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MMBBA MARYLAND MORTGAGE BANKERS AND BROKERS ASSOCIATION

November 1, 2021

Mark Neal, Clerk of the Court
101 West Lombard Street, Suite 8525,
Baltimore, MD 21201
LocalRules@mdb.uscourts.gov

Re: Comments to the Proposed Changes to Md. L.B.R. 4001-6

Dear Mr. Neal,

On behalf of our members, the Mortgage Bankers Association (MBA)[1] and the Maryland Mortgage Bankers Association (MMBA)[2] appreciate the opportunity to offer comments on the recent proposed revisions to Local Bankruptcy Rule 4001-6 (the "Proposed Rule"). On September 15, 2021, this Court approved certain proposed changes, including a modification to Local Bankruptcy Rule 4001-6, that will pose serious legal and practical obstacles for affected creditors and lessors, many of which are likely unintended. The Proposed Rule would require an immediate, giant leap forward in technology, and would impose burdensome regulatory requirements for creditors of all types—and, while well-intended, will likely result in more confusion than clarity. The proposed changes to the Rule go beyond the authority granted to the bankruptcy court and should not be adopted. Ultimately though, compliance with the Rule prior to the proposed December 1, 2021 implementation date is impossible. The most widely used servicing platforms do not currently support providing real-time bankruptcy information and it likely would take several years to develop, test and deploy the enhancements this rule would require. The

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 1,900 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] The mission of The Maryland Mortgage Bankers and Brokers Association is to promote and provide educational opportunities for our members; To influence the legislative process by educating lawmakers on matters affecting real estate ownership; To encourage the practice of professionalism, honesty and integrity in the mortgage banking industry as guided by our Canon of Ethics.

Uniform Residential Loan Application, for example, took 7 years to get to production and was a far less complicated project.

1. The Court Lacks the Authority to Promulgate the Rule

Pursuant to the Rules Enabling Act, "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. Using that authority, the Supreme Court promulgated Fed. R. Bankr. P. 9029, which permits a district court and bankruptcy court to adopt "rules of practice and procedure which are consistent with – but not duplicative of – Acts of Congress and [the federal bankruptcy] rules." The Proposed Rule has little to do with the "practice and procedure" of a bankruptcy proceeding. Indeed, it is unrelated to the administration of the bankruptcy court's dockets, the types of pleadings filed before it, or the procedure in obtaining the relief requested – the general purpose of the Rules Enabling Act. Guaranteeing a debtor access to electronic communications, website access, and payment methods that "were available to the debtor prior to filing bankruptcy" is a clear enlargement or modification of the debtors' rights following the filing of a bankruptcy petition.

The Rule implies that the debtor has the same substantive rights to make payments, receive communications, and access websites in and out of the bankruptcy context; this was never contemplated by the Bankruptcy Code. Rather, these new substantive requirements would be more appropriately achieved through a revision to the Truth-in-Lending Act and/or the Bankruptcy Code or through regulations promulgated by the Consumer Financial Protection Bureau (as discussed below).

The connection between the Proposed Rule and its federal counterpart is tenuous at best. Fed. R. Bankr. P. 4001 relates solely to motion practice in a bankruptcy case including motions for relief (including agreements related thereto), motions related to cash collateral, and motions to obtain post-petition credit. Indeed, every action contemplated by F. R. Bankr. P. 4001 squarely falls (and appropriately) within the "practice and procedure" of a bankruptcy case. On the other hand, as written, the Rule attempts to govern the conduct directly between debtors and all creditors (of all types, notwithstanding perfection, status, or amount), outside the purview of the bankruptcy case and/or court, regardless of the creditor's involvement in the case. A creditor could be subject to liability under the Rule without ever participating in the bankruptcy case.

2. Other Federal Agencies Regulate the Conduct in the Proposed Rule

Even if the Court has authority under the Rules Enabling Act to enact the Rule, the Rule wades into waters that are already the subject of Federal regulatory agencies, especially

the Consumer Finance Protection Bureau (the "CFPB"). For example, Regulation X, 12 C.F.R. § 1024.1 et seq., and Regulation Z, 12 C.F.R. § 1026.1 et seq., contain procedures and regulations regarding the dissemination of various information regarding mortgage loans, including escrow statements and periodic billing statements. These CFPB regulations already dictate how and when the "customary notices and correspondence" related to mortgage loans must be delivered to borrowers, including those in bankruptcy. Likewise, section 1206.36(c)(1)(iii) clearly allows a mortgage servicer to specify, in writing, reasonable requirements for making a payment. Yet, the Proposed Rule significantly restricts this right. It is clear that Congress has intended other federal agencies to regulate in this area and the Court should not insert itself in this sphere that has no direct link to the management of dockets and the parties that seek relief before it.

3. The Rule Should Remain Permissive

The Proposed Rule would be less problematic, both legally and practically, if it remained permissive, as currently written, rather than mandatory. Some creditors already have processes in place to allow debtors to elect specific post-filing payment and communication options. This gatekeeping mechanism allows for creditors and lessors to properly provide information in the bankruptcy context or to relay such information through counsel. The current wording of the Rule does not even provide customers with a way to cease receiving statements and correspondence, which is a frequent complaint - especially as it relates to collateral that is surrendered or abandoned during the bankruptcy. It is important to note, that § 1026.41(e)(5) of Regulation Z expressly permits a consumer to request a mortgage servicer to cease sending periodic statements. Likewise, section 1006.6(c) of Regulation F, which is effective on November 30, 2021, affirmatively prohibits further communications from a debt collector following a consumer's written cease and desist request or refusal to pay. Then, section 1006.14(h) of Regulation F also prohibits a debt collector from communicating with a consumer using a medium (such as email) that the consumer has requested not be used. Thus, there is a direct conflict in substantive laws which prohibit certain communications, while the Proposed Rule leaves no room for these prohibitions. Leaving the permissive nature of the Rule undisturbed is more in keeping with the desires of account holders in bankruptcy, in line with applicable federal law, and consistent with other bankruptcy courts' local rules.

4. The Proposed Rule Imposes an Unnecessary Burden on Creditors and Lessors and May Confuse Debtors Who are Accustomed to Different Methods of Communication.

In making the Rule "mandatory" (with the insertion of the word 'shall') rather than "permissive" (the prior version of the Rule's use of 'may'), creditors will likely run afoul of its provisions without taking an affirmative action. By way of example, the Proposed Rule

currently requires the creditor provide customary notices and correspondence to debtors "both electronically and by mail…" The Proposed Rule is written with the assumption that every debtor has elected to receive electronic notices regarding their account and could impose liability on the creditor for failing to send via notices electronically when it might not have the requisite permissions or information from the debtor to do so. Again, this affirmative, substantive requirement conflicts with federal regulations – specifically, section 1006.6(d)(4) which provides debt collectors with certain procedures to follow when using email to communicate with a consumer.

Conversely, the Proposed Rule, by dictating that statements be sent via both methods, would also require the creditor to send paper statements and correspondence even if the debtor had elected a paperless delivery system with the creditor. As mentioned in the prior paragraph, the Proposed Rule is also silent whether a creditor that allows a debtor to "access, obtain" such information online will meet the requirement to "provide" the correspondence/notice to the debtor. If the debtor is entitled to a new substantive right by virtue of the Proposed Rule, creditors and lessors have equal claim to due process before the Court sanctions them for conduct that contravenes it.

5. The Proposed Rule is Silent About What Information Should Be Provided

Even if a debtor has consented to electronic transmission of notices and correspondence prior to filing the petition for relief, the Rule's requirement that the debtor shall have access to their account information electronically is more likely to cause confusion than aid in administration of their bankruptcy case – the purpose of local rules. In the mortgage servicing context, the terms of the loan documents largely dictate the relative repayment obligations outside of bankruptcy. However, those obligations are often significantly impacted by the bankruptcy process, sometimes more than once during a single case. Thus, the presentation of certain account information becomes complicated in the bankruptcy context and mortgage servicers, who are involuntary participants in the process, are appropriately careful in their communication of such information.

The Rule is silent on what information "shall" be provided to the debtor. Should this "information" match the debtor's Chapter 13 Plan? Must it reflect information provided by the National Data Center that Chapter 13 Trustees use in this District? While creditors undoubtedly appreciate the Court's carve-out of such activity not being a violation of the stay, creditors would likely have trepidations regarding the information to provide bankrupt account holders without further guidance from the Court. For example, must "contractual" information be provided to a debtor to avoid penalties and sanctions for not providing this information—or would providing "contractual" information itself be sanctionable for not properly taking into account the developments in the bankruptcy case? While the Rule provides some protection from meritless stay violation litigation, it does not currently protect creditors from information provided to debtors that may not be congruent with confirmed Chapter 13 or 11 plan. Further, by not limiting the applicability of the Rule, a

Chapter 7 debtor's wish to resume automatic payments may come into direct conflict with a Trustee's desire to administer certain property.

Requiring the debtor to request the access contemplated by the Proposed Rule, and additional guidance from the Court regarding exactly what information to provide under the Proposed Rule, would give creditors the ability to review the bankruptcy case to determine the proper outcome. Also of particular concern, the Proposed Rule, unlike 12 CFR §1026.41(e)(5)(iv)(B), makes no provision to allow a creditor or lessor time to update the account to reflect the filing of the bankruptcy. Does a creditor's liability under the rule begin the minute after the petition is filed? For many accounts, Creditors and Lessors must first calculate the prepetition amounts due prior to determining an ongoing post-petition obligation. Even Fed. R. Bankr. P. 3002 permits Creditors and Lessors seventy days to calculate such amounts. These amounts are simply unknowable prior to plan confirmation. If the Proposed Rule forces creditors to simply open up their systems as they were prior to the bankruptcy, it may do more harm than good.

6. Creditors Cannot Comply by the Implementation Date

Creditors (both secured and unsecured) would face liability not only from the moment of case filing, but from the outset of the Proposed Rule's implementation. Two and a half months (from the Proposed Rule's promulgation to implementation) is hardly enough time for creditors with sophisticated electronic systems to display the correct bankruptcy account information, let alone enough time for smaller creditors to design, test, and troubleshoot a newly designed bankruptcy account system. In addition, creditors cannot viably limit this access and noticing to those account holders solely within the jurisdiction of the Court. The Proposed Rule's mandatory language compounds this problem. The Proposed Rule would force creditors to send statements to the debtors, but not every jurisdiction has a rule that exempts the activity from stay violations. The enactment of the Proposed Rule in Maryland would affect debtors and creditors nationally. Maryland could be forcing creditors into stay violations in other jurisdictions, which is another reason that the account information is sometimes relayed via retained counsel. Maryland isn't alone in wanting to get debtors their statement and correspondence. However, the Courts that have enacted these mandatory statement and correspondence rules tend to limit their applications (i.e. only those accounts paid "outside a plan," or only in Chapter 13 context, only mortgage creditors, etc.). The Rule is not limited by chapter, type of creditor, secured status, or type of collateral.

Conclusion

The Proposed Rule is an overreach into the interaction between creditors and their account holders. The prior version of the Rule, with its permissive language, is better suited for the practical realities dealt with by debtors and creditors. This is especially true

because the implementation of the correct systems to conform to the Proposed Rule would be a practical impossibility by December 1, 2021. On that date, creditors would be in instant violation of the Proposed Rule or perhaps violate rules in other jurisdictions by attempting to comply. The Rule should not be amended or should be further revised to ensure that creditors and debtors know what they are entitled to and what activities may subject them to sanctions or liability. Without such action, the Proposed Rule will likely result in more confusion in cases before this Court and the bankruptcy bench across the nation.

We thank you for your consideration of these very important issues and are available to discuss these items upon request.

Best Regards,

Mortgage Bankers Association
Maryland Mortgage Bankers and Brokers Association - MMBBA

*This letter was prepared with assistance from Robertson, Anschutz, Schneid, Crane & Partners, PLLC.