

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:) CASE NO. 88-10194
) AND CASE NO. 88-10195
WEISZHAAR FARMS, INC. and) CHAPTER 12
L.J. HOG, CO., INC.,)
) FINDINGS OF FACT AND
Debtors.) CONCLUSIONS OF LAW

I.

The above named Debtors filed Chapter 12 Petitions
September 2, 1986.

II.

Weiszhaar Farms, Inc. (Weiszhaar Farms) , is a grain farming
and cattle operation. See Debtor's "Motion for Consolidation of
Cases" filed in case no. 88-10194, October 1, 1986.

III.

L.J. Hog, Co., Inc. is a hog finishing operation. Id.

IV.

The corporate officers of both corporations are Leroy
Weiszhaar and Joan Weiszhaar.

V.

The above mentioned "Motion for Consolidation of Cases" was
filed because the corporations' "respective businesses and
financial affairs are all inter-woven." Id.

VI.

On December 5, 1986 the Court entered an "Order Approving
Stipulation Between Debtors and Leola State Bank for Consolidation
of Cases for Purposes of Administration Only."

VII.

After the consolidation, case no. 186-00227 was consolidated into case no. 186-00226, and from the date of consolidation the cases were designated case no. 186-00226.

VIII.

Leola State Bank is the same entity now known as Livestock State Bank.

IX.

Leola State Bank filed a proof of claim in the L.J. Hog case for \$94,365.81 plus interest. Appended were copies of documents evidencing Leola State Bank's security interest in certain of the L.J. Hog's property, including livestock, equipment, machinery and real estate.

X.

Leola State Bank filed a proof of claim in the Weiszhaar Farms case for \$641,035.15 plus interest. Appended to the proof of claim are documents evidencing Leola State Bank's security interest in certain of Weiszhaar Farms personal property, including livestock and machinery, and in certain of Weiszhaar Farms realty.

XI.

On April 26, 1988 a confirmation hearing regarding the Debtor's Chapter 11 Plan was held in the consolidated case. Attorney Robert Hayes, representing Livestock State Bank, and attorney Thomas Tobin, representing both Debtors, stipulated to treatment of the Livestock State Bank debt under the Chapter 11 Plan. Livestock State Bank also withdrew its ballot rejecting the Debtor's proposed plan and agreed to accept the plan as to be

amended to conform to the stipulation regarding plan treatment.

XII.

An order approving the oral stipulation reached April 26, 1988 was signed April 29, 1988 and entered May 3, 1988. A copy of this order is attached to these findings and conclusions as Exhibit A.

XIII.

On July 7, 1988 Debtors filed an Amended Chapter 11 Plan incorporating the terms stated in the Court's order dated April 29, 1988, and entered May 3, 1988. On July 7, 1988 the Court entered findings of fact and conclusions of law regarding confirmation and entered an order confirming the Debtors' Amended Chapter 11 Plan and discharging the Debtors as provided in 11 U.S.C. Section 1141.

XIV.

Debtors made the first two plan payments totalling \$185,000.00. Debtors were unable to make the \$500,000.00 payment due June 25, 1988, as they were unable to obtain the loan commitments from lenders required to pay off the remaining \$500,000.00 plan obligation owed Livestock State Bank.

XV.

In consideration of foregoing foreclosure and repossession under the terms of the order approving stipulation entered May 3, 1988 and incorporated into the Debtors' Confirmed Chapter 11 Plan, on July 10, 1988, the Debtors and the attorney for Livestock State Bank entered into a second stipulation (attached hereto as Exhibit B). An order approving this stipulation was entered July 25, 1988.

XVI.

On October 14, 1988 the attorney for Livestock State Bank

filed an affidavit with the Court representing the Debtors' inability to comply with paragraphs 4(a) and (b) of the July 10, 1988 stipulation. On October 17, 1988 this Court entered an order directing surrender of all personal property securing the Livestock State Bank debt to the Livestock State Bank for liquidation. Shortly after entry of this order the Livestock State Bank removed collateral from the Debtors' premises for the purpose of liquidation.

XVII.

On October 24, 1988 a telephonic conference hearing was held between the undersigned, attorney H.I. King, representing the Debtors in attorney Tobin's absence, and attorney Hayes for Livestock State Bank. The purpose of the conference call hearing was in response to the Debtor's request to stay implementation of the October 17, 1988 order. The livestock collateral was picked up October 21 and 22, 1988 was being held at sale barns at the time of this telephonic hearing.

XVIII.

The Court refused the Debtors' counsel's request to stay the implementation of the Livestock State Bank's right to foreclose as bargained for in the Chapter 11 bankruptcy and July 10, 1988 stipulation. Subsequently, however, Livestock State Bank agreed to delay the sale of the livestock for seven days.

XIX.

The Debtors were unable to fulfill the requirements of the July 10, 1988 stipulation during this seven day voluntary stay.

XX.

On October 31, 1988 the Debtors filed a proposed order accompanied by two affidavits of Leroy Weiszhaar, a motion to modify the amended Chapter 11 Plan and a proposed modified Chapter 11 Plan. The proposed order would have granted the motion to modify the amended Chapter 11 plan and stayed implementation of the October 17, 1988 order. The proposed modified plan would have allowed the Debtors until December 10, 1988 to cure its default under the stipulation of July 10, 1988. The Court refused the Debtors' ex parte request to enter the order modifying the confirmed Chapter 11 plan.

XXI.

On October 31, 1988 Chapter 12 bankruptcy petitions were filed in the name of Leroy Weiszhaar (88-10196), L.J. Hog, Co., Inc. (88-10194), and Weiszhaar Farms, Inc. (88-10195). The filing of these bankruptcy petitions triggered automatic stays under 11 U.S.C. Section 362 which prevented Livestock State Bank from liquidating its livestock and other security, and contravened the Court's earlier order of October 17, 1988, and its two previous denials of the Debtors' oral and written motions to stay the liquidation.

XXII.

On November 3, 1988 Livestock State Bank filed motions for modification of stay and for dismissal of the Chapter 12 bankruptcies in case numbers 88-10194 and 88-10195. Motions to expedite the notice period for both motions in each of the two cases were also submitted. Orders expediting the notice period and establishing a November 7, 1988, 1:00 p.m. hearing were entered regarding all four motions to expedite.

XXIII.

At the November 7 hearing the Debtors Weiszhaar Farms and L.J. Hog appeared through its officer Leroy Weiszhaar and attorney Tobin. The Livestock State Bank appeared through attorney Hayes. Extensive argument was heard at this hearing, but no testimony or other evidence was presented. At the hearings on the motions to dismiss and for modification of the automatic stay the Debtors argued the present Chapter 12 filings were valid. They also alleged that the additional \$85,000.00 provided for in the July 10, 1983 stipulation as compared to the amended plan treatment and earlier stipulation was not to be paid to Livestock State Bank, but rather represented loan proceeds to be paid to the Debtors to be used to replenish the Weiszhaar Farms cattle herd and to provide cash flow to fund the amended Chapter 11 plan. The Livestock State Bank strongly resisted Debtors' characterization of the \$85,000.00 in question, and contended that the agreement as set forth in the July 10, 1988 stipulation was clear and unambiguous on its face.

XXIV.

Even assuming the Debtors' version of the application of the loan proceeds under the July 10, 1988 stipulation is correct, the Debtors were nonetheless unable to perform under the July 10, 1988 stipulation, and were unable to so perform as of November 7, 1988.

XXV.

The Debtors filed the Chapter 12 Petitions in an attempt to stay the Livestock State Bank's foreclosure of its personal property security interest. The Debtors hoped to secure alternative financing required to pay the obligation owed Livestock State Bank

under the July 10, 1988 stipulation, or to again reorganize under Chapter 12.

XXVI.

These findings of fact are based upon the Court's files and admissions of counsel made at the November 7, 1988 hearing.

CONCLUSIONS OF LAW

I.

The notice period required for motions to dismiss and motions for modification of stay may be expedited by the Court. B.R. 9006(c). The expedited hearings held November 7, 1988 were held pursuant to proper procedures under the Bankruptcy Code, Bankruptcy Rules and Local Bankruptcy Rules. Furthermore, any possible procedural irregularity was waived by the Debtor's appearance at the hearings and their failure to raise any procedural argument.

II.

The hearing on motion for modification of stay was a final hearing. See B.R. 4001(a).

III.

The Debtors are unable to modify their confirmed amended Chapter 11 plan because it has been substantially consummated by stipulation evidenced by the order entered May 3, 1988, and by operation of law under 11 U.S.C. Section 1127(b) and 1101(2)

IV.

Due to their discharge, the Debtors are without authority to convert their Chapter 11 bankruptcies to Chapter 12 11 U.S.C. 1112(d).

V.

The Court may dismiss a Chapter 12 bankruptcy petition on request of a party in interest, for cause. 11 U.S.C. Section 1208(c).

VI.

Cause within the meaning of Section 1208(c) exists for dismissing Chapter 12 filings number 88-10194 and 88-101095 for the following reasons:

- a. Filing bankruptcy on the eve of foreclosure, in itself, does not constitute a bad faith bankruptcy filing. In re Ouverson, 79 B.R. 830 (Bkrtcy. N.D. Iowa 1987); In re Route 202, Corp. 37 B.R. 367 (E.D. Penn. 1984). However, the Debtors' Chapter 12 bankruptcy petitions evidence bad faith filings because they are an attempt to frustrate this Court's order of October 17, 1988 and two subsequent denials of oral and written motions to stay implementation of the October 17, 1988 order.
- b. 11 U.S.C. Section 1129(a) (11) requires that a confirmed Chapter 11 plan not likely be followed by "the need for further financial reorganization, of the debtor." The policy of the code therefore is to prevent debtors from subjecting creditors to multiple reorganization attempts.
- c. The Debtors were given an opportunity to reorganize in their recent Chapter 11 bankruptcy. Bankruptcy is not a guarantee of reorganization but only allows debtors the opportunity to reorganize. The Debtors were extended this opportunity in their Chapter 11 bankruptcy.
- d. In the recent Chapter 11, the parties entered into a binding, court approved stipulation. Under

the stipulation Livestock State Bank negotiated, in exchange for a large debt reduction, for the right to foreclose its security interest if the Debtors were unable to perform as required by the stipulation. Such agreements are fundamental to the necessary bankruptcy negotiation process and are enforceable. See In re Borchardt, 803 F.2d 948 (8th Cir. 1986) ; 47 B.R. 879 (Bkrtcy. D. Minn. 1985); In re Monument Record Corp., 71 B.R. 853 (Bkrtcy. M.D. Tenn. 1987).

- e. Although nothing in The Bankruptcy Code expressly prohibits the present Chapter 12 filings, it is questionable whether the filings are valid, as the Debtors are operating under a recently confirmed Chapter 11 plan. See 11 U.S.C. 1107 (rights of Chapter 11 debtors does not include filing a Chapter 12 petition).

VII.

Dismissal of the Chapter 12 petitions moots Livestock State Bank's motions for modification of the automatic stay. However, if dismissal of the Chapter 12 petitions were not granted, "cause" within the meaning of 11 U.S.C. Section 362(d) (1) would exist for lifting the automatic stay regarding Livestock State Bank's foreclosure efforts for the same reasons "cause" exists under 11 U.S.C. 1208(c).

VIII.

In light of finding of fact number XXIV the Debtors' tendered parol evidence is irrelevant. It is not necessary to decide whether the evidence is admissible.

IX.

The Court will not stay implementation of its corresponding

order entered this date dismissing Chapter 12 cases 88-10194 and 88-10195 pending Debtors' appeal of such order.

X.

The motions for dismissal and for relief from stay constitute core proceedings under 28 U.S.C. §157.

So ordered this 8th day of November, 1988.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By: _____
Deputy

(SEAL)

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

* * * * *

<p>In re:</p> <p>WEISZHAAR FARMS, INC., and L.J. HOG CO., INC., Debtors.</p>	<p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>	<p>Case No. 186-0226 Chapter 11</p> <p>STIPULATION BETWEEN DEBTORS AND LEOLA STATE BANK FOR MODIFICATION OF PRIOR, APPROVED STIPULATION</p>
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* * * * *

Come now the Debtors herein, by an authorized officer and their counsel of record, and Live Stock State Bank, formerly Leola State Bank, by and through its counsel of record, and stipulate as follows:

1. This Stipulation is entered into by way of compromise and - settlement, and shall not, for any purpose, be used as evidence of any fact material in any subsequent proceeding in these consolidated cases;
2. This Stipulation is intended to modify the oral stipulation of the patties entered April 26, 1988, and approved by Order of the Bankruptcy Court dated May 3, 1988;
3. The Debtors are unable to p,₉form Section 1(c) of the Court's prior Order of May 3, 1988, thereby entitling Live Stock State Bank to the immediate possession of the personal property, including livestock and machinery, of the Debtors, and to modification of any

post-Confirmation Stay or Injunction;

4. In lieu of performance of the aforesaid section of the Court's prior Order, it is agreed as follows:

- (a) Not later than the close of business August 29, 1988, the Debtors shall cause to be paid to Live Stock State Bank the sum of \$320,000.00 in return for which Live Stock State Bank shall satisfy and release its security interest in any and all property of the Debtors;
- (B) Not later than the close of business August 29, 1988, the Debtors, in cooperation with Live Stock State Bank, shall obtain a loan secured by a lien on all real estate of the Debtors in the sum of not less than \$265,000.00, which sum, along with interest at the rate of 11 percent per annum, shall be repaid over a term not to exceed fifteen (15) years, the entirety of which loan shall be the subject of a ninety (90) percent guarantee of payment by the United States of America, Farmers Home Administration;
- (c) Within seven (7) days from the execution of this Stipulation, the Bank will receive a written accounting of all livestock sales made during calendar year 1988, through and including the date of execution of this Stipulation;
- (d) From and after the date of this Stipulation, and within five (5) business days of the date upon which sales are made, the Bank shall receive directly from the Debtors an accounting of all sales of livestock made by the Debtors;
- (e) The Bank shall not be obligated to release, subordinate or otherwise waive or impair its lien in personal property of the Debtors until such time as it has received the payment of \$320,000.00, and has closed the loan of \$265,000.00 as described herein.

5. In consideration of the Bank's waiver of performance of the terms of Section 1(c) of the Court's prior Order dated May 3, 1988, and in consideration of the Bank's agreement to pursue the obtaining of the guaranteed loan described above, the Debtors agree that upon the execution of this agreement they will pay to the Bank the sum of \$4,583.33, representing interest for a period of one month.

6. Either party hereto may submit this Stipulation to the Bankruptcy Court for its approval without further notice to any other party. Such approval shall specifically be made on condition and with the acknowledgment that the matters set forth herein shall not constitute admissible evidence in any further or subsequent proceeding in this or any other bankruptcy or reorganization case of the Debtors, or either of them.

7. In the event the terms of this Stipulation are not timely met, the Debtors agree and acknowledge that they will forthwith and upon demand of the Bank assemble and deliver peaceful possession of all personal property, including livestock and machinery, unto the Bank, and the Bank shall be entitled, upon the failure of the Debtors to perform this Section 7 being shown by proper affidavit to the Bankruptcy Court, to an Order of the Court directing the surrender of such property and authorizing the United States Marshal to supervise the surrender of such property. Further, the Bank shall be relieved of any Post-Confirmation Stay or Injunction and shall be thereupon entitled to exercise any and all remedies available to it. at law or in equity, for realization of its mortgages, liens or security interests in real and personal property of the Debtors.

Dated this 10th day of July, 1988.

WEISZHAAR FARMS, INC.

s/ Leroy M. Weiszhaar

s/ Joan Weiszhaar
Vice President

L.J. HOG CO., INC.

s/ Leroy M. Weiszhaar

s/ Joan Weiszhaar
Vice President

TONNER & TOBIN

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P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Live Stock State
Bank (formerly Leola State
Bank)

FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

* * * * *

In re:	*	Case No. 186-00226
	*	Chapter 11
WEISZHAAR FARMS, INC., and	*	
L.J. HOG CO., INC.,	*	ORDER APPROVING ORAL
	*	STIPULATION PROVIDING FOR
Debtors.	*	PLAN TREATMENT AND IN
	*	SETTLEMENT OF OBJECTIONS
	*	TO CONFIRMATION AND IN
	*	SETTLEMENT OF MOTION FOR
	*	MODIFICATION OF STAY
	*	

* * * * *

The motion of the Debtors for confirmation of Chapter 11 plan, and the motion of Live Stock State Bank, Leola, South Dakota (formerly Leola State Bank) for modification of stay having come on for hearing on the 25th day of April, 1980, at the hour of 1:45 o'clock p.m., Live Stock State Bank being present by and through its officers and its counsel, Robert E. Hayes, and the Debtors being present by and through their counsel, Thomas M. Tobin, and the Court having been advised of the oral stipulation of the parties, and good cause thereby appearing,

IT IS HEREBY ORDERED as follows:

1. That, as adequate protection and as treatment under the confirmed plan of the Debtors, the Debtors shall pay unto Live Stock State Bank the following sums:
 - (a) Not later than 5:00 o'clock p.m. on May 2, 1988, the sum of \$80,000.00;
 - (b) Not later than 5:00 o'clock p.m. on June 10, 1988, the sum of \$105,000.00; and
 - (c) Not later than 5:00 o'clock p.m. on June 25, 1988, the sum of \$500,000.00, it being further provided

that not later than 5:00 o'clock p.m. on May 27, 1988, the Bank shall have been provided with a loan commitment for a loan to the Debtors of a net sum not less than \$500,000.00.

2. That the Court's approval of this Stipulation constitutes substantial consummation of a Chapter 11 plan by the Debtors.

3. That if the payments aforesaid are not made within the time indicated, or in the event the commitment required by Section 1(c) of this Order is not received by the Bank-within the time required, and upon such fact being shown by affidavit of any officer of or attorney for the Bank, the Bank shall thereupon be relieved of any pre- or post-confirmation stay or injunction, the Debtors thereupon being required to surrender peaceful possession of all personal property, including livestock and machinery, unto the Bank, and the Bank thereafter being entitled to any and all remedies, at law or in equity, for realization upon its security interests in real and personal property of the Debtors.

4. That in the event the terms of this Order are not performed and the Bank is required to proceed to exercise available remedies in state court, the Bank shall be entitled to seek collection of the full indebtedness owed it, which is in the sum of \$819,387.84 as of April 26, 1988.

Dated April 29, 1988.

BY THE COURT;

Irvin N. Hoyt
Judge, U . S. Bankruptcy Court

Patricia Merritt, Clerk

By: _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:)
) CASE NO. 88-10194
) AND CASE NO. 88-10195
WEISZHAAR FARMS, INC. and)
) CHAPTER 12
L.J. HOG, CO., INC.,)
)
) ORDER
Debtors.)

Pursuant to the Court's Findings of Fact and Conclusions of Law signed this date regarding the two above referenced bankruptcy cases

IT IS HEREBY ORDERED that the Chapter 12 bankruptcy petitions filed in the above referenced cases are dismissed;

IT IS FURTHER ORDERED that the automatic lays imposed by the filing of the two above referenced cases are dissolved;

IT IS FURTHER ORDERED that the Livestock State Bank's motions for relief from stay filed November 3, 1988 are rendered moot by the above granting of its motions for dismissal also filed November 3, 1988.

Dated this 8th day of November, 1988.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By: _____
Deputy Clerk

(SEAL)