

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AGWAY, INC.

Debtor

CASE NO. 02-65872 through
02-65877
Chapter 11
Jointly Administered

IN RE:

AGWAY GENERAL AGENCY, INC.

Debtor

IN RE:

BRUBAKER AGRONOMIC CONSULTING
SERVICE LLC

Debtor

IN RE:

COUNTRY BEST ADAMS, LLC

Debtor

IN RE:

COUNTRY BEST-DEBERRY LLC

Debtor

IN RE:

FEED COMMODITIES INTERNATIONAL
LLC

Debtor

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Court has under consideration the motion filed on August 22, 2005, on behalf of Wyeth Holdings Corporation (“Wyeth”), formerly known as American Cyanamid Company, and on behalf of Cytec Industries, Inc. (“Cytec”) (collectively the “Claimants”), pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”), seeking an enlargement of the period in which Claimants may file a proof of claim against Agway, Inc. (“Agway”). Opposition to the motion was filed on September 29, 2005, by D. Clark Ogle, Trustee (the “LT”) of the Agway Liquidating Trust.

The motion was heard on October 4, 2005, at the Court’s regular motion term in Syracuse, New York. Following oral argument, the Court indicated that it would take the matter under submission without the need for further briefing.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (B), and (O).

FACTS

Agway was an agricultural cooperative formed in 1964 and headquartered in DeWitt, New York. On October 1, 2002, Agway and several of its wholly-owned subsidiaries (the “Debtors”) filed for bankruptcy protection pursuant to chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). The Court in an Order dated March 6, 2003, established May 30, 2003 (the “Bar Date”) as the last day on which creditors could file proofs of claim in this case. The Agway Liquidating Trust was established by this Court’s Order, dated April 28, 2004, confirming the Debtors’ Second Amended Joint Plan of Liquidation. D. Clark Ogle was appointed LT on April 28, 2004, as well.

Claimants seek to assert a claim against Agway for indemnification based on payments totaling \$5,250,000 that Cytec was to make pursuant to a settlement trust created in the chapter 11 bankruptcy case of W.R. Grace & Co., et al., Case No. 01-01139 (Bankr. D. Del.) with respect to an environmental investigation and remediation involving certain real property located in Concord, Massachusetts.

Background

By deed dated December 28, 1943, American Cyanamid & Chemical (“AC&C”)

conveyed property located in Massachusetts in the towns of Acton, Concord, Maynard and Sudbury, to Charles E. Fletcher (“Fletcher”). *See* Claimants’ Exhibit A-1. The deed disclosed that the property had been used “for a great number of years by the grantor and its predecessors in title, for the manufacture and storing of explosives.” *Id.*

Also of note was a provision in the 1943 deed whereby the property was transferred subject to an express covenant and agreement which was to run with the land being conveyed and which was to be binding

upon the grantee, his heirs, executors, administrators and assigns forever, viz.: the grantee, his heirs, executors, administrators and assigns, agrees to hold the grantor, its successors and assigns forever, free and harmless from any claim or liability of any nature whatsoever based upon, or arising on or after this date of delivery of this deed, out of, the condition of the premises hereby conveyed, or anything happening upon said premises, or any use or occupancy of said premises.

Id.

On October 5, 1944, a portion of the property, located in Acton and Concord, was conveyed to Eastern States Farmers’ Exchange (“Eastern States”)¹ by Fletcher. *See* Claimants’ Exhibit A-2. According to the LT, the “portion” conveyed to Eastern States consisted of approximately half of the property originally conveyed to Fletcher by AC&C and included the “Concord Landfill Property.” In turn, Eastern States conveyed a portion of those premises to Dewey and Almy Chemical Co. (“Dewey”)² by deed dated August 13, 1945. *See* Claimants’ Exhibit A-3. According to the LT, Eastern States retained the remaining portion of the property

¹ According to the LT, in 1964 Eastern States merged with the Cooperative Grange League Federation Exchange, Inc. to form Agway.

² The LT indicates that Dewey allegedly merged into W.R. Grace & Co. (“Grace”) in 1954. According to the Grace Notice, Dewey was a former subsidiary of Grace.

transferred from Fletcher for a fertilizer manufacturing operation. LT indicates that the portion of the property retained by Eastern States, which became known as the “Agway/Kress Site,” was the subject of its own environmental remediation.

The LT asserts that in 1954 Dewey/Grace purchased property (“Contiguous Grace Property”), previously owned by AC&C, adjacent to the Concord Landfill Property, on which a chemical plant was operated. In 1983 LT alleges that both the Contiguous Grace Property and the Concord Landfill Property was placed on the United States Environmental Protection Agency National Priority List (the “NPL”) and notice of the designation was published in the National Register. The LT also alleges that since 1985 an aquifer restoration system was in place to remove contaminants from groundwater under both properties.

In the interim, in 1946 AC&C transferred all of its property and assets to American Cyanamid Company,³ as the sole stockholder of AC&C, which the Claimants assert constituted a de facto merger. *See* Claimants’ Exhibit A-6. In 1993 American Cyanamid Company allegedly transferred to Cytec “substantially all of the assets of American Cyanamid Company’s global chemical business, and Cytec undertook a contractual obligation to American Cyanamid to defend and indemnify it against environmental liabilities arising in connection with certain former businesses of American Cyanamid Company, including claims based upon the alleged releases or threatened releases of hazardous materials at or from the Property.” *See* Claimants’ Exhibit A-7 at 1.

According to the Claimants, on or about April 27, 2004, they received a “Notice of

³ In 1994 American Cyanamid Company was purchased by A.C. Acquisition and its name was changed to Wyeth Holdings Corporation.

Response Action and Demand for Reimbursement Under Chapter 21E and RCRA with Regard to Nitrocellulose and Other Waste at Property Formerly Owned by American Cyanamid in Concord, Massachusetts” (“Grace Demand”) from Grace, as the current owner of the property. Claimants’ Exhibit C-1. According to the Claimants, it was Grace’s position, as set forth in the Grace Demand, that the manufacture of explosives on the property, located in Concord, prior to 1944 resulted in contamination for which American Cyanamid and/or its successors were liable for the cost of remediation. *See* Affidavit of Thomas Mesevage, Cytec’s Safety, Health and Environmental Counsel, sworn to April 22, 2005, at 2. In the Grace Demand, Grace’s counsel acknowledged the release provisions in the 1943 deed from AC&C to Fletcher and asserted that those provisions “are not enforceable against Grace because it was not a party to the 1943 deed, because these provisions are not covenants running with the land, and because of the operation of Mass. Gen. L. Ch. 184 s. 23.” *Id.* at Footnote 2.

On May 23, 2005, a Settlement, Compromise and Release Agreement (“Settlement Agreement”) was entered into between Grace, Wyeth Holdings Corporation, f/k/a American Cyanamid Company, and Cytec, requiring that Cytec pay \$5.25 million into a trust in exchange for Grace holding the Claimants harmless as to any acts that occurred prior to the effective date of the Settlement Agreement. *See* Exhibit A-7. It is that obligation for which the Claimants now seek indemnification from Agway.

The proof of claim, dated August 15, 2005, identifies the Claimants as creditors based on a debt that they state was incurred in April 2004. Claimants’ Exhibit A. They assert an unsecured nonpriority claim of \$5.25 million although their proof of claim also indicates that at the time the case was filed the amount of the claim was “unknown.” *Id.* According to the proof

of claim, the basis of the claim of indemnity arises “from [a] covenant.” *Id.*

ARGUMENTS

The Claimants assert that AC&C was unaware of the fact that a portion of the real property it sold to Fletcher in 1943 was later sold to Eastern States, Agway’s predecessor, until it received the Grace Demand. Upon its receipt in April 2004, approximately one year after the Bar Date, the Claimants indicate that they conducted a preliminary investigation concerning the merits of the Grace Demand, and in approximately September 2004, ascertained that Agway was a successor to Eastern States. According to the Claimants, their counsel contacted Weil Gotschal & Manges, Agway’s bankruptcy counsel, to discuss a possible resolution of their claim against Agway, suggesting that it could be resolved if Agway were to assign its rights against Grace, as Agway’s grantee,⁴ to the Claimants. According to the Claimants, following a number of phone calls, it was determined that the law firm of Weil Gotschal & Manges had a conflict of interest as it also represented Grace. Beginning on November 4, 2004, further communications commenced with Agway’s local counsel, the law firm of Menter, Rudin & Trivelpiece, P.C. Claimants contend that over the next several months efforts were made to enter into a settlement with Agway. In the interim, Claimants assert that they reached an agreement with Grace on or about April 13, 2005, which ultimately resulted in the execution of the Settlement Agreement,

⁴ The 1945 deed from Eastern States/Agway, as grantor, to Dewey/Grace, as grantee, provides that the “Grantee, its successors and assigns, agrees to hold the Grantor its successors and assigns forever free and harmless from any claim or liability of any nature whatsoever based upon, or arising, on or after date of delivery of this deed, out of, the condition of the property hereby conveyed” Claimants’ Exhibit A-3.

which fixed the claim for which they now seek indemnification from Agway. The Settlement Agreement was approved by the bankruptcy court in Grace's chapter 11 case on or about June 27, 2005 and two months later, on August 22, 2005, the Claimants filed their motion, which is now under consideration, requesting that they be allowed to file a late proof of claim based on excusable neglect, as set forth by the United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993).

The LT takes issue with the Claimants' assertion that they were unaware of any claim against the Debtors until April 2004. The LT asserts that "[w]hile it may be true that the Claimants did not have knowledge of the actual remediation or Grace's claim before the Bar Date, the Claimants' corporate affiliates actually perpetrated the release of hazardous materials at the Concord Landfill Property and clearly should be charged with knowledge that the condition was likely to give rise to a claim. In addition, it is the position of the LT that the Claimants have not established excusable neglect under the *Pioneer* standard to allow them to file a late proof of claim.

In addition, the LT contends that Wyeth has no basis for a claim against the LT because it has incurred no costs with respect to the settlement with Grace and is not the successor to American Chemical and, accordingly, not entitled to assert any rights under the terms of the indemnity provisions set forth in the various deeds beginning in 1943 with the transfer from AC&C to Fletcher. The LT points out that it is Cytec that is required to make the payments pursuant to the Settlement Agreement because of its agreement to indemnify the obligations of American Cyanamid. Thus, the LT acknowledges that "only Cytec could potentially hold a claim against Agway's estate." In addition, the LT also points out that pursuant to Code §

502(e)(1)(B), claims for reimbursement or contribution are disallowed.

DISCUSSION

The parties do not dispute that the claim for indemnification asserted against Agway in the amount of \$5.25 million is a prepetition claim. The issue before the Court is whether or not the Claimants are entitled to file a late proof of claim under the standards set forth by the Supreme Court in *Pioneer*.⁵

In *Pioneer* the Supreme Court indicated that the determination of whether to allow the late filing of a proof of claim based on “excusable neglect” is an equitable one requiring the Court to consider the totality of circumstances, including

[1] the danger of prejudice to the debtor, [2] the length of delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

Pioneer, 507 U.S. at 395. The United States Court of Appeals for the Second Circuit has “‘taken a hard line’ in applying the Pioneer test.” *In re Enron Corp.*, 419 F.3d 115, 122 (2d Cir. 2005), quoting *Silivanich v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003), *cert. denied sub nom. Essef Corp. v. Silivanich* 540 U.S. 1105 (2004). Furthermore, it is the burden of the Claimants to establish excusable neglect. *Enron*, 419 F.3d at 121; *In re Agway, Inc.*, 313 B.R. 31, 44 (Bankr. N.D.N.Y. 2004). Accordingly, the Court will consider each of the *Pioneer* factors:

⁵ At the hearing conducted on October 4, 2005, the parties acknowledged that the Court was not being asked to rule on the merits of the claim, however.

1. Prejudicial Impact on the Debtors

The Claimants assert that allowing them to file a late proof of claim will not prejudice the Debtors in view of the fact that the case is a liquidation case, rather than a reorganization case. Accordingly, the Claimants contend that the policy considerations in bankruptcy reorganizations that emphasize the importance of finality to the claims' process to ensure swift distribution under a plan does not apply when the debtor is liquidating.

The case of *In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002 (S.D.N.Y. 1993) involved a debtor that had filed a liquidating plan. On March 4, 1992, approximately fifteen months after the bar date and two days before the debtor's plan was confirmed, a Florida insurance company placed in receivership in 1991 filed a proof of claim for \$175 million. By April 30, 1992, over \$800 million, of \$1.3 billion contributed under a global settlement, had been distributed to creditors under the terms of the debtor's plan. The district court in *Drexel* concluded that the bankruptcy court's "ruling refusing an extension of the Bar Date will not be disturbed." *Id.* at 1010. The district court found that "acceptance of a substantial late claim after consummation of a vigorously negotiated claims settlement and Plan of Reorganization thereon and a distribution of a major part of the assets thereunder, would disrupt the economic model on which the creditors, the debtor and the stockholders reached their agreements." *Id.* at 1007-8.

Admittedly, the Claimants are not seeking to file a claim close to \$175 million. However, the fact remains that the Debtors' Plan has been confirmed after lengthy discussions with the Creditors' Committee and other entities and the approval of the creditors who submitted ballots.

In addition, there is the prejudice to the creditors to be considered. In this regard, the

courts have given weight to the possible reduction in funds available to pay the unsecured creditors should the late claim be allowed to be filed and found to be valid, particularly when the debtor's plan has been confirmed and reserves set aside, as is the case herein. *See In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614-615 (Bankr. D.Del. 2006) (reviewing the positions taken by various courts in considering prejudice to creditors, noting that it should not be the only factor that the court considers on the issue of prejudice to the debtor).

The Court notes that in one of its prior decisions in this case, it considered the potential claim of Empire Agri-Systems, Inc. ("Empire") in a proposed third-party action involving bodily injury to one of Agway's former employees in the amount of \$6 million. Empire argued that the Debtors' insurance policy would be able to cover the full amount of any judgment, subject to a \$1 million deductible payable by the Debtors. The Court found that "[t]his payment from the Debtors' estate would deplete the pool of funds available for distribution to unsecured creditors who timely filed proofs of claim in this case" *Agway*, 313 B.R. at 45. At the time, the Debtors' Plan, although filed, had not been confirmed. The Court denied the motion to file a late proof of claim, expressing concerns that permitting the filing of a late claim would open the door to other late claimants seeking the same relief. The Court also noted that having to expend time and counsel fees objecting to those motions would also be prejudicial to the Debtors. *Id.*

The Claimants point out that under the terms of the Debtors' Plan, it was initially anticipated that unsecured creditors would receive a dividend of between 54-66% on their claims. *See Declaration of Margaret Cangilos-Ruiz, Esq.*, dated to August 22, 2005, at ¶ 16 (Claimants' Exhibit D). On information and belief, she also estimates that as of August 22, 2005, the LT has made a distribution of 43% to creditors with allowed claims, with a further distribution scheduled

for December 2005. *Id.* at ¶ 15. She also calculates that should the Claimants' be allowed to file their proof of claim and they were allowed a 43% "catch up" distribution, unsecured creditors would still receive a total payment of 59.3%, which is "well within the initial projection." *Id.* at ¶ 17.

After considering the arguments, the Court concludes that allowing the Claimants' to file a late proof of claim in the amount of \$5.25 million would be just as prejudicial to the Debtors as Empire's claim of \$6 million. This conclusion finds further support in the representation by Debtors' counsel that, unlike the situation involving Empire's third party claim, it has no insurance coverage for a claim such as that asserted by the Claimants. The fact that Agway's Plan is one of liquidation, rather than reorganization, does not alter the importance of timely filing a proof of claim in order to allow a debtor to negotiate, formulate and fund a feasible plan with some finality to the administration of the case to the benefit of both the debtor and creditors.

2. Extent of Delay and Impact on Proceedings

As noted by the Second Circuit in *Enron*, there does not appear to be a "bright-line rule governing when the lateness of a claim will be considered 'substantial.'" *Enron*, 419 F.3d at 128. In this case, the motion now under consideration was filed on behalf of the Claimants not only approximately two years after the Bar Date of May 30, 2003, but also fourteen months after the Debtors' Plan was confirmed on April 28, 2004. At the time of the hearing on this motion, the Debtors had made three distributions to the unsecured creditors and a fourth was anticipated to be made in December 2005.⁶ *See* Claimants' Exhibit D-1.

⁶ According to the UST's records, a fifth distribution was made in June 2006.

Based on the arguments made on behalf of the Debtors, it is clear that allowing the Claimants to file a late proof of claim would not end the dispute. The Debtors have raised issues concerning the validity of the claim, which would require an expenditure of time and resources by the LT, causing delay in a case which is in the process of liquidating its assets with an ultimate intent that Agway dissolve.

3. Reason for the Delay

The Second Circuit has indicated that whether the reason for the delay was within the reasonable control of the movant is the most critical factor in the Court's inquiry. *Id.* at 122-23. In this case, the Claimants indicate that once they learned of the Grace Demand in April 2004, they researched the transfer of ownership of the property originally owned by AC&C in Massachusetts and discovered that Agway was successor to Eastern States, who acquired a portion of the property originally owned by AC&C by deed dated October 5, 1944. In September 2004 Claimants' counsel contacted Weil Gotchal & Manges and commenced discussions about a resolution of the matter. These discussions continued with the law firm of Menter, Rudin & Trivelpiece, P.C. in November 2004 until the Claimants filed the motion now under consideration on August 22, 2005, approximately a year after receipt of the Grace Demand and some nine months after discussions began with Menter, Rudin & Trivelpiece. It is the Claimants' position that they were hoping to resolve the matter consensually by obtaining Agway's assignment of its rights as against Grace in connection with the 1945 deed. They also direct the Court's attention to their involvement with the Grace bankruptcy and their efforts to reach a settlement concerning the Grace Demand. An agreement concerning the latter was ultimately reached in

principle in April 2005 and was approved by the court in Grace's bankruptcy on June 27, 2005.

In support of their position regarding ongoing negotiations serving as a basis for delay, the Claimants refer the Court to *In Jones Truck Lines, Inc.*, 63 F.3d 685 (8th Cir. 1995) and *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730 (5th Cir. 1995). In *Jones* the court was asked to determine whether the defendant's failure to timely file an answer and the entry of a default judgment was excusable as the default occurred while the parties were attempting to negotiate an out-of-court settlement. Clearly, courts favor the resolution of disputes based on the merits of the case, rather than based on a default in answering a complaint. See *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001). "Excusable neglect" may serve as a basis for seeking reconsideration of a default judgment pursuant to Fed.R.Civ.P. 60(b)(1). However, the Court does not believe that ongoing negotiations in the hopes of resolving a pending adversary proceeding and a delay in answering a complaint are comparable to the situation now before this Court.

In *Eagle Bus Mfg.* the debtor objected to motions filed six months after the bar date in connection with personal injury claims against the debtor. The bankruptcy court had initially required that approximately 3,000 such claims be addressed in alternate dispute resolution before the court would consider motions for relief from the automatic stay. The court allowed the filing of several late proofs of claims, noting that there was no prejudice to the debtor given its awareness of the claims before the negotiations and before the confirmation of the debtor's plan. In the case sub judice, the negotiations between the Claimants and Agway occurred after the bar date and after the Debtors' Plan had already been confirmed. Furthermore, there was no provision for the Claimants' claim contemplated in the Plan as was the case in *Eagle Bus*.

In *Enron*, Midland Cogeneration Venture Ltd. Partnership (“Midland”) argued before the bankruptcy court that it was distracted by extensive negotiations concerning certain agreements and inadvertently failed to timely file a proof of claim in Enron’s case under Enron’s guaranty. It had, however, timely filed a proof of claim against ENA, a subsidiary of Enron and also a debtor. The bankruptcy court concluded that the ongoing negotiations were an insufficient reason for failing to file a timely proof of claim. The court found that this particular factor favored the debtors. *In re Enron Corp.*, 298 B.R. 513, 526 (Bankr. S.D.N.Y. 2003), *aff’d* 419 F.3d 115 (2d Cir. 2005). The Claimants’ arguments in this case are no more compelling than were those of Midland in the *Enron* case. According to the Claimants’ papers, they first became aware of Agway’s position as the successor of Eastern States in September 2004. There is also evidence to support Agway’s position that Cytec, as well as Wyeth, f/k/a American Cyanamid Company, had received notice of the Debtors’ chapter 11 cases sometime on or about January 7, 2003. *See* Debtors’ Exhibit F. Despite this awareness and despite having discovered, sometime between April and September of 2004, Agway’s connection with the property in Massachusetts for which the Claimants had been served with the Grace Demand, the Claimants delayed for approximately a year before filing their motion seeking authorization to file a late proof of claim. Their motion was filed on August 22, 2005, more than two years after the Bar Date of May 30, 2003. As was the case in *Enron*, this Court does not accept the ongoing negotiations between the Claimants and Debtors’ counsel as a reason for the delay in seeking to file a late proof of claim. The Court concludes that the delay in seeking such relief was certainly within the reasonable control of the Claimants even if the amount of the claim had not as yet been liquidated in September 2004 when they first contacted Agway’s counsel.

4. Whether the Claimants acted in Good Faith

There is nothing in the facts presented to the Court that would indicate that the Claimants' delay stemmed from a lack of good faith based on some dilatory strategy on their part while negotiating with Debtors' counsel. Indeed, Debtors' counsel acknowledges that as of the date of the hearing on October 4, 2005, there was no evidence of bad faith on the part of the Claimants.⁷ Based on the foregoing consideration of the factors set forth in *Pioneer*, it is hereby

ORDERED that the Claimants' motion seeking to file a late proof of claim in the amount of \$5.25 million is denied.

Dated at Utica, New York

this 14th day of August 2006

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁷ The Debtors did reserve their right to inquire further on the issue of when and what the Claimants knew concerning a possible claim. Debtors' counsel points out that there was no indication whether the Claimants subscribed to services that provide updates on sites across the country that are being investigated for environmental problems involving hazardous waste. Debtors' counsel observed that it was AC&C and its predecessors that were the source of the nitrocellulose found at the site that was the subject of the Grace Demand and the Settlement Agreement.