**SO ORDERED,**

**Judge Neil P. Olack**
**United States Bankruptcy Judge**
**Date Signed: December 8, 2015**

**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:**

**JERMAINE HOWARD,** **CASE NO. 15-02060-NPO**

**DEBTOR.** **CHAPTER 13**

**ORDER SUSTAINING OBJECTION TO SECURED CLAIM AND OVERRULING SECOND AMENDED OBJECTION TO CONFIRMATION**

This matter came before the Court for hearing on October 23, 2015 (the "Hearing") on the Objection to Secured Claim and Other Relief (the "Objection to Secured Claim") (Dkt. 14) filed by the debtor, Jermaine Howard (the "Debtor"); the Response to Debtor's Objection to Secured Claim and Other Relief (Dkt. 23) filed by 21st Mortgage Corporation, successor-in-interest to Chase Manhattan ("21st Mortgage"); the Second Amended Objection to Confirmation (Dkt. 58) filed by 21st Mortgage; and the Response of Debtor, Jermaine Howard[,] to Second Amended Objection to Confirmation (the "Response to Second Amended Objection to Confirmation") (Dkt. 59) filed by the Debtor in the above-referenced bankruptcy case. At the Hearing, Edward E. Lawler, Jr. ("Lawler") represented 21st Mortgage and Timothy L. Gowan

represented the Debtor. After considering the matter, the Court finds as follows:[1]

**Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L). Notice of the Hearing was proper under the circumstances.

**Facts**

To finance the purchase of a 2000 Palm Harbor 32' × 56' manufactured home (the "Home"), the Debtor signed a Consumer Loan Note, Security Agreement and Disclosure Statement (the "Note") in favor of 21st Mortgage in the principal amount of $47,218.60 with an interest rate of 10.49% in 2012. (Exs. 1-2).[2] The Debtor granted 21st Mortgage a security interest in the Home to secure repayment of the Note. *Id*. Although the Home is the Debtor's residence, it is personal property and not real property of the Debtor. (Dkt. 3 at 6).

On July 1, 2015, the Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) under chapter 13 of the Bankruptcy Code.[3] In Schedule D-Creditors Holding Secured Claims ("Schedule D") (Dkt. 3 at 8), the Debtor listed 21st Mortgage as having a secured claim of $24,634.29 and an unsecured claim of $23,431.71. On July 9, 2015, 21st Mortgage filed a proof of claim in the amount of $49,115.98, consisting of the principal amount of $46,251.48, interest

[1] The Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

[2] 21st Mortgage introduced two (2) exhibits into evidence at the Hearing. They are cited together as "(Exs. 1-2)" or separately as "(Ex. __)". The Debtor did not introduce any exhibits.

[3] From this point forward, all section references are to the Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

of $2,425.89, and late fees and other charges of $438.61. (POC 1-1).

Contemporaneously with the filing of the Petition, the Debtor submitted a chapter 13 plan (the "Plan") (Dkt. 4) in which he proposed to retain the Home and pay 21st Mortgage $24,634.29, the purported value of the Home, over sixty (60) months at an annual interest rate of five percent (5%). The Plan also provided for monthly payments of $1,178.40 to the chapter 13 trustee and a dividend of 0% to unsecured creditors. On July 15, 2015, the Debtor filed his Objection to Secured Claim, asking the Court to set the value of the Home at $24,634.29 for purposes of Plan confirmation.

On August 12, 2015, 21st Mortgage filed its initial Objection to Confirmation (Dkt. 24), urging the Court not to confirm the Plan on the ground the Debtor's valuation of the Home was too low. On August 19, 2015, the Debtor filed the Response of Debtor, Jermaine Howard[,] to Objection to Confirmation (Dkt. 33), denying that the Plan failed to propose payment for the present value of the Home. To correct a typographical error, the Debtor filed the Amended Response of Debtor, Jermaine Howard[,] to Objection to Confirmation (Dkt. 34) on that same day.

The Debtor submitted an amended chapter 13 plan (the "Amended Plan") (Dkt. 41) on August 27, 2015. The Debtor did not change the proposed treatment of 21st Mortgage's secured claim in the Amended Plan but included a new provision for payment of a "Domestic Support Obligation" and a handwritten note regarding his retention of two (2) motor vehicles. (*Id*.).

On August 31, 2015, 21st Mortgage filed the first Amended Objection to Confirmation (Dkt. 50), alleging that the Amended Plan lacked feasibility under § 1325(a)(6). The Amended Objection to Confirmation omitted the allegation included in the initial Objection to

Confirmation regarding the Debtor's valuation of the Home. On September 4, 2015, the Debtor filed his Response of Debtor, Jermaine Howard[,] to Amended Objection to Confirmation (Dkt. 52), denying 21st Mortgage's allegation that the Plan lacked feasibility but admitting that as of January 26, 2015, the Debtor owed 21st Mortgage $49,115.98, plus interest, late fees, attorney's fees, and other expenses. On October 21, 2015, 21st Mortgage filed the Second Amended Objection to Confirmation, maintaining both that the Debtor's Amended Plan failed to propose payment for the present value of the Home and lacked feasibility. The next day, the Debtor filed his Response to Second Amended Objection to Confirmation, denying both allegations.

At the outset of the Hearing, the parties agreed that the base value of the Home is $33,900.00, and the cost of repairs to the Home is $7,034.00. They further agreed that the adjusted base value of the Home is $26,866.00[4] after subtracting the repair costs. 21st Mortgage asked the Court to increase the adjusted base value by $8,000.00 to account for "delivery/set up" costs. (Ex. 2). If the delivery and set up costs were added to the adjusted base value, as urged by 21st Mortgage, the value of the Home would be $34,866.00.[5] The Debtor opposed any increase in the adjusted base value of $26,866.00.

**Discussion**

The Debtor invokes the "cram down" option under § 1325(a)(5)(B) to pay the present value of the Home in sixty (60) monthly installments during the life of the Amended Plan. The cram down option, in combination with § 1322(b)(2), allows the Debtor to keep the Home over 21st Mortgage's objection, but he must pay 21st Mortgage no less than the present value of its

[4] The adjusted base value of $26,866.00 differs from the Debtor's valuation of the Home in the Amended Plan and Schedule D ($24,634.29).

[5] $34,866.00 = $26,866.00 + $8,000.00.

allowed secured claim, that is, the present value of the Home, and 21st Mortgage retains its lien on the Home.[6] *Till v. SCS Credit Corp*., 541 U.S. 465, 476 (2004); *In re Stringer*, 508 B.R. 668, 672 (Bankr. N.D. Miss. 2014). The primary issue before this Court is whether the present value of the Home includes delivery and set up costs. To the extent the amount of 21st Mortgage's claim (approximately $49,115.98) exceeds the present value of the Home, that portion of its claim is unsecured. 11 U.S.C. § 506(b). As mentioned previously, the Amended Plan proposes to pay a dividend of 0% on all general unsecured claims.

Lawler stated at the Hearing that if the valuation issue is resolved in 21st Mortgage's favor, the Court must consider whether the Debtor will be able to make all payments under the Amended Plan. *See* 11 U.S.C. § 1325(a)(6). Otherwise, if the valuation issue is resolved in favor of the Debtor, 21st Mortgage will withdraw the feasibility issue.

**§ 506(a)**

The present value of 21st Mortgage's allowed secured claim is governed by § 506(a). The current version of § 506(a) was amended as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Pub. L. No. 109-8, 119 Stat. 23 (2005) ("BAPCPA"). Section 506(a) provides:

> (a) (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the

[6] Section 1322(b)(2) allows a debtor to modify the rights of holders of secured claims with the exception of any claim that is "secured only by a security interest in real property that is the debtor's residence." 11 U.S.C. § 1322(b)(2). Because the Home is personal property, not real property, the Debtor may modify 21st Mortgage's rights as a secured creditor through the Amended Plan.

> proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (2) If 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. With respect to 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.

11 U.S.C. § 506(a).

**Pre-BAPCPA & *Rash***

Before BAPCPA, § 506(a) provided for determination of value "in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting [the secured] creditor's interest." 11 U.S.C. § 506(a). Although this language remains in the first paragraph of the current statute, BAPCPA added a second paragraph. Until 1997, when the U.S. Supreme Court issued its decision in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the U.S. Courts of Appeals disagreed as to whether value should be determined by: (a) what the secured creditor could obtain through a foreclosure sale of the property (the "foreclosure-value standard"); (b) what the debtor would have to pay for comparable property (the "replacement-value standard"); or (c) the midpoint between these two amounts. *Id*. at 956, 959. In *Rash*, the U.S. Supreme Court resolved the issue by ruling that the "proposed disposition or use" of the property governs the valuation issue when a debtor invokes the cram down option under § 1325(a)(5)(B). *Id*. at 961-62. For this reason, the *Rash* Court rejected the foreclosure-value standard in favor of the replacement-value standard. The replacement-value standard considers the debtor's actual use

of the property as mandated by § 506(a), whereas the foreclosure-value standard does not. *Id*. at 963. In footnote two (2), the *Rash* Court defined replacement value as "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." *Rash*, 529 U.S. at 959 n.2.

**BAPCPA & the Codification of *Rash***

In BAPCPA, Congress refined the approach to the valuation of personal property in individual chapter 7 and 13 cases by adding the second paragraph to § 506(a). Section 506(a)(2) follows the general replacement-value standard articulated by *Rash*. The first sentence of § 506(a)(2) requires courts to determine the value of an allowed claim based on the replacement value of the personal property securing that claim. The second sentence of § 506(a)(2) defines "replacement value" as "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." 11 U.S.C. § 506(a)(2). The Code, however, does not articulate a specific method for implementing this definition of "replacement value."

**Value of the Home**

The parties agreed to a base value of $33,900.00. Because § 506(a)(2) requires consideration of the age and condition of the property, the parties further agreed to reduce the base value to $26,866.00 to account for the repair costs. 21st Mortgage asks the Court to increase the base value to $34,866.00 to account for the delivery and set up costs. In support of its position, 21st Mortgage presented the testimony of Christopher King ("King"), a six (6)-year employee of 21st Mortgage from Orange Beach, Alabama.

King, who is currently 21st Mortgage's "remarketing agent" for the region that includes

Mississippi, estimated that the Debtor would have to pay delivery and set up costs of approximately $8,000.00 in a hypothetical purchase of a replacement manufactured home. King testified that the standard cost for moving a double-wide manufactured home from a sales lot to a customer's home site is $4,000.00, assuming the distance falls within a radius of sixty (60) miles. He estimated set up costs of an additional $4,000.00, consisting of: (1) $1,500.00 to prepare the site; (2) $500.00 to build steps at the entryway; (3) $1,000.00 to "skirt" the bottom perimeter; and (4) $1,000.00 to "trim out" the interior and exterior. King reviewed 21st Mortgage's loan file in preparation for his testimony at the Hearing and noted that in 2012, the dealer charged the Debtor delivery and set up costs of $8,110.00, an amount only slightly more than his estimate.[7] King was not qualified as an expert, and his testimony was based on his personal knowledge. The Debtor did not dispute King's estimate of the delivery and set up costs but maintained that replacement value should not include such costs as a matter of law.

At the Hearing, Lawler stated that he was unaware of any case authority adopting the view that delivery and set up costs are proper components of the replacement value of a manufactured home. Since the Hearing, a bankruptcy court in a factually analogous case has considered and rejected 21st Mortgage's argument. As in the present matter, 21st Mortgage argued in *In re Gensler*, No. 15-10407, 2015 WL 6443513 (Bankr. N. Mex. Oct. 23, 2015), that the replacement value of a manufactured home should include the cost to relocate a replacement manufactured home to the debtor's property. 21st Mortgage's remarketing manager (not King) estimated that the relocation cost was $8,600.00. The bankruptcy court in *Gensler* held that

[7] King's estimate differed from the actual delivery and set up costs incurred by the Debtor in 2012 when he purchased the Home in two (2) respects. The dealer charged the Debtor $4,160.00 to move the Home and $950.00 to skirt it, whereas King estimated these same costs to be $4,000.00 and $1,000.00, respectively.

"when the proposed disposition is to keep a mobile home at its current location, *Rash*'s rationale indicates that all moving costs, whether increasing or decreasing, should be disregarded." *Gensler*, 2015 WL 6443513, at *4.

The Court agrees with *Gensler*'s application and analysis of *Rash*. Delivery and set up costs should not be considered in determining the manufactured replacement value of a manufactured home under § 506(a)(2) when the debtor proposes to retain the home. In footnote six (6), the *Rash* Court listed items that should not be included when calculating the replacement value of a motor vehicle:

> [R]eplacement value . . . 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 (emphasis added). The *Rash* Court reasoned that although a retailer may increase the price of a vehicle to include the costs of warranties, inventory storage, and reconditioning, a debtor does not receive the benefit of such items when retaining his vehicle. *Id.* Likewise, although a dealer may charge delivery and set up costs, a debtor does not receive any benefit from paying such costs when retaining a manufactured home.

King testified at the Hearing that delivery and set up costs are necessary and, thus, are often included in any financing for a manufactured home. Until it is delivered to the site and properly installed, a manufactured home is not usable. *See, e.g.*, MISS. CODE ANN. § 75-49-5(4) (authorizing the promulgation and enforcement of regulations for the safe anchoring and blocking of manufactured homes when they are delivered to the home site). To emphasize this

point, King insisted, "When we sell a home off a retailer's lot, we sell the box." (Hr'g Tr. at 10:15:11).[8] A debtor incurs delivery and set up costs, however, only if the manufactured home is actually moved to a sales lot and then delivered to the home site. Such a hypothetical move ignores the proposed use of the manufactured home by the debtor who invokes the cram down option under § 1325(a)(5)(B). The *Rash* Court rejected the foreclosure-value standard precisely because it failed to consider the debtor's continued use of the property as mandated by § 506(a). Simply put, 21st Mortgage's interpretation of § 506(a) is inconsistent with the replacement-value standard established by the Supreme Court in *Rash* and codified by Congress in § 506(a)(2).[9] Accordingly, the Court finds that the value of the Home (and the amount of 21st Mortgage's secured claim under § 506(a)) is $26,866.00.

Other courts have considered and rejected 21st Mortgage's argument in reverse. For example, in *In re Carlson*, No. 06-40402, 2006 WL 4811331 (Bankr. W.D. Wash. Dec. 8, 2006) and *In re Kollmorgen*, No. 11-10904, 2012 WL 195200 (Bankr. D. Kan. Jan. 20, 2012), the bankruptcy courts refused to *reduce* the value of a manufactured home by its relocation costs. "No money value is added to the retail value to relocate or set the manufactured home." *Kollmorgen*, 2012 WL 195200, at *4 n.25 (citation omitted).

[8] Because the Hearing was not transcribed, this citation is to the timestamp of the audio recording.

[9] In *In re Fortenberry*, No. 14-50768, 2014 WL 7407515, *4 (Bankr. S.D. Miss. Dec. 30, 2014), Judge Katharine M. Samson held that the costs of removing and relocating a manufactured home to a sales lot should not be included in the value of the manufactured home under § 506. Although the holding in *Fortenberry* is consistent with this Order, Judge Samson's analysis did not consider "the proposed use or disposition" language in § 506(a)(1). Judge Samson concurs with the approach taken in this Order.

## Conclusion

For the reasons previously stated, the Court sets the replacement value of the Home and the amount of 21st Mortgage's allowed secured claim at $26,866.00 under § 506(a). In light of this conclusion, the Court deems 21st Mortgage's feasibility argument withdrawn.

IT IS, THEREFORE, ORDERED that the relief sought in the Objection to Secured Claim is sustained to the extent 21st Mortgage's claim exceeds $26,866.00.

IT IS FURTHER ORDERED that the Second Amended Objection to Confirmation is overruled.

IT IS FURTHER ORDERED that the Debtor shall file a second amended plan setting forth the value of the Home at $26,866.00 within fourteen (14) days of this Order.

##END OF ORDER##