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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-10-1332-PaDKi
)		
JULIE THUY VU,)	Bk. No.	LA 10-17213 AA
)		
Debtor.)		
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U.S. BANK, N.A.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JULIE THUY VU; KATHY A. DOCKERY,)		
Chapter 13 Trustee,)		
)		
Appellees.)		
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Submitted Without Argument on the Briefs

Filed - May 1, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: Lee S. Raphael, Esq. of Prober & Raphael ALC on
brief for Appellant U.S. Bank, N.A.; Barry E.
Borowitz, Esq. of Borowitz, Lozano & Clark, LLP on
brief for Appellee Julie Thuy Vu.

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1

1 U.S. Bank, N.A. ("U.S. Bank") appeals the Order of the
2 bankruptcy court denying U.S. Bank's Motion to Reconsider the
3 Order Confirming Chapter 13² Plan, and denying its Motion to Amend
4 the Addendum. We AFFIRM.

5 **FACTS**

6 The facts in this appeal are undisputed.

7 Julie Thuy Vu ("Vu") filed a petition under chapter 13 on
8 February 27, 2010. At the same time, she filed a proposed plan
9 which provided for payments of \$437 per month for sixty months.
10 From those payments, \$392.73 per month for sixty months was
11 dedicated to the payment of arrearages totaling \$21,600 on the
12 mortgage held by U.S. Bank on Vu's home. Attached to, and
13 incorporated in Vu's plan was a copy of Local Form F-3015-1.1A
14 (the "Addendum"). The Addendum is a local form adopted by the
15 Central District of California Bankruptcy Court that contains
16 optional chapter 13 plan provisions, and imposes various post-
17 confirmation reporting and other duties on mortgage creditors.
18 Greenpoint Mortg. Funding, Inc. v. Herrera (In re Herrera), 422
19 B.R. 698, 704-06 (9th Cir. BAP 2010), aff'd & adopted sub nom.
20 Home Funds Direct v. Monroy (In re Monroy), 650 F.3d 1300 (9th
21 Cir. 2011).³

22
23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
26 Federal Rules of Civil Procedure are referred to as "Civil Rules."

27 ³ For a full description of the Addendum and its contents,
28 see pp. 704-06 of the Herrera case cited here. The BAP's Herrera
Opinion was affirmed and adopted as law of the circuit in the
Monroy case. For unknown reasons, West Publishing Co. failed to
include in the Federal Reporter the Herrera opinion as an appendix
(continued...)

1 On April 8, 2010, counsel for U.S. Bank sent an email to Vu's
2 attorney, requesting a modification of the Addendum,

3 as my client is not able to create manual monthly
4 statement[s] with what the Addendum requires and prepare
5 quarterly disclosures without incurring fees each month
6 and each quarter to do so. . . . I estimate a fee of
\$75 per month to prepare, review and disburse such
monthly statements . . . and another \$100 per quarter to
prepare the quarterly disclosures.

7 Vu's counsel responded by letter on April 21, 2010, questioning
8 the reasonableness of the fees and requesting a "detailed
9 breakdown of exactly how you calculated the monthly costs you
10 quoted in the email." Vu also requested information about why
11 U.S. Bank was unable to comply with the Addendum's reporting
12 requirements. Id.

13 On May 12, 2010, U.S. Bank responded to Vu's request for
14 information:

15 As you know, the Addendum mandates a mortgage lender to
16 create new monthly statements that provide information,
17 not currently provided in the regular monthly
18 statements, or in any disclosure statement, that my
19 client currently provides your client. Such revised
20 monthly statements must be reviewed by an attorney, not
only to ensure compliance with the Addendum, but to
further ensure accuracy concerning post-petition
activity in the bankruptcy case and the inclusion of
other post-petition fees.

21 The May 12 letter again referred to the fee of \$75 for monthly
22 statements, and \$100 for quarterly reports. U.S. Bank also

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³(...continued)

25 of the Monroy opinion as was directed by the Ninth Circuit in its
26 published Order. West instead referred readers to the Bankruptcy
27 Reporter for the text of the BAP Opinion. Thus, we refer to the
28 Ninth Circuit's opinion as Herrera/Monroy, with page citations to
the original BAP Opinion published in the Bankruptcy Reporter,
bearing in mind that the BAP's Opinion was adopted as its own by
the Ninth Circuit.

1 proposed modifications be made to the Addendum incorporated in
2 Vu's plan to allow U.S. Bank to send notice to Vu of any post-
3 petition fees or advances within 90 days⁴ of any such charges
4 (modifying ¶ A2 of the Addendum, which required such notices on a
5 monthly basis) and to substitute the existing annual report under
6 RESPA sent by U.S. Bank to Vu for the quarterly reports required
7 in ¶ A6.

8 Meanwhile, on April 15, 2010, U.S. Bank filed an objection to
9 confirmation of Vu's proposed plan. The bank argued that the
10 plan's incorporation of the Addendum rendered the plan infeasible
11 because the Addendum is unduly burdensome and costly, and because
12 it directly conflicts with applicable non-bankruptcy law
13 (principally RESPA). U.S. Bank alleged, "it is estimated that the
14 Objecting Secured Creditor will incur attorney fees in having any
15 custom created monthly mortgage statements reviewed and in having
16 the Addendum-mandated quarterly disclosures reviewed." The bank
17 again estimated the additional fees to be \$75 per month and \$100
18 per quarter. Id. Vu responded to the objection on May 7, 2010,
19 generally disputing U.S. Bank's allegations.

20 The bankruptcy court conducted the confirmation hearing
21 concerning Vu's plan on May 13, 2010; the chapter 13 trustee, Vu
22 and U.S. Bank were represented by counsel who were heard. U.S.
23 Bank requested modification of the Addendum as noted above. Hr'g
24 Tr. 2:3-21, May 13, 2010. Vu argued that the plan and the

25
26 ⁴ At some point not clear in the record before us, U.S. Bank
27 changed its request from ninety days to sixty days. Regardless,
28 either period would be inconsistent with the Addendum's
requirement that such notices be provided in the monthly
statements.

1 Addendum should be approved without modification. Hr'g Tr.
2 3:24-4:9. The trustee supported confirmation of the plan with the
3 Addendum unchanged, consistent with the Panel's opinion in In re
4 Herrera. Hr'g Tr. 4:11-14, May 13, 2010.

5 The bankruptcy court confirmed Vu's plan from the bench.
6 Hr'g Tr. 5:15-16. On June 3, 2010, the bankruptcy court entered
7 an order confirming the plan substantially as presented by Vu,
8 including the unchanged Addendum.

9 On June 17, 2010, U.S. Bank filed a Motion for
10 Reconsideration of Order Confirming Chapter 13 Plan Under Federal
11 Rules of Civil Procedure 60(b) ("Motion for Reconsideration") or,
12 in the alternative, Motion for Mortgage Creditor to Request that
13 Debtor Accept Statements that Substantially Comply with the Local
14 Form F 3015-1.1A Section B(3) ("Motion to Amend the Addendum").
15 In this motion, U.S. Bank does not plead any of the elements for
16 reconsideration under Civil Rule 60(b).⁵ Rather, again, U.S. Bank
17 argued that the Addendum was costly, duplicative and inconsistent
18 with RESPA, modified its substantive rights, and violated the
19 separation of powers. U.S. Bank submitted the declaration of
20 Olivia Todd, president of the bank's servicing agency, discussing
21 the effect of the Addendum on accounting practices. Vu filed an
22 Opposition to Motion for Reconsideration and Motion to Amend the
23 Addendum on July 8, 2010. Vu suggested that U.S. Bank had failed
24 to demonstrate any reason for reconsideration of the confirmation

25
26 ⁵ The only discussion of a grounds for reconsideration in
27 either the bankruptcy court record or in the appeal briefs appears
28 in the transcript of the hearing on reconsideration, where counsel
for U.S. Bank suggests that there was newly discovered evidence
consisting of emails between counsel regarding modification of the
Addendum. This allegation will be discussed below.

1 order under Civil Rule 60(b), and that the bank had failed to
2 provide a reasonable explanation as to why it was unable to comply
3 with the terms of the Addendum. Id.

4 Before the hearing on U.S. Bank's two motions, on July 22,
5 2010, the bankruptcy court entered a short tentative ruling:
6 "Deny because no basis to reconsider confirmation of the plan
7 under [Rule] 9024 and because the other relief requested must be
8 initiated by an adversary proceeding." Tentative Ruling, July 22,
9 2010. At the hearing, in a colloquy with counsel for U.S. Bank,
10 the bankruptcy court expressed considerable skepticism over the
11 bank's argument that compliance with the Addendum would require
12 extensive and expensive review by counsel at the rate of \$75 per
13 month and \$100 per quarter:

14 COUNSEL (U.S. BANK): They have to send [each monthly and
15 quarterly statement] to my office to review it. . . .

16 THE COURT: Why would it have to go to your office
necessarily?

17 COUNSEL: Because it's manually created. For the first
18 few months at the very least, we have to look at each
statement and make sure it complies with -

19 THE COURT: Why do you as a lawyer have to do that? That
20 I don't follow.

21 COUNSEL: Well, the fact is that the statements were
22 never created for this addendum, and this addendum is a
legal document which my client must comply with now.

23 THE COURT: Well, if they choose to send it to you that's
24 their business but I don't know that there's any
requirement that they do that.

25 COUNSEL: Well, if they abide by the addendum, then -

26 THE COURT: Don't they have to comply with laws all the
27 time, and they don't always talk to lawyers about every
time they have to comply with the law?

28 COUNSEL: Well, most laws are created by Congress or
state legislatures but this -

1 THE COURT: So, there's a different compliance if it's a
2 Court order – you don't want to go down that path,
[counsel].

3 Tr. Hr'g 3:12–4:13, July 22, 2010.

4 The bankruptcy court adopted its tentative ruling that U.S.
5 Bank had failed to demonstrate any grounds for reconsideration
6 under Rule 9024. Tr. Hr'g 7:14-15. However, the court did agree
7 with U.S. Bank's position that the Motion to Amend the Addendum
8 was not the type of motion contemplated in Rule 7001, and an
9 adversary proceeding was not required. Tr. Hr'g 7:15. The
10 bankruptcy court entered its order denying U.S. Bank's Motion for
11 Reconsideration and Motion to Amend the Addendum on August 18,
12 2010.

13 U.S. Bank filed a timely appeal of the bankruptcy court's
14 order on August 27, 2010.⁶ The Panel suspended consideration of
15 this appeal pending a decision by the Ninth Circuit of the appeal
16 in In re Herrera, a case involving similar issues. The Ninth
17 Circuit issued a decision in In re Monroy, a companion case to In
18 re Herrera, on June 20, 2011, in which the court adopted the BAP's
19 opinion in In re Herrera as its own. In re Monroy, 650 F.3d 1300.

20 On October 17, 2011, the Panel invited the parties to submit
21 supplemental briefing in this appeal addressing the implications
22 of the Ninth Circuit's decision in In re Monroy. That briefing is
23 now complete, and this appeal is now ripe for decision.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C.
26 §§ 1334(b) and § 157(b) (2) (A). We have jurisdiction over this

27
28 ⁶ The confirmation order was not appealed.

1 appeal under 28 U.S.C. § 158.

2 **ISSUES**

3 Whether the bankruptcy court abused its discretion in denying
4 U.S. Bank's Motion for Reconsideration.

5 Whether the bankruptcy court abused its discretion in denying
6 U.S. Bank's Motion to Amend the Addendum.

7 **STANDARDS OF REVIEW**

8 We review denial of a motion for reconsideration under Rule
9 9024 (incorporating Civil Rule 60(b)) for abuse of discretion.
10 Determan v. Sandoval (In re Sandoval), 186 B.R. 490, 494 (9th Cir.
11 BAP 1995).

12 Where we review "rulings of the [bankruptcy] court regarding
13 local practice and local rules, the appropriate standard of review
14 is abuse of discretion." Guam Sasaki Corp. v. Diana's, Inc., 881
15 F.2d 713, 716 (9th Cir. 1989).

16 In applying an abuse of discretion test, we first "determine
17 de novo whether the [bankruptcy] court identified the correct
18 legal rule to apply to the relief requested." United States v.
19 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the
20 bankruptcy court identified the correct legal rule, we then
21 determine whether its "application of the correct legal standard
22 [to the facts] was (1) illogical, (2) implausible, or (3) without
23 support in inferences that may be drawn from the facts in the
24 record." Id. (internal quotation marks omitted). If the
25 bankruptcy court did not identify the correct legal rule, or its
26 application of the correct legal standard to the facts was
27 illogical, implausible, or without support in inferences that may
28 be drawn from the facts in the record, then the bankruptcy court

1 has abused its discretion. Id.

2 **DISCUSSION**

3 **I. The bankruptcy court did not abuse its discretion in**
4 **denying U.S. Bank's Motion for Reconsideration.**

5 In its argument during the hearing on the reconsideration
6 motion on July 22, 2010, U.S. Bank explained its reasons for
7 seeking reconsideration of the confirmation order under Civil Rule
8 60(b).

9 In regards to the reconsideration aspect of the denial
10 of our Motion, I believe that there was [sic] new facts
11 that were not before the court's record that we have
12 also added to the motion, correspondence between
ourselves and Debtor's counsel trying to plead for a
modification of the addendum under these circumstances.

13 Tr. Hr'g 2:8-13, July 22, 2010. Although U.S. Bank did not
14 clarify under which provision of Civil Rule 60(b) it sought
15 relief, we interpret the above statement as referring to Civil
16 Rule 60(b)(2), which provides:

17 **Grounds for Relief from a Final Judgment, Order, or**
18 **Proceeding.** On motion and just terms, the court may
19 relieve a party or its legal representative from a final
20 judgment, order, or proceeding for the following
reasons: . . . (2) newly discovered evidence that, with
reasonable diligence, could not have been discovered in
time to move for a new trial under Rule 59(b)[.]

21 Rule 9024 (incorporating Civil Rule 60(b)(2)).⁷

22 _____
23 ⁷ There is no indication anywhere in the record that U.S.
24 Bank argued that it was the victim of mistake, inadvertence,
surprise, or excusable neglect, Civil Rule 60(b)(1);
25 fraud (whether previously called intrinsic or extrinsic),
misrepresentation, or misconduct by an opposing party, Civil Rule
60(b)(3); a void judgment, Civil Rule 60(b)(4); judgment
26 satisfied, released or discharged, Civil Rule 60(b)(5). And while
27 U.S. Bank might argue that Civil Rule 60(b)(6) applies because it
would be manifestly unjust to allow Vu's confirmed plan to proceed
28 without amendment, this subsection of the Rule "is to be utilized
(continued...)

1 Relief from an order or judgment to offer newly discovered
2 evidence under Civil Rule 60(b)(2) is warranted if (1) the moving
3 party can show the evidence relied on in fact constitutes "newly
4 discovered evidence" within the meaning of Rule 60(b); (2) the
5 moving party exercised due diligence to discover this evidence;
6 and (3) the newly discovered evidence must be of "such magnitude
7 that production of it earlier would have been likely to change the
8 disposition of the case." Feature Realty, Inc. v. City of
9 Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) (citing Coastal
10 Transfer Co. v. Toyota Motor Sales, U.S.A., Inc., 833 F.2d 208,
11 211 (9th Cir. 1987)).

12 U.S. Bank's reconsideration argument is groundless. The
13 "newly discovered evidence" it seeks to offer consists of an
14 exchange of emails between counsel for the parties during the
15 bankruptcy case. But evidence is not "newly discovered under the
16 Federal Rules if it was in the moving party's possession" at the
17 time of the original order. Feature Realty, 331 F.3d at 1093;
18 Wallis v. J.R. Simplot Co., 26 F.3d 885, 892 (9th Cir. 1995). The
19 emails were not only in the possession of U.S. Bank before entry
20 of the order confirming the plan, the emails were in fact created
21 by U.S. Bank and Vu, and were thus always known to both parties.
22 Simply put, the emails could not have been considered newly
23 discovered by the bankruptcy court.

24 _____
25 ⁷(...continued)
26 only where extraordinary circumstances prevented a party from
27 taking timely action to prevent or correct an erroneous judgment."
28 United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049
(9th Cir. 1993). Because it actively contested confirmation of
Vu's plan, U.S. Bank cannot suggest that it was prevented from
taking timely action to contest the confirmation order.

1 Since newly discovered evidence was the only argument
2 advanced by U.S. Bank in its reconsideration motion, and the
3 evidence it wanted the bankruptcy court to consider was
4 conclusively not newly discovered, the bankruptcy court did not
5 abuse its discretion in its finding that U.S. Bank had not shown
6 any grounds for reconsideration of the confirmation order under
7 Civil Rule 60(b) and Rule 9024.

8 **II. The bankruptcy court did not abuse its discretion in denying**
9 **U.S. Bank's Motion to Amend the Addendum.**

10 U.S. Bank's attacks on the Central District's Addendum are
11 familiar to the Panel. U.S. Bank was an objecting secured
12 creditor in one of the four constituent bankruptcy cases in which
13 the bankruptcy courts approved the inclusion of the Addendum in
14 chapter 13 debtors' plans. See In re Hannon, case no. SV-09-
15 11330-MT (Bankr. C.D. Cal. 2009). Indeed, U.S. Bank prosecuted
16 the appeal of that decision to this Panel, resulting in the
17 decision in In re Herrera. Then, when the Panel affirmed the
18 bankruptcy court's rulings concerning the Addendum, U.S. Bank
19 appealed that decision to the Court of Appeals. As noted above,
20 the Ninth Circuit affirmed the Panel's decision and adopted the
21 BAP's opinion in a published Order. Home Funds Direct v. Monroy
22 (In re Monroy), 650 F.3d 1300 (9th Cir. 2011).⁸ U.S. Bank asked
23 for rehearing of the In re Monroy decision, which was denied.

24
25 ⁸ While U.S. Bank's counsel in this appeal did not represent
26 the creditor in the bankruptcy court in this case, he represented
27 all of the secured creditors in the bankruptcy court proceedings
28 in the four cases involved in Herrera/Monroy, as well as in the
appeals to the BAP, and to the Ninth Circuit. It is safe to
assume that both U.S. Bank and its counsel are well-acquainted
with the Addendum, and the decisions of the bankruptcy courts, the
Panel, and the Ninth Circuit concerning the Addendum.

1 There was no certiorari petition to the Supreme Court.

2 Throughout all these cases and appeals, U.S. Bank has
3 consistently challenged the incorporation of the Addendum in the
4 chapter 13 plans of debtors in Central District bankruptcy cases
5 where debtors seek, through the Addendum, to impose various
6 post-confirmation reporting and other duties on mortgage
7 creditors. Although the emphases change from one appeal to the
8 next, U.S. Bank's principal objections to the Addendum's
9 requirements for enhanced reporting all fall into four categories.
10 It argues that: (1) nothing in § 1322 allows debtors to propose a
11 plan that includes additional mortgage creditor reporting
12 obligations; (2) RESPA does not allow an individual chapter 13
13 debtor to supplement a mortgage creditor's reporting requirements;
14 (3) the Addendum's mandate that a mortgage creditor provide
15 additional information to a chapter 13 debtor is a usurpation of
16 the power of Congress to legislate, and consequently, is a
17 violation of the doctrine of separation of powers; and (4)
18 compliance with the Addendum is unduly burdensome for creditors,
19 requiring substantial changes in accounting systems and the costs
20 associated with those changes.

21 The first three of these arguments were addressed and
22 rejected with finality in Herrera/Monroy. The fourth category is
23 at the focus of this appeal, because Herrera/Monroy acknowledged
24 that a challenge to the Addendum based on excessive burden and
25 expense to the creditor, if true, might constitute grounds for not
26 allowing, or requiring modification of, the terms of the Addendum,
27 in particular cases. We will explore all of U.S. Bank's
28 arguments.

1 First, U.S. Bank states in its supplemental brief in this
2 appeal that "there is nothing in 11 U.S.C. § 1322 that allows
3 debtors to propose a plan including the provisions listed in the
4 Addendum." U.S. Bank's Supp. Br. at 3. On the contrary, as noted
5 in the BAP's prior opinion,

6 § 1322(b)(11) provides that a chapter 13 debtor's plan
7 may "include any other provision not inconsistent with
8 [title 11]." This grant gives debtors considerable
9 discretion to tailor the terms of a plan to their
10 individual circumstances. Bankruptcy courts have
11 endorsed a broad range of provisions under
12 § 1322(b)(11). Besides enhanced creditor account
13 reporting requirements, other provisions approved by
14 bankruptcy courts under § 1322(b)(11) include, for
15 example: (1) authorizing the debtor to exercise a
16 trustee's avoiding powers, Hearn v. Bank of New York
17 (In re Hearn), 337 B.R. 603 (Bankr. E.D. Mich. 2006);
18 (2) establishing reserve funds to pay utilities in event
19 of default, In re Epling, 255 B.R. 549 (Bankr. S.D. Ohio
20 2000); (3) paying taxes in a particular order, In re
21 Klaska, 152 B.R. 248 (Bankr. C.D. Ill. 1993).

22 Herrera/Monroy, 422 B.R. at 710-11. U.S. Bank is therefore simply
23 wrong when it suggests that § 1322 is an impediment to the
24 enhanced reporting requirements of the Addendum.

25 The second broad category of U.S. Bank's challenges to the
26 Addendum relies on RESPA, which the bank contends "does not allow
27 for each individual chapter 13 debtor to supplement the reporting
28 requirements as they see fit." U.S. Bank's Supp. Br. at 7. This
29 assertion was also squarely rejected in Herrera/Monroy:

30 We conclude that the mortgage creditors' argument
31 that RESPA occupies the field of reports required by
32 mortgage creditors such that chapter 13 debtors are
33 precluded from crafting additional reporting rules in
34 their chapter 13 plans lacks merit and is directly
35 contradicted by the plain language of RESPA. . . . The
36 Addendum seeks to address chapter 13 issues which are
37 neither addressed nor remedied by the reporting
38 provisions of RESPA. Specifically, the debtors and the
39 court need to know the amount of default so as to
40 implement § 1322(b)(5), which provides that

1 "[n]otwithstanding paragraph (2) of this subsection,
2 [the plan may] provide for the curing of any default
3 while the case is pending on any unsecured claim or
4 secured claim on which the last payment is due after the
5 date on which the final payment under the plan is due."
6 The bankruptcy court and debtors need the information
7 targeted by the Addendum to implement § 1322(b)(5), and
8 are hampered in that task by . . . "the increasing
9 problem of undisclosed and sometimes questionable
10 post-petition mortgage charges assessed by lenders
11 during the course of a chapter 13 proceeding." Indeed,
12 even the Federal Reserve Board recognized the inadequacy
13 of RESPA in its comments proposing the imposition of
14 additional, and more intrusive, reporting requirements
15 on mortgage servicers for their "abusive practices."

16 Herrera/Monroy, 422 B.R. at 715.

17 The bank's third argument is that the Addendum violates the
18 doctrine of separation of powers. U.S. Bank Op. Br. at 25. By
19 this argument, U.S. Bank appears to suggest that, in authorizing
20 the Addendum, the Central District's bankruptcy judges were
21 usurping the power of Congress to legislate. Once again, though,
22 Herrera/Monroy directly addressed and rejected this assertion.

23 Only a brief comment is required to dispatch the
24 mortgage creditors' concerns that inclusion of the
25 offensive provisions in the debtors' confirmed chapter
26 13 plans somehow violates the doctrine of separation of
27 powers. They apparently contend that when a majority of
28 the Central District's bankruptcy judges approved an
optional local form containing provisions that could be
included in the District's chapter 13 plans, several of
which provisions creditors contend run afoul of RESPA,
those judges somehow usurped the prerogative of Congress
to enact laws regulating residential mortgages.

23 The mortgage creditors' argument is a non-starter
24 because it ignores the bankruptcy judges' decision to
25 make use of the Addendum optional, such that the
26 incorporation of its provisions in debtors' plans was
27 subject to review by bankruptcy courts on a case-by-case
28 basis. Indeed, the instructions on Local Form 3015.1.1A
state that "[a] chapter 13 debtor may attach this
addendum to his/her chapter 13 plan." This [is] not a
situation where the local bankruptcy court has, through
a local rule or general order, mandated the terms of a
debtor's proposed plan and treatment of a creditor's

1 claim. As a result, the propriety of the plan
2 provisions arising from incorporation of the Addendum
3 into the debtors' plans was freely subject to challenge
4 in each of these cases, and the mortgage creditors'
5 argument that the bankruptcy courts somehow violated the
6 separation of powers doctrine misses the point.

7 Herrera/Monroy, 422 B.R. at 710.

8 In short, three of U.S. Bank's general areas of challenge to
9 the Addendum in this appeal have been definitively dispatched by
10 the Panel and Ninth Circuit in Herrera/Monroy. U.S. Bank must
11 understand that, with respect to these contentions, its ship has
12 sailed.

13 As mentioned above, there is at least some potential for U.S.
14 Bank's fourth argument in this appeal that, even after
15 Herrera/Monroy, incorporation of the Addendum in Vu's plan will be
16 unduly burdensome and costly to the mortgage creditor. Unlike the
17 facts in the Herrera/Monroy cases, where the creditors did not
18 present evidence of the costs of complying with the Addendum, U.S.
19 Bank argues that in this case it did offer proof of the costs of
20 complying with the Addendum. In Herrera/Monroy, the Panel
21 cautioned that where "substantial, company-wide modification of [a
22 mortgage creditor's] accounting procedures would be required to
23 comply with the Addendum" doubts might be raised about the
24 propriety of adding the Addendum to a chapter 13 plan in those
25 cases. Herrera/Monroy, 422 B.R. at 722 n.20.

26 U.S. Bank argues that it presented evidence to the bankruptcy
27 court in this case that the estimated additional monthly costs to
28 prepare, review and disburse monthly statements to Vu pursuant to
the terms of the Addendum and plan would be approximately \$75, and
that the fee necessary to prepare the quarterly disclosures would

1 be another \$100. U.S. Bank's Reply to Appellee's Response to
2 Appellant's Supp. Br. at 9.⁹

3 It is helpful to trace the history of the alleged \$75/\$100
4 fees through the course of U.S. Bank's submissions in this appeal.
5 A reference by counsel to those fees first appears in U.S. Bank's
6 email to Vu's lawyer on April 8, 2010. The fees are described as
7 "attorney fees" in the bank's objection to confirmation of Vu's
8 plan filed on April 14, in its letter to Vu's counsel on May 12,
9 its Motion for Reconsideration filed on June 17, at the hearing on
10 the Motion to Amend the Addendum on July 22, 2010, and now in its
11 reply to Vu's supplemental brief in this appeal. What is critical
12 to understand is that all of these statements and references to
13 fees are found in the arguments of counsel. In searching the
14 bankruptcy court's record, not a single declaration or affidavit
15 was submitted, nor other testimonial or documentary evidence
16 offered, to support U.S. Bank's contention regarding the need for
17 these fees.

18 "[A]rguments and statements of counsel are not evidence."
19 Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys.), 482 F.3d 1118,
20 1122 n.1 (9th Cir. 2007). This principle has been frequently
21 cited in bankruptcy cases. Exeter Bancorporation, Inc. v. Kemper
22 Securities Group, 58 F.3d 1306, 1312 n.5 (8th Cir. 1995)
23 (statement of counsel not evidence); Malloy v. Wallace (In re
24 Wallace), 298 B.R. 435, 441 (10th Cir. BAP 2003) (opening
25 statement is not testimony); Braunstein v. Sanders (In re
26 _____

27 ⁹ The Panel authorized the parties to submit supplemental
28 briefs, but did not authorize U.S. Bank to submit yet another
reply brief to Vu's supplemental brief. Since Vu has not objected
to the extra brief, we will accept it.

1 Muhammed), 2011 Bankr. LEXIS 2214 at * 7-8 (Bankr. D. Mass. 2011)
2 (arguments of counsel cannot substitute for evidence); In re Olde
3 Block Owner, LLC, 448 B.R. 482, 484 (Bankr. N.D. Ill. 2011) ("Of
4 course, the argument of counsel is not evidence."); In re Valley
5 Park, Inc., 217 B.R. 864, 866 (Bankr. D. Mont. 2006); In re
6 Osborne, 257 B.R. 14, 19-20 (Bankr. C.D. Cal. 2000).

7 In this case, the bankruptcy court was not obliged to
8 consider as "evidence" the statements of U.S. Bank's attorneys
9 that fees of \$75 per month and \$100 per quarter would be added to
10 each debtor utilizing the Addendum. Further, even if counsel's
11 statements were to be given some persuasive weight,¹⁰ this
12 information was not probative concerning the principal harm
13 alleged by U.S. Bank – that the Addendum would cause significant
14 expense to the bank because it would require new accounting
15 systems, training, and associated costs. In other words, it is
16 difficult to understand how add-on attorney fees create
17 significant accounting burdens, let alone a need for restructuring
18 U.S. Bank's whole accounting system.

19 In addition, implicit in U.S. Bank's position is that these
20 additional fees will be required as to each of its debtor-
21 customers using the Addendum every month and quarter throughout
22 the bankruptcy period. But counsel conceded at the hearing in the
23 bankruptcy court that the fees might only arise for a few months.

24 THE COURT: Why would [the statements] have to go to your
25 office necessarily?

26 ¹⁰ To the extent that the bankruptcy court considered
27 counsel's argument that such fees were required as evidence, as
28 indicated in the colloquy quoted above in the description of
facts, the court was obviously skeptical about the factual basis
for the statements.

1 COUNSEL: Because it's manually created. For the first
2 few months at the very least, we have to look at each
statement and make sure it complies with -

3 Tr. Hr'g 3:12-15, July 22, 2010 (emphasis added). According to
4 this statement, even if additional attorney fees are incurred by
5 U.S. Bank to comply with the Addendum, that expense may not
6 necessarily continue longer than a few months. If so, the
7 presence of these additional fees would not show U.S. Bank would
8 experience a significant economic cost, nor that significant
9 changes in the bank's accounting systems would be required.

10 Interestingly, while not referred to by U.S. Bank in any of
11 its briefs in this appeal, there is one relevant, evidentiary item
12 in the record of the bankruptcy proceedings regarding the
13 accounting system costs to U.S. Bank of complying with the
14 Addendum. In the declaration of Olivia A. Todd, the president of
15 the servicing agent for U.S. Bank, submitted with U.S. Bank's
16 Motion for Reconsideration, Todd notes:

17 This new accounting system mandated by the Central
18 District of California Form Addendum will include, but
19 are not limited to, costs to hire accountants and
20 program designers to adequately design a new accounting
21 system; costs to pay Information Technology
22 professionals and engineers to create the new accounting
23 system; costs of creating new training programs to
24 implement the new accounting system; and costs of
25 actually training employees to learn how to use a new
26 accounting system.

27 The Todd Declaration is inadequate to show U.S. Bank will
28 experience the sort of economic burden required to avoid
compliance with the Addendum. First, Todd's statement does not
quantify the alleged costs resulting from compliance with the
Addendum. Second, Todd's statement does not allocate these costs
among the several customers of U.S. Bank filing for chapter 13

1 relief in the Central District of California who elect to
2 incorporate the Addendum in their chapter 13 plans. And finally,
3 Todd's declaration states that she is the custodian of records for
4 the servicing agent, and the person most familiar with Vu's loan
5 on the property in Fontana, California. However, Vu owns no
6 property in Fontana. The U.S. Bank loan impacted by Vu's plan in
7 this case is secured by a trust deed on property in West Covina,
8 California. For these reasons, like the bankruptcy court, we
9 decline to consider Todd's declaration as probative or reliable
10 evidence of U.S. Bank's costs of complying with the Addendum in
11 this case.

12 In sum, whether compliance with the Addendum may cause a
13 given creditor to incur burdensome costs, either on an individual
14 or general basis, may still be an open question. Indeed, the
15 intent of the Panel in offering the parties the opportunity for
16 supplemental briefing in this appeal was not to belabor the
17 settled legal questions on RESPA or separation of powers, but to
18 allow the parties to explore the true costs of U.S. Bank's
19 compliance with the Addendum. However, U.S. Bank did not provide
20 any competent, evidentiary support for its position that the
21 Addendum imposes unreasonable and unnecessary burdens on its
22 financial and accounting systems.

23 **CONCLUSION**

24 Most of U.S. Bank's arguments in this appeal have been
25 rejected by both the Panel and Ninth Circuit in Herrera/Monroy.
26 As for its contention that compliance with the Addendum in Vu's
27 case would be unduly burdensome or expensive, U.S. Bank has not
28 provided the necessary evidence to establish that claim in fact.

1 The bankruptcy court did not abuse its discretion in denying
2 U.S. Bank's Motion for Reconsideration and its Motion to Amend the
3 Addendum. We AFFIRM.

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