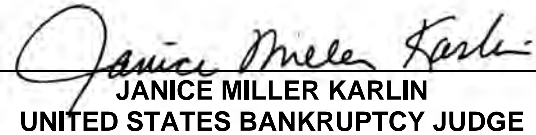
SO ORDERED.

SIGNED this 28 day of September, 2006.



JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

PAUL DOUGLAS COOVER **TERESA ANN COOVER,** **Debtors.**	**Case No. 06-40176** **Chapter 13**
RICHARD LEE HINES, **Debtor.**	**Case No. 06-40328** **Chapter 13**
JEREMY PAUL BOND **LAURA ANN BOND,** **Debtors.**	**Case No. 06-40423** **Chapter 13**
GARY LEE MORAN **MELESSA ANN MORAN,** **Debtors.**	**Case No. 06-40453** **Chapter 13**

CANDACE MARIE WEBB, **Debtor.**	**Case No. 06-40572** **Chapter 13**
RUSSELL MARK WOODGATE **JENNELLE RAE WOODGATE,** **Debtors.**	**Case No. 06-40587** **Chapter 13**
DANIEL JOSEPH DASHNAW, **Debtor.**	**Case No. 06-40502** **Chapter 13**
ANGEL FRANCESCA RIVERA, **Debtor.**	**Case No. 06-40627** **Chapter 13**
FLOYD GENE HILL **VERONICA JEANNE HILL,** **Debtors.**	**Case No. 06-40654** **Chapter 13**
ROBERT DEAN SMITH **CATHY DIANE SMITH,** **Debtors.**	**Case No. 06-40675** **Chapter 13**

ORDER PARTLY SUSTAINING, AND PARTLY OVERRULING, OBJECTION TO MODEL PLAN LANGUAGE

In each of these cases, a home mortgage creditor has objected to the following language contained in the Chapter 13 Trustee's recommended form plan:[1]

[1]The creditor is Mortgage Electronic Registration Systems Inc. in the *Coover* case, and its objection is Doc.25. The creditor is Mortgage Electronic Registration Systems, Inc. in the *Hines* case, and its objection is Doc. 22. The creditor is Mortgage Electronic Registration Systems Inc. in the *Bond* case, and its objection is Doc. 21. The creditor is Mortgage Electronic Registration Systems Inc. in the *Moran* case, and its objection is Doc. 15. The creditor is

> The amount of the arrearage as specified in the creditor's proof of claim shall govern unless specifically controverted in this plan or by an objection to the claim as required by D. Kan. LBR 3015(b).1. Interest will not be paid on the arrearage unless ordered by the Court.
>
> If the Debtor pays the arrearage amount specified in this section, while timely making all required post petition payments, the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition, unless such amounts were included in the allowed proof of claim filed in this case. (Emphasis added)

The obvious purpose of this language, which is unarguably salutary, is to prevent the situation where a debtor pays exactly the amount the mortgage lender says was due upon the date of filing, through the course of the Chapter 13 plan, and also makes all post-petition payments when they come due, only to find, upon discharge, that the lender has either not properly applied the Chapter 13 payments, has misstated the original pre-petition arrearage, or has otherwise added additional costs attributable to the pre- or post-petition period, of which the debtor had no notice.

The model plan language is intended to prevent, as far as possible, the debtor receiving a Chapter 13 discharge, only to promptly face a foreclosure action, with its attendant costs, when the debtor reasonably believed that he was current with his mortgage holder, and that he was in a position to receive the well-advertised fresh start. In the seemingly short time this Judge has been on the bench, there have been numerous cases where some version of this problem has surfaced. As a result, all interested parties have looked for a solution to this perennial problem, and this Court wholeheartedly endorses finding that solution.

Washington Mutual Home Loans Inc. in the *Webb* case, and its objection is Doc. 21. The creditor is U.S. Bank N.A. in the *Woodgate* case, and its objection is Doc. 14. The creditor is U.S. Bank National Association in the *Dashnaw* case, and its objection is Doc. 15. The creditor is FNMA Remic Trust 05-W3 GR3 in the *Rivera* case, and its objection is Doc. 16. The creditor is Mortgage Lenders Network USA, Inc. in the *Hill* case, and its objection is Doc. 16. The creditor is U.S. Bank, N.A. in the *Smith* case, and its objection is Doc. 15. Each of these objections was filed by another entity, generally the servicing agent for the creditor, on behalf of the moving creditor.

The Chapter 13 Trustee decided to attempt to solve the problem, at least as it relates to the pre-petition arrearage, in part, with the quoted language. The intent of the quoted language is to require the creditor to file an accurate pre-petition arrearage claim by the bar date (which is typically 120 days after the filing of the case, with governmental creditors receiving a longer period), and then be required to honor the claimed amount. In other words, the language is meant to require the creditor to file an accurate arrearage claim, accept and properly apply the arrearage payments received from the Trustee, and then not later declare additional pre-petition amounts due. It is intended to "freeze" the accounting on the home mortgage debt so the debtor can know the exact delinquency on the date of filing, and pay it through the confirmed plan.

Each objecting creditor, as well as the proponent of the language, the Chapter 13 Trustee, has filed a brief in this case, as have several Debtors. The Court will summarize the arguments raised by the various creditors: 1) this issue is not ripe for adjudication, and the Court will be giving an advisory opinion if it decides this issue before the conclusion of a particular case; 2) the form plan language is internally inconsistent, because the first paragraph says the arrearage amount contained in the proof of claim governs, while the second paragraph indicates the amount specified "in this section" governs; 3) the plan language violates 11 U.S.C. § 1322(b)(2), which prohibits modification of the rights of a holder of a secured claim that is secured solely by debtor's principal residence, because if contractually allowed post-petition charges accrue, this language will bar collection; and 4) the Court should require the addition of language that "this provision is subject to modification by subsequent order of the court prior to discharge," in case the creditor needs to file an amended claim for debt that should have been included in its original proof of claim, because the form language could arguably prevent a good faith amendment.

A decision that plan language is appropriate is not "advisory"

Although the creditors do not expressly make a constitutional argument that there is no case in controversy, under Article III of the United States Constitution, that is the sense of their argument, to-wit: that any opinion on this issue at this pre-confirmation stage is essentially advisory, and the Court has no jurisdiction to make it. This Court disagrees. First, most of the cases relied on by the creditors are student loan cases, which are completely distinguishable. The Court, in determining whether a student loan will be discharged under the undue hardship standard, must look at a debtor's financial picture at the conclusion of his Chapter 13 plan to determine what debt is left, and what debtor's then financial situation is. The same situation does not apply here.

All the model Chapter 13 plan language is trying to do is to put all creditors on notice of the impact of a confirmed plan. It is no different than a provision in any other plan that states the statutory obvious—for example, that a debtor will be entitled to release of a lien on a car, at least in the pre-910 car days,[2] if the debtor pays the balance due, with *Till*[3] interest, and otherwise completes the plan. Here, the intent of the model language is to require creditors to file an accurate and timely pre-petition claim. If the debtor does not agree with the claim filed, the debtor must timely object to it because if he does not, the Court's local rule[4] will result in the claim being paid as filed. The Court does not believe that looking at this model plan language at this pre-

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[2]*See In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan. June 28, 2006) for a general discussion of the "910-car" issue in BAPCPA.

[3]*Till v. SCS Credit Corp*, 541 U.S. 465 (2004) (rejecting the use of the contract rate of interest to satisfy the present value requirement in a Chapter 13 plan).

[4]D. Kan. LBR 3015(b).1(3).

confirmation stage is premature, or will result in an "advisory opinion." Instead, it simply advises interested parties what will occur if they don't play by the stated rules.

Some language in the form plan is potentially internally inconsistent and should be changed to remove any ambiguity

The first sentence in the form plan regarding real estate mortgages incorporates this Court's local rule, D. Kan. LBR 3015(b).1(3), which states as follows:

> A timely claim for mortgage payments or mortgage arrearages will be paid by the Chapter 13 trustee, as filed and allowed, and the amount stated in the proof of claim will control over any plan, unless an order, stipulation, or specific language in the Order of Confirmation otherwise directs payment.

This local rule was adopted a few years ago to solve a recurring problem. That problem occurred when a plan specified a precise arrearage amount to be paid through the plan, but the noted arrearage was inaccurate. Creditors were filing "protective" objections to confirmation, out of concern that the Tenth Circuit's decision in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,[5] might bind them to the incorrect amount, when in reality, the amount in the plan was debtor's best guess of the arrearage amount.

The Bench Bar Committee recommended to the Court that specific language be added to our local rules to prevent the necessity of such protective objections, and the Court adopted the recommended language.[6] Accordingly, if the arrearage amount contained in the plan differs from the amount in the timely proof of claim, the amount in the claim governs unless specific order language, a stipulation, or specific language in the confirmation order states otherwise. This allows

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[5]179 F.3d 1253 (10th Cir. 1999) (holding that order of confirmation binds all parties to all terms of the confirmed plan).

[6]The Court added similar language to deal with protective objections by taxation creditors, who were faced with the identical concern when the amount of their secured or unsecured priority claims were under-estimated in the plan.

for the relatively rare situation where a debtor really wishes to contest the amount of a claimed pre-petition arrearage, as opposed to the more routine situation where the exact amount of the arrearage has changed (to include all amounts due up to the date of filing) since the last statement received by debtor (upon which his attorney must rely in estimating the arrearage).[7]

Home mortgage creditors are justifiably concerned that they will again be faced with making "protective objections," because the model language is potentially internally inconsistent. This Court believes that concern is justified, because the second paragraph states that debtors will "pay the arrearage amount specified in this section...." rather than the amount of the proof of claim. One creditor suggested this particular problem could be easily remedied by stating that the pre-petition mortgage arrearage listed in the plan is debtor's best estimate, and the mortgage creditor will be paid in accordance with its filed and allowed proof of claim. Since that is the exact purpose of D. Kan. LBR 3015(b).1(e), the Court sustains the various creditor's objection to the plan language as drafted. The Court believes that if the language in the first sentence of the second paragraph is revised to state "If the Debtors pay the arrearage contained in the creditor's proof of claim, as contemplated by D. Kan. LBR 3015(b).1(d)," instead of "If the Debtors pay the arrearage amount specified in this section," this concern will be remedied.

The language is potentially objectionable as to post-petition accruals, because it could impact legitimate post-petition accruals

The creditors argue that pursuant to 11 U.S.C. § 1322(b)(2), a Chapter 13 plan may not modify any of their rights, since their claims are secured by "a security interest in real property that is the debtor's principal residence ...." It is certainly true that residential mortgage holders enjoy a

[7]This problem could as easily be resolved if debtors' attorneys would simply indicate "estimate" or "approximate" in their plans, but the Court and the Trustee have been unable to gain unanimous adoption of such practice.

position that other secured creditors do not, in that most of their rights cannot be modified through a Chapter 13 plan. A mortgagee holds certain bargained-for rights under the mortgage, and those rights are protected from modification under § 1322(b)(2).[8] These creditors contend that the model plan language would bar them from charging, for example, $150 in attorney fees to the account for analyzing debtor's Chapter 13 plan, and adding that amount to the mortgage account (assuming they are an oversecured creditor and assuming it actually takes $150 worth of the attorney's time to read what are oftentimes 2 page plans). Similarly, PHH Mortgage (represented by different counsel in the *Hines* case), argues that "the post-petition bankruptcy process is wrought with circumstances under which reasonable and legitimate charges to the Debtor's account may accrue. Among these circumstances are increases in taxes and insurance, lender insured mandates under federal guidelines for Fannie Mae, Freddie Mac and HUD loans, including the much complained about post-petition property inspection."

The form plan language appears to be aimed at fixing pre-petition amounts due to such lenders.[9] The "$150 for reviewing the Chapter 13 plan," by definition, is not a pre-petition charge. The $15 inspection fee during the second year of the plan is also, by definition, not a pre-petition charge. Accordingly, if the mortgagee's note and mortgage expressly allow such charges, nothing

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[8] *In re Wilson,* 321 B.R. 222, 223 (Bankr. N. D. Ill. 2005) (*quoting Nobelman v. American Sav. Bank*, 508 U.S. 324, 329-330 (1993)).

[9] This is not to say that the Court would be unhappy to have a procedure in place to deal with the "much complained about post-petition property inspection," noted by one creditor, and other fees that oftentimes appear to be added without explanation during the course of the plan. PHH attached as an exhibit a form plan from the Northern District of Illinois that incorporates an interesting procedure dealing with post-petition defaults. It requires the trustee, after making the final payment on the pre-petition arrearage, to notify the mortgage creditor, which in turn has a specified period of time to claim that any post-petition amounts have accrued, are due, and remain unpaid. This procedure is especially helpful in those Districts where the ongoing mortgage payment is paid through estate. Some attorneys practicing in this division have adopted a similar procedure, where they file a motion at the end of the plan to determine if the mortgage is current, and the Court has been willing to entertain those motions, so the amount of any post-petition arrearage, if any, can be specifically determined before the Debtors exit bankruptcy.

in the complained-of language bars the accrual, and later attempt to collect, such amounts. Again, to quote the challenged language, the only effect is to extinguish "any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition...."

All the language attempts to do is to require mortgagees to pick a pre-petition number, and stick with that number.[10] This Court agrees that everyone is entitled to know what the exact amount of the claimed pre-petition arrearage is, and the Court has difficulty understanding why these creditors appear reluctant to be bound by their own claims, filed after they've had up to four months to get their own payment histories analyzed.

That said, the Court does understand that these creditors could be justifiably concerned that the phrase "the mortgage will be reinstated according to its original terms" is intended to repudiate their right to demand, before the mortgage is "reinstated according to its original terms," allowable post-petition charges and amounts. For example, if a creditor who is over-secured incurs reasonable attorney fees in making sure that it retains the protections afforded to it under the terms of the consensual note and mortgage, and the note and mortgage allow for collection of such fees and costs to protect the creditor's interest, a mortgagor/debtor may well be obligated to pay such a charge before the mortgage would be deemed fully "current" or "reinstated." Similarly, if the creditor is mandated under federal guidelines, or otherwise, as PHH suggests, to make post–petition property inspections, and the parties' contract documents so allow, the mortgagor/debtor may well be obligated to pay that charge before a mortgage is deemed "current" or "reinstated."

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[10]The Trustee argues "One must wonder why the Creditor is so concerned at being pinned down on what the debt actually is. Writing in unset jello may be entertaining, but in this environment, concrete numbers should be required."

The Court believes the following language should assuage the concerns of both parties, and suggests it —or language with a substantially similar meaning---be adopted instead of the language in the current model plan. In each of these cases, if Debtor's counsel will agree to substitution of this language through the medium of the Order of Confirmation or by an amended plan, the Court will approve such substitution and will confirm the plan over the objection of the mortgage creditor:

> The amount of the pre-petition arrearage as specified in the creditor's proof of claim shall govern, unless specifically controverted in this plan or by an objection to the claim as required by D. Kan. LBR 3015(b).1. Interest will not be paid on the arrearage unless ordered by the Court.
>
> If the Debtor pays the arrearage amount specified in the mortgage company's timely filed Proof of Claim, while timely making all required post petition payments (including any other reasonable amounts that properly come due pursuant to the pre-petition contractual agreement of the parties and of which the creditor gives such timely and appropriate notice as the parties' pre-petition agreement requires), the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition, unless such amounts were included in the allowed proof of claim filed in this case.

Creditor is not entitled to specific language that pre-petition arrearages can be changed by subsequent court order

PHH argues, in the *Hines* case, that language should be added that allows it to amend its proof of claim if it later determines that its pre-petition claim was wrongly calculated and filed. It argues that it wants to be able to amend its claim after the Court has entered the confirmation order, which of course incorporates, by implication, the local rule provision, coupled with the plan language, that the creditor's own proof of claim amount governs.[11] It does not want to be bound by § 1327(a) if it later needs to amend its claim.

[11]This Court often confirms plans prior to the bar date, so that creditors can start receiving money more quickly. Thus, the creditor has until the bar date to study its own accountings and make sure its proof of claim is correct.

Conversely, Debtors argue that after the plan is confirmed and is final, the creditor would in essence need to file a motion, pursuant to Fed. R. Civ. P. 60(b), as incorporated into the Bankruptcy Rules under Rule 9024, to amend its claim if it determined it was in error as to the pre-petition arrearage, meeting the requirements of that rule. What Debtors are obviously trying to avoid is the situation where they are close to completing their plan, and the creditor then comes in and amends its claim in a fashion that is clearly prejudicial to the reliance interest of the Debtors regarding the claim amount that had been on file for months or years.

A bar date order "does not 'function merely as a procedural gauntlet, ... but as an integral part of the reorganization process.'"[12] The decision to grant or deny an amendment to a timely-filed proof of claim rests with the sound discretion of a bankruptcy judge.[13] "Although amendments to proofs of claim should in the absence of contrary equitable considerations or prejudice to the opposing party be freely permitted, such amendments are not automatic...."[14] Amendments are generally allowed, however, where the purpose is to cure a defect in the claim as originally filed, to describe the original claim with greater particularity, or to plead a new theory of recovery on the facts set forth in the original claim.[15]

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[12]*Cf., In re Enron Corp*., 328 B.R. 75, 86 -87 (Bankr. S.D.N.Y. 2005) (quoting *First Fidelity Bank, N.A. v. Hooker Invs., Inc. (In re Hooker Invs., Inc.),* 937 F.2d 833, 840 (2d Cir.1991), quoting, in turn, *United States v. Kolstad (In re Kolstad),* 928 F.2d 171,173 (5th Cir. 1971)).

[13]*In re McLean Industries, Inc.,* 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990).

[14]*In re W.T. Grant Co.,* 53 B.R. 417, 420 (Bankr. S.D.N.Y. 1985).

[15]*LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1473 (10th Cir. 1983).

When deciding whether to permit an amendment to a proof of claim, a bankruptcy court is guided by a two-prong test.[16] "A court must 'first look to whether there was timely assertion of a similar claim or demand evidencing an intention to hold the estate liable.'"[17] If there was such a timely assertion, the court then examines each fact within the case and determines whether it would be equitable to allow the amendment.[18]

In balancing the equities, the court considers the following equitable factors: (1) undue prejudice to opposing party; (2) bad faith or dilatory behavior on part of the claimant; (3) whether other creditors would receive a windfall were the amendment not allowed; (4) whether other claimants might be harmed or prejudiced; and (5) the justification for the creditor's inability to file the amended claim at the time the original claim was filed.[19] As the Fifth Circuit Court of Appeals noted in *In re Kolstad*,[20] these considerations really come down to two questions. First, is the creditor attempting to stray beyond the perimeters of its original proof of claim, effectively filing a new claim, and what is the degree and incidence of prejudice caused by the creditor's delay.

Because any request of a creditor to amend a proof of claim—whether it be for a pre-petition arrearage or anything else—would have to be individually analyzed by the Court, if a party in interest objected, it is not appropriate, in the model plan, to flatly state that any such amendment would be automatically granted, or denied, or to otherwise suggest that there might be a subsequent

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[16]*Integrated Resources, Inc. v. Ameritrust Co. N.A. (In re Integrated Resources, Inc.),* 157 B.R. 66, 70 (S.D.N.Y. 1993) (citing *In re Black & Geddes, Inc.,* 58 B.R. 547, 553 (S.D.N.Y. 1983)).

[17]*Id.* (quoting *Black & Geddes,* 58 B.R. at 553).

[18]*Id.*

[19]*Id.*

[20]928 F.2d at 176.

order of the Court. For that reason, the Court rejects the request of this creditor for additional language that could arguably suggest the Court might bless any amendment to a pre-petition arrearage claim, under every circumstance. Clearly, more prejudice would likely occur to a debtor the later in the life of the confirmed plan that a creditor attempted to amend a claim. Likewise, generally speaking, the longer the creditor waits to amend its pre-petition claim, during the life of the plan, the more the Court would question the creditor's justification for not knowing of its own error much earlier in the process.

For these reasons, the Court declines to add the sentence that was requested by the creditor, which would potentially suggest a creditor would be allowed to amend at any time and under any circumstances. That declination is merely a recognition that the Court may, or may not, be willing to issue a subsequent order on that, or any other, issue.

Conclusion

The Trustee who authored the model language obviously strived to create some simple and fair procedural mechanism that provides certainty to all debtors relating to the cure of any pre-petition default. While the Court clearly recognizes that 11 U.S.C. § 1322(b)(2) prevents any attempt, by the model plan or confirmation order, to modify the underlying rights of mortgage holders on a debtor's principal residence, the Court also instructs that creditors must take seriously their obligation, during the 120 or more days allowed to them, to file accurate proofs of claims. They must also ensure that throughout the course of the bankruptcy, payments are properly and accurately applied to pre- and post-petition accounts, respectively, so that debtors are not caught by surprise, upon receipt of their discharges, with a large mortgage bill to pay, or a foreclosure petition, or both.

This Court agrees with *In re Wilson,* which held that "[b]y providing a procedure for the parties to use to definitively ascertain what a debtor owes his home lender, the Model Plan does not modify a mortgage holder's rights in violation of § 1322(b)(2)."[21] Similarly, the questioned section of this Trustee's Model Plan, as revised by the Court, also provides such a procedure.

At least one objecting creditor has impliedly endorsed the current procedure in the Western District of Missouri, whereby the discharge order "deems all accounts current" upon discharge, allowing creditors 30 days to object if there remains an outstanding delinquent balance. It seems that with the language changes suggested by the Court above, this Court is essentially trying to accomplish the same objective by instead including language in the model plan that places creditors on notice of the reliance interest of debtors on the accuracy of the amount contained within the pre-petition claim. The Court does not think it unreasonable that creditors be bound to the accuracy of that claim (as well as claims for any post-petition delinquencies that might be later added to the plan), absent a proper case for amendment. It also places the obligation on the home mortgage creditor to properly apply payments so that Debtors are not required to expend additional money for an attorney to litigate to correct errors that the mortgage company should be able to prevent.

IT IS, THEREFORE, ORDERED, that the creditors' objections to the model plan language quoted above is sustained in part and overruled in part. If the debtor in each case agrees, in the confirmation order, to adopt the following revised language, the plan will be confirmed over the objection of the home mortgage creditor:

> The amount of the pre-petition arrearage as specified in the creditor's proof of claim shall govern, unless specifically controverted in this plan or by an objection to the claim as

[21] *In re Wilson*, 321 B.R. at 225.

> required by D. Kan. LBR 3015(b).1. Interest will not be paid on the arrearage unless ordered by the Court.
>
> If the Debtor pays the arrearage amount specified in the mortgage company's timely filed Proof of Claim, while timely making all required post petition payments (including any other reasonable amounts that properly come due pursuant to the pre-petition contractual agreement of the parties and of which the creditor gives such timely and appropriate notice as the parties' pre-petition agreement requires), the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition, unless such amounts were included in the allowed proof of claim filed in this case.

If the Debtor declines to adopt the above-stated language, the plan on file will be denied confirmation, for the reasons noted herein, and Debtor shall be given twenty days from the date of this Order to amend the plan to comply with the terms of this decision. All of these cases will be continued to next month's docket, **October 25, 2006 at 1:30 p.m.** If a debtor agrees to the substitute language, a confirmation order may be submitted so stating, and the case will not be called on that docket. All other cases, if any, will be heard on **October 25, 2006 at 1:30 p.m.**

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