SO ORDERED.

SIGNED this 08 day of December, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
STEPHANY DANELLE COFFMAN,	)	**Case No. 06-10819**
	)	**Chapter 13**
Debtor.	)	
	)	
IN RE:	)	
	)	
WALTER S. MONGER,	)	**Case No. 06-10824**
	)	**Chapter 13**
Debtor.	)	
	)	
IN RE:	)	
	)	
TERRY PRESTON MILLER,	)	**Case No. 06-10964**
ROBIN KAY MILLER,	)	**Chapter 13**
	)	
Debtors.	)	
	)	
IN RE:	)	
	)	
JAY SCOTT BREEDING,	)	**Case No. 06-11383**
MAILE KAY BREEDING,	)	**Chapter 13**
	)	
Debtors.	)	

IN RE:	)	
	)	
JEREMY SCOTT HOLT,	)	**Case No. 06-11536**
STEPHANIE ANN HOLT,	)	**Chapter 13**
	)	
Debtors.	)	
IN RE:	)	
	)	
LARRY JAMES KIRBY,	)	**Case No. 06-11557**
JEANIE KAY KIRBY,	)	**Chapter 13**
	)	
Debtors.	)	
IN RE:	)	
	)	
JOSE ANGEL TORRES,	)	**Case No. 06-11731**
	)	**Chapter 13**
Debtor.	)	

ORDER ON CHAPTER 13 MODEL PLAN LANGUAGE REGARDING CLAIMS SECURED BY REAL ESTATE MORTGAGES ON DEBTORS' PRINCIPAL RESIDENCES

In these Chapter 13 cases, all filed after October 17, 2005, each of the debtors proposed a Chapter 13 plan that contains certain model language dealing with the treatment of claims secured by real estate mortgages on the debtors' principal residences. The Chapter 13 Trustee proposed the adoption of this model language in a laudable effort to disclose to debtors and creditors alike the effect of the completion of the debtors' plans on *prepetition* obligations under the mortgage debts. The plan language in question is included in each of the plans filed in the above-captioned cases and reads as follows:

> The amount of the arrearage as specified in the creditor's proof of claim shall govern unless an objection to the claim is filed. Interest will not be paid on the arrearage, unless ordered otherwise 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.

In each of these cases, the mortgage creditor has objected to confirmation of plans containing this provision. The Court received memoranda of authority from the Trustee and various objecting creditors, has considered those submissions, and is now prepared to rule. This ruling only pertains to this portion of the creditors' respective objections and the Court is cognizant that, in several of these cases, the Trustee has filed confirmation objections on additional grounds that remain outstanding.

Jurisdiction

This is a core proceeding over which the Court has subject matter jurisdiction.[1]

Analysis

In each of these cases, the debtors inhabit homesteads that are subject to real estate mortgages securing the objecting creditors' claims. Each debtor has proposed to pay the claims in full, without modification, as required by 11 U.S.C. § 1322(b)(2). Each debtor has also included the language quoted above which, the Court believes, is intended to effectuate the following two purposes. The first sentence of the disputed language provides that the amount of the arrearage "as specified in the creditor's proof of claim" shall govern, unless it is specifically controverted in the plan or the claim is objected to. No interest is paid on the arrearage unless the Court orders to the contrary.[2] This language appears to parrot the provisions of D. Kan. L.B.R. 3015(b).1(d) which

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[1] *See* 28 U.S.C. § 157(b)(1) and (b)(2)(L) and (O) and § 1334(b).

[2] The Court notes that in the *Miller* case, debtor proposes to pay interest on the arrearage at the contract rate. *Miller*, Dkt. 2. In the *Kirby* case and *Torres* case, debtors' plan provides that

expressly provides for payment by the trustee on a timely filed claim as that claim is "filed and allowed." The "filed and allowed" claim controls over any plan unless otherwise ordered by the Court or stipulated to by the respective parties.

The second paragraph of the disputed language states that if the debtors pay the arrearage "specified in this section" and "timely mak[e] all required post-petition payments," the mortgage will be reinstated per its original terms and the right of a mortgagee to recover any amounts "alleged to have arisen prior to the filing of the petition, unless such amounts were included in the allowed proof of claim" will be "extinguished."

This language elicits vociferous objections from the mortgage creditors that can be categorized as follows. First, they assert that the paragraphs are internally inconsistent in that there could be a difference between the arrearage amount specified in the proof of claim and that "specified in this section." Second, the creditors assert that by stating that making all necessary post-petition accruing mortgage payments as well as completing all the arrearage payments the debtor may "extinguish" any claims the creditor may have for unpaid pre-petition obligations, the Court is deciding an issue that cannot and will not be in controversy until the plan's payments have been concluded. Third, they argue that this "pre-emptive" determination that full plan payments and completed arrearage payments serve to satisfy whatever obligations the debtor had to the creditor prepetition is, in fact, an unlawful modification of a mortgage claim under § 1322(b)(2). Finally, the creditors worry that this language has the effect of discharging the unpaid pre-petition obligations when debts entitled to treatment under § 1322(b)(5) are excepted from the Chapter 13

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interest will be paid on the arrearage, unless ordered otherwise by the Court. *Kirby*, Dkt.2; *Torres,* Dkt. 5. In all of the other cases, the plans provide for no interest on the arrearage. *See Coffman*, Dkt. 30; *Monger*, Dkt. 44; *Breeding,* Dkt. 6; *Holt*, Dkt. 2.

discharge by § 1328(a)(1).

Any approach to this dispute should begin with a brief discussion of the confirmable means of treating a claim secured by a debtor's principal residence in a chapter 13 case. Secured claims are entitled to highly favorable treatment under § 1325(a)(5). That section requires that the plan provide for the claim holder to retain its lien, the payment of the effective date value of the claimant's collateral and, if payments are to be made, that they be in equal monthly amounts. Section 1322(b)(2) prohibits the modification of "the rights of holders of secured claims . . . secured only by a security interest in real property that is the debtor's principal residence." But even this expansive protection is limited by § 1322(b)(5) which excepts from it the treatment of pre-petition arrearages "within a reasonable time" on claims whose final payments are due after the final plan payment is due. And, as noted by the creditors, § 1328(a)(1) excepts from discharge debts that represent liabilities on § 1325(b)(5) claims.

Thus, a debtor who has fallen into pre-petition default may propose a plan that (1) provides for the ongoing payment of his home mortgage post petition and (2) provides for the repayment of any pre-petition arrearage within a reasonable time. The arrearage repayment "off-schedule" is the only manner in which debtor can modify the mortgage-based claim. In a perfect chapter 13 universe, a debtor who in fact makes all of his plan payments, and successfully cures his pre-petition home mortgage arrearage emerges from chapter 13 with a discharge, except that his remaining home mortgage contractual obligations survive. By definition, if he has cured the arrearage, pre-petition defaults no longer exist and are, therefore, unenforceable. They are not "discharged" in a bankruptcy sense, but they certainly have been "paid" and therefore cannot be collected again.

Unfortunately, a chapter 13 "peaceable kingdom" has yet to descend. Here on Earth, at least

in the District of Kansas, an almost endless stream of post-confirmation and post-discharge home mortgage issues arise for debtors, often because mortgage creditors seek to recover previously unclaimed or unknown pre-petition entitlements. Some examples of these might include pre-petition foreclosure attorneys fees, property valuation fees, or escrow shortfalls. In an effort to forestall some of these disputes, the judges of this Court enacted D. Kan. L.B.R. 3015(b).1(d) which essentially authorizes the chapter 13 trustee to pay mortgage creditors in accordance with their timely filed and allowed claims and allows the claimed arrearage amount to control over whatever other number the debtor might have proposed. Creditors have a great deal of incentive to file a timely and accurate claim. If the debtor objects to the creditor's arrearage claim, the claims objection process in Fed. R. Bank. P. 3007 may be employed to resolve the issue.

This Court views the model plan language as having the same salutary goals as its local rule and believes that, with some "tweaking" along the lines suggested by Judge Karlin in her recent opinion on this subject, the provisions are confirmable.[3]

First, the Court agrees with the creditors that "proof of claim" (first paragraph) versus "specified in this section" (second paragraph) may be open to enough interpretation to make these two paragraphs confusing, even if not internally inconsistent. As Judge Karlin noted in *Coover*, this problem is easily remedied by altering the model plan language to state in the second paragraph, "Specified in the mortgage company's timely filed proof of claim"and eliminate the "specified in this section" language. This should eliminate any confusion as to the meaning of the two sentences.

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[3] *See In re Coover, et al.*; No. 06-40176, Dkt. 44, Order Partly Sustaining, and Partly Overruling Objection to Model Plan Language (Bankr. D. Kan. Sep. 28, 2006). Judge Karlin decided this same issue in nine (9) additional cases which are listed in the full case caption of *Coover.*

Second, like Judge Karlin, this Court does not see a cognizable Article III case or controversy problem in this case. What the plan language says is what will be deemed to have happened as a matter of law if the debtor makes all the payments under the proposed plan. Confirming such plan language is not issuing an advisory opinion. A plan memorializes the arrangement among the parties concerning the debtor's financial affairs. If creditors believe the proposed plan does not pay them what they are entitled to in a manner authorized by the Code, they have an opportunity to specify what they should be paid by timely filing a proof of claim and objecting to their proposed treatment in the confirmation process. That the plan includes a conclusory statement as to the effect of the debtor's making all the plan and post-petition mortgage payments is not the same as an advisory opinion. That is what plans do.

Likewise, if the creditor files a timely proof of claim that is allowed, either without objection or after the completion of the claims objection process, restricting the creditor to receiving what is set out in the allowed claim is not a "modification" of the creditor's rights as proscribed by § 1322(b)(2). Indeed, the reasonable repayment of the arrearage over time is a statutorily authorized modification of the creditor's rights under § 1322(b)(5). At the same time, this Court understands that post-petition obligations may accrue, particularly post-confirmation, that are not treated by the plan. These might include post-petition attorneys fees, real estate taxes advanced, property inspection fees and the like. But these amounts would not be "extinguished" by the model plan terms, or indeed, as a matter of law. Only similar expenses arising pre-petition that were unclaimed by the creditor would be unpaid because the creditor will only receive what it claims on account of arrearage. Nothing precludes a creditor from amending its proof of claim should it discover one of these unclaimed expenses during the life of the case.

This Court is also hard put to understand the "discharge" argument proffered by creditors here. If the debtor fulfills his obligations as set out in the creditor's allowed claim during the life of the plan, those obligations are "discharged" in a legal sense because they are paid. If the creditor has failed to claim them, that amounts to a waiver of the creditor's rights, not a modification. What is excepted from the bankruptcy discharge under § 1328(a)(1) are all of the debtor's contractual obligations that may have accrued or are to accrue post-petition. This subsection specifically references § 1322(b)(5) without which debtors would have no ability to cure a home mortgage arrearage, except at the sufferance of their mortgagees.

This Court agrees with Judge Karlin's well-reasoned analysis and ruling in *Coover* and, with the following modifications, approves the model plan language complained of by these creditors today.

> 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 ___will not be paid on the arrearage, unless ordered otherwise by the Court.[4]
>
> If the debtor pays the arrearage amount specified in the mortgage creditor'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.

Debtors who complete their chapter 13 plans and pay in full a mortgage creditor's claimed arrearage,

[4] The Court is not asked here to address the matter of interest on the arrearage. The Court admits the possibility of paying interest on the arrearage and therefore makes provision for that possibility.

as well as all current mortgage payments coming due during the case, deserve to be assured that those creditors and their many successive servicers and assignees cannot dispossess them in foreclosure on the basis of some expense or arrearage claim the creditor failed to advance in the course of the bankruptcy case. Otherwise, the "adjustment of debts of an individual with regular income" as provided by chapter 13 would have little good purpose. In making this statement, this Court notes that these creditors are among the most sophisticated and well-represented. They are far better suited to know and assert what they are owed in accordance with the Bankruptcy Code than are individual debtors. Thus, the burden of whatever omissions or errors these creditors or their servicers make in filing or failing to file pre-petition arrearage claims should fall on them, not on debtors who complete their plans. That is precisely what the model language describes and what this Court hopes to accomplish by approving it as modified. Except to the extent that this Court has modified the model plan's language herein, the creditors' objections thereto are OVERRULED.

Because there remain other outstanding confirmation objections in these cases, the Clerk will set them for status conferences on the next available pretrial docket.

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