UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re: SCOTT ALAN HYMANS dba S&R Ranch SSN/ITIN xxx-xx-0026 and RENA MICHELLE HYMANS SSN/ITIN xxx-xx-4611 Debtors.	)	Bankr. No. 21-50009 Chapter 12 DECISION RE: CONFIRMATION OF DEBTORS' MODIFIED PLAN DATED JANUARY 3, 2022

The matter before the Court is Debtors Scott Alan Hymans and Rena Michelle Hymans's Modified Plan Dated January 3, 2022. This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will deny confirmation of Debtors' modified plan.

I.

Rena Michelle Hymans and her husband Scott Alan Hymans are the chapter 12 debtors in this case and have proposed a Modified Plan Dated January 3, 2022 (doc. 161) for confirmation. The Estate of Leo Drillig (the "Drillig Estate"), First Interstate Bank, and First National Bank filed objections to Debtors' modified plan. At the evidentiary confirmation hearing held April 19, 2022, counsel reported the two banks' objections had been resolved. The Court received evidence regarding the objection filed by the Drillig Estate.

Rena Hymans was an attorney practicing in Sturgis. On October 30, 2020, the Drillig Estate obtained a civil judgment against her for conversion of funds that belonged to the Drillig Estate. Rena Hymans closed her law practice in 2020. In

January 2021, she pled guilty to several related criminal charges. She is currently incarcerated. Her scheduled release date is in October 2023, though she may be eligible for release as early as the autumn of 2022. The real property where her law office was located is being sold, with the net proceeds being paid to mortgage lender First Interstate Bank. The net sale proceeds will *not* pay First Interstate Bank's claim in full.

Debtors have a ranch near Vale where they produce beef calves and grass and alfalfa hay. The ranch is 788 acres, of which 198 acres are hay ground and the balance is pasture and the building site.[1] There is no dispute the ranch real property is worth just over $1,000,000.00. First National Bank holds the first mortgage on the ranch real property, First Interstate Bank holds a second mortgage, and the Drillig Estate holds a judgment lien. All are fully secured by the real property's value. Debtors also lease 228 acres of pasture and 80 acres of hay ground from Rick Oedekoven, a neighbor. Debtors do not insure their hay crop.

Debtors expanded their cattle herd to ninety-four cows in the autumn of 2019 using funds borrowed from First National Bank.[2] The bank has a secured interest in the cattle. The cattle are not insured. According to their schedule of assets filed January 27, 2021, Debtors had eighty-seven bred cows and three bulls. Debtors' cattle herd, as of the April 19, 2022 confirmation hearing, comprises two bulls of unknown age and fifty-two cows born in 2010, nine cows born in 2011, six cows

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[1] Scott Hymans testified the ranch is 788 acres. Ryan Casteel, a ranch real estate expert for the Drillig Estate, reported the ranch is 789 acres.

[2] Some parts of the record indicate Debtors' cow herd was expanded to ninety-*three* head.

born in 2014, and fifteen cows born in 2015, for a total of eighty-two cows. Some cows have new calves at side; the others were expected to calve soon. Two cows have lost their calves. Debtors are bottle feeding two calves. The cows were not pregnancy checked prior to the calving season. The bulls have not been fertility tested. Debtors do not have a regular program for replacing cows that are older or otherwise unproductive. Scott Hymans valued their cattle herd at $128,000.00.

Debtors earned $61,058.52, or $925.13 per head, from the sale of sixty-six calves in November 2018. They earned $48,599.02, or $867.84 per head, from the sale of fifty-six calves in October 2019.[3] They earned $745.72 from the sale of two calves in March 2020 and $620.85 from the sale of two calves in April 2020.[4] Debtors earned $70,384.59, or $790.84 per head, from the sale of eighty-nine calves in November 2020. Debtors also sold two cows for $1,575.44 in June 2020. They sold four cows in July 2021 for $4,017.79. Debtors sold eighty-four calves in November 2021 for $72,343.23, or $861.23 per head. The record indicates Debtors did not purchase any replacement cows or heifers in 2020 or 2021.

Though they admitted their hay sale records are sparse, Debtors reported they sold 506 bales to Dan Dunn in July and August 2020 and 302 bales through the Rock Valley Hay Auction Company in 2020. These sales totaled $47,390.00. At the end

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[3] More calves were sold in Debtors' and First National Bank's names in 2018 and 2019 but Debtors only received a percentage of the proceeds. *See* Exhibit LD6. Rena Hymans testified Debtors had a "share cow" agreement with the Oedekoven family those years and the calves from both Debtors' cows and the Oedekovens' cows were marketed together to obtain a higher price.

[4] The livestock market receipt indicates these were baby calves born that spring.

of 2020, Debtors had approximately 300 bales of hay on hand; this was the number stated in their January 27, 2021 schedules. During 2021, Debtors' ranch produced 170 bales of hay. Production was down due to a drought. That year, they sold a "small number of bales to two neighbors" for $3,050.00. In an answer to interrogatories dated August 2, 2021, Debtors predicted "we will run out of pasture ground before we normally would during the drought and would need all of this hay to feed our current cattle herd with none for sale in the [sic] 2021."

At the April 19, 2022 confirmation hearing, Scott Hymans testified he had hay on hand worth about $20,700.00. The hay on hand will decrease each day as it is fed to Debtors' cattle until later in the spring when the cattle are returned to pasture for grazing.

According to their original schedules of income and expenses filed January 27, 2021, Debtors' ranch expenses exceeded their ranch income by $1,554.09 per month. It is unclear whether these expenses included funds for the replacement of any cows or machinery. According to these schedules, when only Debtors' off-ranch income and their living expenses are considered and when both were working, Debtors had net income of $2,260.18 per month.

According to supplement schedules I and J Debtors filed on June 25, 2021, Debtors had combined off-ranch income of $5,644.65 per month and their household expenses were $2,715.69 per month, for net monthly income of $2,928.96. In the supplement schedule I, Debtors stated their net ranch income per month was $4,788.39, the difference between ranch income of $6,600.00 and ranch expenses of $1,811.61, which was $8,129.95 *less* than the monthly ranch expenses Debtors originally scheduled on January 27, 2021. There was limited congruity between Debtors' January 27, 2021 and June 25, 2021 statements of ranch expenses, with the most notable difference being Debtors did not include any payment to First National Bank–the lender on their ranch real estate and cattle–as an expense in their June 25, 2021 statement of ranch expenses. If that expense of $4,875.00 per month, as stated in their original schedule J, is added to the other ranch expenses, as of June 25, 2021 Debtors' ranch expenses exceeded their ranch income by $86.61 per month.

In an answer to interrogatories dated August 2, 2021, Debtors stated their projected gross annual income in 2022, 2023, and 2024 will be $70,000.00 from cattle sales and $25,000.00 from hay sales. They further estimated their annual net income, after the addition of off-ranch wages for each of them, will average $70,160.00. They did not include living expenses or the cost of purchasing any replacement cows or machinery in these net income projections.

According to their 2021 federal income tax return, Debtors had wage income of $53,846.00,[5] pension and annuity income of $415.00,[6] net income from Rena

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[5] Rena Hymans's gross wage income from January 1, 2021 to August 24, 2021 from her employment with a pizza store was $20,330.96. Debtors' supplement schedule I (doc. 214) indicates she began that job around April 2021, but it appears that start date did not get changed from their original schedule I filed in January 2021, which also said she had been employed by the same pizza store for one year. Scott Hymans had gross wage income of $33,626.87 in 2021 from the State of South Dakota. Debtors' supplement schedule I indicated Scott Hymans started working for the South Dakota Department of Transportation in late 2021 or early 2022, but a W-2 for 2021 indicates he worked most of 2021 for the state.

[6] Debtors did not schedule as an asset any retirement or pension accounts or any annuities. Exhibit LD8, page 5, indicates Rena Hymans cashed out a small retirement account in mid-2021. She acknowledged this at the April 19, 2022 hearing.

Hymans's "Beachbody Sales" of $560.00,[7] rental income of $3,600.00 from T-Mobile USA, Inc., proceeds from the sale of business property of $2,416.00,[8] and net farm income of $16,861.00,[9] for total income of $77,698.00. Included in their gross farm income was $74,818.00 from the sale of livestock and hay, $589.00 from a cooperative distribution, and $3,373.00 from government farm programs. When depreciation is not taken as an expense, Debtors' actual net farm income for 2021 was $29,069.00.

Debtors' account at First National Bank, which became their debtor in possession account, had a balance of $23,150.27 on the January 27, 2021 petition date. On February 18, 2022, the balance was $53,045.92. This increase of almost $30,000.00 was without Debtors' having made any payments to First Interstate Bank, AmeriCredit Financial Services, Inc., the Drillig Estate, or the State Bar Client Assistance Fund but also without any significant hay sales in 2021 and without any off-ranch wages for Rena Hymans since the end of August 2021.

Debtors filed a second set of supplement schedules I and J on April 8, 2022. Therein, Debtors indicated Scott Hymans's off-ranch net income is $2,725.85 per month,[10] their net ranch income is $2,284.51 per month, and their household receives

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[7] Rena Hymans's 1099-NEC from Beachbody, LLC states her gross nonemployee compensation in 2021 was $999.94.

[8] Debtors' reported gross income in 2021 from this business property was $4,018.00. From it, Debtors were allowed to deduct an adjusted basis of $1,602.00.

[9] According to their tax return, Debtors' net farm income in 2021 included a total of $3,372.50 from the United States Department of Agriculture's Price Loss Coverage program and the "CFAP3-CAA-COVID 19" program.

[10] Five of Scott Hymans's pay advices with the South Dakota Department of Transportation were placed in evidence. *See* Exhibit LD12. Four contained at least

another $1,000.00 per month from their son for "rent and other living expenses[.]" Their itemized ranch expenses with these supplement schedules did include a monthly payment of $3,362.83 to First National Bank but did not include any payments to First Interstate Bank, the Drillig Estate, or the State Bar Client Assistance Fund or any capital expenditures for replacement cows or machinery. With all income combined, Debtors projected their monthly net income will be $3,895.78 until Rena Hymans is released from prison and returns to work. They stated Rena Hymans's income will be $5,500.00 per month upon her release. She testified her former employer has indicated it will rehire her.

Debtors have four secured creditors. As noted above, First National Bank has a short-term note secured by Debtors' cattle and ranch personalty and a long-term note secured by Debtors' ranch real estate. The bank did not file a proof of claim. Debtors and First National Bank have agreed the bank will receive annual payments of $40,353.66 for fifteen years on the real estate note, an expense they included on their April 8, 2022 supplement schedule J, and annual payments of $11,161.05 for seven years on the personalty note.

As noted above, First Interstate Bank has a note secured by the lots in Sturgis that are presently being sold and a second mortgage on Debtors' ranch real estate. Debtors and First Interstate Bank have agreed the proceeds from the sale of the Sturgis lots will be applied to the bank's claim and the balance, about $80,000.00,

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some overtime or other enhanced pay differential per pay period. When these pay advices and his 2021 W-2 from the state, *see* Exhibit D15, are considered, it appears Scott Hymans's net income from the South Dakota Department of Transportation is at least $3,000.00 per month.

plus some interest and attorney fees, will be paid at $16,943.85 per year over fifteen years with 4.75% interest.

The Drillig Estate filed an amended proof of claim for $256,300.16. In their modified plan, Debtors propose to pay the Drillig Estate $227,284.77 with 4.75% interest through annual payments of $20,555.10 over fifteen years. The parties are presently litigating some issues regarding the application of certain funds received to pay down the debt and the calculation of interest. The present record shows the Drillig Estate has received on its claim $20,000.00 from the State Bar Client Assistance Fund and $4,544.44 and $46.71 in restitution payments from Rena Hymans. The Drillig Estate will continue to receive small restitution payments from wages Rena Hymans earns while incarcerated. Because Debtors intend to repay the State Bar Client Assistance Fund, that obligation of $20,000.00 should be considered a component of the Drillig Estate's secured claim.

AmeriCredit Financial Services, Inc. holds a note secured by Debtors' 2018 Chevrolet Equinox. Following an objection to its claim by Debtors, the Court reduced AmeriCredit Financial Services' secured claim to $17,362.77 as of April 10, 2022. In their modified plan, Debtors propose to pay this creditor $20,276.22 with 5% interest through five annual payments of $4,460.89. AmeriCredit Financial Services did not object to the plan treatment, though, obviously, the amount Debtors propose to pay AmeriCredit Financial Services in their modified plan is now higher than the allowed amount of AmeriCredit Financial Services' secured claim.

The Internal Revenue Service has an unsecured priority claim of $8,537.01, which Debtors propose to pay over the five-year plan term, and a general unsecured claim of $16,022.93. Unsecured claims were also filed by Navient Solutions, LLC for $13,106.02, Discover Bank for $371.51, and Sturgis Ambulance Service for $1,338.20, for total general unsecured claims of $30,838.66. Debtors' modified plan proposes Navient Solutions, LLC's student loan claim will be paid directly by Debtors pursuant to the "initial" agreement with the creditor, though Rena Hymans hopes she will obtain further payment deferrals or a loan forgiveness. Debtors' modified plan proposes to pay the other general unsecured claim holders, whose claims total $17,732.64, in full during the plan term, which is required by 11 U.S.C. § 1225(a)(4) due to Debtors' substantial equity in their real property.

Under their modified plan, Debtors propose annual payments of $49,608.69 to the trustee for five years. Debtors' modified plan and the subsequent agreements Debtors reached with First National Bank and First Interstate Bank provide for the following annual payments through the trustee:

IRS on priority claim	$ 1,707.41
First National Bank on personalty note	$11,299.59
First Interstate Bank	$17,184.68
AmeriCredit Financial Services, Inc.	$ 4,460.89
Drillig Estate	$20,555.10
trustee fees	$ 2,362.33

These payments total $57,570.00 and do not include anything for Debtors' proposed 100% distribution to the unsecured claim holders or the increase in trustee fees necessitated by the increased payments to the two banks. In addition to the annual payments through the trustee set forth above, under their modified plan Debtors also propose to directly pay their former and current attorneys $10,924.55 per year for five years, First National Bank $40,353.66 per year on its real estate note, and Navient

Solutions, LLC $4,754.40 per year until the $13,106.02 student loan is paid in full. These proposed payments through the trustee and proposed direct payments total $113,602.61 per year and, as noted above, do not include anything for the general unsecured creditors.

At the April 19, 2022 confirmation hearing, Debtors' expert, Roger DeRouchey of DeRouchey Agricultural & Legal Consulting, testified he and three representatives for the Drillig Estate inspected Debtors' real and personal property on March 23, 2022. DeRouchey testified Debtors' machinery is "functional," and "well maintained," with "excellent paint." He described it as "top of the line used equipment." If maintained, he does not believe any of it will need to be replaced during the plan term.

DeRouchey described Debtors' cattle herd as "functional" and said the cows did not look their age. He opined "beef cow people" do not want their cows "over fat" during calving because that may cause calving issues and death loss, intimating some of Debtors' cows were thin. He was not concerned about their condition and said the cows will naturally look thin after they have had their calves. In his cash flow projections for Debtors, he included an allowance for the replacement of four or five cows per year. He opined Debtors did not need to replace more cows annually because Debtors use rotational grazing, have a good water supply for the cows, and can attentively monitor and care for the cows.

DeRouchey said Debtors' existing hay is neatly stacked and in good condition. He stated Debtors would, after the 2022 hay crop is harvested, know what they will need to keep to feed their cattle herd for the coming winter and what they will have available for sale. He acknowledged cows in the area are going to pasture later than normal in 2022 due to the drought's effect on pastures, which will increase the consumption of Debtors' existing hay but will also make the hay available for sale more valuable. He calculated Debtors will harvest 480 tons of hay, feed 324 tons, and have 156 tons to sell at $125.00 per ton, for a total of $19,500.00. He estimated Debtors will have another sixty to seventy-five tons from Debtors' present hay inventory that can be carried over. He did not provide Debtors' historical hay production numbers or any local production averages for similar land.

DeRouchey opined Debtors' gross income in 2022 will be $157,179.00, including Scott Hymans's off-ranch income with the State of South Dakota and monthly rent payments of $1,000.00 from their son. As part of their total income, DeRouchey estimated Debtors will earn $20,000.00 from hay sales, $85,000.00 from calf sales,[11] and $5,000.00 from the sale of cull cows. DeRouchey calculated Debtors' expenses for 2022 will be $71,246.00, Debtors will have $115,545.00 to make plan payments, Debtors will spend $6,250.00 to purchase some replacement cows near the end of the year, and Debtors will have $27,138.00 in cash to carry forward into 2023. Excluding the starting cash balance of $63,000.00 he used, DeRouchey's projections show Debtors will spend $35,862.00 more than they earn in 2022. His 2022 projections do not include any rent expense for the land Debtors lease from Rick Oedekoven, which Scott Hymans testified Oedekoven was waiving for this year, any payment on Rena Hymans's $20,000.00 commitment to the State Bar Client Assistance Fund, or any payment on Rena Hymans's student loan obligation.

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[11] DeRouchey testified at the confirmation hearing he assumed Debtors will have seventy-five calves to sell in 2022, with each worth about $1,133.00.

Debtors' debtor in possession account at First National Bank showed a balance of $53,396.91 on March 21, 2022. Scott Hymans testified the account balance on April 19, 2022 was $65,000.00–slightly more than the $63,000.00 cash carry forward figure used by DeRouchey in his cash flow projections. So he and Rena Hymans would have the funds necessary to make the proposed February 1, 2022 plan payment of $49,608.69, Scott Hymans testified they had recently received $6,000.00 from his parents and $3,000.00 from his daughter, which amounts were included in the $65,000.00.

For 2023, DeRouchey projects Debtors' income will increase to $177,179.00, with the increase coming from more wages and tips earned by Rena Hymans. After expenses are paid and capital expenditures and plan payments are made, DeRouchey calculates Debtors will have $3,076.00 in cash to carry forward into 2024. In the 2023 calendar year, DeRouchey's projections show Debtors will spend $24,062.00 more than they will earn.

For 2024, DeRouchey projects Debtors' income will increase to $223,679.00, with the majority of the increase coming from increased wages and tips earned by Rena Hymans and a small wage increase for Scott Hymans. DeRouchey also indicates Debtors' income from calf sales will decrease by $5,000.00 in 2024 but their income from cull cow sales will increase by $1,500.00. He also shows their expenses and their plan payments both increasing. He calculates Debtors will have $4,960.00 in cash to carry forward into 2025. In calendar year 2024, DeRouchey's projections show Debtors will earn $1,884.00 more than they will spend.

For 2025, DeRouchey projects Debtors' income will be $500.00 less than in

2024. He further projects expenses will increase by $500.00, plan payments will decrease by $2,000.00, and capital expenditures will stay the same. He calculates Debtors will have $7,844.00 in cash to carry forward into 2026. For calendar year 2025, DeRouchey's projections show Debtors will earn $2,884.00 more than they will spend.

For 2026, DeRouchey projects Debtors' income will be $2,500.00 more than in 2025, with the increase coming from slightly higher wages for Scott Hymans and $1,500.00 more from the sale of cull cows. DeRouchey projects expenses will increase by $3,000.00, plan payments will stay the same, and capital expenditures will decrease by $5,000.00. He calculates Debtors will have $15,229.00 in cash to carry forward into 2027. For calendar year 2026, DeRouchey's projections show Debtors will earn $7,385.00 more than they will spend.

DeRouchey testified his cash flow projections are conservative, in part because they did not include annual income from a cell tower lease. The cell tower, however, is on the property in Sturgis currently being sold. He also said the figures are conservative because he did not include all possible farm program payments from the federal government. He did not identify what those possible excluded farm program payments might be, other than seemingly referring to COVID-19-related government payments.

William "Bill" Smoot, a retired senior loan officer with Farm Credit Services of America and an expert for the Drillig Estate, also inspected Debtors' property on March 23, 2022. In his report, Smoot opined Debtors will not have hay for sale because they will need all the hay they produce to feed their cattle during the months the cattle cannot be on pasture. His conclusion, however, was based only on hay produced from the land owned by Debtors; he did not include in his assessment hay produced from the eighty acres of alfalfa and grass Debtors rent from Rick Oedekoven, a lease Debtors did not disclose in their schedules. Smoot said Debtors had extra hay to sell in 2018 and 2019 because above average rainfall and ideal growing conditions produced bumper crops in those years. He also said Debtors had fewer cows to feed during those two years. At the hearing, he calculated, considering all Debtors' owned and rented land, Debtors will have, at most, 175 bales of hay to sell in excess of what is needed for feed, but he cautioned Debtors would be wise to keep some bales in reserve.

Smoot prepared his own cash flow projections for Debtors for 2022 through 2026. He calculated Debtors will have a substantial net loss each year, ranging from as much as $106,527.00 in 2022 to $54,511.00 in 2026. Smoot's most notable variances from DeRouchey's cash flow projections are: Smoot does not start with a cash balance of $63,000.00; Smoot does not include the $1,000.00 per month rental income from Debtors' son because he considers it unreliable and not historically supported; Smoot estimates Rena Hymans's earnings based on her June 28 through July 11, 2021 earnings statement; noting a recent increase in price, he projects Debtors will have seventy-five calves to sell each year for $1,000.00 per head based on a 92% calving success rate; and he does not include any hay income because he believes Debtors will need it all for feed but, as noted above, he did not know about the additional hay from the leased ground. He believes DeRouchey's projection of $20,000.00 in income per year from hay sales is optimistic and, if Debtors' extra hay is sold, Debtors will lose the "insurance" that having hay on hand provides for years when pastures and hay production are affected by drought. He agrees with DeRouchey that rotational grazing allows Debtors to maximize their pastures and he agrees Debtors will need to feed their cattle hay about 180 days per year.

Smoot believes Debtors' expenses for 2022, as set forth in DeRouchey's cash flow projections, are $5,000.00 to $10,000.00 too low when compared to Debtors' actual expenses for 2020 and 2021 and the present size of Debtors' cattle herd. Smoot said his projections are based on Debtors' tax returns. He said his numbers will need to be adjusted to account for the acres Debtors lease from Rick Oedekoven and the additional grazing and hay that land provides. He acknowledges Debtors' losses each year will be reduced by $50,000.00 once Rena Hymans is able to return to work.

Smoot's cash flow projections most notably differ from DeRouchey's because Smoot believes Debtors need to more aggressively replace their older cows, cows that die, and cows that fail to breed each year if Debtors want to ensure they have cows of a good weight, quality, and condition. He calculates the necessary annual capital expenditures for replacement cows will be $42,900.00 in 2022 and 2023 and $18,150.00 in 2024, 2025, and 2026. Smoot testified ranchers with whom he is familiar do not keep cows that are older than twelve years, which he considers to be their productive life expectancy. He stated Debtors will be unable to produce the number of calves they project because Debtors' slow cow replacement program of just four cows per year will take fourteen years to replace the cows that are presently about twelve years old, and so some cows will be an "impossible" age of twenty-six before they are replaced.

At the April 19, 2022 confirmation hearing, the Drillig Estate's second expert, Ryan Casteel of Casteel Auction & Real Estate, Inc., who also ranches near Debtors, testified he took part in the March 23, 2022 on-site inspection of Debtors' real and personal property. He found Debtors had, on that date, 20 bales of hay from the 2021 crop year and about 307 bales from 2019 and 2020. He said the bale count will decrease each day until Debtors are able to return their cattle to pasture. With all types and ages combined, he valued Debtors' hay at $36,400.00 as of March 23, 2022.

Casteel values Debtors' cattle herd at $88,526.00, which excludes the value of calves at side but assumes each cow is bred. He said the present value of the calves at side is $300.00 per head, which adds $10,500.00 to his total value for the herd. As with Smoot, Casteel said he was not able to determine the exact age of each cow because the cattle were not each run through a chute on March 23, 2022 for an individual examination, but he said a livestock auction barn would classify each cow over age nine or ten years as a "broken mouth" cow. He found the younger cows to be in good condition but said several older cows were "thin-backed" and in poorer condition. He said the fifty-nine cows Debtors purchased in 2010 and 2011 are all now considered "broken mouth" and moving toward the end of their "optimal maternal age." He stated as cows age they are unable to raise calves that are as hearty and heavy as calves raised by younger cows and that older cows are more difficult to keep in good condition, especially during the winter months. He said the twenty-one cows born in 2014 and 2015 are "solid mouth" or "short solid" cows who can raise calves of a more desirable weight and will be easier to care for over the winter. He said some of these "solid mouth" cows will become "broken mouth" cows in 2023. He opined the cows with calves at side, *i.e.*, "pairs," will be worth about $1,200.00 to $1,400.00 by mid-May. He said cows who failed to calve or who lost their calf are worth a slaughter price of $700.00 to $800.00 each.

Casteel values Debtors' machinery at $104,850.00, noting their 1980 John Deere swather is in average condition but the fourteen-foot head on it is in poor condition. He testified it is unknown whether Debtors' swather will remain operational for the life of the modified plan, and he estimates a used replacement will cost at least $15,000.00. He said the rest of the machinery is in good condition. He values Debtors' other ranch personalty, including vehicles, at $107,305.00, noting numerous items with a combined value of $29,100.00 are not listed on Debtors' schedules. Casteel did not personally inspect Debtors' guns, but based on the descriptions in Debtors' schedules, he values them at $3,850.00.

Doris Lauing, the personal representative for the Estate of Leo Drillig, testified Rena Hymans took money owed to Leo Drillig over two years. She said Debtors' modified plan proposal to make the Drillig Estate wait fifteen years to be repaid in full was "highly unfair" in light of that circumstance. She also believes the Drillig Estate should be repaid monthly, not annually, with Rena Hymans's income devoted to repaying the Drillig Estate rather than going toward supporting the ranch and then the ranch making the payments to the Drillig Estate.

II.

To be confirmed, a chapter 12 plan must meet six requirements. The plan must: (1) comply with chapter 12 and other provisions of the bankruptcy code;

(2) provide for the payment of all fees established by 28 U.S.C. § 1911 on or before confirmation; (3) be proposed in good faith; (4) the value, on the effective date of the plan, of the property to be distributed under the plan must be equal or greater than what those creditors would get under chapter 7 liquidation, commonly referred to as the "best interest of creditors test"; (5) secured creditors must receive their collateral or be paid the value of the collateral over time with interest, unless they consent to something different; and (6) the plan must be feasible. 11 U.S.C. § 1225(a). If the trustee or an unsecured claim holder objects, the debtor must also pay allowed unsecured claims in full or commit their disposable income for the term of the plan. 11 U.S.C. § 1225(b)(1).

Even if no one objects to confirmation, the Court has a separate mandatory duty to determine whether the confirmation requirements have been met. *In re Weldin-Lynn, Inc.*, 79 B.R. 409, 410 (Bankr. E.D. Ark. 1987). If no objection is filed, however, the Court may presume the plan has been proposed in good faith and not by any means forbidden by law. Fed.R.Bankr.P. 3015(f).

The chapter 12 debtor has the burden to prove the proposed plan meets all the requirements of § 1225(a). *JaKS Farm Custom Forage Harvesting, L.L.C. v. Anderson* (*In re Anderson*), 305 B.R. 861, 865 (B.A.P. 8th Cir. 2004). The debtor must do so by a preponderance of the evidence. *In re Hoffinger Industries, Inc.*, 321 B.R. 498, 502 (Bankr. E.D. Ark. 2005) (cites therein omitted).

The Drillig Estate has primarily challenged whether the modified plan is feasible and whether it has been proposed in good faith.

A chapter 12 debtor must "be able to make all payments under the plan and to comply with the plan[.]" 11 U.S.C. § 1225(a)(6). This feasibility element is fundamentally a question of fact. *In re Foertsch*, 167 B.R. 555, 566 (Bankr. D.N.D. 1994). A chapter 12 plan must offer a reasonable prospect of success and be workable. *Id.* at 565. An "iron clad guarantee" is not required but the plan should not be overly optimistic nor belabor the inevitable demise of a hopelessly insolvent debtor. *Id*. at 565-66 (cite therein). Future income and expense projections, including crop production and market rate predictions, should be rooted in objective fact. *Foertsch*, 167 B.R. at 565-67; *In re Oster*, 152 B.R. 960, 964 (Bankr. D.N.D. 1993) (the court will not confirm a chapter 12 plan that is "problematic and fraught with unsupported projections") (cites therein omitted), *abrogation on unrelated grounds recognized in In re Wruck*, 183 B.R. 862, 864 (Bankr. D.N.D. 1995). Off-ranch income may be considered. *In re Barnett*, 162 B.R. 535, 538 (Bankr. W.D. Mo. 1993).

"The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Clarkson v. Cooke Sales and Service Co.* (*In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *Chase Manhattan Mortgage and Realty Trust v. Bergman* (*In re Bergman*), 585 F.2d 1171, 1179 (2nd Cir. 1978)). A plan must be probable, not merely technically possible. *Foertsch*, 167 B.R. at 566. As stated more recently, the record must provide "[r]easonable assurances that the plan can be completed and that the plan will cash flow[.]" *United States v. Krause* (*In re Krause*), 261 B.R. 218, 224 (B.A.P. 8th Cir. 2001). The Court may, however, resolve conflicts in the evidence in the debtor's favor due to the underlying purpose of chapter 12. *Foertsch*, 167 B.R. at 566.

"[[I]]n determining whether [a plan] is feasible, the bankruptcy court has

> an obligation to scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable." *United Properties, Inc. v. Emporium Department Stores, Inc.*, 379 F.2d 55, 64 (8th Cir. 1967). Success need not be guaranteed. 5 COLLIER ON BANKRUPTCY ¶ 1129.02, at 1129-33. *Cf. In re Anderson*, 28 B.R. 628, 630-631 (S.D. Ohio 1982) (bankruptcy court did not err in finding chapter 13 plan feasible, even though success of debtors' plan was far from certain, where court gave objecting creditor the opportunity to force modification of the plan if creditor's interest became imperiled).

Prudential Ins. Co. of America v. Monnier (*In re Monnier Brothers*), 755 F.2d 1336, 1341 (8th Cir. 1985) (chapter 11 case citing a chapter 13 case, where the statutory feasibility requirement is the same as in chapter 12). However, the burden of proof remains on the debtor; the Court cannot "give judicial gloss to stark financial realities." *Foertsch*, 167 B.R. at 566.

As with plans filed in chapter 11 and chapter 13 cases, a chapter 12 plan must be "proposed in good faith and not by any means forbidden by law[.]" 11 U.S.C. § 1225(a)(3). "Good faith" is not defined by the bankruptcy code. In this circuit, a plan is considered proposed in good faith if there is a reasonable likelihood the plan will achieve a result consistent with the standards prescribed under the bankruptcy code. *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310, 1315 (8th Cir. 1987) (quotations and citations therein omitted), *partially abrogated on other grounds by Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387 n.3, 394 (1993), *quoted in Ad Hoc Committee of Non-Consenting Creditors v. Peabody Energy Corp.* (*In re Peabody Energy Corp.*), 933 F.3d 918, 927 (8th Cir. 2019).

> Whether a plan is proposed in good faith turns on an examination of the totality of the circumstances surrounding the plan and the bankruptcy filing. *Noreen v. Slattengren*, 974 F.2d 75, 76 (8th Cir. 1992); *Handeen v. LeMaire* (*In re LeMaire*), 898 F.2d 1346, 1349 (8th Cir. 1990). The court must focus on factors such as whether the debtor has stated debts

> and expenses accurately; whether the debtor has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether the debtor has unfairly manipulated the Bankruptcy Code. *Noreen*, 974 F.2d at 76; *LeMaire*, 898 F.2d at 1349; *see also Hanson v. First Bank*, 828 F.2d 1310, 1315 (8th Cir. 1987) ("In the context of a chapter 11 reorganization . . . a plan is considered proposed in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'") (citation omitted); *In re Trans World Airlines, Inc.*, 185 B.R. 302, 314 (Bankr. E.D. Mo. 1995) (court should consider whether the plan has been proposed with the legitimate and honest objective of preserving the Debtor's business while maximizing the return available to creditors). Pre-filing conduct is not determinative of the good faith issue, but it is nonetheless relevant. *LeMaire*, 898 F.2d at 1352. In essence, the good faith inquiry looks at the debtor's fairness in dealing with creditors.

Barger v. Hayes County Non-stock Co-op (*In re Barger*), 233 B.R. 80, 83-84 (B.A.P. 8th Cir. 1999).

III.

Debtors have not carried their burden of showing their modified plan is feasible. Two key problems are evident. First, Debtors failed to demonstrate their cattle herd can continue to produce seventy-five healthy calves per year where the large majority of their cows are already aged and where they propose to replace less than half of the sixty-one cows born in 2010 or 2011 during the plan term. The fact Debtors' cow herd has already decreased from a high of ninety-four in 2019, when the fifty-eight additional cows were purchased, to just eighty-two at the time of the confirmation hearing is proof the herd is aging rapidly, and that rate of attrition due to age will only increase. Problematically, however, if Debtors divert more income to replace the older cows at an appropriate rate, they will not have sufficient income to make their plan payments.

Second, Debtors' record on feasibility falls short regarding their projected income from hay sales. Debtors did not present sufficient historical hay production records to support their projections. Their hay production history was limited to two "bumper crop" years and two drought years, neither of which paint a reliable picture of what their owned and leased hay ground can produce in an average year.

Debtors also did not address what alternative income options they have if the drought continues and their hay production remains below normal. In April of any given year, it is difficult for anyone to predict what the weather will be during the summer or what the cattle markets will be in the autumn. Debtors, however, did not offer evidence showing the small cushions in their cash flow projections are sufficient to ensure they can make their plan payments in light of *any* vicissitudes, minor or major. Debtors' income and expenditures in 2021–another drought year–evidence this concern: Though Debtors were not paying most of their secured creditors during 2021 and though Rena Hymans was employed for two-thirds of the year, just prior to the confirmation hearing Debtors did not have sufficient income from 2021 to make the first plan payment due February 1, 2022 and also fund the projected cash carryover for 2022 going into 2023. But for their family's recent contribution of $9,000.00, Debtors' cash carryover will evaporate by the end of 2024 under Debtors' own projections.

The Court also notes Debtors testified, and DeRouchey's cash flow projections assume, Debtors' son will pay them monthly rent for the life of the modified plan, Rick Oedekoven will not charge Debtors land rent in 2022, Rena Hymans will not need to make student loan payments until 2024, and Rena Hymans will have a good-paying job waiting upon her release from prison. None of these declarations was sufficiently corroborated by other evidence to satisfy Debtors' burden of proof.

DeRouchey's testimony offered minimal aid. Though he often described his cash flow projections as "conservative," the actual figures therein were less so.

DeRouchey's projection of the value of seventy-five weanling calves at $1,133.00 per head in 2022 based on the futures market for feeder cattle was difficult to understand and not supported by Debtors' historical calf sales from the past few years. The record thus shows his projections were overly optimistic and not rooted in objective fact. *Foertsch*, 167 B.R. at 565-67. Smoot's projection of the calves' value at $1,000.00 per head was more reliable since it was based on Debtors' historical calf income and a current increase in value.

DeRouchey's testimony that Debtors could somehow sell a cull cow and buy a younger bred replacement cow for just $200.00 more per head was unrealistic and not supported by other evidence. In contrast, Smoot's projections were based on current market prices for both cull cows and replacement cows.

DeRouchey's testimony that Debtors' blanket farm insurance policy covers cows who die from electrocution, drowning, or a stray bullet was undermined by Scott Hymans's testimony that the cows are not insured. Debtors' actual blanket farm insurance policy was not placed into evidence in support of DeRouchey's testimony. DeRouchey also did not present any meaningful analysis showing the cost of insuring the cattle or the hay crop was not financially prudent or otherwise unwarranted.

In support of his claimed "conservative" estimate of Debtors' projected income, DeRouchey attempted to translate the loss of the cell phone tower rent into a net gain in income because the sale of the Sturgis property will reduce First Interstate Bank's secured claim. He failed to show those changes in income and expenses were not already reflected in his cash flow projections. He also suggested Debtors had understated income they might receive from government farm programs, but his testimony on this topic was disjointed and not supported by documentary evidence. He seemingly questioned whether all authorized funds for Debtors from COVID-19 pandemic-related government programs were reflected in Debtors' $63,000.00 cash balance at confirmation, but schedule F of Debtors' 2020 federal income tax return and the October 8, 2021 statement and attachments Scott Hymans received from the Department of Agriculture acknowledge Debtors' receipt of $13,491.00 from agricultural program payments in 2020, including payments related to the pandemic. No other witness, including Debtors, indicated notable additional farm program payments are expected other than what DeRouchey and Smoot included in their cash flow projections.

In contrast to DeRouchey's testimony, Casteel's and Smoot's reports and testimony and Smoot's projections regarding Debtors' income and expenses were more reliable and more soundly based on Debtors' historical income and expenses and the reality of Debtors' aging cow herd. Casteel and Smoot answered all questions with clarity and without hesitation or verbosity. When they did not know something, they simply said so.

On direct examination, Scott Hymans provided most of his information in response to leading questions. On cross examination, he too often said he could not recall. Thus, the reliability of his testimony was weakened. Scott Hymans's inability or unwillingness to answer some questions also resulted in an incomplete record regarding how many cows Debtors' son owns and whether their son's cows were included in the herd count presented at confirmation. For the Court, it also left unanswered what agreement Debtors and their son have for the care and feeding of the son's cows and how that agreement is reflected in Debtors' cash flow projections.

When the entire record is considered and after resolving any conflicts in the evidence in Debtors' favor, Debtors have not shown their ability to fund their modified plan is probable. Their projected cash flow statements are not well grounded in objective fact and, in particular, Debtors have failed to deal with the reality of their aging cow herd.

Debtors also did not carry their burden of showing they offered their modified plan in good faith. As noted above, when assessing Debtors' good faith in proposing their modified plan, the Court must consider all circumstances surrounding the modified plan and the bankruptcy filing, determine whether Debtors have stated debts and expenses accurately, made any fraudulent misrepresentations to mislead the Court, or unfairly manipulated the bankruptcy code. *Noreen*, 974 F.2d at 76, *LeMaire*, 898 F.2d at 1349. Considered another way, the Court must ask whether Debtors have shown their modified plan will likely achieve a result consistent with the standards prescribed by the code, *Hanson*, 828 F.2d at 1315, and whether they have proposed their modified plan with the legitimate and honest objective of preserving their ranching business while maximizing the return available to creditors, *Trans World Airlines*, 185 B.R. at 314.

The evidence presented on the good faith requirement for confirmation was limited. In Debtors' favor, they appear to have maximized their off-ranch income and will be essentially working two full-time jobs each when the work at the ranch is added to their "day jobs." Debtors' family living and ranch expenses are modest. They maintain older farm machinery and actively care for their cows. They employed a financial advisor to aid them in proposing a successful chapter 12 plan.

On the other hand, when considering all circumstances, the Court cannot, as noted by the Drillig Estate's personal representative, ignore the fact that Rena Hymans took funds belonging to Leo Drillig over just two years but Debtors now want to repay what was taken over fifteen years. That is akin to Debtors' taking a fully matured short-term note and turning it into a new long-term obligation through a plan. That is not a result intended by the bankruptcy code, where the Drillig Estate was not a voluntary lender but instead its claim arose from fraud, and where the present record does not indicate even the proposed extended repayment period or an extended repayment period with a balloon payment at an earlier time will allow Debtors to get on their feet financially and timely repay their creditors. *See In re Koch,* 131 B.R. 128, 132-33 (Bankr. N.D. Iowa 1991) ("new loan" created for a formal lending entity under a chapter 12 plan, where the secured claim originally had a ten-year repayment period, may be amortized over thirty years but with a balloon payment of all principal and interest at the end of fifteen years because that plan treatment provides "the fairest balance" and give the debtors a "fighting chance"); *In re Krier*, Bankr. No. 14-12439, 2016 WL 2343038 (Bankr. D. Kan. April 29, 2016) (divorce-related obligation that no longer had the character of a domestic support obligation based on a post-divorce, pre-bankruptcy agreement between the debtor and the ex-spouse and that became a judgment lien on the debtor's real property could not, in good faith, be excessively extended by the chapter 12 debtor; the former spouse was "not a bank and shouldn't be treated like one"); and *In re LLL Farms*, 111 B.R. 1016, 1022 (Bankr. M.D. Ga. 1990) (thirty-year repayment term on a secured claim held by a lending entity with a balloon payment due at twenty years will allow the family farm debtor to get on its feet financially and then pursue other financing). Accordingly, the fifteen-year repayment term for the obligation owed to the Drillig Estate was not proposed by Debtors in good faith.

An order will be entered sustaining the Drillig Estate's objection to the confirmation of Debtors' modified plan and denying confirmation.

Since Rena Hymans's income will be crucial to any successful chapter 12 plan, counsel for Debtors may want to confer with Trustee Dale A. Wein, counsel for the banks, AmeriCredit Financial Services, Inc., and the Drillig Estate to discuss whether all parties will be better served and not be adversely affected if Debtors wait to file a new modified plan after it is known whether Rena Hymans will be released in 2022. A short delay will, of course, inevitably arise from the resolution of Debtors' objection to the Drillig Estate's claim (docs. 213, 254, 255, and 258).

Dated: May 25, 2022.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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

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

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-50009
	)	Chapter 12
SCOTT ALAN HYMANS	)	
dba S&R Ranch	)	
SSN/ITIN xxx-xx-0026	)	
	)	
and	)	ORDER DENYING CONFIRMATION
	)	OF DEBTORS' MODIFIED PLAN
RENA MICHELLE HYMANS	)	
SSN/ITIN xxx-xx-4611	)	
	)	
Debtors.	)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED the Estate of Leo Drillig's objection (doc. 175) to Debtors' Modified Plan Dated January 3, 2022 (doc. 161) is sustained as provided in the decision, and confirmation of Debtors' modified plan is denied.

So ordered: May 25, 2022.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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

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

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota