B-LINE, LLC'S COMMENTS REGARDING PROPOSED AMENDMENTS TO FED.R.BANKR.P. 3001

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I. INTRODUCTION

B-Line, LLC and its affiliates ("B-Line") advise that the proposed amendments to Federal Rule Bankruptcy Procedure 3001 ("Proposed Rule") not be approved because the Proposed Rule exceeds the scope of the Bankruptcy Rules Enabling Act by modifying substantive rights of creditors in contravention of 11 USC §502(b). The Proposed Rule violates due process and conflicts with established Supreme Court and bankruptcy case law. Before discussing the legal issues regarding the Proposed Rule, B-Line would like to provide an overview of its business process and objection to claim statistics regarding its claims. The Proposed Rule is a solution looking for a problem when less than 0.5% of B-Line's claims receive an objection based upon lack of documentation.

A. B-Line's Nationwide Business Process

B-Line is a Washington state limited liability company that is in the business of purchasing and servicing consumer bankruptcy receivables nationwide. B-Line and its affiliates purchase consumer bankruptcy receivables from a variety of originating creditors and other sellers. Before purchasing a portfolio of such receivables, B-Line receives a computer file for each account contained in the portfolio (hereinafter, a "Computer File"), which consists of a summary of the account receivable information contained in the books and records of the originating creditor, updated to reflect any and all payments, credits or other transactions recorded by any intervening

purchaser or purchasers of the debt. The Computer File represents the best and most current summary of the overall status of the purchased account.

The Computer File generally includes: (i) the originating creditor's account number for the debtor, (ii) the debtor's name, (iii) the debtor's address and contact information, (iv) the debtor's social security number, (v) the pre-petition balance on the account, (vi) the charge-off date, (vii) the account opening date, (viii) the name of the originating creditor, (ix) the last activity on the account, (x) the bankruptcy case number, (xi) the applicable bankruptcy chapter, and (xii) the bankruptcy petition date.

Upon receipt of the Computer Files from a potential seller, B-Line loads this data onto its database. As part of the due diligence process, B-Line screens the accounts to confirm that (i) the debtor for the account is the same individual as the debtor for the referenced bankruptcy case and (ii) the status of the bankruptcy case permits B-Line to file either (A) a proof of claim for the account or (B) a Rule 3001 notice evidencing the transfer of an existing proof of claim to B-Line. B-Line performs its due diligence process through a combination of the American Infosource Database (the "AIS Database") and ECF/PACER. The AIS Database is a third-party, proprietary resource that collects bankruptcy data from ECF/PACER for all consumer bankruptcy debtors in the country. As part of its due diligence, B-Line compares or matches its database to the AIS Database to update or verify bankruptcy status of the account. Any account which is not confirmed as a pending bankruptcy is returned to the potential seller and is not purchased. .

Upon purchasing a portfolio of accounts, B-Line repeats the due diligence process described above to once again verify the bankruptcy status of each account. B-Line's process seeks to ascertain (i) whether the case is still open, (ii) whether the bar date for filing claims has passed, (iii) whether the case has been dismissed, and (iv) whether the case was converted to a no asset case. In all of these instances, B-Line will update its database for each account to reflect the additional bankruptcy status information learned from the due diligence process.

B-Line's multi-faceted due diligence ensures that multiple data points are used for verification purposes. For example, the combination of a social security number match and an address match provides a high level of confidence in the account to be purchased. However, if all data points do not match, there is a hierarchy of matching criteria. For example, if B-Line has a social security number match, the fact that an address may be different than that scheduled by the debtor is less important. This is so because the American population is very mobile. And it is foreseeable that when a certain account was opened, it had an address, and the debtor now lives in a very different place. This comparison ensures that B-Line has identified the correct person and bankruptcy case. B-Line performs this comprehensive due diligence on every account that it purchases before a claim is filed. If any step of the automated due diligence process yields an anomaly, the account is manually verified by B-Line. These manual due diligence procedures utilize ECF/PACER and AIS to verify whether an individual is a debtor in a bankruptcy case.

In addition to its review of the Computer Files, B-Line's sellers also represent and warrant the validity of the purchased debt. Each of B-Line's contracts, including the Forward Flow Agreement (as hereinafter defined), contains language that binds the parties and governs their relationship. If there are misrepresentations by a seller, it has consequences – not only in the particular buyer/seller relationship – but to that party's reputation in the industry.

If this due diligence process confirms that a proof of claim may properly be filed in the debtor's bankruptcy case, B-Line will generate and file a claim with the information from the matching Computer File.

Because B-Line believes that the information contained in the Computer File, complemented by B-Line's due diligence, represents the best, most current summary of the status of the purchased account, B-Line relies upon such data when it prepares and files proofs of claim. B-Line also relies upon the fact that the seller has represented and warranted that the debt

is due, owing, valid and enforceable. This representation and warranty is corroborated by the fact that the seller is in possession of nonpublic identifying information consistent with the existence of the account.

When a claim objection is received, B-Line's in-house lawyers analyze and respond to the pleading. In some instances, B-Line will retain outside counsel and litigate the objection. Where further review suggests litigation of the matter may not be economically justifiable, B-Line may elect to withdraw its claim or agree to disallow the claim.

In the course of litigating a claim objection, and where the existence or amount of the underlying debt is disputed by the debtor, B-Line will request copies of the account documentation generated by the originating creditor. Where available, the underlying account documentation is in the custody and control of the originating creditor, and must be affirmatively requested by B-Line. Depending upon a number of factors, including (i) the age of the account, (ii) whether the original creditor is a merged or acquired financial institution, and (iii) the original creditor's document retention policy, there may be substantial delays associated with obtaining this material. In some instances, this material may not be available for various reasons.

B. B-Line's Nationwide Business Process is Reliable.

Statistics for *In re Andrews,* 394 B.R. 384 (Bankr. E.D. N.C 2008)

Before B-Line begins a discussion of the Proposed Rule itself, B-Line includes a brief discussion of some of the assertions made by debtor's counsel in the case of *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008) ("*Andrews*") which appears to have precipitated drafting of the Proposed Rule.

Without any evidence presented in the *Andrews* case, the Court broadly held that "[t]he phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the

bankruptcy system." The *Andrews* court simply assumed that claims filed by debt buyers are inherently bad due to the high volume without reviewing any statistics to support the assumption.

B-Line and its affiliates, including B-Real, LLC, have been reviewing and filing claims since 2002. It was not until 2008 that the question of statute of limitations first became an issue, in the seminal case of *In re Varona,* 388 B.R. 705 (Bankr. E.D. Va. 2008); in that case a debtors' attorney decided to request sanctions and fees against a creditor instead of simple claim disallowance under 11 U.S.C. § 502(b)(1). A small number of debtors' attorneys have made a mountain out of a mole hill.

Nationwide, in 2008, B-Line filed 356,799 claims and transfers of claim, while receiving a total of 2,557 objections to claims. Out of the 2,557 objections to claims received in 2008, only 468 raised the statute of limitations, 1,037 raised lack of documentation as a basis for disallowance, 545 were administrative (duplicate claims or late filed claims), 11 disputed valuation, and 496 alleged miscellaneous reasons for disallowance (identity theft, no asset to pay separate debts, etc) . *Therefore, on a nationwide basis, B-Line received objections to claims alleging that the claim was barred by the statute of limitations in less than 0.13% of all the claims and transfers filed. As for objections to claims based upon lack of documentation, B-Line received 0.29% of all the claims and transfers filed.*

In 2008, B-Line filed 7,874 claims and transfers of claim in the Eastern District of North Carolina. B-Line received a total of 23 objections to claims in 2008 in the Eastern District of North Carolina, of which: 2 alleged that the claim was barred by the statute of limitations, 5 alleged lack of documentation, 14 alleged claim duplication, 1 alleged that claim was a business debt, and 1 disputed the value of the collateral. *Therefore, in the Eastern District of North Carolina, B-Line received objections to claims alleging that the claim was barred by the statute of limitations in less than 0.023% of all claims and transfers filed. As for objections to claims based upon lack of documentation, B-Line received 0.057% of all the claims and transfers filed.*

Other than the objections to claims filed in *Andrews*, B-Line received no inquiry or objection to claim from the counsel who represented the Debtors in *Andrews*. Debtors' counsel in *Andrews* represented to the Court that a significant portion of B-Line's claims are time barred. Unfortunately, the Court relied on such general representation without any supporting evidence and without asking for briefing of the issue.

Moreover, the claim in *Andrews* was scheduled as due and owing, not barred by the statute of limitations and to be paid 0% through confirmed plan, according to the record below. B-Real presented some evidence that the Debtors resided in New Jersey at the time the accounts were opened, which has a six (6) year statute of limitations per N.J. §2A:14-1. The Debtors never disputed that they lived in New Jersey in 2002.

Statistics for *In re Wingerter*, 08-4455 (6th Cir. Ct. of Appeals 2010)

Recently the Sixth Circuit Court of Appeals held that B-Line's business process as outlined above with the representations and warranties in its purchase agreements and the stellar statistical performance is sufficient Fed. R. Bankr. P. 9011 reasonable inquiry to file a claim without the underlying documentation.

The Sixth Circuit Court of appeals acknowledged the following bankruptcy statistics: In 2006, B-Line received disputes between 0.54% to 0.6% on all of its proofs of claim and Rule 3001 claim transfers filed by B-Line in 2006. These disputes include objections to claims, as well as letter or phone inquiries from the trustees or debtors ("claim issues"). Therefore, there are no issues or questions raised by any parties in 99.4% of the claims or transfers B-Line filed.

The substantial majority of these claim issues had been resolved as follows for 2006 (numbers are rounded):

Resolution Description	% Out of the Total Claims and Transfers Filed	% Out of All the Claim Issues Received
Claim Too Small to Litigate	0.04%	7.4%
Claim Allowed or Case	0.33%	61.1%

Dismissed		
Claim Disallowed	0.17%	31.5%
	Total = 0.54%	Total = 100%

Out of the total claims universe, 0.04% of the total claims filed were deemed too small in amount to litigate in a cost effective fashion. 0.33% of the total claims filed were resolved favorably to B-Line, with either the claim being allowed or the objection being withdrawn or rendered moot (by dismissal of the underlying case, for example). 0.17% of the total claims filed were disallowed because B-Line was unable to obtain documentation needed to resolve the claim objection within the time period required for such litigation.

Unless it has determined that a claim is too small to litigate in a cost-effective fashion (in which case B-Line consents to withdrawal or disallowance), B-Line always seeks to obtain the documentation underlying the challenged claims. In some instances, documentation is received after the claim is withdrawn or the objection sustained. In many instances, the window in which a claim objection can be resolved is shorter than the time it may take to obtain the documents.

2009 Objections to Claims Statistics

In 2009, B-Line filed 320,827 claims and transfers of claims nationwide. In the same year, B-Line received objections to claims on 1.01 % on all of its proofs of claim and Rule 3001 claim transfers with the following details:

Description	**% Out of the Total Claims and Transfers Filed**
Administrative Objection to Claim (i.e. late filed, duplicate, debtor dismissed from case)	0.23%
Objection to Claim based upon lack of documentation	0.45%
Objection to Claim based upon statute of limitations	0.15%
Miscellaneous Objection to Claim (i.e.	0.18%

identity theft, debt disputed, amount disputed, separate debt, etc)	
	Total = 1.01%

Of the objections to claims based upon lack of documentation (0.45%), B-Line litigated about 66% of those objections on a nationwide basis with a success rate of 85%. Success is defined as either the claim is allowed in full (i.e. objection overruled or claim allowed) or the claim is settled at a reduced amount. B-Line did not litigate the remaining 34% of cases in which there was an objection to claim based upon lack of documentation mainly because of costs. For example, had debtors' counsel in the *Andrews* case not requested sanctions or alleged FDCPA violations in the objections to claims, B-Line's affiliate, B-Real, would not have responded to the objections since the confirmed plan payout is 0%.

II. LEGAL ISSUES

A. Summary of the Proposed Rule

The Proposed Rule would make six substantial changes to the current rule.

1. First, the Proposed Rule, in practice, amends 11 USC § 502(b) to add lack of documentation as a basis to disallow a claim by permitting and encouraging these type of objections.

2. Second, the Proposed Rule requires attachment to the proof of claim the last account statement sent to the debtor prior to the bankruptcy filing regardless if the claimant does not have possession of the "last account statement".

3. Third, the "last account statement" requirement only applies only to open-end or revolving consumer credit agreements, i.e. cards or store accounts, but not other consumer loans.

4. Fourth, the Proposed Rule requires itemization of all prepetition principal, interest, fees, or other charges incurred regardless of the fact that the interest and fees contractually become

principal under a majority of credit card agreements; therefore, credit card companies cannot operationally comply with the itemization requirement due to the provisions of the contract.

5. Fifth the Proposed Rule precludes a claimant from presenting the omitted information in any form in any proceeding unless the bankruptcy court determines whether failure was "substantially justified" or is "harmless".

6. Sixth, the Proposed Rule permits bankruptcy courts to award one-side monetary sanctions against only the claimant for not complying with the requirements.

B. The Proposed Rule Exceeds the Scope of the Bankruptcy Rules Enabling Act

The Bankruptcy Rules Enabling Act, 28 U.S.C. §§ 2071-2077 authorizes the judiciary to adopt federal rules and procedures but prohibits any rule – federal or local – from modifying or infringing on any substantive rights provided by the Bankruptcy Code.

B-Line respectfully advises that the Proposed Rule should not be approved. Although well intentioned, the Proposed Rule exceeds the authority under the Bankruptcy Rules Enabling Act by modifying the proof of claim process under 11 U.S.C. §§501-502, while unjustifiably increases costs and litigation.

As applied, debtors will file objections to claims based upon violation of the Proposed Rule, i.e. failure to attach the last account statement and/or failure to itemize all interest, fees, and principal. The Proposed Rule directly conflicts with the unanimous U.S. Supreme Court decision in *Travelers Cas. and Sur. Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007), in which the Supreme Court held that the reasons set forth in 11 U.S.C. § 502(b)(1)-(9) are the sole statutory basis for disallowance of a proof of claim. The Supreme Court held that 11 U.S.C. § 502(b)(1)-(9) puts the statutory burden on the

objecting party to raise one of the nine enumerated reasons before a proof of claim can even be considered for disallowance.

Bankruptcy courts, such as Western District of Washington and District of Maryland, have adopted the Proposed Rule as a local rule despite the fact that the Proposed Rule has not been enacted or adopted. Moreover, the bankruptcy courts have unilaterally adopted the Proposed Rule prematurely without conducting any public hearings or soliciting any comments from creditors. Both Western District of Washington and the District of Maryland are courts that have adhered to the majority exclusive view[1] but have disallowed claims based upon failure to comply with the Proposed Rule.

C. The Proposed Rule Inflates the Federal Pleading Standard of Notice Pleading to Summary Judgment Standard for a Proof of Claim and Inflates the Federal Civil Rule 15 Standard in Amending the Proof of Claim.

Since the enactment of the Bankruptcy Code, many bankruptcy courts[2] have analogized a proof of claim to a federal civil complaint when adopting the Federal Rules of Civil Procedure 8(a) and 15. Even in the recently non-exclusive minority view case of *In re Depugh*, 409 B.R.

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1 The majority exclusive view holds that "a creditor's mere failure to fully comply with the documentary requirements in Rule 3001 (c) does not provide a basis for objecting to, or disallowing, a claim" under 11 U.S.C. § 502(b. *See In re Burkett*, 329 B.R. 820, 825-32 (Bankr. S.D. Ohio 2005); *In re Kemmer*, 315 B.R. 706, 711-16 (E.D. Tenn. 2004); *In re Perron*, unpublished, No. 05-8075, 2006 WL 2933827, at *2-5 (B.A.P. 6th Cir. 2006); *In re Moreno*, 341 B.R. 813, 817 (Bankr. S.D. Fla. 2006); *In re Heath*, 331 B.R. 424, 431-37 (B.A.P. 9th Cir. 2005); *In re Dove-Nation*, 318 B.R. 147, 150-53 (B.A.P. 8th Cir. 2004); *In re Shank*, 315 B.R. 799, 808-12 (Bankr. N.D. Ga. 2004); *In re Cluff*, 313 B.R. 323, 330-40 (Bankr. D. Utah 2004); *In re Kincaid,* 388 B.R. 610, 614 (Bankr. E.D. Pa. 2008); *In re Irons*, 343 B.R. 32, 40 (Bankr. N.D. NY 2006); *In re Simms*, 2007 WL 4468682 * 4 (Bankr. N.D. W.Va. 2007); *In re Guidry*, 321 B.R. 712 (Bankr. N.D. Ill. 2005); *In re Lapsansky*, 2006 WL 38559243 (Bankr. E.D. Pa. 2006); *but see. In re Taylor*, 363 B.R. 303 (Bankr. M.D. Fla. 2007), *In re Tran*, 369 B.R. 312 (S.D. Tex. 2007), *In re Kirkland*, 572 F.3d 838 (10th Cir. 2009).

2 *See e.g. In re Washington*, 420 B.R. 643 (Bankr. W.D. Pa. 2009); *In re Montagne*, 421 B.R. 65 (Bankr. Vt. 2009); *In re Bereaux*, 410 B.R. 236 (Bankr. W.D. La. 2009); *In re Sneijder*, 407 B.R. 46 (Bankr. S.D. N.Y. 2009); *In re Robinette*, 2009 WL 2023556 (unpublished); *In re Varona*, 388 B.R. 705 (Bankr. E.D. Va. 2008); *In re Guidry*, 321 B.R.712 (Bankr. N.D. Ill. 2005); *Smith v. Dowden*, 47 F. 3d 940 (8th Cir. 1995) ("Courts have traditionally analogized a creditor's claim as a complaint. . . . ").

84 (Bankr. S.D. Tex. 2009), the court held that a proof of claim is like a federal complaint, in which the Federal Civil Rules of Procedure apply:

> Because LVNV-twelve days after the bar date-has attempted to amend its proofs of claim after the Debtor lodged the Objection, [Finding of Fact No. 10], LVNV was required, pursuant to the Notice and Order, to obtain this Court's leave or the Debtor's written consent before amending its proofs of claim. Fed.R.Civ.P. 15(a)(2). Rule 15(a)(2)-as applicable to this contested matter through Bankruptcy Rule 7015 and the Notice and Order-provides that the Court should freely give leave to amend where justice so requires. Fed.R.Civ.P. 15(b)(1); *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Torch Liquidating Trust v. Stockstill,* 561 F.3d 377, 390 (5th Cir.2009). In order to determine whether "justice so requires," a court may consider a variety of factors, such as (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of the amendment. *Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Torch Liquidating Trust,* 561 F.3d at 391.

Depugh at 100.

The bankruptcy court in the case of *In re Guidry*, 321 B.R. 712, 715 (Bankr. N.D. Ill. 2005) similarly held that a proof of claim is like a creditor's federal civil complaint, but the *Guidry* court held that an objection to claim based upon lack of documentation is merely a motion to dismiss for failure to state a claim. As such, the *Guidry* court held that a proof of claim alleged sufficient facts to show that the claimant has a breach of contract claim on a debt. Moreover, the Bankruptcy Code, 11 U.S.C. § 502(b) does not provide lack of documentation as a statutory basis to disallow a claim.

Both the minority non-exclusive view and the majority exclusive view analogize a proof of claim as a federal civil complaint. The Supreme Court in *Ashcroft v. Iqbal*, 129 .S.Ct. 1937, 1940 (2009), recently published a decision describing the minimum threshold for a federal civil complaint to survive a motion to dismiss:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 127 S.C.t. 1955, the pleading standard Rule 8 announces

does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557, 127 S.Ct. 1955.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 127 S.Ct. 1955 (brackets omitted).

Id (internal citations omitted). A federal civil complaint is not required to attach documentation to support the factual allegations in the complaint. The Proposed Rule essentially creates a summary judgment standard in filing a proof of claim/complaint. The Proposed Rule ignores the fact that plaintiffs in federal civil cases generally have years to file a complaint, while creditors generally receive notice to file a proof of claim within weeks to three months of the bankruptcy filing.

B-Line's proofs of claims all provide sufficient factual statements under strict civil and criminal penalties describing the debt owed by the debtor. Just as the defendant is required to answer a federal civil complaint and the Federal Rules of Civil Procedure, a debtor is required to object to a proof of claim under the Bankruptcy Code and Federal Bankruptcy Rules. Both the defendants and the debtors have the burden to raise a factual dispute in their opposition.

Although neither the Bankruptcy Code nor the Bankruptcy Rules currently address the amendments of claims, nationwide case law adopts the Federal Rule of Civil Procedure 15 as the threshold in allowing amendments. Under Civil Rule 15, the court is mandated to permit amendments freely when justice requires. Many of the cases that analogize a proof of claim to a

federal civil complaint, also apply Civil Rule 15 to amendments. The First Circuit BAP in the case of *In re Clamp All Corp.*, 235 B.R. 137, 140-141 (1st Cir. BAP 1999) summarized the case law permitting amendments of claims under Civil Rule 15:

> Neither the Bankruptcy Code nor Rules address amendment of proofs of claim. 9 Lawrence P. King, et al., *Collier on Bankruptcy* ¶ 3001.04 [1] (15th ed. rev.1999). Prior to the bar date, amendment of a filed proof of claim is permissible. *Id.* at 3001-8. Post-bar date amendments should be scrutinized to ensure that the amendment is not making a new claim against the estate. *Id.* at 3001-9, citing *In re International Horizons,* 751 F.2d 1213, 1216 (11th Cir.1985). Leave to amend a claim should be "freely given when justice so requires." *Gens v. Resolution Trust Corp.,* 112 F.3d 569, 575 (1st Cir.1997), citing Fed.R.Bankr.P. 7015.
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> The "nexus" test, as applied to amendment of proof of claim, requires that amendment of a claim be freely allowed where its purpose is to cure a defect, provide a more particular description of the claim, or plead a new theory of recovery based upon facts stated in the original claim. *International Horizons,* 751 F.2d at 1216. *See* Collier ¶ 3001-8. *International Horizons* noted that the traditional view on amendment of claims is that "amendment is permitted only where the original claim provided notice to the court of the existence, nature and amount of the claim and that it was the creditors' intent to hold the estate liable." *Id.* at 1217.

Id (internal citations omitted).

Since the standard to filing a proof of claim is the same as Federal Rule of Civil Procedure 8, "notice pleading" with sufficient factual allegations to support relief, and courts should freely grant amendments in the interest of justice to cure alleged defect under Civil Rule 15, then the Proposed Rule conflicts with Supreme Court case law and established, nationwide bankruptcy case law.

D. <u>The Proposed Rule Violates Due Process By Providing One-Sided Sanctions Against Creditors Who Cannot Comply with Summary Judgment Standard.</u>

Besides this direct case law conflict, the Proposed Rule goes further to award monetary and non-monetary sanctions against creditors/claimants for failure to comply. Providing monetary and non-monetary sanctions against a creditor/claimant for failure to attach the last

statement sent to the debt is a violation of due process when such documentation is not in the possession of the creditor/claimant. Even under the Federal Rule of Civil Procedure 34 for production of documents, a party is only required to produce documentation that is in the "party's possession, custody, or control." If B-Line does not have the last statement in its possession, custody, or control, B-Line should not be sanctioned for not providing it at the time of the proof of claim filing (moreover, such requirement is not required under Civil Rule 8).

As for complying with the Proposed Rule's itemization mandate, under contract law, interest is folded into the principal on a monthly basis. Upon charge-off, the entire balance is principal. Under Treasury regulations, credit card companies must charge off accounts within a short time frame upon notice of a bankruptcy filing. Since B-Line purchases only bankruptcy receivables, all the accounts purchased have been charged-off. Therefore, the full balance on the revolving consumer credit card proof of claim filed by B-Line is the principal owed on the debt.

A rule unilaterally awarding monetary and non-monetary sanctions against claimants only will increase litigation. There are no checks and balances to the debtors or their attorneys. The debtors can make any false allegations regarding the last statement without any consequences. Who is going to provide evidence that the debtor is lying? The Proposed Rule violates due process by stripping one side (creditor/claimant) of the ability to defend itself against false allegations. The Proposed Rule encourages gamesmanship. A debtors' attorney can allege that the debtors never received the last statement, i.e. creditor violated various federal statutes for failure to send the last statement to the debtors.

E. The Bankruptcy Code and Current Rules are Adequate to Address Abuse.

The *Wingerter* case is a prime example that the Bankruptcy Code and current Bankruptcy Rules provide adequate authority and jurisdiction to bankruptcy courts nationwide to address

perceived/alleged abuses. The bankruptcy courts can sua sponte review a proof of claim for abuse under 11 U.S.C. § 105 and Bankruptcy Rule 9011. *See e.g. Wingerter; In re Hannon*, 2009 WL 5103305 * 3 (Bankr. M.D. Pa. 2009) ("I believe § 105(a) provides the judicial authority to compel a claimant to timely file a claim that ought, in good conscious, be reduced because of the circumstances such as the refund at hand."). Every proof of claim is filed under strict civil and criminal penalties, specifically "fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 USC §§ 152 and 3571". The Department of Justice, through the US Trustee office has the authority to investigate and prosecute fraudulent claims against any creditor/claimant.

Not only do bankruptcy courts have the authority to review claims and address abuse, debtors' counsels and trustees have a statutory and ethical duty to review claims on a case-by-case basis. Moreover, the debtors' counsels are also required under various local bankruptcy rules to review claims with their clients as part of the Chapter 13 fee. Trustees, whether they are Chapter 7 or Chapter 13 trustees, have a statutory duty to review claims and compare them with the debtors' records/testimony. The US Trustee has a duty to investigate any alleged systemic claims abuse. Assuming that the bankruptcy courts, the debtors' counsels, the trustees, and the US Trustees are performing their statutory and rule-related duties, if there was abuse, there would be a significantly higher percentage of claims objections. It is extremely easy and inexpensive to file an objection to claim because of word processing software and ECF.

A small minority of debtors' counsels have argued that a creditor should not be allowed to file a proof of claim that has been barred by the statute of limitations. The Bankruptcy Code, 11 U.S.C § 502(b)(1) puts the burden on the debtors to raise statute of limitations as a basis to disallow a claim (i.e. not enforceable under state law). However, those same attorneys fail to address the fact that not only is the statute of limitations an affirmative defense, but the debtors have possession/knowledge of whether the debt is barred by the statute of limitations.

There are too many factors involved with a statute of limitations defense for a claimant to be able to affirmatively certify that it is inapplicable. Factors include but are not limited to the following legal and factual determination: (1) applicable state law depending on the contract clause or the state in which the debt was incurred (2) the type of debt determines the limitation period (3) applicable state tolling statutes, i.e. whether the debtor moved out of state, whether the debtor acknowledged the debt, whether the debtor was incarcerated, whether the debtor was committed, whether or not the debtor filed multiple dismissed bankruptcy cases, whether the debtor was abroad, whether the debtor was serving in the armed forces, and (4) applicable state accrual statutes, i.e. whether accrual begins upon last payment, first breach, last purchase, etc.

The debtors and their counsel have knowledge of all the facts to determine whether an affirmative defense is applicable. For this very reason, the Bankruptcy Code, Rules, and state laws expressly put the burden on the debtor - and not on the claimant - to determine whether an affirmative defense exists. For example, in the *Andrews* case, the debtors were aware that they resided in New Jersey at the time or around the time the account was opened. B-Line was not aware that the debtors moved until a postal skip trace inquiry.

Ultimately, all attorneys should work together to resolve matters without involving the courts. B-Line encourages trustees, debtors, and their attorneys to request information or documentation on a claim. B-Line's email address and physical address is listed on every claim it files.

F. The Proposed Rule Should be Edited to Remove All Monetary and Non-Monetary Sanctions and to Provide Example for Prima Facie Validity.

To be consistent with Supreme Court case law and bankruptcy case law and to comply with the Bankruptcy Rules Enabling Act, B-Line respectfully requests the following from the Committee:

1) remove all monetary and non-monetary sanctions provisions from the Proposed Rule;

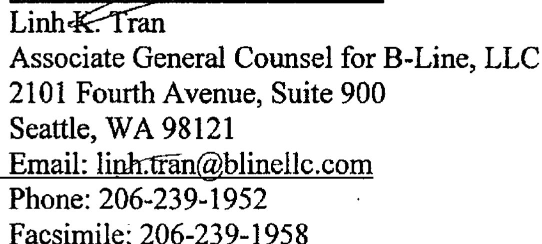
2) edit the Proposed Rule to adopt the Supreme Court's *Twombly* standard for threshold in filing a proof of claim;

3) provide an example of a prima facie valid claim as providing a summary of the account information (assignment information, account number, account balance, original creditor name – if applicable, account holders/debtors' redacted personal information, account payment or purchase information – if applicable, and account open date.) with a copy of the last statement; and

4) state that other forms of evidence and/or information may constitute prima facie validity, i.e. affidavit from original issuer validating the debt, other monthly statements, letter from debtors acknowledging the debt, sworn statement from the debtor admitting to the debt.

These suggestions will eliminate the split between the majority exclusive and the minority non-exclusive views while following the holdings in *Travelers* and *Twombly*. Even among the majority and minority decisions, bankruptcy courts have not been consistent in defining "prima facie validity." Unfortunately, some of those bankruptcy courts have adopted state court rules and procedures in defining prima facie validity. B-Line's recommendations should reduce confusion among bankruptcy courts and provide a more uniform result nationwide.

Thank you for your time and consideration.



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