In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

BRUCE E. TIEDEMANN and TIFFANY R. TIEDEMANN	Bankruptcy No. 96-50943XS
Debtors.	Chapter 13

ORDER RE: CONFIRMATION HEARING ON DEBTORS' FIRST AMENDED PLAN

The matter before the court is the final trial on confirmation of the First Amended and Substituted Plan filed July 11, 1996 by debtors Bruce E. Tiedemann and Tiffany R. Tiedemann. United Community Bank objected to the plan. Trial was held August 7, 1996. Donald H. Molstad appeared for the Tiedemanns. Daniel E. DeKoter appeared for the Bank. Michael Dunbar appeared for the Chapter 13 Trustee. The court now issues its findings and conclusions as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(L).

FINDINGS OF FACT

Bruce Tiedemann is 32 years old. After graduating from high school he worked for Beef Specialists of Iowa for six years. He then began farming on land owned by his parents. The land included the acreage where he and his wife, Tiffany Tiedemann, now live. The acreage property includes a house, garage, outside shop, machine shed, grain storage facility and four or five hog buildings. Tiedemanns raised hogs in a farrow-to-finish operation beginning with 72 sows. They also farmed 160 acres. The Bank, formerly known as Ocheyedan Savings Bank, financed the farm operation.

In August, 1991, the Tiedemanns borrowed $26,000 from the Bank to purchase the acreage. They executed note and mortgage documents. Exhibit 2, Note 911437 and mortgage. The note called for annual payments of $4,325 each August 1 beginning in 1992. Interest accrued at an annual rate of 10.5 percent. A balloon payment was to be due when the note matured on August 1, 1996. The mortgage described the real estate as:

A tract of land in the Northeast Quarter (NE 1/4) of Section Thirty-two (32), Township Ninety-nine (99) North, Range Thirty-nine (39) West of the 5th P.M., Osceola County, Iowa, described as follows:

Starting at the NE Cor. of Said Sec. 32, also the Point of Beginning, thence South 730 Ft.; thence West 520 Ft.; thence North 730 ft.; thence East 520 Ft. to the Point of Beginning.

Tiedemanns had financial difficulties soon after the mortgage loan. On June 17, 1992, they borrowed an additional $72,000 from the Bank. They gave a second mortgage on the acreage and a security interest in their machinery, equipment and livestock. Exhibit 2, Note 921186, mortgage and

agricultural security agreement. The loan was to be repaid in monthly installments with the last payment due June 17, 1999. The balance accrued interest at a variable rate, which at the time of the note was 9.25 percent.

The Tiedemanns then expanded their hog operation. They acquired 100 to 150 more sows; they hired two employees. Bruce Tiedemann began to have health problems. His back "went out." In the fall of 1994, he suffered a mental breakdown. He was hospitalized for nine days under a suicide watch. Bruce's parents and neighbors cared for the hogs. While Bruce was in the hospital, they also sold hogs. The Bank was aware that Bruce was hospitalized and that hogs were being sold. Eventually, the entire herd was liquidated. During about the same time, the Tiedemanns were having marital difficulties. Tiffany Tiedemann moved out of the home for a time.

On March 17, 1995, the Tiedemanns filed a Chapter 7 bankruptcy petition. The Bank did not object to the dischargeability of its debt or to Tiedemanns' discharge. They received their discharge on July 11, 1995.

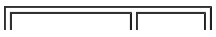
In March 1996, the Bank filed actions in Osceola County District Court to foreclose the real estate mortgage and replevin the farm equipment. On April 12, 1996, Bank obtained judgment for possession of the equipment and for writ of replevin. Exhibit 3.

On April 19, 1996, the Tiedemanns filed their Chapter 13 petition, staying the sheriff's levy. The Tiedemanns' schedules show the Bank, listed as Ocheyedan Savings Bank, as the only secured creditor, and the Osceola County Treasurer as a priority creditor. No general unsecured creditors were scheduled. On May 3, 1996, the Tiedemanns filed a plan. The Bank and the Chapter 13 Trustee filed objections. On July 11, 1996, the Tiedemanns filed their first amended plan. Docket no. 13.

The plan is funded by both debtors' wages and income from custom farming begun post-petition. Bruce Tiedemann is employed by Heartland Construction. He takes home an average of $320 to $340 per week. Tiffany Tiedemann works at Berkley's. Her average net pay is $500 every two weeks. Her employment provides health insurance benefits. The Tiedemanns have a two and a half year old child; Tiffany is pregnant with their second child.

At the end of May or in early June 1996, Bruce began custom feeding hogs for Tom Reick. Reick purchases the feed; Bruce feeds the hogs and provides the hog facilities, water, and bedding. The hogs weigh about 60 pounds when they are brought to the Tiedemanns' acreage. Bruce feeds them for about 100 to 110 days. He is paid seven cents per day per head.

Schedules I and J show Tiedemanns' net income from wages and personal expenses. At trial on confirmation, Tiedemanns for the first time disclosed figures relating to the custom hog operation including monthly income and expenses for bedding, water, electricity, fuel, repairs and taxes. Exhibit A. The Bank challenged the amounts listed for repairs and taxes. Tiedemanns showed an expense item of $400 for repairs, which combined the business expense for the hog operation with personal repair expenses. This number was not based on particular historical figures spent for repairs. Bruce testified that in the winter of 1994, when no one was living at home for some time, the house was damaged by frozen water pipes. An allowance for personal repairs would not duplicate amounts on Schedule J, which shows "0.00" for home maintenance expense. The court will assume for this discussion that the total figure is correct and will divide the amount between business and personal expense. Income from 700 hogs at $.07 per day for 30 days is $1,470 per month. Subtracting the following monthly expenses:



bedding	$250
water	90
electrical	60
fuel	100
repairs	200
	$700

leaves net income before taxes of $770. Tiedemanns listed an expense of $250 per month for tax on the income from hogs. An income tax expense of $250 on income of $770 is approximately 32 percent. Subtracting tax expense, Tiedemanns have net disposable income from hogs of $520.00. Tiedemanns' net wage income is $2,480 per month. Exhibit A. Subtracting their $1,339 personal expenses from Schedule J and $200 for personal repair expense, Tiedemanns have net disposable income from wages of $941.00, for a total net disposable income of $1,461.00 per month.

Tiedemanns propose to pay $1,011.00 each month to the trustee for 60 months. Tiedemanns' plan is an effort to keep the acreage and the farm equipment necessary for the custom hog operation. They propose to pay the Bank the value of the collateral securing its claims, which they have set at $36,000 for the real estate and $8,250.50 for the non-exempt machinery and equipment. Tiedemanns propose to pay $26,000 on the first mortgage claim over five years, with interest at ten percent, in monthly payments of $552.43; $10,000 on the second mortgage claim over ten years, with interest at ten percent, in monthly payments of $132.60; and the value of the equipment over five years, with interest at ten percent, in monthly payments of $180.00.

At trial the Chapter 13 Trustee reported that the Tiedemanns had made only the June payment, and that the payments for July and August were due. Tiedemanns tendered a check to the Trustee which would bring them current.

DISCUSSION

The Bank objects to the treatment of its two claims secured by a mortgage on the acreage; it also claims the plan has been proposed in bad faith in violation of 11 U.S.C. 1325(a)(3). Bank argues that payments on the second mortgage claim may not be stretched out over ten years but must be paid within the five-year plan term. It also argues that Tiedemanns would not be able to make the payments on a plan with a five-year amortization. Bank apparently does not object to the ten percent interest rate on the second mortgage. In its brief Bank stated that payment of the claim over five years at ten percent interest would require a monthly payment of $212.47. The evidence at trial showed that the Tiedemanns have disposable income of $450 not committed to this plan. It is not clear that an amended plan would not be feasible. However, the court agrees with the Bank that the proposed term of repayment is impermissible.

The Bank concedes that the second mortgage claim is secured by equipment in addition to real estate that is the debtors' principal residence. Tiedemanns may modify the claim. 11 U.S.C. 1322(b)(2). However, the plan may not provide for payments on the claim longer than the five-year term of the plan. 11 U.S.C. 1322(d). An exception to this limitation is found in 11 U.S.C. 1322(b)(5) which states that the plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any ... secured claim on which the last payment is due after the date on which the final payment under the plan is due." The court will assume in this case that, for purposes of 1322(b)(5), when the "last payment is due" is determined by the terms of the note, even

though the Tiedemanns' personal liability on the note has been discharged. See Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150 (1991) (mortgage interest surviving a Chapter 7 discharge is a claim). The second mortgage note is due by its terms on June 17, 1999. Because the note comes due within the proposed five-year plan period, the exception of 1322(b)(5) does not apply. The proposal to pay the second mortgage claim over ten years does not comply with confirmation requirements. In re Molitor, 133 B.R. 1020, 1021 (Bankr. D. N.D. 1991); In re Ramirez, 62 B.R. 668, 670 (Bankr. S.D. Cal. 1986); Matter of Foster, 61 B.R. 492, 494 (Bankr. N.D. Ind. 1986); In re Hildebran, 54 B.R. 585, 587 (Bankr. D. Or. 1985).

Bank objects also to the proposed treatment of its first mortgage claim. Bank argues that except to the extent of

1322(c) the claim is protected from modification by 1322(b)(2), which provides:

[T]he plan may ... modify the rights of holders of secured claims, **other than a claim secured only by a security interest in real property that is the debtor's principal residence**, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. 1322(b)(2) (emphasis added). The rights referenced in 1322(b)(2) are those bargained for between the debtor and the mortgagee, which are reflected in the mortgage documents. Nobelman v. American Savings Bank, 508 U.S. 324, 329-30, 113 S.Ct. 2106, 2110 (1993). Bank objects to the plan's proposed change in interest rate and failure to provide for cure, with interest, of the delinquency on the note.

Tiedemanns argue that because the acreage securing the Bank's claim includes a hog operation in addition to their principal residence, the claim is not "secured only by a security interest in real property that is the debtor's principal residence." The court first concludes that the Bank's first mortgage claim is protected by the antimodification clause of 1322(b)(2).

Tiedemanns cite Lomas Mortgage, Inc. v. Louis, 82 F.3d 1 (1st Cir. 1996), as authority for their position. In Lomas v. Louis, the Chapter 13 debtors owned a one-half interest in a three-family dwelling. One of the units was debtors' principal residence, the co-owner lived in another, and the third was rented to tenants. Debtors proposed to bifurcate the undersecured mortgagee's claim into secured and unsecured claims based on the value of the property. The First Circuit believed the issue, whether debtors may modify a mortgage on a multi-family dwelling, was left open by Nobelman. Lomas v. Louis, 82 F.3d at 3. Finding the language and legislative history of 1322(b)(2) inconclusive, the court turned to the legislative history of 1123(b)(5), added by the Bankruptcy Reform Act of 1994. In new 1123(b)(5), Congress used the identical antimodification language of 1322(b)(2) so that treatment of home mortgages would be the same in Chapter 11 as in Chapter 13. Id. at 6.

The House Report says of new 1123(b)(5):

This amendment conforms the treatment of residential mortgages in chapter 11 to that in chapter 13, preventing the modification of the rights of a holder of a claim secured only by a security interest in the debtor's principal residence. Since it is intended to apply only to home mortgages, it applies only when the debtor is an individual. It does not apply to a commercial property, or to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence. See In re Hammond, 27 F.3d 52 (3d Cir. 1994); In re Rameriz, [sic] 62 B.R. 668 (Bankr. S.D. Cal.

1986).

H.R. Rep. No. 834, 103d Cong., 2d Sess. 22 (1994) (discussed in Lomas v. Lewis, 82 F.3d at 6). In Ramirez, the court held that

1322(b)(2) did not prohibit the debtor's modification of a claim secured by real estate that included rental units and the debtor's residence. To the First Circuit, the reference to Ramirez as a correct statement of the law was a "clear expression of congressional intent." The court held that "the antimodification provision of 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units." Lomas v. Louis, 82 F.3d at 7.

In Lomas v. Louis, the court discussed two readings of the language of 1322(b)(2). 82 F.3d at 3-4. Under the first reading, a home mortgage claim is modifiable if it is also secured either by personal property or an additional parcel of real estate. The court determines whether there is in fact additional security other than the real property on which debtor's home is located. See Hammond v. Commonwealth Mortgage Corp. of America (In re Hammond), 27 F.3d 52, 57 (3d Cir. 1994) (finding security in "appliances, machinery, furniture and equipment" was additional security in personal property); In re Hink, 81 B.R. 489, 490 (Bankr. W.D. Ark. 1987) (commercial office building was collateral in addition to house and 18 acres of rural farmland).

The second reading of 1322(b)(2) views the word "is," in the phrase "real property that is the debtor's principal residence," as requiring exclusive identity between the real property and the debtor's principal residence. In Adebanjo v. Dime Savings Bank of New York (In re Adebanjo), 165 B.R. 98 (Bankr. D. Conn. 1994), the debtors were permitted to modify a claim secured by a three-family dwelling. The court said:

[W]here the security includes property which is not intended for occupancy by the debtor's family, but is intended for use by one or more other families or by a commercial concern, the claim is not protected. ... The terms "real property" and "principal residence" are thus equated, suggesting that real property which is designed to serve as the principal residence not only for the debtor's family but for other families is not encompassed by the clause.

Adebanjo, 165 B.R. at 103-04. See also In re McGregor, 172 B.R. 718, 720 (Bankr. D. Mass. 1994) (antimodification clause describes an equivalence between real estate and residence; claim secured by "entire building, which includes both [debtor's] principal residence and three income-producing units" is modifiable).

In cases involving rental property, the Adebanjo reading of 1322(b)(2) can be reconciled with the reading requiring additional collateral. When property is actually used to generate rental income, a creditor's security interest in rent gives it valuable security in addition to the value of the real estate alone. Similarly, in other mixed-use contexts, if a commercial use creates the value that the lender is actually relying on for its security, it can be fairly said that the creditor holds security in collateral other than the home, even if the collateral describes one parcel of real property.

Engaging in business activity on the premises containing the debtor's residence is not enough alone to deny a creditor the protection of 1322(b)(2). Matter of Torres Lopez, 138 B.R. 348, 351 (D. P.R. 1992). However, several cases have allowed modification of debt secured by real property when the

debtor was engaged in significant commercial use of the property at the time of the loan, despite the presence of the debtor's home on the property. In In re McVay, 150 B.R. 254, 257 (Bankr. D. Or. 1993), the court held that the debtors' bed and breakfast inn had "inherent income producing power." The debtors were actually engaged in a commercial use and the creditor was aware it was making a commercial loan. In In re Hines, 64 B.R. 684, 686 (Bankr. D. Colo. 1986), the bank loaned debtor, a fruit grower, $20,000 to build a fruit drying facility on his 20-acre farm. The court found that the bank knew the purpose of the loan was commercial; in addition to the debtor's home, the bank was secured by the rest of the farm. In Matter of Leazier, 55 B.R. 870 (Bankr. N.D. Ind. 1985), the debtor purchased an 80-acre farm on contract. The court apparently viewed the presence of the debtor's home on the farmstead as incidental and believed this was not the typical home mortgage situation Congress had in mind for protection under 1322(b)(2). The nature of the vendor's financing was "fundamentally different from that of a 1322(b)(2) creditor. She is financing an extensive tract of income-producing crop land." Id. at 871. See also In re Molitor, 133 B.R. 1020, 1022 (Bankr. D. N.D. 1991) (debtor-purchaser of 1,920 acres under contracts for deed; creditor had additional security in farmland);

Matter of Foster, 61 B.R. 492, 495 (Bankr. N.D. Ind. 1986) (following Leazier; Federal Land Bank's financing of 162-acre farm was commercial lending).

In two cases, the courts made a threshold finding that the debtors used the land for no other purpose than for their principal residence. Federal Land Bank of Louisville v. Glenn (In re Glenn), 760 F.2d 1428, 1441 (6th Cir. 1985), *cert. denied by* Miller v. First Federal of Michigan, 106 S.Ct. 144 (1985); In re Ballard, 4 B.R. 271, 276 (Bankr. E.D. Va. 1980). In Lievsay v. Western Financial Savings Bank (In re Lievsay), 199 B.R. 705, 709 (9th Cir. BAP 1996), the Chapter 11 debtor used his residence property as his business office. Construing

1123(b)(5), the court refused to permit modification of the mortgagee's claim absent proof that "this use added significant value to the property or that the bank relied on the additional security offered by his home office."

The rule of the cases seems to be that debtors may modify a claim secured by real estate where their home is located if there is a mixed use of the property such that the loan is a commercial loan or the income-producing use provides the creditor with additional collateral.

Tiedemanns have not argued that the Bank has additional collateral by virtue of the mortgage document; the court finds that the Bank does not. The mortgage document is on an Iowa State Bar Association form. It grants collateral described in three paragraphs. The first paragraph gives a security interest in the land and buildings and sets out the legal description of the real property. The second paragraph, titled "Personal Property," defines the collateral as items "integrally belonging to, or hereafter becoming an integral part of the Land or Buildings ...." The third paragraph grants an interest in "rents, issues, profits, leases, condemnation awards and insurance proceeds now or hereafter arising from the ownership, occupancy or use of the Land ...." The court concludes that these boilerplate items are inherent in the real property itself and do not provide the Bank with other collateral for purposes of 1322(b)(2). Allied Credit Corp. v. Davis (In re Davis), 989 F.2d 208, 212-13 (6th Cir. 1993).

Although Tiedemanns were engaged in commercial activity on the acreage when the first mortgage loan was made, the evidence does not show the loan was other than a home mortgage loan. The loan was a purchase money loan for purchase of land that included the debtors' home. The mortgage documents do not indicate a commercial purpose. Cf. Exhibit 2, Agricultural Security Agreement dated June 17, 1992 (granting security interest in livestock and equipment). In the cases discussed

above dealing with purchase of farmland, the amount of land seemed to be a factor in deciding whether the loan was a commercial loan or whether the creditor had additional collateral. Here, the Tiedemanns' property is a relatively small parcel; the presence of the home is not incidental. Moreover, Tiedemanns' use of the land to feed hogs does not provide the Bank with additional valuable collateral. Bank does not have a security interest in livestock. The court concludes that the Bank's first mortgage claim is a "claim secured only by a security interest in real property that is the debtor's principal residence" within the meaning of

1322(b)(2).

An exception to 1322(b)(2) is found in 1322(c)(2) which provides:

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. 1322(c)(2). Congress added 1322(c) as part of the Bankruptcy Reform Act of 1994 in response to court decisions restricting debtors' ability to treat home mortgages. See generally 5 Collier on Bankruptcy 1322.14B (15th ed. 1996). The "last payment" on Bank's first mortgage claim is due before the final payment under Tiedemanns' plan is due whether one considers that the entire claim was due pre-petition or that the note matured by its terms August 1, 1996. Moreover, the last payment would be due before the final plan payment even if Tiedemanns had proposed a three-year plan. By proposing a five-year plan, they are not acquiring a right to modify that they would not have otherwise had; Bank is not prejudiced to that extent.

Bank concedes that 1322(c)(2) is applicable to its claim and permits modification of the claim to some extent. Bank appears to take the position that Tiedemanns may pay the balloon over the term of the plan, but that 1322(b)(2) and 1322(c)(1) require Tiedemanns to pay the balloon with the contract rate of interest and to "cure the default" on the note payment which would have been due by the terms of the note August 1, 1995.

Section 1322(c)(1) provides:

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.

11 U.S.C. 1322(c)(1). This section is a permissive timing rule rather than an additional requirement for cure. See 5 Collier on Bankruptcy 1322.14A (statute intended to overrule case law prohibiting cure after foreclosure judgment). Tiedemanns are not curing and reinstating the note. They are paying the claim under 1322(c)(2). Bank's proof of claim, in the total amount of $138,911.95, combines a

number of notes. Exhibit 2. It is not clear what the amount of Bank's first mortgage claim is. The parties assume that it is less than the fair market value of the real estate. Tiedemanns have rounded the amount to $26,000. After the Tiedemanns' discharge in Chapter 7, the claim continued as a claim against the property. The claim accrued interest because it was oversecured. The claim is due in full. However, the installment payments under the note do not require separate plan treatment as part of the claim. Thus, the plan is not objectionable for debtors' failure to separately cure their 1995 installment default.

This plan cannot be confirmed as filed. The court will not decide today the meaning of the provision of 1322(c)(2) that "the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5)." The parties did not litigate the issue. Compare In re Young, 199 B.R. 643 (Bankr. E.D. Tenn. 1996) with United Companies Lending Corp. v. Witt (In re Witt), ___ B.R. ___, 1996 WL 471204 (W.D. Va. 1996). Nor will the court decide the issue of the appropriate interest rate, which may depend on interpretation of 1322(c)(2). There was no evidence at trial on the market rate or its relation to the contract rate. These issues can be litigated, if necessary, if Tiedemanns file an amended plan.

Bank also contends Tiedemanns' plan was proposed in bad faith. The Bank points to the timing of the Chapter 13 petition as evidence that Tiedemanns do not desire to pay their debts. The Chapter 13 petition followed a Chapter 7 case in which the Tiedemanns received a discharge of all unsecured debts. After the Chapter 7 case was closed, the Bank filed mortgage foreclosure and replevin actions. Tiedemanns filed their Chapter 13 petition approximately a week after the Bank had obtained judgment for replevin of their machinery and equipment. In Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150 (1991), the Supreme Court held that a debtor with a mortgage interest that survives a Chapter 7 discharge has a claim that may be treated in a Chapter 13 case. The Court noted that the Bankruptcy Code prohibits certain other serial filings, but does not categorically prohibit a Chapter 13 case following a Chapter 7. Id., 501 U.S. at 87, 111 S.Ct. at 2156. Filing a so-called "Chapter 20" case is not in itself bad faith. Bruce Tiedemann said the debtors' marital problems affected the decision to file initially as a Chapter 7 rather than Chapter 13. His testimony suggests he may have misunderstood the consequences of the previous Chapter 7 proceeding. The Tiedemanns' delay in filing the case was explained in part by the need to secure funds for their attorney's retainer.

The Bank alleges that the Tiedemanns converted collateral, which is further evidence of their bad faith. In Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346 (8th Cir. 1990), the court said that the good faith analysis requires consideration of the totality of the circumstances of a case. One factor is whether the debt treated in the Chapter 13 plan would be nondischargeable in Chapter 7. Id. at 1348-49 & n.4. Some of the conduct complained of took place before the Tiedemanns filed their Chapter 7 petition. The Bank did not raise dischargeability or discharge issues in the Chapter 7 case. Tiedemanns' personal liability on the Bank's claims is discharged. Moreover, the Bank did not prove that the conduct complained of would have made the debt nondischargeable even if the Tiedemanns were now still personally liable. Bank President David Gonnerman testified that he believed the Bank did not receive all the proceeds from the liquidation of the hog herd. At least some of the hog sales took place while Bruce Tiedemann was hospitalized. There was no evidence regarding hog sales by Bruce after that time.

The Bank claims that Bruce Tiedemann disposed of equipment without authorization. The collateral securing the second mortgage loan included a 1086 tractor and an "M" tractor. Bruce Tiedemann testified that the 1086 was "swapped around" for a more valuable 1486 tractor; he implied that he gave replacement collateral with the knowledge and permission of the Bank. He also said that because he did not need the "M" tractor at present, he allowed his father-in-law to use it on a farm in Spirit

Lake. Gonnerman denied giving permission to dispose of the 1086 tractor. The Bank does not challenge the Tiedemanns' valuation or terms of repayment of the value of the machinery and equipment. The court concludes that the evidence relating to hog sales and use of the tractors does not tend to show that the plan was proposed in bad faith.

The evidence at final trial showed that Tiedemanns have income of $450 each month that is not being committed to the plan. Normally, the debtors' ability to pay is not part of the good faith analysis because the disposable income test is an additional confirmation requirement under 11 U.S.C. 1325 (b). LeMaire, 898 F.2d at 1349. In the Tiedemanns' case, 1325(b) is not applicable because there are no unsecured creditors. The unsecured claims were discharged in the Chapter 7 case. In this situation it seems highly relevant to the issue of the debtors' good faith whether they are making their best effort to pay the Bank's claim. It may be partly due to error that the income and plan payments do not match up. At the time of filing the Chapter 13 petition, Tiedemanns did not have hogs on their acreage. Their first plan and schedules were based on income and expenses only from wages. At the time the amended plan was filed, the Tiedemanns apparently had not yet discussed their hog expenses with their attorney. The exhibit showing income and expenses from the hog operation was prepared shortly before trial. The court would not confirm a plan that leaves such a significant amount of disposable income uncommitted to plan payments. If an amended plan is filed, failure to commit disposable income would be considered as a factor in deciding whether the plan was proposed in good faith. However, the court does not deny confirmation of this plan on the ground that it was proposed in bad faith.

IT IS ORDERED that confirmation of the Debtors' First Amended and Substituted Plan of Reorganization filed July 11, 1996 is denied. Judgment shall enter accordingly.

SO ORDERED THIS 3rd DAY OF OCTOBER 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Donald Molstad, Daniel DeKoter, Carol Dunbar and U. S. Trustee.