James M. McCreedy, Esq.
Wiley, Malehorn And Sirota
Attorneys for Blanchard Securities Co.
250 Madison Avenue
Morristown, New Jersey 07960

Jeffrey Dove, Esq.
Menter, Rudin & Trivelpiece, P.C.
Attorneys for Liquidating Trustee
500 S. Salina Street
Syracuse, New York 13202

Re: Agway, Inc.
Agway General Agency, Inc.
Brubaker Agronomic Consulting Service, LLC
Country Best Adams, LLC
Country Best-DeBerry, LLC
Feed Commodities International, LLC
Case No. 02-65872 Chapter 11 Jointly Administered
Motion by Blanchard Securities Co. to Extend Time to File Notice of Appeal

LETTER DECISION AND ORDER

On August 26, 2004, this Court, from the bench, granted the Liquidating Trustee's motion seeking to expunge the claim of Blanchard Securities Co. ("Blanchard") and requested that the Liquidating Trustee submit a proposed order while simultaneously providing a copy of the proposed order to Blanchard's counsel. By letter, dated August 30, 2004, the Liquidating Trustee's counsel forwarded the proposed order to the Court, with a copy mailed to Blanchard's counsel, asking that the Court sign it if the order met with "the Court's approval and counsel for Blanchard Securities does not file any objections with respect to form . . . ." The Court received the letter, as well as the proposed order, on August 31, 2004, and signed the order on September 1, 2004.

On September 27, 2004, a motion was filed on behalf of Blanchard seeking an extension of time for the filing of a notice of appeal in connection with the Order of September 1, 2004, pursuant to Rule 8002(c) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). According to Blanchard's counsel, the proposed order, along with the cover letter of August 30, 2004, was not received at its offices until Tuesday, September 7, 2004, following the Labor Day weekend. Counsel represented to the Court at the hearing on October 28, 2004, that he believed that he had seven days from the date of service to review the Order and to serve a counterproposal pursuant to Local Rule 9021-1(c)(1), applicable to settlement of a judgment or order.

Blanchard's counsel indicated that after reviewing the proposed Order, he contacted the Liquidating Trustee's counsel and left a message indicating that he had no opposition to the form of the Order. On September 14, 2004, Blanchard's counsel contacted the Court to ascertain the status of the Order and was apprized that it had been signed by the Court on September 1, 2004, as reflected on the electronic docket in the case (Docket No. 5555).

Fed.R.Bankr.P. 8002(c)(2) allows a court to extend the time for filing a notice of appeal upon a showing of excusable neglect as long as the motion is filed within the twenty days after the expiration of the time for filing such a notice. In this case, pursuant to Fed.R.Bankr.P. 8002(a) and 9006(a), Blanchard had until Monday, September 13, 2004, to timely file its notice of appeal. It filed its motion seeking an extension on September 27, 2004, within the twenty day period referenced above.

The Supreme Court previously established a liberal standard for "excusable neglect" as applied to Fed.R.Bankr.P. 9006(b)(1) in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). However, in the context of Fed.R.Bankr.P. 8002(c), this Court

previously has found that the standard is a stricter and more narrow one than that applied in *Pioneer*. *See In re Mowers*, 160 B.R. 720, 725 (Bankr. N.D.N.Y. 1993). The Court summarized the standard as follows:

> [T]he requirement of a timely notice of appeal is 'mandatory and jurisdictional.' . . . [A] finding of 'excusable neglect' must be based on either acts of someone other than appellant or his or her counsel, or some extraordinary event. Such a finding *may not be based on common oversight or administrative failure by the would-be appellant's counsel.*

Id., quoting *Matter of G. General Electro Components, Inc.*, 113 B.R. 122, 123 (Bankr. D. Conn. 1990).

In this case, there have been no allegations of extraordinary circumstances or acts by anyone other than Blanchard's own counsel. Blanchard's counsel relies on the provisions in Local Rule 9021-1 in arguing that he believed that he had seven days to review the proposed order before its entry by the Court. As noted by the district court in *In re Seatrain Lines, Inc.*, 198 B.R. 45, 54 (S.D.N.Y. 1996), a similar argument to that now being made by Blanchard's counsel had been made to the Hon. Jeffry H. Gallet, former U.S. Bankruptcy Judge, by Travelers Insurance Co., *et al*. in seeking an extension to file an appeal. In that case, Travelers' counsel had argued that advance notice of the order was required under the Court's local rules, which applied to settlement of orders and judgments following a hearing or decision. Judge Gallet found that there had been no direction that the order submitted by the chapter 7 trustee be "settled."[1] Judge Gallett pointed out that former U.S. Bankruptcy Judge Francis G. Conrad, who had denied Travelers' motion to have the bankruptcy court abstain from hearing the matter, "'had ruled dispositively from the bench and had

[1] As pointed out by the district court in *Seatrain*, it is a "term of art describing a proposed court order to which the opposing party is entitled to object." *Seatrain,* 198 B.R. at 725.

merely requested that the proposed order reflect his ruling.'" *Id.* Judge Gallet, in denying Travelers' motion seeking an extension to file its notice of appeal from Judge Conrad's decision, observed that "'Travelers' counsel was present in court on the day of the hearing and was aware of Judge Conrad's decision . . . . Travelers could have appealed Judge Conrad's decision at any point after it was announced from the bench.'" *Id.*, quoting Judge Gallet's Decision on Travelers' Motion to Extend its Time to Appeal at 6. Ultimately, the district court affirmed the decision of Judge Gallet, who had denied Travelers' request for an extension.

A similar set of circumstances now confronts this Court in connection with Blanchard's motion seeking an extension of time to file its notice of appeal. Blanchard's counsel relies on a provision found in Local Rule 9021-1(c)(1), applicable to settling orders. Blanchard's counsel was present in court on August 26, 2004, when the Court requested counsel for the Liquidating Trustee to submit an order memorializing its ruling from the bench. No mention was ever made by the Court that counsel "settle" the order. The cover letter from the Liquidating Trustee's counsel, dated August 30, 2003, also makes no mention of the need to "settle" the order.

The Order of September 1, 2004, was docketed in the case. Apparently, Blanchard's counsel, upon receiving a copy of the proposed order on September 7, 2004, made no attempt to locate the Order on the docket before making its telephone inquiry to the Court a week later on September 14, 2004. As noted by U.S. Bankruptcy Judge John J. Connelly, "[c]ounsel have an avid duty to monitor the Court's dockets. There's in place now an electronic method for checking the Court's docket from the attorney's office . . ." *In reWechsler*, 246 B.R. 490, 494 (S.D.N.Y. 2000), quoting March 12, 1999 hearing transcript at 15-16. Indeed, Blanchard's counsel, having been present when the Court made its ruling granting the Liquidating Trustee's motion to expunge

Blanchard's claim, could have filed a notice of appeal without the need to wait until the entry of the Court's Order of September 1, 2004, pursuant to Fed.R.Bankr.P. 8002(a). Under those circumstances, the Court concludes that Blanchard's counsel's neglect in failing to discover that the Order had been signed on September 1, 2004, until after the time to file its notice of appeal is not excusable, and its motion seeking an extension of time to file its notice of appeal pursuant to Fed.R.Bankr.P. 8002(c) is denied.

IT IS SO ORDERED.

Dated at Utica, New York

this 4th day of November 2004

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge