Not intended for publication

Dated: August 29, 2006
The following is SO ORDERED.

G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

Charles Paul Graeser, **Case No. 04-12327**

Debtors. **Chapter 13**

MEMORANDUM OPINION AND ORDER
RE: MOTION TO CEASE DISBURSEMENTS

The Court conducted a hearing on the Debtor's Motion to Cease Disbursement on July 20, 2006. FED. R. BANKR. P. 9014. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Prior to filing for bankruptcy relief, the debtor in this case, Charles Paul Graeser, ("Graeser" or "debtor"), financed the purchase of a 2000 Kia Sephia with Systems Services & Technologies, ("Systems"). The debtor included this debt in his chapter 13 plan as a secured claim with a value of $6544.53. The debtor's plan was confirmed on August 4, 2004.

On May 4, 2006, the Kia was totaled in an automobile accident. The debtor's insurance company issued a check to Systems in the amount of $2,105.00. The debtor then filed his "Motion to

Cease Disbursements" in which he sought to reclassify the remaining balance of Systems' claim as unsecured. At the hearing on this motion, the creditor objected to the reclassification.

II. CONCLUSIONS OF LAW

In the case of In re Frank and Regina Gilford, Case no. 03-12717, the Court addressed the issue of whether or not a debtor can modify a confirmed chapter 13 plan to classify a deficiency balance on a secured claim as unsecured where the collateral was destroyed in an accident. In that case, the Court looked to the the Sixth Circuit case of *In re Nolan,* 232 F.3d 528 (6th Cir. 2000) to determine whether or not reclassification of a deficiency balance is permitted where the collateral is not voluntarily surrendered, but instead, accidentally destroyed.

In *Nolan*, the Sixth Circuit stated:

> We hold that a debtor cannot modify a plan under section 1329(a) by: 1) surrendering the collateral to a creditor; 2) having the creditor sell the collateral and apply the proceeds toward the claim; and 3) having any deficiency classified as an unsecured claim.

Nolan, 232 F.3d at 535. In reaching this decision, the court engaged in a thorough analysis of § 1329 and set forth five factors which prohibited reclassifying a secured creditor. Three of those factors mandate that the debtor's proposed plan modification in the case at bar is prohibited by § 1329.

First, the *Nolan* court stated that "section 1329(a) does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim. Instead, section 1329(a)(1) only affords the debtor a right to request alteration of the amount or timing of specific payments." *Id.* at 532. If a debtor could reclassify a secured creditor as unsecured, it would have the effect of adding a claim to the unsecured creditors. The court stated that such an addition is prohibited by § 1329(a).

The second factor the *Nolan* court relied on in making its decision was that § 1325(a)(5)(B) "mandates that a secured claim is fixed in amount and status and must be paid in full once it has been allowed." *Id.* at 533. When a debtor attempts to "bifurcate a claim that has already been classified as fully secured into a secured claim as measured by the collateral's depreciated value and an unsecured claim as measured by any unpaid deficiency," the debtor is violating § 1325(a)(5)(B)(ii). *Id.*

Lastly, the *Nolan* court stated that § 1329 does not allow a debtor to reduce or increase the amount of a claim once the plan is confirmed; however, § 1329 does allow a debtor to increase or reduce the amount of payments to a particular class or to extend or reduce the time for such payments. The *Nolan* court based this finding on the use of language in the statute and concluded that "if the term 'payments' in section 1329(a) referred to the secured claim itself rather than to individual payments, the separate use of 'claims' in section 1329(a)(3) would be superfluous." *Id.* at 535.

Based on the conclusions reached by the Sixth Circuit in *In re Nolan*, the Court concluded that it had no other option but to rule that the debtor's proposed plan modification in the Gilford case was prohibited. Although the specific holding of the *Nolan* court stated that a debtor could not surrender collateral and then classify the deficiency as unsecured, the statutory inquiry engaged in by the court clearly demonstrates that any proposed post-confirmation reclassification of a secured creditor's claim is prohibited by § 1329. While this Court recognizes that collateral destroyed in an accident is fundamentally different from collateral voluntarily surrendered, the same statutory considerations apply. Until such time as the Sixth Circuit revisits its *Nolan* decision, this Court holds that a debtor cannot reclassify any deficiency balance owing to a secured creditor as unsecured.

Based on this reasoning and conclusion, the Court finds that it must deny the Debtor's motion in the case at bar. The debtor must pay the remainder of Systems' debt as a secured one through his plan.

III. ORDER

It is therefore **ORDERED** that the debtor's "Motion to Cease Disbursements" is **DENIED as follows:**

The Debtor is not allowed to classify the remaining balance of System Services & Technologies' secured claim as unsecured.

Mailing information:

Debtors
Debtors' Attorney
Brad Sigler, Creditor's Attorney
Chapter 13 Trustee