UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
DONALD MARX,	)	CASE NO. BK91-82079
	)	CH. 12
DEBTOR	)	Filing 135, 140,
	)	144, 145, 151

MEMORANDUM

Hearing was held on August 2, 1993, on the Motion to Alter or Amend Order Denying Confirmation filed by debtor. Appearing on behalf of debtor was George Vinton of North Platte, Nebraska. Appearing as Trustee was Richard Lydick. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

This Chapter 12 debtor has proposed a plan which deals with only four claims. Those claims are Farmers Home Administration (FmHA) which has an allowed secured claim of $66,227.22 and which will be paid in thirty annual installments at 5% interest, with the first payment due one year after the confirmation of the plan; a $40,000.00 fully secured claim owed to a post-petition lender who provided funds to pay off the Production Credit Association's prepetition claim and which will be paid with an $8,000.00 down payment on September 1, 1993, semi-annual payments of interest and four equal annual installments of principal; a claim of a co-operative which is fully secured by patronage dividends and will be paid by a setoff to be taken by the co-op upon confirmation of the plan; a fully secured claim in the amount of $29,236.15 held by The Abbott Bank which will be paid in ten annual installments at 8% interest with the first payment due on October 13, 1992, and the remaining payments due on an annual basis thereafter.

The plan proposes, at paragraph 3.2, to be for a period of seven days commencing from the date of confirmation. Although the plan suggests, at paragraph 3.3, that any payments made during the term of the plan to impaired creditors shall be remitted to the Chapter 12 Trustee and he shall earn a fee of 5% on such payments, the reality is that no payments will be made during the seven days following confirmation and, therefore, the

Trustee will not only not distribute any funds, but will not be allowed a fee.

The Chapter 12 Trustee has objected. It is the position of the Chapter 12 Trustee that the plan must run three years and payments on impaired claims must be made through the Chapter 12 Trustee. The Court, after an earlier hearing, entered an order denying confirmation on the basis that the Trustee was correct. The debtor has requested the Court to reconsider the denial of confirmation and has cited as authority for plans running less than three years, three Chapter 13 cases.

The Court has reviewed those cases, In re Markman, 5 B.R. 196 (Bankr. E.D.N.Y. 1980); In re Harper, 11 B.R. 395 (N.D. Ga. 1981); Matter of Curtis, 2 B.R. 43 (Bankr. W.D. Mo. 1979). Each of these cases was decided early in the history of the Bankruptcy Code. The Curtis case made certain factual findings that exceptional circumstances existent in the case justified a Chapter 13 plan that was completed in less than thirty-six months. The Markman and Harper cases, without analysis of the structure of Chapter 13 or the purpose of the appointment of a Chapter 13 Trustee as a monitoring entity, simply state that Congress did not specifically require a case to remain open for three years and, therefore, the court would not require the case to remain open for three years.

The courts have now had extensive experience with the Code and with both Chapter 13 and Chapter 12 cases. The debtor suggests the issue in this case is whether a Chapter 12 case must remain open for three years. The Court, however, believes the issue to be more complex. That is: may a debtor file a Chapter 12 case, restructure obligations by changing the contract terms and forcing such terms upon the creditors, obtain confirmation of a plan which purports to pay the modified claims over time, and then close the case and leave the supervision and jurisdiction of the bankruptcy court without the court or the statutorily required trustee having an opportunity to monitor compliance with the confirmed plan and without the debtor being required to accept the cost of using the bankruptcy system while at the same time receiving the benefits of such system?

Two recent Chapter 12 decisions have required debtors who use the bankruptcy system to restructure obligations to comply with all of the provisions of Chapter 12. That is, the decisions of those two courts required that the debtors pay impaired claims through the Chapter 12 Trustee over the statutory time period authorized by the Code. See Matter of Finkbine, 94 B.R. 461 (Bankr. S.D. Ohio 1988) and In re Fulkrod, 973 F.2d 801 (9th Cir. 1992). In Fulkrod, the Ninth Circuit Court of Appeals, while

holding that the Bankruptcy Code does not authorize a debtor to make payments directly to creditors on claims modified by a plan of reorganization stated:

> Congress clearly intended that the trustee in bankruptcy play a significant role in the administration of estates under Chapter 12. Under 11 U.S.C. § 1202, the trustee is required to account for property received, ensure that the debtor makes timely payments, examine proofs of claims, oversee the discharge of the debtor, furnish information concerning the estate, make a final report and accounting, appear at hearings and perform a host of other services for the debtor and the bankruptcy court.

Fulkrod, 973 F.2d at 802.

In the case before this Court, the debtor is not paying the Farmers Home Administration or the Abbott Bank according to the terms of their contractual arrangements. The claims are modified by the plan of reorganization and the debtor is receiving significant benefit from such modifications. For example, without the use of Chapter 12, the debtor would be able to restructure the Farmers Home Administration debt only pursuant to other federal law concerning restructuring of agricultural debt, which law is not as favorable to the debtor as the bankruptcy statute is. Without Chapter 12, the debtor would be subject to state law remedies available to the Abbott Bank. As the court in Finkbine stated:

> In this voluntary bankruptcy filing, the debtors only avoid the state law consequences of their failure to pay these claims according to their terms under the opportunity granted by Chapter 12. In the absence of clear Congressional directive, it is inconsistent with the statutory scheme that offers debtors opportunities to eliminate substantial obligations, to authorize debtors to avoid the responsibility of paying the statutory trustee fee, since the trustee's office is part of the Congressionally created system that enables Chapter 12 debtors to propose a reorganization.

Finkbine, 94 B.R. at 466.

Chapter 12 gives debtors significant leverage over secured claimholders and permits debtors to make major modifications to

prepetition claims. In return for the leverage, debtors are required to submit to the administration of the case by the trustee, to pay impaired or modified claims through the trustee, report regularly to the court and the trustee, and pay trustee fees. This plan does not comply with such a statutory scheme and should not be confirmed.

By prior order, this Court has denied confirmation of this Chapter 12 plan. The motion to reconsider such denial is overruled. The debtor shall file an amended plan that complies with the statute as construed by this Court by September 15, 1993. Such plan must provide for payment to FmHA and Abbott Bank through the trustee over a three-year period. Failure to so amend will result in a dismissal of this case.

Separate journal entry to be filed.

The Clerk shall provide one copy of this order to counsel for the debtor, one copy to the Chapter 12 Trustee, and one copy to the United States Trustee.

DATED: August 25, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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DONALD MARX,	)	CASE NO. BK91-82079 A
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DEBTOR(S)	)	
	)	CH. 12
	)	Filing No. 135, 140, 144, 145, 151
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	
	)	DATE: August 25, 1993
Defendant(s)	)	HEARING DATE: August 2, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Alter or Amend Order Denying Confirmation.

APPEARANCES

George Vinton, Attorney for debtor
Richard Lydick, Trustee

IT IS ORDERED:

Motion to Alter or Amend Order Denying Confirmation is denied. See memorandum entered this day.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge