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VIA E-MAIL TRANSMISSION TO:
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Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Proposed Amendment to Federal Rule of Bankruptcy Procedure 3001

Dear Mr. McCabe:

The following comments and suggested modifications to the proposed amendment to Federal Rule of Bankruptcy Procedure 3001 (the Proposed Rule) are submitted on behalf of my client, Creditors Bankruptcy Service. Creditors Bankruptcy Service (CBS) acts as an agent for a number of creditors, mostly national retail companies, administering the creditors' non-contingent, liquidated claims against debtors in bankruptcy. CBS has acted as creditors' agent for more than twenty-five years and has processed millions of proofs of claim nationwide. Typically, CBS files a proof of claim in the bankruptcy proceeding based on information provided by the creditor. Many of these claims are based on open-end or revolving consumer credit agreements, and many are unsecured. The average amount of each claim is small, which effectively precludes economically efficient management either by the account owner/creditor or by an attorney, whose legal fees would usually far exceed the claim amount. CBS has acted as creditors' agent for more than twenty-five years and has processed millions of proofs of claim nationwide. I have been privileged to represent CBS on various matters for almost two decades. These comments are based upon CBS' real world experience in preparing and filing proofs of claim, as well as its experiences when debtors' counsel file objections to some proofs of claim.

Proposed Rule 3001 adds both substantive requirements for a creditor filing a proof of claim in an individual debtor case and sanctions for filing proofs of claim that do not meet the additional requirements. Unfortunately, these additional requirements, rather than promoting the just, speedy and inexpensive determination of claims (Bankruptcy Rule 1001), are likely to add additional costs and inefficiencies to the process, without improving the just determination of the claims themselves.

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Generally, an individual debtor's decision to file for protection from creditors is a voluntary act. The debtor is required to notify his or her creditors, and to file schedules of assets and amounts owed to the creditors. In particular, the debtor's schedule of debts is filed under penalty of perjury. When the debtor and the creditor agree on the amount of a debt, a rule that prohibits the creditor from establishing the claim (proposed Rule 3001(c)(2)(D)) appears to reward disingenuous debtors who amend their schedules to dispute claims solely for the purpose of disallowing a valid claim. *See In re Cluff*, 313 B. R. 323, 340 (Bankr. Utah 2004) aff'd by *Cluff v. eCast Settlement,* 2006 U.S. Dist. LEXIS 71904 (D. Utah, Sept. 29, 2006).

> Finally, the Debtors originally listed these debts on their schedules as uncontested, liquidated, and non-contingent....at the time the Debtors filed the objections, the only evidence provided by the Debtors were their sworn statements that the debts were owed. The Debtors each filed and attested to the accuracy of their schedules. The creditors have filed proofs of claim that are substantially similar to the assertions set forth by the Debtors in their original schedules. The Cluffs have now contradicted these prior admissions by filing amended schedules, after the admission was pointed out by the creditors, adopting the amounts in the creditors' proofs of claim and listing each claim as disputed. This last minute change of heart appears disingenuous and smacks of manipulation.

The question of what additional documentation should be required in a proof of claim, and what additional evidence may be allowed in a hearing if the debtor or trustee objects to the proof of claim, is one that several courts have wrestled with for some time. In *Heath v. American Express Travel Related Companies* (*In re Heath*), 331 B.R. 424, 436 (9th Cir. BAP 2005) the court wrote:

> At oral argument before us, counsel conceded that Debtors have no basis to claim that any goods or services were wrongly charged to them, or that any specific interest charges or fees were miscalculated or wrongly imposed, or that they can establish any other grounds for disallowance in Section 502(b). ... Debtors' proposed standards would require creditors to provide volumes of documentation attached to every proof of claim or in response to objections based solely on non-compliance with Rule 3001(c), and that "would unduly burden the parties and would inundate the Court with documents." It would also invite abusive objections and more litigation and would serve no purpose because "if there is no substantive objection to the claim, the creditor should not be required to provide any further documentation of it." (Citations omitted)

A case discussing several of the differing approaches courts have taken is *B-Line, LLC v. Kirkland* (*In re Kirkland*), 379 B.R. 341, 344 (fn 10-11) (10th Cir. BAP (2007) (collecting cases adopting the "Exclusive View" and the "Nonexclusive View) *rev'd Caplan v. B-Line, LLC* (*In re Kirkland*) 572 F.3d 838 (10th Cir. 2009).

The Bankruptcy Rules are not intended to affect substantial rights, "for when Congress accorded the Supreme Court authority to promulgate the Bankruptcy Rules, it stated 'such rules shall not abridge, enlarge, or modify any substantive right.'" *In re Fesq.*, 153 F.3d 113, 116 (3d Cir. 1998) (quoting 28 U.S.C. § 2075). Many of the cases which deal with the effect of lack of documentation have determined that a creditor's claim is still allowed unless the debtor establishes a basis for denial under 11 U.S.C. § 502, which exceptions are considered exclusive (the "Exclusive View"). The proposed change in Rule 3001(c)(2)(D) would deprive creditors of that substantive right, by prohibiting the creditor (except in limited circumstances) from proving the actual debt due, and further make the creditor liable for attorney fees (a reversal of the American Rule) if the documentation is lacking in any particular. In effect, this rule amendment resolves through the rulemaking process (by prohibiting evidence on the issue) the substantive issue of whether 11 USC § 502 is exclusive. This proposed rule will have a profound chilling on creditors, particularly when the vast majority of unsecured claims in individual bankruptcy are relatively small and the intervention of attorneys is not economically justified.

In addition to these concerns, the proposed rule unfairly sanctions creditors who may not have ready access to the paper copies of the actual account statements mailed to debtors, particularly when the debtors do not contest the debt, but have scheduled the debt under penalty of perjury. In the modern economy, by the time a proof of claim is due, a bankrupt debtor's account may have been bundled and sold multiple times. These transfers are often based on computer records, with paper copies of the initial credit application and the statements sent to the debtor lagging well behind the actual transfer. Because the automatic stay applies, b y the time a proof of claim is filed, the "last statement" may well have been sent to the debtor several months prior to the claims filing deadline. Paper copies of the electronic account statement should be adequate to establish the account, the amount owed, any interest or other charges on a proof of claim, without the requirement that the last statement be located as well.

In conclusion, we believe that a better approach to the proposed rule change would be to delete 3001(c)(2)(d) completely, and rather that adding the proposed sentence to Rule 3001(c)(1), expressly provide that copies of electronic records identifying the debtor, the account, the last month's activity, and any interest, fees or other charges, is sufficient writing to establish a *prima facie* proof of claim.

Sincerely,

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TIMOTHY D. ZEIGER

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