Suggested Revision to Federal Rule of Bankruptcy Procedure 9033
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Hello,

I write to suggest that the Advisory Committee on Bankruptcy Rules consider whether to revise Federal Rule of Bankruptcy Procedure 9033 to conform the procedural process thereunder to more closely track the appellate process under Part VIII of the Federal Rules of Bankruptcy Procedure.

Rule 9033 provides a process for handling proposed findings of fact and conclusions of law, or a "report and recommendation," from the bankruptcy court to the district court. This process will apply when the bankruptcy court adjudicates a "non-core" or "Stern claim" and one of the parties does not expressly or implicitly consent to the bankruptcy court's final adjudication of the matter. *See* 28 U.S.C. § 157(c); Fed. R. Bankr. P. 8018.1; *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. ___, 135 S. Ct. 1932, 1947-49 (2015); *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. ___, 134 S. Ct. 2165, 2174-75 (2014).

For the losing party, the process under Rule 9033 entails substantial procedural disadvantages when compared to an ordinary bankruptcy appeal under Part VIII of the Federal Rules of Bankruptcy Procedure.

For example, Rule 9033(b) makes no provision for a reply brief by the losing party, whereas such a brief is permitted in a regular appeal under Rule 8014(c). *See also generally Allen v. Deerfield Mfg*., 424 F. Supp. 2d 987, 1001 (S.D. Ohio 2006) (striking reply brief because Federal Rule of Civil Procedure 72(b) – the magistrate analog to Rule 9033 – does not permit a reply); *Pfizer, Inc. v. Apotex, Inc*., No. 03-C-5289, 2005 U.S. Dist. LEXIS 47176, at *1-2 (N.D. Ill. Dec. 28, 2005) (same); *Cannon Partners, Ltd. v. Cape Cod Biolab Corp*., 225 F.R.D. 247, 250 (N.D. Cal. 2003) (same).

In addition, Rule 9033(c) results in the maximum period of time allowed for the losing party to prepare its brief to be 35 days after the service of the bankruptcy court's ruling, whereas in a regular appeal the default period for filing of the losing party's opening brief is "30 days after the docketing of notice that the record has been transmitted or is available electronically," Rule 8018(a)(1), which itself could be 28 days or more after the bankruptcy court's decision (based on a 14-day period in which to file a notice of appeal, and then another 14-day period in which to designate the record, *see* Rules 8002(a)(1) & 8009 (a)(1)(B)). Thus, the losing party is at a procedural disadvantage both as to the number of briefs it may file and as to the time it has to prepare its merits briefing.

It is difficult to justify this asymmetry between the two processes for challenging a bankruptcy court's decision, especially since the supposition behind matters subject to the Rule 9033 process is that the bankruptcy court ought not finally be deciding such matters. It seems far more sensible for the two processes to be procedurally symmetrical such that the only difference between them is the standard of review applied by the district court (de novo under Rule 9033 as to all matters, including factual findings, but with deference to the bankruptcy court's factual findings on an ordinary appeal). To the extent procedural mismatches continue to exist, the losing party may face a form of Hobson's choice between a more favorable standard of review or a more favorable procedural process with more briefs and more time. As a matter of system design, there seems to be no reason why the losing party should be put in such a situation.

I urge the Committee to review and consider this issue. Perhaps some justification for the current

procedural asymmetry exists and is sufficiently compelling that Rule 9033 should be kept in its current form. From my perspective, however, the procedural asymmetry and disadvantages for the losing party under Rule 9033 are unwarranted and the rule should be amended to eliminate this problem.

Thank you for your consideration of this suggestion. Please note that the suggestion is submitted only by me as an individual, and not on behalf of my law firm or any client.

Sincerely,

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