U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-02140

ORDER ALLOWING LATE FILED CLAIM

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

FILED BY THE COURT
01/22/2010

US Bankruptcy Court Judge
District of South Carolina

Entered: 01/22/2010

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 ALLOWING LATE FILED CLAIM

This matter comes before the Court for hearing on Wendy Jett's Motion to Allow Late Filed Claim to be Deemed Timely Filed and Memorandum in Support [Docket Entry 1385]. The Motion requests that the Court enter an Order allowing Ms. Jett's late filed claim as an unsecured claim in an unknown amount. At the hearing, George B. Cauthen and Frank B. B. Knowlton appeared on behalf of the Debtors ("BI-LO"); Jane H. Downey and Joseph R. Dasta appeared on behalf of Ms. Jett; and Enid N. Stewart and Glenn B. Rice appeared on behalf of the Official Committee of Unsecured Creditors. Counsel for Ms. Jett provided various exhibits to the Court and proffered the testimony of Mr. Dasta. 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. After the hearing the parties provided the Court with Stipulated facts as follows:

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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).

FACTS

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Local Civil Rule 83.IX.01, D.S.C. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. On June 8, 2005, Ms. Jett alleged that she was injured on the job while she was an employee of the Debtors.

4. On February 1, 2006, Ms. Jett hired McWhirter, Bellinger and Associates to represent her in her worker's compensation claim. Mr. Dasta is a partner with that firm.

5. In the administrative worker's compensation claim, BI-LO is represented by Willson, Jones, Carter and Baxley, PA.

6. Mr. Dasta communicated with the Debtors' worker's compensation defense attorney's office, who in turn communicated with the Debtors' worker's compensation insurance adjuster.

7. On March 23, 2009 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned bankruptcy cases (the "Chapter 11 Cases").

8. The Debtors are operating their business and managing their properties as debtors in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. On March 30, 2009, the Office of the United States Trustee for the District of South Carolina appointed the official committee of unsecured creditors (the "Committee"). No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases.

9. On March 23, 2009, the Court entered an order designating the Chapter 11 Cases as Complex Chapter 11 Cases pursuant to Rule 2081-2 of the Local Rules for the United States Bankruptcy Court for the District of South Carolina. On March 24, 2009, the Chapter 11 Cases were administratively consolidated under Case No. 09-02140.

10. BI-LO operates as a regional retail supermarket chain under the "BI-LO" and "Super BI-LO" banners. As of the Petition Date, BI-LO was one of the largest food retailers in the Southeast United States, operating more than 200 stores in South Carolina, North Carolina, Georgia and Tennessee, with the majority of stores located in South Carolina. BI-LO's corporate headquarters are located in Greenville, South Carolina, and it employs more than 15,000 employees.

11. On May 1, 2009, the Debtors filed bankruptcy schedules, listing Ms. Jett's claim on Schedule F and the Statement of Financial Affairs, and listing the claim on Schedule F as contingent, unliquidated, disputed and in an unknown amount. The Debtors did not list Mr. Dasta or his law firm as Notice Only on the schedules. Neither Mr. Dasta nor his firm is listed on Schedule F or on the mailing matrix.

12. The Plaintiff's law firm [referring to Ms. Jett as “Plaintiff”] did not receive notice of a claim form in time to timely file a claim.

13. Neither Mr. Dasta nor his firm was notified by Debtors or their counsel of the bankruptcy proceeding or any deadlines for filing claims. Mr. Dasta did not have notice of the bankruptcy until after the bar date to file a claim. However, Mr. Dasta alleges that as soon as he learned of the bankruptcy and the need to file a claim, which was immediately after the bar date, he took steps to file a claim.

14. Debtors have been paying Ms. Jett's worker's compensation temporary total disability checks for her time out of work. Debtors have also been paying for Ms. Jett’s related

medical and psychological bills and prescriptions. Debtors have been providing authorized medical and psychological care for her injuries related to the incident at work.

15. Ms. Jett also alleges that she suffers from anxiety, depression and panic attacks related to her pain and disability caused by the work related incident. She takes various prescription medications for her physical and psychological injuries to include but not limited to Xanax. Debtors have paid for these prescriptions as part of her worker's compensation claim.

16. Ms. Jett has been treated by orthopedics, pain management doctors, physical therapists and psychologists for her work related injuries and Debtors have paid for such care.

17. Ms. Jett has been receiving psychological care from Post Trauma Resources as part of her worker's compensation claim and Debtors have been paying for that care.

18. On or about April 3, 2009, Ms. Jett was served with a copy of the notice of the claims bar date at two addresses: P.O. Box 54, Gilbert, SC 29054 and 1301 Fish Hatchery Road, Lot 2, Gaston, SC 29053. While the notice sent to the Gaston address was returned, the notice sent to the Gilbert address was not.

19. Ms. Jett admits that she had been receiving paperwork from Debtors regarding their bankruptcy filing but does not remember the date she first received the paperwork.

20. Ms. Jett admits she received notice of the August 13, 2009 bar date, but alleges that she was confused and overwhelmed and unaware of the significance of the bar date.[2] She

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[2] The Notice that the parties refer to (the "Bar Date Notice") is found in Docket Entry 174. It set a deadline of August 13, 2009, for certain creditors to file proofs of claim. It was a one page document, front and back, that included the following language:

> 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

received a volume of other bankruptcy papers she alleges that she did not understand after she received the proof of claim form.

21. Mr. Dasta alleges that he had no knowledge of Debtors' bankruptcy before the deadline to file a claim.

22. On August 17, 2009, Ms. Jett gave Mr. Dasta some of the bankruptcy papers she had been receiving from Debtors and its counsel, but she did not give him the notice of the August 13, 2009 bar date. Mr. Dasta is not a bankruptcy lawyer.

23. On August 17, 2009, Mr. Dasta sent an electronic mail message to BI-LO's worker's compensation defense attorney, Gabe Coggiola, to inquire about the Debtors' bankruptcy and notices that Ms. Jett had been receiving.

24. On August 21, 2009, Mr. Dasta received an email from George Cauthen, Debtors' counsel, notifying him of their representation of Debtors in the bankruptcy and suggesting Mr. Dasta file a notice of appearance in the bankruptcy case and that he contact bankruptcy counsel to assist him. He acknowledged in that electronic mail message, which was after the bar date, that Ms. Jett had contacted his firm and asked Debtors to communicate with her attorney and suggested Mr. Dasta file a notice of appearance.

> 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 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).

25. On August 21, 2009, Mr. Dasta sent an electronic message to Mr. Cauthen inquiring as to whether there was a deadline for Ms. Jett to file her claim in the bankruptcy.

26. On August 21, 2009, Mr. Coggiola sent an electronic mail message to Mr. Dasta that stated that it was a consensus among his firm that the Debtors' bankruptcy proceedings would not affect the worker's compensation claims because it was a reorganization and not a liquidation. Debtors' written correspondence to Mr. Dasta did not state that anything needed to be done to continue with the workers' compensation claim.

27. On August 21, 2009, Mr. Dasta sent an electronic mail message to Mr. Coggiola in response and asked him to contact Mr. Cauthen to help determine whether there were any deadlines to meet regarding the bankruptcy so he could properly protect Ms. Jett's interests and workers' compensation claim. Mr. Coggiola refused to get involved.

28. On August 24, 2009, Mr. Cauthen emailed Mr. Dasta and informed him that the Debtor was self-insured for the first $500,000 and that the deadline for Ms. Jett to file a bankruptcy claim had passed on August 13, 2009.

29. On August 24, 2009, Mr. Dasta contacted Jane Downey to associate her in representing Ms. Jett's interest in the bankruptcy.

30. On September 3, 2009, Ms. Jett filed her Motion to file a late claim.

31. Ms. Jett's claim was listed as unliquidated, contingent and disputed on the Debtors' schedules.

32. Ms. Jett contacted the Debtors' attorney to instruct the Debtors to send all correspondence to her attorney rather than directly to her.

33. Ms. Jett alleges that she had been told by Mr. Dasta in the past that the Debtors' counsel and he would deal directly with each other, instead of Debtors' counsel contacting Ms. Jett directly.

34. Ms. Jett continues to undergo psychiatric care and treatment and takes prescription medicines and for that reason does not operate a motor vehicle.

35. The Debtors have not factored this particular claim into their plan negotiations.[3]

36. There have been 7 motions to allow late filed claims.

37. BI-LO informed Plaintiffs that the Debtors were self-insured, with a retention of $500,000 per occurrence.

DISCUSSION AND CONCLUSIONS OF LAW

Due Process

Fed. R. Bankr. P. 3003(c)(3) provides the following:

> The 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]

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.

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.

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[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.

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 the form that provided notice of the bar date[5] and it was mailed by BI-LO's noticing agent to potential claimants pursuant to the terms of the Order Establishing Certain Notice, Case Management and Administrative Procedures [Docket Entry 115]. The Bar Date Notice was served on Ms. Jett by mail at her mailing address, and Jett received the notice.[6] Ms. Jett did not file a proof of claim before the bar date.

Ms. Jett 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. Ms. Jett next argued that her failure to file a proof of claim was the result of excusable neglect.

Ms. Jett first argues that her due process rights will be violated if the relief she requests is not allowed because the notice she received of the claims bar date was insufficient. The United States Supreme Court has stated that 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). 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

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5 The §341 meeting was held on May 15, 2009.

6 The record does not show that Ms. Jett 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. Jett was used. Rule 9006(e) provides that service is complete upon mailing of the notice. This presumption may be rebutted, but Ms. Jett admitted to receiving notice in this case.

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. (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). As noted in *Grand Union*, the presumption of notice being received after mailing is rebuttable, but Ms. Jett did not offer any proof to counter BI-LO's evidence that it mailed notice of the bar date to her. *Grand Union*¸ 204 B.R. at 870, n.4. Ms. Jett complains that the notice of the bar date was inadequate notice because it was mailed only to her. She contends that notice should have been given to her state court attorney.[8]

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:

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[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).

[8] 11 U.S.C. 342(c)(2) requires that notice be sent to creditors at a specific address if two requests for correspondence to said address are received by debtor within 90 days prior to the filing date. There was no evidence of such communications from Ms. Jett—the creditor in this matter—at such an address within that statutory period, so this rule does not mandate notice to Jett's attorney.

> 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* 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. Jett is a creditor by virtue of her worker's compensation claim and there is nothing in the record to indicate that she is a sophisticated creditor with knowledge of bankruptcy law. Unlike the *Grand Union* claimants who received at most one month's notice of the bar date, Ms. Jett was mailed notice of the August 13, 2009 bar date on April 3, 2009, giving her up to four months to file her proof of claim or contact her attorney. 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 notice warns that recipients should contact an attorney to determine their rights. The form in this case may have contained language that could be deemed legalese as in *Grand Union*, but the Court finds that the form as a whole is straightforward. It is not unreasonable to expect a party, sophisticated or not, to contact his or

her attorney regarding information received via mail regarding an unresolved case, and the notice gave adequate time to do so.

Excusable Neglect

Ms. Jett 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. Jett:

> 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.[9] Finally, the *Pioneer* Court

[9] 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*

explained that the following factors were relevant in 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 another." *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." *In re XO Communications., Inc.*, 301 B.R. 782, 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

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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).

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 is 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 that Ms. Jett'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 and BI-LO rightfully proceeded with its work towards reorganization without including this claim.[10] 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.

The prejudice to BI-LO and negative impact on the proceedings are diminished considerably by the timing of Ms. Jett's late claim and Motion filed just weeks after the bar date.

[10] It should be noted that Ms. Jett 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.* Ms. Jett did not file anything in this case prior to the bar date that establishes her claim or alerts other parties of her claim.

A more lengthy delay would have resulted in a greater impact and prejudice. In this matter the delay is minimal and the danger of prejudice to BI-LO and impact on these proceedings appear small when considering the effect of allowing Ms. Jett'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 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.

Ms. Jett was given proper notice of the bar date in April of 2009, yet she did not immediately consult with her attorney and, as a result, no timely proof of claim was filed. However, the stipulated facts in this case indicate that Ms. Jett is under a doctor's care for the

treatment of conditions that may impair her ability to effectively process and timely respond to the Bar Date Notice that was mailed only to her. The record includes a stipulation indicating that Ms. Jett did not understand the information provided to her and was overwhelmed with the volume of information provided as a result of this case. The record includes details of her mental and physical condition that explain her difficulties. Further, Ms. Jett employed and relied upon an attorney to handle her worker's compensation claim and that attorney had been successful in obtaining ongoing payment from BI-LO. There is no evidence that this payment was interrupted by the bankruptcy filing. As a result of all of these facts, Ms. Jett's inaction after placing the worker's compensation matter in the hands of her attorney is understandable.[11] The stipulated facts indicate that Ms. Jett's attorney did not have knowledge of the bar date until after it had passed, and upon learning of it he took immediate steps to assert the claim in the bankruptcy case. Further, her attorney was not aware of the bankruptcy until after the bar date. It therefore appears that Ms. Jett's failure to respond to the Bar Date Notice is explainable and understandable, and her attorney was unable to assist her due to his lack of knowledge. An analysis of this factor—considering the reason for the delay and whether the delay was within the reasonable control of Ms. Jett—weighs in favor of allowing Ms. Jett's late filed claim.

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

[11] While this fact is not sufficient to require the mailing of notice to the attorney, it does provide insight into understanding the delay and in determining whether the delay was within Jett's reasonable control.

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.

Given the evidence of Ms. Jett's mental and physical condition as discussed above, she did not act unreasonably in failing to respond to the bar date notice or in relying on her counsel to protect her rights. From the stipulated facts the Court can find that Ms. Jett's attorney, acting on her behalf, proceeded in good faith by inquiring about the effect the bankruptcy may have on his client's claim promptly upon learning of the bankruptcy and by acting quickly upon receipt of notice of the bar date. This factor weighs in favor of Ms. Jett.

After considering the factors necessary to a finding of excusable neglect, the Court finds that they weigh in favor of Ms. Jett and her late filed claim must be allowed.

THEREFORE, IT IS ORDERED, that Wendy Jett's Motion to Allow Late Filed Claim to be Deemed Timely Filed is **GRANTED.**

AND IT IS SO ORDERED.