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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**TIMOTHY NEAL
HAGADONE and LERIESA
MARIE HAGADONE,**

Debtors.

Case No. **19-60551-BPH**

ORDER

At Butte in said District this 2nd day of April, 2020.

In this Chapter 12¹ bankruptcy, a telephonic status hearing was held April 2, 2020 (“Status Hearing”), to discuss the telephonic confirmation hearing scheduled for April 3, 2020 (“Confirmation Hearing”).² In conjunction with the Court’s preparation for the Confirmation Hearing, the Court noted that on March 31, 2020, Debtors filed a Fourth Amended Plan. ECF No. 244. On April 1, 2020, American State Bank & Trust Company (“Bank”) filed an objection to confirmation and motion to strike Debtors’ Fourth Amended Plan. ECF No. 249. Further, the Bank had pre-filed 31 exhibits in connection with the hearing. ECF No. 246. The combination of the filing of the Fourth Amended Plan on the eve of the hearing on confirmation of the Third Amended Plan, Bank’s objection and motion to strike the Fourth Amended Plan caused the Court real confusion as to how Debtors’ intended to proceed.³

¹ Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all “Rule” references are to the Federal Rules of Bankruptcy Procedure, and all “Civil Rule” references are to the Federal Rules of Civil Procedure. All references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court.

² Hearings are being held telephonically as a result of various government restrictions on social interaction to prevent the spread of the Coronavirus.

³ The Court is also sensitive to the limitations of trying to have a contested telephonic hearing on confirmation particularly where a party may seek to rely on 31 exhibits, and question a witness appearing remotely using those

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To assist the Court with its preparation for the Confirmation Hearing, the Chapter 12 Trustee, counsel for Debtors and the Bank participated in a Status Hearing, and that conference assisted the Court. First, the Bank’s opposition is centered on “feasibility.” To buttress their arguments, the Bank has assembled a carefully curated set of pre-filed exhibits that include: Historical Income and Expenses 2011 – 2018; Proof of Loss crop insurance 2019; Redacted Tax Returns 2011-2018; and Monthly Operating Reports. Debtors’ counsel explained that the Fourth Amended Plan was intended reflect “better treatment” for the Bank that the Third Amended Plan. However, the Bank advised the Court that in its view, its treatment under the Third Amended Plan was better. When the Court inquired to the extent of time Debtors’ counsel and the Bank spent on the telephone “negotiating” plan treatment, the consensus was very little.⁴

The Court noted for both parties that a feasibility objection could be resolved in the Bank’s favor, and if so, given the duration of this case to date, dismissal may accompany such a decision. Alternatively, the objection could be overruled, and the Bank may find itself locked in a plan with provisions it considers unfavorable. Whether a chapter 12 plan satisfies the feasibility test for confirmation under § 1225(a)(6) is a factual determination that is reviewed by the appellate court for clear error.

The Court’s comments were informed by its familiarity with the following discussion of § 1225(a)(6):

[t]he debtor is not required to guarantee the ultimate success of his plan, but only to provide a reasonable assurance that the plan can be effectuated. However, this reasonable assurance must rise above bare agronomic feasibility. . . . a technical agronomical feasibility determination generally includes a variety of assumptions and the likelihood that these assumptions will occur must be determined by the Court. . . . Because past behavior and productivity are excellent indicators of future productivity,

31 exhibits.

⁴ This was shocking. Both counsels are professional and have a record of serving their client’s interests.

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courts have frequently rejected plans which are premised on highly optimistic projections of increased production.

Miller v. Nauman (In re Nauman), 213 B.R. 355, 358 (9th Cir. BAP 1997) (internal citations omitted). And,

[T]he benefit of the doubt in Chapter 12 cases will be given to farmers, if it appears that a reasonable chance of meeting their payments as projected under a plan [sic].

In re Rugg, 8 Mont. B.R. 457 (Bankr.D.Mont.1990). See also, *In re Toso*, 2007 WL 7540985 (9th Cir. BAP 2007). In these cases, creditors often point to past performance, while debtors rely on projections. Ultimately, neither the creditors, debtors, or even experts can predict with reliable accuracy the innumerable variables that must align for agriculture and ag lending to be successful.

This Court is prepared to adjudicate the disputes that exist between debtors and creditors, but before doing so, the parties should invest efforts that are commensurate with the problem and strive to find a solution that if not ideal, falls within a range of reasonable expectations (which counsel should manage). In this case, the problem between Debtors and American Bank is a \$3,000,000 problem. Based on the statements of counsel, it appears to the Court that the parties have tried to litigate their way to a solution having spent “very little” time on the telephone discussing plan treatment.⁵ To afford the parties a final opportunity to bridge the gulf between them, and focus on the material terms of the Bank’s plan treatment including, term, interest rate, amortization, balloon, and potentially, remedies if there is a default, the parties shall engage Malcolm Goodrich as a mediator consistent with the parties agreement at the Status Conference.⁶

⁵ Notably, the Bank provided Debtors a lifeline early in the case and stipulated to various cash collateral arrangements.

⁶ To be clear, the mediator should focus on any issues that are important to the parties, and nothing in this Order should be construed as limiting the issues or manner that the parties and mediator address them.

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Accordingly,

1. Confirmation of Debtors' Third Amended Plan at ECF No. 216 is denied, and the hearing scheduled for **April 3, 2020** is vacated;

2. The Parties shall engage Malcolm Goodrich ("Goodrich") as a mediator to assist them (the Chapter 12 Trustee shall advise the mediator whether he wants to be included in the mediation) with the outstanding issues, including without limitation, plan treatment of the Bank, and any feasibility objection, or concerns that the Bank harbors;

3. The mediation with Goodrich shall occur telephonically and be completed by **April 17, 2020**, and a report advising of the outcome shall be filed no later than **April 17, 2020**;

4. If the mediation is successful, an amended plan, or stipulation that reflects the parties' agreement shall be filed on or before **April 20, 2020**;

5. If the mediation is not successful, objections by the Bank and Chapter 12 Trustee to Debtors' Fourth Amended Plan shall be filed on or before **April 20, 2020**, and all parties shall file their witness and exhibit lists on or before **April 20, 2020**;

6. A hearing on confirmation of Debtors' Fourth Amended Plan, and any amendments that result from the mediation shall be held telephonically on **Thursday, April 23, 2020, at 9:00 a.m.** To participate in the telephonic conference, the parties shall, on the aforementioned date and time, dial into the Court's telephonic conferencing system at 858-812-0972; the Numeric Access Code for the conference is 3000000# followed by 3100566#. The hearing will be conducted in the manner outlined at ECF No. 239.

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana