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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE:
ARTURO MANZANARES AND
PATRICIA MANZANARES,
DBA CHART SIGNS,

DEBTORS.

No. 13-03-18782 SA

MEMORANDUM OPINION ON CONFIRMATION

This matter is before the Court on the issue of confirmation of Debtors' Chapter 13 Plan (doc. 5) and the objections thereto filed by the New Mexico Taxation and Revenue Department (doc. 8), County of Bernalillo ("County")(doc. 9) and the Chapter 13 Trustee (doc. 10). Debtors are represented by Steve Mazer. The New Mexico Taxation and Revenue Department is represented by James Jacobsen. The County is represented by Deborah Seligman and Moore & Berkson, P.C. The Chapter 13 Trustee appeared through her attorney Annette DeBois. The primary issue presented to the Court was whether the Debtors' plan could be confirmed despite its intentional failure to provide for payment of the County's secured property tax claim through plan payments. The Court requested briefs, which have been filed (docs. 20 and 21), and the Court is ready to issue this ruling. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L).

First, the Court reminds the parties that there has been no evidence presented in this case at this point. The only issue before the Court is the legal question of the ability of a plan proponent to omit intentionally the payment of a secured creditor. Therefore, this Memorandum does not address the other parties' objections to confirmation[1]. In addition to the briefs submitted, the Court has taken judicial notice of the Debtors' Statements and Schedules (doc. 1), Debtors' Chapter 13 Plan ("Plan")(docs. 5 and 6) and the Proof of Claim filed by the County (claim #1).

<u>THE PLAN AND COUNTY'S OBJECTION</u>

The Plan provides for a payment of $525[2] per month for a minimum of 36 months, and as many additional months as may be necessary to complete funding of the Plan, but not more than 60 months. (¶1(a).) Debtors will also contribute any tax refunds to the Plan. (¶1(b).) The Plan first pays Chapter 13

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[1] The State of New Mexico, Taxation and Revenue Department objected because it has a priority tax claim and a general unsecured claim, and that the plan does not provide for payment of the priority claim. In addition, the State alleges that Debtors have missing tax returns, so feasibility is at issue. The Trustee objected because certain documents she requested were not provided, because the proposed plan payments do not appear to fund the plan in full, and she wants operating reports. Neither of these parties objected to the Debtors' treatment of the County.

[2] Schedules I and J shows disposable income of $528.

commissions and expenses and attorney fees. (¶2(a).) Second, the Plan pays Primus Financial Services on its secured written-down auto claim, $7,000, with interest at 6% until paid in full. (¶2(b)(2).) Secured creditors retain their liens until any allowed secured claims have been paid. (¶2(b)(3).) Third, the Plan pays, pro rata, the claims of Citifinancial for a home mortgage arrearage, $1,000, and the New Mexico Children, Youth & Family Department for a priority child support arrearage of $17,714. (¶2(c).) Third [sic, should be "Fourth"], the Plan pays, pro rata, timely filed and allowed nonpriority unsecured claims to the extent there are any funds remaining. (¶2(f).) The Plan also contemplates directly paying to two creditors "the regular payment due post-petition on these claims": Citifinancial (home mortgage), $104,000, and the County of Bernalillo (statutory lien for delinquent taxes), $1,485.[3] (¶3.) The Court interprets this provision to mean that, in the future, property taxes owing to

[3] The County's proof of claim is for $2,548.79, secured by Debtors' residence, and accruing interest at a statutory rate of 12%. No objection has been filed to the proof of claim. It is therefore deemed allowed. 11 U.S.C. § 502(a). Fed.R.Bankr.P. 3001(f). Debtors valued the property on Schedule A at $115,000. They scheduled the mortgage on Schedule D at $104,000. There is no question that County, which has a first priority lien, see §7-38-48 NMSA 1978, is fully secured. Debtors claimed all equity exempt on Schedule C and no objections were filed to the exemption.

the County will be paid as due, since there is no "regular payment" due on delinquent taxes. Therefore, the Plan states an intention to not pay the delinquent amount claimed by the County.

The Plan does not propose to avoid any liens (¶5) or assume any executory contracts (¶6). Property of the estate revests in the Debtors when the plan is completed. (¶8.)

The County objected because Plan ¶3 listed its claim at $1,485 and did not identify its collateral. The County stated it was a secured creditor for property taxes in the amount of $2,548.79 plus interest at the rate of 12% per year. The County objected that Debtors failed to list it as a secured creditor (presumably in ¶2(b) with Primus or ¶2(c) with Citifinancial, both creditors receiving payments from the Trustee). At the preliminary hearing on confirmation, County's attorney argued that Chapter 13 does not permit this treatment for secured creditors, and that § 1322 requires that the County's claim be cured in a "reasonable time." As the Court discusses below, Chapter 13 does permit the omission of a secured creditor from a plan. As to the "reasonable time" requirement, this phrase appears only in § 1322(b)(5) and applies only to claims "on which the last payment is due after the date on which the final payment under the plan is due."

County’s claim is for a prepetition tax, it is not a long term debt governed by § 1322(b)(5). Consequently, that section does not apply. At the hearing, the County also stated that it would be fine with being paid directly outside the plan. Presumably, then, the County’s objection is that the plan does not state on what schedule or at what rate of interest County would be paid outside the plan. County’s objection has not been withdrawn, and this offer was not continued in the Brief, so the Court considers it abandoned.

RELEVANT BANKRUPTCY STATUTES

11 U.S.C. § 1322, Contents of plan, provides, in part:

> (a) The plan shall--
> (1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
> (3) if the plan classifies claims, provide the same treatment for each claim within a particular class.
> (b) Subject to subsections (a) and (c) of this section, the plan may--
> ...
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
> ...

(Emphasis added.)

11 U.S.C. § 1325, Confirmation of Plan, provides, in part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if--
> ...
> (5) with respect to each allowed secured claim provided for by the plan--
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder;
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

(Emphasis added.)[4]

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[4] If a plan meets the six criteria set out in § 1325(a), the bankruptcy court must confirm the plan (absent objection by the trustee or an unsecured creditor.)

> The language of section 1325(a) sets forth the specific and limited universe of requirements that must be met by a debtor in his or her proposed Chapter 13 plan. If those requirements are met, and, as here, the Trustee fails to object to the plan pursuant section 1325(b), the statute states that the plan "shall" be approved. The Supreme Court has consistently held that Congress's use of the word "shall" acts as a command to federal courts. See, e.g., Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947) ("shall" is the "language of command"). Furthermore, by creating a finite list of six affirmative requirements necessary for a plan's confirmation, we assume that Congress intended to exclude other requisites from being grafted onto section 1325(a). See In the

(continued...)

11 U.S.C. § 1326, Payments, provides, in part:

> (c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

11 U.S.C. § 1327, Effect of confirmation, provides:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(Emphasis added.)

11 U.S.C. § 1328, Discharge, provides, in part:

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[4](...continued)
> Matter of Aberegg, 961 F.2d 1307, 1308 (7th Cir.1992) ("The bankruptcy court must confirm the Chapter 13 plan if it meets the six requirements of section 1325(a)."). Absent exceptional circumstances, to permit a bankruptcy court to exercise undefined equitable powers to supplement the requirements of 1325(a) would alter that section beyond the scope that Congress intended, transforming the finite list of requirements a debtor must meet to receive bankruptcy protection into a potentially infinite list.

Petro v. Mishler, 276 F.3d 375, 378 (7th Cir. 2002). See also United States v. Estus (In re Estus), 695 F.2d 311, 314 (8th Cir. 1982)("The bankruptcy judge must confirm a plan that meets the six criteria established by Congress in 11 U.S.C. § 1325(a).")

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a <u>discharge of all debts provided for by the plan</u> or disallowed under section 502 of this title, except any debt–
> ... [exceptions not relevant in this case.]

(Emphasis added.)

<u>RELEVANT STATE STATUTES</u>

In New Mexico, property subject to property taxation is valued as of January 1 of each year. § 7-38-7 NMSA 1978. Property taxes are payable in two installments due on November 10 of the year in which the tax bill was prepared and on April 10 of the following year. § 7-38-38 NMSA 1978. Property taxes not paid within 30 days after the date on which they are due are delinquent (unless a protest is filed). § 7-38-46(A) NMSA 1978. Property taxes imposed are the personal obligation of the property owner on the date the property was subject to valuation and a personal judgment can be rendered against the owner for the taxes that are delinquent together with any penalty and interest. § 7-38-47 NMSA 1978. A sale or transfer of the property after the valuation date does not relieve the former owner of personal liability for the property taxes imposed for that year. <u>Id.</u> Taxes on real property are a lien in favor of the state against the property

from January 1 of the tax year for which the taxes are imposed and secures the payment of the tax, interest and penalties. § 7-38-48 NMSA 1978. The lien continues until the taxes, interest and penalties are paid. Id. The lien created is a first lien and paramount to any other interest in the property, perfected or unperfected. Id. Interest accrues on unpaid property taxes at 1% per month or any fraction of the month. § 7-38-49 NMSA 1978. Delinquent property taxes also accrue a penalty of 1% per month up to 5%. § 7-38-50 NMSA 1978. If a property tax is delinquent for more than 30 days as of June 30, the county treasurer shall mail a notice to the property owner that states: 1) a description of the property, 2) a statement of amounts due, including the rates of accrual of interest and penalties, and 3) a statement that if the property taxes are not paid within three years from the date of delinquency the real property will be sold and a deed issued by the division[5]. § 7-38-51 NMSA 1978. By June 10 of each year the county treasurer shall mail a notice to each property owner of property for which taxes have been delinquent for more than two years, stating: 1) a description of the property, 2) a statement of amounts due, including the

[5] In the Property Tax Code, "department" or "division" means the state Taxation and Revenue Department. § 7-35-2(A) NMSA 1978.

rates of accrual of interest and penalties, 3) a statement that the delinquent tax account will be transferred to the department for collection, and 4) a statement that if the property taxes are not paid within three years from the date of delinquency the real property will be sold and a deed issued. § 7-38-60 NMSA 1978. By July 1 of each year, the county treasurer shall prepare a property tax delinquency list of all real property for which taxes have been delinquent for more than two years, and shall record this list with the county clerk. § 7-38-61(A) NMSA 1978. The county treasurer then notes on the property tax schedule that the account has been transferred to the department for collection. § 7-38-61(B) NMSA 1978. After receiving the tax delinquency list, the department has the responsibility and exclusive authority to take all actions necessary to collect the taxes, including bringing actions in District Courts to enforce the owner's personal liability for the tax and bringing proceedings against the property. § 7-38-62 NMSA 1978. The statutes contain detailed procedures for the department to collect taxes by selling real estate. § 7-38-65 - 67 NMSA 1978. The division may also enter into installment agreements for payment of delinquent property taxes, penalties, interest and costs. § 7-38-68 NMSA 1978. The installment agreement can

extend up to 36 months, and interest accrues during this time at 1% per month. Id. An installment agreement prevents any further actions to collect the delinquent taxes as long as the terms are met. Id.

DISCUSSION

Section 1322(a) has three requirements for a plan. First, the plan must provide for sufficient payments to the trustee to fund the plan. It does not require "all" income be paid to the trustee. Second, the plan must pay all priority claims in full.[6] Third, if the plan classifies claims, it must not discriminate unfairly[7]. Section 1322(b) lists optional plan provisions, including modifying the rights of certain secured claim holders or leaving unaffected the rights of holders of any class of claims. See 11 U.S.C. § 1322(b)(2). Overall, section 1322 suggests that a debtor may choose to not deal with a secured claim through the plan, and

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[6] The secured property tax in this case is not a priority claim. Section 507(a)(8) gives priority status only to certain "unsecured claims of governmental units." See In re McKissick, 197 B.R. 206, 207 (Bankr. M.D. Pa. 1996)(Secured tax claims cannot be unsecured priority claims.); Work v. County of Douglas (In re Work), 58 B.R. 868, 871 (Bankr. D. Or. 1986)(same).

[7] This does not mean, however, that all secured claims must be treated equally. Generally, each secured claim is properly classified in its own class and dealt with individually. See, e.g., In re Whitfield, 290 B.R. 302, 304 (Bankr. E.D. Mi. 2003).

retain sufficient funds from his or her payment to the trustee to enable the debtor to deal with the secured claim outside of bankruptcy[8].

Section 1325 dictates confirmation if certain treatment is accorded secured claims "provided for by the plan." This suggests that a debtor may choose to not "provide" for a secured claim, and have the plan confirmed if it otherwise meets the requirements for confirmation. In other words, if the plan does not "provide for" a secured claim, then the plan need not be accepted by the secured creditor, need not provide that the secured claim holder retain its lien and be paid the present value, and need not state an intention to surrender the collateral.

Section 1327(a) binds all creditors, even those who hold claims that are not provided for by the plan. This again suggests that a debtor may choose to not provide for a claim. Section 1327(c) vests property free and clear of claims or interests of any creditor provided for by the plan. This

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[8] In this case the County is an oversecured creditor. This memorandum opinion deals only with the ability of a debtor to treat a fully secured creditor outside the plan. There are other issues involved if a debtor attempts to pay an unsecured or partially secured (and hence, partially unsecured) creditor outside the plan, e.g., dissimilar treatment of unsecured claims prohibited by Section 1322(a)(3).

suggests that the property does not vest free of claims or interests not provided for by the plan, which again implies that a debtor may choose to not provide for a claim if the debtor is not seeking to alter a creditor's claims or interests in the property.

Finally, section 1328 discharges claims "provided for by the plan." Again, this suggests that a debtor may choose to forego discharge of a claim by not providing for it in the plan.

The Court has found no Tenth Circuit or Tenth Circuit Bankruptcy Appellate Panel decision on this issue. However, the Fourth, Fifth, Seventh and Eleventh Circuits all have either ruled that a chapter 13 debtor can choose to not deal with a secured claim, or that it is acceptable for debtors to pay creditors directly outside of chapter 13 plans. See, 4th Circuit cases: Universal Suppliers, Inc. v. Regional Building Systems, Inc. (In re Regional Building Systems, Inc.), 254 F.3d 528, 532 (4th Cir. 2001)("[A] Chapter 13 debtor can choose not to deal with certain secured claims. See 11 U.S.C. § 1325(a)(5), 1322(a)."); and Cen-Pen Corp. v. Hanson (In re Hanson), 58 F.3d 89, 94 (4th Cir. 1995):

> As a general matter, a plan "provides for" a claim or interest when it acknowledges the claim or interest and makes explicit provision for its treatment. If a Chapter 13 plan does not address a

> creditor’s lien (for instance, by expressly providing for payment of an allowed secured claim and cancellation of the lien), that lien passes through the bankruptcy process intact, absent the initiation of an adversary proceeding ... Several courts have held that a plan “provides for” the lien held by a secured creditor only when it provides for payment to the creditor in an amount equal to its security.

(Citations omitted.) See, 5th Circuit cases: Friendly Finance Discount Corp. v. Bradley (In re Bradley), 705 F.2d 1409, 1411 (5th Cir. 1983):

> Friendly’s contention that a chapter 13 plan may not be approved if the debtor is to make some payments “outside of the plan” is wholly without merit. This circuit has already held that, depending on the circumstances, “fully secured claims may in some instances be dealt with outside a chapter 13 plan.” Foster v. Heitkamp, 670 F.2d 478, 488 (5th Cir. 1982). Bradley’s car loan was a fully secured claim, and we agree with the bankruptcy court that her election to treat it “outside of the plan” did not jeopardize approval of the plan.

and Foster v. Heitkamp (In re Foster), 670 F.2d 478, 488-489 (5th Cir. 1982):

> We therefore agree with those courts which have concluded that fully secured claims may in some instances be dealt with outside a Chapter 13 plan. See Case, supra [In re Case, 11 B.R. 843, 846 (Bankr. D. Utah 1981)]; Wittenmeier, supra [In re Wittenmeier, 4 B.R. 86, 88 (Bankr. M.D. Tenn. 1980)].
>
> Several sections of Chapter 13 refer to payments "under the plan" (See, e.g., 11 U.S.C. §§ 1302(e)(2) and 1326(b)) or to claims "provided for by the plan," (See, e.g., 11 U.S.C. §§ 1325(a)(5) and 1328(a)) suggesting that Congress contemplated that there might be payments not "under the plan" or claims not "provided for by the plan." Although we

do not say that such statutory language must always be so read, such a reading in this case seems consistent with Congress' intent that debtors be given substantial flexibility in formulating Chapter 13 plans. Section 1325(a)(5), for instance, sets out criteria for the treatment of allowed secured claims "provided for by the plan." As discussed in Collier:

> Section 1325(a)(5) applies only to allowed secured claims provided for by the plan. Although the term "provided for by the plan" is not defined by the Code or in its legislative history, the intended meaning seems clear enough. A chapter 13 plan may, but need not, modify the rights of any or all holders of secured claims. Since a plan need not modify allowed secured claims it is discretionary with the debtor whether to make provision in the chapter 13 plan for allowed secured claims. In the event the plan makes no provision for one or more allowed secured claims, the plan is to be confirmed by the court regardless of its acceptance or rejection by holders of allowed secured claims not provided for by the plan and without any other showing being required under section 1325(a)(5). The holders of allowed secured claims not provided for by the plan may seek appropriate relief from the automatic stay in furtherance of any contractual or other remedies available against the chapter 13 debtor or their collateral.

Collier, supra, [5 Collier on Bankruptcy (15th ed. 1981)] ¶ 1325.01 at 1325-20 (footnotes omitted)[9].

See, 7th Circuit case: In re Aberegg, 961 F.2d 1307, 1309 (7th Cir. 1992)("[Bankruptcy Code Section 1322(a)(1)] has been uniformly interpreted as giving bankruptcy courts the discretion to permit debtors to make payment directly to some

[9] This passage from Colliers appears at ¶ 1325.06[1][b] at 1325-25 in the revised 15th edition.

secured creditors, provided that the plan meets all the confirmability requirements set forth in § 1325(a).")(Citations omitted.) See, 11th Circuit case: Southtrust Bank of Alabama, N.A. v. Thomas (In re Thomas), 883 F.2d 991, 998 (11th Cir. 1989), cert. denied, 497 U.S. 1007 (1990)(Debtor's confirmed plan made no provision for Southtrust, so Southtrust was not a creditor "provided for by the plan" under Section 1327(c) and its lien was not extinguished.)

Most bankruptcy and district courts are in agreement with these circuit cases. See, e.g., Unicor Mortgage, Inc. v. James (In re James), 255 B.R. 837, 837-38 (Bankr. M.D. Tenn. 1999)(Debtor "decided" to pay her mortgage outside of her chapter 13 plan. This made it "easier" for the creditor to obtain relief from the stay.); Ruxton v. City of Philadelphia, 246 B.R. 508, 512 (E.D. Pa. 2000)(When debtors' plan made no provision for the City's secured tax claim, it passed through the bankruptcy case unaffected.); In re McKissick, 197 B.R. 206, 207 (Bankr. M.D. Pa. 1996)(Where plan provides that holders of secured claims shall retain their liens, chapter 13 plan need not pay secured tax claim.); In re Harris, 107 B.R. 204, 206 (Bankr. D. Neb. 1989):

> There is no apparent requirement that a Chapter 13 plan provide for the treatment of all secured

> claims. See 11 U.S.C. §§ 1322(a), 1325(a)(5); Matter of Foster, 670 F.2d [478] at 488-89; 5 Collier on Bankruptcy, ¶ 1300; 1325.01 (15th ed.1979). A debtor may choose not to provide for one or more secured claims and elect instead to pay those claims directly to the creditor outside the plan. The lien securing those claims merely passes through the bankruptcy case unaffected. See 11 U.S.C. § 506(d). If the plan does not "provide for" the claim, it will not be eligible for discharge. See 11 U.S.C. § 1328. A Chapter 13 plan may simply be silent on a particular secured debt, such as a car loan, and thus not "provide for" the payment of the debt.

Also, In re Burkhart, 94 B.R. 724, 725 (Bankr. N.D. Fla. 1988)(The Court states that it has "frequently" allowed chapter 13 debtors to pay their secured creditors directly, but that the Court has discretion to determine which claims may be paid directly.); United States v. Evans (In re Evans), 77 B.R. 457, 459-60 (E.D. Pa. 1987)(District Court affirms Bankruptcy Court's ruling "that 11 U.S.C. § 1325(a)(5) enables a debtor to choose whether to deal with a secured claim in his plan, that is, whether to provide for or pay a secured claim inside the plan or outside the plan."); In re Waldman, 75 B.R. 1005, 1008 (Bankr. E.D. Pa. 1987)("[W]hat we are holding, in essence, is that, when a debtor opts to deal with a creditor 'outside the Plan' and, thus, as if the bankruptcy never existed as to that creditor, the debtor must forebear use of the Code to affect the rights of the secured creditor in any other way."); In re Evans, 66 B.R. 506, 509-10 (Bankr. E.D.

Pa. 1986), aff'd., 77 B.R. 457 (E.D. Pa. 1987)("Therefore, as long as a debtor does not attempt to modify the rights of secured parties per 11 U.S.C. § 1322(b)(2) in his plan, by curing arrearages therein or in any other respect, he clearly has the option of not dealing with the secured claim at all in his plan."); In re Case, 11 B.R. 843, 847-48 (Bankr. D. Utah 1981):

> Finally, for purposes of clarification, it is the opinion of this Court that, although not accomplished here, secured creditors may be handled wholly outside of the plan. The provisions of Section 1322(b)(5) make it clear that the Code anticipated that at least payments on home mortgages could properly be made outside the plan. Similarly, since every secured claim must ordinarily be classified separately as each involves a different claim to property of the debtor, there appears to be nothing improper in allowing such a claim to be excluded from treatment under the plan and to be handled individually by the debtor. In fact, the wording of Section 1325(a)(5) which deals only with secured claims "provided for by the plan" would seem to anticipate that some secured claims would, in fact, not be handled pursuant to a plan. In the case of secured claims handled wholly outside of the plan, no statutory fee of the trustee would be imposed on payments made as they are not made pursuant to the plan. Likewise, however, the debtor would not be entitled to invoke the "cram down" provisions of Section 1325(a)(5), but would be left either to pay the debt according to the original contract or to bargain with the creditor for such terms as the creditor is willing to accept. Non-payment on these agreements made outside of the plan would not constitute a default under the plan, nor would the creditor involved be affected by the provisions of the plan. The trustee would have no duty to supervise the execution of this independent relationship, and the creditor concerned would be

> left on its own to work directly with the debtor. The trustee's only concern with secured claims proposed to be paid outside of the plan would be as they affect the feasibility of the plan itself. The debtor should realize that in his proposals to handle secured claims completely outside of the plan, however, consummation of his plan would not result in a discharge of those debts. Section 1328(a) discharges the debtor, upon completion of payments under the plan, only from "all debts provided for by the plan" or which have been disallowed.

(However, in this specific case the Court disallowed treatment of the claims "outside the plan" because the Plan had valued the collateral securing the claims, and "[t]he Court has no power to affect a secured creditor's claim by determining the value of its security unless the claim is included in the plan and is to be paid under the plan." Id. at 845.); In re Hines, 7 B.R. 415, 420 (Bankr. D. S.D. 1980)(Without much discussion states that Section 1326(b) [now Section 1326(c)] allows debtors to pay creditors outside the plan.); In re Wittenmeier, 4 B.R. 86, 87-88 (Bankr. M.D. Tenn. 1980)(Section 1322(a) does not prohibit direct payments; section 1325(a) does not require all payments to be under the plan; section 1325(a)(5) suggests that there may be secured claims not "provided for" in the plan; and section 1326(b) [now section 1326(c)] recognizes that someone other than the trustee can pay creditors if the court so orders.).

Indeed, County does not dispute that the Bankruptcy Code does not require payments to a secured creditor through the Chapter 13 Trustee. See County's Brief in Support of Objection to Confirmation of Chapter 13 Plan, doc. 21, at 2. Rather, it argues that direct payments to a secured creditor are a matter of judicial discretion and should not be allowed in this case, citing Foster, 670 F.2d at 486. It is true that Foster ruled that having a debtor act as disbursing agent is "very much a matter left to the considered discretion of the bankruptcy court." Id. But, the Foster court then limited the scope of this general rule as follows:

> Where a plan designates the debtor as disbursing agent with respect to current mortgage payments to be made under the plan, then, the bankruptcy court, in deciding whether to confirm the plan, must determine whether the debtor will be able to make those payments and to comply with the plan.

Id.

> If the bankruptcy court concludes that the debtor's acting as disbursing agent with respect to the current mortgage payments will not impair the debtor's ability to make all payments under, and to comply with, the plan, then the court is obligated to confirm the plan, assuming it complies in all other respects with § 1325(a).

Id. at 487. Therefore, it appears that under Foster, the Bankruptcy Court really has discretion only over determining feasibility.

County also cites Barber v. Griffin (In re Barber), 191 B.R. 879, 881 (D. Kan. 1996), for the proposition that payments to creditors should typically presumed to be made through the Plan in the absence of unique circumstances. In Barber, both the Bankruptcy Court and District Courts acknowledged the possibility of direct payments. Id. (restating portions of Bankruptcy Court's ruling); id. at 884. The District Court concluded, however, that deviation from the practice of making payments through the Trustee should only be allowed if there was a "significant reason." Id. at 886-87. In reaching this conclusion, the Court failed to notice a distinction between treating a claim outside of a plan and having the debtor acting as disbursing agent for payments under the plan. The Court reviewed various criteria adopted by other courts[10], and commented on concerns about the

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[10] Specifically, it discussed Foster, 670 F.2d at 486 and Harris, 107 B.R. at 207. In Foster, the Fifth Circuit specifically differentiated between "The Debtors as Disbursing Agent" (Part IV of the opinion), 670 F.2d at 486, and "Treatment of Fully Secured Mortgage Claims 'Outside the Plan'" (Part V of the opinion), Id. at 488. The Barber court's criteria from Foster were those that dealt with a debtor as disbursing agent. The Harris opinion also distinguishes between "Debts not provided for in the plan" and "Debts provided for in the plan," 107 B.R. at 206. The Harris court recognized that there is no requirement that a 13 plan "provide for" all secured claims. Id. It also noted that debts "provided for" by a plan must generally be made by the Trustee. Id. The Barber court's criteria from Harris were (continued...)

integrity of the trustee system.[11] Id. at 885. The Court ultimately ruled that the Bankruptcy Court had not abused its discretion in refusing to confirm. Id. at 886. This Court agrees with the result. The Bankruptcy Court had found that the creditor was undersecured and that Mr. Barber had filed two previous chapter 13 cases that failed. Id. at 882. The District Court could have affirmed either 1) because the plan treated one unsecured creditor more favorably that others in violation of 11 U.S.C. § 1322(a)(3), or 2) on feasibility if direct payments were allowed, per Foster. Ultimately, however, this Court does not find Barber persuasive because in the case before the Court, Debtors do not want to act only as disbursing agents for a claim treated by the plan. They want to omit the secured claim from the plan.

County next argues that a desire to avoid payment of trustee fees is not a circumstance warranting direct payment, citing In re Genereux, 137 B.R. 411, 413 (Bankr. W.D. Wa. 1992), and Harris, 107 B.R. at 207. The Court has several

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[10](...continued)
those that dealt with a debtor as disbursing agent. Id. at 207. In the case before the Court, Debtors do not want to act as mere disbursing agents for a claim provided for the their Plan so these criteria would not be relevant.

[11] The Chapter 13 Trustee did not object to direct payment outside the plan in this case.

responses. First, the Debtors are not attempting a "direct payment" arrangement. They are not providing for the claim at all. Second, the documents filed in this case and the Debtors' representations to the Court do not indicate that avoidance of fees is the real issue in this case. As discussed above, Debtors face a $17,714 child support arrearage, a $1,000 home mortgage arrearage, possible liability for unfiled tax returns, and a car loan of $11,135 on a car with a value of $7,000. These are real, immediate needs that can be remedied in a Chapter 13 proceeding. Their plan, as structured, already pays all disposable income to the trustee to deal with the claims listed above. And, even omitting the County's claim, the Plan has drawn a feasibility objection from the Trustee. If Debtors were to provide for the County's claim it would probably render the plan infeasible. On the other hand, the property tax claim is not as immediate.[12] See § 7-38-51 NMSA 1978)(Three years to pay

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[12] As an aside, the Court observes that County, by objecting to confirmation of this Plan, is attempting to put itself into a better position than it would have been had debtors not filed bankruptcy. Under the state statutes, the County's collection rights are quite limited, and do not require monthly payments from a delinquent debtor. Rather, the County must sit by, accrue interest (and penalties) and wait for quite a long period of time to collect on its first priority property tax lien. In general, a creditor's position should not be enhanced by bankruptcy:

(continued...)

tax before tax deed issues.) See also § 7-38-68 NMSA 1978 (Installment agreement for an additional three years.) Therefore, it is logical for Debtors to deal with this tax claim if, when and as they can,[13] consistent with state law.[14] Third, the trustee fees that would be payable on County's claim are insignificant compared to those that will be paid for claims already in the Plan. Finally, if a debt is

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[12](...continued)

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609, 81 S.Ct. 347, 350, 5 L.Ed.2d 323 [1961].

Butner v. United States, 440 U.S. 48, 55 (1979). See also Green Tree Financial Servicing Corp. v. Theobald (In re Theobald), 218 B.R. 133, 136 (10th Cir. BAP 1998)("Green Tree is not at liberty to use the Bankruptcy Code to enable it to more expeditiously obtain relief provided for under state law, or to obtain relief wholly unavailable under state law.")(discussing 11 U.S.C. § 521.)

[13] As one court noted, "while [stay relief] is an unfortunate event, it is by no means uncommon within the context of chapter 13 for a debtor to change residential locations." James, 255 B.R. at 838.

[14] Should the County obtain stay relief to pursue its remedies, presumably the exercise of those remedies would be consistent with state law, including the protections which the law affords to the real estate owner.

not provided for, and hence not paid by the trustee, no fee is due. "A trustee's fee cannot be assessed on payments made on debts not provided for in the plan." Harris, 107 B.R. at 206 (citing 28 U.S.C. § 586(e)(2).) Therefore, even if Debtors' intent was only to avoid trustee fees, that intent is not relevant if no fee would be due because the debt was not provided for by the plan.

County's next objection is that the Plan is vague, makes no provision for interest, and states an incorrect amount for the claim. The Court finds that the Plan is not vague. It clearly makes no provision for County. As to the amount of the claim, see footnote 3. The Plan states that secured creditors retain their liens. And, as to interest, "recovery of post petition interest is unqualified" for oversecured claims. United States v. Ron Pair Enter. Inc., 449 U.S. 235, 241 (1989).

Next, County objects to confirmation on the basis of 11 U.S.C. §§ 1325(a)(5) & (6). As discussed above, § 1325(a)(5) applies to debts "provided for" by the plan. Under § 1325(a)(5), if a creditor's secured claim is not "provided for" it appears that that creditor lacks standing to object to

confirmation. Section 1326(a)(6)[15] is beyond the scope of this memorandum, and will be dealt with at a hearing on confirmation.

County's penultimate argument is that the Plan forces the County to extend new credit[16] to the Debtors, and therefore allows the Debtors to incur new debt in violation of 11 U.S.C. § 364. County has cited no authority for this imaginative proposition. Likewise, the Court has found no case directly

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[15] One wonders, however, why the County would care about the feasibility of the Plan when its claim is not to be paid by the Trustee.

[16] The only "new credit" being extended is the monthly statutory interest accrual, see Section 7-38-49 NMSA 1978, which in any event is fully collateralized.

on point[17]. The Court disagrees that the Plan violates for § 364 for several reasons.

First, Section 364 is titled "Obtaining credit." The word "obtaining" suggests more than the mere receipt or acquisition of something. It suggests purposeful behavior. Accord American Heritage Dictionary of the English Language (4th ed. 2000)("Obtain" is defined as "to succeed in gaining possession of as a result of planning or endeavor.");

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[17] The Court did, however, find one case that is instructive. In Beeler v. Harrison Jewell (In re Stanton), 303 F.3d 939, 940, the debtors owned all stock of Fleet Manufacturing ("Fleet"). Before their bankruptcy they guaranteed financing to Fleet by defendant and secured their guarantee with a second mortgage on their house. After the bankruptcy, defendant continued to advance funds to Fleet relying on the pre-existing lien on Debtors' house. Id. The trustee sought to avoid the lien and the bankruptcy court ruled for the trustee on the theory that debtors had encumbered estate assets without court authority. Id. at 940-41. The Bankruptcy Appellate Panel reversed. Id. at 941. The Ninth Circuit affirmed:

> As the Bankruptcy Appellate Panel recognized, 11 U.S.C. § 364(c) is therefore beside the point. It enables the trustee in bankruptcy to encumber assets of the estate with court approval. The reason this is beside the point is that the Stantons' house was encumbered before the bankruptcy, and [defendant] did not lend any money to the Stantons. As the Bankruptcy Appellate Panel observed, following the Stantons' Chapter 11 petition, the bankruptcy estate included the house "subject to the existing liens, which included the lien created by the prepetition trust deed." ... The Stantons would have needed court approval to incur additional secured debt, but they did not incur any additional secured debt.

Id. at 942 (Emphasis in original; footnotes omitted.)

Webster's Ninth New Collegiate Dictionary (1991)("Obtain" is defined as "to gain or attain usually by planned action or effort."); Black's Law Dictionary (6th ed. 1990)("Obtain" is defined as "to get hold of by effort.") Therefore, Section 364 should only be applicable when a trustee or debtor in possession is planning or endeavoring to obtain new credit for the estate. This Court does not view accrual of interest on a prepetition debt as purposeful behavior by a debtor. Interest, when allowed by the Code, simply compensates the creditor for the time value of the money already owed. "In most situations, interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt." Bruning v. United States, 376 U.S. 358, 360 (1964). Therefore, the Court finds that Section 364 is inapplicable in this case. See also Vincent Properties, Inc. v. Five Star Partners, L.P. (In re Five Star Partners, L.P.), 193 B.R. 603, 611 (Bankr. N.D. Ga. 1996)(Questioning whether a trustee "obtains" or "incurs" anything under section 364 by standing idle as time passes.)

Second, as a matter of law, interest continues to accrue on oversecured debts up to the value of the collateral, see 11 U.S.C. § 506(b); United Savings Assoc. of Texas v. Timbers of

Inwood Forest Assoc. Ltd., 484 U.S. 365, 372 (1988), and on nondischargeable debts, see Bruning, 376 U.S. at 361:

> Congress clearly intended that personal liability for unpaid tax debts survive bankruptcy. The general humanitarian purpose of the Bankruptcy Act provides no reason to believe that Congress had a different intention with regard to personal liability for the interest on such debts.

(Bankruptcy Act case); Tuttle v. United States, 291 F.3d 1238, 1243-44 (10th Cir. 2002)(Bruning applies to cases under the Bankruptcy Code.); Great Lakes Higher Education Corp. v. Pardee (In re Pardee), 218 B.R. 916, 921 (9th Cir. BAP 1998), aff'd., 193 F.3d 1083 (9th Cir. 1999)(Bruning applies to nondischargeable student loans.)(collecting cases.) Under County's theory that interest accrual during a bankruptcy case violates section 364, every reorganization debtor that had an oversecured debt or nondischargeable debt would be in violation of section 364 and perhaps ineligible for relief.[18] This cannot be the law.

Third, one obvious purpose of Sections 364(b), (c) and (d)[19] is to give the bankruptcy court the authority to regulate

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[18] See 11 U.S.C. § 1129(a)(1) (To be confirmable, a chapter 11 plan must comply with all applicable provisions of the Bankruptcy Code.); 11 U.S.C. § 1225(a)(1) (Same for chapter 12 plans.); 11 U.S.C. § 1325(a)(1) (Same for chapter 13 plans.)

[19] Section 364(a) allows a trustee or debtor in possession (continued...)

the trustee's or debtor in possession's incurring administrative expenses, priority administrative expenses and secured debts that will be paid by the estate and therefore impact on distributions to other creditors[20]. This purpose is not violated by Debtors' Plan in this case. Because County's interest accrual will not be paid by the estate[21], other creditors are not impacted, and Section 364 is not implicated.

County's final argument against confirmation is that the Plan's failure to cure the tax claim timely would allow Debtors to continue to breach their mortgage agreement with their mortgage lender. County lacks standing to make this argument.

Under 11 U.S.C. § 1109(b), "A party in interest, including ... a creditor ... may raise and may appear and be

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[19](...continued) that is operating a business to obtain unsecured debt in the ordinary course of business without a court order.

[20] Generally Courts remark that the purpose of this section is to induce creditors, who are often "loathe" to extend credit to debtors, by offering an escalating series of inducements that a debtor in possession may offer while attempting to obtain credit to use in a reorganization. See, e.g., In re Glover, 43 B.R. 322, 324 (Bankr. D. N.M. 1984). In the case before the Court the Debtors are not attempting to obtain credit; the interest accrual is a statutory increase on a prepetition debt.

[21] County's claim for accruing interest is secured by an exempt asset.

heard on any issue in a case under this chapter [i.e. chapter 11].”

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983)(quoting United States v. Wong Kimm Bo, 472 F.2d 720, 722 (5th Cir. 1972)). Because Chapter 13 has no parallel provision to Section 1109(b), the Court concludes that Congress did not intend to give all Chapter 13 creditors standing to object to any issue in a Chapter 13 case. Therefore, traditional notions of standing must be considered.

> Generally, litigants in federal court are barred from asserting the constitutional and statutory rights of others in an effort to obtain relief for injury to themselves. Though this limitation is not dictated by the Article III case or controversy requirement, the third-party standing doctrine has been considered a valuable prudential limitation, self-imposed by the federal courts.
>
> ...
>
> The prudential concerns limiting third-party standing are particularly relevant in the bankruptcy context. Bankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party even though that other party is present in the proceedings and is capable of representing himself. Third-party standing is of special concern in the bankruptcy context where, as here, one constituency before the court seeks to disturb a plan of reorganization based on the rights of third parties who apparently favor the plan. In this context, the courts have been understandably skeptical of the

> litigant's motives and have often denied standing as to any claim that asserts only third-party rights.

Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 643-44 (2nd Cir. 1988)(Citations omitted). See also Mount Evans Co. v. Madigan, 14 F.3d 1444, 1450 (10th Cir. 1994):

> The term “standing” subsumes a blend of constitutional requirements and prudential considerations. ... Beyond the constitutional requirements, a plaintiff must also satisfy the following set of prudential principles: (1) the plaintiff generally must assert his or her own legal rights...

(Citations omitted.) The concerns stated in these two cases are relevant here. Citifinancial was on Debtors’ mailing list, and was served with a copy of the Plan. Citifinancial has not objected. County cannot assert an objection on behalf of Citifinancial, which has not asserted its own objection.

CONCLUSION

Debtors’ Plan is confirmable over County’s objection. The Court will schedule an evidentiary hearing on confirmation to hear the remaining objections.

MATTERS SPECIFICALLY NOT ADDRESSED

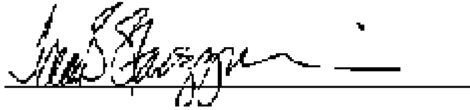
In closing, the Court emphasizes that certain issues were either not raised by the parties, or raised only in passing, and not necessary for the Court’s decision set out above.

This Memorandum Opinion should not be construed as ruling or giving an advisory opinion on them. For example, Debtors' brief (doc. 20, page 1) characterizes the plan as "providing for the Automatic Stay to remain in effect during the period of Plan performance thereby effectively freezing the claim for the life of the Plan." While delaying revestment of property to completion of the Plan may, in general, have the effect of keeping the automatic stay in place, see 11 U.S.C. § 362(c)(1), there is no motion by the County for relief from stay pending[22] and the Court does not rule on this issue. As to "freezing the claim," the Court is not sure what Debtors mean by this. This Memorandum discussed the general rule that oversecured claims are generally entitled to interest. If Debtors want a ruling on this issue, or a declaration of what rate of interest applies, they should file the appropriate motion or adversary proceeding and explain how the Court would have jurisdiction over a creditor not provided for by the Plan.

[22] Citifinancial has, since the filing of the briefs herein, filed a motion for stay relief. A stipulated order conditionally maintaining the stay in place was docketed on February 15, 2005 (doc 53).

The Court also does not address whether the Debtors' personal liability for the property tax, under § 7-38-47 NMSA 1978, is dischargeable upon completion of a chapter 13 plan.

The Court does not address whether confirmation of the plan could act as res judicata or collateral estoppel for a stay motion brought by Citifinancial for a default based on the prepetition tax liability.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 11, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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