SO ORDERED.
SIGNED this 11th day of February, 2019

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

LISA DIANE MCKEE

Case No. 3:18-bk-32585-SHB
Chapter 13

Debtor

MEMORANDUM AND ORDER ON CONFIRMATION OF SECOND AMENDED CHAPTER 13 PLAN

This contested matter is before the Court on confirmation of Debtor's Second Amended Chapter 13 Plan filed October 31, 2018 ("Second Amended Plan") [Doc. 34], and the Objection of Santander Consumer USA Inc. dba Chrysler Capital ("Santander" or "Chrysler Capital") filed on October 15, 2018 [Doc. 29], as amended on January 25, 2019 (collectively "Amended Objection") [Doc. 51].[1] This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

I. PROCEDURAL POSTURE AND FACTS

Debtor filed the Voluntary Petition commencing this Chapter 13 bankruptcy case on

[1] The Chapter 13 Trustee also lodged a feasibility objection to confirmation of Debtor's proposed plan, and her objection remains pending. [Docs. 32, 53.]

August 23, 2018, and scheduled a $21,696.00 obligation to Chrysler Capital secured by a 2014 Dodge Grand Caravan ("Caravan") valued at $9,925.00. [Doc. 1 at p. 25.] On September 13, 2018, Santander filed a secured Proof of Claim in the amount of $21,916.65. [Claim No. 5.] As they relate to Santander, Debtor's Chapter 13 Plan filed on August 23, 2018 [Doc. 2], the Amended Chapter 13 Plan filed on October 4, 2018 [Doc. 26], and the Second Amended Plan filed on October 31, 2018 [Doc. 34], provide for the same treatment in Section 3.2, entitled "Request for Valuation of Security, Payment of Fully Secured Claims, and Modification of Undersecured Claims." Specifically, Section 3.2 proposes a cramdown of Santander's claim on the Caravan to $9.925.00, to be paid at 3.5% interest by monthly payments of $180.55. All of the proposed plans also contain the following language, as mandated by this district's form Chapter 13 plan:

> If the Secured Amount is less than the creditor's total claim, only the allowed Secured Amount will be paid in full with interest at the rate stated below. Any portion of the creditor's total allowed claim that exceeds the Secured Amount will be treated as an unsecured claim under Section 5.1 of this plan. . . .
>
> . . . .
>
> Each creditor listed below will retain its *lien on the property interest of the debtor(s) or the estate(s)* until the earlier of:
>
> (a) payment of the underlying debt determined under nonbankruptcy law, or
> (b) discharge of the underlying debt under 11 U.S.C. § 1328,
>
> at which time *the lien* will terminate and be released by the creditor.

[Docs. 2, 26, 34 (emphases added).] Section 7.1 of each plan also provides that "[p]roperty of the estate will not vest in the debtor(s) until completion of the plan as evidenced by the trustee's filing of a certificate of final payment." [Docs. 2, 26, 34.]

On October 15, 2018, Santander objected to confirmation of the Amended Plan, arguing that the original contract provided for 72 monthly payments of $632.08 plus 17.23% interest; that

the NADA value of the Caravan is $13,450.00; that Santander's interest is not adequately protected by the plan treatment; that Santander is entitled to the value of its collateral plus an appropriate interest rate; that Santander is entitled to payment of the replacement value of the Caravan; that the Amended Plan does not provide for codebtor relief or for payment in full at the contract rate of interest to protect the codebtor; that the Amended Plan improperly provides for Santander to release its lien notwithstanding the non-filing codebtor; and that the Amended Plan improperly provides that the Caravan will vest in Debtor free and clear of liens notwithstanding the non-filing codebtor's interest. [Doc. 29.]

After a status hearing on the objections to confirmation of the Second Amended Plan at which the Court requested that Santander file an amended objection to more fully explain its position, Santander filed its Amended Objection, which fleshed out its argument that "Debtor's attempted lien strip of Santander's lien and vesting of the Collateral in the Debtor at the completion of the plan is inappropriate since the lien secured the indebtedness of not only the Debtor, but also the non-filing party." [Doc. 51 at ¶ 11.] In essence, Santander argues that the form Chapter 13 plan adopted by the United States Bankruptcy Court for the Eastern District of Tennessee in Chattanooga, Greeneville, Knoxville, and Winchester does not adequately provide for retention of a creditor's lien against the non-filing codebtor.

Notwithstanding Santander's arguments to the contrary, the Court finds that the Second Amended Plan adequately protects a creditor's lien rights against collateral in a case involving a non-filing codebtor because the plan makes clear that the lien that is terminated at discharge of the debtor's underlying debt (or on payment of the underlying debt determined under nonbankruptcy law) is limited to the "lien on the property interest of the debtor(s) or the estate(s)." [Doc. 34 at § 3.2.] Thus, Santander's Amended Objection concerning the lien

termination and release and vesting provisions of the Second Amended Plan will be overruled.[2]

II. ANALYSIS

As evidenced by its proof of claim, Santander is a secured creditor of Debtor, holding a security interest in Debtor's Caravan that secures payment of the indebtedness owed to Santander. Accordingly, treatment of Santander's claim through Debtor's plan is governed by 11 U.S.C. § 1325(a), which can be summarized as follows:

> Section 1325(a)(5) provides three alternative methods by which a Chapter 13 debtor may deal with the holder of each allowed secured claim provided for by the plan – acceptance of the plan by the secured creditor (§ 1325(a)(5)(A)); compliance with the Chapter 13 cramdown provisions (§ 1325(a)(5)(B)); or surrender of the collateral to the secured creditor (§ 1325(a)(5)(C)).

In re Maddox, No. 13-31273, 2013 WL 3553395, at *1 (Bankr. E.D. Tenn. July 11, 2013).

Here, only the "cramdown" provision of § 1325(a)(5) is at issue: "the court shall confirm a plan if – with respect to each allowed secured claim . . . – the plan provides that . . . 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)(ii). To comply with § 1325(a)(5)(B), the plan must propose to pay the secured creditor, who retains its lien, "no less than the present value of its allowed secured claim, that is, the present value of the [collateral]." *In re Rucker*, No. 17-04552-NPO, 2018 WL 3244458, at *2 (Bankr. S.D. Miss. July 3, 2018). The Second Amended Plan expressly provides for payment of the secured value of the Caravan: $9,925.00 together with 3.5% interest, through a monthly payment in the amount of $180.55. [Doc. 34.] Any amount owed on the debt to Santander above the secured amount (i.e., $11,771.00) is to be paid pro rata from funds available. [*Id*.]

[2] Santander's objection as to the value of the collateral and appropriate interest rate remains pending with the Chapter 13 Trustee's feasibility objection, both of which have been continued to February 13, 2019.

Any amount of the full contract debt that is not paid through this Chapter 13 case will be discharged once Debtor makes all plan payments and otherwise meets the legal prerequisites for discharge. *See* 11 U.S.C. § 1328. Additionally, Santander will retain its lien *on Debtor's or the estate's interest* in the Caravan until the earlier of (a) payment in full of the contractual obligation owed to Santander under nonbankruptcy law or (b) Debtor receives a discharge under 11 U.S.C. § 1328. [Doc. 34.] Only after one of those events will the lien *against the interest of Debtor or the estate* terminate and be released. [*Id*.]

Much of Santander's argument centers around the fact that there is no plan provision expressly stating that Santander will retain its lien and all contract rights against the non-filing codebtor, who is governed by the codebtor stay of 11 U.S.C. § 1301. Although the codebtor stay is designed "to delay creditors from asserting their rights against co-signed debts while a Chapter 13 bankruptcy case is pending[,]" *In re Leonard*, 307 B.R. 611, 613-14 (Bankr. E.D. Tenn. 2004), "[i]ts purpose is to protect the debtor, not the co-debtor" and "'"to ensure that the creditor does not lose the benefit of the bargain." [Thus,] [t]he creditor is delayed procedurally, but substantive rights against the codebtor are not affected by the codebtor stay.'" *Brooks v. GMAC (In re Brooks)*, 340 B.R. 648, 655 (Bankr. D. Me. 2006) (quoting *In re Humphrey*, 310 B.R. 735-37 (Bankr. W.D. Mo. 2004) (quoting H.R. Rep. No. 595, at 123 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6381)).

Although the Second Amended Plan does not expressly provide for codebtor relief, nothing prevents Santander from seeking relief from the codebtor stay under 11 U.S.C. § 1301(c)(2)[3] to collect the balance of the indebtedness not provided for in Debtor's plan. *See e.g.,*

[3] "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that – . . . (2) the plan filed by the debtor proposes not to pay such claim[.]" 11 U.S.C. § 1301(c)(2).

In re Hart, No. 13-52080-JDW, 2013 WL 6175655, at *2 (Bankr. M.D. Ga. Nov. 21, 2013) (holding that the creditor was entitled to relief from the codebtor stay because the plan provided for payment of 5% interest rather than the contractual 24%, stating that "[t]he statute requires the Court to grant stay relief when the debtor's plan does not provide for payment of the claim in full."); *In re Jackson*, No. 12-10757-JDW, 2012 WL 6623497, at *2 (Bankr. M.D. Ga. Dec. 18, 2012) (stating that "nothing" prevented the creditor "from immediately pursuing" the non-filing codebtor "for the contract interest not provided for in Debtor's plan" by seeking relief from the codebtor stay).

Simply, the Second Amended Plan does not strip Santander of either its lien or its rights with respect to the codebtor. The same argument was rejected by the court in *In re Jackson*:

> [T]his is not a case where both debtors hold an undivided and indivisible interest in the collateral, such that the release of a lien against the property of one debtor necessarily eradicates the lien as to the other debtor. Instead, Debtor and Ms. Brown both hold a one-half interest in the Pontiac. In these circumstances, the Court concludes that the lien release provisions in Debtor's plan will serve to render Lawson's lien unenforceable as to Debtor's interest in the Pontiac. However, the lien will remain in place and can be enforced against Ms. Brown's interest in the Pontiac until such time as Lawson receives full payment of its claim at the contract rate.

2012 WL 6623497, at *2. The text of this district's form Chapter 13 plan as included in the Second Amended Plan unambiguously provides that the terminated and released lien on Santander's collateral applies *only* to any property interest of Debtor or Debtor's bankruptcy estate; this provision in no way provides a termination or release as to the non-filing codebtor.

In support of its arguments to the contrary, Santander cites to cases involving property held by debtors as tenants by the entireties; however, those cases are irrelevant to any inquiry concerning property held as tenants in common, as is the case here. Santander correctly states that "[p]roperty interests are created and defined by state law [so that u]nless some federal

interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979). With respect to jointly held property, the Tennessee Supreme Court recently explained the following:

> Tennessee recognizes three basic forms of concurrent ownership in real property: joint tenancy, tenancy in common, and tenancy by the entirety. A brief review of these tenancies is helpful to our discussion.
>
> At common law, the type of tenancy that results from a conveyance of real property to two or more persons depends on the whether the four unities – interest, title, time, and possession – exist at the time of conveyance. If the four unities exist at the time of the conveyance and the conveyance is made to a married couple, the conveyance results in a tenancy by the entirety, absent language indicating a contrary intent. If the four unities exist but the conveyance is to unmarried persons, the conveyance results in a joint tenancy; by operation of law, a common-law joint tenancy includes a right of survivorship even when no words of survivorship are used in the granting instrument. If, however, the four unities are not present at the time of the conveyance, the conveyance results in a tenancy in common, which does not include a right of survivorship.

Bryant v. Bryant, 522 S.W.3d 392, 399 (Tenn. 2017) (citations omitted). Property held as tenants by the entireties – which is reserved exclusively for married persons – includes a right of survivorship because "'each spouse is seized of the whole or the entirety and not a share, moiety, or divisible part' and ownership of the property, as a whole, fully vests in the surviving spouse upon the death of the other spouse." *In re Roos*, 590 B.R. 803, 807 (Bankr. E.D. Tenn. 2018) (quoting *In re Arwood*, 289 B.R. 889, 893 (Bankr. E.D. Tenn. 2003)). In other words, the parties are viewed not as individuals but as one married unit, and they cannot unilaterally sever the other spouse's rights.

Conversely, property held as joint tenants (through which the cotenants have a right of survivorship by operation of law[4]) or tenants in common (through which there is no right of

[4] Joint tenancy with a right of survivorship as the default was abolished under Tennessee law and is codified by Tennessee Code Annotated § 66-1-107. Nevertheless, Tennessee courts "consistently recognize that property owners

survivorship) is viewed as being held by two or more individual owners, each of whom has equal ownership rights to the property as a whole. *See Bryant*, 522 S.W.3d at 400-01. "That joint tenants and tenants in common hold divisible parts is the central distinction between those tenancies and tenancy by the entirety." *In re Roos*, 590 B.R. at 808.

Santander also relies on *In re Leonard*, 307 B.R. 611 (Bankr. E.D. Tenn. 2004), and *In re Jackson*, No. 12-10757-JDW, 2012 WL 6623497 (Bankr. M.D. Ga. Dec. 18, 2012), to argue that the Second Amended Plan impermissibly provides for Santander to release its lien against the Caravan on entry of Debtor's discharge. The Court disagrees with Santander's interpretation of both cases as they relate to the issues presented here.

First, the issues raised in *In re Leonard* were whether GMAC was required to release its lien and turn over title of the vehicle to the debtors upon completion of their plan,[5] notwithstanding that the vehicle was also owned by a non-filing codebtor, and whether attempts to collect the balance owed under the original contract from the non-filing codebtor was a violation of the discharge injunction. *See In re Leonard*, 307 B.R. at 614. In deciding that GMAC's attempt to collect from the codebtor the unpaid indebtedness owed under the contract did not violate the discharge injunction, the Court focused on the language of 11 U.S.C. § 524(e), which materially provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id.* at 613. The court held that "there is no injunction preventing a creditor from proceeding with collection actions against a non-filing co-debtor once a Chapter 13 case has ended." *Id.* The Court recognized that during

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remain free 'to expressly provide for survivorship by deed.'" *Bryant*, 522 S.W.3d at 404 (quoting *Jones v. Jones*, 206 S.W.2d 801, 803 (Tenn. 1947)).

[5] The *Leonard* opinion does not quote any language within the plan concerning lien release. Based on the proof of claim filed by GMAC and the Final Report filed by the Chapter 13 Trustee, after payment of the secured and unsecured portions provided for under the debtors' plan, GMAC was entitled to a deficiency balance from the non-filing codebtor of $3,328.64. *Leonard*, 307 B.R. at 612.

the pendency of the case, the codebtor was protected by the codebtor stay, noting that "if debtors do not propose to pay the debt in full in the plan, their co-debtors will have to pay." *Id*. (quoting *Se. Bank v. Brown*, 266 B.R. 900, 908 (S.D. Ga. 2001)).

With respect to the lien, the court's focus was not on releasing the lien as to the debtor but on release of the lien with surrender of the title. *See id.* at 614. The court held that because the codebtor's name was still noted on the certificate of title, GMAC retained a lien because it was not paid in full, and although the debtor received a discharge of her debts (including the obligation owed to GMAC), because the vehicle was not paid in full under the confirmed plan, the codebtor remained liable for the deficiency balance and accruing interest. Thus, post-discharge, when the vehicle was no longer property of the estate, GMAC could proceed against the codebtor as well as the vehicle itself if the codebtor did not pay, even though it was enjoined from proceeding against the debtor. *Id*.

In *Jackson*, the proposed plan to which the creditor objected included language providing that "all holders of liens other than long term debt . . . shall cancel said liens within 15 days following notification of the debtor(s) discharge." *In re Jackson*, 2012 WL 6623497, at *1 (quoting paragraph 2(m) of the proposed plan). The secured creditor objected "for multiple reasons, including the ground that its claim [wa]s not being paid in full and therefore it should not be required to release its lien upon discharge as provided in paragraph 2(m)." *Id.* The court found the plan "confirmable . . . [because] the lien release provision . . . only applie[d] to liens against Debtor's interest in property [and the creditor] w[ould] retain its lien to the extent of [the codebtor's] one-half interest in the vehicle" until the codebtor paid the debt in full at the contract rate. *Id*. Focusing on § 1301(c)(2), which allows codebtor relief when a creditor's claim (differentiated from a creditor's "allowed claim") is not paid in full, the court explained that

"nothing prevents [the creditor] from immediately pursuing [the codebtor] for the contract interest not provided for in Debtor's plan." *Id*. at *2. Thus, the *Jackson* decision supports this Court's interpretation of the plan provision at issue. *See also Faulkner v. CEFCU (In re Faulkner)*, Adv. No. 12-08069, 2013 WL 2154790, at *5 (Bankr. C.D. Ill. May 17, 2013) (citing with approval *In re Leonard* and *In re Jackson* and holding that lien release provisions in the plan "no matter how clear and conspicuous, can only serve to release [the creditor's] lien as to the Debtor's interest in the vehicle").

Debtor and the non-filing codebtor are not married; thus, the Caravan is owned as tenants in common, with each individual owning one-half of the whole and, but for imposition of the codebtor stay, Santander could proceed against the codebtor. Santander, at any point, may seek relief from this Court under § 1301 to pursue payment of the unsecured portion of the Caravan as well as the difference in the contractual interest rate and the 3.5% cramdown interest rate provided for in the Second Amended Plan. Most critically, the lien release provision does not in any way protect the codebtor, nor does it fail to provide Santander with adequate protection of its lien against the codebtor. All that is required under the Second Amended Plan, if confirmed and completed so that discharge is entered, is termination of Santander's lien as to Debtor's interest. Santander is not required to release its lien as to the codebtor, nor is Santander required to deliver a free and clear certificate of title to Debtor on completion of her plan and discharge.[6]

Because the lien termination and release provision of the Second Amended Plan satisfies the requirements of 11 U.S.C. § 1325, the Court directs the following:

1. The Objection to Confirmation filed by Santander Consumer USA, Inc. dba Chrysler

[6] This Court would quickly deny any post-discharge motion by Debtor for turnover of the certificate of title to the Caravan with Santander's lien released (absent proof that Santander had been paid the full amount owed under the contract).

Capital on October 15, 2018 [Doc. 29], as amended on January 25, 2019 [Doc. 51], is OVERRULED IN PART as it concerns Sections 3.2 and 7.1 of the Second Amended Plan.

2. The remaining issues raised by the Objection to Confirmation filed by Santander Consumer USA, Inc. dba Chrysler Capital on October 15, 2018 [Doc. 29], as amended on January 25, 2019 [Doc. 51] (i.e., valuation of the Caravan and the appropriate rate of interest), as well as the Chapter 13 Trustee Objection to Confirmation filed on October 26, 2018 [Doc. 32], will be heard on February 13, 2019, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, 800 Market Street, Knoxville, Tennessee.

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