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

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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COPY

May 10, 1996

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Wesley D. Schmidt, Esq.
Counsel for Debtor
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Subject: *In re Jeffrey W. Brown*,
Chapter 12; Bankr. No. 94-40543

Dear Counsel:

The matter before the Court is the MOTION TO REQUIRE DEBTOR TO SIGN SECURITY DOCUMENTATION AND PROVIDE CROP INFORMATION filed by Dakota State Bank of Colman on May 7, 1996 and Debtor's response thereto filed May 9, 1996. A hearing on shortened notice was held May 9, 1996. Appearances included the above-named counsel. Debtor did not appear. Upon receipt of argument, the Court took the matter under advisement. Later on May 9, 1996, counsel for the Bank filed a supplemental brief on jurisdictional issues.

This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that the circumstances presented do not warrant an order requiring Debtor or Debtor's counsel to sign an effective financing statement pursuant to Debtor's confirmed plan. However, the Court will prohibit Debtor for the next thirty-five days from selling without court permission any collateral secured to the Bank while the Bank pursues its available remedies.

Brief Summary of Facts. Debtor's plan was confirmed on May 25, 1995. The confirmed plan incorporated a stipulation between Debtor and the Bank. The stipulation provided that Debtor would execute any and all documents deemed reasonably necessary by the Bank to reflect the new balance of the obligation and the terms thereof, including, but not limited to, a revised Note, Security Agreement and Financing Statement.

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After Debtor defaulted on the terms of the plan and stipulation, the Bank received relief from the automatic stay on October 3, 1995. To date, Debtor has not signed all documents requested by the Bank. Most notably, Debtor has not signed a new effective financing statement (EFS), as defined by 7 U.S.C. § 1631. Consequently, the Bank currently is not protected from any sales of farm product collateral that Debtor may initiate or already has made to certain buyers covered by § 1631.

Through its Motion, as refined at the hearing, the Bank has asked the Court to authorize or require Debtor's counsel, in Debtor's absence, to sign a new EFS. The question presented, therefore, is whether the Court has the jurisdiction or power to do so.

Discussion. Having reviewed the Bank's post-hearing memorandum, the Court agrees with counsel for both parties that the relief from stay order does not deprive this Court of jurisdiction over the Bank's collateral, since it is still estate property, or over the debtor-creditor relationship between Debtor and the Bank. That being so, however, the Court cannot find any specific authority for it to order Debtor or Debtor's counsel to sign an EFS, especially when other remedies under the Bankruptcy Code, state law, and 7 U.S.C. § 1631, are available to the Bank to address Debtor's non compliance with his plan.

The Bankruptcy Code provides a creditor with several options when a debtor does not comply with his Chapter 12 plan. These remedies include relief from the automatic stay under § 362(d), which the Bank has obtained, and use of state law remedies; dismissal of the case for unreasonable delay or gross mismanagement that is prejudicial to creditors or for material default under § 1208(c); removal of the debtor in possession under § 1204; modification of the plan under § 1229; conversion of the case to Chapter 7 under § 1208(d), if fraud can be shown; or revocation of the confirmation order under §1230(a), if confirmation was procured by fraud.

Section 1631 of Title 7 of the United States Code also offers another alternative to an EFS. A creditor may issue a notice of its security interest and of the debtor's failure to perform payment obligations to the protected buyers. 7 U.S.C. § 1631(e)(1). Consequently, a creditor faced with an uncooperative debtor is not without protection under § 1631. While the burden on the secured creditor to give this notice may be greater than the burden on the buyer of farm products to insure that a secured interest does not exist in the goods it purchases, that was the legislative intent of § 1631. See *Lisco State Bank v. McCombs Re: Ranches, Inc.*, 752 F.Supp. 329 (D. Neb. 1990).

Although the Bank has relief from the automatic stay to enforce its lien in state court, it apparently has not commenced a state court action. Further, the Bank also could, but has not, sought remedy under the other Bankruptcy Code provisions. Finally, the Bank has not pursued the alternative notice provision of § 1631(e)(1). Consequently, it is not appropriate for this Court to fashion an alternative, equitable remedy -- that is, ordering Debtor or his attorney to sign an EFS -- when other statutory remedies exist for the Bank to use. The Court's broad powers under 11 U.S.C. § 105(a) to issue equitable orders cannot be used to create new substantive rights. *Bird v. Carl's Grocery Co., Inc. (In re NWFX, Inc.)*, 864 F.2d 593, 595 (8th Cir. 1989). Instead, powers under § 105(a) must be exercised consistent with the Code. *Otoe County National Bank v. Easton (In re Easton)*, 882 F.2d 312, 315 (8th Cir. 1989).

The Court also cannot find any authority under § 1631, the Bankruptcy Code, or state agency law that would permit Debtor's counsel to sign an EFS on Debtor's behalf. Were the Court to order Attorney Schmidt to do so, the Bank may find itself in a precarious position if an EFS signed by Attorney Schmidt is challenged by a buyer protected under § 1631. That being the case, the Court finds no merit in leading the Bank down that path.

Debtor's lack of cooperation and the nature of the Bank's collateral, however, dictate that some safeguards be put in place while the Bank pursues one of these legal remedies. Therefore, the Court will enter an order prohibiting Debtor from selling for the next thirty-five days any of the Bank's collateral unless prior court permission is received. During that time, Debtor may decide to cooperate by signing an EFS and disclosing the information about crops that the Bank has requested. If Debtor still refuses to cooperate, the Bank should pursue one of its available Bankruptcy Code, state law, or § 1631(e)(1) remedies. If the Bank seeks further relief before this Court, it should file and notice its motion for hearing on June 12, 1996, the next regular hearing day in Sioux Falls.

An appropriate order will be entered.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh
CC: Trustee Rick A. Yarnall

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

MAY 10 1996

Clerk
U.S. Bankruptcy Court, District of S.D.

Case: 94-40513 Form id: 122 Ntc Date: 05/10/96 Off: 4 Page : 1
Total notices mailed: 7

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