

**Dated: March 12, 2024**  
**The following is ORDERED:**



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**Denise E. Barnett**  
**UNITED STATES BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**WESTERN DIVISION**

In re  
**RICO MARLO UPCHURCH,**  
Debtor.

Case No. 21-22144  
Chapter 13

\_\_\_\_\_  
**RICO MARLO UPCHURCH,**  
Plaintiff.

vs.

Adv. Proc. No. 23-ap-00107

**UNITED AUTO CREDIT CORPORATION,**  
Defendant.  
\_\_\_\_\_

**ORDER AND OPINION DENYING DEBTOR'S**  
**REQUEST FOR TURNOVER OF VEHICLE TITLE**

This adversary proceeding came before the Court on September 26, 2023, at 10:00 a.m., for a hearing on Rico Marlo Upchurch's ("Upchurch's") *Complaint for Turnover of Vehicle Title* and United Auto Credit Corporation's ("United Auto Credit's") *Answer to Complaint for Turnover of Vehicle Title from United Auto Credit and Counterclaim for Attorneys' Fees and Costs*.<sup>1</sup> Upchurch contends that United Auto Credit's secured claim ("Claim 3-1") was paid in

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<sup>1</sup> Adv Proc. ECF Nos. 1 and 5.

full as provided in his confirmed Chapter 13 Plan, and therefore, United Auto Credit should release its lien and transfer the vehicle title to Upchurch. United Auto Credit opposes the release of its lien and the turnover of vehicle title, contending that, under subsection 1325(a)(5)(B)(i) of the Bankruptcy Code, it retains the lien until Upchurch either pays the non-bankruptcy portion of the debt or obtains a discharge. The Court took under advisement the issue of whether the lien should be released, and title transferred to Upchurch. Upon review of the record, filed documents, consideration of the arguments by the parties, post-hearing supplemental filings, and relevant case law, the Court denies the Upchurch's request for release of lien and turnover of the title before the entry of the Chapter 13 discharge, for reasons outlined below.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

On July 2, 2021, Upchurch filed a Chapter 13 Petition.<sup>2</sup> On July 7, 2021, Upchurch filed a Chapter 13 Plan.<sup>3</sup> The Chapter 13 Plan did not include United Auto Credit's secured claim. On July 20, 2021, United Auto Credit filed Proof of Claim 3-1, for \$2,172.70, with a contractual interest rate of 24.99%. The collateral securing United Auto Credit's claim is a 2012 Chevrolet Malibu Sedan 4D LS, VIN 1G1ZB5E09CF282592, which was purchased on July 19, 2019—within the 910-day period of petition date.<sup>4</sup> Also, on July 20, 2021, Upchurch filed his Amended Chapter 13 Plan, listing United Auto Credit Corporation as a secured creditor in paragraph 7,

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<sup>2</sup> ECF No. 1.

<sup>3</sup> ECF No. 9.

<sup>4</sup> Proof of Claim 3-1. The "910-day" period is referenced in the unenumerated "hanging" paragraph following 11 U.S.C. § 1325(a)(9), and states: "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 (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing."

stating that the value of the claim is \$2,000, to be paid with an interest rate of 5.5%.<sup>5</sup> Paragraph 7 also include the words, “Retain lien under 11 U.S.C. § 1325(a)(5).”<sup>6</sup> United Credit Auto did not object to confirmation of Upchurch’s Amended Chapter 13 Plan.

On September 15, 2021, an *Order Confirming Chapter 13 Plan*, provided for the full amount of United Auto Credit’s claim, \$2,172.70, to be paid at non-contractual interest rate of 5.25%.<sup>7</sup> No portion of United Auto Credit’s claim was treated as unsecured in the Amended Chapter 13 Plan and Order Confirming the Plan.<sup>8</sup>

On September 8, 2023, Upchurch filed the Complaint commencing this adversary proceeding, seeking turnover of the title of the 2012 Chevrolet Malibu because the amount of the secured claim, provided for in the Confirmed Chapter 13 Plan, was paid in full.<sup>9</sup>

On September 20, 2023, United Auto Credit filed its Answer admitting basic facts that lead to the filing of the Complaint but denying that its contractual balance has been paid in full. United Auto Credit raised affirmative defenses that Upchurch is not entitled to the release of the lien and turnover of the title primarily because: (1) Upchurch’s Confirmed Chapter 13 Plan crammed down United Auto Credit’s contractual interest rate from 24.99 % to 5.25%, and United Auto Credit is owed \$947.68 under non-bankruptcy law until Upchurch obtains his discharge under section 1328 of the Bankruptcy Code; and (2) the relief Upchurch is seeking

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<sup>5</sup> ECF No. 15.

<sup>6</sup> *Id.*

<sup>7</sup> ECF No. 17.

<sup>8</sup> *Id.*

<sup>9</sup> Adv. Proc. ECF No. 1.

violates 11 U.S.C. § 1325(a)(5)(B)(i).<sup>10</sup> United Auto Credit further asserted a counterclaim alleging that: (1) it is owed the contractual non-bankruptcy balance in the amount of \$947.68 as of September 18, 2023; (2) the current retail value of the 2012 Chevrolet Malibu is \$6,100; (3) United Auto Credit is entitled to attorney fees because (a) Upchurch's complaint is baseless and should have been dismissed, and (b) United Auto Credit is an over-secured creditor.

On September 26, 2023, the Court held a hearing in the adversary proceeding, when it became clear that the essential facts are not in dispute. At the hearing, the Chapter 13 Trustee confirmed that Claim 3-1 was paid in full. United Auto Credit argued that it should retain its lien, and the title should not be turned over unless Upchurch obtains a discharge, or the non-bankruptcy debt contractual balance is paid off. At the conclusion of the hearing, the Court invited the parties to file post-hearing supplemental filings.

On October 2, 2023, United Auto Credit filed a *Memorandum in Support of Creditor's Answer to Complaint for Turnover*.<sup>11</sup> Upchurch made no post-hearing filings. The central argument outlined in United Auto Credit's memorandum is that subsection 1325(a)(5)(B)(i) of the Code changed under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and now allows a secured creditor to retain its lien if the unsecured portion (non-bankruptcy contractual amount) is not paid off or a discharge has not yet been entered under section 1328 of the Code.<sup>12</sup>

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<sup>10</sup> Adv. Proc. ECF No. 5.

<sup>11</sup> Adv. ECF No. 8.

<sup>12</sup> Adv. ECF No. 8.

## II. DISCUSSION<sup>13</sup>

The Court is presented with the issue of whether a creditor should release its lien and turn over the title to an automobile securing its claim when its secured claim was paid in full pursuant to the confirmed Chapter 13 plan before the entry of discharge under section 1328 of the Code, or whether the creditor could retain its lien until the non-bankruptcy contractual balance is paid off or until the debtor obtains a discharge.

Under subsection 1325(a)(5), the court shall confirm a Chapter 13 plan if one of three conditions is satisfied: (1) the collateral securing the claim is surrendered; (2) the secured creditor accepts plan; or, (3) the creditor retains the lien securing the claim and receives payments that total the “value, as of the effective date of the plan, [that is] not less than the allowed amount of such claim,”<sup>14</sup> commonly described as “crammed down.”

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<sup>13</sup> The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1334(b). Venue is proper in this District. 28 U.S.C. § 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The following shall constitute the court’s findings of fact and conclusions of the law in accordance with Rule 7052, Federal Rules of Bankruptcy Procedure.

<sup>14</sup> Subsection 1325(a)(5) states:

- (a) Except as provided in subsection (b), the court shall confirm a plan if—
- (5) with respect to each allowed secured claim provided for by the plan--
- (A) the holder of such claim has accepted the plan;
- (B)(i) the plan provides that--
- (I) the holder of such claim retain the lien securing such claim until the earlier of--
- (aa) the payment of the underlying debt determined under nonbankruptcy law; or
- (bb) discharge under section 1328; and
- (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
- (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
- (iii) if--
- (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
- (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
- (C) the debtor surrenders the property securing such claim to such holder[.]

11 U.S.C. § 1325(a)(5) (2024).

United Auto Credit argues that its claim was “crammed down” because the interest rate was reduced from the contract interest rate of 24.99% to 5.25%,<sup>15</sup> creating a non-bankruptcy contractual balance of \$947.68. United Auto Credit contends that because its claim was “crammed down,” the plain language of subsection 1325(a)(5)(B)(i), that was added pursuant to BAPCPA of 2005,<sup>16</sup> makes clear that a secured creditor retains its lien until the non-bankruptcy contractual portion of its claim is paid in full or until the debtor receives a discharge under section 1328 of the Code. United Auto Credit further points out that: “Due to the clarity of the statutory language currently found in 11 U.S.C. Section 1325(a)(5)(B)(i), there does not appear to be an abundance of caselaw directly on point regarding the issue presented in this case, i.e. whether the Court should allow turnover of a Vehicle title prior to payment of the underlying debt determined under non-bankruptcy law or discharge under Section 1328 of the Bankruptcy Code[.]”<sup>17</sup> United

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<sup>15</sup> It appears that the 5.25% interest rate calculated consistent with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

<sup>16</sup> Before BAPCA of 2005, subsection 1325(a)(5)(B) of the Code read as follows: “(a) Except as provided in subsection (b), the court shall confirm a plan if— (5) with respect to each allowed secured claim provided for by the plan . . . (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.” 11 U.S.C. § 1325(a)(5)(B) (2004).

Subsection 1325(a)(5)(B), after the enactment of BAPCA of 2005, reads as follows:

(a) Except as provided in subsection (b), the court shall confirm a plan if— (5) with respect to each allowed secured claim provided for by the plan . . .

(B)(i) the plan provides that –

(I) the holder of such claim retain the lien securing such claim until the earlier of

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law.

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan[.]

<sup>17</sup> Adv. Proc. ECF No. 8, at 4.

Auto Credit relies on cases interpreting the language of subsection 1325(a)(5)(B) in the context of whether secured creditors are entitled to the full amount of their contractual claim from insurance proceeds unless their non-bankruptcy balance is paid in full or until the debtor receives a discharge under section 1328 of the Code.<sup>18</sup>

The critical facts in this proceeding are clear and undisputed. The Confirmed Chapter 13 Plan, in paragraph 7, provided for the full amount of the claim, \$2,172.70, to be paid at the non-contractual interest rate of 5.25% and for payment over a longer period than provided under the contract. Paragraph 7 of the Confirmed Amended Chapter 13 Plan also contains lien retention language pursuant to 11 U.S.C. § 1325(a)(5). Paragraph 18 of the Amended Chapter 13 Plan states that “failure to timely file a written objection to the confirmation shall be deemed acceptance of plan.”<sup>19</sup> United Auto Credit did not file a written objection to the Amended Chapter 13 Plan. Nothing in the main case (such as the Amended Chapter 13 Plan, the Order Confirming the Plan, or an amended proof of claim) provides for payment of the unsecured non-bankruptcy contracted portion of United Auto Credit’s claim. Upchurch proposed and United Auto Credit accepted to be treated under subsection 1325(a)(5)(B). Accordingly, both Upchurch and United Auto Credit are bound by the terms of the Confirmed Chapter 13 Plan.

United Auto Credit was fully paid on its secured claim under the terms of the Confirmed Chapter 13 Plan. United Auto Credit, however, is not required to release its lien and turn over the vehicle title to Upchurch until he obtains a discharge pursuant to section 1328 of the Code—this is consistent with subsection 1325(a)(5)(B), the treatment that Upchurch proposed and United

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<sup>18</sup> Adv. Proc. ECF No. 8, at 4-8.

<sup>19</sup> ECF No. 15, at 2.

Auto Credit accepted.<sup>20</sup>

Although United Auto Credit is not entitled to any further payments pursuant to the terms of the Confirmed Chapter 13 Plan, upon conversion<sup>21</sup> or dismissal<sup>22</sup> of Upchurch's Chapter 13 case, the amount of United Auto Credit's claim and its lien rights would be determined by applicable non-bankruptcy law. The release of lien and turnover of title prior to the entry of discharge would deprive United Auto Credit of ability collect any non-discharged amount of its claim and the collateral securing such claim. All obligations to United Auto Credit will be discharged upon entry of the order granting Upchurch his discharge. As such, United Auto Credit is not required to release its lien or turn over title to the vehicle unless Upchurch obtains his discharge under 1328 (or the non-bankruptcy contractual balance is otherwise satisfied).

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<sup>20</sup> It may be argued that United Auto Credit accepted the treatment provided in the Amended Chapter 13 Plan pursuant to subsection 1325(a)(5)(A). Courts have found that a secured creditor who fails to file an objection to confirmation of a Chapter 13 plan, after it had proper notice, accepts the plan pursuant to subsection 1325(a)(5)(A). *See In re Carr*, 584 B.R. 268, 275 (Bankr. N.D. Ill. 2018) (overruling Chapter 13 trustee's objection to confirmation on the grounds that subsection 1325(a)(5)(B)(iii)(I) is not satisfied because no secured creditor objected) *See also In re Jones*, 530 F.3d 1284, 1291 (10th Cir. 2008) (holding that a secured creditor's failure to object to confirmation results in the secured creditor being bound by the terms of the plan). Here, even if United Auto Credit accepts its treatment under the Amended Chapter 13 Plan (by not filing an objection), the plan language called for United Auto Credit to retain its lien.

<sup>21</sup> Subsection 348(f)(1)(C) states that:

Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title . . . (C) with respect to cases converted from chapter 13— (i) the claim of any creditor holding security as of the date of the filing of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and (ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law. 11 U.S.C. § 348(f)(1)(C) (2024).

*In re Woodland*, 325 B.R. 583, 586 (Bankr. W.D. Tenn. 2005) (Brown, J.) (“In the 2005 amendments of the Code, which don’t take effect as to this section until October 17, 2005, § 348(f) is amended to provide that valuations of property and secured claims made in the Chapter 13 case will not be applicable if the case is converted to Chapter 7, and the claim of a secured creditor will continue to be secured in the conversion to Chapter 7 unless the secured claim has been paid in full under nonbankruptcy law. In other words, when a case is converted from Chapter 13 to Chapter 7 under the post-October 17 Code, the Debtor will not get the complete benefit of payments made under a Chapter 13 plan unless the secured claim has been paid in full under its prebankruptcy contractual terms.”).

<sup>22</sup> “[I]f a case is dismissed . . . before the plan is completed, the creditor retains its secured status under applicable law.” BANKR. L. MANUAL § 13:39 (5th ed. 2023) (citing 11 U.S.C. § 1325(a)(5)(B)(i)(I)).



### **III. CONCLUSION AND ORDER**

The Court concludes that Upchurch is not entitled to a release of lien and the title the 2012 Chevrolet Malibu before the entry of his discharge. Accordingly, it is **ORDERED:**

1. Upchurch's request for turnover of the title to the 2012 Chevrolet Malibu is DENIED.
2. United Auto Credit shall retain its lien and the title to the 2012 Chevrolet Malibu until Upchurch obtains a discharge in this case.
3. United Auto Credit's request for attorney fees is DENIED.

Cc: Debtor  
Attorney for Debtor, John Dunlap  
Creditor United Auto Credit  
Attorney for Creditor, Robert Fehse  
Chapter 13 Trustee  
United States Trustee  
All creditors on matrix