LAW OFFICES OF

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Dated: May 8, 2021 (8/27/20 version updated)

Honorable Stephanie W. Humrickhouse, Chief Judge
Honorable David M. Warren
Honorable Joseph N. Callaway

Honorable Lena M. James, Chief Judge
Honorable Catharine R. Aron
Honorable Benjamin A. Kahn

Honorable Judges:

We need your help.

> UPDATE: We still need your help. Sustained lower filings, with no end in sight, have only made things worse.

First, on behalf of the debtor bar, I thank you. Your quick action to eliminate the need for "wet" signatures at the beginning of the Covid-19 pandemic was hugely appreciated, as were your efforts to quickly safeguard all parties concerned by replacing "in person" hearings and 341 meetings with "remote" over-the-phone substitutes.

> UPDATE: I am not sure that any of us in this bankruptcy system are any better off now than we were 9 months ago when I sent the original version of this letter to the court on 8/27/20. Filings are at best around 50% of pre-COVID levels, and there is no indication that anything is going to change, and certainly nothing "for sure", in the next few months. Arguably, and no one really knows, filing levels may not return to pre-COVID levels for up to 2 years or more, if then, for a whole host of reasons. We just don't know and anything this court can do to accommodate lower costs and encourage ease-of-access to the Bankruptcy Court for potential clients, would be greatly appreciated.
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> For the record, our office is still not meeting with clients "in person" and most of our staff are still working from home. Therefore, for the indeterminate future, there are times when there is no one in the office to even meet with a client should a client actually show up in person, whether to meet with us or to sign documents.

As a result, we have seen the benefits of "change in action." Unlike other times where change was instituted based upon speculation that change would improve efficiency or save cost or eliminate inconvenience or whatever, due to Covid-19, change was more or less forced on us all. As a result,

we don't have to speculate. We have had the advantage of seeing firsthand the benefits of "change in action." And, for as bad as Covid-19 has been, arguably, we have wrought some good out of it.

> UPDATE: The intervening 9 months since I last wrote the court would only seem to bolster my conclusions.

I don't know who else, other than myself, you may have heard from, even if only by way of passing comments, but from my point of view and from having spoken to others, these changes have yielded valuable improvement on a number of levels.

Granted, any change temporarily throws things into upheaval and makes for more work at the onset. But that work is mostly now done and behind us.

I write to respectfully ask that, by whatever means possible, you make these 2 changes permanent.

Issue 1:

"Wet" signatures: I would like to see the "wet" signature eliminated as being the only acceptable form of signature. I am not necessarily advocating that this court continue, beyond Covid, to allow signature by email consent. Signature by email consent has and continues to serve its purpose. However, that method poses the potential for misuse as it is never crystal clear who is actually responding by email. This is not to say that we have encountered any problems in this regard. We have not. I just worry about the potential problem in getting an email that only purports to be from the client.

> UPDATE: I believe I speak for all debtor attorneys and presumably all creditor attorneys, and perhaps all others involved in the bankruptcy system, when I say that all of us would love to see the court do away with the requirement of a "wet" signature permanently. I may not be aware of all the facts, but my understanding is that the intervening 9 months since I sent out this letter to the court back on 8/27/20 has shown us all that there is really no substantial downside from relaxing the "wet" signature requirement and, hopefully, provided the court with a lot of evidence in favor of doing so on a permanent basis.
>
> In retrospect, it has been my experience that all of the arguments previously presented in this letter in favor of expanding the definition of "original" signature to include something more than only a "wet" signature still apply.

I am advocating that this court, by whatever means possible, adopt as an additional, acceptable form of signature, electronic signatures (hereafter "esignature") captured by programs such as Eversign, Docusign, and SignEasy.

Unlike merely getting consent by email, these programs have additional safeguards built in to help ensure reliability and authentication.

As the court already knows or can quickly determine, these programs have been forced to implement all kinds of verification and other safeguards, as required to satisfy legal requirements as to validity and enforceability, some, but not all, of it in by reason of having to comply with the requirements of the UETA and ESIGN Acts.

> Parenthetically, I acknowledge that "court filings" are not specifically covered by the UETA and ESIGN Acts, but the fact is that these programs, in having to comply with the requirements of these Acts, have, for our purposes, had to focus on the essential issues and concerns of authentication including issues such as the intent to sign, consent, association with a particular document and attribution. By reason thereof, in adopting esignatures as an acceptable form of signature, with the requirement that the program be one that meets these requirements, we would get the full benefit of that compliance, honed, adjusted and refined by years of experience as to what procedures and protocols work best to build and maintain the level of trust and reliability necessary to maintain commercial viability.

As an example, among others, esignature programs provide an "audit trail" which includes such things as name, date, time stamp, email address and IP address.

Issue 2:

"Remote" hearings and meetings: I would like to see this court preserve and expand these procedures. "Over the phone" is great, and what a time saver for all parties involved. By "expand," I mean to advocate that the court more and more transition to include "over video" as an additional alternative. "Over video" would provide an environment that is more akin to normal human interactions where the addition of the visual component allows for the observation and interpretation of facial reactions and body language. And, as we have all seen, programs like Google Hangout, Zoom, Microsoft Teams, and the like are now high resolution, real time, easy to use, cheap, reliable, and more and more considered the "norm." In addition, they provide the ability to share presentations (think evidence as well as the presentation of relevant charts, graphs, etc.)

With respect to these 2 issues, I respectfully offer up my observations.

> Parenthetically, since other interested parties may well have additional, relevant observations, we are simultaneously Bankruptcy Section for the Chapter
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> It is my hope that others will join in the discussion by way of email addressed to their respective Bankruptcy Clerk of Court, whose email addresses are as follows:
>
> Clerk of Court for the Eastern District of North Carolina
> **Stephanie_Butler@nceb.uscourts.gov**
>
> Clerk of Court for the Middle District of North Carolina

Reid_Wilcox@ncmb.uscourts.gov

"Wet" signature observations:

(1) "Wet" signatures force clients to get in their cars and drive to our office if there is any urgency in getting the case filed. We are all only too familiar with the deadlines that drive urgency to get a bankruptcy case filed. Obvious examples include the looming threat of vehicle repossession, foreclosure, tenant eviction, the need for a speed in terms of a vehicle turnover, means test timing issues, etc., etc. And this does not even take into account those times when we can only proceed with a client-signed verification or affidavit.

(2) Forcing clients to get in their cars takes them away from work at a time when lost income is, almost by definition, of paramount concern. Many times, clients will lose an entire day from work just to come sign some documents "in person". How tragic for people who are already strapped for money.

(3) Getting in the car costs at least the price of gas and meals. To most of us, this is inconsequential. To our clients who already have more bills than they can pay or who may be unemployed or disabled, and who are already stressed out, this can be significant and, in some rare cases, a real deal breaker.

(4) Forcing potential clients to get in the car makes it all the more certain that, for those people who live in the far reaches of our districts, where the drive can be up to 3 hours "one-way", they will never avail themselves of the kind of relief that only filing bankruptcy can provide.

(5) Getting rid of "wet" signatures, coupled with the new reality that, with new and updated technology, all things can be done "remotely," allows us to reach and serve the far reaches and four corners of our respective districts. Is it not our goal to make bankruptcy relief accessible to all those who need it?

(6) The facts are clear. Everything is moving "online," especially now with the advent of reliable and universally available "video" chat programs like Google Hangout, Zoom, Microsoft Teams, etc., etc., all of which add a whole new level of communications, adding to email, phone and text communication. It only makes sense to provide debtors and potential debtors with the same tools. Doing so provides better and more convenient access to legal help across the board, but especially for debtors who live a long way from a lawyer's office, those who are disabled, those who don't have transportation, or those where the distance is what keeps them from getting the help they need. Getting rid of the requirement for "wet" signatures is a necessary component in making it a reality that you can get the help you need, if need be, from the safety and comfort of your own home.

(7) Where documents need to be sent to clients for "wet" signature by "mail," the delay caused by all the steps and days involved to effect the mailing at both ends is significant. As a practical matter, having to mail something back and forth in a day and age when emailing and esigning is more secure, the norm, and almost instantaneous, would seem to serve no good purpose.

(8) Let's face it. At this point in time, requiring nothing but a "wet" signature is archaic. At this point in time, "esignatures" are the norm in virtually all retail transactions and in virtually all other legal and commercial transactions, outside of "court filings." When you think about it, how ridiculous. I buy a house and get a mortgage (for most of us, the biggest, most significant transaction in our lives) by "esignature," but I can't file a bankruptcy case.

Is it not time to start moving "wet" signatures in the direction of things like camera film, wood burning cook stoves, horse drawn carriages, typewriters, flat top haircuts, and bell bottom pants?

(9) **EDNC Local Rule 5005-4(7)** and **MDNC Local Rule 5005-4(7)(a)(1)** both require an "original" signature, which could easily be redefined to include "wet" and/or "esigned" signatures. There is precedence for this: Nebraska Bankruptcy Court's local rule (which pre-dates Covid), reads as follows (bolding added):

> "RULE 9011-1. SIGNATURES AND DOCUMENT RETENTION
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> Chapter: PART IX. GENERAL PROVISIONS
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> **A. Petitions, lists, schedules and statements, amendments, pleadings, affidavits, and other documents which must contain original wet ink signatures or which require verification under Fed. R. Bankr. P. 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically and may include, in lieu of the original wet ink signature, the signature forms described in this Local Rule.**
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> **B. As used in the Nebraska Rules of Bankruptcy Procedure and the Federal Rules of Bankruptcy Procedure including, but not limited to, Rule 9011, all of the following shall constitute a signature on an electronically filed document:**
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> 1. A copy or digitally scanned image of the originally signed document containing a wet ink signature.
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> **2. An image with a signature captured electronically at the time of document creation, and signatures created and verified by use of special software programs for electronic signatures, such as DocuSign and SignEasy.**
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> 3. An original wet ink signature on an original document.
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> 4. Subject to paragraph C below, a filing party may indicate a signature of any party to a document by showing "/s/" followed by the printed name of the signatory where the filing party has received the signature of the signatory.
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> 5. An attorney's use of the login and password issued for CM/ECF shall constitute the signature of the attorney and client(s) for all purposes, including Fed. R. Bankr. P. 9011.
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> C. Any electronically filed document containing "/s/" for a debtor or non-filing party in lieu of one of the other signature types referenced in paragraph B above constitutes a

representation under penalty of perjury by the registered CM/ECF filer that he or she has the document with the signature of such party or, if the signing party is also a registered CM/ECF filer, that the filing party has evidence of permission to indicate the party's signature by use of "/s/." The registered CM/ECF filer shall retain the signed document (original wet ink signature or other signature type set forth in subparagraphs 1, 2, and 3 of paragraph B above) or retain evidence of permission to indicate the party's signature by use of "/s/" for all bankruptcy cases and adversary proceedings for a least one year after the case is closed. Upon request, the signed document or evidence of permission must be provided to other parties or the Court for review.

D. Except as provided in paragraph C above, the intent and purpose of this Rule is to eliminate most document retention requirements when a copy, scan, or other reliable evidence of a signature is present. For purposes of clarification, even if the Rules do not require retention of documentation in certain circumstances, all attorneys are encouraged to consider establishing their own "best practices" for document retention.

E. Notwithstanding any other provision to the contrary, there is no record retention requirement for electronically filed proofs of claim."

(10) Esignatures are admissible in evidence under the Federal Rules of Evidence, as evidenced by several court holdings, provided, of course, that there is sufficient evidence to ensure the validity of the electronic signature.

(11) Esignatures are nothing new to the law or commerce. They pervade many, if not most, commercial interactions, of the transactions outside of legal proceedingsto the court .

(12) Esignatures are not new to our clients either. Our clients have been and are exposed to "esiging" all the time, most obviously in retail stores where credit card use most times requires the collection of a signature electronically. This has been the norm for years, if not decades. And this is in addition to their exposure to exactly the type of esignature programs we are advocating for. In addition and as a result, most, if not all, clients are completely comfortable and at home in signing documents electronically, as we have found. Our office utilizes the Eversign program to collect client signatures on fee agreements, understandings, an notices on a daily basis. Not once that I know of has any client questioned the use of esignatures. Quite the contrary. They love not having to come to our office. They love not having to print out, fill in, sign, scan in and email documents back to us. They love the ease and convenience and the ability to respond instantaneously.

(13) As we have seen during Covid-19, there has been no damage caused by not requiring "wet" signatures and our clients love it.

(14) Emailing and esigning comes across way more professional to our clients and coming across more professionally helps promote a relationship of trust.

(15) Esignatures can completely avoid the need for obtaining a power of attorney from a client who is not incapacitated. A great example would be the case where the client is in the military but deployed and therefore not physically available. In this situation, we would either have to mail everything back and forth or depend upon a power of attorney. For those clients deployed

overseas, mailing could well take so long that an urgently needed bankruptcy filing would not be feasible. The only alternative would be to depend upon a power of attorney, but this assumes that one exists and that it is written to include powers broad enough to allow for a bankruptcy filing. Any which way, it can be a hassle. Filing by esignature eliminates the delay. Esignature programs send documents for signing by email. Boom. No mailing involved. No power of attorney needed. Problem solved.

(16) In my internet reading, the biggest concern about esignature seems to revolve around the issue of "authentication." That is, is the person signing who they claim to be. But, the truth is that, unless we want to revert to forcing every client, in every instance, to physically come to our office, where they can be positively identified as they reach for a pen, authentication can always be a potential problem..however rare the possibility. The best example is where we "mail" the client papers to sign. The truth is that anyone can forge a signature on the documents we send them. SS

The reality is that, in the vast, vast, vast majority of cases, our experience is that this is not an issue. First off, in our experience, most clients are honest and this fact cannot be overstated. Second, in the hours and hours we spend talking to or meeting with our clients and by reason of the many phone calls and emails going back and forth and the fact that we require of them proof of identity, including a picture ID, and the volume of very, very personal information we need to gather from them, we know who we are dealing with long before we obtain their signatures on the bankruptcy petition. And then there is the petition itself which requires the signer to "declare under penalty of perjury that the information provided is true and correct." which information includes statements concerning their identity. And then there is the 341 meeting where all debtors are required to take an oath on the bible or by affirmation, and where they are required to declare who they are, and where they are required to declare that they themselves signed the petition, and where they are not allowed to proceed until after they have provided proof of identity, including a picture ID.

Sure, there is always the outside chance that someone will falsely hold themselves out as someone else, as there will always be crooks in the world, but to focus on that only serves to bureaucratically punish the 999 out of 1,000, or more likely 9,999 out of 10,000, good, honest debtors "who are whom they claim to be" and who desperately need the kind of help that only filing bankruptcy can provide and who deserve to be treated with the kindness, caring and respect owed to all human beings.

That said, should there arise a person who is NOT whom he or she claims to be, let that person be dealt with accordingly and bear the full consequence of the law and punishment, without taking it out on everyone else.

> UPDATE: Arguably, electronic signatures are more reliable than "wet" signatures. The following article entitled "Are Electronic Signatures Safe?" (a blog article presented on the DocuSign website) addresses this very issue: https://www.docusign.com/blog/is-your-esignature-safe

(17) Almost last, but not least, there is the added convenience of esignatures. The truth is that by reason of all the information and documents we require of debtors, we really put them through the ringer as the price to pay to get a bankruptcy discharge. And they do it, but it's not easy and never comfortable for them. Who enjoys sharing their most intimate details with a stranger? So, it only makes sense to do what we can do to make the whole process more approachable. Esignatures, as an acceptable alternative to requiring only "wet" signatures, would help.

(18) Last, but not least, everyone is predicting massive filings in the months and years ahead. And who knows what kind of environment we will be dealing with mentally, physically, culturally, healthwise, and financially. Esignatures, email, phones, text, video, chat, etc. all make it more possible to handle that volume more efficiently while maintaining the quality of services and level of care our clients deserve, and, hopefully, efficiently enough that there won't ever be a need to turn away deserving would-be debtors for lack of our capacity to help them.

"Remote" hearings and meetings:

It is my hope that the court, having done the hard work to put in place good and reliable system for handling hearings and Meetings "remotely" and having gotten everyone used to handling appearances "remotely", will keep this system in place.

> UPDATE: I am told that 341 meetings conducted "telephonically" was the unanimous preference expressed at a recent NACBA/NABT/NACTT Liaison committee meeting.

Doing so has several advantages:

It saves debtors from having to take off a day from work and the cost and stress and time involved to having to physically drive to court or a meeting.

Not having to appear in person, remote hearings and meetings help to incentivize debtors to reach out for the bankruptcy help they need by solving their transportation challenges, whether due to distance, lack of transportation, disability, costs of gas and meals, consequent loss of a day's pay, etc.

It saves judges, court personnel, debtor attorneys, creditor attorneys, trustees and all other parties involved, a ton of time otherwise wasted traveling to and from court and additional time spent waiting around for cases to be called.

And considering that it appears that our system may soon be deluged by massive filings for months or years to come, arguably, it only makes sense not to completely revert to "in person" hearings and meetings. "Remote" hearings are more efficient for all parties involved.

UPDATE: It has now been 9 months since I first sent out this letter on 8/27/20, and what we have learned is that there is no guarantee that filings numbers will return to pre-COVID numbers any time soon, if ever. We just don't know. All indications are that it may be 6 months to 2 years before that happens, and this assumes it will happen at all. I mention "at all" because trying to hold onto experienced staff sufficient to handle pre-COVID filing levels for up to 2 years or so is

just not financially feasible. Paying out more than you have coming in is nothing more than a recipe for disaster. At best, here and elsewhere, from what I can gather, filing levels for the last 12 months have plummeted to, at best, 50% of pre-COVID levels. Very simply, filing only 50% of what we filed pre-COVID brings in, at best, only 50% of the attorney fees we needed to service cases at pre-COVID levels. That is bad news for debtor attorneys. And, unless by some miracle, filing levels return to normal in the next few weeks, we and other debtor attorneys across this state and elsewhere will have to lay off even more employees, while still be being required to provide full representation and service to completion on all already-filed cases. For those cases filed under Chapter 13, this dedicates expenditures of current income for up to 5 years from now. And this obligation exists regardless of how few additional cases we file. And, there is no guarantee that filings will not fall off even more over the next few months, as evidenced by the last couple of months. By definition, having to lay off additional staff will stretch the remaining attorneys and staff to, and arguably beyond, the their physical capacity. This could get so bad that it becomes impossible to provide 100% physical attendance at all required hearings and 341 meetings. Needless to say, this scares the bejesus out of us. And all the more reason why we would love for the court to keep in place "remote" hearings and meetings.ly

And this all assumes that predictions of new outbreaks of Covid-19 do not come true.

It is my hope that this court will, at the very least, allow "esignatures" as an alternative to "wet" signatures.

Whether the court will preserve the system for "remote" hearings and meetings, and perhaps expand it to include "video" hearings, is arguably more complicated, but worth serious consideration, if only by reason of the fact that remote hearings and meetings have already been put in place and been shown to work.

Respectfully submitted,

John T. Orcutt
Attorney