U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-2140

ORDER

The relief set forth on the following pages, for a total of 17 pages including this page, is hereby ORDERED.

FILED BY THE COURT
02/19/2010

US Bankruptcy Court Judge
District of South Carolina

Entered: 02/22/2010

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:	§	**Case No. 09-02140 (HB)**
	§	
BI-LO, LLC *et al.*,	§	**Chapter 11**
	§	
Debtors.[1]	§	**(Joint Administration)**
	§	

ORDER GRANTING MOTION OF KIOKA MCKINNEY

This matter comes before the Court for hearing on Kioka Marie McKinney's Motion Requesting Leave of Court to File Proof of Claim after Established Deadline [Docket Entry 1749]. Ms. McKinney filed a late claim in the amount of $250,000.00. At the hearing, George B. Cauthen and Frank B. B. Knowlton appeared on behalf of the Debtors ("BI-LO"), and Jane H. Downey appeared on behalf of Ms. McKinney, who was also present at the hearing. Counsel for Ms. McKinney provided various exhibits to the Court. 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:

FACTS

1. Ms. McKinney alleges that she was injured in one of BI-LO's stores on April 22, 2008. After her injury, she retained the law firm of Montlick & Associates in Atlanta, Georgia to represent her.

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[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).

2. On June 12, 2008, Ms. McKinney's state court counsel sent a letter to BI-LO's claims adjuster, Broadspire, confirming representation of Ms. McKinney.

3. On August 28, 2008, Ms. McKinney's counsel sent a letter to Broadspire detailing her injuries and damages and demanding compensation.

4. BI-LO filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on March 23, 2009. In the bankruptcy BI-LO listed Ms. McKinney's claim on its schedules as a contingent, unliquidated, and disputed claim in an undetermined amount.

5. The record does not include evidence of any further communications between the parties until April 8, 2009, when Broadspire sent the following letter to Ms. McKinney's state court counsel:

BROADSPIRE
a Crawford Company

April 8, 2009

Montlick and Associates, P.C
17 Executive Park Drive suite 300
Atlanta GA 30329

RE:	**Claimant:**	**Kioka Marie McKinney**
	Insured:	**Bi-Lo**
	A/L Date:	**4/22/08**
	File:	**4400-282539**
	Client:	**Bi-Lo**

Dear Sir:

Please be advised of the following update:

Bi-Lo, LLC files for bankruptcy protection on 3-23-09. At this time we have not been given direction via the bankruptcy court on how to proceed with the claims against Bi_Lo, LLc. Once we are able to advise you further we will do so. Otherwise you may want to review the filing at UNITED STATES BANKRUPTCY COURT DISTRICT OF SOUTH CAROLINA , Case No. 09-021-140hb.

Sincerely,
Broadspire Services, Inc.

Rhenardo Worrell
Liability Adjuster
404-300-0916
Fax 404-300-0992
Rhenardo.Worrell@choosebroadspire.com
CC: Jaime Bruner

6. On April 2, 2009, at the direction of BI-LO's bankruptcy counsel and the Court, Ms. McKinney 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] The Bar Date Notice provided that the deadline for creditors to file a proof of claim was August 13, 2009, and it was mailed to "606 Crown Point Dr., Martinez, GA 30907," which was the last known address BI-LO had for Ms. McKinney.

7. Ms. McKinney admits to receipt of the Bar Date Notice during the latter portion of July 2009 or early August 2009. Ms. McKinney did not take any immediate steps to contact her attorney after receiving the notice.

8. The Certificate of Mailing filed with the Court on May 29, 2009 [Docket No. 678], provides that Ms. McKinney was mailed a copy of the "Notice of Proof of Claim Deadline" ("Proof of Claim Notice") [Docket Entry 619] on May 8, 2009, to the same address. The Proof of Claim Notice also provided that the deadline for creditors to file a proof of claim was August 13, 2009.

9. Ms. McKinney acknowledges receipt of a document titled Notice of Debtors' Motion to Establish Shortened Mailing Matrix Pursuant to SC LBR 2081-2 and Opportunity for Hearing [Docket Entry 996, filed with the Court on July 16, 2009]. The evidence does not indicate the date Ms. McKinney received this document. According to the Certificate of Mailing filed with the Court on July 21, 2009 [Docket No. 1113], this document was mailed to the same address on or before July 18, 2009. After receipt of this document, Ms. McKinney claims she became concerned about the status of her claims against BI-LO and contacted her attorney.

10. After Ms. McKinney contacted her counsel, counsel took the necessary steps to file a proof of claim and obtain local counsel admitted to practice in this Court.

11. Ms. McKinney's counsel mailed a late filed proof of claim to KCC on her behalf via certified mail October 28, 2009.

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[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].

12. Ms. McKinney presented an affidavit to the Court including the following:

> On May 29, 2008 I hired the law firm of Montlick & Associates to represent me in a claim for injuries I suffered while I was shopping at the Bi-Lo Store located at 500 Fury's Ferry Road, Augusta, Georgia.
>
> Some time in late July or August 2009 I received some bankruptcy paperwork at 14 Whitney Court, Augusta, Georgia 30904. These papers were originally sent to my previous address at 606 Crown Point Dr., Martinez, Georgia 30907. I have not lived at the 606 Crown Point address since June 2008.
>
> When I received the paperwork I really did not understand it. The paperwork was very confusing and I did not think anything bad would happen if I did not file a proof of claim because the claim form did not state that anything bad would happen if I did not respond.
>
> I did not think that I had to file a claim a second time because Bi-Lo already knew about my claim.
>
> I knew that Bi Lo [sic] was dealing with my attorney so I did not take the time to read everything in detail because I thought that a copy of what I received was being sent to my attorney since Bi-Lo knew that I was represented by attorney Patrick Matarrese with the law firm of Montlick & Associates.
>
> I did not call my attorney until some time in September 2009, when it appeared to me from other documents that I received from the Bankruptcy Court that my attorney was not getting copies of what I was receiving.
>
> I do not understand why my attorney was not sent copies of these documents when Bi-Lo knew that I was represented by an attorney.

13. Ms. McKinney's bankruptcy counsel argued that Ms. McKinney's failure to take immediate action upon receipt of notice of the bar date stemmed from her belief that BI-LO knew about her claim, thus she felt filing a claim would be repetitive; that the notice did not state what would happen if she failed to file a claim; and because she had an attorney, she believed that BI-LO would contact her attorney if she needed to take action. Further, the disruption of mail delivery caused by her move provided her with less time to sort out these issues.

14. Bankruptcy counsel for BI-LO proffered the testimony of Michael Feder, Chief Restructuring Officer for BI-LO. Mr. Feder's proffer explained that BI-LO would be prejudiced by the potential precedent set by allowing Ms. McKinney's claim. He testified that, as of the hearing date, approximately 97 late filed claims had been filed with preliminary claim figures adding over $9,000,000.00; and that allowance of Ms. McKinney's claim would likely result in the filing of additional late filed claims, which would further dilute the recovery to unsecured creditors.

15. BI-LO offered evidence that it had mailed numerous documents to Ms. McKinney initially using her address at 606 Crown Point Dr. Martinez, GA 30907 and that the mail was not returned until late July. The summary of service indicates that the Bar Date Notice and Proof of Claim Notice were not returned to BI-LO. However, a document mailed in July was returned with the notation "7/22/09 FORWARD TIME EXP RTN TO SEND MCKINNEY KIOKA MARIA 14 WHITNEY CT AUGUSTA GA 20904-5238 RETURN TO SENDER." BI-LO thereafter forwarded that mail to Ms. McKinney's new address on July 28, 2009, and thereafter has mailed documents to both addresses.

16. At the time of the hearing, a Chapter 11 plan had not been confirmed.[3]

DISCUSSION AND CONCLUSIONS OF LAW

Due Process

Fed. R. Bankr. P. 3003(c) provides the following:

> [t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).[4]

[3] 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.

[4] None of these grounds for filing a claim after the expiration of time apply to this matter.

South Carolina Local Rule of Bankruptcy Procedure 3003-1 sets forth the timeframe 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. Further, Rule 2002(g) states that "[n]otices required to be mailed under Rule 2002 to a creditor . . . shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case." Here, the Clerk of Court's office generated a form that provided notice of the bar date [The Bar Date Notice, Docket Entry 174]. KCC served notice of the bar date on Ms. McKinney by mail at her last known mailing address.[5] Further, the record indicates that after service of the Bar Date Notice, KCC also served Ms. McKinney with the Proof of Claim Notice. Ms. McKinney did not file a proof of claim before the bar date.

Ms. McKinney asserts that failure to grant leave to file a late claim or grant an extension of the claim deadline would impair her Due Process rights. The Due Process Clause requires that "deprivation of life, liberty or property by adjudication be preceded by notice and

[5] The record does not show that Ms. McKinney or her counsel filed a request in this case for notice to be given at a particular address; therefore, the last known address of Ms. McKinney—the creditor in this matter—was used. Rule 9006(e) provides that service is complete upon mailing of the notice.

opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Furthermore, "[t]he 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 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).[6] 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. (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)); *see also In re Twins, Inc.*, 295 B.R. 568, 571 (Bankr. D.S.C. 2003).

Ms. McKinney does not argue that she did not receive notice of the bar date. Rather, in her Due Process argument Ms. McKinney complains that the notice she received was inadequate notice because it was mailed only to her. She contends that notice should have been given to her attorney.[7]

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[6] 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).

[7] At the hearing, Ms. McKinney's bankruptcy counsel's first argument was that BI-LO failed to comply with the notice requirements of 11 U.S.C. § 342(c)(2). Her counsel was asked to point out the facts showing the two correspondences were received by BI-LO within the time required by the statute. Ms. McKinney's counsel conceded that such facts were not present; therefore, the Court need not address the merits of Ms. McKinney's § 342(c)(2) argument.

Ms. McKinney's counsel also argued that Rule 4.2 of the Rules of Professional Conduct requires that notice must be given to Ms. McKinney's attorney. Rule 4.2 of the Rules of Professional conduct provides:

In the *Grand Union* case, the court found that the direct mailing of notice to the personal injury claimants failed to satisfy due process requirements where the debtor had pre-petition knowledge of the attorneys that were representing the personal injury claimants. *Id.* at 872. The *Grand Union* court considered the complexity of the notice form, mailed one month prior to the bar date, and stated:

> Even if we assume that they read the bar date notice, the movants would have been hard pressed to determine what action, if any, should be taken with regard to the notice. The bar date notice, a four page, over 1,000 word document, couched with legalese, is a complex legal document, and clearly is not easily comprehensible by a lay-person.

Id. at 873.

Other courts have found that debtors are not required to serve creditors' counsel with notice of the bar date, "even in instances when debtors knew counsel represented creditors in pre-petition matters regarding the debt in question." *In re Brunswick Baptist Church*, 2007 WL 160749, at *3 (N.D.N.Y. 2007) (citing *In re Solvation, Inc.* 48 B.R. 670 (Bankr.D.Mass.1985); *Dependable Ins. Co. v. Horton (In re Horton),* 149 B.R. 49 (Bankr .S.D.N.Y.1992); and *In re Kouterick)* 161 B.R. 755 (Bankr.D.N.J.1993)). The *Brunswick* court and the *Grand Union* court each discussed the *Solvation*, *Horton*, and *Kouterick* cases. The *Grand Union* court distinguished its decision by pointing out that the creditors in *Solvation*, *Horton*, and *Kouterick*

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rules of Prof. Conduct, Rule 4.2. The bankruptcy rules authorize notice of the bar date to creditors and that such notice "be addressed as such entity or an authorized agent has directed in its last request filed in the particular case" Rule 2002(g). No requests were filed in this case directing notice be sent to anyone other than the creditor Ms. McKinney. Further, case law explains that "most courts have not interpreted Fed. R. Bankr.P. 2002(g) to require debtors to serve creditors' counsel, even in instances when debtors knew counsel represented creditors in pre-petition matters regarding the debt in question." *In re Brunswick Baptist Church*, 2007 WL 160749, at *3 (N.D.N.Y. 2007). The Court agrees, as discussed herein, that Rule 2002(g) does not require service upon creditors' counsel in this situation and therefore the contact with Ms. McKinney in this case "is authorized . . . by law" as Rule 4.2 contemplates.

were sophisticated. *Grand Union*, 204 B.R. at 880 ("In *Solvation* the claimant was an accounting firm, in *Horton* it was an insurance company, and in *Kouterick* it was a bank.").

Ms. McKinney is a creditor by virtue of her personal injury claim and, like the claimants in the *Grand Union* case, there is nothing in the record to indicate that she is a sophisticated creditor with knowledge of bankruptcy law. However, unlike the *Grand Union* claimants who were given at most one month's notice of the bar date, Ms. McKinney was mailed notice of the August 13, 2009 bar date on two occasions, giving her at least three months thereafter to file her proof of claim or contact her attorney. A review of the Bar Date Notice and/or the Proof of Claim Notice indicates that the content of the notice and the method of notice appear to have been reasonably calculated to convey notice of the bar date for filing proofs of claim to this claimant. The documents in this case may have contained language that could be deemed legalese as in *Grand Union*, but the Court finds that the forms as a whole are straightforward and it is not unreasonable to expect a party, sophisticated or not, to contact his or her attorney regarding information received via mail regarding his or her unresolved case and the notice gave adequate time to do so.

However, Ms. McKinney claims that she did not immediately *receive* the mailed documents as a result of her move in June of 2008. As noted in *Grand Union*, the presumption of notice being received after mailing is rebuttable. *Grand Union*¸ 204 B.R. at 870, n.4. In this case Ms. McKinney is not contesting eventual receipt of the documents, but rather receipt in time to respond. These facts and arguments are relevant to her excusable neglect argument and will be discussed below.

Excusable Neglect

As an alternative to her due process argument, Ms. McKinney asserts that her failure to file her proof of claim prior to the deadline resulted from excusable neglect and, therefore, she should be permitted to have her late claim deemed timely filed. Rule 9006(b)(1) provides the basis for the relief sought by Ms. McKinney:

> When 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). The Supreme Court has addressed excusable neglect, stating the following:

> 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 determining whether excusable neglect was

[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 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).

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 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." *XO Communications,* 301 B.R. at 797-98; *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 argued, and the record in this case reflects, that it has made progress

in analyzing timely filed claims that will be impeded if this and additional claims are added. 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 of Ms. McKinney's potential claim. 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 and BI-LO rightfully proceeded with its work towards reorganization without including this claim.[9] The evidence indicates that there is a danger that BI-LO will suffer some prejudice and a negative impact on these proceedings may occur if the Court allows the late claim given the evidence presented. Ms. McKinney filed her proof of claim and Motion approximately two and a half months after the bar date. This delay is significant, but not overwhelming when considering the status of the proceedings at the time the claim was asserted. The danger of prejudice to BI-LO and impact on these proceedings appear small when considering the effect of allowing Ms. McKinney's claim alone, but some prejudice to BI-LO and a negative impact on these

[9] Ms. McKinney argued that the April 8, 2009 letter that Broadspire sent to her counsel 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.* Ms. McKinney did not file anything in this case prior to the bar date that establishes her claim or alerts other parties of her claim. Therefore, her argument that Broadspire's letter to her counsel qualifies as an informal proof of claim must fail.

proceedings has been shown if her claim is allowed. Further, allowing any late claim could set a precedent encouraging or allowing others.

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 (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 Brunswick*, 2007 WL 160749, at *5.

BI-LO has presented evidence that it timely and properly mailed notice of the bar date to Ms. McKinney's last known address. The Court does not find it improper that BI-LO sent notice in this fashion, or that it sent notice to Ms. McKinney only. However, Ms. McKinney claims that she did not receive notice of the August 13 bar date until sometime in late July or August of 2009. The evidence of returned mail supports her testimony that there was some disruption and delay in her mail service due to her move at a critical time in this bankruptcy case. Through no

fault of her own or of BI-LO, Ms. McKinney did not receive the same notice of the bar date as other similarly situated creditors, and had far less time to respond. The coincidence of her move during this important time rendered most of the delay in responding outside her reasonable control. Once the notice was received, Ms. McKinney acted reasonably and promptly. The reason for the delay is sufficiently explained and this factor weighs in favor of Ms. McKinney.

Whether the Movant Acted in Good Faith

In cases addressing motions to allow late filed claims based upon excusable neglect, it is rarely found that the movants acted without good faith; therefore, courts often give little weight to the good faith factor in an excusable neglect analysis. *BOUSA, Inc. v. United States (In re Bulk Oil (USA) Inc.)*, 2007 WL 1121739, n. 6 (S.D.N.Y. Apr. 11, 2007). However, 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). In courts' examinations of the good faith factor in excusable neglect analyses, the inquiry as to whether good faith is present focuses 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.

Ms. McKinney and her counsel promptly contacted BI-LO's claims adjuster, Broadspire, after Ms. McKinney was allegedly injured. In doing so, Ms. McKinney and her attorney were diligent in providing contact information to BI-LO. Ms. McKinney's attorney did not know about the bar date, but upon learning about it from Ms. McKinney, a proof of claim was promptly filed. No actions by Ms. McKinney or her counsel suggest an absence of good faith. Therefore, this factor weighs in favor of Ms. McKinney.

After considering the factors necessary to a finding of excusable neglect, the Court finds that they weigh in favor of Ms. McKinney.

THEREFORE, IT IS ORDERED, that the Motion of Kioka McKinney Requesting Leave of Court to File Proof of Claim after Established Deadline is **GRANTED.**

AND IT IS SO ORDERED.