

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jun 30, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OLD REPUBLIC AEROSPACE,  
INC.,

Plaintiff,

v.

TAMARACK AEROSPACE  
GROUP, INC.,

Defendant.

NO: 2:20-CV-421-RMP

NO. 2:20-CV-060-RMP

ORDER DENYING WITH LEAVE  
TO RENEW PLAINTIFF’S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

BEFORE THE COURT, without oral argument, is a Motion for Partial Summary Judgment, ECF No. 18, by Plaintiff Old Republic Aerospace, Inc. (“Old Republic”). Having reviewed Plaintiff’s Motion and supporting declarations and exhibits, ECF Nos. 19, 20, and 21; Plaintiff’s Statement of Material Facts, ECF No. 22; Defendant Tamarack Aerospace Group, Inc.’s (“Tamarack’s”) Response and supporting declarations and exhibits, ECF Nos. 24, 24-2, 24-3, 24-4, 24-5, and 24-6; Defendant’s Statement of Material Facts, ECF No. 24-1; Plaintiff’s Reply and supporting declaration and exhibit, ECF Nos. 25, 27, and 27-1; Plaintiff’s reply

ORDER DENYING WITH LEAVE TO RENEW PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT ~ 1

1 Statement of Facts, ECF No. 26; the remaining record; and the relevant law; the  
2 Court is fully informed.

### 3 **BACKGROUND**

4 The following facts are undisputed unless otherwise indicated.

5 On September 3, 2013, EstoAir, LLC (“EstoAir”) executed an Order Deposit  
6 Contract with Tamarack to purchase the Tamarack ATLAS Winglets retrofit kit.  
7 ECF Nos. 24-5; 26 at 4. R. Wayne Estopinal executed the Order Deposit Contract  
8 on behalf of EstoAir, and the Contract identified a business address of 903 Spring  
9 Street, Jeffersonville, Indiana 47130. ECF No. 24-5 at 1, 9.

10 On January 10, 2018, EstoAir and Tamarack entered into a Purchase and Sale  
11 Agreement (“PSA”) for the installation of the Winglets on a Cessna model 525A,  
12 airframe serial number 525A0449 (“Subject Airplane”). The PSA identifies Mr.  
13 Estopinal as EstoAir’s manager, and Mr. Estopinal executed the agreement on behalf  
14 of EstoAir. ECF No. 24-5 at 14. Tamarack communicated with Mr. Estopinal,  
15 EstoAir’s owner, with respect to the PSA at the street address 903 Spring Street,  
16 Jeffersonville, IN 47130 and at an email address for Mr. Estopinal. ECF Nos. 24-4  
17 at 2; 26 at 4.

18 The Winglets were installed on the Subject Airplane on approximately May  
19 28, 2018. ECF Nos. 24-1 at 3; 26 at 4.

20 On November 30, 2018, Mr. Estopinal, as well as Andrew Davis and Sandra  
21 Johnson, were passengers on the Subject Airplane, flying from Clark County

1 Regional Airport in Sellersburg, Indiana, with an intended destination of Chicago  
2 Midway International Airport in Chicago, Illinois. ECF Nos. 24-1 at 3; 26 at 4–5.  
3 The plane crashed in Indiana, and all three passengers were killed. *Id.*<sup>1</sup>

4 On June 1, 2019, Tamarack filed a voluntary petition for relief under Chapter  
5 11 of the Bankruptcy Code with the U.S. Bankruptcy Court for this District, Case  
6 No. 19-01492 (“Tamarack’s bankruptcy case”). The petition identified “EstoAir,  
7 Attn. R. Wayne Estopinal, 903 Spring Street, Jeffersonville, Indiana 47130” as a  
8 general unsecured creditor of Tamarack, with notice of the bankruptcy filing was  
9 mailed to: (1) “R. Wayne Estopinal, 903 Spring Street, Jeffersonville, IN 47130”;  
10 and (2) Estate of R. Wayne Estopinal, Thomas R. Rough, Esq. c/o Nolan Law  
11 Group, 209 N. Clark St., 30th Floor, Chicago, IL 60602-5094.” ECF No. 24-2 at 2.

12 In a letter dated June 5, 2019, Old Republic wrote to Tamarack and its  
13 president, Brian Cox, to “formally place [Tamarack] on notice of a potential  
14 subrogation” claim on the basis that Old Republic had issued an insurance policy to  
15 “TEG Architects, LLC” that provided physical damage coverage for an aircraft with  
16 the same serial number as the Subject Airplane and various liability coverages to the  
17 insured. ECF No. 20-1 at 4.

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20 <sup>1</sup> The estates of the three individuals who died in the crash have filed suits that  
21 were consolidated into Case No. 20-cv-60-RMP by this Court.

1           On June 12, 2019, a claims manager from Starr Companies, Tamarack’s  
2 insurer, acknowledged receipt of Old Republic’s subrogation notice. ECF No. 20-2  
3 at 2. The claims manager’s confirmation email did not refer to Tamarack’s  
4 bankruptcy case. *Id.* Rather, the claims manager wrote, “As we discussed [in our  
5 telephone conversation], we are currently investigation [sic] this matter and look  
6 forward with [sic] working with you.” *Id.*

7           On June 26, 2019, the Estates of Mr. Estopinal, Mr. Davis, and Ms. Johnson  
8 (the “Plaintiff Estates”) filed a Motion for Relief from Stay in Tamarack’s  
9 bankruptcy case. The Bankruptcy Court ultimately issued an Agreed Order Granting  
10 Relief from Stay and Denying Motion to Waive Fed. R. Bankr. P. 4001(a)(3) that  
11 modified the stay “to allow the Decedents to proceed and prosecute claims against  
12 Tamarack in accordance with 28 U.S.C. § 157(b)(5) up to the policy limits of all  
13 applicable liability insurance policies providing insurance coverage for Tamarack.”  
14 ECF No. 24-3 at 2–3.

15           On September 30, 2019, Tamarack’s bankruptcy counsel sent by U.S. Mail  
16 copies of Tamarack’s Disclosure Statement, Plan of Reorganization, Notice of  
17 Filing/Notice of Hearing, and List of Claims, all of which were filed in Tamarack’s  
18 bankruptcy case, to: (1) R. Wayne Estopinal, 903 Spring Street, Jeffersonville,  
19 Indiana 47130; (2) The Estate of R. Wayne Estopinal, c/o Thomas P. Routh, Esq.,  
20 Nolan Law Group, 20 N. Clark Street, 30th Floor, Chicago, IL 60602-5094; and (3)

1 EstoAir, LLC, Attn: R. Wayne Estopinal, 903 Spring Street, Jeffersonville, Indiana  
2 47130. ECF Nos. 24-2 at 3; 24-3 at 6–7.

3 EstoAir did not file any Proof of Claim, timely or untimely, or move the  
4 Bankruptcy Court to lift the stay to pursue any legal claims arising from damage to  
5 the Subject Airplane. ECF Nos. 24-1 at 5; 26 at 5.

6 On March 2, 2020, the Bankruptcy Court entered a Debtor’s Order  
7 Confirming Amended Plan of Reorganization (“Order Confirming Plan”) that  
8 incorporates by reference the terms and provisions of the Amended Plan of  
9 Reorganization and provides in part that the Order Confirming Plan is binding on  
10 any holder of a claim against or interest in Tamarack “whether or not such holder  
11 has accepted the [Amended Plan of Reorganization], as well as any parties-in-  
12 interest with notice of this proceeding.” ECF No. 24-3 at 31–48. The Amended  
13 Plan of Reorganization provides that the wrongful death claims raised by the  
14 Plaintiff Estates are allowed up to the extent of the insurance coverage and policies  
15 available to pay the claims. *See* ECF Nos. 24-1 at 6; 26 at 6. Tamarack asserts that  
16 the effect of the Order Confirming Plan is to prohibit litigation against Tamarack  
17 unless specifically authorized by the Amended Plan or the Bankruptcy Court. ECF  
18 No. 24-1 at 6. Old Republic disputes the effect of the Amended Plan. ECF No. 26  
19 at 6.

1 Old Republic filed its Complaint in this matter, raising product liability and  
2 breach of express and implied warranty claims against Tamarack, on November 12,  
3 2020. ECF No. 1.

4 On November 24, 2020, counsel for Tamarack sent counsel for Old Republic  
5 an email asserting:

6 At the time the Complaint was filed and served upon my client, Old  
7 Republic had actual and constructive notice of Tamarack’s Chapter 11  
8 bankruptcy proceeding and the Order Confirming the Amended Plan of  
9 Reorganization (ECF No. 171). The filing and service of the Complaint  
10 by Old Republic is a violation of the Amended Plan Injunction and  
Order Confirming the Amended Plan of Reorganization. . . . If the  
Complaint is not dismissed by [November 30, 2020], I have been  
instructed to file a notice of appearance in the United States District  
Court proceeding and a motion to dismiss the Complaint.

11 ECF Nos. 19 at 1–2; 19-1 at 2–3.

12 In Tamarack’s January 11, 2021 Answer to Old Republic’s Complaint,  
13 Tamarack asserted the following affirmative defenses, among others:

14 TWENTIETH AFFIRMATIVE DEFENSE

15 The Causes of Action asserted in this lawsuit are barred by the doctrine  
16 of discharge under Title 11, U.S.C., pursuant to the Petition filed by  
Tamarack in the Bankruptcy Case and the Amended Plan confirmed by  
the Bankruptcy Court on March 2, 2020 (Dkt. 212).

17 TWENTY-FIRST AFFIRMATIVE DEFENSE

18 The claims set forth in Plaintiff’s Complaint are barred pursuant to the  
19 provisions of the First Amended Plan of Reorganization of the  
Defendant Tamarack, and/or the Order of the United States Bankruptcy  
Court confirming the same, and / or provisions of 11 U.S.C. §1141(a).

20 TWENTY-SECOND AFFIRMATIVE DEFENSE

21 The claims set for in Plaintiff’s Complaint are barred by the provisions  
of 11 U.S.C. §1141(d).

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**TWENTY-THIRD AFFIRMATIVE DEFENSE**

To the extent the claims set fort [sic] in Plaintiff’s Complaint arose prepetition and /or prior to the Order of the United States Bankruptcy Court confirming the First Amended Plan of Reorganization, said claims are barred by the principles of collateral estoppel and res judicata.

ECF No. 17 at 9.

On the same day that Tamarack filed its Answer, Old Republic filed the instant Motion for Partial Summary Judgment seeking a ruling that the Order Confirming Plan filed in the Tamarack’s bankruptcy case “does not bar Old Republic from continuing with this action.” ECF No. 18 at 2.

After filing the instant Motion, the parties filed a Stipulated Motion to Consolidate in which they represent that Old Republic and the Plaintiff Estates in consolidated Case No. 20-cv-60-RMP agree to consolidation of the above-captioned case with Case No. 20-cv-60-RMP for discovery and motion purposes, with a separate trial date from the Plaintiff Estates’ cases, and Tamarack agrees to the same while reserving the option to pursue further consolidation, including for trial, at a later date. ECF No. 28.

**LEGAL STANDARD**

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Only disputes over facts that might affect the outcome of the suit will

1 preclude the entry of summary judgment, and the disputed evidence must be “such  
2 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*  
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

4 “[A] party seeking summary judgment always bears the initial responsibility  
5 of informing the district court of the basis for its motion and identifying those  
6 portions of [the record] which it believes demonstrate the absence of a genuine issue  
7 of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Parties  
8 opposing summary judgment must cite to “particular parts of materials in the record”  
9 establishing a genuine dispute. Fed. R. Civ. P. 56(c)(1).

## 10 **DISCUSSION**

11 Old Republic seeks partial summary judgment that it is allowed to proceed  
12 with this action despite the Bankruptcy Court’s Order Confirming Plan, a  
13 determination that would foreclose Tamarack’s affirmative defenses twenty through  
14 twenty-three asserting that Old Republic’s claims in this lawsuit are barred based on  
15 Tamarack’s bankruptcy case. ECF Nos. 18 at 1; 25 at 8–9. Old Republic maintains  
16 that before it filed this lawsuit, it had not received any written notice from Tamarack  
17 concerning Tamarack’s bankruptcy case. ECF No. 22 at 3. Old Republic argues  
18 that it became a “known creditor” of Tamarack by no later than June 5, 2019, and, as  
19 such, had a due process right to formal written notice of Tamarack’s bankruptcy  
20 proceedings. ECF No. 18 at 2.



1 Tamarack responds that there are questions of material fact as to whether Old  
2 Republic was a known creditor entitled to actual notice in the Tamarack bankruptcy  
3 case and maintains that the Bankruptcy Court should adjudicate whether Old  
4 Republic was a known creditor. ECF No. 24 at 3. Tamarack emphasizes that there  
5 is no dispute that it provided notice to known creditor EstoAir. *Id.* Tamarack  
6 further argues that Old Republic has not supported its contention that it is the  
7 assignee and subrogee of EstoAir and TEG Architects with a copy of the insurance  
8 contract or any evidence of payment or assignment. ECF No. 24 at 4–5. Tamarack  
9 moves for an opportunity to conduct discovery in this case pursuant to Fed. R. Civ.  
10 P. 56(d), indicating that it would seek discovery regarding Old Republic’s insurance  
11 policies with EstoAir and TEG Architects reciting any assignment and/or  
12 subrogation rights, “as well as the dates and terms of payment, including the specific  
13 date when Old Republic became an assignee/subrogee” of EstoAir and TEG  
14 Architects. ECF No. 24 at 12.

15 Old Republic counters that it is irrelevant whether Tamarack was aware of  
16 TEG Architects as a potential creditor because Tamarack was on notice by June 5,  
17 2019, that Old Republic had a potential claim against Tamarack related to the crash,  
18 and, therefore there is no factual dispute as to whether Old Republic was a “known  
19 creditor” for purposes of requiring formal notice. ECF No. 25 at 6.

20 In bankruptcy proceedings, a debtor must file a list of all creditors known to  
21 the debtor along with a schedule of liabilities and assets. 11 U.S.C. § 521(1); *see*

1 *Levin v. Maya Constr. (In re Maya Constr. Co.)*, 78 F.3d 1395, 1398 (9th Cir. 1996).  
2 The bankruptcy court gives formal notice to all creditors on the list and advises how  
3 and by when to file a proof of claim. Fed. R. Bankr. P. 3002, 2002; *In re Maya*  
4 *Constr.*, 78 F.3d at 1398–99. Confirmation of the reorganization plan discharges the  
5 debtor from debt that arose before the date of the confirmation. 11 U.S.C. §  
6 1141(d); *see also In re Maya Constr.*, 78 F.3d at 1399.

7 “Notwithstanding the broad language of 11 U.S.C. § 1141(d), due process  
8 demands that a creditor in a Chapter 11 case receive reasonable notice of a claims  
9 bar date before it is effective against the creditor.” *Monster Content, LLC v.*

10 *Homes.com, Inc.*, 331 B.R. 438, 442 (N.D. Cal. 2005) (citing *City of New York v.*  
11 *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953)); *see*  
12 *also Shu Lun Wu v. May Kwan Si, Inc.*, 508 B.R. 606, 611–12 (S.D.N.Y. 2014)  
13 (“[T]he claim of a creditor who is not listed on an individual chapter 11 debtor’s  
14 schedules will not be discharged unless the creditor had notice of the bankruptcy  
15 case in time to file a timely proof of claim.”) (citing 11 U.S.C. § 523(a)(3)(A)).

16 Creditors are entitled to “notice reasonably calculated, under all the circumstances,  
17 to apprise interested parties of the pendency of the action and afford them an  
18 opportunity to present their objections.” *Mullane v. Central Hanover Trust Co.*, 339  
19 U.S. 306, 314 (1950).

20 “A debtor must list a creditor whose identity and claim he knows. The burden  
21 is on the debtor to cause formal notice to be given; the creditor who is not given

1 notice, even if he has actual knowledge of reorganization proceedings, does not have  
2 a duty to investigate and inject himself into the proceedings.” *In re Maya Constr.*,  
3 78 F.3d at 1399 (citing 11 U.S.C. § 521). A creditor is “known” if the creditor’s  
4 identity is either known or “reasonably ascertainable by the debtor.” *Tulsa*  
5 *Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). A  
6 creditor’s identity is “reasonably ascertainable” if that creditor can be identified  
7 through “reasonably diligent efforts.” *Mennonite Bd. of Missions v. Adams*, 462  
8 U.S. 791, 798 n.4 (1983). By contrast an “unknown” creditor is one whose  
9 “interests are either conjectural or future or, although they could be discovered upon  
10 investigation, do not in due course of business come to [the debtor’s] knowledge.”  
11 *Mullane*, 339 U.S. at 317. “The line between known and unknown creditors is not  
12 always obvious or easy to draw.” *Goodall v. Chrysler, Inc. (In re Old Carco LLC)*,  
13 Nos. 09-50002 (SMB), 17-01185 (SMB), 2018 Bankr. LEXIS 2401, at \*12 (Bankr.  
14 S.D.N.Y. Aug. 10, 2018). One bankruptcy court explained:

15 Typically, a known creditor may have engaged in some communication  
16 with a debtor concerning the existence of the creditor’s claim. This  
17 communication by itself does not necessarily make the creditor known.  
18 Direct knowledge based on a demand for payment is not, however,  
required for a claim to be considered “known.” A known claim arises  
from facts that would alert the reasonable debtor to the possibility that  
a claim might reasonably be filed against it.

19 *In re Drexel Burnham Lambert Grp. Inc.*, 151 B.R. 674, 681 (Bankr. S.D.N.Y.  
20 1993), *aff’d*, *In re Drexel Burnham Lambert Grp. Inc.*, 157 B.R. 532 (S.D.N.Y.  
21 1993); *see Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995) (“The

1 requisite search instead focuses on the debtor’s own books and records. Efforts  
2 beyond a careful examination of these documents are generally not required. Only  
3 those claimants who are identifiable through a diligent search are ‘reasonably  
4 ascertainable’ and hence ‘known’ creditors.’”).

5 Known creditors are entitled to direct notice of bankruptcy proceedings; those  
6 whose potential liability was not reasonably ascertainable need receive only notice  
7 by publication. *In re: Arch Wireless, Inc.*, 534 F.3d 76, 80–81 (1st Cir. 2008); *In re*  
8 *Maya Constr.*, 78 F.3d at 1399.

9 Old Republic posits that it was entitled to formal notice in Tamarack’s  
10 bankruptcy case based on the June 5, 2019 letter informing Tamarack of a “potential  
11 subrogation” claim by Old Republic. ECF No. 18 at 2. However, the June 5, 2019  
12 letter did not indicate that Old Republic was a potential subrogee of EstoAir, the  
13 company with which Tamarack had transacted regarding the Winglets retrofit kit,  
14 only of TEG Architects, which was not a known creditor to Tamarack. *See* ECF  
15 Nos. 20-1 at 4; 24-5 at 14. There is no indication that Old Republic informed  
16 Tamarack that it was subrogee of known creditor EstoAir; nor is there evidence in  
17 the record that confirms that Old Republic is the subrogee of either EstoAir or TEG  
18 Architects.

19 “To prevail on a request for additional discovery under Rule 56(d), a party  
20 must show that ‘(1) it has set forth in affidavit form the specific facts it hopes to  
21 elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts

1 are essential to oppose summary judgment.” *Midbrook Flowerbulbs Holland B.V.*  
2 *v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 619–20 (9th Cir. 2017) (quoting  
3 *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827  
4 (9th Cir. 2008)). A party who fails to diligently to pursue discovery before summary  
5 judgment is not entitled to additional discovery under Fed. R. Civ. P. 56(d). *See Big*  
6 *Lagoon Rancheria v. California*, 789 F.3d 947, 955 (9th Cir. 2015) (en banc).

7 As the caselaw discussed above highlights, the question of whether Old  
8 Republic was a known creditor to Tamarack is fact intensive, and the parties have  
9 not yet had an opportunity to complete discovery regarding those facts. Moreover,  
10 without evidence supporting that Old Republic was a creditor to Tamarack, Old  
11 Republic’s interests are too conjectural to preclude Tamarack from asserting  
12 affirmative defenses regarding the effect of the Order Confirming Plan on Old  
13 Republic’s claims. *See Mullane*, 339 U.S. at 317. Furthermore, there is no  
14 indication of any failure to diligently pursue discovery by Tamarack. Rather, Old  
15 Republic filed its Motion for Partial Summary Judgment before the parties  
16 propounded any discovery requests.

17 In sum, the Court finds a genuine question of fact regarding whether Old  
18 Republic was a known creditor to Tamarack entitled to formal notice of Tamarack’s  
19 bankruptcy. The Court further finds that Tamarack has shown that it requires an  
20 opportunity to obtain additional information regarding its sought-after facts. *See*  
21 ECF No. 24-6 at 2 (detailing discovery that Tamarack intends to seek).

1 Accordingly, the Court denies with leave to renew Plaintiff's Motion for Partial  
2 Summary Judgment, after discovery is conducted in this matter. *See* Fed. R. Civ. P.  
3 56(d).

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Partial Summary Judgment, **ECF No. 18**, is

6 **DENIED** with leave to renew as indicated above.

7 2. The parties' Stipulated Motion to Consolidate this case with consolidated

8 Case No. 20-cv-60-RMP, **ECF No. 28**, is **GRANTED**. The Court

9 directs the District Court Clerk to consolidate the docket for this case

10 with the consolidated docket for Case No. 20-cv-60-RMP, which shall

11 remain the docket on which all docket entries will be consolidated, and

12 the docket on which all future filings will be made. *See* ECF No. 28.

13 3. A scheduling conference to determine a trial date for the Old Republic and

14 Tamarack parties shall be scheduled by separate notice.

15 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this  
16 Order and provide copies to counsel.

17 **DATED** June 30, 2021.

18  
19 *s/ Rosanna Malouf Peterson*  
20 ROSANNA MALOUF PETERSON  
21 United States District Judge