

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION**

In re:	)	
	)	
RICKY DALE HAMLET,	)	Case No. 14-50836
	)	Chapter 13
Debtor.	)	
_____	)	

**MEMORANDUM AND ORDER GRANTING TRUSTEE’S MOTION**

THIS MATTER came before the court on June 8, 2016 on the Chapter 13 Trustee’s Motion to Modify Plan to include a minimum dividend to unsecured creditors pursuant to 11 U.S.C. § 1329. At the hearing, Christopher Avery appeared on behalf of Ricky Dale Hamlet (the “Debtor”), Vernon Cahoon appeared on behalf of the Chapter 13 Trustee, and Robert E. Price, Jr. appeared on behalf of the Bankruptcy Administrator. Based upon the pleadings, the oral arguments, the supplemental briefs, the record in this case, and applicable law, the court concludes that the Motion must be granted.

**BACKGROUND**

The relevant facts of this case are undisputed. The Debtor filed a Chapter 13 petition on July 29, 2014. Fifteen days prior to filing, on July 14, 2014, the Debtor entered into a contract for the purchase of a used 2005 Chrysler 300, at which time the Debtor took possession of the

Chrysler. The contract was subsequently assigned to Credit Acceptance Corporation (“CAC”), who remains sole owner and current holder of the contract. CAC had a purchase money security interest in the Chrysler that attached on the date of sale. CAC perfected its security interest on August 13, 2014, 30 days after the interest attached. CAC filed a proof of claim on September 12, 2014 (Claim #4), asserting a balance owed of \$12,699.12. CAC attached a copy of the contract and the Chrysler’s title to the proof of claim evidencing the security interest and subsequent perfection.

CAC failed to perfect its security interest within 20 days from the date the Debtor took possession of the vehicle pursuant to N.C. GEN. STAT. § 20-58.2,<sup>1</sup> and also failed to perfect its security interest pursuant to 11 U.S.C. § 546(b)(1)(A).<sup>2</sup> Consequently, CAC’s claim was subject to avoidance by the Trustee pursuant to 11 U.S.C. § 549(a)(2)(B).<sup>3</sup> In the Debtor’s Plan of reorganization, confirmed October 16, 2014, CAC’s claim was classified as fully secured, to be paid in full. However, the Amended Standing Order dated May 22, 2014, incorporated by reference in the Order Confirming Plan, includes the provision that “all rights to avoid liens are reserved and confirmation of the Plan is without res judicata effect as to any action to avoid a lien.” *Amended Standing Order*, Para. 18 (May 22, 2014). On March 14, 2016, the Trustee filed a Motion to Approve Settlement Agreement (Dkt. 35), seeking to settle the Trustee’s § 549

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<sup>1</sup> N.C. Gen. Stat. § 20-58.2. Date of perfection:

If the application for notation of security interest with the required fee is delivered to the [Motor Vehicle] Division within 20 days after the date of the security agreement, the security interest is perfected as of the date of the execution of the security agreement. Otherwise, the security interest is perfected as of the date of delivery of the application to the Division.

<sup>2</sup> 11 U.S.C. § 546 Limitations on avoiding powers:

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that –

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . . .

<sup>3</sup> 11 U.S.C. § 549 Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate –

(2)(B) that is not authorized under this title or by the court.

claim. The Court approved the settlement on March 28, 2016 (the “Consent Order”). (Dkt. 38). Among other provisions, the Consent Order provides for Claim #4 to be treated as wholly unsecured in the amount of \$12,699.12, and that “Plan payments and the Plan base amount shall not be reduced by this lien avoidance inasmuch as the equity<sup>4</sup> created by the avoidance is preserved for the bankruptcy estate.” (Dkt. 38, Para. 8 at 3.)

On April 11, 2016, the Trustee filed the instant Motion to Modify Plan seeking to maintain the Plan base, and to require that a minimum of \$12,700<sup>5</sup> be paid on unsecured priority and general unsecured claims, based on the value of the § 549 action. (Dkt. 40). On April 14, the Debtor responded, arguing that \$9,135.00 was owed based on the value referenced in the Consent Order, rather than \$12,700. The Motion was heard on May 26, and then continued to June 8. On June 8, the matter was taken under advisement, and the parties were given fourteen (14) days to file briefs with the court.

### **LEGAL ANALYSIS**

Pursuant to 11 U.S.C. § 551, “Any transfer avoided under section . . . 549 . . . of this title . . . is preserved for the benefit of the estate but only with respect to property of the estate.” As CAC’s claim was consensually avoided pursuant to § 549, per § 551, the Trustee is seeking to require the Debtor to pay into the Plan the value of the avoided transfer, the value of the claim. However, the Debtor contends that the transfer was void in addition to avoidable, and thus the appropriate value to require the Debtor to pay unsecured creditors is the value of the collateral instead of the value of the claim.

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<sup>4</sup> It is the ambiguity of the word “equity” that gives rise to the current dispute. The Consent Order sets CAC’s claim value at \$12,699.12, but it does not explicitly state that the equity being preserved is of the same value of the claim.

<sup>5</sup> The Trustee rounded up the secured claim of CAC to \$12,700 but for the purposes of this Memorandum and Order the claim amount of \$12,699.12 shall be used, as set forth in the Consent Order.

### *The Value of the Claim Avoided*

Prior to the entry of the Consent Order, CAC's claim was treated in the Plan as fully secured, an amount in excess of the value of the underlying collateral, by operation of the "hanging paragraph" of § 1325(a).<sup>6</sup> Normally, pursuant to § 506(a),<sup>7</sup> a claim is secured up to the value of the underlying collateral, and any additional sums claimed are bifurcated into an unsecured general claim. However, the hanging paragraph in § 1325(a) provides an exception to bifurcation, and instructs that if a debt is incurred to purchase a vehicle for personal use within 910 days preceding the filing of the petition, then the creditor's claim shall not be bifurcated, leaving the creditor with a fully secured claim. Here, the Chrysler was purchased well within the 910-day lookback period, making the hanging paragraph applicable. Thus, when CAC's secured lien was avoided, the value of the claim was \$12,699.12, the full amount of the secured claim.

### *The Trustee's Net Recovery*

It is long established that when the trustee succeeds on an avoidance action, the rights of the trustee are subrogated to the rights of the lienholder. *Connell v. Walker*, 291 U.S. 1, 4 (1934) ("[T]he right under the lien of attachment, be preserved for the benefit of the bankrupt's estate, and to secure its benefits he may, as provided in section 67c, 11 USCA § 107(c), be subrogated to all the rights of the lienor."); *Moore v. Bay*, 284 U.S. 4, 5 (1931) ("[C]laims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors

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<sup>6</sup> The "hanging paragraph" of 11 U.S.C. § 1325(a) provides:

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.

<sup>7</sup> 11 U.S.C. § 506(a) provides in part:

(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor's interest ....is less than the amount of such allowed claim.

of the bankrupt shall not be liens against his estate. The rights of the trustee by subrogation are to be enforced for the benefit of the estate.”).<sup>8</sup> The purpose of § 551 in preserving value for the estate is to prevent junior lienholders from moving up in priority following the avoidance of a senior lien and thereby creating access to equity. *Gold v. United States (In re Laines)*, 352 B.R. 420, 425 (Bankr. E.D. Va. 2006) (citing H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 376 (1977); S.Rep. No. 95–989, 95th Cong., 2d Sess. 91 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5877, 6332 (“The section as a whole prevents junior lienors from improving their position at the expense of the estate when a senior lien is avoided.”)). Essentially, a trustee who avoids an interest assumes the position that the interest holder occupied relative to competing interests. *Retail Clerks Welfare Trust v. McCarty (In re Van de Kamp's Dutch Bakeries)*, 908 F.2d 517, 519 (9th Cir. 1990). Avoidance does nothing to enhance or detract from the rights of the creditor whose interest has been avoided relative to any other creditors. *Carvell v. Bank One, Lafayette, N.A. (In re Carvell)*, 222 B.R. 178, 180 (B.A.P. 1st Cir. 1998). And the value of the avoided lien, which is the amount no longer required to be paid to the creditor, is preserved for the benefit of the estate. *Griffin v. Novastar Mortg., Inc. (In re Ramsey)*, 356 B.R. 217, 227 (Bankr. D. Kan. 2006) (“The resulting increase in disposable income available to pay creditors holding allowed claims under the Chapter 13 plan is a benefit to the estate.”).

Here, the Trustee is stepping into the shoes of CAC, the holder of a \$12,699.12 claim. As the actual net recovery that the Debtor need no longer pay to CAC through the Plan is \$12,699.12, the value preserved for the estate is \$12,699.12. Chapter 13 provides for the value of a claim to be greater than the value of the collateral where the hanging paragraph applies.

11 U.S.C. § 1325(a). To allow the Debtor to pay a lower amount due to the present value of the

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<sup>8</sup> *Connell* and *Moore* were both decided under the now-repealed Bankruptcy Act of 1898 but contained a comparable provision in Chapter VII: 67(f), codified at 11 U.S.C. § 107(f) until the adoption of the Bankruptcy Code in 1978.

vehicle would allow the Debtor to carve out value from CAC's claim and would lessen the Trustee's claim that is entitled to share priority and value with that of CAC.

#### *Avoidable Versus Void*

The Debtor does not oppose the Trustee's and the Bankruptcy Administrator's position that CAC's lien is avoidable, and that the Trustee stands in the shoes of CAC. Rather, the Debtor argues that in addition to CAC's lien being avoidable, it was also void *ab initio* by reason of violating the automatic stay. The Debtor posits that under Chapter 7 liquidation, the liquidated value of the vehicle would be distributed to unsecured creditors, regardless of the value of the claim of lien, and as a consequence the Trustee is now attempting to extract value from a void lien.

Pursuant to § 362(a)(4), "a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate . . . ." The Debtor argues that, as CAC failed to perfect its lien pursuant to N.C. GEN. STAT. § 20-58.2 and § 546(b)(1)(A), when CAC did finally seek to perfect its lien on August 13, 2014, it did so in violation of the stay.

There is a split within the Fourth Circuit as to whether acts taken in violation of the automatic stay are void *ab initio* or merely avoidable, as the court raised the issue in *Winters v. George Mason Bank* and declined to answer the question. 94 F.3d 130, 136 (4th Cir. 1996). Multiple jurisdictions would consider CAC's lien void as a violation of the automatic stay. *Mink v. Baltimore Behavioral Health, Inc.*, Civ. No. WDQ-11-1937, 2013 WL 3507314, at \*2 (D. Md. July 10, 2013); *Ellison v. C.I.R.*, 385 B.R. 158, 164 (S.D.W. Va. 2008); *Valenti v. JP Morgan Chase Bank, N.A. (In re Valenti)*, No. 13-01350-8-DMW, 2014 WL 4980039, \*3 (Bankr. E.D.N.C. Oct. 6, 2014); *In re Carpenter*, No. 10-03870-8-SWH, 2010 WL 3744337, at \*2

(Bankr. E.D.N.C. Sept. 15, 2010); *Robb v. National Tree (In re Robb)*, 399 B.R. 171, 171 fn. 1 (Bankr. N.D.W.V. 2008); *Felder v. Am. Gen. Finance, Inc. (In re Felder)*, No. 97-05465-B, 2000 WL 33710885, at \*7 (Bankr. D.S.C. July 7, 2000). Similarly, multiple jurisdictions would consider CAC's lien merely avoidable. *Houck v. LifeStore Bank*, No. 5:13-CV-00066-RLV, 2013 WL 1890652, at \*2 (W.D.N.C. May 6, 2013); *Cooper v. GGGR Investments, LLC*, 334 B.R. 179, 194 (E.D. Va. 2005); *Hass v. Duncan*, No. 1:05CV91 JCC, 2005 WL 5714293, at \*3 (E.D. Va. July 6, 2005); *Khozai v. Resolution Trust Corp.*, 177 B.R. 524, 527 (E.D. Va. 1995). Other appellate circuits that have taken up the issue are similarly divided, with the Third, Fifth, Sixth, and Eleventh Circuits finding that such a lien is avoidable. *See In re Siciliano*, 13 F.3d 748 (3d Cir.1994); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir.1990); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir.1993); *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir.1984). In contrast, the Second, Ninth, and Tenth Circuits find the lien void. *See Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir.1994); *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569 (9th Cir.1992); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371 (10th Cir.1990). The Middle District of North Carolina has one case that acknowledges the split, but declines to rule on the issue. *Saslow v. Porsche Fin. Servs. (In re Ware)*, No. 02-12262C-7G, 2003 WL 22956837, at \*5 (Bankr. M.D.N.C. Dec. 15, 2003) ("There is a split of authority as to whether action that is taken in violation of the automatic stay is void or merely avoidable, although it appears that the weight of authority holds that such action is avoidable rather than void."). The Debtor now urges the court to rule on whether attempting to perfect a lien in violation of the automatic stay imposed by § 362(a)(4) is void *ab initio* or merely avoidable.

However, the court need not make such a determination, as the Consent Order has already done so. The Consent Order provides that CAC forward the Chrysler's title to the Trustee for safekeeping during the Chapter 13 case and that should the Debtor complete the Plan and obtain a discharge, CAC "shall complete a 'Release of Lien'" on the title. (Dkt. 38, Para. 3 at 3.) The Consent Order further provides that should the Debtor's case be dismissed, the Trustee shall *return* the title to CAC. (Dkt. 38, Para. 5 at 3.) In view of these terms of the Consent Order, which was signed by all parties including the Debtor, the court finds that the lien's status has already been established as avoidable, but not void.<sup>9</sup>

### CONCLUSION

Credit Acceptance Corporation's claim is of the kind described in § 1325(a)'s hanging paragraph and as a result, prior to the entry of the Consent Order, Credit Acceptance Corporation's allowed claim was for the full \$12,699.12. The Consent Order resolved the Trustee's § 549 avoidance action and established the Credit Acceptance Corporation's lien as avoidable. Because § 551 preserves the value of the avoided transfer for benefit of the bankruptcy estate, the Trustee steps into the shoes of Credit Acceptance Corporation and is entitled to the full amount of Credit Acceptance Corporation's claim for the benefit of the estate.

Based upon the foregoing, it is hereby ORDERED that:

1. The Plan base shall remain \$77,640.00;
2. The Plan shall remain in effect until the Debtor has paid the greater of the Plan base or the amount necessary to pay all short-term secured and priority claims in full; and

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<sup>9</sup> If indeed the lien were to be both avoidable and void, the Debtor provides no reason as to why the equity preserved for benefit of the bankruptcy estate should be based on the void *ab initio* analysis, rather than the § 549 avoidable analysis. Further, it appears that a logical extension of the Debtor's argument would then allow the Debtor to claim a portion of the Chrysler's value as exempt, a result which would certainly seem to run afoul of the intent and purpose of applicable provisions of the Bankruptcy Code.



3. A minimum of \$12,699.12 shall be paid on the unsecured priority and unsecured general claims.

**END OF DOCUMENT**