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

IN RE:)	CASE NO. 00-53097	
)		
STEPHEN J. GERAKE, JR.)	CHAPTER 13	
DEBORAH ANN GERAKE)		
)		
DEBTORS)	JUDGE	MARILYN
SHEA-STONUM			

**ORDER RE: OBJECTION OF
WELLS FARGO FINANCIAL ACCEPTANCE
TO VALUATION IN DEBTORS' CHAPTER 13 PLAN**

This matter came before the Court on an objection to the valuation of collateral [docket #7] (the "Objection") filed by Wells Fargo Financial Acceptance ("Wells Fargo") and debtors' response to the Objection (the "Response") [docket #18]. The Objection is based on debtors' proposed valuation of two motor vehicles, a 1993 Dodge Ram Van (the "Dodge Ram") and a 1998 Pontiac (the "Pontiac").

An evidentiary hearing on the matter was held on January 18 and January 25, 2001. Appearing at the hearing were Robert Whittington, counsel for debtors; and Cynthia Jeffrey, counsel for Wells Fargo. During the hearing, Wells Fargo presented evidence as to the value of the Dodge Ram through testimony of Rebecca Thompson, credit manager at a local Wells Fargo branch. Debtors presented evidence as to the value of the Dodge Ram through testimony of Charles Lake, an individual who has spent the last 15 years servicing and selling used automobiles. At the conclusion of the hearing the

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matter was 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. It 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). Based upon testimony and evidence presented at the evidentiary hearing, the arguments of counsel and the documents of record in this case, the Court makes the following findings of fact and conclusions of law.

I. BACKGROUND

On October 10, 2000, debtors filed a chapter 13 bankruptcy petition which included a proposed chapter 13 plan. On Schedule B - Personal Property, debtors listed the fair market value of the Dodge Ram at \$1,500.00 and the fair market value of the Pontiac at \$14,000.00. On Schedule D - Creditors Holding Secured Claims, debtors listed Wells Fargo as the holder of a \$36,212.35 non-purchase money security interest in both vehicles. Through their plan, debtors propose to pay Wells Fargo on a \$15,500.00 secured claim bearing interest at a rate of 10 percent and on a \$20,712.35 unsecured claim. Debtors' plan provides that creditors holding allowed unsecured claims will receive 100 percent of those claims, without interest, over a period not to exceed 60 months.¹

On November 2, 2000, Wells Fargo filed the Objection contending that the total fair market value of the Dodge Ram and the Pontiac is \$19,950.00 and that it should be paid interest on the secured portion of its claim at the parties' contract rate of 18.58

¹ Debtors' plan also provides that Wells Fargo will retain its liens on the Dodge Ram and the Pontiac until the fair market value of that collateral is paid in full through the plan

² On December 28, 2000, Wells Fargo filed a proof of claim with respect to the Dodge Ram and the Pontiac in the amount of \$29,017.82. That proof of claim, which included supporting documentation, listed Wells Fargo's interest as fully secured and entitled to bear interest at a rate of 18.58 percent. On that proof of claim, Wells Fargo lists the value of the collateral securing its claim at \$23,275.00. On January 3, 2001, Wells

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percent.² Through the Objection, Wells Fargo only addressed the *combined* value of the vehicles, and during the evidentiary hearing, Wells Fargo presented evidence only as to the value of the Dodge Ram. Because Wells Fargo never specifically addressed or objected to debtors' proposed valuation of the Pontiac, the Court can only conclude that Wells Fargo does not object to its fair market value being fixed, for purposes of debtors' chapter 13 plan, at \$14,000.00. Accordingly, the only issue before the Court is whether debtors' proposed plan undervalues Wells Fargo's secured claim by providing to pay it \$1,500.00 plus 10 percent interest on account of the Dodge Ram.

II. DISCUSSION

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.

Fargo filed another proof of claim which, except for the date of filing and the lack of supporting documentation, appears to be exactly the same as the earlier filed proof of claim. To date, debtors have not objected to either of these proofs of claim and Wells Fargo's counsel has not addressed the discrepancy between the amount it contends it is owed and the valuation of the collateral as set forth in the Objection and the amount it contends it is owed and the valuation of the collateral as set forth in the proofs of claim.

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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. 520 U.S. 953, 957-64 (1997). It is this "replacement value" of the Dodge Ram that the Court must consider in addressing the issues raised in the Objection. 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*, 520 U.S. 953, 965 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).

During the evidentiary hearing, debtors presented evidence as to the current value of the Dodge Ram through testimony of Charles Lake. Mr. Lake testified that his inspection included visually inspecting the interior and exterior of the vehicle (including looking at the underside of the car while it was up on "racks") and driving the vehicle on both surface streets and the highway. Based upon that inspection, Mr. Lake testified that the Dodge Ram had a "rough" interior, had a "rough" engine and transmission that would need to be replaced or reconditioned, needed new tires, and included some rust spots. Mr. Lake also testified that the vehicle's air conditioning, power seats, cruise control and cassette stereo were not in operating condition. Based upon his inspection, Mr. Lake valued the Dodge Ram at no more than \$1,200.00.

Wells Fargo presented evidence as to the current value of the Dodge Ram through testimony of Rebecca Thompson. Ms. Thompson testified that her valuation began with a reference to the National Automobile Dealers Association ("NADA") official used car guide valuation of a Dodge Ram with similar characteristics but that because of the vehicle's high mileage (101,0227), a \$1,500.00 deduction was factored into that valuation.

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Ms. Thompson also testified that she physically inspected the Dodge Ram by looking over the outside of vehicle and at the inside of the vehicle through an opened passenger side door. Ms. Thompson did not drive the vehicle nor did she view its underside or engine. Although she used them to determine the applicable NADA official used car guide value, Ms. Thompson testified that she was unaware of whether or not the vehicle's air conditioning, cruise control and cassette stereo were in working order. Based upon the NADA official used car guide and her inspection of the Dodge Ram, Ms. Thompson fixed its "wholesale" value at \$3,750.00 and its "retail" value at \$6,550.00.

Neither witness was clear as to how much it would cost debtors to replace the Dodge Ram with a similar vehicle. Mr. Lake acknowledged that his \$1,200.00 valuation was based upon what he thought this vehicle would sell for at an auction but indicated that if some repairs were made, it would probably sell for more through a used car dealership. Mr. Lake did not identify the necessary repairs nor did he estimate how much they would cost. Although Ms. Thompson identified both a "wholesale" and "retail" valuation, she failed to explain how or why she or the NADA official used car guide she was relying upon arrived at these differing amounts.

Given Mr. Lake's experience with servicing and selling used automobiles, combined with the fact that he actually drove the vehicle and took the time to view it up on "racks," the Court finds his \$1,200.00 valuation to be the more persuasive for the purpose of determining the "wholesale" value of the Dodge Ram. The "retail" value would generally be more. Wells Fargo has the burden of establishing the value of its collateral and its evidence on "retail" value did not consider the vehicle's "rough" condition and the fact that many of its more desirable features (air conditioning, cruise control and cassette stereo) did not work. On this state of the record, the Court finds that

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debtors' plan has not been shown to undervalue Wells Fargo's secured claim by listing the Dodge Ram's value at \$1,500.00.

Through the Objection, Wells Fargo also contends that it should be paid interest on the secured portion of its claim at the parties' contract rate of 18.58 percent and not at the 10 percent rate provided for in debtors' plan. Other than a cursory statement in the Objection, Wells Fargo failed to present the Court with any legal authority or evidence for this contention.

Pursuant to its decision in *Memphis Bank & Trust Co. v. Whitman*, the Sixth Circuit determined that, in the absence of special circumstances, the rate of interest to be paid on account of secured claims in a chapter 13 "cramdown" situation is not the contract rate of interest but the "current market rate of interest used for similar loans in the region." 692 F.2d 427, 431 (6th Cir. 1982). *See also United States v. Arnold*, 878 F.2d 925 (6th Cir. 1989) (addressing "cramdown" in a chapter 12 context and discussing the application of the *Memphis Bank & Trust Co. v. Whitman* standard for determining appropriate interest rates). The purpose of including interest as part of installment payments on secured claims is to place the secured creditor in the same economic position as if debtors had instead just surrendered the collateral to the secured creditor. *United Carolina Bank v. Hall*, 993 F.2d 1126, 1130 (4th Cir. 1993).

The only evidence before the Court regarding the "current market rate of interest" is a print-out from www.bankrate.com that was attached to the Response and that purports to show "[u]sed auto loan rates . . . based on a \$10,000 loan for a 3-year-old vehicle . . . and a 20% down payment, based on the lesser of the sales price or the . . . NADA . . . published value." *See Debtors' Response at Exhibit C.* Although this evidence falls far short of providing the Court with very meaningful information from

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which to determine the rate of interest currently being charged by lenders in this region³ for the purchase or refinance of used cars, it was all that was presented in this case and it showed an average rate of interest of 9.825 percent.⁴ Based upon the information in Exhibit C and the fact that Wells Fargo presented *no* evidence, the Court finds that by providing a 10 percent rate of interest, debtors are not undervaluing Wells Fargo's secured claim.⁵

III. CONCLUSION

Based upon the foregoing the Court hereby finds that debtors' plan does not undervalue Wells Fargo's secured claim by listing its value at \$1,500.00 plus 10 percent interest. Accordingly, for purposes of confirmation of debtors' proposed chapter 13 plan, Wells Fargo holds a \$15,500.00 secured claim bearing interest at a rate of 10 percent and

³ What the phrase "charged by lenders in this region" actually means has been the subject of debate in some courts that implement the "coerced loan" approach adopted by the Sixth Circuit in *Memphis Bank & Trust Co. v. Whitman*. See, e.g. *In re Mellema*, 124 B.R. 103, 104 (Bankr. D. Colo. 1991) (deciding the issue of whether the appropriate loan rate is the one the objecting creditor was charging or the one that was "typically used in, and as generally reflected by the practice in and recent history of, confirmed Chapter 13 plans in this region"). Because neither party raised this as an issue, it need not be decided in or discussed any further in this case.

⁴ Other than in the Response, debtors did not again raise the issue of the proper interest rate to be charged with the Court. Although this matter was not again raised and Exhibit C not in any way authenticated or introduced into evidence during the evidentiary hearing, Wells Fargo at no time objected to the Court considering this exhibit. Based upon that failure to object, the Court has considered Exhibit C to the extent referenced in this Opinion.

⁵ The fact that Wells Fargo presented no evidence regarding the appropriate "current market rate" of interest that should be applied to its secured claim is especially significant given the fact that it should have that information readily available. See *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 70 (3rd Cir. 1993) ("We believe that in most instances, regularly maintained documents of the creditor should make it possible for the debtor and creditor to stipulate on the interest rate the creditor would charge for a new loan of similar character, amount and duration.").

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a \$20,712.35 unsecured claim.

IT IS SO ORDERED.

MARILYN SHEA STONUM
Bankruptcy Judge

DATED: 3/23/01