



Appearances included Larry Nelson for Trustee and Curt Ewinger for Debtors. Debtors did not appear.

Counsel for Debtors reported to the Court that he had no contact with Debtors and, to his knowledge, that Debtors had moved out-of-state.

Staff for Trustee reported to the Court that Debtors originally owed \$7,782.74 under their confirmed plan, that Debtors had paid \$6,675.90, and that only \$1,106.84 remained unpaid. Debtors' arrearage of \$1,106.84 is equal to all remaining payments due. The last known address that Trustee had for Debtors was in Pennsylvania. However, Trustee's last correspondence to Debtors at that address was returned.

The Court's last known address for Debtors was in Oregon. The Court has not received a change of Debtors' address from Debtors or their counsel since early 1987.

The issue presented is whether it is in the best interest of creditors and the estate to dismiss the case or convert it to a Chapter 7 proceeding.

## II.

Section 1307 of Title 11 provides:

[O]n request of a party in interest ... and after notice and a hearing, the court **may** convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, **whichever is in the best interests of creditors and the estate**, for cause, including --

.....  
(6) material default by the debtor with respect to a term of a confirmed plan[.]

11 U.S.C. § 1307(c) (in pertinent part) (emphasis added). Dismissal or conversion is not automatic even if cause is established. In re White, 126 B.R. 542, 546 (Bankr. N.D. Ill. 1991). Granting a dismissal or conversion is, instead, a discretionary decision for the Court. Id. (cites omitted).

Generally, a court will find dismissal or conversion appropriate when efforts to cure a default are unsuccessful and the plan cannot be modified so as to make it feasible for completion.

Id. Other factors to consider include whether the Chapter 13 debtor has exhausted the five-year plan limitation imposed by 11 U.S.C. § 1322(c). Id. at 547. If the five years have been exhausted, dismissal is generally mandated. Id.

If a Chapter 13 debtor defaults on his plan,

[t]he [c]ourt, in considering whether to convert or dismiss a ... case, has the obligation to look beyond the fact of a default in an effort to determine whether the cause of that default was intentional ... or was caused by factors beyond [the debtor's] control.

In re Faaland, 37 B.R. 407, 409 (Bankr. D.N.D. 1984). A "mutuality of interests" between creditors and the debtor would "prompt a common effort to facilitate the curing of defaults rather than the insistence upon conversion or dismissal." Id.

### III.

The facts presented make it difficult for the Court to dismiss or convert the case at this time. A conversion of the case to a Chapter 7 proceeding would likely result in a discharge for Debtors. The fact that Debtors have made almost eighty-six percent of their plan payments may justify that end. A continuation of the

Chapter 13 also would likely result in discharge. Debtors could cure the default on their present plan or, in the alternative, Debtors could modify their plan since the five-year plan limitation has not expired. Finally, there is a possibility that Debtors may be eligible for a Chapter 13 hardship discharge.

Other factors weigh in favor of denying Debtors a discharge at this time by dismissing the case. First, Debtors have not made any plan payments since November, 1990 and they made only partial, untimely payments for several months before then. Second, contrary to 11 U.S.C. § 521(3) and F.R.Bankr.R. 4002(5), Debtors have failed to file a statement of their address change.

In many Chapter 13 cases where the debtor has defaulted, it is in the best interest of the estate, creditors, and the debtors if the debtors are allowed to complete their remaining plan payments. The Court finds that general rule applies here. Modification of the plan or a hardship discharge should be considered only if completion of the originally confirmed plan is not possible. Conversion should be considered only if Debtors can be located and they have assets available for distribution. A dismissal is appropriate only if a plan cannot be completed and conversion will yield few or no assets for the estate.

In essence, the Court needs answers to several questions before it dismisses the case. These questions -- whether Debtors can make the original or modified plan payments or whether they are eligible for a hardship discharge -- can be answered only if Debtors are found. To that end, Trustee and Debtors' counsel will

be ordered to make all reasonable efforts to locate Debtors and serve them with a copy of this Memorandum and corresponding Order. Debtors will be given forty-five days from entry of the Order to file a response to Trustee's Motion to Dismiss or Convert and, if appropriate, to file a motion to modify or a motion for hardship discharge. If no timely response is filed by Debtors, the case will be dismissed.

Dated this 7th day of August, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

IN RE: ) CASE NO. 87-10312-INH  
)  
DONALD S. REED and ) CHAPTER 7  
SHARON M. REED, )  
)  
)  
)  
Debtors. )  
)

ORDER HOLDING TRUSTEE'S MOTION TO DISMISS OR  
CONVERT IN ABEYANCE FOR FORTY-FIVE DAYS

In recognition of and compliance with the Memorandum of Decision re: Trustee's Motion to Dismiss or Convert entered this day,

IT IS HEREBY ORDERED that Chapter 13 Trustee Rick A. Yarnall and Debtors' counsel, Curt R. Ewinger, shall make every reasonable effort to locate Debtors and serve them with a copy of this Order and the corresponding Memorandum of Decision; and

IT IS FURTHER ORDERED that Debtors shall be given forty-five days from entry of this Order, whether or not they are located and timely served by Trustee or their counsel, to file a response to Trustee's Motion to Dismiss or Convert and, if appropriate, to file a motion to modify or a motion for hardship discharge; and

IT IS FURTHER ORDERED that if no timely response is filed by Debtors, the case shall be dismissed by order of this Court.

Dated this \_\_\_\_\_ day of August, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)