SO ORDERED

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 31, 2019

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:

DAVID J. LEWIS, **CASE NO. 19-00014-NPO**

DEBTOR. **CHAPTER 13**

ORDER SUSTAINING OBJECTION TO PROPOSED CHAPTER 13 PLAN AND CONFIRMATION THEREOF

This matter came before the Court for hearing on April 8, 2019 (the "Hearing"), on the Objection to Proposed Chapter 13 Plan and Confirmation Thereof (the "Objection") (Dkt. 19) filed by U.S. Bank National Association, as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2 ("U.S. Bank") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Bradley P. Jones appeared on behalf of U.S. Bank, George Adam Sanford appeared on behalf of David J. Lewis, the debtor (the "Debtor"), and James L. Henley, Jr., the standing chapter 13 trustee (the "Trustee"), appeared on his own behalf. After the Hearing, the Court instructed the Debtor and U.S. Bank to submit legal authorities in support of their respective positions regarding the confirmability of the Chapter 13 Plan (the "Plan") (Dkt. 2) proposed by the Debtor. The Debtor filed the Amended Notice of Authorities (Dkt. 32) on April 22, 2019, and U.S. Bank filed the Response to Debtor's Notice of

Authorities (Dkt. 33) on April 29, 2019. After fully considering the matter, the Court finds as follows:[1]

Jurisdiction

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

Facts

1. On November 24, 1997, the Debtor and his spouse, Bettie J. Lewis ("Bettie Lewis") (who is not a joint debtor in the Bankruptcy Case), obtained a home loan in the principal amount of $68,000.00. They signed a note (the "Note") (Cl. #1-1 pt. 2 at 63-66) promising to repay the loan at an annual interest rate of 12.5% and a deed of trust (the "Deed of Trust") (Cl. #1-1 pt. 2 at 51-62) conveying their residence located at 452 White Road in Florence, Mississippi (the "Property") in trust as security until repayment of the debt. In 2005, U.S. Bank became the holder of the Note and the Deed of Trust through a series of assignments. (Cl. #1-1 pt. 2 at 58-60).

2. The Note required the Debtor and Bettie Lewis to repay the loan in monthly installments of $772.59 beginning on January 1, 1998, with the final payment of remaining principal and interest due on December 1, 2017. (Cl. #1-1 pt. 2 at 63-66).

3. The introductory paragraphs in the Deed of Trust reiterate that the Debtor and Bettie Lewis owe a debt in the principal amount of $68,000.00, and that the debt is evidenced by the Note, which provides for monthly payments with the full amount due on December 1, 2017.

[1] The Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

(Cl. #1-1 pt. 2 at 51). The lien of the Deed of Trust is described as securing "the repayment of the debt evidenced by the Note, with interest, and *all renewals, extensions and modifications of the Note*." (*Id.*) (emphasis added). The Deed of Trust was duly recorded in the land records of Rankin County, Mississippi.

4. At some point, the Debtor and Bettie Lewis became behind in their mortgage payments. After negotiations, U.S. Bank, the Debtor, and Bettie Lewis signed a Loan Modification Agreement (the "Modification Agreement") (Cl. #1-1 pt. 2 at 49-50) on February 7, 2008, that amended both the Note and the Deed of Trust. The Debtor and Bettie Lewis promised to pay $60,272.55, the unpaid principal balance of the loan as of March 1, 2008, in monthly installments of $449.04 beginning on April 1, 2008, with the final payment of remaining principal and interest due on June 1, 2036. In addition to extending the December 1, 2017 maturity date, the Modification Agreement reduced the annual interest rate from 12.5% to 8%, resulting in the reduction in monthly payments from $772.59 to $449.04. After the date of the Modification Agreement, any principal-and-interest payments made by the Debtor and Bettie Lewis to U.S. Bank were in the reduced amount of $449.04. (Cl. #1-1 at 4-13).

5. The Modification Agreement was not filed in the land records of Rankin County, Mississippi, and no notation was recorded on the margin of the Deed of Trust indicating any extension of the original December 1, 2017 maturity date. (Cl. #1-1 pt. 2 at 51-62).

6. On January 3, 2019, the Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) pursuant to chapter 13 of the U.S. Bankruptcy Code (the "Code"). On Schedule A/B: Property, the Debtor valued his interest in the Property at $35,000.00. (Dkt. 4 at 3). On Schedule

D: Creditors Who Have Claims Secured by Property, the Debtor listed Ocwen[2] as having a mortgage on the Property in the amount of $65,000.00 (Dkt. 4 at 11).

7. Contemporaneously with the Petition, the Debtor filed the Plan. The last payment under the 60-month Plan becomes due in 2024. (Plan ¶ 2.1). In the Plan, the Debtor proposes to pay U.S. Bank $35,000.00, the Debtor's estimated value of the Property, over the sixty (60)-month term of the Plan with post-confirmation interest at the "*Till* rate" of 6.75%.[3] (Plan ¶ 3.2). In Part 8 of the Plan, the Debtor explained his treatment of U.S. Bank's secured claim: "The mortgage loan . . . matures during the life of the plan [and so the] Debtor proposes to cram down the claim . . . to pay the value of $35,000.00." (Plan ¶ 8.1).

8. U.S. Bank filed the Objection on February 4, 2019, challenging the Debtor's proposed treatment of its secured claim in the Plan. U.S. Bank contends that the Debtor is prohibited by 11 U.S.C. § 1322(b)(2) from cramming down the mortgage, which is secured only by the Debtor's principal residence and which does not become due, pursuant to the terms of the Modification Agreement, during the life of the Plan.

9. On February 7, 2019, U.S. Bank filed a proof of claim (the "POC") (Cl. #1-1) in the amount of $73,273.45, reflecting the loan balance as of the date of the Petition, which includes a pre-petition arrearage of $23,286.89. Attached to the POC are copies of the

[2] Ocwen is the loan servicing agent for U.S. Bank. (Cl. #1-1 pt. 2 at 1). The Debtor does not dispute that U.S. Bank is the current holder of the Note and the Deed of Trust.

[3] The "*Till* rate" of 6.75% is the presumptive interest rate applicable to a secured creditor's claim paid under the "cram down" option of 11 U.S.C. § 1325(a)(5)(B) in all cases filed in this judicial district on or after October 1, 2018. *See* Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate (Aug. 17, 2018); *Till v. SCS Credit Corp.*, 541 U.S. 465, 479-80 (2004).

Modification Agreement, the Deed of Trust, and the Note. (Cl. #1-1 pt. 2 at 49-66). The Debtor has not filed an objection to the POC.[4]

10. After the Hearing, both the Debtor and U.S. Bank submitted briefs. In summary, the Debtor argues that 11 U.S.C. § 1322(c)(2) applies as an exception to 11 U.S.C. § 1322(b)(2) based on the maturity date of December 1, 2017 in the Deed of Trust (Dkt. 32 at 1), whereas U.S. Bank contends that 11 U.S.C. § 1322(c)(2) does not apply because the Modification Agreement extended the maturity date to June 1, 2036 (Dkt. 33 at 2).

Discussion

For the Plan to be confirmed, it must satisfy the requirements of 11 U.S.C. § 1325.[5] In the absence of an agreement between the Debtor and U.S. Bank, the Debtor has two other options under § 1325(a)(5) with respect to the treatment of U.S. Bank's secured claim in the Plan. The Debtor may attempt to "cram down" U.S. Bank's claim to its secured value under § 1325(a)(5)(B) or he may surrender the Property under § 1325(a)(5)(C). The Debtor has chosen to cram down U.S. Bank's secured claim in the Plan under § 1325(a)(5)(B).[6] U.S. Bank opposes the Debtor's proposed treatment of its claim.

1. Bifurcation and Cram Down Process

Generally, a debt is secured only to the extent it is supported by the market value of the collateral to which the lien is attached. 11 U.S.C. § 506; *United States v. Ron Pair Enters., Inc.*,

[4] "A proof of claim executed and filed in accordance with [the Federal Rules of Bankruptcy Procedure] shall constitute prima facie evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f).

[5] Unless noted otherwise, all section references are to the Code found in title 11 of the U.S. Code.

[6] Another option to a "cram down" under § 1325(a)(5)(B) is a "cure and maintenance" under § 1322(b)(5), which is what U.S. Bank proposes. *See infra* at 7.

489 U.S. 235, 239 (1989). When the value of the collateral is less than the entire amount of the debt, § 506(a) allows a debtor to bifurcate or "cram down" a claim into secured and unsecured portions. The ability to bifurcate a claim is important because unsecured debt generally receives less favorable treatment than secured debt. The extent to which a chapter 13 plan may use § 506(a) to bifurcate a claim depends upon the application of § 1325(a)(5)(B). *See In re Young*, 199 B.R. 643, 647 (Bankr. E.D. Tenn. 1996) ("The very essence of a § 1325(a)(5) modification is the write down or 'cramdown' of a secured claim to the value of the collateral securing the debt.").

Under the cram down option in § 1325(a)(5)(B), a debtor may keep collateral over the creditor's objection as long as the creditor retains its lien until payment of the underlying debt or discharge under § 1328 and receives periodic payments under the plan at least equal in value to the allowed amount of its secured claim. The Supreme Court explained the cram down process in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997):

> Under the cram down option, the debtor is permitted to keep the property over the objection of the creditor; the creditor retains the lien securing the claim, *see* § 1325(a)(5)(B)(i), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the allowed secured claim, *i.e.*, the present value of the collateral, *see* § 1325(a)(5)(B)(ii). The value of the allowed secured claim is governed by § 506(a) of the Code.

Id. at 957. Upon successful completion of a plan, the unsecured portion of the debt generally is discharged at which point the collateral is no longer subject to the creditor's lien. 8 COLLIER ON BANKRUPTCY ¶ 1328.01 (16th ed. 2019). The extent to which the Plan in question may modify the rights of a secured creditor like U.S. Bank and still be confirmed depends upon whether § 1325(a)(5)(B) applies, which requires the Debtor to confront and overcome the exception to § 1325(a)(5)(B) found in § 1322(b)(2).

2. Special Protection for Certain Residential Mortgages

Section 1322(b)(2), referred to as the anti-modification provision, allows a debtor to modify claims other than those "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). The legislative history of § 1322(b)(2) reflects an intent by Congress "to encourage the flow of capital into the home lending market" by prohibiting chapter 13 debtors from cramming down residential mortgages. *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J. concurring). The Supreme Court has interpreted § 1322(b)(2) as protecting even partially-secured residential mortgages. *Nobleman*, 508 U.S. at 332.

Notwithstanding the anti-modification provision in § 1322(b)(2), a debtor who has become delinquent in his residential mortgage may propose a chapter 13 plan that cures the default and maintains monthly mortgage payments under § 1322(b)(5) if the repayment period exceeds the life of the chapter 13 plan. *Rake v. Wade*, 508 U.S. 464, 468-69 (1993); *Nobleman*, 508 U.S. at 330. The "curing of any default" and the "maintenance of payments" under § 1322(b)(5) is not the modification of a secured claim for purposes of § 1322(b)(2). 8 COLLIER ON BANKRUPTCY ¶ 1322.07. In effect, § 1322(b)(5) excepts the mortgage arrearage from the prohibition against modification in § 1322(b)(2).

U.S. Bank asks the Court to require the Debtor to maintain ongoing mortgage payments of $449.04 per month until June 1, 2036 and cure the delinquency of $23,286.89 during the life of the Plan pursuant to § 1322(b)(5). The Debtor, however, proposes to pay U.S. Bank only $35,000.00, the asserted market value of the Property, at an annual interest rate of 6.75% during the 60-month term of the Plan based on § 1322(c)(2), an exception to the anti-modification provision.

3. Exception to the Anti-Modification Provision

Section 1322(c)(2) permits a debtor to bifurcate an under-secured mortgage on the debtor's principal residence where the last payment on the original schedule is due before the final payment under the chapter 13 plan becomes due. Section 1322(c)(2) provides:

> Notwithstanding [§ 1322(b)(2)] and applicable nonbankruptcy law . . . in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(c)(2). Accordingly, if a claim meets the criteria that the "last payment on the original payment schedule" is due "before the date on which the final payment under the plan is due," the debtor may cram down the mortgage loan under § 1325(a)(5)(B). Congress enacted § 1322(c)(2) to withdraw anti-modification protection from certain "second mortgages," including "short-term, high-interest rate home equity loans" and certain long-term mortgages that are nearing expiration. *First Union Mortg. Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 468, 480 (B.A.P. 6th Cir. 1998). The exception demonstrates that Congress intended to maintain the protections afforded certain residential mortgage lenders, while preventing thinly-disguised personal lending from taking advantage of those protections. Steven R. Tipler, Note, *Bankruptcy—How Judicial Interpretation of 11 U.S.C. § 1322(c)(2) Has Given Wholly Unsecured Loans a Whole Lot of Undeserved Security*, 24 WM. MITCHELL L. REV. 713, 740 (1998). "[B]ecause second mortgages are not in the business of lending money for home purchases, the same policy reasons for protection of first mortgages under section 1322(b)(2) do not exist for second mortgagees." *Lam v. Inv'rs Thrift (In re Lam)*, 211 B.R. 36, 41 (B.A.P. 9th Cir. 1997).

The Debtor contends that the exception in § 1322(c)(2) applies to U.S. Bank's claim because the Note matured on December 1, 2017, before the commencement of the Bankruptcy Case. In support of the proposition that a loan that fully matures pre-petition qualifies as a claim that becomes due "before the date on which the final payment under the plan is due," the Debtor cites *In re Nelson*, Case No. 14-14503-NPO (Bankr. N.D. Miss. Mar. 30, 2015) and *In re Maddox*, Case No. 14-11592-JDW (Bankr. N.D. Miss. June 30, 2015). (Dkt. 32 at 1). Both decisions concern the application of § 1322(c)(2) to residential mortgages but differ as to the maturity date in relation to the petition date.

In *In re Nelson* this Court held that a mortgage that fully matured before the date of the petition may be crammed down by the debtor under § 1322(c)(2). *In re Nelson*, Case No. 14-14503-NPO, slip op. at 4-5. Similarly, in *In re Maddox*, the bankruptcy court concluded that a note that matured one year after the date of the petition may be crammed down by the debtor. *In re Maddox*, Case No. 14-11592-JDW, slip op. at 11. U.S. Bank does not dispute the application of § 1322(c)(2) under the facts presented in *In re Nelson* and *In re Maddox* but argues that the facts here are not analogous because the maturity date of the Note was extended to the year 2036 under the Modification Agreement. (Dkt. 33 at 2).

The Debtor admits that he entered into the Modification Agreement and does not challenge its enforceability as between the parties. (Dkt. 32 at 1). He argues, however, that because U.S. Bank failed to file the Modification Agreement or renew the Deed of Trust in the land records, the Deed of Trust "matured" prior to the date of the Petition for purposes of § 1322(c)(2). (Dkt. 32 at 1). As legal authority for his argument regarding the effect of U.S. Bank's failure to file the Modification Agreement or renew the Deed of Trust, he cites § 89-5-19

of the Mississippi Code and the Mississippi Supreme Court's decision in *Perkins v. White*, 43 So. 2d 897 (Miss. 1950).

Chapter 5 of Title 89 of the Mississippi Code, entitled "Recording of Instruments," contains detailed rules about the recordation and prioritization of instruments affecting land and addresses the effect that real property conveyances and security instruments have upon third parties. *See* MISS. CODE ANN. §§ 89-5-1, 89-5-3, 89-5-5, 89-5-7. Chapter 5 employs a "race/notice" scheme of recordation and priority. A document or contract in relation to land must be recorded with the chancery clerk to constitute notice to third parties of the transaction, and the earlier of two recorded documents affecting the same real property generally takes precedence over the one recorded later. MISS. CODE ANN. §§ 89-5-1, 89-5-5.

Chapter 5 also provides methods by which a recorded security interest can be subordinated to third parties. If a debt has been paid in full, the margin of the deed of trust or other recorded document must be marked satisfied, which has the effect of revesting title to the property in the mortgagor. MISS. CODE ANN. § 89-5-21. Even so, it is possible that once an encumbrance has been recorded, it might persist indefinitely. For that reason, section 89-5-19 of the Mississippi Code, on which the Debtor relies, was enacted to clear the record title of "ancient" mortgages—mortgages unsatisfied of record insofar as subsequent purchasers and creditors are concerned but likely paid in full because of the passage of time. *Magnolia Fed. Bank for Savs. v. United States*, 42 F.3d 968, 972 (5th Cir. 1995). Under MISS. CODE ANN. § 89-5-19, a lien obtained on real property at a time when the note or obligation secured by an earlier lien on the same property appears on the face of the public record to be time barred has priority over the earlier lien:

> Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred

> by the statute of limitations (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six (6) months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record the same shall be deemed to be due one (1) year from the date of the instrument securing the same for the purpose of this section.

MISS. CODE ANN. § 89-5-19.

The purpose of title-clearing statutes like MISS. CODE ANN. § 89-5-19 is "to promote the stability of land titles and transferability of real property." *Magnolia Fed.*, 42 F.3d at 972. The effect of the statute is to establish an exception to the usual "race/notice" priority rule set out in MISS. CODE ANN. § 89-5-5 where priorities of liens are governed by the priority in time of the filing of the deed of trust or other instrument in the absence of actual notice. *Metro. Nat'l Bank v. United States*, 901 F.2d 1297, 1303-04 (5th Cir. 1990). Without MISS. CODE ANN. § 89-5-19, real property could be removed from commerce for an indefinite period of time. Simply put, the statute "remove[s] from land titles the dead hand of ancient mortgages." *Magnolia Fed.*, 42 F.3d at 972. In *Lampton-Reid Co. v. Allen*, 171 So. 780 (1937), the Mississippi Supreme Court, in construing the predecessor to the current MISS. CODE ANN. § 89-5-19, demonstrated how the statute operates. Thus, it held that when a lien appears on the face of the record to be barred, the lien is barred and ineffective as to creditors and subsequent purchasers without notice. *See Klaus v. Moore*, 27 So. 612, 612 (1900) (noting that "section 2462 was enacted to protect creditors and purchasers who parted with something on the appearance of the record").

Applying MISS. CODE ANN. § 89-5-19 to the facts, the recorded documents reflect that the Note secured by the Deed of Trust matured on December 1, 2017. U.S. Bank's lien on the

Property, therefore, will expire on December 1, 2023 "as to creditors and subsequent purchasers for valuable consideration without notice," pursuant to a six-year statute of limitations,[7] unless U.S. Bank files the Modification Agreement in the land records,[8] makes an appropriate marginal notation on the Deed of Trust regarding its renewal, or institutes foreclosure proceedings before June 1, 2024. MISS. CODE ANN. § 89-5-19. As of the date of the Petition, however, the limitations period that governs the Note had not expired, and U.S. Bank's mortgage lien was not at risk of subordination under MISS. CODE ANN. § 89-5-19. Even if its lien had expired before the date of the Petition, however, the statute dictates only that "the lien shall cease and have no effect *as to creditors and subsequent purchasers for valuable consideration without notice*," a point the Fifth Circuit made clear in *Magnolia Federal*. *See Magnolia Fed.*, 42 F.3d at 970 (emphasis added). The risk to U.S. Bank in not recording the Modification Agreement or taking any other action to protect its lien before June 1, 2024, therefore, is not that its failure to act would render the Modification Agreement invalid but that it would open the door for the Debtor to convey his interest in the Property to a third person without actual notice of the extended maturity date.

The Debtor also relies on *Perkins*, a decision rendered by the Mississippi Supreme Court before the enactment of MISS. CODE ANN. § 89-5-19, but is relevant, according to the Debtor, because of its application of a statute of limitations to a deed of trust. (Dkt. 32 at 1). The

[7] The statute of limitations to enforce an obligation to pay a note is six (6) years. MISS. CODE ANN. § 75-3-118(a); *see Jordan v. BancorpSouth Bank*, 964 So. 2d 1205, 1207 (Miss. Ct. App. 2007) (holding that a promissory note is subject to a six-year statute of limitations rather than the general three-year limitations period governing actions for which no limitations period has been prescribed).

[8] Section 89-5-7 of the Mississippi Code allows one who has entered into a contract relating to land, which otherwise would not be binding on subsequent purchasers, to make the contract binding on subsequent purchasers, by recording the instrument. *Buras v. Shell Oil Co.*, 666 F. Supp. 919 (S.D. Miss. 1987).

Mississippi Supreme Court ruled in *Perkins* that where a note secured by a deed of trust became due on September 1, 1929, and there was no renewal of the note or institution of foreclosure proceedings for six years, the remedy on the deed of trust became barred under the general six-year statute of limitations. *Perkins*, 43 So. 2d at 899.

On March 9, 1929, G.C. Leggett and his wife (the "Leggetts") gave a deed of trust on property they owned to secure a debt of $780.00 evidenced by a promissory note due on September 1, 1929. *Id.* at 897-98. The Leggetts failed to pay property taxes, and the property was sold to the State of Mississippi on April 6, 1931. *Id.* at 898. In a series of unrelated transactions, the note and the deed of trust eventually were sold to D.M. White ("White") on September 15, 1937. *Id.* In 1938, the Leggetts executed mineral deeds purporting to convey the oil, gas, and minerals in place under the property. *Id.* Thereafter, White purchased the land from the State of Mississippi. *Id.* In 1943, White filed suit seeking a judgment cancelling the mineral deeds from the Leggetts as clouds upon the title to the property. *Id.*

The general rule in Mississippi is that a mortgagee may not, as long as the relationship of mortgagor and mortgagee exists, obtain title to property by means of a tax sale when he can, if he chooses, pay the taxes upon default of the mortgagor and add the amount paid to his claim against the mortgagor. *Id.* (citing 37 AM. JUR. *Mortgages* § 1163, at 416). The owners of the mineral deeds argued that a fiduciary relationship existed between the Leggetts and White arising from the relationship of mortgagor and mortgagee. They maintained that White's purchase of the land from the State of Mississippi, therefore, amounted to a redemption of the property from the tax sale and the title acquired by White inured to the benefit of the Leggetts. The question presented to the Mississippi Supreme Court was whether the mortgagor-mortgagee relationship existed between White and the Leggetts when White obtained title to the property.

The Mississippi Supreme Court found that the note secured by the deed of trust, due on September 1, 1929, became barred on September 1, 1935, by the six-year general statute of limitations. *Id.* (citing MISS. CODE ANN. § 722 (1942) (current version at MISS. CODE ANN. § 15-1-49)). The expiration of the statute of limitations as to the note meant that the remedy in equity on the deed of trust also was barred under section 719 of the Mississippi Code of 1942, now MISS. CODE ANN. § 15-1-21. *Perkins*, 43 So. 2d at 899. Moreover, under section 743 of the Mississippi Code of 1942, now MISS. CODE ANN. § 15-1-3, the remedy on the deed of trust not only became barred but was completely extinguished on September 1, 1935. *Perkins*, 43 So. 2d at 899. As a result, the Mississippi Supreme Court concluded that the mortgagor-mortgagee relationship ended on September 1, 1935, and White's acquisition of the tax title in 1939 did not inure to the benefit of the Leggetts because at that time no fiduciary relationship existed between them. *Id.* at 900.

Accordingly, *Perkins* shows that Mississippi subscribes to the lien theory of mortgages—mortgages cannot be enforced when the debt they secure is barred. *Musser v. First Nat'l Bank of Corinth*, 147 So. 783, 784 (Miss. 1933). Apparently, the Debtor cites *Perkins* to demonstrate for purposes of determining the applicability of MISS. CODE ANN. § 89-5-19 when "the remedy to enforce any . . . deed of trust . . . appears on the face of the record to be barred by the statute of limitations." MISS. CODE ANN. § 89-5-19.

Applying the statute of limitations to these facts, U.S. Bank's remedy to enforce the Deed of Trust will be barred by the six-year statute of limitations in the year 2042 when the time for commencing suit on the Note and the Modification Agreement will have expired. MISS. CODE ANN. § 75-3-118(a). As noted previously, however, U.S. Bank could lose its lien priority in the year 2024 under MISS. CODE ANN. § 89-5-19 "as to creditors and subsequent purchasers for a

valuable consideration without notice" based on the earlier maturity date in the Deed of Trust. MISS. CODE ANN. § 89-5-19.

In summary, the Debtor relies on MISS. CODE ANN. § 89-1-15 and *Perkins* for the proposition that the maturity date that governs the applicability of § 1322(c)(2) is the maturity date in the recorded Deed of Trust that provides constructive notice through the public land records to all creditors and subsequent purchasers rather than the maturity date in the unrecorded Modification Agreement that governs the contractual relationship between the parties. The question before the Court is whether the maturity date for purposes of the exception in § 1322(c)(2) is the date in the land records (the Deed of Trust) or in the loan documents (the Modification Agreement).

As pointed out by U.S. Bank, the Modification Agreement, although unrecorded, is an enforceable contract between the Debtor and U.S. Bank. *McMillan v. Aru*, 773 So. 2d 355, 363 (Miss. Ct. App. 2000). Moreover, the Debtor does not propose to treat U.S. Bank as an unsecured creditor in the Plan. Apparently, no one, including the Trustee,[9] disputes that U.S. Bank held a valid security interest in the Debtor's principal residence as of the date of the

[9] The Trustee has not initiated an avoidance action although, as of the date of the Petition, the Trustee assumed the rights and powers of a hypothetical bona fide purchaser of real property from the Debtor, including the right to obtain title to the Property free of unrecorded interests. 11 U.S.C. § 544(a)(3). Nevertheless, in further support of his contention that U.S. Bank had a duty to provide notice to third parties of the extended maturity date (Dkt. 32 at 1), the Debtor cites *Henderson v. Bank of America, N.A. (In re Simmons)*, 510 B.R. 76 (Bankr. S.D. Miss. 2014), an avoidance action brought by the chapter 7 trustee under § 544(a)(3). There, the bankruptcy court held that a deed of trust with a defective legal description for property in Pennsylvania was insufficient under Mississippi law to place the chapter 7 trustee on inquiry notice to question the title to the property that the parties intended to convey. *Henderson*, 510 B.R. at 104. Unlike the facts in *Henderson*, there is no dispute here regarding the priority of U.S. Bank's lien on the Property. The Court views the Debtor's reliance on *Henderson* as another effort to engraft Mississippi law onto § 1322(c)(2), which the Court rejects for the reasons explained later in this Order.

Petition. The dispute centers around the meaning of the phrase "last payment" in § 1322(c)(2), which is not defined in the Code.[10]

"When a statute does not define a term," courts begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose. *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). In ordinary usage, the phrase "final payment" means "the last in a series of payments, or the amount needed to pay off a debt." *Final Payment*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/final-payment (last visited May 22, 2019). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quotation & citation omitted). The Debtor asks the Court to engraft onto the statute a reference to the status of real property records. The Fifth Circuit has addressed the "last payment" language but not the specific issue presented here. A review of those decisions and a decision by a bankruptcy court as to whether a modified maturity date controls the applicability of § 1322(c)(2) provides some guidance to the Court.

In *Grubbs v. Houston First American Savings Ass'n*, 730 F.2d 236 (5th Cir. 1984), the Fifth Circuit held that the pre-bankruptcy acceleration of a mortgage under state law has no bearing on whether the "last payment" becomes due during the life of a plan. *Id.* at 237. More recently, in *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000), the Fifth Circuit held that the "last payment" in § 1322(c)(2) refers to the final payment and not the most recent payment. *Id.* at 295. The Fifth Circuit reached this holding without

[10] Section 1322(c)(2) applies to cases "in which the *last payment on the original payment schedule* for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due." 11 U.S.C. § 1322(c)(2) (emphasis added).

reference to state law. The bankruptcy court in *In re Hinds-Santiago*, No. 14-10337, 2015 WL 239211 (Bankr. S.D. Fla. Jan. 16, 2015), held that "last payment" in § 1322(c)(2) refers to the payment schedule necessary to satisfy the underlying note, including any subsequent modifications to the contractual maturity date. *In re Hinds-Santiago*, 2015 WL 239211, at *2. From these cases can be gleaned the following statement: "Last payment" means the final payment necessary to satisfy the note, including any subsequent modifications to the contractual maturity date, under the note's non-accelerated terms. The Debtor has not cited any published decision, and the Court's own research has not revealed any legal authority defining the phrase "last payment" by reference to a state's recording statutes.

Generally, state law defines the property rights of a debtor in a bankruptcy estate "[u]nless some federal interest requires a different result." *Butner v. United States*, 440 U.S. 48, 55 (1979). There are two exceptions to this general rule, first, when Congress modifies state law through legislation enacted under Congress's "authority . . . to establish 'uniform Laws on the subject of Bankruptcies throughout the United States,'" *id.* at 54 (quoting U.S. CONST. art. I, § 8, cl. 4) and, second, if "some federal interest requires a different result," *id.* at 55. For example, Mississippi law is relevant to the application of § 1322(c)(2) as to whether U.S. Bank held a valid security interest in the Debtor's principal residence at the time the Petition was filed. *Butner*, 440 U.S. at 55. In addition, however, the Debtor asks the Court to incorporate into § 1322(c)(2) the lien-prioritization provisions of MISS. CODE ANN. § 89-5-19. The Debtor's contention broadens the analysis of state property rights generally required to determine whether § 1322(c)(2) applies in a chapter 13 case to include the perspectives and interests of hypothetical lien creditors and subsequent purchasers. "There is a basic difference between filling a gap left

by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie*, 540 U.S. at 538 (quotation & citation omitted).

The Court cannot discern from the plain language of § 1322(c)(2) any intent by Congress to predicate the exception to the anti-modification provision upon a state's lien prioritization statute or its recording act. To adopt the Debtor's reasoning would require the Court to modify § 1322(c)(2) to read that the exception applies "in a case in which the last payment on the original payment schedule [as reflected in the real property records under applicable non-bankruptcy law] for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due." *See* 11 U.S.C. § 1322(c)(2). That additional language is inconsistent with the plain meaning of the statute and stretches *Butner*'s deferential approach to state property law too far.

In reaching its holding in *Grubbs* that § 1322(b) did not bar a debtor from curing a pre-petition default and acceleration on a debt, the Fifth Circuit expressly rejected the contention that state law governs the effect of the acceleration and the ability of a debtor to cure the default under § 1322(b). *Grubbs*, 730 F.2d at 242. The Fifth Circuit based its holding in *Grubbs* on a detailed analysis of the legislative history of § 1322(b) from which it found no objection by Congress to the curing of default accelerations. *Id.* at 245. The legislative history of § 1322(c)(2) indicates that it was enacted by Congress to protect debtors with short-term mortgages, fully matured mortgages, balloon-payment mortgages, and long-term mortgages close to completion because such mortgages often have high rates or terms that are particularly unfavorable. 8 COLLIER ON BANKRUPTCY ¶ 1322.17. There is no indication in the legislative history that Congress intend to protect the rights of those protected by a state's recording system. The purpose of recording systems like Chapter 5 of the Mississippi Code is to impart

constructive notice to creditors and subsequent purchasers that there exists another interest in property and, thus, to prevent property owners from conveying or mortgaging the same property to several people at the same time. The Court declines to use state law to ascribe a meaning to "last payment" outside the broader context of § 1322(c)(2) and instead interprets the statute consistent with the goal of Congress to except certain short-term mortgages from the anti-modification provision when the last payment is due, according to the contractual terms of the note, before the last payment under the plan is due. *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 162 (1946) (holding that federal law rather than state law controls the allowance, priority, and rights to distribution on a claim).

Conclusion

The Court declines to fit the square peg of Mississippi's recording act into the round hole of § 1322(c)(2)'s exception for certain short-term mortgages. Because the maturity date of the note as between the Debtor and U.S. Bank did not become due during the life of the Plan, U.S. Bank's claim is not subject to cram down. As noted by U.S. Bank, the Debtor's attempt to ignore the Modification Agreement at this juncture—after enjoying the benefits of a lower interest rate, extended maturity date, and reduced mortgage payments for over a decade—smacks of unfairness. (Dkt. 33 at 3).

IT IS, THEREFORE, ORDERED that the Objection is hereby sustained.

IT IS FURTHER ORDERED that the Debtor shall file an amended Plan consistent with this Order within the next fourteen (14) days.

##END OF ORDER##