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2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
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8 In re)
9) Case No. 06-20424-A-13G
10 NOAH and DEVERY FLORES,)
11) Docket Control No. SW-1
12 Debtors.)
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13 **MEMORANDUM**

14 General Motors Acceptance Corporation (GMAC) holds a claim
15 secured by an automobile. Its objection to confirmation of the
16 plan proposed by the chapter 13 debtors, Noah and Devery Flores,
17 will be sustained. The plan impermissibly provides for periodic
18 payments that are not "in equal monthly amounts" as required by
19 11 U.S.C. § 1325(a) (5) (B) (iii) (I).

20 On its face, section 1325(a) (5) (B) (iii) (I) does not
21 differentiate between types of secured claims. Its application
22 does not appear limited, for instance, to real property or
23 personal property secured claims. Section 1325(a) (5) (B) (iii) (I)
24 refers only to "property to be distributed pursuant to this
25 subsection." If "this subsection" refers to subsection (a) (5) of
26 section 1325, dealing with the treatment of all secured claims,
27 then section 1325(b) (5) (B) (iii) (I) requires equal monthly amounts
28 whenever a plan proposes to make periodic payments on account of

1 any type of secured claim.

2 At least one court, however, has read the requirements of
3 section 1325(a)(5)(B)(iii)(I) and section 1325(a)(5)(B)(iii)(II)
4 as being cumulative. That is, if a plan proposes periodic
5 payments, they must be in equal amounts and adequately protect
6 the creditor's interest in its collateral only if the claim is
7 secured by personal property. See In re Perez, 339 B.R. 385,
8 402, n.18 (Bankr. S.D. Tex. 2006).

9 The issue of the type of claim entitled to receive periodic
10 payments in equal monthly amounts is not germane to this case.
11 GMAC is secured by personal property, an automobile. Whatever
12 the construction given to section 1325(a)(5)(B)(iii)(I), personal
13 property secured claims are included within its scope.

14 When a plan provides for periodic payments on account of a
15 secured claim, section 1325(a)(5)(B)(iii)(I) requires that those
16 payments be in equal monthly amounts. GMAC maintains that the
17 plan permits periodic payments in unequal monthly amounts. This
18 is undeniably true. The plan provides for monthly periodic
19 payments of \$200 for six months. Then, the payments step-up to
20 \$500 a month until GMAC's claim is paid in full. GMAC objects
21 and demands equal monthly payments until its secured claim has
22 been paid in full.

23 The scant case authority available suggests that GMAC's
24 interpretation of section 1325(a)(5)(B)(iii)(I) is correct. The
25 court in In re DeSardi, 340 B.R. 790, 805-06 (Bankr. S.D. Tex.
26 2006), after concluding that periodic payments need not commence
27 immediately upon confirmation, opined that section
28 1325(a)(5)(B)(iii)(I) "require[s] payments to be equal once they

1 begin, and to continue to be equal until they cease...."

2 The debtors respond that the plan may define two different
3 periods and specify equal monthly payments within each period.

4 Unfortunately, the statute is not susceptible to this
5 interpretation. Nothing in section 1325(a)(5)(B)(iii)(I)
6 suggests that a chapter 13 debtor has the latitude to permit
7 variable payments for multiple periods of time.

8 If the court nonetheless adopted the debtors' interpretation
9 of section 1325(a)(5)(B)(iii)(I), a chapter 13 plan might
10 specify, for example, sixty different periods of one month each
11 and provide a different monthly payment for each month. If the
12 plan may identify two different periods of time, it can specify
13 sixty different periods, or any number of periods between one and
14 sixty.

15 Thus, the debtors' interpretation of section
16 1325(a)(5)(B)(iii)(I) has the potential to read the requirement
17 of equal monthly amounts right out of the Bankruptcy Code.

18 Assuming the court could confirm a plan providing variable
19 payments over multiple periods of time, what standard should the
20 court apply to determine whether the plan satisfies section
21 1325(a)(5)(B)(iii)(I)? Are multiple periods permissible only if
22 there is no possibility of repayment at a constant rate
23 throughout the plan? Or, is the standard more flexible and
24 amorphous - multiple payment periods are permissible as long as
25 this treatment is "reasonable" or is proposed in good faith?

26 The debtors suggest that the court adopt a good faith
27 standard. Their suggestion is reminiscent of the now discredited
28 practice of using the "good faith" requirement of 11 U.S.C. §

1 1325(a)(3) to force chapter 13 debtors to pay an arbitrary
2 minimum dividend to unsecured creditors.

3 Prior to 1984, many courts labeled plans as being proposed
4 in bad faith if they failed to pay unsecured creditors an
5 "arbitrary minimum-percentage dividend," or "the proposed
6 dividend was either not 'substantial,' not 'meaningful,' not
7 'substantial and meaningful,' not 'equitable,' or not 'fair and
8 equitable,' or . . . the plan did not represent the debtor's
9 'best efforts' . . ." See Oversight Hearing on Personal
10 Bankruptcy Before the Subcommittee on Monopolies and Commercial
11 Law of the House Committee on the Judiciary, 97th Cong., 1st and
12 2nd Sess. 15-96, testimony of Judge Conrad K. Cyr [footnote
13 omitted].

14 By seizing upon the good faith requirement of section
15 1325(a)(3), some pre-1984 courts imposed "subjectively contrived
16 refinements upon subsections 1325(a)(4), (5) and (6), the only
17 confirmation criteria of a quantitative nature to be found
18 anywhere in chapter 13." Id. at 187 [footnote omitted]. And, as
19 is usually the case when courts apply a subjective standard,
20 results differed dramatically. "As between a district in which
21 it is held that a chapter 13 plan must represent the debtor's
22 'best effort' and return no less than 70% to holders of unsecured
23 claims, and a neighboring district in which a 1% dividend is
24 regarded as sufficient provided it represents the debtor's 'best
25 effort,' the uniformity to be expected in the administration of
26 an important law of commerce enacted by Congress pursuant to its
27 constitutional power 'To establish . . . uniform laws on the
28 subject of Bankruptcies throughout the United States' may

1 reasonably be thought somewhat lacking." Id. at 194-95

2 [footnotes omitted; emphasis in original].

3 This court declines to impose its "subjectively contrived
4 refinements on" section 1325(a)(5) as the debtors urge it to do.

5 The court adds that, if it could confirm a plan that
6 provided variable payment amounts over multiple periods, and
7 regardless of the applicable standard of review, it would not
8 approve this plan. The only reason for paying GMAC's secured
9 claim, as well as another secured claim, at the rate of \$200 a
10 month and later increasing the monthly payment to \$500, is to
11 permit payment of the debtors' attorneys' fees of \$2,100 in the
12 first six months of the plan. However, Schedules B and C
13 indicate that the debtors have over \$16,000 in nonexempt bank
14 deposits (not to mention a \$5,000 tax refund).¹ The debtors can
15 easily pay their attorney without needlessly complicating the
16 payment of their secured claims.

17 If the debtors do not wish to invade their savings, they
18 have other alternatives.

19 The debtors might propose a plan with equal monthly payments
20 and, when it is no longer possible to make those payments, or if
21 the debtors wish to increase the monthly payments, the debtors
22 may propose a post-confirmation modification of the plan.

23 Section 1329(a)(1) permits a modified plan to "increase or reduce
24 the amount of payments on claims of a particular class," and
25 section 1329(a)(2) allows a modified plan to "extend or reduce
26 the time for such payments...." See 11 U.S.C. § 1329(a)(1) &

27
28 ¹ The court takes judicial notice of Schedules B and C.

1 (a) (2) .

2 The plan payments must be equal only if they are "periodic"
3 payments. So, the debtors might propose, in the alternative,
4 equal monthly payments that are preceded or followed by a payment
5 that is not a periodic payment, such as a lump sum or balloon
6 payment.

7 Finally, the debtors might stretch the repayment of GMAC's
8 secured claim over a longer period of time, not to exceed the
9 applicable commitment period. The only caveat to such treatment
10 is that the equal monthly payment must "adequately protect"
11 GMAC's interest in its collateral as required by section
12 1325(a)(5)(B)(iii)(II). In other words, the monthly payments
13 must, at a minimum, keep pace with the depreciation of the
14 automobile securing GMAC's claim.

15 Therefore, based on the findings of fact and conclusions of
16 law contained in this Memorandum,² confirmation of the debtors'
17 chapter 13 plan will be denied. The debtors shall propose an
18 amended plan within 15 days of entry of an order.

19 A separate order shall be entered.

20 Dated:

21 By the Court

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24 Michael S. McManus, Chief Judge
United States Bankruptcy Court

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27 ² The findings and conclusions contained in this
28 Memorandum supplant those contained in the ruling appended to the
minutes of the hearing conducted on June 30, 2006 at 9:00 a.m.