

DEC 14 2012

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|                                    |   |   |
|------------------------------------|---|---|
| In re:                             | ) | BAP No. CC-12-1164-PaMkBe               |
|                                    | ) |   |
| ALVIN LABOSTRIE and                | ) | Bankr. No. LA 12-11261-RN               |
| SANDRA LABOSTRIE,                  | ) |   |
|                                    | ) |   |
| Debtors.                           | ) |   |
| _____                              | ) |   |
|                                    | ) |   |
| ALVIN LABOSTRIE; SANDRA LABOSTRIE, | ) |   |
|                                    | ) |   |
| Appellants,                        | ) |   |
|                                    | ) |   |
| v.                                 | ) | <b>M E M O R A N D U M</b> <sup>1</sup> |
|                                    | ) |   |
| L.A. FINANCIAL CREDIT UNION;       | ) |   |
| ROSENDO GONZALEZ, Chapter 7        | ) |   |
| Trustee, <sup>2</sup>              | ) |   |
|                                    | ) |   |
| Appellees.                         | ) |   |
| _____                              | ) |   |

Submitted Without Oral Argument  
on November 15, 2012<sup>3</sup>

Filed - December 14, 2012

Appeal from the United States Bankruptcy Court  
for the Central District of California

Hon. Richard M. Neiter, Bankruptcy Judge, Presiding

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Chapter 7 trustee, Rosendo Gonzalez, was named as an appellee in this case. However, the trustee did not file a brief or otherwise participate in this appeal.

<sup>3</sup> After examination of the briefs and record, and after notice to the parties, the Panel unanimously determined that oral argument was not needed in an order entered October 4, 2012. Fed. R. Bankr. P. 8012.

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Appearances: Appellants Alvin LaBostrie, Sr. and Sandra LaBostrie pro se on brief; Bruce Paul Needleman, Esq. on brief for appellee L.A. Financial Credit Union.

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Before: PAPPAS, MARKELL, and BEESLEY,<sup>4</sup> Bankruptcy Judges.

Appellants, chapter 7<sup>5</sup> debtors Alvin and Sandra LaBostrie ("Debtors"), appeal the decision of the bankruptcy court determining the redemption value of their 2005 Ford Freestyle SE (the "Vehicle") pursuant to § 722 to be \$7,500, and granting stay relief to their creditor, appellee L.A. Financial Credit Union ("Creditor"). We AFFIRM.

**FACTS**

On January 13, 2012, Debtors filed a pro se petition for relief under chapter 7. In their schedule D filed with the petition, Debtors listed Creditor as a secured creditor for a "vehicle loan" in the amount of \$13,000. They listed the value of the Vehicle securing Creditor's debt as \$1,400.

On February 6, 2012, Creditor filed a motion for relief from the automatic stay seeking leave of the bankruptcy court to enforce the security interest it claimed in the Vehicle. In the motion, Creditor, presumably relying on Debtors' schedules, also listed the value of the Vehicle at \$1,400. A hearing on the

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<sup>4</sup> The Honorable Bruce T. Beesley, U.S. Bankruptcy Judge for the District of Nevada, sitting by designation.

<sup>5</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 motion was set for March 13, 2012.

2 On February 22, 2012, Debtors filed a motion to redeem the  
3 Vehicle pursuant to § 722. In the motion, Debtors alleged that  
4 the redemption value of the Vehicle was \$1,265 based on an online  
5 Kelley Blue Book report, less the amount of Debtors' California  
6 state law exemption in the Vehicle of \$2,500. Creditor opposed  
7 Debtors' motion arguing that, according to a different Kelley Blue  
8 Book online report, the value of the Vehicle was actually \$11,056.  
9 Creditor also disputed Debtors' suggestion that their exemption in  
10 the Vehicle would reduce the amount they were required to pay to  
11 redeem the Vehicle. Debtors' motion was also set for hearing on  
12 March 13, 2012.

13 At the hearing on Debtors' motion for redemption and  
14 Creditor's motion for stay relief, the bankruptcy court questioned  
15 Mr. LaBostrie about the valuation of the Vehicle in Debtors'  
16 redemption motion of \$1,265. Mr. LaBostrie explained that he used  
17 an online version of Kelley Blue Book which valued the Vehicle at  
18 \$3,990 to \$5,265. He then subtracted from that value Debtors'  
19 California automobile exemption of \$2,500.<sup>6</sup> The court advised  
20 Mr. LaBostrie that he could not deduct an exemption from the value  
21 of collateral in which he held no equity. In response,  
22 Mr. LaBostrie stated that he would pay \$3,990 to Creditor to  
23 redeem the Vehicle, which he characterized as a fair value. He  
24 then described the Vehicle, representing to the bankruptcy court  
25 that it had been driven over 155,000 miles and that it needed

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26  
27 <sup>6</sup> Using the lowest value provided by Debtors of \$3,990, and  
28 subtracting the exemption amount of \$2,500, even if this had been  
proper, it is unclear from the record how Debtors concluded that  
\$1,265 was the value of the Vehicle.

1 repairs. The bankruptcy court advised Mr. LaBostrie that it was  
2 required to determine the retail value of the Vehicle, and Debtors  
3 would be required to pay that amount to Creditor in order to  
4 redeem it. Mr. LaBostrie argued that, although the \$3,990  
5 represented the trade-in value in the report, in his view, it was  
6 also the retail value of the Vehicle.

7 Creditor's counsel argued that, considering the age,  
8 condition, and mileage for the Vehicle, as described by  
9 Mr. LaBostrie, its value was \$9,500. At that point, the court  
10 asked the parties to confer outside the courtroom, suggesting that  
11 they should reach a compromise for the value. If the parties were  
12 unable to agree on a value after a conference, the court stated  
13 that it would determine the value. The parties were unable to  
14 agree on a value.

15 The court found the value of the Vehicle to be \$7,500,  
16 explaining that the trade-in value of \$3,990, as argued by  
17 Debtors, was not the correct valuation. Rather, the court  
18 concluded, retail value was the appropriate valuation. The court  
19 then noted that when the condition and mileage of the Vehicle as  
20 described by Mr. LaBostrie was considered, an appropriate retail  
21 value was \$7,500. The court informed Debtors that they could  
22 redeem the Vehicle for that amount within ten days, but if they  
23 failed to do so, Creditor would be allowed to pursue its state law  
24 rights in the Vehicle. The court granted Creditor's motion for  
25 relief from the automatic stay, but allowed Debtors ten days to  
26 redeem the Vehicle for the retail value of \$7,500.

27 The bankruptcy court entered an order setting the redemption  
28 value of the Vehicle at \$7,500 on March 15, 2012. On the same

1 day, the court entered an order granting relief from the automatic  
2 stay providing Debtors ten days to redeem the vehicle for \$7,500  
3 before the automatic stay order became effective.

4 Debtors filed a notice of appeal on March 22, 2012.

#### 5 JURISDICTION

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
7 and 157(b)(2)(K) and (O). We have jurisdiction under 28 U.S.C.  
8 § 158.

#### 9 ISSUE

10 Whether the bankruptcy court erred in valuing the Vehicle at  
11 \$7,500 for purposes of redemption under § 722.

#### 12 STANDARD OF REVIEW

13 "The determination of value is a factual finding. It is  
14 reviewed under the clearly erroneous standard." Tuma v. Firstmark  
15 Leasing Corp. (In re Tuma), 916 F.2d 488, 491 (9th Cir. 1990)  
16 (internal citations omitted). "Clearly erroneous review is  
17 significantly deferential, requiring that the appellate court  
18 accept the [trial] court's findings absent a definite and firm  
19 conviction that a mistake has been made." United States v. Syrax,  
20 235 F.3d 422, 427 (9th Cir. 2000).

21 To the extent that this appeal requires the Panel to review  
22 the bankruptcy court's interpretation of § 506(a)(2), its decision  
23 is reviewed de novo. Nash v. Clark Cnty. Dist. Atty's Office, et  
24 al. (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012) (citing  
25 Smith v. Rojas (In re Smith), 435 B.R. 637, 642-43 (9th Cir. BAP  
26 2010)).

#### 27 DISCUSSION

28 On appeal, Debtors argue that the bankruptcy court abused its

1 discretion in setting the redemption value of the Vehicle because  
2 the court: (1) did not consider the value of the Vehicle listed in  
3 Creditor's motion for relief from the automatic stay; (2) did not  
4 set the value of the Vehicle based on Debtors' schedules and other  
5 exhibits; (3) did not consider Debtors' exemptions in fixing the  
6 value of the Vehicle; (4) did not properly apply § 506(a) in  
7 valuing the Vehicle; and (5) did not make adequate findings of  
8 fact based on all the evidence presented. Debtors' arguments lack  
9 merit.

10 **I. Applicable Law: Sections 722 and 506(a)**

11 Section 722 provides:

12 An individual debtor may, whether or not the  
13 debtor has waived the right to redeem under  
14 this section, redeem tangible personal  
15 property intended primarily for personal,  
16 family, or household use, from a lien securing  
17 a dischargeable consumer debt, if such  
18 property is exempted under section 522 of this  
19 title or has been abandoned under section 554  
20 of this title, by paying the holder of such  
21 lien the amount of the allowed secured claim  
22 of such holder that is secured by such lien in  
23 full at the time of redemption.

19 A lien is a "charge against or interest in property to secure  
20 payment of a debt or performance of an obligation." § 101(37).  
21 The amount of an "allowed secured claim" that must be paid to a  
22 secured creditor to redeem collateral from a lien is determined by  
23 reference to § 506(a). In re Morales, 387 B.R. 36, 39 (Bankr.  
24 C.D. Cal. 2008). Section 506(a) provides:

25 (a)(1) An allowed claim of a creditor secured  
26 by a lien on property in which the estate has  
27 an interest . . . is a secured claim to the  
28 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

1 interest . . . is less than the amount of such  
2 allowed claim . . . .

3 (2) If the debtor is an individual in a case  
4 under chapter 7 or 13, such value with respect  
5 to personal property securing an allowed claim  
6 shall be determined based on the replacement  
7 value of such property as of the date of the  
8 filing of the petition without deduction for  
9 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.

10 Determining the replacement value of collateral for purposes  
11 of § 506(a) is done on a case-by-case basis. Taffi v. United  
12 States (In re Taffi), 96 F.3d 1190, 1193 (9th Cir. 1996); see also  
13 In re Morales, 387 B.R. at 41. “[T]he proper measure of the  
14 replacement value of a vehicle is its retail value [but] an  
15 adjustment to that value may be necessary: A creditor should not  
16 receive portions of the retail price, if any, that reflect the  
17 value of items the debtor does not receive when he retains his  
18 vehicle . . . .” Assocs. Commercial Corp. v. Rash, 520 U.S. 953,  
19 965 n.6 (1997).

20 Methods used by bankruptcy courts for determining the  
21 replacement value for vehicles vary, but consideration of the  
22 Kelley Blue Book retail values, at least as a starting point, has  
23 been endorsed by courts. See In re De Anda-Ramirez, 359 B.R. 794,  
24 796-97 (10th Cir. BAP 2007) (noting that Kelley Blue Book is not  
25 determinative of retail replacement value but holding that the  
26 bankruptcy court’s reliance on Kelley Blue Book for the retail  
27 replacement value was not clearly erroneous); see also In re  
28 Araujo, 464 B.R. 15, 21 (Bankr. N.D. Cal. 2011); In re Martinez,

1 409 B.R. 35, 40 (Bankr. S.D.N.Y. 2009); In re Cook, 415 B.R. 529,  
2 535 (Bankr. D. Kan. 2009); In re Morales, 387 B.R. at 47-48.

3 Because the language of § 506(a)(2) is arguably  
4 contradictory,<sup>7</sup> the timing of determining the replacement value of  
5 collateral under § 722 is subject to some debate. See In re  
6 Morales, 387 B.R. at 43 (discussing cases holding that the  
7 petition date is the correct date to determine the replacement  
8 value, those holding that the date of the hearing on value is the  
9 valuation date, and holding that the petition date is the most  
10 appropriate date); but see 6 COLLIER ON BANKRUPTCY ¶ 722.05[1] (Alan  
11 N. Resnick & Henry J. Sommer eds., 16th ed., 2012) (stating "most  
12 courts have held that, for purposes of redemption, valuation  
13 should ordinarily be as of the date of the redemption proceeding"  
14 and noting that conclusion is supported by the second sentence of  
15 § 506(a)(2)); In re Cook, 415 B.R. at 534 (disagreeing with  
16 Morales and stating that the appropriate time for determination of  
17 the replacement value is the time of the hearing on value). Here,  
18 Debtors and Creditor both submitted evidence presumably to show  
19 the value of the Vehicle as of the date of the hearing in the  
20 bankruptcy court. Therefore, whether the valuation of the Vehicle  
21 should have been made as of the petition date or hearing date is  
22 not at issue.

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25 <sup>7</sup> The first sentence of § 506(a)(2) states that "value with  
26 respect to personal property securing an allowed claim shall be  
27 determined based on the replacement value of such property as of  
28 the date of filing the petition . . ." However, in the next  
sentence, the statute provides that "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." (emphasis added).



1 **II. Analysis and Disposition.**

2 Creditor does not dispute that its lien on the Vehicle is  
3 subject to redemption by Debtors under § 722. The sole issue on  
4 appeal is whether the bankruptcy court erred in its valuation of  
5 the Vehicle for redemption purposes and in the order granting  
6 relief from the automatic stay. As a question of fact, we review  
7 the bankruptcy court's determination of the Vehicle's value under  
8 the clearly erroneous standard. As to the bankruptcy court's  
9 interpretation of § 506(a)(2), we review de novo.

10 Debtors assign five different types of error at the  
11 bankruptcy court's conclusion as to the value of the Vehicle for  
12 § 722 purposes and in the order granting relief from the automatic  
13 stay. Each will be addressed in turn.

14 A. The value in creditor's motion for relief from the  
15 automatic stay is not dispositive.

16 The fact that Creditor stated the value of the Vehicle to be  
17 \$1,400 in its motion for relief from the automatic stay, and later  
18 changed it to \$11,056 in opposition to Debtors' redemption motion,  
19 is of little consequence in this case. The bankruptcy court, as  
20 the fact-finder, is the arbiter of the redemption value under  
21 § 722 and the value of a lien pursuant to § 506(a)(2). See  
22 § 105(a); Rules 3012 and 6008; see also In re Lopez, 224 B.R. 439,  
23 443 (Bankr. C.D. Cal. 1998) (holding that the bankruptcy court  
24 determines the value of the collateral pursuant to § 722  
25 regardless of other valuation processes). That the bankruptcy  
26 court did not adopt Creditor's allegations concerning the value of  
27 the Vehicle does not render the bankruptcy court's decision  
28 concerning value clearly erroneous.

1        B. The value placed by Debtors on the Vehicle in  
2        their Schedules and Exhibits was properly considered  
3        by the bankruptcy court and rejected.

4        The bankruptcy court considered Debtors' motion to redeem and  
5        the values provided for the Vehicle in that motion. The court  
6        determined that the values provided by Debtors were not the  
7        replacement value as required by § 506(a)(2). The court then  
8        adjusted the retail book value to account for the age and  
9        condition of the Vehicle in reaching its final conclusion  
10       concerning the value of the Vehicle.

11       The bankruptcy court did not commit clear error when it  
12       considered the values offered by Debtors in their motion and  
13       schedules but rejected them in favor of a higher valuation for  
14       § 722 purposes.

15       C. The bankruptcy court properly held that exemptions  
16       do not apply to collateral in which debtors have no equity.

17       A debtor may not claim an exemption in property that is  
18       wholly encumbered by a consensual lien. See Owen v. Owen,  
19       500 U.S. 305, 308 (1991) (stating, "since the equitable interest  
20       does not pass to the estate, neither can it pass to the debtor as  
21       an exempt interest in property.") (and citing Long v. Bullard,  
22       117 U.S. 617 (1886)). Under § 506(a)(2), Creditor's allowed claim  
23       was the "replacement value" of the Vehicle which means "the price  
24       a retail merchant would charge for property of that kind  
25       considering the age and condition of the property at the time  
26       value is determined." Because there was no dispute that the debt  
27       owed by Debtors to Creditor exceeded the value of the Vehicle,  
28       Debtors' claim of an exemption in the Vehicle is of no import in  
determining the amount of Creditor's allowed secured claim. In

1 other words, since they lacked any equity in the Vehicle, nothing  
2 in the Code would allow Debtors to utilize their state law  
3 exemptions to reduce the value of the Vehicle for § 722 purposes.  
4 See, e.g., In re Longmore, 273 B.R. 633, 635 (Bankr. D. Nev. 2001)  
5 (stating “[w]here a vehicle is over-encumbered and thus has no  
6 equity, there is no exemptible interest.”). Therefore, the  
7 bankruptcy court did not err when it rejected Debtors’ attempt to  
8 use their statutory exemption to reduce the value of the Vehicle  
9 for § 722 purposes.

10 D. The bankruptcy court applied the correct legal  
11 standard under § 506(a).

12 As the bankruptcy court correctly observed at the hearing on  
13 March 13, and as the Supreme Court instructed in Rash, § 506(a)(2)  
14 requires that replacement value be used to determine the amount of  
15 Creditor’s allowed secured claim in the Vehicle. In determining  
16 that replacement value, the bankruptcy court considered the  
17 evidence presented by the parties. The court reviewed the Kelley  
18 Blue Book information submitted by each of the parties, and  
19 listened to Mr. LaBostrie’s description of the current condition  
20 of the Vehicle. When the parties were unsuccessful in privately  
21 resolving this value issue, the court adopted a value different  
22 from that urged by either party. The court declined to adopt the  
23 low, trade-in book value offered by Debtors; it also reduced the  
24 value as submitted by Creditor after taking into consideration the  
25 age and condition of the Vehicle. In arriving at its value, the  
26 court expressly noted the condition and mileage of the Vehicle as  
27 represented by Mr. LaBostrie, and that the Vehicle needed repairs.  
28 It is unclear from the record at what point in time the bankruptcy

1 court was determining the value - whether the court fixed the  
2 Vehicle's value as of the hearing date or the petition date.  
3 However, because the parties also did not offer different values  
4 for the Vehicle for each of the two possible dates, we presume the  
5 court properly determined the value of the Vehicle at the time of  
6 the hearing. Regardless, the bankruptcy court correctly  
7 interpreted § 506(a)(2) to require replacement value to be  
8 determined as the retail value and there is no basis to conclude  
9 that the bankruptcy court clearly erred in assessing the value of  
10 the Vehicle under that standard.

11 E. The bankruptcy court made adequate findings of  
12 fact and its valuation of the vehicle was not  
clearly erroneous.

13 Debtors argue that, "[t]he Trial Judge erred with its  
14 decision not to remain partial [sic]" in deciding the value of the  
15 vehicle pursuant to § 506(a). Debtors' Br. at 4. Debtors claim  
16 further error in the bankruptcy court's ruling based on the  
17 negotiations of the parties before the court determined the value  
18 of the Vehicle. We disagree.

19 Rule 6008 provides that, "[o]n motion by the debtor . . . and  
20 after hearing on notice as the court may direct, the court may  
21 authorize the redemption of property from a lien . . . ."  
22 Rule 9014, governing contested matters, supplied the procedural  
23 rules applicable to resolving the issues raised by Debtors' motion  
24 to redeem the Vehicle.

25 Regardless of the parties' prior negotiations, the bankruptcy  
26 court is the finder of fact. Under the Code and Rules, the court  
27 conducted a hearing at which the parties submitted evidence and  
28 were otherwise heard. The court then entered oral findings of

1 fact on the record in accordance with Rule 7052. Williams v. Eli  
2 Levi et al. (In re Williams), 323 B.R. 691, 700 (9th Cir. BAP  
3 2005); In re Harris, 279 B.R. 254, 260 (9th Cir. BAP 2002). From  
4 the hearing transcript, it is evident that the bankruptcy court  
5 properly interpreted § 506(a)(2) and considered the Kelley Blue  
6 Book information submitted by the parties as a starting point in  
7 fixing the value of the Vehicle. It concluded that neither book  
8 value represented the correct replacement value based upon its  
9 findings concerning the Vehicle's condition and mileage, and its  
10 need of repairs. The bankruptcy court then decided, as its  
11 ultimate finding of fact, that the replacement value of the  
12 Vehicle was \$7,500. In this process, the bankruptcy court  
13 correctly interpreted § 506(a)(2) and committed no clear error in  
14 valuing the Vehicle.

15 **CONCLUSION**

16 We AFFIRM the order of bankruptcy court.  
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