NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the Matter of	:	Case No. 10-48532/JHW
John Riley, Jr. d/b/a John Riley Landscaping	:	
Debtor	:	**OPINION**

APPEARANCES: Mark W. Ford, Esq.
P.O. Box 110
4½ Broadway
Gloucester City, New Jersey 08030
Counsel for the Debtor

David R. Lyons, Esq.
Hillary Veldhius, Esq.
Lyons, Doughty & Veldhius, P.C.
136 Gaither Drive, Suite 100
Mt. Laurel, New Jersey 08054
Counsel for Ally Financial Inc.

The debtor seeks here to "cram down," or reduce, a secured claim provided for in his Chapter 13 plan to the replacement value of its collateral, a seven year old pickup truck used by the debtor for business purposes. Characterizing the condition of his vehicle as "poor" to "very rough," the debtor proposes to establish an independent base value for the truck, based on expert testimony, to factor in the expected cost of repairs, and to pay this claim over the course of his plan at a reduced interest rate as predicated under Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed.2d 787 (2004). The creditor disagrees with the debtor's proposed starting point for the valuation

process and challenges the final valuation and interest rate proposed by the debtor for this vehicle. For the reasons expressed below, the creditor's objection is sustained in part. For cramdown purposes, the vehicle's valuation will be based on the expert's independent valuation without deduction for the cost of repairs, as adjusted, cross-checked and synthesized with the applicable valuation guides.

FACTS

John Riley, Jr., d/b/a John Riley Landscaping, filed a voluntary petition under Chapter 13 of the Bankruptcy Code on December 14, 2010.[1] As is relevant here, the debtor listed as an asset a 2004 Chevrolet Silverado 1500 Series truck, with an extended cab and approximately 136,000 miles[2] on it, with a value of $1,500.00. In Schedule D, the debtor listed GMAC as the secured lender for the vehicle with a claim of $9,500. In his initial Chapter 13 plan, the debtor proposed to make payments of $250 per month for 60 months

[1] It is noted that the debtor is not eligible for a Chapter 13 discharge in this case. The debtor previously filed a joint voluntary petition under Chapter 7 on August 16, 2007 and received a discharge on November 30, 2007. His case was closed on December 18, 2007. Section 1328(f)(1) prohibits the debtor from receiving a Chapter 13 discharge where he has previously received a Chapter 7 discharge in a case filed within the 4 year period preceding the filing of the current case. 11 U.S.C. § 1328(f).

[2] The debtor's supplemental submission states that the vehicle has "over 300,000 miles driven on it at the time of the petition filing." This is over double the number of miles indicated in the debtor's petition and double the amount shown in the picture of the vehicle's odometer taken three months post-petition. Counsel's erroneous factual representation on this point will be disregarded.

to satisfy administrative expenses and cure arrearages on a home mortgage.[3] The debtor also proposed to cram down GMAC's secured claim from $9,500 to $1,500, and to pay the $1,500 over the course of the debtor's plan with 5% interest.

On February 15, 2011, Ally Financial Inc., f/k/a GMAC, [hereinafter "Ally"] filed a secured proof of claim in the amount of $12,433.61, based upon a claim in the amount of $9,517.89 with interest at 5.25% over 60 months. The proof of claim sets the value for the vehicle at $9,517.89. The underlying retail installment sale agreement was originally executed between the debtor and Lucas Chevrolet Geo, Inc. on September 7, 2004. At that time, the debtor borrowed $28,400.00 at 9.70% interest. Ally seeks payment of its claim through the debtor's plan at an interest rate of 5.25%, which reflects the current prime rate plus a risk factor.

On February 21, 2011, Ally filed an objection to confirmation, asserting that the debtor's proposed valuation of $1,500 was incorrect, and suggesting to the court that the December 2010 edition of the National Automobile Dealers Association ("NADA") Official Used Car Guide should be used to value the

[3] On January 14, 2011, the debtor filed an amended plan increasing the payments to $500 a month for 60 months, including adequate protection payments to another creditor and adding a provision to cure a separate arrearage on another car loan. A second modified plan, filed on March 4, 2011, increased payments to $646 per month, and a third modified plan, filed on July 8, 2011, increased payments to $983 per month. Confirmation is scheduled for September 14, 2011.

debtor's vehicle. Ally declared that an equivalent 2004 Chevrolet Silverado would be valued in the appropriate NADA Guide with a wholesale value of $7,925 and a retail value of $11,025. In support of this contention, Ally attached a copy of an NADA Vehicle Summary for the debtor's vehicle as of February 15, 2011, two months post-petition. The February 2011 summary reflected a base "Clean Retail" value of $13,050 and a base "Clean Trade-In" value of $9,950, along with a mileage adjustment of $2,025 for both categories, for final totals of $11,025 and $7,925, respectively.[4] Citing to Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L.Ed.2d 148 (1997), Ally asserted that the NADA retail value most closely represents the replacement value for the debtor's vehicle, and since the debtor's payoff amount was less than the NADA retail value, Ally requested not only its total claim, but also $350 in contractual counsel fees.[5] Citing to Till, Ally also sought a 6.25% interest rate (in contrast to the 5.25% originally referenced in its proof of claim), comprised of a 3.25% prime rate and a risk factor of 3%.

Oral argument was considered on May 19, 2011 at which time testimony was presented from both the debtor and the debtor's expert. The debtor

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[4] The December 2010 NADA Eastern Edition Used Car Guide lists a Clean Retail value for a 2004 Chevrolet Silverado 1500 Series truck with an extended cab of $12,050, a Clean Trade-In value of $9,100 and a mileage adjustment of $1,525, resulting in adjusted values of $10,525 and $7,575, respectively.

[5] The contractual support for these fees was not provided. Reasonable fees, costs or charges provided for under a retail installment agreement would be allowable if the value of the vehicle exceeded the amount of the allowed secured claim. 11 U.S.C. § 506(b).

described the Silverado's condition as "mashed," in "poor, poor condition," "just beat up," and "destroyed."[6] He explained that the vehicle was a work truck that he used in the course of his landscaping and hardscaping business to pull a trailer, to haul heavy equipment and to store tools and other equipment inside. He described the interior as dirty, smelly, with gas and oil stains, and he noted that the driver's side seat was ripped. He pointed out that the exterior had various dings and dents from work use and accidents, and that both the front and rear bumpers were damaged. He stated that the truck's transmission was "slipping" and needed to be repaired. He asserted that the brakes "were completely shot" prior to filing for bankruptcy and that he was recently forced (post-petition) to have them repaired at a cost of $700-800.[7] He testified also that he had had the motor and rear end rebuilt in the last 2-3 years.[8] In addition, he claimed that the vehicle would not pass inspection, due in September, because the "check engine" light was on.

The debtor's expert, Ronald Pritchett of Wayne's Auto Sales in Somerdale, New Jersey, characterized the overall condition of the vehicle as "poor" to "very rough". See Appraisal at 1. He confirmed the interior/exterior defects described by the debtor, and noted, as the debtor had done, that the vehicle required a transmission overhaul, new brakes and rotors, and service for the "check engine" warning light. In his written appraisal, he provided a

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6 T5-21 to 6-1 (5/19/2011).
7 T16-20 to 24.
8 T19-1 to 2.

breakdown of the costs to repair the vehicle along with pictures documenting the current condition of the truck. He testified that when he initially turned to the Kelley Blue Book Official Guide ("KBB") to make his evaluation, he discovered that the KBB did not offer values for vehicles in poor condition.[9] He explained further that while the KBB categories included "Excellent," "Good," and "Fair," in his business experience, after "Fair", the lower quality ratings were generally accepted to be "Poor," "Rough," "Very Rough" and "Junk".[10] Factoring in the vehicle's exterior, interior and mechanical condition, he determined that the debtor's vehicle fell somewhere in between the Rough and Very Rough categories. He explained that the exterior was dented, scraped, gouged and generally banged up with both bumpers falling off. The bed of the truck was dented and overall the exterior would "require extensive body work and paint work to bring it back to good condition."[11] He estimated that the body work and painting could easily cost $3,000.[12] The interior of the truck was "very, very filthy dirty," the mats were worn and damaged, and the seats required restoration.[13] He estimated a cost of approximately $800 to return the interior to a clean retail state.[14] Mechanically, he found that the transmission and clutch needed to be repaired and the brake pads and rotors needed to be replaced. In addition, he pointed out that the check engine light would prevent

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9 T28-16 to 21.
10 T29-5 to 8.
11 T29-24 to 25.
12 T36-12 to 19.
13 T30-8 to 11.
14 T46-21 to 24.

the vehicle from passing inspection and that the problem would need to be resolved.

Pritchett reflected that the KBB value for this type of vehicle, as a trade-in, would be approximately $5,200[15], but because of the poor condition of the debtor's specific vehicle, he felt compelled to establish his own "Base Trade In Value", which he set at $4,100.[16] From this starting point, he then reduced the base value by $2,250 for the projected transmission repair, $450 for the brake repair, and $200 to resolve the check engine light issue, resulting in a final estimated value of $1,200 for the vehicle. He opined that the vehicle should be valued somewhere between $1,000 and $1,500 and that $1,200 fell in the middle of that range.[17] He added that he was "kind of surprised in a way that, under the kinds of use that Mr. Riley has been describing . . . that the truck hasn't broken down by now."[18] Based on Pritchett's testimony, the debtor described his vehicle as "a terminal patient getting hospice care."[19] He

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15 Pritchett's testimony that $5,200 is representative of the KBB value of a Silverado in "Fair" condition does not appear to be consistent with the applicable KBB values listed. The October-December 2010 Edition of the KBB, the relevant edition at the time of the debtor's filing, lists trade-in values for 8 different 2004 Chevrolet Silverado 1500 trucks with extended cabs, including 4 different models (Base, Work, LS/SLE, LT/SLT) each with 2 different bed lengths. According to the KBB, a Work truck model, with an 8 foot bed, has a Fair Trade-In value of $5,175, which is consistent with Pritchett's presumption. However, the Vehicle Identification Number ("VIN") for the debtor's vehicle, according to the Certificate of Title provided by Ally in its proof of claim, includes the designation "C19T" which, according to the KBB, corresponds to the LT/SLT model which the KBB values in "Fair" condition as either $6,250 or $6,675, depending on the bed length. Pritchett's initial premise that the KBB Fair Trade-In value was $5,200 could be off by approximately $1,000 to $1,500.

16 T42-4 to 11.

17 T28-11 to 14.

18 T49-5 to 7.

19 T54-19.

maintained that the truck was in such poor shape that it really did not have a retail value. Instead, the costs of repairs far exceeded the actual value of the vehicle. The debtor acknowledged that the NADA and Kelley Blue Book were appropriate standards for fair and average vehicles, but insisted that a case-by-case or individual evaluation was necessary to value poor or below rated vehicles.

Countering the debtor's presentation, Ally asserted that the proper starting point for replacement valuation purposes should be the NADA retail value of the vehicle. The creditor pointed out that this value factors in the sales and marketing costs mentioned in Rash, while the other starting points do not. According to Ally, the debtor's valuation method would result in effectively double dipping, by starting with a value reduced for the condition of the car and then adjusting it further for the costs of repair.

DISCUSSION

Ally's objection to confirmation focuses on the proper valuation to be afforded in a cramdown scenario. Section 1325(a) directs the court to confirm a proposed Chapter 13 plan if it complies with the requirements outlined in that section and other relevant portions of the Code. 11 U.S.C. § 1325. See United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381, 176 L.Ed.2d 158 (2010); Associates Commercial Corp. v. Rash, 520 U.S. 953, 956,

117 S. Ct. 1879, 1882, 138 L.Ed.2d 148 (1997). At issue here is the application of section 1325(a)(5), which requires one of three conditions to be met with respect to the treatment of secured claims under the debtor's proposed plan, either: (1) the creditor accepts the plan, 11 U.S.C. § 1325(a)(5)(A); (2) the debtor surrenders the collateral back to the creditor, § 1325(a)(5)(C), or (3) the debtor utilizes the so-called cramdown provision, § 1325(a)(5)(B). Rash, 520 U.S. at 957, 117 S. Ct. at 1882. In this case, the creditor has not accepted the plan and the debtor does not plan to surrender the vehicle. Under the cramdown provision, the debtor may retain the vehicle, notwithstanding the creditor's objection to the plan, if the creditor retains its lien against the vehicle while the debtor makes payments under his plan that equate with the present value of the claim and such payments are not less than the relevant adequate protection requirements. 11 U.S.C. § 1325(a)(5)(B). See also Rash, 520 U.S. at 957, 117 S. Ct. at 1882-83. To determine the value of Ally's allowed secured claim, we turn to 11 U.S.C. § 506(a).

Section 506(a) provides that an allowed claim is secured to the extent of the secured creditor's interest in the estate's interest in the property, and unsecured to the extent that it exceeds such interest. 11 U.S.C. § 506(a). Assuming a first priority position, this means that the creditor's claim is secured to the extent of the value of the vehicle. Section 506(a) also provides that the valuation "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a)(1).

As is relevant here, in subsection 506(a)(2), the Code further states that "[i]f the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing."[20] 11 U.S.C. § 506(a)(2). Thus section 506(a) expressly directs that the value of the vehicle in question here, which must be assessed to establish the amount of the secured claim, be based on the replacement value of the property, determined as of the date of the petition.

A. Replacement Value.

The current statutory language contained in section 506(a)(2) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to reflect a codification of the U.S. Supreme Court's decision in Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L.Ed.2d 148 (1997). See In re Mayslake Village-Plainfield Campus, Inc., 441 B.R. 309, 321 n.3 (Bankr. N.D.Ill. 2010) ("§ 506(a)(2) essentially codifies the result in Rash"); In re Pearsall, 441 B.R. 267, 270 (Bankr. N.D.Ohio 2010) ("In

[20] The second sentence in section 506(a)(2) provides a further direction that in the context of property "acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." Id. This provision is not directly applicable here in the context of a vehicle used for business purposes.

new § 506(a)(2) Congress appears to be codifying Rash for application to a broader set of legal circumstances."); In re Scott, 437 B.R. 168, 172-73 (Bankr. D.N.J. 2010). In Rash, the Supreme Court explained that "[b]y using the term 'replacement value,' we do not suggest that a creditor is entitled to recover what it would cost the debtor to purchase the collateral brand new." Id. at 959 n.2, 117 S. Ct. at 1884 n.2. Instead, "by replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." Id. In other words, replacement value means "the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use.'" Id. at 965, 117 S. Ct. at 1886. The Court went further to explain in footnote 6 that:

> Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning. Nor should the creditor gain from modifications to the property- e.g., the addition of accessories to a vehicle-to which a creditor's lien would not extend under state law.

Id. at 965 n.6, 117 S. Ct. at 1886 n.6.

The majority of courts that have addressed the cramdown vehicle valuation issue post-Rash, and post-BAPCPA, have done so primarily in the context of vehicles retained for personal use. In that context, the second sentence in section 506(a)(2), specifically referring to the price that a "retail merchant would charge" and requiring an adjustment for "age and condition", expressly comes into play. However, there are very few published decisions focusing on the valuation of commercial or business use vehicles, to which arguably only the first sentence in section 506(a)(2), requiring only a "replacement value" determination without the express qualifications of relying on what a retail merchant would charge and making adjustments for the condition of the property, applies. See, e.g., In re Counts, No. 07-60542-13, 2007 WL 2669204 (Bankr. D.Mont. Sept. 6, 2007) (modifying the online NADA retail value); In re Garrison, No. A06-00396-DMD, 2007 WL 1589554 (Bankr. D.Alaska June 1, 2007) (deducting the costs of repair from the blue book value); In re Finnegan, 358 B.R. 644 (Bankr. M.D.Pa. 2006).

In Finnegan, the court noted that the National Automobile Dealers Association ("NADA") Official Used Car Guide and the Kelley Blue Book ("KBB") are frequently used as references to assist in establishing replacement value. Courts have generally found both resources to be admissible under Rule

803(17) of the Federal Rules of Evidence.[21] See, e.g., In re Penny, No. 10–55073 SLJ, 2011 WL 204888, *2 (Bankr. N.D.Cal. Jan. 21, 2011) (KBB); In re Young, 390 B.R. 480, 492 (Bankr. D.Me. 2008) (KBB); In re Finnegan, 358 B.R. 644, 649 (Bankr. M.D.Pa. 2006) (recognizing that both have been accepted as admissible); In re Henry, 328 B.R. 529, 536 n.7 (Bankr. S.D.Ohio 2004); In re Bouzek, 311 B.R. 239, 243 (Bankr. E.D.Wis. 2004) (NADA); In re Roberts, 210 B.R. 325, 330 (Bankr. N.D.Iowa 1997). See also In re Gonch, 435 B.R. 857, 862-63 (Bankr. N.D.N.Y. 2010) (KBB is admissible under Fed.R.Evid. 402); In re Ayres, No. 09–56695 ASW, 2010 WL 652825 (Bankr. N.D.Cal. Feb. 16, 2010) (relying on Edmunds.com). In Finnegan, the debtor relied upon the KBB "Private Party Value," adjusted to reflect the debtor vehicle's lower mileage and to factor in the costs of sale and marketing expenses, while the creditor utilized the NADA retail value which was about $2,600 higher after a mileage adjustment then the KBB "Private Party Value." The court acknowledged that "N.A.D.A. valuations tend to be higher than 'replacement value' as contemplated in Rash. The N.A.D.A. guidebook does not consider a vehicle's condition, and the stated value may include warranties, reconditioning, and other services excluded by Rash." Id. at 650. See also In re Bryan, 318 B.R. 708, 711 (Bankr. W.D.Mo. 2004); In re Gonzalez, 295 B.R. 584, 587 (Bankr.N.D.Ill. 2003) (NADA values are typically higher than the Kelley Blue

[21] Rule 803(17) provides an exception to the hearsay rule for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Fed.R.Evid. 803.

Book because NADA prices do not vary with the vehicle's condition). Ultimately, the court was unable to determine which book value, NADA or KBB, more accurately reflected the vehicle's replacement value, because "[n]either value [was] fully supported by the evidence." Id. Because of the evidentiary limitations, the court chose a value roughly in the middle of the two modified proposals.

In this case, we are asked to contrast Ally's reliance on the NADA Clean Retail value against the debtor's expert appraisal based on a modified KBB value. Ally presented a copy of what appears to be an online NADA vehicle summary and asked that the adjustments for condition and repairs begin from the "Clean Retail" value. The statement included a wide spectrum of values, from "Clean Retail" through "Clean Loan", "Clean Trade-In", "Average Trade-In", and "Rough Trade-In" values, each adjusted for mileage. Although the distinction between the classifications of retail and trade-in is not defined by the NADA, the quality of the vehicles that would be included within each individual category are described. As is relevant here, the NADA website defines the category "Clean Retail" as:

> a vehicle in clean condition. This means a vehicle with no mechanical defects and passes all necessary inspections with ease. Paint, body and wheels have minor surface scratching with a high gloss finish and shine. Interior reflects minimal soiling and wear with all equipment in complete working order. Vehicle has a clean title history. Because individual vehicle condition varies greatly, users of NADAguides.com may need to make independent adjustments for actual vehicle condition.

NADA Guides, http://www.nadaguides.com/ (last visited July 18, 2011). See In re Cook, 415 B.R. 529, 535 (Bankr. D.Kan. 2009) (quoting definition). The Clean Retail category presupposes a vehicle with little or no defects. The NADA does acknowledge that adjustments may be needed in order to reflect the vehicle's actual condition, but it does not expressly provide any other retail categories or separate adjustments for varying condition. In an as-is condition, without the necessary repairs or reconditioning, the debtor's vehicle clearly does not fit within this category.

At the opposite end of the spectrum, in contrast, the NADA defines the category "Rough Trade-In" as:

> a vehicle in rough condition. Meaning a vehicle with significant mechanical defects requiring repairs in order to restore reasonable running condition. Paint, body and wheel surfaces have considerable damage to their finish, which may include dull or faded (oxidized) paint, small to medium size dents, frame damage, rust or obvious signs of previous repairs. Interior reflects above average wear with inoperable equipment, damaged or missing trim and heavily soiled/permanent imperfections on the headliner, carpet, and upholstery. . . . Vehicle will need substantial reconditioning and repair to be made ready for resale. Some existing issues may be difficult to restore. Because individual vehicle condition varies greatly, users of NADAguides.com may need to make independent adjustments for actual vehicle condition.

Id. This "Rough Trade-In" description is more in line with the evidence and testimony offered to describe the condition of the debtor's vehicle in this case. The chart offered by Ally reflects an NADA "Rough Trade-In" value as of

February 15, 2011, with mileage adjustments, of $5,550.[22] While the description of a vehicle in "rough condition" describes the debtor's vehicle well, the NADA description recognizes that independent adjustments for actual vehicle condition may be necessary. In this case, in light of the very poor condition of the vehicle, a further downward adjustment of that value would appear to be appropriate.

The debtor's expert used the KBB as a starting point and testified that the "Base Trade-In Value" for the debtor's vehicle, if it qualified for a "Fair" rating, would be approximately $5,200.[23] Mr. Pritchett discounted the "Fair" rating valuation to reflect his opinion that the vehicle was not in "Fair" condition, but should be categorized as in "Rough" or "Very Rough" condition.[24] He therefore discounted the KBB value to $4,100, and then reduced the value

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[22] The December 2010 NADA Edition lists the Rough Trade-In value of a 2004 Chevrolet Silverado 1500 Extended Cab LS as $6,775 and an LT as $8,100. The mileage adjustment would be $1,525, resulting in adjusted values of $5,250 and $6,575 respectively.

[23] Neither the debtor nor his expert presented the relevant pages of the KBB as a part of this record. As reflected earlier, the actual KBB value would be at least $1,000 to $1,500 higher. See supra n.15.

[24] The KBB describes vehicles included within its "Fair" rating as having:

> Some mechanical or cosmetic defects.
> Needs servicing, but is still in running condition. Has a clean title history.
> The paint, body and/or interior may need professional servicing.
> The tires may need replacing.
> May have some repairable rust damage.

Kelley Blue Book, http://kbb.com (last visited 7/18/2011).

further by the estimated cost of needed repairs to arrive at his opinion that the vehicle should be valued at $1,200.

The problem with Mr. Pritchett's valuation is that he is actually discounting the value of the vehicle twice – first, by downgrading the condition of the vehicle from the "Fair" category, and second, by deducting the estimated cost of repairs and reconditioning. This double discount, which suppresses the asserted replacement value of the vehicle substantially, appears to be contrived and redundant. Mr. Pritchett's discounted number of $4,100, based on his understanding of the relevant KBB values, was apparently intended to reflect his opinion that the debtor's vehicle was in worse condition than the "Fair" condition described in the KBB.[25] His adjustment of $1,100 (in actuality $2,100 to $2,500, see supra n.15) is significantly below the NADA "Rough Trade-In" value which contemplates a vehicle in a condition similar to that of the debtor's vehicle, with significant mechanical defects, considerable exterior damage, and above average interior wear.

In synthesizing Mr. Pritchett's testimony with the applicable NADA and KBB values, I conclude that the replacement value of the vehicle as of the date of the petition is $4,800. This value focuses on Mr. Pritchett's testimony regarding the need to discount the KBB value for a vehicle in "Fair" condition downward to reflect the "Rough" to "Very Rough" condition of the subject

[25] See supra n.15.

vehicle, while remaining consistent with the NADA Rough Trade-In value, as adjusted to reflect the vehicle's actual condition. This value also factors in consideration of the "cost of sale or marketing" of the vehicle, as the statute requires. 11 U.S.C. § 506(a)(2).

B. Interest Rate.

The debtor proposes to satisfy Ally's modified claim at a 5% interest rate over the course of 60 months. Ally seeks a 6.25% interest rate. Both values fall within the general guidelines established in Till.

In Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed.2d 787 (2004), the Supreme Court held that, in the context of a loan cramdown pursuant to section 1325(a)(5)(B), the "formula approach" was the most appropriate method for determining the applicable rate of interest to be afforded under a debtor's plan. This approach begins with the current prime rate and then adds an adjustment factor to compensate for the risk of nonpayment. In Till, the debtors sought to realign the value of the secured creditor's claim with its fair market value and to reduce the interest rate payable through the debtors' Chapter 13 plan on that claim from the contract rate of 21% to a modified rate of 9.5%. The creditor objected to the interest rate reduction and sought to reinstate the contract rate, insisting that it was commensurate with "the rate . . . [the creditor] would obtain if it could foreclose

on the vehicle and reinvest the proceeds in loans of equivalent duration and risk as the loan' originally made" to the debtors. Id. at 471, 124 S. Ct. at 1957.

The Court recognized that section 1325(a)(5)(B) requires that the payment received over the course of the debtors' plan equal or exceed the value of the creditor's allowed secured claim, and therefore the debtor must employ a sufficient interest rate to compensate the creditor for the impact of inflation, the risk of nonpayment, and the loss of the creditor's ability to immediately use its money. Id. at 474, 124 S. Ct. at 1958. The Court concluded that this necessitates an objective rather than subjective interest valuation analysis which should be tailored to "adequately compensate all such creditors for the time value of their money and the risk of default," instead of focusing on that one particular creditor's individual circumstances. Id. at 476-77, 124 S. Ct. at 1960. As a result, the Court rejected approaches based on the coerced loan, contract rate and cost of funds methodologies as overly "complicated, impos[ing] significant evidentiary costs, and aim[ing] to make each individual creditor whole rather than to ensure the debtors' payments have the required present value." Instead, the Court adopted the formula approach. Id. at 477, 124 S. Ct. at 1960.

The formula approach is based on the national prime rate, which in the Court's opinion, "reflect[ed] the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to

compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." Id. at 479, 124 S. Ct. at 1961. The Court noted that "if the [bankruptcy] court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept cramdown loans." Id. at 479 n.18, 124 S. Ct. at 1961 n.18. As this is not the case in the normal course and in light of the fact that a debtor "typically pose[s] a greater risk of nonpayment than solvent commercial borrowers," the prime rate must be augmented by a risk factor adjustment. Id. at 479, 124 S. Ct. at 1961. See In re Johnson, 438 B.R. 854, 859 (Bankr. D.S.C. 2010) ("the risk of nonpayment referred to in Till is the risk that the chapter 13 debtor's plan will not succeed"). "The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." Id.

The Till Court recognized that there was some question as to the exact extent of the amount of risk inherent in a Chapter 13 case, but discounted the proposition that a pre-bankruptcy default "translates into a high probability that the same debtor's confirmed Chapter 13 plan will fail." Id. at 482, 124 S. Ct. at 1963. The Court cautioned that cramdown interest rates should not be set "at absurdly high levels, thereby increasing the risk of default." Id. at 483, 124 S. Ct. at 1962. Instead, the debtors' plan should utilize "a rate high

enough to compensate the creditor for its risk but not so high as to doom the plan." Id. at 480, 124 S. Ct. at 1962.

The Court declined to adopt a set scale for the range of acceptable risk adjustment rates, although it did note that "other courts have generally approved adjustments of 1% to 3%." Id. at 480, 124 S. Ct. at 1962 (citing to In re Valenti, 105 F.3d 55, 64 (2d Cir), abrogated on other grounds by Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L.Ed.2d 148 (1997) (collecting cases)). See also In re Evans, No. 10 80446C 13D, 2010 WL 2976165, *4 (Bankr. M.D.N.C. July 28, 2010) (the Chapter 13 trustee determines a "presumptive Till interest rate" which is reviewed on a quarterly basis). The burden in this regard is upon the creditor to justify the size of the risk adjustment that it seeks. The creditor may present evidence with respect to "(1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement.'" Id. at 484, 124 S. Ct. at 1964 (quoting Justice Scalia at 541 U.S. at 499, 124 S. Ct. at 1973). See also In re Plourde, 402 B.R. 488, 493 (Bankr. D.N.H. 2009) ("Factors to consider when adding risk include: rate of collateral depreciation, liquidity of the collateral market, debtor's financial prospects, Lender's risk factors and lost opportunity costs, and pre petition mortgage arrearage."). "The determination may be assisted by evidence included in the debtor's bankruptcy filings, such as work history, job stability, cash flow, disposable income, the existence or absence of prior bankruptcy

filings, and the contents of the Chapter 13 plan." In re Bivens, 317 B.R. 755, 764 (Bankr. N.D.Ill. 2004). The focus in this regard is on the debtor and the bankruptcy estate, rather than on any one specific creditor.

The parties in this case do not delve into the factors outlined above beyond the creditor's general statement regarding the inherent risk in any bankruptcy filing. Both risk factors, the debtor's 1.75% and the creditor's 3.0%, fall within the acceptable range. In light of the significant adjustments made to the value of the creditor's collateral, for cramdown purposes, occasioned by the poor condition and repairs needed for this vehicle, and in conjunction with the 60 month length of the debtor's plan, I will affirm the use of the creditor's higher 3.0% interest rate.

In conclusion, the debtor's plan provision providing for the cramdown of Ally's claim may be confirmed at a valuation of $4,800, and satisfied over the course of the debtor's plan at a 6.25% interest rate. The creditor's request for counsel fees is denied.

Dated: August 16, 2011

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT