**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MONTANA**

| | |
|---|---|
| In re<br><br>**KENNETH I. WRIGHT**, and<br>**TRISHA L. WRIGHT**,<br><br>Debtors. | Case No. **05-62400-13** |

# *MEMORANDUM of DECISION*

At Butte in said District this 2nd day of November, 2005.

In this Chapter 13 bankruptcy, after due notice, a hearing was held on October 6, 2005, in Butte on Debtors' Motion for Valuation of Security[1] and on confirmation of Debtors' Amended Chapter 13 Plan dated August 22, 2005. The Chapter 13 Trustee, Robert G. Drummond, was present at the hearing in opposition to Debtors' Amended Chapter 13 Plan, as was attorney John Paul on behalf of First Liberty Federal Credit Union. Debtors were represented at the hearing by their counsel of record, Stephen R. McCue. With regard to confirmation, Debtor Kenneth I. Wright ("Kenneth") testified. At the conclusion of the hearing, the Court took the matter under advisement.

## BACKGROUND

Wright has been in the automobile business for approximately 20 years. Wright started his auto career in Oregon but moved to Montana in 1989 after purchasing an ownership interest in Power Chevrolet. Wright sold his interest in Power Chevrolet in March of 2004 to Lithia

[1] The Court entered ruling on Debtors' Motion for Valuation of Security at the October 6, 2005, hearing and by separate Order entered October 19, 2005.

Automotive Dealerships ("Lithia") and is presently the area manager for Lithia. Wright oversees roughly 380 to 420 employees at 6 Lithia dealerships that sell Chrysler, Jeep, Dodge, Honda and Chevrolet, along with various makes and models of used cars.

Debtors' Statement of Financial Affairs reflects that Debtors gross income was $602,319.00 in 2004 and $0.00 in 2003. Kenneth testified that his income was actually reduced to $25,000.00 per month in March 2004, but he received significant bonuses in January of 2004. The reduction in income in March of 2004 coincides with the purchase of Power Chevrolet by Lithia. Kenneth experienced another reduction in income in March of 2005, when Kenneth's gross monthly income was reduced from $25,000.00 to $18,000.00. Utilizing a monthly gross wage of $18,000.00 per month, Kenneth states that he will earn approximately $216,000.00 in 2005. Kenneth's income will increase by 5% in March of 2006, or $900.00 per month

On Schedule I, under "Payroll Deductions", Debtors have subtracted $4,740.68 per month for payroll taxes and social security, $654.62 for insurance, $540.00 per month for "401k (required)" and $155.20 per month for "401k (5 mos remaining)". Debtors also show that Debtor Trisha Wright receives $50.00 per month for "Western CPE 600 div. 12". Adding the aforementioned $50.00 to Kenneth's gross monthly income of $18,000.00 and after subtracting Kenneth's payroll deductions leaves Debtors with $11,959.50 in total combined monthly income.

Kenneth testified that his present monthly payroll tax withholding will not be sufficient to cover Debtors' income tax burden for 2005. Specifically, Kenneth testified that he increased his withholding allowance from 5 to 8 to increase his take-home pay. Because Debtors claim they will have a tax burden at the end of 2005, Debtors have budgeted $708.39 per month for estimated taxes owing in 2005.

Debtors reside in a 5,900 square foot, 5 bedroom home that Debtors purchased in August of 2004 for $598,000.00. The home sits on 4 acres. Debtors' monthly payment on the first mortgage is $3,980.00 and Debtors also pay $1,285.00 per month on a second mortgage, for a total of $5,265.00 per month for consensual mortgage payments on their home. Because of the reduction in Kenneth's income, Kenneth testified that Debtors' are about one payment from foreclosure and Debtors' owe a significant arrearage on the home. In fact, the total arrearage owing on the first and second mortgages is roughly $18,311.77 per Debtors' Amended Chapter 13 Plan The looming foreclosure prompted Debtors to seek relief under Chapter 13 of the Bankruptcy Code.

Kenneth testified that Debtors are on budget billing for electricity and gas, and the monthly amount for electricity and heating is $360.00 per month. Debtors have budgeted $787.00 per month for electricity, telephone, Direct TV, garbage and security contract. Kenneth testified that Debtors spend $74.00 per month on an activated security system because someone previously broke into Debtors' home. With regard to the home, Debtors have also budgeted $109.00 per month for home maintenance on their home built in 2003.

Following down Schedule J, Debtors have also budgeted $788.00 per month in food for their family of 5,[2] and $303.00 per month in clothing. Kenneth testified that the monthly clothing expense is necessary because Kenneth has to wear a suit and tie to work at all times. Kenneth did not expect to buy any suits this year, but indicated that the travel required by his job caused a lot of wear and tear on his clothing. Kenneth also testified that such amount covered the cost for such things as hats and mittens for the children. Debtors' budgeted expense of $79.00

[2] Debtors have three children, ages 6, 7 and 9.

per month for laundry and dry cleaning pertains primarily to the cleaning of Kenneth's work clothes.

Next, Debtors have scheduled $280.00 per month for medical and dental, which amount is on top of $654.62 that is deducted on a monthly basis from Kenneth's payroll check for insurance. Debtors also list $200.00 per month for recreation, $50.00 per month for charitable contributions, and $415.00 per month for life insurance. Debtors' monthly expense of $200.00 for recreation is supplemented by an additional miscellaneous expense of $188.00 per month, which Kenneth testified is used for tae kwon do lessons for their son, ballet lessons for one daughter, and gymnastic lessons for Debtors' third child.

Prior to experiencing the reduction in income, Debtors sent their children to a private school, but Debtors now send their children to public school. Although Debtor Trisha Wright is a "homemaker" and although Debtors' children are all in public schools, Debtors have budgeted $69.00 per month for child care. Debtors have discontinued the services of their housekeeper, which cost Debtors $500.00 per month.

In addition to the above expenses, Debtors have budgeted $200.00 per month for the regular "operation of business, profession, or farm". Although Debtors did not attach a detailed statement of such expenses to their Schedule J, as specifically directed on Schedule J, Kenneth testified that he is expected to take managers to dinner on a regular basis. On further questioning, Kenneth thought perhaps the cost of dinners for managers was reflected in Debtors' monthly budget of $200.00 for entertainment, but was not sure. At any rate, Kenneth never indicated what he actually spent per month on such dinners, but conceded that his employer reimburses Kenneth $150.00 per month for such expense. In sum, Debtors' recreational expense

and business expense are basically unexplained.

Debtors have also budgeted $999.00 per month for a "1st mortgage on Hawaii house" and $418.00 per month for "Additional dependants (2 x 209)". According to Kenneth, Debtors make monthly payments of $999.00 for Kenneth's childhood home on the Big Island of Hawaii. Debtors purchased the property from Kenneth's mother in 1995 when Kenneth's mother was no longer able to take care of the property The original home is no longer inhabitable, but Kenneth's mother built a detached structure on the property, where she now resides. Kenneth testified that his mother receives social security income of $600.00 per month, but is unable to fully support herself. Nevertheless, Kenneth did not indicate that Debtors provide any kind of support to Kenneth's mother, other than the $999.00 mortgage payment. Kenneth also testified that his mother is not impressed with Montana and has no intention of moving to Montana to help Kenneth and his spouse conserve expenses. Kenneth testified that the value of the Hawaii property is between $90,000.00 and $98,000.00.

Finally, Kenneth testified he must contribute $540.00 per month to his 401k retirement plan. Although Kenneth testified that contribution to the retirement plan is a condition of his employment, Kenneth testified that such condition is not set forth in writing. Rather, according to Kenneth, senior management of Lithia strongly encourages participation in the retirement plan and Kenneth feels that his job could be in jeopardy if he does not continue to contribute to the retirement plan.

At the hearing, the Trustee stated that he did not request dismissal of this case in his objection to confirmation because he believes that Debtors can repay one-hundred percent of the allowed unsecured claims, which claims, according to the Trustee, total roughly $55,000.00. The

Court notes that since the October 6, 2005, hearing, the Trustee filed a Motion to Dismiss on October 13, 2005, seeking the dismissal of this case on grounds of bad faith and for Debtors' failure to turnover documents requested by the Trustee. The Trustee's Motion to Dismiss is opposed by Debtors and is scheduled for hearing on November 15, 2005.

Turning back to the issue of confirmation, the Trustee opposes confirmation of Debtors' Amended Chapter 13 Plan on grounds that the plan was not been filed in good faith and on grounds that Debtors' are not committing 100% of their disposable income to their plan as required by 11 U.S.C. §1325(b)(1)(B). Likewise, First Liberty Federal Credit Union opposes approval of Debtors' Amended Chapter 13 Plan arguing that Debtors' Amended Chapter Plan has not been filed in good faith, Debtors have not provided full payment to First Liberty Federal Credit Union on the full amount of its allowed secured claim, Debtors have proposed an unreasonably low interest rate on the obligation owing to First Liberty Federal Credit Union and Debtors are not committing 100% of their disposable income to their Chapter 13 Plan.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(L) involving confirmation of a Chapter 13 plan. At issue is whether Debtors are committing 100% percent of their disposable income to their Plan as required by 11 U.S.C. § 1325(b)(1)(B). After reviewing the record and considering the testimony of Kenneth at the October 6, 2005, hearing, and for the reasons set forth below, the Court concurs with the objections raised by the Trustee and First Liberty Federal Credit Union. Accordingly, confirmation of Debtors' Amended Chapter 13 Plan is denied and Debtors shall have five days to file a second amended Chapter 13 plan providing for full payment of all allowed claims. This Memorandum of Decision sets forth both the Court's findings of fact

and conclusions of law.

## DISCUSSION

Section 1325(b)(1) of the Bankruptcy Code provides that if an unsecured creditor or the trustee objects to confirmation of a Chapter 13 plan, and the plan does not provide for 100% payment to all unsecured creditors, then a debtor must commit all disposable income to the plan. Section 1325(b)(2) defines the term "disposable income" as:

> --income which is received by the debtor and which is not reasonably necessary to be expended–
>
> > (A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section § 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and
> >
> > (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2); *In re Cavanagh*, 18 Mont. B.R. 109, 111-12, 242 B.R. 707, 710 (Bankr. D. Mont. 2000), *aff'd*, 18 Mont. B.R. 351, 352, 250 B.R. 107, 110-11 (9th Cir. BAP 2000); *In re Sutton*, 19 Mont. B.R. 220, 228 (Bankr. D. Mont. 2001); *In re Eiesland*, 19 Mont. B.R. 194, 204 (Bankr. D.Mont. 2001). Whether particular expenses or expenditures qualify as "reasonably necessary" depends on the facts and circumstances of each individual case. *In re Shaffer*, 15 Mont. B.R. 286, 288 (Bankr. D. Mont. 1996). Moreover, a court interpreting the phrase "reasonably necessary" articulated the standard as one of "adequacy, supporting basic needs 'not related to [the debtor's] former status in society or the lifestyle to which he is accustomed.'" *In re Sutliff*, 79 B.R. 151, 157 (Bankr. N.D.N.Y. 1987) (quoting *In re Jones*, 55 B.R. 462, 466-67 (Bankr. D.Minn. 1985)). The court in *Sutliff* reasoned that "[d]ebtors should not be allowed to

continue in the lifestyle that drove them to file bankruptcy and at the expense of their creditors." *Id.* at 157.

In the instant case, neither the Trustee nor First Liberty Federal Credit Union dispute that Debtors are reporting 100% of their household income. In fact, Debtors' schedules reflect that Debtors have a combined monthly income of $11,959.50. Rather, the Trustee and First Liberty Federal Credit Union take exception with many of Debtors' proposed monthly expenses.

For instance, the Trustee and First Liberty Federal Credit Union object to Kenneth's monthly contribution of $540.00 to his 401k plan. Several courts have considered the issue of whether voluntary contributions to pension funds or retirement plans constitute disposable income for purposes of section 1325(b). *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994) (voluntary 401K contributions are considered income for the purposes of Code section 1325(b)), *In re Fountain*, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) ( holding that "the $177.54 contribution to the debtor's pension fund is not necessary for the maintenance or support of the debtor as required by 11 U.S.C. § 1325(b)(2)(A) and therefore constitutes disposable income and, as such, it is not being used to make payments under the plan in conformity with 11 U.S.C. § 1325(b)(1)(B)"), and *In re Festner*, 54 B.R. 532 (Bankr. E.D. N.C. 1985) ($25 per week contribution for retirement benefits was not a necessary expenditure for the maintenance or support of the debtor or a dependent of the debtor, and was a factor in the denial of confirmation of that debtors plan).

In *In re Baldwin*, 15 Mont. B.R. 451, 452 (Bankr. D. Mont. 1996), this Court followed the sound reasoning of the above cases, holding "that for the purposes of 11 U.S.C. § 1325(b), voluntary contributions to retirement plans, such as a 401k Plan, are not necessary for the

maintenance or support of a debtor or a debtor's dependents." Consequently, contributions by debtors to a voluntary 401k Plan must be considered disposable income under 11 U.S.C. § 1325(b).

The Court also takes exception with Debtors' proposed monthly expense of $708.33 for estimated taxes. Debtors' combined monthly income, based upon Debtors' Schedule I, will be approximately $216,600.00 in 2005. The maximum social security tax on Kenneth's wages of $216,000.00 is $5,580 and the medicare tax on such wage is $3,132.00. Debtors are entitled to 5 exemptions, which may be reduced due to Debtors' income level. However, Debtors will undoubtedly have significant itemized deductions, particularly as it relates to the interest on Debtors' home mortgages. The Court highly doubts that Debtors' taxable income will exceed $140,000.00. Thus, for purposes of illustration, the Court will presume that Debtors' taxable income in 2005 will be $140,000.00. Utilizing the 2005 Montana Individual Income Tax tables, Debtors' Montana income tax will not exceed $9,217.00. Additionally, using the 2004 federal income tax tables, Debtors' income tax liability on taxable income of $140,000.00 will be $29,157.50. Adding the social security tax, the medicare tax and Debtors' proposed state and federal income tax liability results in a total tax liability of $47,086.50 for 2005, which equates to $3,923.88 per month. The figure of $3,923.88 is well below the figure of $4,740.68 set forth on Debtors' Schedule I. Therefore, the Court sees no justification for Debtors' proposed expense of $708.33 per month for estimated taxes.

Similarly, as previously noted, Debtors have budgeted $418.00 per month for two additional dependents. From the record, it does not appear that Debtors spend anything, other than the $999.00 mortgage payment, to support Kenneth's mother. Thus, the entire $418.00

should be included in a disposable income calculation. The same holds true for the $999.00 mortgage payment on the home in Hawaii. The Court did not find Kenneth to be a credible witness and his testimony was nothing more than self-serving rhetoric. Thus, the Court assigns no probative weight to Kenneth's testimony. What the Court discerns from the record is that Debtors are paying $999.00 for a second home in Hawaii.

In the case of *In re Moore*, 20 Mont. B.R. 77 (Bankr. D. Mont. 2002), this Court held that vacation time shares were nonessential luxury items, reasoning:

As one bankruptcy court described luxury items including time shares:

> Debtors do not have an entitlement, at the expense of their creditors, to maintain their prepetition lifestyles and status in society, especially when their prior lifestyles " ... were characterized by luxury, excessive consumption of nonessentials, or inordinately high expenditures for purchases of necessities." *In re Bottelberghe*, 253 B.R. at 263 (citations omitted). In fact, the determination of what is deemed a "reasonably necessary" expense under the disposable income test does not even consider debtor's former prepetition lifestyle. *See In re McNichols*, 249 B.R. 160, 168 (Bankr.N.D.Ill.2000), *citing In re Jones*, 55 B.R. 462, 464 (Bankr.D.Minn.1985).
>
> In short, debtor's proposed continuing payment of these luxury items defeats confirmation of her plan. *See In re Bottelberghe*, 253 B.R. at 256; *In re Kasun*, 186 B.R. 62, 63-64 (Bankr.E.D.Va.1995); *In re Webster*; 165 B.R. 173, 176 (Bankr.E.D.Va.1994).

*In re Daniel*, 260 B.R. 763, 769 (Bankr. E.D. Va. 2001).

This Court could continue with its scrutiny of Debtors' individual line-item expenses. However, the Court is reluctant to engage in such a review as such review of line-item expenses is invariably, to some extent, a reflection of the undersigned's personal views and requires an analysis of a debtor's individual lifestyle and philosophies. Rather than engage in such a subjective review of a debtor's scheduled expenses, this Court has on occasion utilized other

available methods to determine a reasonable and necessary figure for a debtor's monthly household expenses.

For example, this Court has utilized the Collection Financial Standards established by the Internal Revenue Service ("IRS") and has adjusted such standards up or down according to the particular facts of a given case.[3] Under the IRS's Collection Financial Standards, a family of five living in Lewis and Clark County, Montana, and having gross monthly income in excess of $5,834.00 are allocated $3,076.00 per month for food, clothing, housing, utilities and other household expenses. The payment on Debtors' first mortgage alone exceeds the monthly allowance under the Collection Financial Standards. The Court is very doubtful that these Debtors could exist within the confines of the Collection Financial Standards, even with adjustments.

What the foregoing discussion illustrates is that Debtors are not contributing 100% of their disposable income to their Chapter 13 plan. If the Court added just the four items discussed above, consisting of the 401k payment of $540.00, the mortgage on the Hawaii property of $999.00, the deduction for 2 additional dependents of $418.00 and the monthly estimated tax payment of $708.33, to Debtors' proposed initial plan payment of $510.00, Debtors could afford a monthly plan payment of at least $3,175.33. Simply put, it appears that Debtors are attempting to maintain their former lifestyle at the expense of their creditors, which this Court will neither allow nor condone. As explained in *In re Kitson*, 65 B.R. 615, 622 (Bankr. E.D.N.C. 1986), a

---

[3] This Court is not bound by the Internal Revenue Service's Collection Financial Standards. *See, e.g., In re Degross*, 272 B.R. 309, (Bankr. M.D. Fla. 2001). However, such standards provide a starting point for courts. This Court fully recognizes that each debtor has unique circumstances and the Court notes that adjustments to the national standards is in order to properly reflect the circumstances of each debtor.

Chapter 13 debtor "cannot expect to 'go first class' when 'coach' is available".

The Court would also note that Debtors are facing a good faith objection to confirmation raised by both the Trustee and First Liberty Federal Credit Union. Rather than deal with the good faith objection at this juncture, the Court finds that the better course of action is to simply require that Debtors propose a 100% repayment plan. Assuming that Debtors have administrative expenses of $1,000.00, secured obligations of $44,500.00, arrearages of $18,311.77 and unsecured debt of $55,000.00, Debtors plan payments under a 60 month plan that proposes 100% payment to unsecured creditors would be approximately $2,391 per month.[4] Based upon the evidence presented at the hearing, the Court firmly believes that Debtors can trim the fat out of their extravagant budget to provide a plan payment that will repay all allowed claims in this case.

Given the Court's above ruling and with one exception, the Court will not address the other objections to confirmation raised by the Trustee and counsel for First Liberty Federal Credit Union. The exception pertains to First Liberty Federal Credit Union's objection to Debtors' proposed interest rate of 6% per annum. The BAP in *In re Boulders on the River*, 164 B.R. 99, 105 (9th Cir. BAP 1994), noted that the Ninth Circuit applies the "formula rate" approach for determining the interest payable on the deferred payment of an obligation under the cramdown. *See also In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990); *In re Camino Real*, 818 F.2d 1503, 1508 (9th Cir. 1987); *Tax Collector v. Pluma (In re Pluma)*, 303 BR 444, 447-48 (9th Cir. BAP 2003) (Chapter 13), *aff'd, In re Pluma*, --- F.3d ----, 2005 WL 2840441 (9th Cir. Oct 31, 2005) (NO. 04-55107).

---

[4] Under a 48 month plan, Debtors' plan payments would be approximately $2,947.00.

In *In re Janssen Charolais Ranch, Inc.*, 4 Mont. B.R. 290, 73 B.R. 125, 127-28 (Bankr. D.Mont. 1987), this Court discussed the requirements 11 U.S.C. § 1225(a)(5)(B)(ii), which are similar to the requirements of 11 U.S.C. § 1325(a)(5)(B)(ii), in determining an appropriate interest rate:

> The issue in this case is whether the Bank is receiving under the Plan the value of the property, i.e., cash payments, distributed under the Plan which have a present value equal to the amount of its claim. Section 1225(a)(5)(B)(ii) is identical to 1325(a)(5)(B)(ii). *In re Trent*, 42 B.R. 279, 281 (Bankr.W.D.Va.1984) holds:
>
> > "11 U.S.C. § 1325(a)(5)(B)(ii) requires that a plan providing for an allowed secured claim must propose to distribute property thereunder on account of such claim in an amount the present value of which is not less than the allowed amount of such claim. This requires a determination of the time value of money to be paid in the future under the plan. More is required than that the sum of all payments made on account of a secured claim equal the allowed amount of that claim. Future payments to be made under the plan must be discounted to determine their 'present value' and the total of the present values of all payments made on account of a secured claim provided for under the plan must at least equal the allowed amount of that claim."
>
> The discount rate is equivalent to the rate of interest that would be paid on an obligation of the Debtor considering a market rate of interest that reflects the risk of the Debtor's business. However, the discount rate is used to compute a factor that reduces money that will be paid in the future to a sum of money with a present value. If that sum earns interest at a rate equal to the discount rate, then the result of the future will equal the original amount of money before discounting. The matter of proper interest or discount rate is addressed in *In re Welco Industries*, 60 B.R. 880, 882, 883 (9th Cir. BAP 1986) where the court held:
>
> > "The factors relevant in determining an appropriate interest rate are discussed in 5 Collier on Bankruptcy, ¶ 1129.03, at 1129-65 (15th Ed. 1982):
> >
> > > 'The appropriate discount [interest] rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate [interest] rate, the court must consider the prevailing market rate for a loan of a term

> equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.'
>
> * * *
>
> The appropriate interest rate is the prevailing market rate for the type and quality of loan. Current market conditions determine what the market rate will be. One factor that has an impact on that determination is the prime rate. Prime represents the rate charged by commercial banks to prime commercial loan customers. [*In re] Mitchell*, [39 B.R. 696] at 701 [Bankr.Or. (1984) ]. Factors which influence the determination of prime are the general level of money rates, the availability of reserves, general business conditions, size and term of loan, geographic variations, elements of profits and collection costs."

To the same effect is *U.S. v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir.1986) and *In re Martin*, 66 B.R. 921, 927 (Bankr.Mont.1986).

In the present case, the Debtor has failed to show that the proper discount or interest rate should be the rate of 8%. It appears that interest figure was merely pulled out of the hat and bears no resemblance to market interest rates required under *Welco*.

More recently, this Court discussed interest rates in the context of present value in *In re Schaak*, 17 Mont. B.R. 349, 355-56 (Bankr. D.Mont. 1999), quoting *In re Brummer*, 12 Mont. B.R. 219, 223-24 (Bankr. D.Mont. 1993) (*quoting In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990)). There, the Court explained two methods by which a cramdown interest rate may be determined, either by taking testimony on current market interest rates for similar loans in the region, or by use of a formula starting with a base rate and adding a factor based on the risk of default and the nature of the security. *Id.* The Ninth Circuit approved the formula approach in *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503, 1508 (9th Cir. 1987); *In re Fowler*, 903 F.2d at 697-98; *In re Boulders on the River, Inc.*, 164 B.R. 99, 105 (9th Cir. BAP 1994).

Under the formula rate approach the court starts with a base rate and adds a risk factor based on the risk of default and the nature of the security. *Boulders on the River*, 164 B.R. at 105; *In re Fowler*, 903 F.2d at 697; *In re Pluma*, 303 BR at 448; *see also Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 1961-62, 158 L.Ed.2d 787 (2004) (Chapter 13 cramdown – after hearing adjust prime rate to account for the greater nonpayment risk that bankrupt debtors typically pose, depending on such factors as the circumstances of the estate, the nature of security, and the duration and feasibility of the reorganization). The interest rate determination is to be made on a case-by-case basis. *Boulders on the River*, 164 B.R. at 105; *In re Camino Real*, 818 F.2d at 1508; *In re Pluma*, 303 BR at 447.

As of this date, the federal prime rate of interest is 7.00%, which became effective November 1, 2005, and which would be the starting point for the Court's application of the formula approach to ascertaining the appropriate interest rate. After considering evidence, testimony, the risk of default and the nature of the security as required by *Boulders on the River*, 164 B.R. at 105, the Court finds that Debtors have not satisfied their burden of proof. Specifically, Debtors have not shown that the 6% interest rate they propose to pay First Liberty Federal Credit Union is fair and equitable. Consistent with the foregoing,

IT IS ORDERED that the Court will enter a separate order sustaining the objections to confirmation raised by the Chapter 13 Trustee and First Liberty Federal Credit Union; denying confirmation of Debtors' Amended Chapter 13 Plan; and granting Debtors five (5) days from the date of this Order to file a second amended Chapter 13 plan that provides for 100% payment of all allowed claims.

IT IS FURTHER ORDERED that a hearing on Debtors' second amended Chapter 13 plan

shall be held Tuesday, November 15, 2005, at 09:00 a.m., or as soon thereafter as the parties can be heard, in the 2ND FLOOR COURTROOM, FEDERAL BUILDING, 400 N. MAIN, BUTTE, MONTANA.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana