UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re	:	Chapter 11
ENRON CORP.,	:	Case No. 01-16034 (AJG)
	:	Jointly Administered
Reorganized Debtors.	:	(Confirmed)

OPINION DENYING ENTERPRISE PRODUCTS OPERATING L.P.'S MOTION FOR (1) LEAVE TO AMEND PROOF OF CLAIM, AND (2) LEAVE TO FILE LATE PROOF OF CLAIM

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The issues before the Court are (1) whether Enterprise Products Operating, L.P. ("Enterprise") may amend its Proof of Claim ("Proof of Claim") against Enron North America Corp. ("ENA") to (a) include a specific claim for a guaranty that Enron Corp. ("Enron") executed, and (b) to more clearly assert Enron as an additional debtor to the Proof of Claim, or, in the alternative, (2) whether Enterprise may file a late proof of claim against Enron for a guaranty entered into by both parties based on "excusable neglect." Upon consideration of the pleadings and arguments of the parties, the Court finds that Enterprise may not amend the Proof of Claim due to prejudice to the opposing party. Further, the Court finds that Enterprise may not file a late proof of claim based on "excusable neglect."

I. Jurisdiction

The Court has subject matter jurisdiction over this matter under sections 1334(b) and 157(a) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York. This is a core proceeding within the meaning of section 157(b)(2) of title 28 of the United States Code.

II. Background

A. *General Procedural History*

Commencing December 2, 2001 (the "Petition Date"), Enron, ENA and certain of Enron's direct and indirect subsidiaries (collectively, the "Debtors" or "Debtor," referencing a single entity) each filed voluntary petitions for relief under chapter 11 of title 11 of the United

States Code (the "Bankruptcy Code"). The Debtors' chapter 11 cases were procedurally consolidated for administrative purposes. During the chapter 11 cases, the Debtors operated their businesses and managed their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004.

The Debtors filed "Motion of the Debtors for an Order Pursuant to Bankruptcy Rules 2002(a)(7), 2002(1), and 3003(c)(3) Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Manner of Providing Notice Thereof" on July 31, 2002 ("Bar Date Notice Request"). The Bar Date Notice Request provided the following provision: "To avoid confusion and facilitate the Claims reconciliation process, the Debtors request that all creditors . . . be required to file separate Proofs of Claim with respect to each alleged claim and against each Debtor." By order dated August 1, 2002 (the "Bar Date Order"), the Court set October 15, 2002 as the bar date (the "Bar Date") by which proofs of claim must be filed against certain Debtors and approved the Bar Date Notice Request "in all respects." The Bar Date Order further provided that any creditor who fails to file a proof of claim in accordance with the Bar Date Order by October 15, 2002, "shall be forever barred, estopped and enjoined from asserting such claim against such Debtor (or filing a proof of claim with respect thereto) . . . ." August 10, 2002, the Debtors mailed, *inter alia*, the notice of the Bar Date to potential creditors of the Debtors, including Enterprise ("Bar Date Notice").

B. *Enterprise's Proof of Claim*

Prior to the petition date, Enterprise engaged in energy trading transactions with ENA. On November 11, 1999, Enterprise and ENA entered into an ISDA Master Agreement ("ISDA"),

pursuant to which Enron executed a guaranty (the "Guaranty") on January 26, 2000, promising to "guarantee[] the timely payment when due of obligations of" ENA. After ENA filed a Chapter 11 case on December 2, 2001, Enterprise timely filed the Proof of Claim against ENA asserting a claim in the amount of $11,678,202.86, consisting of (1) $11,678,202.86 allegedly owed to Enterprise as a result of financial gas swaps during the period of November 2001 through March 2002, less (2) a total of $1,279,365.00 which Enterprise and its subsidiary, Pontchartrain Natural Gas System owe to ENA and which Enterprise asserts is subject to setoff under the ISDA.[1] Enterprise attached an unexecuted copy of the Guaranty to this claim, but failed to file a separate proof of claim against Enron for the Guaranty.[2] Debtors thereafter objected to the ENA claim and sought to reclassify it as unsecured and allowed in its net amount of $10,398,837.86.

Enterprise maintains that its failure to file a proof of claim against Enron based upon the Guaranty was through inadvertence. In particular, Enterprise explains that while it was reviewing the basis for claims, collecting data to support proofs of claims, and preparing the claims prior to the Bar Date, the Guaranty was not discussed. In March 2005, in connection with the claims objections and resolution process with the Debtors, Enterprise inquired as to how a guarantee would be treated in the Enron case. Enterprise maintains that until that time it had not "become aware of and had inadvertently overlooked the need to file a separate stand-alone proof of claim against (Enron)" on the Guaranty. On April 19, 2005, Enterprise located a signed copy of the Guaranty. Thereafter, on May 31, 1004, Enterprise filed a motion for leave to amend the

[1] This setoff amount comprises $1,047,240.00 which Enterprise owes to ENA arising out of the financial swap contracts and $232,125.00 which Enterprise's subsidiary, Pontchartrain Natural Gas System, owes to ENA for the pre-petition purchase of natural gas. Enterprise asserts that both of these are subject to setoff pursuant to the ISDA.

[2] Enterprise also timely filed a proof of claim against Enron Gas Liquids, Inc. ("EGLI") in regard to transactions that are not at issue here.

Proof of Claim against ENA or leave to file a late proof of claim. The hearing took place July 28, 2005.

III. Discussion

A. *Parties' Contentions*

1. *Enterprise's Contentions*

Enterprise contends that its claims against ENA and Enron were preserved because in addition to Enron's scheduling of the Guaranty claim as undisputed, Enterprise filed the Proof of Claim which listed the case names and numbers for both ENA and Enron in its caption and included as an attachment the ISDA, an exhibit to which is an unsigned copy of the Guaranty. Enterprise alleges that this put Enron on notice that it would be held liable under the Guaranty. Therefore, Enterprise reasons, the rationale of section 501 of the Bankruptcy Code was satisfied and it should be allowed to amend its claim to specifically include its Guaranty claim against Enron.

In the alternative, Enterprise argues that it should be allowed to file a late proof of claim against Enron because its failure to do so by the Bar Date was the result of excusable neglect and mere inadvertence during the "complicated compilation of data and calculation of the underlying liabilities" to identify the Guaranty and realize the need "to file a separate stand-alone claim" on that basis.

Enterprise further argues that neither amending its claim nor filing a late proof of claim at this juncture will prejudice Enron because the debtors have proposed a liquidating plan. Because in a liquidating plan a debtor does not plan on continuing business after discharge, allowing a late proof of claim will only shift the distribution of assets from the debtor's limited pool of funds and will not directly affect the debtor. Enterprise asserts that the Guaranty claim, at just

less than $10.5 million, would have only a *de minimis* impact on the overall distribution and result in no disruption to the judicial proceedings.[3]

2. *Debtors' Contentions*

The Debtors contend that Enron properly scheduled the Guaranty as a potential claim, thereby putting Enterprise on notice. Enron scheduled Enterprise as having a "contingent" and "unliquidated" claim on the Guaranty. As stated previously, Enterprise did not file a separate proof of claim against Enron. Enron argues that because the Bar Date Notice "clearly states that a creditor must file a separate proof of claim with respect to each such Debtor and identify on the form the particular Debtor against whom the claim is asserted," Enterprise's motion to amend its claim or file a late proof of claim should be denied.

Further, Enron maintains that the mere attachment of the Guaranty to the back of the Proof of Claim does not put Enron on notice that Enterprise intends to preserve its claim. Enron argues that not only did Enterprise not file a separate proof of claim based on the Guaranty, but it also did not reference the Guaranty in the Proof of Claim or even mention any claim against Enron in that claim. Nor does the Summary of Claim "mention Enron or indicate an intention to hold Enron liable for any of ENA's obligations under the Master Agreement."

Enron also asserts that allowing Enterprise to amend its claim or file a late proof of claim at this juncture will cause great prejudice. Despite Enterprise's assertions that the claim would not be prejudicial because Enron's is a liquidating plan and because its claim would only have a *de minimis* impact on the plan overall, Enron maintains that allowing the claim would "open[] the floodgates to other late filed guaranty claims" and that even a small number of similar such

[3] The Guaranty claim proposed would be in the amount of $10,398,837.86. Because guarantied claims are paying 14.5 percent, the claim is worth approximately $1,507,831.49 to Enterprise.

claims could "impede the claims resolution process." Further, Enron maintains that Enterprise's failure to timely file a copy of the executed Guaranty was wholly within Enterprise's reasonable control. Enron asserts that Enterprise has only offered a vague explanation of why it took almost three years to locate the Guaranty and to determine whether a separate claim based on the Guaranty was necessary.

B. *Amendment of a Proof of Claim*

1. *General Standards for Permitting A Post-Bar Date Amendment to a Timely Filed Proof of Claim*

Bankruptcy Rule 3003(c)(3) directs a bankruptcy court to establish a bar date beyond which proofs of claim are disallowed in a chapter 11 case. The bar date is critically important to the administration of a successful chapter 11 case for it is intended "to be a mechanism providing the debtor and its creditors with finality." *Gulf States Exploration Co. v. Manville Forest Products Corp. (In re Manville Forest Products Corp.),* 89 B.R. 358, 374 (Bankr. S.D.N.Y. 1988). A bar date order "serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization.'" *In re Keene Corp.,* 188 B.R. 903, 907 (Bankr. S.D.N.Y. 1995) (quoting *First Fidelity Bank, N.A. v. Hooker Invs., Inc. (In re Hooker Invs., Inc.),* 937 F.2d 833, 840 (2d Cir. 1991)). The bar date, rather than serving merely as a procedural tool, is an integral part of the reorganization process. *Id.* (quoting *First Fidelity*, 937 F.2d at 840 (quoting *United States v. Kolstad (In re Kolstad),* 928 F.2d 171, 173 (5th Cir. 1991))).

The bankruptcy judge has the discretion to grant or deny an amendment to a timely filed proof of claim. *In re McLean Industries, Inc.,* 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990). The

bankruptcy court must take care that an amendment would truly amend a timely filed proof of claim rather than assert a new claim. *Maxwell Macmillan Realization Liquidating Trust v. Aboff (In re Macmillan)*, 186 B.R. 35, 49 (Bankr. S.D.N.Y. 1995). Courts apply a two-prong test. *Integrated Resources, Inc. v. Ameritrust Co. N.A. (In re Integrated Resources, Inc.)* 157 B.R. 66, 70 (S.D.N.Y. 1993) (citing *Associated Container Transp. (Austrailia) Ltd. v. Black & Geddes (In re Black & Geddes, Inc.)*, 58 B.R. 547, 553 (S.D.N.Y. 1983)). First, a court must determine whether there was "'timely assertion of a similar claim or demand evidencing an intention to hold the estate liable.'" *Id.* (quoting *Black & Geddes, Inc.*, 58 B.R. at 553). If the first prong is satisfied, the court must then determine whether it would be equitable to allow the amendment. *Id.* In balancing the equities the court then examines each fact within the case and considers five equitable factors: (1) undue prejudice to the opposing party; (2) bad faith or dilatory behavior on the part of the claimant; (3) whether other creditors would receive a windfall were the amendment not allowed; (4) whether other claimants might be harmed or prejudiced; and (5) the justification for the inability to file the amended claim at the time the original claim was filed. *Integrated Resources*, 547 B.R. at 70 (quoting *In re McLean Indus., Inc.*, 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990)). "The second prong is to be applied only if the first prong is satisfied and the claim qualifies as an amendment and not simply a new claim." *In re Sage-Dey, Inc.*, 170 B.R. 46 (Bankr. N.D.N.Y. 1994) (citing *Integrated Resources*, 157 at 70).

2. *Application of Rule 15(c) of The Federal Rules of Civil Procedure*

As the Court discussed in *Midland Congeneration Venture Ltd. v. Enron Corp., (In re Enron Corp.)*, 298 B.R. 513, 521 (Bankr. S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005), neither the Bankruptcy Code nor Bankruptcy Rules directly address amendment of a proof of claim. However, in

determining whether the first prong of the two-prong test is satisfied, we and other courts have applied Rule 15(c) of the Federal Rules of Civil Procedure ("Rule") pursuant to Bankruptcy Rules 7015 and 9014(c), to analyze such an amendment. *Id.* (citing *Enjet, Inc. v. Maritime Challenge Corp. (In re Enjet, Inc.)*, 220 B.R. 312, 315 (E.D.La. 1998); *In re Brown*, 159 B.R. 710, 714 (Bankr. D.N.J. 1993); *Liddle v. Drexel Burnham Lambert Group, Inc.*, 159 B.R. 420, 425 (S.D.N.Y. 1993) and; *McLean Industries*, 121 B.R. at 710).[4] Accordingly, the Court exercises its discretion under Rule 9014(c) in applying by analogy the standards of subsections (c)(2) and (c)(3) of Rule 15 to determine whether the Guaranty claim relates back to the Proof of Claim against ENA and whether Enterprise can add Enron as a debtor to the Proof of Claim. Rule 15(c) provides in pertinent part

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the [120-day] period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

After the statute of limitations has run (here, the Bar Date), Rule 15(c)(2) is used for amending an original pleading (here, the Proof of Claim) to add a claim or defense, and Rule 15(c)(3) applies for adding a new party (here, Enron). Although Rule 15(c)(3) refers to changing a party and does not state adding a party, the Court and others have liberally construed the word "changes" to include adding a new party. *In re Enron Corp.* 298 B.R. 513, 522 (Bankr.

[4] Bankruptcy Rule 7015 provides that Rule 15 applies in adversary proceedings and Bankruptcy Rule 9014 permits a [bankruptcy] court to extend Rule 7015 to contested matters as well as adversary proceedings. *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992) (citations omitted).

S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005) (citations omitted).

Because Rule 15(c)(3) provides that the requirements of Rule 15(c)(2) must first be satisfied, the Court will, as in *In re Enron Corp.* 298 B.R. 513 (Bankr. S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005), examine whether Enterprise can add the Guaranty claim and Enron as a debtor to the Proof of Claim under the criteria of Rule 15(c)(3). However, the Court will not extend the analysis by analogy to Rule 15(c)(3)'s criteria that notice must be provided to the newly-named party within the Rule 4(m) period. The party asserting the relation-back, here, Enterprise, bears the burden of proof. *Randall's Island Family Golf Ctrs. v. Acushnet Co. (In re Randall's Island Family Golf Ctrs.)*, 2002 WL 31496229, at *2, 2002 Bankr.Lexis 1247, at *6 (Bankr. S.D.N.Y. Nov. 8, 2002).

The Court notes that the Guaranty executed by Enterprise and Enron specifically provides that it was entered into in regard to "swap, option or other financially-settled derivative transactions" of the parties. It provides that because Enron "will directly or indirectly benefit from the transactions to be entered into between [Enron North America] and [Enterprise]," and "in consideration of [Enterprise] entering into the Contract, [Enron]" agrees to "irrevocably and unconditionally guarantee[] the timely payment when due of the obligations of" ENA to Enterprise. Further, the Guaranty was entered into on the same date as the ISDA Master Agreement, November 11, 1999. While the Guaranty claim is a different cause of action from the underlying ISDA, courts have allowed parties to add another claim on amendment if it arises out of the same transaction or occurrence. *In re Soly Srour*, 138 B.R. 413, 418 (Bankr. S.D.N.Y. 1992). Accordingly, the Court finds that the Guaranty claim does arise out of the same

transaction or occurrence set forth in the Proof of Claim, that is, the Guaranty claim is related to the ISDA.

The second factor or Rule 15(c)(3) requires that the party to be brought in by the amendment to have received adequate "notice" on the institution of the action so the party will not be prejudiced in maintaining a defense on the merits. Aside from actual notice under the rule, notice received by the original defendant may be imputed to the new defendant if there is an identity of interest between these two parties. Under the identity of interest exception, "the institution of an action against once party will constitute imputed notice to a party subsequently named by an amendment of the pleading when the parties are closely related in their business activities or linked in their corporate structure." *Allbrand Appliance & Television Co. v. Caloric Corp. (In re Allbrand Appliance & Television Co.)*, 875 F.2d 1021, 1025 (2d Cir. 1989). A "parent-subsidiary relationship standing alone is simply not enough . . . to establish the identity of interest exception to the relation back rule." *Id*. Instead, courts have required "substantial structural and cultural identity, such as shared organizers, officers, directors, and offices." *Id.* Although the Guaranty claim was noted on Enron's schedules, such disclosure does not impute notice to Enron of the institution of this action, that is, Enterprise's filing of the Proof of Claim. Nor does Enterprise's attachment of a copy of the ISDA and an unsigned copy of the Guaranty to the Proof of Claim against ENA impute notice to Enron of the institution of this action. The Bar Date Order, sent to all creditors listed in Enron's Schedules, of which Enterprise was one, explicitly and unambiguously stated a creditor must file a separate proof of claim for each specific Enron entity that the creditor desired to hold liable. Enterprise filed the Proof of Claim in ENA's case and evidenced its intent to hold that particular entity liable. Rather, because Enron shared officers with its subsidiary ENA and that the two entities were closely related in

their business operations and other activities, the Court finds that notice may be imputed to Enron that it was aware of the Proof of Claim based on Enron and ENA's identity of interest between the parties.

Enterprise's amendment to the Proof of Claim must still meet the "mistake" factor under Rule 15(c)(3). To establish "mistake" under Rule 15(c)(3), Enterprise must show either factual mistake, such as misnaming a party it wished to sue, or legal mistake such as misunderstanding the legal requirements of its cause of action. *Thomas Rogers v. Sterling Foster & Co. (In re Sterling Foster & Co.)* 222 F.Supp.2d 216, 261 (E.D.N.Y. 2002). As the Court reasoned in *In re Enron*, 'mistake' under Rule 15(c)(3) is concerned primarily with the new party's awareness that failure to join it was error and not deliberate strategy, and depends on what the plaintiff knew about the identity and involvement of the added defendant when he filed the timely pleading. *In re Enron Corp.* 298 B.R. 513, 524 (Bankr. S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005) (citations omitted). Here, although Enterprise was aware of Enron's identity at the time it filed the Proof of Claim, and although an unsigned copy of the Guaranty was attached to that claim, the Court nevertheless finds that Enterprise's failure to add Enron is a mistake, that is, actual inadvertence on the part of Enterprise, not a conscious choice or deliberate strategy to exclude Enron.

Despite finding that Enterprise's amendment satisfies the first prong of the two-prong test, the Court concludes that the amendment should still not be permitted under the second prong, a similar equitable determination made in finding no excusable neglect below. *See generally Brown*, 159 B.R. at 710, n. 4 ("the equitable analysis applied in cases decided under Rule 7015 is essentially the same . . . that the Supreme Court used to determine what is 'excusable neglect' under Rule 9006(b)(1) for allowing the filing of an untimely claim"). In

particular, the Court emphasizes that the Debtors would be unduly prejudiced due to the possibility of other similarly situated creditors coming forward to amend their claims or file late claims.

In addition, Enterprise's reliance on *In re Interco Inc.*, 149 B.R. 934 (Bankr. E.D. Mo. 1993) and *In re Hemingway Transp., Inc.*, 954 F.2d 1, 9-12 (1st Cir. 1992) is misplaced. Though the creditor in *Interco* was allowed to amend an informal proof of claim when it attached copies of guarantees by a co-debtor affiliate to a claim against one debtor arising out of a lease agreement, the court found that the creditor had evidenced an intention to share in the debtor's assets. *Interco* 149 B.R. at 939. The Proof of Claim Enterprise submitted does not qualify as an informal proof of claim. To qualify as an informal proof of claim, a document purporting to evidence such claim must have (1) been timely filed with the bankruptcy court and have become part of the judicial record, (2) state the existence and nature of the debt, (3) state the amount of the claim against the estate, and (4) evidence the creditor's intent to hold the debtor liable for the debt. *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 190 B.R. 185, 187 (Bankr. S.D.N.Y. 1995). Assuming without deciding that Enterprise has met factors one through three, above, it has failed to prove its intent to hold Enron liable for this debt. The fact that Enron may have been put "on notice" that Enterprise filed an unexecuted copy of the Guaranty does not change the result. In *Hemingway*, though the creditor was allowed to amend its claim where prior to a post-petition contingency there was no value that could be reasonably ascribed to an indemnification agreement, the court found there was no prejudice to other claimants in doing so. *Hemingway* 954 F.2d at 10.

Therefore, Enterprise's only recourse for permitting the Guaranty claim is to show its failure to timely file a proof of claim for the Guaranty against Enron was the result of "excusable neglect."

C. *Excusable Neglect*

Bankruptcy Rule 9006(b)(1) provides that a bankruptcy court in its discretion may accept a late-filed proof of claim where a claimant establishes "excusable neglect." The burden is on the claimant to prove that he or she did not timely file the claim because of "excusable neglect." *In re Andover Togs, Inc.* 231 B.R. 521, 549 (Bankr. S.D.N.Y. 1999).

The seminal case interpreting the "excusable neglect" language of Bankruptcy Rule 9006(b)(1) is *Pioneer Inv. Servs. Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993). In permitting a creditor's late filing under Bankruptcy Rule 9006(b)(1), the Supreme Court explained that Congress, "by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' plainly contemplated that courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*, 507 U.S. at 388, 113 S.Ct. 1489 (quoting, in part, Bankruptcy Rule 9006(b)(1)). The Supreme Court further clarified that whether a claimant's neglect of a deadline is excusable is an equitable determination, taking account of all the relevant circumstances surrounding the claimant's omission. *See id.* at 395, 113 S.Ct. 1489. These equitable considerations include (1) "the danger of prejudice to the debtor," (2) "the length of delay and its potential impact on judicial proceedings," (3) "the reason for the delay, including whether it was within the reasonable control of the movant," and (4) "whether the movant acted in good faith."

The relative weight, however, to be accorded to the factors identified in *Pioneer* requires recognizing that not all factors need to favor the moving party. *See Keene*, 188 B.R. at 909. As one bankruptcy court concluded, "no single circumstance controls, nor is a court to simply proceed down a checklist ticking off traits. Instead, courts are to look for a synergy of several factors that conspire to push the analysis one way or the other." *In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998).

Affirming *In re Enron*, the Second Circuit has clarified its position on *Pioneer's* four equitable factors noting that it has taken a "'hard line' in applying the Pioneer test." *Midland*, 419 F.3d at 122. Pursuant to its "hard line" approach, the Second Circuit observed that "in the 'typical' case, 'three of the [*Pioneer*] factors' – the length of the delay, the danger of prejudice, and the movant's good faith – 'usually weigh in favor of the party seeking the extension.'" (quoting *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003), cert. denied sub nom. *Essef Corp. v. Silivanch*, 540 U.S. 1105, 157 L. Ed. 2d 890, 124 S. Ct. 1047 (2004)). Therefore, the Second Circuit has "focused on the third factor: the reason for the delay, including whether it was in the reasonable control of the movant." *Id.* (quoting *Pioneer*, 507 U.S. at 395) (internal quotations omitted). Under this approach, the "'equities will rarely if ever favor a party who fails to follow the clear dictates of a court rule . . . .'" *Id.* (quoting *Silivanch*, 333 F.3d at 366-67).

With *Pioneer's* four equitable factors in mind and the Second Circuit's recent clarification of their application, the Court turns to the facts of this case to determine if Enterprise's failure to file a timely proof of claim was caused by "excusable neglect."

1. *Danger of Prejudice to Debtors*

The Court in *Keene* noted that while *Pioneer* did not define "prejudice," subsequent cases have weighted a number of considerations in determining prejudice, including (1) the "size of the late claim in relation to the estate," (2) whether a disclosure statement or plan [of reorganization] has been filed or confirmed with knowledge of the existence of the claim," and (3) "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." *Keene*, 188 B.R. at 910.

Enterprise cites to *In re Sacred Heart Hosp.*, 186 B.R. 891 (Bankr. E.D. Pa. 1995), in support of its contention that when the debtor's plan is a liquidating plan, a court's allowance of a late proof of claim will not prejudice the debtor. In that case, the court held that the debtor would suffer no prejudice largely because the debtor's plan was a liquidating plan. *Id.* at 897. The court found "the issue of prejudice to the Debtor as a result of the late filing" to be "the primary consideration which must be made in the Pioneer analysis," thereby going "a long way towards winning the day" for the creditor. *Id.* As a result, the court granted an extension of bar date to allow the creditor to file a proof of claim. *Id.* at 898. Enterprise also cites to *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 737-40 (5th Cir. 1995), as further support of its position that a late-filed proof of claim will cause no or little prejudice to the debtor when the claims are being paid from a limited pool of funds. The *Eagle Bus* court also uses prejudice as "the central inquiry" in its *Pioneer* analysis. *Id.* at 737.

Contrary to both of the above decisions, the Second Circuit has recently determined that the primary consideration in conducting the *Pioneer* analysis is the "reason for the delay," including whether it was within the reasonable control of the movant. *Midland*, 419 F.3d at 122. Moreover, in *Keene*, the Court cited to the *Sacred Heart* and *Eagle Bus* decisions and "question[ed] the wisdom of an approach under which the court must ultimately ignore the

creditor's culpability and permit the filing of a[] late claim if prejudice is absent." 188 B.R. at 909. The Court agrees with the analysis in *Keene* and does not find these cases to Enterprise's advantage.[5] Instead, the Court comes to the same the conclusion it reached in *In re Enron Corp.*, 298 B.R. 513 (Bankr. S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005).

While the Guaranty claim is not substantial in relation to the Debtors' estate, it was filed after the Debtors filed their proposed plan of reorganization and disclosure statement. In addition, the Court agrees with the Debtors that considering that certain Debtors might be parties to agreements with guarantees or guarantors of such agreements involving other Debtors, allowing late-filed proof of claims based on such guarantee or guarantor relationships would adversely affect the Debtors' assessment of their liabilities as well as negatively impact their bankruptcy proceedings.

Enterprise argues that its case differs from that in *In re Enron* because that creditor failed to include even an unsigned copy of a guarantee to its proof of claim against ENA whereas Enterprise attached a copy of the Guaranty to the Proof of Claim. Enterprise argues that while allowing the claim in *In re Enron* presented an "unquantifiable risk of a flood of late-filed guarantee claims" the Enterprise case does not present such a risk because "the number of creditors who timely asserted a guarantee claim by including a copy of the Guaranty in the proof of claim is limited." While the inclusion of the copy might, as discussed above, demonstrate that Enron was aware of the Guaranty, it does not give notice to Enron that Enterprise intended to hold the estate liable. The Court also disagrees that merely attaching a copy of the Guaranty to

[5] For the same reasons, Enterprise's reliance on *Raymond v. IBM Corp.*, 148 F.3d 63 (2d Cir. 1998) and *In re Herman's Sporting Goods, Inc.*, 166 B.R. 581, 585 (Bankr. D.N.J. 1994), does not adequately support its claim.

the back of a claim that is against ENA, only includes Enron's name in the caption, and does not discuss the Guaranty in any way is a timely-asserted guaranty claim.

In addition, the Court maintains, as it has previously stated, that "it can be presumed in a case of this size with tens of thousands of filed claims, there are other similarly-situated potential claimants . . . . Any deluge of motions seeking similar relief would prejudice the Debtors' reorganization process." *In re Enron Corp. et. al.*, Case No. 01-16034, Memorandum Decision and Order Denying P.P.C. Industries' Motion to Permit a Late-Filed Proof of Claim Due to Excusable Neglect at 10 (Bankr. S.D.N.Y. April 8, 2003, Docket No. 10121).

The Court, therefore, finds that the prejudice factor weighs in favor of the Debtors.

2. *Length of Delay and its Potential Impact on Judicial Proceedings*

The Court finds that the length of delay in filing the proof of claim here is substantial, that is, it was filed almost three years after the Bar Date. Again, the Court reiterates the conclusion it reached in *In re Enron*

> The Court . . . notes that the Bar Date Order was meant to function as a statute of limitations and effectively exclude such late claims in order to provide the Debtors and their creditors with finality to the claims process and permit the Debtors to make swift contributions under any confirmed plan of reorganization. To find otherwise, that is outside the context of excusable neglect, would vitiate the Debtors' reorganization process.

In re Enron Corp. 298 B.R. 513, 526 (Bankr. S.D.N.Y. 2003), aff'd, *Midland Cogeneration Venture Ltd. v. Enron Corp (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005). Therefore, the length of delay also weighs in favor of the Debtor.

3. *Reason for Delay, Including Whether it Was Within Reasonable Control of Movant*

While *Pioneer* recognized that courts are "permitted, where appropriate, to accept late filings caused by inadvertence," a creditor nonetheless must explain the circumstances

surrounding the delay in order to supply the Court with sufficient context to fully and adequately address the reason for delay factor and the ultimate determination of whether equities support the conclusion of excusable neglect. *Pioneer*, 507 U.S. at 388, 113 S.Ct. 1489. Here, Enterprise offered a general explanation that it did not discuss the Guaranty claim in the midst of "complicated compilation of data and calculation of the underlying liabilities. Enterprise explains that "the guaranty agreement was not identified and no separate claims were filed on the Enron Corp. Guarantee" and that "it was only in connection with the claims objection and resolution process regarding the ENA claim that Enterprise inquired as to how [the Guaranty] would be treated in connection with the allowance" of the ENA claim. It asserts that until that time it had not become aware of and had "inadvertently failed to realize" the need for a separate claim. Aside from these vague explanations, Enterprise failed to articulate any reason for the delay in filing the Guaranty claim. Because the Debtors provided Enterprise with adequate notice of the Bar Date, which Enterprise admits, the Court finds it was within Enterprise's control to timely file a proof of claim for the Guaranty against Enron. Accordingly, the Court finds this factor also favors the Debtors.

4. Whether Movant Acted in Good Faith

The Court finds that there is no indication in the record that Enterprise acted in a manner other than in good faith in seeking to file this proof of claim. Therefore, this factor favors Enterprise.

Although Enterprise acted in good faith, the remaining *Pioneer* factors, including danger of prejudice to the Debtors, the length of delay and its impact on the judicial proceedings, and the reason for the delay, all weigh strongly in favor of the Debtor in not permitting Enterprise

leave to file a late proof of claim against Enron for the Guaranty. Therefore, the relief sought by Enterprise to file a late proof of claim under "excusable neglect" is denied.

IV. Conclusion

The Court concludes that while Enterprise's amendment to the Proof of Claim seeking to add Enron as a debtor and include the Guaranty claim is permissible under the first prong of the two-prong test for determining whether to permit amendment, Enterprise's amendment fails under the second prong of the test because the Debtors might be unduly prejudiced by possibly opening the floodgates for similar late-filed guaranty claims. Further, the attachment of the unexecuted Guaranty to the Proof of Claim in ENA's case did not constitute an informal proof of claim or sufficiently provide notice to Enron that Enterprise intended to hold it liable for the Guaranty claim.

The Court also concludes that while Enterprise acted in good faith, the remaining *Pioneer* factors, including danger of prejudice to the Debtors, the length of delay and its impact on the judicial proceedings, and the reason for the delay, all weigh in favor of the Debtors in not permitting Enterprise leave to file a late proof of claim against Enron for the Guaranty.

Therefore, the motion by Enterprise is denied in all respects. The Debtors are to settle an order consistent with this opinion.

Dated: New York, New York
February 23, 2007

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE