U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 1, 2009 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	CASE NO. 07-45041-DML-13
ERIC DAMON DORTCH	§	
	§	
and	§	
	§	
DAWN RENEE DORTCH,	§	
	§	
Debtors.	§	
	§	

MEMORANDUM ORDER

Before the court is the Trustee's Objection to Proof of Claim Filed on Behalf of Citifinancial Auto Credit, Inc. (the "Objection"), filed by the chapter 13 standing trustee (the "Trustee") in response to the amended claim (the "Amended Claim") filed as an unsecured claim by CitiFinancial Auto Credit, Inc. (the "Claimant"). The Claimant filed both a response and a supplemental response (collectively the "Response") to the Objection. The court conducted a

hearing on the Objection on November 23, 2009, during which the Trustee and the Claimant presented argument.

This matter is subject to the court's core jurisdiction 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (O). This memorandum order embodies the court's findings of fact and conclusions of law. FED. R. BANKR. P. 9014 and 7052.

The debt to the Claimant had its genesis in a contract by which Debtors in 2006 purchased a 2003 Lexus GX470. The contract of purchase and the lien securing it were subsequently acquired by the Claimant.

On November 11, 2007, Debtors commenced this chapter 13 case. On November 26, 2007, well before the April 7, 2008, bar date, the Claimant filed a secured claim in the amount of $42,040.86. That claim asserted no unsecured liability against Debtors.

In their plan (as filed and including amendments, the "Plan"), Debtors provided for direct payment to the Claimant of the full amount of the original secured claim. However, Debtors defaulted on payment, and, on the Claimant's motion, the court entered its order terminating the automatic stay of section 362 of the Bankruptcy Code (the "Code")[1] as to the Claimant's collateral on December 31, 2008.

The Claimant's sale of its collateral did not satisfy its entire debt. Facing a deficiency of $23,897.43, the Claimant filed the Amended Claim. By the Amended Claim, which the Claimant portrays as an amendment pursuant to Fed. R. Civ. P. 15 (adopted in adversary proceedings by Fed. R. Bankr. P. 7015), the Claimant seeks to participate under the Plan as an unsecured creditor as to its deficiency.

The Plan, which was confirmed on March 18, 2008, made no provision for payment by

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1 11 U.S.C. §§ 101 *et seq.*

the Trustee of the Claimant. If the Amended Claim is allowed and the Claimant participates on a parity with other unsecured creditors, the return on unsecured claims will fall from 100% to about 34%. The Trustee therefore objects to the Amended Claim, arguing that confirmation of the Plan, by virtue of the doctrine of res judicata, bars allowance of the Amended Claim.

As a general rule, confirmation of a plan in a case does not absolutely bar later amendment of a claim, though a showing of compelling circumstances in addition to the normal prerequisites to allowing amendment is required. *See Holstein v. Brill*, 987 F. 2d 1268 (7th Cir. 1993). This is not to say that the doctrine of res judicata will never be relevant to an analysis of whether amendment of a claim should be permitted. *See, e.g., In re New River Shipyard, Inc.*, 355 B.R. 894 (Bankr. S.D. Fla. 2006). Indeed, in the case at bar, the changes in treatment of the Claimant and unsecured creditors and the shift of payment of Debtors' obligation to the Claimant from outside to within the Plan suggest that a res judicata analysis might bar the Amended Claim.

But the court need not address the issues raised in applying res judicata.[2] Even if the Amended Claim is not barred by the doctrine of res judicata and even if the Claimant had shown compelling circumstances as required by *Holstein* (which it has not), allowing amendment of the claim at this stage of the case is within the court's sound discretion. *See, e.g., In re Plunkett,* 82 F. 3d 738, 740 (7th Cir. 1996).

Even after meeting the nexus test of Fed. R. Civ. P. 15,[3] whether to exercise equitable

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2 A four part test is used in determing whether a matter is res judiciata. "'The parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.'" *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987) (quoting *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983)).

3 Notably, Rule 7015 (and thus Rule 15) is not made applicable in contested matters. Fed. R. Bankr. P.

discretion to permit amendment of a claim after the bar date has been assessed by the courts based on five factors. First, prejudice to the opposing party must be considered. Second, the court must consider delay by the creditor seeking to amend. Third, it is significant if other creditors will receive a windfall if amendment is not permitted. Fourth, prejudice to other creditors must be considered. Finally, the reason given for amending after the bar date is of consequence. *In re Macmillan*, 186 B.R. 35, 49 (Bankr. S.D.N.Y. 1995); *In re Integrated Resources, Inc.*, 157 B.R. 66, 70 (S.D.N.Y. 1993); *In re McLean Industries, Inc.*, 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990).

In considering these factors, the court need not give each equal weight. *See, e.g., Silvercreek Mgmt. v. Banc of Am. Secs. LLC*, 534 F.3d 469, 472 (5th Cir. 2008); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (noting varying weight given factors in deciding the similar issue of whether late filing of claim was due to excusable neglect).

In the case at bar, the court considers the question of prejudice most significant. *Cf. In re Sacred Heart Hosp. of Norristown*, 186 B.R. 891, 895-97 (Bankr. E.D. Pa. 1995) (emphasizing the issue of prejudice in determining excusable neglect as it applies to late-filed proofs of claim). Clearly, allowing the Amended Claim will prejudice other creditors and the Trustee – return on unsecured claims will be cut by two thirds if the pool is diluted by addition of the Amended Claim. Such a dilution is inconsistent with what the court infers were the expectations of the parties (*see In re Miss Glamour Coat Co., Inc.,* 80-2 U.S. Tax Cus. ¶ 9737 (S.D.N.Y. 1980)). Unsecured creditors and the Trustee acquiesced in confirmation of the Plan in the expectation

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9014(c). As the Amended Claim and Objection present a contested matter (*see* 9 COLLIER ON BANKRUPTCY ¶ 3007.01[1] (15th ed. rev. 2009); FED. R. BANKR. P. 3007 advisory committee's note (1983)) it is questionable whether a Rule 15 analysis is appropriate at all in the case at bar.

that the pool available for unsecured creditors would not be used in part to pay the Claimant's debt.

As for the other factors, they do not favor the Claimant. Other creditors will receive no windfall by reason of not allowing the Amended Claim. The Claimant was arguably not dilatory in filing the Amended Claim. It did so on March 14, 2009, less than three months after obtaining relief from the automatic stay, and so reasonably soon after the Claimant would have quantified its deficiency. On the other hand, the Claimant filed its motion for relief from the stay in November of 2008. By then the Claimant must have recognized a deficiency was likely;[4] the Claimant might be better placed to ask the court to exercise its equitable discretion to allow the Amended Claim had it then (or even earlier) raised the possibility it would seek participation under the Plan as an unsecured creditor. As to the reason for not asserting its unsecured claim until a year after confirmation and more than a year after the bar date, presumably (as discussed above) that resulted from the Claimant's reliance on the paragraph added by BAPCPA to the end of Code § 1325(a) and its treatment in the Plan. The court does not consider this justification sufficient to outweigh the prejudice to other parties.

In sum, the Claimant accepted treatment under the Plan as fully secured. It filed its original claim accordingly. The only justification the Claimant now gives for amending its claim is that Debtors did not perform as to the Claimant as required by the Plan.[5] This is insufficient to

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4 The court notes that the unnumbered paragraph at the end of Code § 1325(a) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to prefer auto-financers. The effect of the provision – to eliminate bifurcation of undersecured claims of auto-financers – here results in detriment to the Claimant. If the ordinary bifurcation rules applied, the Claimant would have timely claimed a deficiency. That the addition by BAPCPA in this case arguably penalizes an auto-financer is no reason to see in the provision congressional intent to alter the normal disfavor of post-confirmation amendments to claims. Had Congress wished to give auto-financers the sort of "have-your-cake-and-eat-it-too" treatment the Claimant seeks, it could easily have so provided.

5 In the Response the Claimant asks for court alternatively to grant it relief against Debtors. The present

support allowance of the Amended Claim.

Accordingly, for the foregoing reasons, the Objection will be sustained.

It is so ORDERED.

END OF MEMORANDUM ORDER # # #

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context is not an appropriate one in which to address the merits of a claim against Debtors.