

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

CONDUIT MORTGAGE PAYMENTS IN
CHAPTER 13 CASES ASSIGNED TO
JUDGE WAITES AND JUDGE
DUNCAN.

OPERATING ORDER 16-02

Effective October 1, 2016, the following procedures are binding upon all parties and counsel appearing in Chapter 13 cases assigned to Judge John E. Waites and Judge David R. Duncan:

I. Requirement for the Debtor to make Mortgage Payments¹ to the Trustee. Post-petition Mortgage Payments made on claims secured by liens on real property and/or mobile homes shall be made by the Debtor to the Chapter 13 Trustee (“Trustee”) for payment through the Chapter 13 Plan² (“Conduit Mortgage Payments”) under the following conditions:

- A. When, as of the Petition Date, the Debtor is delinquent **six (6) months or more³** in Mortgage Payments owed to a Mortgage Creditor;⁴ or
- B. As part of a Section 362 Settlement Order involving a Mortgage Payment delinquency that proposes a cure of a Post-petition default in Mortgage Payments that were delinquent for **four (4) months or more** on the day the motion for stay relief was filed; or
- C. If requested by the Debtor and without objection from or with the agreement of the Mortgage Creditor and Trustee, or
- D. As otherwise ordered by the Court.

¹ “**Mortgage Payments**” are defined as the regular, ongoing monthly payments made on claims secured by liens on real property and/or mobile homes.

² When used herein, the term “Plan” shall include any applicable modifications to the Plan, including but not limited to Base Plan Amendments and Trustee’s Notices of Plan Payment Change.

³ If the Debtor’s initial proposed Plan does not provide for Conduit Mortgage Payments because the Debtor believes the Mortgage Payment delinquency is less than six (6) months, and the Mortgage Creditor thereafter files a Proof of Claim that shows a delinquency of six (6) months or more, then the Debtor shall file a modified Plan providing for Conduit Mortgage Payments as provided for herein within fourteen (14) days of the filing of the Proof of Claim.

⁴ “**Mortgage Creditor**” is defined as the holder of a note secured by a lien on real property and/or a mobile home, and any entity acting on its behalf, including, but not limited to, any subsequent holder, servicer, transferee, or trustee.

II. Exemption from Conduit Mortgage Payment Requirement.

A. **Exceptions.** Notwithstanding Section I, *supra*, the Debtor is not required to make Conduit Mortgage Payments if:

1. the real property and/or a mobile home securing the Mortgage Creditor's debt ("Collateral") is the subject of a motion to value or surrender;
2. the Mortgage Payment is being paid directly to the Mortgage Creditor by a co-debtor; and/or
3. in cases assigned to Judge Waites, when the initial plan provides for Loss Mitigation/Mortgage Modification according to Chambers' Guidelines.

B. **On Motion for Good Cause Shown.** A party may be exempted from complying with the provisions of this Order only upon a showing of good cause.⁵ The burden of proof to establish such good cause shall be on the party requesting exemption. To seek an exemption, on or before fourteen (14) days after the filing of the petition (or, if the case is converted to Chapter 13, within fourteen (14) days after the conversion), the party must file and serve on the Debtor, the affected Mortgage Creditor, and the Trustee, a motion setting forth specific factual grounds to support the relief requested.

III. Conduit Plan.

A. **Trustee Percentage Fees.** The proposed Plan shall include that payments by the Debtor to the Trustee shall provide sufficient funding to cover the Trustee Percentage Fees,⁶ in an amount no greater than 10% of receipts for all claims, including the amounts needed for payment of the Conduit Mortgage Payments.

B. **Chapter 13 Plan Language.** Conduit Mortgage Payments shall be proposed through the inclusion of approved non-standard language in the proposed Plan, as set forth in **Exhibit A** to this Order. This language is subject to objection by affected parties.

C. **Classification.** If Conduit Mortgage Payments are provided for in a proposed Plan, the Plan may include up to five (5) classes of mortgage claims, as follows:

1. **Pre-petition Arrears.** This class shall include any Pre-petition Mortgage Payments (including principal and interest, escrow(s), mortgage insurance, fees, charges, and other obligations provided for in the loan documents between the Debtor(s) and Mortgage Creditor (hereinafter the "Loan Documents")), due as of the Petition Date.
2. **Conduit Mortgage Payments.** This class shall include:

⁵ Any additional cost associated with the Trustee's statutory commission charged for disbursing the Conduit Mortgage Payments (*see* III.A) shall not, standing alone, constitute good cause justifying an exemption from the provisions of this Order.

⁶ "Trustee Percentage Fees" are the fees for the Trustee, fixed annually under 28 U.S.C. § 586(e) by the Executive Office of the United States Trustee. The applicable percentage fee shall be periodically published by the Trustee, made available on the Trustee's website, or provided upon request.

- a. Post-petition Mortgage Payments, beginning with the payment due in the third calendar month following the filing of the petition; or
- b. Post-petition Mortgage Payments, beginning with the payment due in the third calendar month following the occurrence of any other event requiring the Debtor to make Conduit Mortgage Payments.

3. **Gap Payments.** This class shall include the Post-petition Mortgage Payments due in the two (2) months:

- a. immediately after the petition is filed; or
- b. immediately after the occurrence of any other event requiring the Debtor to make Conduit Mortgage Payments.

4. **Post-petition Charges.** This class shall include all payments due to the Mortgage Creditor as described in any Notice of Post-petition Mortgage Fees, Expenses, and Charges under Federal Rule of Bankruptcy Procedure⁷ 3002.1(c) (“3002.1(c) Notice”), filed with the Court. The Debtor will be responsible for reviewing all 3002.1(c) Notices within sixty (60) days of the date of filing of such notice. If the Debtor fails to file a timely objection, then the Trustee may pay the amounts claimed in the 3002.1(c) Notice.⁸ Any request for a refund for overpayment or obligation for underpayment will be the sole responsibility of the Debtor. Once the Trustee has filed a Notice of Final Cure under Bankruptcy Rule 3002.1(f), the Debtor shall be directly responsible for any further Post-petition Charges.

5. **Post-petition Arrears.** This class shall include payments resulting from:

- a. a Moratorium Order; or
- b. the Debtor’s Post-petition delinquency in either Conduit Mortgage Payments or Plan Payments.⁹

IV. Plan Disbursements.

A. **Request for Mortgage Creditor Report.** If the Mortgage Creditor has not filed a Compliant POC,¹⁰ the Trustee may file a Request for Mortgage Creditor Report and Notice of Possible Hearing (collectively “Request”) requiring the Mortgage Creditor to file, within twenty-one (21) days of the Request, a Mortgage Creditor Report that provides the following information on the loan: an estimate of Pre-petition Arrears, the

⁷ Hereinafter all references to the Federal Rules of Bankruptcy Procedure shall be referred to as “Bankruptcy Rule.”

⁸ The Debtor’s failure to object will be deemed as a waiver of any claim against the Trustee for payment of the noticed amounts.

⁹ “Plan Payments” are defined as the gross monthly payment amount paid by the Debtor to the Trustee.

¹⁰ “Compliant POC” is defined as a Proof of Claim filed in full compliance with the Official Forms and Bankruptcy Rules 3002 or 3004, and including: (a) all relevant Loan Documents; and (b) a detailed breakdown of any escrow, mortgage insurance, or other monthly obligation as provided for in the terms of the Loan Documents.

ongoing Monthly Payment amount, and a short description of the status of escrow. The Request will contain notice to the Mortgage Creditor that a hearing on the Request has been scheduled.

If the requested information is provided to the satisfaction of the Trustee, the Court may remove the hearing upon notice by the Trustee to the Court. If the requested information is not provided, or not provided to the satisfaction of the Trustee, the hearing will be held as noticed and shall be attended by a representative of the Mortgage Creditor and counsel for the Mortgage Creditor.

B. Timing of Payments.

1. Unless otherwise ordered by the Court, Conduit Mortgage Payments will be retained by the Trustee until the entry of an Order Confirming Plan,¹¹ after which time the Trustee shall commence disbursements as soon as is practicable. Thereafter, disbursements by the Trustee will be made after receipt and posting of payments from the Debtor, but no disbursements will be made until at least ten (10) days after posting to ensure funds are available.

2. All disbursements made by the Trustee will be made in accordance with the Trustee's established office policies and procedures and may not coincide with the payment due date set forth in the Loan Documents.

C. Amount of Plan Payments. The sums held by the Trustee for disbursement to the Conduit Mortgage Payment class shall be in the amount:

1. estimated by the Debtor in the Plan and/or in a proof of claim filed by the Debtor for the Mortgage Creditor pursuant to 11 U.S.C. § 501(c)¹² (if no Compliant POC is filed);

2. set forth in the Mortgage Creditor's Compliant POC; or

3. set forth in an allowed Notice of Mortgage Payment Change filed in compliance with the deadlines and service requirements set forth in Bankruptcy Rule 3002.1(b), and using the applicable Official Forms.

D. Failure of Mortgage Creditor to file Compliant POC. In a confirmed case, until such time as:

1. the Mortgage Creditor files a Compliant POC; or

2. the Debtor files a Proof of Claim pursuant to § 501(c);

the Trustee will not disburse funds to the Mortgage Creditor for the Conduit Mortgage Payment. In the event the Mortgage Creditor files a Compliant POC after the Debtor

¹¹ If a case is dismissed prior to confirmation, disbursements will be made pursuant to the terms of SC LBR 3070-1.

¹² Hereinafter, all references to provisions under the United States Bankruptcy Code, 11 U.S.C. §§101, *et seq.*, shall be by section number only.

files a Proof of Claim on behalf of the Mortgage Creditor, the Trustee will disburse pursuant to the Mortgage Creditor's Compliant POC.

If the Mortgage Creditor does not file its Compliant POC until after the Trustee has commenced disbursements pursuant to the confirmed Plan, then any Conduit Mortgage Payments already made will be deemed to have been disbursed in the proper amount and shall be accepted by the Mortgage Creditor without assertion of default, late charges, or other fees assessed. Any resulting shortage in Mortgage Payments will be classified and paid as Post-petition Charges (*see* III.C.4).

E. **Notice of Payment Change.** No Notice of Payment Change filed by the Mortgage Creditor pursuant to Bankruptcy Rule 3002.1 shall be effective to change the amount of the Conduit Mortgage Payment unless and until a Compliant POC is filed.

F. **Plan Payments.**

1. **Changes in Plan Payments.** After confirmation, the Trustee is authorized to increase monthly Plan payments by the amount necessary to fund the Plan if the Plan becomes no longer mathematically viable due to the filing of any of the following:

- a. Notice of Mortgage Payment Change;
- b. Order Granting Moratorium in Plan Payments;¹³
- c. An Amended Proof of Claim; or
- d. Notice of Post-petition Fees, Expenses, and Charges (subject to **III.C.4, *infra***).

2. **Increases in Plan Payments.** The Trustee may increase the monthly Plan Payment by filing a Trustee's Notice of Plan Payment Change in the form attached hereto as **Exhibit B**, and providing notice to the Debtor and Debtor's attorney.

3. **Specific Dollar Amounts.** Unless the Debtor is required to pay specific dollar amounts to priority and/or general unsecured creditors under § 1325(a) or (b), the Trustee is not required to seek an increase in Plan Payments in order to achieve or maintain a certain dividend to general unsecured creditors.

4. **Reduction in Plan Payments.** Nothing herein shall prevent the Debtor from seeking a reduction in Plan payments in the event the Conduit Mortgage Payment decreases for any of the reasons listed in this Section IV.F.

5. **Returned Payments.** Payments from the Debtor to the Trustee that are returned for insufficient funds or for any other reason by the Trustee's financial institution will be deemed "not received."

6. **Payments Arising out of a § 362 Settlement Order.** The terms and

¹³ If the Court enters an Order granting the Debtor's motion to defer payments due under a Plan that includes Conduit Mortgage Payments, the Trustee may file a Trustee's Notice of Plan Payment Change to increase the remaining Plan payments by an amount sufficient to make up the deferred payments before the completion of the Plan, if necessary.

timing of disbursements of Post-petition Arrearages as a result of a § 362 Settlement Order referenced in I.B, *infra*, may be:

- a. set forth in a § 362 Settlement Order containing the consent of the Trustee; or
- b. treated in the Post-petition Arrears class in a modified Plan proposed by the Debtor.

7. **Insufficient Payments.** If the Debtor pays the Trustee less than the amounts needed to fund the Plan, the Trustee is authorized to apply the funds received and make disbursements in the following order:

- a. Trustee percentage fees;
- b. Conduit Mortgage Payments;
- c. All other secured claims (including but not limited to Pre-petition Arrears, Gap Payments, Post-petition Charges and Post-petition Arrears) and the balance of the Debtor's Attorney's Fees¹⁴ included in the Plan, on a *pro rata* basis;
- d. Priority unsecured claims on a *pro rata* basis;
- e. General unsecured claims on a *pro rata* basis.

V. Mortgage Creditors.

A. **Limitations on Charges.** For so long as the Debtor remains current in Conduit Mortgage Payments pursuant to the Plan, and regardless of the date of disbursement of the Conduit Mortgage Payment by the Trustee, the Mortgage Creditor shall not: (1) declare the loan in default; (2) impose any Post-petition Charge; or (3) seek to recover or assess late fees or penalties.

B. **Change by Mortgage Creditor of Name, Address, Servicer, or Trustee, or transfer or sale of Loan Documents.** For the purpose of disbursing payments, the Trustee will not acknowledge any change of the name or address of the Mortgage Creditor or Servicer, or any Transfer or Assignment of Claim, until a reasonable time after the filing of a notice that complies with Bankruptcy Rule 3001(e) and/or other applicable Rules.

¹⁴ Nothing in this section is intended to alter the provisions of SC LBR 3015-1 and the exhibits thereto, which provide that, following confirmation of the Plan, the Trustee shall disburse \$1,000 to the attorney for the Debtor from the initial disbursement. *See* SC LBR 3015-1, Exhibit A at IV.A.

EXHIBIT A TO OPERATING ORDER 16-02
APPROVED NON-STANDARD LANGUAGE FOR CONDUIT MORTGAGE PLANS

Non-standard language approved for Conduit Mortgage Plans, to form plan, Exhibit A to SC LBR 3015-1:

Substitute as ¶ III(A):

A. PAYMENTS FROM THE DEBTOR TO THE CHAPTER 13 TRUSTEE (THE “TRUSTEE”): The Debtor submits to the supervision and control of the Trustee all or such portion of future earnings or other future income as is necessary for the execution of the plan. In addition, the Debtor will pay to the Trustee any portion of a recovery under a Pre-petition claim or cause of action that constitutes disposable income or is not exempt.

As required by Operating Order 16-02 dated August ____, 2016 (“Operating Order”), which is incorporated herein by reference, this plan provides for the Debtor to make Mortgage Payments to the Trustee on a conduit basis. In the event of a conflict between this document and the Operating Order, the terms of the Operating Order control.

The first plan payment from the Debtor is due to the Trustee not later than thirty (30) days following the date of the filing of the bankruptcy petition, and monthly plan payments are due every thirty (30) days thereafter.

The Debtor shall pay to the Trustee the sum of \$____per month for a period of ____months, unless all allowed claims (other than long-term claims) are fully paid pursuant to the plan.

Except for the initial disbursement after confirmation,¹⁵ which is addressed in IV.A.1. below, the Trustee shall apply any funds received in the order set forth below:

1. Trustee percentage fees;
2. Ongoing Conduit Mortgage Payments;
3. All other secured claims (including but not limited to Pre-petition Mortgage Payments, Gap Payments, and Post-petition Charges) and Debtor’s attorney’s fees included in the Chapter 13 Plan, on a *pro rata* basis;
4. Priority unsecured claims on a *pro rata* basis;
5. General unsecured claims on a *pro rata* basis.

Nothing in this plan should be interpreted to impair the right of any party in interest to seek the appropriate relief from the Court as a result of the Debtor’s failure to make Conduit Mortgage Payments or Plan Payments to the Trustee.

¹⁵ Nothing in this section is intended to alter the provisions of SC LBR 3015-1 and the exhibits thereto, which provide that, following confirmation of the plan the Trustee shall disburse \$1,000 to the attorney for the Debtor from the initial disbursement. *See* SC LBR 3015-1.

The Trustee is authorized to increase monthly plan payments by the amount necessary to fund the Plan if the Plan becomes no longer mathematically viable due to the filing of any of the following:

1. Notice of Mortgage Payment Change;
2. Order Granting Moratorium in Plan Payments;
3. An Amended Proof of Claim; or
4. Notice of Post-petition Fees, Expenses, and Charges (subject to ¶ IV(B)(3)(d) below).

The Trustee may make these payment changes by filing a Trustee's Notice of Plan Payment Change and providing notice to the Debtor and Debtor's attorney.

An increase in Conduit Mortgage Payments may decrease the dividend, if any, paid to general unsecured creditors. Unless the Debtor is required to pay specific dollar amounts to priority and/or general unsecured creditors under 11 U.S.C. § 1325(a) or (b), the Trustee is not required to seek an increase in plan payments in order to achieve or maintain a certain dividend to general unsecured creditors.

Nothing herein shall prevent the Debtor from seeking a reduction in plan payments in the event the Conduit Mortgage Payment decreases for any of the reasons listed in this section.

Add as substitute for ¶ IV(B)(3) – add subsequent lettered ¶s :

3. **Mortgage payments.**

Insert complete Property address, including zip code and TMS #

Ongoing Mortgage Payments will be paid by the Trustee to Mortgage Creditors (**list the name and address of each Mortgage Creditor**) on a conduit basis. For so long as the Debtor remains current in Conduit Mortgage Payments pursuant to the plan, and regardless of the date of disbursement of the Conduit Mortgage Payment by the Trustee, the Mortgage Creditor, any servicer, trustee for the loan, or successor-in-interest, shall not: (1) declare the loan in default; (2) impose any Post-petition Charge; or (3) seek to recover or assess late fees or penalties. Payments from the Debtor to the Trustee that are returned for insufficient funds or for other reasons by the Trustee's financial institution will be deemed "not received." The Mortgage Creditor shall apply all Trustee disbursements as designated by the Trustee, in accordance with the classes below:

a. **Pre-petition Arrears.**

To (**creditor name**): The Trustee shall pay the **Pre-petition Arrearage (including month of filing)** as stated in the creditor's allowed claim or as otherwise ordered by the Court at the rate of **\$payment amount** or more per month, [**along with (percent)% interest, if applicable**].

Note to users: add separate paragraphs for each creditor entitled to be paid arrears.

b. **Conduit Mortgage Payments (ongoing Post-petition Monthly Mortgage Payments)**. Beginning in the third calendar month following the filing of the petition or the occurrence of any other event requiring the Debtor to make Conduit Mortgage Payments, the Trustee shall pay the ongoing Mortgage Payments due to Mortgage Creditors as indicated in the chart below. Unless otherwise ordered, Conduit Mortgage payments will be retained by the Trustee until after confirmation of the plan and until such time as either the Debtor files a proof of claim for the Mortgage Creditor pursuant to

11 U.S.C. § 501(c), or the Mortgage Creditor files a proof of claim in compliance with the Official Forms. Mortgage Creditors shall apply the payments designated by the Trustee as Conduit Mortgage Payments solely to Post-petition obligations that accrue during or after the month specified herein. If the Conduit Mortgage Payments are placed into a suspense, forbearance, or similar account, they will be deemed to have been timely applied pursuant to this subsection. Mortgage Creditors shall file and serve a Notice of Mortgage Payment Change in accordance with the applicable Official Form, within the deadline and in compliance with the service requirements set forth in F.R.B.P. 3002.1(b), to reflect any changes in the monthly mortgage payments or escrow amounts that occur during the term of the plan.

<i>Mortgage Creditor's name, including servicer/trustee as applicable, at time of last notice</i>	<i>Ongoing Monthly Mortgage Payment Amount*</i>	<i>Does payment include escrows for real estate taxes or homeowners' insurance or both? Yes/No</i>
	\$	
	\$	

*Amount(s) listed above will be deemed to be the amount of the ongoing Mortgage Payment. The Debtor asserts that the above amount is correct as of the last written notice (including escrow amounts, if applicable). Upon the filing of a Proof of Claim in compliance with the Official Forms and F.R.B.P. Rule 3002 or 3004, and twenty-one (21) days after the filing of a Notice of Mortgage Payment Change filed in compliance with the deadlines and service requirements set forth in F.R.B.P. 3002.1(b) and using the applicable Official Forms, the Trustee shall be authorized to disburse the monthly payment amount provided by the Mortgage Creditor, if that amount is higher than stated in the plan.

c. **Gap payments.** The Post-petition Mortgage Payments for the two (2) months immediately after the petition is filed, or the two (2) months immediately after the occurrence of any other event requiring the Debtor to make Conduit Mortgage Payments, shall be cured over the full term of the plan at the rate of \$[payment amount] or more per month, [along with (percent)% interest, if applicable].

d. **Post-petition Charges.** This class includes all payments due to the Mortgage Creditor as described in any Notice of Post-petition Mortgage Fees, Expenses, and Charges under F.R.B.P. 3002.1(c) ("3002.1(c) Notice"), filed with the Court. The Debtor will be responsible for reviewing all filed 3002.1(c) Notices within 60 days of the date of filing of such notice. If the Debtor fails to object within 60 days, then the Trustee may pay these amounts as filed, on a *pro rata* basis as funds are available. The Debtor's failure to object will be deemed as a waiver of any claim against the Trustee for payment of these amounts. Any request for refund of overpayment or obligation for underpayment will be the sole responsibility of the Debtor. Once the Trustee has filed a Notice of Final Cure under F.R.B.P. 3002.1(f),

the Debtor shall be directly responsible for any further Post-petition fees and charges.

e. **Post-petition Arrears resulting from a Moratorium Order or from the Debtor's Post-petition delinquency in either mortgage or plan payments.**

To (**creditor name**): The Trustee shall pay the Post-petition Arrearage for the following calendar month(s):_____. Disbursements will be made at the rate of **\$payment amount** or more per month, [**along with (percent)% interest, if applicable**].

PROPOSED EXHIBIT B TO OPERATING ORDER 16-02
NOTICE OF PLAN PAYMENT CHANGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

CASE NO:
CHAPTER 13

**TRUSTEE'S NOTICE OF PLAN
PAYMENT CHANGE**

DEBTOR(S)

TAKE NOTICE THAT, as the result of escrow adjustment, mortgage modification, Post-petition mortgage fees and charges, or the granting of a moratorium, the trustee deems it necessary for the Chapter 13 plan payment to change.

If no timely written objection is filed, the new Chapter 13 plan payment amount will change to \$_____, effective on the eleventh (11th) day following the date of this Notice. This change in amount does not change the date payments are due to the trustee.

Date: _____

Chapter 13 Trustee