IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
LEGEND ENERGY SERVICES, LLC	§	Case No. 21-60451
	§	
Debtor	§	Chapter 7

JACOB ROSE, et al.,	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Adversary No. 22-06003
	§	
LEGEND ENERGY SERVICES, LLC, et al.,	§	
	§	
	§	
Defendants(s)	§	

INTERIM ORDER REGARDING
SECOND MOTION TO DISMISS ADVERSARY PROCEEDING

ON THIS DATE the Court considered the "Second Motion to Dismiss Plaintiffs' First Amended Complaint Pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure and Brief in Support" (the "Motion"), filed on June 16, 2022 by the Defendant, Grappler Pressure Pumping (the "Defendant" or "Grappler"). Defendant seeks dismissal of the "First Amended Complaint" (the "Amended Complaint") filed on June 2, 2022 by the Plaintiffs, Jacob Rose, *et. al.* (the "Plaintiffs").[1]

[1] Mr. Jacob Rose filed the Amended Complaint both individually and on behalf of all similarly situated former employees of the Debtor, Legend Energy Services, LLC.

I. Background

Debtor, Legend Energy Services, LLC (the "Debtor" or "Legend"), filed a voluntary petition for Chapter 7 relief in the underlying bankruptcy case on October 26, 2021.[2] The deadline to file non-government claims was February 22, 2022. Plaintiffs filed the "Original Complaint" on March 9, 2022, alleging that Legend improperly terminated a number of former employees in violation of the Worker Adjustment and Retraining and Notification Act (the "WARN Act"). *See* 29 U.S.C. §§ 2101-2109.

Plaintiffs joined Grappler as a co-defendant, arguing that as Legend's "successor," it was also liable for the alleged WARN Act violation. Plaintiffs did not consent to a final judgment by this Court, filed a jury demand on March 10, 2022, and filed a "Motion for Withdrawal of Reference" on March 16, 2022.[3] Plaintiffs' "Motion for Withdrawal of Reference" was transmitted to the District Court on April 7, 2022, and was assigned to the Hon. Jeremy D. Kernodle on April 8, 2022.[4]

Grappler filed a "Motion to Dismiss Adversary Proceeding" (the "Original Motion") on May 13, 2022, seeking dismissal of Plaintiffs' Original Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Plaintiffs filed both the

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[2] *See In re Legend Energy Services, LLC*, No. 21-60451, ECF No.1.

[3] This Court may enter an order on a motion to dismiss, regardless of whether the proceeding is core or non-core, or the Court lacks the authority to enter a final order. *Watson v. TSC Global (In re TSC Global, LLC)*, Adv. No. 12-50119, 2013 WL 6502168, at *1 (Bankr. D. Del. June 26, 2013) (citing *Luna & Gushon v. Tri-Valley Corp. (In re Tri-Valley Corp.)*, Adv. No. 12-50989 (MFW), 2013 WL 1910287, at *1 (Bankr. D. Del. May 1, 2013)).

[4] *See* Case No. 6:22-mc-00006.

Amended Complaint and "Plaintiffs' Response to Defendant's Rule 12(b) Motion to Dismiss" on June 2, 2022.[5] Defendant subsequently filed the Motion in response to the Amended Complaint. Plaintiffs filed a "Response in Opposition to Defendant's Rule 12(b) Motion to Dismiss" on July 14, 2022. On July 22, 2022, the District Court denied Plaintiffs' "Motion for Withdrawal of Reference," allowing the Court to retain jurisdiction over this adversary proceeding "through its pre trial stages and [to] withdraw the reference when the case is ready to proceed to a jury trial."[6] Grappler filed its "Reply in Support of Second Motion to Dismiss Plaintiffs' First Amended Complaint" (the "Reply") on August 4, 2022.

The Court now considers the Motion in relation to the Amended Complaint. Grappler seeks dismissal on multiple grounds, including an alleged lack of standing under Fed. R. Civ. P. 12(b)(1).[7] If a Rule 12(b)(1) motion is filed in conjunction with other motions to dismiss under Fed. R. Civ. P. 12, the Court will consider the jurisdictional attack under Rule 12(b)(1) before addressing any attack on the legal merits. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

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[5] For this reason, Grappler's Original Motion is now moot and the Court will separately enter an appropriate dismissal order.

[6] *See* Order Denying Mot. to Withdraw Reference, Case No. 6:22-mc-6-JDK, ECF No. 2; *see also Rose v. Legend Energy Services, LLC*, Adv. No. 22-06003, ECF No. 29.

[7] "Standing is a component of subject matter jurisdiction." *HSBC Bank USA, N.A. v. Crum,* 907 F.3d 199, 202 (5th Cir. 2018).

II. Analysis

A. Fed. R. Civ. P. 12(b)(1)

Grappler contends Plaintiffs lack "standing to impose successor liability against Grappler for [Debtor's] alleged violations of the WARN Act because the remedy of successor liability, to the extent it [] exists, is property of the [Debtor's] bankruptcy estate."[8] If the cause of action belongs to the estate, then the Chapter 7 trustee "has exclusive standing to assert the claim." *Collins v. Sydow (In re NC12, Inc.)*, 478 B.R. 820, 831 (Bankr. S.D. Tex. 2012) (citing *Schertz-Cibolo-Universal City, Indep. Sch. Dist. (In re Educators Grp. Health Trust)*, 25 F.3d 1281, 1284 (5th Cir. 1994)).

Filing a petition for bankruptcy creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. *See United States v. Whiting Pools*, 462 U.S. 198, 205-06 (1983). To determine "whether a cause of action belongs to the estate requires the court to "look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors.""[9] *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (1989) (quoting *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987)). "If the

[8] Mot., 10, ¶ 20, ECF No. 23.

[9] "It is "[a]ctions by individual creditors asserting a generalized injury *to the debtor's estate*, which ultimately affects all creditors[,]" that can be said to raise a "generalized grievance," not actions by creditors that are merely common to a number of them." *Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 589 (5th Cir. 2008) (quoting *Jongepier v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 360 (5th Cir. 1999)).

harm to the creditor comes about only because of harm to the debtor, then its injury is derivative, and the claim is property of the estate." *Buccaneer Energy Limited v. Meridian Capital CIS Fund (Matter of Buccaneer Resources, L.L.C.)*, 912 F.3d 291, 293 (5th Cir. 2019) (citing *Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 584 (5th Cir. 2008)). Thus, if a creditor is harmed *because* the debtor is harmed, then "only the bankruptcy trustee has standing to pursue the claim for the estate so that all creditors will share in any recovery." *Seven Seas*, 522 F.3d at 584. The Fifth Circuit further explained in *Buccaneer*:

> "As for direct-injury claims that belong to a particular creditor or group of creditors, the simple case is when the claim does not involve any harm to the debtor. These cannot be part of the estate. *Id*. at 584 (quoting *In re Educators Grp. Health Trust*, 25 F.3d 1281, 1285 (5th Cir. 1994)). But even when the conduct harms the debtor, the creditor may also have a claim if its asserted injury does not flow from injury to the debtor. This means that the estate and a creditor may have separate claims arising out of the same events. *Seven Seas*, 522 F.3d at 585; *Educators Trust*, 25 F.3d at 1284-85. To pursue a claim on its behalf, a creditor must show this direct injury is not dependent on injury to the estate."

Buccaneer, 912 F.3d at 293-94.[10]

Plaintiffs' alleged injury is not derivative of or dependent on harm to the Debtor. Rather, they allege that Debtor *caused* them harm by terminating their employment

[10] The Court recently reviewed case precedents, including *Buccaneer*, in its consideration of a summary judgment motion. The motion turned in part on ownership of alter ego claims where the individual defendant asserted the plaintiff lacked standing due to the Chapter 7 estate's alleged ownership of the asserted causes of action. *Han v. Coutts (In re Coutts)*, 2022 Bankr. LEXIS 2284 (Bankr. E.D. Tex. 2022). The instant case, however, considers the applicability of the "successorship doctrine," rather than an alter ego argument. *See* Mot., 5-8, ¶¶ 6-16, ECF No. 23. The Court considers the analysis of case precedent in *Han* instructive to the extent *Han* and this case are similar in nature.

without proper notice.[11] Furthermore, Plaintiffs' claim under the WARN Act is specific to their time as employees of the Debtor and is not general or common with other creditors. Any potential theory of successor liability against Grappler is still based on Plaintiffs' employment by Legend.[12] *See Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) ("When a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring suit against the third party."). Thus, the Court finds that Plaintiffs have standing to bring a WARN Act claim under the theory of successor liability against Grappler.[13]

B. Fed R. Civ. P. 12(b)(6)

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although detailed factual

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[11] "Unlike these derivative injuries, the harm to [the creditor] from an improper firing without the required severance does not depend on any harm to the debtor." *Buccaneer*, 912 F.3d at 294.

[12] In *Buccaneer*, the Fifth Circuit affirmed a district court order remanding the case to state court because the tortious interference claim at issue belonged to the individual and was not property of estate. This case differs, however, in that Debtor's liability is still at issue, and Grappler's potential liability as a successor is dependent on a finding that Debtor violated the WARN Act.

[13] Because Plaintiffs' WARN Act claim is not property of the estate, it does not violate the automatic stay. 11 U.S.C. § 362(a)(3).

allegations are not required, a plaintiff must show they are entitled to relief using more than labels and conclusions." *Twombly*, 550 U.S. at 545. Furthermore, a "formulaic recitation of the elements of a cause of a cause of action will not do." *Id*. The complaint must be factually suggestive so as to "raise a right to relief above the speculative level," and into the "realm of plausibility." *Id*. at n.5. In considering a Rule 12(b)(6) motion, a court must accept all of the plaintiff's allegations as true. *Ballard v. Wall*, 413 F.3d 510, 514 (5th Cir. 2005).

Grappler contends Plaintiffs have failed to state a claim in the Amended Complaint because the "Succe[ss]orship Doctrine is not applicable to WARN Act claims."[14] Plaintiffs disagree, instead emphasizing that the Successorship Doctrine is applicable to their WARN Act claim pursuant to federal labor law.[15] *See Hollowell v. New Orleans Reg'l Hosp. LLC*, 217 F.3d 379, 390-91 (5th Cir. 2000). Grappler correctly states, however, that *Hollowell* does not clearly support Plaintiffs' use of the Successorship Doctrine because it "does not apply a federal law or Texas law successorship theory."[16] Grappler further argues that "*Hollowell* is distinguishable because the successor liability theory applied by the court under Louisiana state law does not exist in Texas."[17] According to Grappler, Plaintiffs' use of *Hollowell* as the basis for the use of successor

[14] Mot., 7, ¶ 12, ECF No. 23.

[15] First Am. Compl., 29, ¶ 125, ECF No. 21.

[16] Mot., 7, ¶ 12, ECF No. 23.

[17] *Id*. at ¶ 14.

liability theory for a WARN Act claim is misplaced. While Grappler is correct that Texas "strongly embraces a non-liability rule for corporate successors," it fails to recognize the history of the applicability of successor liability to claims under federal labor law.[18]

The theory of successor liability stems from a line of Supreme Court cases concerning labor law. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964) (holding successor employer had duty to arbitrate under preexisting collective bargaining agreement where there was "substantial continuity" in the business both before and after the change in ownership); *see also NLRB v. Burns International Security Servs., Inc.*, 406 U.S. 272, 277-90 (1972) (finding that successor employer is not bound to substantive terms of preexisting collective bargaining agreement); *see also Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 257-59 (1974) (limiting holding in *Wiley* such that asset sale successor employer not bound to arbitrate grievance); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (holding that successor agreement in hiring predecessor employees had no duty to arbitrate unless substantial continuity between business operations).

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[18] Specifically, Tex. Bus. Org. Code § 10.254(b) states as follows: "(b) Except as otherwise expressly provided by another statute, a person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person." In a case applying this provision, one Texas court found that a former employee could not hold their former employer's successors liable for an un-assumed judgment. *E-Quest Mgmt., LLC v. Shaw*, 433 S.W.3d 18, 25 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). The *E-Quest* court, however, also recognized the existence of a difference between the claims presented in that case and a claim brought under either Title VII of the Civil Rights Act of 1964, or the Texas Commission on Human Rights Act, both employment law statutes. *Id*.

"The policy underlying the successor doctrine [is] to protect an employee when the ownership of his employer suddenly changes[.]" *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 750 (5th Cir. 1996). Successor liability has been further "extended" to federal employment law claims "asserted under Title VII and related statutes." *Id*. Courts have also applied the theory of successor liability in cases arising under the Fair Labor Standards Act ("FLSA"),[19] Americans with Disabilities Act ("ADA"),[20] the Age Discrimination in Employment Act ("ADEA"),[21] and the Employee Retirement Income Security Act ("ERISA").[22] Therefore, while Texas law protects successor purchasers, that protection does not provide a universal shield from federal labor and employment laws intended to protect employees.[23] The Court finds Plaintiffs' claim of Grappler's potential successor liability for Debtor's alleged violations of the WARN Act plausible, but makes

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[19] *See Powe v. May*, No. 02-30802, 2003 WL 1202795, at *1 (5th Cir. 2003) (assuming without deciding that successor liability is applicable to the FLSA); *see also Valdez v. Celerity Logistics, Inc.*, 999 F.Supp.2d 936, 941 (N.D. Tex. 2014); *see also Stuntz v. Elastomers, LLC*, No. 1:14-CV-00173-MAC, 2018 WL 5091625, at *4 (E.D. Tex. Sep. 21, 2018).

[20] *See E.E.O.C. v. Labor Solutions*, 242 F.Supp.3d 1267, 1273-74 (N.D. Ala. 2017) (citing *McKee v. Am. Transfer & Storage*, 946 F.Supp. 485, 487 (N.D. Tex. 1996) (Looking to "those courts which have interpreted Title VII, 42 U.S.C. § 2000e et seq. successor liability as guidance for successor liability of ADA claims.")).

[21] *Criswell v. Delta Air Lines, Inc.*, 868 F.2d 1093, 1095 (9th Cir. 1989) (finding successor may be held liable for predecessor's obligation not to discriminate based on age of employee).

[22] *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512 (9th Cir. 1987) (finding successor may be held liable for predecessor's failure to make retirement plan contributions).

[23] The Fifth Circuit recognizes the following factors in determining successor liability: (1) whether the buyer had notice of all the liabilities at issue; (2) whether the seller is able to provide adequate relief; and (3) whether there is substantial continuity of business operations between the seller and the buyer." *Rojas*, 87 F.3d at 750.

no finding on whether Grappler actually has successor liability.

C. Proofs of Claim vs. Adversary Proceeding

Grappler further contends that Plaintiffs' WARN Act claim should be barred because they both failed to timely file proofs of claim and initiated this adversary proceeding after the claims bar date. Grappler also argues that because of this failure, Plaintiffs' claim against them "violate[s] the automatic stay of 11 U.S.C. § 362 and [is] barred under Fed. R. Bankr. P. 3002 and the doctrines of res judicata and/or collateral estoppel."[24]

The Federal Rules of Bankruptcy Procedure allows for two types of disputes: (1) adversary proceedings, and (2) contested matters. The Rules further "classify only ten types of disputes as adversary proceedings, set forth in Bankruptcy Rule 7001." *Watson v. TSC Global, LLC (In re TSC Global, LLC)*, Adv. No. 12-50119, 2013 WL 6502168, at *3 (Bankr. D. Del. June 26, 2013).[25] Fed. R. Bankr. P. 7001(7) allows for an adversary proceeding "to obtain an injunction or other equitable relief..." The court in *TSC Global* found that "WARN Act claims seek equitable relief" because WARN Act plaintiffs do not seek "compensation for the damages flowing from their discharge, but a reimbursement of those salaries and benefits, calculated on a per diem basis, which were

[24] Mot., 12-13, ¶ 27, ECF No. 23.

[25] "The filing of a proof of claim ordinarily does not commence an adversary proceeding, even if priority is also claimed." *Conn v. Dewey & Leboeuf LLP (In re Dewey & Leboeuf LLP)*, 487 B.R. 169, 177 (Bankr. S.D.N.Y. 2013) (citing COLLIER ON BANKRUPTCY ¶ 7001.01 (16th ed. 2012)).

due to them on the day they were laid off." *Watson v. TSC Global, LLC (In re TSC Global, LLC)*, 2013 WL 6502168, at *3 (quoting *Dewey & Leboeuf LLP*, 487 B.R. at 176). The Court finds this reasoning persuasive.[26] Therefore, the Court finds that an adversary proceeding is appropriate here under Fed. R. Bankr. P. 7001(7), and that Plaintiffs were not necessarily required to file proofs of claim or participate in the claims allowance process to assert their claims.[27]

D. The Bar Date

Grappler last argues that Plaintiffs' claim should be dismissed because they filed this adversary proceeding after the claims bar date. The "bar date" is "the date by which all creditors must file a proof of claim to be treated as a creditor." *West Wilmington Oil Field v. Nabors Corp. Services, Inc. (In re CJ Holding Co.)*, 27 F.4th 1104, 1109 (5th Cir. 2022) (citing *In re DLH Master Land Holding, L.L.C.*, 464 F. App'x. 316, 317 n.1 (5th Cir. 2012)). The deadline to file a proof of claim in the underlying bankruptcy case was

[26] *See Burgio v. Protected Vehicles, Inc. (In re Protected Vehicles, Inc.)*, 392 B.R. 633, 638 (Bankr. D.S.C. 2008) (finding adversary proceeding proper under Rule 7001(7) because WARN Act claims are equitable in nature); *see also Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836, 843 (6th Cir. 2011) ("...WARN Act remedies at issue are equitable in nature.").

[27] Grappler argues that Plaintiffs were required to file proofs of claim, citing *Schuman v. Connaught Group, Ltd. (In re Connaught Group, Ltd.)*, 491 B.R. 88, 94 n.5 (Bankr. S.D.N.Y. 2013). *Connaught*, however, differed from this case because "the plaintiff and the putative class members [were] asserting a "right to an equitable remedy for breach of performance" that "gives rise to a right of payment," and the Bankruptcy Code defines this right as a "claim."" *Id*. Plaintiffs, however, argue they seek "equitable relief" as allowed by Fed. R. Bankr. P. 7001(7). *See Conn v. Dewey & LeBoeuf LLP (In re Dewey & LeBoeuf LLP)*, 487 B.R. 169, 176-78 (Bankr. S.D.N.Y. 2013) (holding that it was proper for putative plaintiff class to seek relief under the WARN Act by commencing an adversary proceeding because plaintiffs sought "equitable relief.").

February 22, 2022.[28] Plaintiffs filed this adversary proceeding on March 9, 2022.[29] Even if, as Plaintiffs argue, they were not required to file either individual or class proofs of claim, they were required to timely file the Original Complaint.[30] Plaintiffs did not seek an extension from this Court. Thus, this adversary proceeding appears to be untimely filed.

Because motions to dismiss are "disfavored" and "rarely granted" in the Fifth Circuit, the Court is not inclined to dismiss the Amended Complaint altogether. *Rodriguez v. Rutter*, 310 Fed.App'x. 623, 626 (5th Cir. 2009) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)). Grappler correctly states, however, that "(i) the Plaintiffs failed to timely file any proofs of claim; and (ii) the adversary proceeding was commenced after the claims bar date."[31] After review of the pleadings, the Court finds Plaintiffs have neither adequately addressed the reasons for the late filing of the Original Complaint, nor the legal basis, if any, for their apparent contention that this adversary proceeding need not have been filed prior to the bar date.[32]

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[28] *See* Case No. 21-60451, ECF No. 27.

[29] *See* Compl., ECF No. 1.

[30] *See Bailey v. Jamesway Corp. (In re Jamesway Corp.)*, Nos. 95 B 44821 (JLG), 96/8389A, 1997 WL 327105, at *10-11 (Bankr. S.D.N.Y. June 12, 1997).

[31] Def.'s Reply, 7, ¶ 15, ECF No. 28.

[32] The Court notes that Plaintiffs seek to hold Grappler responsible as Legend's successor while simultaneously asserting that Legend's bar date is inapplicable to the filing of this adversary. This argument, however, is incongruous with the fact that Grappler's successor liability is dependent upon a finding that Legend violated the WARN Act.

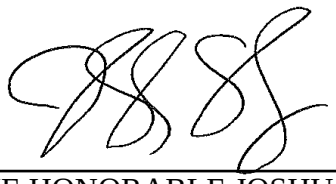
For this reason, the Court shall provide a limited opportunity for Plaintiffs to submit concise and direct supplementary briefing to the Court explaining why this adversary proceeding should not be dismissed as untimely.[33]

III. Conclusion

IT IS THEREFORE ORDERED that the Plaintiffs, Jacob Rose, *et.al*., shall have **fourteen (14) days** after entry of this order to file a supplemental brief explaining why this adversary proceeding should not be dismissed as untimely filed. If Plaintiffs fail to submit such supplemental briefing, this adversary proceeding shall be dismissed.

IT IS FURTHER ORDERED that if Plaintiffs, Jacob Rose, *et.al*., submit supplemental briefing as permitted in the preceding paragraph, then Defendant, Grappler Pressure Pumping, may file a reply brief in further support of dismissal within **twenty-eight (28) days** following entry of this order.

Signed on 04/13/2023



THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE

[33] *See Bailey v. Jamesway Corp. (In re Jamesway)*, 1997 WL 327105, at *10-11; *see also W.T. Grant Co.*, 53 B.R. 417, 420-21 (Bankr. S.D.N.Y 1985) ("Although amendments [] should in the absence of contrary equitable considerations or prejudice to the opposing party be freely permitted, such amendments are not automatic but are allowed, "where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity...") (quoting *Biscayne 21 Condominiums Assoc., Inc. v. South Atlantic Fin. Corp. (In re South Atlantic Fin. Corp.)*, 767 F.2d 814, 819 (11th Cir. 1985)); *see also In re Commonwealth*, 617 F.2d 415, 420-21 (5th Cir. 1980).