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CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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8 **UNITED STATES BANKRUPTCY COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 In re: ) **AMENDED**  
11 ) **MEMORANDUM DECISION**  
12 DWIGHT L. WILLIAMS, Debtor )  
Case No. 01-09650-B13 )  
13 CHRISTINA R. PORTILLA, Debtor, )  
Case No. 01-09889-B13 )  
14 CHRISTINA CUMMINGS, Debtor, )  
Case No. 01-10117-H13 )  
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18 At issue is the rate of interest that will provide San Diego  
19 County ("County") with payments having a present value equal to  
20 the allowed amount of its claim as required by 11 U.S.C. §  
21 1325(a)(5)(B)(ii).

22 This Court has jurisdiction to determine this matter  
23 pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order  
24 No. 312-D of the United States District Court for the Southern  
25 District of California. This is a core proceeding pursuant to  
26 28 U.S.C. § 157(b)(2)(B) and (L).

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1 FACTS

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3 The debtors in these consolidated cases<sup>1</sup> each filed a  
4 Chapter 13 petition under the Bankruptcy Code ("Code"). The  
5 County filed a proof of claim for unpaid taxes in each case. It  
6 is undisputed that the County's claims are secured.

7 Debtors submitted their respective plans of reorganization  
8 that proposed to defer payment of the tax claims under §  
9 1325(a) (5) (B) (ii). Section 1325(a) (5) (B) (ii) permits a court to  
10 confirm a plan where the debtors provide deferred cash payments  
11 in satisfaction of the claim, if the sum of the payments equal  
12 the present dollar value of the claim as of the confirmation  
13 date. This requirement implies the payment of interest.

14 Debtors proposed the following in their plans:

15 <u>DEBTOR(S) NAME:</u>	<u>CLAIM AMOUNT</u>	<u>INSTALLMENT PAYMENT</u>	<u>INTEREST</u>
16 Dwight L. Williams	\$1,856.66	\$50.00	4.8%
17 Christina R. Portilla	\$1,707.58	\$60.00	4.8%
18 Christina Cummins	\$1,574.38	\$53.00	4.8%

19 DISCUSSION

20 A. The Market Rate of Interest Applies.

21 County objects to debtors' proposed interest rate of 4.8% on  
22 the grounds that under California law, it would be entitled to  
23 receive statutory interest of 18% per annum on delinquent taxes.  
24 County contends that it is the statutory interest rate that  
25 controls and not the market rate as set forth in In re Camino  
26 Real Landscape Maint. Contractors, Inc., 818 F.2d 1503 (9th Cir.

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28 <sup>1</sup> The parties stipulated at the February 6, 2002, hearing that the  
three cases would be consolidated.

1 1987). The Court disagrees and finds Camino Real controlling in  
2 the Ninth Circuit.

3 Camino Real involved three consolidated cases involving  
4 Chapter 11 debtors who submitted plans of reorganization that  
5 proposed to defer the payment of Internal Revenue Service claims.  
6 The County argues that Camino Real is inapplicable because it  
7 concerned unsecured tax claims and here the County is  
8 oversecured. The Ninth Circuit however specifically noted that  
9 its analysis regarding the appropriate rate of interest for an  
10 unsecured tax debt would "be useful to courts in considering  
11 secured ... tax claims [as well]." Camino Real, 818 F.2d 1504 n.  
12 1. Therefore, it is irrelevant that the County's claim is  
13 oversecured for purposes of determining the proper rate of  
14 interest for delinquent taxes.

15 Similar to this case, the government in Camino Real argued  
16 that the interest rate on deferred taxes was fixed by statute --  
17 26 U.S.C. § 6621. The Ninth Circuit rejected the statutory rate  
18 of interest and instead found that the prevailing market rate of  
19 interest for a loan of a term equal to the payout period,  
20 considering both the quality of the security and subsequent  
21 default, was appropriate. Even though Camino Real dealt with  
22 Chapter 11 debtors, the requirements for confirming a Chapter 13  
23 plan are similar given § 1325(a)(5)(B)(ii). Accordingly, "the  
24 fact that a particular debt arises from taxes due to the  
25 government does not affect the appropriate interest rate. It  
26 continues to be determined by the commercial loan market."  
27 Camino Real, 818 F.2d at 1506.

28

1 B. Determining the Appropriate Market Rate.

2 Debtors timely submitted the declaration of their expert,  
3 George Dell ("Dell"). In determining the appropriate market  
4 rate, Dell relied on the analysis set forth in Camino Real, 818  
5 F.2d at 1508 and In re Fowler, 903 F.2d 694 (9th Cir. 1990).  
6 According to Dell, the market rate is determined by starting with  
7 a base rate, either the prime rate or the rate on treasury  
8 obligations, and then adding ~~adds~~ a factor based on the risk of  
9 default and the nature of the security (the "risk factor").  
10 Fowler, 904 F.2d at 697.

11 As the base rate, Dell chose the prime interest rate which  
12 is currently 4.75%.<sup>2</sup> The value of the debtors' residences in all  
13 three cases ranged from a low of \$180,000 (Portilla), \$215,000  
14 (Williams), to a high of \$260,000 (Cummings). Dell testified  
15 that the taxes owed to the County are afforded first priority and  
16 are paid before every other creditor, including the mortgage  
17 lender. Dell then concluded that the risk of total loss to the  
18 County was .01% since the debtors' properties would need to  
19 become worthless for a loss to occur, and a total loss of value  
20 would be extremely rare in this situation. Dell then added the  
21 risk factor and the prime rate of 4.75% and concluded that the  
22 proper rate of interest was 4.76%. Debtors have agreed to pay  
23

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24  
25 <sup>2</sup> The prime interest rate is higher than the rate on treasury  
26 obligations, which is the government's cost of borrowing. The court in Camino  
27 Real noted that "this rate is usually quite low because to the lender the  
28 government's obligation is a short-term, low risk investment. The obligation  
of a private borrower is quite different; its creditworthiness is not the same  
as the federal government's." The court further noted that the treasury rates  
may be relevant, but not the same as the § 1129(a)(9)(C) rate. Camino Real,  
818 F.2d 1506.

1 4.8%.<sup>3</sup>

2 The County argues that the 4.8% interest rate proposed by  
3 the debtors is far below the current rate for loans on real  
4 property. The County asserts those loans currently carry between  
5 7% and 8% interest. The County lists a series of "risks"  
6 associated with the recovery of its tax lien, all of which are  
7 without merit and are without evidentiary support.<sup>4</sup>

8 The risk factor in this situation is de minimus. Mr. Dell  
9 testified on cross-examination, there is even less risk in these  
10 cases because 1) the County enjoys a substantial equity cushion  
11 on its first priority lien on the debtors' residence, and 2) the  
12 debtors' income stream provides additional security by paying the  
13 claim through the Chapter 13 plan. County asserts that the  
14 debtors' pose a high risk factor because they have previously  
15 defaulted on paying their County taxes and have filed bankruptcy

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17 <sup>3</sup> This was to accommodate the Chapter 13 trustee in his  
18 calculations.

19 <sup>4</sup> On December 21, 2001, this Court issued its Order Regulating  
20 Evidentiary Proceedings and Fixing Date for Hearing which was served on the  
21 debtors and the County (the "Pre-Trial Order"). The Pre-Trial Order provided,  
22 inter alia, that January 18, 2002, was fixed as the last date by which all  
23 declarations in lieu of direct testimony shall be filed with the Court with a  
24 copy served on opposing counsel. Pre-trial orders requiring written  
25 declarations in lieu of direct oral evidence have long been considered valid  
26 orders in the Ninth Circuit. In re Adair, 965 F.2d 777, 779 (9th Cir. 1992).  
27 The debtors obeyed the Court's order and timely filed the declaration of Mr.  
28 Dell; the County did not. On February 4, 2002, the day prior to the hearing  
on February 5, 2002, the County filed the declaration of Shell-Lee Davidson in  
support of its position. Also, on February 4, 2002, the County filed an ex  
parte application asking for a continuance to allow the Court time to read and  
consider the declaration submitted by its expert. At the February 5, 2002,  
hearing, the Court denied the County's continuance as being without merit and  
refused to consider the declaration of Ms. Davidson since it was untimely.  
Further, Ms. Davidson was not present in Court for cross-examination. The  
Court may exercise its discretion in refusing to admit evidence where a party  
fails to comply with pre-trial order. In re Gergely, 110 F.3d 1448, 1452 (9th  
Cir. 1997).

1 petitions. But, many courts point out that the risk factor is  
2 not large in a Chapter 13 case given the protections that  
3 creditors enjoy under Chapter 13 of the Code. In re Knight, 254  
4 B.R. 227, 230 (Bankr. C.D. Ill. 2000) (citations omitted).  
5 Specifically, Chapter 13 debtors must show that they are  
6 financially able to make all their payments under the proposed  
7 plan. Moreover, creditors have an enhanced ability to assess the  
8 debtors' ability to service their debt, and wage orders can be  
9 used in Chapter 13's to eliminate the risk of the debtors  
10 defaulting on their monthly payments. Finally, the cost of  
11 collection and garnishment and self-help repossession are  
12 eliminated in a Chapter 13 proceeding and the costs of  
13 administration are largely borne by the Chapter 13 trustee. Id.

14       Lastly, County contends that applying the statutory rate of  
15 interest to a Chapter 13 case promotes judicial economy. County  
16 argues that if the Court adopts a present value approach, there  
17 will always be litigation on the issue of the appropriate market  
18 rate because it is constantly changing. Yet, in reality, the  
19 present value approach promotes certainty with respect to the  
20 proper rate to be applied in these cases. In addition, parties  
21 are likely to be reasonable regarding the market rate of interest  
22 because of the guidance given in Camino Real, 818 F.2d 1503 and  
23 Fowler, 908 F.2d at 697-98 (i.e., starting with a base rate and  
24 adding a factor based on the risk of default and the nature of  
25 the security). Accordingly, the Court does not believe more  
26 litigation regarding the market rate will necessarily follow in  
27 these cases.

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1 C. Section 1322 Does Not Prevent The County's Claim From Being  
2 Altered.

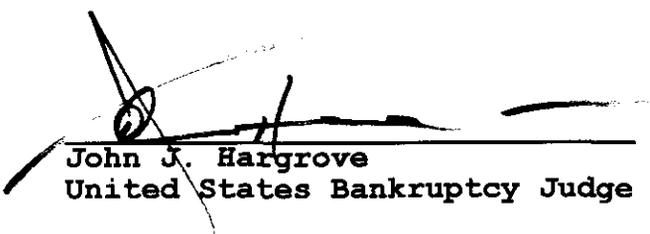
3 County argues that § 1322 prohibits the debtors from  
4 modifying its claim because it is secured by the debtors'  
5 residences. While it is true that a Chapter 13 plan may not  
6 modify the rights of holders of secured claims secured only by a  
7 security interest in the real property that is the debtors'  
8 principal residence, the County has neglected to note that 11  
9 U.S.C. § 101(51) defines "security interest" as a lien created by  
10 an agreement. This type of security interest is most often seen  
11 in the form of a note secured by a deed of trust in California.  
12 A "security interest" does not include an involuntary tax lien  
13 affixed by the County.

14  
15 CONCLUSION

16 The Court finds that the market rate of interest is the  
17 appropriate rate for delinquent taxes when considering plan  
18 confirmation and the provisions of § 1325(a) (5) (B) (ii).

19 This Memorandum Decision constitutes findings of fact and  
20 conclusions of law pursuant to Federal Rule of Bankruptcy  
21 Procedure 7052. The attorney for the debtors is directed to file  
22 with this Court an order in conformance with this Memorandum  
23 Decision within ten (10) days from the date of entry thereof.

24  
25 Dated: February 20, 2002

26   
27 John J. Hargrove  
United States Bankruptcy Judge

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