

is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.” *Crawford v. W. Elec. Co., Inc.*, 745 F.2d 1373, 1378 (11th Cir. 1984) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948)).

II. Analysis

Upon review of the record and the Order, the Court determines that the Bankruptcy Court’s findings of fact were not clearly erroneous, and after *de novo* review of the conclusions of law, finds no error. The Court hereby adopts the decision of the United States Bankruptcy Court as its own, with non-substantive revisions, as follows:

Bankruptcy Court Decision

The question in this case is: can a title pawnshop's failure to object to a confirmed chapter 13 plan constitute waiver of the pawned vehicle's forfeiture under the Alabama Pawnshop Act?

TitleMax clearly and admittedly waives forfeiture of pawned vehicle titles in other contexts. Its corporate representative testified in another case before the Bankruptcy Court that outside bankruptcy TitleMax routinely allows borrowers to enter into new pawn agreements after the redemption period has run under the Pawnshop Act.¹ The Bankruptcy Court ruled in TitleMax's favor, holding that TitleMax had waived forfeiture and thus had not (as the debtor there contended) illegally accepted several thousand dollars of payments on a car TitleMax already owned.² As a practical matter, TitleMax frequently files secured claims based on post-redemption title pawns in chapter 13 cases (*see* footnote 3 *infra*).

¹ In *In re Eldridge*, 2020 WL 2844358 (Bankr. S.D. Ala. Feb. 13, 2020).

² Appeal was taken from the Bankruptcy Court’s decision in *In re Eldridge*. The undersigned has affirmed that decision in an opinion entered contemporaneously herewith.

Having reviewed TitleMax's motion to confirm termination or absence of stay, the briefs of the parties, and the relevant law, the court found that TitleMax can likewise waive forfeiture of a pawned vehicle title by failing to object to confirmation or otherwise speak up in opposition to a chapter 13 plan which proposes to treat the loan as a secured claim. As a result, TitleMax's motion was denied.

The pertinent facts are not in dispute. On January 15, 2019, the debtor Jennifer Deakle pawned a 2003 Honda Pilot to TitleMax that required the repayment of \$1,889.27 plus a \$226.52 pawnshop charge for a total of \$2,115.79. (Doc. 2, PageID#94). The Pilot remained in the debtor's possession and TitleMax was listed as a lienholder on the Pilot's certificate of title. (*Id.*). The pawn matured on February 14, 2019. Under § 5-19A-6 of the Alabama Pawnshop Act, the debtor had until March 16, 2019 to redeem the Pilot but did not do so.

On May 31, 2019, the debtor filed her chapter 13 bankruptcy case, listing TitleMax as a creditor with respect to the Pilot. In her chapter 13 plan, also filed on May 31, 2019, she proposed to pay TitleMax \$1,500 through the trustee over the life of the case. The court entered an order confirming the debtor's plan, and the proposed treatment of TitleMax, on October 2, 2019.

The record reflects, and TitleMax does not dispute, that it had notice of the bankruptcy and of the applicable deadlines, including for objections to confirmation. *See, e.g., In re Illiceto*, 706 F. App'x 636, 643 (11th Cir. 2017). TitleMax did not object to confirmation of the debtor's plan or take any other action in the bankruptcy case until three months after the confirmation order was entered, when it filed the pending motion to confirm termination or absence of stay. TitleMax contends that it was not required to object to confirmation, that 11 U.S.C. § 1327(a)

and the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa* do not apply to the situation at hand, and that it is not bound by the confirmed plan because the Pilot was never property of the debtor's chapter 13 bankruptcy estate.

The basic principle underlying the parties' dispute is not novel. Under Bankruptcy Code § 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Even legally suspect plans bind the parties once confirmed. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010); *In re Bateman*, 331 F.3d 821, 829-30 (11th Cir. 2003).

Alabama law defines what rights, if any, the debtor has in relation to the Pilot. See *In re Northington*, 876 F.3d 1302, 1310 (11th Cir. 2017). Under the Pawnshop Act, "[p]ledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker." Ala. Code § 5-19A-6. However, as discussed in more detail below, the court found TitleMax can waive that forfeiture and has done so in this case.

In a recent case decided by the Bankruptcy Court, it agreed with TitleMax that a pawnshop can waive § 5-19A-6's forfeiture of "absolute right, title, and interest in and to the" vehicle after the statutory 30-day grace period has expired. In *In re Eldridge*, 2020 WL 2844358 (Bankr. S.D. Ala. Feb. 13, 2020), the debtor Christopher Dawan Eldridge pawned the title to a 2002 Jeep Cherokee with TitleMax in 2015. Eldridge did not redeem the title by the pawn's maturity date. Instead, he entered into numerous successive pawn transactions with TitleMax related to the Jeep. In several of these transactions, Eldridge did not redeem the Jeep before the

maturity date or enter into another pawn within the statutory grace period. Instead, he signed a new pawn ticket outside of the statutory grace period - beyond the redemption period - a practice TitleMax's corporate representative testified that TitleMax routinely allows.

Eldridge argued that, pursuant to Alabama Code § 5-19A-6, TitleMax obtained "absolute right, title, and interest" to the Jeep the first time he did not redeem the Jeep or enter into another pawn transaction within the grace period because that statutory provision cannot be waived - that is, after 60 days (the pawn's 30-day maturity date plus the 30-day grace period), the only remedy a pawnshop has is repossession. He contended that as a result TitleMax had accepted thousands of dollars of payments from him on a vehicle it already owned. TitleMax opposed this argument and contended that it had waived automatic forfeiture under § 5-19A-6 by agreeing to subsequent pawn transactions. Ultimately, this court agreed with TitleMax.

In contrast to its position in *Eldridge*, TitleMax argues here that there was no waiver of § 5-19A-6 even though it did not object to confirmation or take any action until three months after confirmation of the debtor's plan. TitleMax contends that this case is different than *Eldridge* because that case,

involved a mutual decision by the customer and TitleMax to waive forfeiture, and to execute a new pawn agreement. . . . This case does not involve any mutual determination by TitleMax and the Debtor to waive forfeiture. This case involves the unilateral decision by the Debtor to include TitleMax in a bankruptcy proceeding (after forfeiture), and subsequent inaction by TitleMax.

(Doc. 2, PageID#130). TitleMax contends its "mere failure" to object prior to confirmation is not a waiver of forfeiture of § 5-19A-6. The court rejected TitleMax's argument for several reasons.

"[I]t is a well-settled principle of Alabama law that a waiver is generally defined as the intentional relinquishment of a known right." *See Edwards v. Kia Motors of Am., Inc.*, 8 So. 3d

277, 281 n.5 (Ala. 2008) (citation, quotation marks, and brackets omitted); *see also, e.g., Stewart v. Bradley*, 15 So. 3d 533, 543 (Ala. Civ. App. 2008) ("Waiver is defined as the voluntary surrender or relinquishment of some known right, benefit, or advantage.") (citation and quotation marks omitted). Alabama law is likewise clear that waiver may be implied from conduct. *See, e.g., Hughes v. Mitchell Co.*, 49 So. 3d 192, 201-03 (Ala. 2010); *see also Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enters. LLC*, 163 F. Supp. 3d 1150, 1165 (N.D. Ala. 2016); *Reynolds v. Ala. Dep't of Transp.*, , 2014 WL 3517773, at *9 (M.D. Ala. July 16, 2014).

The Bankruptcy Court, not TitleMax, is the judge of when and if there is a waiver. Waiver does not require a mutual decision between two parties, as TitleMax argues; if it did, there would be no place for waiver jurisprudence. Instead, "a party's intention to waive a right is to be ascertained from the external acts manifesting the waiver. This intention to waive a right may be found where one's course of conduct indicates the same or is inconsistent with any other intention." *See Hughes*, 49 So. 3d at 202- 03 (citations and quotation marks omitted).

"Alabama precedent establishes that many significant rights may be waived by failing to either timely or properly assert them." *Ex parte Cowley*, 43 So. 3d 1197, 1199 (Ala. 2009). For example, criminal defendants can waive numerous statutory rights, "even some that contain mandatory language[,]" *see Lay v. State*, 82 So. 3d 9, 13 (Ala. Crim. App. 2011), as well as "many of the most fundamental protections afforded by the Constitution." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). If a criminal defendant can waive statutory and even fundamental rights by failing to assert those rights, then surely TitleMax can waive the (non-fundamental) statutory right to claim absolute ownership under § 5-19A-6 by failing to timely assert that right in a debtor's bankruptcy.

TitleMax's conduct in this case established a clear waiver of its statutory right to assert absolute ownership under § 5-19A-6 and demonstrated its acceptance of being treated instead as a secured creditor. TitleMax is a bankruptcy-savvy creditor which often accepts treatment as a secured creditor for its title pawns. The Bankruptcy Court has numerous cases on its docket in which TitleMax has waived forfeiture under § 5-19A-6 and is content for its claim to be treated as a secured claim.³

This ruling will not result in a situation, as described by TitleMax, where debtors are permitted “to strip owners of property, simply by (improperly) listing property, which they do

³ For example, see the plan in the following recent cases filed in and confirmed by this court: 19-20408 (petition date October 17, 2019; plan confirmed May 15, 2020; secured claim filed by TitleMax February 20, 2020; pawn maturity September 13, 2019); 19-11042 (petition date March 29, 2019; plan confirmed July 29, 2019; claim filed by debtor, no response by TitleMax; pawn maturity April 5, 2019); 19-11938 (petition date June 10, 2019; plan confirmed October 28, 2019; claim filed by debtor, no response by TitleMax; pawn maturity May 3, 2019); 19-12040 (petition date June 17, 2019; plan confirmed December 13, 2019; secured claim filed by TitleMax July 5, 2019; pawn maturity June 19, 2019); 19-12219 (petition date July 1, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax September 23, 2019; pawn maturity June 2, 2019); 19-12266 (petition date July 3, 2019; plan confirmed December 16, 2019; secured claim filed by TitleMax August 1, 2019; pawn maturity June 27, 2019); 19-12698 (petition date August 6, 2019; plan confirmed December 27, 2019; secured claim filed by TitleMax October 18, 2019; pawn maturity September 23, 2018); 19-12913 (petition date , 2019; pawn maturity September 23, 2018); 19-12913 (petition date August 22, 2019; plan confirmed April 13, 2020; secured claim filed by TitleMax September 19, 2019; pawn maturity July 31, 2019). The court takes judicial notice of the contents of its own electronic files in those cases pursuant to Federal Rule of Evidence 201 and the guidance of *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

not own, in their schedules, hoping no objection is timely filed." If TitleMax could not waive forfeiture under § 5-19A-6 - as it has explicitly argued it can - this argument might have some merit. But forfeiture is either waivable or it isn't. Here, TitleMax waived any right to immediately possess the Pilot when it did not object to confirmation of the debtor's plan, a course of action it has also taken in other cases. The court refuses to let TitleMax have its cake and eat it too.

A nearly identical issue is addressed in *In re Cottingham*, 2020 WL 3410170 (Bankr. N.D. Ala. May 4, 2020). In that case, as here, the redemption period expired before the debtor filed for bankruptcy, the debtor included TitleMax as a secured creditor in the chapter 13 plan, and the court confirmed the plan with no objection from TitleMax. Several months later TitleMax filed a motion to confirm termination or absence of the stay, which Judge Robinson denied. Unlike here, the debtor's attorney filed a proof of claim for TitleMax and TitleMax accepted at least one payment from the trustee. However, Judge Robinson stated that he would be inclined to deny TitleMax's motion even if no claim had been filed and no payments accepted based on TitleMax's "failure to voice any objection after having received notice of the debtor's intent to treat its matured title pawn as a secured claim." *See In re Cottingham*, 2020 WL 3410170, at *3 n.8. This court agrees.

This is not a situation like *Northington* where a debtor's statutory redemption period expired preconfirmation and TitleMax took action to preserve its state law rights in a pawned vehicle. As explained by the court in *Cottingham*, "a critical difference between that decision and the instant case [is that] the pawnbroker in *Northington* asserted its state-law rights in the vehicle

before the plan was confirmed," which TitleMax did not do in *Cottingham* or in in this case.⁴ See *In re Cottingham*, 2020 WL 3410170, at *3. "TitleMax's acceptance of being treated as a secured claimant at confirmation [in this case] was consistent with its practice in other cases and was completely at odds with its tardy objection, in the form of the [pending m]otion, which it voiced for the first time postconfirmation." See *id* at *3 n.8. This "is exactly the sort of 'gotcha' attempt that the Bankruptcy Code abhors and that the concepts of waiver and the binding res judicata effect of confirmation are designed to prevent." *Id*.

"TitleMax did nothing to preserve its position that its interest in the [Pilot] should not be treated as a secured claim in the [d]ebtor's plan, because the [Pilot] was not part of the bankruptcy estate at confirmation." *Id.* at *4. The Eleventh Circuit contemplated this exact situation in *Northington* when it outlined how a pawnshop *can lose its state-law position* and how TitleMax in that case actually avoided a waiver of its rights precisely because it acted prior to confirmation:

Before jumping into the merits, we must first address the bankruptcy court's alternative (but logically antecedent) holding that TitleMax's challenge is procedurally barred on 'res judicata' grounds.

The bankruptcy court held that TitleMax 'slept on its rights' by 'fail[ing] to timely object to confirmation' of [the debtor]'s proposed [c]hapter 13 plan. . . . Accordingly, the court held that its confirmation order was conclusive under 11

⁴ This court's prior decision in *In re Tesseneer*, No. 19-11283 (Bankr. S.D. Ala. Oct. 2, 2019) and *In re Burrell*, No. 18-4602 (Bankr. S.D. Ala. Apr. 2, 2019) do not conflict. In those cases, TitleMax timely objected to confirmation and the court sustained the objections based on *Northington*. See *In re Cottingham*, 2020 WL 3410170, at *4 ("If the bankruptcy court finds the pawnbroker acted timely — preconfirmation — then its rights in the pawned vehicle are preserved and controlled under applicable state law as opposed to any contrary treatment proposed in the debtor's chapter 13 plan[.]").

U.S.C. § 1327(a)—which generally binds a debtor and his creditors to the terms of a confirmed plan—and '[t]he doctrine of res judicata.' . . .

In the particular circumstances of this case, we cannot agree that TitleMax impermissibly 'slept on its rights' and thus forfeited its ability to raise the argument that it presents on appeal. The decision that the bankruptcy court cited for support, *In re Young*, 281 B.R. 74 (Bankr. S.D. Ala. 2001), provides a useful (and stark) contrast. As in this case, the debtors in *Young* failed to redeem property that they had pledged to a pawnbroker. And as in this case, the bankruptcy court held a hearing on the debtors' proposed [c]hapter 13 plan—which listed the pawnbroker as the creditor on the pawn debt—and later entered an order confirming the plan. The pawnbroker in *Young*, however, did absolutely nothing to preserve its argument that it had rightful title to the pawned property. It didn't 'participate in the confirmation [hearing],' nor did it in any way contest the plan's consummation; rather, following confirmation, the pawnbroker simply set out, unilaterally, to sell the pawned property, prompting the debtors to file a motion to enforce the automatic stay. . . .

Here, by contrast, even before the bankruptcy court held a confirmation hearing, and thus by definition before it entered any confirmation order, TitleMax filed a written motion in which it contended—just as it does here—that at the moment [the debtor] failed to redeem the [car] pursuant to [the applicable state law], the car ceased to be property of the bankruptcy estate. TitleMax then appeared at the hearing, and later filed post-hearing briefs, to reiterate its position. When the bankruptcy court later denied its motion for relief from the automatic stay, thereby bringing the bankruptcy proceeding to a close, TitleMax appealed directly to the district court and then, following that court's affirmance, directly to this Court. Our dissenting colleague, who would affirm on res-judicata grounds, **is of course quite right to say that TitleMax had 'to take some action' in order to preserve its position that the car dropped out of the estate upon the expiration of the redemption period.** . . . The question is precisely what form that 'action' had to take. The dissent repeatedly protests that TitleMax didn't formally 'object' to the confirmation of [the debtor]'s [c]hapter 13 plan. . . . That's true—no one denies it, and TitleMax freely admits it. We hold, though, that on the unique facts of this case, TitleMax was not required to file an 'Objection'—styled as such—but rather adequately preserved its position through its pre-confirmation motion for relief from the automatic stay, which it briefed and argued to the bankruptcy court.

In re Northington, 876 F.3d at 1307-08 (emphasis added).

Based on the fact that TitleMax spoke up before confirmation, the *Northington* majority disagreed with the dissent that *Espinosa* mandated that TitleMax was bound by the confirmed

plan. Here, though, TitleMax slept on its rights by taking no action in this bankruptcy until three months after the plan was confirmed. As a consequence of its waiver of ownership, TitleMax is properly treated as a secured creditor in the debtor's confirmed plan and, as such, is bound by the confirmed plan under *Espinosa*.⁵

TitleMax attempts to distinguish *Northington* on the ground that the redemption period in that case expired after the case was filed but before confirmation, while the redemption period in this case expired prepetition. As in *Cottingham*, the Bankruptcy Court here "sees no logical reason why *Northington's* rationale (on the importance of the pawnshop asserting its position preconfirmation to preserve its state-law rights) should not extend to all cases where the redemption period has expired before plan confirmation, whether the expiration occurred prepetition or postpetition." See *In re Cottingham*, 2020 WL 3410170 at *4. Both the court in *Cottingham* and this Court interpret the majority's position in *Northington* "as approving, if not requiring, a bankruptcy court's assessment of the timeliness of a pawnbroker's declaration of its state-law rights to avoid the res judicata effect of a confirmation order." *Id.* "The key to avoiding res judicata is the pawnbroker's *preconfirmation* assertion of its state-law rights in the pawned vehicle." *Id.* at *6. When the redemption period expired was not the dispositive issue in *Northington*; "what was dispositive was the timely—preconfirmation—motion seeking relief filed

⁵ Judge Clifton R. Jessup, Jr. of the U.S. Bankruptcy Court for the Northern District of Alabama has also found that TitleMax "slept on its rights" under similar circumstances and denied TitleMax's motion to confirm the absence of the automatic stay. See *In re ett*, No. 19-81656-CRJ-13.

by the pawnbroker declaring it was insisting on its state law rights and was not willing to be paid as a secured creditor pursuant to the debtor's plan." *Id.*

The fact that the redemption period of the pawn had expired prepetition, assuming that is as crucial as TitleMax believes, was uniquely within TitleMax's purview to bring before this court before plan confirmation, and was not the type of patent 'defect' that the court could be expected to raise *sua sponte* at confirmation under the guidance of *Espinosa*. If this was an illegal plan as TitleMax contends [albeit three months after the fact], because the [vehicle] was not estate property (in the absence of TitleMax's waiver), then TitleMax was in the best position to say so before confirmation

Id. at *7.

As in the Northern District of Alabama, "there is virtually no meaningful public transportation in" this district. *Id.* at *3 n.8.

Saving a debtor's vehicle is the essence of many chapter 13 plans as the loss of the vehicle can be an existential calamity for the debtor and his family in many cases. Without a vehicle, a typical debtor cannot get to his job, take his children to school and for medical care, or carry on the day-to-day essential activities of life. The loss of a home may soon follow the loss of a vehicle because many debtors with rent or mortgage payments cannot keep their jobs if they cannot keep their cars. If TitleMax does not intend to accept being treated as a secured creditor in a chapter 13 plan [as it has in multiple cases, *see* footnote 3 above], after having received notice that the debtor intends to do just that, it must voice its objection before confirmation.

Id.

TitleMax relies heavily on *In re Thorpe*, 612 B.R. 463 (Bankr. S.D. Ga. 2019). The bankruptcy court there held that a vehicle did not enter the bankruptcy estate when the debtor filed her chapter 13 case, even though the debtor obtained confirmation of the plan that purported to pay the pawnshop the redemption amount, and the plan could not serve to reconstitute the debtor with any interest in the vehicle. The Bankruptcy Court respectfully disagreed with that decision for the same reasons articulated in *Cottingham*: TitleMax failed to voice any

objection after having received notice of the debtor's intent to treat its matured pawn as a secured claim. Further, *Thorpe* involved Georgia, not Alabama, law and did not address waiver under Alabama law at all. Under TitleMax's position (which the *Thorpe* court accepted), TitleMax is the sole decisionmaker of when it wants to assert its state law rights in a vehicle. As discussed above, this Bankruptcy Court held (at TitleMax's urging) that Alabama law permits waiver of the automatic forfeiture provision of the Alabama Pawnshop Act, which is exactly what the Court finds happened here.

TitleMax is not without a remedy, as it seems to argue in its reply brief. TitleMax can still file a late proof of claim and be paid \$1,500 plus interest for the 2003 Pilot as provided by the confirmed plan.

TitleMax can't have it both ways - that is, forfeiture is waivable in some situations but not at confirmation. Indeed, the res judicata effect of confirmation weighs even more heavily in favor of waiver in that context. Just as when TitleMax allows a pawn renewal more than 60 days after the last one (the situation in *Eldridge*) or files a secured claim based on a pawned title (the situation in multiple cases in footnote 3), TitleMax can waive title forfeiture under Alabama Code § 5-19A-6 through the chapter 13 confirmation process.

If the debtor in *Eldridge* is right and forfeiture cannot be waived after the grace period has run, then outside bankruptcy many Alabama customers are paying TitleMax on non-recourse loans for vehicles which TitleMax already owns. Likewise, if forfeiture cannot be waived, then TitleMax is filing secured claims and accepting chapter 13 plan payments on non-recourse loans for vehicles it already owns. The ruling here accords with both the reality on the ground and Alabama waiver law. It applies to the small number of chapter 13 cases where TitleMax has been

properly noticed but does not object in any way to a proposed plan. This court is simply requiring TitleMax to follow the same rules as every other creditor: ,if you disagree with your treatment in a proposed chapter 13 plan, you must timely object (*Espinosa*) or otherwise speak up (*Northington*) because you will be bound by the confirmed plan pursuant to 11 U.S.C. § 1327(a).

III. Conclusion

Based on the foregoing, and after conducting a *de novo* review of the Bankruptcy Court's conclusions of law, the undersigned concludes that there is no error. Neither are any of the Bankruptcy Court's factual findings clearly erroneous. Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

DONE and ORDERED this 31st day of March, 2021.

/s/ JEFFREY U. BEAVERSTOCK
UNITED STATES DISTRICT JUDGE