1:31 pm

6:12-15990 **Randel Dwayne France and Shannon Marie France** **Chapter 13**

#51.00 Confirmation of Chapter 13 Plan

Also #15

EH__

Docket #:

Tentative Ruling:

On March 9, 2012, Debtors filed a voluntary Chapter 13 Petition. On the same day, Debtors filed their Chapter 13 Plan (the "Plan"). The Plan included Local Rule Form F 3015-1.1 entitled "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" (the "Addendum")." On April 12, 2012, Creditor, U.S. Bank, filed an Objection to Debtors' Plan, *inter alia*, objecting to Debtors' use of the Addendum. The Court will first address the specific objection to Debtors' Plan before turning to Creditor's objection regarding the Addendum.

i. The Debtor has Failed to Provide for Interest on the Arrears

Creditor fails to provide sufficient evidence that it is entitled to interest payments at 9.25% of the total arrearage in order to cure the default through the Plan.

Sections 1322(b)(3) and (5) allow the Debtor to alter the secured creditor's right to immediately repossess its collateral under nonbankruptcy law by permitting the debtor the opportunity to "cure" a default through the plan. 11 U.S.C. § 1322(b). Monetary defaults are "cured" by paying all amounts due and owing. *Matter of Clark*, 738 F.2d 869, 872 (7th Cir. 1984). Under § 1322(e)1, if the debtor intends to cure a default through the plan, "the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." Therefore, where payment of *default interest* is included in the underlying contract and is enforceable under state law, it is payable as part of the "cure" amount. *See Hepner v. PWP Golden Eagle Tree, LLC* (*In re K & J Prop., Inc.*), 338 B.R. 450, 461 (Bankr. D. Co. 2005).

The security instrument attached to the Objection states that:

> Should any sum due hereunder, including accumulated interest, not be paid in accordance with the terms of the Note, the sums not paid shall bear interest at the same rate as the principal, or 6.0% plus the Bank of America Prime rate as publicly announced by the Bank of

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> America National Trust and Savings Association, a National Association as its "Referenced Rate", whichever is higher,…

That is, the default interest rate, pursuant to the agreement, is either the same rate on the principal or 6% plus the Bank of America prime rate, whichever is higher. However, Creditor failed to provide evidence of the Bank of America prime rate alongside its Objection, much less any evidence to admit the document attached to the objection. Therefore, while Creditor's assertion that it is entitled to 9.25% interest on the arrears in order to cure the default, the Movant has failed to meets its evidentiary burden.

ii. The Addendum Objection

Before turning to the merits of the Addendum objection, the Court notes the purpose behind the Addendum. The Bankruptcy Judges in the Central District of California created this Addendum for the following reasons:

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

In re Herrera, 422 B.R. 698, 704–705 (9th Cir. BAP 2010), *aff'd*, *sub nom.* Monroy v. U.S. Bank, N.A. (In re Monroy), 650 F.3d 1300 (9th Cir. 2011) . Furthermore, "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.'" *Id.* at 705.

The Court also notes that the use of the Addendum was upheld by the Ninth Circuit Bankruptcy Appellate Panel over Creditor's objection in *In re Herrera* and affirmed by the Ninth Circuit in *Monroy*. The use of the Addendum is the subject to a similar appeal in the case of *U.S. Bank v. Vu (In re Vu)*, BAP No. 10-1332. The Court declines to rule on the issues presented in the current objection to the extent that those issues are pending appeal.

Creditor argues that the Addendum is now superfluous in light of Federal Rule of Bankruptcy Procedure 3002.1, enacted on December 1, 2011. Creditor specifically objects because: (1) Section (A)(6) of the Addendum Violates Rule 3002.1(b) and (c); (2) Section (A)(2) is duplicative, superfluous, and will impose a monthly cost on Debtors; (3) Section (A)(5) of the Addendum is also duplicative, superfluous, and will impose a monthly cost on Debtors; (4) Section (B)(2) of the Addendum needs revision; (5) secured creditor is entitled to an evidentiary hearing concerning the compliance costs associated with the Addendum.

a. Is Section (A)(6) of the Addendum Duplicative or Superfluous of FRBP 3002.1(b) and (c)?

Federal Rule of Bankruptcy Procedure ("FRBP") 9029 states that, "Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which *are consistent with—but not duplicative of—*Acts of Congress and these rules." The Ninth Circuit Bankruptcy Appellate Panel ("BAP") promulgated a three-part test for determining whether a local rule is valid: "(1) whether it is consistent with Act of Congress and the Federal Rules of Bankruptcy Procedure; (2) whether it is more than merely duplicative of such statutes and rules; and (3) whether it prohibits or limits the use of Official Forms." *Garner v. Shier* (*In re Garner*), 246 B.R. 617, 624 (B.A.P. 9th Cir. 2000)

The Creditor here challenges the Plan Addendum, approved for use by the bankruptcy judges of the Central District of California, as being violative of FRBP 9029. In *Greenpoint Mortgage Funding v, Herrera* (*In re Herrera*), the Ninth Circuit BAP addressed whether the Plan Addendum, imposed redundant and/or onerous reporting duties on mortgage creditors. The Court upheld the legitimacy of the Addendum and found it was not violative of the provisions of the Bankruptcy Code. In so deciding, the Court found that, "Section 1322(B)(11) provides that a chapter 13 plan may 'include any other provision not inconsistent with [Title 11].' This grant gives debtors considerable discretion to tailor the terms of a plan to their individual circumstances." 422 B.R. 698, 710 (9th Cir. BAP 2011). *Herrara* and FRBP 9029, therefore, do not prohibit the each

district from creating additional requirements so long as they do not duplicate the requirements under the Federal Rules.

FRBP 3002.1(b) requires 21 day notice before:

Any change in payment amount is due

...including any change that results from interest rate or escrow adjustment.

FRBP 3002.1(c) requires 180 day notice after the date on which any of the following are due:

Post-petition fees, expenses, or charges incurred in connection with claim and that claimant asserts are recoverable against debtor or debtor's principal residence

Section (A)(6) of the Addendum requires quarterly notice of:

Any amounts due (see 3002.1(c)) OR proposed changes in payments (see 3002.1(b))
The nature (not in FRBP) and expense (see 3002.1(c)) of the charge; AND
Date of payment (not in FRBP)

Section (A)(6) of the Addendum simply includes additional requirements to FRBP 3002.1(b)(c). FRBP 3002.1 does not require notice of including the nature of the amount due or proposed payment or require the date of the payment to be on the notice. Therefore, the notices by required Section (A)(6) of the Addendum include additional information which is not contained in the FRBP 3002.1 notices Additionally, Section (A)(6) of the Addendum requires that these notices come at least once every 3 months. Section (A)(6) of the Addendum does not change the date notices are due under FRBP 3002.1, it merely requires additional notifications.

b. Is Section (A)(2) Duplicative or Superfluous, or will it Impose a Monthly Cost on Debtors?

Creditor argues that Section (A)(2) is duplicative of Rule 3002.1 and therefore, violates Rule 9029. Section (A)(2) states:

> (2) Except as provided in paragraphs (3) and (4) below, if the Mortgage Creditor provided monthly statements to the debtor pre-petition, the Mortgage Creditor must provide monthly statements to the debtor. The monthly statements must contain at least the

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following information concerning post-petition mortgage payments to be made outside the Plan:
(a) The date of the statement and the date the next 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 date of the last statement;
(g) A telephone number and contact information that the debtor or the debtor's attorney may use to obtain reasonably prompt information regarding the loan and recent transactions; and
(h) The proper payment address.

However, upon review of Creditor's objection, the Court cannot find any persuasive reasoning as to how Section (A)(2) is duplicative of Rule 3002.1. Creditor states that it will "incur attorney fees in having any custom monthly mortgage statement prepared, reviewed and distributed--and this will be passed on to the Debtor." First, Creditor provides no evidence as to attorney fees. Moreover, this "custom statement" would assumingly be created from producing the required monthly statement under (A)(2). Creditor has provided no evidence demonstrating how or why complying with the Addendum reporting requirements will create extensive attorney fees other than "Creditor estimates that it will incur a fee of approximately $50 per month to prepare, review and disburse such monthly statements in accordance with the Addendum." Regardless, this argument is itself superfluous, as the real issue here is whether Section (A)(2) is duplicative of Rule 3002.1.

Creditor's remaining argument is that "Debtors do not need a monthly statement with all the details set forth in Section (A)(2) when the Secured Creditor is already required to file a proof of claim that goes into great detail, and the Secured Creditor is mandated by the new rules to provide notice of any payment changes and the incurrence of *any* post-petition cost or fee." In sum, Creditor's argument appears to be that Debtor will mostly receive all the information required to be included on the monthly statement through new Rule 3002.1 in one way or another. However, the monthly statement, per the Addendum, requires additional information that is not included in creditor's proof of claim, or through the Rule 3002.1(c) itemized expense reporting requirement. For example, neither the Proof of Claim Attachment or the statement pursuant to Rule 3002.1 will

include the amount of the current monthly payment, the amount and date of receipt of all payments received since the date of the last statement, the telephone number or contact information for the loan information, etc. Therefore, (A)(2) is not duplicative of Rule 3002.1.

c. Is Section (A)(5) Duplicative or Superfluous, or will it Impose a Monthly Cost on Debtors?

Creditor argues that Section (A)(5) is duplicative of RESPA and Form B 10S1. Creditor asserts that debtors will be substantially apprised of all the information listed in (A)(5) through its monthly statement, coupled with mandated REPSA disclosures, and Form B 10S1. However, Creditor provides *no evidence or reasoning* in support of its argument that these documents will provide substantially the same information as required by Section (A)(5). Creditor does not give the Court any evidence of what RESPA requires or what is provided in its regular monthly statement. Further, Rule 3002.1 does not address certain requirements of (A)(5), including the original maturity date of the loan, the interest paid year-to-date, and property taxes.

Additionally, Creditor provides no evidence or argument as to how Section (A)(5) will impose a monthly cost on debtors.

d. Section (B)(2) is Helpful but Needs Revision

Creditor complains that Section (B)(2) of the Addendum needs to be revised. This does not appear to be an actual objection to Debtors' Plan, or an objection that Section (B)(2) violates Rule 9029, but a general complaint about the logic of the Addendum Section. Further, Creditor cites no authority suggesting this Section is without legal foundation.

e. Secured Creditor is Entitled to an Evidentiary Hearing Concerning Compliance Costs Associated with the Addendum

Secured Creditor demands an evidentiary hearing concerning the compliance costs associated with the Addendum. However, Creditor does not provide the Court with any evidence that it is entitled to such an evidentiary hearing, not even through a sworn declaration. Pursuant to LBR 9013-1(i) all factual contentions contained in an opposition must be presented by declaration. Creditor has failed to do that here.

Furthermore, the Court will not entertain these issues to the extent that they overlap with the

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issues pending appeal in the *U.S. Bank v. Vu (In re Vu)*, BAP No. 10-1332. It appears that this issue overlaps with issues on appeal in this matter, specifically, issue "f" on appeal.*Appellant's Opening Brief*, at 2.

Party Information

Debtor(s):

Randel Dwayne France — Represented By Jenny L Doling

Joint Debtor(s):

Shannon Marie France — Represented By Jenny L Doling

Trustee(s):

Amrane (RS) Cohen (TR)

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6:12-15991 **Gustavo C Madrigal and Magdaline E M Madrigal** **Chapter 13**

#52.00 Confirmation of Chapter 13 Plan

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Docket #:

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Gustavo C Madrigal Represented By

Jenny L Doling

Joint Debtor(s):

Magdaline E M Madrigal Represented By

Jenny L Doling

Trustee(s):

Amrane (RS) Cohen (TR)