See In re Sacred Heart, 177 B.R. at 24 (noting that timing of class certification motion which "was filed only at the eleventh hour, eleven days before the bar date was to run" weighed heavily against granting class certification); In re FirstPlus, 248 B.R. at 78 (denying motion for class certification on grounds that it was untimely, due to counsel "dragging their feet" on seeking resolution of the class issue). Therefore, the timing of the Class Certification Motions, as well as equality and fairness concerns, support denial of the Class Certification Motions and disallowance of the Burgess Class Proofs of Claim.

II. Proofs of Claim must be filed by a creditor or an authorized agent

A. The Bankruptcy Code and Class Proofs of Claim.

25. Section 501(a) of the Bankruptcy Code permits the filing of a proof of claim by a "creditor or an indenture trustee," but does not provide for class proofs of claim. See In re Allegheny International, Inc., 94 B.R. 877, 879 (Bankr. W.D. Pa. 1988); In re Computer Devices, Inc., 51 B.R. 471, 474 (Bankr. D. Mass. 1985). "Nowhere in the Code is 'creditor' defined as a 'class' or 'representative' of a group or class." In re Baldwin-United Corp., 52 B.R. 146, 148 (Bankr. S.D. Ohio 1985).

26. Bankruptcy Rule 3001(b) permits the execution of the proof of claim "by the creditor or the creditor's authorized agent." The proofs of claim are valid only if executed by an authorized agent of the purported class. For the reasons set

forth below, the proofs of claim were not executed by an authorized agent of the purported class.

B. Agency and assent by the principal.

27. An agency relationship exists only upon manifestation by a principal to an agent authorizing the agent to act on the principal's behalf. See Restatement (Second) Agency § 15 (1957). "Only when an agent has *express authorization* may he file a claim on behalf of another." In re Ionosphere Clubs, Inc., 101 B.R. 844, 852 (Bankr. S.D.N.Y. 1989) (emphasis added). With the exception of the named representatives, who have all filed individual proofs of claim, counsel for the Burgess Plaintiffs have not produced evidence of authorization from the purported class members that would authorize the filing of a proof of claim, nor have they identified the individual members of the class.

C. Timing of agency authority.

28. In order to comply with Bankruptcy Rule 3001(b), the person executing the proofs of claim must have been authorized as an agent at the time of filing the proof of claim. See In re Allegheny, 94 B.R. at 81. "Rule 3001(b) allows a creditor to decide to file a proof of claim and to instruct an agent to do so; it does not allow an 'agent' to decide to file a proof of claim and then inform a creditor after the fact." In re FirstPlus, 248 B.R. at 68 (citation and internal quotations omitted). Requiring prior agency authorization takes into

account the distinction between class action procedures which are designed to create an opt-out membership, and bankruptcy claims procedures which are designed to create an opt-in membership.

29. The Fourth Circuit has not addressed whether a proof of claim may be filed on behalf of a class, let alone a class that has not been certified. Many courts have held that such "class" claims cannot be filed for the reasons discussed above. There are cases, however, that allow such claims in limited circumstances where certain procedures are followed. See, e.g., In re Trebol Motors Distributor Corp., 220 B.R. 500 (1st Cir. 1998) (allowing class proof of claim for previously certified class); In re Charter Co., 876 F.2d 866 (11th Cir. 1989), cert. dismissed 496 U.S. 944 (1990); In re American Reserve, 840 F.2d 487 (7th Cir. 1988). The leading case allowing class proofs of claim is In re American Reserve in which the court held that the proposed representative of an uncertified class may file a proof of claim on behalf of the proposed class. 840 F.2d 493. The court concluded that § 501 of the Bankruptcy Code must be interpreted as providing a non-exclusive list of those persons entitled to file proofs of claims. Id. The basis for that conclusion was (1) that Califano v. Yamasaki, 442 U.S. 682 (1979), requires the court to interpret a federal statute in favor of authorizing class proceedings; (2) interpreting § 501 as containing an exclusive list of the persons authorized to file a proof of claim violates this rule of construction; and (3)

interpreting § 501 as containing an exclusive list would render Rules 3001(b) and 7023 as meaningless. Id. at 492-93. Therefore, the court therefore held that the proposed class representative is an authorized agent of the class *nunc pro tunc* if the court later certifies the class and appoints the putative representative as the class representative. Id. at 493.

30. In re Charter also is widely cited as support for allowing class proofs of claim in bankruptcy. In that case, the claimants obtained class certification from a non-bankruptcy court after filing a proof of claim on behalf of the class, but before the debtor objected to the claim. 876 F.2d at 867-68. The In re Charter court adopted the reasoning of In re American Reserve in holding that a proof of claim on behalf of a class of claimants is valid. Id. at 876. In re Charter can be distinguished from the case at bar, however. First, prior to seeking treatment as a class action by the bankruptcy court, the In re Charter claimants had obtained class certification in district court. Id. at 875. In addition, the In re Charter claimants complied with bankruptcy procedures by filing a Rule 9014 motion to have Rule 7023 apply to the case. Id.

31. While recognizing that some courts have followed the In re American Reserve and In re Charter line of cases, this court declines to do so. First, the presumption of Califano is inapplicable because this proceeding is governed by Rule 9014, which unlike the Federal Rules of Civil Procedure, does not

automatically include Rule 23 class certification. Therefore, interpreting § 501 as an exclusive list does not violate an applicable presumption and does not render Rules 3001(b) or 7023 meaningless. Second, § 501 authorizes the creditor to file a proof of claim. Rule 3001(b), while not expanding the list of those who may file a proof of claim pursuant to § 501, articulates that the filing of a proof of claim is a delegable act, which a creditor may authorize an agent to do. In re FirstPlus, 248 B.R. at 71. The failure to specifically include "authorized agent" in § 501 should not be interpreted as eliminating principles of agency because agency law holds that the conduct of an authorized agent is deemed to be the conduct of the principal. See Restatement (Third) Agency § 1.01 (2001). Finally, interpreting § 501 as prohibiting filing by a proposed representative of an uncertified class does not render Rule 7023 meaningless because class proceedings may occur in other contested matters.

32. Furthermore, interpreting § 501 as a non-exclusive list would create significant of problems of interpretation for the Bankruptcy Code. Many sections of the Code contain lists which are specifically non-exclusive. See, e.g., §§ 330(a)(3); 362(d); 503(b); 1112(b). If Congress had intended § 501 to be a non-exclusive list, it would have used similar language.

33. The plain meaning of Bankruptcy Rule 3001(b) is that an agent must have been authorized at the time the proof of claim

was filed. Black's Law Dictionary defines "authorize" as "to give a legal authority; to empower" or "formally approve; to sanction." BLACK'S LAW DICTIONARY 129 (7th ed. 1999). This language implies that to authorize is to empower prospective--not retroactive--action. By permitting retroactive application of agency status, the Seventh Circuit effectively ignores the plain meaning of the word "authorized." The Fourth Circuit has repeatedly instructed bankruptcy courts to interpret statutory text "in accordance with its plain meaning using the ordinary understanding of words." In re NVR, 189 F.3d 442, 457 (4th Cir. 1999). "Only in those rare instances in which there is a clearly expressed legislative intent to the contrary . . . or in which a literal application of the statute would produce an absurd result, should the courts venture beyond the plain meaning of the statute." In re JKJ Chevrolet, Inc., 26 F.3d 481, 483-84 (4th Cir.1994). Following the clear language of § 501, Rule 3001(b), and the principles of construction mandated by the Fourth Circuit, this court holds that a proof of claim can only be filed by a creditor or by an agent who is authorized to file a proof of claim at the time of filing.

III. Contested Matters and Class Actions

A. Class certification is not ordinarily available in contested matters.

34. Bankruptcy courts have as their principal function to determine in a single collective proceeding the entitlements of

all concerned. In re American Reserve, 840 F.2d at 489. Indeed, by concentrating litigation in a single forum, a bankruptcy proceeding offers the same advantages as a class action. In re Woodward & Lothrop Holdings, Inc., 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997). A Chapter 11 bankruptcy case "is a concerted business-driven effort to formulate a consensual plan under which creditors can partake of an 'inadequate pie' while leaving the baker intact." Luisa Kaye, The Case Against Class Proofs of Claim in Bankruptcy, 66 N.Y.U. L. Rev. 897, 906 (1991). Therefore, courts should be wary of the high costs of class actions, particularly in bankruptcy cases where the claimants are competing with others for a limited supply of funds. In re American Reserve, 840 F.2d at 489.

> Class actions consume judicial time, putting off adjudication for other deserving litigants; they impose steep costs on defendants, even those in the right. The systemic costs of class litigation should not be borne lightly.

Id. at 490. See also In re Mechem Financial, Inc., 125 B.R. 151 (Bankr. W.D. Pa. 1991) (exercising discretion to deny class proof of claim as unnecessary in bankruptcy).

35. Class certification under Bankruptcy Rule 7023 is not applicable to contested matters unless the court in its discretion directs otherwise. See Bankruptcy Rule 9014, Committee Note (objection to proof of claim creates a contested matter); In re Woodward & Lothrop, 205 B.R. at 369 (noting that

for a class action claim to proceed, the bankruptcy court must direct Rule 23 to apply). The majority of courts that have addressed the issue have held that the filing of a motion requesting the application of Rule 7023 is mandatory. See In re FirstPlus, 248 B.R. at 67 n.5 (collecting cases); see also In re GAC Corp., 681 F.2d 1295, 1299 (11th Cir. 1982) (noting that in the absence of a motion seeking application of Rule 7023, "a class proof of claim could not properly be permitted"); In re Thomson McKinnon Securities, Inc., 150 B.R. 98, 102 (Bankr. S.D.N.Y. 1992) (expunging class proofs of claim when class representative failed to petition for application of Rule 7023). In the absence of such a motion, there is no basis for granting class certification. See Reid, 886 F.2d at 1470-71.

B. Discretionary application of Rule 7023.

36. The bankruptcy court has the discretion not to apply Rule 7023. See, e.g., Reid, 886 F.2d at 1472 (affirming decision of bankruptcy court not to apply Rule 7023); In re Charter, 876 F.2d at 876-77 (remanding to bankruptcy court for exercise of discretion as to whether to apply Rule 7023); In re American Reserve, 840 F.2d at 493-94 (same). Courts have described this discretion as "substantial" and "wide." In re American Reserve, 840 F.2d at 492; In re Bicoastal, 133 B.R. at 256. The burden of proving entitlement to class certification rests on the party seeking certification. See Reid, 886 F.2d at 1471. See also Securities & Exchange Commission v. Aberdeen Securities Co.,

Inc., 480 F.2d 1121, 1128 (3d Cir. 1973) (affirming denial of class certification because "petitioners failed to show that the method they advocated was superior to the procedures being followed by the Bankruptcy Court"). When a court exercises its discretion and does not apply Rule 7023, class claims are denied and expunged. In re Thomson McKinnon, 150 at 102.

37. The bankruptcy court must weigh the relative advantages of class certification in the bankruptcy context, and determine whether certification will "enable the parties and the court to realize the same benefits that class actions confer in civil litigation." In re Woodward & Lothrop, 205 B.R. at 376. See also In re American Reserve, 840 F.2d at 492 (noting that Rule 9014 and Rule 23 give the court substantial discretion to consider the benefits and costs of class litigation).

38. The court finds that in the present case class certification is unwarranted. The existing bankruptcy claims process provides the most efficient procedure for resolution of the approximately seventy-five individual "Burgess claims" filed in this case. The debtors have given both actual and constructive notice to the purported class members, thereby eliminating the major benefit of class certification.

39. The damage alleged by the Burgess Litigation is not latent, such that potential claimants would not be aware of their rights. Rather, the state court complaints describe the "mill dust" as a "constant daily barrage" which causes "immediate and

severe damage" and "requires increased maintenance, constant cleaning, more frequent painting and other cleaning." These claims have been well publicized--yet of the thousands of potential claimants, fewer than seventy-five completed and mailed in the one-page proof of claim form. There is no reason to believe that additional notification procedures for the class would produce a significant number of additional claimants.

40. Moreover, a class action in this context would not be efficient unless the class action claims were settled. Presuming there was not a settlement and litigation resulted in a class-wide judgment against the debtors, the court would then have to proceed to the next step to determine the debtors' liability to each class member. Only after considerable time and effort would the court reach the point that was crossed as of the Bar Date on July 27, 2001.

41. Granting class certification would have a real and prejudicial effect on both the debtors and creditors because of the increased expense to the estate in litigating class action issues and the decrease in the size of the pool for creditors who timely filed a claim. Instead of addressing seventy-five claims relating to alleged real property, motor vehicle, and water-craft damage, the debtors would have to focus on approximately 10,000 alleged claims. It is clear from the debtors' schedules of assets and liabilities filed in this proceeding and based upon the representations of counsel that GSC is insolvent and

distributions to unsecured creditors will be substantially less than par.[4] Due process for all GSC creditors requires a level playing field. Accordingly, the court finds that a class action in this context is without benefit and exercises its discretion in declining to apply Rule 7023.

Conclusion

42. To summarize, the court finds multiple alternative grounds to deny the Class Certification Motions and to disallow the Burgess Class Proofs of Claim, including the following:

a. allowing class proofs of claim would violate due process by extending the bar date for purported class members who received actual and constructive notice, but did not timely file a proof of claim;

b. the proofs of claim were not filed by an authorized agent and are therefore invalid; and

c. class action procedures are without benefit in this matter.

Based upon the foregoing alternative reasons and the exercise of discretion not to apply Rule 7023, it is therefore ORDERED that:

1. The Motion for Class Certification by Guy S. Hutchins, Jr. is DENIED;

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[4] In addition, because the pool available is insufficient to pay all creditors' claims in full, the existing claimants may not fairly represent the proposed class claimants due to potential conflicts between their interests and those of the other claimants.

2. The Motion for Class Certification by John and Mamie Cunningham is DENIED;

3. The Motion for Class Certification by John and Patricia Burgess is DENIED;

4. The Class Proofs of Claim are DISALLOWED; and

5. The Class Proofs of Claim are EXPUNGED from the claims register in this case.

George R Hodges
United States Bankruptcy Judge