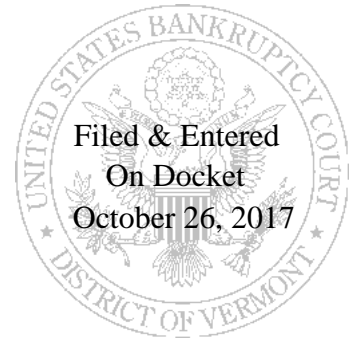


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**Jean M. Gay and
Michael A. Gay,
Debtors.**

**Chapter 13 Case
13-10069**

ORDER

**GRANTING THE DEBTORS' MOTION FOR DISGORGEMENT OF CONDUIT MORTGAGE OVERPAYMENTS
AND DIRECTING U.S. BANK, N.A. TO PAY SANCTIONS FOR VIOLATION OF RULE 3002.1**

The Debtors filed a motion asking this Court to (1) direct mortgage creditor U.S. Bank, N.A. ("U.S. Bank") to disgorge overpayments, and (2) impose sanctions on U.S. Bank (doc. # 30, the "Motion"). The Debtors alleged U.S. Bank (i) failed to provide notices of mortgage payment changes to the debtors' attorney and the case trustee, as required by Bankruptcy Rule 3002.1, (ii) failed to properly apply payments it received from the trustee, (iii) failed to refund overpayments to the debtors, and (iv) failed to comply with applicable federal and local rules (doc. #30). The Court enters this order to memorialize U.S. Bank's voluntary payment of attorney's fees and the Court's ruling on the debtors' request for other sanctions, as announced at the hearing on October 25, 2017.

The salient Bankruptcy Rule at issue here provides:

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

FED. R. BANKR. P. 3002.1(b) (2017).

The critical facts are as follows. The debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code and the Court entered an order (doc. #24) confirming the debtors' plan of reorganization (doc. #17). That confirmed plan included conduit mortgage payments to U.S. Bank, i.e., the debtors made their mortgage payments to the trustee and he, in turn, sent them to U.S. Bank. See VT. LBR 3015-2(j). During the pendency of the case, the amount of the debtors' monthly mortgage payment fluctuated often. U.S. Bank provided the debtors with statements of these mortgage payment changes semi-annually.

However, U.S. Bank frequently failed to file, and send the chapter 13 trustee and debtors' attorney, the required notices of each payment change. In fact, from the date of the petition through the date the Motion was filed, U.S. Bank only filed one notice of mortgage payment change; it was filed on December 4, 2014 (doc. #28). Based upon the record in this contested matter, it is now clear that there were at least ten changes in the mortgage payment over this period of time – nine of which were not filed, or served on the debtors' attorney and trustee (doc. ## 30, 38).¹

As a result of U.S. Bank's failure to file and serve notice of the payment changes on the trustee or debtors' attorney, as required by Rule 3002.1(b), the trustee continued to pay U.S. Bank an excess amount for each month's conduit mortgage payment. Consequently, U.S. Bank received an overpayment with each month's conduit mortgage payment for nearly two years, from July of 2015 to April of 2017.² The debtors tabulated the total amount of the overpayment attributable to the lack of notice as \$9,944.91 (doc. #30). Upon learning of the notices from his clients, the debtors' attorney filed the Motion, seeking disgorgement of the \$9,944.91 in overpayments, appropriate sanctions for failure to issue notice of payment changes, and attorney's fees of \$950 – the amount the debtors had incurred as of the filing date of the Motion – plus any additional attorney's fees accrued thereafter, until final resolution of this contested matter (doc. #30).

In response to the Motion and the arguments presented at the hearing held on August 30, 2017, the Court entered a scheduling order on September 1, 2017 (doc. #33) directing U.S. Bank to (a) file a proof of claim and a written response to the debtors' Motion, (b) file and send to the debtors and their attorney a notice for each change in the debtors' mortgage payment since the petition date, and (c) file a computation of the amount U.S. Bank believed it had been overpaid in this case. U.S. Bank failed to comply with that Order by failing to timely file the documents by the September 13th deadline. U.S. Bank did file a response to scheduling order (doc. #38), but it did so six days late and only after the Court issued an order, on September 15, 2017, directing U.S. Bank to appear and show cause why sanctions should not be imposed (doc. #36).

U.S. Bank “does not dispute or object to the Debtors' Motion” and, in its Response, it offered “to remit to Debtors the amounts of \$9,944.91 and attorneys' fees of \$950.00 as sought” (doc. #38). At the hearing held on August 30, 2017, the attorney for U.S. Bank acknowledged “there were not notices of mortgage payment [change] filed,” and that, failing to provide the notices, it appeared to him there

¹ The information set out in the Motion (doc. #30) and U.S. Bank's response to scheduling order (doc. #38) reveals that U.S. Bank sent the following notices of mortgage payment changes only to the Debtors, *i.e.*, not to the chapter 13 trustee or the debtors' attorney: February 20, 2013, November 12, 2013, May 15, 2014, May 14, 2015, November 18, 2015, May 5, 2016, November 9, 2016, December 29, 2016, and May 11, 2017.

² The excess amount collected by U.S. Bank in each month's overpayment varied, ranging from \$548.78 per month during the six-month period from July to December of 2016, to \$118.55 per month for the period from January to April of 2017.

“would be issues with the amount paid” (audio file of that hearing at doc. #32). At the conclusion of the September 20, 2017 hearing in this matter, the Court took under advisement the debtors’ request for additional sanctions, pursuant to Bankruptcy Rule 3002.1(i).


After considering the record in this case, including the papers filed and arguments presented by both parties and the trustee, THE COURT FINDS U.S. Bank failed to comply with Bankruptcy Rule 3002.1 and failed to comply with this Court’s scheduling order on debtors’ motion for disgorgement and sanctions (doc. #33). THE COURT ALSO FINDS U.S. Bank mismanaged the debtors’ account by accepting, and not promptly refunding, the conduit mortgage overpayments. Finally, based upon U.S. Bank’s failure to provide the notice and information required by Bankruptcy Rule 3002.1(b) over a 22-month period, THE COURT FURTHER FINDS it is appropriate to impose attorney’s fees and additional sanctions on U.S. Bank, as authorized by Bankruptcy Rule 3002.1(i) and § 105 of the Bankruptcy Code.³

Accordingly, IT IS HEREBY ORDERED that

1. the Debtors’ Motion for Disgorgement of Overpayment and for Sanctions is **GRANTED**;
2. U.S. Bank shall disgorge and pay the conduit mortgage overpayment amount, nine thousand nine hundred forty four dollars and ninety-one cents (\$9,944.91) to the debtors **by November 9, 2017**;
3. **by November 9, 2017**, U.S. Bank shall pay to the debtors all attorney’s fees they incurred for this contested matter, as determined by stipulation between counsel (or by Court Order if they cannot agree), in an amount to include the \$950 for services rendered through the date the debtors filed their Motion, plus any and all reasonable attorney’s fees the debtors incurred in this matter since that date;
4. as additional relief for the debtors, and as authorized under Rule 3002.1(i), U.S. Bank shall pay, directly to the debtors, **by November 9, 2017**, the sum of six thousand six hundred dollars (\$6,600), a sum computed as \$300 per month for each month the debtors overpaid their mortgage as a result of U.S. Bank’s breach of its duty under Bankruptcy Rule 3002.1; and
5. **by November 10, 2017**, U.S. Bank shall file an affidavit affirming it has made all three payments required by this Order, specifying the date, amount, and mode of delivery for each such payment.

SO ORDERED.

October 26, 2017
Burlington, Vermont


Colleen A. Brown
United States Bankruptcy Judge

³ Since U.S. Bank promptly provided the missing notices to the debtors’ counsel, and promptly agreed to refund the overpayments it received and pay the debtors’ attorney’s fees, the Court finds it appropriate to impose a lower per month sanction under Rule 3002.1(i) in this case than it has in other cases where a mortgage creditor failed to comply with Bankruptcy Rule 3002.1. And, since in this case the debtors’ suffered actual financial harm – having to withdraw funds from a retirement account to cure a plan default, which they would not have been required to do if U.S. Bank had refunded the payments without need for a motion – the Court directs the sanction to be paid directly to the debtors, rather than to a nonprofit legal services agency. Compare In re Gravel, 556 B.R. 561 (Bankr. D. Vt 2016).