Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re	Case No. BK-07-50384-MKN
LANCE GILMAN LAROCHE,	Chapter 13
Debtor.	Date: November 30, 2007 Time: 9:30 a.m.

MEMORANDUM DECISION ON DEBTOR'S OBJECTION TO CLAIM OF GREAT BASIN FEDERAL CREDIT UNION AND ON CONFIRMATION OF DEBTOR'S PROPOSED PLAN

On January 28, 2008, the final post-hearing brief in this matter was filed. An evidentiary hearing previously was conducted on November 30, 2007. Closing arguments were presented and the appearances of counsel were noted on the record.

BACKGROUND[1]

Lance Gilman LaRoche ("Debtor") filed a voluntary Chapter 13 petition on April 11, 2007, along with his Schedules of Assets and Liabilities, and a Statement of Financial Affairs. (Dkt# 1) Amongst the unsecured creditors listed on Debtors' Schedule "F" is Great Basin Federal Credit Union with one claim in the scheduled amount of $16,290.89 and another in the

[1] In the text and footnotes of this Memorandum Decision, all references to "Section" shall be to provisions of the Bankruptcy Code appearing in Title 11 of the United States Code unless otherwise indicated. All references to "Rule" shall be to provisions of the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

scheduled amount of $3,427.15.

On April 17, 2007, GBFCU filed a proof of claim stating that the amount of $723.92 is owed by the Debtor on a nonpriority, unsecured basis. On the same date, GBFCU filed another proof of claim stating that the amount of $9,340.84 is owed on a secured basis stemming from Debtor's purchase of a 2001 Harley Davidson motorcycle ("the Harley Claim"). On the same date, GBFCU filed a further proof of claim asserting that it is owed $22,131.28 on a secured basis stemming from Debtor's purchase of a 2004 Chevrolet pickup ("Chevy Pickup") truck ("the Chevy Claim").

On April 26, 2007, the Debtor filed a proposed Chapter 13 plan that includes GBFCU's secured claims in secured Class 2. (Dkt# 9) In conjunction with confirmation, the proposed plan seeks to value the collateral of the secured creditors. As to the Harley Claim, Class 2 seeks to value the 2001 Harley Davidson motorcycle at $12,000 and to pay the full amount of $9,340.84 at 8% interest. As to the Chevy Claim Class 2 seeks to value the Chevy Pickup at $14,000 and to pay that amount as the allowed secured claim at 10% interest. The remaining balance of the Chevy Claim, i.e., $8,131.28, would be paid as a Class 7 unsecured claim. Under Class 7, unsecured claims are paid on a pro rata basis and the plan projects that holders of Class 7 claims will receive approximately 2 percent of their allowed claims.

On May 16, 2007, GBFCU filed an objection to plan confirmation ("Plan Objection") (Dkt# 13) and a supplement to the objection on June 19, 2007. ("Supplemental Plan Objection") (Dkt #26) GBFCU asserts that the proposed plan undervalues the Chevy Pickup and provides inadequate interest. It also asserts that the proposed plan provides for inadequate interest on the Harley Claim. The Supplemental Plan Objection asserts that the plan violates the certain language of Section 1325(a) by attempting to value the Chevy Pickup under Section 506(a) when it was purchased within 910 days prior to the commencement of the case.

The Trustee also filed an objection to plan confirmation (Dkt# 16) and a motion to dismiss the case. (Dkt# 19) The Trustee's objection was based on an apparent failure by the Debtor to provide copies of his 2005 and 2006 tax returns, while the Trustee sought dismissal on

the additional ground that the Debtor's proposed plan could not be confirmed. The Trustee also filed an objection to Debtor's claim to an exemption of the motorcycle under Section 21.090(1)(f) of the Nevada Revised Statutes (Dkt # 17), to which the Debtor responded (Dkt# 28) by asserting that the motorcycle can be exempted as one vehicle under that Section and that the Chevy Pickup can be exempted as a tool of the Debtor's trade under Section 21.090(1)(d).

On August 17, 2007, Debtor filed an objection to the Chevy Claim ("Claim Objection") (Dkt# 31) to which GBFCU filed a written response. ("GBFCU Response") (Dkt# 34) A written reply was filed by the Debtor on September 18, 2007. ("Claim Objection Reply") (Dkt# 36) In his Claim Objection, Debtor asserted that the Chevy Pickup is used for work and therefore the Chevy Claim is subject to allowance under Section 506(a). GBFCU disputed this contention. On September 18, 2007, an initial hearing was conducted on the Claim Objection, along with the Chapter 13 Trustee's motion to dismiss and on confirmation of the Debtor's proposed Chapter 13 plan. Because the outcome of the Claim Objection would resolve the other two matters, a combined evidentiary hearing was scheduled. After the evidentiary hearing was concluded, additional briefs were submitted by the Debtor ("Debtor's Post-Trial Brief") (Dkt# 44) and by GBFCU. ("GBFCU Post-Hearing Brief") (Dkt# 47)

DISCUSSION

At the evidentiary hearing, GBFCU presented the testimony of Lindsay Jones and while the Debtor testified on his own behalf. The parties stipulated to the admission of the exhibits offered at the hearing. No other evidence was presented

A. Applicable Legal Standards.

1. The Burden of Proof on a Claim Objection.

A properly completed proof of claim constitutes prima facie evidence of its validity. See Fed.R Bankr.P. 3001(f). This is true even if the proof of claim is executed by the creditor's attorney rather than the creditor or a principal of the creditor. See In re Garner, 246 B.R. 617, 622 (9th Cir.B.A.P. 2000). An objecting party must present sufficient evidence and "show facts tending to defeat the claim by probative force equal to the allegations of the proofs

of claim themselves." In re Holm, 931 F.2d 620, 623 (9th Cir. 1991); In re Abbate, 187 B.R. 9, 12 (D.Nev. 1995). The evidence must be such that "if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." See Lundell v. Anchor Construction Specialists, Inc. (In re Lundell), 223 F.3d 1035, 1040 n.2 (9th Cir. 2000).

2. The Burden of Proof on Plan Confirmation.

For a bankruptcy court to confirm a Chapter 13 plan, "each of the requirements of section 1325 must be present and the debtor has the burden of proving that each element has been met." In re Barnes, 32 F.3d 405, 407 (9th Cir.1994). See, e.g., Ho v. Dowell (In re Ho), 274 B.R. 867, 883 (9th Cir. B.A.P. 2002)(debtor has the burden of proving good faith under Section 1325(a)(3)). The Court will apply a preponderance of evidence standard of proof in absence of any indication in Section 1325(a) that a higher standard applies. Compare Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed. 2d 755 (1991)(preponderance of evidence standard applied in dischargeability litigation where language of Section 523 and legislative history are silent as to standard of proof).

B. The Evidentiary Record.

1. The Documentary Evidence Presented.

Although copies of a variety of documents were attached to the pleadings filed by the parties in connection with the claim objection and plan confirmation, only three documents were admitted at the hearing. Debtor's Exhibit "1" is a copy of a Simple Interest Vehicle Contract and Security Agreement ("Purchase Contract") signed by the Debtor to purchase the Chevy Pickup from Reno Mazda, a car dealership located in Reno, Nevada. GBFCU's Exhibit "1" is a copy a Credit Application signed by the Debtor in connection with the purchase of the Chevy Pickup. GBFCU's Exhibit "2" is a copy of the Certificate of Title issued to the Debtor for the Chevy Pickup that reflects GBFCU as the lienholder.

Section "B" of the Purchase Contract sets forth the amount financed for the purchase of the vehicle ($30,208.00), the annual percentage rate (6.75%), the amount of the monthly payments ($512.83), the beginning date of payments (02/02/2005), and the last date of payment

(01/02/2011). Over a period of 72 months, the total of all payments also is set forth ($36,923.76).

Section "C" of the Purchase Contract itemizes the amount financed by the Debtor. Parts 1 through 4 include the selling price of the pickup, sales taxes, government fees, and an extended service contract, resulting in a total cash sales price. The total cash sales price in Part 5 is shown as $31,928.13. Part 6 reflects a gross trade-in allowance of $22,700 for the Debtor's prior vehicle, a 2001 Ford F-150 pickup, less a payoff balance of $22,200, for a net trade-in value of $500. Part 7 reflects a total down payment of $1,200.13, which apparently was the result of a sales tax credit for the trade-in, i.e., none of the down payment was attributable to cash, manufacturers' rebate or other forms. Part 8 reflects that the net trade-in value of $500 plus the total down payment of $1,220.13, was deducted from a total cash sales price of $31,928.13, to yield a total amount financed of $30,208.00.

Section "D" of the Purchase Contract reflects the date of the transaction as being December 19, 2004, and describes the vehicle purchased and its vehicle identification number. Section "D" also includes boxes denoting three options to specify the "use for which" the vehicle is purchased: Personal, Business, and Agriculture. Only the box for "Personal" use is checked.

The Credit Application is dated the same as the Purchase Contract, i.e., December 19, 2004, and is signed by the Debtor. It shows the Debtor's occupation as "driver" and his employer as Luce & Son at an address in Reno, Nevada. It indicates that he had been employed at Luce & Sons for 10 years. Debtor's address is shown as being in Sparks, Nevada, which is the same as shown on the Purchase Contract.

The Certificate of Title is dated January 12, 2005, and includes the same vehicle identification number as set forth in the Purchase Contract. It shows an address for the Debtor that differs from that shown on the Purchase Contract and the Credit Application. It also differs

from the address shown on the bankruptcy petition.[2]

Copies of the Purchase Contract and the Certificate of Title also are attached to the Chevy Claim. The claim shows January 3, 2005 as being the date the debt was incurred to GBFCU. The parties do not dispute that January 3, 2005 reflects the date the Purchase Contract was acquired by GBFCU from Reno Mazda. Also attached is a copy of a "Wholesale/Retail Breakdown" from Kelly Blue Book for the period March-April 2007 reflecting wholesale/retail value range of $18,825 to $23,105 for a 2004 Chevrolet Silverado pickup[3].

2. The Testimony of the Debtor.

Debtor testified that at the time signed the Purchase Contract he also owned a 2001 Ford F-150 pickup ("Ford Pickup"). He testified that he thought the Ford Pickup was worth $17,000 at that time, but that he owed approximately $22,200. Debtor also stated that he believes he could have purchased the Chevy Pickup without trading in the Ford Pickup.

Debtor testified that he thought the Chevy Pickup was worth $24,000 or $25,000 when he bought it and that he has been told that he would be lucky to sell it for $15,000 or $16,000 currently.

Debtor testified that he currently is employed at Lakeside Transport as a Class A heavy haul driver. He also stated that the Chevy Pickup is necessary for his current occupation. His explanation was that he uses it to go to and from work, that on numerous occasions he has used it to retrieve equipment for his employer, and that he sometimes uses it to pilot[4] other heavy haul

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[2] Curiously, Item 15 of the Debtor's Statement of Financial Affairs reflects neither of the two different addresses shown on the Purchase Contract, the Credit Application, and the Certificate of Title.

[3] Attached as Exhibit "E" to the Plan Objection is another Kelly Blue Book valuation for the period May-June 2007. As noted in Debtor's Post-Trial Brief, however, that exhibit was never admitted into evidence. See Debtor's Post-Trial Br. at 5:20.

[4] "Pilot" means that he drives the pickup ahead of trucks carrying oversized loads to warn oncoming traffic. The pickup is outfitted with a sign warning of the oversized load and a flashing beacon.

trucks.

Debtor testified that at the time he purchased the Chevy Pickup he worked as a driver for a beer distributorship. The beer distributorship provided its own vehicle. He testified that he did not use the Chevy Pickup for work at the time he purchased it. Rather, he indicated that he used the vehicle for work after he started working for his current employer.

On cross-examination, Debtor identified the beer distributorship as Luce & Sons and he reiterated that he did not use the Chevy Pickup for work. Debtor also reiterated that he signed the Purchase Contract, but stated that it was filled in by sales personnel at Reno Mazda. As to his estimate of the trade-in value of the Ford Pickup, he explained that it was based on his conversations with sales personnel at the dealership. He also testified that he is not an expert on car values and that he is not in the car sales business. Debtor acknowledged that the Purchase Contract reflects a trade-in allowance for the Ford Pickup in excess of the amount owed, but asserted that "it was not the way it turned out to be. Because I ended up owing them money because the payoff was more on the truck."

He also testified that he signed the Credit Application, that he has never been married, and that the Credit Application accurately reflected that he was employed with Luce & Sons.

Debtor also testified on cross-examination that he uses his motorcycle to get to and from work on the rare occasions when his Chevy Pickup is loaded with materials and is left at work. So as to limit exposure to theft, the Debtor clarified on re-direct that the vehicle is left in his employer's "yard", rather than being parked in front of his home, if it is loaded with heavy equipment.

3. The Testimony of Lindsay Jones.

Lindsay Jones testified that she is the collection supervisor for GBFCU and began working there in 2002. She is familiar with the Debtor's loan account and testified that the debt under the contract arose 843 days prior to the bankruptcy petition was filed. She testified that GBFCU rarely makes business vehicle loans because of the increased wear and tear on the vehicle and attendant depreciation. She testified that if Section "D" of the Purchase Contract had

indicated the Chevy Pickup to be for business rather than personal use, it would have affected GBFCU's decision to acquire the Purchase Contract from Reno Mazda.

Ms. Jones also testified that GBFCU would have considered the Debtor's debt-to-income ratio if he had attempted to purchase the Chevy Pickup without trading in the Ford Pickup. She indicated that there was a possibility that the loan would not have been approved without a trade-in since there would be questions as to whether the Debtor could afford more than one vehicle.

She also testified that GBFCU's financing agreement with car dealerships would be violated if a trade-in vehicle is listed for more than what it actually is worth. She explained that no dealership would hide "negative equity" in a purchase contract since they would be losing money on the new sale. Moreover, if financing of negative equity had taken place, she testified that it would have been reflected in the Purchase Contract which instead reflected in Item 6 of Section "C", a credit of $500. She concluded that GBFCU did not finance any negative equity in connection with the Ford Pickup trade-in.

Ms. Jones also testified that the purchase of an extended service contract was not required for the Debtor to acquire the Chevy Pickup.

On cross-examination, Ms. Jones testified that she has 30 units of college credits and has worked in the collections department at GBFCU for almost five years. As a collections supervisor, she testified that she has many duties, including the collection of delinquent accounts. She also testified that she is not in the loan approval department of GBFCU and became familiar with the Debtor's account only after it went into collection status. She did not know why GBFCU approved the transaction but was aware the Debtor does have two vehicles currently financed by GBFCU, presumably the Chevy Pickup and the motorcycle. Ms. Jones testified that she has no independent knowledge as to whether GBFCU would have approved the loan if the Debtor had not traded in the Ford Pickup.

Ms. Jones acknowledged that the Debtor signed the Purchase Contract on December 19, 2004, but did not know when GBFCU agreed to provide financing. She acknowledged that title was issued on January 12, 2005, according to the Certificate of Title, but could not specify the

date that GBFCU approved the transaction.

She also testified that she has no independent knowledge of the value of the Chevy Pickup on the date it was purchased nor what the Ford Pickup was worth at the time it was traded in. Ms. Jones acknowledged that the selling price for a vehicle is not necessarily equal to its value.

On redirect, Ms. Jones reiterated that she is not in the GBFCU loan department. However, she testified that she has knowledge of her employer's loan approval policies through her experience in the collections department and that cross-training occurs between the loan approval and collections departments. She further testified that there usually is only a very short period of time that elapses between the time when a vehicle purchase contract is signed by a buyer and the time when the contract is acquired by GBFCU. On redirect, Ms. Jones confirmed that she has never been in the lending department for GBFCU.

C. The Applicability of Section 1325(a).

Section 1325(a)(5) permits a Chapter 13 plan to provide various treatments of secured claims. Permissible treatments include those that are simply consented to by the secured creditor, see 11 U.S.C. §1325(a)(5)(A), those involving the surrender of the collateral to the secured creditor, see 11 U.S.C. §1325(a)(5)(C), and various forms of nonconsensual treatment requiring retention of liens and periodic payments equal to the allowed amount of the secured creditor's claim. See 11 U.S.C. §1325(a)(5)(B). Ordinarily, under Section 506(a) a secured claim is allowed to the extent of the value of the underlying collateral while the balance owed on the claim is allowed as an unsecured claim.[5] The nonconsensual or forced treatment alternative under Section 1325(a)(5)(B) is commonly referred to as a "cramdown" of a secured claim.

The so-called "hanging paragraph" appearing at the end of Section 1325(a) provides in pertinent part that "For purposes of paragraph (5), section 506 shall not apply to a claim

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[5] Section 506(a) provides in pertinent part 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...." 11 U.S.C. § 506(a).

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 preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle...acquired for the personal use of the debtor..." If Section 506(a) does not apply, then the creditor's claim cannot be bifurcated into an allowed secured claim limited to the value of the collateral for purposes of a cramdown under Section 1325(a)(5).

As previously noted, Debtor's plan proposes to value the Chevy Pickup at $14,000, to treat GBFCU's claim as an allowed secured claim in that amount pursuant to Section 506(a)(1), and to force GBFCU to accept payments as a secured creditor under Class 2 pursuant to Section 1325(a)(5)(B). The balance owed on GBFCU's claim would be paid as a general unsecured claim under Class 7).[6]

GBFCU contends that the Debtor is prohibited by the hanging paragraph from relying on Section 506(a) to determine the allowed amount of its secured claim. If this is correct, then the Debtor would be required to treat the full amount of its claim as being secured, resulting in an increase in the amount of the monthly payments required under Class 2 of the plan. In In re Rodriguez, supra, the Bankruptcy Appellate Panel noted that "pursuant to the hanging paragraph, section 506 does not apply if (1) the creditor has a purchase money lien, (2) the debt was incurred within 910 days before the petition date, and (3) the collateral is a motor vehicle acquired by the debtor for his or her personal use." 375 B.R. at 541. See also In re Trejos, 374 B.R. 210, 215 (9th Cir. B.A.P. 2007)[7]. Debtor argues that elements (1) and (3) are not met, thereby permitting GBFCU's claim to be bifurcated into secured and unsecured components

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[6] Debtor is seeking retain the Chevy Pickup rather than to surrender it in full satisfaction of the amount owing to GBFCU, including any deficiency. Surrender of a vehicle encompassed by the hanging paragraph in full satisfaction of the entire debt, including a deficiency claim, is not permitted. See In re Rodriguez, 375 B.R. 535, 546-48 (9th Cir. B.A.P. 2007).

[7] The Bankruptcy Appellate Panel affirmed the decision of the bankruptcy court for this judicial district reported at 352 B.R. 250 (Bkrtcy.D.Nev. 2006)(Markell, J.).

under Section 506(a). More particularly, Debtor contends that GBFCU does not have a purchase money security interest in the Chevy Pickup, and that it was purchased for business rather than personal use. There is no dispute that the Chevy Pickup was acquired by the Debtor within 910 days prior to the commencement of his bankruptcy case.

1. Purchase Money Status.

Section 104.9103 of the Nevada Revised Statutes defines a "purchase money obligation" to mean "an obligation...incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used...." N.R.S. § 104.9103(1)(b).[8] Subsections (5), (6) and (7) do not expressly apply in consumer goods transactions, and the court is left with "the determination of the proper rules in consumer goods transactions". Nev.Rev.Stat. § 104.9103(8). That subsections (5), (6) and (7) do not expressly apply, however, does not limit "the nature of the proper rule in consumer goods transactions" and the court "may continue to apply established approaches." Id.

Debtor argues that his obligation to GBFCU is a "mixed transaction" having both purchase money, i.e., the Chevy Pickup, and non-purchase money components, i.e., "negative equity" in the Ford Pickup trade-in, and the extended service contract. See Debtor's Post-Trial Brief at 8:5-8. He then argues that the transaction must be treated under either the "transformation rule" or the "dual status rule" applicable to mixed transactions. Both rules are commonly explained as follows:

> With respect to transactions involving consumer goods, Article 9 leaves to the courts the determination of the proper rules regarding whether a purchase-money security interest will retain its status as such or will transform into a regular security interest. Courts tend to apply one of two different analyses, the "transformation rule" or the "dual status rule."

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[8] While some courts have concluded that a federal definition of "purchase money" should be developed to carry out the purposes of the hanging paragraph, see, e.g., In re Westfall, 376 B.R. 210, 217-19 (Bkrtcy.N.D.Ohio 2007) and In re Mitchell, 379 B.R. 131, 139-40 (Bkrtcy.M.D.Tenn. 2007), the Bankruptcy Appellate Panel for this circuit has looked to state law for determination of the issue. See In re Trejos, supra, 374 B.R. at 215.

> According to the "transformation rule," once collateral secures not only its own purchase price but also that of other items, then the purchase-money security interest that existed before the "add-on" procedure is transformed into nonpurchase-money status. In some jurisdictions applying the transformation rule, however, if there is a statutory or contractual mechanism for determining the extent of the purchase-money interest, then the purchase-money security interest does not transform into a regular security interest. Thus, if consumer goods secure any indebtedness other than their own, and there is no formula for the application of payments, the security interest in those goods transforms from a purchase-money security interest to a security interest. According to this rule, a purchase-money security interest in collateral also loses its status when consolidated with a subsequent nonpurchase-money loan.
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> Some authorities hold that a secured obligation may possess a dual status by having a purchase-money part and a nonpurchase-money part. According to this "dual status" rule, add-on debts or cross collateralization do not transform the purchase-money security interest into a nonpurchase-money interest. Specifically, the existence of a nonpurchase-money security interest in goods does not terminate the purchase-money security interest in such goods to the extent that the collateral continues to secure its own price, even though it may also secure the payment of other property. In other words, a security interest may simultaneously have the status of a purchase-money security interest to the extent that it is secured by collateral purchased with the loan proceeds and the status of a general security interest to the extent that the collateral secures obligations unrelated to its purchase.
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> Under the dual status rule, the allocation of payments between various purchases may be made by agreement, mandated by statute, or provided by the court. Courts have held that a "first in, first out" allocation allows a seller to retain a purchase-money security interest in an item until the purchase price is fully paid and prevents creditors from retaining title to, or a purchase-money security interest in, goods for which the purchaser has completely paid.

79 C.J.S., Secured Transactions § 12 (Footnotes omitted.)(database update Feb. 2008).

Debtor argues that the transformation rule should apply to render GBFCU's financing a non-purchase money transaction that is not encompassed by the hanging paragraph of Section 1325(a). See Debtor's Post-Trial Brief at 8:2 to 10:14.[9]

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[9] No argument is made that the dealership's assignment of the security interest to GBFCU invalidated the security interest. The Bankruptcy Appellate Panel rejected that argument in Trejos, supra, 374 B.R. at 221.

Debtor argues that GBFCU financed the "negative equity" in the Ford Pickup that was used as a trade-in rather than the acquisition of the Chevy Pickup. Debtor's assertion that negative equity was involved in the transaction, however, is belied by the terms of the Purchase Contract that the Debtor signed. Debtor does not dispute that approximately $22,200.00 was owed on the Ford Pickup at the time of the transaction. He does not dispute that he was credited with $22,700.00 for the Ford Pickup as a trade-in. He does not dispute that he received a trade-in sales tax credit as well.

His testimony that he believed the Ford Pickup to have been worth $17,000 on December 19, 2004, is based solely on conversations he had with sales representatives at the dealership. Beyond any obvious hearsay concerns regarding the statements of the sales representatives, it also appears that the statements attributed to the sales representatives were based on unspecified "blue books" which themselves would be hearsay.[10] Coupled with Debtor's acknowledgment that he has no expertise in car sales nor is not in the car sale business, his testimony as to the value of the Ford Pickup almost three years ago is accorded no weight.[11]

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[10] Interestingly, Debtor argues that the $22,700 amount credited for the Ford Pickup on the Purchase Contract would have been objected to as hearsay if anyone testified to that value at the evidentiary hearing. See Debtor's Post-Trial Brief at 6:3-5. Since the Debtor admittedly is not an expert in car sales and does not otherwise qualify to give an expert opinion as to the value of the vehicle, he would not be able to render an opinion based on inadmissible hearsay. Compare Fed.R.Evid. 703 ("...If of a type reasonably relief upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.") See, e.g., In re Colonial Realty Co., 209 B.R. 819, 822 (Bkrtcy.D.Conn. 1997)(expert testimony on insolvency admissible even if based on hearsay and documents unavailable for review).

[11] Debtor is correct that an owner of property is competent to testify as to its value. See Debtor's Post Trial Brief at 5:11-16, citing Joe T. Dehner Dist. Inc. v. Temple, 826 F.2d 1463, 1466 (5th Cir. 1987) and Bingham v. Bridges, 613 F.2d 794, 796 (10th Cir. 1980). The weight to be given to a property owner's testimony, however, is at the discretion of the trier of fact. In this case, Debtor did not testify as to the condition of the Ford Pickup, or that he had solicited offers for it, or had surveyed prices offered for comparable vehicles. Instead, he simply related what he had been told by others. His testimony simply was not of "probative force" equal of the value stated in the Chevy Claim. Cf., In re Lundell, supra (debtor's claim objection testimony regarding his intent to form partnership was not credible and therefore insufficient to rebut

Similarly, Debtor's testimony that the Chevy Pickup was worth only $24,000 to $24,500 when he purchased it on December 19, 2004, is of little persuasive value. While that dollar range is certainly less than the vehicle sales price of $28,700 under the Purchase Contract, it does not compel the conclusion that the difference constituted disguised "negative equity" in the Ford Pickup that was financed by GBFCU. See Debtor's Post-Trial Brief at 6:12-17. At best the difference infers that the Debtor overpaid for the Chevy Pickup.[12] The Court concludes that there was no "negative equity" financing in this transaction at all.[13]

There is no dispute that the Purchase Contract includes the entry of $614.00 in Section C for purchase of an extended service contract. There also is no dispute that purchase of the extended service contract was not required for the Debtor to acquire the Chevy Pickup. The authorities are split on whether inclusion of an extended warranty or additional insurance, both of which maybe optional devices that protect the value of the vehicle for both the buyer and the seller, enable the purchase transaction to be completed. See generally In re Hayes, 376 B.R. 655, 671 n.22 (Bkrtcy.M.D.Tenn. 2007).

In Hayes, the bankruptcy court concluded that the inclusion of optional, additional insurance did not enable the debtor to acquire the vehicle in question and therefore was not encompassed by the hanging paragraph. 376 B.R. at 671-72. Inclusion of the additional

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allegations in proof of claim).

[12] Acceptance of Debtor's argument would mean that every claim encompassed by the hanging paragraph could be disputed by a debtor simply by asserting that, in hindsight, he paid more than the vehicle was actually worth and that the difference therefore represents a non-purchase money component.

[13] There is a split of authority on whether the presence of negative equity financing removes a transaction from the purchase money focus of the hanging paragraph. Compare In re Cohrs, 373 B.R. 107 (Bkrtcy.E.D.Cal. 2007)(negative equity of trade-in does not affect purchase money character under Section 1325(a)) with In re Mitchell, 379 B.R. 131 (Bkrtcy.M.D.Tenn. 2007)(inclusion of negative equity eliminates purchase money character under plain language of Section 1325(a)). Because no such financing is present in this case, it is not necessary to resolve the issue.

insurance, however, did not transform the entire transaction into a non-purchase money contract. Rather, the court concluded that application of the dual status approach better served the legislative intention behind the hanging paragraph of preventing debtors from purchasing vehicles shortly before bankruptcy to shed the depreciated value of the vehicle. Id. at 676.

A similar conclusion was reached by the bankruptcy court in In re Johnson, 380 B.R. 236 (Bkrtcy.D.Or. 2007). In Johnson, the court agreed with the analysis in Hayes and applied the dual status approach as better representing the purpose of the statute. 380 B.R. at 248.

In In re Riach, 2008 WL 474384 (Bkrtcy.D.Or. February 19, 2008), the bankruptcy court applied the dual status approach and fashioned a pro rata apportionment to the purchase money and non-purchase money components of the underlying transaction. 2008 WL 474384 at *5. This effectively preserved the purchase money status of the vehicle purchase, while allocating a proportionate share of the payments made and balance owing for the nonpurchase money component.

The conclusions reached by the courts in Hayes, Johnson, and Riach, are consistent with the decision of a bankruptcy court for this district in In re Linklater, 48 B.R. 916 (Bkrtcy.D.Nev. 1985)(Jones, J.). In the context of a conversion action for which a determination of dischargeability was sought under Section 523(a)(6), the court had to determine whether the creditor's purchase money security interest in jewelry sold to the debtor survived a consolidation with a subsequent purchase. The initial contract for purchase of jewelry included a mechanism to allocate payments toward subsequent purchases. The court looked to Nevada law to determine whether a purchase money transaction existed and discussed the transformation and dual status rules. Judge Jones noted that "the policy underlying the transformation rule is to prevent over-reaching creditors from retaining title to all items covered under the consolidated contract until the last item purchased is paid for." 48 B.R. at 919. The court also observed that "the rationale behind the dual status rule...allows a purchase money security interest in goods 'to the extent that' it secures the purchase price of the goods. The policies underlying U.C.C. § 9-107 are to encourage security agreements that benefit both buyer and seller, and to facilitate the

sale of consumer goods." Id. The court then concluded that "the policies underlying both the dual status rule and the transformation rule are served when the dual status rule is properly applied." Id. Judge Jones noted that proper application of the dual status rule involves the allocation of payments pursuant to the underlying agreement of the parties, application of a controlling statute, or through determination by the court. Id.[14]

Although the decision in Linklater was made in connection with a dischargeability proceeding, its rationale is no less persuasive in the context of Section 1325. Through the hanging paragraph, Congress apparently sought to protect certain vehicle sales contracts from alteration. Application of the dual status approach minimizes the effects of any alteration through allowing a purchase money security interest to the extent it secures the purchase of goods while encouraging security agreements that facilitate consumer sales transactions. Nothing in the language of the hanging paragraph or its legislative history compels a different conclusion. Thus, to the extent that the Purchase Contract included a non-purchase money component for the extended warranty, an allocation of the Debtor's payments between the Chevy Pickup and the extended warranty on a pro rata basis would be appropriate. See, e.g., In re Riach, supra.

2. Personal Use of the Chevy Pickup.

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[14] Prior to the decision in Linklater, an approach similar to the transformation rule was applied by the Ninth Circuit in Matthews v. Transamerica Financial Services (In re Matthews), 724 F.2d 798, 801 (9th Cir. 1984). Debtor argues that the circuit decision in Matthews supports his contention that the presence of the extended service agreement transformed the Purchase Contract into a nonpurchase money transaction. See Debtor's Post-Trial Brief at 10:3-14. In Matthews, however, the debtor obtained a purchase money loan to acquire various household goods and personal property. Thereafter, the debtor refinanced the loan to pay off the original purchase money loan and to provide additional cash. The Ninth Circuit concluded that the refinance resulted in a nonpurchase money transaction since none of the proceeds of the refinance were used to acquire the original collateral. 724 F.2d at 800-801. There was no factual basis or argument presented whereby the court could chose between applying a transformation rule instead of a dual status approach. The decision in Matthews simply does not support the conclusion advanced by the Debtor. See In re Acaya, 369 B.R. 564, 570 (Bkrtcy.N.D.Cal. 2007)(Matthews provided no factual basis for adoption of a dual status rule).

The hanging paragraph specifies that it applies to a vehicle "acquired for the personal use of the debtor...". GBFCU argues that when the Debtor originally purchased the Chevy Pickup from Reno Mazda, he indicated on the Credit Application that he was employed as a truck driver with Luce & Son for ten years and was provided a vehicle by his employer. In fact, Debtor testified that at the time he purchased the Chevy Pickup he worked as a driver for a beer distributorship that provided its own vehicle. On cross-examination, Debtor identified the beer distributorship as Luce & Sons and he reiterated that he did not use the Chevy Pickup for work at the time he purchased it. Rather, Debtor indicated that he used the vehicle for work after he started working for his current employer.

As additional evidence that the Chevy Pickup was not acquired for business use, GBFCU also refers to the Purchase Contract, Section D of which includes a box that was checked indicating that the vehicle was being acquired for personal use. Debtor testified, however, that the Purchase Contract was filled out by sales personnel at Reno Mazda and that he did not check the box. He also argues that checking a box on a purchase contract does not preclude the admission of parol evidence of the purchaser's purpose in acquiring a vehicle. See Claim Objection Reply at 2:12-16 and Debtor's Post-Trial Brief at 13:24 to 14:3, both citing In re Andoh, 370 B.R. 377 (Bkrtcy.D.Colo. 2007). Assuming that parole evidence may be admitted, however, the Debtor's testimony confirmed that at the time he purchased the Chevy Pickup from Reno Mazda it was not intended for business use since the beer distributorship already provided a vehicle. Beyond the highly unlikely occurrence that a beer distributor would have its products delivered in an unrefrigerated vehicle, there is no credible evidence that the box checked on the Purchase Contract was contrary to the Debtor's intended purpose when he acquired the Chevy Pickup.

Debtor argues that his current use of the Chevy Pickup for tasks at his present job takes the vehicle outside of the hanging paragraph. See Claim Objection at 3:5-6, Claim Objection Reply at 2:3-4, and Debtor's Post-Trial Brief at 13:19-23. He testified that at his current job with Lakeside Transport, he uses the vehicle to go to and from work, and that on numerous

occasions he uses the Chevy Pickup to retrieve equipment and to pilot other heavy trucks. He also leaves the vehicle, when loaded with equipment, in Lakeside Transport's yard, rather than risking theft if the loaded vehicle were parked in front of his residence. On those occasions, he takes his motorcycle into work presumably after having gotten a ride home the previous day. Debtor was not asked, nor did he testify as to how often he uses the Chevy Pickup for these purposes. In view of his present use of the vehicle, Debtor argues that under a "totality of circumstances" test, the Chevy Pickup falls outside of the hanging paragraph. See Claim Objection Reply at 2:4-9, citing In re Solis, supra, and In re Hill, supra.

While GBFCU does not dispute that the Debtor occasionally uses the Chevy Pickup at his place of employment, it essentially argues that the purpose of the hanging paragraph would be eviscerated if a debtor could simply start driving his car to work each day. See GBFCU Response at 4:2-7. The Court agrees. But what can be made of the Debtor's use of his vehicle to occasionally haul equipment for his employer and to pilot other vehicles hauling heavy loads? There is no indication in the record that the Debtor's employer, Lakeside Transport, requires the Debtor to use his vehicle for such purposes and no indication that the Debtor seeks a tax deduction for such use.[15] What happens on the days that the Debtor takes his motorcycle to work instead of the Chevy Pickup? Does the employer dock his pay, require him to go home and bring back the pickup, or simply use some other vehicle? It appears that it is the Debtor's decision to use the Chevy Pickup to drive to work and that he volunteers its use for the benefit of his employer. Compare In re Solis, supra, 356 B.R. at 410.

While such questions were not asked at the hearing, they need not be answered since the testimony clearly establishes that the Chevy Pickup was acquired for the Debtor's personal use at the time it was purchased from Reno Mazda. Ms. Jones testified that Debtor's personal use of

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[15] Compare In re Breen, 123 B.R. 357, 361 (9th Cir.B.A.P. 1991)(pickup truck used by carpenter subject to tools of trade exemption under Nevada law where debtor testified as to his reliance on the vehicle, provided photographs of the vehicle loaded with carpentry tools, and offered tax returns showing deductions for vehicle expenses incident to operation of carpentry business).

the vehicle was an important factor in GBFCU's decision whether to acquire the Purchase Contract. While Ms. Jones was not in the loan department for GBFCU and did not participate in the decision to acquire the Purchase Contract from Reno Mazda, her training in the loan approval process gave credibility to her testimony that GBFCU rarely makes commercial loans. The rationale stated was that business vehicles are subject to increased wear and depreciation, presumably making such vehicles less valuable as collateral. Her testimony was persuasive that the specification in Section D of the Purchase Contract that the Chevy Pickup was being acquired for personal rather than business use would have affected GBFCU's decision to acquire the Purchase Contract. No contrary testimony from any other witness was offered nor was her testimony outweighed by any other considerations presented or argued by the Debtor.

GBFCU also argued, in the alternative, that the term "personal" in the hanging paragraph describes who will be using the vehicle rather than the type of use for the vehicle. In other words, GBFCU contends that a debtor's personal use means that the vehicle was acquired for the debtor's use rather than for anyone other than the debtor. See GBFCU Response at 4:18 to 5:8.[16] Debtor testified at trial that he has never been married and no suggestion was made that the Chevy Pickup was purchased for anyone other than the Debtor. Apparently, Debtor sees little importance in the argument since he does not directly respond to it at all in his written materials nor was any contention to the contrary presented at the hearing.

While the Debtor's lack of response is not determinative, the Court also does not believe the argument is alone dispositive since it makes little sense for a debtor to be able to buy a vehicle for use by a third party within 910 days of the petition date, have the vehicle stripped of almost all value through excessive use in a business, and then be able to bifurcate the vehicle lender's claim under Section 506. Certainly the hanging paragraph was not intended to permit a

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[16] For this proposition, GBFCU cites the bankruptcy courts' decisions in In re Jackson, 338 B.R. 923 (Bkrtcy.M.D.Ga. 2006); In re Finnegan, 358 B.R. 644 (Bkrtcy.M.D. Pa. 2006); In re Press, 2006 WL 2734335 (Bkrtcy.S.D.Fla. 2006); In re Solis, 356 B.R. 398 (Bkrtcy.S.D. Tex. 2006); and In re Hill, 352 B.R. 69 (Bkrtcy.W.D.La. 2006).

cramdown in this scenario while not permitting a cramdown by a debtor who buys a car to make trips to the grocery store. Rather, the Court believes that intended user of the vehicle is simply a factor that may be considered in determining whether the vehicle was acquired for personal use of the debtor. In this case, Debtor does not suggest that the Chevy Pickup was acquired for anyone other than himself.

Under these circumstances, the Court concludes that the Chevy Pickup was acquired for personal use by the Debtor within the meaning of the hanging paragraph.

D. Valuation of the Chevy Pickup.

The parties' dispute over the valuation of the Chevy Pickup does not require resolution given that the hanging paragraph prohibits the Debtor from bifurcating the Chevy Claim into secured and unsecured components under Section 506(a). If a valuation was required, however, the Court notes that it previously gave no weight to Debtor's opinion as to the value of the Ford Pickup based on his lack of expertise in car sales, his reliance on hearsay statements of sales personnel, and the lack of contemporaneous knowledge. Additionally, the Court similarly gave no weight to the Debtor's opinion as to the value of the Chevy Pickup at the time he purchased the vehicle.

As to the current value of the vehicle, Debtor testified that he could sell it to a private party for between $15,000 and $16,000, based on what he was told by sales personnel. He testified that sales personnel told him the market is "flooded" with such vehicles. As was the case with the Ford Pickup, Debtor's testimony was based entirely on what he was told by others, rather than on his own knowledge regarding his vehicle. He did not identify the sales personnel nor did he indicate the basis for their information. Debtor expressed no other basis for his opinion other than what he had been told by the unidentified sales personnel. While an owner of property ordinarily is competent to testify as to its value, an owner cannot simply be the mouthpiece for an out of court declarant. Because the Debtor is not an expert in the valuation of vehicles, the Court assigns no weight to such testimony.

Under the circumstances, the Debtor would not meet his burden in objecting to the Chevy

Claim to which is attached a copy of a Kelly Blue Book wholesale/retail valuation showing range between $18,825 and $23,105 as of March-April 2007 for a 2004 Chevrolet Silverado pickup. While resort to a Kelly Blue Book valuation may provide only a "superficial analysis", see Irby-Greene v. M.O.R., Inc., 79 F.Supp.2d 630, 636 n.22 (E.D.Va. 2000), it may be a sufficiently reliable indicator of the value of a used vehicle under Federal Rule of Evidence 803(17). See generally In re Finnegan, supra, 358 B.R. at 649. If it was necessary to decide the issue, the Court would conclude that the Debtor has not provided evidence to overcome the prima facie validity of GBFCU's secured proof of claim.

E. The Appropriate Interest Rate.

Although Debtor is prevented by the hanging paragraph from bifurcating the Chevy Claim into secured and unsecured components under Section 506(a), the full amount of GBFCU's claim still may be subject to "cramdown" treatment under Section 1325(a)(5)(B). See In re Trejos, supra, 352 B.R. at 266. Under this cramdown alternative, a secured creditor can be forced to accept a stream of payments that have a "value, as of the effective date of the Chapter 13 plan,...not less than the allowed amount of such claim". 11 U.S.C. § 1325(a)(5)(B).

The parties dispute the appropriate interest rate to be paid on the Chevy Claim[17]. In Trejos, the bankruptcy court observed:

> Nothing in the specific language of the hanging paragraph changes the "effective date" language that historically has allowed debtors to return to secured creditors the allowed amount of their claims at a market rate of interest. Moreover, ever since Till v. SCS Credit Corporation, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004), the calculation of the interest rate has been routinized; in this district, parties typically begin with [the] prevailing prime rate, and then adjust it for relative risk. Although this method contains many methodological errors, it is the method that the Supreme Court has indicated that lower courts should adopt, and nothing specific in BAPCPA, or legitimately implied by other provisions of BAPCPA, changes this result. (Footnotes omitted.)

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[17] According to Chevy Claim, the Debtor owed $22,131.28 to GBFCU under the Purchase Contract as of April 17, 2007.

352 B.R. at 267. It further noted that "Under Till, the evidentiary burden falls squarely on [the objecting creditor] to establish the need for an interest rate higher than the one proposed by the Chapter 13 debtor." Id. at 268.[18]

GBFCU argues that under Till and Trejos, the national prime rate of interest should be the starting point, and that an upward adjustment of 1.5% is appropriate. See GBFCU Post-Hearing Brief at 14:11-13. Its rationale is that the proposed adjustment compensates for the 60 month plan duration and the depreciating nature of the vehicle. Id. at 14:11-14. Arguing that the prime interest rate is currently 7.25%, GBFCU maintains that an interest rate of 8.75% should be required for Debtor's payments on the Pickup Claim. Id. at 14:10-15.

Debtor does not dispute that the prime interest rate as of the confirmation hearing is 7.25%. In contrast, the Purchase Contract provides for an interest rate of 6.75% per annum. In spite of the formula articulated in Till and applied in Trejos, the Debtor argues that the contract rate should apply in this case. See Debtor's Post-Trial Brief at 14:22. Debtor argues that because he is steadily employed, has made his plan payments, and insures and maintains the vehicle, the maximum upward adjustment in interest should be 1%, see id. at 14:20-25, meaning no more than a 7.75% interest rate.

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[18] Oddly enough, Class 2 of the Debtor's proposed plan provides, in pertinent part, that "If no interest rate is specified below to provide the creditor with the present value of its allowed secured claim, 10% per annum will be imputed and paid on the claim." Below this language, Class 2 includes a table of creditors that lists the Chevy Claim but specifies no interest rate. Under the quoted language from the proposed plan, it appears that the plan provides an interest rate of ten percent for the Chevy Claim. In spite of this language, GBFCU has objected to the lack of an interest rate being specified in the Class 2 table, see Plan Objection at 3:9-10, even though the quoted language results in an interest rate that exceeds the 6.75% rate specified in the Purchase Contract. Based on the dispute presented, the Court can only infer that the Debtor intends or has expressed an intent to amend Class 2 of the proposed plan to provide the interest rate specified by the Court.

The Purchase Contract has a six year term, providing for payments on the 2004 Chevy Pickup for 72 months beginning February 2, 2005 and ending on January 2, 2011. Debtor's proposed plan provides for payments beginning in April or May 2007 for 60 months, with the final payment in April or May 2012. By the time the plan would be completed, the Chevy Pickup will have an additional 9 or 10 months of wear and tear and depreciation beyond the payoff date contemplated by the Purchase Contract.

Due to the increased risk posed by the extended payment term, the Court concludes that a modest upward adjustment is appropriate in this case. Accepting 7.25% as the applicable prime rate, a .50% adjustment will be applied, resulting in an interest rate of 7.75% applicable to treatment of the Chevy Claim.

CONCLUSION

Debtor's Objection to the Chevy Claim will be overruled. GBFCU's objection to confirmation of Debtor's proposed plan will be sustained and confirmation of the plan will be denied without prejudice. Any amended plan submitted by the Debtor will require treatment of the Chevy Pickup claim that is not inconsistent with the hanging paragraph under Section 1325(a). To the extent any amended plan proposes for the Debtor to retain the Chevy Pickup, an upward adjustment of .50% above the then-current prime rate of interest will be required[19]. Separate orders have been entered concurrently herewith.

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[19] GBFCU originally objected to the proposed plan treatment of the Motorcycle Claim under Class 2 whereby the full amount of the claim would be paid at 8% interest rather than 10.25%. See Plan Objection at 2:12-16 and 4:12-17 and Supplemental Plan Objection at 2:9-22. This aspect of the confirmation objection was never addressed at the plan confirmation hearing nor was it raised in the post-hearing briefs. It is not clear whether GBFCU has abandoned the objection. Should it choose to do so, GBFCU may raise the issue, if necessary, in connection with any amended plan that the Debtor submits.

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