

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-02140

ORDER

The relief set forth on the following pages, for a total of 20 pages including this page, is hereby ORDERED.

FILED BY THE COURT
01/20/2010



Entered: 01/20/2010

A handwritten signature in cursive script, appearing to read "John L. Currie".

US Bankruptcy Court Judge
District of South Carolina

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

In re:	§	
	§	Case No. 09-02140 (HB)
BI-LO, LLC <i>et al.</i>,	§	
	§	Chapter 11
Debtors.¹	§	
	§	(Joint Administration)
	§	

ORDER DENYING MOTION OF SUSAN PEARSON REQUESTING LEAVE OF COURT TO FILE PROOF OF CLAIM AFTER ESTABLISHED DEADLINE

This matter came before the Court for hearing on the Motion of Susan Pearson Requesting Leave of Court to File Proof of Claim after Established Deadline [Docket Entry 1482]. The Motion requests that the Court enter an Order deeming Pearson’s claim timely filed or enlarging the time period to file her claim. Elinor V. Lister, Pearson’s bankruptcy counsel, appeared at the hearing. She proffered certain facts without objection and presented documentary evidence and arguments. George B. Cauthen and Frank B.B. Knowlton appeared on behalf of the Debtors (“BI-LO”). BI-LO’s bankruptcy counsel called the Court’s attention to various facts and documents in the Court’s records, and proffered the testimony of BI-LO’s Chief Restructuring Officer, Michael A. Feder, who was also present at the hearing. The Court finds as follows:

¹ The Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

FACTS

1. This is a core proceeding and the Court has appropriate jurisdiction to determine the issues addressed in the Motion.

2. Pearson was involved in an automobile accident in Tennessee in 2008. As a result Pearson filed a personal injury action in state court in Tennessee against the driver of the other vehicle and another owner, claiming \$125,000.00 in damages. She is represented by counsel in that action.

3. At the time of the accident Pearson was employed by BI-LO, and she alleges that her injuries occurred while she was working within the course of her employment. Pearson filed a worker's compensation claim with the Tennessee Department of Labor. On March 22, 2008, BI-LO's agent handling the worker's compensation matter in Tennessee filed a document titled "Employer's First Report of Work, Injury or Illness." The report included a line in the middle of the page with a "bubble" to check "yes" or "no" to the inquiry line "self insured." The form indicated a "no" in response. BI-LO's counsel pointed out that there were only two response choices on the form, and no bubble for any combination of the two options. No evidence was offered indicating how this form should have been properly executed that would allow the Court to conclude that this form was completed incorrectly.

4. BI-LO filed a motion through its Tennessee counsel to intervene as a party in Pearson's personal injury suit against the driver and owner to assert a subrogation lien on any recovery Pearson may receive in that suit for any amounts it has paid or may pay as a result of her worker's compensation claim.

5. Lister represented to the Court that Pearson has received treatment for injuries allegedly resulting from that accident and that “she’s already receiving these benefits, and she’s going to be detrimentally affected if her treatment is cut off in the middle” It is assumed that counsel was referring to the receipt of worker’s compensation benefits, but no other details were provided.

6. BI-LO filed this bankruptcy case on March 23, 2009. BI-LO operates approximately 200 stores in the South Carolina, North Carolina, Georgia and Tennessee and employs approximately 15,000 people. BI-LO timely filed the required proof of insurance with the United States Trustee in this bankruptcy, including information regarding the policies relevant to Pearson’s claim.

7. The deadline for certain creditors to file a proof of claim in this case was established by the Court and had passed at the time this Motion was filed. According to the records of BI-LO, there are an estimated 80 late filed claims and of those claims asserted with specific dollar amounts total approximately \$5,000,000.00. There are approximately 240 “litigation” claims similar to the one asserted in this matter that were timely filed.

8. Steven Waldron, counsel for Pearson in Tennessee, was immediately aware of the bankruptcy filing. On March 27, 2009, approximately one year after BI-LO filed the “Employer’s First Report of Work, Injury or Illness” in the worker’s compensation matter and four days after the bankruptcy filing, Waldron wrote the following letter to an attorney representing BI-LO in Tennessee, indicating that he forwarded a copy to Pearson:

Waldron and Fann

R. Steven Waldron
Terry A. Fann
Benjamin L. Parsley, III

Attorneys at Law

202 West Main Street
Murfreesboro, Tennessee 37130
(615) 890-7365
FAX (615) 848-1658

March 27, 2009

Ms. Jennifer W. Arnold
Attorney at Law
P. O. Box 23583
Chattanooga, TN 37422

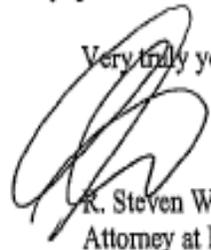
Re: My Client: Susan Pearson
Your Client: Bi-Lo, LLC
Date of Injury: March 19, 2008

Dear Ms. Arnold:

I am sorry to hear that Bi-Lo has filed for bankruptcy protection. I am not sure it has anything to do with this claim since they are not self insured. It is our understanding that Ace American is their comp carrier.

Please feel free to call should you have any questions.

Very truly yours,



R. Steven Waldron,
Attorney at Law

RSW:as

cc: Henry Tupis, Tennessee Department of Labor
Susan Pearson

9. On April 1, 2009, Tennessee counsel handling this matter on behalf of BI-LO responded to Waldron's March 27, 2009 letter:

APR/01/2009/WED 01:04 PM ALLEN KOPET & ASSOC. FAX No. 423 899 9028 P.002



LAW OFFICES OF
ALLEN, KOPET & ASSOCIATES, PLLC

P.O. Box 23583, Chattanooga, TN 37422
(423) 899-8810 - telephone (423) 899-9028 - fax
jarnold@allen-kopet.com

ADDITIONAL OFFICES

*TN: Jackson • Knoxville • Memphis • Nashville AL: Huntsville
FL: Ft. Lauderdale • Orlando • Tallahassee • Tampa GA: Atlanta KY: Lexington
SC: Columbia • Greenville • Hilton Head NC: Charlotte • Raleigh/Durham MS: Jackson*

April 1, 2009

VIA FACSIMILE: 615-848-1658

R. Steven Waldron, Esq.
Waldron & Fann
202 West Main Street
Murfreesboro, TN 37130

RE: Susan Pearson v. Bi-Lo, LLC
Our File No.: 102-23924
D/O/I: 03/19/08

Dear Steven:

I am in receipt of your correspondence of March 27, 2009, in which you indicate that you are not sure if Bi-Lo's filing of bankruptcy has anything to do with this workers' compensation claim. As you know, Bi-Lo is in bankruptcy at this time, and federal law automatically stays all action against Bi-Lo. It is my understanding that a Motion is pending to allow workers' compensation matters to move forward, and once the federal Court issues an Order, we will advise and abide by it.

With respect to Ace American, we have no idea what the insurance agreement is, but we understand that Bi-Lo may have a high retention. However, this fact does not change anything about the bankruptcy.

Again, I will advise if the automatic stay is lifted by the federal Court. Thank you for your understanding in this matter, and please do not hesitate to contact me if you have any questions.

Very truly yours,

JENNIFER W. ARNOLD
For the Firm

JWA/jml

cc: Henry Tupis (via facsimile: 615-848-1658)

10. BI-LO's Tennessee counsel sent another letter to Waldron on April 2, 2009:



LAW OFFICES OF
ALLEN, KOPET & ASSOCIATES, PLLC

RECEIVED APR - 7 2009

P.O. Box 23583, Chattanooga, TN 37422
(423) 899-8810 - telephone (423) 899-9028 - fax
aphebus@allen-kopet.com

ADDITIONAL OFFICES

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FL: Ft. Lauderdale • Orlando • Tallahassee • Tampa GA: Atlanta KY: Lexington
SC: Columbia • Greenville • Hilton Head NC: Charlotte • Raleigh/Durham MS: Jackson*

April 2, 2009

R. Steven Waldron
202 West Main Street
Murfreesboro, TN 37130

Mary Beth Halton
201 4th Avenue North
Suite 1500
Chattanooga, TN 37219

RE: Susan Pearson v Bi-Lo, LLC
Coffee County Circuit Court
Our File No.: 102-24755

Dear Steven and Mary Beth:

Enclosed please find an executed copy of the Motion to Intervene, Intervening Complaint and Agreed Order Granting the Motion to file an Intervening Complaint. Pursuant to both of your instructions, I executed the Agreed Order on your behalf.

As I am sure you are aware, Bi-Lo has recently filed Chapter 11 bankruptcy. We still have not received instructions as to how the bankruptcy will affect the position of Bi-Lo's general liability cases. A bankruptcy creates an automatic Stay on all Bi-Lo's cases. However, this Stay can be lifted upon request to the bankruptcy court under certain conditions. I would expect that the Stay in the workers compensation case will be lifted prior to the general liability cases. As soon as I hear more, I will let you know. Meanwhile, if you have any questions, please do not hesitate to call.

Very sincerely,

ANNETTE T. PHEBUS
For the Firm

ATP/ilm(04/02/09)
Enclosures

11. On April 2, 2009, at the direction of BI-LO's bankruptcy counsel and the Court, Pearson and others were mailed a copy of the "Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines" ("Bar Date Notice") [Docket Entry 174], as evidenced by the Certificate of Mailing filed in this bankruptcy case [Docket Entry 221]. The Bar Date Notice was mailed by BI-LO's noticing and balloting agent, Kurtzman Carson Consultants LLC ("KCC").²

12. The Bar Date Notice consisted of one page, front and back, and notified certain creditors that the deadline to file a proof of claim was August 13, 2009.

13. Regarding the bankruptcy stay of 11 U.S.C. § 362, the Bar Date Notice included the following language:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the Court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Regarding the filing of proofs of claim, the back portion of the notice contained a heading titled "EXPLANATIONS," and included the following relevant instructions:

The staff of the Bankruptcy Clerk's Office cannot give legal advice. Consult a lawyer to determine your rights.

.....

... A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any Bankruptcy Clerk's Office. You may look at the schedules that have been or will be filed at the Bankruptcy Clerk's Office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you

² The Court approved BI-LO's application to employ KCC as claims, noticing and balloting agent on March 25, 2009. See Order Authorizing the Debtors to Employ Kurtzman Carson Consultants LLC as Claims, Noticing and Balloting Agent, *In re BI-LO, LLC*, C/A No. 09-02140-hb (Bankr. D.S.C. March 25, 2009) [Docket Entry 57].

are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. **If your claim is not listed at all or if your claim is listed as disputed, contingent or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan.** A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the Bankruptcy Court, with consequences a lawyer can explain.

(Emphasis added).

14. Pearson does not dispute that she received the Bar Date Notice.³

15. BI-LO listed Pearson's claim on its schedules as a contingent, unliquidated, and disputed claim in an undetermined amount.

16. The record does not include any evidence of inquiries made by Pearson, on her own or through her counsel, to BI-LO between the April 2 letters and the August 13, 2009 bar date.

17. On August 31, 2009, Lister, on behalf of Pearson, sent a document labeled as a consent order for relief from stay to one of the attorneys representing BI-LO in this bankruptcy case, requesting that BI-LO agree to the lifting of the stay to allow resumption of Pearson's Tennessee actions. Lister explained that in her experience when a contract of insurance or other source of payment is available to a claimant in addition to a possible recovery of any claim against a bankrupt party, the claimant and the bankrupt might negotiate to lift the automatic stay to allow the claimant to pursue the other sources of payment or to establish the claim in another forum. She argued that Pearson and her

³ The record does not show that Pearson or her counsel filed a request in this case for notice to be given at a particular address; therefore, the last known address of Pearson was used. Rule 9006(e) provides that service is complete upon mailing of the notice. This presumption may be rebutted, but Pearson admitted to receiving notice in this case.

counsel understood that BI-LO was not self-insured, and therefore other sources of payment could be pursued.

18. On September 1, 2009, BI-LO's bankruptcy counsel responded to Lister's request by informing her that Pearson needed to file a proof of claim in the bankruptcy for payment and that the bar date of August 13, 2009 had passed.

19. Pearson's Motion explains her failure to file a timely claims as follows:

Pearson did not know that she had to file a proof of claim until after the bar date had passed. She did not receive notice from the Debtor that it was self-insured and/or that property of the estate would be affected by her worker's compensation claim. In fact, the documentation that she did receive seemed to indicate that the Debtor was not self-insured.

20. After Lister inquired of bankruptcy counsel and learned that the facts Pearson relied upon were incorrect, on September 25, 2009, Lister filed a proof of claim in this case for Pearson listing the amount of \$100,000.00. On September 30, 2009, she filed this Motion. Counsel for Pearson represented to the Court that after learning from BI-LO's bankruptcy counsel that BI-LO was self-insured and prior to filing the proof of claim and Motion, Pearson's attorneys diligently investigated the history of the relevant cases to determine whether proper notice had been given, whether filing of a proof of claim prior to the deadline was required, and to determine the appropriate course of action.⁴ Pearson's Motion states that during this process "Waldron . . . reviewed his files and determined that Pearson had never received notice that the Debtor was self-insured."

21. Pearson's exhibits include the following documents that appear on the public docket for this bankruptcy case: BI-LO's Motion of the Debtors for Entry of an Order Authorizing Continuation of Insurance Policies and Payment of All Obligations in

⁴ The Court notes that at the time this Motion was filed the docket in this case was large, including 1482 entries.

Respect Thereto (“Pearson Exhibit C”) [Docket Entry 34 filed on November 3, 2009]; and the Court’s Order Authorizing Continuation of Insurance Policies and Payment of All Obligations in Respect Thereto (“Pearson Exhibit D”) [Docket Entry 314 entered on April 8, 2009]; BI-LO’s Motion of the Debtors for Entry of an Order Establishing Procedures to Settle Certain Claims (“Pearson Exhibit E”) [Docket Entry 1161 filed on July 24, 2009]. Pearson asserts that Exhibits C and D, which both mention that BI-LO was self-insured, were never served on her.⁵ She acknowledged that she was served with Exhibit E, but that it did not state that BI-LO was self-insured.

22. At the hearing on the Motion held on October 14, 2009, the Court received Feder’s proffered testimony. It explained that claims analyses had been conducted at that point; that discussions regarding the claims process had taken place between BI-LO, the Unsecured Creditors Committee, and others regarding claims and a plan of reorganization; and that to allow changes to the claims register at that point in the process would be prejudicial to BI-LO’s administration of claims and would require a further claims estimation process. Feder’s testimony indicated that if Pearson’s late claim is allowed, BI-LO would be prejudiced not only by the effect of allowing that claim, but also by the resulting precedent such a decision would set for the allowance of additional late claims. Feder’s testimony further indicated that allowance of late claims would dilute the recovery to unsecured creditors and impede BI-LO’s progress towards reorganization.

⁵ There was no allegation that BI-LO was required to serve these documents on Pearson, and one was filed and served after this Motion was filed. *See* Order Establishing Certain Notice, Case Management and Administrative Procedures, *In re BI-LO, LLC, C/A* No. 09-02140-hb (Bankr. D.S.C. March 27, 2009) [Docket Entry 115]. Further, Pearson did not call the Court’s attention to any document in the record indicating that any other party had filed a Notice of Appearance or any other request for service on her behalf. *See* Fed.R.Bankr.P. Rule 2002.

23. At the time of the hearing, no Chapter 11 plan had been proposed.⁶

DISCUSSION AND CONCLUSIONS OF LAW

Due Process

South Carolina Local Rule of Bankruptcy Procedure 3003-1 sets forth the time for filing proofs of claim in Chapter 11 cases:

Proofs of claim or interest of nongovernmental entities required or permitted to be filed under Fed. R. Bankr. P. 3003(c) must be filed not later than ninety (90) days after the first date set for the § 341 meeting of creditors, and such proofs of claim or interest of governmental entities must be filed within one hundred eighty (180) days after the date of the order for relief, except as otherwise specified in the Bankruptcy Code or Federal Rules of Bankruptcy Procedure or ordered by the Court. A request to extend the times provided for by this local rule must be made before the expiration of the time.

Fed. R. Bankr. P. 3003(c) provides further parameters regarding the filing of proofs of claims in Chapter 11 cases. Creditors filing proofs of claim pursuant to Rule 3003(c) are entitled to a minimum of 20 days' notice via mail of "the time fixed for filing proofs of claims pursuant to Rule 3003(c)." Fed. R. Bankr. P. 2002(a)(7). Rule 2002(a) provides that the clerk "or some other person as the court may direct . . ." shall serve the notice.

Pearson argues that despite receipt of the Bar Date Notice, her due process rights will be violated if the relief requested in her Motion is not granted. The Due Process Clause requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* at 314 (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "This right to be heard has little reality or worth unless one is

⁶ Two separate, competing disclosure statements and plans were filed in this case on November 20, 2009, and were first scheduled for hearing on December 28, 2009.

informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Id.* In bankruptcy, “[w]hether a creditor received adequate notice of a bar date ‘depends upon the facts and circumstances of a given case.’” *In re Grand Union Co.*, 204 B.R. 864, 871 (Bankr. D. Del. 1997) (granting the motions to file late proofs of claims).⁷ Notice is sufficient if it complies with the requirements of due process:

In general, due process requires notice that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” In other words, the notice must be such that it would reasonably inform the interested parties that the matter is pending and would reasonably allow the parties to “choose for [themselves] whether to appear or default, acquiesce or contest.”

Id. (citations omitted); *see also In re Twins, Inc.*, 295 B.R. 568, 571 (Bankr. D.S.C. 2003).

Pearson argues that she was not properly notified that she needed to file a proof of claim because she was not given notice that BI-LO was self-insured. However, the Bar Date Notice clearly instructs creditors with claims listed as contingent, disputed or unliquidated that they must file a proof of claim. Sufficient time was given for Pearson to investigate the applicable facts and law to determine whether she was such a person. Pearson has not defined any legal duty on the part of BI-LO that requires her to receive anything more than the information set forth in the Bar Date Notice mailed to her. Therefore, the Court cannot find that her due process rights will be violated if her late claim is excluded.

⁷ This Court has cited *Grand Union* to support the premise that “inadequate notice of the claims bar date, in and of itself, is a ground upon which a late proof of claim is allowed to be filed.” *See In re Twins*, 295 B.R. 568, 573 (Bankr. D.S.C. 2003).

Excusable Neglect

Pearson asserts that her failure to file her proof of claim prior to the deadline resulted from excusable neglect and, therefore, her late claim should be deemed timely filed or she should be granted an extension of time.

Rule 9006(b)(1) provides the basis for the relief sought by Pearson:

[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of *excusable neglect*.

(emphasis added).

Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. This context suggests that Rule 9006's allowance for late filings due to 'excusable neglect' entails a correspondingly equitable inquiry.

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 389 (U.S. 1993) (citations omitted). The *Pioneer* Court further discussed Rule 9006(b)(1), providing that “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Id.* at 388.⁸ Finally, the *Pioneer* Court explained that the following factors were relevant in

⁸ This Court notes that a review of the decisions of other bankruptcy courts since *Pioneer* suggests that allowing late filed claims as a result of excusable neglect appears to be the exception, not the rule. See *In re Gardenhire*, 209 F.3d 1145 (9th Cir. 2000) (holding that “a bankruptcy court lacks equitable discretion to enlarge the time to file

determining whether excusable neglect was present: “the danger of prejudice to the debtor, the length of the 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. Other courts have found that an excusable neglect inquiry involves weighing the *Pioneer* factors, but “that not all factors need to favor the moving party.” *In re XO Communications, Inc.*, 301 B.R. 782, 796 (Bankr. S.D.N.Y. 2003) (finding that the majority of the *Pioneer* factors weighed in favor of the debtor despite the fact that there was little prejudice to the debtor due to the small size of the movant’s claim). “Instead, courts are to look for a synergy of several factors that conspire to push the analysis one way or the other.” *In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998) (finding that excusable neglect was not present where creditors received notice of the bar date from the court and supplemental notice from the debtors; that allowing the claims would not create significant problems in delaying or complicating the judicial proceedings, nor were the claims large enough to interfere with the case’s administration; that allowance of one claim could result in the filing of many other claims, which would be prejudicial to the debtor; and that the notice given to claimants was not ambiguous).

**The reason for the delay, including whether it was
within the reasonable control of the movant**

When deciding whether excusable neglect is present, numerous courts emphasize “the reason for the delay” factor. *In re PT-1 Communications, Inc.*, 403 B.R. 250, 260

proofs of claim; rather, it may only enlarge the filing time pursuant to the exceptions set forth in the Bankruptcy Code and Rules.”); *see also Jones v. Chemetron Corp.*, 212 F.3d 199 (3rd Cir. 2000); *see also In re American Classic Voyages Co.*, 405 F.3d 127 (3rd Cir. 2005); *see also In re Enron Corp.*, 419 F.3d 115 (2nd Cir. 2005); *see also In re Kmart Corp.*, 381 F.3d 709 (7th Cir. 2004).

(Bankr. E.D.N.Y. 2009); *In re Enron Corp.*, 419 F.3d 115, 122 (2nd Cir. 2005) (“We noted, though, that ‘we and other circuits have focused on the third factor: “the reason for the delay, including whether it was within the reasonable control of the movant.””); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (“While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.”); *In re Musicland Holding Corp.*, 356 B.R. 603, 607 (Bankr. S.D.N.Y. 2006) (“Consequently, the Second Circuit, as well as other Circuits, focus on the third factor—the reason for the delay—as the predominant factor.”). “Courts generally do not rule in favor of claimants . . . who have neglected to timely file proofs of claim as a result of their failure to communicate with counsel regarding a legal notice or their own or their counsel’s disregard of the relevant substantive law governing their claim.” *In re Agway, Inc.*, 313 B.R. 31, 40 (Bankr. N.D.N.Y. 2004); *see also In re Brunswick Baptist Church*, 2007 WL 160749, at *5 (N.D.N.Y. 2007).

The evidence before the Court does not support a finding that Pearson or her counsel failed to file a timely claim as a result of any misrepresentation made by BI-LO to Pearson or her attorney or any failure on BI-LO’s part to satisfy any legal duty to disclose information about the status of insurance. The evidence, together with Lister’s arguments, could lead the Court to conclude that the reason for the delay was that Pearson and/or her Tennessee counsel were mistaken about the need to file a proof of claim as the Bar Date Notice instructed, but nothing more. Once appropriate inquiries were made of bankruptcy counsel after the bar date, Pearson filed a proof of claim. The Court cannot conclude that the delay in filing the claim was not within the reasonable control of Pearson and her attorneys. Waldron contacted BI-LO’s Tennessee counsel on March 27, 2009, stating that

he was unsure of the effect of the bankruptcy on Pearson's claims and actions. Tennessee counsel for BI-LO responded that BI-LO may have a "high retention" and that they were not yet certain of the effect of the bankruptcy on Pearson's claim. The Bar Date Notice warned claimants to check their status and file a proof of claim. More than three months passed after the Bar Date Notice with no action from Pearson per this record. The Court cannot find from the evidence that Pearson was led to believe that no proof of claim was necessary and cannot conclude that the inaction after the Bar Date Notice was reasonable. It appears that the delay results from a miscalculation of the law based on a misunderstanding of the facts without sufficient inquiry. These factors weigh in favor of BI-LO.

Whether the Movant Acted in Good Faith

In cases applying the *Pioneer* factors when analyzing excusable neglect, it is rarely found that the movants acted without good faith; therefore, courts often give little weight to the good faith factor. *BOUSA, Inc. v. United States (In re Bulk Oil (USA) Inc.)*, 2007 WL 1121739, n. 6 (S.D.N.Y. Apr. 11, 2007). However, bankruptcy courts have found that inaction during the time period allotted for the filing of claims is an example of a lack of good faith. *In re J.S. II, L.L.C.*, 397 B.R. 383, 389 (Bankr. N.D. Ill. 2008). When examining the good faith factor, courts have focused on whether good faith is present on a subjective review of the specific facts of a given case. *See In re Garden Ridge Corp.*, 348 B.R. 642 (Bankr. D. Del. 2006); *see also In re Smidth & Co.*, 413 B.R. 161 (Bankr. D. Del. 2009); *see also In re J.S. II, L.L.C.*, 397 B.R. 383.

The delay by Pearson and her counsel may have resulted from a belief that BI-LO was not self-insured and may have been based on a legal analysis (correct or incorrect) of

the effect of that information on Pearson's need to file a proof of claim. However, from a review of the evidence, the Court cannot conclude that this was a reasonable belief as BI-LO's Tennessee counsel warned that BI-LO may have a "high retention" and that they were unsure of the effect of the bankruptcy on Pearson's claim. Thereafter or around the same time, the Bar Date Notice provided to Pearson gave clear instructions that, if followed before the bar date passed, would have led to the filing of a timely claim. Pearson or her counsel should have inquired or researched further if they doubted the applicability or relevance of the Bar Date Notice to her claim. There is no explanation in the record for the inaction between the mailing of the Bar Date Notice in early April and the August deadline. The Court also cannot find from this record that Pearson, on her own or by and through her counsel, acted in good faith. This factor is neutral in the *Pioneer* analysis and does not advance Pearson's excusable neglect argument.

The danger of prejudice to the Debtors, the length of the delay and its potential impact on judicial proceedings

The bar date in Chapter 11 cases functions as a statute of limitations that excludes late claims "in order to provide the Debtor and its creditors with finality to the claims process and permit the Debtor to make swift distributions under the Plan." *In re XO Communications., Inc.*, 301 B.R. at 797-98 (Bankr. S.D.N.Y. 2003); *see also Berger v. TWA (In re TWA)*, 96 F.3d 687, 690 (3d Cir. Del. 1996); *see also Grand Union*, 204 B.R. 864 (finding that excusable neglect was not present to warrant allowing the late filed proofs of claims). BI-LO argued that it would be prejudiced if this claim is allowed and finality denied. BI-LO has made progress in analyzing timely filed claims that will be impeded if this and additional claims are added. A plan has yet to be confirmed, but the evidence before the Court indicates that at the time the Motion was filed BI-LO had made

significant progress towards analyzing the scores of claims filed and has taken significant steps towards reorganization. Allowing a late filed claim on these facts would certainly risk opening the floodgates to allow others. Furthermore, this Court should hesitate before it acts to allow the claim and dilute the return to those similarly situated creditors who received similar notice, yet managed to file a proof of claim in a timely fashion.

Representatives of BI-LO were aware that Pearson's claim was being asserted in another forum against BI-LO and others and, therefore, BI-LO cannot argue that it was not aware of the possibility that a claim may be presented for payment in this case on her behalf. However, this is true with any and all claims listed on a debtor's schedules as contingent, disputed, or unliquidated, yet applicable authorities require the affirmative filing of a timely proof of claim in the bankruptcy records for such creditors to participate in the Chapter 11 distribution. The evidence does not indicate that BI-LO was aware that the creditor intended to pursue a claim for distribution in this bankruptcy.⁹ After claims were due, BI-LO relied on the lack of a filed claim for Pearson, and the absence of many others, in making its analysis of claims presented for distribution so that it could swiftly proceed towards reorganization. As a result of this justified reliance on the absence of this claim and the disruption that an additional claim could cause, the evidence presented to the Court indicates that there is a danger that BI-LO will suffer some prejudice and a negative impact on these proceedings may occur if the late claim is allowed.

⁹ It should be noted that Pearson did not argue that any document could be treated as an informal proof of claim giving notice to BI-LO of her claim in this bankruptcy. A creditor seeking to establish an informal proof of claim must take affirmative action to alert other parties to its claim. *In re Elleco, Inc.*, 295 B.R. 797, 800 (Bankr. D.S.C. 2002). An informal proof of claim may be found "if there is anything in the bankruptcy case's record that *establishes a claim*. . . ." *Id.* Pearson did not file anything in this case prior to the bar date that establishes her claim or alerts other parties of her claim.

The prejudice to BI-LO and negative impact on the proceedings are diminished somewhat by the timing of Pearson's late claim and Motion filed approximately a month and a half after the bar date. A more lengthy delay would have resulted in a greater impact and prejudice. Any potential prejudice is further mitigated by the fact that BI-LO has intervened in Pearson's lawsuit for recovery of payment for her injuries from another party, seeking subrogation of any benefits paid or to be paid and potentially reducing any impact on these proceedings. However, success with that subrogation claim is not guaranteed.

In conclusion, the delay was not overwhelming and the danger of prejudice to BI-LO and impact on these proceedings appear small when considering the effect of allowing Pearson's claim alone, but some prejudice to BI-LO and a negative impact on these proceedings has been shown if her claim is allowed. Further, allowing any late claim could set a precedent encouraging or allowing others.

The analysis of these factors tips the scales in favor of BI-LO.

THEREFORE, IT IS ORDERED, that the Motion of Susan Pearson Requesting Leave of Court to File Proof of Claim after Established Deadline is **DENIED**.

AND IT IS SO ORDERED.