UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 93-40213
	)	Chapter 12
DOUBLE L.J. FARMS	)	
Tax I.D. No. 46-0344672	)	MEMORANDUM OF DECISION RE:
	)	DEBTOR'S MOTION TO MODIFY
Debtor.	)	CONFIRMED PLAN AND
	)	TRUSTEE'S MOTION TO DISMISS

The matters before the Court are the Motion to Dismiss Case filed by Trustee Rick A. Yarnall and the Second Motion to Modify Confirmed Plan filed by Debtor. These are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the proposed modification should not be granted and that the case should be dismissed unless another modification is proposed within thirty days.

I.

Double LJ Farms is a partnership between Larry Johnson and his brother Loren Johnson. The partnership filed a Chapter 12 petition on April 9, 1993. Also on April 9, 1993, Larry Johnson and his wife Lorine filed a Chapter 13 petition, Bankr. No. 93-40212, and Loren Johnson and his wife Pamela filed a Chapter 13 petition, Bankr. No. 93-40211. The Johnsons' two cases were later converted to Chapter 12. The three cases were never substantively consolidated nor jointly administered by order but they did progress side-by-side-by-side.

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At the time of filing, Debtor Double LJ Farms' assets included two checking accounts, two pickups worth a total of $7,500.00, a stock trailer valued at $1,500.00, and some grain valued at $18,260.00. The partnership's creditors included the Farmers Home Administration (FmHA), who had a blanket lien on Debtor's personalty, and the State Bank of Alcester (the Bank), who had a lien on a combine and who also had provided operating credit. Unsecured claims against Debtor totaled $68,357.71.

Debtor did not list either Larry or Loren Johnson as a co-debtor. However, the proof of claims registers for the Debtor's case and the Johnsons' two cases indicate that the claims by FmHA and the Bank were interrelated.

Debtor Double LJ Farm's plan was confirmed November 9, 1994. An amended confirmation order was entered August 17, 1995 to correct errors in the earlier order.[1] Debtor's confirmed plan had three classes. Class One was the Bank. The Bank was to be paid $10,951.46 annually for five years commencing January 2, 1995 and would be paid $6,190.47 annually for fifteen years commencing May 1, 1995. The second class was FmHA. FmHA was to be paid $5,577.00 annually for fifteen years commencing May 1, 1995. The third class was for unsecured and undersecured claims. Debtor pledged disposable income to pay them. These claims totaled $391,731.65, of which FmHA held $22,679.09, the Bank held

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[1] The September 20, 1994 confirmation hearings were conducted by the Hon. Peder K. Ecker but the confirmation orders and amended confirmation orders were entered by the undersigned following Judge Ecker's retirement.

$251,786.06, ASCS held $52,460.00, and Pete's Produce held $15,486.01. All the other unsecured claims were each less than $10,000.00. The five-year term of Debtor Double LJ Farm's plan was to begin October 1, 1994 and end September 30, 1999.

The plans of Loren and Pamela Johnson and Larry and Lorine Johnson were also confirmed on November 9, 1994. Corrected plans and confirmation orders were entered May 4, 1995. Loren and Pamela Johnson's corrected plan provided for a three-year term with the last plan payment on January 1, 1997. In addition to their attorneys' fees, these debtors were to pay the IRS three annual payments of $1,297.25[2] commencing January 1, 1995.

For the treatment of ASCS's claim, the plan stated:

> The United States District Court for the District of South Dakota has ordered Loren R. Johnson to pay to the ASCS and its successors criminal restitution owed due to his criminal involvement in grain shortages. Prior payments on the criminal restitution debt have been made through ASCS offset. In 1992, the debtors made $13,223.93 payment on the restitution debt from the proceeds of the 1992 crop grown by Double LJ Farms, a partnership which they partially own. The payment was made through a cashier's check issued by the State Bank of Alcester. The ASCS contracts involved are in the names of the partners, and not the partnership. This $13,223.93 debt shall be treated as an unsecured debt owed to Double LJ Farms.
>
> Restitution in the amount of $2,819 is left unpaid. The remaining debt is due before March 1, 1995, unless extended by the U.S. Probation Office and/or the District Court. The United States shall be permitted to satisfy the debt by deducting the remaining balance as an offset against any funds that it may owe to the debtors through any federal agencies.

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[2] This number was provided by the May 4, 1995 corrected confirmation order.

For the treatment of FmHA's claim, the plan stated:

> As partners of Double LJ Farms, Loren and Larry Johnson are liable to the FmHA for the partnership debt. The partnership debt, which is treated as a secured debt in the Double LJ Farms Chapter 12 case, shall not be discharged in the bankruptcies of Loren and Larry Johnson. Any unsecured debt owed to the FmHA in the partnership Chapter 12 shall also be considered as unsecured debt in this bankruptcy.

The Bank's collateral was returned to it. The Bank's remaining claim of $251,996.06 was unsecured. Under the plan, unsecured claim holders were to receive only disposable income. Attached to Loren and Pamela Johnson's plan was the same list of unsecured creditors that was attached to Debtor Double LJ Farm's plan. The list did not include several medical debts that Loren and Pamela Johnson had scheduled.

Larry and Lorine Johnson's plan had a three-year term with the final plan payment to be made to the Trustee on January 1, 1997. In addition to their own attorneys' fees, Larry and Lorine Johnson agreed to pay the IRS $747.41[3] for three years beginning January 1, 1995. They also agreed to pay the Bank $282.81 for five years on a claim secured by a combine. The plan contained an identical provision to Loren Johnson's regarding Larry Johnson's obligation to pay criminal restitution to ASCS and the payment of FmHA's secured and unsecured claim. In addition, Larry and Lorine Johnson owed unsecured debt of $30,952.66 to ASCS. Unsecured claim holders were to receive disposable income. Larry and Lorine Johnson's plan

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[3] This number was provided by the May 4, 1995 corrected confirmation order.

also had the same list of unsecured claims attached. However, there were at least three unsecured claims that Larry and Lorine Johnson had scheduled that were not included on the list.

The amounts that Debtor and the Johnsons were to pay the Bank in each of their cases were seldom consistently stated throughout the several plans, pre-confirmation modifications, settlements, and orders that have been entered. During the course of Debtor Double LJ Farm's case, some plan treatment of the Bank's claim was modified when Debtor obtained post-confirmation crop financing.

When faced with motions to dismiss by the case trustee, on April 19, 1996, the individual debtors filed motions to modify their confirmed plans. Larry and Lorine Johnson and Loren and Pamela Johnson wanted to delay the payment of their legal fees, to use their 1995 income tax refund as an offset against the 1995 payment due the IRS, and to pay any deficiency on their respective 1995 IRS payments later with their 1997 payment.

A hearing on the Johnsons' motions to modify and Trustee Yarnall's motions to dismiss were held May 21, 1996. The modification of Larry and Lorine Johnson's plan was approved. The balance due the IRS was corrected on the record. Trustee Yarnall's motion to dismiss was continued to July 10, 1996 and then withdrawn at a hearing that day.

The modification of Loren and Pamela Johnson's plan also was approved at the hearing on May 21, 1996. Trustee Yarnall's motion to dismiss was continued to July 10, 1996. On July 10, 1996, the Court ordered Loren and Pamela Johnson to cure all plan payment

arrearages by August 12, 1996 or the case would be dismissed on the Trustee's affidavit of default. Loren and Pamela Johnson made the payment and the Trustee withdrew his motion to dismiss on August 16, 1996.

Debtor Double LJ Farms filed a motion to modify on April 22, 1996, which was denied by Order entered May 23, 1996. Debtor Double LJ Farms filed a second modification motion on June 5, 1996. Debtor proposed to delay payment of its bankruptcy counsel, return all the secured collateral to the Bank, pay the Bank $9,575.38 without further interest on December 31, 1996 to cover the balance of the Bank's cash collateral claim, and to return to FmHA most of its secured collateral and make small payments to FmHA to cover secured claims for the collateral retained. Debtor again proposed to pay disposable income to unsecured creditors but stated none would be paid until Debtor's attorneys' fees were paid. An income and expenses projection for 1996 only was attached to the proposed modification. The plan did not address how FmHA or the unsecured claim holders would be paid after the 1996 crop year. A liquidation analysis was not attached.

The Bank objected to Debtor Double LJ Farm's proposed modification on the grounds that it is contrary to an earlier agreement with the Bank, that it did not comply with several Code requirements, and that it was not feasible. FmHA also objected on the grounds that the interest rate proposed was insufficient.

A hearing was held July 10, 1996. Counsel for Debtor and FmHA reported they had settled FmHA's objections. The Bank

continued to argue that the modification was not made in good faith and that it was essentially a liquidating plan. The Bank continued to press for a dismissal of the case. Trustee Yarnall expressed concern that there would be no on going effort to generate disposable income for unsecured creditors but that Debtor would receive a discharge regardless. The parties also discussed the fact that Debtor is essentially liquidating and receiving a discharge in Chapter 12 although it could not receive a Chapter 7 discharge. Counsel for Debtor and the Johnsons said "they" intended to get back into hog farming but it was unclear whether "they" included Debtor or when this new venture might begin. The matter was taken under advisement.

II.

Under 11 U.S.C. § 1229(a), a Chapter 12 debtor may seek modification of his confirmed plan to:

> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> (2) extend or reduce the time for such payments; or
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

A Chapter 12 plan modified after confirmation must meet the same requirements as the initial plan because §§ 1222(a), 1222(b), 1223(c), and 1225(a) apply to any modification. 11 U.S.C. § 1229(b). Consequently, a modified plan must be proposed in good faith and it must be feasible. 11 U.S.C. §§ 1225(a)(3) and (a)(6).

Further, the value of the distributions under the plan *on the effective date of the plan* may not be less than the creditors would

receive in a Chapter 7 liquidation -- the "best interest of creditors" test. 11 U.S.C. § 1225(a)(4). The weight of authority indicates that a modified plan must meet the best interest of creditors test on the date of the proposed modification; that is, the *effective date of the modified plan* is the day the modification takes effect. *In re Harter*, Bankr. No. 92-30070, slip op. at 5-6 (Bankr. D.S.D. March 24, 1994)(cases cited and discussion therein).

III.

The Court concludes that Debtor's proposed post-confirmation modification must be denied for three reasons. First, it is not offered in good faith. Second, there is no evidence of how Debtor will make the proposed annual payments to FmHA. Third, it does not meet the best interest of creditors test.

The modification is not offered in good faith because it offers little, if anything, to unsecured creditors. Under the modified plan, Debtor's secured creditors are being paid or will receive their collateral. Unsecured creditors, however, are still getting only disposable income. Debtor's offer of disposable income while it was still farming was an entirely different treatment for unsecured claims than such an offer is now when the partnership is no longer farming. Consequently, the Court cannot approve a modified Chapter 12 plan and let the case proceed to discharge where the modified plan continues to exist only to give unsecured creditors the *possibility* of disposable income. If there is nothing available for these unsecured creditors, the case should be dismissed. *See Harter*, Bankr. No. 92-30070, slip op. at 6-8.

The present posture of the case conflicts with the purpose of Chapter 12, which is "to assist the family farmer by allowing him to successfully complete a plan of payments that enables him to keep his land and continue his farming operation." *In re Gage*, 151 B.R. 522, 528 (Bankr. D.S.D. 1993)(*citing* H.R. Rep. No. 958, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249), *rev'd on other grounds, Nail v. Harmelink & Fox Law Office,* Civ. No. 93-4050, slip op. (D.S.D. November 1, 1993). After this crop year, Debtor will lose its crop land. Plans to hog farm are tenuous. It is unclear whether Debtor's partners intend to continue to generate income through the partnership and pay the partnership's unsecured creditors. There is now nothing to reorganize.

If this Chapter 12 debtor were not a partnership and if Debtor's and its principal's debts were not intertwined, the Court would be more willing to treat this case as a liquidating Chapter 12 since a liquidation under Chapter 12 is not prohibited. *See* 11 U.S.C. § 1222(b)(8). However, the partners are getting partnership debts discharged without any continuing effort or obligation on their part to generate income in the partnership. That is unfair to the partnership's creditors, especially where Debtor is owed substantial funds from the individual partners. Thus, Debtor's unsecured creditors are hit twice by the partners: first, when the partners used Debtor's assets to pay personal debts and second, when the partners quit farming but continue to generate off-farm income that may pay their individual unsecured creditors

but not the partnership's unsecured creditors.

It is curious that each plan in all three of the cases included the same list of unsecured creditors where there has been no consolidation of estates or debts in these cases. However, merely listing the unsecured claims together does not consolidate the debts. Only those unsecured claims that are jointly owed can be paid from assets of more than one estate.

Debtor's proposed delay until December 1996 to pay the Bank the balance of its secured claim also shows a lack of good faith, especially where no interest is offered. Debtor will harvest its 1996 crop sooner but it offered no satisfactory explanation of why the Bank could not be paid sooner.

The second reason Debtor's proposed plan modification will not be approved is because there is no evidence of how Debtor will make the annual payments to FmHA. There is no evidence of how the partnership will generate income after the 1996 crop year. Since the FmHA debt can only be discharged through the partnership's plan, how this debt will be paid is an important provision. Although the payment is relatively small, Debtor's ability to pay this debt cannot be merely presumed.

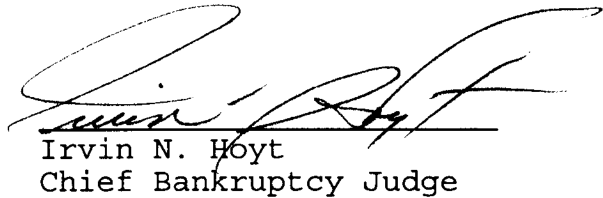
The final reason Debtor's proposed plan modification will not be approved is because it does not meet the best interest of creditors test set forth at § 1225(a)(4). The assets that Debtor retains must be listed and valued as if the assets were to be liquidated in a Chapter 7. This liquidation must include the $13,223.93 that Larry and Loren Johnson each owe their

partnership.[4] When that asset is included, Debtor may be obligated to make payments to its unsecured claim holders in addition to disposable income.

An order will be entered denying approval of Debtor's proposed modification. The case will be dismissed in thirty days upon Trustee Yarnall's pending motion unless Debtor proposes another plan modification that addresses the concerns raised herein.

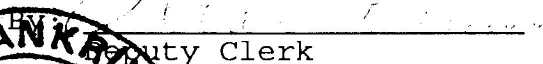
Dated this 19th day of August, 1996.

BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk



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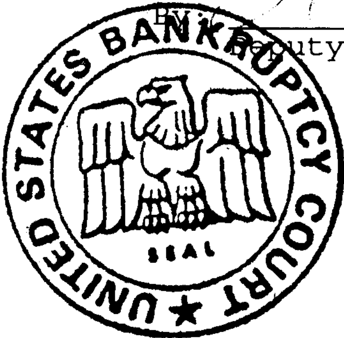

(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
AUG 19 1996
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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[4] It is unclear from the case files whether Larry and Loren Johnson each owe Debtor $13,223.93 or whether the $13,223.93 represents the total they owe together.

Case: 93-40213 Form id: 122 Ntc Date: 08/19/96 Off: 4 Page : 1
Total notices mailed: 6

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Trustee	Yarnall, Rick A.	PO Box J,	Sioux Falls, SD 57101		
Aty	Dougherty, Patrick T.	PO Box 1004,	Sioux Falls, SD 57101-1004		
Aty	Gaumer, Craig Peyton	PO Box 5073,	Sioux Falls, SD 57117		
Intereste	U.S. Trustee,	Shrivers Square, Suite 502,	230 S. Phillips Avenue,	Sioux Falls, SD 57104-6321	