

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No. 07-34184
)
Leonard S. Tieman and) Chapter 13
Denise L. Tieman,)
)
Debtors.) JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER

This case is before the court on Debtors’ Objection to Claim of Ford Motor Credit Company LLC (“Objection”) [Doc. # 33] and Ford Motor Credit’s response [Doc. # 35]. The court held a hearing on the Objection that counsel for Debtors and Ford Motor Credit attended by phone. The parties were granted leave to, and did, file supplemental briefs in support of their respective positions. [Doc. ## 44 & 45]. Because the court finds that there is no controversy presently before the court to which Debtors’ Objection relates, the court will overrule the Objection.

BACKGROUND

On January 4, 2006, Debtor Leonard S. Tieman (“Tieman”) executed a retail installment contract and obtained a loan from Mathews Ford Linc Merc Inc. (“Mathews Ford”) in the amount of \$33,027.76 for the purchase of a 2002 Ford F250 pickup truck (“Vehicle”). Pursuant to the contract, Tieman granted Mathews Ford a security interest in the Vehicle. The contract and security agreement was subsequently assigned to Ford Motor Credit, and the lien was duly noted as the first lien on the title to the Vehicle.

Debtors filed this Chapter 13 case on September 26, 2007, listing Ford Motor Credit on their

Schedule D - Creditors Holding Secured Claims. They scheduled the debt at \$26,629 secured by the Vehicle that they valued at \$11,239. On the same date, they filed a proposed Chapter 13 plan, wherein they proposed keeping the Vehicle and making direct payments to Ford Motor Credit outside of the plan. [Doc. # 2, ¶ 6]. The proposed plan was served on Ford Motor Credit at the following address set forth in Debtor's creditor matrix: Ford Credit, P.O. Box 152271, Irving, TX 75015. The plan also included a paragraph identified as "Property to be Surrendered to Secured Creditor," under which Debtors stated "None." [Id. at ¶ 9]. The proposed plan provided that "unsecured debts shall be paid 100 cents on the dollar. . . ." [Id. at ¶ 4(d)(2)]

On October 17, 2007, Ford Motor Credit filed a proof of claim [Claim # 4], asserting a total debt of \$22,457.80 as being fully secured and attaching the retail installment contract and the Ohio Certificate of Title showing it as the first lienholder in Tieman's Vehicle. The proof of claim is signed by Elaine DeFelice as an "[a]gent" of Ford Motor Credit without further specifying her title. The proof of claim provides that notices should be sent to the following address, which differs from the address in the creditor matrix: Ford Motor Credit Company LLC, P.O. Box 537901, Livonia, MI 48153-9905.

On November 21, 2007, Debtors served Ford Motor Credit at the Irving, Texas address with notice that the confirmation hearing would be held on January 29, 2008. On December 28, 2007, Debtors filed an Amended Chapter 13 Plan. The proposed amended plan altered the treatment of the debt owed to Ford Motor Credit. Paragraph 6 was amended by deleting Ford Motor Credit as a creditor to whom payments outside of the plan would be made, and paragraph 9 was amended to read "Property to Be Surrendered to Secured Creditor in full satisfaction of the debt" and listed the debt as follows:

Name	Amount of Claim	Description of Property
FORD CREDIT	\$15,390.00	2002 FORD SUPER DUTY LARIOT/DEISEL

[Doc. # 27]. The proposed 100% dividend to be paid to unsecured creditors remains unchanged. The proposed amended plan was also served on Ford Motor Credit at the Irving, Texas address.

On January 16, 2008, after Debtors had filed their proposed amended plan, counsel for Ford Motor Credit filed a notice of appearance and request that all notices and other papers to be served in this case be served on counsel. A confirmation hearing was held on January 29, 2008. There was no appearance by or on behalf of Ford Motor Credit and it filed no objection to Debtors' proposed amended plan. The court entered an order confirming the Amended Chapter 13 Plan on February 15, 2008.

On June 10, 2008, Debtors filed the instant Objection to Claim Number 4 filed by Ford Motor Credit. Ford Motor Credit filed a timely response and filed a motion for relief from the automatic stay due to

Debtors' failure to make monthly payments on the debt. Debtors did not object to the motion for relief and the court entered an order granting Ford Motor Credit's motion on July 9, 2008. Although the court's order granted Ford Motor Credit leave "to file an unsecured deficiency claim within 60 days after liquidation of the Collateral, if such claim exists," [Doc. # 41], to date, no such claim has been filed. The record is silent as to whether the Vehicle has been sold or, if so, as to how and when it was sold.

LAW AND ANALYSIS

In their objection to Ford Motor Credit's claim, Debtors argue that their Amended Chapter 13 Plan provides for surrender of the Vehicle in full satisfaction of the debt owed. Ford Motor Credit contends that it is entitled to file an unsecured claim for the deficiency balance after sale of the vehicle. It argues that the confirmation of Debtors' plan occurred in violation of Ford Motor Credit's due process rights because Debtors failed to serve the amended plan and notice of the confirmation hearing at the address for notices set forth in its proof of claim in accordance with Rule 2002(g) of the Federal Rules of Bankruptcy Procedure. It further argues that surrender in full satisfaction is considered a contested matter and, under Bankruptcy Rule 9014, must be raised by motion and served in accordance with Rule 7004. Finally, Ford Motor Credit relies on the Sixth Circuit's decision in *In re Long*, 519 F.3d 288 (6th Cir. 2008), interpreting the "hanging paragraph" portion of 11 U.S.C. § 1325(a) as allowing for deficiency claims following surrender of vehicles acquired for debtors' personal use within 910 days of filing their bankruptcy petition.

First, Ford Motor Credit cites no authority for the proposition that surrendering a vehicle in full satisfaction of a debt is a contested matter subject to the provisions in Rule 9014 that relief must be requested by separate motion and served in accordance with Rule 9014. Rule 9014 provides that in a contested matter "*not otherwise governed by these rules* relief shall be requested by motion" and "shall be served in the manner provided for service of a summons and complaint by rule 7004." Fed. R. Bankr. P. 9014(a) & (b). The Bankruptcy Code provides that a plan may "modify the rights of secured claims," 11 U.S.C. § 1322(b)(2), and describes the ways in which a debtor may treat secured claims in a Chapter 13 plan, including surrendering the property to the holder of the claim, *see* 11 U.S.C. § 1325(a)(5). Rule 3012 governs valuation of a secured creditor's collateral. "Valuation of a secured creditor's collateral by motion is permissive, not mandatory." *In re Hudson*, 260 B.R. 421, 432 (Bankr. W.D. Mich. 2001). And Rules 3015(d) and 2002(b) govern the manner in which notice of the plan is provided to creditors. Therefore, the manner in which a debtor seeks to surrender a vehicle in full satisfaction of a debt in a Chapter 13 case and provide notice that it is seeking such relief is "otherwise governed" by the Bankruptcy Rules and a separate motion under Rule 9014 is not required as long as the plan provisions are effective to accomplish the desired

treatment of the secured claim. *See In re Hoskins*, 262 B.R. 693, 697-98 (Bankr. E.D. Mich. 2001)(strip off of second mortgage can be accomplished through plan, which functions as equivalent of motion under Rules 9013 and 9014, if the plan itself provides sufficient information to affected creditor); *In re Perry*, 337 B.R. 649, 654-55 (Bankr. N.D. Ohio 2005)(discussing specificity of description of treatment of secured creditor's claim required to effect modification through plan confirmation process).

Next, the court notes that *Long* was decided on March 4, 2008, after confirmation of Debtors' Amended Chapter 13 Plan, prior to which there was a split of authority as to the correct interpretation of § 1325(a)'s hanging paragraph. *See In re Hill*, Case No. 06-50972, 2007 Bankr. LEXIS 2350, *4-5, 2007 WL 2021897, *2 (Bankr. E.D. Tenn. July 6, 2007) (citing cases). The court assumes that Ford Motor Credit's reliance on *Long* is in conjunction with its argument that Debtor's objection based on the res judicata effect of the confirmation order should be overruled because the order was entered in violation of its due process rights. While there are due process concerns in the manner in which Debtors served Ford Motor Credit with the amended plan and notice of the confirmation hearing,¹ to the extent that Ford Motor Credit is arguing that the confirmation order is not binding due to the fact that notice that was defective, the court does not believe that the claims allowance process is the proper procedural context in which to address the argument. Rather, challenges to a confirmation order should be raised in an adversary proceeding to revoke the confirmed plan under § 1330(a) or in a motion to vacate the order under Rule 9024, depending on the facts of the case. *See In re Hudson*, 260 B.R. at 440, 445 (finding that notice problems should be addressed in the proper context, under Section 1330(a) or 9024, "rather than being utilized as a reason to disregard the Bankruptcy Code-mandated binding effect of a confirmed plan."); *Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 147 (B.A.P. 9th Cir. 2004)(citing *Hudson*); *cf. Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160 (4th Cir. 1993) (reversing denial of motion to revoke confirmation order where notice to creditor of confirmation hearing was inadequate). Although Ford Motor Credit stated in its supplemental brief that it was filing a motion to vacate the confirmation order, no such motion has been filed.

Notwithstanding that Ford Motor Credit's due process argument is not presented in the proper procedural context, the court finds that Debtors' Objection must be denied as it suffers from several

¹ The court is not convinced that the filing of a notice of appearance by counsel for Ford Motor Credit after the amended plan and notice of the confirmation hearing were served rectifies any due process violations that might have occurred. Nor is the court convinced that the claimed insufficiency of Ford Motor Credit's proof of claim due to it being signed by an individual identified only as an "agent" without further designating her position with the corporation renders any deficient notice adequate as argued by Debtors.

fundamental problems. Debtors ask that Ford Motor Credit's claim be treated as set forth in the amended plan and objects to it amending its claim to include an unsecured deficiency claim. Paragraph nine of the amended plan, however, at least arguably provides only for surrender of the Vehicle in satisfaction of the secured debt, as the debt listed in that paragraph is only the secured portion of the debt owed to Ford Motor Credit as scheduled in Debtors' Schedule D. *See Hildebrand v. Hays Imports, Inc.*, 279 B.R. 218, 223 (Bankr. M.D. Tenn. 2002)(“confirmation in this case may well be preclusive of relitigation of the \$15,000 value for Hays' collateral”). Moreover, to the extent that Debtors are challenging this court's order granting Ford Motor Credit relief from stay and leave to file an unsecured deficiency claim, they too have not presented their argument in the proper procedural context, namely, a motion to vacate under Rule 9024.² Finally, at this time, there is no controversy before the court with respect to the allowance of any deficiency claim since Ford Motor Credit has not yet filed a deficiency claim or amended its original claim to designate any amount of the claim as unsecured. And it is not clear that it may still rely on the court's order to file such a claim as it was required to do so within sixty days after selling the Vehicle. The record is silent as to whether the Vehicle has been sold or, if so, when such sale occurred, the date of which may be relevant in determining the commercial reasonableness of the sale and the amount of any deficiency. *See Ohio Rev. Code § 1309.610(B)*, cmt. n.3 (“[I]f there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a ‘commercially reasonable’ manner.”). These questions must be left for another day, since this court's subject matter jurisdiction is limited to actual cases or controversies. Art. III, Sec. 2 of the United States Constitution; *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007). Requesting a decision regarding a deficiency claim not yet asserted requires the court to render an advisory opinion, which the Supreme Court has held does not constitute a justiciable “controversy.” *Id.*

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtors' Objection to Claim of Ford Motor Credit Company LLC [Doc. # 33] be, and hereby is, **OVERRULED**, without prejudice.

²The court does not equate procedural leave to file a deficiency claim with its allowance. Any amended claim filed is still subject to objection on any grounds otherwise legally or factually available, including for reasons as varied as the applicable binding provisions of a confirmed plan and non-compliance with applicable provisions of the Uniform Commercial Code in governing disposition of collateral.