

**Dated: December 17, 2020**  
**The following is ORDERED:**



A handwritten signature in black ink, appearing to read "M. Ruthie Hagan".

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**M. Ruthie Hagan**  
**UNITED STATES BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**WESTERN DIVISION**

In re:  
**Cleo Rayford**  
Debtor

Case No. 16-29914  
Chapter 13

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**OPINION AND ORDER REGARDING MOTION TO DETERMINE  
DISCHARGEABILITY AND DETERMINATION UNDER FED. R. BANKR. P. 3002.1(h)**

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This matter is before the Court on the Motion to Determine Dischargeability [DE 50] filed by Debtor Cleo Rayford (“Debtor”) which seeks a determination that all post-petition ongoing payments as set forth in Nationstar Mortgage, LLC’s (“Nationstar” or “Creditor”) Response to Notice of Final Cure Payment [DE 49] were paid in full through the Debtor’s Chapter 13 Plan. After argument, the Court took the matter under advisement.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Accordingly, the Court has both the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII (“Bankruptcy Appeals”) of

the Federal Rules of Bankruptcy Procedure. This memorandum of decision constitutes the Court's findings of fact and conclusions of law under FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the submitted materials, including the Chapter 13 trustee's payment ledger, considered statements of counsel, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Court determines that (1) there are no pre-petition arrears owed by the Debtor and (2) there are no post-petition arrears owed by the Debtor as they were paid pursuant to the Second Amended Proof of Claim and the confirmed Chapter 13 plan, as modified. Therefore, the Court deems the mortgage current.

**DISCUSSION OF BACKGROUND FACTS AND  
INFORMATION AND PROCEDURAL HISTORY OF THIS CASE**

Debtor filed a Chapter 13 petition on October 27, 2016. Debtor's Chapter 13 plan was confirmed on January 13, 2017. [DE 17]. Creditor was the holder of a Note secured by a deed of trust on Debtor's residence located at 4165 Forest View Drive, Memphis, TN 38118. [See Claim No. 3-2]. In his Chapter 13 plan, Debtor estimated that he owed Creditor an arrearage in the amount of \$3,688.00. [DE 2]. His plan provides that the Chapter 13 trustee shall pay monthly the allowed claim for such arrearages over the course of Debtor's sixty-month plan. [*Id.*]. In addition, the plan provides that the Chapter 13 trustee shall pay, monthly, all post-petition mortgage payments beginning with the January 2017 payment. [*Id.*].

Creditor did not file a proof of claim in this case. Thus, on June 16, 2017, Debtor filed a proof of claim on its behalf asserting a secured claim in the amount of \$73,000.00, which included an arrearage in the amount of \$3,688.00. [Claim No. 3-1]. No objection to the claim was filed. On June 27, 2019, Creditor filed an Amended Proof of Claim asserting a secured claim in the

amount of \$70,584.62, which included an arrearage in the amount of \$1,528.89. [Claim No. 3-2]. The arrearage amount listed also included the following qualifying language:

**\*\*Includes Post-Petition Payments as required by local district rules\*\***

[*Id.*]. A Second Amended Proof of Claim was filed on August 20, 2019, which asserted a secured claim in the amount of \$70,764.83, which included an arrearage amount of \$1,859.10.<sup>1</sup> [Claim No. 3-3]. Again, the arrearage amount listed included the following qualifying language:

**\*\*Includes Post-Petition Payments as required by local district rules\*\***

[*Id.*].

On October 2, 2020, near completion of Debtor's Chapter 13 plan, the Chapter 13 trustee filed a Notice of Final Cure Payment and Completion of Plan Payments (the "Notice of Final Cure") [DE 45] wherein notice was given to the Creditor that Debtor paid the entire allowed pre-petition arrearage as required under the confirmed plan, thus, all amounts required to cure the default relating to the Creditor's claim were paid in full and the Debtor's monthly ongoing mortgage payment (at the time of filing the Notice of Final Cure) was currently due for October 1, 2020.

Within 21 days of the service of the Notice, a creditor must file, pursuant to FED. R. BANKR. P. 3002.1(e), a statement indicating whether it agrees that the debtor has paid in full the amount required to cure the default and whether, consistent with 11 U.S.C. § 1322(b)(5), the debtor is otherwise current on all payments or be subject to further action of the Court including possible sanctions. On October 23, 2020, the Creditor filed its Response to Notice of Final Cure Payment wherein the Creditor agreed that the Debtor paid, in full, the amount required to cure the pre-petition default on the Creditor's claim. [DE 49, Part 2]. However, the Creditor asserted that the

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<sup>1</sup> While this issue is not before the court, it appears that the Creditor added post-petition attorneys' fees of \$150 for reviewing the plan, two years after it was confirmed. [Claim No. 3-3, p. 7].

Debtor was not current on all post-petition payments consistent with 11 U.S.C. § 1322(b)(5), with remaining unpaid monthly payments for November 2016, December 2016 and October 2020 (\$467.10 + \$467.10 + \$476.51). [DE 49, Part 3]. After application of funds held in suspense, the Creditor asserted that the total post-petition amount due was \$1,176.82. *Id.* The Creditor acknowledged in its Response to Notice of Final Cure that the remaining amounts due were for the “GAP arrears for 11/2016 and 12/2016 and the ongoing payment due for 10/2020”. *Id.*

Debtor’s counsel filed a Motion to Determine Dischargeability [DE 50] on November 3, 2020, wherein Debtor sought the Court to (1) determine that all post-petition ongoing payments as set forth in Creditor’s Response to Final Cure were paid in full, (2) preclude Creditor from collecting said amount against Debtor or the underlying collateral, (3) determine what charges, if any, are recoverable by Creditor against the Debtor or the collateral, (4) alternatively, modify the plan to provide for payment of any recoverable amounts, to pay said amounts as an arrears claim and to prohibit Creditor from collecting said amounts and (5) award a reasonable attorney fee. The Court construes the motion brought by the Debtor to be one under FED. R. BANKR. P. 3002.1(h). While the Court notes no objection or other pleading filed by the Creditor, counsel for the Creditor appeared at the hearing.

### **LAW AND ANALYSIS**

The provisions of Rule 3002.1 of the Federal Rules of Bankruptcy Procedure apply in a Chapter 13 case to claims “(1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments.” FED. R. BANKR. P. 3002.1(a). Pursuant to § 1322(b)(5) of the Bankruptcy Code, Debtor's Chapter 13 plan provided for the curing of any pre-petition default and maintenance of payments with respect to Creditor’s claim, which is secured by a mortgage on her

residence. *See* 11 U.S.C. § 1322(b)(5). The “cure and maintain” provisions of Debtor's plan thus make Rule 3002.1 applicable in this case.

Pursuant to Rule 3002.1, after the debtor completes all payments under the plan, the Chapter 13 trustee must “file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim.” FED. R. BANKR. P. 3002.1(f). The holder of the secured claim must then “file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code.” FED. R. BANKR. P. 3002.1(g). The rule provides that the required statement shall be filed as a supplement to the holder's proof of claim but that it is not afforded the same prima facie presumption of validity as the original claim under Rule 3001(f). *Id.* On motion of the debtor or trustee, “the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required post-petition amounts.” FED. R. BANKR. P. 3002.1(h).

Rule 3002.1 does not expressly address the burden of proof under subsection (h). The Court infers from the absence of a presumption of prima facie validity that the claimant bears the burden of proof under FED. R. BANKR. P. 3002.1(h). Moreover, courts addressing the issue have concluded that the mortgage holder has the burden to establish outstanding post-petition obligations on the mortgage. *See In re Ferrell*, 580 B.R. 181, 185 (Bankr. D.S.C. 2017) (stating that mortgage holder was required to appear and establish the alleged post-petition defaults set forth in its Rule 3002.1(g) response); *Kreidler v. The Bank of New York Mellon Trust Co.*, (*In re Kreidler*), 494 B.R. 201, 204 (Bankr. M.D. Pa. 2013) (same).

Here, there is no dispute that Debtor has paid in full the amount required to cure the pre-petition default.<sup>2</sup> And there is no dispute that Debtor has made mortgage payments every month since 2017.<sup>3</sup> The Chapter 13 trustee records show the on-going monthly mortgage payments were paid January 2017 thru November 2020.<sup>4</sup> However, the Creditor contends that Debtor is not current on required post-petition payments and Debtor owes \$467.10 (11/1/16) + \$467.10 (12/1/16), less \$233.89 held in suspense, for a total of \$700.31 in post-petition arrearages. Debtor disputes this amount. During the hearing, Counsel for the Chapter 13 trustee noted that the November 2016 and December 2016 payments should have been listed in the Creditor's proof of claim, and the Chapter 13 trustee's office pays these "gap" payments as part of the arrearage claim.

In the Western District<sup>5</sup>, mortgages are generally provided conduit treatment (i.e. included within the plan) if the loan is delinquent at the time of filing the bankruptcy petition. The first payment will generally be the second or third month after the petition date (the exact month is determined by the debtor's plan). Because of this, the "gap" payments (i.e. post-petition mortgage installment payments that will not be paid through the plan as post-petition maintenance payments) are included in the arrearage claim even though they are actually post-petition payments.

In this case, the Debtor's plan provided for ongoing monthly mortgage payments to begin January 2017 and provided for arrearages in the amount of \$3,688.00 to be paid thru the plan [DE 2 & 17]. Debtor filed the original proof of claim for the Creditor which included an arrearage

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<sup>2</sup> The Creditor in its Response to Final Cure agrees that Debtor has paid the amount required to cure the pre-petition mortgage arrearage. [DE 49].

<sup>3</sup> While counsel for the Creditor stated she was unable to review the Chapter 13 trustee records at the time of the initial hearing, she did not intend to dispute that the monthly payments for October 2020 or November 2020 were paid if the records confirmed said payments. Counsel for the Chapter 13 trustee confirmed during the hearing that these payments were paid.

<sup>4</sup> Chapter 13 trustee Pay Records produced show on-going payments as of November 10, 2020.

<sup>5</sup> See Tennessee: Federal Bankruptcy Code Not So Uniform in Chapter 13 Practice <https://www.usfn.org/blogpost/1296766/249601/Tennessee-Federal-Bankruptcy-Code-Not-So-Uniform-in-Chapter-13-Practice> (June 2016).

amount of \$3,688.00 [Claim No. 3-1]. Two years later, the Creditor appeared and filed an Amended Proof of Claim which reduced the arrearage to \$1,528.89. [Claim No. 3-2]. However, Claim No. 3-2 specifically stated that the arrearage amount “Includes Post-Petition Payments as required by local district rules”. At the time the Amended Proof of Claim was filed, according to the Chapter 13 trustee’s pay records, the Creditor had received \$1,798.00 for the arrearage portion of its claim (i.e. more than the Amended Proof of Claim arrearage). Two months later, in August 2019, the Creditor filed a Second Amended Proof of Claim which increased its arrearage claim to \$1,859.10. [Claim No. 3-3]. Again, the Creditor specifically stated that the arrearage amount “Includes Post-Petition Payments as required by local district rules.” The Second Amended Proof of Claim included post-petition attorneys’ fees of \$150. [Claim No. 3-3, p. 7]. An Administrative Order Allowing the Second Amended Claim was entered on August 26, 2019. [DE 40]. An additional arrearage payment was made by the Chapter 13 trustee’s office to the Creditor on or about October 10, 2019, which paid the total allowed arrearage claim amount of \$1,859.10. [See Chapter 13 trustee Pay Records]. The Creditor did not receive any other arrearage payments from the Chapter 13 trustee’s office after October 2019. [See Chapter 13 trustee Pay Records].

While the Creditor filed a Response to the Notice of Final Cure indicating it did not agree that the Debtor was current on all payments, the Creditor failed to attach any meaningful ledger to account for all arrearage money it received. Unlike a proof of claim, statements filed pursuant to Rule 3002.1(g) have “no prima facie evidentiary effect and no presumptive validity.” *Bodrick v. Chase Home Fin., Inc. (In re Bodrick)*, 498 B.R. 793, 803 (Bankr. N.D. Ohio 2013); FED. R. BANKR. P. 3002.1(g). It is thus incumbent upon the Creditor to prove by a preponderance of the evidence the amount of the post-petition arrearage it claims Debtor owes.

The record is silent as to how the Creditor calculated the asserted post-petition arrearage in its Second Amended Proof of Claim. Moreover, after pouring over the Creditor's Response to Notice of Final Cure (and attachments thereto), nothing in it shows the application of arrearage payments received by the Chapter 13 trustee's office, and the Court will not speculate as to the application. The record shows, and the Court finds, that the Creditor has failed to prove by a preponderance of the evidence a post-petition arrearage still owed by Debtor. The record shows, and the Court finds, according to the Chapter 13 trustee pay records, there are no post-petition arrears owed by the Debtor as they were paid pursuant to the Second Amended Proof of Claim and the confirmed Chapter 13 plan, as modified.

The Court next turns to Debtor's request for attorneys' fees and expenses. Rule 3002.1(c) provides that a mortgage holder:

shall 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 debtor's principal residence.

FED. R. BANKR. P. 3002.1(c).

Similarly, Rule 3002.1(g) provides that a mortgage holder:

shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5).... The statement shall itemize the required cure or post-petition amounts, if any, that the holder contends remain unpaid as of the date of the statement.

FED. R. BANKR. P. 3002.1(g).

The penalty for failing to comply with Rule 3002.1(c) or (g) is set forth in Rule 3002.1(i).

The court may, after notice and hearing, take the following actions:



- (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
- (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

FED. R. BANKR. P. 3002.1(i).

For the reasons set forth herein, the Court finds, first, it has the authority pursuant to Rule 3002.1(i), pertinent caselaw, and its inherent powers, to award appropriate relief because of the Creditor's errors in (1) its Second Amended Proof of Claim, (2) its Rule 3002.1(c) Notice of Fees, Expenses, and Charges, and/or (3) its Rule 3002.1(g) Response to Notice of Final Cure. Second, this Court has the authority, pursuant to § 105(a) and its inherent powers, to award appropriate relief to the Debtor because of the Creditor's failures as described herein.<sup>6</sup>

Based on the facts and circumstances of this case, it is appropriate for the Creditor to pay reasonable attorney's fees and expenses. Debtor's counsel shall submit an itemized request for his attorney's fees and expenses associated with this matter within 14 days of this Order. A separate order will be entered by the Court regarding the granting of reasonable expenses and attorney's fees.

### **CONCLUSION**

For the reasons stated herein, the Court determines that (1) there are no pre-petition arrears owed by the Debtor and (2) there are no post-petition arrears owed by the Debtor as they were paid pursuant to the Second Amended Proof of Claim and the confirmed Chapter 13 plan, as modified.

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<sup>6</sup> The Creditor had ample time to correct any error in its claim. After the Debtor filed a proof of claim on behalf of the Creditor (and provided for payment of all arrearage in the Chapter 13 plan), the Creditor filed two separate proofs of claims wherein it reduced its arrearage claim (yet acknowledged that the arrearage claim included post-petition arrearage). The filing of these amendments triggered a modification of the plan, and the Chapter 13 trustee's office ceased sending arrearage payments to the Creditor in October 2019 in accordance with the Creditor's Second Amended Claim and the Chapter 13 plan.

Therefore, based on the foregoing and consideration of the entire Chapter 13 case and its record as a whole, the Court deems the mortgage current as of December 1, 2020.<sup>7</sup> Additionally, the Court will award Debtor's counsel reasonable attorney's fees and expenses for the additional proceeding necessary to resolve this issue.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

Cleo Rayford  
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<sup>7</sup> The Chapter 13 trustee's pay records did not include any payments that may have been made in December to the Creditor. As of the date of this order, the Debtor may have paid the December 2020 mortgage.