UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE BRENDAN LINEHAN SHANNON

824 N. MARKET STREET
WILMINGTON, DELAWARE
(302) 252-2915

July 16, 2019

Lauren D. Crump, Esq.
Alba Law Group, P.A.
240 N. James Street, Suite 100E
Newport, DE 19804

William F. Jaworski, Jr., Esq.
The Law Office of William Jaworski
1274 S. Governors Ave.
Dover, DE 199904

Re: *In re Ricky and Alicia Porter*
Case No. 18-10669 (BLS) (Chapter 13)

Dear Counsel:

Before the Court is a dispute relating to a claim held by PennyMac Loan Services, LLC ("PennyMac") against the Debtors Ricky and Alicia Porter. PennyMac holds a mortgage on the Debtors' home and filed a claim reflecting an arrearage on the petition date of $332.46 (the "Claim"). In a twist not often seen in our cases, the Debtors were contractually current on their mortgage payments when they filed. The arrearage in the Claim reflects only a projected escrow shortage. The Debtors objected to the Claim [Docket No. 19]. They do not dispute PennyMac's mortgage or the underlying claim—they contest only the asserted arrearage amount and they assert it should be reduced to $0. For the reasons that follow, the Court will overrule the Debtors' objection.

Under the Real Estate Settlement Procedures Act ("RESPA"), a mortgagee may require a borrower to make payments into an escrow account to be used toward paying future property tax and insurance. Pursuant to RESPA, PennyMac's mortgage anticipates that it will collect and hold an escrow for future taxes and insurance in an amount determined "on the basis of current data and reasonable estimates of expenditures of future Escrow Items." [Docket No. 20-2 at 7]. Per PennyMac's estimates, the Debtors would owe $1,745.04 over the twelve months following the petition. Because the Debtors' escrow account only had $1,412.04 on the petition date, PennyMac asserts it has a claim for $332.46 in projected escrow shortage. PennyMac argues that shortfall should be treated as arrearage and, in support, highlights the language in Official Form 410A that includes projected escrow deficiencies in the calculation of prepetition arrears. *See* Claim 16-1. PennyMac adds that Rule 9009 provides the official forms "shall be used without alteration" and that the parties are prohibited from changing them. Based on the technical language in the Official

Form, therefore, PennyMac argues that any projected escrow shortage must be treated as a prepetition claim.

In response, the Debtors argue the escrow shortage payments should be treated as post-petition claims. The tax and insurance payments will not accrue until after the petition date and, therefore, the Debtors argue they should be treated as they come due post-petition. The Debtors' position reflects practical and procedural considerations: a debtor believing herself current as of the petition date (and with no way of actually discerning if there will be an escrow deficiency at some future date) will file a Chapter 13 plan based on zero prepetition mortgage arrears. The confusion over how to treat the escrow shortage compels mortgagees to file an objection to the plan on the basis of the treatment of arrearage. The debtor then must reimburse the mortgagee for the filing or counsel fees associated with filing the objection.[1] In addition, if the claim is paid through the plan, the debtor must pay another layer of cost through Chapter 13 Trustee fees. These Debtors acknowledge that PennyMac must do the escrow analysis on Official Form 410A,[2] but they maintain the Code and Rules do not offer a procedure for treating the escrow shortage that is binding on this Court.

The Court is persuaded by the arguments advanced by PennyMac and will find that the escrow shortfall must be treated as a pre-petition claim. In so ruling, the Court notes that this result is clearly the intended outcome of Official Form 410A, Rule 9009, and Local Rule 3023-1(b)(ii)(D). When filing a claim, a mortgagee that is secured by a debtor's principal residence must fill out Official Form 410A. The Form asks the mortgagee to list expenses and calculate the outstanding debt, prepetition arrearage, and the monthly payment. Significantly, Form 410A includes "projected escrow shortage" in the calculation of "total prepetition arrearage." It would therefore appear that the drafters of Form 410A have already answered this question. As PennyMac noted at the hearing on this matter, Bankr. R. 9009 provides that all official forms must be used "without alteration." Even if it wanted to treat the claim otherwise, PennyMac is required to include the projected escrow shortage in the calculation of pre-petition arrears.

The Local Rules further support this approach. Local Rule 3023-1(b)(ii)(D) provides "mortgagees shall not include any prepetition cost or fees or prepetition negative escrow in any post-petition escrow analysis. These amounts shall be included in the prepetition claim amount unless the payment of such fee or cost was actually made by the servicer." Based on the unambiguous language in the Local Rules, the Court does not need to reach any further into this issue. The drafters of the Official Forms and the Local Rules already answered the question and have advised that the projected escrow must be treated as prepetition arrearage.

The Debtors raise a number of valid concerns. In particular, the Debtors argue that treating the projected escrow as prepetition arrearage results in unnecessary cost to them. The Debtors' concerns are well-founded, but are not enough to overcome the clear and unambiguous language found throughout the Rules and Official Forms. And, as PennyMac pointed out at the hearing on

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[1] The parties agreed at oral argument that the mortgage documents require the Debtor to reimburse PennyMac for fees associated with filing objections to the Debtors' Chapter 13 Plan.

[2] The Debtors also acknowledge Local Rule 3023-1(b)(ii)(D), which provides mortgagees "shall not include any prepetition cost or fees or prepetition negative escrow in any post-petition escrow analysis. These amounts shall be included in the prepetition claim amount unless the payment of such fee or cost was actually made by the servicer."

the matter, the Debtors and the mortgagee may confer and reach an agreement amongst themselves on how to treat these types of claims. The Court notes that the Official Form was approved by the Judicial Conference and blessed by Bankr. R. 9009. Pursuant to the existing authority on this matter, therefore, the Court will rule that the projected escrow shortage must be treated as prepetition arrearage, absent an agreement amongst the parties to treat them otherwise. The parties are requested to confer and submit an order consistent with the foregoing.

Very truly yours,

Brendan Linehan Shannon
United States Bankruptcy Judge

cc: Michael B. Joseph, Esquire

BLS/cmw