SO ORDERED.

SIGNED this 6th day of September, 2019.

Robert E. Nugent
United States Bankruptcy Judge

DESIGNATED FOR ONLY ONLINE PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE: **GRAVES FARMS,** **Debtor**	**Case No. 18-10893** **Chapter 12**
IN RE: **HAROLD DEAN GRAVES** **KAREN LYNN GRAVES** **Debtors**	**Case No. 19-10064** **Chapter 12**
IN RE: **MICHAEL KEITH GRAVES** **RACHELLE RAE GRAVES** **Debtors.**	**Case No. 19-10982** **Chapter 12**

ORDER DENYING DEBTORS' MOTION TO RECONSIDER THE ORDER DENYING CONFIRMATION OF JOINT PLAN

To prevail on a Rule 59(e) motion to alter or amend judgment, a party must show the law has changed since the order's entry, that new, previously unavailable, evidence has come to light, or that the court committed clear error—in other words, that the Court misapprehended the facts, the law, or a party's position.

Debtors Graves Farms, Michael Graves, and Dean Graves argue that in denying confirmation of their joint plan, the Court misapprehended the "position" and function of non-debtor Kylee Graves. They now assert, for the first time, that Ms. Graves has succeeded to the debtor partnership's business and affairs, making the Court's analysis of the partnership's precarious legal status irrelevant. They also say that the Court misunderstood the plan's terms, and finally, that the Court's concerns about late planting caused by this year's unusual weather have been alleviated by what, so far, appear to be healthy and successful crops. Despite the critical inconsistencies between the Joint Plan's terms and its proponents' testimony, the Court understood that what the debtors and Ms. Graves broadly contemplated was combining all of the family's farming assets and operations under Kylee Graves's umbrella to pay claims of the three bankruptcy estates and to service her debts. That solution doesn't work in bankruptcy, however, when the principal secured creditor does not agree to its treatment. What the debtors propose

in this motion is simply reargument of positions they argued at trial. The motion to reconsider is denied.[1]

Rule 59(e) Standards

The federal procedural rules do not specifically recognize a post-trial motion for reconsideration.[2] Rather, a motion "to reconsider" that is timely filed and draws into question the correctness of the trial court judgment is treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).[3] Fed. R. Bankr. P. 9023 makes Rule 59, as modified, applicable in bankruptcy cases. A motion to alter or amend the judgment of a bankruptcy court must be filed no later than 14 days after entry of the order.[4] The debtors' motion to reconsider is timely filed and will be considered as a Rule 59(e) motion to alter or amend the order denying confirmation of the joint plan.[5]

Motions to alter or amend judgment serve a limited purpose. Such motions seek a substantive change in the challenged judgment or otherwise question its substantive correctness.[6] They are appropriate when a court has misapprehended

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[1] On September 5, 2019, the Court heard oral argument on the motion. Unless otherwise noted, all docket number references shall be those docket entries in *Graves Farms,* No. 18-10893, the lead case in these jointly administered Chapter 12 cases.

[2] *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991). By local rule, the District Court of Kansas recognizes a motion to reconsider non-dispositive orders and applies the same standards as a motion to alter or amend under Rule 59(e). *See* D. Kan. Rule 7.3(b)

[3] *Id. See also Hayes Family Trust v. State Farm Fire & Casualty Co.,* 845 F.3d 997, 1004 (10th Cir. 2017); *In re 6 & 40 Investment Group*, 752 F.2d 515, 516 (10th Cir. 1985).

[4] *See* Fed. R. Bankr. P. 9023. *Cf.* Fed. R. Civ. P. 59(e) providing 28 days from entry of judgment to file a motion to alter or amend in a non-bankruptcy case.

[5] Doc. 177, filed on the fourteenth day after entry of the Memorandum Opinion denying confirmation.

[6] *Yost v. Stout,* 607 F.3d 1239, 1243 (10th Cir. 2010) (the court looks beyond the label or form of the motion to the substance of the relief requested).

the facts, a party's position, or controlling law.[7] Generally, a Rule 59(e) motion is not an occasion to revisit issues already addressed or advance arguments that were or could have been raised previously.[8] Grounds warranting a motion to alter or amend include (1) an intervening change in the controlling law; (2) new evidence previously unavailable,[9] and (3) the need to correct clear error or prevent manifest injustice.[10] The debtors' motion asserts I misapprehended their position and committed clear error in denying confirmation.

Procedural History

The Joint Plan was the partnership's effort to amend its first plan, while folding into the mix provisions for the individual partners to deal with their tax liabilities and other claims.[11] I denied confirmation of the partnership's first plan because it lacked historical cash flow information, robbing the creditors of any ability to measure its feasibility.[12] In that order, I remarked about the plan's failure to clarify the position vis-à-vis the partnership of Ms. Graves who appeared to have taken over the farming operation. In the Joint Plan, Ms. Graves is referred to as the

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[7] *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). *See Van Skiver*, 952 F.2d 1241, 1244 (arguing that the court misapplied the law or misunderstood their position are proper grounds for a Rule 59(e) motions).

[8] The Tenth Circuit has recognized a limited circumstance when a party may reargue it previous position. In *Hayes Family Trust,* it stated that a Rule 59(e) motion "certainly" allows a party to reargue previously articulated positions to correct "clear legal error." 845 F.3d 997, 1005 (challenging an order confirming an appraisal award).

[9] *Tuttle v. ANR Freight Systems,* 1992 WL 95412 at *3, 962 F.2d 18 (Table) (10th Cir. 1992) (Evidence that a party held back as a matter of trial strategy can't be considered newly discovered evidence.)

[10] *Servants,* 204 F.3d at 1012; *Brumark Corp. v. Samson Resources, Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

[11] Doc. 134.

[12] Doc. 120.

"principal of the farming operation," even though she is not a partner of the partnership, an owner of any of the farm assets (other than her own), or a debtor under this Court's jurisdiction.[13] The Joint Plan proposed that Ms. Graves would acquire the partnership's assets on confirmation, paying for them by assuming the secured claims of RCB Bank in rem. But Ms. Graves testified that she would not receive title to the assets until she had completed making the payments the plan contemplated.[14] Though not set out in the Joint Plan, she testified that she would employ her father, Mike, and pay him a salary to work on the farm with her.[15] The cash flow projections also contemplated paying an "owners draw," a payment the Court naturally assumed would be paid to an "owner."[16] Mike and Dean, the general partners of Graves Farms, would use their partnership distributions and earnings to pay their personal federal priority income tax liabilities.[17] Kylee and Mike testified that the general idea was that Kylee would run the operation with Mike's help so that the family could retain the partnership assets and so Dean

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[13] Doc. 134, p. 1.

[14] *See* Doc. 134, pp. 7-8 treatment of RCB's Class 2 secured claims and referring to partnership real estate and personal property to be "sold" to Kylee, who will pay RCB's claim, and p. 5, ¶ 13 indicating that the partnership will have no remaining assets at the end of the plan term. *Cf.* Doc. 134, p. 5, ¶ 13 plan summary indicating partnership real estate and farm equipment "will be paid for by Kylee Graves in her farm operations and acquired by Kylee and Mike."

[15] Kylee indicated that the $30,000 line item expense for "labor" in the projections was Mike's W-2 wages. *See* Ex. 4.

[16] Ex. 4. Nothing in the body of the Joint Plan refers to these owner draws.

[17] Although the non-priority personal tax liabilities were to be paid with debtors' disposable income as Class 8 unsecured claims, the Joint Plan states that there is "no substantial contribution available from the partners available [sic] for repayment of unpaid claims in this proceeding." Doc. 134, pp. 3-4, ¶ 6. The projections utilized at trial did not include either Mike's or Dean's disposable income nor the priority tax liabilities on the expense side. *See* Ex. 4.

Graves could keep his homestead. Kylee would borrow in her own right and manage her own cattle while farming ground leased in her name, all for the benefit of the family enterprise.

Analysis

Careful review of the Joint Plan, debtors' cash flow projections (Ex. 4), and this Court's Opinion[18] turned up no "misapprehensions" of fact or law. I recognized early in the opinion that Kylee had been designated the farm's "principal," but also noted that her contractual or legal relationship to the partnership remained largely undefined—an issue discussed in both confirmation denial orders. As for the idea that, as the "principal," Kylee controlled and effectively "became" Graves Farms, the Joint Plan doesn't say that. Instead, it provides—

> Submission of income. The *Debtors* shall each pay to the trustee such portion of the *Debtor's* [sic] earnings and other future income as is necessary for the execution of this Plan.[19]
>
> Except as hereinafter specified in the Plan, confirmation of the Plan shall vest all assets of the estate in the *Debtor*….[20]
>
> Except as noted to be paid directly, all payments to be paid during the plan shall be paid to the Trustee….[21]
>
> *Debtor's* [sic] Plan proposes to *retain* certain real estate and farm equipment which will be paid for by Kylee Graves in her farm operations and acquired by Kylee *and Mike*.[22]

[18] Doc. 172.
[19] Doc. 134, p. 2, § A.1.
[20] *Id.* at § A.2.
[21] *Id.* at p. 3, § A.5.
[22] *Id.* at p. 5, § A.13. Emphasis added.

It was fair to read the words "debtor" and debtors" in these passages to refer to the partnership and individual debtors, not Kylee Graves. The Joint Plan and the cash flow exhibit suggested that Kylee's efforts would be dedicated to the payment of the partnership's debts, not that she had "become" the debtor.

Kylee is not an owner of either the partnership or individual estate assets. Indeed, the Court gave debtors and Kylee the benefit of the doubt when she testified directly contrary to the Joint Plan's terms concerning receiving title to the partnership's land and equipment. The Joint Plan says—

> The Poovey Ground *will be sold to Kylee* for its present value as previously found by the Court. [The sale price of $280,000] will be amortized over 30 years … commencing November 1, 2019 …and a balloon payment on November 1, 2023.[23]
>
> The portion of the Bank's claim secured by personal property *to be sold to Kylee*…shall be allowed in the amount of $411,000 to paid over a seven-year amortization ….[24]
>
> The Home Place . . . *will be sold to Kylie [sic]*, who will pay the lien of RCB . . . in the principal amount of $288,000 to be amortized over 30 years . . . commencing December 1, 2019 . . . and a balloon payment on December 1, 2023.[25]

These words suggested that the property would be sold to Kylee upon confirmation, but she testified that she would not take title until the secured claims had been paid in full. The Court credited Kylee's testimony that the partnership would pay its claims with income from farming operations that she would manage, even though the Joint Plan doesn't say that.

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[23] *Id.* at p. 7, § D Class 2(a). Emphasis added.
[24] *Id.* at § D Class 2(b). Emphasis added.
[25] *Id.* at p. 8, § D Class 2(c). Emphasis added.

As for the idea that the "owners draw" would be payable to Kylee (not the partners), first raised in the motion to reconsider,[26] the Joint Plan is silent regarding owner draws or distributions. The cash flow projections filed in support of the Joint Plan as well as the revised projections advocated at trial, propose an "owners draw" as part of the partnership's debtor's expenses.[27] Partnerships are owned by their general partners. Ms. Graves isn't one. Nor did anyone testify to Ms. Graves receiving an "owners draw." Instead, the testimony was that she or the partnership would pay Mike for his services and that he would use that money to pay his plan payments on his individual debts and tax liabilities.[28]

The debtors' view that "[o]nce the Joint Plan is not construed as continuing to operate the partnership, the Court's concerns are addressed" simply ignores partnership law.[29] The debtors seem to agree that the partnership is being wound up in the case, but they deny that it is required to make payments under the plan. The Joint Plan doesn't say that.[30] Only now do the debtors argue that the Joint Plan provides for the partnership to wind up, but what the Plan says is that Kylee will receive the partnership's assets after clearing the liens that encumber them and Mike will receive the Home Place subject to FSA's mortgage. That is what Kylee and Mike testified to as well. The Court understood what the debtors wanted

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[26] *See* Doc. 177, p. 3.
[27] *See* Doc. 134-4 and Trial Ex. 4.
[28] Counsel stated at trial that the Court could rely on the individual debtors' schedules I/J to determine whether their plans were feasible.
[29] *See* Doc. 177, p. 5.
[30] Doc. 134, p. 2 requires all three debtors to pay their earnings and future income to the Chapter 12 trustee as necessary to execute the Joint Plan, and p. 5 states that "[a]t the end of the plan term, Graves Farms will have no remaining assets and dissolve."

to do, but was not convinced that their plan was a legally appropriate means of winding up the entity.[31] A proper winding up would require that the assets of Graves Farms, including Dean's and Mike's capital, be applied to pay the Graves Farms' obligations in full. Thereafter, each partner would receive a distribution, but only if a surplus remained after all the other debts were paid.[32] That is not at all what the Joint Plan proposes.

Partnership creditors are entitled to receive partnership assets or their proceeds at winding up. They may agree to accept those payments over time, but the Kansas Revised Uniform Partnership Act doesn't require them to do that. Rather, KAN. STAT. ANN. § 56a-807(a) provides that, at winding up, "the assets of the partnership, including the contributions of the partners required by this section, *must be applied to discharge its obligations to creditors* …."[33] Partners are entitled to "a settlement of all partnership accounts *upon winding up* the partnership business."[34] Both these statutory provisions suggest that winding up takes place in the near term, not on the installment plan.

Finally, the debtors note through photographs that, despite dire predictions of crop failure voiced by RCB Bank at the hearing, Kylee's crops are faring well at this time. And, based on Kylee's testimony, it is clear these are *her* crops, not the partnership's. The Joint Plan reflects that all of the partnership's farm leases have

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[31] Only a partner, or someone designated by a court, may wind up the partnership. KAN. STAT. ANN. § 56a-803.
[32] KAN. STAT. ANN. § 56a-807(a) and (b).
[33] KAN. STAT. ANN. § 56a-807(a). Emphasis added.
[34] KAN. STAT. ANN. § 56a-807(b). Emphasis added.

expired. Kylee testified that she had taken over those leases in her name and borrowed on the growing crops for input financing. She proposes to use income from those crops to pay the partnership's expenses as well as her own. The Court found that feasibility of the partnership's plan was a close question, based upon the evidence presented at the confirmation hearing.

But Dean's and Mike's plans' feasibility is not a close question. Neither will receive any draw from the partnership—RCB Bank has what is essentially a lien on Dean's draw and it *owns* Mike's--and it is difficult at best to see how they can service their sizeable tax obligations based on their income and expense schedules filed in their cases.[35] Debtors state that nothing in the Joint Plan calls for money to be paid to the partnership and therefore, the charging orders will net nothing because "there is nothing for the charging order to attach to."[36] That defies legal sense—if there is recognizable partnership income in excess of expenses, that surplus is subject to the charging orders.

The debtors had the burden of proof on confirmation. It was incumbent upon them to present a coherent explanation of their Joint Plan and their projections that supported its feasibility, and to demonstrate compliance with confirmation requirements. It was also the debtors' burden to draft a plan that clearly articulated their intentions, as is the case for any contract. The Court is mindful that at trial, debtors offered little testimony to elaborate on the differences between

[35] The Joint Plan itself acknowledges that the individuals are unable to make a "substantial contribution" to repayment of claims. Doc. 134, p. 4, ¶ 6.
[36] Doc. 177, p. 6.

the cash flow projections offered at trial (Ex. 4) and those it had offered when the Joint Plan was filed.[37] The Court to a large degree was left to its own devices to reconcile plan ambiguities and omissions, assess testimony inconsistent with plan terms, and interpret the cash flow projections presented. A motion to alter or amend is not the appropriate forum to try, for the third time, to explain, clarify, or refine the plan terms.

Combining the Graves' debtors' enterprises with Kylee's farm makes for a constructive and creative term sheet, but this Court can't cram that proposal down on RCB Bank without its consent as a lienholder and, now, the transferee of one-half of the partnership equity. The debtors essentially reargue now what they argued at trial (and, indeed, at the first confirmation hearing). That is not enough to show that the Court misapprehended the facts, the law, or their positions in this case. The motion to reconsider is DENIED.

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[37] The debtors disclosed that they had abandoned planting a cotton crop shortly before trial; as a result, they had to make up nearly $370,000 in lost crop income between the projections as filed and those presented at trial, Ex. 4.