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

Before this Court is a motion filed by Portec, Inc. ("Portec") on November 24, 2004, seeking (a) an order pursuant to Rules 3003(c)(3) and 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") extending the time in which Portec may file a proof of claim against Agway, Inc. ("Agway" or the "Debtors") and (b) an order pursuant to section 362(d)(1) of the Bankruptcy Code, 11 U.S.C. § § 101-1330 ("Code"), and Fed.R.Bankr.P. 4001 and 9014 to lift the automatic stay to allow Portec to proceed with its legal action against Agway in the United States District Court, Northern District of New York.

The Court heard the motion at its regular motion term in Utica, New York on December 16, 2004. Upon the conclusion of the December 16th hearing, the Court reserved decision on Portec's two requests. The Court provided the parties an opportunity to file memoranda of law by January 21, 2005.

JURISDICTION

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), (b)(2)(A), (B), and (O).

FACTS

On March 23, 2001, Ronald Rogers ("R. Rogers"), an employee of the Debtors, and his wife, Lisa Rogers ("L. Rogers" and collectively with R. Rogers, the "Plaintiffs"), commenced a lawsuit against Westfalia Associated Technologies, Inc. ("Westfalia") in the United States District Court for the Northern District of New York. *See* Portec's Mot. at Ex. A. In their complaint, the Plaintiffs alleged that while working for the Debtor, R. Rogers injured himself when he tried to replace a torn conveyor belt and fell off an overhead conveyer system, which the Debtors had installed in the Debtors' feed mill. *See id*. The Plaintiffs claimed that Westfalia was, *inter alia*, negligent in the design, manufacture, and installation of this conveyor system. *See id.*

On August 10, 2001, Westfalia filed a third-party summons and complaint against third-party defendants Portec, Probec, Inc. ("Probec"), and the Debtors. *See* Portec's Mot. at Ex. C. Westfalia alleged, *inter alia*, that the third party defendants' negligence caused R. Rogers's injuries. *See id*. Westfalia asserted that as R. Rogers's employer, the Debtors failed to properly hire and train their employees, failed to provide the proper equipment for the work their employees performed, and permitted a dangerous condition to remain in R. Rogers's work area. *See id*. Westfalia also claimed that Portec negligently manufactured and installed the conveyor

belt and conveyor system that allegedly injured R. Rogers.[1] *See id*.

The Debtors responded on October 11, 2001, by filing an answer to Westfalia's third party complaint. *See* Portec's Mot. at Ex. D. The answer contained a cross-claim against Portec, which asserted that Portec was responsible for Westfalia's damages. *See id*. On May 17, 2002, Portec filed both a reply to the Debtors' cross-claim and an answer to Westfalia's third-party complaint, which also contained a cross-claim against the Debtors. *See* Portec's Mot. at Ex. E. Portec alleged that the Debtors at least partly caused any injuries the Plaintiffs sustained. *See id*.

On October 1, 2002, the Debtors filed a voluntary petition for Chapter 11 bankruptcy relief. The Debtors' counsel then sent a letter dated October 8, 2002, to Portec's counsel, which provided Portec with notice that the Debtors had filed for bankruptcy relief. *See* Liquidating Trustee's Objection to Portec's Mot. at Ex. A. The Bankruptcy Court thereafter set a May 30, 2003, bar date and required the Debtors to give notice to all known and potential creditors of the May 30 deadline for filing of proofs of claims against the Debtors.

On August 11, 2003, Westfalia submitted a motion to enlarge the time to file a proof of claim and sought relief from the Debtors' automatic stay in order to resume its pending district court action against the Debtors. *See* Portec's Mot. at Ex. H. The Court entered a decision and order denying Westfalia's motion on December 31, 2003. *In re Agway*, 313 B.R. 22 (Bankr. N.D.N.Y. 2003). The Court found no excusable neglect for Westfalia's failure to comply with the May 30, 2003, bar date. *See id*. at 30-31.

When Portec learned of Westfalia's motion, it alleges that it conducted a search of its files

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[1]Although in certain paragraphs of Westfalia's complaint Westfalia addresses Portec as "Protec," the Court assumes that Westfalia is referring to Portec.

to determine if the Debtors had served Portec with the Court order establishing the bar date. Portec's Mot. ¶ 15. Portec asserts that it also conducted a search for any documents it may have received from the Debtors' counsel concerning the bar date. *Id*. at ¶ 16. Once Portec's parent office confirmed that it had not received any bar date notice, Portec asserts that on June 15, 2004, its counsel sent a letter to the Debtors' litigation counsel, Paul Ferrara of the law firm of Costello, Cooney & Fearon, informing him that Portec had completed a search of its files and had not received any document that might be considered to be a Notice of Bar Date. *See* Portec's Mot. at Ex. K. Portec's counsel asked Attorney Ferrara to forward Portec a copy of such notice, if the notice was sent. *Id*. Portec's counsel received no response and sent a follow-up letter on July 21, 2004, making the same request. *See* Portec's Mot. at Ex. L. On July 23, 2004, Attorney Ferrara sent Portec a letter informing Portec that his firm no longer represented the Debtors in connection with the law suit by R. Rogers. Portec's Mot. at Ex. M. Attorney Ferrara explained to Portec that James McGowan, Esq. of Menter Rudin & Trivelpiece had assumed responsibility for representing the Debtors concerning this matter. *Id*. Portec forwarded all prior correspondence from its counsel to Attorney McGowan. Portec's Mot. at Ex. N. Attorney McGowan sent Portec a letter on August 4, 2004, but mistook Portec for co-third party defendant "Probec, Inc." in its response. Portec's Mot. at Ex. O. According to oral argument, some time in August the Debtors finally admitted to Portec that it had not sent notice to Portec. Portec requests that this Court exercise its discretion to enlarge the time for Portec to file its $61 million proof of claim.

ARGUMENTS

Portec argues that it was a known creditor of the Debtors, which entitled it to actual or adequate notice of the bar date, and that the Court should allow it to file a late proof of claim because the Debtors did not give it reasonable notice of the bar date. Furthermore, Portec contends, the lack of notice deprived Portec of its due process right to participate in the Debtors' liquidation plan. Portec also asserts that its failure to file was excusable because of intervening circumstances and acts of the Debtors, that were beyond Portec's control. Portec states that it had no idea that the Court had set a bar date and had no other means of obtaining that information other than by notice from the Debtors.

The Debtors admit that Portec did not become aware of the bar date until after it had passed. However, the Debtors argue that Portec's failure to timely file a proof of claim was inexcusable because Portec waited too long to file the motion once it acquired actual knowledge of the bar date. The Debtors contend that Portec's due process argument must fail because once it had actual notice of the bar date, it still had the opportunity to assert its rights and be heard. The Debtors argue that due process cannot be a substitute for lack of due diligence when a party has actual notice of a proceeding.

DISCUSSION

I. Excusable Neglect

Fed.R.Bankr.P. 3003(c)(3) authorizes bankruptcy courts to set a bar date and extend the

time for filing proofs of claims for "cause shown." The order establishing a bar date is "an integral part of the reorganization process," *First Fidelity Bank, N.A. v. Hooker Invs., Inc.* (*In re Hooker Invs., Inc.*), 937 F.2d 833, 840 (2d Cir.1991), "serv[ing] the important purpose of enabling the parties in interest to ascertain with reasonable promptness the identity of those making claims against the estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization." *In re Best Prods. Co.*, 140 B.R. 353, 357 (Bankr.S.D.N.Y.1992) (citing *Hooker Invs.*, 937 F.2d at 840). If a claimant does not file a proof of claim before the bar date passes, the claimant cannot participate in the reorganization unless it establishes sufficient grounds for the failure to file. *Id*.

Courts may allow proofs of claims filed after the bar date if the claimant's failure to file earlier was the result of "excusable neglect." *Fed.R.Bankr.P. 9006(b)(1)*. The burden of proving the existence of excusable neglect rests with the movant. *See In re XO Communications, Inc.*, 301 B.R. 782, 794-95 (Bankr. S.D.N.Y. 2003).

The Supreme Court fashioned the test for finding excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380 (1993). The *Pioneer* test is an equitable one, requiring courts to consider "all relevant circumstances surrounding the party's omission, including (1) the danger of prejudice to the debtor, (2) the length of the 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." *Id*. at 395.

The First Circuit concluded that the four *Pioneer* factors do not carry equal weight. *Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270

F.3d 1, 5-6 (1st Cir. 2001). It stated that "[w]hile 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." *Id*. This Court will examine each factor, but will follow one bankruptcy court's comments and "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).

a. Good faith

The Debtors do not dispute that Portec has acted in good faith in filing the instant motion *See* Mem. of law in support of Liquidating Trustee's Objection to Portec's Motion, p.4. The Court finds nothing in the record to the contrary.

b. Prejudice to the Debtors

Portec contends that allowing it to file its late proof of claim would not prejudice the Debtors because the Debtors knew about Portec's claim before the bar date and should be charged with an expectation that the claim would be filed. The Debtors counter by stating that after the Court denied Westfalia's motion to enlarge the time to file a proof of claim, they did not expect Portec to file such a claim.

The Debtors allege that they have insurance policies with a $1 million deductible. *See* Liquidating Trustee's Objection to Portec's Mot. ¶ 37. If the Court permits Portec's claim and Portec successfully pursues its cross-claim, the Debtors contend that they would have to pay up to the first $1 million of Portec's claim. This would drain the estate of assets the Debtors are using to fulfill its plan payment distribution requirements to creditors who timely filed their claims. However, the district court in *Manousoff v. Macy's Northeast, Inc.* (*In re R.H. Macy & Co.*), 166 B.R. 799 (S.D.N.Y. 1994), made clear that "the inquiry into prejudice to the estate does

not stop with dollar-for-dollar depletion. The analysis depends upon a broader consideration of the circumstances." *Id*. at 802. While the Supreme Court never defined "prejudice" in *Pioneer*, subsequent cases have provided several factors to consider in determining the existence of prejudice to the Debtors. These include the size of the late claim in relation to the estate, whether a disclosure statement or plan has been filed or confirmed with knowledge of the existence of the claim, the disruptive effect that the late filing would have on a plan close to completion or upon the economic model upon which the plan was formulated and negotiated. *In re Keene Corp.*, 188 B.R. 903, 910 (Bankr. S.D.N.Y. 1995) (citing *Greyhound Lines, Inc. v. Rogers* (*In re Eagle Bus Mfg.*), 62 F.3d 730, 737-38 (5th Cir.1995), and *Manousoff*, 166 B.R. at 802).

In the Court's earlier decision in *In re Agway*, the Court found that the allowance of the creditor Westfalia's claim would prejudice the Debtors. *See* 313 B.R. at 28. At that time, the Debtors were in the midst of negotiating a liquidation plan and had yet to file a disclosure statement and plan with the Court. *Id*. at 29. The Court noted that it was reasonable for the Debtors to have relied on the bar date's finality and begin formulating a liquidation plan. *Id*. at 28. The Court concluded that permitting Westfalia's claim would have a prejudicial effect on the Debtors' liquidation plan and would encourage other untimely claimants to move the Court to enlarge the time to file proofs of claims, which would require the Debtors to deplete their assets by defending each motion. *Id*.

Now, sixteen months later, the Court finds there would be an even greater prejudicial effect on the Debtors if it permitted Portec's claim. Portec sought to file a $61 million disputed and unliquidated claim seven months after the Court confirmed the Debtors' liquidation plan on April 28, 2004. The Debtors created the plan and negotiated the terms with the other creditors

without taking into account Portec's claim. Creditors who had timely filed their claims also voted on the plan without taking into account Portec's claim. Following the terms of their plan, the Debtors transferred their property interests, claims, causes of action, and potential causes of action to a liquidating trust, which the Debtors created for the purpose of liquidating their assets. The liquidating trustee has already commenced distributions to unsecured creditors under the plan.

Section 7.01(c) of the Debtors' plan established a "Disputed Claims Reserve," which requires the liquidating trustee to allocate cash to the reserve sufficient enough to pay each holder of a disputed unsecured claim the amount that such holder would have been entitled to as an "allowed claim," a term that includes claims allowed under the plan. If the Court grants Portec's motion, the plan would presumably require the liquidating trustee to account for Portec's claim in the Disputed Claims Reserve. The Debtors assert that it lacks funds to cover such an increase. Allowing Portec's claims thus could conceivably result in the Debtors defaulting on their confirmed plan.

For these reasons, permitting Portec to file its proof of claim would disrupt the economic model on which all parties reached their agreements. *See In re Alexander's Inc.*, 176 B.R. 715, 722 (Bankr. S.D.N.Y. 1995). While Portec asserts that it is the prejudiced party, *Pioneer* only focuses on prejudice to the debtor as a factor, not prejudice to the creditor. *In re Nat'l Spa & Pool Inst.*, 257 B.R. 784, 788 (Bankr. E.D. Va. 2001).

c. Length of Delay

Portec contends that the length of delay in this case should not bar it from filing a proof of claim. Portec submitted its motion to extend the time to file a proof of claim on November 24,

2004, eighteen months after the May 30, 2003, bar date and seven months after the Court confirmed the Debtors' liquidation plan on April 28, 2004. Length of delay alone is not dispositive of whether Portec's neglect is excusable. *See Agway*, 313 B.R. at 29. Length of delay becomes a significant factor, however, when the creditor's delay may disrupt judicial administration of the case. *In re Infiltrator Sys., Inc.*, 241 B.R. 278 (Bankr. D. Conn. 1999). The delay's impact on a case will depend upon the rule under consideration and the factual background of the case. Here, the length of the delay does negatively impact the case. At this stage in the bankruptcy proceeding, the Debtors have already commenced plan distributions to the unsecured creditors.

d. Reason for Delay

Portec contends that the Debtors' failure to provide adequate notice to Portec of the bar date is the reason for Portec's delay in filing a proof of claim. It additionally asserts that when it learned that it missed the bar date, it did not immediately file a proof of claim because the Debtors had alleged that they had served all the parties in the District Court action with notice of the bar date, and Portec did not want to waste judicial resources by filing a late proof of claim, which the Court would deny if it turned out that the Debtors had indeed sent Portec notice. Instead, Portec states that it undertook an extensive search of its files to determine if it had received a notice of the bar date. When Portec finally completed its search, it then delayed approximately two more months (June 2004 to August 2004) trying to contact the Debtors to find out if they had sent Portec notice. The Debtors did not confirm that they had not sent Portec notice until August of 2004.

There is a dispute between the parties as to when Portec learned it had missed the bar date

deadline. In oral argument, Portec asserted that it acquired notice of the bar date in December of 2003. The Debtors claim that Portec learned about the bar date some time between July 28, 2003, and September of 2003, when the Debtors filed and served opposition to the Westfalia motion to enlarge the time to file a proof of claim. The Debtors submitted a copy of an affidavit of service showing that Portec's counsel, Carter, Conboy, Case, Blackmore, Maloney & Laird, had been served with both the original Westfalia motion and the amended Westfalia motion on July 29 and August 12, 2003, respectively. *See* Liquidating Trustee's Objection to Portec's Mot. at Ex. B. Both Westfalia motions provide the bar date deadline. Portec's counsel acted as Portec's agent, and New York law provides that a principal is bound by notice to the principal's agent in all matters within the scope of the agency although in fact the information may never actually have been communicated to the principal. *See In re Alexander's Inc.*, 176 B.R. at 720 (citing *Farr v. Newman*, 199 N.E.2d 369, 371 (N.Y. 1964)). Even if Portec had not discovered the bar date deadline until December of 2003, it still delayed almost a year before filing a motion to extend the time to file a proof of claim on November 24, 2004.

Portec has not provided the Court an adequate reason to justify allowing a claim seven months after the Court confirmed the Debtors' plan and at least eleven months after Portec became aware that it had missed the bar date. A similar situation occurred in *Otto v. Texas Tamale Co., Inc.* (*In re Texas Tamale Co., Inc.*), 219 B.R. 732, 736 (Bankr. S.D. Tex. 1998). In that case, the creditor, a former president of the debtor corporation, did not receive formal notice of the bar date from the debtor. *Id*. at 734. The creditor later attempted to collect his claims by filing suit in the district court, asserting that the debtor owed him money in back wages, severance pay, and reimbursement expenses. *Id*. at 735. The debtor removed the case to the

bankruptcy court. *Id*. The bankruptcy court held that the creditor's law suit was an attempt to collect money eleven months after the plan confirmation and fourteen months after the creditor became aware that the proposed plan would not provide him with any payments. *Id*. at 736. The bankruptcy court ruled that the creditor's delay in filing was within the creditor's control. *Id*. It further stated that:

> Even assuming [the creditor] was unable to raise the claims prior to confirmation, there is no justification for waiting eleven months after confirmation to raise the claims. Certainly [the creditor] could have raised these claims at a period of time closer to confirmation which would have allowed the debtor a better opportunity to modify the plan, if warranted, or which would have allowed the Court to consider the claims without the plan being substantially consummated.

Id.

In this case, Portec could have filed its motion in December of 2003, or perhaps even earlier. Portec asserts that it conducted a search of its files that took approximately six months. It did not intervene when the Court confirmed the Debtors' plan in April of 2004. Once it learned in June of 2004 that it did not have any records relative to receipt of the bar date notice, it took another five months before it filed its current motion. Even subtracting the two months (from June to August, 2004) it took the Debtors to respond to Portec's inquiries, the Court finds that Portec delayed for too long in filing its motion. The *Pioneer* test is an equitable one, and the equities do not favor Portec. As with the creditor in *Texas Tamale*, all Portec needed to do was file a motion to allow the late claim prior to the plan confirmation date. The Court would most likely have favorably considered the motion at that time because Portec did not receive actual notice of the bar date before it passed.

Portec could also have avoided spending six months searching its files by simply using the PACER database to perform an online search for the Debtors' "Certificate of Service for Mailing Regarding Notice of Deadline for Filing of Proofs of Claims." PACER is an acronym that stands for Public Access to Court Electronic Records. The United States Bankruptcy Courts, including this Court, provide this service, which allows the public to access bankruptcy case and docket information through the Internet. Access to web based PACER systems generates a minimal charge per page. A creditor of Portec's sophistication arguably had the necessary computer and Internet capabilities to access and pay for the information provided on PACER. The bar date Certificate of Service contains alphabetical lists of the creditors served with notice of the bar date. Portec could have used PACER to determine that this Certificate of Service did not include Portec. The search on PACER would have lasted a matter of minutes, instead of six months.

It is true that Portec did not receive the statutory notice of the time fixed for filing proofs of claims that Fed.R.Bankr.P. 2002(a)(7) requires. While this factor makes out a prima facie case for excusable neglect under Fed.R.Bankr.P. 9006(b) because "to hold otherwise would encourage debtors to violate the statutory notice requirements with impunity." *In re Fairchild Aircraft Corp.*, 128 B.R. 976, 984 (Bankr. W.D. Tex. 1991), Portec's unreasonable delay rebuts this finding. Although Portec acted in good faith in submitting this motion, its unreasonable delay in filing the motion and the danger of prejudice to the Debtors if the Court granted the motion, convince the Court that Portec's neglect is inexcusable under Fed.R.Bankr.P. 9006(b)(1) and *Pioneer*.

II. Due Process

The Fifth Amendment provides that no person shall be deprived of property "without due process of law." In a proceeding accorded finality, due process requires notice that is "reasonably calculated under all the circumstances to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This due process obligation applies to bankruptcy proceedings involving a disposition of property. *See In re Brunswick Hosp. Ctr.*, Nos. 892-80487-20, 894-8283-346, 1997 WL 836684 *3 (Bankr. E.D.N.Y. Sept. 12, 1997); *In re B.C. Enters., Ltd.*, 160 B.R. 827, 830 (Bankr. D. Ariz. 1993). Reasonable notice of a bankruptcy proceeding includes notice of the bar date for filing a proof of claim. *In re Waterman S.S. Corp.*, 157 B.R. 220, 221 (S.D.N.Y. 1993).

What constitutes "reasonable notice" varies according to the type of creditor. *See In re S.N.A. Nut Co.,* 198 B.R. 541, 543 (Bankr. N.D. Ill. 1996). Bankruptcy law divides creditors into two groups, known and unknown. *In re Charter Co.*, 125 B.R. 650, 654 (M.D. Fla.1991). A known creditor is one whose identity is either known or reasonably ascertainable by the debtor. *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988). A creditor's identity is "reasonably ascertainable" if that creditor can be identified through "reasonably diligent efforts[,]" *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4 (1983), but reasonable diligence does not mandate "impracticable and extended searches ... in the name of due process." *Mullane*, 339 U.S. at 317. Due process entitles known creditors to actual notice of the bankruptcy

filing, as well as the claims' bar date. *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953).

An unknown creditor is one whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in the due course of business come to the knowledge of the debtor. *Mullane*, 339 U.S. at 317. Due process does not require debtors to provide actual notice to unknown creditors. *In re Drexel Burnham Lambert Group*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993). Instead, debtors can provide unknown creditors constructive notice, *i.e.*, notice by publication. *See In re Argonaut Fin. Servs., Inc.*, 164 B.R. 107, 112 (N.D. Cal. 1994); *In re Thomson McKinnon Sec., Inc.*, 130 B.R. 717, 719-20 (Bankr. S.D.N.Y. 1991).

Portec was a known creditor because it had filed a cross-claim against the Debtors in the District Court action and the Debtors had likewise cross-claimed against Portec, all of which occurred pre-petition. *See In re Pettibone Corp.*, 162 B.R. 791, 798 (Bankr. N.D. Ill. 1994). Neither Portec nor the Debtor disputes this. Both parties also agree that Portec did not receive formal notice before the bar date and that Portec actually became aware of the bar date several months prior to the plan confirmation date of April 18, 2004. Portec argues that this failure to receive timely notice of the bar date deprived it of its due process. In oral argument, Portec's counsel admitted that the Debtors served it with copies of the Westfalia motion and the Debtors' objection to the Westfalia motion, both of which provide the bar date. The Debtors point to language in the Westfalia decision in which the Court stated that "[t]he Debtors, although they are in the midst of negotiating a plan of liquidation, have yet to file a disclosure statement and plan with the Court." *In re Agway*, 313 B.R. at 29. The Debtor asserts that this language provided Portec with actual notice before the confirmation date that the Debtors were

negotiating a plan during the winter and spring of 2003. The Debtor states that once Portec received actual notice of the bar date and pending plan negotiations, it had the opportunity to assert its rights and be heard. Portec cannot justify its delay, the Debtor contends, by relying on a due process argument.

Although Portec did not receive actual notice of the bar date, this fact alone does not convince the Court that it should allow Portec's claim at such a late date. Due process concerns are not as compelling when the creditor has actual knowledge of the bankruptcy case and the confirmation hearing, but does not receive formal notice of the bar date in time to file a timely claim. *Texas Tamale*, 219 B.R. at 738. The Court does not know if Portec knew the date of the confirmation hearing, but the Court's earlier decision in *In re Agway* should have made Portec aware that the Debtors were in the midst of negotiating liquidation. *See* 313 B.R. at 28. Due process concerns are allayed when the party still has an adequate opportunity to protect itself. *See In re Fairchild Aircraft Corp.*, 128 B.R. at 983. Once Portec learned that it missed the bar date, it had an adequate opportunity to promptly file its motion without disrupting the bankruptcy plan and prejudicing both the Debtors and other creditors who have relied on the confirmed plan. As with the creditor in *Texas Tamale*, Portec had several months prior to confirmation to assert its claim. *See* 219 B.R. at 740. Portec waited at least eleven months (December of 2003 to November of 2004) before it moved to protect its rights by filing the instant motion to allow a late filed claim. The Court reaches the same conclusion that the Texas bankruptcy court did in *Texas Tamale*: Portec received actual notice with sufficient time to protect its rights. *See id*. This satisfies Portec's due process rights. Portec's eleven month delay overrides its lack of notice of the bar date. This Court wants to encourage quick and efficient

bankruptcy administration. Even if the Court ignores the two months (from June to August of 2004) Portec spent waiting for the Debtors to reply to its inquiries on whether the Debtors had sent Portec notice, Portec simply delayed too long taking six months to search its files (December of 2003 to June of 2004) and three months to file its motion once the Debtors informed Portec that it had not been sent the notice of the bar date (August to November, 2004). Based on the foregoing reasons, the Court denies Portec's motion to enlarge the time in which to file a proof of claim.

III. Automatic Stay

Portec's failure to file a proof of claim bars it from seeking to recover any of the assets of the Debtors and from participating in a reorganization plan. *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 179-180 (7th Cir. 1994). However, Portec is not per se foreclosed from proceeding against the Debtors to establish the Debtors' liability in order to recover from the Debtors' insurer. *See Hawxhurst*, 40 F.3d at 180; *Royal Ins. Co. of Am. v. McCrory Corp.*, No. 94 Civ. 5734(SS), 1996 WL 204482, at *1-2 (S.D.N.Y. April 25, 1996); *In re Turner*, 55 B.R. 498, 501-02 (Bankr. Ohio 1985). The *McCrory* court pointed out that in a situation in which a party "sues the debtor only to establish liability against a third party, and where the bankruptcy court is persuaded that allowing the action to go forward will not burden the estate or prejudice other creditors, the plaintiff's failure to file a proof of claim should not, and does not, preclude it from recovering against the debtor's insurer." *McCrory*, 1996 WL 204482, at *1. *Matter of Holtkamp* provides an example of this situation. 669 F.2d 505, 508-09 (7th Cir. 1982). In *Matter of Holtkamp*, the Seventh Circuit affirmed the bankruptcy court's decision to lift the automatic stay

when it permitted a personal injury action against a debtor to proceed because the debtor's insurer had "assumed full financial responsibility for defending that litigation" and the action would not harm the debtor. *Id*.

In *In re Sonnax Industries, Inc.*, the Second Circuit listed a number of factors ("Sonnax factors") that may be relevant in deciding whether the stay should be lifted in order to permit litigation to continue in another forum: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms. 907 F.2d 1280, 1285-86 (2d Cir. 1990). Several of these factors are relevant in the present case.

The Debtors assert that their insurer, Reliance National Indemnity Company, is itself in liquidation proceedings and has refused to defend them in any law suits. This would require the Debtors to pay the litigation costs they would incur in defending Portec's cross-claim in the district court. Portec has not rebutted this assertion. Furthermore, if the Debtors pay the

litigation costs, this would decrease the estate assets available to the Debtors' other creditors. Litigation in the district court would prejudice the interests of the other creditors. Allowing Portec to prosecute its cross-claim against the Debtors would force the Debtors to pay the litigation fees and spend time defending themselves. This would interfere with the Debtors' bankruptcy case. The automatic stay is intended for the protection not only of the debtor, but for the benefit of all creditors as well. *In re Flores*, 291 B.R. 44, 50 (Bankr. S.D.N.Y. 2003). The Court therefore finds that the second, fifth, and seventh Sonnax factors weigh in the Debtors' favor. The Court uses its discretion in deciding whether to lift the automatic stay after a fact intensive inquiry made on a case-by-case basis. *In re Betzold*, 316 B.R. 906, 915 (Bankr. N.D. Ill. 2004). Based on the three factors weighing in the Debtors' favor, the Court denies Portec's motion to lift the automatic stay at this time without prejudice.

IT IS SO ORDERED.

Dated at Utica, New York

this 5th day of May 2005

/s/
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge