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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA

7 In re Case No. 06-10978-A-13
8 BRANDY BYRON BLEVINS AND
9 SUSAN LYNN BLEVINS

10 Debtor.
11 _____/

12 FINDINGS OF FACT AND CONCLUSIONS OF LAW
13 REGARDING OBJECTION OF DOWNEY SAVINGS & LOAN ASSOCIATION
14 TO CONFIRMATION OF PLAN

15 Brandy Byron Blevins and Susan Lynn Blevins filed their
16 chapter 13 case on July 5, 2006. Downey Savings & Loan
17 Association, F.A. ("Downey") filed a timely objection to
18 confirmation of the Blevins' plan. A hearing on that objection
19 was held September 12, 2006. At the hearing, the debtors and
20 Downey resolved two of Downey's objections by stipulation.
21 Remaining for the court to decide is the final aspect of Downey's
22 objection. According to Downey, the Bankruptcy Code requires
23 that it receive equal monthly payments over the life of the plan.
24 The debtors disagree. This memorandum contains findings of fact
25 and conclusions of law required by Federal Rule of Bankruptcy
26 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a
27 core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

28 The Eastern District of California has adopted a form plan
for chapter 13 debtors. The Blevins used that form, but modified

1 it by adding "Additional Provisions," as the plan permits. The
2 form plan provides at paragraph 3.09 that Class 1 claims are
3 "Long-term secured claims that were delinquent when the petition
4 was filed and mature after the last payment under the plan."

5 Paragraph 3.09 states:

6 "This plan will cure all pre-petition arrears but not
7 otherwise modify Class 1 claims. Each claimant will retain
8 its existing lien and receive no less than the equal monthly
9 amount specified below as its plan dividend."

10 The Blevins' plan provides for Downey as a Class 1 creditor.

11 The Additional Provisions section of the form plan filed by
12 the Blevins states at paragraph 7.02:

13 "Trustee to begin monthly dividend payment to Class 1
14 creditor, Downey Savings, once attorney fees under 3.08 of
15 the Chapter 13 plan are paid in full."

16 It is this language to which Downey objects.

17 Bankruptcy Code § 1325(a)(5) describes how allowed secured
18 claims may be treated in a chapter 13 plan. There are three
19 options. The holder of the claim may accept the plan. The
20 debtor may surrender the property securing an allowed secured
21 claim to the holder of that claim. Neither of those
22 possibilities occurred here. Or, the plan may require under
23 § 1325(a)(5)(B) that the holder of the claim retain the lien and
24 that

25 "(ii) the value, as of the effective date of the plan, of
26 property to be distributed under the plan on account of such
27 claim is not less than the allowed amount of such claim; and

28 (iii) if -

(I) property to be distributed pursuant to this
subsection is in the form of periodic payments, such
payments shall be in equal monthly amounts; . . ."

The Blevins have provided for payments to Downey in equal

1 monthly amounts. However, those equal monthly payments do not
2 begin until after payment of attorneys' fees under § 3.08 of the
3 plan. It is Downey's position that the language "equal monthly
4 amounts" requires that the equal monthly payments commence with
5 the first payment under the plan and continue until the plan is
6 fully performed. The Blevins argue that the phrase "equal
7 monthly amounts" simply means that once monthly payments
8 commence, such payments must be in equal monthly amounts. This
9 is the issue that the court must decide.

10 The language in question was added to the Bankruptcy Code by
11 the Bankruptcy Abuse Prevention and Consumer Protection Act of
12 2005. There are a few reported decisions that interpret the
13 language.

14 The Sixth Circuit briefly examined this phrase in a footnote
15 in In re Nichols, 440 F.3d 850, 857 at fn. 6 (2006). The court
16 stated:

17 "[T]he new language seems to require that payments made
18 after confirmation be in equal amounts and keep pace with
depreciation during the term of the plan. . . ."

19 This language requires payments to be in equal amounts and to
20 cover any depreciation. The decision concerns personal property
21 collateral. It says nothing about requiring that the equal
22 payments be made throughout the life of the plan.

23 A Texas bankruptcy court analyzed the provision in In re
24 DeSardi, 340 B.R. 790 (S.D. Tex. 2006). The court squarely
25 phrased the question as

26 "Does section 1325(a)(5)(B)(iii) require that equal payments
27 commence in the first month of the plan and continue at the
same amount throughout the plan term?"

28 Id. at 793. The court concluded that the equal payments do not

1 need to commence in the first month or continue until the last
2 month of the chapter 13 plan. Id. at 794.

3 The Texas court observed that the equal payment provision
4 does not state that its requirements must be met beginning in
5 month one of the plan. Id. at 805. It also does not state that
6 the payments must be equal as of the effective date of the plan.
7 Contrast the language of § 1325(a)(5)(B)(ii) which refers to
8 value as of the effective date of the plan.

9 As the DeSardi court observed, there also does not seem to
10 be any requirement that the equal monthly amounts extend
11 throughout the plan. This makes sense because a creditor could
12 not insist on continued equal monthly payments once its principal
13 and interest are fully paid. The correct reading of the equal
14 payment provision is, according to the DeSardi court, that

15 "The equal payment provision requires that payments be level
16 once they begin and terminate once the lender is fully paid.
Exactly when these level payments begin is case-specific."

17 Thus, "insofar as periodic payments are to be made, those
18 payments must be in equal monthly amounts." Id. at 806.

19 It is important to observe that the equal monthly payment
20 provision is different from provisions in § 1325 requiring
21 adequate protection to the holder of an allowed secured claim.
22 And, in the Blevins' case, Downey has not argued that it lacks
23 adequate protection.

24 A Florida bankruptcy court considered the equal monthly
25 amount requirement in In re Davis, 343 B.R. 326 (M.D. Fla. 2006).
26 That court seems to analyze § 1325(a)(5) as not applying to home
27 mortgages.

28 In In re Wagner, the bankruptcy court required equal monthly

1 payments over the life of the plan without much discussion. 342
2 B.R. 766 (E.D. Tenn. 2006).

3 The better analysis is that of the Texas bankruptcy court in
4 DeSardi. The phrase "equal monthly amounts" in § 1325(a)(5)(B)
5 does not require that the equal payments be made over the life of
6 the plan. To interpret the Code in that way would lead to
7 anomalous results. As mentioned above, it would not allow for
8 payments to cease once a creditor had been paid in full. The
9 provision is not directed toward the requirement of adequate
10 protection. The provision seems, rather, to address the
11 situation in which a secured creditor might receive a percentage
12 of the amount available to all creditors during the life of the
13 plan. Creditors holding allowed secured claims rightly need to
14 know how much they are going to be paid each month. This is the
15 only way they can keep track of whether the debtor is performing
16 his obligations under the plan. Thus, requiring payments in
17 equal monthly amounts, as opposed to a variable payment that is a
18 percentage of an amount available for distribution to similarly
19 situated creditors, makes sense.

20 For the above reasons, the objection of Downey to
21 confirmation of the plan is overruled. The debtors may submit an
22 appropriate form of order confirming the plan, incorporating the
23 other provisions to which the debtors and Downey have agreed, and
24 approved as to form by Downey and the chapter 13 trustee.

25 DATED: September 21, 2006.

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WHITNEY RIMEL, Judge
United States Bankruptcy Court

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2656 U.S. Courthouse, 1130 O Street, Fresno, California, 93721. On September 21, 2006, I served the within document on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as follows:

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct. Executed on September 21, 2006, at Fresno, California.

Kathy Torres, PLS

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