SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 8, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

BILLY E. MCLAURIN AND MISTY MCLAURIN,	**CASE NO. 11-52262-NPO**
DEBTORS.	**CHAPTER 13**

ORDER OVERRULING OBJECTION
TO SECURED CLAIM AND OTHER RELIEF

This matter came before the Court for hearing on November 14, 2016 (the "Hearing"), on the Objection to Secured Claim(s) and Other Relief (the "Objection") (Dkt. 44) filed by the debtors, Billy E. McLaurin and Misty McLaurin (the "Debtors"), the Proposed Agreed Order on Objection to Secured Claims (Dkt. 45), and the Response to Debtor's [*sic*] Objection to Claim (the "Response") (Dkt. 48) filed by Fifth Third Bank (the "Bank") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Douglas Joel Graham represented the Debtors, Charles F. F. Barbour ("Barbour") represented the Bank, and Samuel J. Duncan ("Duncan") appeared on behalf of J.C. Bell, the standing chapter 13 panel trustee (the "Trustee"). After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Objection was proper under the circumstances.

Facts

1. The Debtors filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on September 30, 2011 (the "Petition") (Dkt. 1). The Debtors filed the Chapter 13 Plan (the "Plan") (Dkt. 8) contemporaneously with the Petition. In the Plan, the Debtors proposed to make sixty (60) monthly payments of $539.00. (Plan at 1). The Plan listed the Bank as a creditor with a claim secured by a 2007 Dodge Durango (the "Durango"). (*Id.*). The Debtors proposed to pay the Bank the amount owed of $21,296.35 at an annual interest rate of seven percent (7%)[1] over the life of the Plan. (*Id.*). With interest, the Plan indicated that the Bank would be paid a total of $25,301.62. (*Id.*). The Plan proposed to pay nothing to unsecured creditors, which had claims totaling $25,495.49. (*Id.* at 2).

2. The Bank timely filed the Proof of Claim (the "POC") (Cl. No. 5-1) on October 21, 2011, which indicated that it financed the purchase of the Durango. The POC provided that the Bank had a secured claim in the amount of $21,560.85 as of the date the Petition was filed. (POC at 1). On the POC, the Bank left the box designated for it to indicate the interest rate

[1] When the Debtors filed the Petition on September 30, 2011, the presumptive interest rate in accordance with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) was seven percent (7%). *See* U.S. Bankruptcy Court for the Southern District of Mississippi, MEMORANDUM FROM CHIEF JUDGE ELLINGTON (effective March 1, 2009 through July 31, 2014), *available at* http://www.mssb.uscourts.gov. Pursuant to the U.S. Bankruptcy Court for the Northern and Southern Districts of Mississippi, STANDING ORDER DESIGNATING PRESUMPTIVE 11 U.S.C. § 1325(A)(5)(B) INTEREST RATE (effective Aug. 1 2014), *available at* http://www.mssb.uscourts.gov, the presumptive interest rate under *Till* is currently five percent (5%).

blank. (*Id.*). Accordingly, the entire amount of the Bank's secured claim, according to the POC, was $21,560.85. (*Id.*). Attached to the POC was the Itemization of Claim and Summary of Supporting Documents for Claim of Fifth Third Bank (the "Itemization & Summary") (POC at 2), which indicated the total amount of the Bank's claim, including the principal balance and accrued unpaid interest, was $21,560.85. (Itemization & Summary at 1). According to the Retail Installment Sale Contract attached to the POC (POC at 3-4), the annual rate of interest for the Durango was 7.94%.

3. The Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders (the "Confirmation Order") (Dkt. 18) was entered on December 22, 2011. In the Confirmation Order, the Court confirmed the Debtors' proposal to pay the Bank the amount owed for the Durango plus seven percent (7%) interest. (Conf. Or. at 4).

4. On October 25, 2016, almost five (5) years after the Confirmation Order was entered, and well after the expiration of the claims bar date, the Debtors filed the Objection. In the Objection, the Debtors argued that, contrary to the POC filed by the Bank, which did not include interest, they should pay the Bank five percent (5%) interest.[2]

5. The Bank filed the Response on November 11, 2016. In the Response, the Bank stated that it "agrees that it should be paid its timely [filed] proof of claim in full plus 5% interest." (Resp. at 1). According to the Bank, the Debtors are "indebted to [the Bank] with the purchase of a vehicle made within 910 days of the petition date[], and [the Bank] filed a timely proof of claim." (*Id.*). The Bank noted that the Plan included the payment of seven percent (7%) interest through the Plan, although the POC "did not include an interest rate by mistake." (*Id.*).

[2] *See supra* note 1. At the Hearing, Barbour stated that the five percent (5%) interest rate represented a compromise between the Bank and the Debtors. (Hr'g at 10:20:20) (the Hearing was not transcribed; citations are to the time stamp of the audio recording.).

6. At the Hearing, Duncan stated that the POC controls the payments the Trustee makes to creditors. Accordingly, the Trustee did not pay interest to the Bank. According to Duncan, although the Plan proposed to pay nothing to unsecured creditors, the Trustee has made a 51% disbursement to the unsecured creditors. Duncan said that the Trustee currently is holding $2,000.00 pending the resolution of the Objection. (Hr'g at 10:17:25). He argued, however, that there is "slim" authority for the Trustee to use that money to pay interest to the Bank because the Bankruptcy Code provides that a claim is allowed as filed unless there is an objection (Hr'g at 10:20:30-10:21:10).

7. Barbour argued at the Hearing that the Confirmation Order, not the POC, should control, meaning that the Bank is entitled to interest of seven percent (7%) on its secured claim. He did not, however, have any legal authority to support this argument at that time. (Hr'g at 10:18:30).

8. At the conclusion of the Hearing, the Court granted the Bank fourteen (14) days in which to submit authority that would require the Trustee to pay it five percent (5%) interest. The Bank filed the Memorandum of Authorities (the "Bank Memo") (Dkt. 50) on November 28, 2016. In the Bank Memo, the Bank argued that a "confirmed Chapter 13 plan binds both the debtor and creditor to the provisions of the plan." (Bank Memo at 2). The Bank cited § 1327(a),[3] which provides that the "provisions of a confirmed plan bind the debtor and each creditor . . . whether or not the creditor has objected to, has accepted, or has rejected the plan." (*Id.*) (citing 11 U.S.C. § 1327(a)). According to the Bank, "a confirmed plan is *res judicata* as to any issues resolved or subject to resolution at the confirmation hearing." (*Id.*). Because § 1325(a)(5)(B)(ii) requires a chapter 13 plan to pay the full value of allowed secured claims, the

[3] Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

Bank argued that "the value of a secured claim is fixed as of the effective date of the plan." (*Id.* at 2-3). The Bank contended in the Bank Memo that the plan confirmation process governed by §§ 1321-1329 "controls the treatment of claims, including whether interest is to be paid on a claim and, if so, what interest is to be paid on the claims." (*Id.* at 3).

In the Bank Memo, the Bank acknowledged the tension between the plan confirmation process and the proof of claim process "because the Bankruptcy Code describes two parallel processes that inevitably interact and overlap at confirmation in a Chapter 13 case." (*Id.*). The Bank argued, however, that the treatment of a claim is governed by a confirmed plan rather than a proof of claim. (*Id.* at 4).

Discussion

In the Bankruptcy Case, the Trustee paid the Bank's claim pursuant to the POC—which did not provide that the Bank would be paid interest—rather than the Plan—which provided the Bank was to receive seven percent (7%) interest. Nearly five (5) years after the Plan was confirmed, the Debtor filed the Objection. The Debtor and the Bank contend that the Plan, not the POC, should control. The Court must determine whether the POC or the Plan controls payment of interest.

I. Precedent

Section 1327(a) provides that the terms of a confirmed plan "bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Not only are the debtor and the creditors bound to a confirmed plan, but "[a]lthough not specifically mentioned, the trustee is also bound by the plan because the trustee normally acts on behalf of creditors or, occasionally, the debtor." 8 COLLIER ON BANKRUPTCY ¶ 1327.02 (16th ed. 2016).

An order confirming a chapter 13 "represents a binding determination of the rights and liabilities of the parties as ordained by the plan," and the confirmed plan "is *res judicata* and its terms are not subject to collateral attack." 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1]. Despite the *res judicata* effect of a confirmed plan, "the plan may not be binding as to every aspect of the parties' relationship." 8 COLLIER ON BANKRUPTCY ¶ 1327.02 [2]. Both the Fifth and the Eleventh Circuit Courts of Appeals have held "that a provision of a confirmed chapter 13 plan cannot alter a claim filed by a creditor, because section 502(a) of the Code provides that a filed proof of claim is deemed allowed unless a party invokes the specific mechanism of objecting to that claim, and a creditor is entitled to rely on the filing of a proof of claim absent such an objection." *Id.* (citing *Simmons v. Savell (In re Simmons),* 765 F.2d 547 (5th Cir. 1985); *Univ. Am. Mort. Co. v. Bateman (In re Bateman),* 331 F.3d 821 (11th Cir. 2003)). Under § 502(a), "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a).

In the Bank Memo, the Bank relied predominantly on a decision rendered by the United States Bankruptcy Court for the Southern District of Ohio in *In re McLemore,* 426 B.R. 728 (Bankr. S.D. Ohio 2010). The bankruptcy court in *In re McLemore* held that when a confirmed plan and a proof of claim contained different interest rates, and the creditor did not object to confirmation of the plan, the confirmed plan was *res judicata*. *Id.* at 734-35. While the Court agrees that *In re McLemore* supports the Bank's argument, the Fifth Circuit has rendered at least three decisions regarding the *res judicata* effect of a confirmation order, which is binding precedent upon this Court.

Two of the Fifth Circuit's decisions appear to be in tension, reflecting "the difficulty in striking a workable balance between the interest in the protection of secured creditors and the

interest in finality for chapter 13 debtors." *Sun Fin. Co. v. Howard (In re Howard)*, 972 F.2d 639, 641 (5th Cir. 1992). In the first Fifth Circuit case to address the issue, *In re Simmons*, a creditor had a perfected statutory lien and filed a proof of claim to that effect, but was incorrectly listed in the debtor's plan as an unsecured creditor. *In re Simmons*, 765 F.2d at 549. The debtor did not object to the proof of claim before confirmation of the plan, and the creditor did not object to the plan at the confirmation hearing. *Id.* The creditor's status in the plan was never corrected, and the plan was confirmed. *Id.* The debtor argued that the creditor failed to object to confirmation; therefore, he was bound by the terms of the plan. *Id.* at 550. The Fifth Circuit, however, held that a chapter 13 plan cannot substitute for an objection to a secured creditor's proof of claim. *Id.* at 551-52. Once a creditor has filed a proof of claim, "the Code and Rules clearly impose the burden of placing the claim in dispute on any party in interest desiring to do so by means of filing an objection." *Id.* at 552.

After deciding *In re Simmons*, the Fifth Circuit held in *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), that the confirmed plan was *res judicata* on the issue of the validity of a plan provision. In *Shoaf*, the bankruptcy court confirmed a debtor's plan that released a guaranty executed by a third party in favor of a creditor. *Id.* at 1047. The creditor did not object to the plan or appeal the confirmation of the plan, but it did initiate an adversary against the third party. *Id.* After the plan was confirmed, the third party raised the defense of *res judicata*, arguing that the confirmed plan in the bankruptcy case controlled. *Id.* Stated differently, the plan confirmation order in *Shoaf* contained a provision that invalidated a guaranty by a third party in favor of one of the creditors. *Id.* 1048. The creditor objected to the provision in one hearing, but did not object at the confirmation hearing. *Id.* at 1049. The Fifth Circuit concluded that the confirmation order entered by the bankruptcy court released the third party from any

liability and extinguished the creditor's claim. *Id.* at 1054. The confirmation order "makes it indisputably clear" that the creditor's adversary claim arose out of the same transaction that was the subject of the confirmation order. *Id.* The Fifth Circuit, therefore, concluded that the elements of *res judicata* were satisfied and the confirmation order was *res judicata. Id.* An important distinction between *In re Simmons* and *Shoaf* is that unlike the creditor in *In re Simmons,* "the holder of the guaranty in *Shoaf* was not a secured creditor of the debtor entitled to the protection of §§ 502(a) and 506." *In re Howard,* 972 F.2d at 641.

In *In re Howard,* the creditor held a secured mortgage claim in the amount of $4,590.47, but the chapter 13 plan described the claim as disputed, proposing to pay the creditor $500.00. *Id.* at 640. The creditor filed a proof of claim before the confirmation hearing, but never received a copy of the plan or notice that the debtor had reduced its claim to just $500.00. *Id.* The debtors did not object to the creditor's proof of claim and the creditor did not participate in the confirmation proceedings. *Id.* There were no objections to the proposed plan, and the bankruptcy court entered a confirmation order. *Id.* The creditor did not receive the payments it expected pursuant to its proof of claim, and subsequently filed a motion for relief from the automatic stay so that it could foreclose. *Id.* The debtors argued that, pursuant to § 1327(a), the confirmed plan was *res judicata* and the creditor was bound by the provision reducing its claim. *Id.* Because a timely filed proof of claim is *prima facie* valid absent an objection and no objection to the proof of claim was filed, the creditor argued that the plan could not reduce the amount of its lien. *Id.*

Although the Fifth Circuit noted in *In re Howard* that § 1327(a), on its face, gives a confirmed plan "a sweeping binding effect on all creditors," it held that "[p]rovisions of the bankruptcy code cannot be read in isolation but should be interpreted in light of the remainder of

the statutory scheme." *Id.* (citations omitted). "Several provisions of the bankruptcy code provide special procedures to protect secured creditors and their liens," including § 502 and § 506. *Id.* Recognizing the "apparent tension" between its decisions in *In re Simmons* and *Shoaf*, "when properly read, these cases are not in conflict." *Id.*

The Fifth Circuit held in *In re Simmons* that "with a loan secured by a lien on the assets of a debtor who becomes bankrupt before the loan is repaid may ignore the bankruptcy proceeding and look to the lien for satisfaction of the debt." *Id.* at 641 *(*quoting *In re Simmons,* 765 F.2d at 556) (quotation omitted)). "In other words, a secured creditor may remain outside the bankruptcy proceedings until an interested party objects to his allowed secured claim." *Id*. The right to rely on the value of a lien would be "meaningless, however, if the creditor's claim can be compromised away without further notice and he is bound by that compromise. Strict adherence to the requirement that an objection be filed to challenge a secured claim is necessary to protect this important interest under the Code." *Id.*

> In light of these concerns, *Shoaf* stands for the proposition that a confirmed Chapter plan is *res judicata* as to all parties who participate in the confirmation process. The general applicability of *res judicata* to bankruptcy plan confirmations must give way, however, to the interest of the secured creditor, as we recognized in *Simmons,* in being confident that its lien is secure unless a party in interest objects to it. Unlike the creditor in this case, the holder of the guaranty in *Shoaf* was not a secured creditor of the debtor entitled to the protection of §§ 502(a) and 506. The immediate importance of that distinction is demonstrated by the fact that the *Shoaf* court found it unnecessary to cite *Simmons.* Thus, *Simmons* represents a limited exception to the general rule of *Shoaf* based upon the competing concerns expressed in the bankruptcy code.

Id. The Fifth Circuit concluded in *In re Howard* that the "key to *Simmons* is the requirement that a claim be objected to before the creditor loses its ability to rely upon its lien for relief." *Id.* at 642.

In *In re Howard*, like in *In re Simmons*, the creditor relied on its lien, which it was entitled to do unless a party in interest objected. *Id.* at 641-42. The creditor's "timely filed proof of claim was never objected to and [the creditor] did not participate in the confirmation of the [debtors'] plan." *Id.* at 642. Thus, the Fifth Circuit held that the plan was not *res judicata* as to treatment of the secured creditor. *Id.* "We hold only that a debtor who wishes to challenge the amount of a secured claim either by asserting a counterclaim or offset against it or by disputing the amount or validity of the lien must file an objection to the creditors' claim in order to put the creditor on notice that it must participate in the bankruptcy proceedings." *Id.*

II. Bankruptcy Case

The facts of the Bankruptcy Case differ from the facts of the aforementioned cases because the Debtor did not attempt to reduce the amount of the Bank's claim through the Plan. Instead, the Plan actually provided for an increase in the total amount of the Bank's claim by providing for a seven percent (7%) interest rate, whereas the POC did not include interest. Unlike the creditors in *In re Simmons, Shoaf,* and *In re Howard*, the Bank is essentially arguing that its proof of claim is not *prima facie* valid. The facts of the Bankruptcy Case are further complicated by the fact that the Debtor did file the Objection to the *prima facie* valid proof of claim, but did so nearly five (5) years after the Confirmation Order was entered. The Court must first address whether the POC was *prima facie* valid despite the Objection before determining whether the POC or the Plan governs the payment of interest.

A. POC *Prima Facie* Valid

As the Court previously discussed, a timely filed proof of claim is *prima facie* valid unless a party in interest objects. Federal Rule of Bankruptcy Procedure 3007 ("Rule 3007") governs objections to claims, and it does not establish a deadline for objecting to a claim. FED.

R. BANKR. P. 3007. In *In re Simmons*, the Fifth Circuit held that although Rule 3007 does not establish a time limit for objecting to a claim, "section 502(b) provides that, in the absence of an objection by a party in interest, a proof of claim is deemed allowed. We must determine then when a secured claim, proof of which has been timely filed in a Chapter 13 case, must be allowed." *In re Simmons*, 765 F.2d at 553. The Fifth Circuit held that in general a secured claim that was not objected to prior to confirmation of a chapter 13 plan should be allowed. *Id*.

In determining when a proof of claim must be allowed under § 502, the Fifth Circuit in *In re Simmons* cited *In re Hartford*, 7 B.R. 914 (Bankr. D. Me. 1981). *Id.* In *In re Hartford*, the debtor's chapter 13 plan, which listed a creditor as a "long term claimant," was confirmed after the creditor filed a secured proof of claim. *In re Hartford*, 7 B.R. at 915. The creditor moved for reconsideration of the confirmation order, arguing that its claim should be allowed as secured rather than as a "long term claimant." *Id.* The court cited two sections of the Bankruptcy Code that "clearly require that proof of secured claims be acted upon . . . before confirmation of a Chapter 13 plan." *Id.* at 916. First, § 506(a) requires a valuation of the creditor's security interest in conjunction with a hearing on confirmation. *Id.* Second, § 1325(a)(5) "requires that a timely filed proof of a secured claim provided for by the plan be acted upon before confirmation." *Id.* at 917. The court held that "it seems clear that Sections 506(a) and 1325(a)(5) require that a secured claim, proof of which is timely filed, and which is provided for in the debtor's Chapter 13 plan, must be allowed or disallowed before confirmation of the plan. It seems equally clear that Section 502(a) requires, in the absence of an objection by a party in interest, that the claim be allowed." *Id.*

After discussing *In re Hartford*, the Fifth Circuit in *In re Simmons* concluded that "under sections 506(a) and 1325(a)(5), a proof of secured claim must be acted upon-that is, allowed or

disallowed-before confirmation of the plan or the claim must be deemed allowed for purposes of the plan." *In re Simmons*, 765 F.2d at 553. Because no objections to the creditor's secured claim in *In re Simmons* were filed before the chapter 13 plan was confirmed, the Fifth Circuit held that the creditor's claim "should have been deemed an allowed secured claim for purposes of confirmation." *Id.* at 554.

Although the Debtor has now filed the Objection, the Court finds that, based on the precedent set by the Fifth Circuit in *In re Simmons*, the POC was deemed allowed on the date the Confirmation Order was entered. In *In re Howard*, the Fifth Circuit held that a debtor that wishes to dispute a secured claim must file an objection to put the creditor on notice that it must participate in the confirmation proceedings. *In re Howard*, 972 F.2d at 642. Here, the Debtor did not file the Objection until five (5) years after the Confirmation Order was entered. Thus, the Bank would not have been put on notice that it needed to participate in the confirmation proceedings. Because no objection to the POC was filed before the Confirmation Order was entered, the POC was *prima facie* valid as to the amount. To hold otherwise would frustrate the purpose of the claim objection process articulated by the Fifth Circuit in *In re Simmons* and *In re Howard*. Thus, the Court finds that the POC is *prima facie* valid, and the only issue left for the Court to resolve is whether the *prima facie* valid POC or the Plan controls the payment of interest on the Bank's claim.

B. POC Controls

Taken together, *In re Simmons*, *Shoaf*, and *In re Howard* appear to hold that a confirmed plan is not *res judicata* as to a particular claim if: 1) there is a timely filed proof of claim; 2) no objections to the claim are made prior to confirmation; and 3) the creditor with the timely filed

proof of claim did not participate in the plan confirmation. In other words, if these three elements are satisfied, a confirmed plan is not *res judicata* as to that claim.

Although the Bank presents an argument opposite from the creditor in *In re Simmons*, the facts here are otherwise similar to those in *In re Simmons*. The Bank filed the POC, to which no objections were filed prior to the entry of the Confirmation Order. The Debtor filed the Plan, which treated the Bank as secured and proposed to pay the Bank at a seven percent (7%) rate of interest. The Bank did not object to the Plan, and the discrepancy as to the payment of interest was never resolved. As the Fifth Circuit held in *In re Simmons*, a chapter 13 plan cannot substitute for an objection to a secured creditor's proof of claim. *In re Simmons*, 765 F.2d at 551-52. Once a creditor has filed a proof of claim, "the Code and Rules clearly impose the burden of placing the claim in dispute on any party in interest desiring to do so by means of filing an objection." *Id.* at 552.

In consideration of Fifth Circuit precedent, this Court finds that the interest rate provided in the POC controls. The general rule in *Shoaf* is that a plan is *res judicata* as to all parties who participate in the plan confirmation process. *In re Howard*, 972 F.2d at 641. Secured creditors with claims to which no objections were filed prior to confirmation are entitled to rely on their proofs of claim, and their claims are not altered simply because a debtor provides for different treatment in the plan. *Id.* Had the Debtor objected to the POC prior to confirmation or had the Bank objected to the Plan, the Plan would be *res judicata.* Because no objections to the POC were filed prior to entry of the Confirmation Order, the POC was *prima facie* valid.

The Court finds that the Fifth Circuit's holdings in *In re Simmons*, *Shoaf*, and *In re Howard* compel a finding that the POC governs the interest rate in the Bankruptcy Case. The three requirements necessary for the exception to the *res judicata* effect of a confirmed plan to

apply to a claim are satisfied in the Bankruptcy Case: 1) the Bank timely filed the POC; 2) there were no objections to the POC prior to confirmation; and 3) the Bank did not participate at the confirmation hearing. The Court will not upset the settled law that a timely filed proof of claim is *prima facie* valid unless an objection is filed, and the fact that the Plan contradicts the POC did not constitute an objection to the POC. The Trustee, therefore, correctly paid the claim pursuant to the terms of the POC for almost five (5) years. Accordingly, the Court finds that the POC controls the Bank's claim, meaning that the Bank was not entitled to the payment of interest included in the Plan. The Objection should be overruled.

IT IS, THEREFORE, ORDERED that the Objection is hereby overruled.

##END OF ORDER##