UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:	)	CASE NO. 90-10094-INH
	)	
RICHARD EARENFIGHT TRAVIS,	)	CHAPTER 11
	)	
	)	MEMORANDUM OF DECISION
	)	RE: MOTION TO CONVERT
Debtor.	)	

The matter before the Court is the Motion to Convert filed by creditor Overholt Crop Insurance Service Company and the response thereto filed by Debtor Richard E. Travis. This is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Richard E. Travis (Debtor) filed a Chapter 11 petition for reorganization on May 21, 1990. Creditors include Overholt Crop Insurance Service Company (Overholt), which holds a judgment against Debtor for $1,244,168.27 plus interest, and Walworth County with a claim for real estate taxes of $670.00.[1] Debtor has four other unsecured claims that total $51,266.00, including a claim of $50,500.00 to Citizens Bank of Mobridge for a note that Debtor cosigned in 1990. Debtor has assets totaling $245,955.00 consisting primarily of a vehicle, cash on hand, limited personalty, very limited office personalty, and some investment

[1] Without explanation, Debtor has scheduled Overholt's claim as secured (Schedule A-2).

accounts, an annuity, some bonds, and a mutual fund account.[2]

Overholt filed a Motion to Convert on December 28, 1990 on the grounds that there has been a continuing diminution of the estate and Debtor does not have a reasonable likelihood of rehabilitation, that Debtor is unable to effectuate a confirmable plan, and that Debtor has unreasonably delayed the proceeding to the prejudice of Overholt. Debtor denied all allegations in his response.

A hearing was held January 23, 1991. Upon consideration of the testimony and exhibits presented and the argument of counsel, the Court concluded that the Debtor's estate consisted primarily of cash-on-hand and investment accounts. Overholt did not show these assets were presently at risk or declining in value. Absent such a showing, Overholt failed to show that here has been diminution of the estate. The question of whether the case should be converted due to Debtor's inability to effectuate a plan or his unreasonable, prejudicial delay in the case was taken under advisement. Overholt filed a Memorandum in support of its Motion that day. Debtor declined the opportunity to file a memorandum.

Debtor filed his plan of reorganization with the Court at the January 23, 1991 hearing and filed his Disclosure Statement on

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[2] Debtor has failed to comply with the Court's Order entered December 13, 1990 which directed him to file an amended schedule of exempt property. Consequently, the Court is unable with any certainty to identify those assets which Debtor has declared exempt.

February 4, 1991. Debtor proposes in his plan to pay Walworth County in full plus 12% interest within one year of the effective date of the plan. Unsecured claim holders are scheduled to receive payment of their claims in full plus 10% interest within one year of the effective date of the plan. Debtor proposes to pay Overholt, pending resolution of an appeal of the judgment against him to the United States Court of Appeals for the Eighth Circuit, $50,000 on the effective date of the plan plus annual payments of $28,480.44 over ten years beginning January 1, 1992, which represents $175,000 "principal" plus 10% interest. Debtor offers to secure Overholt's claim to the extent of $175,000.00 with assignments of a life insurance policy, some security interests, or a combination thereof. In exchange for the "infusion" of $50,000, Debtor also proposes to "acquire" post-confirmation ownership of the estate assets.

Neither the plan nor disclosure statement set forth Debtor's actual or projected income and expenses. One of Debtor's exhibits at the hearing projected Debtor would have income of $113,308.00 in 1991, including $41,608.00 in income from his bonds, investment accounts, and the annuity. Debtor projected his 1991 business and family living expenses would equal $54,685.00.

The Court continued its consideration of Debtor's Disclosure Statement and Debtor's counsel's interim fee application pending resolution of Overholt's Motion to Convert.

II.

A Chapter 11 case may be dismissed or converted to a Chapter 7 proceeding for cause, including "inability to effectuate a plan" and "unreasonable delay by the debtor that is prejudicial to creditors." 11 U.S.C. §§ 1112(b)(2) and 1112(b)(3). The moving party has the burden of establishing cause. In re Sheehan, 58 B.R. 296, 299 (Bankr. D.S.D. 1986). A determination of cause is within the discretion of the Court upon a consideration of all circumstances of the case. Id. The movant may meet his burden by showing the debtor will not be able to generate sufficient income to fund a plan or that reorganization will not improve a debtor's income generation. In re Kerr, 908 F.2d 400, 403 (8th Cir. 1990); see also Sheehan, 58 B.R. at 299. Once the movant has met his initial burden, the burden may shift to the debtor to demonstrate "that [he has] at least some chance of achieving every stage of [his reorganization] proposal." In re Minnesota Alpha Foundation, 122 B.R. 89, 94 (Bankr. D. Minn. 1990)

Absent a showing of bad faith in filing, Kerr, 908 F.2d at 404, a case in its early stages should be dismissed or converted only upon a showing "that there is no more than a `hopeless and unrealistic prospect' of rehabilitation." Minnesota Alpha Foundation, 122 B.R. at 91 (quoting In re Economy Cab & Tool Co., Inc., 44 B.R. 721, 724 (Bankr. D. Minn. 1984), and cite therein); see also Sheehan, 58 B.R. at 299. The feasibility test is "firmly

rooted in predictions based on objective fact." Clarkson v. Cooke Sales and Service Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985). "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." Id. Once a debtor is given a reasonable amount of time to reorganize, however, his Chapter 11 may be dismissed or converted if a plausible plan has not been proposed. Kerr, 908 F.2d at 404; In re Ashton, 107 B.R. 670, 675 (Bankr. D.N.D. 1989); Sheehan, 58 B.R. at 300.

As the Court and counsel discussed at the hearing, Debtor's biggest obstacle may be his ability to propose any plan that comports with the absolute priority rule codified at 11 U.S.C. § 1129(b)(2)(B)(ii). Since Overholt's balloting on the plan will carry any class of unsecured claim holders[3] and since Overholt has already indicated that it will not vote for Debtor's proposed plan, the Court must consider at this stage whether Debtor has more than a "hopeless and unrealistic prospect" of utilizing the cram down provision of § 1129(b)(2) to obtain confirmation of a plan.

The absolute priority rule provides that a dissenting class of creditors must be provided for in full before any junior class can

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[3] Although Overholt is scheduled as a secured creditor and although Debtor in his plan proposes to secure a portion of Overholt's claim, upon the facts presented to date, the Court can only conclude that Overholt is an unsecured claim holder for purposes of balloting on confirmation.

receive or retain any property under a Chapter 11 plan. 11 U.S.C. § 1129(b)(2)(B)(ii); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, ___, 108 S.Ct. 963, 966 (1988). Property is defined broadly and includes both tangible and intangible property, **even potential future profits and the value of control**, even where debts far exceed assets and the "going concern" value of a sole proprietorship is minimal. Ahlers, 485 U.S. at ___, 108 S.Ct. at 969. If the debtor proposes to overcome the absolute priority rule by meeting the recognized "infusion of new capital" or "new value" exception[4], he must, viewed from the time of approval of the plan, provide to the estate a present consideration of "money or money's worth" reasonably equivalent in value to the retained value of the estate. Id., 485 U.S. at ___, 108 S.Ct. at 967; Case v. Los Angeles Lumber Products, Co., 308 U.S. 106 (1939); Ashton, 107 B.R. at 674; In re Yasparro, 100 B.R. 91, 96-97 (Bankr. M.D. Fla 1989).

The best interest of creditors test set forth at 11 U.S.C. § 1129(a)(7) is not relevant to a determination of whether a plan is fair and equitable as required by 11 U.S.C. § 1129(b). Yasparro, 100 B.R. at 94. Consequently, even if a debtor proposes to pay unsecured claim holders an amount equal to what they would

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[4] In Norwest Bank Worthington v. Ahlers, 485 U.S. 197, ___, 108 S.Ct. 963, 967 n.3 (1988), the United States Supreme Court did not expressly accept the infusion of new capital exception to the absolute priority rule. Post Ahlers, however, the exception has been recognized in this Circuit. In re Blankemeyer, 861 F.2d 192, 194 (8th Cir. 1988).

receive in a Chapter 7 liquidation, that sum may not equal or exceed the retained value of the estate and, therefore, the "new value" exception to the absolute priority rule may not be met. Id. It should be noted that:

> [t]he individual Chapter 11 debtor's task is more complex in contributing capital which is reasonably equivalent in value to the interest retained by [the] debtor [compared to a corporation's, where the principals may infuse new capital equivalent to the going concern value and reissue shares]. ... The individual debtor cannot recast his interest in property the way corporate shareholders can recast their shares. Pragmatically, without a benevolent parent or guardian or 100% payment to the unsecured creditors, the individual debtor is always left in the precarious position of determining how much property to liquidate in order to save the remainder.

Id. at 98.

Further, the amount of the unsecured claims is irrelevant to a determination of whether a contribution by an individual debtor is reasonably equivalent in value to the retained interest. Id. at 98. The comparison is between the value of the retained interest and the new capital contributed. Id.

Finally, contrary to the assertions of Debtor's counsel, the new value contributed is more than a "user's fee" that the debtor pays the estate for the use of assets during the life of the plan. The absolute priority rule states that the junior claim holder may not "receive **or retain** ... any property" under a plan unless senior claim holders are paid in full. 11 U.S.C. § 1129(b)(2)(B)(ii)

(emphasis added). The statute encompasses property the debtor will receive under the plan, as well as the property that the debtor will retain when plan payments are completed. As the Supreme Court noted, the retained value may include even future profits. Ahlers, 485 U.S. at ___, 108 S.Ct. at 969.

III.

Upon consideration of all circumstances in this case, the Court concludes that Overholt's Motion to Convert should be continued at least until a hearing is held on an amended disclosure statement. While Debtor testified that he intended to "infuse" only $50,000.00 of new value under the plan and while $50,000 is insufficient to meet any new value exception to the absolute priority rule[5], the evidence did not clearly establish that there is no more than a "hopeless and unrealistic prospect" that Debtor may be unable to obtain additional funds sufficient to insure confirmation under § 1129(b)(2)(B). Debtor's testimony, as well as his counsel's arguments, was premised on counsel's erroneous assertions regarding the absolute priority rule and the new value exception to that rule. To the extent that counsel can reassess

[5] Computing the retained value of this estate will be difficult but not impossible. Debtor projects that the income for one year from the Chapter 11 estate's bonds, annuities, and investment accounts is $41,608. Since Debtor proposes to retain these investments, it would appear that any new value contribution would have to reflect their liquidation value, the income Debtor will receive from them during the life of the plan and in the future, plus the value of retaining control over the assets.

the case[6] and propose an amended disclosure statement and amended plan that accurately reflect the new value exception to the absolute priority rule, the Court deems it prudent to allow Debtor that opportunity.

Further, insufficient evidence was presented for the Court to conclude that Debtor has only a "hopeless and unrealistic prospect" of proposing a **feasible** plan. There was no concrete evidence of Debtor's pre- and post-petition income nor of his future earning capacity reflecting factors such as his age and the market for his crop insurance sales. Thus, the Court could not conclude that Debtor's income and expense predictions in his exhibits were unreasonable. Guided by the principle that evidence of feasibility must be "firmly rooted in predictions based on objective fact," it will be Debtor's burden at confirmation to show that "the things which are to be done after confirmation can be done as a practical matter under the facts." Clarkson, 767 F.2d at 420.

Debtor should not expect multiple opportunities to get a plan confirmed. The case has been pending for over a year. Debtor's delay in proposing a plan has not been justified by necessary post-petition changes in Debtor's business or by resolution of adversary proceedings, as may be common in more typical reorganizations. At

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[6] If counsel's reassessment of the case leads him to conclude that the case should be dismissed or converted, that course of action should not be further delayed by Debtor or counsel. See In re Alderson, 114 B.R. 672 (Bankr. D.S.D. 1990).

this juncture, this is essentially a one creditor case and Debtor should view it as such. See also Yasparro, 100 B.R. at 94.

An order will be entered allowing Overholt to bring its Motion to Convert before the Court for a continued hearing upon ten days notice to parties in interest as defined by Local Bankr. R. 206. Debtor shall be given thirty days from entry of this order to file an amended plan and amended disclosure statement and to set and notice the amended disclosure statement for hearing. If Debtor fails to timely file an amended disclosure statement and amended plan and set the disclosure statement for hearing as allowed by the order, Overholt may seek dismissal of the case without further notice by complying with Local Bankr. R. 307.

Dated this 5th day of April, 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. 90-10094-INH
	)	
RICHARD EARENFIGHT TRAVIS,	)	CHAPTER 11
	)	
	)	ORDER CONTINUING
	)	MOTION TO CONVERT
Debtor.	)	

In recognition of and compliance with the Memorandum of Decision Re: Motion to Convert entered this day,

IT IS HEREBY ORDERED that creditor Overholt Crop Insurance Service Company may bring its Motion to Convert before the Court for a continued hearing upon ten days notice to parties in interest as defined by Local Bankr. R. 206; and

IT IS FURTHER ORDERED that Debtor Richard E. Travis shall within thirty days from entry of this order file an amended plan and amended disclosure statement and set and notice the amended disclosure statement for hearing; and

IT IS FURTHER ORDERED that if Debtor shall fail to timely file an amended disclosure statement and plan and set and notice the amended disclosure statement for hearing as allowed by this Order, Overholt Crop Insurance Service Company may seek dismissal

of the case without further notice by complying with Local Bankr. R. 307.

So ordered this _____ day of April, 1991.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)