SO ORDERED

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: January 13, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: DEMENTRA RENEA CAMPBELL	**CASE NO. 14-50914-KMS**
DEBTOR	**CHAPTER 13**
HOLMES MOTORS, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 14-06013-KMS**
DEMENTRA RENEA CAMPBELL	**DEFENDANT**

MEMORANDUM OPINION AND ORDER
SUSTAINING HOLMES MOTORS' OBJECTION TO CONFIRMATION
OF PLAN AND DENYING MOTION FOR TURNOVER

THIS MATTER is before the Court on the Objection of Holmes' Motors to Confirmation of Plan filed by Holmes Motors, Inc. (Dkt. No. 18); the Response to Holmes' Motors, Inc.'s Objection to Confirmation of Plan (Dkt. No. 26) filed by Dementra Campbell, the debtor in the above-styled Chapter 13 bankruptcy case; the Motion for Turnover[1] filed by Holmes Motors, Inc. (Adv. Dkt. No. 1); the Brief in Support of Creditor's Objection to Confirmation of the Plan and Motion for Turnover filed by Holmes Motors, Inc. (Dkt. No. 29, Adv. Dkt. No. 14); and the

[1] The Motion for Turnover is the initial pleading in the adversary proceeding filed by Holmes Motors, Inc. against Dementra Campbell. Unless stated otherwise, citations to docket entries in the adversary proceeding, Adv. Proc. No. 14-06013-KMS, are cited as "(Adv. Dkt. No. ___)"; and citations to docket entries in the main bankruptcy case, Case No. 14-50914-KMS, are cited as "(Dkt.No. ___)".

Memorandum of Law in Opposition to Holmes' Motors, Inc.'s Objection to Confirmation of Plan (Dkt. No. 28, Adv. Dkt. No. 15). The primary issue is whether the agreement entered into between the Debtor and Holmes Motors, Inc. ("Holmes") created a true lease or a security interest. Having considered the pleadings and memoranda, as well as the evidence and testimony presented at the hearing on the matter, the Court finds that the agreement entered into by the parties is a true lease. Accordingly, Holmes' Objection to Confirmation of Plan should be sustained; however, for the reasons stated below, the Motion for Turnover should be denied.

I. Jurisdiction

The Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (L).

II. Factual and Procedural Background

1. On July 11, 2013, Dementra R. Campbell ("Campbell" or "Debtor") entered into an agreement styled "Closed End Motor Vehicle Lease" ("Lease") with Holmes for the lease of a used 2009 Chevrolet Malibu Sedan with an odometer reading of 124,159 miles. (Dkt. No. 18, Ex. 1; Adv. Dkt. No. 12, Ex. 1).

2. The terms of the Lease provide for 77 periodic payments due biweekly in the amount of $215.00 after a down payment of $2,000.00 and an initial payment of $215.00, resulting in total periodic payments of $16,770.00 and total payments under the Lease of $18,770.00. (*Id.*).

3. Pursuant to the Lease, the agreed-upon value of the vehicle was $18,559.64 and the residual value of the vehicle at the end of lease is $2,225.40. (*Id.*).

4. The Lease contains both an early termination provision and an option to purchase. (*Id.*).

5. On May 31, 2014, Campbell filed a petition for relief under Chapter 13 of the Bankruptcy Code[2] in the United States Bankruptcy Court for the Southern District of Mississippi. (Dkt. No. 1).

6. Campbell's Chapter 13 plan ("Plan") provided for payment to Holmes of the approximate amount owed under the Lease—$16,000.00—plus 7.00% interest. (Dkt. No. 2 at 1). The Plan listed the value of the vehicle as $10,665.00. (*Id.*).

7. On July 7, 2014, Holmes filed its objection to confirmation of the Plan. (Dkt. No. 18). Holmes alleges that Campbell incorrectly identified the vehicle as property of the Debtor and collateral for the debt to Holmes instead of leased property owned by Holmes. (*Id.* at 1, ¶¶ 1–2). Holmes further alleges that the Lease is subject to 11 U.S.C. § 365 and was in default at the time of filing, that bi-weekly payments of $215.00 are to be paid, and that the Debtor has failed to maintain insurance coverage. (*Id.* at ¶ 3). Finally, Holmes argues that the Plan does not provide the amount that will be paid to cure the default in lease payments and that it attempts to create an ownership right in favor of the Debtor when none exists. (*Id.* at 1–2, ¶ 4). Holmes makes similar allegations in the Motion for Turnover. (Adv. Dkt. No. 1 at 1, ¶¶ 1–3).

8. On July 22, 2014, Campbell filed her response to Holmes' Objection to Confirmation requesting that the Plan be confirmed as proposed. (Dkt. No. 26). Citing the Mississippi Uniform Commercial Code two-prong test, set forth in Mississippi Code Annotated

[2] "Bankruptcy Code" or "Code" refers to the United States Bankruptcy Code located at Title 11 of the United States Code.

§ 75-1-203(b), Campbell argues that the form of Lease creates a security agreement.[3]

9. On July 24, 2014, a hearing was held on Holmes' Motion for Turnover and the Objection to Confirmation. Jason Johnson ("Johnson"), the General Manager of Holmes testified. Documents, including the Lease, a payment history for Debtor's account, and a GPS history for the vehicle were admitted into evidence. (Adv. Dkt. No. 12).

10. Johnson testified that Campbell had been in default on Lease payments at various times; and although the vehicle had been repossessed, Campbell was able to redeem the vehicle prior to her bankruptcy. According to Johnson, Campbell was current as of May 16, 2014. (Adv. Dkt. No. 18 at 30). At the time the bankruptcy petition was filed on May 31, 2014, Campbell was behind $5.00 (the amount of a late fee under the Lease) and her May 29 payment was due. (Adv. Dkt. No. 12, Ex. 2).[4] But the bankruptcy petition was filed within the grace period allowed under the Lease.[5] Johnson also testified that the Lease was in default because the GPS device on the vehicle was no longer working. (Adv. Dkt. No. 18 at 13). According to the testimony, however, a lack of power to the device could have disabled it, (*Id.* at 12), and the evidence and testimony did not establish that Campbell disabled the device. Johnson also testified that Campbell had allowed the insurance on the vehicle to lapse. However, at the time the petition was filed, the vehicle was insured. A lapse in insurance occurred after Campbell filed her bankruptcy petition. (*Id.* at 13).

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[3] (Dkt. No. 26 at 1–2, ¶ 3–4). The Debtor argues that the test is satisfied because the Debtor does not have the right to terminate the Lease; the vehicle will have no economic life at the end of the Lease; and the Debtor has the option to purchase the vehicle for nominal consideration. (*Id.* at 2–3, ¶ 6-7).

[4] According to the Lease, Campbell began making her biweekly payments on July 11, 2013. On May 29, 2014, she had made the 23 payments required under the lease, paid late fees of $63.67, a repossession fee of $500 and was only $5.00 short of the total amount due. *See* (Adv. Dkt. No. 12, Ex. 2).

[5] The Lease provides that late fees are assessed for any payment not received within 10 days of the due date. (Adv. Dkt. No. 12, Ex. 1 at 2, ¶ 8). A conflicting provision of the Lease provides that there is a 5 day grace period and that repossession may occur at any time after 5 days. (*Id.* at 5)**.** According to the payment history, the next contractual payment was due on May 29, 2014. (*Id.* at Ex. 2). Campbell filed bankruptcy on May 31, 2014. (Dkt. No. 1).

11. Post-hearing briefs were submitted by the parties at the Court's direction, and the matters were taken under advisement.

III. Analysis

A. Whether the lease was terminated prior to the commencement of the bankruptcy

Holmes argues that the Lease was terminated prior to the commencement of the bankruptcy due to three events of default: 1) Campbell's default on her payments; 2) the GPS in the car was not operational; and 3) Campbell's failure to maintain insurance. The Court disagrees. First, Campbell was due for the May 29, 2014 payment when she filed her petition within the grace period allowed under the terms of the Lease, and the lapse in insurance did not occur until after Campbell filed her petition.[6] Thus, these two events of default did not occur until after the bankruptcy had commenced. Additionally, Holmes failed to establish that Campbell disabled the GPS system in the vehicle. Moreover, Section 14 of the Lease provides that, even after repossession, the vehicle would be held subject to rights under applicable law to cure the default or recover the vehicle. (Adv. Dkt. No. 12, Ex.1 at 3). And no evidence was adduced at the hearing indicating that Holmes notified Campbell that the lease was terminated prior to the filing of her bankruptcy petition. Thus the Debtor's interest in the vehicle, whether a leasehold interest or an ownership interest, is property of the bankruptcy estate and subject to the automatic stay provisions contained in 11 U.S.C. § 362. 11 U.S.C. §§ 541, 362, 364. The Court now turns to the issue of whether the transaction in question created a security interest.

B. Lease v. security interest and the Chapter 13 plan

Whether the Lease is a security interest or is a true lease will determine how the Debtor may treat the claim in her Chapter 13 bankruptcy Plan. Generally, if the agreement created a

[6] Although there had been prior lapses in insurance coverage, Campbell had been allowed to cure and Holmes did not exercise its right to terminate.

security interest, the Debtor may provide for payment of the value of the allowed secured claim under the plan, and any deficiency may be treated as an unsecured debt. 11 U.S.C. §§ 1325(a)(5), 506. But § 506 is not applicable if the creditor has a purchase-money security interest that was incurred within the 910-day period preceding the petition. 11 U.S.C. § 1325(a)(*).[7] If the agreement is an unexpired lease, the Debtor may not assume the lease except upon prompt cure[8] and provision of adequate assurance of future performance pursuant to 11 U.S.C. § 365(b). Subject to § 365, the Chapter 13 plan may "provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section," and may "provide for the curing . . . of any default." 11 U.S.C. §§ 1322(b)(3) and (b)(7). Campbell's plan treats Holmes' claim as a secured claim to be paid in full through the Plan. If the agreement is a security interest, Holmes' objection to the Plan may be overruled and the Debtor may proceed with the Plan as proposed. If, however, the agreement is a lease, then the Plan must be modified to provide for the assumption and prompt cure of the Lease or rejection of the Lease.

C. State commercial law is determinative

State commercial law determines whether a contractual agreement should be characterized as a true lease or as a security agreement. *Butner v. United States,* 440 U.S. 48, 55 (1979). Mississippi's version of the Uniform Commercial Code addresses whether a transaction

[7] Courts have used an asterisk to cite the unnumbered hanging paragraph following § 1325(a)(9). *DaimlerChrysler Fin. Servs. Ams. LLC v. Miller, (In re Miller),* 570 F.3d 633, 637 n.5 (5th Cir. 2009). The Debtor's plan proposes to pay the amount owed to Holmes rather than the value of the vehicle. (Dkt. No. 2). Debtor's Schedule D lists the 2009 Chevrolet Malibu as secured with a purchase money security interest dated July 11, 2013. (Dkt. No. 4 at 8).

[8] "Prompt cure" depends on the facts and circumstances of a particular case. *In re PRK Enterprises, Inc.*, 235 B.R. 597, 601(E.D. Tex. 1999) (noting that some courts find cure to be prompt as long as proposed cure period does not extend to end of lease).

in the form of a lease creates a true lease or security interest. Miss. Code. Ann. § 75-1-203.[9] The burden of proof is on the party that seeks to have the form of the lease agreement characterized as an instrument other than a lease. *In re Uni Imaging Holdings, LLC*, 423 B.R. 406, 414 (Bankr. N.D.N.Y. 2010); *In re Ecco Drilling Co., Ltd.*, 390 B.R. 221, 226 (Bankr. E.D. Tex. 2008); *In re QDS Components, Inc.*, 292 B.R. 313, 321-22 (Bankr. S.D. Ohio 2002). The Court proceeds in its analysis by looking to applicable Mississippi statutes.

D. Application of Miss. Code. Ann. § 75-1-203(b)

"Whether a transaction in the form of a lease creates a 'security interest' is determined pursuant to Section 75-1-203." Miss. Code Ann. 75-1-201(b)(35). Section 75-1-203[10] sets forth a two-prong test for distinguishing true leases from security interests. If both prongs of the test are satisfied, the transaction is deemed to have created a security interest as a matter of law, regardless of whether the transaction is in the form of a lease. The 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

[9] The Court may also consider decisions from other jurisdictions interpreting the same or similar uniform statutes. *See, e.g.*, *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 537 F.3d 1165, 1175 n.7 (10th Cir. 2008) (in UCC context decisions from other jurisdictions are persuasive due to uniform nature of UCC).

[10] The current version of the statute became effective July 1, 2010.

> (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. Section 75-1-203 also lists several factors that, even if present, do not necessitate a finding that the transaction in question created a security agreement. Miss. Code. Ann. § 75-1-203(c).

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

1. Part One – Early Termination

The Court must first decide whether Campbell had the right to terminate the Lease prior to the expiration of its term. Miss. Code Ann. § 75-1-203(b). If Campbell does have the right to terminate early, the transaction cannot be deemed to have created a security interest as a matter of law and the Court need not proceed in an analysis of the four residual factors contained in § 75-1-203(b). But if Campbell does not have the right to terminate early, any one of the remaining four factors may satisfy the second prong of the test resulting in a finding that the agreement is a disguised security interest as a matter of law. *Id.*

Section 3 of the subject Lease contains the following Early Termination provision: "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." (Adv. Dkt. No. 12, Ex. 1 at 1). Section 13 of the Lease sets forth several paragraphs detailing early termination liability, including the following:

> Upon early termination you agree to pay the following charges: Any unpaid periodic payments then due. The Early Termination Fee, if any, shown in Item 10.[11] Any official fees and taxes imposed in connection with termination. The amount by which the adjusted lease balance exceeds the Vehicle's realized value at termination. If the total of these four amounts is more than the total of your remaining periodic Lease payments, you instead agree to pay the total of your remaining periodic Lease payments. If we have to repossess the Vehicle from you, you shall pay us any amounts we have to pay for the expenses in doing so. If we have to store the Vehicle and pay storage charges, you will pay us the amount of the storage charges. We may at our election apply some or all of your security deposit to what you owe.

(Adv. Dkt. No. 12, Ex. 1 at 3).

When confronted with a similar early termination clause,[12] the court in *In re Doss* held that, "[a]ccording 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,*[13] the Lease does not allow early termination within the meaning" of § 75-1-203(b). *In re Doss,* No. 12-00812-NPO, slip op. at 14 (Bankr. S.D. Miss. Nov. 6, 2012). *See also In re Cherry*, No. 12-81454-JAC-13, 2012 WL 3252231, at *3 (Bankr.

[11] Section 10 provides for an Early Termination Fee of $500.00. (Adv. Dkt. No. 12, Ex. 1 at 2).

[12] The Early Termination paragraph in *Doss* provided: "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." *In re Doss,* at 13.

[13] The court cited *In re Bailey,* 326 B.R. 156, 162 (Bankr. W.D. Ark. 2005), stating that "[t]he 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," and further stating that "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." *In re Doss,* No. 12-00812-NPO, at 12. The court also cited *Automotive Leasing Specialists L.L.C. v. Little,* 392 B.R. at 234, in which the court found that the amount the debtor would owe upon termination of the lease was directly tied to the remaining balance and would be higher at the beginning of the lease. *Id.* at 13.

N.D. Ala. Aug. 7, 2012) ("Given the identical language in the contract before the Court that the earlier the debtor ends the lease, 'the greater this charge is likely to be,' the Court finds that the debtor cannot effectively terminate her obligations under the subject agreement."). The Court agrees with the reasoning of the *Doss* and *Cherry* courts and finds that the Early Termination provisions of the Lease do not allow Campbell to end her obligations under the Lease and therefore she does not have the right to terminate early.

Johnson—the General Manager of Holmes—testified on direct examination that, contrary to the language contained in the Lease and regardless of whether the lessee is in default, Holmes would allow the lessee "to just simply hand the car over, hand the keys over and walk away upon the vehicle passing evaluation." (Adv. Dkt. No. 18 at 14). When asked whether there was a termination penalty in the Lease, Johnson replied, "No, … in the agreement there's language to that, but we typically just – you know, if their situation they can't afford it we just – as long as we get the vehicle back we're fine." (*Id.*). Johnson also referred to the "bullet" provision on the last page of the lease that provides: "[i]f for some reason during this agreement you need out of the contract, simply bring back for evaluation and release of agreement and debt. Vehicle must pass evaluation." (Adv. Dkt. No. 12, Ex. 1 at 5). On redirect, Johnson was asked if he had ever assessed a penalty fee to someone who wanted to turn in their keys to their vehicle. Johnson testified that, "our policy is, you know, we understand people have hardships and what have you, and so we're – as long as we get the vehicle back we typically give them a hug and say, come back and see us in the future when, you know, you're back on our feet, and we have done that many, many times." (Adv. Dkt. No. 18 at 29).

The Court is not persuaded that the bullet provision of the Lease and Holmes' practice of not enforcing the Lease provisions for early termination render the clear language of Sections 3

and 13 of the Lease unenforceable. Instead, the decision not to enforce the early termination provisions is within the sole discretion of Holmes. Consequently, the Court finds that the Lease is not subject to termination by the lessee. Accordingly, part one of Mississippi Code Annotated § 73-1-203(b) is satisfied and the Court now turns to part two of the test.

2. Part Two – Residual Value Factors

Once the first part of § 75-3-203(b) has been established, any one of the four residual value factors may be established to satisfy the second part of the subsection (b) test for a lease to be deemed a security agreement as a matter of law. *Uni Imaging Holdings, LLC,* 423 B.R. at 416. Two of the four factors listed in § 75-1-203(b) relate to renewal provisions or options under a lease.[14] These provisions are not relevant to the subject Lease and the parties do not argue their applicability. The provisions applicable in this case concern the remaining economic life of the Lease and whether the consideration given was nominal. Miss. Code. Ann. § 75-1-203(b)(1) and (b)(4). The Court considers each provision in turn.

i. Remaining Economic Life

The first residual value factor requires that "[t]he original term of the lease is equal to or greater than the remaining economic life of the goods." Miss. Code. Ann. § 75-1-203(b)(1). The "remaining economic life of the goods" must be determined "with reference to the facts and circumstances at the time the transaction is entered into." Miss. Code Ann. § 75-1-203(e). At the time the parties executed the Lease in July of 2013, they agreed to a Residual Value for the vehicle at the end of the Lease term of $2,225.40. The Lease term was for 78 biweekly payments (or until 2016, at which time the 2009 vehicle will be more than 7 years old). Apart

[14] Section 75-1-203(b)(2) states that "[t]he 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," and § 75-1-203(b)(3) states that "[t]he 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." Miss. Code. Ann. § 75-1-203(b)(2) and (b)(3).

from the values set forth in the Lease, no evidence was presented showing the remaining economic life of the goods as determined with reference to the facts and circumstances at the time the transaction was entered into. Therefore, because the parties agreed there would be a value remaining at the end of the Lease, the Court finds that the original term of the lease is not greater than or equal to the remaining economic life of the goods, and § 75-1-203(b)(1) has not been satisfied. *See In re Doss,* No. 12-00812-NPO, at 14 ("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").

ii. Nominal Consideration

The fourth provision of § 75-1-203(b) requires that "[t]he 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)(4). Section 75-1-203(d) provides that additional consideration *is not* nominal if: "[w]hen the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed." Miss. Code Ann. § 75-1-203(d)(2) (emphasis added). By contrast, § 75-1-203(d) provides that "[a]dditional consideration *is* nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." Miss. Code Ann. § 75-1-203(d) (emphasis added). Neither statutory provision is helpful in this case as the purchase option price is set as the Residual Value plus the purchase option fee, not the fair market value, and the Lease does not provide for a disposition fee or other penalty for not exercising the purchase option.

Section 3 of the Lease provides that the lessee has the "option to Purchase the Vehicle at the end of the Lease term for an additional payment of $2,225.40 and an additional purchase

option fee of $500.00. The purchase option does *not* include official fees such as those for taxes, tags, licenses, and registration." (Adv. Dkt. No. 12 Ex. 1, at 1). Thus the additional consideration required to purchase the vehicle at the end of the Lease is $2,725.40 plus any applicable official fees. Faced with the exact same transaction, the court in *In re McBride* only peripherally addressed the issue of nominal consideration before finding the transaction in question had created a true lease. *In re McBride,* No. 11-03190-MAM-13, 2011 WL 3902991, at *3 (Bankr. S.D. Ala. Sept. 6, 2011), rev'd in part 473 B.R. 813 (S.D. Ala. 2012). The *McBride* court did state that "'[t]he real yardstick in determining whether the option price is nominal or substantial would appear to hinge on whether that price bears a resemblance to the fair market price of the article.'" *Id.* (quoting *In re Winston,* 181 B.R. 589, 592 (Bankr. N.D. Ala. 1995)). In analyzing whether the consideration required to exercise a purchase option is nominal, courts have concluded that extremely low payments are nominal. *E.g.*, *Peoples Bank and Trust Co. v. Applewhite (In re 20th Century Enters., Inc.),* 152 B.R. 119 (Bankr. N.D. Miss. 1992) ($100.00 after payment of $850,000.00 was nominal). And one court found that payments of $2,230.00 and $2,080.00 for two tractors were nominal where the payments represented between 13% and 14% of the fair market value of the tractors at the time of the option. *In re Bailey,* 326 B.R. at 164.

In this case, the only evidence offered as to the fair market value of the vehicle in question was the Residual Value of $2,225.40 contained in the lease and Johnson's testimony that the value of the vehicle at the end of the lease term will be $4,000.00 to $5,500.00. (Adv. Dkt. No. 18 at 15). The minimum consideration required to exercise the purchase option represents at least $500.00 more than the Residual Value and approximately 50% of the value of

the vehicle at the end of the lease term. The Court thus concludes that the consideration required to exercise the purchase option is not nominal.

A transaction only creates a security interest as a matter of law if both prongs of the test contained in § 75-1-203 have been met. In the transaction in question, Campbell did not have the right to terminate the Lease; however, none of the other four factors were met. Thus, because the second prong of the test has not been satisfied, the Court finds that the Lease in question is a true lease and not a security agreement.[15]

E. Conclusion

The Court finds that the Lease in this case did not terminate prior to the commencement of the bankruptcy, thus Campbell's interest in the Lease is property of her bankruptcy estate and subject to the provisions of § 362. The Court further finds that the specific Lease in this case did not create a security interest, and that the vehicle should be treated as a true lease in the Debtor's Chapter 13 bankruptcy. The Debtor will be given 21 days to propose an amended plan and file any other necessary pleadings proposing to cure and assume the lease, or otherwise proposing to reject the lease.

IT IS THEREFORE ORDERED AND ADJUDGED that the Objection to Confirmation filed by Holmes is sustained.

[15] Some courts proceed to a "facts and circumstances" test where the two-part test is not met. *See, e.g.*, *In re Warne,* No. 09-13941, 2011 WL 1303425, at *3 (Bankr. D. Kan. Apr. 4, 2011) (courts must consider the facts of the case to determine whether the transaction creates a security interest when the two-part test is not met). The Court does not find a facts and circumstances analysis necessary in this case, as the Debtor failed to adduce any evidence at the hearing indicating there are facts and circumstances, apart from those the necessary to the Court's consideration of whether the two-part test was met, indicating that the Lease in question should be considered a security interest rather than a true lease.

IT IS FURTHER ORDERED AND ADJUDGED that the Debtor shall have 21 days to file an amended plan to provide treatment of Holmes' claim as a lease rather than a security interest.

IT IS FURTHER ORDERED AND ADJUDGED that the Motion for Turnover is denied.

##END OF ORDER##