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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 98-51267	
)		
DONALD TYLICKI)	CHAPTER 13	
WANDA TYLICKI)		
)	JUDGE	MARILYN
)	SHEA-STONUM	
DEBTORS)		
)	<u>ORDER RE: OBJECTIONS</u>	
)		<u>OF KEYBANK AND SECOND</u>	
)	<u>NATIONAL BANK OF WARREN</u>	
)		<u>TO CONFIRMATION OF</u>	
)		<u>DEBTORS' CHAPTER 13 PLAN</u>	

This matter came before the Court on objections of creditors, KeyBank and Second National Bank of Warren ("Second National"), to confirmation of debtors' chapter 13 plan. Those objections were based on debtors' proposed valuation of two motor vehicles, a 1997 Ford Ranger (the "Ranger") and a 1996 Ford Windstar (the "Windstar"). KeyBank holds a security interest in the Ranger and Second National holds a security interest in the Windstar.

A hearing on those objections was held on August 13, 1998. Appearing at that hearing were Betty Groner, counsel for debtors; Cynthia Vадnal, counsel for KeyBank; and Randil Rudloff, counsel for Second National. During the hearing, debtors presented evidence as to the value of both motor vehicles through testimony of Art Shapiro, an

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individual who has spent over 40 years in car sales and financing and who has appraised cars for the last 30 years. Second National presented evidence as to the value of the Windstar through testimony of Al Keenan, manager of Akron Auto Auction. At the conclusion of the hearing the issues raised by the objections of KeyBank and Second National were taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

I. BACKGROUND

Debtors filed a chapter 13 bankruptcy petition on April 24, 1998. On May 15, 1998, debtors filed their chapter 13 plan. In that plan, debtors listed the value of Second National's secured claim in the Windstar at \$5,100.00 and the value of KeyBank's secured claim in the Ranger at \$6,700.00. Debtors' plan did not provide for the payment of any interest on these secured claims but did provide that Second National and KeyBank would retain their liens on the collateral until paid in full through the plan.

On May 11, 1998, Second National filed a proof of claim with respect to the Windstar in the amount of \$18,161.87. That proof of claim, which included supporting documentation, listed Second National's interest as fully secured and entitled to bear interest at a daily rate of 8.5%. On June 1, 1998, KeyBank filed a proof of claim with respect to the Ranger in the amount of \$15,507.76. That proof of claim, which also included supporting documentation, listed KeyBank's interest as fully secured and entitled to bear interest at an annual rate of 9.75%. To date, debtors have not objected to either of these proofs of claim.

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On June 1, 1998, KeyBank filed a document entitled "Objection to Confirmation." In its objection, KeyBank asserted that the value of the Ranger was \$10,900.00 and that debtors' plan should not be confirmed because it undervalues the vehicle and fails to provide for the payment of its contractually allowed 9.75% per annum interest on the secured portion of its claim. KeyBank's prayer for relief requests that this Court either (1) enter an order denying confirmation of debtor's plan or (2) allow KeyBank's claim for the Ranger as secured in the amount of \$10,900.00, plus 9.75% per annum interest, with the remaining balance as a general unsecured claim.

On June 4, 1998, Second National filed a document captioned "Objection to Chapter 13 Plan." In that objection, Second National asserted that the value of the Windstar was between \$15,525.00 and \$18,275.00 and that debtors' plan should not be confirmed because it undervalues the vehicle and fails to provide for the payment of its contractually allowed 8.64% per annum interest on the secured portion of its claim. Second National's pleading does not set forth a specific prayer for relief.

On August 11, 1998, debtors filed an amended chapter 13 plan. In that amended plan, debtors listed the value of Second National's secured claim in the Windstar at \$8,800.00 and the value of KeyBank's secured claim in the Ranger at \$8,600.00. Additionally, debtors proposed to pay 9.75% per annum interest on KeyBank's secured claim and 7.9% per annum interest on Second National's secured claim.

Pursuant to the objections raised by KeyBank and Second National and the provisions in debtors' amended plan, the following issues remained in dispute as of the August 13, 1998 hearing: (1) whether debtors' amended plan undervalues KeyBank's secured claim in the Ranger by listing it at \$8,600.00 plus interest at 9.75% per annum, and (2) whether debtors' amended plan undervalues Second National's secured claim in

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the Windstar by listing it at \$8,800.00 plus interest at 7.9% per annum.

II. DISCUSSION

A. Valuation of Secured Claims in a Chapter 13 Plan

Pursuant to 11 U.S.C. §1325(a)(5), the present value of each secured claim must be paid over the life of the plan, unless the creditor agrees to other treatment or the secured property is surrendered to the creditor. The amount of a creditor's secured claim is determined pursuant to 11 U.S.C. §506(a), which provides in pertinent part:

[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest. . .is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . .and is an unsecured claim to the extent that the value of such creditor's interest. . .is less than the amount of such allowed claim. Such value is to be determined in light of the purpose of the valuation and of the proposed distribution or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

See 11 U.S.C. §506(a).

In *Associates Commercial Corp. v. Rash*, the United States Supreme Court determined that under §506(a), the proper valuation of property to be retained by chapter 13 debtors is the cost the debtors would incur to obtain a like asset for the same proposed use. *See* 117 S.Ct. 1879, 1883-86 (1997). It is that "replacement value" of the Windstar and the Ranger that the Court must consider in addressing the issues raised by the objections of KeyBank and Second National. Given that the valuation process is not an exact science, the Court, as trier of fact, must sort through conflicting facts and weigh the evidence presented. *See Associates Commercial Corp. v. Rash*, 117 S.Ct. 1879, 1886 n.6 (1997); *In re Coates*, 180 B.R. 110 (Bankr. D.S.C. 1995); *In re Snook*, 134 B.R. 424 (Dist. Kansas 1991).

1. Issues Raised as to the Ranger

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During the August 13 hearing, debtors presented evidence as to the current value of the Ranger through testimony of Art Shapiro. Mr. Shapiro testified that based upon his inspection of the motor vehicle, he valued the Ranger at \$8,500.00. That \$8,500.00 value included a bed cap which was added to the Ranger by Mr. Tylicki after its purchase. Although Mr. Shapiro did not independently value the bed cap, he estimated that the Ranger's value without that item would be between \$7,600.00 and \$8,000.00.

Mr. Shapiro, who inspected the Ranger on July 21, 1998, testified that the truck had an odometer reading of 34,873 miles, that the front tires were badly worn and that the vehicle needed a front-end alignment. Mr. Shapiro also testified that his estimate of the vehicle's value was reduced given its excessive mileage, five speed manual transmission and lack of air-conditioning.

Through cross-examination of Mr. Shapiro, KeyBank introduced the National Automobile Dealers Association ("NADA") official used car guide valuation of a Ranger with the characteristics of the subject vehicle. That \$10,200.00 valuation was arrived at by taking a base price of \$10,900.00, adding \$600.00 for XLT trim, deducting \$600.00 for manual transmission and deducting \$700.00 for no air conditioning. The NADA used car guide also set forth that the valuation of the vehicle should be reduced further by \$200.00 if it had a mileage reading of between 25,001 and 30,000 miles and by \$400.00 if it had a mileage reading of between 30,001 and 35,000 miles. On further cross-examination, Mr. Shapiro indicated that if the Ranger had average and not excessive mileage, he would have appraised its value at \$500.00 to \$1,000.00 higher.

During his testimony, Mr. Tylicki indicated that he had not driven the Ranger the same amount of miles during each of the 18 months that he has owned it because for approximately ten months, the Ranger had transmission problems and was not driven. As

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of the date of the hearing, Mr. Tylicki testified that the vehicle had approximately 37,000 miles on its odometer.

During the August 13 hearing, KeyBank argued that the value of the Ranger should be determined as of the date that debtors filed their chapter 13 petition and not as of the date of Mr. Shapiro's inspection or the date of the valuation hearing. Such an argument has been the subject of varied decisions by the courts. *See, e.g., In re Kennedy*, 177 B.R. 967 (Bankr. S.D. Ala. 1995) (holding that collateral should be valued as of the date of the confirmation hearing); *In re Coates*, 180 B.R. 110 (Bankr. D.S.C. 1995) (holding that collateral should be valued as of the date of the valuation hearing); and *In re Phillips*, 142 B.R. 15 (Bankr. D. N.H. 1992) (holding that collateral should be valued as of the date of filing). During the August 13 hearing, debtors did not raise any counter-argument to KeyBank's position. Therefore, this Court will construe debtors' non-response to KeyBank's argument as acquiescence that the Ranger should be valued as of debtors' petition date.

Pursuant to Mr. Tylicki's testimony, it appears that the Ranger was driven approximately 37,000 miles in only eight months. Assuming that Mr. Tylicki drove a similar amount of miles each of those months, he would have driven the Ranger approximately 4,625 miles monthly. Given that Mr. Shapiro's inspection occurred three months after debtors filed for bankruptcy, it is more probable than not that on the petition date, the vehicle had been driven approximately 13,800 less miles than when Mr. Shapiro conducted his inspection. As of the petition date, therefore, the mileage of the vehicle would have been roughly 21,000 miles. Pursuant to the NADA official used car guide, this amount of mileage would be average for the Ranger.

Although the NADA guidelines provide some indication of value, they are not

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conclusive. *See In re Roberts*, 210 B.R. 325, 330 (Bankr. N.D. Iowa 1997). Indeed, the consideration of the particular vehicle provided by Mr. Shapiro's inspection and appraisal is more consistent with the valuation approach of *Rash*. Because Mr. Shapiro actually inspected the vehicle at issue, although not on the date of the filing, his estimate of its value is quite useful to this Court. Therefore, the Court will use Mr. Shapiro's \$7,600.00 to \$8,000.00 estimate as its starting point to determine the Ranger's replacement value.¹ Given Mr. Tylicki's driving habits, it is probable that the Ranger had only an average amount of mileage on it as of the petition date, but the unspecified transmission problems that left the vehicle inoperative suggest that those were "hard miles." As such, Mr. Shapiro's estimate should be increased by the minimum of his \$500.00 to \$1,000.00 low mileage additive.

In their amended plan, debtors valued the Ranger at \$8,600.00. This value is supported by, and actually higher than, the Shapiro appraisal. Additionally, the amended plan proposes to pay 9.75% annual interest which is the amount requested in KeyBank's objection. Therefore, the Court finds that debtors' amended plan does not undervalue KeyBank's secured claim in the Ranger by listing it at \$8,600.00 plus interest at 9.75% per annum.

2. Issues Raised as to the Windstar

During the August 13 hearing, Second National presented evidence as to the then current value of the Windstar through testimony of Al Keenan. Mr. Keenan testified that, based upon his inspection of the vehicle and his review of the NADA official used car

¹ Because Mr. Tylicki installed the bed liner on the Ranger after its purchase, KeyBank is not entitled to benefit from any increase it may have had on the vehicle's value. *Associates Commercial Corp. v. Rash*, 117 S.Ct. 1879, 1886 n.6 (1997).

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guide, he valued the Windstar at between \$12,500.00 and \$13,000.00. Debtors presented competing testimony as to the Windstar's value through testimony of Al Shapiro. Mr. Shapiro testified that based upon his inspection of the vehicle, he valued the Windstar at \$7,800.00.

Mr. Keenan, who inspected the Windstar on June 24, 1998, testified that his inspection lasted approximately 20 to 25 minutes and consisted of visually inspecting the outer body and the interior of the Windstar as well as listening to the idle of the vehicle's motor. Mr. Keenan reported that the vehicle registered 89,745 miles on the odometer, had a dent on its right rear quarter and had been subject to some prior body work. Otherwise, Mr. Keenan reported that the Windstar was in fairly good condition. Cross-examination revealed that Mr. Keenan did not drive the Windstar, that he did not inspect the under carriage of the vehicle and that he based some portion of his evaluation of the vehicle's condition by questioning debtor, Wanda Tylicki. Further, this was the first appraisal of this nature that Mr. Keenan had ever done.

Mr. Shapiro, who inspected the Windstar on July 17, 1998, testified that his inspection also lasted approximately 20 to 25 minutes and also consisted of visually inspecting the outer body and interior of the Windstar. Unlike Mr. Keenan, however, Mr. Shapiro's inspection included his driving the vehicle and examining its engine. Mr. Shapiro reported that the vehicle registered 96,122 miles² on the odometer, was leaking oil and was equipped with fairly new tires. Mr. Shapiro also indicated that due to collision damage at the rear of the vehicle, the left front tire was unevenly worn, the front-end was

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Mr. Keenan and Mr. Shapiro each testified that the mileage reported for the Windstar during their respective inspections was excessive given the age of the vehicle and each took that factor into consideration in determining the Windstar's value.

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out of alignment, the rear windshield wipers did not work and the rear tailgate door could not be opened.

During his testimony, Mr. Tylicki, who is now divorced from Wanda Tylicki who has possession of the Windstar, stated that he was unaware of any recent accident. On examination by the Court, however, Mr. Tylicki testified that Mrs. Tylicki was the primary driver of the Windstar and that the couple do not live at the same residence.

Mr. Keenan's observation and recollection of the subject vehicle were substantially less detailed than those of Mr. Shapiro. Mr. Shapiro has significantly more experience in the field of appraising individual vehicles. In addition, Mr. Shapiro actually drove the Windstar and inspected more than just its exterior body. Because of these factors, Mr. Shapiro's estimated replacement value of the vehicle is the more persuasive. In their amended plan, debtors valued the Windstar at \$8,800.00. This value, which is substantially lower than that placed on the vehicle by Mr. Keenan, is supported by Mr. Shapiro's appraisal. In fact, debtors' valuation is higher than the Shapiro appraisal. Therefore, the Court finds that debtors' amended plan does not undervalue Second National's secured claim in the Windstar by listing its value at \$8,800.00. Debtors' proposal to pay only 7.9% per annum interest on that secured claim is, however, problematic.

Second National's proof of claim indicated that its secured claim was entitled to bear annual interest at a rate of 8.64%. Given the discrepancy with the amount of interest proposed in debtors' amended plan, an issue exists as to what amount of interest should be paid on Second National's claim. Neither Second National nor debtors presented any evidence or argument on this issue in their pleadings or during the August 13 hearing.

Once filed, a proof of claim constitutes prima facie evidence of the validity and

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amount of the claim. *Sloan's Furrier's Inc. v. Bradley*, 146 F.2d 757, 758 (6th Cir. 1954); Fed. R. Bankr. P. 3001(f). This presumption of validity places the burden of producing evidence to rebut the presumption on the debtor. *Id.*

During the August 13 hearing, debtors produced sufficient evidence to rebut the presumption that the amount of Second National's secured claim was as listed on its proof of claim. Debtors failed, however, to present any evidence to rebut the presumption that the secured claim should bear a lesser amount of interest than that set forth on Second National's proof of claim. Debtors have, therefore, failed to carry their burden to rebut the presumption that Second National's secured claim should bear interest at any rate other than 8.64% per annum. As such, the Court finds that debtor's plan provides an inadequate rate of interest on Second National's secured claim by proposing to pay only 7.9% per annum.

III. CONCLUSION

Based upon the foregoing the Court hereby finds that debtors' amended plan does not undervalue KeyBanks' secured claim in the Ranger by listing it at \$8,600.00 plus interest at 9.75% per annum. The court also finds that debtors' amended plan does not undervalue Second National's secured claim in the Ranger by listing it at \$8,800.00 but does undervalue that claim by proposing to pay an annual rate of interest of only 7.9%.

THEREFORE, IT IS HEREBY ORDERED:

1. That KeyBank's objection to the confirmation of debtors' amended plan is hereby overruled;
2. That KeyBank's claim in the Ranger shall be allowed as secured in the amount of \$8,600.00, plus 9.75% per annum interest, with the remaining balance as a general unsecured claim; and

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3. That Second National's objection to the confirmation of debtors' amended plan is overruled as it relates to the valuation of the secured claim in the Windstar and granted as it relates to the amount of annual interest that should bear on that secured claim.

IT IS FURTHER ORDERED that debtors shall further amend their plan consistent with the Court's findings herein within two weeks of the date of entry of this Order.

MARILYN SHEA STONUM
Bankruptcy Judge

DATED: 9/16/98