The relief described hereinbelow is SO ORDERED.

SIGNED this 28th day of February, 2020.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

COREY BOYD SALTER and
MAKALLA JESSE SALTER,

Debtors.

Case No. 19-21542
Chapter 13

Order Overruling Objection to Plan Confirmation

Secured creditor Kubota Credit Corporation objects to plan confirmation on the grounds that the plan does not comply with § 1325(a)(5)[1] of the Bankruptcy Code. This matter was submitted on the briefs. Because § 1325(a)(5) does not support Kubota's argument, the objection is overruled.

[1] All statutory references are to Title 11, United States Code (the "Bankruptcy Code"), unless otherwise stated.

I. Facts and Procedural History

Debtors Corey Boyd Salter and Makalla Jesse Salter borrowed $86,878.75 from Kubota Credit Corporation to purchase an excavator, tractor, and four other pieces of equipment in December 2017. Debtors filed a Chapter 13 petition in July 2019.[2] Kubota Credit Corporation filed a secured claim for $69,619.56. Debtors' plan[3] proposes partial surrender of Kubota's collateral; Debtors would retain and pay for the tractor and other pieces of equipment while surrendering the excavator and bucket. Kubota objects, arguing § 1325(a)(5) doesn't allow partial surrender of collateral.

II. Analysis

Section 1325(a)(5) provides that a debtor must demonstrate one of three things as to each allowed secured claim:

> (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

[2] ECF 1.
[3] ECF 6.

> (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;[4] (emphasis added)

The parties here disagree on whether § 1325(a)(5) permits a debtor to surrender only part of the property securing a single loan. According to the Debtors it does; according to Kubota, it does not.[5] In essence, the controversy between the parties is about whether the "or" in § 1325(a)(5) is exclusive.

Most courts to consider this question have held that the "or" in § 1325 is exclusive — i.e., that § 1325(a)(5) does not permit partial surrender. Most notably, the Fifth Circuit ruled in a case cited by Kubota, *Williams v. Tower Loan of Mississippi, Inc. (In re Williams)*, that the surrender and cramdown options are exclusive methods of handling a secured claim.[6] The court grounded its holding on dicta in *Associates Commercial Corp. v. Rash*, in which the Supreme Court observed that:

> "a plan's proposed treatment of secured claims can be confirmed if **one of three** conditions is satisfied: the secured creditor accepts the plan, see 11 U.S.C.

---

[4] *Id.*
[5] ECF 19, 22, and 33.
[6] 168 F.3d 845 (5th Cir. 1999); *see also First Brandon Nat'l Bank v. Kerwin (In re Kerwin)*, 996 F.2d 552 (2nd Cir. 1993) (holding that § 1225(a)(5) prevented the Chapter 12 Debtor from disposing of her farm through both surrender and distribution; however, the court found that the Debtor could accomplish the same end by simply distributing only some of the farm property); *Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 585 B.R. 397 (W.D. Tex. 2018) (applying Williams to two cross-collateralized car loans and holding that the debtor could not surrender just one car); *In re Elkins*, Case No. 04-67961, 2005 Bankr. LEXIS 2900 (Bankr. S.D. Ohio Aug. 16, 2005); *In re Covington*, 176 B.R. 152 (Bankr. E.D. Tenn. 1994).

> § 1325(a)(5)(A); the debtor surrenders the property securing the claim to the creditor, see § 1325(a)(5)(C); **or** the debtor invokes the so-called "cram down" power, see § 1325(a)(5)(B)."[7] (emphasis added)

The *Williams* court concluded that the phrasing of this test in *Rash* "strongly indicates that a debtor cannot combine subsections (B) and (C) to create a fourth option."[8] However, the dicta quoted in *Williams* is merely a restatement of the test for treatment of a secured claim — the Supreme Court offered no new interpretation of the statutory text. It is instead more accurate to say the issue was not addressed at all. The holding in *Williams* stretches dicta to justify a conclusion otherwise unsupported by the statute.

In re McCommons, the case cited by debtors, takes a better approach. In that case, the Bankruptcy Court for the Middle District of Georgia rejected the approach taken by the *Williams* court and held that § 1325(a)(5) allows partial surrender.[9] The court relied on three things. First, fundamental concepts of debtor-creditor law, under which debtors always have the ability — and sometimes the obligation (*see* § 362(d)(2) — to surrender unnecessary collateral. Second, the plain language of § 1325(a)(5), is read in light of Congress's explicit command in § 102(5) that "or" be read as nonexclusive.[10] Third, that § 1325(a) "does not tell a debtor what he can and cannot propose," but rather "tests what has been proposed."[11]

---

[7] *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (holding that when a debtor invoked the "cram down" power, the amount of the secured claim is the replacement value of the property).
[8] *In re Williams*, 168 F.3d at 847.
[9] 288 B.R. 594 (M.D. Ga. 2002); This viewpoint also receives support in Collier, which states "when there are multiple items of collateral, the debtor may decide to surrender some items and retain others." 8 *Collier on Bankruptcy* ¶ 1325.06 (Richard Levin & Henry J. Sommer eds., 16th ed.).
[10] *Cf. In re Phila. Newspapers, LLC*, 599 F.3d 298 (3rd Cir. 2010) (holding that § 102(5) required the court to interpret "or" as nonexclusive); *see also O'Brien v. First Marblehead Educ. Res., Inc. (In re O'Brien)*, 299 B.R. 725 (Bankr. S.D.N.Y. 2003).
[11] *In re McCommons*, 288 B.R. at 597.

Section 1325(a)(5) aims to provide full value for the secured creditor's allowed claims, and unless the value of the collateral is dependent on it remaining whole and undivided, partial surrender is consonant with that broader purpose. If partial surrender diminishes the value of other collateral, then it is impermissible because it would obstruct the purpose of the statute. In *In re Covington*, the Bankruptcy Court for the Eastern District of Tennessee expressed concern that partial surrender would lead debtors to endlessly subdivide collateral down to the last nut and bolt.[12] Requiring that debtors demonstrate that partial surrender does not impair the value of collateral as a unit effectively avoids this problem.[13]

Another source of support for allowing partial surrender lies in the purpose and function of the Bankruptcy code. If a debtor retains some collateral while surrendering the remaining collateral, it is because that is necessary to the reorganization. The obvious benefit to the estate of retaining a portion of the collateral can be seen in *McCommons* – there the debtor's retention of the truck and welding tools allowed him to earn additional income and pay off debt. So long as the secured creditor receives the required value for its claim, the purpose of the Bankruptcy code is better achieved if debtors can partially surrender collateral.

In this case, the debtors seek to surrender the Excavator and bucket, retain the other items of collateral, and pay for those retained items in full through their Chapter 13 plan. There is nothing in the record that indicates the value of the excavator will be diminished by the debtors' retention of the other collateral, and Kubota has not objected on

[12] *In re Covington,* 176 B.R. at 155.
[13] *In re McCommons*, 288 B.R. at 597. In McCommons, the court does not hold that the burden to prove there is no diminishment in value from separating collateral rests with the debtor. However, this can be inferred from the context of § 1325, which sets out the requirements the debtor must meet to confirm a plan.

those grounds. The record before the court lacks important information on the exact purpose for which Debtors decided to retain part of the collateral. Debtors shall provide this information within 20 days to allow the court to determine whether retention of the collateral is necessary to their reorganization.

III. Conclusion

Kubota Credit Corporation's objection to plan confirmation is overruled.

IT IS SO ORDERED.

###