2020 WL 3446362
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United States Bankruptcy Court, S.D. Alabama.

IN RE: Jennifer L. DEAKLE, Debtor.

Case No. 19-11820
|
Signed June 24, 2020

Attorneys and Law Firms

William J. Casey, Mobile, AL, for Debtor.

Daniel B. O'Brien, Chapter 13 Trustee, Mobile, AL, for U.S. Trustee.

ORDER DENYING MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY

HENRY A. CALLAWAY, CHIEF U.S. BANKRUPTCY JUDGE

***1** Perhaps the most important aspect of chapter 13 is that confirmation of a chapter 13 plan binds both creditors and debtors. The question in this case is: can a title pawnshop's failure to object to a confirmed chapter 13 plan constitute waiver of the pawned vehicle's forfeiture under the Alabama Pawnshop Act?

The pawnshop here, TitleMax of Alabama ("TitleMax"), clearly and admittedly waives forfeiture of pawned vehicle titles in other contexts. Its corporate representative testified in another case before this court that outside bankruptcy TitleMax routinely allows borrowers to enter into new pawn agreements after the redemption period has run under the Pawnshop Act. This court ruled in TitleMax's favor, holding that TitleMax had waived forfeiture and thus had not (as the debtor there contended) illegally accepted several thousand dollars of payments on a car it already owned. And TitleMax frequently files secured claims based on postredemption title pawns in chapter 13 cases (see the many cases cited in footnote 3).

Having reviewed TitleMax's "motion to confirm termination or absence of stay (doc. 55), the briefs of the parties, [1] and the relevant law, this court finds that TitleMax can likewise waive forfeiture of a pawned vehicle title by failing to object to confirmation or otherwise speak up in opposition to a chapter 13 plan which proposes to treat the loan as a secured claim. As a result, the court denies TitleMax's motion (doc. 55).

Background

The pertinent facts are not in dispute. On January 15, 2019, the debtor Jennifer Deakle pawned a 2003 Honda Pilot to TitleMax that required the repayment of $1,889.27 plus a $226.52 pawnshop charge for a total of $2,115.79. (*See* doc. 55-2). The Pilot remained in the debtor's possession and TitleMax was listed as a lienholder on the Pilot's certificate of title. (*See id.*). The pawn matured on February 14, 2019. Under § 5-19A-6 of the Alabama Pawnshop Act, the debtor had until March 16, 2019 to redeem the Pilot but did not do so.

On May 31, 2019, the debtor filed this chapter 13 bankruptcy case, listing TitleMax as a creditor with respect to the Pilot. In her chapter 13 plan also filed on May 31, 2019, she proposed to pay TitleMax $1,500 through the trustee over the life of the case. The court entered an order confirming the debtor's plan, and the proposed treatment of TitleMax, on October 2, 2019.

The record reflects, and TitleMax has not disputed, that it had notice of the bankruptcy and of the applicable deadlines, including for objections to confirmation. *See, e.g.*, *In re Iliceto*, 706 F. App'x 636, 643 (11th Cir. 2017). TitleMax did not object to confirmation of the debtor's plan or take any other action in the bankruptcy case until three months after the confirmation order was entered, when it filed the pending motion to confirm termination or absence of stay. TitleMax contends that it was not required to object to confirmation, that 11 U.S.C. § 1327(a) and the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa* do not apply to the situation at hand, and that it is not bound by the confirmed plan because the Pilot was never property of the debtor's chapter 13 bankruptcy estate.

Legal Analysis

***2** The basic principle underlying the parties' dispute is not novel. Under Bankruptcy Code § 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Even legally suspect plans bind the parties once confirmed. *See* *United Student Aid Funds, Inc.*

v. Espinosa, 559 U.S. 260, 275, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010); *In re Bateman*, 331 F.3d 821, 829-30 (11th Cir. 2003).

Alabama law defines what rights, if any, the debtor has in relation to the Pilot. *See In re Northington*, 876 F.3d 1302, 1310 (11th Cir. 2017). Under the Pawnshop Act, "[p]ledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker." Ala. Code § 5-19A-6. However, as discussed in more detail below, the court finds that TitleMax can waive that forfeiture and has done so in this case.

In a recent case decided by this court, the court agreed with TitleMax that a pawnshop can waive § 5-19A-6's forfeiture of "absolute right, title, and interest in and to the" vehicle after the statutory 30-day grace period has expired. In *In re Eldridge*, No. 19-12443, — B.R. —, 2020 WL 2844358 (Bankr. S.D. Ala. Feb. 13, 2020),[2] the debtor Christopher Dawan Eldridge pawned the title to a 2002 Jeep Cherokee with TitleMax in 2015. Mr. Eldridge did not redeem the title by the pawn's maturity date. Instead, he entered into numerous successive pawn transactions with TitleMax related to the Jeep. In several of these transactions, Mr. Eldridge did not redeem the Jeep before the maturity date or enter into another pawn within the statutory grace period. Instead, he signed a new pawn ticket outside of the statutory grace period – beyond the redemption period – a practice TitleMax's corporate representative testified that TitleMax routinely allows.

Mr. Eldridge argued that, pursuant to Alabama Code § 5-19A-6, TitleMax obtained "absolute right, title, and interest" to the Jeep the first time he did not redeem the Jeep or enter into another pawn transaction within the grace period because that statutory provision cannot be waived – that is, after 60 days (the pawn's 30-day maturity date plus the 30-day grace period), the only remedy a pawnshop has is repossession. He contended that as a result TitleMax had accepted thousands of dollars of payments from him on a vehicle it already owned. TitleMax opposed this argument and contended that it had waived automatic forfeiture under § 5-19A-6 by agreeing to subsequent pawn transactions. Ultimately, this court agreed with TitleMax.

In contrast to its position in *Eldridge*, TitleMax argues here that there was no waiver of § 5-19A-6 even though TitleMax did not object to confirmation or take any action until three months after the court confirmed the debtor's plan. TitleMax contends that this case is different than *Eldridge* because that case

> involved a mutual decision by the customer and TitleMax to waive forfeiture, and to execute a new pawn agreement.... This case does not involve any mutual determination by TitleMax and the Debtor to waive forfeiture. This case involves the unilateral decision by the Debtor to include TitleMax in a bankruptcy proceeding (after forfeiture), and subsequent inaction by TitleMax.

***3** (TitleMax br., doc. 80, p.9). TitleMax then argues that its "mere failure" to object prior to confirmation is not a waiver of forfeiture of § 5-19A-6. The court rejects TitleMax's argument for several reasons.

"[I]t is a well-settled principle of Alabama law that a waiver is generally defined as the intentional relinquishment of a known right." *See Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d 277, 281 n.5 (Ala. 2008) (citation, quotation marks, and brackets omitted); *see also, e.g., Stewart v. Bradley*, 15 So. 3d 533, 543 (Ala. Civ. App. 2008) ("Waiver is defined as the voluntary surrender or relinquishment of some known right, benefit, or advantage.") (citation and quotation marks omitted). Alabama law is likewise clear that waiver may be implied from conduct. *See, e.g., Hughes v. Mitchell Co.*, 49 So. 3d 192, 201-03 (Ala. 2010); *see also Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enters. LLC*, 163 F. Supp. 3d 1150, 1165 (N.D. Ala. 2016); *Reynolds v. Ala. Dep't of Transp.*, No. 2:85-cv-665-WKW, 2014 WL 3517773, at *9 (M.D. Ala. July 16, 2014).

This court, not TitleMax, is the judge of when and if there is a waiver. Waiver does not require a mutual decision between two parties, as TitleMax argues; if it did, there would be no place for waiver jurisprudence. Instead, "a party's intention to waive a right is to be ascertained from the external acts manifesting the waiver. This intention to waive a right may be found where one's course of conduct indicates the same or is inconsistent with any other intention." *See Hughes*, 49 So. 3d at 202-03 (citations and quotation marks omitted).

"Alabama precedent establishes that many significant rights may be waived by failing to either timely or property assert them." *Ex parte Cowley*, 43 So. 3d 1197, 1199 (Ala. 2009). For example, criminal defendants can waive numerous statutory rights, "even some that contain mandatory language[,]" *see Lay v. State*, 82 So. 3d 9, 13 (Ala. Crim. App. 2011), as well as "many of the most fundamental protections afforded by the Constitution." *See United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). If a criminal defendant can waive statutory and even fundamental rights by failing to assert those rights, then surely TitleMax can waive the (non-fundamental) statutory right to claim absolute ownership under § 5-19A-6 by failing to timely asserts that right in a debtor's bankruptcy.

TitleMax's conduct in this case established a clear waiver of its statutory right to assert absolute ownership under § 5-19A-6 and demonstrated its acceptance of being treated instead as a secured creditor. TitleMax is a bankruptcy-savvy creditor which often accepts treatment as a secured creditor for its title pawns. This court has numerous cases on its docket in which TitleMax has waived forfeiture under § 5-19A-6 and is content for its claim to be treated as a secured claim. [3]

*4 This ruling will not result in a situation that "would permit bankrupt debtors to strip owners of property, simply by (improperly) listing property, which they do not own, in their schedules, hoping no objection is timely filed." (*See* TitleMax br., doc. 80, p.15). If TitleMax could not waive forfeiture under § 5-19A-6 – as it has explicitly argued it can – this argument might have some merit. But forfeiture is either waivable or it isn't. Here, TitleMax waived any right to immediately possess the Pilot when it did not object to confirmation of the debtor's plan, a course of action it has also taken in other cases. The court refuses to let TitleMax have its cake and eat it too.

Judge James Robinson recently addressed a nearly identical issue in *In re Cottingham*, No. 19-40825-JJR13, 2020 WL 3410170 (Bankr. N.D. Ala. May 4, 2020). In that case, as here, the redemption period expired before the debtor filed for bankruptcy, the debtor included TitleMax as a secured creditor in the chapter 13 plan, and the court confirmed the plan with no objection from TitleMax. Several months later TitleMax filed a motion to confirm termination or absence of the stay, which Judge Robinson denied. Unlike here, the debtor's attorney filed a proof of claim for TitleMax and TitleMax accepted at least one payment from the trustee. However, Judge Robinson stated that he would be inclined to deny TitleMax's motion there even if no claim had been filed and no payments accepted based on TitleMax's "failure to voice any objection after having received notice of the debtor's intent to treat its matured title pawn as a secured claim." *See In re Cottingham*, 2020 WL 3410170, at *3 n.8. This court agrees.

This is not a situation like *Northington* where a debtor's statutory redemption period expired preconfirmation and TitleMax took action to preserve its state law rights in a pawned vehicle. Judge Robinson explained, and the undersigned concurs, that "a critical difference between that decision and the instant case [is that] the pawnbroker in *Northington* asserted its state-law rights in the vehicle *before* the plan was confirmed," which TitleMax did not do in *Cottingham* or in this case. [4] *See In re Cottingham*, 2020 WL 3410170, at *3. "TitleMax's acceptance of being treated as a secured claimant at confirmation [in this case] was consistent with its practice in other cases and was completely at odds with its tardy objection, in the form of the [pending m]otion, which it voiced for the first time postconfirmation." *See id.* at *3 n.8. This "is exactly the sort of 'gotcha' attempt that the Bankruptcy Code abhors and that the concepts of waiver and the binding res judicata effect of confirmation are designed to prevent." *See id.*

"TitleMax did nothing to preserve its position that its interest in the [Pilot] should not be treated as a secured claim in the [d]ebtor's plan, because the [Pilot] was not part of the bankruptcy estate at confirmation." *See id.* at *4. The Eleventh Circuit contemplated this exact situation in *Northington* when it outlined how a pawnshop can lose its state-law position and how TitleMax in that case actually avoided a waiver of its rights precisely because it acted prior to confirmation:

> *5 Before jumping into the merits, we must first address the bankruptcy court's alternative (but logically antecedent) holding that TitleMax's challenge is procedurally barred on 'res judicata' grounds.
>
> The bankruptcy court held that TitleMax 'slept on its rights' by 'fail[ing] to timely object to confirmation' of [the debtor]'s proposed [c]hapter 13 plan.... Accordingly, the court held that its confirmation order was conclusive under 11 U.S.C. § 1327(a)—which generally binds a debtor and his creditors to the terms of a confirmed plan—and '[t]he doctrine of res judicata.' ....

> In the particular circumstances of this case, we cannot agree that TitleMax impermissibly 'slept on its rights' and thus forfeited its ability to raise the argument that it presents on appeal. The decision that the bankruptcy court cited for support, *In re Young*, 281 B.R. 74 (Bankr. S.D. Ala. 2001), provides a useful (and stark) contrast. As in this case, the debtors in *Young* failed to redeem property that they had pledged to a pawnbroker. And as in this case, the bankruptcy court held a hearing on the debtors' proposed [c]hapter 13 plan—which listed the pawnbroker as the creditor on the pawn debt—and later entered an order confirming the plan. The pawnbroker in *Young*, however, did absolutely nothing to preserve its argument that it had rightful title to the pawned property. It didn't 'participate in the confirmation [hearing],' nor did it in any way contest the plan's consummation; rather, following confirmation, the pawnbroker simply set out, unilaterally, to sell the pawned property, prompting the debtors to file a motion to enforce the automatic stay....
>
> Here, by contrast, even before the bankruptcy court held a confirmation hearing, and thus by definition before it entered any confirmation order, TitleMax filed a written motion in which it contended—just as it does here—that at the moment [the debtor] failed to redeem the [car] pursuant to [the applicable state law], the car ceased to be property of the bankruptcy estate. TitleMax then appeared at the hearing, and later filed post-hearing briefs, to reiterate its position. When the bankruptcy court later denied its motion for relief from the automatic stay, thereby bringing the bankruptcy proceeding to a close, TitleMax appealed directly to the district court and then, following that court's affirmance, directly to this Court.
>
> Our dissenting colleague, who would affirm on res-judicata grounds, is of course quite right to say that TitleMax had 'to take some action' in order to preserve its position that the car dropped out of the estate upon the expiration of the redemption period.... The question is precisely what form that 'action' had to take. The dissent repeatedly protests that TitleMax didn't formally 'object' to the confirmation of [the debtor]'s [c]hapter 13 plan.... That's true—no one denies it, and TitleMax freely admits it. We hold, though, that on the unique facts of this case, TitleMax was not required to file an 'Objection'—styled as such—but rather adequately preserved its position through its pre-confirmation motion for relief from the automatic stay, which it briefed and argued to the bankruptcy court.

In re Northington, 876 F.3d at 1307-08 (emphasis added).

***6** It was for this reason – the fact that TitleMax spoke up before confirmation – that the *Northington* majority disagreed with the dissent that *Espinosa* mandated that TitleMax was bound by the confirmed plan. Here, though, TitleMax slept on its rights by taking no action in this bankruptcy until three months after the court confirmed the plan. As a consequence of its waiver of ownership, TitleMax is properly treated as a secured creditor in the debtor's confirmed plan and, as such, is bound by the confirmed plan under *Espinosa*.[5]

TitleMax attempts to distinguish *Northington* on the ground that the redemption period in that case expired after the case was filed but before confirmation, while the redemption period in this case expired prepetition. Like Judge Robinson, the undersigned "sees no logical reason why *Northington's* rationale (on the importance of the pawnshop asserting its position preconfirmation to preserve its state-law rights) should not extend to all cases where the redemption period has expired before plan confirmation, whether the expiration occurred prepetition or postpetition." *See In re Cottingham*, 2020 WL 3410170 at *4. Both Judge Robinson and the undersigned interpret the majority's position in *Northington* "as approving, if not requiring, a bankruptcy court's assessment of the timeliness of a pawnbroker's declaration of its state-law rights to avoid the res judicata effect of a confirmation order." *See id.* "The key to avoiding res judicata is the pawnbroker's *preconfirmation* assertion of its state-law rights in the pawned vehicle." *Id.* at *6. When the redemption period expired was not the dispositive issue in *Northington*; "what was dispositive was the timely—preconfirmation—motion seeking relief filed by the pawnbroker declaring it was insisting on its state law rights and was not willing to be paid as a secured creditor pursuant to the debtor's plan." *See id.*

> The fact that the redemption period of the pawn had expired prepetition, assuming that is as crucial as TitleMax believes, was uniquely within TitleMax's purview to bring before this court before plan confirmation, and was not the type of patent 'defect' that the court could be expected to raise *sua sponte* at confirmation under the guidance of *Espinosa*. If this was an illegal plan

> as TitleMax contends [albeit three months after the fact], because the [vehicle] was not estate property (in the absence of TitleMax's waiver), then TitleMax was in the best position to say so before confirmation ....

Id. at *7.

As in the Northern District of Alabama, "there is virtually no meaningful public transportation in" this district. *See id.* at *3 n.8.

> Saving a debtor's vehicle is the essence of many chapter 13 plans as the loss of the vehicle can be an existential calamity for the debtor and his family in many cases. Without a vehicle, a typical debtor cannot get to his job, take his children to school and for medical care, or carry on the day-to-day essential activities of life. The loss of a home may soon follow the loss of a vehicle because many debtors with rent or mortgage payments cannot keep their jobs if they cannot keep their cars. If TitleMax does not intend to accept being treated as a secured creditor in a chapter 13 plan [as it has in multiple cases, *see* footnote 3 above], after having received notice that the debtor intends to do just that, it must voice its objection before confirmation.

*7 *Id.*

TitleMax relies heavily on *In re Thorpe*, 612 B.R. 463 (Bankr. S.D. Ga. 2019). The bankruptcy court there held that a vehicle did not enter the bankruptcy estate when the debtor filed her chapter 13 case, even though the debtor obtained confirmation of the plan that purported to pay the pawnshop the redemption amount, and the plan could not serve to revest the debtor with any interest in the vehicle. This court respectfully disagrees with that decision for the same reasons articulated by Judge Robinson in *Cottingham*: TitleMax failed to voice any objection after having received notice of the debtor's intent to treat its matured pawn as a secured claim. Further, *Thorpe* involved Georgia, not Alabama, law and did not address waiver under Alabama law at all. Under TitleMax's position (which the *Thorpe* court accepted), TitleMax is the sole decisionmaker of when it wants to assert its state law rights in a vehicle. As discussed above, this court has held (at TitleMax's urging) that Alabama law permits waiver of the automatic forfeiture provision of the Alabama Pawnshop Act, which is exactly what the court finds happened here.

TitleMax is not without a remedy, as it seems to argue in its reply brief. TitleMax can still file a late proof of claim and be paid $1,500 plus interest for the 2003 Pilot as provided by the confirmed plan.

Conclusion

TitleMax can't have it both ways – that is, forfeiture is waivable in some situations but not at confirmation. Indeed, the res judicata effect of confirmation weighs even more heavily in favor of waiver in that context. Just as when TitleMax allows a pawn renewal more than 60 days after the last one (the situation in *Eldridge*) or files a secured claim based on a pawned title (the situation in multiple cases in footnote 3), TitleMax can waive title forfeiture under Alabama Code § 5-19A-6 through the chapter 13 confirmation process.

If the debtor in *Eldridge* is right and forfeiture cannot be waived after the grace period has run, then outside bankruptcy many Alabama customers are paying TitleMax on non-recourse loans for vehicles which TitleMax already owns. Likewise, if forfeiture cannot be waived, then TitleMax is filing secured claims and accepting chapter 13 plan payments on non-recourse loans for vehicles it already owns. The ruling here accords with both the reality on the ground and Alabama waiver law. It applies to the small number of chapter 13 cases where TitleMax has been properly noticed but does not object in any way to a proposed plan. This court is simply requiring TitleMax to follow the same rules as every other creditor: if you disagree with your treatment in a proposed chapter 13 plan, you must timely object (*Espinosa*) or otherwise speak up (*Northington*) because you will be bound by the confirmed plan pursuant to 11 U.S.C. § 1327(a).

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined

that they would not alter the result. The court denies TitleMax's motion to confirm termination or absence of stay. TitleMax is bound to the payment of its claim as provided in the debtor's confirmed plan, and the stay remains in place as to the Pilot.

All Citations

--- B.R. ----, 2020 WL 3446362

Footnotes

1 The court ordered TitleMax to brief several issues (see order, doc. 76), which TitleMax did (see doc. 80). The debtor filed a response to TitleMax's brief (see doc. 81) and TitleMax filed a reply (see doc. 82). At a status hearing held on May 27, 2020, the parties agreed on the record for the court to take the matter under submission without oral argument.

2 This court's decision is currently on appeal by debtor to the district court.

3 For example, see the plan in the following recent cases filed in and confirmed by this court: 19-20408 (petition date October 17, 2019; plan confirmed May 15, 2020; secured claim filed by TitleMax February 20, 2020; pawn maturity September 13, 2019); 19-11042 (petition date March 29, 2019; plan confirmed July 29, 2019; claim filed by debtor, no response by TitleMax; pawn maturity April 5, 2019); 19-11938 (petition date June 10, 2019; plan confirmed October 28, 2019; claim filed by debtor, no response by TitleMax; pawn maturity May 3, 2019); 19-12040 (petitiondateJune 17, 2019; plan confirmed December 13, 2019; secured claim filed by TitleMax July 5, 2019; pawn maturity June 19, 2019); 19-12219 (petition date July 1, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax September 23, 2019; pawn maturity June 2, 2019); 19-12266 (petition date July 3, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax August 1, 2019; pawn maturity June 27, 2019); 19-12698 (petition date August 6, 2019; plan confirmed December 27, 2019; secured claim filed by TitleMax October 18, 2019; pawn maturity September 23, 2018); 19-12913 (petition date August 22, 2019; plan confirmed April 13, 2020; secured claim filed by TitleMax September 19, 2019; pawn maturity July 31, 2019). The court takes judicial notice of the contents of its own electronic files in those cases pursuant to Federal Rule of Evidence 201 and the guidance of *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

4 This court's prior decision in *In re Tesseneer*, No. 19-11283 (Bankr. S.D. Ala. Oct. 2, 2019) and *In re Burrell*, No. 18-4602 (Bankr. S.D. Ala. Apr. 2, 2019) do not conflict. In those cases, TitleMax timely objected to confirmation and the court sustained the objections based on *Northington*. *See In re Cottingham*, 2020 WL 3410170, at *4 ("If the bankruptcy court finds the pawnbroker acted timely — preconfirmation — then its rights in the pawned vehicle are preserved and controlled under applicable state law as opposed to any contrary treatment proposed in the debtor's chapter 13 plan[.]").

5 Judge Clifton R. Jessup, Jr. of the U.S. Bankruptcy Court for the Northern District of Alabama has also found that TitleMax "slept on its rights" under similar circumstances and denied TitleMax's motion to confirm the absence of the automatic stay. *See In re Barnett*, No. 19-81656-CRJ-13.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TITLEMAX OF ALABAMA, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 1:20-335-JB-N**
	)	
JENNIFER L. DEAKLE,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Appellant, TitleMax of Alabama, Inc.'s ("TitleMax") appeal of the United States Bankruptcy Court's June 26, 2020 Order, Denying Motion to Confirm Termination or Absence of Stay ("Order"). (Doc. 1, PageID # 2). Upon due consideration of the record, the Court concludes that the Bankruptcy Court is due to be AFFIRMED.

I. Appellate Jurisdiction and Standard of Review

The Court has appellate jurisdiction of this appeal pursuant to 28 U.S.C. § 158(a), and functions as an appellate court in reviewing the Bankruptcy Court's Order. *See In re Colortex Indus., Inc.*, 19 F.3d 1371, 1374 (11th Cir. 1994). The Court reviews the legal conclusions of the Bankruptcy Court *de novo*. *See In re JLJ, Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993). The Bankruptcy Court's findings of fact are reviewed under a clearly erroneous standard. *See* Federal Rule of Bankruptcy Procedure 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."); and *In re Thomas*, 883 F.2d 991, 994 (11th Cir. 1989). A finding of fact is clearly erroneous when, "although there

is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Crawford v. W. Elec. Co., Inc.*, 745 F.2d 1373, 1378 (11th Cir. 1984) (*citing United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948)).

II. Analysis

Upon review of the record and the Order, the Court determines that the Bankruptcy Court's findings of fact were not clearly erroneous, and after *de novo* review of the conclusions of law, finds no error. The Court hereby adopts the decision of the United States Bankruptcy Court as its own, with non-substantive revisions, as follows:

Bankruptcy Court Decision

The question in this case is: can a title pawnshop's failure to object to a confirmed chapter 13 plan constitute waiver of the pawned vehicle's forfeiture under the Alabama Pawnshop Act?

TitleMax clearly and admittedly waives forfeiture of pawned vehicle titles in other contexts. Its corporate representative testified in another case before the Bankruptcy Court that outside bankruptcy TitleMax routinely allows borrowers to enter into new pawn agreements after the redemption period has run under the Pawnshop Act.[1] The Bankruptcy Court ruled in TitleMax's favor, holding that TitleMax had waived forfeiture and thus had not (as the debtor there contended) illegally accepted several thousand dollars of payments on a car TitleMax already owned.[2] As a practical matter, TitleMax frequently files secured claims based on post-redemption title pawns in chapter 13 cases (*see* footnote 3 *infra*).

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[1] In *In re Eldridge*, 2020 WL 2844358 (Bankr. S.D. Ala. Feb. 13, 2020).

[2] Appeal was taken from the Bankruptcy Court's decision in *In re Eldridge*. The undersigned has affirmed that decision in an opinion entered contemporaneously herewith.

Having reviewed TitleMax's motion to confirm termination or absence of stay, the briefs of the parties, and the relevant law, the court found that TitleMax can likewise waive forfeiture of a pawned vehicle title by failing to object to confirmation or otherwise speak up in opposition to a chapter 13 plan which proposes to treat the loan as a secured claim. As a result, TitleMax's motion was denied.

The pertinent facts are not in dispute. On January 15, 2019, the debtor Jennifer Deakle pawned a 2003 Honda Pilot to TitleMax that required the repayment of $1,889.27 plus a $226.52 pawnshop charge for a total of $2,115.79. (Doc. 2, PageID#94). The Pilot remained in the debtor's possession and TitleMax was listed as a lienholder on the Pilot's certificate of title. (*Id.*). The pawn matured on February 14, 2019. Under § 5-19A-6 of the Alabama Pawnshop Act, the debtor had until March 16, 2019 to redeem the Pilot but did not do so.

On May 31, 2019, the debtor filed her chapter 13 bankruptcy case, listing TitleMax as a creditor with respect to the Pilot. In her chapter 13 plan, also filed on May 31, 2019, she proposed to pay TitleMax $1,500 through the trustee over the life of the case. The court entered an order confirming the debtor's plan, and the proposed treatment of TitleMax, on October 2, 2019.

The record reflects, and TitleMax does not dispute, that it had notice of the bankruptcy and of the applicable deadlines, including for objections to confirmation. *See, e.g.*, *In re Iliceto*, 706 F. App'x 636, 643 (11th Cir. 2017). TitleMax did not object to confirmation of the debtor's plan or take any other action in the bankruptcy case until three months after the confirmation order was entered, when it filed the pending motion to confirm termination or absence of stay. TitleMax contends that it was not required to object to confirmation, that 11 U.S.C. § 1327(a)

and the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa* do not apply to the situation at hand, and that it is not bound by the confirmed plan because the Pilot was never property of the debtor's chapter 13 bankruptcy estate.

The basic principle underlying the parties' dispute is not novel. Under Bankruptcy Code § 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Even legally suspect plans bind the parties once confirmed. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010); *In re Bateman*, 331 F.3d 821, 829-30 (11th Cir. 2003).

Alabama law defines what rights, if any, the debtor has in relation to the Pilot. *See In re Northington*, 876 F.3d 1302, 1310 (11th Cir. 2017). Under the Pawnshop Act, "[p]ledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker." Ala. Code § 5-19A-6. However, as discussed in more detail below, the court found TitleMax can waive that forfeiture and has done so in this case.

In a recent case decided by the Bankruptcy Court, it agreed with TitleMax that a pawnshop can waive § 5-19A-6's forfeiture of "absolute right, title, and interest in and to the" vehicle after the statutory 30-day grace period has expired. In *In re Eldridge*, 2020 WL 2844358 (Bankr. S.D. Ala. Feb. 13, 2020), the debtor Christopher Dawan Eldridge pawned the title to a 2002 Jeep Cherokee with TitleMax in 2015. Eldridge did not redeem the title by the pawn's maturity date. Instead, he entered into numerous successive pawn transactions with TitleMax related to the Jeep. In several of these transactions, Eldridge did not redeem the Jeep before the

maturity date or enter into another pawn within the statutory grace period. Instead, he signed a new pawn ticket outside of the statutory grace period - beyond the redemption period - a practice TitleMax's corporate representative testified that TitleMax routinely allows.

Eldridge argued that, pursuant to Alabama Code § 5-19A-6, TitleMax obtained "absolute right, title, and interest" to the Jeep the first time he did not redeem the Jeep or enter into another pawn transaction within the grace period because that statutory provision cannot be waived - that is, after 60 days (the pawn's 30-day maturity date plus the 30-day grace period), the only remedy a pawnshop has is repossession. He contended that as a result TitleMax had accepted thousands of dollars of payments from him on a vehicle it already owned. TitleMax opposed this argument and contended that it had waived automatic forfeiture under § 5-19A-6 by agreeing to subsequent pawn transactions. Ultimately, this court agreed with TitleMax.

In contrast to its position in *Eldridge*, TitleMax argues here that there was no waiver of § 5-19A-6 even though it did not object to confirmation or take any action until three months after confirmation of the debtor's plan. TitleMax contends that this case is different than *Eldridge* because that case,

> involved a mutual decision by the customer and TitleMax to waive forfeiture, and to execute a new pawn agreement. . . . This case does not involve any mutual determination by TitleMax and the Debtor to waive forfeiture. This case involves the unilateral decision by the Debtor to include TitleMax in a bankruptcy proceeding (after forfeiture), and subsequent inaction by TitleMax.

(Doc. 2, PageID#130). TitleMax contends its "mere failure" to object prior to confirmation is not a waiver of forfeiture of § 5-19A-6. The court rejected TitleMax's argument for several reasons.

"[I]t is a well-settled principle of Alabama law that a waiver is generally defined as the intentional relinquishment of a known right." *See Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d

277, 281 n.5 (Ala. 2008) (citation, quotation marks, and brackets omitted); *see also, e.g., Stewart v. Bradley*, 15 So. 3d 533, 543 (Ala. Civ. App. 2008) ("Waiver is defined as the voluntary surrender or relinquishment of some known right, benefit, or advantage.") (citation and quotation marks omitted). Alabama law is likewise clear that waiver may be implied from conduct. *See, e.g., Hughes v. Mitchell Co.*, 49 So. 3d 192, 201-03 (Ala. 2010); *see also Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enters. LLC*, 163 F. Supp. 3d 1150, 1165 (N.D. Ala. 2016); *Reynolds v. Ala. Dep't of Transp.*, , 2014 WL 3517773, at *9 (M.D. Ala. July 16, 2014).

The Bankruptcy Court, not TitleMax, is the judge of when and if there is a waiver. Waiver does not require a mutual decision between two parties, as TitleMax argues; if it did, there would be no place for waiver jurisprudence. Instead, "a party's intention to waive a right is to be ascertained from the external acts manifesting the waiver. This intention to waive a right may be found where one's course of conduct indicates the same or is inconsistent with any other intention." *See Hughes*, 49 So. 3d at 202- 03 (citations and quotation marks omitted).

"Alabama precedent establishes that many significant rights may be waived by failing to either timely or properly assert them." *Ex parte Cowley*, 43 So. 3d 1197, 1199 (Ala. 2009). For example, criminal defendants can waive numerous statutory rights, "even some that contain mandatory language[,]" *see Lay v. State*, 82 So. 3d 9, 13 (Ala. Crim. App. 2011), as well as "many of the most fundamental protections afforded by the Constitution." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). If a criminal defendant can waive statutory and even fundamental rights by failing to assert those rights, then surely TitleMax can waive the (non-fundamental) statutory right to claim absolute ownership under § 5-19A-6 by failing to timely assert that right in a debtor's bankruptcy.

TitleMax's conduct in this case established a clear waiver of its statutory right to assert absolute ownership under § 5-19A-6 and demonstrated its acceptance of being treated instead as a secured creditor. TitleMax is a bankruptcy-savvy creditor which often accepts treatment as a secured creditor for its title pawns. The Bankruptcy Court has numerous cases on its docket in which TitleMax has waived forfeiture under § 5-19A-6 and is content for its claim to be treated as a secured claim.[3]

This ruling will not result in a situation, as described by TitleMax, where debtors are permitted "to strip owners of property, simply by (improperly) listing property, which they do

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[3] For example, see the plan in the following recent cases filed in and confirmed by this court: 19-20408 (petition date October 17, 2019; plan confirmed May 15, 2020; secured claim filed by TitleMax February 20, 2020; pawn maturity September 13, 2019); 19-11042 (petition date March 29, 2019; plan confirmed July 29, 2019; claim filed by debtor, no response by TitleMax; pawn maturity April 5, 2019); 19-11938 (petition date June 10, 2019; plan confirmed October 28, 2019; claim filed by debtor, no response by TitleMax; pawn maturity May 3, 2019); 19-12040 (petition date June 17, 2019; plan confirmed December 13, 2019; secured claim filed by TitleMax July 5, 2019; pawn maturity June 19, 2019); 19-12219 (petition date July 1, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax September 23, 2019; pawn maturity June 2, 2019); 19-12266 (petition date July 3, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax August 1, 2019; pawn maturity June 27, 2019); 19-12698 (petition date August 6, 2019; plan confirmed December 27, 2019; secured claim filed by TitleMax October 18 For example, see the plan in the following recent cases filed in and confirmed by this court: 19-20408 (petition date October 17, 2019; plan confirmed May 15, 2020; secured claim filed by TitleMax February 20, 2020; pawn maturity September 13, 2019); 19-11042 (petition date March 29, 2019; plan confirmed July 29, 2019; claim filed by debtor, no response by TitleMax; pawn maturity April 5, 2019); 19-11938 (petition date June 10, 2019; plan confirmed October 28, 2019; claim filed by debtor, no response by TitleMax; pawn maturity May 3, 2019); 19-12040 (petition date June 17, 2019; plan confirmed December 13, 2019; secured claim filed by TitleMax July 5, 2019; pawn maturity June 19, 2019); 19-12219 (petition date July 1, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax September 23, 2019; pawn maturity June 2, 2019); 19-12266 (petition date July 3, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax August 1, 2019; pawn maturity June 27, 2019); 19-12698 (petition date August 6, 2019; plan confirmed December 27, 2019; secured claim filed by TitleMax October 18, 2019; pawn maturity September 23, 2018); 19-12913 (petition date , 2019; pawn maturity September 23, 2018); 19-12913 (petition date August 22, 2019; plan confirmed April 13, 2020; secured claim filed by TitleMax September 19, 2019; pawn maturity July 31, 2019). The court takes judicial notice of the contents of its own electronic files in those cases pursuant to Federal Rule of Evidence 201 and the guidance of *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

not own, in their schedules, hoping no objection is timely filed." If TitleMax could not waive forfeiture under § 5-19A-6 - as it has explicitly argued it can - this argument might have some merit. But forfeiture is either waivable or it isn't. Here, TitleMax waived any right to immediately possess the Pilot when it did not object to confirmation of the debtor's plan, a course of action it has also taken in other cases. The court refuses to let TitleMax have its cake and eat it too.

A nearly identical issue is addressed in *In re Cottingham*, 2020 WL 3410170 (Bankr. N.D. Ala. May 4, 2020). In that case, as here, the redemption period expired before the debtor filed for bankruptcy, the debtor included TitleMax as a secured creditor in the chapter 13 plan, and the court confirmed the plan with no objection from TitleMax. Several months later TitleMax filed a motion to confirm termination or absence of the stay, which Judge Robinson denied. Unlike here, the debtor's attorney filed a proof of claim for TitleMax and TitleMax accepted at least one payment from the trustee. However, Judge Robinson stated that he would be inclined to deny TitleMax's motion even if no claim had been filed and no payments accepted based on TitleMax's "failure to voice any objection after having received notice of the debtor's intent to treat its matured title pawn as a secured claim." *See In re Cottingham*, 2020 WL 3410170, at *3 n.8. This court agrees.

This is not a situation like *Northington* where a debtor's statutory redemption period expired preconfirmation and TitleMax took action to preserve its state law rights in a pawned vehicle. As explained by the court in *Cottingham*, "a critical difference between that decision and the instant case [is that] the pawnbroker in *Northington* asserted its state-law rights in the vehicle

before the plan was confirmed," which TitleMax did not do in *Cottingham* or in in this case.[4] *See In re Cottingham*, 2020 WL 3410170, at *3. "TitleMax's acceptance of being treated as a secured claimant at confirmation [in this case] was consistent with its practice in other cases and was completely at odds with its tardy objection, in the form of the [pending m]otion, which it voiced for the first time postconfirmation." *See id* at *3 n.8. This "is exactly the sort of 'gotcha' attempt that the Bankruptcy Code abhors and that the concepts of waiver and the binding res judicata effect of confirmation are designed to prevent." *Id.*

"TitleMax did nothing to preserve its position that its interest in the [Pilot] should not be treated as a secured claim in the [d]ebtor's plan, because the [Pilot] was not part of the bankruptcy estate at confirmation." *Id.* at *4. The Eleventh Circuit contemplated this exact situation in *Northington* when it outlined how a pawnshop *can lose its state-law position* and how TitleMax in that case actually avoided a waiver of its rights precisely because it acted prior to confirmation:

> Before jumping into the merits, we must first address the bankruptcy court's alternative (but logically antecedent) holding that TitleMax's challenge is procedurally barred on 'res judicata' grounds.
>
> The bankruptcy court held that TitleMax 'slept on its rights' by 'fail[ing] to timely object to confirmation' of [the debtor]'s proposed [c]hapter 13 plan. . . . Accordingly, the court held that its confirmation order was conclusive under 11

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[4] This court's prior decision in *In re Tesseneer*, No. 19-11283 (Bankr. S.D. Ala. Oct. 2, 2019) and *In re Burrell*, No. 18-4602 (Bankr. S.D. Ala. Apr. 2, 2019) do not conflict. In those cases, TitleMax timely objected to confirmation and the court sustained the objections based on *Northington*. *See In re Cottingham*, 2020 WL 3410170, at *4 ("If the bankruptcy court finds the pawnbroker acted timely—preconfirmation—then its rights in the pawned vehicle are preserved and controlled under applicable state law as opposed to any contrary treatment proposed in the debtor's chapter 13 plan[.]").

> U.S.C. § 1327(a)—which generally binds a debtor and his creditors to the terms of a confirmed plan—and '[t]he doctrine of res judicata.' . . . .
>
> In the particular circumstances of this case, we cannot agree that TitleMax impermissibly 'slept on its rights' and thus forfeited its ability to raise the argument that it presents on appeal. The decision that the bankruptcy court cited for support, *In re Young*, 281 B.R. 74 (Bankr. S.D. Ala. 2001), provides a useful (and stark) contrast. As in this case, the debtors in *Young* failed to redeem property that they had pledged to a pawnbroker. And as in this case, the bankruptcy court held a hearing on the debtors' proposed [c]hapter 13 plan—which listed the pawnbroker as the creditor on the pawn debt—and later entered an order confirming the plan. The pawnbroker in *Young*, however, did absolutely nothing to preserve its argument that it had rightful title to the pawned property. It didn't 'participate in the confirmation [hearing],' nor did it in any way contest the plan's consummation; rather, following confirmation, the pawnbroker simply set out, unilaterally, to sell the pawned property, prompting the debtors to file a motion to enforce the automatic stay. . . .
>
> Here, by contrast, even before the bankruptcy court held a confirmation hearing, and thus by definition before it entered any confirmation order, TitleMax filed a written motion in which it contended—just as it does here—that at the moment [the debtor] failed to redeem the [car] pursuant to [the applicable state law], the car ceased to be property of the bankruptcy estate. TitleMax then appeared at the hearing, and later filed post-hearing briefs, to reiterate its position. When the bankruptcy court later denied its motion for relief from the automatic stay, thereby bringing the bankruptcy proceeding to a close, TitleMax appealed directly to the district court and then, following that court's affirmance, directly to this Court. Our dissenting colleague, who would affirm on res-judicata grounds, **is of course quite right to say that TitleMax had 'to take some action' in order to preserve its position that the car dropped out of the estate upon the expiration of the redemption period**. . . . The question is precisely what form that 'action' had to take. The dissent repeatedly protests that TitleMax didn't formally 'object' to the confirmation of [the debtor]'s [c]hapter 13 plan. . . . That's true—no one denies it, and TitleMax freely admits it. We hold, though, that on the unique facts of this case, TitleMax was not required to file an 'Objection'—styled as such—but rather adequately preserved its position through its pre-confirmation motion for relief from the automatic stay, which it briefed and argued to the bankruptcy court.

In re Northington, 876 F.3d at 1307-08 (emphasis added).

Based on the fact that TitleMax spoke up before confirmation, the *Northington* majority disagreed with the dissent that *Espinosa* mandated that TitleMax was bound by the confirmed

plan. Here, though, TitleMax slept on its rights by taking no action in this bankruptcy until three months after the plan was confirmed. As a consequence of its waiver of ownership, TitleMax is properly treated as a secured creditor in the debtor's confirmed plan and, as such, is bound by the confirmed plan under *Espinosa*.[5]

TitleMax attempts to distinguish *Northington* on the ground that the redemption period in that case expired after the case was filed but before confirmation, while the redemption period in this case expired prepetition. As in *Cottingham*, the Bankruptcy Court here "sees no logical reason why *Northington's* rationale (on the importance of the pawnshop asserting its position preconfirmation to preserve its state-law rights) should not extend to all cases where the redemption period has expired before plan confirmation, whether the expiration occurred prepetition or postpetition." *See In re Cottingham*, 2020 WL 3410170 at *4. Both the court in Cottingham and this Court interpret the majority's position in *Northington* "as approving, if not requiring, a bankruptcy court's assessment of the timeliness of a pawnbroker's declaration of its state-law rights to avoid the res judicata effect of a confirmation order." *Id.* "The key to avoiding res judicata is the pawnbroker's *preconfirmation* assertion of its state-law rights in the pawned vehicle." *Id.* at *6. When the redemption period expired was not the dispositive issue in *Northington*; "what was dispositive was the timely—preconfirmation—motion seeking relief filed

[5] Judge Clifton R. Jessup, Jr. of the U.S. Bankruptcy Court for the Northern District of Alabama has also found that TitleMax "slept on its rights" under similar circumstances and denied TitleMax's motion to confirm the absence of the automatic stay. *See In re ett*, No. 19-81656-CRJ-13.

by the pawnbroker declaring it was insisting on its state law rights and was not willing to be paid as a secured creditor pursuant to the debtor's plan." *Id.*

> The fact that the redemption period of the pawn had expired prepetition, assuming that is as crucial as TitleMax believes, was uniquely within TitleMax's purview to bring before this court before plan confirmation, and was not the type of patent 'defect' that the court could be expected to raise *sua sponte* at confirmation under the guidance of *Espinosa*. If this was an illegal plan as TitleMax contends [albeit three months after the fact], because the [vehicle] was not estate property (in the absence of TitleMax's waiver), then TitleMax was in the best position to say so before confirmation . . . .

Id. at *7.

As in the Northern District of Alabama, "there is virtually no meaningful public transportation in" this district. *Id.* at *3 n.8.

> Saving a debtor's vehicle is the essence of many chapter 13 plans as the loss of the vehicle can be an existential calamity for the debtor and his family in many cases. Without a vehicle, a typical debtor cannot get to his job, take his children to school and for medical care, or carry on the day-to- day essential activities of life. The loss of a home may soon follow the loss of a vehicle because many debtors with rent or mortgage payments cannot keep their jobs if they cannot keep their cars. If TitleMax does not intend to accept being treated as a secured creditor in a chapter 13 plan [as it has in multiple cases, *see* footnote 3 above], after having received notice that the debtor intends to do just that, it must voice its objection before confirmation.

Id.

TitleMax relies heavily on *In re Thorpe*, 612 B.R. 463 (Bankr. S.D. Ga. 2019). The bankruptcy court there held that a vehicle did not enter the bankruptcy estate when the debtor filed her chapter 13 case, even though the debtor obtained confirmation of the plan that purported to pay the pawnshop the redemption amount, and the plan could not serve to revest the debtor with any interest in the vehicle. The Bankruptcy Court respectfully disagreed with that decision for the same reasons articulated in *Cottingham*: TitleMax failed to voice any

objection after having received notice of the debtor's intent to treat its matured pawn as a secured claim. Further, *Thorpe* involved Georgia, not Alabama, law and did not address waiver under Alabama law at all. Under TitleMax's position (which the *Thorpe* court accepted), TitleMax is the sole decisionmaker of when it wants to assert its state law rights in a vehicle. As discussed above, this Bankruptcy Court held (at TitleMax's urging) that Alabama law permits waiver of the automatic forfeiture provision of the Alabama Pawnshop Act, which is exactly what the Court finds happened here.

TitleMax is not without a remedy, as it seems to argue in its reply brief. TitleMax can still file a late proof of claim and be paid $1,500 plus interest for the 2003 Pilot as provided by the confirmed plan.

TitleMax can't have it both ways - that is, forfeiture is waivable in some situations but not at confirmation. Indeed, the res judicata effect of confirmation weighs even more heavily in favor of waiver in that context. Just as when TitleMax allows a pawn renewal more than 60 days after the last one (the situation in *Eldridge*) or files a secured claim based on a pawned title (the situation in multiple cases in footnote 3), TitleMax can waive title forfeiture under Alabama Code § 5-19A-6 through the chapter 13 confirmation process.

If the debtor in *Eldridge* is right and forfeiture cannot be waived after the grace period has run, then outside bankruptcy many Alabama customers are paying TitleMax on non-recourse loans for vehicles which TitleMax already owns. Likewise, if forfeiture cannot be waived, then TitleMax is filing secured claims and accepting chapter 13 plan payments on non-recourse loans for vehicles it already owns. The ruling here accords with both the reality on the ground and Alabama waiver law. It applies to the small number of chapter 13 cases where TitleMax has been

properly noticed but does not object in any way to a proposed plan. This court is simply requiring TitleMax to follow the same rules as every other creditor: ,if you disagree with your treatment in a proposed chapter 13 plan, you must timely object (*Espinosa*) or otherwise speak up (*Northington*) because you will be bound by the confirmed plan pursuant to 11 U.S.C. § 1327(a).

III. Conclusion

Based on the foregoing, and after conducting a *de novo* review of the Bankruptcy Court's conclusions of law, the undersigned concludes that there is no error. Neither are any of the Bankruptcy Court's factual findings clearly erroneous. Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

DONE and ORDERED this 31st day of March, 2021.

/s/ JEFFREY U. BEAVERSTOCK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In re:	)	
	)	
Jennifer Lea Deakle,	)	Case No. 21-11161
	)	
Debtor.	)	

ORDER GRANTING IN PART MOTION (DOC. 21) TO CONFIRM TERMINATION OR ABSENCE OF THE AUTOMATIC STAY

This case is before the court on the motion of TitleMax of Alabama, Inc. ("TitleMax") "to confirm termination or absence of the automatic stay." The motion relates to a pending Eleventh Circuit appeal of this court's confirmation order in a now-dismissed chapter 13 case involving the debtor Jennifer Deakle. The court grants the motion in part and orders TitleMax to provide a copy of this order to the Eleventh Circuit.

Background

In May 2019, the debtor filed a chapter 13 bankruptcy case, case no. 19-11820. She filed a chapter 13 plan in which she proposed to pay TitleMax for her pawned 2003 Honda Pilot as a secured claim of $1,500. TitleMax was properly noticed with the bankruptcy petition and the proposed plan but did not object or take any other action. The court confirmed the proposed plan in October 2019.

In January 2020, TitleMax filed a "motion to confirm termination or absence of stay." After a hearing, this court denied the motion, finding that TitleMax had waived forfeiture of the pawned vehicle title by failing to object to confirmation and that TitleMax was bound by the terms of the confirmed plan under Bankruptcy Code § 1327(a) and *United Student Aid Funds,*

Inc. v. Espinosa, 559 U.S. 260 (2010).[1] TitleMax appealed that ruling to the district court. While the district court appeal was pending, this court dismissed the chapter 13 case in November 2020 because of debtor's failure to make plan payments. But no one told the district court, which entered an order in March 2021 affirming this court's ruling.

TitleMax appealed again, this time to the Eleventh Circuit, in April 2021. TitleMax did not inform the Eleventh Circuit in its statement of the case or otherwise that the underlying bankruptcy case had been dismissed months earlier. After debtor's counsel from the original chapter 13 case filed a motion to withdraw, pointing out that the chapter 13 was no longer pending and that the debtor had filed a new chapter 7 case, the Eleventh Circuit ordered briefing on whether the appeal was moot or the automatic stay applied. The Eleventh Circuit later ordered TitleMax to seek a determination from this court on whether the stay is in effect.

Pursuant to the Eleventh Circuit's instructions, TitleMax filed a "motion to confirm termination or absence of the automatic stay." Soon after, on September 24, 2021, the debtor received a chapter 7 discharge. This court asked the parties (doc. 26) what had happened to the 2003 Honda Pilot, since the debtor did not list or mention the vehicle in her chapter 7 schedules. (*See* doc. 1). TitleMax responded that it had not repossessed the Pilot. (*See* doc. 27). The debtor through counsel responded as follows (*see* doc. 30):

1. The 2003 Honda Pilot listed in the Debtor's previous chapter 13 case is located at her residence, 9436 Roland Godwin Rd., Bay Minette, AL 36507.

2. The 2003 Honda Pilot was not addressed on the Debtor's schedules in her recent chapter 7 case because it belongs to TitleMax of Alabama.

3. The 2003 Honda Pilot was not an asset of the bankruptcy estate.

[1] This court has also found that TitleMax could waive forfeiture outside bankruptcy by entering into a new pawn transaction after the customer's redemption rights had expired. *See In re Eldridge*, 615 B.R. 657 (Bankr. S.D. Ala. Feb. 13, 2020). The Eleventh Circuit recently affirmed that ruling. *See In re Eldridge*, No. 21-11457, 2021 WL 4129368 (11th Cir. Sept. 10, 2021).

4. There is no bankruptcy stay since the chapter 13 case was discharged.

5. The Debtor wants TitleMax of Alabama to retrieve the 2003 Honda Pilot immediately.

(*Id.*).

Analysis

The debtor's chapter 7 bankruptcy case created an automatic stay under Bankruptcy Code § 362 when she filed it on June 21, 2021. TitleMax's motion raises two related issues: (1) whether the automatic stay applies to TitleMax's continued action against the debtor Ms. Deakle, the named appellee; and (2) whether the automatic stay applies to the 2003 Honda Pilot that is the subject of the appeal.

Ms. Deakle. The debtor filed her chapter 7 case within a year of the dismissal of her chapter 13 case and did not seek an extension of the automatic stay under Bankruptcy Code § 362(c)(3)(B). Under Code § 362(c)(3)(A), the automatic stay thus terminated "with respect to the debtor" (but not property of the chapter 7 bankruptcy estate) on the thirtieth day after filing. *See generally In re Roach*, 555 B.R. 840 (Bankr. M.D. Ala. 2016). The automatic stay was therefore in effect as to the debtor from June 21 until July 21, 2021.

However, this court entered an order of discharge on September 24, 2021. Under Bankruptcy Code § 524(a)(2), a bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . ." The discharge injunction prohibits TitleMax from continuing any action seeking to collect against the debtor. TitleMax says it is not seeking to do so (*see* doc. 21, p.3); in any case, the debtor has never been

personally liable on the title pawn loan because it was nonrecourse under Alabama Code § 5-19A-6.

If TitleMax wants a declaration from this court that it may proceed with its appeal against the discharged debtor under the doctrine of *In re Jet Florida Systems, Inc.*, 883 F.2d 970 (11th Cir. 1989), the court denies that request. The debtor has no practical or economic interest in trying to uphold the binding effect of a confirmation order in a now-dismissed chapter 13 over a vehicle she does not want. And there has been no showing that the debtor can afford counsel to represent her in the appeal; according to her bankruptcy petition, she is disabled and her only income is from Social Security and food stamps. (*See* doc. 1, schedule I). *See generally SuVicMon Dev., Inc. v. Morrison*, 991 F.3d 1213 (11th Cir. 2021).

The Honda Pilot. The debtor's possessory interest in the 2003 Honda Pilot became property of her chapter 7 bankruptcy estate when the debtor filed her petition in June 2021. *See* 11 U.S.C. § 541(a)(1) (chapter 7 bankruptcy estate encompasses "all legal or equitable interests of the debtor"); *see also In re Davis*, 374 B.R. 362, 365 (Bankr. S.D. Ga. 2006) (debtor's possessory interest in a vehicle is property of the estate and protected by the automatic stay). This court disagrees with the debtor that she did not need to list the Pilot in her bankruptcy schedules. She should have listed her possessory interest in schedules A/B ("Do you own, lease, or have legal or equitable interest in any vehicles . . . ?") or at least included the vehicle in her Statement of Financial Affairs ("23. Do you hold or control any property that someone else owns?").

The debtor's discharge did not terminate the stay as to the debtor's interest in the 2003 Honda Pilot. Under Bankruptcy Code § 362(c)(1) and (2), a debtor's discharge does not terminate the stay as to property of the bankruptcy estate until it is no longer property of the

estate. Here, the chapter 7 trustee filed a "report of no distribution" on July 20, 2021 and no interested party objected within thirty days. The debtor's bankruptcy estate is therefore presumed to have been fully administered. *See* Fed. R. Bankr. P. 5009(a). The court thus finds that the automatic stay is no longer in effect as to the vehicle.

Finally, even if there were a question as to whether her interest in the 2003 Honda Pilot remains in the estate because the debtor did not list it in her schedules, the debtor at most has a bare possessory interest in the vehicle. That interest has no value to the estate and is not necessary to any effective reorganization since this chapter 7 case is a liquidation. *See* 11 U.S.C. § 362(d). To make sure the record is clear, the court will also grant relief from stay as to the vehicle.

* * * * *

It is not clear to this court what relief TitleMax is seeking in its Eleventh Circuit appeal. TitleMax says it is not pursuing the discharged debtor. If TitleMax wants the 2003 Honda Pilot, there is nothing stopping it now. This court has determined that the automatic stay is not in effect as to the vehicle, and the debtor has essentially said "Come and get it!" If self-help repossession does not work for some reason, TitleMax can sue for replevin in state court.

In its brief to the Eleventh Circuit about whether its appeal is moot, TitleMax told that court it wanted a declaration that it had not forever waived its rights in the 2003 Honda Pilot by failing to object to confirmation in the now-dismissed 2019 chapter 13 case. (*See* TitleMax Response to Court Order of August 4, 2021 in appeal no. 21-11447) ("Because of the conflict regarding ownership of the vehicle following dismissal of the bankruptcy case, it remains possible for this Court to grant effectual relief."). This court's order upholding the binding effect

of confirmation did not so hold, and the binding effect of confirmation disappeared upon dismissal of the case. *See* 11 U.S.C. 349(b); *see also, e.g.*, *In re Templeton*, 538 B.R. 578, 587 (Bankr. N.D. Ala. 2015) (if a chapter 13 case is dismissed, "the plan and its order of confirmation no longer have a binding effect"); *First Nat'l Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663, 668 (M.D. Fla. 2018). The debtor certainly is not contending that TitleMax has forever waived its rights in the Pilot – she wants them to retrieve it. And if she changes her mind and there is an issue of waiver in the future, that issue must be decided by the court in which it arises. *See, e.g.*, *Miller v. F.C.C.*, 66 F.3d 1140, 1145 (11th Cir. 1995).

In its pending motion, TitleMax more recently told this court that it "seeks only clarification from the Eleventh Circuit as to TitleMax's obligations to preserve its property rights when a debtor seeks to include a previously forfeited vehicle in her bankruptcy petition." (*See* doc. 21, p.3). In other words – not a remedy against Ms. Deakle or the Honda Pilot but a ruling that TitleMax does not have to object to confirmation in other chapter 13 cases.[2] The Eleventh Circuit will have to decide whether such a ruling would be an impermissible advisory opinion. *See Miller v. F.C.C.*, 66 F.3d at 1145-46; *see also BankWest, Inc. v. Baker*, 446 F.3d 1358, 1367 (11th Cir. 2006).

[2] Although TitleMax failed to object to confirmation in *In re Northington*, 876 F.3d 1302 (11th Cir. 2017), the Eleventh Circuit found that its motion for relief from stay effectively constituted an objection to confirmation.

Conclusion

For the reasons above, the court grants in part TitleMax's motion as follows:

1. The automatic stay terminated with respect to the debtor individually on July 21, 2021, but she was discharged on September 24, 2021. The discharge injunction applies to the continuation of TitleMax's appeal to the extent it seeks relief against the debtor.

2. The debtor's chapter 7 bankruptcy estate has been fully administered and there is currently no stay in effect as to the 2003 Honda Pilot. Alternatively, so that the record is clear, the court grants relief from the stay under Bankruptcy Code § 362(d)(1) and (2) in favor of TitleMax as to the 2003 Honda Pilot and waives the fourteen day stay of Bankruptcy Rule 4001(a)(3).

The court orders TitleMax to provide a copy of this order to the Eleventh Circuit with its next monthly status report in appeal no. 21-11447.

Dated: October 14, 2021

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE