UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

March 9, 2006

John H. Mairose, Esq.
Counsel for Debtors
2640 Jackson Boulevard, Suite 3
Rapid City, South Dakota 57702

Dale A. Wein,
Chapter 13 Trustee
Post Office Box 1329
Aberdeen, South Dakota 57402-1329

Subject: *In re Randy L. and Anne C. Dickhaut*,
Chapter 13, Bankr. No. 03-50141

Dear Mr. Mairose and Mr. Wein:

The matters before the Court are the Motion for Authorization to Obtain Credit and Request for Preliminary Hearing and the Motion for Authorization to Sell Real Property filed by Debtors and the objection to both motions filed by Trustee Dale A. Wein. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter 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, both motions will be denied.

Summary. Debtors Randy L. and Anne C. Dickhaut obtained confirmation of a Chapter 13 plan on June 20, 2003. Under the confirmed plan, Debtors were to pay their mortgage holder on their home and the lien holder on one of their vehicles outside the plan. Debtors were to pay unsecured creditors approximately 21% of their claims and all disposable income through June 1, 2003. The plan term was 45 months with the final payment to be made April 15, 2007.

After falling into default on their home mortgage payments in late 2003 and while facing the mortgagee's relief from stay motion, Debtors moved to modify their confirmed plan. Under the motion, which was approved, Debtors extended their plan six months to cure the post-petition arrearage and pay related costs to the mortgagee.

On February 16, 2006, Debtors filed two motions: one for authority to sell their present home and another for authority to borrow additional funds to purchase a newly constructed home. If approved, the motions would result in a monthly increase in Debtors' home mortgage payment by $375. They also proposed to "pre-pay" the remainder of their Chapter 13 plan payments "plus any net disposable income shown to be due the estate." Since the disposable income period was to last at least until April 15, 2007, it was unclear how Debtors intended to account for any "future" disposable income they would accrue between the time of these motions and April 15, 2007.

Chapter 13 Trustee Dale A. Wein objected to both motions. He said Debtors had not made a plan payment since December 19, 2005, and were delinquent by $1,200. He also said while he did not object to Debtors selling their current homestead, he objected to them retaining any of the estimated $48,000 in proceeds without making payments to their unsecured creditors. He argued any proceeds in excess of Debtors' allowed homestead exemption of $30,000 would constitute disposable income that had to be paid to the unsecured creditors under the plan terms.

As to Debtors' request for authorization to incur a larger mortgage to purchase a new home, Trustee Wein said the increased housing expense was not appropriate where Debtors' unsecured creditors were only being paid 21% of their claims.

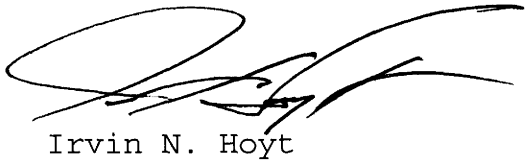
Discussion. Both motions will be denied. Other than an apparent desire to live in a new, more expensive home, Debtors have failed to justify an increase in their housing expense. Further, under Debtors' proposal, it appears unsecured creditors would not receive all available disposable income, both because some of the equity in their current home would be applied to the new home and also because Debtors' monthly expenses would increase significantly.

Bankruptcy is a privilege, not a right. *Bauer v. Iannacone (In re Bauer)*, 298 B.R. 353, 357 (B.A.P. 8th Cir. 2003) (citing *Grogan v. Garner*, 498 U.S. 279, 286 (1991)). If Debtors want the benefit of a Chapter 13 discharge, they must make a good faith effort through their plan. 11 U.S.C. § 1325(a)(3); *see Banks v. Vandiver (In re Banks)*, 248 B.R. 799, (B.A.P. 8th Cir. 2000)(discussion of good faith in a Chapter 13 case), *aff'd*, 267 F.3d 875 (8th Cir. 2001). The purchase of a new home by Debtors during the plan term that will divert equity and substantially increase their monthly housing expense in lieu of paying unsecured

creditors belies that good faith effort.

An order will be entered denying both motions.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice and Debtor(s), if Debtor(s) did not receive electronic notice.

Charles L. Nail, Jr.
Clerk, U.S. Bankruptcy Court
District of South Dakota

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Charles L. Nail, Jr.
Clerk, U.S. Bankruptcy Court
District of South Dakota