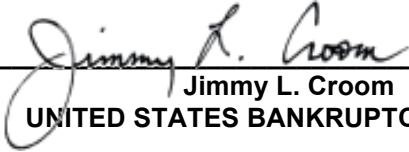


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Dated: August 29, 2013
The following is SO ORDERED:



Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re)	
)	
DENTIS SISSON and)	Case No. 11-12502
CATHY SISSON)	
)	
Debtors.)	Chapter 11
)	

**MEMORANDUM OPINION RE: VALUATION OF PERSONAL PROPERTY FOR
PURPOSES OF PLAN CONFIRMATION**

Before the Court is the issue of valuing various pieces of personal property that serve as collateral for a "Forbearance Agreement" signed on August 7, 2009 by the debtors, Denits and Cathy Sisson (herein "Debtors"), and First Bank (herein "Bank"). The Bank and the Debtors seek a valuation of the property for purposes of plan confirmation pursuant to 11 U.S.C.

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§§ 506(a)(1) and 1129(a)(7)(B). The Court conducted a hearing in this matter on August 1, 2013. Fed. R. Bankr. P. 9014.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

I. FACTS

The Debtors filed their voluntary Chapter 11 petition for bankruptcy relief on August 17, 2011. On June 12, 2013, the Debtors filed their second amended plan of reorganization ("Second Amended Plan") which included a 2003 M9000 Kubota tractor (herein "Kubota"), a 2007 Chevrolet Silverado 2500 HD PICKUP-3/4 Ton-V8 (herein "Silverado") and a 2008 Chevrolet Tahoe LTZ 1/2-Ton-V8 (herein "Tahoe") (collectively "Vehicles").¹ The Debtors proposed paying for the Vehicles through the Second Amended Plan and proposed a cumulative value for the Vehicles of \$53,000. The Debtors proposed paying this value to the Bank at 5.25% interest per annum with payments of \$940.00 per month until the value is paid in full.

The Bank filed an objection to the Second Amended Plan on July 18, 2013. Among

¹The Debtors' Second Amended Plan uses the following descriptions of the Debtors' Vehicles: 2003 M9000 Kubota, 2007 Chevrolet Silverado, and 2008 Chevrolet Tahoe. The Vehicles are described differently in this opinion to provide more clarity on the Vehicles' features.

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other things, the Bank objected to the Debtors' proposed terms of repayment and the Debtors' proposed valuation of the Vehicles. The Bank also objected to the rate of interest and amount of monthly payments the Debtors proposed to pay the Bank.

The parties requested a hearing to determine the value of the Vehicles for purposes of confirming the Second Amended Plan. Both the Debtors and the Bank presented expert testimony from appraisers who conducted independent evaluations of the Vehicles. In addition to his testimony, the Bank's expert offered an appraisal report and photographs as exhibits at the hearing. The Debtors did not provide a written appraisal report at the time of the hearing; however, on August 12, 2013, the Debtors filed a "Memorandum Regarding the Value of Personal Property" which included the values testified to by the Debtors' expert at the hearing.

The Debtors' expert was Edd Daniels ("Daniels"). Daniels testified that he is a certified personal property appraiser for K&M Appraisal with thirty to forty years of experience who is also in the business of buying and selling farm equipment. Daniels inspected and appraised the Vehicles on May 5, 2013. Daniels testified that the Kubota's hour meter indicated that the tractor had been used for approximately 713 hours; however, Daniels stated that the debtor Dentis Sisson advised him that the hour meter had been broken for several years. Daniels stated that the Kubota was in average condition with a wholesale value of approximately \$10,000 to \$14,000. As for the Silverado, Daniels stated that it was a four-wheel-drive vehicle with a diesel engine, and in good condition. Neither Daniels' report nor his testimony indicated the mileage for the Silverado. Daniels testified that the Silverado's wholesale value was between \$19,000 and \$25,000. As for the Tahoe, Daniels testified that the vehicle was in good condition and had approximately 75,352 miles on it. Daniels estimated the wholesale

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value for the Tahoe to be between \$17,500 and \$21,500. On cross-examination, Daniels stated that he based his values for the Vehicles on his experience as a certified property appraiser, that he had not consulted with any car dealers when assigning values, and that the Blackbook automotive pricing database was the only vehicle guide he referenced when valuing the property.

The Bank's expert was Mark McCaslin ("McCaslin"). McCaslin testified that he is a special asset appraiser employed by the Bank and has thirty-five years of experience in valuing property. McCaslin inspected and appraised the Vehicles on July 30, 2013. McCaslin stated that the Kubota was in good condition with a reported 711.9 hours; however, McCaslin also acknowledged that the debtor Dentis Sisson advised him that the hour meter had been broken for four or five years and estimated that the tractor would be expected to have approximately 1,400 to 1,500 hours on it based upon the Debtors' average annual use of the tractor. McCaslin testified that the Kubota had an approximate retail value of \$20,000 to \$25,000 based upon an analysis of comparable tractor sales listed on www.tractorhouse.com as of July 30, 2013. As for the Silverado, McCaslin testified that the vehicle was in good condition with approximately 70,687 miles registered on the odometer. Additionally, McCaslin's appraisal report and photographs showed that the vehicle had four-wheel-drive and a Z71 off-road package. McCaslin testified that according to the Blackbook, the Silverado had a clean retail value of \$32,000. Turning to the Tahoe, McCaslin stated that at the time of his inspection, the vehicle had approximately 71,055 miles on it and was in good condition. McCaslin's appraisal report indicated that the Tahoe was an upgraded LTZ version. McCaslin testified that the Tahoe had a clean retail value of \$30,000 according to the Blackbook guide.

II. ANALYSIS

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The Debtors in this case are seeking to retain property over the Bank's objection. In order to do so, § 1129(a)(7)(B) of the Bankruptcy Code requires the Debtors to distribute to the Bank, an amount, "as of the effective date of the plan, that is not less than the value of [the Bank's] interest in the estate's interest in the property that secures the claim." 11 U.S.C. § 1129(a)(7)(B). The value that must be paid pursuant to § 1129(a)(7)(B) is determined by 11 U.S.C. § 506(a)(1), which provides that:

An 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 shall be determined in light of the purpose of the valuation and of the proposed disposition 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)(1). As the plan proponent, "the debtor bears the burden of proof on the issue of valuation under § 506(a)." *In re Wcislak*, 417 B.R. 24, 28 (Bankr. N.D. Ohio 2009) (citing *Sovereign Bank, F.S.B. v. Finnegan (In re Finnegan)*, 358 B.R. 644, 649 (Bankr. M.D. Pa. 2006).

Courts interpret the valuation process under § 506(a) as a two-step determination. The first step calls for the "division of the secured creditor's claim into secured and unsecured portions, with the secured portion of the claim limited to the value of collateral." *Assoc. Commercial Corp., v. Rash*, 520 U.S. 953, 961, 117 S. Ct. 1879, 1885 (1997) (citation omitted). Additionally, "to separate the secured from the unsecured portion of the claim, a court must compare the creditor's claim to the value of 'such property,' i.e. the collateral." *Id.* at 961.

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The second and more complicated step in the valuation process requires a court to determine how to value collateral. While the Bankruptcy Code does not provide instruction on how to assign value to collateral, the Court in *Rash* offered guidance for the valuation process by explaining that “the proposed disposition or use of collateral is of paramount importance to the valuation question.” *Id.* at 962.

In *Rash*, the Supreme Court provided clarification on the appropriate standard to use in determining the value of collateral when debtors intend to retain property. The Court held that “under § 506(a), the value of property retained because the debtor has exercised the . . . ‘cram down’ option is the cost the debtor would incur to obtain a like asset for the same proposed . . . use.” *Rash*, 520 U.S. at 966. The Court further explained what it labeled as “replacement value” when stating that “in a ‘cram down’ case, . . . , the value of property (and thus the value of the secured claim under § 506(a)) is the price a willing buyer in the debtor’s trade, business, or situation would pay to obtain like property from a willing seller.” *Id.* at 960. While *Rash* was decided in the context of a ‘cram down’ under a Chapter 13 plan, the methodology applies equally in Chapter 11 cases. *In re Heritage Highgate, Inc.*, 679 F.3d 132, 141 (3d Cir. 2012).

Although *Rash* and its progeny determined that replacement value is the appropriate standard of valuation when debtors intend to retain property over a creditor’s objection, those cases did not address the question of how to determine replacement value for motor vehicles in cram down situations. Rather, in *Rash*, the Court noted that “the replacement-value standard, . . . leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of evidence presented.” *Rash*, 520 U.S. at 967 n.6.

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In light of this directive, decisions issued since *Rash* have identified a method for determining replacement value for motor vehicles. In *First Merit v. Getz (In re Getz)*, 242 B.R. 916 (B.A.P. 6th Cir. 2000), the Bankruptcy Appellate Panel for the Sixth Circuit recognized that:

[u]sing the average of the [National Automobile Dealer's Association guide] as a starting point to determine replacement value of a vehicle for a . . . cram down is consistent with the dictates of *Rash*, which recognized the discretion of the trial judge to adopt a rule for valuation "to serve the interests of predictability and uniformity." Further, the bankruptcy court's approach of using the average of retail and wholesale values merely as a starting point subject to adjustment by other evidence introduced by the parties is not precluded by *Rash*'s rejection of the Seventh Circuit's approach of mechanically assigning the midpoint between the collateral's foreclosure and replacement values.

Id. at 919 (citing *Rash*, 520 U.S. at 964). Several other courts within the Sixth Circuit have also used this method to determine replacement value for automobiles. See e.g., *Id.*, *In re Lyles*, 226 B.R. 854, 856-57 (Bankr. W.D. Tenn. 1998); *In re Glueck*, 223 B.R. 514, 519 (Bankr. S.D. Ohio 1998). This approach of using the average guidebook value as a starting point for valuation strikes a balance among several considerations.² First, although debtors may prefer to pay wholesale prices to "avoid [] the overhead costs inherent in purchases from automobile dealerships, . . . [a] debtor's inability to regularly access the wholesale market requires an upward adjustment from wholesale value." *Id.* at 514. Second, Debtors are not limited to the retail market when purchasing a vehicle. "Debtors are able to purchase

²Although the guide used in *In re Getz*, 242 B.R. 916, was the National Automobile Dealer's Association appraisal guide, the bankruptcy court in *In re Glueck*, 223 B.R. 514, broadened the scope of acceptable appraisal guides when it noted that "used vehicle guidebooks provide objective and authoritative evidence of retail and wholesale values." *Id.* at 519. As such, use of any official used car guide is acceptable when valuing vehicles in the bankruptcy arena. It will be for the court to decide what probative weight to give the guidebook. Such determination will be based upon the reliability and acceptability of the book by the automobile industry.

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automobiles at auctions, from private individuals, from used car lots, from family members, or from rental car companies, just to name a few options. That market is clearly broader than a purely retail market.” *Id.* at 519 (citing *In re McElroy*, 210 B.R. 833 (Bankr. D. Or. 1997)). Because this method of averaging wholesale and retail values balances these considerations, this Court concludes that it is an appropriate formula to use as a starting point for the valuation in this case.

For purposes of cram down, reported decisions regarding the valuation of vehicles arise most often in Chapter 13 cases. See e.g., *In re Araujo*, 464 B.R. 15 (Bankr. N.D. Cal. 2011); *In re Marquez*, 270 B.R. 761 (Bankr. D. Ariz. 2001); *Glueck*, 223 B.R. at 514; *McElroy*, 339 B.R. 185; *In re Johnson*, 117 B.R. 577 (Bankr. D. Idaho 1990). Given the nature of Chapter 13 proceedings, it is often “impractical to require expert testimony to determine valuation under Rash” *Glueck*, 223 B.R. at 519. Expert testimony or any other type of additional evidence may, however, be introduced in establishing value under § 506(a). A court may use such evidence to adjust the average of the guidebook values. Such additional evidence may take the form of “appraisals, investment banker opinions, expert testimony, testimony from the parties, offers of purchase for the subject property, and less formalized evidence regarding prices obtained from the sale of similar property.” *Collier on Bankruptcy* ¶ P506.03 (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2013).

When examining and assigning weight to evidence presented by experts, this Court considers numerous factors.

A nonexclusive listing of these factors includes: the appraiser’s education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented.

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Buckland v. Household Realty Corp., 123 B.R. 573, 578 (Bankr. S.D. Ohio 1991). However, “a bankruptcy court is not bound to accept the values contained in the parties’ appraisals; rather, it may form its own opinion on the value of subject property after considering the appraisals and expert testimony.” *In re Smith*, 267 B.R. 568, 572 (Bankr. S.D. Ohio 2001).

At the hearing in this matter, the Court found both experts were qualified to offer their opinions and testimony as to the value of the Vehicles. The Court noted that the Debtors’ expert provided the Court with wholesale values for the relevant property, while the Bank’s expert based his valuation entirely upon retail value for the same property.

As for the Kubota, Daniels testified that the wholesale value of the Kubota tractor was between \$10,000 and \$14,000. The Bank’s expert testified that the tractor had a retail value of between \$20,000 and \$25,000. The average of these values results in a starting point for the tractor of between \$15,000 and \$19,500. Based on McCaslin’s testimony about comparable sales for tractors substantially similar to the Debtors’, the Court assigned the Kubota a replacement value of \$19,500. Although McCaslin’s report makes clear that several similar tractors sold for prices in excess of the assigned replacement value, these tractors all had working hour meters and had been used for substantially fewer hours than the Debtors’ Kubota.

Turning to the Silverado, Daniels testified that the wholesale value was between \$19,000 and \$25,000, while McCaslin testified that the vehicle had a retail value of \$32,000. An average of these figures leaves the vehicle with a starting value of between \$25,500 to \$28,500. Both parties’ experts agreed that the vehicle was in good condition, and neither expert testified to any body damage, mechanical problems, or any other issue that would necessitate a reduction to the vehicle’s replacement value. Furthermore, the photographic

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evidence submitted by the Bank confirms that the vehicle was clean with minimal wear and tear. The Court determined that the high end of the starting point range was appropriate for the Silverado due to the vehicle's reported good condition. The vehicle's features including the diesel engine and Z71 off-road package also work to increase the vehicle's replacement value. The court therefore assigns the Silverado a replacement value of \$28,500.

Finally, as to the Tahoe, Daniels testified that the Tahoe had a wholesale value of between \$17,500 and \$21,500 while McCaslin testified that the vehicle had a wholesale value of \$30,000. These figures leave the vehicle with a starting value of \$23,750 to \$25,750. Both experts agreed that the Tahoe, like the Silverado, was in good condition. The experts did not testify to any physical or mechanical issues which would require a downward adjustment to the vehicle's replacement value. The Court concludes that the higher end of the starting point range is appropriate for a relatively late model Tahoe with no demonstrated damage to the vehicle's interior or exterior. Additionally, according to the appraisal report submitted by McCaslin, the Blackbook appraisal guide shows a \$5,000 difference between the value of the LT or base model of the Tahoe and the Debtors' upgraded LTZ version of the vehicle. The vehicle's upgraded features and condition thus weighed in favor of a higher replacement value. The court therefore concludes that the replacement value for the Tahoe is \$25,750.

After reviewing the testimony and the evidence presented by the parties, the Court concludes that the Kubota tractor has a replacement value of \$19,500, the Silverado has a replacement value of \$28,500 and the Tahoe has a replacement value of \$25,750. The Vehicles have a cumulative value of \$73,750. The Court believes that the replacement values reflect the price a willing buyer in the Debtors' trade would be willing to pay for vehicles in good

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condition, with upgraded features, and which will not require additional expenditures to remedy mechanical or physical issues. *Rash*, 520 U.S. at 960.

The court will address the Bank's other objections to the Debtors' proposed treatment of its claims at the confirmation hearing.

The Court will enter an order in accordance herewith.

Mailing list

A. Russell Larson, attorney for Debtors

C. Jerome Teel, attorney for Debtors

Laura Williams, attorney for First Bank

United States Trustee