IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO. 08-32404-H4-13**
CHARLES D. GILBREATH and	§	
KRISTIN B. GILBREATH,	§	**Chapter 13**
	§	
Debtors.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEBTORS' OBJECTION TO CLAIM NUMBER 11, 12, 13, 14, AND 18 OF LVNV FUNDING LLC
[Docket Nos. 48-52]

I. FINDINGS OF FACT

1. LVNV Funding LLC (LVNV) filed original proofs of claim 11, 12, 13, 14, and 18 in the Debtors' case on May 22, 2008.

2. Each proof of claim contains the last four digits of an account number and the amount due on that account and lists the creditor's name as "LVNV Funding LLC its successors and assigns as assignee of Citibank." LVNV's proofs of claim are signed by Joyce Montjoy, Bankruptcy Recovery Manager of Resurgent Capital Services. All of LVNV's proofs of claim are for "unsecured charge off" from various credit card accounts held by the Debtors. Attached to LVNV's original proofs of claim are the following documents:

   a. A document attached to proofs of claim 11, 12, 13, 14, and 18 prepared by Resurgent Capital Services containing the last four digits of an account number, the amount due as of the date the bankruptcy case was filed, and a "borrower information" section listing one or the other Debtors as the account holders. This document also explains that Resurgent Capital Services is a company that services accounts on behalf of LVNV.

b. A document attached to proof of claim 11 signed by a representative of Citibank, entitled "Bill of Sale and Assignment of Accounts," which contains the following language:

> Citibank (South Dakota), N.A. (successor to Citibank USA, N.A.) ("Seller"), for value received, to the extent permitted by applicable law, and subject to the terms of that certain Purchase and Sale Agreement entered into as of July 11, 2003 (the "Agreement"), by and between Sears, Roebuck and Co., Sears National Bank, SRFG, Inc., SMTB, Inc., SVFT, Inc., SLRR, Inc. and Sears Financial Holding Corporation (collectively, "Originator") and Sherman Originator LLC ("Buyer"), then subsequently assumed by Seller pursuant to that letter dated October 30, 2003, transfers, sells, assigns, conveys, grants and delivers to Buyer, who simultaneously transfers, sells, assigns, conveys, grants and delivers to LVNV Funding LLC ("Subsequent Buyer") all rights, title and interest in and to the Chapter 13 Accounts which are described on the Disk furnished by Seller to Buyer in connection herewith; (ii) all payments on the proceeds of such accounts (each, an "Account") after the close of business on may 15, 2008, and (iii) all claims arising out of or relating to each Account.

c. A document attached to proofs of claim 12, 13, 14, and 18 entitled "Assignment and Assumption Agreement," which contains the following language:

> THIS BILL OF SALE, ASSIGNMENT AND ASSUMPTION AGREEMENT is dated as of May 15, 2008, between Citibank (South Dakota), National Association . . . (the "Bank") and Sherman Originator LLC . . . ("Buyer").
>
> For value received and subject to the terms and conditions of the Purchase and Sale Agreement . . . between Buyer and the Bank (the "Agreement"), the Bank does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to Buyer, who simultaneously transfers, sells, assigns, conveys, grants, bargains, sets over and delivers to LVNV Funding LLC ("Subsequent Buyer"), and to Subsequent Buyer's, (sic) successors and/or assigns, the Accounts described in Section 1.2 of the Agreement.

2. The Debtors filed objections to LVNV's original proofs of claim 11, 12, 13, 14, and 18 on July 18, 2008. The Debtors' objections to LVNV's proofs of claim complained that LVNV did not attach documentation sufficient to support its claims and that the proofs of claim failed to meet the requirements of Fed. R. Bankr. P. 3001.

3. The Court held a brief hearing on July 21, 2008, and informed the parties that they should return on August 18, 2008 for a trial on the merits.

4. On August 5, 2008, LVNV electronically filed additional documentation in support of its proofs of claim 11, 12, 13, 14, and 18. These filings contain the following documents in addition to those included in LVNV's original proofs of claim:

   a. Affidavits signed by LVNV's personal representative certifying the following with respect to claims 11, 12, 13, 14, and 18:

      > Based on business records maintained on [the Debtor's Account], the Account is the result of an extension of credit or service to Charles Gilbreath by [Sears, Children's Place, Office Depot, Zales, and Citibank South Dakota N.A.] Said business records further indicate that the Account was then owned by Citibank South Dakota N.A. later sold and/or assigned Portfolio [11238, 11240, and 11270] to [LVNV's] assignor, Sherman Originator LLC, which included the [Debtor's] Account on May 15, 2008. Thereafter, all ownership rights were assigned to, transferred to and became vested in [LVNV] . . . .

      [Docket Nos. 66-70.]

   b. Bills of sale signed by a representative of Sherman Originator LLC (Sherman), which purport to convey to LVNV, "in accordance with the provisions of the Sale Agreement dated as of April 29, 2005, . . . the Receivable Assets (as defined in the Agreement) identified in the Receivable File dated 5/31/08." [Docket Nos. 66-70.]

c. What appears to be portions of a computer file listing the Debtors' names and addresses, account numbers, and the balances on their respective accounts. [Docket Nos. 66-70.]

d. A power of attorney granting Resurgent Capital Services, the company that prepared and executed LVNV's original proofs of claim, authority to service LVNV's accounts and to file and sign proofs of claim. [Docket Nos. 66-70.]

5. On August 18, 2008, the Court held a hearing on Debtors' Objections to LVNV's proofs of claim. At the hearing, the Debtors argued that LVNV did not properly document its ownership of the accounts in question and therefore does not have standing as a matter of law to bring claims based on those accounts. The Debtors also asserted that the additional documents filed by LVNV on August 5, 2008 are insufficient to establish the validity of claims 11 through 14 and 18. In closing, the Debtors argued that LVNV's practice of filing proofs of claim without supporting documentation violates Bankruptcy Rule 3001 and that LVNV should not be allowed to retroactively comply with the rules by filing supporting documentation only after the Debtor objects and a hearing has been scheduled. LVNV did not move to admit any exhibits and did not offer any evidence at the hearing; LVNV's attorney made solely legal arguments. Thus, the record is bare.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1). This dispute is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), and (O). Venue is proper pursuant to 28 U.S.C. § 1408(1).

B. LVNV's Burden of Production with Respect To its Original Proofs of Claim

A proof of claim executed and filed in accordance with the Bankruptcy Rules constitutes *prima facie* evidence of the validity and amount of that claim and is deemed allowed unless a party in interest objects. *See* 11 U.S.C. § 502(a); Fed. R. Bankr. P. 3001(f). However, proofs of claim that fail to comply with the Bankruptcy Rules are not *prima facie* valid and are therefore not deemed allowed. *See Brock v. Brock (In re Brock)*, No. 06-4228, 2008 WL 2954621, at *6 (Bankr. E.D. Tex. July 31, 2008); *In re Reyna*, No. 08-10049-CAG, 2008 WL 2961973, at *3-6 (Bankr. W.D. Tex. July 28, 2008); *In re White*, No. 06-50247-RLJ13, 2008 WL 269897, at *3-5 (Bankr. N.D. Tex. Jan. 29, 2008).

1. *Prima Facie* Validity of LVNV's Original Proofs of Claim

With respect to LVNV's original proofs of claim, counsel for LVNV argues that proofs of claim need not include supporting documentation—that supporting documentation need only be attached once a debtor objects and a dispute arises. In support of his contention, LVNV's counsel relies on the language of Bankruptcy Rule 3001(f), which states that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity of the amount of the claim." Fed. R. Bankr. P. 3001(f). With regard to assigned claims, LVNV's counsel asserts that, because Bankruptcy Rule 3001(e) requires that "evidence of the transfer shall be filed by the transferee" on claims transferred *after* the proof of claim is filed, and is silent as to evidence required on claims transferred *before* the proof of claim is filed, no supporting evidence is required on the latter proofs of claim. *See* Fed. R. Bankr. P. 3001(e)(1)-(4).

LVNV's arguments ignore the plain language of Bankruptcy Rule 3001(a) and (c), the clear instructions on the Official Proof of Claim Form (Form 10), and the wealth of case law on the issue in this Circuit.

Bankruptcy Rule 3001(a) mandates that "[a] proof of claim shall conform substantially to the appropriate Official Form." Fed. R. Bankr. P. 3001(a). Additionally, Bankruptcy Rule 9009 states that the Official Forms "shall be observed." Fed. R. Bankr. P. 9009. Paragraph 7 of the official proof of claim form (Form 10) directs the creditor to "[a]ttach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements" or a summary of such documents. Paragraph 7 of Form 10 also directs that "[i]f the documents are not available, please explain." It is difficult to understand how a creditor could substantially comply with this instruction by filing a bare bones proof of claim without any explanation. At the very least, Form 10 instructs creditors to give a reason why supporting documents have not been attached.

Moreover, Bankruptcy Rule 3001(c) provides that when a claim is based on a writing (i.e. a credit card agreement),[1] "the original or duplicate shall be filed with the proof of claim," and "[i]f the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim." Fed. R. Bankr. P. 3001(c). This language could not be more clear—creditors must attach documents giving rise to a claim (or copies of such documents) to their proof of claim or explain why they have not. *See also In re Hight*, No. 07-36683, 2008 WL

[1] The District Court, in *Tran*, looking to Texas state law to determine the substance of the claims at issue, affirmed the bankruptcy court's ruling that claims to recover amounts on a credit card account are "claims based on a writing," which must comply with Fed. R. Bankr. P. 3001(c). *See ECast Settlement Corp. v. Tran (In re Tran)*, 369 B.R. 312, 316-17 (S.D. Tex. 2007).

3539802, at *5 n.7 (Bankr. S.D. Tex. Aug. 13, 2008) (determining that a creditor that failed to attach any supporting documentation to support its claims violated Bankruptcy Rule 3001(c)).

Indeed, the District Court for the Southern District of Texas recently affirmed the ruling by Bankruptcy Judge Brown that proofs of claim to recover amounts on a credit card account must be accompanied by either writings on which they were based or by an explanation of why such writings were not provided. *ECast Settlement Corp. v. Tran (In re Tran)*, 369 B.R. 312, 316-17 (S.D. Tex. 2007). Further, Bankruptcy Judges Felsenthal, Houser, and Hale, of the Northern District of Texas, determined that a lack of supporting documentation strips a claim of any *prima facie* validity. *In re Armstrong*, 320 B.R. 97, 104-05 (N.D. Tex. 2005). The *Armstrong* court held that

> in the case of a credit card or consumer account creditor, in order for the proof of claim to be given *prima facie* effect, the creditor must attach an account statement containing the debtor's name, account number, the prepetition account balance, interest rate, and a breakdown of the interest charges, finance charges and other fees that make up the balance of the debt, or attach enough monthly statements so that this information can be easily determined.

Id. at 106.

The *Armstrong* court also determined that a "transferee has an obligation under Bankruptcy Rule 3001 to document its ownership of the claim . . . [by] attach[ing] a signed copy of the assignment and sufficient information to identify the original credit card account." *Id.* (internal marks omitted) (quoting *In re Hughes*, 313 B.R. 205, 212 (Bankr. E.D. Mich. 2004)). Bankruptcy Judge Jones, also of the Northern District, rejected the argument that Bankruptcy Rule 3001(e)'s silence as to evidentiary requirements for claims assigned before the proof of claim was filed eliminates the need to comply with Bankruptcy Rule 3001(c) and Form 10. *See In re White*, 2008 WL 269897, at *4-5.

LVNV's original proofs of claim do not comply with Bankruptcy Rule 3001, the instructions in Form 10, or applicable law. First, LVNV failed to "[a]ttach redacted copies of any documents that support the claim," or a summary thereof in accordance with Rule 3001 and Form 10. LVNV instead attached a document prepared by its servicer containing the same information contained on the proof of claim form: the last four digits of the Debtors' account number and the amount owing on the account. LVNV did not attach the credit card agreement between the Debtors and the original credit card issuer, nor did it attach any summary thereof or give an explanation as to why supporting documents have not been provided. Second, LVNV checked the box in Form 10 to indicate that its claim includes interest or other charges in addition to principal. However, the form requires creditors who check this box to "[a]ttach [an] itemized statement of interest or charges," which LVNV failed to do. Third, the only other document attached to LVNV's original proofs of claim is a purchase agreement between Citibank and LVNV, which purports to transfer certain unnamed accounts (originally belonging to a credit card issuer, then sold to Sherman, then sold to Citibank) to LVNV. LVNV did not include the purchase agreement between the original card issuer and Sherman, nor did it include the purchase agreement between Sherman and Citibank. The purchase agreement provided by LVNV does not establish LVNV's ownership of the Debtors' accounts. Therefore, LVNV failed to provide "sufficient information to identify the original credit card account," or to "document ownership" of its claims. *Armstrong*, 320 B.R. at 106.

Further, the information provided in the proof of claim form and LVNV's attached documents does not suffice to establish *prima facie* validity of LVNV's claims. LVNV has not attached any account statements, provided any information concerning the interest rate or finance charges or other fees that comprise the balance of the debt (despite having checked the box

indicating that its claim includes interest and fees), or attached monthly statements so that this information can be determined. All of this information was required for LVNV's claims to enjoy *prima facie* validity. *Id.*

LVNV's argument that proving claims is too expensive is of no import. This Court has a duty to enforce the Bankruptcy Rules and the Bankruptcy Code as written. Even if the Court were inclined to consider the potential costs of complying with the Bankruptcy Rules, its decision would be the same. Bankruptcy Rule 3001(c) provides that if the documents supporting the creditor's claim cannot be produced, "a statement of the circumstances of the loss or destruction shall be filed with the claim." Fed. R. Bankr. P. 3001(c). Further, paragraph 7 of Form 10 allows a creditor to attach a summary of documents supporting the claim and requires some explanation if the documents are unavailable. These rules and instructions appear to be designed specifically to accommodate creditors like LVNV, who claim to be unable to produce documents. Given these provisions, it is difficult to understand how providing a summary of documents supporting a claim, or at least providing an explanation for why the proof of claim has nothing attached to it, unduly burdens creditors. The only explanation could be that certain creditors wish to continue their routine of executing and filing proofs of claim without objection and without any evidence—essentially, without having to do any work. This practice violates the Bankruptcy Rules and undermines the bedrock notion of the legal system that claimants bear the burden of proving their claims. *See Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 21 (2000) (recognizing that "the burden of proof is an essential element of the claim itself," and that "one who asserts a claim [has] the burden of proof that normally comes with it").

For the reasons stated above, LVNV's original proofs of claim do not comply with Bankruptcy Rule 3001and are not *prima facie* valid. Claims to recover amounts charged on credit card accounts must be accompanied by adequate supporting documents or copies thereof or, at the very least, an explanation of why such documents could not be produced. LVNV did neither in the case at bar. Further, because LVNV's claims have allegedly been assigned to it, proof of the assignments must also be provided to have standing. For all of these reasons, LVNV has failed to meet its initial burden of production with regards to original proofs of claim 11, 12, 13, 14, and 18.

2. Consequences of Failing to Attach Sufficient Documentation to Proofs of Claim

Although incomplete or insufficient proofs of claim are not *prima facie* valid, they are not automatically disallowed. *See In re Armstrong*, 320 B.R. at 106. The debtor, however, "has no evidentiary burden to overcome" when objecting to a claim that is not *prima facie* valid. *In re Tran*, 369 B.R. at 318. Once the debtor objects to a proof of claim, the claim's validity becomes a "contested matter" and the burden shifts back to the creditor to prove the claim is valid by a preponderance of the evidence. *See* 11 U.S.C. § 502; *In re O'Conner*, 153 F.3d 258, 260-61 (5th Cir. 1998); *In re Fid. Holding Co., Ltd.*, 837 F.2d 696, 698 (5th Cir. 1988). Because the Debtors in the case at bar are objecting to proofs of claim that do not enjoy *prima facie* validity, the Debtors do not have to overcome any evidentiary presumption in making their objections.[2] The Debtors'

[2] Courts disagree about the consequences of a creditor's failure to comply with Bankruptcy Rule 3001 and the instructions in Form 10. The Tenth Circuit Bankruptcy Appellate Panel (BAP) recently explained that two main schools of thought have developed on the subject—the "exclusive view" and the "nonexclusive view." *B-Line, L.L.C. v. Kirkland (In re Kirkland)*, 379 B.R. 341, 344 (B.A.P. 10th Cir. 2007). Courts adopting the "exclusive view" hold that 11 U.S.C. § 502(b) provides the exclusive basis for disallowance of claims, and that the creditor's failure to attach documents, alone, is not a basis for an objection. *Id.* at 344 n.10 (listing courts that have adopted the "exclusive view"). The Tenth Circuit BAP also adopted the "exclusive view" in *Kirkland*. *Id.* at 344. Courts adopting the "nonexclusive view" hold that a creditor's failure to attach supporting documents is a valid ground for a claim objection, and that, once an objection is lodged, the claim must be disallowed if the creditor fails to prove its claim at the claim objection hearing. *Id.* at 344 n.11 (listing courts that have adopted the "nonexclusive view"). So far, courts within the Fifth Circuit have adhered to the "nonexclusive view." *See In re Armstrong*, 320 B.R. at 106; *In re Tran*, 369 B.R. at 318.

objections are sufficient to shift the burden back to LVNV to prove ownership and validity of its claims in accordance with state law.

C. LVNV's Post-Objection Amendments to its Proofs of Claim

Before this Court proceeds with its analysis of the validity of LVNV's claims, it must first determine whether to consider LVNV's original proofs of claim or its proofs of claim as amended by LVNV's August 5, 2008 filings. If LVNV failed to properly amend its proofs of claim, LVNV must rely solely on its original proofs of claim to satisfy its burden of proof.

The Debtors filed their objections to LVNV's original proofs of claim on July 18, 2008. LVNV electronically filed affidavits and other documents in support of claims 11, 12, 13, 14, and 18 on August 5, 2008. Thus, LVNV amended all its claims without leave of Court or the consent of the Debtors after the Debtors lodged their objection. This case presents an interesting (and

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Courts applying the "exclusive view" frequently make a distinction between "technical" and "substantive" objections. The Tenth Circuit BAP in *Kirkland*, for example, determined that an objection based solely on insufficient documentation that does not actually dispute liability for the debt is merely "technical," and does not invoke any of the statutory grounds for disallowance in 11 U.S.C. § 502(b). *Kirkland*, 379 B.R. at 346-47. To allow such a technical objection, *Kirkland* explains, would allow debtors to weasel out of undisputed debts and require unnecessary hearings. *Id.* at 348-49.

This Court need not decide the issue since the Debtors made substantive objections (i.e. that the Debtors did not owe LVNV anything because there was no proof of assignment). However, this Court believes that the "nonexclusive view" is particularly applicable in a case where, as here, a creditor files a skeletal proof of claim with no documentation attached to it. Although a debtor's claim objection must be couched in one of the statutory grounds for disallowance in § 502(b), complaining that the creditor has offered no documentation in support of its claims necessarily asserts that the claim is "unenforceable against the debtor . . . under . . . applicable law" under § 502(b)(1). 11 U.S.C. § 502(b)(1). This Court knows of no jurisdiction where a claim arising out of a credit card agreement is enforceable without proof of the underlying agreement. Neither is this Court aware of any jurisdiction where a purchaser of contract rights may establish the enforceability of those rights without proof of purchase. The technical/substantive distinction for claim objections seems more applicable in a case where the creditor has at least made a good faith attempt to comply with Bankruptcy Rule 3001. Such is not the case here. If a creditor willfully disregards the language of Bankruptcy Rule 3001 by filing a proof of claim without documentation, then the debtor's objection about insufficient documentation should likewise be sufficient to shift the burden back to the creditor to produce the documents that it was required to produce in the first place. Otherwise, the technical/substantive distinction would render Bankruptcy Rule 3001 toothless. Bankruptcy Rule 3001 would never be enforced if debtors could not effectively object to proofs of claims for noncompliance with that rule. Further, it is the creditor's violation of Bankruptcy Rule 3001, not the debtor's objection, that creates the need for unnecessary hearings.

apparently novel) question: May a claimant freely amend its proof of claim after the debtor has objected and initiated a contested matter?[3]

1. Applicability of Bankruptcy Rule 7015 to Contested Matters

Generally, a creditor may freely amend its proofs of claim before they are successfully objected to by the debtor. *See, e.g.*, *First Nat'l Bank of Mobile v. Everhart (In re Commonwealth Corp.)*, 617 F.2d 415, 422 n.12 (5th Cir. 1980) (noting that "amendment of claims in bankruptcy is liberally allowed" within statutory limits). However, once the debtor objects to a proof of claim, it becomes a "contested matter" under Bankruptcy Rule 9014. *See In re Cloud*, No. 99-51109, 2000 WL 634637, at *2 (5th Cir. 2000) (unpublished); *see also* Fed. R. Bankr. P. 3007, advisory committee's note ("The contested matter initiated by an objection to a claim is governed by rule 9014 . . . ."); Fed. R. Bankr. P. 9014, advisory committee's note ("[T]he filing of an objection to a proof of claim . . . creates a dispute which is a contested matter . . . ."). Further, Bankruptcy Rule 9014 makes applicable certain procedural rules contained in Part VII of the Bankruptcy Rules, and allows the court to "at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed. R. Bankr. P. 9014(c). Bankruptcy Rule 7015 makes Federal Rule of Civil Procedure 15 (Rule 15), governing amendments, applicable in adversary proceedings. Taken together, Bankruptcy Rules 9014 and 7015 make Rule 15 applicable in contested matters at the Court's election.[4]

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[3] This Court recently held that Bankruptcy Rule 7015, and, by extension, Federal Rule of Civil Procedure 15, applied where another creditor in this case attempted—without leave of court—to amend its proofs of claim, which originally attached no documents, after the debtor lodged an objection on the grounds that the original proofs of claim contained no documents evidencing ownership of the debt. *In re Gilbreath*, 395 B.R. 356, 365-67 (Bankr. S.D. Tex. 2008). The Court shall therefore reiterate its reasoning from *Gilbreath* in the present case.

[4] The Court takes note of the bankruptcy courts in other circuits that have determined that Bankruptcy Rule 7015 is inapplicable to contested matters. *Cf. In re Carr*, 134 B.R. 370, 372 (Bankr. D. Neb. 1991); *In re Calisoff*, 94 B.R.

Further, most bankruptcy courts have recognized that "[t]he trend of the cases appear to apply Rule 7015 to contested matters." *In re MK Lombard Group I, Ltd.*, 301 B.R. 812, 816 (Bankr. E.D. Pa. 2003); *see also, e.g.*, *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992) (noting that Bankruptcy Rule 9014 permits extension of Rule 7015 to contested matters); *In re Best Refrigerated Express, Inc.*, 192 B.R. 503, 506 (Bankr. D. Neb. 1996) (applying Rule 7015 through Rule 9014 to allow amendment to filed proof of claim to relate back); *Enjet, Inc. v. Maritime Challenge Corp. (In re Enjet, Inc.)*, 220 B.R. 312, 314 (E.D. La. 1998) (noting that "numerous courts have applied Rule 7015 and Rule 15(c) explicitly or by analogy in non-adversary [bankruptcy] proceedings"); *In re Brown*, 159 B.R. 710, 714 (Bankr. D.N.J. 1993) (noting that Rule 15's "standards for allowing amendments to pleadings in adversary proceedings . . . also apply to amendments to a proof of claim"); *In re Blue Diamond Coal Co.*, 147 B.R. 720, 725 (Bankr. E.D. Tenn. 1992) (extending Rule 9014 to apply Rule 7015 to contested matters); *In re Enron Corp.*, 298 B.R. 513, 521-22 (Bankr. S.D.N.Y. 2003) (invoking Rule 9014 to apply Rule 7015); 10 Collier on Bankruptcy ¶ 7015.02 n. 1 (Matthew Bender 15th ed. Rev.).

Rule 15 requires claimants to obtain "the opposing party's written consent or the court's leave" to amend their claim after being served with a response (here, a written objection). Fed. R. Civ. P. 15(a)(2). It is therefore within this Court's power and discretion to refuse to consider the materials submitted by LVNV on August 5, 2008, in support of claim 11, 12, 13, 14, and 18, which

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1002, 1003 n.2 (Bankr. N.D. Ill. 1988). These courts have so held because Bankruptcy Rule 9014 does not expressly list Bankruptcy Rule 7015 among the rules in Part VII that "shall apply" in contested matters. However, this logic disregards the language of Bankruptcy Rule 9014(c), which states that "[t]he court may at any stage in a particular matter direct that one or more of the *other rules* in Part VII shall apply." Fed. R. Bankr. P. 9014(c).

were filed without the Court's leave or the Debtors' consent after the Debtors lodged their claim objections.

2. The Court's Equitable Power to Allow or Disallow Amendments to Contested Proofs of Claim Filed Without Leave of Court

Even if Bankruptcy Rule 7015 is reserved solely for adversarial proceedings, a number of courts have determined that proof of claim amendments are subject to the court's equitable powers under 11 U.S.C. § 105(a). *See United States v. Johnson*, 267 B.R. 717, 721 (N.D. Tex. 2001); *see also In re Eden*, 141 B.R. 121, 123-24 (Bankr. W.D. Tex. 1992) (recognizing that "many bankruptcy courts—for equitable reasons—do permit amendments to proofs of claim, even past the bar date"). The Seventh Circuit explained that "[Bankruptcy] Rule 7015 is not . . . the only possible authority for amendment. Another possible basis is the bankruptcy court's broad equitable jurisdiction." *In re Unroe*, 937 F.2d 346, 349 (7th Cir. 1991). The District Court for the Northern District of Texas also determined that a bankruptcy court has authority to regulate amendments under its equitable powers pursuant to 11 U.S.C. § 105(a). *Johnson*, 267 B.R. at 721 (concluding that "the [bankruptcy] court's power to prevent abuse of process includes bending the time requirements . . . to permit amendments" (internal marks omitted)).

3. Ruling on LVNV's Post-Objection Amendments

This Court is not prepared to make an ultimate determination as to whether every amendment to a proof of claim filed after the debtor objects requires strict adherence to Rule 15, and these are not the facts on which to do so. The Court does, however, believe that a bankruptcy court's equitable powers play some role in determining whether or not to allow an amendment filed without leave or consent in a contested matter. *See* Fed. R. Bankr. P. 9014(c) (stating that the bankruptcy

court "may" direct that other rules in Part VII shall apply). Here, LVNV's amendments (in the form of electronically filed affidavits), all of which were submitted fifteen days after this Court set the Debtor's objections for a hearing, should be subject to the strictures of Rule 15, incorporated through Bankruptcy Rule 7015. Creditors should not be permitted to file defective proofs of claim in hopes that the debtor will not object, but then, when the debtor does object and the matter is set for a hearing, to file the necessary supporting documents. This is one of the reasons Rule 15 was enacted—to prevent undue prejudice and surprise to litigants and to permit opposing parties time to prepare for trial. *See United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002) (determining that "prejudice to the opposing party," "bad faith," and "repeated failure to cure deficiencies" are considerations under Rule 15).

LVNV knew that the Debtors had objected to its original proofs of claim on July 18, 2008, but waited until *well after* this Court set the Debtor's objections for a hearing to amend the proofs of claim. Indeed, the amendments were filed (August 5, 2008) less than two weeks prior to the scheduled August 18, 2008 hearing—which made it virtually impossible for the Debtors to conduct any discovery about the amendments, including taking the deposition of the individula who signed the affidavits that comprised the amendments. These tactics, taken together with LVNV's blatant disregard for Bankruptcy Rule 3001 and the instructions in Form 10 requiring LVNV to attach documents to its original proofs of claim—*see infra*, Section II(B)(1)—speak to the inequity of permitting LVNV to amend its deficient proofs of claim without leave or consent. Therefore, the Court, pursuant to Bankruptcy Rules 9014 and 7015, Rule 15, and its equitable powers under 11 U.S.C. § 105(a), will not allow these amendments to LVNV's proofs of claim 11, 12, 13, 14, and 18.

Because LVNV's amendments are disallowed, its original proofs of claim are all that remain to withstand the Debtors' objection.

D. Validity of LVNV's Original Proofs of Claim

The validity of LVNV's claim is based on Texas contract law, but whether its claim is allowable in bankruptcy "is a matter of federal law and the bankruptcy court's exercise of equitable powers." *See Ford v. Durkey (In re Ford)*, 967 F.2d 1047, 1050 (5th Cir. 1992). Section 502(b) provides nine grounds for disallowing a claim that has been objected to. 11 U.S.C. § 502(b). One of these grounds is that the claim "is unenforceable against the debtor under . . . applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). Courts have uniformly interpreted this to mean that a claim may be disallowed if it is unenforceable under applicable state law. *See, e.g.*, *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) (recognizing that § 502(b)(1) "requires bankruptcy courts to consult state law in determining the validity of most claims").

Under Texas law, a credit card issuer must prove that an enforceable contract exists under which the debtor is liable. *See Preston State Bank v. Jordan*, 692 S.W.2d 740, 744 (Tex. App.—Fort Worth 1985, no writ). Texas law also requires an alleged assignee of a contract to come forward with evidence of the assignment. *See Skipper v. Chase Manhattan Bank USA, N.A.*, No. 09-05-196 CV, 2006 WL 668581, at *1 (Tex. App.—Beaumont 2006, no pet. hist.) (citing cases). Therefore, LVNV has the burden of proving the validity of its underlying claim, which, under Texas law, requires (1) proof of an enforceable contract between the Debtors and the original creditor, and (2) proof of any subsequent assignment of that contract to LVNV.

The inevitable result of the disallowance of LVNV amendments is that LVNV's original proofs of claim must, alone, be sufficient to establish the validity of its claims. This is clearly not the case. First, as stated above, LVNV's original proofs of claim do not sufficiently document LVNV's ownership of claims 11, 12, 13, 14, or 18. In fact, there are at least two missing links in LVNV's chain of title. Second, LVNV provided no evidence that an enforceable contract existed between the Debtors and the original credit card issuer. Therefore, LVNV's original proofs of claim are insufficient to establish that LVNV's claims are valid under Texas law.

E. Even if LVNV's amendments were allowed, LVNV has still failed to establish the validity of claims 11, 12, 13, 14, and 18.

Even if this Court is incorrect in its conclusion that Bankruptcy Rule 7015 applies in this case and that LVNV's amendments to its proofs of claim should be disallowed, the additional documents submitted by LVNV on August 5, 2008 are still insufficient to establish the validity of claims 11, 12, 13, 14, and 18 by a preponderance of the evidence.

1. Proof of Ownership

In order to establish the validity of proofs of claim 11 through 14 and 18 over the Debtors' objection, LVNV had the burden of proving that it actually owns the claims. *See In re Armstrong*, 320 B.R. at 106 (requiring a creditor to prove ownership of the claim by attaching a "signed copy of the assignment and sufficient information to identify the original credit card account"); *In re Reyna*, 2008 WL 2961973, at *5-6 (disallowing creditor's claim where there was "no evidence to link the entity assigning the claim with an entity listed on the debtor's schedules"); *In re Leverett*, 378 B.R. 793, 801 (Bankr. E.D. Tex. 2007) (requiring, at a minimum, that credit card claimants "include[] or attach[] documentary or other evidence pertaining to how it acquired the claim and

showing that it is the current holder of the claim"); *In re Padilla*, No. 04-42708 H213, 2006 WL 2090210, at *4 (Bankr. S.D. Tex. June 29, 2006) (sustaining objections to a creditor's assigned claims where there was no proof of the assignment).

The Court notes, at the outset, that LVNV did not offer any evidence in support of its original or amended proofs of claim at the hearing. Although LVNV attached documents to its pleadings in the form of exhibits, LVNV's counsel never moved to admit these documents at the August 18, 2008 hearing. *See In re Wilmington Hospitality L.L.C.*, No. 01-19401DWS, 2003 WL 21011689, at *1 n.1 (Bankr. E.D. Pa. Apr. 18, 2003) ("[D]ocuments attached to pleadings are not evidence."). Therefore, LVNV has no evidence to support a claim. However, even if LVNV had moved to admit the exhibits attached to its pleadings, these exhibits would still be insufficient to establish the validity of LVNV's claims. The Court proceeds with its analysis under the fiction that the exhibits electronically filed on the docket had actually been offered as evidence.

a. LVNV's Submitted Affidavits

Affidavits may well be sufficient to establish the *prima facie* validity of an unchallenged proof of claim, but once the debtor makes an objection (as the Debtors have done here), a creditor has the burden of proving its claims by a preponderance of the evidence as it would in any trial on the merits. *In re Fid. Holding*, 837 F.2d at 698. Affidavits, such as those submitted by LVNV, are generally inadmissible in a trial on the merits unless they qualify under an exception to the hearsay rule or contain statements made by party opponents.[5] *Bd. of Pub. Instruction v. Meredith*, 119 F.2d

[5] Affidavits are typically submitted by parties on motions for summary judgment (for consideration of whether any genuine issue of material fact exists for trial), and are generally inappropriate for use at trial because of their hearsay character. *See* 10B Charles Alan Wright et al., Federal Practice and Procedure: Civil § 2738, at 330-33 (3d ed. 1998) ("[E]x parte affidavits, which are not admissible at trial, are appropriate on a summary-judgment hearing to the extent they contain admissible information."). Here, LVNV relies predominantly on affidavits to defend the validity of its proofs of claim after the Debtors objected to the original claims for, among other reasons, the absence of sufficient

712, 713 (5th Cir. 1941) ("[U]sually ex parte affidavits are not sufficient to prove material facts in a contested case . . . ."); *see also, e.g.*, *FTC v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 n.9 (5th Cir. 2004) (determining that certain affidavits were hearsay and did not qualify for any exception under Fed. R. Evid. 803 or 804).

The affidavits filed by LVNV in support of proofs of claim 11, 12, 13, 14, and 18 contain inadmissible hearsay. All of LVNV's affidavits have been executed and signed by Sherrie A. Emerson (Emerson), an employee of LVNV. [Docket Nos. 66-70.] These affidavits contain out of court statements offered to prove the truth of their assertions. Emerson did not appear to give live testimony at the August 18, 2008 hearing on the Debtors' objections to the amended proofs of claim and was therefore not subject to cross examination, which deprives the Debtors of due process. *See Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) ("[T]he Confrontation Clause is violated when hearsay evidence is admitted as substantive evidence against the defendant with no opportunity to cross examine the hearsay declarant at trial."); *Mattox v. United States*, 156 U.S. 237, 242 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used . . . in lieu of a personal examination and cross examination of the witness.").

Additionally, the statements made in paragraph 3 of each affidavit are, in some cases, triple hearsay. For example, in all of LVNV's affidavits, Emerson testifies as to the accuracy of LVNV's

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documentation showing LVNV's ownership of the debt. Because a bona fide dispute has arisen, and because these affidavits contain hearsay statements that do not fall within any exception, they are inadmissible and cannot satisfy LVNV's burden of proof.

Although Federal Rule of Civil Procedure 43, applicable to bankruptcy cases under Fed. R. Bankr. P. 9017, suggests that affidavits may be admissible in motion practice, that rule contains discretionary language. Fed. R. Civ. P. 43(c) ("When a motion relies on facts outside the record, the court *may* hear the matter on affidavits or *may* hear it wholly or partly on oral testimony or on depositions." (emphasis added)). The Court finds that affidavits should be given no weight in this case, where LVNV was given ample opportunity to present its case at a hearing with live testimony from witnesses. Moreover, that LVNV has the burden of proving the validity of its claims by a preponderance of the evidence, as it would in any civil trial on the merits, suggests that the hearsay character of LVNV's affidavits should not be ignored.

business records, which are a "compilation" of information provided to LVNV by Sherman. [Docket Nos. 66-70.] She also certifies that "[t]he records provided to [LVNV] *have been represented*" (presumably by Sherman) "to include information provided by Citibank." [Docket Nos. 66-70.] According to these affidavits, LVNV's claims are the result of an extension of credit to the Debtors by Sears, Children's Place, Office Depot, and Zales, and that the Debtor's account was subsequently assigned to Citibank, then to Sherman, and finally to LVNV. [Docket Nos. 66-70.] Ms. Emerson is not competent to testify as to the accuracy of the business records of LVNV's predecessors. Further, LVNV's business records are based entirely on information transmitted from Citibank to Sherman, and then from Sherman to LVNV. These statements are triple hearsay, which is manifestly unreliable and will not be considered by the Court.

Emerson's statements in LVNV's affidavits do not fall under any hearsay exception. Therefore, even if LVNV had offered its affidavits at the hearing—which it did not—the Court would have sustained an objection to their inadmissibility, and the affidavits would have held no evidentiary weight.[6]

b. LVNV's Submitted Bills of Sale

LVNV's submitted bills of sale are also insufficient to establish LVNV's ownership of claims 11, 12, 13, 14, and 18. At most, the bills of sale submitted by LVNV suggest that certain accounts (not necessarily the Debtors') were transferred from Citibank to Sherman, and then to LVNV.

The first bill of sale submitted by LVNV in support of its proof of claim 11 is subject to "the terms of that certain Purchase and Sale Agreement " between Sears and Sherman, which was

[6] In fact, counsel for the Debtor objected to the hearsay character of LVNV's submitted affidavits both in its written objection to LVNV's original proofs of claim and orally at the hearing.

subsequently assumed by Citibank and ultimately by LVNV. [Docket No. 66.] This bill of sale purports to transfer "all rights, title and interest in and to the Chapter 13 Accounts which are described on the Disk furnished by [Citibank] to [Sherman]." [Docket No. 66.] LVNV has not provided, nor has it attempted to prove the contents of, this "Disk," and this Court will not presume that the Debtors' accounts are on it.

Similarly, the first bill of sale LVNV submitted in support of its proofs of claim 12, 13, 14, and 18 relies on a "Purchase and Sale Agreement dated December 16, 2005, between [Sherman] and [Citibank]" and purports to transfer "Accounts described in Section 1.2 of the Agreement." [Docket Nos. 67-70.] LVNV has not provided this "Agreement." Once again, this Court will not presume that the Debtors' accounts are listed in this "Agreement."

The second bill of sale in support of all of LVNV's proofs of claim purports to transfer from Sherman to LVNV, "in accordance with the provisions of the Sale Agreement dated as of April 29, 2005 between [Sherman] and [LVNV] (the 'Agreement'), the Receivable Assets (as defined in the Agreement) identified in the Receivable File." [Docket No. 66.] LVNV has not provided this "Receivable File," which allegedly includes the Debtors' accounts, and this Court will not presume that the Debtors' accounts are included therein.

Under the above-described circumstances, the Court cannot decipher which "Chapter 13 Accounts" or "Receivable Assets" are being assigned, or that such accounts include any of the Debtors' accounts.[7]

[7] Although LVNV attached to its pleadings a redacted spreadsheet listing the Debtors' account information and balance, the Court will not presume that this is the same "Receivable File" described in the bill of sale between Sherman and LVNV; and this Court will also not presume that the spreadsheet submitted by LVNV came from the elusive "Disk" supplied to Sherman by Citibank. Indeed, the spreadsheet is untitled and its origin was never explained at the hearing or in any of LVNV's affidavits. Neither were any of these documents offered into evidence.

c. Conclusion Regarding LVNV's Proof of Ownership

For the reasons stated above, LVNV has failed to prove by a preponderance of the evidence, that it is the present owner of claims 11, 12, 13, 14, and 18, as required by Texas law. Because the affidavits and documents filed by LVNV on August 5, 2008 were never offered at the hearing, they have no evidentiary value. Even if they had been offered, the Court would have sustained the Debtors' objections to their admission.[8] LVNV's affidavits contain inadmissible hearsay, and, in some cases, triple hearsay (i.e. statements by Ms. Emerson, an out of court declarant, based on information provided by Citibank, based on information provided by Sherman). This Court would also not have admitted LVNV's bills of sale because no foundation has been laid to except these documents from the hearsay rule. LVNV has the burden of proving ownership of its claims and was given ample opportunity to do so at the August 18, 2008 hearing.[9] No evidence or testimony was adduced by LVNV at that hearing. Therefore, LVNV has failed to establish the validity of claims 11, 12, 13, 14, and 18 in the face of the Debtors' objections.[10]

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[8] The Debtors principally complain in their objections to LVNV's affidavits that the affidavits contain inadmissible hearsay and that LVNV did not lay a proper foundation for its bills of sale, which are also hearsay. [Docket No. 80-84.]

[9] Indeed, LVNV had nearly a month following the initial hearing on July 21, 2008, to prepare for the August 18, 2008 hearing.

[10] It could also be argued, persuasively, that LVNV's failure to provide evidence that it owns claims 22 through 28 deprives LVNV of standing in the Debtors' case. *See, e.g., Fla. Dept. of Ins. v. Chase Bank of Tex., N.A.*, 274 F.3d 924, 929-32 (5th Cir. 2001) (holding that a receiver of insurance policies did not have standing because it failed to prove it was the assignee of the policyholders' claims); *Redmon v. Griffith*, 202 S.W. 3d 225, 239 (Tex. App.—Tyler 2006, pet. denied) (holding that, for the purposes of standing to bring an action to recover on a contract, "[p]rivity is established by proving the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff").

2. Proof of the Underlying Contract

LVNV has also failed to meet its burden of proving that enforceable contracts existed between the Debtors and the original account issuers. First, none of LVNV's documents in support of its proofs of claim were ever offered into evidence. Second, even if LVNV's affidavits and bills of sale had been offered, the Court would have sustained an objection to their admissibility because they are all based on hearsay. Third, while the bills of sale submitted by LVNV hint that agreements existed between the Debtors and the original credit card issuers, these hints, by themselves, are insufficient to establish an enforceable contract under Texas law. *See, e.g.*, *Preston State Bank*, 692 S.W.2d at 744 (affirming trial court's dismissal of a credit card issuer's contract claim where the issuer "failed to introduce the contract between itself and [the debtor] or the terms and conditions thereof"). LVNV did not provide the original contracts, nor did it provide any evidence from which an enforceable contract could be gleaned.

For the reasons set forth above, LVNV failed to meet its burden of proving the validity of claims 11, 12, 13, 14, and 18 under Texas law.

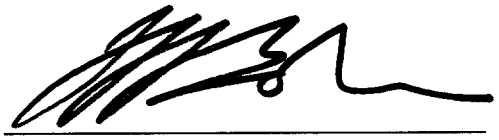
III. CONCLUSION

LVNV's burden of proof at this stage of the proceeding is greater than it was at the time of its initial filing because its claims have been contested. *See Fid. Holding*, 837 F.2d at 698. Even if admitted, the documents filed with the Clerk's office by LVNV on August 5, 2008 do not suffice to prove LVNV's ownership of its claims or that those claims are based on an enforceable contract under Texas law. However, these documents may have sufficed to establish *prima facie* validity had they been attached to LVNV's original proofs of claim. The point is this: LVNV could have availed itself of *prima facie* validity, avoided the strictures of the post-objection amendment process, and

shifted the evidentiary burden to the Debtors had it correctly filed its proofs of claim to begin with. Instead, LVNV chose to disregard Rule 3001 and the instructions in Form 10 by not attaching any documents to its initial proofs of claim or by giving a written explanation why it could not do so. This omission permitted the Debtors to object without having to overcome any evidentiary hurdle, thereby requiring LVNV to meet a heavier burden of proof to establish the validity of its claims.

For the foregoing reasons, the Debtors' objections to LVNV's proofs of claim 11, 12, 13, 14, and 18 should be sustained. This Court reserves the right to make additional findings of fact and conclusions of law as it deems necessary and appropriate. An order consistent with these findings of fact and conclusions of law shall be entered on the docket simultaneously with the entry of this opinion.

Signed on this 19th day of November, 2008.



Jeff Bohm
United States Bankruptcy Judge