**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF SOUTH CAROLINA**

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| IN RE: | C/A No. 14-01909-HB |
| Jimmy L. Davis, | Chapter 7 |
| Debtor(s). | **ORDER SETTING CLAIM OF JANET M. GARAFANO** |

**THIS MATTER** is before the Court for consideration of the proof of claim filed by Janet M. Garafano. The Chapter 7 Trustee, Randy Skinner, objected to the claim[1] and Garafano filed a response.[2] A hearing was held on September 3, 2019. Garafano was the only witness and the Court received documentary evidence.

## FACTS

Jimmy L. Davis ("Debtor") was the sole owner of Jimmy L. Davis, Inc. Debtor and his nephew, Nathan Davis, were members of and each held 50% ownership interests in God's Country Outfitters LLC, a sporting goods store located in Albemarle, North Carolina. Nathan Davis was the managing member of the LLC. Bob Chesshire is Garafano's cousin and a social and professional acquaintance of Debtor. Debtor discussed the need for money for the LLC with Chesshire. Chesshire then put Debtor, who lived in South Carolina, in contact with Garafano, who resides in New Jersey, regarding a possible loan.

Debtor and Garafano negotiated terms in February 2011 and she agreed to loan $250,000.00. Although the record contains no formal note evidencing the loan, the parties corresponded via email and Debtor provided Garafano with an amortization schedule,

[1] ECF No. 416, filed Jun. 21, 2019.
[2] ECF No. 508, filed Aug. 21, 2019.

which included details of the monthly payment and interest amounts. According to this schedule, the loan was for a term of 34 months from April 1, 2011 through January 1, 2014, with monthly payments ranging from $2,000.00 to $60,000.00, and a final balloon payment of $133,337.40. The loan accrued 15.00% interest, which decreased by 2.5% each year to 10.00%. Scheduled payments totaled $325,337.40.

Garafano testified that she required Debtor's personal guaranty as a condition of her loan to the LLC and she would not have leant the money without it. To support this, Garafano presented Debtor's personal financial statements, which she required he provide during the loan negotiations to confirm his creditworthiness for the personal guaranty, and email correspondence. An email sent to Garafano on February 28, 2011, from Mary Yerdon at the email address mary_jldinc@bellsouth.net ("Yerdon Email") states:

> Janet,
>
> Per our conversation this morning, I am submitting this informal statement of agreement. I agree to the payment schedule and accompanying interest rate detailed in the attached file. I understand that this agreement is accompanied by no closing costs or other related costs. I understand that there are no prepayment penalties for accelerated pay off. I agree to offering my personal guarantee on the loan.
>
> Thank you,
> *Jimmy L. Davis*
> *God's Country Outfitters*
> . . . .
> mary_jldinc@bellsouth.net

Garafano testified that this email attached the amortization schedule, the "jldinc" in Yerdon's email address is an acronym for "Jimmy L. Davis, Inc." and she received other emails from Debtor from this email address. Garafano responded by emailing Debtor's nephew, Nathan Davis, on the same day and stated:

> Nathan,

> I got a note [from] someone, with what you sent and Jimmy's name. Her name is [M]ary. I asked that she either send it from Jimmy's email or have him sign it [a]nd scan and email back to me. I have not heard from them. Just wanted to let you know, because I am not releasing funds until I have [s]omething more official from him.

Nathan Davis responded, "I understand. Jimmy doesn't have a personal email. He is going back to his [o]ffice to sign. You should have a signed copy from Mary's email shortly. Mary [i]s his secretary." ("Davis Email").[3] Garafano did not receive a signed copy from Debtor; instead, she informed Davis that same day, "thats [sic] ok, I sent my letter request for the transfer before I left . . ."

Trustee asserts the Yerdon Email is inadmissible hearsay because it was not sent by Debtor, but rather is from Mary Yerdon's email address. He also asserts other email correspondence from Nathan Davis (but not the Davis Email referenced above) is inadmissible hearsay. Trustee does not dispute that Debtor is a party opponent to Garafano.

There is no dispute that Garafano's $250,000.00 loan was funded to the LLC on March 3, 2011. Thereafter, payments on the loan were made by the LLC, but stopped as of late 2012 and the store was forced to close in 2013. On December 31, 2013, Garafano filed a complaint in the United States District Court for the District of South Carolina against Debtor and the LLC, seeking damages for breach of contract related to the loan. Debtor's Answer was filed by counsel on January 27, 2014, which included a general denial as to the allegation of a personal guaranty and did not assert any affirmative defenses, including one based on the statute of frauds.

[3] The Davis Email is one of several included in a chain of emails submitted as Creditor's Exhibit B. Neither the Trustee nor Garafano's counsel questioned her about the Davis Email, but instead submitted the exhibit to demonstrate that the loan was funded by Garafano. The Trustee's brief filed in support of his objection refers to different emails from Davis to Garafano sent in 2013, after the loan was made, and asserts they should not be considered as evidence because they are inadmissible hearsay. Even though no objection was raised as to the Davis Email, the Court discusses its admissibility below.

Debtor filed a voluntary petition for Chapter 11 relief on April 2, 2014. The *List of Creditors Holding 20 Largest Unsecured Claims* filed with Debtor's petition included Garafano.[4] It described the nature of the claim as "God's Country – Personal Guarantee" in the amount of $313,530.00 and did not list it as contingent, unliquidated, disputed, or subject to setoff. Debtor's initial Schedule F was filed on April 28, 2014, and lists Garafano as an unsecured creditor with a claim in the amount of $313,530.00 for a debt described as "God's Country – Personal Guarantee."[5] This debt is not marked as contingent, unliquidated, or disputed. Debtor filed Amended Schedules on June 3, 2014 that again listed Garafano's debt with the same description and amount as the initial schedules.[6] The Schedules and Amended Schedules were signed by Debtor under penalty of perjury. Debtor's Amended Disclosure Statement included an exhibit describing his various business interests. This exhibit included the LLC and disclosed that the company's assets were liquidated in October 2013 and the business is no longer operating. It further stated that the LLC owes various debts, including one to Garafano of approximately $350,000.000, "all of which were personally guaranteed by Jimmy L. Davis, the Debtor."[7]

On May 14, 2014, Garafano filed an unsecured claim in the amount of $350,000.00 for money loaned.[8] Attached to Garafano's claim was a summary of the debt, which explained that no formal note or guaranty was reduced to writing and referred to the amortization schedule and federal litigation.

[4] ECF No. 1, filed Apr. 2, 2014. Fed. R. Evid. 201 allows the Court to take judicial notice of facts that are not subject to reasonable dispute. A bankruptcy court may take judicial notice of the docket events in a case and the contents of the bankruptcy schedules to determine the timing and status of case events, as well as other facts not reasonably in dispute. *In re Harmony Holdings, LLC*, 393 B.R. 409, 413 (Bankr. D.S.C. 2008).
[5] ECF No. 18, filed Apr. 28, 2014.
[6] ECF No. 45, filed Jun. 3, 2014
[7] ECF No. 190, filed Feb. 24, 2015.
[8] POC No. 7.

Debtor's case was converted from Chapter 11 to Chapter 7 on March 31, 2015, and Skinner was appointed as Trustee. Trustee objected to Garafano's claim and asked that it be disallowed. Trustee does not contest the validity of the underlying debt owed to Garafano by the LLC or question whether that loan was made. Instead, he asserts there is no writing documenting the personal guaranty and it is, therefore, invalid under South Carolina's statute of frauds, S.C. Code Ann. § 32-3-10.[9] At the hearing and in his brief filed after the hearing began, Trustee asserted the alternative argument that if the claim is allowed, it should be in the amount of $325,287.38 based on his calculation. After the hearing, Garafano filed a reply brief arguing, in part, that the amount of the claim is $321,432.80.[10]

## DISCUSSION AND CONCLUSIONS

Pursuant to § 502(a) of the Bankruptcy Code, a claim is deemed allowed unless an objection is filed by a party in interest. A Chapter 7 trustee is a party in interest whose duties include reviewing filed proofs of claim and objecting to the allowance of any claim that is "improper" and if the objection would serve a purpose. 11 U.S.C. § 704(a)(5). Section 502(b) provides that if an objection to a claim is made, the Court, after notice and a hearing, shall determine the amount of the claim as of the date of the petition, and shall allow such claim in that amount, unless the claim is disallowed under exceptions listed in the Bankruptcy Code, including that the "claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . ." 11 U.S.C. § 502(b)(2)(1).

[9] ECF No. 509, filed Sept. 3, 2019. The parties do not dispute application of South Carolina law.
[10] ECF No. 512, filed Sept. 13, 2019.

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(a) and (b). A determination concerning the allowance or disallowance of a claim against the estate is a core proceeding over which this Court has authority to enter a final order. 28 U.S.C. § 157(b)(2)(B).

The Federal Rules of Bankruptcy Procedure specify the form, content, and filing requirements for a valid proof of claim. *See e.g.*, Fed. R. Bankr. P. 3001. Specifically, Rule 3001(c) states that when a claim is based on a writing, "a copy of the writing shall be filed with the proof of claim. If 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)(1). Additionally, if the debtor is an individual and "[i]f, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim." Fed. R. Bankr. P. 3001(c)(2)(A). When a claim is executed and filed in accordance with the Bankruptcy Rules, Rule 3001(f) provides that the proof of claim "shall constitute *prima facie* evidence of the validity and amount of the claim."

Generally, the burden of establishing the validity and amount of a bankruptcy claim shifts between the parties. However, if the requirements under Fed. R. Bankr. P. 3001 are not met and the claim lacks *prima facie* evidence of validity and amount, the burden is on the claimant to establish the validity and amount of the claim. *See In re Devey*, 590 B.R. 706, 721 (Bankr. D.S.C. 2018); *In re Mazyck*, 521 B.R. 726, 732 (Bankr. D.S.C. 2014). In such circumstances, the objecting party only needs to raise a basis for disallowance under § 502(b) to satisfy its burden, such as a dispute as to the amount, validity or enforcement of the claim. *In re Brown*, 603 B.R. 786, 791-92 (Bankr. D.S.C. 2019)

Garafano's proof of claim included only a summary of the debt, explaining that no formal note or guaranty was reduced to writing. Neither the amortization schedule nor an itemized statement of interest was included with the proof of claim. Therefore, Garafano's proof of claim was not filed in accordance with Fed. R. Bankr. P. 3001(c)(2)(A) and lacks *prima facie* evidence of its validity and amount pursuant to Fed. R. Bankr. P. 3001(f). *Brown*, 603 B.R. 786, 792-93 (citing *Maddux v. Midland Credit Management, Inc.*, 567 B.R. 489 (Bankr. E.D. Va. 2016) (finding a claim lacked *prima facie* evidence of validity and amount when the claim attached an itemized statement that did not accurately indicate the amount of interest and fees owed on the claim)). Because Garafano's claim is not *prima facie* valid under Rule 3001(f), she bears the burden of establishing the validity of her claim.

Trustee asserts the claim is unenforceable against the estate because the debt was incurred by the LLC and the statute of frauds precludes enforcement of any purported personal guaranty. Garafano asserts the statute of frauds does not apply because Debtor admitted his obligation as a personal guarantor of the loan to the LLC in his bankruptcy filings signed under oath. Further, even if the statute of frauds is applicable, Garafano contends the evidence includes sufficient writings to meet its requirements.

South Carolina's statute of frauds provides that no action shall be brought "[t]o charge the defendant upon any special promise to answer for the debt . . . of another person," or "[t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof," unless the agreement is "in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized." S.C. Code Ann. § 32-3-10.

> In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and "the writings must establish the essential terms of the contract without resort to parol evidence." *Cash v. Maddox*, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975) (citing *Barr v. Lyle*, 263 S.C. 426, 430, 211 S.E.2d 232, 234 (1975)). However, "[u]nder the statute of frauds, the form of the writing is not material, and may be shown entirely by written correspondence . . ." *Barr*, 263 S.C. at 430, 211 S.E.2d at 234 (citing *Speed v. Speed*, 213 S.C. 401, 408, 49 S.E.2d 588, 591 (1948)).

*Springob v. Univ. of S.C.*, 407 S.C. 490, 496, 757 S.E.2d 384, 387 (2014). Because the alleged agreement between Debtor and Garafano involved a guaranty for payment of the loan by the LLC and the loan's terms were more than one year, it falls under S.C. Code § 32-3-10. As a result, for the agreement to be enforceable, a writing must exist that contains both the essential terms of the parties' agreement and the signature of Debtor, the party against whom Garafano seeks to enforce the agreement.

To determine if a sufficient writing exists, the Court must consider Trustee's objections to the Court's consideration of certain writings presented in support of the claim. Fed. R. Evid. 801(d)(2) identifies five types of statements as "admissions by a party opponent," and excludes them from the definition of hearsay. Specifically, Rule 801(d)(2)(A) excludes the party opponent's own statement, made in either an individual or representative capacity and Rule 801(d)(2)(D) excludes a statement made by a party's agent or employee concerning a matter within the scope of that relationship and made during the existence of the agency or employment. To introduce a statement under Rule 801(d)(2)(D), the record must reveal "independent evidence establishing the existence of the agency," but specific authorization to speak need not be shown. *Sutton v. Roth, L.L.C.*, 361 F. App'x 543, 547-48 (4th Cir. 2010) (quoting *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982)). "The purpose of the hearsay rule is to remove from evidence out-of-court statements offered for their truth that have questionable

trustworthiness when the opposing party has no opportunity to contest the hearsay's reliability." *In re Harmony Holdings, LLC*, 393 B.R. 409, 415 (Bankr. D.S.C. 2008).

Under Fed. R. Evid. 901(a), documents must be properly authenticated as a condition precedent to their admissibility by "evidence sufficient to support a finding that item is what its proponent claims." "The requirement of authentication and identification also ensures that evidence is trustworthy, which is especially important in analyzing hearsay issues. Indeed, these two evidentiary concepts often are considered together when determining the admissibility of exhibits or documents." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (D. Md. 2007) (footnote and citations omitted). A document may be authenticated by "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," or "[a]ny method of authentication or identification allowed by a federal statute or rule prescribed by the Supreme Court." Fed. R. Evid. 901(b)(4) & (10).

The Electronic Signatures in Global and National Commerce Act provides that certain signatures should not be denied legal effect solely because they are in electronic form. 15 U.S.C. § 7001(1). This law preempts state laws on electronic transactions unless the state has adopted the Uniform Electronic Transactions Act ("UETA"). 15 U.S.C. § 7002(a). Consistent with this, South Carolina adopted the UETA to "provide[] alternative procedures or requirements for the use of electronic records to establish the legal effect or validity of records in electronic transactions" S.C. Code Ann. § 26-6-10(B).

The UETA defines a transaction as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or government affairs." S.C. Code Ann. § 26-6-20(17). "Electronic signature" is broadly defined as "an

electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." S.C. Code Ann § 26-20(8). "Record" means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." S.C. Code Ann. § 26-20(14). Under the UETA:

> An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person ***may be shown in any manner***, including a showing of the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

S.C. Code Ann. § 26-6-90 (emphasis added). Further, a contract or signature must not be denied legal effect or enforceability solely because it is in electronic form. S.C. Code Ann. § 26-6-70. "An electronic signature satisfies a law requiring a signature." *Id.*

While Trustee objected to other correspondence from Nathan Davis as hearsay, he did not object to the admissibility of the Davis Email, which explains that Yerdon is Debtor's secretary and her email address is used for his correspondence. Nevertheless, the Davis Email is not presented to demonstrate that Debtor agreed to a personal guaranty. Rather, it is non-hearsay admitted to evidence Yerdon's and Debtor's relationship and Debtor's custom of communicating through Yerdon's email address.

The Davis Email and other evidence indicate the Yerdon Email was sent by Debtor or, at minimum, by Yerdon as his agent. The evidence reveals Debtor's intent to electronically sign the Yerdon Email consistent with the UETA. It includes his name, title, and contact information below the content of the message. *See Ashford v. Pricewaterhousecoopers, LLP*, C/A No. CV 3:18-904-CMC-SVH, 2018 WL 4501207, at *3-4 (D.S.C. May 22, 2018), *report and recommendation adopted*, C/A No. 3:18-CV-904-CMC-SVH, 2018 WL 3454783 (D.S.C. July 18, 2018) ("A signature demonstrates that the

signer intends to authenticate a document as her own act through the use of a mark." (quoting *Hamdi Halal Mkt. LLC v. United States*, 947 F. Supp. 2d 159, 164 (D. Mass. 2013))). The Yerdon Email includes terms and details of the loan Garafano discussed and negotiated only with Debtor and attached the amortization schedule. Garafano testified that she received other communication from Debtor from this email address and the Davis Email demonstrates that Debtor did not have his own email address, but instead used Yerdon's. Therefore, the Yerdon Email is properly authenticated. Moreover, despite transmission from a different email address, because the Yerdon Email was electronically signed by Debtor under the UETA and sent by him, the Court finds this to be an admission by a party opponent pursuant to Fed. R. Evid. 801(d)(2). Therefore, the Yerdon Email is admissible non-hearsay to be considered when weighing the evidence.

Taken together, the Yerdon Email, the loan amortization schedule, and the personal financial statements are sufficient evidence to demonstrate a meeting of the minds to form an enforceable contract. The amortization schedule set forth the details and terms of the loan and was attached to the Yerdon Email, wherein Debtor acknowledged his agreement to personally guarantee that loan. Debtor electronically signed the Yerdon Email pursuant to South Carolina's UETA and, therefore, signed the personal guaranty agreement. Further, Debtor's act of providing financial statements to Garafano is consistent with her testimony. Based on the record before the Court, and after an opportunity to consider the credibility of the witnesses and evidence, the Court finds Garafano has met her burden to establish that Debtor agreed to personally guarantee the debt and S.C. Code Ann. § 32-3-10 is satisfied.

Moreover, Debtor's acknowledgement of the personal guaranty repeatedly throughout this case, including in his bankruptcy schedules, list of creditors, and disclosure statement, are probative evidence of the validity of the claim.[11] Trustees often assert objections to claims that are contrary to representations in debtors' schedules. However, there is no indication here that the underlying loan was not made nor any nefarious intent by Garafano in filing the claim or by Debtor in his acknowledgment of the personal guaranty.

**IT IS, THEREFORE, ORDERED** that Trustee's objection is sustained in part and overruled in part. The unsecured claim filed by Janet M. Garafano on May 14, 2014 is allowed, but reduced to $321,432.80.

**FILED BY THE COURT**
**09/30/2019**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

US Bankruptcy Judge
District of South Carolina

Entered: 09/30/2019

[11] *See In re Tammarine*, 405 B.R. 465, 468 (Bankr. N.D. Ohio 2009) (citing *In re Burkett*, 329 B.R. 820, 829 (Bankr. S.D. Ohio 2005) ("Of course, a debtor's scheduling of a debt does not constitute an admission by a trustee, but as a sworn statement and admission against interest, it is nevertheless strongly probative of the claim's validity.")); *In re Kemmer*, 315 B.R. 706, 716 (Bankr. E.D. Tenn. 2004)); *see also In re Korfonta*, C/A No. 08-16675-SSM, 2010 WL 4259396, at *7 (Bankr. E.D. Va. Oct. 26, 2010) (holding that scheduling a debt as undisputed constitutes a judicial admission and is binding on the debtor unless corrected and also noting that judicial admission is not synonymous with judicial estoppel).