

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

JON S. HAARBERG and)
DONNA HAARBERG,)

DEBTORS)

VICTOR HAARBERG and)
KATHLEEN HAARBERG,)

DEBTORS)

CASE NO. BK86-1862
Chapter 11

CASE NO. BK86-1861
Chapter 11

MEMORANDUM

Relief from stay, confirmation and valuation hearings were held on October 6, 1987, and March 1, 1988. William Needler appeared for debtors at final hearing and on briefs. James McClymont and Larry Baumann appeared for FLB of Omaha and PCA of the Midlands.

Debtors are two related farm families who each filed Chapter 11 petitions on June 26, 1986. Eventually they filed a consolidated plan of reorganization. FLB and PCA voted against the plan and filed objections.

In February, 1987, PCA filed a motion for relief from automatic stay. On May 8, 1987, the parties entered into a stipulation on the record concerning such motion. Shortly thereafter debtors changed lawyers and rejected the stipulation. The two wives were not present in court and did not agree to the stipulation and the Court found that such stipulation was not binding on the debtors. Hearing on the renewed motion was set for the same time as the confirmation hearing.

Issues which are to be determined from the evidence at trial are:

- 1) Should relief be granted PCA?
- 2) Value of land in which FLB has an interest.
- 3) Value of all collateral in which PCA has an interest.
- 4) Extent of PCA security interest in Government program payments represented by commodity certificates.
- 5) Effectiveness of PCA financing statement against the property of the wives.
- 6) Which party has a right to interest on cash collateral accounts.

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DISTRICT OF NEBRASKA
AT _____ 5) _____
1987 JUN 23 1988
Judith M. Napier Clerk, U.S. Bankruptcy Court
By _____ Deputy

- 7) Applicability of Agricultural Credit Act of 1987.
- 8) Confirmability of the plan under the feasibility and absolute priority requirement of 11 U.S.C. §1129.

The Court will deal with these issues in reverse order.

8) This plan cannot be confirmed. The Court determines as a fact that it is not feasible. The estimates of income and expenses and the physical and mental input of the debtors do not reflect the actual income and expense history of the debtors. In addition, debtors propose to feed cattle provided by others, and the estimated income is necessary to the reorganization effort. The evidence that the cattle feeding would be profitable was disputed. The Court believes it would not be. In addition, as a matter of law, it cannot be confirmed.

Section 1129(b)(2)(B) requires that all dissenting unsecured creditors must be provided for before junior classes may retain any value. The plan treats PCA as an undersecured creditor, proposes that debtors will keep control of the operation and all its assets and will not pay the PCA in full. The plan cannot be confirmed. See Norwest Bank Worthington et al. v. Ahlers, 108 S.Ct. 963 (1988).

7) The Agricultural Credit Act of 1987 does apply to these debtors and PCA and FLB must give them the benefit of such Act. However, such applicability does not prohibit PCA and FLB from continuing to participate in litigation concerning plan confirmation in bankruptcy.

6) Since "cash collateral" by nature and definition is property in which the creditor has a security interest and since in this case, but for bankruptcy, creditor would have possession and use of such cash collateral, interest earned by investing it is included in the collateral of the creditor to date of confirmation.

5) The PCA continuation statement which was filed to continue perfection of a validly perfected security interest complies with Nebraska law and is effective to continue the PCA's interest in property owned by the wives. The original financing statement listed Victor, Jon, Kathleen and Donna. The continuation statement listed Victor and Jon, but specified by filing number that it continued the previously filed financing statement. The County Clerk indexed it under all four names.

The applicable law is Neb. Rev. Stat. U.C.C. §9-403 (Cum. Supp. 1986', in effect when the continuation statement was filed. It requires a continuation statement to be served by the secured party, identify the financing statement by file number and state that the original statement is still effective. The continuation

statement meets the statutory requirements. The statute does not require any debtor's names. This continuation statement listed two of the four debtors and is sufficient to provide notice to third parties that the original financing statement is still effective.

4) The PCA claims a security interest in Government program payments, some of which were paid to debtors in cash and some in commodity certificates. This Court has previously ruled in the case of In re Lehl, 79 B.R. 880 (Bkrtcy. D. Neb. 1987). In that opinion this Court analyzed the Government regulations concerning such certificates, the language on the face of the certificates, the underlying authority for agency regulations and the purpose of such regulations. The Court concluded that a creditor could not be granted a security interest in such certificates. The PCA strongly urges the Court to reconsider in light of a more recent case, In re George, ___ B.R. ___ (Bkrtcy. D. Kan. 1988). However, this Court, although respecting the thought process of Judge Pearson and general tenor of that opinion, declines to follow it. The reasoning of Judge Jackwig in the case of In re Hall, 79 B.R. 417 (Bkrtcy. S.D. Iowa 1987) is more persuasive.

The PCA has no security interest in the Government payments received in the form of commodity certificates.

3) The value of the collateral in which the PCA has an interest is \$948,957.15 less the value of the commodity certificates, plus interest accruing on the cash collateral accounts from October 6, 1987. This value is determined by accepting as correct the evidence presented by the PCA. Such evidence was more credible than that of the debtors. The land and personal property appraisers were more experienced. They used better comparables and more of them. Their information sources seemed more reliable.

Debtors claim the PCA-FLB real estate appraiser has a conflict of interest and the Court should, therefore, discount both his integrity and his opinion. The Court has carefully considered the relationship between the appraiser and an officer of the FLB-PCA and finds it to be one of landlord/tenant between the officer and the appraiser's father. It is a private business relationship, not related to this appraisal business. The appraiser's credentials are significant. He has long experience in the business of appraising, managing, and selling agricultural real estate. He explained the business dealings with the FLB-PCA officer to the satisfaction of the Court.

Debtors further suggest that FLB sales considered by FLB appraiser are not representative of the market and should not be used. The FLB appraiser used some FLB sales, explained their weight as used in formulating his opinion, and the Court finds his opinion credible.

2) The value of the land in which FLB has a mortgage interest is \$416,734 which is determined as indicated in number 3 above.

1) Relief is denied. Debtors have used cash collateral of creditor without approval and innocently. However, by the value determination made today, the Court finds PCA to be oversecured on the valuation date, October 6, 1987, and not harmed by the use of such collateral.

An issue raised, but not listed above, concerns the FLB and PCA interest, cost and attorney fees. The Court has found both creditors oversecured and both have the right to such items pursuant to Section 506 up to the value of the collateral.

In conclusion, using debtors' plan and values, the plan is not feasible nor legally confirmable. Using the values found in this opinion, the plan is less feasible and still not legally confirmable.

Separate Journal Entry shall be filed.

DATED: June 22, 1988.

BY THE COURT:


Chief Judge

Copies to:

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