

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

In Re:)	
)	
BuildNet, Inc.,)	Case No. 01-82293
)	
The Fast Management Group, Inc.,)	Case No. 01-82294
)	
BuildNet Financial Services, Inc.,)	Case No. 01-82295
)	
Rim Data Systems, LLC,)	Case No. 01-82296
)	
BuildNet Corp.,)	Case No. 01-82297
)	
The UniLink Group, Inc. and)	Case No. 01-82298
)	
Contractors Software Group, Inc.,)	Case No. 01-82299
)	
Debtors.)	

**ORDER GRANTING MOTION TO CONSIDER
PROOFS OF CLAIM TIMELY FILED**

This matter came before the Court after notice to all parties in interest and hearing on May 6, 2003, in the U.S. Bankruptcy Courtroom in Durham, N.C., to consider the Motion by William W. Neal, III, Baynard M. Atwood, Keith T. Brown, Justin Hall-Tipping, Nathan P. Morton, Charles M. Cosby, Peter B. Drayson, Stephen L. Holcombe, Steven C. Thompson, Sr., and Peter Abene, Sr. (the "Movants") to consider proofs of claim timely filed (the "Motion"). After consideration of the pleadings and briefs, the arguments of counsel and other matters of record, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On August 8, 2001, BuildNet and its wholly-owned subsidiaries filed voluntary petitions

for relief under Chapter 11 of the United States Bankruptcy Code (the “Debtors”). This court set December 6, 2001 as the bar date to file proofs of claim (the “Bar Date”). There is no unsecured creditors committee in this case.

Prior to the bankruptcy filing, on January 18, 2000, BuildNet, Inc. (“BuildNet”) acquired The UniLink Group, LLC (“UniLink”) for \$27 Million. In connection with the acquisition, BuildNet executed and delivered a \$27 million promissory note (“Note”) with a term of 24 months to TUG Liquidation, LLC (“TUG”). The Note was convertible in its entirety into common BuildNet stock. Because TUG did not elect to convert its Note prior to the petition date, TUG is now the holder of an unsecured claim of approximately \$27 million against the Debtors.

During the post-petition period, an issue was raised regarding mismanagement or irregularity in the management of the affairs of the Debtors by current or former officers and directors of the Debtors. TUG filed a motion for an order directing a Rule 2004 examination of certain documents in the Debtors’ possession or control. The Debtors objected to the document request as being unduly broad and burdensome, and possibly in conflict with non-disclosure or confidentiality agreements to which the Debtors were a party. Ultimately, the parties agreed to the appointment of an examiner to properly investigate any claims or causes of action against any officers and directors of the Debtors for misconduct or mismanagement. On December 6, 2001, the court appointed Holmes P. Harden (the “examiner”) as an examiner to investigate and file a Statement of Investigation concerning any facts ascertained pertaining to incompetence, misconduct, mismanagement or irregularity in the management of the Debtors, or pertaining to a cause of action available to the estates with respect to any present or former officer or director of

the Debtors.

The Examiner filed his Preliminary Report on April 9, 2002. The report identified the existence of several claims the Debtors may have against certain officers and directors. Debtors' counsel and the Examiner are pursuing such claims as a result of the evidence discovered during the investigation; however, TUG disagreed with some of the findings in the Preliminary Report and believed that the Debtors may have additional claims. The parties eventually reached an agreement whereby the Debtors assigned to TUG those claims which neither the Debtors nor the Examiner wished to pursue in consideration for \$15,000 and TUG's agreement to withdraw its objection to the Debtors' proposed plan of reorganization. This court entered an order ("Assignment Order") on September 4, 2002 authorizing the Debtors to assign and transfer the Debtors' rights to pursue, settle or collect monies from those claims. On October 21, 2002, this court confirmed the Debtors' plan of reorganization, providing for the complete liquidation of all properties.

On November 12, 2002, TUG filed a complaint against the Movants, former officers and directors of the Debtors, in the United States District Court for the Northern District of Georgia. Subsequently, on January 28, 2003, TUG dismissed the District Court action and filed a complaint against the Movants in the State Court of Cobb County, Georgia ("State Court Action"). TUG's claims in the State Court Action are based on the alleged mismanagement of BuildNet and are brought individually and as assigns of BuildNet. TUG seeks no less than \$100 million in compensatory damages, as well as unspecified punitive damages and attorneys' fees and costs. The Movants dispute all of TUG's allegations and deny that they have any liability to TUG. Pursuant to the bylaws of BuildNet and Delaware law, the Movants are entitled to

indemnification from the Debtors for the costs of defense and for any liability with respect to the claims asserted in the State Court Action.

In February of 2003, the Movants removed the State Court Action to the United States District Court for the Northern District of Georgia on the basis that the action was “related to” the Debtors’ bankruptcy case, and the District Court had original jurisdiction pursuant to 28 U.S.C. § 1334. In response, TUG filed a Motion to Remand or for Abstention. The Movants oppose this motion, and argue that because of BuildNet’s indemnity obligations, TUG’s claims against the Movants are, in effect, claims against the BuildNet estate itself. In addition, the Movants filed a Motion to Transfer Venue to this court where the bankruptcy of BuildNet is pending.

On February 21, 2003, the Movants filed the present Motion, with attached proofs of claim, asserting their indemnification claims against the Debtors based on the claims asserted in the State Court Action. TUG filed an objection to the Motion on May 2, 2003. The Debtors have not objected to this Motion.

DISCUSSION

Federal Rule of Bankruptcy Procedure 3003(c)(3) provides that:

The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

F.R.B.P. 9006(b) permits the bar date to be extended in situations where the failure to file a timely claim result from “excusable neglect.” In Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the United States Supreme

Court set forth the standard for excusable neglect. Neglect includes both faultless omissions to act due to circumstances beyond a creditor's control and omissions caused by carelessness. Id. at 388, 113 S.Ct. at 1494. The determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395, 113 S.Ct. at 1498. Excusable neglect should be determined from the totality of the circumstances surrounding the incident, including (1) the danger of prejudice to the debtor; (2) the length of the delay and potential impact on judicial proceedings; (3) the reason for the delay including whether it is within the reasonable control of the movant; and (4) whether the movant acted in good faith. Pioneer, 507 U.S. at 395, 113 S.Ct. at 1498. A creditor seeking to extend the bar date based upon F.R.B.P. 9006 bears the burden of proving excusable neglect be a preponderance of the evidence. See In the Matter of Bulic, 997 F.2d 299, 302 (7th Cir.1993); In re Montaldo Corp., 209 B.R. 40, 47 (Bankr. M.D.N.C. 1997). In some instances, a creditor may choose not to file a claim for some tactical reason, or because of a belief that no dividend will be paid. When a creditor makes a conscious decision not to file a known claim, despite notice, there is no "neglect" and relief based upon F.R.B.P. 9006(b) is not appropriate. See In re Montaldo Corp., 209 at 48; In re Bicoastal Corp., 176 B.R. 966 (Bankr. M.D. Fla.1994); In re Mother Hubbard, Inc., 152 B.R. 189 (Bankr. W.D. Mich.1993). But see Agribank v. Green, 188 B.R. 982, 989 (C.D. Ill. 1995) (finding that there may be rare instances in which a deliberately late filing can constitute neglect).

TUG contends that the Movants have not shown that their failure to file timely proofs of claim was a result of neglect. The Movants failed to file their proofs of claim until after the State Court Action was commenced against them. Whether the Movants' failure to act was a faultless

omission due to their inability to predict a future lawsuit against them or was a result of their own carelessness in that they should have anticipated the claims against them, there is sufficient basis to conclude that the claim was filed late as a result of neglect. Therefore the court must determine whether the Movants' neglect is excusable.

Turning to the Pioneer factors, the court finds that, in this instance, allowing the Movants' late filed proofs of claim will not prejudice the Debtors. The Plan is a liquidating plan pursuant to which the Debtors' assets are to be sold and distributions made to creditors in accordance with Bankruptcy Code priorities. The Debtors will not continue in business, therefore the allowance of these claims will not jeopardize the Debtors' ability to reorganize. While the late filed claims will increase the total amount of unsecured claims against the Debtors' estate, any amounts to which the Movants are entitled should be offset in large part by a corresponding reduction in TUG's claim due to its recovery in the State Court Action.¹ Notably, the Debtors do not oppose the Movants' Motion and have not articulated any concerns regarding possible prejudice.

A related inquiry is whether the late claim will have a significant impact upon the judicial proceeding. The court may consider a number of factors, including the disruptive effect that the late filing would have on a plan, whether any distribution has been made under the plan and any

¹ Any depletion in the assets available for timely filed claims is unfortunate, but standing alone, is an insufficient basis to find prejudice. "Were it otherwise, virtually all late filings would be condemned by this factor; they seek to share, with timely filed claims, in the bankrupt's limited resources." Manousoff v. Macy's Northeast, Inc. (In re R.H. Macy & Co.), 166 B.R. 799, 802 (S.D.N.Y.1994) (holding that the depletion of resources otherwise available for timely filed claims is not prejudice). See also In re O'Brien Environmental Energy, Inc., 188 F.3d 116, 126 (3rd Cir. 1999).

other effect that the late claim would have on the administration of the case. In this case, the Plan of Reorganization provides for the resolution of indemnification claims against the Debtors. The allowance of the Movants' claims will not affect the structure of the Plan, nor will it necessitate additional proceedings.

As to the length of the delay, there is no bright line test to determine what length of delay is too long. Rather, the court must look at the circumstances in each particular case. The Movants' Motion to consider the late filed proofs of claim was filed within one month of the commencement of the State Court Action and approximately three months after the first complaint filed in District Court, which was ultimately dismissed. The complaint in the State Court Action, filed on January 28, 2003, asserts eleven causes of action and is approximately 70 pages in length. The Movants filed the present Motion on February 21, 2003. Under the circumstances, this length of time is not unreasonable.

Furthermore, the court finds that the Movants' have presented a credible and reasonable explanation for the delay, and the events giving rise to the Movants' indemnification claims were not within their reasonable control. A movant need not be entirely without fault for a court to find excusable neglect. In re Infiltrator Systems, Inc., 241 B.R. 278, 281 (Bankr. D. Ct. 1999) (citing Pioneer, 507 U.S. at 392-94). Although the court is cognizant of the fact that many of the Movants received notice of the Bar Date due to unrelated debts, at the time of this notice, there was no indication that there might be claims against them as officers and directors that would trigger their indemnification rights until well after the Bar Date. The Examiner did not file his Preliminary Report until approximately five months after the Bar Date, the claims were not assigned to TUG until nine months after the Bar Date and the State Court Action was not filed

until thirteen months after the Bar Date.

Finally, the court finds that the Movants have acted in good faith. There is no indication that the Movants purposely delayed in filing their proofs of claim to obtain a tactical advantage. After the State Court Action was commenced, the Movants retained counsel and acted promptly to file their indemnification claims. While TUG has made certain allegations regarding the motives of the Movants in seeking to establish federal bankruptcy jurisdiction and a change of venue in the State Court Action, it has presented no evidence to support these allegations. The Movants' requests to consider their proofs of claim and to transfer venue do not, in and of themselves, substantiate a lack of good faith. Furthermore, the court is mindful of the source of these allegations and must weigh them accordingly. As stated previously, the Debtors do not object to this Motion.

For the foregoing reasons, the court concludes that the circumstances presented in this case constitute "excusable neglect." It is therefore ORDERED that the Motion by the Movants to consider proofs of claim timely filed is hereby granted.

This the 26th day of August 2003.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge