

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF CALIFORNIA
3 SACRAMENTO DIVISION

4 In re:) Case No. 04-31993-D-12L
5)
6) D.C. No. CWC-9
7)
8 WILLIAM A. TOSO, dba) Chapter 12.
9 ARNOLD TOSO AND SONS,)
10) Date: May 19, 2005
11) Time: 1:30 p.m.
12) Place: Hon. Thomas C. Holman
13 Debtor(s).) Courtroom 34
14) Sixth Floor
15) United States Courthouse
16) 501 I Street
17) Sacramento, CA 95814

18 **MEMORANDUM DECISION**

19 This matter, the confirmation hearing on debtor's First
20 Amended Chapter 12 Plan filed March 21, 2005, as subsequently
21 modified (the "Plan"), initially came on for hearing on May 3,
22 2005. The only objection to confirmation was filed by Bank of
23 Stockton (the "Bank"). The Chapter 12 trustee supports
24 confirmation. Neither the debtor, nor the Chapter 12 trustee nor
25 the Bank filed a separate statement of disputed material fact
26 under Local Bankruptcy Rule 9014-1(f)(1)(ii) and (iii).
27 Therefore, the debtor, the Chapter 12 trustee and the Bank
28 consented to the resolution of the issues pursuant to
Fed.R.Civ.P. 43(e).

Nevertheless, the court continued the hearing to May 19,
2005 for an evidentiary hearing on two issues: (1) the
feasibility of the Plan, specifically whether the debtor has

1 arranged financing sufficient to allow him to farm his land
2 successfully, and (2) the adequacy under 11 U.S.C. §
3 1225(a)(5)(B)¹ of the interest rate proposed with respect to the
4 Class 2A and 2B claims held by objecting creditor Bank.

5 After the evidentiary hearing on May 19, 2005, the court
6 requested additional post-hearing briefing on one issue - the
7 Bank's claimed security interest the post-petition asparagus beds
8 and crops. The matter was taken under advisement on June 7,
9 2005, the expiration of the time for filing the post-hearing
10 briefs. This memorandum constitutes the court's findings and
11 conclusions pursuant to Bankruptcy Rules 9014(c) and 7052,
12 incorporating F.R.Civ.P. 52.

13 Because the confirmation criteria of section 1225 are nearly
14 identical to those of Section 1325, "case law interpreting
15 section 1325 will be relevant in interpreting section 1225." 8
16 Lawrence P. King, et al., Collier on Bankruptcy ¶ 1225.01 (15th
17 ed. 2005); In re Kjerulf, 82 B.R. 123, 126 (Bankr D. Or.
18 1987)(J.Perris)(citing legislative history that "[c]hapter 12 was
19 closely modeled after existing chapter 13, with alterations of
20 provisions that are inappropriate for family farmers.")

21 Except where a different burden has been allocated, e.g., on
22 the issue of the appropriate interest rate under 11 U.S.C. §
23 1325(a)(5), the debtors bear the burden of establishing that the
24 requirements for confirmation are met. In re Buckingham, 197

25
26 ¹ Unless otherwise noted, all statutory references are to the
27 Bankruptcy Code, 11 U.S.C. §101 et seq., and all "Rule"
28 references are to the Federal Rules of Bankruptcy Procedure.

1 B.R. 97, 102-103 (Bankr. D.Mont. 1996); In re Garako Farms, Inc.,
2 98 B.R. 506, 509 (Bankr. E.D.Cal. 1988).

3 The Bank makes the following objections:

4 1. "[T]he Plan is unclear...whether the debtor is committing
5 all of his net disposable income to fund the Plan or whether he
6 is limiting his contribution to the projected 'margin' set forth
7 on Exhibit '1' to the Plan." The Bank cites no authority for
8 this objection, but the court interprets it as an objection under
9 Section 1225(b). Under the Plan, a portion of Claim No. 6 and a
10 portion of Claim No. 9 filed by the Bank are treated as
11 unsecured. Thus, the Bank is the holder of unsecured claims in
12 Class 5 under the Plan and has standing to raise a Section
13 1225(b) objection. The Bank contends that, if it objects on this
14 basis, as it has, then the Plan cannot be confirmed unless it
15 either (A) provides for payment in full of the Bank's unsecured
16 claims, or (B) requires the debtor to devote all of his actual
17 disposable income, whatever it may turn out to be, to the plan
18 for at least thirty-six months. The Bank has not challenged the
19 projections filed March 21, 2005 as Exhibits 1 and 2 in support
20 of the Plan. This objection is overruled. Section 1225(b) is
21 satisfied if the Plan requires debtor to devote all of his
22 projected disposable income to the Plan for a three year period
23 (or longer if necessary). Anderson v. Satterlee (In re
24 Anderson), 21 F.3d 355 (9th Cir. 1994) (interpreting Section
25 1325(b)). The debtor has met this requirement.

26 2. "[T]he Plan is unclear in that it fails to specify what
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1 rights and remedies are available to the Bank should the Debtor
2 fail to perform on his obligations to the Bank under the
3 Plan....” The Bank has not provided any authority in support of
4 this objection. The objection is overruled. The Plan states
5 that the Bank retains all rights set forth in the Bank’s loan
6 documentation, except as modified by the Plan. (p. 2, lines 23-
7 26).

8 3. The Plan is not feasible for three reasons. First, the
9 debtor has not provided evidence of financing to allow him to
10 farm his property in order to perform under the Plan. This
11 objection was a subject of the evidentiary hearing on May 19,
12 2005. At that hearing, the debtor provided testimony showing the
13 existence of unsecured financing arrangements to provide for
14 operational expenses. This objection is therefore overruled.
15 Second, the Plan projects the need for “Bank Debt” but the
16 debtor’s income and expense projections do not provide for the
17 payment of interest on “Bank Debt.” The debtor’s response to the
18 Bank’s objection states that the term “Bank Debt” was a
19 “misnomer” and that the projections should be read to refer to
20 “External Unsecured Financing.” As set forth above, the debtor
21 has shown at the evidentiary hearing on May 19, 2005 that such
22 financing is available. This objection is therefore overruled.
23 Third, the Bank believes that the debtor’s projections of 18,700
24 cartons of asparagus and \$31.00 per carton are “unrealistically
25 high.” Actually, debtor’s Exhibit 1 projected prices of \$24.00
26 to \$29.00 per carton. In any event, the evidence at the

1 evidentiary hearing on May 19, 2005 showed that the projected
2 number of cartons might be high, but that the projected prices
3 per carton were low. Instead of 18,700 cartons, the debtor
4 testified that he expects to harvest 13,500 to 14,000 cartons of
5 asparagus and that the price per carton will be \$35.00. Thus,
6 the original projections for asparagus (\$487,878.00) will
7 actually be \$472,500.00 to \$490,000.00. The lower number of
8 cartons and the higher price (which the Bank acknowledged in its
9 Supplemental Objection To Plan filed May 6, 2005) essentially
10 offset each other. The debtor's projected asparagus revenue
11 remains constant - \$487,878.00 versus \$481,250.00 (the latter
12 figure representing the average revenue based on 13,750 cartons).
13 This objection is overruled.

14 4. The Plan fails to provide for the Bank's claimed
15 security interest in the debtor's post-petition asparagus crops.
16 This objection is sustained. This objection was the subject of
17 post-hearing briefing. The testimony at the May 19, 2005
18 evidentiary hearing was that asparagus grows in beds that produce
19 commercial crops over a period of ten to twelve years. The
20 asparagus beds on debtor's real property are seven to eight years
21 old; thus, they were planted before August 6, 2004, the date of
22 the bankruptcy filing. The 2004 asparagus crop had been
23 harvested and sold by the time of the filing of the case. The
24 2005 crop did not first appear until the Spring of 2005, well
25 after the filing. Nevertheless, the post-petition asparagus
26 constitutes crops as defined in the Agricultural Security

1 Agreement dated June 27, 2002 (the "Security Agreement"). A copy
2 of the Security Agreement is attached to the Exhibits To
3 Supplemental Objection To Plan filed by the Bank of May 6, 2005.
4 In re Dettman, 84 B.R. 662 (9th Cir. BAP 1988); In re Beck, 61
5 B.R. 671 (Bankr. D.Neb. 1985). The Bank's security interest in
6 crops includes rights in proceeds of the crops. Cal. Comm. Code
7 §§ 9203(f) and 9315 (West 2002 & Supp. 2005). Under 11 U.S.C. §
8 552(b)(1), the Bank's security interest under the Security
9 Agreement extends to all collateral acquired by the debtor prior
10 to the bankruptcy filing and to all proceeds, product, offspring,
11 or profits acquired by the estate after the commencement of the
12 case, "except to the extent that the court, after notice and a
13 hearing and based on the equities of the case, orders otherwise."
14 The debtor presented no evidence sufficient to support an order
15 that the Bank's security interest should not, based on the
16 equities of the case, extend to post-petition asparagus crops
17 produced by the existing asparagus beds. The court's ruling on
18 this objection is made without prejudice to the debtor's ability
19 to bring further proceedings to attempt to show such equities
20 under Section 552(b), or to attempt to surcharge the Bank's
21 collateral under Section 506(c) or to assert other rights.

22 5. The Plan fails the best interests of creditors test
23 because the "supplemental revenue," meaning the excess asparagus
24 revenue assumed to arise from the \$35.00 per carton price applied
25 to the originally projected 18,700 cartons, should be applied to
26 payments to Class 5. This objection is overruled. First, this

