UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Sid Brooks

In re:	)	
	)	Bankruptcy Case No.
DEBBIE SUE TORREZ,	)	07-19307-SBB
	)	Chapter 13
Debtor.	)	
	)	
Last four digits of SS#: 9614	)	

APPEARANCES:

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ORDER CONFIRMING CHAPTER 13 PLAN OVER OBJECTION

THIS MATTER comes before the Court on November 14, 2007 for hearing regarding the Chapter 13 Plan filed by Debbie Sue Torrez ("Debtor") on August 22, 2007 (Docket # 2) and the Objection thereto filed by DaimlerChrysler Financial Services Americas, LLC ("Creditor"). The Court, having reviewed the Chapter 13 Plan, Objection thereto, the within case file, and having heard argument by counsel for the Debtor, Creditor, and the Standing Chapter 13 Trustee, makes the following findings of fact, conclusions of law and Order.

I. Summary

Creditor holds a security interest in the Debtor's 2004 Dodge Ram 1500 ("Truck"). The principal balance due and owing on the loan as of the date of the bankruptcy filing was $4,276.54, not including interest, attorney's fees and costs. The Truck is worth $12,700.00. The Debtor filed her Chapter 13 Plan on August 22, 2007. The Debtor proposes in her Chapter 13 Plan to pay off the Creditor over 60 months through her Chapter 13 Plan. Creditor objects to this treatment because, by operation of the Plan, the Creditor will not be sent its first disbursement under the Chapter 13 Plan until after attorney fees of $4,774.00 are paid. Because plan payments are $186.00 per month, it may be 20 months before Creditor receives its first post-confirmation disbursement. Creditor argues that pursuant to 11 U.S.C. § 1325(a)(5)(B)(iii)(I), Creditor must immediately begin receiving pre-confirmation adequate protection payments and receive

disbursements beginning the first month after confirmation of the Chapter 13 Plan.[1]

II. Issue

The sole issue before the Court is whether 11 U.S.C. § 1325(a)(5)(B)(iii)(I) requires that equal payments to an over secured creditor must commence in the first month of the Plan and continue at the same amount throughout the Plan's term.

The Court concludes that the equal payments provision requires that payments be level once they begin and terminate once the lender is paid in full. Exactly when these periodic payments, in equal monthly amounts begins, depends on the facts of the case and the Chapter 13 Plan proposed. This interpretation of 11 U.S.C. § 1325(a)(5)(B)(iii)(I) is more consistent with other provisions of the Bankruptcy Code and spirit of the law as discussed below.

III. Facts

Creditor is a secured creditor of the Debtor. The outstanding principal balance due and owing to Creditor on the underlying Retail Installment Contract, as of the date of the bankruptcy filing was $4,276.54, not including interest, attorneys' fees and costs.

The Retail Installment Contract is secured by a first lien and security interest filed against the Truck.

As of the time of the filing of the Objection to Confirmation of the Chapter 13 Plan, the Retail Installment Contract was in payment default.

The Chapter 13 Plan of Debtor classifies Creditor as a Class Two C creditor (i.e. a secured creditor subject to 11 U.S.C. § 506) and indicates that Creditor's claim will be secured for payoff of $4,276.54 and paid at 10% interest over sixty (60) months.

Creditor is not listed as a creditor under the Chapter 13 Plan to be paid adequate protection payments.

Based upon the facts of the case, Creditor will not be sent its first disbursement on its secured claim until after attorney fees of $3,774.00 are paid, and with plan payments of $186.00 per month, it may be 20 months before Creditor receives its first post-confirmation disbursement.

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[1] Put another way, the Creditor argues it *must* be paid "... in equal monthly amounts ..." *pre-confirmation,* and concurrently with *priority creditors post-confirmation.*

IV. Discussion

This appears to be a matter of first impression in this Circuit. The Court is aware of only two opinions that are *directly* on point with respect to the issue before the Court: *In re DeSardi,*[2] and *In re Denton.*[3] 11 U.S.C. § 1325(a)(5)(B)(iii)(I), as enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), provides that if property to be distributed to the holder of an allowed secured claim is to be in the form of periodic payments, such payments shall be in equal monthly amounts.[4]

Under the facts of the *Denton* case,[5] the Court concluded that the periodic payments in equal monthly amounts to a secured creditor, as required under 11 U.S.C. § 1325(a)(5)(B)(iii)(I), must begin in the first disbursement following confirmation. Creditor relies upon this case and asserts that a strict interpretation of 11 U.S.C. § 1325(a)(5)(B)(iii)(I), requires that the priority payment scheme under 11 U.S.C. § 507 be altered so as to permit the Creditor to be paid together, or concurrently, with claimants with higher payment priority where no adequate protection is being offered by the debtor. Here, however, it appears that both Debtor and Creditor agree that this is not a case where adequate protection is at issue since the Creditor is *over-secured* by over $7,500.00. Thus, the provision of 11 U.S.C. § 1325(a)(5)(B)(iii)(II) is not applicable

The *DeSardi* case, on the other hand, found that, in looking at the Bankruptcy Code as a whole and also that court's own local bankruptcy rule, if adequate protection was provided, then payments to the secured creditor must be equal once they begin, but those payments did not

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2 340 B.R. 790 (Bankr. S.D. Tex. 2006).

3 370 B.R. 441 (Bankr. S.D. Ga. 2007).

4 Specifically, 11 U.S.C. § 1325(a)(5)(B)(iii)(I) provides that:

[T]he court shall confirm a plan if ...

(5) with respect to each allowed secured claim provided for by the plan ...
(iii) if—
(I) property to be distributed pursuant to this subsection is in the form of period payments, such payments shall be in equal monthly amounts ...

5 It appears that the entire discussion in the *Denton* case with respect to 11 U.S.C. § 1325(a)(5)(B)(iii)(I) is dicta because the Court had before it a motion to hold a Chapter 13 Trustee in contempt of court for overpayment to secured creditors in a manner that resulted in counsel for the Chapter 13 debtor receiving no fee. The Court ruled that the Chapter 13 Trustee had immunity from such suits. However, the Court went on to discuss distributions by a Chapter 13 Trustee in cases dealing with 11 U.S.C. §§ 1325(a)(5)(B)(iii)(I) and (2), and 1326(a)(1)(C) going forward.

necessarily have to commence as of the effective date of the plan.[6]

Although virtually no legislative history exists with respect to this specific provision, one commentator stated:

> It is important to note that this provision refers to the distributions to the holder of the allowed secured claim and not to the debtor's plan payments. As long as the plan provides that the *trustee's distributions to the holder of the allowed secured claim be in equal monthly amounts, the debtor's plan payments need not be.* There also does not seem to be any requirement that the equal monthly amounts extend throughout the plan. Indeed, because the debtor's payments must also be sufficient to provide adequate protection, and therefore greater than the amount necessary for equal payments throughout the plan, it may be mathematically impossible both to provide adequate protection and to make equal payments thoughout the plan. *A debtor may, for example, provide for equal monthly amounts to be distributed to a particular secured creditor for the first 24 months of a 36-month plan or, if the requirement of providing adequate protection is met, the last 24 months of a 36 month plan.*[7]

Both Creditor and Debtor acknowledge (1) that a significant equity cushion exists here and (2) that adequate protection is not an issue. Under the facts of this case, the Court believes that this Creditor, an over-secured creditor, is not entitled to cash payments for adequate protection because it is adequately protected through the existence of the equity cushion and the vehicle is insured.[8] Consequently, *in what both parties agree is an unusual case*, where, as here, there is *substantial* equity in the vehicle—and a *substantial* equity cushion for the secured creditor—the equal payments can begin at some date after confirmation during the duration of the Chapter 13 Plan. Therefore, this Court will confirm this Chapter 13 Plan over the Creditor's Objection.

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[6] 340 B.R. at 799-80, 805-10.

[7] 8 *Collier on Bankruptcy* ¶ 1325.06[3][b][A], at 1325-37 (Alan N. Resnick and Henry J. Sommer ed., 15th ed. Rev. 2007) (citations omitted) (emphasis added).

[8] *See,* 11 U.S.C. § 361; *In re Gallegos Research Group, Corp.,* 193 B.R. 577, 584-85 (Bankr. D.Colo.1995) (in the context of a Chapter 11 case addressing cash collateral and adequate protection related thereto).

V. Further Findings and Conclusions

THIS COURT FURTHER FINDS AND CONCLUDES:

(1) That the Debtor's Chapter 13 Plan complies with Chapter 13 and all other applicable provisions of Title 11, United States Code;

(2) That any fee, charge, or amount required under Chapter 123 of Title 28, United States Code, or by the Plan, to be paid before confirmation, has been paid;

(3) That the action of the Debtor in filing the petition was in good faith;

(4) That the Chapter 13 Plan has been proposed in good faith and not by any means forbidden by law;

(5) That the value, as of the effective date of the Chapter 13 Plan, of property to be distributed under the Plan on account of each unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor were liquidated under Chapter 7 of Title 11, United States Code on such date;

(6) That the Debtor's Chapter 13 Plan complies with the provisions of 11 U.S.C. §1325(a)(5) as to holders of secured claims.

VI. Order

(1) Creditor's Objection to Confirmation filed September 12, 2007 (Docket # 15) is OVERRULED.

(2) The Debtor's Chapter 13 Plan dated August 22, 2007 (Docket #2) is confirmed.

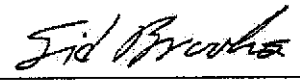
(3) The Debtor shall make payments in accordance with the terms of the Plan.

(4) Creditors holding liens on property which the Chapter 13 Plan specifies is to be surrendered by the Debtor are hereby granted relief from stay imposed by 11 U.S.C. § 362 and may enforce their rights in and to said property.

(5) The assumption of executory contracts on the terms stated in the Plan is approved. If the plan provides for the rejection of an executory contract or unexpired lease, the party to the rejected executory contract or lease shall file a proof of claim within 30 days of the date of the entry of this Order, failing which the claim may be barred.

Dated this 30th day of November , 2007.

BY THE COURT:



Sidney B. Brooks,
United States Bankruptcy Judge