

MAY 29 2015

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

5	In re:	)	BAP No.	NC-14-1376-DKiTa
6	LIONEL BEA,	)	Bk. No.	14-41272-MEH13
7	Debtor.	)		
8	<hr/>			
9	MARTHA G. BRONITSKY,	)		
10	Chapter 13 Trustee,	)		
	Appellant,	)		
11	v.	)	<b>OPINION</b>	
12		)		
13	LIONEL BEA,	)		
14	Appellee.	)		
15	<hr/>			

Argued and Submitted on May 14, 2015  
at San Francisco, California

Filed - May 29, 2015

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

Hon. M. Elaine Hammond, Bankruptcy Judge, Presiding

Appearances: Leo G. Spanos argued for appellant, Martha G. Bronitsky, Chapter 13 Trustee; Andrew Christensen of The Cline Law Group LLP, argued for appellee Lionel Bea.

---

Before: DUNN, KIRSCHER AND TAYLOR, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:

2  
3 Martha G. Bronitsky, the chapter 13<sup>1</sup> trustee ("Trustee"),  
4 appeals the bankruptcy court's orders overruling her objection to  
5 confirmation of the Debtor's First Amended Chapter 13 Plan  
6 ("Plan") and confirming the Plan. We AFFIRM as to both orders.

7 I. FACTS

8 The facts underlying this appeal are not in dispute. The  
9 Debtor, Lionel Bea, filed his chapter 13 petition on March 25,  
10 2014. He filed the Plan on May 13, 2014. The Plan proposed  
11 payments of \$584 for 60 months. The Plan pays \$3,000 in  
12 attorneys fees, a total of \$7,020 to claimants holding claims  
13 secured by the Debtor's personal property, \$4,380 in domestic  
14 support arrears, and \$15,190 in priority tax claims. Unsecured  
15 creditors are projected to receive 0% on their claims under the  
16 Plan.

17 Under Section 2.05 of the Plan, the three nonpurchase money  
18 secured creditors (collectively, "Secured Creditors") are treated  
19 as follows: The City of Oakland is to receive a total of \$995,  
20 payable \$83 per month at 0% interest. The California Franchise  
21 Tax Board ("FTB") is to receive a total of \$325, payable \$28 per  
22 month at 0% interest. The Internal Revenue Service ("IRS") is to  
23 receive payments of \$382 per month to pay its allowed secured  
24

---

25  
26 <sup>1</sup> Unless specified otherwise, all chapter, section and rule  
27 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037. The Federal Rules of Civil Procedure are referred to  
as "Civil Rules."

1 claim of \$5,700 at 3% interest. The Secured Creditors will  
2 retain their liens until their allowed secured claims are paid in  
3 full. The Debtor anticipates that the fixed equal monthly  
4 payments provided for in Section 2.05 of the Plan will pay the  
5 IRS in full in about 15 months and the City of Oakland and the  
6 FTB in full in about 12 months each. However, under Section 5.01  
7 of the Plan, the fixed monthly payments to the Secured Creditors  
8 do not begin until month seven of the Plan, in order to allow the  
9 Debtor's \$3,000 in outstanding attorneys fees to be paid first.  
10 None of the three Secured Creditors objected to the Plan.

11 The Trustee objected to the Plan on the ground that it was  
12 contrary to requirements of the Bankruptcy Code in that the  
13 deferred payments to the Secured Creditors under the Plan did not  
14 provide them with adequate protection during the first six months  
15 of the Plan as required by § 1325(a)(5)(B)(iii)(II). The Debtor  
16 responded that § 1325(a)(5) was satisfied in that the Secured  
17 Creditors in effect accepted the Plan by not filing objections.

18 The bankruptcy court heard argument on the Trustee's Plan  
19 objection on June 24, 2014, and ruled orally. The bankruptcy  
20 court held that Ninth Circuit authority supported its conclusion  
21 that a secured creditor's failure to object to its treatment in a  
22 chapter 13 plan generally "translates into acceptance of the plan  
23 by the secured creditor." It further concluded that the Supreme  
24 Court's decision in United Student Aid Funds, Inc. v. Espinosa,  
25 130 S.Ct. 1367 (2010), did not require a different result in this  
26 case. Accordingly, the bankruptcy court overruled the Trustee's  
27 objection to the Plan.

28 On June 27, 2014, the bankruptcy court entered its order

1 overruling the Trustee's objection and setting forth its findings  
2 and conclusions. It entered its order confirming the Plan on  
3 July 1, 2014. The Trustee timely appealed both orders. At oral  
4 argument, Debtor's counsel confirmed that Debtor's outstanding  
5 attorneys fees provided for in the Plan were paid in full, and  
6 payments to the three Secured Creditors have commenced.

## 7 II. JURISDICTION

8 The bankruptcy court had jurisdiction under 28 U.S.C.  
9 §§ 1334 and 157(b) (2) (L). We have jurisdiction under 28 U.S.C.  
10 § 158.

## 11 III. ISSUES

12 While the parties have stated the issues before us in a  
13 number of ways, we characterize the issues before us in this  
14 appeal as follows:

15 1) Does a chapter 13 plan necessarily violate the Bankruptcy  
16 Code if it provides that equal payments to secured creditors  
17 start later than the first plan payment?

18 2) If a secured creditor does not object to a delay in the  
19 start of equal payments to it under a chapter 13 plan, does such  
20 failure to object constitute acceptance of its treatment under  
21 the plan for purposes of § 1325(a) (5) (A)?

## 22 IV. STANDARDS FOR REVIEW

23 We review the bankruptcy court's legal conclusions,  
24 including its interpretation of provisions of the Bankruptcy  
25 Code, de novo and its findings of fact for clear error. Arnold  
26 v. Gill (In re Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000).

## 27 V. DISCUSSION

28 The Trustee argues that it was error for the bankruptcy

1 court to confirm the Plan where the Plan did not provide adequate  
2 protection to the Secured Creditors through equal payments  
3 commencing with the first Plan payment due, as required under  
4 § 1325(a)(5)(B)(iii)(II), in light of the Supreme Court's  
5 decision in United Student Aid Funds, Inc. v. Espinosa, 559 U.S.  
6 260 (2010). The Debtor argued, and the bankruptcy court agreed,  
7 that the allowed claims of secured creditors can be satisfied in  
8 three alternative ways in a chapter 13 plan: a) by secured  
9 creditor acceptance of its treatment under the plan  
10 (§ 1325(a)(5)(A)); b) by surrender of the secured creditor's  
11 collateral (§ 1325(a)(5)(C)); or c) by the secured creditor  
12 retaining its lien on its collateral until its allowed secured  
13 claim is paid in full during the term of the plan  
14 (§ 1325(a)(5)(B)). Since none of the Secured Creditors objected  
15 to their treatment in the Plan, the bankruptcy court concluded,  
16 under Ninth Circuit and other authority, that the Secured  
17 Creditors had accepted the Plan, and the alternative provided by  
18 § 1325(a)(5)(A) was satisfied. We agree for the following  
19 reasons.

20 In Espinosa, the Supreme Court was confronted with the  
21 following situation: The debtor, Francisco Espinosa, had student  
22 loan debt. Mr. Espinosa filed for protection under chapter 13  
23 and in his chapter 13 plan, proposed to pay the principal of his  
24 student loan debt over the life of the plan but further provided  
25 that once the principal had been paid, any accrued interest would  
26 be discharged. Notice and a copy of Mr. Espinosa's plan were  
27 provided to the student loan creditor, United Student Aid Funds,  
28 Inc. ("United"). In bold typeface immediately beneath the

1 caption of the plan was stated: "WARNING IF YOU ARE A CREDITOR  
2 YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." The plan further  
3 noted the deadlines for filing proofs of claim and objections to  
4 confirmation of the plan. Id. at 265.

5 United received the notice and filed a proof of claim in an  
6 amount representing both unpaid principal and accrued interest on  
7 Mr. Espinosa's student loan debt. However, United did not object  
8 either to confirmation of Mr. Espinosa's chapter 13 plan or to  
9 his failure to initiate an adversary proceeding to seek a  
10 determination that his student loan debt was dischargeable,  
11 imposing an undue hardship on him, as required under § 523(a)(8).

12 The bankruptcy court confirmed Mr. Espinosa's plan. One  
13 month later, the chapter 13 trustee sent United a form notice  
14 stating that "[t]he amount of the claim differs from the amount  
15 listed for payment in the plan," and "[y]our claim will be paid  
16 as listed in the plan." Id. United did not appeal the  
17 confirmation order and did not respond to the trustee's notice.  
18 Thereafter, Mr. Espinosa made all payments required under his  
19 plan and received a discharge.

20 Three years later, the United States Department of Education  
21 commenced efforts to collect the unpaid interest on Mr.  
22 Espinosa's student loan debt. Mr. Espinosa filed a motion in the  
23 bankruptcy court to enforce the discharge order "by directing the  
24 Department and United to cease all efforts to collect the unpaid  
25 interest on his student loan debt." Id. at 266. United opposed  
26 and filed a cross-motion to vacate the confirmation order under  
27 Civil Rule 60(b)(4), applicable in bankruptcy under Rule 9024, as  
28 void. It argued that Mr. Espinosa's chapter 13 plan was

1 inconsistent with the Bankruptcy Code requirement to make undue  
2 hardship findings before discharging student loan debt, citing  
3 §§ 523(a)(8) and 1328(a)(2). It further argued that confirmation  
4 of the plan violated requirements of the Rules, in that undue  
5 hardship findings must be made in the context of an adversary  
6 proceeding (Rule 7001(6)), and that United was not properly  
7 served with a summons and complaint (see Rules 7003 and 7004).  
8 Id. at 266.

9 The bankruptcy court ruled in favor of Mr. Espinosa and  
10 against United. On appeal, the district court reversed, holding  
11 that United was denied due process because the confirmation order  
12 was entered without service of a summons and complaint as the  
13 Rules required. On further appeal, the Ninth Circuit reversed.  
14 It concluded that United had adequate notice of the plan. Even  
15 if United had a meritorious objection and basis for appeal, it  
16 was bound by the plan when it neither objected nor appealed. Id.  
17 at 266-67.

18 The Supreme Court granted certiorari and affirmed the Ninth  
19 Circuit in a unanimous decision, noting that Civil Rule 60(b)(4)  
20 "does not provide a license for litigants to sleep on their  
21 rights." Id. at 275. United had notice of Mr. Espinosa's plan  
22 and its contents but did not object or file a timely appeal of  
23 the confirmation order, in spite of submitting to the  
24 jurisdiction of the bankruptcy court by filing a proof of claim.  
25 In these circumstances, United "forfeited its arguments regarding  
26 the validity of service or the adequacy of the Bankruptcy Court's  
27 procedures by failing to raise a timely objection in that court,"  
28 and its Civil Rule 60(b)(4) motion did not work. Id.

1 Of particular significance in this appeal, the Supreme Court  
2 went on to provide guidance to bankruptcy courts as to their  
3 duties when confronted with debtor plan provisions that clearly  
4 conflict with provisions of the Bankruptcy Code.

5 [A] Chapter 13 plan that proposes to discharge a  
6 student loan debt without a determination of undue  
7 hardship violates §§ 1328(a)(2) and 523(a)(8). Failure  
8 to comply with this self-executing requirement should  
9 prevent confirmation of the plan even if the creditor  
10 fails to object, or to appear in the proceeding at all.  
11 . . . That is because § 1325(a) instructs a bankruptcy  
12 court to confirm a plan only if the court finds, *inter*  
13 *alia*, that the plan complies with the “applicable  
14 provisions” of the Code. . . . [T]he Code makes plain  
15 that bankruptcy courts have the authority - **indeed, the**  
16 **obligation** - to direct a debtor to conform his plan to  
17 the requirements of §§ 1328(a)(2) and 523(a)(8).

18 Id. at 277 (emphasis added). Accordingly, the Supreme Court  
19 expressed its unanimous view in Espinosa that bankruptcy courts  
20 should police chapter 13 plans to ensure that they are consistent  
21 with the “clear and self-executing” requirements of the  
22 Bankruptcy Code. Id.

23 We consider the following Bankruptcy Code provisions in this  
24 appeal. Section 1325(a)(1) provides in relevant part: “[T]he  
25 court shall confirm a [chapter 13] plan if - (1) the plan  
26 complies with the provisions of this chapter and with the other  
27 applicable provisions of this title.” Section 1325(a)(5)(A)  
28 provides: “[T]he court shall confirm a [chapter 13] plan if - (5)  
with respect to each allowed secured claim provided for by the  
plan - (A) the holder of such claim has accepted the plan.” As  
noted above, § 1325(a)(5)(B) provides an alternative basis for  
confirming a chapter 13 plan with respect to an allowed secured  
claim provided for in the plan **if** the secured creditor retains  
its lien, **and** the allowed secured claim is paid in full in equal



1 periodic payments under the plan. Section 1325(a)(5)(B)(iii)(II)  
2 sets forth a condition to the application of § 1325(a)(5)(B), as  
3 follows: if the claim is secured by personal property, "the  
4 amount of such [periodic] payments shall not be less than an  
5 amount sufficient to provide to the holder of such claim adequate  
6 protection during the period of the plan."

7 The Trustee argues that the Plan's provision of a six-months  
8 delay in commencing equal monthly payments to the Secured  
9 Creditors is "in direct violation" of the adequate protection  
10 requirement of § 1325(a)(5)(B)(iii)(II), and in light of  
11 Espinosa, a "creditor's silence is not acceptance when the plan  
12 expressly violates the Code." The Trustee bases her argument on  
13 her conclusion that Espinosa fundamentally altered the rules on  
14 secured creditor "silence as acceptance" of a debtor's chapter 13  
15 plan, calling into question pre-Espinosa Ninth Circuit  
16 authorities such as Great Lakes Higher Educ. Corp. v. Pardee (In  
17 re Pardee), 193 F.3d 1083 (9th Cir. 1999), and Andrews v. Loheit  
18 (In re Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995) ("Here,  
19 § 1325(a)(5) is fulfilled because subsection (A) was satisfied  
20 when the holders of the secured claims failed to object. In most  
21 instances, failure to object translates into acceptance of the  
22 plan by the secured creditor." (citations omitted)). We note,  
23 as argued by the Debtor and as recognized by the bankruptcy  
24 court, that there are authorities within the Ninth Circuit (post-  
25 Espinosa), and from other circuits (pre-Espinosa) that recognize  
26 that failures to object to confirmation of a chapter 13 plan can  
27 constitute acceptance for purposes of applying § 1325(a)(5)(A).  
28 See, e.g., Shaw v. Aurgroup Fin. Credit Union, 552 F.3d 447 (6th

1 Cir. 2009); Wachovia Dealer Servs. v. Jones (In re Jones), 530  
2 F.3d 1284, 1291 (10th Cir. 2008) (“[I]f a secured creditor fails  
3 to object to confirmation, the creditor will be bound by the  
4 confirmed plan’s treatment of its secured claim under  
5 § 1325(a) (5). . . . This is because the failure to object  
6 constitutes acceptance of the plan.” (citations omitted)); In re  
7 Rosa, 495 B.R. 522, 524 (Bankr. D. Hawaii 2013) (“The Ninth  
8 Circuit and the overwhelming majority of courts hold that a  
9 secured creditor’s failure to object to a chapter 13 plan  
10 constitutes acceptance.” (citations omitted)); In re Hill, 440  
11 B.R. 176, 183 (Bankr. S.D. Cal. 2010) (“While Chapter 11 cases  
12 provide a mechanism for plan acceptance by creditors,  
13 § 1325(a) (5) (B) only applies where the holder of the secured  
14 claim objects to the Chapter 13 plan. Acceptance is implied when  
15 no objection is raised.” (citing In re Andrews, 49 F.3d at  
16 1409)); In re Thomas, 2010 WL 9498475 (Bankr. E.D. Cal. Sept. 13,  
17 2010).

18 The Trustee retorts in effect that these authorities beg the  
19 fundamental question at issue in this appeal: How can a secured  
20 creditor’s failure to object to a plan provision that is  
21 inconsistent with Bankruptcy Code requirements be treated  
22 effectively and credibly as acceptance? Fortunately, there are  
23 two bankruptcy court decisions that provide helpful analysis.

24 1. Montoya

25 In In re Montoya, 341 B.R. 41 (Bankr. D. Utah 2006), the  
26 chapter 13 debtor proposed a plan to pay for a car that she  
27 purchased within 910 days prior to filing her petition by paying  
28 the secured value of the vehicle in full but only a small

1 percentage on the unsecured balance, contrary to the requirements  
2 of the "hanging paragraph" found after § 1325(a)(9). Both the  
3 debtor and the chapter 13 trustee argued that such treatment of  
4 the secured car creditor's claim should be allowed because the  
5 secured creditor did not object to the debtor's plan and,  
6 consequently, should be deemed to have accepted the plan  
7 treatment of its claim under § 1325(a)(5)(A). They further  
8 asserted that since the confirmation requirements with respect to  
9 secured claims in chapter 13 are set forth in the disjunctive in  
10 § 1325(a)(5), the secured creditor's deemed acceptance under  
11 § 1325(a)(5)(A) should control despite the unmet requirements of  
12 the hanging paragraph with respect to "910-day" vehicles. Id. at  
13 42-43. The bankruptcy court noted that "[t]he majority of courts  
14 interpreting the hanging paragraph hold that it precludes a  
15 Chapter 13 debtor from using § 506 to cram down a 910-day  
16 vehicle," a holding with which the bankruptcy court agreed. Id.  
17 at 44.

18 The bankruptcy court ultimately concluded that the debtor's  
19 plan was not confirmable based on the following rationale:

20 The Chapter 13 Trustee and the Debtor broadly  
21 contend that failure to object to a properly noticed  
22 plan constitutes acceptance of the plan. This position  
23 overstates the case because the parties improperly  
24 combine two significantly different concepts and Code  
25 sections. It is correct that, if a plan is properly  
26 noticed and otherwise meets the requirements of  
27 § 1325(a), the Court may deem a secured creditor's  
28 silence to constitute acceptance of a plan and the plan  
may be confirmed. This "implied" acceptance is allowed  
because Chapter 13, unlike Chapter 11, has no balloting  
mechanism to evidence acceptance of a proposed plan,  
and it is only the negative - a filed objection - that  
evidences the lack of acceptance. When the creditor  
simply does nothing, the judicial doctrine of "implied"  
acceptance fills the drafting gap in the Code. The  
concept of implied acceptance of an otherwise compliant

1 plan . . . , however, is quite different from proposing  
2 a plan intentionally inconsistent with the Code and  
3 then waiting for the trap to spring on a somnolent  
4 creditor. **Creditors are entitled to rely on the few**  
5 **unambiguous provisions of the BAPCPA for their**  
6 **treatment.** They should not be required to scour every  
7 Chapter 13 plan to ensure that provisions of the BAPCPA  
8 specifically inapplicable to them will not be inserted  
9 in a proposed plan in the debtor's hope that the  
10 improper secured creditor treatment will become *res*  
11 *judicata*.

12 . . .

13 Section 1325(a)(1) provides that "the court shall  
14 confirm a plan if (1) the plan complies with the provisions  
15 of this chapter and with the other applicable provisions of  
16 this title." The parties agree that Menlove Dodge's 910-day  
17 vehicle claim cannot be bifurcated, yet the Plan proposes  
18 this type of treatment. The Court has an affirmative duty  
19 to review and ensure that the Plan complies with the Code  
20 even if creditors fail to object to confirmation.

21 Id. at 45-46 (emphasis added). Thus, the In re Montoya court  
22 determined that it could not confirm a plan, even if a concerned  
23 secured creditor did not object, if the proposed plan included a  
24 provision that was inconsistent with one of the "few unambiguous  
25 provisions" of the Bankruptcy Code.

## 26 2. Thomas

27 In a more recent decision, In re Thomas, 2010 WL 9498475  
28 (Bankr. E.D. Cal. Sept. 13, 2010), the chapter 13 debtors  
submitted a plan that proposed to pay the allowed claims of two  
creditors with claims secured by motor vehicles without interest.  
After the trustee objected, the debtors asserted that paying no  
interest on one of the claims was in error and specified an  
amended interest rate of 1.9%. As to the other secured claim, 0%  
interest was consistent with the proof of claim filed by the  
creditor. Neither motor vehicle secured creditor objected to its  
proposed treatment under the debtors' plan, and the debtors

1 argued that confirmation in these circumstances was appropriate  
2 because the secured creditors' failure to object should be deemed  
3 acceptance for purposes of § 1325(a)(5)(A). The trustee, as in  
4 this appeal, opposed confirmation on the ground that the proposed  
5 plan did not comply with the requirements of § 1325(a)(5)(B), as  
6 it did not provide for a rate of interest to the motor vehicle  
7 secured creditors that would compensate them "for the delay in  
8 paying their claims in full," i.e., the proposed plan did not  
9 provide adequate protection to the personal property secured  
10 creditors by not providing that the secured creditors would  
11 receive the present values of their allowed secured claims. Id.  
12 at \*1.

13 While the bankruptcy court ultimately determined that it  
14 could not confirm the debtors' plan because notice to the motor  
15 vehicle secured creditors was inadequate, it addressed the  
16 adequate protection issue raised by the trustee's objection in  
17 light of Espinosa.

18 The [Supreme] Court characterized the requirement for a  
19 determination of undue hardship to discharge a student  
20 loan debt as "self executing" and stated that failure  
21 to comply with that requirement should prevent  
22 confirmation of a plan even if the creditor fails to  
23 object. . . . But is the requirement for provision of  
24 present value in the absence of acceptance of a chapter  
25 13 plan by a secured creditor the kind of compliance  
26 about which the court in Espinosa was speaking?

27 Id. at \*4. As in In re Montoya, the bankruptcy court in In re  
28 Thomas concluded that it was making a decision that involved the  
application of two different concepts. Id. at \*5. First,  
§ 1325(a)(5) provides three alternatives to allow for  
confirmation of a chapter 13 plan as it deals with allowed  
secured creditor claims, and one of those alternatives is to

1 treat a secured creditor's failure to object as acceptance for  
2 purposes of § 1325(a)(5)(A). However, in some cases, application  
3 of that alternative is not compatible with

4 the idea that a plan intentionally inconsistent with  
5 the Code ought not to be confirmed even in the absence  
6 of objection. Good examples are a plan that attempts  
7 to discharge a student loan claim without a proper  
8 proceeding to determine undue hardship and a plan that  
9 improperly bifurcates a 910 claim into a secured and an  
unsecured portion. Another example is a plan that  
provides for payments over a period that is longer than  
five years in contravention of Bankruptcy Code  
§ 1322(d).

10 Id. The bankruptcy court recognized that the "adequate  
11 protection" provision in § 1325(a)(5)(B)(iii)(II) is different  
12 from such clear and "self executing" provisions. "The  
13 requirement of present value is not self executing. It requires  
14 evidence and it requires proof." Id. at 6.

15 We agree with the analysis of the bankruptcy court in In re  
16 Thomas as it considered adequate protection. Congress provided  
17 some guidance as to what could constitute "adequate protection"  
18 in § 361:

19 Adequate Protection. When adequate protection is  
20 required under section 362, 363, or 364 of this title  
of an interest of an entity in property, such adequate  
protection may be provided by -

21 (1) requiring the trustee to make a cash payment  
22 or periodic cash payments to such entity, to the extent  
23 that the stay under section 362 of this title, use,  
24 sale, or lease under section 363 of this title, or any  
grant of a lien under section 364 of this title results  
in a decrease in the value of such entity's interest in  
such property;

25 (2) providing to such entity an additional or  
26 replacement lien to the extent that such stay, use,  
27 sale, lease, or grant results in a decrease in the  
value of such entity's interest in such property; or

28 (3) granting such other relief, other than  
entitling such entity to compensation allowable under  
section 503(b)(1) of this title as an administrative  
expense, as will result in the realization by such

1           entity of the indubitable equivalent of such entity's  
2           interest in such property.

3           However, nothing in § 361 provides any guidance as to the timing  
4           to provide adequate protection, and the reference to "adequate  
5           protection" in § 1325(a)(5)(B)(iii)(II) adds nothing to assist us  
6           in determining what "adequate protection" means in a particular  
7           case.

8           In Paccom Leasing Corp. v. Deico Electronics, Inc. (In re  
9           Deico Electronics, Inc.), 139 B.R. 945 (9th Cir. BAP 1992), the  
10          Panel specifically considered the question of "the appropriate  
11          'begin' date for adequate protection payments contemplated by the  
12          bankruptcy code" in a chapter 11 case. Id. at 946. The Panel  
13          analyzed the issue as follows:

14                 The bankruptcy code does not specifically provide  
15                 for a date upon which adequate protection payments  
16                 should commence, but the purpose of adequate protection  
17                 lends assistance to that inquiry. In United Saving  
18                 Association v. Timbers of Inwood Forest, 484 U.S. 365  
19                 . . . (1988), the Supreme Court held that undersecured  
20                 creditors are entitled to adequate protection to  
21                 compensate them for the depreciation in their  
22                 collateral. Adequate protection prevents creditors  
23                 from becoming more undersecured because of the delay  
24                 that bankruptcy works on the exercise of their state  
25                 law remedies.

26                 Accordingly, adequate protection analysis requires  
27                 the bankruptcy court to first determine when the  
28                 creditor would have obtained its state law remedies had  
29                 bankruptcy not intervened. Presumably, that will be  
30                 after the creditor first seeks relief. The court must  
31                 then determine the value of the collateral as of that  
32                 date. This is consistent with Collier's admonition  
33                 that value should be determined as of when the  
34                 protection is sought.

35                 The amount by which the collateral depreciates  
36                 from that valuation is the amount of protection  
37                 adequate to compensate the creditor for the loss  
38                 occasioned by bankruptcy. But collateral may not  
39                 always depreciate according to a precise monthly  
40                 schedule. Moreover, requiring a lump sum of past due

1 protection could suffocate a debtor otherwise able to  
2 reorganize.

3 Therefore, while the amount of adequate protection  
4 to which an undersecured creditor is entitled is equal  
5 to the amount of depreciation its collateral suffers  
6 after it would have exercised its state law remedies,  
7 **neither that determination nor the schedule for its  
8 tender are appropriate for application of a rigid  
9 formula. Instead, the bankruptcy court must have  
10 discretion to fix any initial lump sum amount, the  
11 amount payable periodically, the frequency of payments,  
12 and the beginning date, all as dictated by the  
13 circumstances of the case and the sound exercise of  
14 that discretion.**

15 Id. at 947 (emphasis added). We reiterated the conclusion of the  
16 Panel in Deico that the bankruptcy court has broad discretion to  
17 fix the commencement date for adequate protection payments in our  
18 en banc disposition in People's Capital and Leasing Corp. v.  
19 Big3D, Inc. (In re Big3D, Inc.), 438 B.R. 214, 222, 224 (9th Cir.  
20 BAP 2010) (en banc). Accordingly, the timing for commencement of  
21 adequate protection payments is a fact-based determination  
22 depending on the circumstances of a particular case.

### 23 3. This Appeal

24 In this case, the Plan provides for a six-month delay in the  
25 commencement of payments to the Secured Creditors. However, the  
26 Plan further provides for the payment in full of the allowed  
27 secured claims of the City of Oakland, the FTB and the IRS well  
28 within the sixty-months term of the Plan. With no objection  
filed by any of the Secured Creditors, the bankruptcy court had  
no way of knowing whether the Secured Creditors were satisfied  
that the payments proposed by the Debtor in the Plan provided  
them with adequate protection or whether the amounts involved  
and/or the risk of nonpayment in light of the proposed six-months  
delay in commencing payments simply did not justify the costs



1 entailed in filing and prosecuting objections to confirmation of  
2 the Plan, and neither do we. However, we conclude, consistent  
3 with In re Thomas, that the provision for "adequate protection"  
4 in § 1325(a)(5)(B)(iii)(II) is not the type of clear, "self  
5 executing" provision of the Bankruptcy Code that would preclude  
6 the bankruptcy court from translating the Secured Creditors'  
7 failures to object to confirmation as acceptance for purposes of  
8 § 1325(a)(5)(A) and confirming the Plan as consistent with the  
9 requirements of § 1325(a)(1), under Espinosa.<sup>2</sup>

10 CONCLUSION

11 Based on the foregoing analysis, we AFFIRM the orders of the  
12 bankruptcy court overruling the Trustee's objection to  
13 confirmation of the Plan and confirming the Plan.

---

24 <sup>2</sup> Having concluded that the adequate protection provision  
25 in § 1325(a)(5)(B)(iii)(II) is not a clear, "self-executing"  
26 requirement of the Bankruptcy Code within the meaning of  
27 Espinosa, we do not consider further the argument that  
28 § 1325(a)(5)(A)'s express inclusion of secured creditor consent  
as a possible basis for confirmation, standing alone, also or  
independently supports affirmance.