UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re	)	Case No. 04-33109-A-13G
MARIO and GENEE AGUIRRE,	)	Docket Control No. NES-2
Debtors.	)	Date: April 18, 2005 Time: 9:00 a.m.

On April 18, 2005 at 9:00 a.m. the court considered the debtors' motion to confirm their second amended plan and the objections to that plan. The text of the final ruling appended to minutes of the hearing appears below. This final ruling constitutes a "reasoned explanation" for the court's decision and is accordingly posted to the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format as required by the E-Government Act of 2002. The official record remains the minutes of the hearing.

FINAL RULING

The motion will be denied and the objections will be sustained.

First, notice is defective. The motion and proposed plan were not served on the United States Trustee as required by Fed. R. Bankr. P. 2002(b) & (k), 3015(b), 9034, as well as the United States Trustee Guidelines for Region 17, § 1.1. While the proof of service reports service on the United States Trustee, the address used is not correct. The proof of service refers to "501 I Street, Fresno, CA 93721." 501 I Street is the location of the Sacramento courthouse. The United States Trustee has an office

in it. However, the envelope was addressed to Fresno.

Second, the debtor leases a vehicle from VW Credit. The debtor may assume or reject this unexpired lease. See 11 U.S.C. § 365. Instead of picking one of these alternatives, the debtor asserts that VW Credit holds a claim secured by the vehicle and attempts to strip down the claim to the value of the vehicle pursuant to 11 U.S.C. § 506(b) and then to pay the balance as a Class 2 secured claim. This is not permissible. The debtor must either make the monthly lease payments or reject the lease and surrender the vehicle.

Third, the debtor has failed to maintain post-petition support payments as required by a court order. This indicates to the court that the debtor does not have the ability to make plan payments while staying current with ongoing obligations. The plan is not feasible. See 11 U.S.C. § 1325(a)(6).

Fourth, the plan erroneously treats a pre-petition support claim as a priority claim even though it is secured by an abstract of judgment. It is a secured claim and must be provided for as such. See 11 U.S.C. § 1325(a)(5).

Fifth, as to the secured claim of Fireside, the plan does not comply with 11 U.S.C. § 1325(a)(5)(B) because it will not pay it the present value of its collateral, a vehicle. The private party valuation database of the Kelley Blue Book gives the value "you might expect to pay for a used car when purchasing from a private party." This value does not include warranties, inventory storage, and reconditioning charges as does the retail valuation in the Kelley Blue Book. The court agrees that this is a good method of ascertaining the replacement value of a vehicle

as required by Rash v. Associates Commercial, 138 L.Ed.2d 148 (1997). In this case, the private party value of the vehicle is $6,375. The plan will pay only $3,430.

The plan also proposes an interest rate, 7%, that is too low to pay the present value of the secured claim.

The Supreme Court decided in Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004), that the appropriate interest rate is determined by the "formula approach." This approach requires the court to use the national prime rate in order to reflect the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate it for the loan's opportunity costs, inflation, and a slight risk of default. The bankruptcy court is required to adjust this rate for a greater risk of default posed by a bankruptcy debtor. This upward adjustment depends on a variety of factors, including the nature of the security, and the plan's feasibility and duration. Cf. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir. 1990); In re Camino Real Landscape Main. Contrs., Inc., 818 F.2d 1503 (9th Cir. 1987).

To set the appropriate rate, the court is required to conduct an "objective inquiry" into the appropriate rate. However, the debtor's bankruptcy statements and schedules may be culled for the evidence to support an interest rate.

As reported by the Federal Reserve at http://www.federalreserve.gov/releases, the prime rate is currently 5.75%.

As surveyed by the Supreme Court in Till, courts using the formula approach typically have adjusted the interest rate 1% to

3%. The debtor's proposed rate of 7% gives a 1.25% adjustment. Given the nature of the collateral, personal property, its age and current condition, and the proposed length of the plan, the court agrees that 7% does not satisfy section 1325(a)(B)(ii).