

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 was signed electronically at the time and date indicated, which may be materially different from its entry on the record.





Russ Kendig
United States Bankruptcy Judge

Dated: 11:13 AM February 4, 2019

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CHAPTER 13
)
ANTHONY MICHAEL) CASE NO. 18-41519-rk
DONNADIO,)
MELISSA MARIE DONNADIO,) JUDGE RUSS KENDIG
)
Debtors.)
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)
) **MEMORANDUM OF OPINION**
) **(NOT FOR PUBLICATION)**
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Anthony Michael Donnadio and Melissa Marie Donnadio (“Debtors”) filed a Chapter 13 bankruptcy petition on July 20, 2018. They filed their Chapter 13 plan on that same date.

Santander filed Proof of Claim #3 in this case on August 24, 2018, claiming \$9,650.50 fully secured by Debtors’ 2013 Buick Verano. The claimed interest rate was 18.14%. Debtor

objected to the interest rate on September 20, 2018, and the objection was granted, lowering the interest rate to 7% in accordance with In re Till.

Creditor Santander Consumer USA Inc. (“Santander”) filed an Objection to Confirmation on October 8, 2018, arguing that the plan did not provide for retention of its lien until either payment in full under non-bankruptcy law, or upon discharge. The confirmation hearing was held on November 1, 2018, and the plan was confirmed on November 2. The order clarified that confirmation was subject to the resolution of Santander’s objection. A briefing schedule was established by the Scheduling Order of November 2.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. §§ 157(b)(2), and the court has authority to issue final entries.

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the Court.

DISCUSSION

The lien retention question raised by Santander arises from the interaction between two provisions of the Bankruptcy Code, and whether their necessary conditions for confirmation are met by the National Form Chapter 13 Plan (“Form Plan”). 11 U.S.C. § 1325(a)(5) governs the requirements for confirmation respecting an allowed secured claim. Relevant in this case is the requirement that “the plan provides that the holder of such claim retain the lien securing such claim until the earlier of the payment of the underlying debt determined under nonbankruptcy law; or discharge under section 1328.” 11 U.S.C. § 1325(a)(5)(B). This language is used verbatim in the Form Plan, section 3.2, which deals with “Request[s] for valuation of security, payment of fully secured claims, and modification of undersecured claims.” However, Santander’s concern derives from the lack of similar or identical language listed in section 3.3, titled “Secured claims excluded from 11 U.S.C. § 506” – the section under which Santander’s claim falls.

Section 506 of the Code addresses the determination of secured status, allowing for the bifurcation of certain claims. 11 U.S.C. § 506. The so-called “hanging paragraph” at the end of section 1325(a), appended after § 1325(a)(9), states that:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle . . . acquired for personal use of the debtor . . .

There is significant disagreement among the courts regarding whether § 506 is intended to provide the sole operable definition of “allowed secured claim” for purposes of § 1325(a)(5). If the section is “definitional”, then the hanging paragraph would seem to indicate that 910-day

claims, being excluded from bifurcation, cannot then be considered “allowed secured claims”, and are not included within the purview of § 1325(a)(5). See, e.g., In re White, 352 B.R. 633, 643 (Bankr. E.D. La. 2006) (“if § 506 is made inapplicable to the claim by the hanging paragraph, it may in fact be a claim secured by a lien but not qualify for treatment as an ‘allowed secured claim’). This categorical reading of exclusion forms the core of the Trustee’s theory in this matter.

However, most courts seem to have adopted a less constricted reading of the hanging paragraph. See, e.g., In re DeSardi, 340 B.R. 790, 812 (Bankr. S.D. Tex. 2006) (“[A 910-day claim] is an allowed secured claim and may be treated under § 1325(a)(5).”)¹; DaimlerChrysler Fin. Serv. Ams., LLC (In re Brown), 339 B.R. 818, 820 (Bankr. S.D. Ga. 2006) (“[The 910 language] means only that the claims it describes cannot be bifurcated into secured and unsecured portions under § 506(a).”); In re Johnson, 337 B.R. 269, 272 (Bankr. M.D.N.C. 2006) (“[The 910 language] simply provides that debtors may not bifurcate the claims of lenders with purchase money security interests in vehicle purchased within 910 days of bankruptcy for the debtor’s personal use.”) The Supreme Court has also clarified that “the words ‘allowed secured claim’ . . . need not be read as an indivisible term of art defined by reference to §506(a), which by its terms is not a definitional provision.” Dewsnup v. Timm, 502 U.S. 410, 415 (1992).

Instead, as the DeSardi court suggests, “[t]erms not defined in the Bankruptcy Code should be given their plain meaning.” DeSardi, *supra*, at 60, citing United States v. Ron Pair Enters, 489 U.S. 235, 242 (1989). This Court agrees. The Code’s general definitional provision describes a lien as a “charge against or interest in property to secure payment of a debt”. 11 U.S.C. § 101(37). Thus, a debt is “secured” by a lien. In re Brown, *supra*, at 821. Under 11 U.S.C § 502, a claim is deemed “allowed” if it is filed under § 501, “unless a party in interest . . . objects.” Therefore, put simply, a claim based upon a valid lien, to which another party in interest has not objected, is both “allowed” and “secured”, bringing it within the stated purview of § 1325(a)(5). Santander’s 910-day claim is thus an allowed, secured claim.

Though this Court agrees with Santander that the hanging paragraph does not mean that its claim is *excluded* from § 1325(a)(5), it is not convinced that this means § 1325(a)(5) applies to a 910-day claim exactly as it would to any other allowed, secured claim. The § 1325(a) lien retention requirement is predicated upon the possibility that a lien might be unfairly, inadvertently, or untimely released. Prior to BAPCPA, some courts would permit liens to be released once the secured portion of an undersecured claim was paid off, shorting the creditor of any entitlement to the unsecured portion. See, e.g., In re Rheaume, 296 B.R. 313, 319 (Bankr. D. Vt. 2003) (“If . . . the debtor has paid the allowed secured portion of the claim in full prior to dismissal, the debtor is entitled to the lien release and the creditor is left with only an unsecured claim post-bankruptcy.”); see also In re Murry-Hudson, 147 B.R. 960 (N.D. Cal. 1992); In re Campbell, 160 B.R. 198 (M.D. Fla. 1993). This made it unclear “whether a creditor could be required to release its lien after payment of the ‘allowed secured claim’ (which could occur prior to the completion of the plan, or whether the creditor could retain its lien until the claim (secured and unsecured) was paid in full.” Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885 (10th

¹ The DeSardi court also noted that it is “unlikely that Congress would create a new, undefined type of claim, and then furnish no guidance as to how such a claim should be handed.” Id.

Cir. B.A.P. 2010), fn. 32. BAPCPA clarified the issue by requiring the plan to “allow the creditor to retain its lien until the full contract amount”, including any unsecured portion of the claim, is paid, or until discharge. Id.

The function of the “hanging paragraph” following § 1325(a)(9) is to establish only that 910-day claims cannot be bifurcated. A claim that has not been – and indeed is prohibited from being – bifurcated is not subject to the concerns that necessitated the lien retention requirement of § 1325(a)(5)(B). The § 1325(a)(5) language, as reproduced in the Plan, assures the creditor that its lien will be retained until payment in full of the entire claim, or discharge. A non-bifurcated claim is treated as one undivided amount, and thus this clarification is not needed.

Section 3.3 of the Plan states that the claims listed within “will be paid in full under the plan with interest at the rate stated below.” Explicit language assuring the creditor that its lien will be retained is not necessary to effectuate the actual retention of the lien, as there is no reason in the Plan or in the Code why it would be released. The lien is retained by operation of law. To the extent that § 1325(a)(5) must be applied to a 910-day claim, it does not indicate that the only way for a provision to be “provided for by the plan” is if the statutory protections and guarantees within the Code are each spelled out verbatim in the plan itself. The vast majority of the Code operates in the background at any given time; if a plan could not be confirmed unless it contained reference to all of the relevant provisions acting upon each of its sections, one might as well be required to submit a complete copy of Title 11 itself.

The Court will overrule Santander’s Objection to Confirmation by separate order.

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