

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

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In re	) Case No.: 09-02046
	) (Jointly Administered)
HARTMARX CORPORATION, ET AL.,	)
	) Chapter 11
Debtors.	)
	) Honorable Bruce W. Black

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**NOTICE OF MOTION**

Please take notice that on **October 15, 2009**, at **2:00 p.m.** or as soon thereafter as counsel may be heard, GE Commercial Finance Business Property Corporation shall appear before the Honorable Bruce W. Black, or any other person sitting in his place and stead, in Courtroom 615 of the Everett McKinley Dirksen United States Courthouse, located at 219 South Dearborn Street, in Chicago, Illinois 60604 and shall then and there present its Motion for the Entry of an Order Recognizing its Previously Filed Informal Proofs of Claim, or, in the Alternative, Granting Leave to File Formal Proofs of Claim After the Bar Date (the "Motion"), at which time and place you may appear as you see fit. A copy of the Motion is attached hereto and hereby served upon you.

Dated: October 7, 2009

By: /s/ Stephen T. Bobo  
Counsel to GE Commercial  
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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

In re	) Case No.: 09-02046
HARTMARX CORPORATION, ET AL.,	) (Jointly Administered)
Debtors.	) Chapter 11
	) Honorable Bruce W. Black

**GE COMMERCIAL FINANCE BUSINESS PROPERTY CORPORATION’S MOTION FOR THE ENTRY OF AN ORDER RECOGNIZING ITS PREVIOUSLY FILED INFORMAL PROOFS OF CLAIM, OR, IN THE ALTERNATIVE, GRANTING LEAVE TO FILE FORMAL PROOFS OF CLAIM AFTER THE BAR DATE**

GE Commercial Finance Business Property Corporation f/k/a General Electric Capital Business Asset Funding Corporation (“GE Capital”), by its undersigned counsel, and pursuant to Fed. R. Bankr. P. 3003 and 9006, hereby moves for the entry of an Order declaring that its previous filings before this Court constitute informal proofs of claim against the above-captioned debtors or, in the alternative, granting GE Capital leave to file formal proofs of claim after July 27, 2009 (the “Bar Date”). In support thereof, GE Capital states as follows:

**Factual Background**

1. On January 23, 2009 (the “Petition Date”), the above-captioned debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

2. Prior to the Petition Date, Hartmarx Corporation (“Hartmarx”) executed a Promissory Note dated March 22, 2001 (the “Note”) in favor of GE Capital, pursuant to which Hartmarx promised to pay GE Capital \$9,375,000 together with certain interest, costs and fees thereon described more fully in the Note (the “Loan”).

3. On March 22, 2001, in order to induce GE Capital to make the Loan to Hartmarx, Jaymar-Ruby, Inc. (“Jaymar-Ruby”) executed a Guaranty (the “Guaranty”) in favor of GE Capital, pursuant to which Jaymar-Ruby unconditionally guaranteed Hartmarx’s obligations under the Note.

4. To secure the indebtedness under the Note and the Guaranty, Hartmarx and Jaymar-Ruby (collectively, the “Debtors”) executed a Commercial Mortgage, Security Agreement, Assignment of Leases and Rents, and Fixture Filing dated March 22, 2001 (the “Mortgage”), pursuant to which the Debtors granted GE Capital a first priority senior secured mortgage on, *inter alia*, certain real property in Michigan City, Indiana (the “Premises”) as well as senior secured liens on certain personal property located on, or associated with, the Premises.

5. This personal property includes, but is not limited to, the following:

All buildings, structures, improvements, parking areas, landscaping, fixtures and articles of property now or hereafter erected on or attached to the Premises; including but without being limited to, all heating, air conditioning and incinerating apparatus and equipment; all boilers, engines, motors, dynamos, generating equipment, piping and plumbing, fixtures, water heaters, cooling, ventilating, sprinkling and vacuum cleaning systems, fire extinguishing apparatus, gas and electric fixtures, carpeting, floor coverings, underpadding, elevators, escalators, partitions, mantels, built-in mirrors, window shades, blinds, draperies, screens, storm sash, awnings, signs and including also all interest of any owner of the Premises in any of such items hereafter at any time acquired under conditional sale contract, chattel mortgage or other title retaining or security instrument, all of which property mentioned in this clause (a) shall be deemed part of the realty constituting the Premises and not severable wholly or in part without material injury to the freehold of the Premises (all of the foregoing together with replacements and additions thereto are referred to herein as “Improvements”).

*Mortgage*, pp. 1-2.

6. In order to further secure the obligations due under the Note and the Guaranty, on March 22, 2001, Jaymar-Ruby also executed (i) an Assignment of Rents and Leases (the

“Assignment”) in favor of GE Capital, pursuant to which Jaymar-Ruby granted GE Capital an interest in all written and oral leases related to the Premises, including all rents, income and profits related thereto; and (ii) a Security Agreement (the “Security Agreement”) in favor of GE Capital, pursuant to which Jaymar-Ruby granted additional senior secured liens in certain personal property to GE Capital.

7. As a result of, *inter alia*, the Mortgage, Assignment, and Security Agreement, GE Capital has a senior secured interest in certain real and personal property of the Debtors (the “Collateral”), which interests have not been challenged before this Court or otherwise.

8. The Debtors have acknowledged certain of its obligations to GE Capital in their schedules of assets and liabilities. Specifically, Hartmarx has scheduled the GE Capital Loan as a contingent secured claim in the amount of \$5,804,606.

9. On May 21, 2009, the Debtors filed a motion (the “Sale Motion”) pursuant to which they sought, *inter alia*, the entry of an order (a) approving bid procedures related to a proposed sale of substantially all of the Debtors’ assets (the “Bid Procedures”), and (b) approving the sale of the Debtors’ assets free and clear of all liens, claims and encumbrances (the “Sale”). *See Sale Motion* [Docket No. 463].

10. On June 1, 2009, GE Capital filed its Limited Objection of GE Commercial Finance Business Properties to the Debtors’ Motion to Approve Bid Procedures and the Sale of Substantially All of the Debtors’ Assets (the “First Sale Objection”), pursuant to which it set forth in detail the bases for its claims against the Debtors’ estates and objected to the Sale to the extent the Debtors sought to permit the sale of the Collateral for less than the total value of GE Capital’s claims secured thereby. A copy of the First Sale Objection is attached hereto as Exhibit A.

11. In addition, on June 19, 2009, GE Capital filed a second objection to the Sale Motion (the “Second Sale Objection”), pursuant to which GE Capital again asserted the bases for its claims against the Debtors and objected to the Sale on the basis that it threatened to sell certain personal property in which GE Capital had a properly perfected senior secured interest without providing payment to GE Capital. A copy of the Second Sale Objection is attached hereto as Exhibit B.

12. In addition, pursuant to the Second Sale Objection, GE Capital asserted that the outstanding obligations owed to it were not less than \$5,548,394.26, and objected to the sale of any portion of the personal or real property collateral in which it had a secured interest “for less than the aggregate value of GE Capital’s outstanding liens on the Collateral.” *Second Sale Objection*, ¶ 13.

13. On May 5, 2009, this Court entered an order establishing July 27, 2009 (the “Bar Date”) as the deadline to file proofs of claim against the Debtors’ estates.

14. Apart from the First Sale Objection and the Second Sale Objections, both of which were filed in advance of the Bar Date, GE Capital did not file formal proofs of claim against the Debtors until September 8, 2009. At that time, it filed: (i) a secured proof of claim against Hartmarx Corporation in the amount of \$5,548,394.26 for the amounts due under the Note and the Mortgage (the “Hartmarx Claim”); and (ii) a secured proof of claim against Jaymar-Ruby in the amount of \$5,548,394.26 for those amounts due under the Guaranty, the Assignment, and the Security Agreement (the “Jaymar-Ruby Claim”). Copies of the Hartmarx Claim and the Jaymar-Ruby Claim (collectively, the “GE Capital Claims”) are attached hereto as Exhibit C and Exhibit D, respectively.

### Argument

15. In the instant case, GE Capital is entitled to the allowance of its claims against the Debtors despite its failure to file formal proofs of claim against the Debtors until September 8, 2009. As a first matter, the Sale Objections constitute informal proofs of claim pursuant to which GE Capital asserted (i) the bases and amounts of its claims against the Debtors, and (ii) its demand that the Debtor compensate it for those claims. The Sale Objections were made part of the record of these proceedings well in advance of the Bar Date, and all parties in interest to these proceedings were aware of the nature, extent and priority of GE Capital's claims by no later than June 19, 2009. Second, to the extent this Court finds that the Sale Objections do not constitute informal proofs of claim, cause exists to permit GE Capital to file formal proofs of claim against the Debtors despite the passage of the Bar Date. As demonstrated herein, leave should be granted because, *inter alia*, (i) the Debtors have not been prejudiced by GE Capital's failure to file formal proofs of claim; and (ii) the delay caused by GE Capital's failure to file formal proofs of claim will have no impact on the Debtors' bankruptcy proceedings. As such, pursuant to the established precedent of the United States Supreme Court set forth below, permission to file late-filed proofs of claim is warranted in these circumstances.

#### **A. The Sale Objections Constitute Informal Proofs of Claim Against the Debtors**

16. In the Seventh Circuit, the "general rule is that a claim [either formal or informal] arises where the creditor evidences an intent to assert its claim against the debtor." *In the Matter of Wilkens*, 731 F.2d 462, 465 (7<sup>th</sup> Cir. 1984). "The informal proof of claim doctrine is an equitable doctrine developed by the courts to ameliorate the strict enforcement of the claims bar date." *In re Griffin Trading Co.*, 270 B.R. 883, 895 (Bankr. N.D. Ill. 2001). Under this doctrine "an 'informal' proof of claim filed before the bar date is equally effective as a

‘formal’ proof of claim in satisfying the time requirements of the [Bankruptcy Rules].” *In re Burrell*, 85 B.R. 799, 801 (Bankr. N.D. Ill. 1988).

17. “[T]o be deemed an informal proof of claim a writing must (1) make a demand for payment on the debtor’s estate and (2) must reflect an intent to hold the debtor liable for the debt.” *Id*; *see also, In re Wigoda*, 234 B.R. 413, 415 (Bankr. N.D. Ill. 1999) (informal proofs of claim must (i) have been timely filed with the bankruptcy court and become a part of the record; (ii) state the existence and the nature of the debt; (iii) state the amount of the creditor’s claim; and (iv) evidence creditors intent to hold the debtor liable).

18. There are a variety of ways in which a creditor may manifest the necessary demand and intent to hold the estate liable. Examples include, but are not limited to, cases in which a creditor has filed an objection to a sale of the debtor’s assets. *See, e.g., In re The Float, Inc.*, 163 B.R. 18 (Bankr. N.D.N.Y. 1993) (objection to sale of the debtor’s assets was sufficient to constitute an informal proof of claim); *Sun Basin Lumber Co. v. U.S.*, 432 F.2d 48 (9<sup>th</sup> Cir. 1970) (secured creditor’s objection to a proposed sale of its collateral was sufficient to constitute an informal proof of claim); *see also, County of Napa v. Franciscan Vineyards, Inc.*, 597 F.2d 181 (9<sup>th</sup> Cir.1979) (claimant sent tax bills to the trustee and requested he pay them), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 598 (1980); *Fyne v. Atlas Supply Co.*, 245 F.2d 107 (4<sup>th</sup> Cir.1957) (claimant participated in creditors’ meetings and wrote and spoke with trustee about his desire to be paid by estate, and claimant’s attempts to levy on debtor were alleged in petition in bankruptcy); *In re Lipman*, 65 F.2d 366 (2<sup>d</sup> Cir.1933) (claimant filed objections to trustee’s petition describing itself as a creditor); *Scottsville Nat. Bank v. Gilmer*, 37 F.2d 227 (4<sup>th</sup> Cir.1930) (claimant and trustee exchanged letters and had talks in which trustee treated claimant as seeking payment from estate).

19. In the instant case, the Sale Objections constitute informal proofs of claim against the Debtors. Specifically, the Sale Objections (i) were filed within this proceeding prior to the Bar Date; (ii) specifically identify the bases for GE Capital's claims against Hartmarx and Jaymar-Ruby; (iii) establish the amount of the outstanding obligations due thereunder; (iv) assert GE Capital's right to be paid in full on those obligations; (v) assert GE Capital's right to present a credit bid to purchase the Collateral; and (vi) make clear that GE Capital intends to hold the Debtors liable for the amounts due under its agreements with the Debtors. *See, Exhibits A and B.*

20. Indeed, an examination of the Sale Objections discloses every essential statement required to constitute a proof of claim, and the Sale Objections fully and accurately informed the court, the Debtors, and all other creditors of the Debtors of the amount of GE Capital's claims and the security held for these claims. As such, the Sale Objections constitute informal proofs of claim against Hartmarx and Jaymar-Ruby.

**B. In the Event the Sale Objections Do Not Constitute Informal Proofs of Claim, GE Capital Should Be Permitted to File Proofs of Claim Against the Debtors**

21. Even were this Court to determine that the Sale Objections do not constitute informal proofs of claim, GE Capital should be permitted to file proofs of claim against the Debtors for the amounts it is owed.

22. It is well-settled that courts are empowered to accept late filings where the failure to act was the result of excusable neglect, including in circumstances, where the late filing was "caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495 (1993). This flexibility in the

understanding of ‘excusable neglect’ recognizes the policies behind chapter 11, which has an aim of avoiding forfeitures by creditors. *Id.*

23. When determining whether to permit a late-filed claim, a court should consider: “the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.* at 395, 1498. In the instant case, these factors weigh in favor of permitting GE Capital to file formal proofs of claim against the Debtors despite the passage of the Bar Date.

24. As a first matter, no prejudice to the Debtors will result if GE Capital is permitted to file its claims against Hartmarx and Jaymar-Ruby. It is uncontested that the Debtors were aware of the amounts owed to GE Capital. In fact, the Debtors scheduled GE Capital as a contingent secured creditor in an amount in excess of what GE Capital asserts it is owed. *Compare, Hartmarx Schedule D* [Docket No. 302] (scheduling GE Capital as a contingent secured claim in the amount of \$5,804,606); *Second Sale Objection* [Docket No. 578], ¶ 13 (asserting that the outstanding obligations due GE Capital are not less than \$5,548,394.26). Indeed, the Debtors have continued to pay GE Capital adequate protection on its interest in the Premises equal to the full amounts owed under the Note, the Mortgage, and the Guaranty since the Petition Date.

25. In addition, the Debtors are still in the preliminary stages of their bankruptcy process and have not filed any proposed plan of reorganization that would be prejudiced by the allowance of GE Capital’s claims. As such, GE Capital asserts that no prejudice to the Debtors would occur if it is permitted to file its claims against the Debtors.

26. Second, GE Capital asserts that its proofs of claim would cause no delay nor would they otherwise impact these judicial proceedings. As stated above, the Debtors are well-aware of GE Capital's claims and have never sought to challenge those claims as part of these bankruptcy proceedings or otherwise. Through the Sale Objections, GE Capital asserted its claims against the Debtors as a matter of record in these proceedings well in advance of the Bar Date. Further, GE Capital filed the Claims shortly after the Bar Date, and before the filing of any plan of reorganization and/or claim objections. As such, GE Capital asserts that its failure to file formal proofs of claim until September 8, 2009 constituted, at most, a brief delay that had no impact on these proceedings or their ability to progress efficiently.

27. Third, GE Capital's failure to file formal proofs of claim prior to the Bar Date was nothing more than an inadvertent error caused by a failure of GE Capital's counsel to properly document the Bar Date on their calendar. Upon learning of their error, GE Capital's counsel reached out to counsel for the Debtor to apprise the Debtor of their mistake, and to explore the possibility of rectifying the error. Such an error, while admittedly within the control of GE Capital's counsel, still falls within the parameters of excusable neglect, and should not outweigh the policy objectives of chapter 11 which aims to avoid forfeitures by creditors. *Pioneer Inv. Services Co.*, 507 U.S. at 388.

28. Finally, GE Capital has, at all times, acted in good faith while attempting to rectify its error in these proceedings. Among other things, it has been consistent in the assertion of its claims against the Debtors' estates from the filing of the First Sale Objection through the present. In addition, upon learning of its failure to file formal proofs of claim before the Bar Date, GE Capital promptly contacted the Debtors' counsel to make them aware

of the error. GE Capital has, and will continue to, operate with full disclosure to the Debtors and this Court regarding the amount of, and bases for, its claims.

29. It is well settled that a secured creditor maintains its prepetition lien against the property of the estate even if it fails to file a proof of claim. *In re Tarnow*, 749 F.2d 464 (7<sup>th</sup> Cir. 1984); *Matter of Penrod*, 50 F.3d 459, 461-62 (7<sup>th</sup> Cir. 1995); *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773 (1992) (liens on real property pass through bankruptcy unaffected). Consequently, the relief sought in this Motion does not impact GE Capital's secured claim against the Collateral and relates only to an ultimate deficiency claim at an early state in these Chapter 11 cases when distributions to such creditors are many months and years away.

30. Given the totality of these circumstances, equitable principles support the allowance of GE Capital's claims against Hartmarx and Jaymar-Ruby, and weigh in favor of GE Capital being permitted to file formal proofs of claim against the Debtors. *See, Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993).

WHEREFORE, for the reasons stated herein, GE Commercial Finance Business Property Corporation requests that this Court enter an Order (a) finding that the Sale Objections constitute timely-filed informal proofs of claim against the Debtors which may thereafter be amended by formal proofs of claim or, in the alternative, finding that cause exists to permit GE Capital to file proofs of claim against the Debtors for the amounts owed to GE Capital as identified in the Claims; and (b) granting such other relief as may be appropriate under the circumstances.

Dated: October 7, 2009

By: /s/ Stephen T. Bobo  
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Finance Business Property Corporation

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**CERTIFICATE OF SERVICE**

I, Stephen T. Bobo, hereby certify that on October 7, 2009, I caused a copy of the **GE COMMERCIAL FINANCE BUSINESS PROPERTY CORPORATION'S MOTION FOR THE ENTRY OF AN ORDER RECOGNIZING ITS PREVIOUSLY FILED INFORMAL PROOFS OF CLAIM, OR, IN THE ALTERNATIVE, GRANTING LEAVE TO FILE FORMAL PROOFS OF CLAIM AFTER THE BAR DATE** (the "Motion") to be filed electronically. Notice of this filing was sent automatically, via the Court's CM/ECF system, to all parties that have filed an electronic appearance in these proceedings.

\_\_\_\_\_  
/s/ Stephen T. Bobo  
Stephen T. Bobo