



IT IS ORDERED as set forth below:

Date: September 11, 2014

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE: : CASE NO. 13-66201-BEM
: :
TONJA DENISE RUSSELL : CHAPTER 13
: :
Debtor. : :

ORDER

This Chapter 13 case came before the Court on February 4, 2014, for a hearing on confirmation of Debtor's proposed Second Amended Chapter 13 plan (the "Hearing" and the "Plan," respectively) (Doc. No. 31) and the objections thereto filed by the Standing Chapter 13 Trustee and creditor, USA Discounters ("Creditor"). (Doc. Nos. 16 & 30, 17). Sonya Buckley, staff attorney for the Standing Chapter 13 Trustee, Janet

Womack for Creditor, Ashley Edwards for the Debtor, and the Debtor were present at the Hearing.

Ms. Buckley reported that the Debtor had cured the Trustee's objections by increasing the pool of funds available to unsecured creditors to \$10,000. Ms. Buckley further reported that the bar date for claims had passed prior to the Hearing and as of the date of the Hearing unsecured claims in the amount of \$5,822.00 have been filed. Ms. Buckley noted that the Creditor's objection to confirmation was outstanding and presented the issue whether the Debtor can confirm a plan that proposes to surrender collateral when the Debtor is not in possession of the property and cannot physically deliver the same to the creditor. Put another way, the issue the Court must decide is the meaning of the word surrender as contained in 11 U.S.C. § 1325(a)(5)(C).

Creditor argues that the Court should follow *Hospital Authority Credit Union v. Smith*, 207 B.R. 26 (Bankr. N.D. Ga. 1997) (Massey, J.). In *Smith*, pre-confirmation, debtor proposed to retain and pay for a vehicle. After confirmation, debtor delivered the vehicle to a repair shop, determined that she could not afford to recover the vehicle and then sought to modify her confirmed plan to surrender the vehicle. In this context, of a post-confirmation modification, Judge Massey held that debtor could not "pay, distribute or surrender something that she could neither deliver nor tender" and concluded that the phrase "to such holder" in section 1325(a)(5)(C) required that "debtor must at least tender possession or control of the collateral to the creditor . . . merely telling the creditor where it can find the collateral is not surrender 'to such holder.'" *Id.* at 30.

In contrast, Debtor argues, in reliance on *In re Cornejo*, 342 B.R. 834 (Bankr. M.D. Fla. 2005), that the Court should consider whether the Debtor has made a good faith effort to locate the property and conclude that surrender does not require turnover of property. In *Cornejo*, the Court considered whether § 521 requires turnover of property that the debtor intends to surrender. In concluding that surrender did not require turnover, the *Cornejo* court noted that when Congress intended to require delivery of property, the Code expressly states that delivery is required. *Id.* at 836 (citing, *Kasper* (noting delivery requirement in §§ 727(d), 542(a), 543(b); 543(d); Fed.R.Bankr.P. 7001(1))). The Court further relied upon the “fundamental purpose of the Code” of providing the debtor a fresh start in concluding that delivery was not necessary for surrender. *Id.* at 837.

Although not relied upon by Debtor, the *Cornejo* Court cited *In re Alexander*, 225 B.R. 665 (Bankr. E.D. Ark. 1998), a chapter 13 case in which the Court considered whether the debtor’s surrender of all rights in a vehicle controlled by debtor’s ex-spouse and co-debtor satisfied the requirements of § 1325(a)(5)(C). In *Anderson*, the Court distinguished *Smith* because *Smith* dealt with a post-confirmation modification and because of an “element of culpable behavior” present in *Smith* that was not present in *Alexander*. *Id.* at 665; *See also, In re Walton*, 243 B.R. 793 (Bankr. M.D. Ala. 1999); *In re Anderson*, 316 B.R. 321 (Bankr. W.D. Ark. 2004). The Court in *Alexander* concluded that there was a remedy for both debtor and creditor because of debtor’s good faith inability to deliver the property and the creditor’s remedies outside of bankruptcy to pursue recovery against a co-debtor (if there is one) and to retain its lien rights outside of

bankruptcy. *Id.*; *see also, Kasper* (concluding that §521 is a notice statute and does not alter the nonbankruptcy law rights of debtor or lien holder). Finally, the Court notes the Fourth Circuit’s statement that “[a]t the most basic level, then, the word “surrender” means the relinquishment of all rights in property, including the possessory right, even if such relinquishment does not always require immediate physical delivery of the property to another.” *IRS v. White*, 487 F.3d 199, 205 (4th Cir. 2007).

This Court concludes that the better construction of the term surrender acknowledges that surrender does not always require immediate physical delivery of the property. In this case, although neither party presented evidence, the Creditor did not dispute Debtor’s counsel’s statements that the Debtor had sought to locate her estranged spouse in an effort to locate the property and that the Debtor had filed a police report with respect to the property. Creditor did not allege in its written objection or at the Hearing that the Debtor lacked good faith. Thus, the Court finds that Debtor’s proposed surrender is proposed in good faith and that there is no indication of bad faith or fraud, such that the Creditor’s objection to confirmation should be overruled.

Beyond surrender, the Plan does not address treatment of Creditor’s claim. Presumably this is because surrender of collateral securing a claim that is not subject to valuation under § 506 “necessarily satisfies an allowed secured claim.” *Americredit Fin. Svcs, Inc. v. Hickox (In re Hickox)*, 2008 Bankr. LEXIS 4373, *6 (Bankr. S.D. Ga 2008). Notwithstanding, surrender does not eliminate the creditor’s state law rights so that if the underlying contract and/or state law provide a right to a deficiency claim then the creditor retains that claim. *See, DaimlerChrysler Fin. Svcs, LLC v. Barrett*, 543 F.3d 1239 (11th

Cir. 2008). Thus, Creditor has a right to amend its claim to address its state law deficiency claim, if any, and it is now, hereby,

ORDERED that the Objection to Confirmation filed by USA Discounters is OVERRULED and the Debtor's Second Amended Chapter 13 Plan is Confirmed.

END OF DOCUMENT

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