

Dated: December 24, 2020



*Daniel P. Collins*

Daniel P. Collins, Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

<b>In re:</b>	)	<b>Chapter 13 Proceedings</b>
	)	
<b>JORDAN GARCIA and</b>	)	<b>Case No. 2:19-bk-06454-DPC</b>
<b>CYNTHIA CELENE</b>	)	
<b>BUSTAMANTE,</b>	)	
	)	<b>UNDER ADVISEMENT ORDER</b>
<b>Debtors.</b>	)	<b>RE CURE OF POST-</b>
	)	<b>CONFIRMATION DEFAULTS</b>
	)	<b>THROUGH A CHAPTER 13 PLAN</b>
	)	<b>MODIFICATION</b>
	)	
	)	<b>[NOT FOR PUBLICATION]</b>

Jordan Garcia and Cynthia Celene Bustamante (“Debtors”) seek to modify their confirmed chapter 13 plan by paying over time the post-petition arrears that have built up on the first lien against their residence. Although the holder of the first lien has not objected to the Debtors’ proposed plan modification, the chapter 13 trustee contends that the proposed plan (“Modified Plan”) is prohibited by § 1322(b)(2)<sup>1</sup> of the Bankruptcy Code. The Court now holds that, notwithstanding the language of § 1322(b)(2), paragraphs (3) and (5) authorize a modified chapter 13 debtor’s plan to cure post-petition arrears on a lien secured only by a lien on that debtor’s residence.

**I. BACKGROUND**

Debtors filed their Chapter 13 Petition on May 24, 2019 (“Petition Date”). Their 60-month Chapter 13 Plan (“Confirmed Plan”) was confirmed on November 7, 2019.<sup>2</sup>

<sup>1</sup> Title 11 of the United States Code.

<sup>2</sup> DE 27. This was then shortly amended on November 25, 2019 at DE 36.

1 Among other things, the Confirmed Plan called for pre-Petition Date arrears of \$13,105.08  
2 owed on Freedom Mortgage’s (“Lienholder”) lien against Debtors’ residence at 3410 S.  
3 88th Lane, Tolleson, AZ 85353 (“Residence”) to be paid over the course of the Plan. This  
4 Court’s Local Rules<sup>3</sup> require a debtor’s pre-petition home mortgage arrears and ongoing  
5 post-petition mortgage payments to be paid to the chapter 13 trustee under what is known  
6 as a “conduit plan.”

7 All went well with the Debtors’ conduit Confirmed Plan, that is until the COVID-  
8 19 pandemic gripped the United States in March 2020. Debtors missed their home loan  
9 payments for the months of March through June. Lienholder’s lawyer entered her  
10 appearance on June 3, 2020.<sup>4</sup> Debtors filed their Modified Plan<sup>5</sup> calling for, among other  
11 things, payment of Debtors’ post-Petition Date arrears on the Lienholder’s loan over 71  
12 months.<sup>6</sup> Although the Lienholder and its lawyer received notice of the Debtors’ Modified  
13 Plan,<sup>7</sup> it never filed an objection. However, the chapter 13 trustee, Edward Maney  
14 (“Trustee”), did file his recommendations<sup>8</sup> on August 10, 2020 requiring, among other  
15 things, that the Debtors obtain the Lienholder’s written consent to the proposed treatment  
16 under Debtors’ Modified Plan.

17 Rather than seek the Lienholder’s written consent to their Modified Plan, Debtors  
18 filed a Memorandum<sup>9</sup> contending the Lienholder, by failing to object, had accepted the  
19 Modified Plan. The Trustee filed his Memorandum<sup>10</sup> contending that, with or without an  
20 objection by the Lienholder, the Debtor’s Modified Plan cannot be confirmed under  
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23 <sup>3</sup> LR 2084-4(b)(1).

24 <sup>4</sup> DE 39.

25 <sup>5</sup> DE 43.

26 <sup>6</sup> The Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress on March 27, 2020.  
27 Under § 1113(b)(1)(C) of the CARES Act, Pub. L. No. 116-136, "for a plan confirmed prior to the date of enactment  
28 of this subsection," someone experiencing "a material financial hardship due, directly or indirectly to the . .  
pandemic," may modify a chapter 13 plan to provide for payments up to a period of no more "than 7 years after the  
time that the first payment under the original confirmed plan was due."

<sup>7</sup> DEs 43-1 and 45.

<sup>8</sup> DE 46.

<sup>9</sup> DE 60.

<sup>10</sup> DE 63.

1 § 1322(b)(2), absent Lienholder’s written consent to its treatment under the Modified  
2 Plan.

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4 **II. JURISDICTION**

5 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b)(2)(L)  
6 and 1334.

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8 **III. LEGAL ANALYSIS**

9 After a debtor’s chapter 13 plan has been confirmed, but before the completion of the  
10 plan payments, a debtor may seek to modify that plan in accordance with § 1329(a). In doing  
11 so, the debtor may seek to “(2) extend or reduce the time for such payments.” The proposed  
12 modified plan must comply with § 1322(b)<sup>11</sup> which tells us that a debtor’s chapter 13 plan  
13 may:

14 (2) modify the rights of holders of secured claims, other than a claim secured  
15 only by a security interest in real property that is the debtor’s principal  
16 residence, or of holders of unsecured claims, or leave unaffected the rights  
of holders of any class of claims;

17 (3) provide for the curing or waiving of any default;

18 (5) notwithstanding paragraph (2) of this subsection, provide for the curing  
19 of any default within a reasonable time and maintenance of payments while  
20 the case is pending on any unsecured claim or secured claim on which the  
last payment is due after the date on which the final payment under the plan  
is due;

21 A chapter 13 trustee has standing to object to the debtor’s plan under §  
22 1325(a)(1).<sup>12</sup> Where a secured creditor fails to object to the debtor’s chapter 13 plan, this  
23 usually “translates into acceptance of the plan by the secured creditor.”<sup>13</sup> However, the  
24 Lienholder’s implied acceptance of Debtor’s proposed Modified Plan does not, as Debtors  
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27 <sup>11</sup> *In re Mrdutt*, 600 B.R. 72 (9<sup>th</sup> Cir. BAP 2019) (“A modified plan is essentially a new plan and must be consistent  
with the statutory requirements for confirmation.”)

28 <sup>12</sup> *In re Andrews*, 49 F. 3d 1404, 1409 (9<sup>th</sup> Cir. 1995).

<sup>13</sup> *Id.*

1 suggest, deprive the Trustee of standing to object to the Modified Plan. As the 9<sup>th</sup> Circuit  
2 noted in *Andrews*,

3 the Chapter 13 trustee is saddled with a wide range of powers and duties...It  
4 thus would be inconsistent to provide the trustee with such a broad array of  
5 powers and duties and yet deny the trustee standing to object at the  
6 confirmation hearing when the plan fails to comply with the Bankruptcy  
Code.<sup>14</sup>

7 Since the Trustee has standing to object to the Modified Plan, the question for this  
8 Court to resolve is whether the Debtors' proposed Modified Plan complies with the  
9 Bankruptcy Code where it proposes to cure post-confirmation defaults on the Lienholders'  
10 secured claim against the Residence. The parties have cited no controlling decision from  
11 the 9<sup>th</sup> Circuit Court of Appeals or the 9<sup>th</sup> Circuit's BAP nor has this Court located such  
12 binding authority.

13 The Trustee focuses on § 1322(b)(2)'s prohibition on modification of "a claim  
14 secured only by a security interest in real property that is the debtor's principal residence."  
15 All agree that the Lienholder holds a security interest in real property and that such interest  
16 is secured only by the Residence and that the Residence is Debtors' principal residence.  
17 But does the Modified Plan seek a modification of the Lienholder's rights as a secured  
18 creditor? In this Court's view, the Modified Plan does not seek to modify the Lienholder's  
19 secured claim but, rather, seeks alter the schedule within which the Lienholder's secured  
20 claim is to be fully satisfied. The Confirmed Plan delayed the time within which pre-  
21 Petition Date arrears were to be paid to the Lienholder. That Confirmed Plan was approved  
22 without objection from the Lienholder or the Trustee. The Modified Plan likewise simply  
23 seeks to stretch the time over which Debtors' post-Petition Date arrears are paid to the  
24 Lienholder. The Debtors do not seek to dodge payment of any portion of the Lienholder's  
25 claim secured by the first lien against the Residence. The Court finds the Modified Plan  
26 does not run afoul of § 1322(b)(2).

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<sup>14</sup> *Id* at 1408.

1 Even if the Debtors' Modified Plan could be construed to modify the Lienholder's  
2 claim secured by the Debtors' Residence, the provisions of § 1322(b)(3) permit the  
3 Modified Plan to cure Debtors' post-Petition Date defaults on their obligations to the  
4 Lienholder. Paragraph (3) permits a chapter 13 plan to "provide for the curing or waiving  
5 of any default." The defaults which may be cured by a chapter 13 plan are not limited to  
6 pre-petition defaults or defaults on unsecured obligations or defaults on obligations  
7 secured by personal property or by real property which is not a debtor's principal  
8 residence. Rather, § 1322(b)(3) allows a debtor's plan to cure *any* defaults, without regard  
9 to the nature of the claim or collateral securing the creditor's claim.

10 In addition to § 1322(b)(3), this Court looks to § 1322(b)(3)(5) which permits a  
11 debtor's plan to overcome the residential loan modification restrictions of § 1322(b)(2).  
12 § 1322(b)(5) begins by explicitly noting that this paragraph controls the directives of  
13 § 1322(b)(2). It then goes on to permit a debtor's chapter 13 plan to (1) "...provide for  
14 curing of any default within a reasonable time..." and (2) "...maintenance of  
15 payments...on any...secured claim on which the last payment is due after the date on  
16 which the final payment under the plan is due." Here, the Lienholder's first position  
17 secured claim calls for a final payment to the Lienholder after Debtors' final payment is  
18 due on their proposed Modified Plan. Debtors' proposal to pay (cure) post-Petition Date  
19 defaults through payments to the Lienholder over the term of the Modified Plan is a  
20 permitted provision under § 1322(b)(5). In this regard, this Court agrees with Judge Hess'  
21 opinion in the case of *In re McCollum*<sup>15</sup>, where the court noted that § 1322(b)(5) "is not  
22 specifically limited to prepetition defaults and in fact provides for curing of 'any  
23 defaults.'" *McCollum* held "that §§ 1329, 1322(b)(2) and (5) permit the court to approve  
24 the modification of a plan to take into account post-confirmation defaults in payment to a  
25 creditor secured only by the debtor's residence."<sup>16</sup> The 11<sup>th</sup> Circuit Court of Appeals had  
26 occasion to address this same issue and found this conclusion in accord with both the

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28 <sup>15</sup> *In re McCollum*, 76 B.R. 797, 800 (Bankr. D. Or. 1987)

<sup>16</sup> *Id.*

1 legislative history behind these chapter 13 provisions and the analysis of “the leading  
2 treatise<sup>17</sup> on bankruptcy.”<sup>1819</sup>

3 Despite the Trustee’s protestations to the contrary, the Debtor’s Modified Plan does  
4 not violate the mandate of this Court’s Local Rule 2084-4(b)(2)(C). That Rule states:  
5 “Debtor must include the regular post-petition payment amount owing to the real property  
6 creditor along with the trustee’s fee of 10% in the regular plan payments.” Here, the  
7 Debtors’ Modified Plan calls for monthly payments to the Trustee in an amount sufficient  
8 to satisfy the Debtors’ regular post-petition monthly payment due to the Lienholder, as  
9 well as the Trustee’s 10% cut, plus additional amounts needed to cure pre- and post-  
10 Petition Date payment arrears on their debt owed to the Lienholder which debt is secured  
11 by the Residence.

12 Next, the Trustee references this Court’s 2018 Order in *Klave*, 2:16-bk-14246 as  
13 supporting his argument that a secured creditor’s written consent must be given if post-  
14 Petition Date defaults are to be cured under a modified chapter 13 plan. *Klave* involved  
15 the question of whether a debtor’s modified plan could escape the conduit payment system  
16 without the creditor’s written consent where the earlier confirmed plan involved the  
17 secured creditor’s voluntary participation in this Court’s Mortgage Modification  
18 Mediation (“MMM”) program. Since the secured creditor could not be forced to  
19 participate in the MMM program but voluntarily opted to do so, this Court found the  
20 debtor could not later be relieved of making conduit payments as called for in the MMM  
21 program without the written consent of the secured creditor. *Klave* is factually dissimilar  
22 to the case at bar and does not suggest that the Debtors in the case at bar must gain the  
23 Lienholder’s written consent to the Debtors’ proposed Modified Plan.

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27 <sup>17</sup> I.e., *Colliers on Bankruptcy*.

28 <sup>18</sup> *In re Hogle*, 12 F.3d 1008, 1010 fn 3 (11<sup>th</sup> Cir. 1994).

<sup>19</sup> The Trustee argues that *United Student Aid Funds, Inc. v Espinosa*, 559 U.S. 260 (2010) reminds bankruptcy courts to “not confirm plans that fail to comply with the self-executing requirements” of the Code. DE 63, page 4. Because this Court finds the Debtors’ Modified Plan complies with the noted provisions of the Bankruptcy Code, the Court does not address this argument.

1 The Trustee correctly notes, however, that the Modified Plan does not specifically  
2 indicate how or when the post-Petition Date missed payments will be made. The Modified  
3 Plan only indicates that “post-petition conduit payments for the months 3/2020 through  
4 6/2020 that have been missed based on the suspension of payments will be cured through”  
5 the Modified Plan.<sup>20</sup> This lack of specificity leaves this Court unable to determine whether  
6 the post-Petition Date default (which may be cured in the Modified Plan) is actually  
7 proposing to do so “within a reasonable time” as required by the 1<sup>st</sup> phrase of § 1322(b)(5).  
8 For this reason, the Court cannot presently approve the Modified Plan. The Modified Plan  
9 must not leave the Trustee guessing as to which obligations the Debtors’ conduit plan  
10 payments are to be applied. The Plan must indicate whether the conduit payments are to  
11 be applied to currently due principal and interest amounts or to post-Petition Date  
12 defaulted amounts or pre-Petition Date arrears or to late fees, attorney’s fees or to any  
13 other component of the Lienholder’s 1<sup>st</sup> lien secured by the Debtor’s Residence.

14  
15 **CONCLUSION**

16 Debtors’ proposed Modified Plan may be confirmed without first gaining the  
17 Lienholders’ written consent to the Modified Plan’s cure proposed for post-Petition Date  
18 defaults on Debtor’s Confirmed Plan. However, the Debtors’ Modified Plan must first  
19 provide the Trustee with greater detail on where and when Debtors’ plan payments are to  
20 be applied.

21 Debtors shall file their revised Modified Plan no later than February 1, 2021.

22  
23 **DATED AND SIGNED ABOVE.**

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<sup>20</sup> DE 43, page 7 of 9.