

1 Shannon A. Doyle, Esq. # 207291
Nancy B. Clark, Esq. # 207024
2 **Law Offices of Borowitz & Clark, LLP**
100 N. Barranca Ave., Suite 250
3 West Covina, CA 91791
Tel: (626) 332-8600
4 Fax: (626) 332-8644

5 Attorney for Debtors
George Steven Geyer and
6 Elena Geyer

7 **UNITED STATES BANKRUPTCY COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **SANTA ANA DIVISION**

10 In re:
11 GEORGE STEVEN GEYER
12 and
13 ELENA GEYER,
14
15 Debtors.

Case No. 8:12-bk-13367-TA

Chapter 13

RESPONSE TO OBJECTION TO CHAPTER
13 PLAN AND CONFIRMATION BY BANK
OF NEW YORK MELLON, DECLARATION
OF NANCY B. CLARK IN SUPPORT
THEREOF

Date: May 16, 2012

Time: 1:30 pm

Place: 411 West Fourth Street, Courtroom 5B
Santa Ana, CA 92701

19
20 The debtors, George Steven Geyer and Elena Geyer, by and through their attorney, Nancy B. Clark,
21 hereby provide this Response to Objection to Chapter 13 Plan Confirmation Filed by Bank of New York
22 Mellon (“Creditor”). This Brief is based upon the following Memorandum of Points and Authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24
25 **STATEMENT OF FACTS**

26 On March 16, 2012, George Steven Geyer and Elena Geyer (“Debtors”) filed for Chapter 13
27 bankruptcy relief. Debtors’ Chapter 13 Plan was also filed on March 16, 2012 (see attached as Exhibit A, a
28 true and correct copy of Chapter 13 Plan filed on March 16, 2012). Debtors attached to their chapter 13

1 plan ("Plan") the Addendum to Chapter 13 Plan Concerning Debtors Who are Repaying Debt Secured by a
2 Mortgage on Real Property or a Lien on Personal Property the Debtor Occupies as the Debtor's Principal
3 Residence ("Addendum"). Creditor filed its Objection to Proposed Chapter 13 Plan and Confirmation
4 Thereof ("Objection") on April 23, 2012.

6 ARGUMENT

7 I. The Creation of the Addendum

8 The Ninth Circuit Bankruptcy Appellate Panel ("BAP") first examined the propriety of the
9 Addendum in *Leff v. Herrera (In re Herrera)*, 422 B.R. 698 (9th Cir. BAP 2010), *aff'd. sub nom. Monroy v. U.S.*
10 *Bank, N.A. (In re Monroy)* 650 F.3d 1300 (9th Cir. 2011). The use of the Addendum was subsequently
11 affirmed by the Ninth Circuit in *Monroy*. Finally, a similar appeal regarding the use of the Addendum was
12 affirmed by the Bankruptcy Appellate Panel for the Ninth Circuit in *U.S. Bank v. Vu (In re Vu)*, BAP No.
13 10-1332 (attached hereto). The BAP noted in *Herrera* the reason for the creation of the Addendum by the
14 Central District of California Bankruptcy Judges¹:

16 According to the chair of the ad hoc committee of Central District of California bankruptcy judges
17 that apparently crafted the Addendum, it was designed and adopted in response to two needs:
18 overcoming the reluctance of secured creditors to communicate with debtors in chapter 13, and
19 preventing a secured creditor from assessing additional fees and costs against the debtor at the
20 conclusion of the bankruptcy case that had not been communicated to the debtor or approved by
21 the bankruptcy court. The committee originally proposed adoption of a general order by the
22 bankruptcy court that would require that provisions such as those ultimately incorporated in the
23 Addendum be included in all chapter 13 plans. However, this proposal was rejected by the district's
24 board of judges, which preferred that such decisions be made in each bankruptcy case, and not
25 imposed on chapter 13 debtors by a general order. As a result, the committee ultimately proposed
26 a non-binding, optional form, the Addendum, the propriety of which could be adjudicated on a
27 case-by-case basis.

28 ¹ "The Addendum was approved by majority vote of the bankruptcy judges of the Central District of California, and the
judges' decision was implemented via "Local Form 3015-1.1A.'" *Herrera* at 705.

1 *Id.* at 704-705. Much of the impetus for the creation of the Addendum was related to the pervasive nature
2 of mortgage servicers' abuses in chapter 13.²

3 **A. The Addendum is an Optional Form**

4 "Chapter 13 contemplates the filing of a plan only by the debtor... [and] is designed serve as a
5 flexible vehicle for the repayment of part or all of the allowed claims of the debtor." S. Rep. No 95-989, 95th
6 Cong, 2d Sess. 61, reprinted in 1978 U.S.C.C.A.N. 5787, 5927. This flexibility is embodied in section 1322,
7 which contains a minimal number of mandatory plan provisions and a broad range of permissive provisions.
8 See *id.*; 11 U.S.C. § 1322(a), (b). Under section 1322 debtor has the right to modify the rights of holders of
9 secured claims, with limited exception, and the debtor has the right to propose any other appropriate
10 provision not inconsistent with title 11. Those are the substantive rights of chapter 13 debtors.
11

12
13 The optional Local Form F 3015-1.1A standing alone does not enlarge substantive rights of the
14 debtors. It is not self-implementing. Debtors may choose to incorporate the optional Local Form into their
15 plans or they may not. If debtors opt not to include provisions of the Local Form into their plans, the
16 Form has no effect on creditors. By contrast, if debtors elect to incorporate the provisions of optional
17 Local Form F 3015-1.1A into their plans, then those provisions must not be inconsistent with any other
18 provision of the Bankruptcy Code. If a plan contains provisions that are inconsistent with the Bankruptcy
19 Code, the plan cannot be confirmed.
20

21 ///

22
23
24 ² See *In re Rathe*, 114 B.R. 253 (Bankr. D. Idaho 1990)(enjoining mortgage lender from collecting any sums other than contractual
25 payments accrued after the date of order approving trustee's final accounting, closing estate, and granting debtor their discharge);
26 *In re Sanchez*, 372 B.R. 289, 297 (Bankr. S.D. Tex. 2007)("in order for the bankruptcy system to function-every entity involved in a
27 bankruptcy proceeding must fully disclose all relevant facts"); *In re Jones*, 366 B.R. 584, 602-03 (Bankr. E.D. La.2007)("Bankruptcy
28 courts cannot function if secured lenders are allowed to assess post-petition fees without disclosure and then divert estate funds
to their satisfaction without court approval"); *In re Dominique*, 368 B.R. 913 (Bankr. S.D. Fla. 2007)(servicer failed to provide
escrow statements during chapter 13 plan and just before plan completion provided debtors with an escrow account statement
asserting a \$6,397 escrow deficiency); *In re Rizzo-Cheverier*, 364 B.R. 532 (Bankr. S.D.N.Y. 2007)(servicer allowed deficiency in
escrow account to accrue and then, without notice to debtor, applied trustee payments, intended to cure pre-petition default, to
post-petition escrow deficiency).

1 **II. Contested Plan Provisions**

2 Federal Rule of Bankruptcy Procedure (“FRBP”) 9029 states that “[e]ach district court acting by a
3 majority of its district judges may make and amend rules governing practices and procedures in all cases and
4 proceedings within the district court’s bankruptcy jurisdiction which are consistent with—but not duplicative
5 of—Acts of Congress and these rules[.]” Creditor states that the Addendum violates FRBP 9029, 3001 and
6 3002.1. In *Garner v. Shier (In re Garner)*, 246 B.R. 617, 624 (BAP 9th Cir. 2000), the BAP set forth a three part
7 test for determining whether a local rule is valid: “(1) whether it is consistent with Act of Congress and the
8 Federal Rules of Bankruptcy Procedure; (2) whether it is more than merely duplicative of such statutes and
9 rules; and (3) whether it prohibits or limits the use of Official Forms.” *Id.* at 624. These three issues were
10 addressed by the BAP in *Herrera*. The BAP found the Addendum to be consistent with RESPA and TILA.
11 In so doing the BAP stated that “Section 1322(b)(11) provides that a chapter 13 plan may ‘include any other
12 provision not inconsistent with [Title 11].’ This grant gives debtors considerable discretion to tailor the
13 terms of a plan to their individual circumstances.” *Herrera* at 710.

14 **1. Section A(6) does not Violate FRBP 3002.1(b) and (c).**

15 Creditor challenges three provisions contained in the Addendums to Debtor’s plan—sections A(2),
16 (5) and (6) and sections B(2). Section A(6) requires Creditor to provide quarterly notices detailing any post-
17 petition payment changes or other amounts due and an explanation for the change or charge to the debtors
18 account. This section provides:
19
20
21

22 (6) The Mortgage Creditor must provide the following information to the debtor, the debtor’s
23 attorney and, when the debtor is making ongoing mortgage or arrearage payments through the chapter 13
24 trustee, the chapter 13 trustee, at least quarterly, and upon reasonable written request of the debtor or the
25 chapter 13 trustee: (a) any other amount due or proposed change in payments arising from an adjustable
26 interest rate, charges paid by the Mortgage Creditor for taxes, insurance, attorney’s fees or any other
27 expenses or fees charged or incurred by the Mortgage Creditor, such as property inspection fees, servicing
28 fees or appraisal fees; (b) the nature of the expense or charge; and (c) the date of the payment.

FRBP 3002.1(b) states:

1 The holder of a claim shall file and serve on the debtor, debtors' counsel, and the trustee a
2 notice of any change in the payment amount, including any change that results from an
3 interest rate or escrow account adjustment, no later than 21 days before a payment in the
4 new amount is due.

5 FRBP 3002.1(c) states:

6 The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a
7 notice itemizing all fees, expenses, or charges (1) that were included in connection with the
8 claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable
9 against the debtor or against the debtor's principal residence. That notice shall be served
10 within 180 days after the date on which the fees, expenses or charges are incurred.

11 Section A(6) includes additional requirements to the FRBP 3002.1(b) and (c) by requiring notice of the
12 nature of the amount due or proposed payment, nor the date of the payment to be on the notice. As stated
13 by the BAP these requirements in the A(6) do not modify lenders rights and are permissible. Furthermore,
14 Section A(6) requires that the that notice be given on a quarterly basis. This provision again is necessary so
15 that debtors may be fully informed about changes before or at the time that they occur and are able to
16 successfully complete their Chapter 13 Plan. The Addendum does not change the date notices are due, it
17 merely requires additional notification.

18 **2. Section A(2) is not Duplicative or Superfluous.**

19 Creditor states that Section A(2) is duplicative of Rule 3002.1. Taken together sections A(2), (3) and
20 (4) require mortgage creditors to provide statements of accounts or coupon books to debtors if 1) the
21 mortgage creditor provided statements or coupon books to the debtor pre-petition, and 2) the debtor is
22 making maintenance payments directly to the creditor. Section A(2) also details what information must be
23 included on statements. Specifically, this section states:

24 (2) Except as provided in paragraphs (3) and (4) below, if the Mortgage Creditor provided monthly
25 statements to the debtor pre-petition, the Mortgage Creditor must provide monthly statements to the
26 debtor. The monthly statements must contain at least the following information concerning post-petition
27 mortgage payments to be made outside the Plan: (a) The date of the statement and the date the next
28 payment is due; (b) The amount of the current monthly payment; (c) The portion of the payment
attributable to escrow, if any; (d) The post-petition amount past due, if any, and from what date; (e) Any
outstanding post-petition late charges; (f) The amount and date of receipt of all payments received since the

1 last statement; (g) A telephone number and contact information that the debtor or the debtor's attorney may
2 use to obtain reasonably prompt information regarding the loan and recent transactions; and the proper
3 payment address.

4 Section A(2) of the Addendum is notably different than FRBP 3001(c) and 3002.1(b) and (c) in that
5 it focuses on monthly statements. While some of the information in the monthly statements would be
6 covered by the new rules, such as, new payment amounts and fees, the Addendum statements deal with
7 reporting on payments received and how they have been applied. Additionally, FRBP 3001(c) and 3002.1(b)
8 and (c) do not include the amount of the current monthly payment, the amount and date of receipt of all
9 payments received since the date of the last statement, the telephone number or contact information for
10 loan information, etc. The new rules do not deal with these issues and, therefore, do not conflict with the
11 Addendum.
12

13 **3. Section A(5) is not Duplicative or Superfluous.**

14 Creditor also takes issue with section A(5) of the Addendum to Debtors' plan. Section A(5) states
15 that:
16

17 (5) The Mortgage Creditor must provide the following information to the debtor upon the
18 reasonable request of the debtor: a) The principal balance of the loan; (b) The original maturity date; (c) The
19 current interest rate; (d) The current escrow balance, if any; (e) The interest paid year to date; and (f) The
20 property taxes paid year to date, if any.

21 Creditor again suggests that section A(5) is duplicative and superfluous but does not state specifically
22 how A(5) is duplicative or superfluous. Creditor argues that A(2) must be stricken entirely. Yet, for its
23 argument against Section A(5), Creditor states that if it is allowed to send **regular monthly statements**
24 coupled with the RESPA annual statements and because Creditor is now required to comply with the
25 requirements under FRBP 3002.1(b), debtors will be substantially apprised of the information in Section
26 A(5). Then, Creditor goes on to make the same rejected argument made in *Herrera* regarding RESPA and
27 usurping Congress' authority. The BAP stated in *Herrera*:
28

1 We conclude that the mortgage creditors' argument that RESPA occupies the field of reports
2 required by mortgage creditors such that chapter 13 debtors are precluded from crafting
3 additional reporting rules in their chapter 13 plans lacks merit and is directly contradicted by
4 the plain language of RESPA. As stated in the Joint Memorandum, RESPA provides a floor,
5 a minimum set of disclosures required of mortgage creditors to borrowers. The Addendum
6 seeks to address chapter 13 issues which are neither addressed nor remedied by the reporting
7 provisions of RESPA. Specifically, the debtors and the court need to know the amount of
8 default so as to implement § 1322(b)(5), which provides that

9 [n]otwithstanding paragraph (2) of this subsection, [the plan may] provide for
10 the curing of any default within a reasonable time and maintenance of
11 payments while the case is pending on any unsecured claim or secured claim
12 on which the last payment is due after the date on which the final payment
13 under the plan is due.

14 The bankruptcy court and debtors need the information targeted by the Addendum to
15 implement § 1322(b)(5), and are hampered in that task by, as the Joint Memorandum
16 describes it, "the increasing problem of undisclosed and sometimes questionable post-
17 petition mortgage charges assessed by lenders during the course of a chapter 13 proceeding."
18 Indeed, even the Federal Reserve Board recognized the inadequacy of RESPA in its
19 comments proposing the imposition of additional, and more intrusive, reporting
20 requirements on mortgage servicers for their "abusive practices."

21 *Id.* at 715.

22 **4. Section B(2) is Helpful and does not need Revision.**

23 Debtors agree that Section B(2) is helpful. Furthermore, Section B(2) does not require revision.

24 **5. Creditor fails to Provide proper Evidence of Cost.**

25 Creditor misstates the BAP *Herrera* in relation to the holding and reasoning in *In re Nosek*, 544 F.3d
26 34 (1st Cir. Mass. 2008). What Creditor fails to state is that the debtors in *Nosek* had failed to include
27 language in their plan that would remedy the pernicious problem exhibited by creditor misapplying
28 payments during chapter 13 bankruptcies. *Id.* at 50. The Addendum along with FRBP 3001 and 3002.1
together cure this problem for debtors by providing notice and reporting requirements to ensure that
payments are not misapplied as they were in *Nosek*.

Creditor states that the BAP in *Herrera* failed to recognize that forcing lender to create a new
accounting system was expensive and modified creditor's substantive rights. Yet Creditor fails again to

1 provide any evidence of the fees and costs involved in complying with the Addendum requirements.
2 Furthermore, the BAP in *Herrera* stated that under the Truth in Lending Act, “Regulation Z requires the
3 servicer to have access to information on all costs and balance, not only those specified by the Addendum,
4 and to provide that payout report on five days’ notice.” *Herrera* at 714. It, therefore, cannot be said that
5 compliance with the reporting requirements of the Addendum are too burdensome when under TILA,
6 more specifically, Regulation Z requires creditor to provide all relevant information regarding a borrowers
7 loan on five days’ notice. Finally, “arguments and statements of counsel are not evidence.” *Wood v. Stratos*
8 *Prod. Dev., LLC (In re Abaza Sys.), Wood v. Stratos Prod. Dev., LLC (In re Abaza Sys.),* 482 F.3d 1118m 1122 n.1
9 (9th Cir. 2007). As Creditor provides no evidence other than unsupported statements, an evidentiary
10 hearing concerning compliance with the Addendum is not required.
11
12

13 **CONCLUSION**

14 For the foregoing reasons, Creditor’s Objection to Chapter 13 Plan Confirmation should be denied.
15

16 Respectfully submitted:

Borowitz & Clark, LLP

17
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19 Date: _____

Nancy B. Clark
Attorney for Debtors

DECLARATION OF NANCY B. CLARK

I, Nancy B. Clark, do hereby declare as follows:

1. As to the following facts, I know them to be true of my own personal knowledge, and if called upon to testify in this action, I could and would testify competently thereto;
2. That I am an associate at the Law Offices of Borowitz & Clark, L.L.P. As such, I have access to all of Borowitz & Clark’s clients’ files including that of George Steven Geyer and Elena Geyer;
3. That on March 16, 2012 the debtors, George Steven Geyer and Elena Geyer (“Debtors”), filed the instant chapter 13 bankruptcy (case number 8:12-bk-13367-TA) to save their home;
4. That Debtors’ Chapter 13 Plan was filed on March 16, 2012 (see attached as Exhibit A, a true and correct copy of Debtors’ Chapter 13 Plan filed on March 16, 2012). Debtors attached to their chapter 13 plan (“Plan”) the Addendum to Chapter 13 Plan Concerning Debtors Who are Repaying Debt Secured by a Mortgage on Real Property or a Lien on Personal Property the Debtor Occupies as the Debtor’s Principal Residence (“Addendum”);

I, Nancy B. Clark, declare under penalty of perjury that the foregoing information is true and correct to the best of my knowledge. Executed in West Covina, California on May 7, 2012.

Nancy B. Clark