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 the Court are two motions. The first is a motion filed by D. Clark Ogle, Trustee of the Agway Liquidating Trust (the "LT"), on June 8, 2005, seeking an order holding Harold R. Castleman and Bonnie Castleman; Donald Jobe, as independent executor of the Estate of J.H. Carmen Jobe, deceased; Laurie Mae Thompson, individually and as independent executrix of the Estate of John Nathan Thompson, deceased; and Francis Lee Whitehead, individually and as independent executrix of the Estate of Walter Ray Whitehead, deceased, (collectively referred to as the "Beaumont Plaintiffs") in contempt and seeking enforcement of prior Bankruptcy Court Orders pursuant to § 105 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") and Rule 9020 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") (the "Contempt Motion").

The second motion is a motion filed on June 13, 2005, by the law firm of Reaud, Morgan & Quinn ("RM&Q") on behalf of 35 claimants with asbestos-related personal injury causes of action (the "Asbestos Claimants") against Agway, Inc. ("Agway" or the "Debtor"). The motion requests an Order allowing the Asbestos Claimants to submit late-filed proofs of claim to the Liquidating Trust and clarifying that the Court's Confirmation Order, entered on April 28, 2004, did not discharge the claims of the Asbestos Claimants. The Beaumont Plaintiffs are a subset of the Asbestos Claimants. Two days later, on June 15, 2005, RM&Q filed an amended motion on behalf of "over 35" Asbestos Claimants ("Amended Motion"). RM&Q also filed a response to the LT's Contempt Motion on June 29, 2005, on behalf of the Beaumont Plaintiffs. This response requested that the Court both deny the LT's Contempt Motion and declare that the Confirmation Order does not discharge the Beaumont Plaintiffs' claims.

The LT responded to RM&Q's Amended Motion by filing opposition to it on June 29, 2005. On July 1, 2005, RM&Q filed a reply to the LT's opposition on behalf of 58 Asbestos Claimants. The LT filed a response to RM&Q's reply on July 20, 2005.

The Court scheduled the motions for a hearing on July 21, 2005, at its regular motion term in Utica, New York.[1] The Court asked the parties to file additional memoranda of law by August 19, 2006, on the motion requesting that the Asbestos Claimants be permitted to file late proofs

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[1] On August 15, 2005, the 58 Asbestos Claimants filed a Second Amended Motion to Allow Late Filed Proofs of Claim and Request for Clarifying Order that Confirmation Order Does Not Discharge the Claims of Certain Asbestos Personal Injury Plaintiffs ("Second Amended Motion") in response to issues raised by the LT concerning RM&Q's standing to bring the motion "on behalf of" the Asbestos Claimants. The Second Amended Motion provides a list of the 58 Asbestos Claimants; however, some of the Beaumont Plaintiffs were not included in the list. Those omitted Beaumont Plaintiffs are Bonnie Castleman; Laurie Mae Thompson (in her individual capacity, as opposed to being the independent executrix of the estate of John Nathan Thompson); and Francis Lee Whitehead (in her individual capacity).

of claims. The Court then adjourned the Contempt Motion to October 25, 2005, and declared that it would then review the status of the motion to file late proofs of claims at that date. Upon conclusion of the October 25th hearing, the Court reserved decision on both motions. The Court also provided the LT an opportunity to file a memorandum of law in support of the Contempt Motion within 30 days, and provided RM&Q an opportunity to respond to the LT's memorandum within 10 days of its receipt. The matters were submitted for decision ultimately on December 6, 2005.

JURISDICTIONAL STATEMENT

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

FACTS

Agway, along with several of its wholly-owned subsidiaries (collectively, the "Debtors"), filed for bankruptcy protection pursuant to chapter 11 of the United States Bankruptcy Code on October 1, 2002 (the "Commencement Date"). On March 6, 2003, the Court entered an Order establishing May 30, 2003, as the final date for filing proofs of claims against the Debtors, and approving the proposed formal notice of bar date (the "Bar Date Notice") and publication procedures (the "Bar Date Order"). The Bar Date Order required the Debtors to give notice of the Bar Date to all known and potential creditors. On March 21, 2003, the Debtors published

notice of the Bar Date in the *New York Times*, *Wall Street Journal*, and *Syracuse* (*N.Y.*) *Post-Standard*. The Court approved the published notice and deemed it sufficient. On April 28, 2004, approximately 13 months later, the Court entered a Confirmation Order confirming the Debtors' Second Amended Joint Plan of Liquidation (the "Plan") and appointing D. Clark Ogle as the LT of the Debtors' Liquidating Trust. The Liquidating Trust had been established to liquidate and distribute the Debtors' assets to holders of claims against the estate. The Confirmation Order provided that "[p]ursuant to Section 11.04 of the Plan, unless otherwise provided, all injunctions or stays provided for in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date." Section 12.02 of the Plan also provided that:

> In consideration for the distributions received under the Plan all holders of claims . . . shall be deemed to have released, remised, and forever discharged: (a) the Debtors . . . of and from all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, promises, damages, claims and liabilities whatsoever, known or unknown, arising from a Claim . . . and existing on the Petition Date or which thereafter could arise based on any fact, transaction, cause, matter or thing which occurred prior to the Petition Date.

The effective date of the Plan occurred on May 1, 2004. ("Effective Date").

On or about February 14, 2005, the Beaumont Plaintiffs filed a First Amended Petition entitled *Black et ux v. Mobil Oil Co., et al.* in the 172nd Judicial District Court of Jefferson County, Texas, naming Agway, Inc., as successor to Texas City Refining, Inc. ("Texas City Refining"), and 233 other entities as defendants. The Beaumont Plaintiffs had originally sued Mobile Oil Co., et al. for damages relating to their asbestos exposure at a refinery located in Texas City, Texas (the "Texas City Plant" or "Plant"). The Beaumont Plaintiffs then amended

their complaint (the First Amended Petition) to include Agway as a defendant based upon Agway's alleged ownership of the Texas City Plant (the "Texas Asbestos Litigation").[2] The First Amended Petition alleges that Agway injured the Beaumont Plaintiffs through exposure to asbestos while the Beaumont Plaintiffs or their decedents worked at the Texas City Plant. The First Amended Petition allegedly refers to the Beaumont Plaintiffs as "invitees" and "craftsmen and construction tradesman" at the facilities run by the defendants.

On or about February 28, 2005, the First Amended Petition was served on CT Corp., as the agent for service of process on Agway in Texas. Upon receipt of the First Amended Petition, the LT's counsel sent correspondence, dated March 8, 2005, to Christopher Portner, Esq. ("Portner") of RM&Q, informing the Beaumont Plaintiffs' counsel of Agway's bankruptcy proceeding and requesting immediate dismissal of the Texas Asbestos Litigation against Agway because the Beaumont Plaintiffs failed to file timely proofs of claim in the Debtors' bankruptcy proceeding and were, therefore, barred from pursuing any claims against Agway in the Texas Asbestos Litigation. *See* Exhibit C, attached to the Contempt Motion.

Portner then informed the LT's counsel that the bankruptcy counsel to the Beaumont Plaintiffs, Sander Esserman, Esq. ("Esserman"), would determine whether the Beaumont Plaintiffs would dismiss the Texas Asbestos Litigation against Agway. On or about May 18, 2005, Esserman asked the LT's counsel about the expected distribution to unsecured creditors and the aggregate amount of claims filed against the Liquidating Trust. On May 20, 2005, the LT's counsel sent Esserman a letter answering his questions and informing him that the LT would

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[2] On March 2, 2005, the Beaumont Plaintiffs' suit was transferred to the 11th District Court of Harris County, Texas, and is pending in that court.

file a motion to hold the Beaumont Plaintiffs in contempt if they did not dismiss the Texas Asbestos Litigation against Agway by May 26, 2005. *See* Exhibit D, attached to the Contempt Motion. The Beaumont Plaintiffs did not dismiss the suit. On June 8, 2005, the LT filed the Contempt Motion.

ARGUMENTS

The LT contends that the Bar Date Order and release provisions of the Plan prohibit the Beaumont Plaintiffs from pursuing their claims against Agway in the Texas Asbestos Litigation. It is the LT's position that when the *New York Times*, *Wall Street Journal*, and *Syracuse* (N.Y.) *Post-Standard* published notice of the Bar Date on March 21, 2003, the Asbestos Claimants were unknown creditors of Agway. The LT explains that the Asbestos Claimants were unknown because of the following: (1) they were not employees of Agway; (2) Agway does not maintain any employee records for Texas City Refining; (3) Agway did not have a business relationship with the Asbestos Claimants; (4) Agway's interest in the Texas City Plant was limited to a 66% equity interest in Texas City Refining, which in turn owned the Texas City Plant; (5) Texas City Refining sold all of its assets, including the Texas City Plant, in 1987 and was dissolved in 1993; (6) a review of Agway's books and records show that Agway has never been named as a defendant in any asbestos litigation related to Texas City Plant; and (7) Agway's Schedules, Amended Schedules, and Statement of Financial Affairs do not list the Asbestos Claimants as creditors because Agway did not become aware of any claims by the Asbestos Claimants until it received the First Amended Petition in February of 2005, 20 months after the Bar Date. The

LT declares that publication of the Bar Date Notice satisfied the Asbestos Claimants' right to due process as unknown creditors. The LT asserts that Agway did not have to publish the Bar Date Notice in the hundreds of locations in which it conducted business because that would have been a substantial burden. The LT concludes that by not dismissing the Texas Asbestos Litigation against Agway, the Beaumont Plaintiffs have violated the Plan's Permanent Injunction and its release provisions. The LT requests that the Court find the Beaumont Plaintiffs in contempt and fine them until they purge the contempt by dismissing the Texas Asbestos Litigation against Agway.

According to the LT, the Court should also deny the Amended Motion because the Asbestos Claimants received adequate notice of the Bar Date. Pursuant to the Bar Date Order and Plan, the Asbestos Plaintiffs are enjoined from pursuing claims against Agway. In addition, the LT asserts that the Court should deny the Amended Motion because it does not adequately describe the basis for the Asbestos Claimants' alleged claims. RM&Q did not attach proposed proofs of claim, did not estimate the amount of the Asbestos Claimants' potential claims, and offers only unsupported allegations of a "diagnosis date" for their asbestos-induced maladies. The LT also contends that the Asbestos Claimants have not articulated any theory on which Agway could be liable for Texas City Refining's alleged asbestos-related obligations. The determination as to whether the Asbestos Claimants have legitimate claims against the Liquidating Trust is within the Court's jurisdiction, the LT contends, and the Court should hold that there is no legal basis for their claims against Agway.

Additionally, the LT asserts that because the Debtors' published notice of the Bar Date was sufficient as to the Asbestos Claimants, the Asbestos Claimants must demonstrate that the

failure to file a timely proof of claim was due to "excusable neglect." Ignorance of one's claim does not constitute excusable neglect, the LT argues. Because the Asbestos Claimants failed to meet their burden of proving excusable neglect, the Court should deny the Amended Motion. The LT also argues that the Beaumont Plaintiffs are attempting to circumvent their failure to demonstrate excusable neglect by asserting that their claims are not discharged. The LT contends that even assuming that Code § 1141(d)(3) prevents the Debtors from obtaining a discharge from the Beaumont Plaintiffs' claims, they are still permanently enjoined from pursuing the Texas Asbestos Litigation because the Bar Date Order and the release provisions of the Plan forever bar any person or entity from asserting a claim against the Debtors if that person or entity failed to file a timely proof of claim. The LT takes the position that the discharge is irrelevant because the Beaumont Plaintiffs have no timely claims to assert against the Debtors.

Finally, the LT contends that the Court should deny the Amended Motion because RM&Q does not have standing to seek the requested relief. RM&Q is not a creditor of the Debtors, but its Amended Motion seeks relief in favor of RM&Q, as opposed to a party in interest in the Debtors' cases. The filing of the Asbestos Claimants' Second Amended Motion does not cure this standing issue, the LT argues. The LT asserts that it will not respond to the Asbestos Claimants' Second Amended Motion because a hearing was already held on RM&Q's Amended Motion and RM&Q never filed a notice of motion providing a hearing date and a response deadline for the Second Amended Motion. The Court should not permit the Asbestos Claimants to substantively alter the relief sought following the hearing, the LT contends. The LT also cautions that granting RM&Q's Amended Motion could create an "open door policy" for an undetermined number of claimants to be able to pursue unfounded claims against Agway in

asbestos litigation.

In response to the Contempt Motion, RM&Q asserts that the Beaumont Plaintiffs commenced the Texas Asbestos Litigation before they were aware that Agway had filed for bankruptcy. There are two reasons for the Beaumont Plaintiffs' lack of awareness, RM&Q explains: (1) Agway provided inadequate notice of the Bar Date to creditors with asbestos-related personal injury claims against it; and (2) the Beaumont Plaintiffs were not aware that they suffered from an asbestos-related disease at the time when Agway provided its notice on March 21, 2003. The Beaumont Plaintiffs had not yet been diagnosed with an asbestos-related disease, nor had any of them attributed their symptoms to an asbestos-related injury. When the Beaumont Plaintiffs were notified of Agway's bankruptcy, they proposed to dismiss their suit against Agway without prejudice and submit their claims to the Court so long as Agway agreed to toll the applicable statute of limitations, RM&Q explains. The Beaumont Plaintiffs did not dismiss their suit, but they agreed not to proceed in their suit against Agway pending resolution of the instant issues before the Court. RM&Q argues that because the Beaumont Plaintiffs did not receive proper notice of Agway's bankruptcy, they are not bound by the Bar Date Order or Agway's Plan and, therefore, they did not commit contempt against the Court.

In furtherance of the motion to submit a late-filed proof of claim, RM&Q argues that the Asbestos Claimants were known claimants because their identities were reasonably ascertainable. RM&Q contends that Agway made no effort to identify the Asbestos Claimants and relied upon notice by publication to notify the Asbestos Claimants. This form of notice did not satisfy the Asbestos Claimants' right to due process. RM&Q asserts that Agway owned the Texas City Plant, and as the owner, Agway should have known that the Plant contained asbestos during the

period when Agway owned it. The Plant allegedly had been a source of asbestos litigation since 1987, and given the current state of asbestos litigation and the publicized bankruptcies of manufacturers of asbestos-containing insulation products, Agway had notice that it had potential asbestos liability, RM&Q contends. RM&Q maintains that this notice required Agway to make reasonably diligent efforts to uncover the identities of those persons who might have asbestos claims against it arising from its ownership of the Texas City Plant. RM&Q continues by stating that a search of the employee records from the Plant would have revealed those employees, such as the Asbestos Claimants, who were likely to have been exposed to asbestos at the Plant during the time in which Agway owned it. RM&Q asserts that Agway's published notice did not provide the Asbestos Claimants with notice because the Asbestos Claimants were not likely to read the newspapers that published the notice. Agway should have provided notice in a regional publication likely to be read by the Asbestos Claimants. RM&Q concludes that the Asbestos Claimants are not bound by either the Bar Date Order or the terms of the Plan because they did not receive proper notice.

Additionally, RM&Q alleges that some of the Asbestos Claimants had not manifested symptoms of an asbestos-related disease at the time when Agway provided notice by publication. These Asbestos Claimants could not have known that Agway's bankruptcy and the Bar Date Order held any relevance to them, RM&Q explains, and thus they did not receive adequate notice. Therefore, their claims are not barred by the Bar Date and are not discharged by confirmation of Agway's Plan. RM&Q maintains that Agway could have provided representation for this class of claimants by asking the Court to appoint a Futures Representative under Code § 524(g) to protect the interests of those claimants who did not develop an asbestos-

related disease until after confirmation of the Plan.

RM&Q further contends Agway cannot discharge its debt through a chapter 11 liquidation. RM&Q continues by stating that this means that the claims of the Asbestos Claimants were not discharged by confirmation of the Plan and that the Beaumont Plaintiffs did not violate any order of this Court by bringing their lawsuit against Agway. Because the Asbestos Claimants' claims were not discharged, the Asbestos Claimants are entitled to seek liquidation of their claims in an appropriate non-bankruptcy forum.

RM&Q asserts that the Asbestos Claimants need not rely on the equitable relief provided by the excusable neglect standard. Instead, the Asbestos Claimants are entitled to submit their claims to the Liquidating Trust based on statutory and constitutional principles of law. The Asbestos Claimants did not "neglect" to file their claims, RM&Q contends, rather it was Agway's neglect that caused the Asbestos Claimants' failure to file proofs of claim.

Finally, the Asbestos Claimants assert that they filed the Second Amended Motion because at the June 15, 2005, hearing, the Court questioned whether RM&Q had standing to file its Amended Motion. The Asbestos Claimants note that they believe it was appropriate for RM&Q to file the Motion to Allow Late Claims and the Amended Motion on behalf of their clients. The Asbestos Claimants assert that the LT demands that they go through the time and expense of submitting a whole new motion, when such a motion would be substantively identical to the motion already before the Court. RM&Q already provided all parties of interest with notice of the relief requested, the Asbestos Claimants argue. The Asbestos Claimants contend that the LT's position achieves nothing except to cause the Court and the Asbestos Claimants added expense and effort.

DISCUSSION

Standing

On August 19, 2005, the LT asserted in its Memorandum of Law (Docket No. 6148) that RM&Q had no standing to seek the relief requested in the Amended Motion, filed on June 15, 2005 (Docket No. 6073). LT takes the position that while the Asbestos Claimants "are clearly potential creditors," RM&Q is not a creditor of the Debtors. The Court finds no merit to this assertion based on the fact that the "Wherefore clauses" in both the Amended Motion (Docket No. 6099) and the Second Amended Motion (Docket No. 6141), as well as the original Motion (Docket No. 6065), state that "the Asbestos Claimants respectfully request entry of an order . . . ." None of the "Wherefore clauses" make any mention of relief being sought by RM&Q.

Claims of the Asbestos Claimants

> [B]ankruptcy, if it is to be an effective remedy, must extend to cover all the liabilities a given debtor *knows it is facing*, even those liabilities whose contours are fuzzy. Yet future claims also remind us that bankruptcy is not a panacea. It cannot achieve all ends imagined. Like all other federal remedies, it is cabined by notions of due process and fundamental fairness.

In re Fairchild Aircraft Corp., 184 B.R. 910, 934 (Bankr. W.D. Tex. 1995) (emphasis supplied), *vacated on equitable grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998). Thus, in defining "claim" as "[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" (11 U.S.C. § 101(5)), Congress sought to give the term "claim" the "broadest possible definition" in which "all legal obligations of the debtor, no matter how remote

or contingent, will be able to be dealt with in the bankruptcy case." *See Energy Coop., Inc. v. Socap Int'l, Ltd.* (*In re Energy Coop., Inc.*), 832 F.2d 997, 1001 (7th Cir. 1987) (citing House and Senate Reports).

As an initial matter, the Court must determine whether or not the Asbestos Claimants have claims against Agway before considering the arguments they have raised concerning due process. Indeed, the Court recognizes that by expanding on what constitutes a "claim" for purposes of bankruptcy, concerns involving notions of fundamental fairness and due process with respect to any claim are also expanded, as will be discussed more fully below. *See In re UNR Indus., Inc.*, 224 B.R. 664, 669 (Bankr. N.D. Ill. 1998) (noting that "[t]he fresh start policy calls for a broad view of claims, resulting in a broad discharge, while considerations of due process and fairness dictate that discharge of a claim that is unknown to the holder in time to be asserted against the bankruptcy estate is inequitable").

The Circuit Courts of Appeals are divided over what theory to use in determining the date a claim arose for purposes of classifying it as a pre- or post-petition claim. *In re Parker*, 313 F.3d 1267, 1269 (10th Cir. 2002). In *Avellino & Bienes v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332, 336 (3d Cir. 1984), the Court of Appeals for the Third Circuit held that the Code defines a "claim" as a "right to payment" and that "the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law." Courts have referred to this theory as the "accrual theory" or "accrued state law theory" or "state law accrual test."

In *In re A.H. Robins Co.*, 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd sub nom. Grady v. A.H. Robbins Co.*, 839 F.2d 198, 201 (4th Cir. 1988), the Court of Appeals for the Fourth Circuit,

like the bankruptcy court whose decision it affirmed, declined to follow *Frenville*. It declared that "Congress has the power under the bankruptcy article, U.S. Const. Art. I, § 8 cl.4, to define and classify claims against the estate of a bankrupt," and the "legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy." *Id.* at 202. The Fourth Circuit noted that under the Code, a claim is a "right to payment" whether or not "such right" is "contingent." *Id.* The Fourth Circuit found that the claimant, who had not discovered injuries relating to the insertion of a Dalkon Shield contraceptive, intra-uterine device until after the bankruptcy filing, held a contingent claim because the claim depended upon a future uncertain event, namely, the manifestation of the injury. The Fourth Circuit then concluded that a claim arose pre-petition when the acts constituting the tort or breach of warranty occurred, even if the manifestation of the injury occurred after the petition filing. *Id.* at 202-03. Courts have referred to this theory as the "conduct test theory" or "conduct test."

The conduct test theory discussed in *A.H. Robins* was the same test that the bankruptcy court had applied in *In re Johns-Manville Corp.*, 57 B.R. 680, 686 (Bankr. S.D.N.Y. 1986). In that case, the movants sought to proceed with two independent post-petition state court actions against the debtor stemming from damages incurred in the pre-petition use of building materials manufactured and sold by the debtor. The court chose not to follow *Frenville* because of what it viewed as being inconsistent with congressional intent to expand the concept of a "claim." It noted that adherence to *Frenville* "would frustrate Congress's intent to channel claims concerns toward one forum and allow for a comprehensive plan of reorganization." *Id.* at 690. The court concluded that in determining when a claim arises, the focus must be on the actions or omissions

of the debtor that ultimately gave rise to the claim, and that a pre-petition claim may encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed. *Id*. Similarly, in *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993), the bankruptcy court agreed with *Manville* and held that a claim arises at the moment when acts giving rise to the alleged liability are performed. Applying the conduct test theory to the facts before it, the court held that the claims of the asbestosis claimants, who had been employees of the debtor, arose at the moment they came into contact with the asbestos, which meant that they were pre-petition claim holders. *Id.*

Other courts have viewed the conduct test as defining Code § 101(5) too broadly and prefer the "prepetition relationship test." *See In re Piper Aircraft Corp.*, 162 B.R. 619, 625-26 (Bankr. S.D. Fla. 1994) (analyzing the three different tests), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom. Epstein v. Official Comm.* (*In re Piper Aircraft Corp.*), 58 F.3d 1573 (11th Cir. 1995). In *United States v. The LTV Corp.* (*In re Chateaugay Corp.*), 944 F.2d 997, 1002 (2d Cir.1991), the Second Circuit explained that:

> Defining claims to include any ultimate right to payment arising from pre-petition conduct by the debtor comports with the theoretical model of assuring that all assets of the debtor are available to those seeking recovery for pre-petition conduct. But such an interpretation of "claim" yields questionable results. Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, the future victims have a "claim." Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on that one bridge

when it crashes.

In *Chateaugay Corp.*, the Environmental Protection Agency ("EPA") had filed a $32 million proof of claim for recovery of environmental cleanup costs incurred pre-petition at fourteen sites at which the EPA had identified the debtor as being potentially responsible for the cleanup costs. The debtor was a diversified company primarily involved in steel, aerospace/defense, and energy products. The industries in which the debtor's subsidiaries were engaged typically generated substantial amounts of hazardous industrial wastes which needed to be treated or disposed of on the premises or at an off-site location. The issue of when EPA's claim arose was important because bankruptcy discharges liability only for claims that arose before the bankruptcy petition was filed. The Second Circuit held that "[t]he relationship between environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of 'claims.'" *Id.* at 1005. The EPA and the debtor were both acutely aware of each other, the Second Circuit found, and thus their relationship was far closer than that existing between future tort claimants totally unaware of injury and a tort-feasor. *Id*. The Second Circuit affirmed the district court and held that the EPA's claim for the debtor's pre-petition releases or threatened releases of hazardous substances was a claim for actions by the debtor that were contemplated by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as giving rise to liability. *See id.*

In *In re Piper Aircraft Corp.*, 162 B.R. at 627, the bankruptcy court stated that:

> The Conduct Test and the Relationship Test are not mutually exclusive theories. Requiring that there be some prepetition relationship between the Debtor and claimant would not change the analysis or results of the Conduct Test cases . . . The theories advanced by prior cases exploring the outer limits of the concept of

> claim, when thus reconciled, lead to the conclusion that in order for a future claimant to have a "claim" under § 101(5), there must be some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor's prepetition conduct and the claimant. This is not to suggest that any and every prepetition relationship will give rise to a claim. Rather, a prepetition relationship connecting the conduct to the claimant is a threshold requirement.

Seven months after the *Piper* decision, the same bankruptcy court modified that decision when it ruled on the issue of whether a party held a claim arising out of Piper's pre-petition design, manufacture, sale and distribution of allegedly defective aircraft whose injury occurred in the time period between the filing of the bankruptcy petition and the confirmation of the debtor's chapter 11 plan. *See In re Piper Aircraft Corp.*, 169 B.R. 766, 769 (Bankr. S.D. Fla. 1994). The court held that an individual has a § 101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a "relationship" between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's pre-petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. *Id.* at 775. The Court of Appeals for the Eleventh Circuit adopted this test in the case, referred therein as the "Piper test" for determining the scope of the term "claim" in a related adversary proceeding in the case. *See Epstein v. Official Comm.* (*In re Piper Aircraft Corp.*), 58 F.3d at 1577. The court found that '[t]he debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established *before confirmation* between an identifiable claimant or group of claimants and that prepetition conduct." *Id.* (emphasis supplied).

The "fair contemplation test" is another test used by courts, which provides that a claim exists if, based on the pre-petition conduct in question, the parties can fairly contemplate the existence of a claim. *In re Agway, Inc.*, 313 B.R. 31, 42 (Bankr. N.D.N.Y. 2004) (citing *California Dep't of Health Servs. v. Jensen* (*In re Jensen*), 995 F.2d 925, 930 (9th Cir. 1993); *In*

re National Gypsum Co., 139 B.R. 397, 407-09 (N.D. Tex. 1992).

In *Jensen*, the California Department of Health Services asserted a claim in connection with the cleanup of hazardous waste on property on which the individual debtors had operated a lumber company. The court found that it was a pre-petition contingent claim of which the Department had knowledge prior to the debtors' filing of their chapter 7 bankruptcy case and concluded that their pro rata share of the cleanup costs was discharged in their bankruptcy. *Jensen*, 995 F.2d at 931.

The *Gypsum* case relied on by this Court involved counterclaims for future CERCLA response costs which the court determined could be discharged to the extent that they could be fairly contemplated by the parties. So too the court in *In re Hexcel Corp.*, 239 B.R. 564 (N.D. Calif. 1999), relying on *Jensen*, applied the fair contemplation test in the context of a third party complaint against the debtor in connection with the cleanup of the discharge of toxic pollutants. *Id.* at 568. The court in *Hexcel* stated the following:

> Although this distinction between future claims not subject to contemplation by the parties that fall outside the purview of section 101(5) and contingent, foreseeable claims that fall within the Code appears straightforward, the case law has created some confusion regarding the circumstances under which a claim may be discharged. Courts throughout the country have applied a number of different legal tests to conduct this inquiry. However, although these different tests might at first appear to support different outcomes with respect to the case at hand, closer examination reveals that a common thread runs through the large majority of these cases: the claim of a creditor which stems from the pre-petition conduct of the debtor should not be discharged if the parties could not reasonably contemplate the potential existence of the future claim prior to the reorganization.

Id. at 567. The district court further explained that the relationship test appears to incorporate, at least implicitly, the notion that a future claim must be within the reasonable contemplation of the parties. *Id.* at 568. If a relationship exists between the pre-petition conduct of the debtor and

an identifiable potential claimant, the district court reasoned that it typically follows that the parties can fairly contemplate the possible existence of a claim against the debtor. *Id*. *See also Chateaugay Corp.*, 944 F.2d at 1005 (noting that ["[t]he relationship between environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of 'claims'"). Thus, if there was a legal contract between two parties or if there was some contact, exposure, impact, or privity between two parties involved in a tort, the possibility of a claim was within the contemplation of the parties. *See In re Emelity*, 251 B.R. 151, 156 (Bankr. S.D. Cal. 2000) (citing *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.* (*In re Water Valley Finishing, Inc.*), 203 B.R. 537, 541 (S.D.N.Y. 1996), *rev'd on other grounds*, 139 F.3d 325 (2nd Cir. 1998).

In a prior decision in this case, the movants sought to file a late proof of claim against Agway for contribution and indemnity in a lawsuit commenced by a former Agway employee, who was injured when he fell from a feed bin manufactured and/or sold by the movants. This Court found that the "prepetition relationship test" did not apply under those circumstances and opted to apply the "fair contemplation test." *Agway*, 313 B.R. at 42. Ultimately, the Court concluded that the extent of the employee's injuries could have been fairly contemplated by the parties at the time of the accident, which had occurred approximately two years pre-petition. *Id.* Thus, it concluded that the movant's claim for purposes of Agway's bankruptcy case accrued pre-petition. *Id.* at 43.

What is evident from a review of these cases and the application of the various tests is the dilemma facing the courts as they consider the status of injured parties seeking to recover

damages from an entity that has sought relief in bankruptcy. The court in *Chateaugay Corp.* found that it did not need to decide "how the definition of 'claim' applies to tort victims injured by pre-petition conduct, especially as applied to the difficult case of pre-petition conduct that has not yet resulted in detectable injury, much less the extreme case of prepetition conduct that has not yet resulted in any tortious consequence to a victim." *Chateaugay Corp.*, 944 F.2d at 1004. It had only to address "the far more manageable problem of sums ultimately to be owed to the EPA at such time as it incurs CERCLA response costs." *Id.* So too the bankruptcy court in *Piper* recognized that it needed to focus on more than pre-petition events in distinguishing its case from that of "the asbestos and Dalkon Shield future claimants, all of whom were exposed to a known dangerous product before the petition date." *Piper*, 169 B.R. at 774. The same distinction was drawn by the court in *In re Pettibone Corp.*, 90 B.R. 918 (Bankr. N.D. Ill. 1988), which confronted the issue of whether an individual injured post-petition but preconfirmation while operating a forklift manufactured by the debtor pre-petition, had a pre-petition claim. The court noted that

> "[i]f a tort claimant is exposed to a defective product and sustains a bodily injury or impact that gives rises [sic] to future injury prior to the commencement of the debtor's case, the claimant's bankruptcy claim arises pre-petition. This rule applies regardless of nonbankruptcy law providing that the cause of action on the claim does not arise until the claimant discovers his injury or the cause of the injury. Accordingly, in case of pre-petition exposure to harmful chemicals, drugs, materials or interuterine [sic] devices, the bankruptcy courts will presume that a bodily injury was sustained at the time of the exposure to the defective product. For bankruptcy purposes, the claim will be deemed to arise at that time, regardless of whether the injury remains latent and does not manifest itself until after a case is commenced. . . .
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> * * * * * *
>
> Conversely, if a tort claimant whose employer had purchased a defective product pre-petition is exposed only post-petition to that product and sustains bodily

> injury only after filing of the manufacturer's bankruptcy, the claimant's bankruptcy claim arises post-petition This is so even though the debtor wholly manufactured and sold the defective product before commencement of the bankruptcy.

Id. at 932.

The matter presently before this Court involves the very issue that was only referenced in dicta by the courts in *Chateaugay*, *Piper*, and *Pettibone*. The basis for the relief sought by the Asbestos Claimants rests on Agway's prior interest in Texas City Refining, which owned and operated the Texas City Plant where it is alleged the Asbestos Claimants or their decedents were exposed to asbestos. Based on the facts presented herein, which do not involve an issue of liability for the discharge of hazardous waste or an issue of product liability, the Court concludes that the "conduct test" is most applicable under the circumstances. Accordingly, the Court finds that the contingent claims of the Asbestos Claimants against Agway arose pre-petition when the Asbestos Claimants or their decedents were exposed to the asbestos.

Due Process Concerns

While the court in *Pettibone* recognized that it had no need to concern itself with "the solutions emerging from the asbestos cases [which] suggest a pragmatic effort to accommodate bankruptcy policies with the statutory and constitutional rights of victims of mass torts" (*Id.* at 930), that is exactly what now confronts this Court with respect to what can only be identified as the Asbestos Claimants' contingent claims. The Fifth Amendment of the U.S. Constitution 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). "The proper inquiry in evaluating notice is whether the party giving notice acted reasonably in selecting means likely to inform persons affected, not whether each person actually received notice. *In re Best Prod. Co.*, 140 B.R. 353, 357-58 (Bankr. S.D.N.Y. 1992). In a bankruptcy case, each creditor or interested party must receive proper notice in order for it to have the opportunity to protect its interests. *In re Turning Point Lounge, Ltd.*, 111 B.R. 44, 47 (Bankr. W.D.N.Y. 1990). Reasonable notice of a bankruptcy proceeding includes notice of the bar date for filing a proof of claim. *City of New York v. New York, New Haven & Hartford R.R.* Co., 344 U.S. 293, 297 (1953); *In re Enron Corp.*, Case No. 01-15034, 2006 WL 898031, at * 4 (Bankr. S.D.N.Y. March 29, 2006).

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). A "creditor" in bankruptcy is anyone who has a "claim" against the bankrupt estate that arose (so far as it bears on this case) no later than the filing of the voluntary petition in bankruptcy. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000) (citing Code §§ 101(10), 301). Bankruptcy law divides creditors into two groups, known and unknown. *In re Charter Co.*, 125 B.R. 650, 654 (M.D. Fla.1991). However, as the U.S. Court of Appeals for the Seventh Circuit pointed out, these terms are imprecise. *Fogel*, 221 F.3d at 963. The Seventh Circuit explained that:

> The issue is not whether the creditor is known to the trustee but whether the creditor's name and address can be readily ascertained by the trustee, making it feasible to send the creditor the notice directly and not force him to read the fine print in the Wall Street Journal. Apart from the cost of finding the creditor's name and address, the sheer number of potential creditors in relation to the size of their claims may make it excessively costly to provide direct notice to all of them (citation omitted). The cost of direct notice in such a case might eat up the debtor's estate, especially when the claims are discounted to reflect their actual

value.

Id.

Due process entitles known creditors to actual notice of the bankruptcy filing, as well as the claims' bar date. *City of New York*, 344 U.S. at 296; *Waterman S.S. Corp.*, 157 B.R. at 221. A known creditor includes one whose identity is either known or reasonably ascertainable by the debtor. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995), *appeal after remand*, 212 F.3d 199 (3d Cir. 2000). 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 requires a reasonable search for contingent or unmatured claims so that ascertainable creditors can receive adequate notice of the bar date." *In re XO Communications, Inc.*, 301 B.R. 782, 783 (Bankr. S.D.N.Y. 2003). What is "reasonable" depends on the facts of the case but requires more than a cursory review of books and records. *Id.* at 783-84. The focus is on whether the debtor has in its possession "'some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.'" *Id.* at 784, quoting *Louisiana Dep't of Envt'l Quality v. Crystal Oil Co.*, 158 F.3d 291, 297 (5th Cir. 1998). However, in this regard, the debtor need not be "omnipotent or clairvoyant." *Id.* at 793.

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; *see also In re Thomas McKinnon Sec., Inc.*,

130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991) (defining unknown creditors as "those whose identities or claims are not reasonably ascertainable and those creditors who hold only conceivable, conjectural or speculative claims"). Due process does not require debtors to provide actual notice to unknown creditors. *In re Drexel Burnham Lambert Group, Inc.*, 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); *Thomson McKinnon Sec.*, 130 B.R. at 719-20. The Supreme Court observed that "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best (citation omitted). But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication." *City of New York*, 344 U.S. at 296. Notice by publication may be appropriate when potential claimants are numerous, unknown, or have small claims (whether nominally or realistically) -- all circumstances that singly or in combination may make the cost of ascertaining the claimants' names and addresses and mailing each one a notice of the bar date and processing the responses consume a disproportionate share of the assets of the debtor's estate. *Fogel*, 221 F.3d at 963.

The facts here are unlike the facts in *Waterman S.S. Corp.* In *Waterman*, former employees of the debtor (a deep sea ocean carrier) claimed that they were exposed to asbestos pre-petition but manifested asbestos-related diseases post-petition. The court found that the claimants were essentially independent contractors for whom the debtor had no records, and who did not belong to any union that had agreements with the debtor. *Waterman SS. Corp.*, 141 B.R. at 554. However, over 100 claims asserting asbestos-related diseases were filed against the debtor during its reorganization. *Id.* at 558. The majority of the claimants were marine

engineers, and most of them were plaintiffs in litigation pending against the debtor prior to the bankruptcy filing date, which was settled two days prior to confirmation of the debtor's plan. *Id.* The court found that at the time of confirmation the debtor knew that other former, nonsettling employees, whose injuries had not yet manifested themselves, had contingent asbestos-related claims against the debtor. *Id.* For this reason, the court determined that the claimants were known creditors for whom notice by publication was insufficient to comply with due process.[3] *Id.* The court concluded that "[w]e will not tolerate efforts to sandbag a class of known creditors through publication notice when Waterman simply could have appointed a representative to receive notice for, and represent the interests of, known but unidentifiable future claimants." *Id.*

In *In re Chicago, Rock Island and Pacific R.R. Co.*, 90 B.R. 329 (N.D. Ill. 1987), the debtor sought injunctive relief against George and Delores Furry, who had commenced an action against the debtor in 1986 in the U.S. District Court for the District of Nebraska for injuries Mr. Furry had sustained as a result of exposure to asbestos during over 20 years of employment with the debtor. He alleged that he first became aware of the asbestos-related injury sometime in1984 after the bar date of April 12, 1984 in the debtor's case. He did not file a proof of claim against the debtor until November 1986. The court found that the Furrys were unknown creditors prior to the bar date despite the argument made by them that the debtor knew at the time that it filed

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[3] The district court vacated the decision of the bankruptcy court to the extent that the latter court found that not all the asbestosis claimants were known creditors. *In re Waterman S.S. Corp.*, 157 B.R. at 222. The district court held that the bankruptcy court did not adequately analyze whether the notice given by the debtor to those claimants who were unidentifiable and yet had manifested symptoms of the disease when notice of the bar date was published was sufficient *Id.* The district court, however, concurred with the bankruptcy court's finding that the claims of those individuals that had not manifested any symptoms when the bar date was published, were not discharged. *Id.*

its petition that its employees had suffered asbestos exposure and were potential claimants. The court determined that "in the absence of any indication that a particular claim would ensue, the plaintiffs can[not] be classified as potential creditors. A trustee has no duty to give notice, other than publication to non-creditors." *Id.* at 331. The court concluded that they were enjoined from prosecution of their claims against the debtor in the district court. *Id.*

So too in *In re Trump Taj Mahal Assocs.*, 156 B.R. 928 (Bankr. D.N.J. 1993), Helen O'Hara was one of several hundred potential claimants that had been injured at the debtor's premises. She had commenced an action against the debtor in state court on August 21, 1992. This was after the debtor had filed its petition on July 16, 1991, and after the bar date set by the court of August 23, 1991. On October 7, 1992, the O'Haras' attorney was sent a letter on behalf of the debtor requesting that the O'Haras dismiss their complaint, noting that there had been no proof of claim filed by them. The court concluded that the O'Haras' right to payment arose pre-petition and that the action commenced in state court was subject to the automatic stay and enjoined by Code § 524(a)(3). *Id.* at 943. The court found the O'Haras to be unknown creditors who it enjoined from "further violating this court's previous Orders as well as the provisions of the Bankruptcy Code. Specifically, this court enjoins the defendants from prosecuting the subject lawsuit[s] against the debtor, the Taj." *Id.* at 942-43. It also made a finding that the action in state court was null and void as to the debtor. *Id.* at 942.

It is the position of the Asbestos Claimants that they were reasonably ascertainable as creditors by Agway. They make the argument that Agway should have been aware of the possibility of such claims given the press coverage concerning asbestos litigation that has cropped up in this country in the past. While the Asbestos Claimants assert that there has been

asbestos litigation concerning the Texas City Plant since1987, there is no evidence that such litigation had been commenced against Agway during the fifteen years before Agway filed its chapter 11 petition on October 1, 2002. Indeed, the Beaumont Claimants did not commence their litigation against Agway until approximately two years after the Bar Date and a year after confirmation of the Debtors' Plan and appointment of the LT.

Not only have there been no allegations that any of the Asbestos Claimants had sued Agway pre-petition, there also have been no allegations that the Asbestos Claimants were employees of Agway at any time, as had been the case in *Waterman SS Corp.* Agway apparently did not have a business relationship with the Asbestos Claimants, and its only interest in the Texas City Plant, where the Asbestos Claimants assert they were exposed, was limited to a 66% equity interest in Texas City Refining, which in turn owned the Texas City Plant.[4] Agway allegedly divested itself of its interest in Texas City Refining in 1987 or 1988.[5] A thorough review of Agway's books and records is unlikely to have uncovered any indicia to suggest the existence of such claims. It has not been asserted that the Debtor possessed any specific information that reasonably suggested that it was liable for asbestos claims of individuals who previously worked at the Texas City Plant and their identity. Based on the facts presented and

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[4] The Asbestos Claimants asserted in their motion papers that Agway owned the Texas City Plant, but in response to the Court's statement in oral argument that "Agway says they owned 60% of the stock in the Texas City Refinery [sic]," the Asbestos Claimants asserted that Agway had an interest in the Plant that will ultimately prove them liable for the asbestos claims." *See Transcript of July 21st Hearing* at 13 (Docket No. 6073).

[5] According to an article appearing in the J. OF COMMERCE, entitled *Agricultural Co-ops to Sell Refinery to Salomon Unit,* Agway, along with Southern States Cooperative, Inc., which owned the other one-third of Texas City Refining, sold their shares sometime in 1988. 4/29/88 J.COM. 7B. *See also* 10/27/88 SYRACUSE HERALD J. (N.Y.) F7 (indicating that Agway sold its 2/3 ownership in Texas City Refining in June 1988).

the review of the cases cited above, the Court finds that the identities of the Asbestos Claimants were not reasonably ascertainable by Agway. The Court finds it difficult to conclude that they were even conceivable, speculative or conjectural under the circumstances at the time of the Bar Date, as well as at the time of the confirmation of the Debtors' Plan. Accordingly, the Court finds that the Asbestos Claimants were "unknown" claimants.

The Court also finds that Agway provided adequate notice to the Asbestos Claimants as unknown creditors by publishing notice of the Bar Date in the *New York Times*, *Wall Street Journal*, and *Syracuse (N.Y.) Post-Standard* on March 21, 2003. It is impracticable to expect a debtor to publish notice in every newspaper a possible unknown creditor may read. *Best Prods.*, 140 B.R. at 358. Providing adequate notice to unknown creditors such as the Asbestos Claimants did not require Agway to publish notice in the many locations where Agway conducted business. *Id.* That would have been onerous and too costly. As pointed out by the court in *Vancouver Women's Health Collective Soc. v. A.H. Robins Co.*, 820 F.2d 1359 (4th Cir. 1987),

> [i]n bankruptcy, the court has an obligation not only to potential claimants, but also to existing claimants . . . . The Court must balance the needs of notification of potential claimants with the interests of existing creditors and claimants. A bankrupt estate's resources are always limited and the bankruptcy court must use discretion in balancing these interests when deciding how much to spend on notification.

Id. at 1364.

Furthermore, there is a question whether its interest in Texas City Refining qualifies as "conducting business" in Texas City, Texas. Moreover, there is no information concerning whether the Asbestos Claimants were actually residents of Texas City, Texas. Courts consistently reject the argument that a publication of "general circulation," such as the *New York Times* or *Wall Street Journal*, must be available in the particular locality where the objecting

party resides. *In re Adler, Coleman Clearing Corp.*, 204 B.R. 99, 107 (Bankr. S.D.N.Y. 1997). For example, in *Chemetron Corp.*, 72 F.3d at 347-348, the Third Circuit held that publication of the notice of bar date in the *New York Times* and the *Wall Street Journal* was sufficient even though the claimants were "scattered across Ohio and as far away as Texas." In *Wright v. Placid Oil Co.*, 107 B.R. 104, 106 (N.D. Tex. 1989), the district court held that publication of the bar date order in the *Wall Street Journal* was sufficient notice to an unknown creditor injured at the debtor's location in Louisiana. *See also In re US Airways, Inc.*, No. 04-13819-SSM, 2005 WL 3676186, at *6 (Bankr. E.D. Va. Nov. 21, 2005) (declaring that publication in national newspapers is sufficient, especially given the nationwide nature of the debtor's business); *Brown v. Seaman Furniture Co.*, 171 B.R. 26, 27 (E.D. Pa. 1994) (holding publication in local and national editions of the *New York Times* sufficient notice to claimant in Pennsylvania).

Accordingly, the Court finds that publication of the Bar Date Notice on a single day in two newspapers of general circulation (*New York Times* and *Wall Street Journal*) and one newspaper of regional circulation (*Syracuse (N.Y.) Post-Standard*) was reasonable under the circumstances. *In re Adler*, 204 B.R. at 107 (citing *In re Chicago Pac. Corp.*, 773 F.2d 909, 917 (7th Cir. 1985) (notice published once in the *Wall Street Journal* sufficient constructive notice of hearing on reorganization plan). The Court concludes that Agway satisfied the due process requirements of providing adequate notice to the Asbestos Claimants.

The question then arises regarding whether to allow the Asbestos Claimants as pre-petition creditors to file late proof of claim, thus entitling them to share in the distribution from the Liquidating Trust. Courts may allow proof 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)'s

"excusable neglect" standard governs late filings of proofs of claim in chapter 11 cases. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 (1993). In *Pioneer* the Supreme Court declared that Fed.R.Bankr.P. 9006(b)(1) grants a reprieve to out-of-time filings that were delayed by "neglect," and that the word "neglect" encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. *Id.* at 388. 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 burden of proving excusable neglect lies with the late-claimant.'" *Midland Cogeneration Venture LP v. Enron Corp.* (*In re Enron Corp.*), 419 F.3d 115, 121 (2d Cir. 2005) (quoting *Chemetron Corp.*, 212 F.3d at 205). Furthermore, "[i]gnorance of one's own claim does not constitute excusable neglect." *Best Prod.*, 140 B.R. at 359.

In this case, the Asbestos Claimants assert that their request to file late proofs of claim is not based on neglect on their part. Rather, they rely on arguments of a lack of due process, as discussed above, and the fact that some of the claimants (including the Beaumont Plaintiffs), did not manifest symptoms of an asbestos-related disease prior to the time when Agway filed its bankruptcy.[6]

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[6] Most of the Asbestos Claimants were diagnosed with asbestos-related diseases before October 1, 2002 (the date the Debtors filed their petitions), but nine were not. Specifically, the Asbestos Claimants allege the following: (1) Harold R. Castleman ("Castleman") was diagnosed (with an asbestos-related disease) on November 15, 2004; (2) William A. Higman ("Higman") was diagnosed on August 3, 2004; (3) Walter Ray Whitehead ("Whitehead"), deceased, was diagnosed on February 12, 2004; (4) John Nathan Thompson ("Thompson"), deceased, was diagnosed on February 9, 2004; (5) Joe H. Jobe ("Jobe"), deceased, was diagnosed on August 21,

With respect to the issue of excusable neglect, there have been no allegations that the Asbestos Claimants acted in bad faith. Whether or not the delay in seeking to file a claim against Agway was within their reasonable control is impossible to determine when one considers that there are allegedly over 35, and perhaps as many as 58, Asbestos Claimants represented by RM&Q. There clearly has been a substantial delay in seeking the relief herein, particularly when one considers the fact that the majority of the Asbestos Claimants were aware of their injuries prior to Agway's filing in 2002, a period of almost four years. In that interim period, the Debtors have successfully liquidated their assets pursuant to the Confirmation Order of April 28, 2004, and have already made several distributions to unsecured creditors. Although prejudice to creditors is not among the factors cited by the Supreme Court in *Pioneer*, the Court cannot ignore the fact that allowing the Asbestos Claimants to file late claims would also be extremely prejudicial to those creditors that timely filed claims and voted to accept Agway's Plan. Most importantly, to allow the claims of the Asbestos Claimants to be tardily filed and to then have them liquidated in the Texas Asbestos Litigation would be clearly prejudicial to Agway in both delay and in cost. Under those circumstances, the Court concludes that it must deny the motion of the Asbestos Claimants to be permitted to file late proofs of claim.

Therefore, under the terms of the Bar Date Order, entered on May 30, 2003, because the

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2003; (6) William Vaughn ("Vaughn") was diagnosed on February 10, 2003; (7) Julia Fay Warren ("Warren"), deceased, was diagnosed on February 7, 2003; (8) Joseph Ernest Malbrough, Sr. ("Malbrough"), deceased, was diagnosed on January 6, 2003; (9) Philip Dean Cook ("Cook") was diagnosed on December 16, 2002 (the "Nine Asbestos Claimants"). Of these Nine Asbestos Claimants, Vaughn, Warren, Cook and Malbrough were allegedly diagnosed before the March 21, 2003, publication of the Bar Date. Whitehead, Thompson, and Jobe were allegedly diagnosed before the Plan Confirmation Order signed on April 28, 2004. Only Higman and Castleman were allegedly diagnosed after the Confirmation Order.

Court holds that the Asbestos Claimants' failed to file timely proofs of claim, they are "forever barred, estopped and enjoined from asserting such claim against the Debtors . . . and the Debtors and their property shall be forever discharged from any and all indebtedness or liability with respect to such claims, and such holder shall not be permitted to . . . participate in any distribution in the Debtors' chapter 11 cases on account of such claim . . . ." Bar Date Order at 5. In addition, because the Asbestos Claimants, including the Beaumont Plaintiffs, are pre-petition creditors, they are bound by the provisions of the Plan given the Court's conclusion that they received adequate notice as unknown creditors.

Furthermore, the Court notes that Agway's Plan provides for total liquidation, with distribution of all assets to the pre-petition creditors that timely filed their proofs of claim. No assets will revest in the Debtor and no bankruptcy estate exists. The Debtor has no future in the marketplace, i.e. no entity succeeds it. Under the terms of the Plan, all of the Debtors, except Agway, were to have been deemed dissolved and each was to file with the office of the Secretary of State or other appropriate office for the state of its reorganization a certificate of cancellation or dissolution. *See* § 7.04(c) of the Plan. "Agway, Inc. shall be deemed dissolved once the Pension Plan and Thrift Plan have been terminated and all assets of such plans are fully distributed." *Id.* From a practical point of view, these cases constitute a "straight" liquidation, which "would preclude claims through the dissolution of the Debtor company." *See In re Erie Lackawanna R.R. Co.*, 803 F.2d 881, 882 (6th Cir. 1986) (*dicta*).

Article XI, ¶ 11.03 of the Debtors' Plan provides that "[e]xcept as otherwise provided in section 1141(d)(3) of the Bankruptcy Code, on and after the Confirmation Date, the provisions of the Plan shall bind any holder of a Claim against . . . the Debtors . . . ." Code § 1141(d)((3)

provides that confirmation of a plan does not discharge a debtor if (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan, and (C) the debtor would be denied a discharge under Code § 727(a) if the case were a case under chapter 7. In this regard. Code § 727(a) does not grant a discharge to a debtor that is not an individual. *See N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377, 378-79 (9th Cir. 1988). That being the case, because Agway is a corporation and not an "individual," it was not entitled to a discharge. Because there is to be no successor corporate entity and because Agway is to be dissolved, the Beaumont Claimants, as well as the other Asbestos Claimants, may be precluded from continuing or commencing any further litigation against Agway. However, since the Court has concluded that they may not file late proofs of claim, they clearly cannot enforce their claims against the Liquidating Trust.

Contempt Motion

The LT argues that the Beaumont Plaintiffs are in contempt under the terms of the Plan and Confirmation Order.[7] The Beaumont Claimants had no actual notice of Agway's bankruptcy

[7] Article XII, ¶ 12.02 of the Debtors' Plan, provides that, with certain exceptions identified therein,

case when they commenced the Texas Asbestos Litigation. On or about March 8, 2005, a little over a year ago, they were apprized of the Debtors' bankruptcy and the assertion by the LT that they were barred from pursuing their claims against Agway. The Contempt Motion was filed by the LT three months later on June 8, 2005, when the Beaumont Claimants declined to dismiss the Texas Asbestos Litigation against Agway. However, they did agree not to proceed with the litigation pending this Court's determination of their motion, as well as the LT's motion.

Under the terms of the Confirmation Order, the provisions of Code § 362 ceased upon the Effective Date, which was deemed to have occurred on May 1, 2004. *See* ¶ 60 of the Confirmation Order. The Beaumont Claimants commenced the Texas Asbestos Litigation on February 14, 2005. With respect to the statutory injunction set forth in Code § 524(a), the Court does not believe it has any application with respect to a corporation that has liquidated all of its property and has no statutory right to a discharge. Under the circumstances of this case, the Court concludes that the Beaumont Claimants' actions do not rise to the level of contempt that warrants an award of damages. It appears that their actions were taken in good faith and in an effort to protect their rights for which the Court cannot find fault.

Based on the foregoing, it is hereby

> all holders of Claims . . . .shall be deemed to have released, remised and forever discharged (a) the Debtors . . . from all debts, demands, actions, causes of action, . . . claims and liabilities whatsoever, known or unknown, arising from a Claim . . . which occurred prior to the Petition Date.

This appears to be in conflict with Article XI, ¶ 11.03 concerning the binding effect of the Plan "except as otherwise provided in section 1141(d)(3) . . . ." However, the Court deems it unnecessary to comment on the effect of the two provisions on the Asbestos Claimants when addressing the Contempt Motion.

ORDERED that the motion of the Asbestos Claimants requesting that they be allowed to file late proofs of claim against the Liquidating Trust is denied; it is further

ORDERED that because their claims are pre-petition claims, the Asbestos Claimants are bound by the terms of the Court's Confirmation Order, entered on April 28, 2004; and it is finally

ORDERED that the LT's Contempt Motion is denied for the reasons stated above.

Dated at Utica, New York

this 3rd day of August 2006

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge