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

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June 27, 1990

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Re: Richard E. and Deanna Schuldies
Chapter 12; 90-50001

Dear Counsel:

The Court has before it the Farmers Home Administration's motion to dismiss the Chapter 12 case of Richard and Deanna Schuldies. After reviewing the testimony, evidence, briefs and applicable authority, the Court will grant FmHA's motion.

The debtors operate a farm and ranch near Nisland, South Dakota. They filed for reorganization under Chapter 11 of the United States Bankruptcy Code on May 15, 1985. Their plan and disclosure statement were filed on September 13, 1985, and an amended plan was filed on February 18, 1986. The plan was ordered confirmed after a hearing on March 24, 1986. The order confirming the plan of reorganization was filed by the Court on May 9, 1986. On July 1, 1988, the debtors filed an application for a final decree, which was entered on September 8, 1988.

On January 2, 1990, the debtors filed a Chapter 12 bankruptcy petition. Their Chapter 12 plan of reorganization was filed on March 29, 1990. The plan shows the treatment of four creditors, namely the Butte County Treasurer, Federal Land Bank of Omaha (now

Farm Credit Bank of Omaha), Farmers Home Administration, and

First Western Bank. The debtors' confirmed Chapter 11 plan also treated Butte County, FCBO and FmHA. The evidence presented shows that the debtors are current on their Chapter 11 plan payments to FCBO, but
are delinquent in their payments to Butte County and FmHA. The debtors admit that it is their inability to make their Chapter 11 payments that necessitates the filing of their Chapter 12 bankruptcy.

The hearing on FmHA's motion to dismiss was held on April 3, 1990, and continued to April 30. The Court took the matter under advisement, and has received briefs from the debtors, FmHA, FCBO (which has also filed a motion to dismiss), and an amicus curie brief from the United States Trustee.

FmHA, in its brief in support of its motion to dismiss, argues that the debtors' Chapter 12 case was not filed in good faith pursuant to 11 U.S.C. § 1208. It also argues that the debtors' petition is a de facto conversion from Chapter 11 to Chapter 12, which is prohibited by *In re Erickson Partnership*, 856 F.2d 1068 (8th Cir. 1988). Debtors finally argue that the Chapter 12 is an attempt to modify a substantially consummated Chapter 11 case in violation of 11 U.S.C. § 1127(b).

The debtors argue that their Chapter 12 petition is filed in good faith and is based upon economic necessity. They further assert that there is no code provision forbidding the initiation of a Chapter 12 case after their Chapter 11 plan has been closed, and that the entry of the final decree in their Chapter 11 belies the argument that they are attempting a de facto conversion to Chapter 12.

The United States Trustee urges the Court to adopt a good faith test in determining whether a second petition in a bankruptcy is filed for a proper purpose. See *In re Culbreth*, 87 B.R. 225 (Bankr. M.D. Ga. 1988), *In re Garsal Realty, Inc.*, 98 B.R. 140 (Bankr. N.D. N.Y. 1989), In re Jartran, Inc., 87 B.R. 525 (Bankr. N.D. Il. 1988), *In re Inesta Quinones*, 73 B.R. 333 (Bankr. D. P.R. 1987), and *In re Woloschak Farms*, 70 B.R. 498 (Bankr. N.D. Oh. 1987)

This Court will first consider whether this case constitutes an impermissible de facto conversion from Chapter 11 to Chapter 12. See *Erickson*, supra. This Court has recently issued two opinions concerning this subject. See *In re Moeller*, Bankr. 89-30022, Slip Op. (Bankr. D. S.D. *Oct.* 17, 1989), affd. Civ. 89-30038, Slip Op. (Dist. S.D. Feb. 12, 1990), and In re Gerth, Bankr. 89-10062, Slip Op. (Bankr. D. S.D. Aug. 2, 1989). In both cases, the Court dismissed Chapter 12 cases that were found to be attempted de facto conversions from Chapter 11. The Court's holding in *Moeller* was based upon the debtor's dismissal of their Chapter 11 case followed

by their filing for relief under Chapter 12. In *Gerth*, the debtor filed for Chapter 12 relief before a final decree had been entered in his Chapter 11 case. *Moeller* and *Gerth* are inapposite given the facts in this case. Here, unlike *Moeller* or *Gerth*, the debtors' Chapter 11 plan has been substantially consummated and the final decree has been entered. The Court does not believe, given the facts, that the debtors are attempting a de facto conversion.

The Court must next consider whether the debtors' Chapter 12 petition constitutes an "end run" modification of their Chapter 11 plan. 11 U.S.C. § 1127(b) provides:

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Substantial consummation is defined in section 1101(2):

> (2) 'substantial consummation' means –
>
> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

Substantial consummation requires completion or near completion of transfers of property to be made to or from a debtor at or near the time a plan is confirmed, but only commencement of distribution of dividends of creditors to be made over a period of time from operating revenues. See *In re Novak*, 86 B.R. 625 (D. S.D. 1988).

Under our Local Bankruptcy Rules, substantial consummation and full administration of the bankruptcy estate triggers the requirement of applying for a final decree. See L. B.R. 308(D). The Court finds on these facts and as a matter of law that the debtors' Chapter 11 plan is substantially consummated.

As previously noted, the debts to be treated under the debtors' proposed Chapter 12 plan are basically the same as those that were treated in their Chapter 11. In re Hill, 84 B.R. 623 (Bankr. E.D. Mo. 1988), holds that debtors may not file a Chapter 12 petition to treat the same debts as those that were the debts treated in a previous Chapter 11. In essence, Hill stands for the proposition that "end run" modifications of substantially consummated Chapter 11 plans are impermissible. See also In re Colony Square Co., 62 B.R. 48 (Bankr. N.D. Ga. 1985), In re AT of Maine, Inc., 56 B.R. 55 (Bankr. D. Ma. 1985), and In re Northampton Corp., 37 B.R. 110 (Bankr. E.D. Pa. 1984), affd. 59 B.R. 963 (E.D. Pa. 1984).

The above cases, except Hill, all concern the filing of Chapter 11 petitions after the debtors had already been reorganized under a previous Chapter 11 plan. Despite this factual difference, the Court finds their logic persuasive. Northampton is particularly instructive. In that case, the debtor filed a second petition under Chapter 11 to forestall a foreclosure action initiated by a creditor after the debtor failed to make required payments to the creditor under the debtor's confirmed Chapter 11 plan. The creditor moved to dismiss the debtor's new Chapter 11 petition or alternatively to convert the debtor to a Chapter 7. The Court held that the debtor was bound by the terms of its confirmed Chapter 11 plan, and that the obligations arising from that plan could not be altered by a successive petition. The Court noted that to find otherwise would allow the debtor to continuously circumvent the provisions of a confirmed plan by filing new Chapter 11 petitions ad infinitum. The Court further found that in light of the prior confirmed Chapter 11 plan, the debtor's present intention to reorganize and the feasibility of any such reorganization were "completely irrelevant." 37 B.R. at 113.

It should be noted that Culbreth, supra, is a factually similar case in which the Court confirmed a debtor's Chapter 12 plan even though the debtor's Chapter 11 plan was substantially consummated. The Court in Culbreth based its decision on the legislative intent behind the enactment of Chapter 12 and Congress' failure to specifically prohibit the filing of a Chapter 12 petition after a final decree had been entered in a Chapter 11. Turning its attention to an examination of § 1127(b), the Court

noted that the code section concerned modifications after confirmation and prior to substantial consummation. The Court then concluded that § 1127(b) was inapplicable. This Court respectfully disagrees with the Court in Culbreth and declines to follow its holding. Section 1127(b) implicitly prohibits modifications of substantially consummated Chapter 11 plans. See Hill, Colony Square AT, and Northampton, supra. The debtors in this case are attempting to modify a substantially consummated Chapter 11 plan.

It is apparent that the debtors have a substantially consummated Chapter 11 plan. Further, the evidence shows that the proposed Chapter 12 reorganization intends to treat the same debts as were previously treated in the Chapter 11. The Court finds that such is tantamount to an impermissible post—confirmation modification of a substantially consummated Chapter 11 plan. For this reason, the FmHA's motion to dismiss will be granted. This holding renders moot the FCBO's motion to dismiss and confirmation of the debtors' Chapter 12 plan.

This constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 and Bankruptcy Rule 9014. This is a core proceeding under 28 U.S.C. § 157(b) (2) (A) and (L). The Court will enter an appropriate order.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 90-50001
RICHARD E. SCHULDIES and	)	CHAPTER 12
DEANNA SCHULDIES,	)	
	)	ORDER GRANTING FARMERS
	)	HOME ADMINISTRATION'S
Debtors.	)	MOTION TO DISMISS

Pursuant to the letter opinion executed in this matter and filed this same date,

IT IS HEREBY ORDERED that the Chapter 12 case of debtors Richard E. and Deanna Schuldies hereby is dismissed.

IT IS FURTHER ORDERED that the motion to dismiss of the Farm Credit Bank of Omaha and debtors' motion to confirm their Chapter 12 plan of reorganization hereby are rendered moot.

Dated this 27th day of June, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy-Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk