Dated: May 21, 2010
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
LAWRENCE THURSTON SHARP, JR.,
Debtor.

Case No. 10-20164-L
Chapter 13

MEMORANDUM OPINION

This cause came on to be heard April 1, 2010, upon Ford Motor Credit Company's (hereinafter referred to as "Ford") objection to confirmation of the Debtor's chapter 13 plan. Taking the position that the vehicle securing Ford's claim was acquired primarily for use by the Debtor's non-filing wife rather than for the personal use of the Debtor, the Debtor proposes to cram down and bifurcate Ford's claim in his Chapter 13 plan. Ford objects to this proposed treatment contending that it violates the hanging paragraph of section 1325(a) of the Bankruptcy Code.[1]

---

[1] The Bankruptcy Code is contained in 11 U.S.C. §§ 101-1532. Unless stated to the contrary, all future statutory references are to the Bankruptcy Code, cited "Code section ___."

The Court has jurisdiction over this core proceeding. 28 U.S.C. § 157(b)(2)(L). It arises in a case under title 11 that has been referred to the bankruptcy court by the district court, and the Court may enter appropriate orders and judgments subject to appellate review. 28 U.S.C. §§ 157(a) and (b)(1); *In re Bankruptcy Jurisdiction and Procedure Under The Bankruptcy Amendments Act of 1984*, Misc. No. 84-30 (W.D. Tenn. July 11, 1984).

As the objecting party, Ford must meet the initial burden of producing evidence in support of its objection. The Debtor has the ultimate burden to show that his plan complies with the confirmation requirements of Bankruptcy Code section 1325. *In re Ozenkoski*, 417 B.R. 794, 797-98 (Bankr. E.D. Mo. 2009)*; In re Cross*, 376 B.R. 641, 644-45 (Bankr. S.D. Ohio 2007).

FACTS

The Debtor filed his individual chapter 13 petition on January 7, 2010. Less than 910 days prior, on March 28, 2008, he and his wife purchased a 2007 Lincoln MKX from Landers Ford in Collierville, Tennessee. The purchase was financed by Ford, which filed a proof of claim in the amount of $36,716.03 at the commencement of this case. Proof of Claim No. 3-1. The Debtor and his wife executed a Retail Installment Contract in order to purchase the Lincoln. Introduced by counsel for Ford at the hearing on this matter, the form contract shows that the cash purchase price for the Lincoln was $37,058.02. Trial Exhibit 1. The contract further shows, and the Debtor confirmed, that he and his wife traded in a 2004 Lincoln Navigator, made a $1,000.00 down payment, and financed $44,128.57, payable at 5.99% interest for 72 months in order to purchase the Lincoln. The contract additionally contains a "Use for Which Purchased" section that offers three use choices: "personal, commercial, or agricultural." The Debtor and his wife marked "personal."

When questioned by his attorney, the Debtor offered that he and his wife chose the "personal use" box because they thought it was the "only choice" of the three.

According to the Debtor's uncontested testimony, his wife was the primary driver of the Navigator that was traded in to purchase the Lincoln. The Debtor further testified that he and his wife leased a 2008 Mercury Milan from Landers Ford on the same day that they purchased the Lincoln. They chose to lease the Milan because the monthly lease payments were lower than monthly purchase payments. They leased the Milan primarily for the Debtor's use and purchased the Lincoln primarily for his wife's use. The couple has 2 children, ages 15 and 11 years old, who attend different schools. He and his wife are both employed. The Debtor's wife does the majority of the shopping for the household and transports the children to and from school and extracurricular activities. The Debtor drives the Lincoln on Sundays when transporting the family to and from church.

ISSUE

The issue for decision is whether the Debtor's proposed plan is capable of confirmation in the face of Ford's objection.

DISCUSSION

Section 1325(a) sets forth the mandatory criteria for a confirmable chapter 13 plan. *Shaw v. Aurgroup Fin. Cred. Union*, 552 F.3d 447 (6th Cir. 2009). There are three prescribed options for the treatment of allowed secured claims under section 1325(a)(5): the holder of the claim may accept the proposed plan; the debtor may surrender the collateral securing the claim; or the debtor may propose that the holder of the claim retain its lien on the collateral and receive payments equal to the present value of its secured claim. "The third option, § 1325 (a)(5)(B), is known as the 'cram

down option' because it may be enforced over a claim holder's objection." *Id.* at 450-51. The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amended the Bankruptcy Code to prevent the cram down of certain claims secured by vehicles. The following unnumbered paragraph was added to section 1325(a):

> For purposes of paragraph (5), section 506[2] shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

11 U.S.C.A. § 1325.[3]

Thus, as recently explained by the Court of Appeals for the Sixth Circuit, a claim is protected from bifurcation and must be paid as fully secured where: "(1) the creditor holds a purchase money security interest; (2) the debt was incurred within 910 days of filing; (3) the collateral consists of a motor vehicle; and (4) the debtor acquired the vehicle for his/her personal use . . . ." *Nuvell Credit Corp. v. Westfall (In re Westfall),* 599 F.3d 498, 502 (6th Cir. 2010).

The Debtor raised no issue as the result of the fact that the amount financed exceeded the purchase price of the vehicle. There is no dispute that Ford holds a purchase money security interest in the vehicle that was purchased within 910 days pre-petition. Rather, the dispute is whether the

---

[2] Section 506 of the Code provides for the bifurcation, or cram down, of a secured claim to the present value of the collateral with the balance of the claim treated as unsecured. *Shaw* 552 F.3d at 451.

[3] This language, inserted after section 1325(a)(9) as an unnumbered paragraph, is commonly referenced as the "hanging paragraph" and cited as section 1325(a)(*). *In re Strange,* 424 B.R. 584, 587, n. 2 (Bankr. M.D. Ga. 2010). A claim that meets the requirements of the paragraph is known as a "910 claim." *Shaw* 552 F.3d at 452, n. 7.

vehicle was "acquired for the personal use of the debtor" within the meaning of section 1325(a)(*). Resolution of this issue turns upon the interpretation to be given to the phrase "personal use of the debtor," a phrase that is not defined in the Bankruptcy Code. The issue of its meaning arises in cases where a debtor contends that the vehicle was purchased for business as opposed to personal use or in cases, like this one, where the debtor contends that the vehicle was purchased for use by another. *In re Strange*, 424 B.R. 584, 588-89 (Bankr. M. D. Ga. 2010).

Whether a vehicle is purchased for personal use is determined at the time of purchase. *See*, *Strange*, 424 B.R. at 588. Designating a vehicle as one purchased for personal purposes on the retail installment contract is probative evidence of the debtor's intended use. It meets the creditor's initial burden of proof, but is not necessarily dispositive. *Ozenkoski*, 417 B.R. at 800. Courts may look to evidence of the actual use made of a vehicle as persuasive evidence of the vehicles's intended use at the time of purchase. *Id.*; *Cross*, 376 B.R. at 648; *In re Solis*, 356 B. R. 398, 408-09 (Bankr. S.D. Tex. 2006).

If a debtor establishes that a vehicle was acquired for business use, the hanging paragraph does not apply. *See, Ozenkoski*, 417 B.R. at 800; *In re Powell*, 403 B.R. 583, 586 (Bankr. C.D. Ill. 2009), *aff'd in part*, 423 B.R. 862 (C.D. Ill. 2010); *In re Grimme*, 371 B.R. 814, 816 (Bankr. S.D. Ohio 2007); *In re Finnegan*, 358 B.R. 644, 647 (Bankr. M.D. Penn. 2006). The Fourth Circuit distinguished business use from "personal, family or household use," a phrase that appears in Code section 722, in *Cypher Chiropractic Center v. Runski (In re Runski)*, 102 F.3d 744 (4th Cir. 1996). In that case, the debtor proposed to redeem medical and office equipmen, arguing that she should be allowed to redeem the equipment as personal property because it was titled in her name and used by her personally. Relying on cases considering whether a debt is a consumer debt for purposes of

Code section 101(8), the court held that "property used for business purposes or with a profit motive is not property intended primarily for personal use within the meaning of § 722." *Runski*, 102 F.3d at 747. The debtor's motion to redeem was therefore denied.

With the *Runski* holding for guidance, there is general agreement that "business use," for purposes of the hanging paragraph, is use: within the scope of employment; for a profit motive; and/or to generate income. *In re Phillips*, 362 B.R. 284, 303-04 (Bankr. E.D. Va. 2007). *See also*, *In re LaDeaux*, 373 B.R. 48, 50 (Bankr. S.D. Ohio 2007) (A vehicle purchased solely to transport and care for foster children which provided 20% of debtors' income was not acquired for personal use.); *In re Andoh*, 370 B. R. 377 (Bankr. D. Colo. 2007)(A vehicle acquired for and used in debtor's limousine business was not acquired for personal use notwithstanding the fact that debtor had checked the "personal use box" on the financing agreement.). The weight of authority holds that a debtor's use of a vehicle to travel to and from the debtor's place of employment is not a business or profit making use. *Solis*, 365 B.R at 408*; In re Joseph*, 2007 WL 950267,*3 (Bankr. W.D. La. 2007); *In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan. 2006) (When a vehicle is not used within the scope of employment and is acquired by the debtor for the joint purposes of traveling to and from work and for conducting the debtor's private affairs, it is properly classified as acquired for "personal use."). *But see In re Hill*, 352 B.R. 69 (Bankr. W.D. La. 2006) (Use of a vehicle to drive to and from work allows the debtors to make a significant contribution to the family income and thus constitutes business use.).

Virtually all courts agree that, as a threshold matter, "personal use" means or implies non-business use. *In re Bethoney*, 384 B.R. 24, 28 (Bankr. D. Mass. 2008), *citing In re Grimme*, 371 B.R. 814 (Bankr. S.D. Ohio 2007). According to *Grimme*, "[w]ith this as the threshold analysis, the

'personal use' test is simple." 371 B.R. 816. Under this test, the hanging paragraph does not apply when the evidence shows that a vehicle was acquired for a business purpose and does apply if the evidence shows that it was acquired for a non-business purpose, *period*. *Id. See also, Lowder,* 2006 WL 1794737. The *Grimme* court concluded that a 910 vehicle purchased by the unlicensed, non-driving debtor so that her son would have a vehicle to drive, which he occasionally used to transport the debtor to medical appointments and run errands, was acquired for the personal use of the debtor within the meaning of the hanging paragraph. *Grimme,* 371 B.R. at 816. This approach is in the minority, however.

When it is shown that a vehicle was not acquired for a business purpose, a majority of courts look beyond the business/non-business comparison to consider whether the vehicle was purchased for the use of the debtor or of someone else in order to determine whether the personal use is that "of the debtor." *Bethoney*, 384 B.R. at 28-29; *Strange,* 424 B.R. at 591. There is general agreement among these courts that "debtor" in the hanging paragraph refers to the "debtor" as defined at Code section 101(13), i.e., "a person . . . concerning which a case under this title has been commenced" rather than the person who signed the retail vehicle purchase agreement. *Solis,* 356 B.R. at 411*; Strange*, 424 at 589; *In re Vagi*, 351 B.R. 881, 885 (Bankr. N.D. Ohio 2006). *But see In re Press*, 2006 WL 2734335 (Bankr. S.D. Fla. 2006)(where a vehicle is acquired for the primary use of a non-debtor *to the secured creditor*, the vehicle is not acquired for the *personal use of the debtor* within the meaning of the hanging paragraph.).

In deciding that *personal use of the debtor* means more than simply non-business use, one court relied upon the Supreme Court's instruction that courts should give effect, if possible, to every clause and word of a statute. *See In re Lewis*, 347 B.R. 769, 773 (Bankr. D. Kan. 2006), citing,

Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120 (2001). According to *Lewis*, an interpretation of the phrase *personal use of the debtor* that simply requires a distinction between business and non-business use without any consideration of the user ignores the requirement that the use be that *of the debtor*. *Id*. The court concluded that the phrase *personal use of the debtor* "cannot reasonably be stretched to include a vehicle acquired for the use of an independent adult child who does not reside with the debtor." *Id. See also In re Finnegan*, 358 B.R. 644, 648 (Bankr. M.D. Penn. 2006) (The hanging paragraph does not apply simply because the debtor took title to the vehicle. The relevant questions are for whose use and for what purpose was the vehicle purchased.).

The most often used approaches to determining whether a non-business vehicle was acquired for the personal use of the debtor within the meaning of the hanging paragraph are: (1) *the statutory construction test* (first articulated in *In re Jackson*, 338 B.R. 923 (Bankr. M.D. Ga. 2006)); (2) *the totality of the circumstances (significant and material use test)* (initiated by *In re Solis*, 356 B.R. 398 (Bankr. S.D. Texas 2006)); or (3) some combination of the prior two. *Strange* 424 B.R. at 592. The statutory construction test is illustrated by *Jackson* in which the debtor purchased a vehicle for the primary use of his non-filing spouse. Because Congress did not include *family or household* use in the language of the statute, the court held that *personal use of the debtor* is distinct from *family or household use* and concluded that the vehicle was not purchased for the personal use of the debtor. According to the *Jackson* court,

> In interpreting the hanging paragraph, the court begins with the principle that it must enforce the plain language of the statute unless doing so leads to an absurd result. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024 (2004) (*quoting Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L. Ed. 2d 1 (2000)). Furthermore, " '[i]t is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another.' " *BFP v. Resolution Trust Corp*., 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556

> (1994) (*quoting Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 1593, 128 L. Ed. 2d 302 (1994)).
>
> In this case, the statute applies to a motor vehicle "acquired for the personal use of the debtor." [Creditor] does not argue that this language is in any way vague or ambiguous. In fact, it is the one portion of the hanging paragraph of unquestionable clarity in the Court's view. [Creditor] does argue, however, that the "personal use of the debtor" may include family or household use. However, when Congress wants to include family or household use within the scope of a statute, it knows how to do so. For example, § 101(8) provides, "The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). The phrase also arises in § 365(d)(5) (regarding performance of obligations under an unexpired lease); § 506(a)(2) (regarding valuation of certain property); § 507(a)(7) (regarding deposits for the acquisition of certain property); and several subsections of § 522 (regarding exempt property). Consequently, the omission of "family and household" use from the hanging paragraph demonstrates that Congress intended "personal use" standing alone to have a different meaning.
>
> "Personal" is defined as "[o]f or relating to a particular person; private." American Heritage Dictionary of the English Language (4th ed.2000). In this case, the vehicle must have been acquired for the use of a particular person-Debtor-for the hanging paragraph to apply. [Creditor] has conceded that the Gran Prix was purchased to replace Debtor's wife's previous car, that she has at all times been the primary driver of the Gran Prix, and that Debtor has primary use of a different vehicle. Because the Gran Prix was not acquired for Debtor's personal use, the hanging paragraph does not apply to [Creditor's] claim.

Jackson, 338 B.R. at 925-26. *Accord In re Geddes*, 2008 WL 4490113, *3 (Bankr. M.D. Tenn. 2008); *In re Pearson*, 2008 WL 687058,*2 (Bankr. E.D. N.C. 2008); *In re Finnegan*, 358 B.R. 644, 647 (Bankr. M.D. Penn. 2006); *In re Press*, 2006 WL 2734335 (Bankr. S.D. Fla. 2006).

In *Solis* the debtor proposed to cram down the value of two 910 vehicles in her chapter 13 plan. One vehicle, a Dodge Ram pickup truck, was purchased and used as transportation for the debtor and her husband, but was also used by the non-filing husband to transport equipment used in his business. The second vehicle was a Dodge Neon, purchased for and used exclusively by the debtor's adult son and his family. The debtor argued that neither vehicle was subject to the hanging paragraph because they were not purchased for her personal use. 356 B.R. at 402-03. The court

found under a totality of the circumstances that the pickup truck was purchased for the personal use of the debtor where it was not purchased for the husband's sole use, but rather that it was intended that the debtor's personal use of the truck would be "significant and material." 356 B.R. at 403. With respect to the Dodge Neon, however, the court found hat the vehicle was not purchased for the personal use of the debt where it was purchased for the exclusive use of the debtor's adult son. 356 B.R. at 404.

The *Solis* court analyzed the language of the hanging paragraph, reviewed the jurisprudence concerning *personal use of the debtor*, and reasoned thus:

> The extended discussions in these conflicting decisions demonstrate how confusing the statutory language is, how little guidance there is to help the courts establish a test, and how much the courts have struggled to achieve reasonable interpretation. Since the Court cannot simply abandon the task as impossible, the Court reaches the following conclusions as most likely (at least in this Court's judgment) to be what Congress intended. The words to be interpreted are
>
> > 'acquired for the personal use of the debtor.'
>
> Courts should not strain to interpret the hanging paragraph in a way that would effectively emasculate the amendment.
>
> 1) "Acquired for"-The statutory language clearly points to the intention of the acquirer at the date of acquisition. The Court has found no jurisprudence that explicitly rejects the notion that the Court should determine the intention of the parties at the time that the vehicle was acquired, not any later date. Although the jurisprudence sometimes discusses how the vehicle "is used" rather than discussing the "purpose for which it was acquired", the loose language in many cases can be attributed to lax evidentiary presentations, to the fact that in most cases there is probably no difference between intended use and subsequent actual use, and to the fact that the courts are judging credibility of testimony about "intended use" by observing "actual use." Therefore, the Court concludes that the appropriate test is the intention of the purchaser at the time that the vehicle was acquired.
>
> 2) "Exclusive use by a non-debtor"-The Court agrees with *Lewis* [347 B.R. 769] that if the vehicle was acquired for the exclusive use of a person other than the debtor, then the hanging paragraph does not apply. However, the Court also agrees with *Vagi* [351 B.R. 881] that if the "other person" is debtor's spouse, then the question

is more problematic since use by debtor's spouse may use [sic?] the vehicle for the benefit of the debtor, debtor's family, and debtor's household. This latter use might, depending on all the facts and circumstances, be "use of" the debtor.

3) "Percentage of Debtor Use"-The Court agrees with *Bolze* [2006 WL 4491438] that the hanging paragraph does not use the words "solely", "exclusively", "mostly", "primarily", "partially" or any other bright line (or even hazy, gray line). There is no authority in the statute to determine that a vehicle is not a 910 Vehicle because the purchaser intended someone else to use it part of the time. Having no guidance from the statute, the Court will adopt its best estimate of a reasonable conclusion. The Court will determine that the "personal use" requirement of the statute is satisfied if the acquirer intended a debtor's personal use to be significant and material.

4) "Percentage of Non-Business Use"-The Court agrees with the almost universal conclusion that "personal" implies "non-business". Therefore the Court would agree with *Lowder's* [2006 WL 1794737] interpretation of *Runski*: that a vehicle acquired exclusively for business use is not a vehicle acquired for personal use. But, just as there is no bright or gray line for the Court to use when comparing proportionate use by a debtor and use by a nondebtor, there is no guidance in the statute concerning what percentage of business use (less than 100%) would disqualify the vehicle as a 910 Vehicle. The words "solely", "exclusively", "mostly", "primarily", "partially" or any other type of quantitative requirement do not appear in the hanging paragraph in this context, either. Having no guidance from the statute, the Court will adopt its best estimate of a reasonable conclusion. The Court will determine that the 'personal use' requirement of the statute is satisfied if the personal use of the debtor is significant and material, regardless of whether there is also some business use.

5) What does "personal" mean?-"Personal" use and "family or household" use are not different or mutually exclusive. The chapter 13 debtor is always a person [Code § 109(e)], and when the debtor has a family it would be virtually impossible to distinguish "family" use from "personal" use. And, even if "personal" "family" and "household" were mutually exclusive as to any one event or activity, the same vehicle could provide "family or household" benefits on some trips and could provide "personal" benefits on other trips. Therefore, the Court concludes that "personal use" includes any use of the vehicle that benefits the debtor(s) such as transportation that satisfies personal wants (such as recreation), transportation that satisfies personal needs (such as shopping or seeking medical attention or other errands), and transportation that satisfies family and other personal obligations, whether legal or moral obligations. The Court concludes that "personal use" includes transportation to and from work in almost all circumstances since there is almost always an alternative such as walking, bicycling, public transportation, carpooling, obtaining housing closer to the workplace, etc. In circumstances in which there is an alternative, the decision to use an automobile is a personal use: to

> make the trip faster, more pleasant, and more convenient. But if there is truly no alternative, the Court would not conclude that the use of a vehicle to go to and from work was "personal use" of the vehicle. This Court will consider all of the facts and circumstances to determine whether the vehicle was acquired with the intent of providing personal benefits for the debtor(s).
>
> 6) "Use" of a vehicle is not limited to driving it-some courts seem to test "use" by determining which person is doing the driving. Although identifying the person "who is driving" the vehicle will often identify the person "who is using" the vehicle, that is not necessarily the case. The language of the statute is "personal use of the debtor" (emphasis added), not "personal use by the debtor". There are many ways to "use" a vehicle. For example, a disabled person could acquire a vehicle for personal transportation, and could hire a driver to do the actual driving; the Court would conclude that the vehicle is for the acquirer's use, even though the acquirer never physically manipulates the controls. A husband who drives a vehicle to run an errand for his wife would be using the vehicle for the wife. This Court will test "use" by testing "for whose benefit" the vehicle was intended to be used, not solely by considering who was intended to manipulate the controls.
>
> 7) The term "debtor" means the person(s) who filed the bankruptcy case, not the person(s) who signed the retail purchase agreement. That is the way it is defined in the statute [Code § 101(13)], and in virtually all discussion about chapter 13. The Court sees no logic in adopting a different definition for the hanging paragraph.
> . . . .
>
> In summary, the "hanging paragraph" of § 1325 applies to a vehicle claim if: (1) the claim is secured by a purchase money security interest, (2) the debt was incurred within 910 days prior to the filing of the bankruptcy case, (3) the collateral is a motor vehicle, and (4) at the time of the acquisition the acquirer intended that a significant, material portion of the use of the vehicle would be (a) for the benefit of the debtor(s) in the bankruptcy case, (b) for non-business purposes, and (c) for satisfaction of debtor(s)' wants, needs, or obligations. In reaching conclusions as to what is significant and material, the Court must take into consideration all of the facts and circumstances of the case.

Solis, 356 B.R. at 408-11 (footnotes omitted).

As has been demonstrated, the reported decisions are divided over whether *personal use of the debtor* should be interpreted to encompass family and household use. *Phillips*, 362 B.R. at 300-01. On the one hand are those cases that adopt the statutory construction approach holding that omission of family and household use from the language in the hanging paragraph reflects

Congressional intent that personal use be specific to the debtor. *See, e.g., In re Geddes*, 2008 WL 4490113, *3 (Bankr. M.D. Tenn. 2008); *In re Pearson*, 2008 WL 687058,*2 (Bankr. E.D. N.C. 2008); *In re Finnegan*, 358 B.R. 644, 647 (Bankr. M.D. Penn. 2006); *In re Davis*, 2006 WL 3613319 (Bankr. M.D. Ala. 2006); *In re Press*, 2006 WL 2734335 (Bankr. S.D. Fla. 2006). On the other hand are cases that agree with *Solis* that, as a practical matter, family and household use necessarily overlap with personal use, and that it is "more likely that Congress envisioned 'personal use' to encompass the everyday household and family usage common to any Chapter 13 debtor." *Bethoney*, 384 B.R. at 31. *See also*, *Phillips*, 362 B.R. at 304-05; *Cross*, 376 B.R. at 647; *In re Adaway*, 367 B.R. 571, 575 (Bankr. E.D. Tex. 2007).

There is general agreement that if a vehicle is not used for business purposes, then family and household use, as opposed to exclusive personal use by the debtor, does not remove the vehicle from the application of the hanging paragraph. *Phillips*, 362 B.R. at 304-05; *Strange*, 424 B.R. at 591; *Vagi*, 351 B.R. at 885. The majority of cases holding that the hanging paragraph does not apply to a non-business vehicle, including *Jackson*, rely upon a factual finding that the debtor is not the intended, actual, primary or significant user of the non-business vehicle. Accordingly, where a vehicle is purchased for the *exclusive* use of someone other than the debtor, a majority of courts holds that the hanging paragraph does not apply. *Strange*, 424 B.R. at 590-91 (collecting cases). Similarly, courts often conclude that the paragraph does not apply where it is shown that a non-filer is the *primary* user of the vehicle. *Id.* As Judge Hoffman noted in *Cross*,"each case is fact-specific and the courts' rulings are necessarily fact-driven." 376 B.R. 647. Consequently, almost without exception, the determinative factor in the cases where the hanging paragraph is not applied is that

the debtor has the use of a different vehicle. *See, e.g., In re Adaway*, 367 B.R. at 576 (The personal use requirement is met if the personal use of a vehicle by the debtor is significant and material.).

Recognizing along with *Solis* and other courts that the statute does not contain a percentage of use modifier for measuring the degree of use by the debtor, however, the *Strange* court provides the following explanation for the judicial application of such measurements.

> The weight of authority suggests that the debtor's use of the car must be more than incidental but not necessarily exclusive. However, when judicially rewriting a statute to fill a gap left by Congress, as courts seem compelled to do in the case of careless draftsmanship, the Court must consider more than mere weight of authority. In this case, the provision at issue upends one of the foundational policies behind bankruptcy law, as well as long-standing practice: providing equal treatment of similarly situated creditors. The hanging paragraph allows a preferred class of undersecured creditors to be treated as fully secured. . . . The Supreme Court has indicated that, "absent clear[ ] textual guidance" to the contrary, statutes generally should be interpreted to harmonize with rather than disrupt longstanding practices and policies. *BFP v. Resolution Trust Corp*., 511 U.S. 531, 543, 114 S. Ct. 1757, 1764, 128 L. Ed. 2d 556 (1994). However, the Court also noted that Congress can override such practices and policies "by implication when the implication is unambiguous." *Id*. at 546, 114 S. Ct. at 176. . . . . If the statute were read to apply only to vehicles purchased for exclusive use by the debtor-a reasonable conclusion from a plain meaning reading of the provision-few cars would fall within the scope of the hanging paragraph.
>
> * * *
>
> While exclusive use by the debtor represents one extreme for interpreting the hanging paragraph, incidental or *de minimis* use by the debtor lies at the other extreme. And, it is an equally unsuitable interpretation. Congress imposed four express statutory limits on 910 claims, which provides textual evidence that it did not intend to sweep every non-business car within reach of the hanging paragraph. As the weight of authority dictates, it is more reasonable to assume Congress intended it to reach vehicles purchased with the expectation that the debtor would make some regular use of the vehicle-whether that use is defined as "primary use" or "significant and material use" or some other qualifier. Whether the debtor's intended use of the vehicle is sufficient to bring it within the hanging paragraph must therefore depend on the court's subjective consideration of the totality of the circumstances rather than a clearly defined statutory standard.

Strange, 424 B.R. at 591-92 (footnotes omitted). *See also Adaway*, 367 B.R. at 575-76*; Solis*, 356 B.R. at 409; *Bethoney*, at 384 B.R. at 31.

The *Strange* court considered the totality of circumstances and, applying a "primary use" qualifier to the facts, concluded that a claim secured by a vehicle acquired primarily for non-business use by the debtor was protected by the hanging paragraph while a claim secured by a vehicle acquired primarily for non-business use by the debtor's non-filing husband was not. *Strange*, 424 B.R. at 592-93.

A determination that the hanging paragraph does not apply to a particular claim because the vehicle is not for the "primary" or "material and significant" personal use of the debtor does not necessarily mean that the plan may be confirmed or that the creditor is without other remedies. For example, a plan must be proposed in good faith. 11 U.S.C. § 1325(a)(3). A plan that proposes to cram down a claim secured by a vehicle that was acquired for the personal use of someone other than the chapter 13 debtor may not meet the good faith test. *Lewis*, 347 B.R. at 773-74. Additionally where a non-debtor is a co-obligor on the claim, the "court, on motion of a party in interest, must grant relief from the co-debtor stay to the extent the claim is not being paid in full under the plan." *Davis*, 2006 WL 3613319, * 2, n. 3.

ANALYSIS and CONCLUSION

In this case, the Debtor seeks to except Ford's secured claim from the protection of the hanging paragraph. Ford objects to the proposed treatment and has met its initial burden of producing evidence in support of its objection by providing the parties' Retail Installment Contract. The contract provides persuasive evidence that the Debtor acquired the Lincoln for personal use because it bears the designation that the Lincoln was purchased for "personal" purposes. The burden

thus shifts to the Debtor to show that the vehicle was not acquired for his personal use within the meaning of the hanging paragraph. His argument is that the Lincoln was not acquired for *his* significant and material business or personal use, but rather for the significant and material personal use of his non-filing spouse. When questioned by his attorney, the Debtor offered that he and his wife chose the "personal use" box on the retail sails contract because they thought it was the "only choice" of the three. The mere checking of a box on the contract is not determinative of the outcome in this case.

The Debtor testified without contradiction that he and his wife traded in a 2004 Lincoln Navigator for which his wife was the primary driver in order to purchase the Lincoln. He further testified that they leased a 2008 Mercury Milan from Landers Ford on the same day that they purchased the Lincoln , intending the Milan to be primarily for his use. The Debtor explained that his wife does most of the shopping for the household and transports the couple's two school age children to their various activities during the week. The Debtor drives the Lincoln on Sundays when transporting the family to and from church.

Although the facts in this case are similar to those of *Strange*, the Court is not persuaded by the outcome reached in that case. That is, the Court believes that Congress did not intend for a debtor to be permitted to cram down the value of a 910 vehicle purchased for the personal use of a married couple who is living together, even though the vehicle is used primarily but not exclusively by the non-filing spouse. The Debtor testified that his wife uses the Lincoln for the transportation of their children to school and extracurricular activities. This use is personal to the Debtor even if he is not the actual driver, because it involves the use of the vehicle to discharge duties personal to

him. That this use is personal to the Debtor is further indicated by the fact that the Debtor is the driver of the vehicle for the same purposes on weekends when he is available to do so.

As a practical matter, this Court is persuaded that no purpose would be accomplished by allowing the Debtor to cram down the value of the Lincoln in this case. The Debtor and his non-filing spouse are married to each other and living together. The Debtor's wife is employed and has a good income. They apparently share household expenses. Both are obligated to Ford for the purchase of the Lincoln. Were the Court to find itself compelled to permit the Debtor to cram down the value of the Lincoln, it would find itself equally compelled to terminate the co-debtor stay of Code section 1301(a) to permit Ford to collect the full payments called for by its contract from the Debtor's non-filing wife. It would be grossly unfair to force Ford to wait until the end of the Debtor's plan, when the value of its collateral has further declined, to collect the remaining balance of its debt from the Debtor's non-filing spouse.

For the foregoing reasons, the objection of Ford Motor Credit Company to confirmation of the Debtor's plan is **SUSTAINED**. The Debtor shall be given a period of fourteen (14) days to propose a plan that is capable of confirmation. Failing this, the case will be dismissed without further notice. The Court will enter a separate order consistent with this opinion.

cc: Debtor
Attorney for Debtor
Ford Motor Credit Company
Attorney for Ford Motor Credit Company
Chapter 13 Trustee