THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 98-51267-S
	)	
BRET CREEKMORE,	)	CHAPTER 13
	)	
	)	
DEBTOR.	)	
	)	**ORDER RE: OBJECTIONS**
	)	**TO CONFIRMATION OF**
	)	**DEBTOR'S CHAPTER 13 PLAN**
	)	**AND MOTION TO DISMISS**
	)	**DEBTOR'S CASE FOR LACK**
OF		
	)	**GOOD FAITH**

The matters before the Court are (1) the objection of creditor Forrest Motors of Ohio Leasing, Inc. ("Forrest") to the confirmation of Debtor's Chapter 13 plan, (2) Forrest's motion to dismiss Debtor's case for alleged lack of good faith in filing his Chapter 13 petition, (3) the Debtor's motion for determination of whether the contract between Forrest and Debtor is a sales agreement or a lease, and (4) if necessary, the valuation of the vehicle which was the subject of that contract. Since there were overlapping factual issues presented by the four matters, the Court consolidated the evidentiary hearing on these matters. That evidentiary hearing was held on July 14, July 15 and August 16, 1999.

This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A),(L) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. Findings of Fact

A. Debtor's Decision and Agreement to Acquire the Motor Vehicle

On April 26, 1999, Debtor acquired a 1994 Pontiac Grand Am GT (the "Pontiac") from Forrest. Approximately four years prior to acquiring the Grand Am, Debtor had purchased a 1989 Oldsmobile Cutlass Supreme (the "Oldsmobile") from Forrest.[1] After the Oldsmobile broke down and Debtor had determined that the cost of remedying the problem would exceed the car's value, Debtor went to Forrest to acquire a replacement for his Oldsmobile.

In connection with acquiring the Pontiac**,** Debtor executed a document entitled Motor Vehicle Lease Agreement (the "Agreement"). The Agreement provides for a total rental amount to be paid of $11,786.36, payable in 72 installments of $163.63, due on the 15th and 30th of each month. Joint Exhibit (hereinafter "JX") 1.[2] Other than exercising the option to purchase the Pontiac at the end of the contract term, the Agreement provides that the Debtor cannot terminate the Agreement before the end of the three-year term. Debtor's Exhibit (hereinafter "DX") 3, para. 13. After Debtor pays the total rental amount due under the Agreement, he can purchase the Pontiac by paying an additional $10, plus applicable taxes and title transfer costs. JX 1, DX 3, para.16.

The Agreement does not limit the miles Debtor can drive the Pontiac per year or provide for Debtor's payment of any additional amount to Forrest if Debtor drives the Pontiac more than a certain number of miles per year. DX 1. Debtor is not subject to any standard "for determining unreasonable or excessive wear and use" of the Pontiac.

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[1] Forrest acknowledged that Debtor's earlier acquisition of the Oldsmobile constituted a purchase of that automobile.

[2] A document entitled "Lease/Purchase Worksheet" (the "Worksheet") describes how Forrest calculated the total payments due from Debtor under the Agreement. The Worksheet states that the sale price of the Pontiac is $7,795.00. After subtracting Debtor's down payment of $794.25, and adding the costs of sales tax, a filing fee and a 30-day tag, the Worksheet states that the Pontiac's price is $7,561.46. To that amount, the Worksheet adds $3,544.90 in interest and a product warranty charge of $675, to arrive at a total amount due to Forrest over a three-year period of $11,781.36. (Debtor's Exhibit 2).

DX 2.

On the Ohio Certificate of Title, issued on May 25, 1999, Forrest Motors of Ohio, Inc. is listed as the owner of the Pontiac. Creditor's Exhibit (hereinafter "CX") 4. However, in a letter dated April 26, 1999 sent to Debtor, Forrest thanked Debtor "for his recent purchase." DX 4. At numerous points during his testimony in response to questions not only from Debtor's counsel but also from his own counsel, Forrest's owner, Forrest Fuller, frequently referred to Debtor's acquisition of the Pontiac as a "sale" or "purchase". Mr. Fuller testified that the determination to label his financing arrangements with his customers as either a sale or lease is dictated by whether he is holding the paper himself, in which case he realizes tax advantages by calling the transaction a lease, or selling the contract rights to a third party. Thus, whether something is called a lease or a sale by Fuller does not depend on the credit worthiness of a customer, but rather the business opportunities available to him in selling his contract paper.

B. Debtor's Financial Disclosure to Forrest

As a prerequisite to acquiring the Pontiac, Debtor filled out a document entitled "Application for Financing" (the "Application"). CX 1. In the Application, Debtor disclosed that he was divorced and had two children, ages three and four years old. Debtor stated that his landlord was Janice Creekmore,[3] and that he did not pay rent.[4]

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[3] Debtor testified that Janice Creekmore is his mother, although Janice Creekmore's relationship with Debtor is not stated in the Application.

[4] After acquiring the Pontiac, Debtor began to pay rent to his mother. The amount which he pays to her varies but is no less than $300 per month. Debtor testified that he initially paid no rent to his mother because he intended to live with her for only a few weeks. Once Debtor realized that he would be living with his mother for longer than that, he agreed to pay rent.

Debtor noted that his current employer was Account Temps and that he received weekly net pay in the amount of $345. Debtor also noted that he had three prior employers between February 1997 and December 1998, and that these three jobs each lasted for five to six months. The Application requested that the applicant list his or her debts, the balance with respect to each debt listed and the monthly payment to be made. In the Application, Debtor listed only a personal loan with a balance of $4,200.

In addition to reviewing the Application, while Debtor was present, Scott Schnabel, the Vice President and General Manager of Forrest, obtained a credit bureau report regarding Debtor (the "Report"). The Report indicated that Debtor had paid off the entire balance owed with respect to the Oldsmobile he had acquired from Forrest and that Debtor had outstanding aggregate indebtedness in the approximate amount of $33,000, with current monthly payments in the amount of $255. DX 5. That Report further indicated that in March 1999, Debtor was the subject of a garnishment action initiated by Cuyahoga Falls General Hospital. DX 5.

Mr. Schnabel was responsible for deciding whether or not Forrest would enter into the Agreement with Debtor. Mr. Schnabel explained that the most significant factor favoring that decision was Debtor's status as a prior customer of Forrest who had paid off the balance owed with respect to his earlier automobile purchase, *i.e.*, the Oldsmobile.

Before the parties entered into the Agreement, Mr. Schnabel met with Debtor and spoke with him regarding the Report. As a result of the Report, Mr. Schnabel stated that he was aware of the garnishment action taken against Debtor in March 1999, but that such an action did not concern him because he believed that Debtor's employment with a temp agency would make it difficult for Debtor's wages to be garnished. Mr. Schnabel also testified that outstanding student loans are not generally an obstacle to his credit extension decision because many Forrest customers simply do not pay their student loans.

Although Mr. Schnabel was willing to overlook Debtor's significant credit flaws,

as disclosed by the Application and the Report, *e.g.*, the fact that Debtor's reported debt was more than twice his annual gross income, Mr. Schnabel maintained that he would not have authorized Forrest's entry into the Agreement if he knew that Debtor's indebtedness exceeded $60,000, rather than approximately 60% of that of which he was on notice. The Court cannot credit this unsupported assertion.

C. Debtor's Bankruptcy Filing

On May 12, 1999, Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. Debtor's Schedules indicate that he has total liabilities in the amount of $78,103.37. Debtor lists secured debts in the aggregate amount of $14,100, no unsecured priority debts and unsecured nonpriority debts in the aggregate amount of $64,003.37. Schedules D, E and F of Debtor's Schedules of Assets and Liabilities.

Debtor testified that he did not intend to file a bankruptcy petition at the time he acquired the Grand Am from Forrest. Instead, Debtor testified that he filed bankruptcy only after he became convinced that his wages were about to be garnished. Debtor became convinced that a successful garnishment was imminent after receiving notices of garnishment and orders to appear for an examination of his assets. Debtor knew from his experience in the credit collection industry that because he was now a full time employee his creditors would be able to garnish his wages. Because Debtor could not afford a 25% decrease in his net pay that would result from a successful garnishment, Debtor filed a chapter 13 case.

On August 12, 1999, the parties filed stipulations admitting the authenticity and admissibility of garnishment notices and orders to appear for examination of assets received by the debtor. Those stipulations addressed: (1) correspondence from Jerome G. Reidy to Debtor dated April 14, 1999 with reference to a collection action filed by

Cuyahoga Falls General Hospital; (2) an Affidavit and Motion for Supplementary Proceedings and Order to Appear for examination filed by Cuyahoga Falls General Hospital on April 7, 1999; (3) an Affidavit and Motion for Supplementary Proceedings and Order to Appear filed by the Creditor, Heslop, Inc., on May 10, 1999; and (4) a Notice of Court Proceedings to Collect Debt (15 day demand) filed by Heslop, Inc. on April 26, 1999.

During the August 16, 1999 evidentiary hearing, Forrest produced the affidavit of Jerome Reidy, counsel for one of the Debtor's creditors, Cuyahoga Falls General Hospital.[5] Examination of Mr. Reidy did not establish that the Debtor had planned to file bankruptcy prior to his transaction with Forrest.

D. Debtor's Treatment of Forrest Under His Plan of Reorganization

Debtor contends that the Agreement is not a "true lease," but rather a security device, and that Debtor is entitled to treat Forrest as the holder of a secured claim, subject to "cramdown" under § 1325(a)(5)(B) of the Bankruptcy Code. The value that Debtor ascribed to the Pontiac in the chapter 13 plan (the "Plan") was $6,000, plus interest in the amount of $1,300, on account of Forrest's secured claim, and 10% of the unsecured balance. Forrest objects to its treatment under the Plan. Forrest contends that it is entitled to payment of the amounts provided for under the Agreement or the return of the Pontiac.

E. Valuation of Pontiac

At the August 16, 1999 hearing, Debtor addressed the Pontiac's value through the testimony of Art Shapiro. Mr. Shapiro has spent over 40 years in car sales and

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[5] Forrest made an oral motion to continue the August 16, 1999 evidentiary hearing so that Forrest could obtain live testimony from Jerome Reidy which allegedly supported Forrest's motion to dismiss for filing in bad faith. At the end of the hearing, Forrest sought to introduce an August 12, 1999 affidavit from Jerome Reidy. Before concluding the evidentiary hearing, the Court permitted Forrest to examine Mr. Reidy telephonically with Debtor's counsel cross-examining by the same mode.

financing and has appraised cars for the last 30 years. Mr. Shapiro has developed significant expertise in the valuation of used cars and is highly credible. Mr. Shapiro inspected the Pontiac on May 29, 1999 for approximately 10-15 minutes. The inspection included driving the car and visually inspecting the engine and other components visible upon lifting the hood. Mr. Shapiro testified that based upon his inspection of the Pontiac, he valued the car at $5,500. Mr. Shapiro's based his testimony on a report he completed the day of the inspection. DX 6. The starting point for Mr. Shapiro's appraisal was the loan value provided in the May editions of the N.A.D.A. Official Used Car Guide ("N.A.D.A.") and the Black Book National Auto Research Weekly ("Black Book").

In his inspection, Mr. Shapiro found that the Pontiac had an odometer reading of 89,175 miles, that the air conditioning did not work, the fog lights did not work, the drivers side door lock was inoperable, that the car ran "hot" and that the front tires were bad. The report also stated that the Pontiac needed an alignment, the front end should be inspected for ball joints and tie rod ends, and that the car had high mileage relative to its age.

Forrest addressed the valuation of the Pontiac through the testimony of Mark Bann. Mr. Bann has been a buyer with Forrest for four years and purchases approximately 15 to 20 cars a week. Mr. Bann testified that he purchased the car at an auction and drove it for two to three days as a work car. Mr. Bann acknowledged that at no time had he inspected the Pontiac in respect to the details in Mr. Shapiro's report.

Mr. Bann testified that he priced cars within $500 dollars of the retail value given in the N.A.D.A. guide and that he never deducted for mileage on used cars. During the hearing, Mr. Bann read the retail value of the Pontiac from the March 1999 N.A.D.A. CX 5. The March 1999 retail value for that model in good condition was $7,875. Mr.

Bann also recited values for that model from the July 1999 N.A.D.A. Mr. Bann reiterated the statements of Forrest Motors' vice president, Scott Schnabel, stating that this Pontiac is "sexy." Mr. Bann maintained that this Pontiac model is in short supply and high demand at auction. Mr. Bann testified that he purchased the car at auction for approximately $3,600 to $4,000. Mr. Bann further testified that because supply and demand has a great influence on the value of used cars, in his view he "stole" the Pontiac for that price at the auction. Moreover, Mr. Bann testified that even though sales at auction are with reserve, he was still able to "steal" the particular car for a low price at auction because he believes dealers do not mind losing money on some cars knowing they would make money on others. Mr. Bann did not have any dealings with the seller of the Pontiac at auction that would confirm his theory as to why he was able to obtain such a purportedly "sexy" car at such a low price. Other than Mr. Bann's testimony regarding the value at which he purchased the car and testimony as to how used cars should be valued, Forrest did not provide the Court with a definitive value for this Pontiac.

On the record of evidence before it, the Court finds the price of the Pontiac at auction was a fair wholesale price and reveals that the Pontiac was probably not in good condition when acquired by Forrest nor when subsequently sold to Debtor. Given the proximity of the purchase to time of filing, the Court finds that value provided by Mr. Shapiro is probably close to fair market value at the time of the purchase. As such, the Court finds Mr. Shapiro's appraisal-based valuation to be the fair market replacement value of this Pontiac as of the date the petition was filed.

CONCLUSIONS OF LAW

A. The Characteristics of a Lease Intended for Security

If an agreement has been constructed with the intention of providing security for a

purported lessor, rather than incorporating economic components consistent with a true lease, the lease constitutes a disguised security agreement. As such, a debtor is not required to comply with the provisions of § 365 of the Bankruptcy Code as concerns that lease, *i.e.*, assumption or rejection of the lease and satisfaction of its terms. Instead, the debtor may treat the "lessor" as the holder of a secured claim. *In re Murray*, 191 B.R. 309, 311 (Bankr. E.D. Pa. 1996); *In re Lerch*, 147 B.R. 455, 457 (Bankr. C.D. Ill. 1992); *In re Farrell*, 79 B.R. 300, 302 (Bankr. S.D. Ohio 1987)(regarding chapter 13 plan's treatment of lessor of Chevrolet van, "if the [lease] is one intended as a security device, then the debtors may treat GMAC's claim as secured in an amount equal to the value of the collateral plus an appropriate discount factor pursuant to section 1325(a)(5)").

The determination of whether a particular agreement constitutes a lease or a security agreement is made by reference to state law. *Murray*, 191 B.R. at 313; *Lerch*, 147 B.R. at 457; *Farrell*, 79 B.R. at 302. Ohio Revised Code ("ORC") § 1301.01(KK)(2) provides the framework for evaluating the legal status of this transaction. That section provides in pertinent part:

> Whether a transaction . . . creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee and if . . .
> (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

ORC § 1301.01(KK)(2)(Page's Ohio Revised Code Ann. 1998 Supp.).

Other Courts interpreting this Ohio statute have held that neither the parties' intention nor the manner in which they describe a lease transaction is determinative of the legal nature of that transaction. *In re Tillery (Bill Swad Leasing Co. v. Stikes)*, 571 F.2d 1361, 1364-65 (5th Cir. 1978); *In re Bevis Co.*, 201 B.R. 923, 925 (Bankr. S.D. Ohio 1996);

Columbus Motor Car Co. v. Textile Tech, Inc., 68 Ohio Misc. 25, 28 428 N.E.2d 882, 885 (Franklin County Municipal Ct. Ohio 1981)(stating that "[n]either the subjective intent of the parties nor the label that is placed upon the document controls whether the document is a true lease or one intended as a security interest").

The Agreement provides that the lessee/Debtor is to pay the lessor/Forrest for the possession and use of the Pontiac for the term of the lease and that the lease is not subject to termination by the lessee. JX 1; DX 3, para.13. Furthermore, the lessee has the option to purchase the Pontiac for the nominal consideration of $10.00. DX 3, para. 16. To ascertain whether the option price constitutes nominal consideration, the price can be evaluated by comparing the option price to the aggregate amount of "rent" to be paid or to the fair market value of the leased goods at the time that the purchase option is exercised. *In re Wakefield*, 217 B.R. 967, 971 (Bankr. M.D. Ga. 1998); *Bevis*, 201 B.R. at 926.[6]

The $10.00 option price constitutes nominal consideration whether compared to the entirety of the rental amount to be paid under the Agreement, *i.e.*, $11,786.36, or to

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[6] A controlling factor in evaluating whether a lease constitutes a disguised security agreement is the existence of an option to purchase the leased property for nominal consideration. "Where the court finds that the lessee can exercise an option to own the leased property for nominal consideration, the court need not consider other factors, but should deem the lease one intended as security." *Bevis Co.*, 201 B.R. at 925. *See also*; *Sight & Sound v. Wright*, 36 B.R. 885, 890 (S.D. Ohio 1983)(stating that "[a] broad based inquiry, however, must be cut short whenever it determined that the purported lease provides that 'upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for nominal consideration.' In such instances, the applicable statutory provision compels the legal conclusion that the lease was one intended for security."). This test has been described as the "no lessee in its right mind" test. If the option price in a lease is low enough that no lessee in his or her right mind would refuse to buy the property, the transaction is deemed to create a security interest rather than a lease. *Brown Motors Leasing v. Reucher*, 80 Ohio App.3d 225, 228, 608 N.E.2d 1162, 1164 (Ohio Ct. App. 1992).

the fair market value of the Pontiac at the end of the Agreement's three-year term. If Debtor had paid the entire rental amount due under the Agreement, he would undoubtedly decide to pay the comparably minimal option price as well, in order to obtain legal title to the Pontiac. Accordingly, under ORC §1301.01(KK)(2), the Agreement creates a security interest and not a true lease.

> Finally, the retention of title by the "lessor" to the transaction is not determinative of whether a security interest or a lease has been created.[7] "In a conditional sales contract or a lease intended as security, the seller holds legal title as security for the payment of the purchase price." *Brown Motors Leasing v. Reucher*, 80 Ohio App.3d at 228, 608 N.E.2d at 1164. Consequently, even when a creditor has retained title to allegedly leased goods, if the lease constitutes a disguised security agreement, the lease is not subject to the provisions of § 365 of the Bankruptcy Code, and the debtor need not assume or reject the lease. *Wakefield*, 217 B.R. at 971; *In re Baker*, 91 B.R. 426, 427 (Bankr. N.D. Ohio 1988). Under the provisions of ORC § 1301.01(KK)(2), the Agreement constitutes a disguised security agreement and is not a "true lease." Because the Agreement constitutes a security agreement under Ohio law, Forrest is a secured creditor whose claim may be bifurcated into secured and unsecured portions in accordance with § 506(a) of the Bankruptcy Code. The amount of the secured portion of Forrest's claim will be determined by reference to the fair market value of the Pontiac. 11 U.S.C. §§ 1322(b)(2) and (a)(5)(B). C. Debtor's Bankruptcy Filing

Forrest alleges that Debtor's petition was not filed in good faith and therefore, the petition should be dismissed for cause. § 1307(c) of the Bankruptcy Code states that Chapter 13 petitions may be dismissed "for cause." 11 U.S.C. § 1307(c). Although §1307(c) does not specifically list "good faith" as a cause for dismissal, the Sixth Circuit

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[7] The Court notes that in Forrest's Brief and Further Exhibits and Argument for Finding of Bad Faith Pre-Filing Actions, Forrest alleges that Debtor's classification of the Agreement as a security interest is contrary to ORC § 4505.04. Forrest argues that under § 4505.04, the fact that a certificate of title was not issued in Debtor's name demonstrates that the Agreement was intended as nothing more than a lease. The Court finds that Forrest's reliance on § 4505.04 is misplaced. The Supreme Court of Ohio held that "it is apparent that R.C. §4505.04 is irrelevant to all issues of ownership except those regarding the importation of vehicles, rights of lienholders, rights of bona-fide purchasers, and instruments evidencing title and ownership." *Smith v. Nationwide Mutual Ins. Co.*, 37 Ohio St 3d. 150, 152-53 (1998). Accordingly, the Court holds that Forrest's reliance on ORC § 4505.04 is inapplicable to this case.

concluded that a petitioner's lack of good faith is sufficient cause for a bankruptcy court to dismiss a Chapter 7 case. *Industrial Insurance Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir.1991). A similar "good faith" test has been judicially inferred for Chapter 13 filings from the "for cause" language of section 1307(c). *In the Matter of Robert John Love*, 957 F.2d at 1354; *In re Brenner*, 189 B.R. 121, 129 (Bankr.N.D.Ohio 1995). While the Sixth Circuit has never defined the elements of good faith in the context of Section 1307(c), it determined the meaning of good faith as it relates to the confirmation of a Chapter 13 plan under Section 1325(a). *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir.1990). The policy of good faith is the same regardless of whether the issue is raised under section 1307(c) or 1325(a). *Love*, 957 F.2d at 1356-57. The purpose of good faith under a section 1307 or 1325 filing is to ensure that the filing is fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions. *Love*, 957 F.2d, at 1357. Therefore, similar analysis can be used to determine good faith under both sections.

Under *Caldwell*, the Sixth Circuit suggested twelve factors that could be examined to determine if good faith is present:

> (1) the amount of the proposed payments and the amount of Debtor's surplus; (2) Debtor's employment history, ability to earn and likelihood of future increase in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which Debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of Debtor in seeking Chapter 13 relief; (11) the burden which the plan's administration would place upon the trustee; and (12) whether Debtor is attempting to abuse the spirit of the Bankruptcy Code.

Caldwell, 895 F.2d at 1126-27.

Because Forrest is the movant and is requesting the dismissal of Debtor's case, Forrest bears the burden of proving Debtor's lack of good faith. The Court finds that Forrest failed to meet its burden. While noting that the factors listed in *Caldwell* are not an all inclusive list, the Court notes that factors 4, 6, 10 and 12 correspond to the allegations of bad faith made by Forrest.

The fourth factor listed in *Caldwell* relates to the accuracy of the plan's statement of debts. Forrest alleges that Debtor failed to include the Pontiac in the schedule of secured claims. Forrest also claims that the value of the Pontiac in the plan is too low. The Court finds that Forrest's allegations regarding the secured claims schedule and the value of the Pontiac in the plan are without basis. A review of the secured claims schedule reveals that the Pontiac is in fact listed as a secured claim. Furthermore, the value of the Pontiac is consistent with the appraisal of Art Shapiro whose 35 years of experience provide ample basis for concluding that the value of the Pontiac in the plan was not in bad faith.

Forrest also alleges that the classification of the Pontiac contract as a security agreement and not a lease is a modification of the secured claim indicating bad faith. Under the sixth factor in *Caldwell*, the extent to which secured claims are modified can be an indicia of bad faith. However, because the Court has found that the contract governing the acquisition of the Pontiac is a disguised security agreement, Forrest's allegation is without merit.

Forrest's next set of allegations correspond to the tenth and twelfth factors listed in *Caldwell i.e.*, the motivation and sincerity of Debtor in seeking Chapter 13 relief and whether Debtor is attempting to abuse the spirit of the Bankruptcy Code. Were this a chapter 7 case, Forrest likely would have objected to the discharge of its claim under § 523(a)(2) of the Bankruptcy Code. However, the super discharge in chapter 13 results in

the issue being raised under the more general bad faith rubric. Forrest alleges that the following items indicate that Debtor lacked good faith when filing his petition: (1) Debtor failed to list all of his debts on the lease agreement; (2) the proximity of Debtor's acquisition of the Pontiac and filing his petition; (3) Debtor's knowledge of the credit collection industry; and (4) Forrest's assertion that Debtor contemplated filing bankruptcy in January of 1999. The Court will address each of these allegations in turn.

First, while Debtor's failure to list all of his debts in the application to Forrest can be indicative of bad faith, the testimony presented by Forrest' own witness, Scott Schnabel, demonstrates that Forrest did not rely on the listed information in the application in its decision to enter into a contract with Debtor. Instead, Forrest relied on its prior dealings with Debtor and discounted the Report listing among other things a prior bankruptcy, a March 1999 garnishment action and an approximately $33,000 of debt in addition to that listed in the application. DX 5. As such, the Court finds that Debtor's failure to list all of his debts does not support Forrest allegation of bad faith.

Second, the Court holds the proximity between the acquisition of the Pontiac and filing the petition, while suspicious, was adequately explained so as not to demonstrate bad faith. The Debtor acquired the Pontiac only after his previous car broke down. Furthermore, Debtor testified that he filed for relief under Chapter 13 only after he received the Notice of Court Proceedings to Collect Debt, filed by Heslop, Inc., some time after April 26, 1999. After receiving this notice, Debtor was sure that his wages would be garnished, and therefore, he sought relief under Chapter 13. Accordingly, the proximity between Debtor's acquisition of the Pontiac and filing his petition do not demonstrate that Debtor was motivated by bad faith or was attempting to abuse the spirit of the Bankruptcy Code.

Third, the Court finds that Debtor's experience in the credit collection industry does not support Forrest's allegation that he filed his petition in bad faith. Debtor testified, and there was no evidence to the contrary, that he did not have any involvement with bankruptcies while employed as a collection agent in the credit collection industry. However, the Court does find that Debtor's knowledge of the credit collection was sufficient to allow him to realize that the Notice of Court Proceedings to Collect Debt, filed by Heslop, Inc. on April 26, 1999, would result in a garnishment. Therefore, the Court finds that it was the Notice of Court Proceedings to Collect Debt and not Debtor's knowledge of the credit collection industry or an attempt to "take the money and run" to bankruptcy that motivated Debtor's filing of the Chapter 13 petition.

Finally, the Court holds that the testimony of Cuyahoga Falls General Hospital counsel Jerome Reidy does not support Forrest's allegation that Debtor filed his petition in bad faith. Mr. Reidy's testimony was vague at best and he had little or no recollection of his communications with Debtor.

Forrest has failed to meet its burden of establishing that this case should be dismissed for cause under 11 U.S.C. § 1307(c).[8]

E. Valuation of the Pontiac

Pursuant to 11 U.S.C. §1325(a)(5)(B), 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

[8] The Court notes that in Forrest's Brief and Further Exhibits and Argument for Finding of Bad Faith Pre-Filing Actions, Forrest makes reference to Bankruptcy Code § 548. Forrest argued that Debtor's acquisition of the Grand Am amounted to a fraudulently incurred obligation under § 548. However, the Court notes that § 548 deals with the Trustee's and not a creditor's power to avoid fraudulent transfers and obligations. As such, the Court makes no finding as to Forrest's allegation under § 548.

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.

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 debtors would incur to obtain a like asset for the same proposed use, the "replacement value." 117 S.Ct. 1879, 1883-86 (1997). It is that "replacement value" of the car that the Court must consider in addressing the issues raised by the objection of the creditor. The Supreme Court held that bankruptcy courts, as triers of fact, are responsible for identifying the best method for ascertaining replacement value on the basis of the evidence presented. *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).

Although the decision in *Rash* provided bankruptcy courts with a starting point for determining the replacement value of collateral under § 506(a), the date that the replacement value should be ascertained remains 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 16

evidentiary hearing, no argument was made as to the date of valuation. Therefore, in order to adequately protect the creditor's interest in the collateral, particularly when the value of the collateral diminishes quickly over time, the collateral in this case will be valued as of the date of filing.

A review of the evidence shows that the $5,500 value given by Mr. Shapiro was the only definitive evidence of value presented to the Court. Forrest provided the Court with little to no evidence regarding the value of this collateral. Instead, Forrest provided evidence as to the valuation of used cars in general and the purchase price of this car at auction. Indeed, the Court finds that the $3,600 to $4,000 purchase price of the Pontiac at auction supports Mr. Shapiro's valuation of the car. Accordingly, the Court finds that the $5,500 value given by Mr. Shapiro is the fair market replacement value of the Pontiac. This is less than the $6,000 value used in the plan and thus the plan valuation is fair to Forrest.

Finally, because Forrest rested its case without addressing the interest rate for the secured portion of the Pontiac under the "cramdown" provision of § 1325(a)(5)(B), interest provisions in Debtor's plan will control.

III. CONCLUSION

Because under Ohio law the Agreement is determined to be a security agreement, Forrest is a secured creditor whose claim is appropriately bifurcated into secured and unsecured portions in accordance with § 506(a) of the Bankruptcy Code. The valuation of the Pontiac in the Plan is amply supported by the record evidence. Therefore, Forrest's objection to the confirmation of Debtor's Chapter 13 plan is overruled. In addition, the Court holds that Forrest has failed to meet its burden of establishing that this case should be dismissed for cause under 11 U.S.C. § 1307(c) and therefore, Forrest's motion to dismiss Debtor's case for alleged lack of good faith is also denied.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 11/22/99