UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	CHAPTER 11
	:	(Jointly Administered)
NEW CENTURY TRS HOLDINGS, INC.,	:	
et al.	:	Case No. 07-10416 (KJC)
	:	
Debtors	:	Re: D.I. 10824

ORDER GRANTING THE NEW CENTURY LIQUIDATING TRUST'S MOTION FOR ENTRY OF AN ORDER TO DETERMINE THAT THE DEBTORS HAVE COMPLIED WITH THE ORDER ESTABLISHING BAR DATES FOR FILING PROOFS OF CLAIM AND APPROVING FORM, MANNER AND SUFFICIENCY OF NOTICE THEREOF

AND NOW, this 30th day of August, 2013, upon consideration of the New Century Liquidating Trust's Motion for Entry of an Order to Determine that the Debtors have Complied with the Order Establishing Bar Dates for Filing Proofs of Claim and Approving Form, Manner and Sufficiency of Notice Thereof (the "Trustee's Bar Date Motion") (D.I. 10824), and the objections thereto, and after an evidentiary hearing on May 23, 2012, and for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED** that the Trustee's Bar Date Motion is **GRANTED**.

VACATED

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

cc: Alan M. Root, Esquire[1]

[1]Counsel shall serve a copy of this Order and the accompanying Memorandum upon all interested parties and file a Certificate of Service with the Court.

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In re	:	CHAPTER 11
	:	(Jointly Administered)
NEW CENTURY TRS HOLDINGS, INC.,	:	
et al.[1]	:	Case No. 07-10416 (KJC)
Debtors	:	

MEMORANDUM[2]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

Before the Court is The New Century Liquidating Trust's Motion for Entry of an Order to Determine that the Debtors have Complied with the Order Establishing Bar Dates for Filing Proofs of Claim and Approving Form, Manner and Sufficiency of Notice Thereof (the "Trustee's Bar Date Motion") (D.I. 10824). A number of objections to the Trustee's Bar Date Motion were filed on or about April 18, 2012. The Court held an evidentiary hearing and, for the reasons set forth below, the Trustee's Bar Date Motion will be granted.

[1]The Debtors are the following entities: New Century Financial Corporation (f/k/a New Century REIT, Inc.), a Maryland corporation; New Century TRS Holdings, Inc. (f/k/a New Century Financial Corporation), a Delaware corporation; New Century Mortgage Corporation (f/k/a JBE Mortgage) (d/b/a NCMC Mortgage Corporate, New Century Corporation, New Century Mortgage Ventures, LLC), a California corporation; NC Capital Corporation, a California corporation; Home123 Corporation (f/k/a The Anyloan Corporation, 1800anyloan.com, Anyloan.com), a California corporation; New Century Credit Corporation (f/k/a Worth Funding Incorporated), a California corporation; NC Asset Holding, L.P. (f/k/a NC Residual II Corporation), a Delaware limited partnership; NC Residual III Corporation, a Delaware corporation; NC Residual IV Corporation, a Delaware corporation; New Century R.E.O. Corp., a California corporation; New Century R.E.O. II Corp., a California corporation; New Century R.E.O. III Corp., a California corporation; New Century Mortgage Ventures, LLC (d/b/a Summit Resort Lending, Total Mortgage Resource, Select Mortgage Group, Monticello Mortgage Services, Ad Astra Mortgage, Midwest Home Mortgage, TRATS Financial Services, Elite Financial Services, Buyers Advantage Mortgage), a Delaware limited liability company; NC Deltex, LLC, a Delaware limited liability company; and NCoral, L.P., a Delaware limited liability partnership. On August 3, 2007, New Century Warehouse Corporation, a California corporation, which is also known as "Access Lending," filed a voluntary chapter 11 bankruptcy petition. These entities are referred to herein as the "Debtors," collectively, or any individual entity may be referred to herein as the "Debtor."

[2]This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. 157(b)(1) and (b)(2)(A) and (B).

FACTS[3]

On April 2, 2007, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On June 8, 2007, the Debtors filed a motion pursuant to Fed.R.Bankr.P. 2002, 3003(c)(3) and 9007 asking the Court to fix the time within which proofs of claim may be filed (the "Debtors' Bar Date Motion"). (D.I. 1173). After a hearing on the Debtors' Bar Date Motion, this Court entered an Order dated June 28, 2007 (the "Bar Date Order") establishing August 31, 2007 at 5:00 p.m. (prevailing Pacific Time) as the deadline for filing proofs of claim in this chapter 11 case (the "Bar Date") (Trustee Ex. 2, D.I. 1721). On July 9, 2007, the Debtors' claims and noticing agent, Xroads Case Management Service LLC (the "Claims Agent") filed a Declaration of Service, stating that it mailed a copy of the *Notice of Bar Date* (the "Bar Date Notice") and a proof of claim form substantially similar to Official Form No. 10 to "parties listed on the Master Mailing Matrix as set forth on a list maintained by Debtors' counsel." (D.I. 1861). On August 3, 2007, the Claims Agent filed affidavits of publication stating that it had published the Bar Date Notice in the *Wall Street Journal* (National Edition) and the *Orange County Register* on July 23, 2007. (D.I. 2148 and D.I. 2149).

On November 20, 2009, the Court entered an Order confirming the Modified Second Amended Joint Chapter 11 Plan of Liquidation (the "Modified Plan") (D.I. 9905).[4] The

[3]Because this matter involves the same factual background, some of the facts set forth herein are repeated from this Court's Memorandum dated February 7, 2012 *In re New Century TRS Holdings, Inc.,* 465 B.R. 38 (Bankr.D.Del. 2012) (described *infra* as the "February 7 Decision").

[4]This Court entered an Order Confirming the Second Amended Joint Chapter 11 Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors Dated as of April 23, 2008 (the "Confirmation Order") on July 15, 2008 (D.I. 8596), which became effective on August 1, 2008. An appeal was taken and, on July 16, 2009, the United States District Court for the District of Delaware issued a Memorandum Opinion reversing the Confirmation Order. On July 27, 2009, the Bankruptcy

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Modified Plan adopted, ratified and confirmed the New Century Liquidating Trust Agreement, dated as of August 1, 2008, which created the New Century Liquidating Trust (the "Trust") and appointed Alan M. Jacobs as Liquidating Trustee of New Century Liquidating Trust and Plan Administrator of New Century Warehouse Corporation (the "Trustee").

On or about July 29, 2011, Helen Galope filed proof of claim number 4131 (the "Galope Claim"). On August 26, 2011, the Trustee filed The New Century Liquidating Trust's Forty-Second Omnibus Objection to Claims (the "Claim Objection") asking the Court to disallow and expunge the Galope Claim.[5] Ms. Galope and other claimants filed responses in opposition to the Trustee's Claim Objection.[6] The Court held an evidentiary hearing on December 13, 2011 on the issue of whether the Galope Claim should be disallowed because it was filed after the claims bar date.

On February 7, 2012, the Court entered a Memorandum and Order (D.I. 10725 and 10726) (the "February 7 Decision") disallowing and expunging the Galope Claim. The Court considered the testimony of the Debtors' former lead counsel about the decision-making process

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[4](...continued)
Court entered the Order Granting Motion of the Trustee for an Order Preserving the Status Quo Including Maintenance of Alan M. Jacobs as Liquidating Trustee, Plan Administrator and Sole Officer and Director of the Debtors, Pending Entry of a Final Order Consistent with the District Court's Memorandum Opinion (the "Status Quo Order") (D.I. 9750). On September 30, 2009, the New Century Liquidating Trust filed the Modified Plan.

[5] The Claim Objection also challenged proof of claim 4132 filed by Tiphanie Goines on July 20, 2011, in the amount of $432,000 (secured) (the "Goines Claim") and proof of claim number 4133 filed by Karan J. Russell on July 20, 2011 in the amount of $880,000 (secured) (the "Russell Claim"). The Goines Claim was disallowed pursuant to Order dated April 23, 2012 (D.I. 10860). The objection to the Russell Claim is under advisement with the Court.

[6] *See* D.I. 10574 (Russell's Response), D.I. 10575 (Goines' Response) and D.I. 10578 (Galope's Response). A response was also filed on behalf of claimants Kimberly S. Cromwell, Mary Guinto and Thomas A. Guinto, W. Mark Frazer and Konilynn Frazer (D.I. 10576).

behind publication of the Bar Date Notice. The February 7 Decision determined, in part, that the Debtors' publication of the Bar Date Notice in the national edition of the *Wall Street Journal*, supplemented with notice in the *Orange County Register*, was constitutionally adequate for Helen Galope, who was an unknown creditor at the time the Bar Date Notice was served.

On February 21, 2012, Ms. Galope filed a motion for reconsideration of the February 7 Decision arguing, among other things, that the Court erred in deciding that the Debtors' publication of the Bar Date Notice was constitutionally adequate as applied to unknown creditors. By a Memorandum and Order dated May 17, 2012, (D.I. 10742) the Court denied Galope's Motion for Reconsideration of the February 7 Decision (the "Reconsideration Decision").[7]

On April 2, 2012, the Trustee filed the Trustee's Bar Date Motion, asking the Court to find that the Debtors' published notice of the Bar Date satisfied the requirements of due process for *all unknown creditors*. On or about April 18, 2012, Galope and other claimants filed responses in opposition to the Trustee's Motion.[8] On April 20, 2012, the Trustee filed an Omnibus Reply to the objections (D.I. 10853). On May 23, 2012, the Court held an evidentiary hearing on the Trustee's Bar Date Motion.

DISCUSSION[9]

[7]Ms. Galope filed a second motion for reconsideration (D.I. 10917). Oral argument on the motion was held on June 20, 2013 and the motion is currently under advisement.

[8]*See* D.I. 10835 (Konar's Response), D.I. 10841 (White's Response), D.I. 10842 (Guinto's Response), D.I. 10848 (Galope's Response), D.I. 10849 (Cromwell and Russell's Response) (collectively, the "Objectors").

[9]This Memorandum addresses only the constitutional sufficiency of the publication of the Bar Date Notice as it applies to unknown creditors. I do not make any determination about whether particular

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The Trustee seeks an order consistent with the February 7 Decision and the Reconsideration Decision, concluding that the Debtors' publication notice of the Bar Date complied with the requirements set forth in the Bar Date Order and satisfied the requirements of due process for *unknown creditors*.

The objections to the Trustee's Bar Date Motion fall into two categories. First, the Objectors argue that the Bar Date publication was a "mere gesture" and that the Debtors did not publish notice in a manner that was reasonably calculated to inform potential claimants of the Bar Date. To support this objection, the Objectors argue that the Debtors (i) did not consider readership profiles of the newspaper used for national notice; (ii) did not spend an adequate amount of funds to publish notice, considering the size and complexity of the case; (iii) did not provide sufficient time for claimants to file claims after the notice publication; and (iv) did not ensure that the font size and placement of the published notice was adequate. Second, the Objectors argue that the Debtors, aware of the potential for a large number of claims by borrowers, published the Bar Date Notice in a manner to ensure that potential borrower claimants would not receive adequate notice.[10]

As discussed in the February 7 Decision, the purpose and procedures for setting a claims bar date were aptly described by my colleague, Judge Gross, in *In re Smidth & Co.,* 413 B.R.

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[9](...continued)
creditors were unknown creditors or known creditors entitled to actual notice. Also, I do not address whether any particular individual claimants have met the requirements for excusable neglect for a late-filed proof of claim.

[10]Although not specifically defined in the pleadings, I understand that the term "borrowers," as used by the parties, refers to individuals who assert claims against the Debtors based upon pre-petition loan transactions in which those individuals borrowed funds from a Debtor entity secured by a mortgage lien against their residence or other real property (the "Borrowers").

161 (Bankr.D.Del. 2009):

> Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure authorizes courts to set bar dates by which proofs of claim or interest may be filed. This rule contributes to one of the main purposes of bankruptcy law, securing, within a limited time, the prompt and effectual administration and settlement of the debtor's estate. Setting an outside limit for the time to assert a right triggers due process concerns of which every court must be cognizant. This concern is resolved through notice: when a debtor provides proper notice to its creditors, due process is satisfied, and a court can bar creditors from asserting claims. What qualifies as proper notice, however, is dependent upon whether the creditor is known or unknown. If a creditor is known, the debtor must provide actual notice of the bankruptcy proceedings, whereas if the creditor is unknown, notice by publication is sufficient.

Id. at 165 citing, *inter alia*, *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 97 L.Ed. 333 (1953), *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). For creditors who receive the required notice, the bar date is a "drop-dead date" that prevents a creditor from asserting prepetition claims after passage of the Bar Date unless that creditor can demonstrate that failure to file a claim timely was due to the creditor's excusable neglect. *Berger v. TransWorld Airlines, Inc. (In re TransWorld Airlines, Inc.)*, 96 F.3d 687, 690 (3d Cir. 1996).

The discharge of claims of future or unknown claimants raises questions of due process. *Wright v. Owens Corning,* 679 F.3d 101, 107 (3d Cir. 2012). "The level of process due to a party prior to the deprivation of a property interest . . . is highly dependent on the context." *SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin),* 530 F.3d 230, 239 (3d Cir. 2008). The *Wright* Court recognized that:

> Notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . . ." Lack or inadequacy of notice of a bankruptcy prevents a claimant from having the opportunity to participate meaningfully in a bankruptcy proceeding to protect his or her claim.

Wright, 679 F.3d at 107 quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Due process concerns are satisfied if the published notice is "reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for response." *Chemetron*, 72 F.3d at 346. "The proper inquiry in evaluating notice is whether a party acted reasonably in selecting means likely to inform persons affected, not whether each person actually received notice." *In re Charter Co.,* 113 B.R. 725, 728 (M.D.Fla. 1990) citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied* 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 (1989).

Here, the Debtor published notice of the Bar Date in the national edition of the *Wall Street Journal* and in the *Orange County Register*. The Objectors argue that publishing notice in those two newspapers was a "mere gesture" to comply with notice requirements, rather than a decision made after an in-depth analysis of potential unknown creditors. *See Mullane,* 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process.").

Suzzanne Uhland, whose law firm was lead counsel to the Debtors during these chapter 11 bankruptcy cases, submitted a declaration in support of the Trustee's Bar Date Motion and testified at the May 23, 2012 hearing. Ms. Uhland stated that notice of the Bar Date was published in the national edition of the *Wall Street Journal* because the Debtors had business operations throughout the United States and publication in a newspaper that was published and available nationwide would provide notice to unknown creditors as broadly as possible throughout the country. Tr. 59:18 - 60:1; Tr. 92:18 - 93:6; Trustee Ex. 5 (Uhland Decl.), ¶5(b). The Debtors had been doing business throughout the nation and had more than a million

borrowers. *Id.* at ¶5(c). Further, the Debtors determined that the *Wall Street Journal* was a customary place to publish legal notices and believed it was prudent to publish notice in a newspaper where parties might expect to find a bar date notice. Tr. 60:2 - 60:9, Trustee Ex. 5 (Uhland Decl.), ¶5(c).

The Bar Date Order required publication in the national edition of the *Wall Street Journal* and "such local newspapers as the Debtors deem appropriate." Trustee Ex. 2, ¶18. The Debtors also published notice of the Bar Date in the *Orange County Register* because the Debtors' main office was located in Irvine, California, which is located in Orange County, California. Trustee Ex. 5 (Uhland Decl.), ¶6(a). A large concentration of the Debtors' employees were based in Orange County, and the Debtors were concerned about the potential for unknown claims asserted by former employees affected by the Debtors' substantial workforce reduction in the weeks and months prior to the bankruptcy filing. *Id.*, Tr. 60:15 - 61:6. Also, the Debtors knew that the *Orange County Register* was providing extensive coverage of the Debtors' bankruptcy, and the Debtors believed that supplementary notice in the local publication would reach any individuals who may have been reading the *Orange County Register* to keep track of the Debtors' chapter 11 cases. Trustee Ex. 5 (Uhland Decl.), ¶6(b).[11]

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[11] The Liquidating Trust has asserted throughout this and related proceedings that entry of the Bar Date Order approving this provision for publication notice served as a final and inviolate determination by the Court that notice thus given was constitutionally sufficient. *See, e.g.,* Trustee's Bar Date Motion, at ¶¶16-18.

At the June 27, 2007 hearing on the Debtor's Bar Motion, no party objected to the manner or breadth of the proposed publication notice, which left to the Debtors' discretion whether publication notice beyond that in the *Wall Street Journal* was appropriate. The Court approved this particular provision, in support of which no evidence was offered. The Court could not - - at that stage - - assess circumstances of which neither the Court nor any party was (or, arguably, could have been) aware. I view this as a significant reason why the United States Supreme Court, along with others, including the Third Circuit Court of Appeals, have adopted both due process standards (*see, e.g.,City of New York v. New*

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In *Wright*, the Third Circuit held generally that, for unknown claimants, "notice by publication in national newspapers is sufficient to satisfy the requirements of due process, particularly if it is supplemented by notice in local papers." *Wright,* 679 F.3d at 107-08 citing *Chemetron*, 72 F.3d at 348-49. *See also, e.g., Gentry v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.),* 439 B.R. 652, 660 (E.D. Va. 2010) quoting *In re J.A. Jones, Inc.*, 492 F.3d 242, 251 (4th Cir. 2007) ("where the creditor is unknown to the debtor, constructive notice - - typically in the form of publication - - is generally sufficient to pass constitutional muster."). However, the United States Supreme Court has recognized the limitations of notice by publication:

> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. . . . 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; and

> [I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification [by publication] is all that the situation permits and creates no constitutional bar to a final decrees foreclosing their rights.

Mullane, 339 U.S. at 317. Whether that notice is adequate depends upon the circumstances of the particular case. *Wright*, 679 F.3d at 108.

The Objectors argue that the Debtors did not adequately consider the readership profile

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[11](...continued)
York, N.H. & H.R. Co., 344 U.S. 293, 297 (1953), *Wright v. Owens-Corning,* 679 F.3d 101 (3d Cir. 2012), *Chemetron Corp. v. Jones,* 72 F.3d 341 (3d Cir. 1995)), and excusable neglect standards (*see, e.g. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993), *Jones v. Chemetron Corp.*, 212 F.3d 199 (3d Cir. 2000)), to address circumstances that come to light - - inevitably - - *after* entry of a bar date order.

Of course, the finality sought to be achieved by a bar date order is critical to the orderly completion of the chapter 11 process and the disposition of claims. *See*, discussion, *infra*.

of the *Wall Street Journal* when deciding to publish notice to unknown creditors. Cromwell Ex. F.[12] They argue that notice of the Bar Date in the national edition of the *Wall Street Journal* was not likely to reach individual Borrowers. However, the Debtors' decision to publish notice in the *Wall Street Journal* was made, in part, in an effort to reach all types of unknown creditors nationwide, whether institutional or individual creditors. Trustee Ex. 5 (Uhland Decl.), ¶5(d). The Debtors appropriately considered the wide-spread availability of the national edition of the *Wall Street Journal* to unknown creditors in deciding where to publish notice. *See Brown v. Seaman Furniture Co, Inc.*, 171 B.R. 26, 27 (E.D.Pa. 1994) ("Since the national edition [of the *New York Times*] is sold throughout the country and can be purchased from any corner newspaper vendor here in Philadelphia, the Court finds that it is a reasonable means of alerting potential creditors of the need to file a proof of claim."); *Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.,* 112 B.R. 920, 922, 924 (N.D.Ill. 1990) (The Court rejected the tort claimants' argument that notice of the bar date in the *Wall Street Journal* was constitutionally insufficient because, due to their poor education, they had never even heard of the *Wall Street Journal*).

The Objectors also argue that the Debtors should have spent considerably more money on publishing the Bar Date Notice to ensure that notice would appear in more local papers in locations where the Debtors transacted business. They argue that the amount spent by the Debtors for the Bar Date Notice pales in comparison to other cases. *See Wright v. Owens Corning*, 450 B.R. 541, 557 (W.D.Pa. 2011) *aff'd in part, rev'd in part* 679 F.3d 101 (3d Cir.

[12]Cromwell, Ex. F is a Subscriber Study for the *Wall Street Journal*, prepared by the Advertising Sales Office, which, Ms. Cromwell noted, states that the subscribers to the *Wall Street Journal* have an annual household income above $253,000 and household net worth averaging nearly $2.5 million.

2012) (noting that Owens Corning published notice of its bankruptcy proceedings, including the bar date and entry of the confirmation order, in the *New York Times,* the *Wall Street Journal,* and *USA Today*, as well as 250 regional or local newspapers in areas where Owens Corning had significant business operations at the time of publication, and in approximately 35 trade publications in the primary lines of business operated by Owens Corning). Notwithstanding the Herculean publishing efforts in the *Owens Corning* bankruptcy case, other courts have recognized that "[i]t is impracticable . . . to expect a debtor to publish notice in every newspaper a possible unknown creditor may read." *Chemetron*, 72 F.3d at 348-49 quoting *In re Best Products Co.,* 140 B.R. 353, 358 (Bankr.S.D.N.Y. 1992).

The decision of the Third Circuit in *Chemetron* is instructive here. In *Chemetron*, tort claimants filed a lawsuit against debtor Chemetron Corporation ("Chemetron") almost four years after the claims bar date and 20 months after plan confirmation. The claimants alleged injuries arising from a toxic landfill site in Ohio operated by Chemetron pre-bankruptcy. When Chemetron sought to dismiss the lawsuit, the claimants sought permission from the bankruptcy court to file late proofs of claim and filed motions seeking a declaratory judgment that their claims were not discharged by the reorganization plan. *Chemetron*, 72 F.3d at 344-45.

The bankruptcy court in *Chemetron* granted the claimants' motion to file late claims, finding that the claimants were known creditors entitled to actual notice of the bankruptcy proceeding and bar date. On appeal by Chemetron, the district court reversed the bankruptcy court, holding that the claimants were not known creditors and that publication notice of the bar date was sufficient. *Id.* The Third Circuit affirmed the district court, in part, holding that the claimants were unknown creditors and that notice of the bar date by publication satisfied the

requirements of due process.[13] *Id.* at 348. The bar date order in *Chemetron* required the debtors to publish notice in the national editions of the *New York Times* and the *Wall Street Journal*, and the debtors also voluntarily published notice in seven other newspapers in areas where they were doing business at the time of the filing. *Id* at 345. The Third Circuit rejected the claimants' argument that due process required Chemetron to publish notice in a Cleveland area newspaper, writing

> Having held that the claimants were "unknown" creditors, we have little difficulty holding that the notice which Chemetron published in the *New York Times* and the *Wall Street Journal* was sufficient. It is well established that, in providing notice to unknown creditors, constructive notice of the bar claims date by publication satisfies the requirements of due process. . . . Such notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane*, 339 U.S. at 314, 70 S.Ct. At 657. We find that Chemetron's notice met this standard.

Id. at 348.[14] Similarly, here, the Debtors' publication of the Bar Date Notice in the national edition of the *Wall Street Journal* was reasonably calculated to notify potential claimants of the Bar Date across the United States. *See also Brown*, 171 B.R. at 27 (deciding that publishing notice of the bar date in the local and national editions of the *New York Times* satisfied due process for unknown creditors), *In re U.S. Airways, Inc.*, 2005 WL 3676186, *6 (Bankr.E.D.Va. Nov. 21, 2005) (deciding that publishing notice of the bar date in the *Wall Street Journal,* the *New York Times* and *USA Today* satisfied due process for unknown creditors), *In re Best*

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[13]The Third Circuit vacated the district court's decision regarding dischargeability of the claims for failure to demonstrate excusable neglect and remanded the matter to the bankruptcy court. *Chemetron*, 72 F.3d at 350. *See also Jones v. Chemetron Corp.,* 212 F.3d 199 (3d Cir. 2000).

[14]The Third Circuit also noted that the claimants' argument for publication in a Cleveland area newspaper was undermined by the fact none of the claimants resided near the Cleveland site at the time of the publication notice. *Chemetron*, 72 F.3d at 349.

Products Co., Inc., 140 B.R. 353, 358 (Bankr.S.D.N.Y. 1992) (deciding that notice published in the national editions of the *Wall Street Journal* and the *New York Times*, as well as three local papers, satisfied due process for unknown creditors).

The Debtors also cited consideration of costs as part of the decision-making process with respect to publishing notice. Debtors' counsel testified that cost was always a concern because the Debtors were liquidating and, in particular, at the time the Bar Date Notice was being published, there was concern about significant administrative costs. Tr. 61:7 - 61:16; Trustee Ex. 5 (Uhland Decl.), ¶ 6(c). As noted in the February 7 Decision, publication in newspapers in "dozens of locations" in which a Debtor is conducting business can be "onerous, cumbersome and unduly expensive." *Best Products*, 140 B.R. at 358. The Fourth Circuit has said:

> In bankruptcy, the court has an obligation not only to potential claimants, but also to existing claimants and the petitioner's stockholders. 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.

Vancouver Women's Health Collective Soc. v. A.H. Robins Co., 820 F.2d 1359, 1364 (4th Cir. 1987). While additional publication notice may have been desirable (although there is no proof here that additional notice would have been availing), the notice given here was constitutionally sufficient.

The Objectors also argue that the font size and placement of the published Bar Date Notice, as well as the time given to creditors to file claims, was insufficient under due process standards. The Bar Date Notice was published in both newspapers on July 23, 2007, requiring claims to be filed prior to the Bar Date of August 31, 2007. The Bar Date Order required notice to be published no less than 30 days prior to the Bar Date. Trustee Ex. 2, ¶18. The parties have

not provided any reason why publishing notice 39 days prior to the Bar Date was insufficient. Despite any disadvantages, the font size and placement of the published notice were also sufficient.

The Objectors also argue that the Debtors, aware of the potential for a large number of claims by Borrowers, published the Bar Date Notice in a manner to ensure that potential Borrower claimants would *not* receive adequate notice to file claims. On the record before me, I cannot conclude that the Debtors published notice of the Bar Date in a manner to preclude Borrower claims. In her Declaration, counsel for the Debtors stated that, early in the case, the Borrowers were not considered a source of potential claims:

> At the time the Bar Date Notice was published . . . the Debtors generally did not view borrowers as potential creditors, unless and until a borrower filed a complaint or commenced litigation, at which point they were considered litigation creditors or potential creditors who were included on the litigation schedule of creditors provided with actual notice. Unless a borrower filed a complaint or commenced litigation against the Debtors, thereby becoming a potential creditor of the Debtors, the Debtors generally viewed the borrowers as account-debtors who *owed money to the Debtors*.

Trustee Ex. 5 (Uhland Decl.), ¶5(c) (emphasis added). Tr. 61:17 - 62:4. The Objectors assert that the Debtors should have been aware of the potential for numerous claims by Borrowers based on the Debtors' documentation of troubled loans as set forth in the "kick-out reports" or "scratch and dent pools" described in the Examiner's Report.[15] However, the Debtors did not

[15]The Objectors sought to introduce into evidence portions of the Final Report of Michael J. Missal Bankruptcy Court Examiner, February 29, 2008 (docket no. 5518)(the "Examiner's Report") at the hearing. Upon agreement by the Trustee, the entire Examiner's Report was admitted into evidence. Tr. at 161:14 - 161:25. The Examiner's Report describes "kickouts" as loans that New Century sought to sell to investors in the secondary market that were rejected by those investors due to defective appraisals, incorrect credit reports and missing documentation. Examiner Report, p. 109. "Kickouts," and loans with egregious deficiencies (such as non-performing loans or loans that did not comply with New Century's underwriting standards) were then moved into the "scratch and dent" category of New Century's loan

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associate those loans with potential Borrower claims. As explained by Debtors' counsel:

> We viewed the scratch and dent pools as loans that had . . . documentation problems that affected their enforceability and therefore the loan value.. . . We didn't correlate the scratch and dent loan pools with borrower claims.

Tr. 80:5 - 80:9. The same was true with respect to the "kickout loans." Tr. 82:9 - 82:16. ("My view is that the fact a loan was kicked out doesn't correlate with the borrower having a claim against New Century."). The Objectors' argument that the Debtors' intentionally published notice in a manner to preclude Borrowers from asserting timely claims is completely unsupported by the evidence.

Finally, I note again that this decision does not address the merits of any underlying Borrower claims. As stated by the Third Circuit in *Chemetron*:

> In reaching this result, we are not unsympathetic to the alleged injury suffered by the claimants in this case. We stress that our holding addresses the burden placed on the bankruptcy debtor to provide actual notice to potential claimants, not the merits of a timely and properly filed tort suit. Where a debtor has sought the protection of bankruptcy law, however, procedural protections such as the bar claims date apply.

Chemetron, 72 F.3d at 348. As discussed in the February 7 Decision, an overriding principle in bankruptcy is finality. The bar date provides that finality because it gives a date certain after which a plan can be negotiated, formulated, and eventually confirmed, ultimately leading to the rehabilitation of the debtor and the payment of claims under a plan of reorganization. *See In re Drexel Burnham Lambert Group Inc.*, 151 B.R. 674, 679 (Bankr. S.D.N.Y. 1993) *aff'd*, 157 B.R. 532 (S.D.N.Y. 1993). As quoted in the February 7 Decision, and as is so particularly apt here, the *U.S. Airways* Court explained:

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[15](...continued)
inventory. Examiner Report, p. 67.

> The establishment and enforcement of a bar date for filing claims "furthers the policy of finality designed to protect the interests of a debtor and his diligent creditors and the expeditious administration of the bankruptcy case." *In re Peters,* 90 B.R. 588, 597 (Bankr. N.D.N.Y. 1988). Furthermore, "to allow the debtor to be continually pursued by his creditors ad infinitum ... would be to sanction a form of slow torture contrary to the spirit and purposes of the bankruptcy laws." *Id.* (quoting *Maine Bonding & Casualty Co. v. Grant (In re Grant)*, 45 B.R. 262, 264 (Bankr.D.Me.1984)).
>
> In the instant case, the debtor would be prejudiced by allowing the [claimants] to assert their claim six months after the bar date had passed, particularly in a case as large as this. As noted above, U.S. Airways provided mailed notice to all known creditors and notice by publication to all "unknown" claimants of the applicable bar date. Following passage of the bar date, the debtor should reasonably be able to assume that all claimants needing to be dealt with in the plan have come forward to vindicate their rights, thereby allowing the debtor to calculate its potential liabilities for purposes of effectuating its reorganization. If the court were to allow the [claimants] to file a late claim solely because they were unaware of the bankruptcy filing, it is difficult to see on what basis the court could deny the same relief to dozens or perhaps hundreds of creditors who might now come forward and assert a previously unknown claim. Such a policy would, in effect, allow any creditor who has neglected to comply with a bar date to seek an extension on the grounds of excusable neglect because it did not read the notice. Hence, notice of a bar date by publication would be rendered a useless means of establishing a date by which all claims must be filed or forever barred. *In re Best Products Co., Inc.,* 140 B.R. 353, 359 (Bankr.S.D.N.Y.1992).

U.S. Airways, 2005 WL 3676186 at *7 - *8. These considerations are equally applicable to the case at bar. A finding that the Bar Date Order is effective against all unknown creditors furthers the policy of finality.

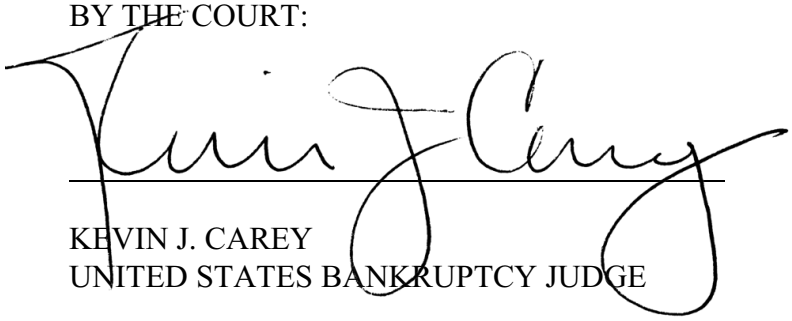
CONCLUSION

During the May 23, 2012 evidentiary hearing, all parties were given the opportunity to present evidence and to cross-examine Ms. Uhland. Upon consideration of the evidentiary record

and relevant case law, nothing has been offered to change the conclusions reached in the February 7 Decision. Therefore, based on the record before me and for the reasons set forth above, I conclude that the Debtors' decision to publish the Bar Date Notice in the national edition of the *Wall Street Journal*, supplemented with notice in the *Orange County Register*, was reasonably calculated, under the circumstances, to apprise interested parties nationwide of the Bar Date and afford them an opportunity to file claims. Accordingly, publication of the Bar Date Notice in the national edition of the *Wall Street Journal,* supplemented with notice in the *Orange County Register*, passes constitutional muster.

The Trustee's Bar Date Motion will be granted. An appropriate order follows.

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: August 30, 2013

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: NEW CENTURY TRS HOLDINGS, INC., a Delaware Corporation, et al., Debtors.	)	Chapter 11 Bankr. No. 07-10416-BLS Jointly Administered
MOLLY S. WHITE and RALPH N. WHITE, Appellants, v. ALAN M. JACOBS, as liquidating trustee of the New Century Liquidating Trust, Appellee.	)	Civ. No. 13-1719-SLR

ORDER

At Wilmington this 19th day of August, 2014, consistent with the memorandum opinion issued this date;

IT IS HEREBY ORDERED that the bankruptcy court's August 30, 2013 order is **vacated**, and the matter is **remanded** for further proceedings.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: NEW CENTURY TRS HOLDINGS, INC., a Delaware Corporation, et al., Debtors.	)	Chapter 11 Bankr. No. 07-10416-BLS Jointly Administered
MOLLY S. WHITE and RALPH N. WHITE, Appellants, v. ALAN M. JACOBS, as liquidating trustee of the New Century Liquidating Trust, Appellee.	)	Civ. No. 13-1719-SLR

Molly S. White and Ralph N. White, Port Orange, Florida. Pro se Appellants.

Bonnie Glantz Fatell and Alan M. Root, Esquires, Blank Rome LLP, Wilmington, Delaware. Counsel for Appellee.

MEMORANDUM OPINION

Dated: August 19, 2014
Wilmington, Delaware

ROBINSON, District Judge

I. INTRODUCTION

Appellants Molly S. White and Ralph N. White ("White") ("appellants") filed this bankruptcy appeal on October 18, 2013. (D.I. 1) They appear *pro se*. The appeal arises from an order entered by the bankruptcy court on August 30, 2013, that determined debtors complied with the bankruptcy court's order establishing bar dates for filing proofs of claim and approving the form, manner, and sufficiency of the notice as applied to unknown creditors. The court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a).

II. BACKGROUND

Appellants entered into a consumer mortgage loan transaction that closed on or about July 26, 2006. *White v. New Century TRS Holdings, Inc.*, Adv. No. 10-55357-BLS, D.I. 59.[1] In April 2007, New Century TRS Holdings, Inc. ("TRS Holdings") and its affiliates (collectively, "debtors"[2]) filed chapter 11 bankruptcy petitions in the United

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[1]The lead case (07-10416) and adversary proceeding were originally assigned to United States Bankruptcy Judge Kevin J. Carey. The cases were reassigned to United States Bankruptcy Chief Judge Brendan Linehan Shannon on January 31, 2014. (Bankr. No. 07-10416-BLS, D.I. 11340)

[2]Debtors are the following entities: New Century Financial Corporation (f/k/a New Century REIT, Inc.), a Maryland corporation; New Century TRS Holdings, Inc. (f/k/a New Century Financial Corporation), a Delaware corporation; New Century Mortgage Corporation (f/k/a JBE Mortgage) (d/b/a NCMC Mortgage Corporate, New Century Corporation, New Century Mortgage Ventures, LLC), a California corporation; NC Capital Corporation, a California corporation; Home123 Corporation (f/k/a The Anyloan Corporation, 1800anyloan.com, Anyloan.com), a California corporation; New Century Credit Corporation (f/k/a Worth Funding Incorporated), a California corporation; NC Asset Holding, L.P. (f/k/a NC Residual II Corporation), a Delaware limited partnership; NC Residual Corporation, a Delaware corporation; NC Residual IV Corporation, a Delaware corporation; New Century R.E.O. Corp., a California corporation; New Century R.E.O. II Corp., a California corporation; New Century R.E.O. III Corp., a California corporation; New Century Mortgage Ventures, LLC (d/b/a Summit Resort

States Bankruptcy Court for the District of Delaware ("bankruptcy court") in Bankr. No. 07-10416-BLS (the "bankruptcy proceeding"). *See In re New Century TRS Holdings, Inc.*, 407 B.R. 675 (D. Del. 2009). On June 8, 2007, debtors filed a motion pursuant to Fed. R. Bankr. P. 2002, 3003(c)(3), and 9007, asking the bankruptcy court to fix the time within which proofs of claim may be filed ("debtors' bar date motion"). (Bankr. No. 07-10416-BLS at D.I. 1173) On June 28, 2007, the bankruptcy court entered an order (the "bar date order") that established August 31, 2007 at 5:00 p.m. (prevailing Pacific Time) as the deadline for filing proofs of claim in the chapter 11 case (the "bar date"). (*Id.* at D.I. 1721) On July 9, 2007, debtors' claims and noticing agent, Xroads Case Management Service LLC ("claims agent") filed a declaration of service, stating that it mailed a copy of the notice of bar date (the "bar date notice") and a proof of claim form substantially similar to Official Form No. 10 to "parties listed on the master mailing matrix as set forth on a list maintained by debtors' counsel." (*Id.* at D.I. 1861) On August 3, 2007, the claims agent filed affidavits of publication stating that the bar date notice was published in the national edition of The Wall Street Journal and The Orange County Register on July 23, 2007. (*Id.* at D.I. 2148, D.I. 2149)

On November 22, 2008, appellants filed claim 4073, and later, on or about January 21, 2009, they filed claim numbers 4074 and 4080 in debtors' bankruptcy

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Lending, Total Mortgage Resource, Select Mortgage Group, Monticello Mortgage Services, Ad Astra Mortgage, Midwest Home Mortgage, TRATS Financial Services, Elite Financial Services, Buyers Advantage Mortgage), a Delaware limited liability company; NC Deltex, LLC, a Delaware limited liability company; and NCoral, L.P., a Delaware limited liability partnership. (bankruptcy proceeding, D.I. 8254 at 1 n.1) "Debtors" also include New Century Warehouse Corporation (a/k/a Access Lending), a California corporation, which filed its voluntary chapter 11 petition on August 3, 2007. (*Id.*)

case.[3] (Adv. No. 10-55357-BLS, D.I. 59) On November 20, 2009, the bankruptcy court entered an order confirming the modified second amended joint chapter 11 plan of liquidation that adopted, ratified and confirmed the New Century Liquidating Trust Agreement, dated as of August 1, 2008, which created the New Century Liquidating Trust and appointed Alan M. Jacobs as Liquidating Trustee of New Century Liquidating Trust and Plan Administrator of New Century Warehouse Corporation ("Trustee"). (*Id.* at 9905, 9957)

On August 13, 2010, the Trustee filed an objection to appellants' claims on the grounds they lacked merit and were filed after the bar date. (Adv. No. 10-55357-BLS, D.I. 59) On November 10, 2010, appellants filed adversary proceeding *White v. New Century TRS Holdings*, Adv. No. 10-55356-BLS. Disputes regarding appellants' claims and the adversary proceeding complaint were consolidated in a scheduling order that was entered in the adversary proceeding on December 13, 2010. (*Id.* at D.I. 9) On June 7, 2011, the bankruptcy court granted in part and denied in part the Trustee's motion to dismiss appellant's adversary complaint. (*Id.* at D.I. 59, 60) The bankruptcy court stated, "[a]lthough the [d]ebtors arguably complied with the stated minimum requirements of the [b]ar [d]ate [o]rder, without a more fully developed factual record, I am unable to determine whether the publication notice was reasonably calculated to provide notice to consumer mortgagors like the Whites. At this stage in the proceeding, the Trustee has not met his burden of proving that publication in one national edition

[3]The bankruptcy court believes that claim numbers 4074 and 4080 are duplicative of claim number 4073. (Adv. No. 10-55357-BLS, D.I. 59)

newspaper and one local newspaper is sufficient to meet due process requirements as applied to the Whites as unknown creditors." (*Id.* at D.I. 59 at 14)

In July 2011, Helen Galope ("Galope") filed proof of claim number 4131, objected to by the Trustee, and an evidentiary hearing was held on December 13, 2011 to determine whether the claim should be disallowed as filed after the claims bar date. (Bankr. No. 07-10416-BLS at D.I. 11256) On February 7, 2012, the bankruptcy court entered a memorandum and order that disallowed and expunged Galope's claim. (*Id.* at 10725, 10726) The February 7, 2012 memorandum and order determined, in part, that debtors' publication of the bar date notice in the national edition of The Wall Street Journal, supplemented with notice in The Orange County Register, was constitutionally adequate for Galope, who was an unknown creditor at the time the bar date notice was served. The bankruptcy court subsequently denied two motions for reconsideration of the February 7, 2012 order filed by Galope. (*Id.* at D.I. 10742, 11256)

On April 2, 2012, the Trustee filed a global constructive notice motion seeking a determination that the debtors had: (1) complied with the requirements of the bankruptcy court's June 28, 2007 order establishing bar dates for filing proofs of claim and approving form, manner and sufficiency of notice; and (2) provided constructive notice of the bar date by publication that satisfied the requirements of due process for all unknown creditors. (*Id.* at D.I. 10824) The Trustee sought an order consistent with the February 7, 2012 Galope decision and first reconsideration order that concluded debtors' publication notice of the bar date complied with the requirements set forth in the bar date order and satisfied the requirements of due process for unknown creditors. On April 18, 2012, appellants (and others) filed an objection to the global constructive

notice motion and, on April 20, 2012, the Trustee filed an omnibus reply in further support of the motion and in response to the objections filed by the Whites and other pro se litigants. (*Id.* at D.I. 10841, 10853)

The bankruptcy court held an evidentiary hearing on the matter on May 23, 2012. (*Id.* at 10916) White appeared at the hearing but, due to his scheduled flight home, was unable to fully participate in the hearing. (*Id.* at 10916 at 145). During the hearing, White was told that this was his opportunity to cross-examine witnesses. (*Id.* at 145-46) The matter was taken under advisement and, on August 30, 2013, the bankruptcy court entered an order finding that debtors had complied with the requirements of the bar date order, and that debtors had published the bar date notice in a manner that was "reasonably calculated, under the circumstances, to apprise interested parties nationwide of the bar date and afford them an opportunity to file claims". (*Id.* at D.I. 11233, 11234). The bankruptcy court specifically stated that the memorandum "addresses only the constitutional sufficiency of the publication of the bar date notice as it applies to unknown creditors," that it made no "determination about whether particular creditors were unknown creditors or known creditors entitled to actual notice," that it did not "address whether any particular individual claimants have met the requirements of excusable neglect for a late-filed proof of claim," and that the decision did not "address the merits of any underlying borrower claims." (*Id.* at 11233 at 4-5 n.9, 15) The order is the subject of this appeal.

III. STANDARD OF REVIEW

In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to

that court's legal conclusions. *See American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a *de novo* basis bankruptcy court opinions. *See In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002). A factual finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re Cellnet Data Sys., Inc.*, 327 F.3d 242, 244 (3d Cir. 2003) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness." Fed. R. Bankr. P. 8013.

IV. ISSUES RAISED ON APPEAL

Appellants raise the following issues for review (D.I. 2):

> (1) whether the bankruptcy court abused its discretion by assuming without competent evidentiary support that the publication notice of the bar date placed in the national edition of The Wall Street Journal was in fact distributed nationwide throughout the United States when the declaration of the advertising clerk specifically declares and limits such

published and general circulation to (3) three locations, New York, New York, DePage County, Illinois and Dallas, Texas;

(2) whether the bankruptcy court erred in considering the declaration of Suzzanne Uhland ("Uhland") despite contradiction in the declarant's testimony and evidence on record that the declaration was not based on the declarant's personal knowledge;

(3) whether the bankruptcy court misapplied the controlling law in effect pertaining to the claims process and noticing as articulated in *Wright v. Owens Corning,* 679 F.3d 101 (3d Cir. 2012), *cert. denied*, __U.S.__, 133 S.Ct. 1239 (2013);

(4) whether the bankruptcy court erred in permitting and allowing one group of potential unknown creditors to be treated differently as it pertains to the right to receive the bar date notice than another group of potential unknown creditors; and

(5) whether the bankruptcy court abused its discretion to exclude relevant evidence presented at the May 23, 2012 hearing pertinent to the reasonableness of debtors' publication of the bar date notice.

Appellee's counter-statement raises four issues on appeal (D.I. 3):

(1) whether the bankruptcy court made a clear error in its finding in the memorandum and order that the debtors complied with the terms of the bar date order;

(2) whether the bankruptcy court abused its discretion in considering the declaration and testimony of the debtors' former lead counsel in making its determination in the memorandum and order that the debtors considered publications that would provide nationwide notice of the bar date to apprise all interested parties such that constitutional requirements of due process were satisfied;

(3) whether the appellants waived their rights to challenge the bankruptcy court's alleged exclusion of evidence presented at the May 23, 2012 evidentiary hearing where the appellants failed to request the admission of such evidence; and

(4) whether there is a credible challenge to the bankruptcy court's determination in the memorandum and order that the constructive notice of the bar date provided by publication, including the size, placement, and manner thereof, was reasonably calculated, under the circumstances, to apprise all interested parties nationwide such that constitutional requirements of due process were satisfied.

V. DISCUSSION

Appellants raise a number of issues that challenge the ruling of the bankruptcy court on the grounds that the bankruptcy court abused its discretion, erred, and misapplied the law. Appellants contend that they were entitled to receive actual notice of the bar date and, because they were not, they were not afforded due process. That issue, however, is not before the court. As discussed by the bankruptcy court, the August 30, 2013 order was limited solely to the issue of the constitutional sufficiency of the publication of the bar date notice as applied to unknown creditors. No ruling was made on the issue of whether any particular creditors were entitled to receive actual notice. Appellants further contend that the constructive notice was insufficiently published to provide unknown creditors with any meaningful opportunity to participate in debtors' chapter 11 proceedings.

A. Unknown Creditors and Notice

An "unknown" creditor is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)). Notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . . ." *Mullane,* 339 U.S. at 314. Whether adequate notice has been provided depends on the circumstances of a particular case. *In re Grossman's, Inc.*, 607 F.3d 114, 127 (3d Cir. 2010). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Wright v. Owens Corning*, 679 F.3d at 108 (quoting *Mullane*, 339 U.S. at 314). "Lack or

inadequacy of notice of a bankruptcy prevents a claimant from having the opportunity to participate meaningfully in a bankruptcy proceeding to protect his or her claim." *Wright v. Owens Corning*, 679 F.3d at 107 (citing 11 U.S.C. § 342(a) ("There shall be given such notice as is appropriate . . . of an order for relief . . . under [the Bankruptcy Code].")). Inadequate notice accordingly "precludes discharge of a claim in bankruptcy." *Chemetron*, 72 F.3d at 346.

It is well settled that constructive notice of the claims bar date by publication satisfies the requirements of due process for unknown creditors. *Id.* at 348. Publication in national newspapers is regularly deemed sufficient notice to unknown creditors, especially when supplemented with notice in papers of general circulation in locations where the debtor is conducting business. *Id.* at 348; *see also City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. . . . But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication.").

The bar date order provided for debtors to cause the publication notice to be published once in the national edition of The Wall Street Journal and any such other local publications as debtors deemed appropriate not less than thirty days prior to the general bar date. (Bankr. No. 07-10416-BLS, D.I. 1729 ¶ 18) Debtors published notice of the bar date in The Wall Street Journal and The Orange County Register on July 23, 2007.

B. Evidence Considered by the Bankruptcy Court

In its August 30, 2013 ruling, the bankruptcy court referred to its prior February 7, 2012 memorandum and order wherein it considered the testimony of Uhland, debtors'

former lead counsel, regarding the decision-making behind the publication of the bar date notice with regard to Galope, an unknown creditor, and found the publication in the national edition of The Wall Street Journal supplemented with notice in The Orange County Register passed constitutional muster. (Bankr. No. 07-10416-BLS, D.I. 11233 at 4) In addition, the bankruptcy court considered the May 23, 2012 testimony presented by Uhland as well as a declaration she submitted in support of the bar date motion. That evidence included Uhland's testimony and declaration that notice of the bar date was published in the national edition of The Wall Street Journal because debtors had business operations throughout the United States and publication in a newspaper that was published and available nationwide would provide notice to unknown creditors (whether institutional or individual) as broadly as possible throughout the country. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶¶ 5(b), (d); D.I. 10916 at 59-60, 92-93) Debtors had been doing business throughout the nation and had more than a million borrowers. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶ 5(c)) Debtors determined that The Wall Street Journal was a customary place to publish legal notices and believed it was prudent to publish notice in a newspaper where parties might expect to find a bar date notice. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶ 5(c); D.I. 10916 at 60)

The bar date order required publication in the national edition of The Wall Street Journal and "such local newspapers as the debtors deem appropriate, "and debtors published notice of the bar date in The Orange County Register because debtors' main office was located in the City of Irvine in Orange County, California. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶ 6(a)) A large concentration of debtors' employees were based in Orange County, and debtors were concerned about the potential for unknown claims asserted by former employees affected by debtors' substantial workforce reduction in

the weeks and months prior to the bankruptcy filing. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶ 6(a); D.I. 10916 at 60-61) Debtors were aware that The Orange County Register was providing extensive coverage of debtors' bankruptcy, and debtors believed that supplementary notice in the local publication would reach individuals who may have been reading The Orange County Register to keep track of the chapter 11 cases. (*Id.* at D.I. 10825, ex. Uhland decl. at ¶ 6(b))

C. Analysis

Appellants proceed *pro se* and generally contend, as characterized by appellee in his statement of issues raised on appeal, that the constructive notice of the bar date provided by publication, including the size, placement, and manner thereof, was not reasonably calculated, under the circumstances, to apprise all interested parties nationwide such that constitutional requirements of due process were satisfied. The court starts its analysis with the reminder that the August 30, 2013 memorandum specifically excludes the issues of whether particular creditors were unknown creditors or known creditors entitled to actual notice or whether individual claimants met the requirements for excusable neglect for a late-filed proof of claim. Therefore, those issues will not be addressed on appeal.

With respect to the question of whether the constructive notice provided passes constitutional muster, the court finds no error by the bankruptcy court in its reliance upon Uhland's testimony and declaration to the extent that Uhland explained why The Wall Street Journal and The Orange County Register were chosen as appropriate publications in which to circulate notice of the bar date to unknown claimants. *See In re Myers*, 491 F.3d 120, 126 (3d Cir. 2007) ("The bankruptcy court is best positioned to assess the facts, particularly those related to credibility . . . ."). Given "the due process

concern in [*Wright v. Owens Corning*, 679 F.3d 101 (3d Cir 2012)] – that claimants would lose any opportunity for relief without first receiving proper notice," *In re W.R. Grace & Co.*, 729 F.3d 311, 323 (2013), the question remains whether the constructive notice provided in the instant bankruptcy proceeding was sufficient under the law.

As explained above,

> [d]ischarge of the claims of future unknown claimants raises questions regarding due process. Notice is '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." . . . Lack or inadequacy of notice of a bankruptcy prevents a claimant from having the opportunity to participate meaningfully in a bankruptcy to protect his or her claim. . . . Inadequate notice accordingly "precludes discharge of a claim in bankruptcy."

Wright, 679 F.3d at 107 (citations omitted). While the Third Circuit generally deems notice by publication in national newspapers sufficient to satisfy the requirements of due process for unknown claimants, "whether adequate notice has been provided depends on the circumstances of a particular case. . . . Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 108 (citations omitted).

Looking to the circumstances in this particular case, the court reiterates the description of the landscape provided by Uhland. Debtors had business operations throughout the United States and had more than a million borrowers. Debtors were concerned about the potential for unknown claims asserted by former employees (unknown employee claims) but apparently did not consider their customers (borrowers) at all in connection with the question of notice.[4]

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[4]Early in the case, Uhland declared that "the borrowers were not considered a source of potential claims" as debtors did not associate troubled loans with potential

In *Wright*, the Third Circuit found debtors' notices "sufficient as to most unknown claimants,"[5] to wit: In November 2001, the bankruptcy court set a claims bar date of April 15, 2002. The bankruptcy court also approved a bar date notice, which was published twice in The New York Times, twice in The Wall Street Journal, and twice in USA Today, among other publications. *Id.* at 103. By comparison, unknown claimants in the instant proceeding were given a mere 39 days' notice by a single publication.[6] That single publication was presented in The Wall Street Journal, certainly a newspaper with a national distribution,[7] but not one - like USA Today - that necessarily enjoys a

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borrower claims. (Bankr. No. 07-10416-BLS, D.I. 11233 at 14-15) In addition, during the May 23, 2012 hearing, Uhland testified, "we did not consider borrowers to be creditors . . . . We considered the borrowers to be account debtors . . . . And accordingly didn't – wouldn't have considered noticing them generally with the bar date . . . ." (*Id.* at D.I. 10916 at 61-62)

[5]The exceptions being for those persons whose claims were based solely on the retroactive effect of the rule announced in *In re Grossman's, Inc.*, 607 F.3d 113 (3d Cir. 2010), wherein the Third Circuit established that a "'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code."

[6]In this regard, debtors chose The Orange County Register as the publication most likely to provide notice to their workforce, not to unknown creditors such as the borrowers who apparently resided throughout the United States.

[7]Appellants contend that the bankruptcy court abused its discretion in determining that the evidence supported a finding that the publication notice of the bar date was placed in the national edition of The Wall Street Journal. In the affidavit of Glenn Hellums, Jr. ("Hellums"), advertising clerk of the publisher of The Wall Street Journal, he describes The Wall Street Journal as a daily national newspaper published, and of general circulation, in the City and County of New York, New York; City of Naperville, DuPage County, Illinois; and City and County of Dallas, Texas. (*Id.* at D.I. 2148) With regard to publication of the bar date notice, Hellums' affidavit specifically states that the notice was "regularly published in The Wall Street Journal **for national distribution**" on July 23, 2007. (*Id.*) The bankruptcy court did not abuse its discretion in determining that a notice placed in The Wall Street Journal reached a nationwide audience. *See e.g., In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 112 B.R. 920 (N.D. Ill. 1990) (holding publication notice in the Wall Street Journal adequate under bankruptcy law); *Wright v. Placid Oil Co.*, 107 B.R. 104 (N.D. Tex.1989) (holding

broad circulation among less than sophisticated, focused readers. The court concludes that the adequacy of the notice provided in this case has not been meaningfully explored and likely was not reasonably calculated to apprise appellants of the bar date. The court concludes that "[d]ue process affords a re-do" under the circumstances of this case.[8] *Id.* at 108.

VI. CONCLUSION

Based on the reasoning above, the bankruptcy court's August 30, 2013 order will be vacated and the matter remanded for further proceedings consistent with this memorandum opinion.[9] An appropriate order shall follow.

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publication in The Wall Street Journal sufficient notice to unknown creditor injured in Louisiana).

[8]It strikes the court that, when the bar date is set so close to the publication date, debtors have a heavier burden to ensure that notice is widespread.

[9]In this regard, the court finds that the bankruptcy court did not err in excluding the publication Landier, Augustine & Sraer, David & Thesmar, David, 2010. "Going for Broke: New Century Financial Corporation, 2004-2006). The transcript of the May 23, 2012 hearing indicates that the publication was marked as exhibit W-1, and opposing counsel objected on the grounds of hearsay. (Bankr. No. 07-10416-BLS, D.I. 10916 at 130) The bankruptcy court indicated that there might be an exception to hearsay and White was allowed to question Uhland about the publication. (*Id.* at D.I. 10919 at 127-35) Although the publication was marked as an exhibit, White did not move for its admission into evidence. (*Id.* at D.I. 10919 at 125-35) Appellants later filed a motion for the bankruptcy court to take judicial notice of the publication. (*Id.* at D.I. 11011) While appellants contend that the bankruptcy court did not consider the publication, there is no indication from the record that the bankruptcy court did not consider the publication.