UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	) Bankr. No. 03-40965
	) Chapter 11
BRIDGEPORT TRACTOR PARTS, INC.,	)
aka Gary's Tractor Parts, Inc.	) DECISION RE: CONFIRMATION
Tax I.D. No. 47-0813031	) OF DEBTOR'S PROPOSED PLAN
	) AND GARY IMPLEMENT, INC.'S
Debtor.	) MOTION FOR RELIEF FROM STAY
	) AND MOTION TO DISMISS

The matters before the Court are the confirmation of Debtor's plan dated January 7, 2004, and the Motion for Relief From the Automatic Stay and the Motion to Dismiss filed by Gary's Implement, Inc. These are core proceedings under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, this case will be dismissed because Debtor's petition was filed in bad faith.

I.

On July 15, 1998, Gary's Implement, Inc., ("Gary's Implement") sold to Gary's Tractor Parts, Inc., later known as Bridgeport Tractor Parts, Inc., ("Bridgeport"), a tractor and farm equipment salvage business located in Morrill County, Nebraska. Of the total purchase price of $1,050,000, $525,000 was allocated to equipment and inventory, $25,000 was allocated to a non-competition agreement with Gary's Implement and its sole shareholders, Gary and Joan Phillips, and $500,000 was allocated to goodwill. Bridgeport gave Gary's Implement cash for the equipment and inventory and a note for $500,000 for the goodwill. The note was to be paid over five years, beginning one year after the closing date, with interest at 6% annually. The note contained a default provision that would render the entire balance due at 16% interest. To fulfill the $25,000 price for the non-competition agreement, Bridgeport agreed to make annual payments of $5,000, also beginning one year after the sale.

In tandem with this business asset sale, David A. Dyke personally purchased from Gary’s Implement the real estate on which the salvage business was operated. The purchase price was $350,000, which was paid in cash.

To secure the $500,000 note and the $25,000 non-competition agreement, Bridgeport gave Gary’s Implement a security agreement in the business inventory. As additional security, David Dyke gave Gary’s Implement a deed of trust on the business realty. The deed of trust was timely recorded in Morrill County, Nebraska. One provision of the deed of trust prohibited David Dyke from selling the realty without Gary’s Implement's prior approval. If a sale occurred, the deed of trust provided that Gary’s Implement could declare all secured sums to be immediately due and payable and file a notice of default.

Bridgeport is solely owned by All States Ag Parts, Inc. ("All States"). Members of the David Dyke family own 85% of All States. David Dyke served Bridgeport as president at the time the salvage business and real estate were purchased from Gary's Implement; David's son John Dyke later assumed that office. All States leased some employees and managerial services to Bridgeport. At some point, Bridgeport also began to pay David Dyke rent for use of the realty.

Ultimately, disputes arose between Gary's Implement and Bridgeport. Bridgeport failed to timely make its July 15, 2000, payment to Gary's Implement on the note and non-competition agreement. Gary's Implement brought suit against Bridgeport in Nebraska state court in the autumn of 2000. Bridgeport counterclaimed, alleging Gary's Implement had violated terms of the purchase agreement and the non-competition agreement. On July 22, 2003, a jury returned a verdict for Gary's Implement. Gary's Implement was awarded $612,255 on the note and $20,000 on the non-competition agreement; both sums included accrued interest. Gary's Implement also was awarded post-judgment interest on both sums, and costs were taxed to Bridgeport. Bridgeport's counterclaim was denied. Bridgeport's motion for a new trial was denied. The state court set the appeal bond at

$729,750.

Gary’s Implement began to execute on its state court judgment. On July 31, 2003, Gary’s Implement also filed a notice of default on the deed of trust it had been given by David Dyke to secure Debtor’s note for the balance owed on the purchase agreement for the salvage business.

In response to Gary’s Implement’s actions, David Dyke and his wife Carol Dyke sold the salvage business real estate to Bridgeport on August 1, 2003, for $350,000. A warranty deed was recorded August 4, 2003. Bridgeport paid $10.00 down, and it gave David Dyke a note for $350,000 with annual interest at 1% over prime. Bridgeport also gave David Dyke a deed of trust on the realty to secure the note, which was recorded August 4, 2003. Under the note’s terms, Bridgeport was to begin making monthly payments to Dyke in September 2003.

On August 7, 2003, Bridgeport (“Debtor”), as a South Dakota corporation, filed a Chapter 11 petition in the District of South Dakota. In an amended schedule, Debtor valued its recently acquired realty at $350,000, and it said secured claims against the realty totaled $982,000. There was an additional secured claim to David Dyke for $50,000 that Debtor said was secured by a blanket business lien for total secured claims of

$1,032,000.00. Debtor listed unsecured claims against it totaling $898,945.14. Dyke family members and other corporations owned or controlled by the Dyke family represented all the secured claims except Gary’s Implement’s claim and almost 95% of the unsecured claims.

On August 12, 2003, Debtor filed a notice of appeal with the Nebraska state court. On September 18, 2003, Debtor sought relief from the automatic stay to continue the appeal. No objection to the motion was filed and relief was granted on October 3, 2003. Debtor has not yet posted the appeal bond of $729,750.

Gary’s Implement filed its own relief from stay motion and a motion to dismiss Debtor’s bankruptcy case, primarily on the grounds that Debtor’s petition had been filed in bad faith. It argued David Dyke transferred the real property to Debtor so that he personally would not have to file bankruptcy. Gary’s Implement also argued that Debtor had sought bankruptcy relief because it was unable to post the required state court appeal bond.

Evidence on Gary’s Implement’s two motions was received on December 3, 2003. By agreement of the parties, the depositions of Brian Sittig and David Dyke were received into evidence. In his deposition, Brian Sittig, a professional in the surety business, stated he would not recommend that an appeal bond be written for Debtor based on the Debtor's financial condition. In his deposition, David Dyke reviewed his purchase of the salvage business realty, Debtor's purchase of the business itself, and his sale of the realty to Debtor just before Debtor filed bankruptcy. He said he made the sale to Debtor so that he would not lose the land to Gary's Implement and because he wanted Debtor to have it because of its necessity for the business. David Dyke acknowledged that he was aware that the deed of trust he gave to Gary's Implement required him to obtain Gary's Implement's permission before he sold the land to anyone.

At the hearing, Joan Phillips, a shareholder, corporate director, and vice president for Gary's Implement, reviewed Debtor's and David Dyke's purchase of the farm salvage business and real estate from Gary's Implement in July 1998. She stated David Dyke never requested nor received her and her husband's permission to sell the real property to another. After Debtor's default on the July 15, 2000, payments, Phillips acknowledged that Gary's Implement, through the Nebraska state court lawsuit, sought and was awarded damages from Debtor for the default. Phillips further acknowledged that Gary's Implement had begun to execute on its judgment, including garnishing Debtor’s bank accounts, and it had begun to foreclose on the deed of trust given by David Dyke.

Phillips opined that the value of the realty and farm salvage business were probably worth more than the purchase price paid by Debtor and David Dyke. She acknowledged that a liquidation or “fire sale” of Debtor’s business would generate less for creditors than would a Chapter 11 bankruptcy plan. She stated she and her husband, as the shareholders of Gary’s Implement, preferred to be paid under the default terms of Debtor’s purchase agreement, which included interest at 16%, rather than in full with interest over a twenty-year Chapter 11 plan term. She stated they could re-incorporate Debtor’s used parts business into Gary’s Implement’s neighboring business, but they did not want to do so. Instead, Phillips said she and her husband would rather get paid for the business and realty that Gary’s Implement sold to Debtor and David Dyke.

John Dyke, Debtor’s president, also testified at the hearing on Gary’s Implements’ motion to dismiss and motion for relief from stay. He stated he is currently the chief operating officer of All States and president of All States’ subsidiaries, which include Debtor, Salem Tractor Parts, Great Lakes Tractor

Parts, Iowa Tractor Parts, and Hendricks Tractor Parts. John Dyke acknowledged that Debtor filed its Chapter 11 petition about two weeks after the Nebraska state court judgment was rendered against it. He said Debtor went into bankruptcy because it "had more financial obligations than [it] could pay" and he felt bankruptcy was the best way to protect the business. John Dyke acknowledged that the filing was also precipitated by Gary's Implement's collection efforts on its state court judgment and by its foreclosure action on the realty's deed of trust.

John Dyke acknowledged that Debtor purchased the realty underlying its salvage business from his father, David Dyke, on August 1, 2003, just one week before Debtor filed Chapter 11. He opined that the land was worth the $350,000 purchase price only to Debtor because its business was located there and the business inventory could not be economically moved elsewhere. John Dyke acknowledged that the realty was encumbered by liens exceeding $630,000 when his father sold it to Debtor but he said Debtor nonetheless purchased it because "the property was worth $350,000 to Bridgeport Tractor Parts." He viewed the purchase as an "equitable transfer." While he was not familiar, in a general business context, with any similar land sales where encumbrances on the realty substantially exceeded its fair market value, David Dyke stated his attorneys said they were familiar with similar situations.

John Dyke presented Debtor’s September 2003 income statement, which included year-to-date figures. According to this report, at the end of September 2003, Debtor had a net loss of $48,866.37. He also presented a draft budget for Debtor for 2004. Therein, he projected that Debtor would have a net profit of $37,666 after payment of regular business expenses and “Interest” and “Amortization” expenses totaling $89,884. John Dyke also prepared a “Payoff Schedule.” On this schedule, he stated Debtor owed David Dyke a secured claim of $50,000, owed unsecured and under-secured creditors a total of $1,457,813.15, owed Gary Phillips (i.e., Gary’s Implement) a secured claim of $350,000, and owed administrative claimants $23,313.42. In years one through four, according to this exhibit, Debtor proposed to pay creditors $108,405.26 per year and administrative claimants $6,728.05 per year for a total plan payment per year of $115,133.31. Total plan payments were slated to decrease slightly in the fifth year after administrative claims were paid in full and decrease again in the eleventh year after David Dyke was paid in full.

At the conclusion of the hearing on Gary’s Implement’s motion to dismiss and motion for relief from stay, the Court directed that both matters would be held in abeyance pending the confirmation hearing on Debtor’s plan. The Court advised the parties, and in particular Debtor’s counsel, that the plan and disclosure statement had to be filed by December 8, 2004, that the disclosure statement hearing would be held in January 2004, and that the confirmation hearing would be held in February 2004.

Debtor timely filed its plan and disclosure statement. A hearing on the disclosure statement was held January 7, 2004. The parties resolved Gary’s Implement’s objections to the Disclosure Statement through an Amended Disclosure Statement, which Debtor filed with a new plan on January 7, 2004.

Debtor’s proposed plan consisted of five classes. Class 1 was Gary’s Implement. Debtor valued Gary’s Implement’s total claim at $635,934, the approximate amount of the judgment Gary’s Implement holds. Debtor split the claim into two parts. Debtor valued that portion it said was secured by realty at $420,000 and proposed to pay it over twenty years at 6% interest. Debtor said the balance of approximately $215,934, which it did not label as secured, would be paid over twenty years at 4.5%

interest. In the proposed plan, Debtor also reserved the right to prepay Gary’s Implement’s claim and to cease or reduce payments to Gary’s Implement if it were successful in its Nebraska state court appeal.

Through a pending adversary proceeding,[1] Debtor has disputed Gary’s Implement's perfected security interest in its inventory. Nonetheless, Debtor did not put the $215,934 portion of Gary’s Implement’s claim with the class of unsecured creditors. The twenty-year plan terms significantly extended the original five-year agreement that Debtor and David Dyke made with Gary’s Implement when the salvage business and realty were purchased in 1998. Gary’s Implement balloted against the plan and also filed specific objections to it.

Class 2 consisted of David Dyke, an insider by virtue of his relationships to Debtor’s president and Debtor’s parent company. Debtor stated that it owed Dyke $50,000, which was fully secured by business assets. Debtor proposed to pay this debt in full over ten years without interest in equal annual payments of $5,000 beginning in the fourth year of the plan. Debtor stated that it also owed Dyke $634,403 on an unsecured claim, which

[1] *See Bridgeport Tractor Parts, Inc. v. Gary’s Implement, Inc. (In re Bridgeport Tractor Parts, Inc.)*, Adversary No. 04-4003, Bankr. No. 03-40965 (Bankr. D.S.D.).

Debtor proposed to pay with Class 4 of general unsecured claim holders. Debtor stated that it further owed David Dyke $350,000 for the business real estate that it purchased from him. Debtor acknowledged Gary's Implement's first lien on the land. The plan provided that Debtor would pay David Dyke his claim in full "after the prior lien position of [the] class 1 creditor had been paid" and that David Dyke would retain his lien until he was paid in full. David Dyke balloted in favor of the plan.

Class 3 consisted of unsecured creditors with claims under $3,000 or claims held by unsecured creditors who elected to take $3,000 in lieu of their full claim and that were not listed as "disputed, contingent or liquidated."[2] Debtor proposed to pay the creditors in this class in full over three years without interest. Debtor stated special treatment for this class was "reasonable and necessary, and for administrative convenience." Of the sixteen ballots received from approximately twenty-eight creditors in this class, all were in favor of the plan. The class included Great Lakes Agri-Marketing, Inc., which is owned by insider David Dyke, and Hendricks Tractor parts, which, like Debtor, is solely owned by All States. These insiders' claims

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[2] Based on the context of the sentence and a later, similar sentence in the plan, the Court presumes that Debtor meant to use here the term "unliquidated" rather than "liquidated."

totaled $4,280.44, or about one-third of the balloted claims total of $12,116.95.

Class 4 comprised the remaining unsecured creditors, except one, with claims over $3,000 or with an unliquidated claim. Debtor’s plan stated the Class 4 creditors’ claims totaled $862,532 and that they would receive $3,594 monthly beginning in March 2004 for twenty years. Debtor proposed to increase the monthly payments by $2,500 once Class 2 and Class 3 were paid in accordance with the plan. There were seven creditors in this class. Only one creditor, Abilene Machine, Inc., with a balloted claim of $6,242.04, was not an insider or affiliate of Debtor. David Dyke held the largest claim at $634,403.21. All members of this class balloted in favor of the plan.

The fifth class consisted of one unsecured creditor, R.T.S. Shearing, L.L.C., who was excepted from the general class of unsecured creditors in Class 4. Debtor said the lone creditor in Class 5 had a damages claim against Debtor for $24,500[3] and that the creditor owed Debtor $51,000 for salvage inventory. The plan provided that the parties’ claims would be offset at

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[3] Debtor’s schedules described this creditor’s claim as a trade debt, not one for damages. No pending litigation by this creditor was clearly disclosed in Debtor’s statement of financial affairs.

confirmation. This creditor accepted the plan treatment.

Gary's Implement objected to Debtor's plan primarily on the grounds that it was not proposed in good faith, as evidenced by the eve-of-bankruptcy transfer of the real property to Debtor, Debtor's use of the bankruptcy as a litigation tactic in the state court action it had lost to Gary's Implement, the prevalence of insiders among Debtor's creditors, and Debtor's failure to pursue preference claims against insiders. Gary's also argued against confirmation on the grounds that the plan improperly classified its claim into one class and that the plan was likely to be followed by liquidation or another reorganization attempt, *i.e.*, that it was not feasible. Finally, Gary's Implement argued that the plan did not provide fair and equitable treatment to Gary's claim under § 1129(b) because Gary's Implement would not receive the "indubitable equivalent" of its claim. It argued its secured claim was undervalued, the interest rate proposed was too low, and the amortization term was too lengthy.

At the confirmation hearing,[4] Gary's Implement withdrew its

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[4] Also heard on February 4, 2004, just before confirmation, was Debtor's motion that Gary's Implement's ballot should be designated under 11 U.S.C. § 1126(e), or alternatively, that Gary's Implement's claim should be temporarily allowed for balloting purposes pursuant to Fed.R.Bankr.P. 3018(a). The

objection regarding the classification of its secured and unsecured claims in one class. Debtor moved for confirmation under 11 U.S.C. § 1129(b) since it believed all requirements for confirmation had been met other than § 1129(a)(8) due to Gary's Implement's negative ballot.

Certified Public Accountant John Wendande testified[5] in support of the discount rate offered in the plan to Gary's Implement. His testimony was not contradicted by other evidence.

In his testimony on Debtors' behalf, John Dyke confirmed the various transactions involved when Debtor purchased the salvage

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Court denied Debtor's motion to designate. Though Debtor argued in its written closing arguments following confirmation that the Court did not temporarily allow Gary's Implement's claim for balloting purposes, that is inaccurate. It was agreed on the record that the value of Gary's Implement's claim was accurately set forth in the plan. Both parties also agreed that the pending adversary proceeding between the parties, which would address Gary's Implement's secured status regarding personalty, did not need to be resolved before confirmation because of the manner in which Debtor had structured Gary's Implement's plan payments. Based on that record, the Court understood that the parties had agreed that Gary's Implement's claim was being allowed as provided in the plan for balloting purposes and the confirmation hearing continued. Accordingly, Debtor will not be heard now to argue, as it did in its written closing argument, that Gary's Implement's ballot should be deemed invalid.

[5] Debtor's present manager, David DeFoe, also testified for Debtor on February 4, 2004. His testimony, however, was directed more to Debtor's motion to designate Gary's Implement's claim and less toward confirmation.

business from Gary’s Implement, when his father purchased the realty from Gary’s Implement, and when Debtor purchased the realty from his father. Dyke acknowledged that Gary’s Implement’s claim from the state court judgment represented $420,000 for principal and $215,934.19 for accrued interest for a total claim of $635,934.19. Although he acknowledged that the business real estate was only worth $350,000 with the business as a going concern, David Dyke testified that Debtor was willing to pay Gary’s Implement $420,000 on its claim secured by the realty to make the plan more palatable to Gary’s Implement and because the land was such an integral part of Debtor’s salvage business.[6]

John Dyke also testified regarding the feasibility of Debtor’s plan. He presented a year-to-date income statement dated September 30, 2003, and a 2004 projected budget. Based on Debtor’s historical figures and his knowledge of the farm salvage business, John Dyke estimated that Debtor’s net income for 2004 will be $127,550, that plan expenses will be about

[6] John Dyke testified that Debtor has a tortious interference claim against Gary’s Implement regarding some scrap iron that is separate from the state court action that resulted in the large judgment for Gary’s Implement. That claim was valued at $0.00 in Debtor’s schedules. It was not included in the plan’s liquidation analysis nor resolved within the plan treatment of Gary’s Implement’s claims.

$100,000, and that Debtor will have a profit cushion of about $27,000. He said Debtor needs the cash cushion to cover fixed expenses during the slower winter months and also to purchase inventory when needed. Dyke said Debtor’s profitability and cash flow had improved each year but he did not quantify or document that conclusion at the hearing.

Debtor’s monthly report to the United States Trustee for August 2003 indicated Debtor’s took in $128,452.69 more in cash than it paid out. In each of the remaining months of 2003, Debtor experienced a net decrease in cash: $26,475.71 in September 2003; $11,088.25 in October 2003; $24,771.12 in November 2003; and $37,434.29 in December 2003. For the last quarter of 2003, Debtor’s total net decrease in cash was $73,293.66. Debtor’s December 2003 report to the United States Trustee further indicated that Debtor ended the year with $18,381.69 in cash. On the date of the confirmation hearing, John Dyke testified that Debtor held $15,000 in cash.

While John Dyke acknowledged that the year-end cash of $18,381.69 would be insufficient to cover Debtor’s proposed plan payments as set forth in the 2004 budget, he testified Debtor could sell additional scrap iron to produce cash as needed and Debtor could purchase less inventory to reduce expenses. The

$18,381.69 2003 year-end cash balance was also less than the $37,666.00 cash carryover that Debtor projected in its budget for the end of 2004 *after* plan payments.

Under the plan, Debtor proposed to continue leasing some employees and management services from All States. According to the 2004 budget attached to Debtor’s Amended Disclosure Statement, the “Wages/Contract Labor fees” would be $240,000 annually and the “Management Fee” would be $94,000 annually. For administrative expenses, John Dyke estimated at the confirmation hearing that Debtor would owe its bankruptcy attorney an additional $5,000 and that it would owe the United States Trustee fees of “several thousand dollars.” It was not clear whether these administrative costs were included in one of the expense items listed in the 2004 budget attached to the Amended Disclosure Statement; they were not included in the Plan Payments summary attached to the Amended Disclosure Statement.

Michael Bloom also testified on Debtor’s behalf. He stated he owns 5% of All States. He has managed Wisconsin Tractor Parts, one of Debtor’s affiliates that are owned by All States, since 1986. Bloom testified that Wisconsin Tractor Parts regularly buys and sells inventory from Debtor and its other affiliates. He stated these transactions are all at arm’s length. He said each entity operates essentially independent of the others, though the parent company, All States, has ultimate control, especially on major decisions such as building projects. Bloom stated confirmation of Debtor's plan was to Wisconsin Tractor Parts' advantage because he thought it was the only way Wisconsin Tractor Parts' claim would get paid.

The Court received written closing arguments and responses from Debtor and Gary's Implement regarding confirmation of Debtor's plan. Confirmation of Debtor's plan and Gary's Implement's motion to dismiss the case and motion for relief from the stay were all taken under advisement.

II.

A Chapter 11 case may be dismissed for cause if it is in the best interest of creditors and the bankruptcy estate. *Hatcher v. U.S. Trustee (In re Hatcher)*, 218 B.R. 441, 448 (B.A.P. 8th Cir. 1998)(cites therein), *aff'd*, 175 F.3d 1024 (8th Cir. 1999). Cause may include, but is not limited to, the several reasons set forth in 11 U.S.C. § 1112(b). A determination of cause is within the discretion of the Court upon consideration of all circumstances. *Lumber Exchange Building Limited Partnership v. Mutual Life Co. of New York (In re Lumber Exchange Building Limited Partnership),* 968 F.2d 647, 648 (8th Cir. 1992). The burden of proof to show cause for dismissal or conversion rests on the movant. *In re Sheehan*, 58 B.R. 296, 299 (Bankr. D.S.D. 1986).

Cause for dismissal may include bad faith. *First National Bank v. Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990)(cited in *Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)*, 235 F.3d 375, 379 (8th Cir. 2000)); *Hatcher*, 218 B.R. at 448. Several factors may be considered on a motion to dismiss for bad faith. These factors include:

(1) the debtor has only one asset, the property, in which it does not hold legal title;

(2) the case is essentially a two-party dispute capable of prompt adjudication in state court;

(3) there are only a few unsecured creditors;

(4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;

(5) the filing of the petition effectively allows the debtor to evade court orders;

(6) the debtor has no ongoing business to reorganize;

(7) the debtor has few employees; [and]

(8) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditor to enforce their rights.

Hatcher, 218 B.R. at 448 (cites therein).[7] Once the movant has made his initial showing of establishing a bad faith filing, the burden may shift to the debtor to show that the case was commenced in good faith. *In re Avalon Hotel Partners, L.L.C.*, 302 B.R. 377, 384 (Bankr. D. Or. 2003); *In re Walden Ridge Development*, L.L.C., 292 B.R. 58, 61-62 (Bankr. D.N.J. 2003)(cites therein); and *In re Nichols*, 223 B.R. 353, 355 (Bankr. N.D. Okla. 1998); *contra In re New Batt Rental Corp.*, 205 B.R. 104, 106-07 (Bankr. N.D. Ohio 1997)(burden under § 1112(b) does not shift).

Before dismissing a case for bad faith, the court may also need to consider whether reorganization is possible. *Kerr,* 908 F.2d at 404 and 404 n.10. However, a case may be dismissed for bad faith even if the debtor can propose a confirmable plan. *Cedar Shore Resort*, 225 F.3d at 380-81.

III.

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[7] These are often referred to as the "Phoenix Piccadilly" factors. *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988). They are still considered appropriate guidelines, even after the Bankruptcy Code amendments in 1994, *State Street Houses, Inc. v. New York State Urban Development Corp. (In re State Street Houses, Inc.)*, 356 F.3d 1345, 1346-47 (11th Cir. 2004), especially for cases other than single-asset cases. *In re Boughton*, 243 B.R. 830, 834 (Bankr. M.D. Fla. 2000).

The Court concludes that Debtor’s Chapter 11 petition was filed in bad faith. The first indicia of Debtor’s lack of good faith was its purchase of the real property from an insider, David Dyke, on the eve of its Chapter 11 petition for the nominal down payment of $10.00. No one will dispute that Debtor needs that particular land to continue its salvage business. But the reverse is true, also. The land owner also needs the salvage business to continue where it is. If the salvage business ceased, the land owner, just like Debtor, would suffer great expense if the tons and tons of salvage farm equipment had to be moved elsewhere.[8] There is no evidence that Debtor’s purchase of the realty from David Dyke on the eve of bankruptcy was the only way to preserve Debtor’s ability to continue its business there. Also, Debtor’s purchase of the real estate to Debtor was unabashedly contrary to David Dyke’s agreement with Gary’s Implement. That fact alone taints the entire sale. It also supports the conclusion that Debtor’s purchase of the land and its subsequent bankruptcy petition were primarily motivated

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[8] John Dyke described the business’ realty as 54 acres “completely covered” with thirty-years worth of “tractors and combines and other machinery in various states of disrepair.” He did not think there was a single machine that could move on its own power, and he stated that it would be financially impossible to move the salvage from that location.

by insider David Dyke’s desire to place the realty under the protection of a bankruptcy stay. Further, Debtor’s purchase made little economic sense where the land was already heavily encumbered. Through the purchase, Debtor did not obtain any equity in the land, and it has little hope of seeing any meaningful equity anytime soon. For these reasons, the Court cannot condone Debtor’s purchase of the realty on the eve of its bankruptcy. *See New Batt Rental Corp.*, 205 B.R. at 107-08 (property transfers to a debtor to thwart collection actions constitute bad faith); and *In re Growers Properties No. 56 Ltd.*, 117 B.R. 1015 (Bankr. M.D. Fla. 1990)(questionable pre-petition transactions and lack of a reorganization purpose may warrant dismissal of a Chapter 11 case for lack of good faith); *see also In re Ravick*, 106 B.R. 834 (Bankr. D.N.J. 1989)(case dismissed for bad faith filing where corporate debtor tried to undo pre-petition sale agreement that had been in nonbankruptcy court litigation); and *In re Southwest Development Corp.*, 76 B.R. 196, 198-99 (Bankr. M.D. Fla. 1987)(case was dismissed as a bad-faith filing were the debtor, a bare corporate shell, purchased property subject to a foreclosure action just ten days before its Chapter 11 petition).

Debtor’s lack of good faith is also demonstrated by its decision to file Chapter 11 to forestall the Nebraska state court proceedings. This case essentially reflects a two-party dispute; Debtor's other creditors are few and they are primarily trade creditors, holding small claims, or insiders. There is no evidence that the Nebraska state courts could not effectively resolve the legal conflicts between Debtor and Gary's Implement. The Bankruptcy Court cannot offer any special expertise, procedures, or remedies to finalize that litigation of nonbankruptcy issues. Thus, under the circumstances of this case, Debtor's quick jump into bankruptcy when faced with a large adverse judgment, coupled with Debtor's inability to post an appeal bond, evidence a bad faith filing. *See Hatcher*, 218 B.R. at 448-49; *In re Crown Financial, Ltd.*, 183 B.R. 719, 723 (Bankr. M.D.N.C. 1995)(case dismissed because Chapter 11 was not an additional forum to continue litigation of essentially a two-party dispute); and *In re HBA East, Inc.*, 87 B.R. 248, 258-63 (Bankr. E.D.N.Y. 1988)("Chapter 11 was never intended to be used as a fist in a two party bout.").

> [B]ankruptcy courts should become involved in cases only if the bankruptcy court's services are needed to truly reorganize a debtor who is having financial problems; however, if the matter can be dealt with by another forum, better equipped to do it and in a better position to deal with a dispute between two parties or just a few parties, the bankruptcy court

should refrain from exercising its jurisdiction.

In re Heritage Wood 'N Lakes Estate, Inc., 73 B.R. 511, 514 (Bankr. M.D. Fla. 1987)(citing *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.*), 749 F.2d 670 (11th Cir. 1984)).

Debtor's inability to offer a confirmable plan is additional evidence that its petition was filed in bad faith. Debtor's plan dated January 7, 2004, fails to meet the confirmation requirements of good faith, § 1129(a)(3),[9] and feasibility, § 1129(11).[10]

Good faith of plan. A plan is considered filed in good faith

"'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'"

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[9] A useful comparison of the standard for *petition* filed in good faith to the standard for a *plan* filed in good faith may be found in *In re Sagewood Manor Associates Ltd. Partnership*, 223 B.R. 756, 761-62 (Bankr. D. Nev. 1998).

[10] It also appears that the plan did not meet the more technical confirmation requirement of § 1129(a)(12). Further, the Court does not reach the issue of whether the plan's treatment of Gary's Implement's claims was "fair and equitable" under a § 1129(b) cram down since the plan did not first meet the good faith requirement of § 1129(a)(3) or the feasibility requirement of § 1129(a)(11).

Hanson v. First Bank of South Dakota, 828 F.2d 1310, 1315 (8th Cir. 1987)(quoting *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)). All relevant circumstances are considered. *Noreen v. Slattengren*, 974 F.2d 75, 76-77 (8th Cir. 1992)(cites therein); *Barger v. Hayes County Non-stock Co-op (In re Barger)*, 233 B.R. 80, 83 (B.A.P. 8th Cir. 1999).

When all the circumstances of this case and Debtor's plan are considered, the Court can only conclude that Debtor's plan was not offered in good faith. This lack of good faith in the plan is most keenly demonstrated by Debtor's attempt to use the plan to transform a five-year purchase agreement for personalty, which term had already expired pre-petition, into a twenty-year purchase agreement that is more akin to a real property transfer. This is true regardless of whether Debtor offers an appropriate discount rate in an attempt to give Gary's Implement the present value of its claim.[11] Gary's Implement is at peril

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[11] Both parties spent a significant portion of their written closing arguments discussing the appropriateness under § 1129(b)(2)(i)(II) of the two discount rates offered by Debtor to Gary's Implement in the plan. The only evidence offered on that issue was C.P.A. John Wendande's testimony and his limited supporting documents. His testimony was largely consistent with the discount rates offered by Debtor. Argument of counsel for Gary's Implement alone did not, nor could it, controvert that testimony. Consequently, the Court could only conclude that the rates offered were appropriate.

for a default on plan terms that are, at their conclusion, *four* times longer that the parties' original agreement. Moreover, should Debtor default again, which its financial records indicate it will, Gary's Implement will be back before the state court to try to enforce its rights under the confirmed plan.[12] That litigation would mirror the litigation in which Gary's Implement already has received a judgment. Under these circumstances, approval of the plan's treatment of Gary's Implement's claim would not give Debtor a fresh start but a brand new, long-term deal that Gary's Implement explicitly avoided when the original agreement was made. *See In re Rose,* 135 B.R. 603, 605-07 (Bankr. N.D. Ind. 1991)(reasonableness of plan's repayment term on a secured claim determined in light of both commercial standards as well as any circumstances unique to the debtor or creditor); *In re Koch,* 131 B.R. 128, 130-33 and 130 n.3 (Bankr. N.D. Ia. 1991)(duration of repayment term for secured claim under § 1225(a)(5)(B)(ii), which is similar to § 1129(b)(2)(A)(i)(II), "must be in line with customary lending

[12] A confirmed Chapter 11 plan constitutes a new contract between the debtor and the creditors that participate in the plan. *General Electric Capital Corp. v. Dial Business Forms, Inc. (In re Dial Business Forms, Inc.)*, 341 F.3d 738, 742-43 and 742 n.3 (8th Cir. 2003).

practices or market standards"); c*ompare Prudential Insurance Co. of America v. Monnier (In re Monnier Brothers)*, 755 F.2d 1336, 1342 (8th Cir. 1985)(fifteen-year plan repayment term deemed "fair and equitable" under § 1229(b)(2)(A)(i)(II) where parties' original agreement had fifteen-year term); *In re Snider Farms, Inc.*, 83 B.R. 977, 978-79 (Bankr. N.D. Ind. 1988)(thirty-year plan term for mortgage on farm land deemed appropriate for "cram down" in a Chapter 12 confirmation).

Feasibility of plan. A plan is feasible if it "'offers a reasonable prospect of success and is workable.'" *Monnier Brothers*, 755 F.2d at 1342 (quoting *United Properties, Inc. v. Emporium Department Stores, Inc.*, 379 F.2d 55, 64 (8th Cir. 1967)). Any feasibility determination must be "firmly rooted in predictions based on objective facts." *Clarkson v. Cooke Sales and Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985).

> The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.

Id. (citing *Chase Manhatten Mortgage and Realty Trust v. Bergman (In re Bergman)*, 585 F.2d 1171, 1179 (2nd Cir. 1978)(quoting 9 COLLIER ON BANKRUPTCY at 1139))). For secured claims in particular, a plan is feasible if it is reasonably likely that the secured claim will be paid in full. *Danny Thomas Properties II Ltd. Partnership v. Beal Bank (In re Danny Thomas Properties II Ltd. Partnership)*, 241 F.3d 959, 962-63 (8th Cir. 2001).

In this case, Debtor's past performance and present cash flow do not support the conclusion that Debtor can make the payments it proposes in its plan. Debtor ended 2003 -- a year in which it did not pay any debt service -- with only $18,381.69 in cash. In an effort to downplay Debtor's cash crunch in the last quarter of 2003,[13] John Dyke testified Debtor could sell scrap iron to generate additional cash. That ability, however, was not quantified and the attendant expenses of such sales were not set forth. John Dyke even testified that in the "normal course of business," he might be "reluctant" to raise cash in this manner. John Dyke also said that while Debtor's "Accounting and Professional" expense was $52,000 in 2003, that expense would be much less in 2004. His projected 2004 budget,

[13] Though the confirmation hearing was held more than a month after Debtor would have closed its 2003 books, Debtor failed to provide 2003 year-end financial records or any records for January 2004. The Court can only assume the numbers on the reports were not favorable to Debtor. To its final written arguments, Gary's Implement attached a copy of Debtor's January 2004 report to the United States Trustee. The Court did not receive that report as evidence.

however, had already reduced that expense to $20,000. Moreover, the record remains unclear regarding what professionals need to be paid in 2004 and how much. John Dyke's testimony and the plan's projected 2004 budget did not sufficiently quantify the professional fees or other administrative expenses that needed to be paid under the plan, such as United States Trustee's fees. While John Dyke's "Payoff Schedule" put in evidence December 2, 2003, estimated that the administrative class would be owed $23,313.42, that sum was not included in the plan payments schedule attached to Debtor's Amended Disclosure Statement. Whether it was reflected in the projected 2004 budget was not clear.

John Dyke, in support of the plan's feasibility, also testified that in 2003 Debtor had increased its inventory available for resale, thus arguing that 2003 expenses may have been higher than will be expected for 2004 and also that 2004 income will be boosted by this additional inventory. The record made by Debtor, however, did not demonstrate that Debtor's 2003 year-end inventory was unusual. Instead, John Dyke testified that the $125,507.73 in inventory purchases for the last quarter of 1993 was "typical." Further, the inventory book value (not liquidation value) of $622,754.62 at the end of October 2003, the latest report the Court was given, was only slightly higher than Debtor’s inventory of $611,069.00 when it filed its schedules.

All told, the Court could not deem Debtor’s proposed 2004 budget as “firmly rooted in predictions based on objective facts” because of the several inconsistencies and unknowns. *Clarkson*, 767 F.2d at 420. Debtor’s historical performance in 2003 did not reflect that it will be able to make projected 2004 plan payments, and no testimony or exhibits offered at the confirmation hearing altered that conclusion. *See Loop Corp. v. United States Trustee*, 290 B.R. 108, 114 (D. Minn. 2003)(if movant meets initial burden of showing cause for conversion, burden shifts to debtor to show case should stay in Chapter 11); *In re Coones Ranch, Inc.*, 138 B.R. 251, 259 (Bankr. D.S.D. 1991)(if movant meets its initial burden of showing the case should be dismissed because the debtor cannot reorganize timely, the burden then shifts to the debtor).

Though Gary’s Implement did not specifically raise the issue, there is another indicia of Debtor’s bad faith in proposing its plan that the Court cannot ignore. Debtor placed a single unsecured creditor in a separate class when the record does not support the conclusion that this creditor was impaired as defined by 11 U.S.C. § 1124 or that this separate classification was appropriate under 11 U.S.C. §§ 1122 and 1123(a)(1).[14] John Dyke admitted that the Class 5 creditor was being paid in full upon confirmation. Moreover, though John Dyke testified this creditor was notably different because, absent a setoff, litigation would be necessary to resolve its claim against Debtor, his statement carries little weight since Debtor also has litigation pending and proposed against Gary's Implement. Further, John Dyke and Michael Bloom both testified that Debtor did business back and forth with other creditors. These other creditors also may have been able to effect a setoff. In sum, it appears this creditor was placed in a class by itself only to insure that at least one impaired class of claims voted for the plan, as required by § 1129(a)(10), thus evidencing a lack of good faith in proposing the plan. *See Windsor on the River Associates, Ltd. v. Balcor Real Estate Finance, Inc. (In re Windsor on the River Associates, Ltd.),* 7 F.3d 127, 130-33 (8th Cir. 1993)(discussion of workings and purpose of § 1129(a)(10)); *Lumber Exchange Building Limited Partnership,* 968 F.2d at 649-50 (how creditors achieved their status -- by trade or operation of law -- does not alter the

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[14] This conclusion would also mean that Debtor's plan failed to meet the confirmation requirements of §§ 1129(a)(1) and (a)(10). No objections to confirmation were filed on these grounds, however.

legal character of the claim or warrant separate classification); and *Phoenix Mutual Life Insurance Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991)(citing, *inter alia*, *Hanson*, 828 F.2d at 1313 (a classification scheme should not be approved if it simply masks the intent to gerrymander the voting process).

Gary's Implement also asked the Court to find that Debtor's plan had been filed in bad faith because Debtor had, to date, been unwilling to seek avoidance of preferential or fraudulent transfers. Though Debtor identified in its Statement of Financial Affairs many transfers to creditors within 90 days of its petition and several transfers to two insiders within one year of the petition, the only evidence offered on the nature of those transfers was John Dyke's limited testimony based on John Dyke's cursory assessment of the transfers. He said he thought most of the transfers reflected the Debtor's regular business transactions with these creditors. There was no evidence that suggested otherwise. Consequently, the Court cannot conclude that Debtor's failure to seek avoidance of all or some of these transfers is evidence of bad faith.

IV.

Debtor has demonstrated a lack of good faith in seeking

Chapter 11 relief by purchasing realty from an insider on the eve of bankruptcy to forestall a foreclosure action on that property, by filing the petition essentially to address a two-party dispute that had resulted in an adverse state court judgment and an appeal bond it could not post, and by filing a plan that is not confirmable because it was not proposed in good faith and is not feasible. Therefore, this case will be dismissed for cause. *Euerle Farms, Inc. v. State Bank in Eden Valley (In re Euerle Farms, Inc.)*, 861 F.2d 1089, 1091 (8th Cir. 1988)(a multiplicity of factors may be considered in the aggregate to the meet the cause requirement for dismissal); *Barger*, 233 B.R. at 84-85 (citing *Euerle Farms*, 861 F.2d 1089)(inequities in the debtor's pre-filing conduct coupled with a denial of confirmation of a plan are ample cause for dismissal). Had only one of these several circumstances occurred, the result may have been different. The totality, however, dictates that a dismissal order be entered.

Dated this ___ day of April, 2004.

BY THE COURT:

____

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: ______________________

Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	) Bankr. No. 03-40965
	) Chapter 11
BRIDGEPORT TRACTOR PARTS, INC.,	)
aka Gary's Tractor Parts, Inc.	)
Tax I.D. No. 47-0813031	) ORDER DISMISSING CASE
	)
Debtor.	)

In recognition of and compliance with the Decision entered this day,

IT IS HEREBY ORDERED that this case is DISMISSED.

So ordered this ___ day of April, 2004.

BY THE COURT:

____
Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: __________________________
Deputy Clerk
(SEAL)