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IT IS SO ORDERED.



Beth A. Buchanan
Beth A. Buchanan
United States Bankruptcy Judge

Dated: March 16, 2012

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re)
)
ROCKEY POFF) **Case No. 11-15869**
) **Chapter 13**
) **Judge Buchanan**
)
Debtor)

ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

This matter is before the Court on the Debtor’s *Chapter 13 Plan – First Amended* (the “Proposed Plan”) [Docket Number 21] and the *Brief Addressing Proposed Non-Standard Provision of Plan* [Docket Number 26]. A hearing was held on January 24, 2012.

The Chapter 13 Trustee provides a “form” Chapter 13 Plan (the “Form Plan”) for use in this division. The use of the Form Plan is strongly encouraged by this Court and the Chapter 13 Trustee because it increases the efficiency of administering Chapter 13 cases. *In re Russell*, 458 B.R. 731, 735 (Bankr. E.D. Va. 2010). The standardized language of the Form Plan greatly facilitates review by creditors, the Chapter 13 Trustee and this Court. *Id.* Creditors are more

“readily [able to determine] the effect of confirmation on their claims and the duties that confirmation imposes on them.” *In re Jackson*, 446 B.R. 608, 611 (Bankr. N.D. Ga. 2011). Debtors similarly benefit from the use of the Form Plan in that it provides a template which, if properly used, will likely result in confirmation of a debtor’s proposed plan. *In re Maupin*, 384 B.R. 421, 426 (Bankr. W.D. Va. 2007).

Understanding that the Form Plan may not address every situation that might arise based on the individual circumstances of a debtor’s case, the Form Plan includes a section (“Paragraph 30”) where a debtor may include provisions that are specific to his or her particular obligations and the proposed treatment of such obligations. A debtor is encouraged to include only those provisions in Paragraph 30 that are directly applicable to the debtor’s actual obligations and are essential to the debtor’s reorganization so as not to undermine the benefits of using the Form Plan. *See, e.g., In re Walter*, 2008 Bankr. LEXIS 1039 at *3-4 (Bankr. D.S.C. April 10, 2008)(“[Additional] provisions should not be included in plans unless applicable to the debtor’s situation. The form plan needs no additional boilerplate language.”).

With these general parameters in mind, the Court turns to the specific plan provisions at issue in this case. Paragraph 30 of the Proposed Plan contains the following nonstandard provisions:

Confirmation of the plan shall impose a duty on Real Property Creditors and/or servicers of such Creditors, with respect to application of mortgage and mortgage-related payments, to comply with the provisions of 11 U.S.C. §524(i), and all Administrative Order(s) of the Bankruptcy Court relating to Arrearages, Administrative Arrearages, Mortgage Payments, and Conduit Mortgage Payments. The terms and conditions of the respective Administrative Orders are specifically incorporated herein by this reference as if completely set-forth with respect to the acceptance and application of all funds pursuant to the Conduit Mortgage Payment Rule. As a result, all Real Property Creditors and/or servicers for such Creditors shall have an affirmative duty to do the following upon confirmation of the Plan:

- A. To apply all post-petition payments received from the Chapter 13 Trustee and designated to the pre-petition arrearage claim and the administrative arrearage claim only to such claims;
- B. To apply all post-petition payments received from the Chapter 13 Trustee and designated as Conduit Mortgage Payments beginning with the calendar month and year designated for payment by the Court in the Order Confirming Plan;
- C. To apply all post-petition payments received directly from the Debtor in a non-conduit mortgage plan only to post-petition payments unless otherwise ordered by the Court;
- D. To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor based solely on the pre-petition default;
- E. To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor (including additional interest, escrow and taxes) unless notice of such fees and charges has been timely filed pursuant to the Administrative Orders of the Court, and a proof of claim has been filed and has not been disallowed upon objection of the Chapter 13 Trustee or the Debtor;
- F. To the extent that any post-confirmation fees or charges are allowed pursuant to the said Administrative Order and are added to the Plan, to apply only payments received from the Chapter 13 Trustee and designated in payment of such fees and charges to such fees and charges.
- G. To the extent that any post-confirmation fees or charges are allowed pursuant to the said Administrative Order and are NOT added to the Plan, to apply only payments received directly from the Debtor and designated in payment of such fees and charges to such fees and charges.
- H. All contractual provisions regarding arbitration or alternative dispute resolution are rejected in connection with the administration of this Chapter 13 case.

(collectively, the "Plan Provisions"). Although no creditor objected to the Plan Provisions, the Court, *sua sponte*, set the Proposed Plan for hearing in order for Debtor's counsel to discuss the legal basis and implications of the Plan Provisions.

The Debtor states that he is entitled to include the Plan Provisions in his Proposed Plan pursuant to Section 1322(b)(11) of the Bankruptcy Code,¹ which provides that a Chapter 13 plan “may include any other appropriate provision not inconsistent with this title.” 11 U.S.C. § 1322(b)(11). The Debtor asserts that neither creditors, the Chapter 13 Trustee nor this Court is entitled to “dictate and limit plan contents” if the plan provisions are appropriate and otherwise consistent with Title 11 because doing so undermines the Debtor’s exclusive right to file and modify a plan pursuant to Sections 1321 and 1322 of the Bankruptcy Code.

The Debtor misconstrues this Court’s intent in seeking further information regarding the basis for including the Plan Provisions in the Proposed Plan. This Court is not attempting to restrain or otherwise control the manner in which the Debtor chooses to structure his proposed reorganization. Rather, this Court is merely evaluating whether the Plan Provisions are necessary and appropriate.

While the Debtor has an exclusive right to propose a plan, this Court has an affirmative obligation to independently review a proposed plan to ensure that its terms comply with the applicable provisions of the Bankruptcy Code.

[T]he [Bankruptcy] Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of [the Bankruptcy Code]. [Specifically,] Section 1325(a) [of the Bankruptcy Code] . . . requires bankruptcy courts to address and correct a defect in a debtor’s proposed plan even if no creditor raises the issue.

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381 and n.14, 176 L. Ed. 2d 158 (2010); *see also, In re Jackson*, 446 B.R. at 610-11 (“[T]he Court has the obligation to deny confirmation of a plan that does not comply with the confirmation requirements of 11 U.S.C. § 1325(a), regardless of whether a creditor objects to its treatment or even appears in the case.

¹ Unless otherwise indicated, the terms “Bankruptcy Code,” “Section” and “§” refer to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

Consequently, the Court must determine that plan provisions dealing with a claim secured only by a security interest in real property that is the debtor's principal residence do not impermissibly modify the claim in violation of 11 U.S.C. § 1322(b)(2)." (citations omitted)); *In re Carlton*, 437 B.R. 412, 417 (Bankr. N.D. Ala. 2010) ("After *Espinosa* there can be no doubt about a bankruptcy court's authority and responsibility to deny confirmation of an offending plan although the creditor who would suffer the consequences of confirmation fails to object.").

Accordingly, this Court will now address whether the Plan Provisions are tailored to the circumstances of this Debtor's case and whether such provisions are appropriate and otherwise consistent with the requirements of Title 11.

The Debtor maintains that the Plan Provisions are needed to deal with circumstances that frequently arise post-discharge with mortgage lenders and servicers regarding the application of plan payments to the loan balance and the assessment of additional fees and expenses. The mortgage lender at issue in the Debtor's case is Bayview Financial Loan ("Bayview"), which holds the first mortgage on the Debtor's residence. By his Proposed Plan, the Debtor intends to cure the pre-petition arrearages on his mortgage and maintain post-petition payments to Bayview, pursuant to Section 1322(b)(5), with such payments being made through his Chapter 13 plan.

The Debtor contends that the Plan Provisions are needed in order to preserve the benefit of Section 524(i) in the event that Bayview fails to properly credit payments received pursuant to the Proposed Plan (if confirmed). Section 524(i) provides that:

The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an

injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. §524(i).

The Debtor further contends that the Plan Provisions are proper because Section 524(i) trumps Section 1322(b)(2) and enhances Section 1322(b)(5). “Section 1322(b)(2) prohibits tampering with a lender’s ‘rights,’ if the lender is secured solely in real property which is the debtor’s principal residence. . . . Section 1322(b)(5) is an exception to § 1322(b)(2)’s anti-modification language. It allows for ‘cure’ of defaults and maintenance of regularly scheduled payments on long term debt.” *In re Anderson*, 382 B.R. 496, 501 (Bankr. D. Or. 2008).

This Court disagrees with the Debtor’s contention that Section 524(i) serves as a basis to override the requirements of Section 1322(b)(2). Section 524(i) contains no language indicating that it is anything other than a potential post-discharge remedy if a creditor fails to honor the terms of a confirmed Chapter 13 plan by not properly crediting payments received as required by the plan. *See In re Winston*, 416 B.R. 32, 37 (Bankr. N.D.N.Y. 2009)(“[The debtor’s] argument that § 524(i) stands as an outright exception to § 1322(b)(2), to the extent it protects her from the improper crediting of her plan payments, is untenable.”); *In re Collins*, 2007 Bankr. LEXIS 2487 at *12, 2007 WL 2116416 at *4 (Bankr. E.D. Tenn. July 19, 2007)(finding that Section 524(i) is a remedy and does not serve as statutory grounds to propose plan language outlining the procedure for crediting plan payments received by a mortgage lender); *In re Anderson*, 382 B.R. at 503 (concurring with *In re Collins*). Rather, Sections 1322 and 1325 of the Bankruptcy Code govern which provisions are permissible under a Chapter 13 Plan. *Id.*

The following is this Court’s evaluation of the Plan Provisions when considered in light of the requirements of Sections 1322 and 1325 of the Bankruptcy Code.

1. **Paragraph 30 - Preamble**

The preamble to the Plan Provisions in Paragraph 30 (the “Preamble”) states:

Confirmation of the plan shall impose a duty on Real Property Creditors and/or servicers of such Creditors, with respect to application of mortgage and mortgage-related payments, to comply with the provisions of 11 U.S.C. §524(i), and all Administrative Order(s) of the Bankruptcy Court relating to Arrearages, Administrative Arrearages, Mortgage Payments, and Conduit Mortgage Payments. The terms and conditions of the respective Administrative Orders are specifically incorporated herein by this reference as if completely set-forth with respect to the acceptance and application of all funds pursuant to the Conduit Mortgage Payment Rule. As a result, all Real Property Creditors and/or servicers for such Creditors shall have an affirmative duty to do the following upon confirmation of the Plan:

As an initial matter, the Court notes that the Preamble includes several capitalized terms that are not defined in the Proposed Plan. The use of capitalized terms in a plan without further explanation creates ambiguity, which is a basis alone to strike the Preamble. *In re Walter*, 2008 Bankr. LEXIS 1039 at *11 (“Since the meaning and intent of this provision is unclear and since the burden at confirmation is on the debtor, the provision cannot be included in the plan if it is to be confirmed.”).

There are additional problems with the Preamble. The first sentence of the Preamble purports to impose a duty on “Real Property Creditors” and/or their servicers to comply with the provisions of Section 524(i) and certain “Administrative Order(s) of the Bankruptcy Court.” As previously discussed, Section 524(i) is a potential remedy for debtors. It does not prescribe a specific course of conduct that creditors must follow. Rather, the affirmative obligations on creditors that may give rise to a Section 524(i) remedy are found elsewhere in the Bankruptcy Code. Accordingly, this is an inaccurate statement of the law and must be stricken. The reference in this sentence to compliance with various “Administrative Order(s) of the Bankruptcy Court” also must be stricken. This Court is not familiar with any administrative orders of the nature described in the Preamble nor was counsel for the Debtor able to elaborate

further on the substance or entry date of such orders. The second sentence of the Preamble, which incorporates the “Administrative Orders” with respect to “the acceptance and application of all funds pursuant to the Conduit Mortgage Payment Rule,” must be stricken for the same reason.

The final sentence of the Preamble, if revised along the lines of the following, may be included in Paragraph 30 of the Proposed Plan: “The holders and/or servicers of mortgage claims shall have an affirmative duty to do the following upon confirmation of the Plan:”.

2. Paragraphs 30A, B and C – Application of Arrearage and Post-Petition Mortgage Payments

Paragraphs 30A, B and C of the Proposed Plan provide:

- A. *To apply all post-petition payments received from the Chapter 13 Trustee and designated to the pre-petition arrearage claim and the administrative arrearage claim only to such claims;*
- B. *To apply all post-petition payments received from the Chapter 13 Trustee and designated as Conduit Mortgage Payments beginning with the calendar month and year designated for payment by the Court in the Order Confirming Plan;*
- C. *To apply all post-petition payments received directly from the Debtor in a non-conduit mortgage plan only to post-petition payments unless otherwise ordered by the Court;*

These Plan Provisions address the application of post-petition payments of mortgage claims provided for in the Proposed Plan. Specifically, Paragraphs 30A, B and C outline that payments made by the Chapter 13 Trustee on the pre-petition arrearage claim are to be applied to the pre-petition arrears, and that post-petition payments made by either the Chapter 13 Trustee, or directly by the Debtors, should be applied to the post-petition payments due. The Debtor contends that these provisions are necessary because Section 524(i) is not self-executing. The Debtor notes that although Section 524(i) provides a cause of action when a mortgage lender or its servicer fails to properly credit payments received under a confirmed Chapter 13 plan, there is

nothing in the Form Plan that sets forth the manner in which payments should be credited by the mortgage creditor.

The Debtor has elected to pay the mortgage debt of Bayview pursuant to Section 1322(b)(5) of the Bankruptcy Code (*i.e.*, cure and maintain). Pursuant to Section 1322(b)(5), the Debtor may bifurcate payment of his mortgage into two components; the first being payment of the pre-petition arrears which may be paid over a reasonable period of time and the second being payment of the ongoing, post-petition installments as they become due under the terms of the mortgage. *In re Carlton*, 437 B.R. at 418.

Many courts find provisions such as those proposed by the Debtor in Paragraphs 30A, B and C to be unnecessary where a plan sets forth separate treatment of arrearage claims and ongoing post-petition mortgage payments under the cure and maintain provision of Section 1322(b)(5). *In re Duke*, 447 B.R. 365, 371 (Bankr. M.D. Ga. 2011); *In re Jackson*, 446 B.R. at 608, 611 (Bankr. N.D. Ga. 2011); *In re Carlton*, 437 B.R. 412, 417 (Bankr. N.D. Ala. 2010); *In re Russell*, 458 B.R. 731, 735 (Bankr. E.D. Va. 2010); *In re Anderson*, 382 B.R. 496, 505 (Bankr. D. Or. 2008); *In re Maupin*, 384 B.R. 421,428 (Bankr. W.D. Va. 2007). These courts find that the requirement to apply arrearage payments to the arrearage component of the mortgage claim and to apply post-petition mortgage payments to the payments coming due post-petition is inherent from the separate treatment of such claims in a plan. *Id.* These courts note that failure to properly apply payments as contemplated by the plan is improper and sanctionable, and needs no plan provision to make it so. *In re Russell*, 458 B.R. at 736; *In re Duke*, 447 B.R. at 369; *In re Anderson* 382 B.R. at 505 (“If the home lenders don’t apply these payments to the arrears, they expose themselves to a § 524(i) claim for contempt.”).

Notably however, one circuit court has taken a contrary position. The First Circuit in *Nosek v. Ameriquest Mortgage Co.*, found that a chapter 13 plan, which provided for payment of pre-petition arrearages over sixty months and the maintenance of regular monthly payments in accordance with the terms of the mortgage, did not “place any specific obligations on [the mortgage creditor], accounting or otherwise.” 544 F.3d 34, 47 (1st Cir. 2008). While acknowledging that the plan language “must be read in light of the purposes of § 1322(b)(5) and Chapter 13 more generally,” the First Circuit noted that Section 1322(b)(5) is merely an elective element that a Chapter 13 debtor may include in a plan—but the provision itself has no meaning separate and apart from the manner in which the debtor chooses to express the cure and maintain option in the plan. *Id.* at 47-48. The First Circuit found that the language the debtor incorporated into the plan lacked sufficient specificity regarding the accounting treatment of the plan payments to sanction the mortgage creditor for improperly accounting for the plan payments. *Id.* at 47.

Recognizing the difficulties encountered by debtors where a plan does not include language directing the manner in which plan payments are to be applied by mortgage creditors, other courts take a more intermediate stance on plan provisions such as those found in Paragraphs 30A, B and C of the Proposed Plan. These courts find that plan provisions addressing the application of arrearage and ongoing post-petition mortgage payments are generally acceptable because such provisions do not violate the requirements of Section 1322. *In re Booth*, 399 B.R. 316, 324-25 (Bankr. E.D Ark. 2009); *In re Nelson*, 408 B.R. 394, 399 (Bankr. D. Colo. 2008)(“language in a Chapter 13 plan burdening mortgagees with procedural obligations over the life of the plan does not, *per se*, violate § 1322(b)(2)’s anti-modification provision and is permissible and even desirable.” (quoting *In re Collins*, 2007 Bankr. LEXIS

2487 at *32, 2007 WL 2116416 at *11); *In re Walter*, 2008 Bankr. LEXIS 1039 at *7-11 (noting that the Section 524(i) remedy may be unavailable a debtor if the plan does not set forth the manner in which creditors are to apply payments); *In re Watson*, 384 B.R. 697, 705 (Bankr. D. Del. 2008).

While this Court generally agrees with the line of reasoning holding that the requirement to separately account for arrearage and ongoing post-petition payments is inherent from the bifurcated treatment of such claims in a plan considering the purpose of Section 1322(b)(5), this Court understands the Debtor's concern in light of the conflicting case law and the importance of preserving the Section 524(i) remedy. Accordingly, this Court does not find objectionable plan provisions that seek to impose an affirmative obligation on mortgage creditors to apply payments in the bifurcated manner set forth in a plan (*i.e.*, application of arrearage payments to pre-petition arrearage claims and ongoing post-petition mortgage payments to post-petition payments as they come due), whether such payments are made directly by the debtor or through the Chapter 13 Trustee.

The Plan Provisions as currently set forth in Paragraphs 30A, B and C, however, require certain modifications. In Paragraph 30A, the Debtor needs to clarify the reference to "administrative arrearage claim." If the Debtor is referring to curing potential post-petition mortgage arrearages by subsequently modifying his plan to provide for payment of such post-petition arrearages through the plan, then the Debtor should so specify. Paragraph 30B likewise requires clarification. "Conduit Mortgage Payments" and "Order Confirming Plan" are not a defined terms in the Proposed Plan. Moreover, the standard confirmation order routinely tendered by the Chapter 13 Trustee does not designate the "calendar month and year" in which conduit mortgage payments begin. Finally, Paragraph 30C deals with application of post-

petition payments where a debtor proposes to make mortgage payments directly to the mortgage holder and not through the plan, *i.e.*, a non-conduit mortgage plan. In this case, however, the Debtor proposes to make his mortgage payments through the Chapter 13 Trustee as a conduit under the Proposed Plan. Therefore, Paragraph 30C is not applicable to the facts of this case and should be stricken.

3. Paragraphs 30D and E – Assessment of Additional Fees or Charges

Paragraphs 30D and E of the Proposed Plan provide:

- D. *To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor based solely on the pre-petition default;*
- E. *To refrain from assessing or adding any additional fees or charges to the loan obligation of the Debtor (including additional interest, escrow and taxes) unless notice of such fees and charges has been timely filed pursuant to the Administrative Orders of the Court, and a proof of claim has been filed and has not been disallowed upon objection of the Chapter 13 Trustee or the Debtor;*

Paragraph 30D prohibits holders of mortgage claims from assessing additional fees or charges based solely on the Debtor's pre-petition default. This provision merely restates the law and therefore should be stricken. *See In re Frazee*, 2011 Bankr. LEXIS 3695 at *2 (Bankr. S.D. Ohio Sept. 27, 2011). A mortgage creditor's pre-petition arrearage claim is fixed as of the petition date. *In re Collins*, 2007 Bankr. LEXIS 2487 at *41-42, 2007 WL 2116416 at *14. "Any post-petition assessment of late fees and charges on the prepetition arrearage is not authorized by § 1322(b)(5)." *Id.*

Additionally, recent amendments to the Federal Rule of Bankruptcy Procedure (the "Rules") afford the Debtor added procedural protections to ensure that any pre-petition default is

cured upon full payment of the proof of claim arrears.² In cases where the debtor is an individual, a secured creditor is required to include an itemized statement with its proof of claim delineating interest, fees, expenses, or charges incurred pre-petition. Fed. R. Bankr. P. 3001(c)(2)(A). Within thirty days after the debtor completes all payments under a plan, the Chapter 13 trustee is required to file and serve on the secured creditor a notice stating that the debtor has paid in full the amount required to cure any default on the claim.³ Fed. R. Bankr. P. 3002.1(f). The secured creditor is given twenty-one days to dispute whether the default has been cured and whether the debtor is otherwise current on all payments consistent with Section 1322(b)(5). Fed. R. Bankr. P. 3002.1(g). If the secured creditor files a timely dispute, the debtor or the Chapter 13 trustee may file a motion to have the court determine whether the debtor has cured the default and paid all required post-petition amounts. Fed. R. Bankr. P. 3002.1(h). Therefore, the Rules provide a mechanism to bring any dispute regarding pre-petition fees or charges to the Court's attention before the case is closed.

Paragraph 30E likewise is not necessary and should be stricken. Rule 3002.1 now requires holders of mortgage claims secured by the debtor's principal residence and provided for under §1322(b)(5) of the debtor's plan to disclose post-petition fees, expenses or charges within 180 days after such claims are incurred. Fed. R. Bankr. P. 3002.1(c). Specifically, the claimant must "file and serve on the debtor, debtor's counsel and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the

² The United States Supreme Court's order approving the 2011 amendments to Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1 provides that the foregoing Rules "shall take effect on December 1, 2011, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Supreme Court Order on Rules of Bankruptcy Procedure (April 26, 2011), available at <http://www.supremecourt.gov/orders/ordersofthecourt.aspx?Term=10>.

³ A debtor may file and serve the notice if the Chapter 13 trustee fails to do so in a timely manner. Fed. R. Bankr. P. 3002.1(f).

debtor's principal residence." *Id.* The debtor then has one year from the filing of this notice to file a motion requesting that the court determine whether the payment of the fees charged under the notice are required. Fed. R. Bankr. P. 3002.1(e). Since the Rules provide a procedure for the disclosure and disallowance of post-petition fees, expenses or charges relating to mortgage claims, it is unnecessary for the Debtor to do so in the Proposed Plan. *See In re Carlton*, 437 B.R. at 429-30 ("The probable adoption of the amended and new rules [3001 and 3002.1] and forms further persuades this Court that ad hoc plan provisions that attempt to regulate mortgage creditors and deprive them of secured claims without procedural safeguards provided by the Code and Bankruptcy Rules are not plan-appropriate under Section 1322(b)(11) and violate the prohibition in Section 1322(b)(2) against modifications to mortgages encumbering debtors' principal residences."); *In re Duke*, 447 B.R. at 372 (observing that the proposed amended and new rules governing home mortgage claims "will address many of the disclosure and reporting requirements which the 'special provisions' [of the debtor's proposed plan] addressed").

4. Paragraphs 30F and G – Application of Payments for Post-Petition Fees or Charges

Paragraphs 30F and G of the Proposed Plan provide:

- F. To the extent that any post-confirmation fees or charges are allowed pursuant to the said Administrative Order and are added to the Plan, to apply only payments received from the Chapter 13 Trustee and designated in payment of such fees and charges to such fees and charges.*
- G. To the extent that any post-confirmation fees or charges are allowed pursuant to the said Administrative Order and are NOT added to the Plan, to apply only payments received directly from the Debtor and designated in payment of such fees and charges to such fees and charges.*

Paragraph 30F and G essentially seek to provide that payment of any allowed post-petition fees or charges—whether paid through the Proposed Plan or directly by the Debtor—must be allocated and applied to such designated fees or charges. For the reasons previously

discussed regarding Paragraphs 30A and B, this Court does not find objectionable plan provisions that seek to impose an affirmative obligation on mortgage creditors to apply payments to the components of the holder's claim as set forth in a debtor's plan. Therefore, this Court would consider modified proposed language consistent with this Court's ruling regarding Paragraphs 30A, B, C and D.

5. **Paragraphs 30H – Rejection of Arbitration or Alternative Dispute Resolution Provisions**

Paragraphs 30H of the Proposed Plan provides:

H. All contractual provisions regarding arbitration or alternative dispute resolution are rejected in connection with the administration of this Chapter 13 case.

Paragraph 30H should be stricken for several reasons. First, in order to reject a contract, the Debtor must demonstrate that it is executory. *In re Maupin*, 384 B.R. at 429. The Debtor has not established the existence of any executory contracts relating to “Real Property Creditors and/or servicers for such Creditors.” *In re Madera*, 445 B.R. 509, 517-18 (Bankr. D.S.C. 2011) In fact, the Debtor expressly states elsewhere in the Proposed Plan that he does not have any executory contracts. Proposed Plan at ¶13. In addition, as a general rule, a debtor may not partially reject an executory contract. *In re Madera*, 445 B.R. at 517; *In re Booth*, 399 B.R. at 329. Finally, without further context, it is not possible for this Court to determine whether Paragraph 30H may impermissibly modify the rights of the Debtor's mortgage holder in contravention of the requirements of Sections 1322(b)(2) and (5).

For the foregoing reasons, confirmation of the Proposed Plan is **DENIED**, without prejudice. The Debtor is hereby ordered to file a modified Proposed Plan consistent with the terms of this Order **within thirty (30) days**.

SO ORDERED.

Distribution list:

All Creditors and parties in interest.

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