U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-02140

Amended 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
02/02/2010

US Bankruptcy Court Judge
District of South Carolina

Entered: 02/02/2010

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)**
	§	

AMENDED[2] ORDER DENYING MOTION OF ISABELL MARCH

This matter comes before the Court for hearing on Isabell March's Motion to Allow Late Filed Claim to be Deemed Timely Filed and Memorandum in Support [Docket Entry 1447]. Ms. March filed a late claim in the amount of $49,800.00. At the hearing, George B. Cauthen and Frank B. B. Knowlton appeared on behalf of the Debtors ("BI-LO"); Jane H. Downey and Todd E. Gonyer appeared on behalf of Ms. March, and Ms. March was also present at the hearing; and Enid N. Stuart and Glenn B. Rice appeared on behalf of the Official Unsecured Creditors Committee. Counsel for Ms. March provided various exhibits to the Court and proffered the testimony of Mr. Gonyer. 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. Additionally, after the hearing the parties provided the Court with Stipulated facts:

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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] Footnote 3 below indicates the reason for the amendment.

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 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").

4. 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.

5. 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.

6. 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.

7. Ms. March alleges that she suffered serious and painful personal injuries when she slipped and fell in one of the Debtors' stores on July 3, 2007. Ms. March alleges that this incident and her consequent injuries were the result of negligence on the part of BI-LO, LLC and its employees.

8. Ms. March retained the law firm of Campbell & Associates in Charlotte, North Carolina to represent her with regard to her claim against Debtors on July 6, 2007.

9. Ms. March's counsel first initiated contact with Debtors in a letter dated July 9, 2007, advising Debtors of the firm's representation and directing all future correspondence to be directed to and through counsel.

10. On or about August 18, 2008, case 08-CVS-3276, *Isabell March vs. Bi-Lo, LLC* was filed in the Catawba County Superior Court containing allegations of personal injury from a slip and fall injury occurring on July 3, 2007 at the 1555 East Union Street BI-LO store in Morganton, NC. BI-LO filed an answer.

11. In a letter dated March 30, 2009, Ms. March's civil attorney, Andrew Bowman, was notified by Debtors' counsel in the Catawba County civil suit, Kenneth Raynor, that BI-LO, LLC had filed bankruptcy, thereby staying the Catawba County case.

12. On May 1, 2009, the Debtors filed bankruptcy schedules, listing the lawsuit 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 the law firm of Campbell & Associates as Notice Only on the schedules. Therefore, the firm was not served by the Debtors with notice of the bar date before the bar date passed.

13. On or about May 8, 2009, the Debtors' claims agent, Kurzman Carson Consultants ("KCC") mailed directly to Ms. March, at her former home address, a Notice of Proof of Claim

Deadline establishing August 13, 2009 as the date by which she must file a proof of claim.[3] Neither Debtors nor the Court sent a copy of this Notice to Ms. March's attorney of record, nor is her attorney listed in the service matrix. Ms. March does acknowledge receiving the Notice of Proof of Claim Deadline.

14. Ms. March herself began receiving the various filings and pleadings in this bankruptcy case. Although Ms. March is able to read and write English, it was her proffered testimony that as a lay person and unfamiliar with bankruptcy proceedings, she was unable to understand or appreciate the need to file a proof of claim by the August 13, 2009 deadline.

15. Ms. March was at the time going through a divorce that was not finalized until June of 2009. As a result of this divorce, Ms. March was also forced to move from her home during the filing period.

16. Further, Ms. March underwent surgery on her knee on June 9, 2009 and was recovering for a period of several weeks thereafter. During this period of convalescence, Ms. March was taking prescription pain killers and other medications which she testified further impaired her ability to focus on and understand the import of the bankruptcy documents she was receiving.

17. Ms. March further believed that since she had an attorney in the state-court action, he would also be receiving and taking care of the bankruptcy notices.

18. Pleadings and other filings in the bankruptcy case were not mailed or otherwise served upon Ms. March's attorney, Andrew Bowman, of the firm Campbell & Associates in

[3] At the hearing BI-LO presented Exhibit 2—a Certificate of Mailing indicating that the Bar Date Notice (Docket Entry 174) was served on Ms. March on April 3, 2009 at 134 Evans Street, Morganton, NC 28655. That Bar Date Notice set a deadline of August 13, 2009 for certain creditors to file proofs of claim. However, the parties thereafter agreed to submit stipulated facts set forth herein. Those stipulations do not include any reference to service or receipt of the Bar Date Notice but rather reference service of a Notice of Proof of Claim Deadline [Docket Entry 619] on May 8, 2009 which, although similar, provides different language than the Bar Date Notice.

Charlotte, North Carolina. Further, none of the attorneys at Campbell & Associates are/were admitted to practice before the United States Bankruptcy Court for the District of South Carolina. Accordingly, Ms. March's counsel did not receive any electronic notifications as to any filings or deadlines, nor was her counsel able to access the Court's electronic filing and docketing system.[4] Ms. March's counsel was unaware that a deadline to file a proof of claim had been imposed.

19. On or about May 22, 2009, Ms. March's civil attorney, Andrew Bowman, left the law firm of Campbell & Associates; however, he did not take Ms. March's case with him.

20. On June 1, 2009, attorney Mr. Gonyer was hired by Campbell & Associates and thereafter had Ms. March's civil case assigned to him for handling. A *Substitution of Counsel* in the Catawba County civil matter was filed and thereafter granted on July 1, 2009.

21. Mr. Gonyer is also not admitted to practice before the United States Bankruptcy Court for the District of South Carolina was likewise unaware of the August 13, 2009 proof of claim filing deadline.

22. On or about June 17, 2009, Mr. Gonyer wrote the defense attorney, Kenneth Raynor, in Ms. March's civil suit to inquire generally as to the status of the matter, and specifically to determine the limits of Debtors' self-insured coverage in order to pursue Ms. March's claim.

23. In a letter dated June 24, 2009 from Mr. Raynor, Mr. Gonyer was informed that the Debtors' self-insured retention limit was one million dollars. The letter also advised Mr. Gonyer to contact the Debtors to determine how the estate would handle claims, but did not

[4] The Court notes that its public records are available for viewing in a number of ways, including online, by anyone who follows appropriate procedures. Further, the Bar Date Notice and Notice of Proof of Claim Deadline included a website address for the claims agent.

include a deadline concerning the claim. Instead, the letter stated that the bankruptcy may include the [Ms. March's] claim.

24. On August 25, 2009, after coming into possession of a copy of the *Supplement to Motion of the Debtors for Entry of an Order Establishing Procedures to Settle Certain Claims* and attached proposed order, attorney Gonyer contacted Debtors' counsel, George Cauthen, to inquire as to the impact of the pending motion and proposed order on Ms. March's claim and the status of the bankruptcy generally. Mr. Cauthen advised Mr. Gonyer of the August 13, 2009 deadline for non-governmental creditors and the September 21 deadline for governmental creditors.

25. Per Mr. Cauthen's instructions, that same day, Mr. Gonyer sent an email to him requesting that Debtors agree to accept the proof of claim outside the deadline.

26. On August 26, 2009, Mr. Cauthen responded by stating that Debtors would not agree to accept the proof of claim after the deadline.

27. On August 27, 2009, Mr. Gonyer first contacted local counsel, Gene Trotter, requesting assistance in obtaining leave of Court to have Ms. March's proof of claim accepted out of time.

28. Upon the recommendation of Mr. Trotter, on September 11, 2009, Mr. Gonyer prepared a proof of claim on Ms. March's behalf and mailed it via certified mail to the BI-LO Claims Processing Center, care of Kurtzman Carson Consultants, LLC, approximately one month after the bar date and before the deadline for government claims, and approximately 2 weeks after learning of the requirement to file a claim.

29. Ms. March's proof of claim was received by KCC on or about September 18, 2009.

30. Ms. March's proof of claim is in the amount of $49,800.00 for personal injuries she suffered due to the alleged negligence of Debtors and/or their employees.

31. On September 23, 2009, Ms. March filed her Motion to file a late filed claim.

32. Additional facts stipulated to include those contained in the exhibits to Ms. March's Motion. The admissibility of these exhibits was stipulated to by the Debtors and the Committee at the October 14, 2009 hearing. These exhibits include, but are not limited to, correspondence between counsel *during* and after the filing period, sworn affidavits from Ms. March's attorneys, and pleadings filed in the state-court lawsuit.

33. On October 30, 2009, after the hearing, the Debtors filed a proposed Consent Order Allowing Thompson National Properties, LLC to File Claim After the Bar Date which was entered November 4, 2009.

34. The Debtors have not filed a plan and have not specifically factored the amount of this particular claim into any of their plan negotiations.[5]

35. There have been 7 motions to file late claims.

36. During the applicable period of time, the Debtors were self-insured, with a retention of $1,000,000 per occurrence.

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).[6]

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[5] 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.

[6] 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 the original form that provided notice of the bar date [The Bar Date Notice, Docket Entry 174]. The evidence at the hearing indicated that KCC served the Bar Date Notice on Ms. March by mail at her last known address.[7] Further, the record in this matter and stipulations indicate that after service of the Bar Date Notice, KCC also served Ms. March with the Notice of Proof of Claim Deadline [Docket Entry 619] and she acknowledges receipt of this mailing. Ms. March did not file a proof of claim before the bar date.

Ms. March 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

[7] The record does not show that Ms. March 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. March—the creditor in this matter—was used. Rule 9006(e) provides that service is complete upon mailing of the notice.

"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 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).[8] 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. March admits that she received the Notice of Proof of Claim Deadline served on her months before the bar date passed. However, Ms. March complains that the notice of the bar date she received was inadequate notice because it was mailed only to her. She contends that notice should have been given to her attorney.[9]

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[8] 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).

[9] At the hearing, Ms. March'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). Ms. March's 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. March's counsel conceded that such facts were not present; therefore, the Court need not address the merits of Ms. March's § 342(c)(2) argument.

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*

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

> 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. March. 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. March 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. March 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 received at most one month's notice of the bar date, Ms. March was mailed notice of the August 13, 2009 bar date as early as May 8, 2009, giving her at least three months to file her proof of claim or contact her attorney. A review of the Bar Date Notice and/or the Notice of Proof of Claim Deadline 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 in either form, and the notice given supplied adequate time to do so.

Excusable Neglect

Ms. March 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. March:

> 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).

> 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.[10] Finally, the *Pioneer* Court 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 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

[10] 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).

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 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. March'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.[11] 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. March's late claim and Motion filed a little more than a month after the bar date. 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. March'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*

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

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. March was given proper, ample notice of the bar date. She failed to take any action in response. Ms. March has provided the Court with information about her personal situation between May of 2009 and August 13, 2009, indicating several unfortunate events during that time, mostly in June of 2009. Her attorney also advised the Court of a change in counsel in June of 2009. However, there is nothing in the record to indicate the Ms. March was not capable of reading the notice provided to her and bringing the document to the attention of her counsel at some point between May and August 13, 2009, yet she failed to do so. From the evidence the Court cannot conclude that the delay in filing a proof of claim was not within the reasonable control of the movant. The Court finds the explanation for her inaction insufficient. An analysis of this factor—considering the reason for the delay and whether the delay was within the reasonable control of Ms. March—weighs against the allowance of the late claim on excusable neglect grounds.

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.

As a result of her insufficiently explained inaction after receiving notice of the bar date, the Court cannot find that Ms. March acted in good faith. Therefore, this factor is at best neutral in the *Pioneer* analysis and does not advance Ms. March's excusable neglect argument.

THEREFORE, IT IS ORDERED, that Isabell March's Motion to Allow Late Filed Claim to be Deemed Timely Filed is **DENIED.**

AND IT IS SO ORDERED.