UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Roderick L. Jones and	)	**03-51675**
Barbara A. Jones,	)	
	)	
Debtors.	)	

ORDER

This matter came on before the court on October 1, 2003 upon the objection by General Motors Acceptance Corp. to confirmation of plan. Appearing before the court was Carl A. Penny, attorney for the Debtors, Pamela P. Keenan, attorney for General Motors Acceptance Corp. ("GMAC") and Kathryn L. Bringle, Chapter 13 Trustee. After considering the pleadings, evidence and arguments of counsel, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On October 27, 2001, the Debtors purchased a 2002 Chevrolet Avalanche (the "Vehicle") from Modern Chevrolet Co., Inc., pursuant to the terms of an installment sales contract (the "Contract"). At the time of the purchase, the Debtors qualified for a particularly low interest rate as part of a financing package styled as "incentive financing." The total amount financed under the Contract was $36,024.91, payable over a period of 48 months with interest accruing at the rate of 2.9% per annum. The Contract was subsequently assigned to GMAC.

The Debtors filed a petition under Chapter 13 of the Bankruptcy Code on June 9, 2003. On June 25, 2003, GMAC filed a proof of claim in the amount of $22,302.28, along with a copy

of the Contract and title to the Vehicle. On August 27, 2003, the Debtors filed their notice of proposed Chapter 13 plan (the "Plan"). The Plan provides GMAC with a secured claim in the amount of $18,765 with interest at the Contract rate of 2.9%. The remaining balance due under the Contract is allowed as a general unsecured claim.

GMAC has filed an objection to confirmation of the Debtors' Plan based upon the treatment of its secured claim. GMAC asserts that the proposed Plan does not satisfy the "cram down" provision of Chapter 13 because it provides for interest on its secured claim at the "market rate," as opposed to the "incentive rate."

CONCLUSIONS OF LAW

The issue presented in this case is whether the interest rate used in a "cram down," pursuant to 11 U.S.C. §1325(a)(5)(B)(ii), is capped at the contract amount to which the secured creditor originally agreed. Section 1325(a)(5)(B)(ii) provides that a plan shall be confirmed, despite a secured creditor's objection, provided:

> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim;

Pursuant to this section, to effect a "cram down," the total amount of payments under the plan must have a present value equal to that of the allowed amount of the secured claim. In the case of an undersecured lender, that value equals the "replacement value" of the collateral as of the petition date. In re Rash, 520 U.S. 953, 962, 117 S.Ct. 1879, 1885 (1997); 11 U.S.C. § 506(a). Because the secured creditor will receive payments equal to the amount of its claim over the life of the plan, rather than immediate payment, the creditor is entitled to interest on its claim that

compensates the creditor for the delay. United Carolina Bank v. Hall, 993 F.2d 1126, 1130 (4th Cir. 1993).

Numerous courts have addressed the issue of the appropriate rate of interest to be applied in a Chapter 13 case involving the "cram down" of a secured creditor's claim. The Fourth Circuit has adopted an approach which treats a Chapter 13 cram down as a new loan and attempted to match the rate of return to the creditor with the market rate. United Carolina Bank v. Hall, 993 F.2d 1126; see also; In re Hardzog, 901 F.2d 858, 860 (10th Cir.1990); Memphis Bank and Trust Co. v. Whitman, 692 F.2d 427, 431 (6th Cir.1982). In Hall, the debtor's Chapter 13 plan provided that she retain possession of her mobile home in exchange for payment of the mobile home's current value with interest at the rate of 10%. The original Contract rate of interest was 13%. The secured creditor objected to the interest rate, arguing that the rate of interest should be based upon the interest rates charged by area mobile home sellers. The secured creditor presented evidence that the prevailing local rate for new mobile homes was 13.5% and for used mobile homes, 15.5%.

The Fourth Circuit held that the appropriate amount of interest to pay the secured creditor under the cram down provision of Chapter 13 is that of the secured creditor's lending market, taking into account the rates from similar loans in the area and also expenses in obtaining those loans. Id. at 1131. In conclusion, the court stated:

> Finally, so as to eliminate a windfall benefit to the secured creditor, the district court capped any interest rate used in the "cram down" situation at the contract amount to which the secured creditor had originally agreed. See In re Mellema, 124 B.R. 103, 107-08 (Bankr.D.Colo.1991). As a matter of equity, we agree with that limitation.

Id. Therefore, despite the fact that the secured creditor in Hall had presented evidence that the market rate was higher than the contract rate, the Fourth Circuit held that the use of a higher rate would result in a windfall to the creditor. In capping the interest rate to the contract amount, the court cited Mellema, which held that in the absence of special circumstances, such as the market rate being higher than the contract rate, bankruptcy court should use the current rate of interest on comparable loans. In re Mellema, 124 B.R. 103 (Bankr. D. Colo.1991)(citing In re Hartzog, 901 F.2d 858 (10th Cir. 1990)). Based upon the holding in Hall and the line of cases upon which Hall relies, Chapter 13 cram down provisions in this district use the lower of either a "presumptive" market rate which fluctuates along with prevailing interest rates in this geographic area (currently around 9%) or the contract rate to which the secured creditor originally agreed.

Nonetheless, GMAC contends that the Hall decision does not require the Court to cap the interest rate at the contract amount in all circumstances. GMAC urges the Court to look beyond the mere language of Hall and determine that the language in Hall provides for an equitable approach to determine whether the secured creditor would receive a "windfall benefit." GMAC argues that the court must look to the particular circumstances of the case to determine whether, in fact, the use of a presumptive market rate which is higher than the contract rate would result in a "windfall benefit." GMAC agrees that in some instances, such as those in which the secured lender is to be paid the full balance due under its contract, as described by the court in In re Mellema, 124 B.R. at 107-08, or is taking only a relatively small cram down but receiving a substantial increase in the interest rate, the use of the presumptive market rate would not be appropriate. In the case at hand, however, GMAC contends that it will not receive any such "windfall benefit" by use of the presumptive market rate because, even with this higher rate,

GMAC will not receive more than the full balance remaining due under the Contract.

The court finds that a cap on the interest rate as set forth in Hall is applicable in this case. The facts in Hall are similar to those in this case, except here, because of the incentive program, the contract rate is appreciably lower than the presumed market rate. The "special circumstances" contemplated in Mellema and Hardzog, namely, the market rate being higher than the contract rate, are precisely the type of circumstances presented in this case.

It is therefore ORDERED that the objection by General Motors Acceptance Corp. to confirmation of plan is overruled and the Debtors' Plan is confirmed.

This the 14th day of October 2003.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge