice of the Debtors' Amended Disclosure Statement [D.I. 2749], Amended Chapter 11 Plan of Liquidation [D.I. 2751], ballots, proof of claim forms, and dates of confirmation hearings, as well as any subsequent material pleadings in this case.

Further, in light of the rapidly-approaching confirmation hearing and the Debtors' recently-filed Amended Disclosure Statement and Amended Plan, the State of Texas respectfully requests that the Court continue all hearings on the Amended Disclosure Statement and Plan until these known creditors are provided actual written notice in accordance with the foregoing items (i) and (ii) in order to provide known consumer gift card purchasers with a reasonable time to review all the required information and meaningfully participate in this case, and for any further relief to which it may so be entitled.

Dated: August 11, 2015.

Respectfully Submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

Disclosure Statement and Amended Plan, as well as all other pleadings and deadlines in this case, can be accessed free of charge.

RONALD R. DEL VENTO
Assistant Attorney General
Chief, Bankruptcy & Collections Division

/s/ Hal F. Morris

HAL F. MORRIS

Texas State Bar No. 14485410

ASHLEY F. BARTRAM

Texas State Bar No. 24045883

CHRISTOPHER S. MURPHY

Texas State Bar No. 24079031

CHARLIE SHELTON

Texas State Bar No. 24079317

P. O. Box 12548

Austin, Texas 78711-2548

Telephone: (512) 475-4550

hal.morris@texasattorneygeneral.gov

ashley.bartram@texasattorneygeneral.gov

christopher.murphy@texasattorneygeneral.gov

charlie.shelton@texasattorneygeneral.gov

ATTORNEYS FOR THE STATE OF TEXAS