UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

CYNTHIA M. DOSS, **CASE NO. 12-00812-NPO**

DEBTOR. **CHAPTER 13**

MEMORANDUM OPINION AND ORDER
ON MOTION TO MODIFY CHAPTER 13 PLAN

There came on for hearing (the "Hearing") on August 27, 2012, the Motion to Modify Chapter 13 Plan (the "Motion to Modify") (Dkt. 49) filed by the Debtor, Cynthia M. Doss ("Doss"), and the Response and Objection to the Motion to Modify Plan (the "Response") (Dkt. 52) filed by DBA Automotive, LLC d/b/a Legacy Toyota ("Legacy") in the above-referenced bankruptcy case. At the Hearing, L. Jackson Lazarus represented Doss, and W. Brady Kellems represented Legacy. At the conclusion of the Hearing, the Court instructed the parties to submit briefs addressing whether the agreement between the parties is a "true" lease or a secured transaction under Mississippi law. On September 10, 2012, Doss filed a Memorandum Brief of Cynthia M. Doss (the "Doss Brief") (Dkt. 68), and Legacy filed a Memorandum in Opposition to [Motion to] Modify Plan (the "Legacy Brief") (Dkt. 67) on that same day.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Motion to Modify was proper under the circumstances.

Facts

1. Doss voluntarily filed a petition for relief (Dkt. 1) under chapter 13 of the U.S. Bankruptcy Code on March 7, 2012. Pursuant to a chapter 13 reorganization, Doss filed a

proposed payment plan (the "Proposed Plan") (Dkt. 2) with a plan period of sixty (60) months. In the Proposed Plan, Doss identified Legacy as a secured creditor and listed the value of Legacy's purported collateral, a 2002 Toyota 4 Runner (the "Toyota"), as $6,800.00. Under the terms of the Proposed Plan, Doss would retain the Toyota and pay Legacy $176.49 per month.

2. On May 18, 2012, Legacy filed a proof of claim (Cl. 5-1) and attached a copy of a document styled, "Motor Vehicle Lease Agreement-Closed End" (the "Lease"), signed by Doss on February 20, 2012, less than one month before she filed her bankruptcy petition. In the purported Lease, Doss agreed to pay Legacy $1,500.00 immediately upon delivery of the Toyota and, thereafter, $325.00 per month for the next two years. The total of Doss's payments is $9,300.00, which includes her first monthly payment and a registration fee of $1175.00.

3. Legacy filed an Objection to Proposed Plan (the "Objection") (Dkt. 28) stating that Doss had leased the Toyota for two years and that the Lease required her to pay Legacy $325.00 per month. For reasons that are unclear, Legacy also stated in the Objection that the agreed "value" of the Toyota (as of the date of the Lease) was $8,898.10.

4. Prior to a hearing on the Objection, Doss and Legacy resolved their dispute and submitted an agreed order for the Court's approval. The Court entered the order (the "Agreed Order") (Dkt. 36) approving the settlement on June 8, 2012. The Agreed Order states, in pertinent part, as follows:

> IT IS THEREFORE, ORDERED that the payment to Legacy Toyota shall be in the amount of $325.00 per month, which represents the contractual monthly lease due for said vehicle. Further, the parties agree that the value of the vehicle at the date of filing is $8,898.10 and the proposed plan should be modified accordingly.

(Agreed Order, Dkt. 36).

5. The Proposed Plan was amended in accordance with the Agreed Order, and the Court entered an order (the "Confirmation Order") (Dkt. 42) confirming the amended plan (the "Confirmed Plan") (Dkt. 42), without objection, on June 22, 2012.

6. In the Motion to Modify, filed on July 2, 2012, Doss proposes to modify the Confirmed Plan "to pay Legacy Toyota $8,898.10 over the life of the plan at 7% interest." Doss attached to the Motion to Modify a copy of her new, modified plan in which Legacy would receive a reduced monthly payment of $176.49.

7. In its Response, Legacy objects to the modification of the Confirmed Plan for the same reason it objected to the Proposed Plan. Because it is a lessor, not a secured creditor, Legacy argues that Doss must treat its claim as an unexpired lease pursuant to 11 U.S.C. § 1322(b)(7)[1] and 11 U.S.C. § 365.[2] Legacy contends that if Doss desires to keep the Toyota, she must assume the Lease and comply with all of its terms, including the provision requiring her to pay Legacy $325.00 per month. In addition, Legacy points out that the Lease is for a term of two years and, therefore, will expire on February 20, 2014, before the completion of the 60-month plan. Legacy objects to Doss's effort to exceed the term of the Lease beyond February 20, 2014. Finally, Legacy argues that because Doss acquiesced to the treatment of its claim as an unexpired lease in the Agreed Order, the affirmative defense of *res judicata* precludes Doss from asserting that the Lease is a "credit" sale.

8. After the Hearing, the parties submitted briefs on the issue of whether the agreement between the parties, although labeled as a "Lease," is a "true" lease or a secured

[1]Section 1322(b)(7) states, in pertinent part, that the plan may "provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected." 11 U.S.C. § 1322(b)(7).

[2]Under § 365(b)(1)(A), a debtor may assume a lease if she "cures, or provides adequate assurance that the [debtor] will promptly cure" any default. 11 U.S.C. § 365(b)(1)(A).

transaction in disguise. In the Doss Brief, Doss maintains that the agreement between the parties is a "credit" sale, not a "true" lease, and, therefore, Doss has the right to modify Legacy's secured claim under 11 U.S.C. § 1322(b).[3] Doss does not respond to Legacy's contention that *res judicata* bars her attempt to recharacterize Legacy's claim. Legacy, on the other hand, maintains the view in the Legacy Brief that the agreement in question is indeed a "true" lease, not a "credit" sale. Legacy also asserts that even if the agreement is indeed a "credit" sale, the doctrine of *res judicata* precludes Doss from asserting that it is.

Discussion

Whether Legacy is a lessor or a secured creditor is important because Doss may restructure the payment terms in the Lease only if Legacy is a secured creditor. Because of the history of this dispute, the Court finds that this issue is more appropriately considered under the doctrine of judicial estoppel. The Court addresses that doctrine as a threshold matter and then discusses Legacy's contention that the Agreed Order is *res judicata* and, therefore, precludes Doss's attempt in the Motion to Modify to reclassify the Lease as a "credit" sale. Finally, the Court discusses Doss's argument that the Lease is a "credit" sale, rather than a "true" lease.

A. Judicial Estoppel

Although neither Doss nor Legacy raised the issue, the attempt by Doss to "cramdown" Legacy's claim, given that Doss had agreed previously to treat the Lease as a "true" lease for the purpose of obtaining the confirmation of her plan, requires the Court to consider whether Doss is judicially estopped from asserting that the Lease is a "credit" sale. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not

[3]Section 1322(b)(2) states, in pertinent part, that "the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1322(b)(2).

thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). The U.S. Court of Appeals for the Fifth Circuit (the "Fifth Circuit") has held that, "'[t]he policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993)).

Courts in the Fifth Circuit generally consider three factors[4] when determining whether to apply the doctrine of judicial estoppel, including whether: (1) the party against whom judicial estoppel is sought has asserted a legal position that is "plainly inconsistent" with a position asserted in a prior case; (2) the court in the prior case accepted that party's original position, thus creating the perception that one or both courts were misled; and (3) the party to be estopped has not acted inadvertently. *Love v. Tyson Foods, Inc*., 677 F.3d 258, 261 (5th Cir. 2012). The Fifth Circuit recently applied these factors in a similar bankruptcy context in *Baker v. Peake (In re Fernandez)*, 478 Fed. App'x 138 (5th Cir. 2012), an unpublished decision.[5] In *Fernandez*, a debtor filed a bankruptcy petition under chapter 13 to save his home, which he believed had been wrongfully foreclosed upon the previous year. In connection with the allegedly wrongful foreclosure, the debtor filed an adversary proceeding which was later dismissed upon the entry of

[4]The Fifth Circuit considers the doctrine of judicial estoppel a matter of federal procedure and, therefore, applies federal law. *See* Hall v. GE Plastic Pac. PTE Ltd., 327 F.3d 391, 395 (5th Cir. 2003).

[5]Because *Fernandez* is an unpublished decision, it is without precedential value. *See* 5th Cir. R. 47.5.4.

an agreed judgment. The agreed judgment rescinded the foreclosure, reinstated the note and accompanying deed of trust, and required the debtor to file an amended plan. It also required the debtor to make monthly mortgage payments and authorized the chapter 13 trustee to disburse immediately to the lender all mortgage payments accruing to the date of the plan. The debtor violated the agreed judgment by failing to amend the plan, and his bankruptcy case was subsequently dismissed without plan confirmation. At the time of dismissal, the trustee distributed all funds paid by the debtor to the lender in accordance with the agreed judgment. The debtor's attorney filed an emergency motion seeking the unpaid balance of his fees from the post-dismissal funds paid to the lender. The bankruptcy court denied the attorney's request, and the district court affirmed. On further appeal, the Fifth Circuit affirmed the district court, on the ground that the doctrine of judicial estoppel prevented the debtor's attorney from collaterally attacking the agreed judgment.

The facts here are similar to those in *Fernandez:* Doss acquiesced to the Agreed Order which classified the Lease as a "true" lease. If Doss had not negotiated the settlement, Legacy likely would have pressed its Objection. To avoid a hearing on the Objection and the risk that Legacy might succeed, Doss consented to the entry of the Agreed Order. Now, Doss takes a position inconsistent with the one she embraced in order to obtain the confirmation of her plan. As explained by the U.S. Supreme Court, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Maine*, 532 U.S. at 749 (quotation omitted).

Given the procedural history of their dispute, the Court finds that the doctrine of judicial estoppel prevents Doss from asserting that the Lease is a "credit" sale. *See In re Peck*, 155 B.R. 301 (Bankr. D. Conn. 1993) (debtor was judicially estopped from taking a position that was

inconsistent with an earlier position taken in a stipulated ordered entered in the same bankruptcy case). The Court, therefore, finds that the Motion to Modify should be denied. Having made this finding, it is unnecessary for the Court to consider Legacy's contention that the Agreed Order is *res judicata*, but the Court does so anyway because it offers an alternate ground for denying the Motion to Modify.

B. *Res Judicata*

The Doss Brief provides no assistance to the Court in determining whether the Agreed Order is *res judicata* because Doss does not even mention the doctrine, even though Legacy raised *res judicata* as an affirmative defense in its Response, at the Hearing, and in the Legacy Brief. *Res judicata*, or claims preclusion, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit. *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005). The Fifth Circuit has adopted a four-part test for applying the doctrine of *res judicata* in the bankruptcy context.[6] *Bank of Lafayette v. Baudoin (In re Baudoin*), 981 F.2d 736, 739 (5th Cir. 1993). "[A] bankruptcy judgment bars a subsequent suit if: 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases." *Id*. at 740 (citation omitted). Only the third factor (final judgment on the merits) warrants the Court's close analysis and, for that reason, is considered last.

[6] Notably, Legacy contends that the Motion to Modify is barred by *res judicata*, not the Confirmation Order. Although the Confirmed Plan is binding on all parties under 11 U.S.C. § 1327(a), it may be modified by Doss at any time before completion of her plan payments pursuant to 11 U.S.C. § 1329. *See* Meza v. Truman (In re Meza), 467 F.3d 874, 877-78 (5th Cir. 2006).

1. Same Parties and Court of Competent Jurisdiction

The Court finds that the first two factors of *res judicata* are present because the parties are the same and the Agreed Order was entered by this Court, a court of competent jurisdiction. Moreover, the Court entered the Agreed Order on June 8, 2012, prior to the Motion to Modify.

2. Same Cause of Action

The Court finds that the fourth factor of *res judicata* is present because the Agreed Order allowing Legacy's claim involved the same facts that are at issue in the Motion to Modify. The Fifth Circuit has adopted the transactional test for deciding whether two matters involve the same cause of action for *res judicata* purposes. *Baudoin*, 981 F.2d at 743. "Under this test, 'the critical issue is . . . whether . . . the two actions [are based] on the same nucleus of operative facts.'" *Id*. (quoting *Howe v. Vaughan (In re Howe)*, 913 F.2d 1138, 1144 (5th Cir. 1990)).

The Agreed Order states, "the payment to Legacy Toyota shall be in the amount of $325.00 per month, which represents the contractual monthly lease due for said vehicle." In comparison, the Motion to Modify proposes to amend the Confirmed Plan to treat Legacy's claim as a secured claim and reduce the monthly payment to Legacy from $325.00 to $176.49. Simply put, the Motion to Modify is an attempt by Doss to revert to the more favorable payment terms of the original Proposed Plan. Clearly, the Agreed Order and the subsequent Motion to Modify involve the same nucleus of operative facts, and the fourth factor of *res judicata* is satisfied.

3. Final Judgment on the Merits

The Court finds that the third *res judicata* factor is present because the Agreed Order was a final judgment on the merits. *Baudoin*, 981 F.2d at 742 (finding that a bankruptcy order allowing a proof of claim is a final judgment entitled to *res judicata* effect). Although the Fifth

Circuit has not created an exact standard for determining when an order entered in a bankruptcy case constitutes a final judgment on the merits, it has stated that "for purposes of determining the finality of a bankruptcy order, each matter that arises between the filing of the bankruptcy petition and the issuing of a closing order is treated as a separate proceeding." *Indus. Clearinghouse, Inc. v. Mims (In re Coastal Plains, Inc.)*, 338 B.R. 703, 712-13 (5th Cir. 2006) (citation omitted). Consequently, a "'final' order in a bankruptcy case can be any order that 'ends a discrete judicial unit in the larger case.'" *Id.* (quoting *Smith v. Revie (In re Moody),* 817 F.2d 365, 368 (5th Cir. 1987)); *see also Siegel v. Fed. Home Loan Mortg. Corp*., 143 F.3d 525, 529 (9th Cir. 1998) ("[T]he allowance or disallowance of a claim in bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of res judicata.") (quotation omitted).

Consistent with this precedent, the Court has previously found that a bankruptcy order constitutes a final judgment for purposes of *res judicata*. In *Barkley v. Wachovia Equity Servicing, LLC (In re Cavett),* Adv. Proc. No. 06-00115-NPO (Bankr. S.D. Miss. June 8, 2007), the chapter 13 trustee objected to certain charges included in a proof of claim filed by the debtor's mortgage lender. The lender did not respond to the trustee's objection, and an order was entered disallowing the lender's charges. Thereafter, the trustee initiated an adversary proceeding in which he alleged that the lender had charged the debtor improper, excessive, and unreasonable fees and expenses. On the lender's motion to dismiss, the Court held that the order disallowing the lender's charges was *res judicata* and precluded the trustee's claims asserted in the adversary proceeding.

In this matter, the Court finds that the Agreed Order constituted a final judgment on the merits for purposes of *res judicata* because it achieved finality as to the characterization of

Legacy's claim. Doss should not be allowed to nullify the Agreed Order, which allowed her to obtain confirmation of her plan. Therefore, consistent with this Court's decision in *Cavett*, the Agreed Order constituted a final judgment on the merits.

In sum, the Court finds that the doctrine of *res judicata* precludes Doss from recharacterizing the nature of Legacy's claim. The parties to the Agreed Order and the Motion to Modify are the same. The Agreed Order was entered by this Court, a court of competent jurisdiction. Further, the Agreed Order constituted a final judgment on the merits because it ended "a discrete judicial unit in the larger case." Finally, the Agreed Order and the Motion to Modify are based on the same nucleus of operative facts involving the lease of the Toyota. Thus, all elements of *res judicata* are present, and the Agreed Order bars the amendment sought by Doss in the Motion to Modify. Although application of the doctrines of judicial estoppel and *res judicata* requires the Court to deny the Motion to Modify, the Court nevertheless considers whether the Lease is a "credit" sale or a "true" lease, mainly because this argument is the only one raised by Doss.

C. True Lease or Secured Transaction?

The Court has already found that the doctrines of judicial estoppel and *res judicata* prevent Doss from taking the position that the Lease is a "credit" sale, without regard to whether the Lease is indeed a "credit" sale. Even if the doctrines of judicial estoppel and *res judicata* did not apply, the Court nevertheless finds that the Lease is a "true" lease.

In determining whether a transaction is a "true" lease or a secured transaction, the Court must turn to applicable state commercial law. *Butner v. United States*, 440 U.S. 48, 55, 99 (1979). The parties agree that Mississippi law governs this issue. Mississippi's version of the Uniform Commercial Code distinguishes between a "true" lease of personal property and a

transaction that creates a security interest by application of a two-prong test set forth in MISS. CODE ANN. § 75-1-203(b). If both prongs are satisfied, then the transaction in question is deemed to have created a security interest as a matter of law, even if the agreement between the parties is in the form of a lease. That test is as follows:

> (b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:
>
> (1) The original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
>
> (3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or
>
> (4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

MISS. CODE. ANN. § 75-1-203(b). Also, in MISS. CODE ANN. § 75-1-203(c), there is a list of several factors that, even if found in a contractual agreement, do not necessarily mean that the transaction in question created a security interest.

"Under this approach, the lease will be construed as a security interest as a matter of law if the debtor cannot terminate the lease and one of the enumerated requirements . . . is satisfied." *In re Greenville Auto Mall, Inc.*, 278 B.R. 414, 419 (Bankr. N.D. Miss. 2001) (quotation omitted) (applying similar provision of Illinois commercial law). "Thus, a lease creates a security interest only if (1) the lessee does not have the right to terminate the lease; and (2) one of the four enumerated requirements . . . is satisfied.". *Automotive Leasing Specialists, LLC v.*

Little, 392 B.R. 222, 234 (W.D. La. 2008) (construing substantively identical provision of Louisiana commercial law).

Before applying MISS. CODE ANN. § 75-1-203(b) to the transaction between Doss and Legacy, the Court notes that there was no evidence presented at the Hearing about the expectation of the parties at the time they entered into the Lease. The fact that Legacy is in the business of both selling and leasing automobiles does not weigh in favor of either party. The fact that the transaction is in the "form" of a true lease is also not determinative of the issue. Therefore, the Court is confined to an examination of the recitations in the Lease to determine whether the statutory factors support a finding that the parties intended to create a security interest.

As required by MISS. CODE ANN. § 75-1-203(b), the Court must ask first whether Doss has the right to terminate the Lease prior to expiration of its two-year term. If Doss has the right to terminate the Lease early, the transaction is not deemed to have created a security interest, and the Court need not inquire further to determine if any of the remaining requirements are present. As to the early termination issue, the bankruptcy court's decision in *In re Bailey*, 326 B.R. 156, 162 (Bankr. W.D. Ark. 2005), is instructive. In *Bailey*, the debtors were liable for three months' lease payments if they chose to "bring back" the leased equipment. *Bailey*, 326 B.R. at 163. The court found that because the debtors did not have a legal right to cease payments and "walk away from the lease without liability for the deficiency," they did not have a right to terminate under the purported lease. *Bailey*, 326 B.R. at 163. "A provision in a contract requiring the lessee to remain financially liable to the lessor for payments that become due after the termination date does not constitute the right to terminate under the statute." *Id*. (citation omitted).

Similarly, in *Automotive Leasing Specialists*, the district court upheld the bankruptcy court's finding that the debtor's obligation under the lease agreement in question would not end if she chose to terminate the lease early. *Automotive Leasing Specialists,* 392 B.R. at 234. The lease agreement contained the following language:

> **24. EARLY TERMINATION**: You may have to pay a substantial charge if you end this Lease early. *The charge may be up to several thousand dollars.* The actual charge will depend upon when the Lease is terminated. The earlier you end the Lease, the greater this charge will be.

Id. at 224. The district court explained its reasoning, as follows:

> This Court agrees with the Bankruptcy Court that the amount the Debtor would owe if she chose to terminate the Lease Agreement early is *directly tied* to how much she would owe on the remaining balance, which, as the Bankruptcy Judge noted, would be *higher* at the beginning of the lease period. [U]nder the clear provisions of the Lease Agreement, the Debtor is put on notice that, should she terminate the lease at the beginning of the lease term, she may be required to pay *thousands of dollars* in payments to [Creditor]. Regardless of what these amounts would be called, the economic reality of the transaction is that the Debtor's obligations under the Lease Agreement would not be terminated if the Debtor chose to terminate the lease early, and particularly not if she chose to terminate the lease at the beginning of the lease term.

Id. at 234. In contrast, the bankruptcy court in *In re Yarbrough*, 211 B.R. 654, 658 (Bankr. W.D. Tenn. 1997), held that a consumer rental agreement was not a security agreement but rather a lease, because the lease allowed the lessee to terminate the lease "at any time by returning the Property to the Owner and paying all charges due through the date of return." *Id.* at 657 (applying Mississippi commercial law). The court, however, did not discuss the presence of any additional language in the rental agreement that would impose obligations upon the lessee for its early termination.

At first blush, the language of the Lease in this matter appears to allow Doss to terminate the parties' agreement except that in doing so, she is bound by the following "early termination"

provision, which is almost identical to the language in the agreement discussed in *Automotive Leasing Specialists*:

> Early Termination: You may have to pay a substantial charge if you end this Lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the Lease is terminated. The earlier you end the lease, the greater this charge is likely to be.

(Cl. 5-1). According to this provision of the Lease, if Doss exercises an early termination, she would incur a fee, and her obligations would not end. Therefore, following the analysis in *Bailey* and *Automotive Leasing Specialists,* the Lease does not allow early termination within the meaning of MISS. CODE. ANN. § 75-1-203(b). Because the Lease meets the first prong of the test under that statute for the creation of a security interest, the Court must now turn to the second prong of the test and determine whether the Lease satisfies any one of the four factors listed in MISS. CODE ANN. § 75-1-203(b)(1)-(4) that would support Doss's characterization of the Lease as a credit sale.

The Court finds that the Lease does not meet the first enumerated factor because its term is less than the remaining economic life of the Toyota. "The hallmark of a lease is that it grants the lessee the right to use property for a period less than its economic life with the concomitant obligation to return the property to the lessor while it retains some substantial economic life." *In re QDS Components, Inc.*, 292 B.R. 313, 322 (Bankr. S.D. Ohio 2002); *see In re Marhoefer Packing Co.,* 674 F.2d 1139, 1145 (7th Cir. 1982) ("An essential characteristic of a true lease is that there be something of value to return to the lessor after the term. Where the term of the lease is substantially equal to the life of the leased property such that there will be nothing of value to return at the end of the lease, the transaction is in essence a sale."). The term of the Lease was for only two years. Despite the fact that it was ten years old at the time of the Lease, the Toyota would have had some economic value at the end of its relatively short lease. The Lease itself

assigns the vehicle a "Residual Value" of $1,175.00 (despite the absence of any provision allowing Doss to purchase the Toyota). Because the Toyota has economic life after the term of the Lease, the Court finds that the first factor does not exist. The Court also finds that the second factor and third factor are not met because the Lease does not contain any language allowing Doss to renew its original term.

Finally, as to the fourth enumerated factor, the Court finds that the Lease does not grant Doss an option to purchase the Toyota at the end of the lease term. Although the Lease contains language regarding the purchase of the Toyota, including the "Residual Value" of the vehicle, the box that would allow Doss to pursue that option is blank. The unchecked box is consistent with the title of the Lease, which includes the description "Closed-End." Thus, the fourth factor weighing in favor of a security interest is not satisfied.

Because a lease creates a security interest only if (1) the lessee does not have the right to terminate the lease; and (2) one of the four enumerated requirements of the statute is satisfied, the Court finds that the Lease is a true lease. Following the decisions in *Bailey* and *Automotive Leasing Specialists*, Doss does not have the right to terminate the Lease, which would suggest a credit sale except that the transaction did not meet any of the additional four factors. The term of the Lease was less than the economic life of the Toyota and the Lease does not give Doss the option either to renew the Lease or purchase the Toyota at the end of the lease term. Therefore, because the Lease does not satisfy the statutory factors, the Court finds that the Lease is indeed a true lease. As a result, Doss may not treat Legacy's claim as a secured claim, and the Motion to Modify should be denied.

Conclusion

For the above and foregoing reasons, the Court concludes that the Motion to Modify should be denied. Doss is judicially estopped from asserting that the Lease is a "credit" sale. In addition, the Court concludes that the Agreed Order is *res judicata* and prevents Doss from modifying the Confirmed Plan to reclassify Legacy's claim. Finally, the Court concludes that even if the doctrines of judicial estoppel and *res judicata* did not apply, the Lease is a "true" lease under Mississippi law and, therefore, is not subject to modification.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: November 6, 2012