UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re:	Case No. 04-31880-D-12L
ARNOLD C. TOSO and GEORGETTE M. TOSO, dba ARNOLD TOSO FARMS,	D.C. No. CWC-8
	Chapter 12.
	Date: May 19, 2005
	Time: 1:30 p.m.
Debtor(s).	Place: Hon. Thomas C. Holman Courtroom 34 Sixth Floor United States Courthouse 501 I Street Sacramento, CA 95814

MEMORANDUM DECISION

This matter, the confirmation hearing on debtors' Chapter 12 Plan filed March 3, 2005, as subsequently modified (the "Plan"), initially came on for hearing on May 3, 2005. The only objection to confirmation was filed by Bank of Stockton (the "Bank"). The Chapter 12 trustee supports confirmation. Neither the debtors, nor the Chapter 12 trustee nor the Bank filed a separate statement of disputed material fact under Local Bankruptcy Rule 9014-1(f)(1)(ii) and (iii). Therefore, the debtors, the Chapter 12 trustee and the Bank 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 debtors have arranged financing sufficient to allow them to farm their land

successfully, and (2) the adequacy under 11 U.S.C. § 1225(a)(5)(B)[1] of the interest rate proposed with respect to the Class 2A claim held by objecting creditor Bank.

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

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

Except where a different burden has been allocated, e.g., on the issue of the appropriate interest rate under 11 U.S.C. § 1325(a)(5), the debtors bear the burden of establishing that the requirements for confirmation are met. In re Buckingham, 197 B.R. 97, 102-103 (Bankr. D.Mont. 1996); In re Garako Farms, Inc.,

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

98 B.R. 506, 509 (Bankr. E.D.Cal. 1988).

The Bank makes the following objections:

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

2. "[T]he Plan is unclear...whether debtors remain obligated to perform their obligations under existing Bank loan

documentation to the extent such documentation requires that the Debtors protect, preserve and insure the collateral which secures repayment of the Bank debt." The Bank has not provided any authority in support of this objection. The objection is overruled. The Plan requires post-petition compliance with the Bank's loan documentation, except as modified by the Plan. (p. 2, lines 23-26). The Plan does not alter the debtors' obligations to protect preserve and insure Bank's collateral as required by the loan documentation. Therefore, the obligations remain in force post-confirmation.

3. The Plan treats the Bank's Class 2B claim as unsecured, notwithstanding the Bank's claimed lien on and/or security interest in the Debtors' 2005 cherry and walnut crops. This objection is sustained. This objection was the subject of post-hearing briefing. The court takes judicial notice of the fact that cherries and walnuts grow on trees that produce commercial crops over a period of years. The cherry and walnut trees on the debtors' real property commonly known as 14860 East Baker Road, Linden, CA (the "Real Property") were planted before July 19, 2004, the date of the bankruptcy filing. No evidence was submitted as to the remaining useful commercial life of debtors' cherry and walnut trees. The first maternal blossoms for neither the 2005 cherry crop nor the 2005 walnut crop had appeared by July 19, 2004. Nevertheless, trees are fixtures [Cal. Comm. Code § 9102(a)(41)(West 2002 & Supp. 2005) and Cal. Civil Code § 660 (West 1982 & Supp 2005)], and they are therefore part of the

Bank's collateral under its deed of trust (the "Deed of Trust") on the Real Property recorded July 19, 2002. A copy of the Deed of Trust is attached to Claim No. 7. The post-petition 2005 cherry and walnut crops, even though the first maternal blossoms had not yet appeared at the time of the bankruptcy filing, are "other rights, royalties and profits relating to the real property," as that phrase is used in the Deed of Trust. In addition, the post-petition 2005 cherry and walnut crops, even though the first maternal blossoms had not yet appeared at the time of the bankruptcy filing, are crops as defined in the Agricultural Security Agreement dated June 15, 2003 (the "Security Agreement"). A copy of the Security Agreement is attached to Claim No. 6. In re Dettman, 84 B.R. 662 (9th Cir. BAP 1988); In re Beck, 61 B.R. 671 (Bankr. D.Neb. 1985). The Bank's security interest in crops includes rights in proceeds of the crops. Cal. Comm. Code §§ 9203(f) and 9315 (West 2002 & Supp. 2005). Under 11 U.S.C. § 552(b)(1), the Bank's lien under the Deed of Trust and security interest under the Security Agreement extend to all collateral acquired by the debtors prior to the bankruptcy filing and to all proceeds, product, offspring, or profits acquired by the estate after the commencement of the case, "except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." The debtors presented no evidence sufficient to support an order that the Bank's lien and/or security interest should not, based on the equities of the case, extend to post-petition cherry and

walnut crops produced by the existing trees. The court's ruling on this objection is made without prejudice to the debtors' ability to bring further proceedings to attempt to show such equities under Section 552(b), or to attempt to surcharge the Bank's collateral under Section 506(c) or to assert other rights.

4. The Plan is not feasible because the debtors failed to provide information regarding any potential financing commitment for future horticultural expenses. This objection was a subject of the evidentiary hearing on May 19, 2005. At that hearing, the debtors provided testimony showing the existence of unsecured financing arrangements to provide for operational expenses. This objection is therefore overruled.

5. The Plan is not feasible as debtors have not proven the ability to sell the property. This objection is overruled. The debtors propose to sell the subject property within 120 days for at least the July 1, 2004 appraised value. The court takes judicial notice pursuant to Federal Rule of Evidence 201 of the fact that real estate values in the Central Valley have been rising since July 1, 2004, and continue to rise. The debtors' proposal for sale is therefore feasible. Alternatively, even if the proposal for sale were not feasible, the feasibility requirement of 11 U.S.C. § 1225(a)(6) relates to the debtors' ability to make "all payments under the plan and to comply with the plan." Since the Plan calls for either sale within 120 days or abandonment, the Plan is feasible.

6. The Plan provides for no payments to the Bank within the

120 day marketing period for the Real Property. In their First Amended Chapter 12 Plan filed May 31, 2005, the debtors have inserted a provision for the monthly payment to the Bank of interest at the rate of 6% per annum during the 120 day marketing period. Therefore, this objection is overruled as moot.

7. The plan does not permit Bank to record a notice of default unless and until the real property is surrendered after the 120-day period under which debtors could sell the property. The objection is overruled. The Bank may not like this provision, but the Bank has provided no authority that this objection prevents confirmation under 11 U.S.C. § 1225(a).

8. The plan is not proposed in good faith as it is proposed solely for the benefit of debtors' daughter. The objection is overruled. The Bank has provided no evidence to support this objection other than the unsworn statements in the objection (1) that "the Bank has previously been advised through counsel that the Debtors anticipated selling the Property to their daughter Lisa" (page 4, lines 4-5), and (2) that "if the sole purpose of the plan is to delay for an additional 120 days the date by which Lisa must come up with the purchase price with no additional sum for payment of interest, then the plan is not proposed in good faith as it is proposed primarily to benefit a person other than the debtors." The court finds on the totality of the circumstances and on the record before the court that the Plan and the debtors proposal of the Plan are consistent with the purposes of the Bankruptcy Code for the financial rehabilitation

of family farmers and that the Plan has not been proposed primarily for the benefit of someone other than the debtors. The court therefore finds that the Plan has been proposed in good faith and not by any means forbidden by law.

9. The Plan is not feasible because the Bank is entitled to an equitable lien on the cherry crop. The objection is overruled. The court has sustained the Bank's objection based on its claim of a lien on and/or security interest in the 2005 cherry crop. Furthermore, the Bank has provided no evidence (other than the assertion of the objection) or authority showing that it is entitled to an equitable lien on the 2005 cherry crop.

10. The Plan is not feasible because the Bank is entitled to an equitable lien on the walnut crop. The objection is overruled. The court has sustained the Bank's objection based on its claim of a lien on and/or security interest in the 2005 walnut crop. Furthermore, the Bank has provided no evidence (other than the assertion of the objection) or authority showing that it is entitled to an equitable lien on the 2005 walnut crop.

11. The Plan violates the best interests of creditors test set forth in 11 U.S.C. § 1225(a)(4). The objection is overruled. The Bank does not dispute the asset values. The debtors intend to collect the receivable described in the objection. The debtors have shown that the liquidation test is met.

12. The Plan does not provide an adequate interest rate on the Bank's Class 2A claim. This issue was a subject of the evidentiary hearing on May 19, 2005. No evidence on the

appropriate interest rate was submitted by the debtors or the Bank. A secured claim is only entitled under 11 U.S.C. § 1225(a)(5)(B)(ii) to interest at a rate sufficient to meet the present value criteria set forth in that section. Debtors propose to pay creditor's Class 2A claim interest of 6% until the property is sold or surrendered. The burden of proving the appropriate rate belongs to creditor. Till, et ux. v. SCS Credit Corporation, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The rate starts at prime and is adjusted upward by an appropriate risk factor. The court takes judicial notice pursuant to Federal Rule of Evidence 201 that the prime rate on the date of the evidentiary hearing, May 19, 2005, was 6.0% as reported by the Federal Reserve System. See http://www.federalreserve.gov/releases/h15/update/. The court further takes judicial notice of the fact that the prime rate remains 6% as of the date of this ruling. The debtors have included a risk adjustment of 0%. The Bank has failed to carry its burden of showing that any risk adjustment is necessary, and the Bank has therefore failed to carry its burden of showing that the debtors' proposed rate is insufficient. Therefore, this objection is overruled.

Because the court has sustained the Bank's objection regarding the elimination of its lien on and/or security interest in the 2005 cherry and walnut crops, the debtors have failed to carry their burden of showing compliance with all of the requirements of 11 U.S.C. § 1225(a), specifically 11 U.S.C. §

1225(a)(5). Therefore, confirmation is denied without prejudice to the debtors' ability to bring further proceedings to address that objection. The court will issue a separate order.

Dated:

/s/ Thomas C. Holman
United States Bankruptcy Judge