

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Southern Division

In re: ) Bankr. No. 01-40853  
 ) Chapter 11  
KING SEA RESTAURANT NO. 3, INC. )  
Tax I.D. No. 46-0441424 ) DECISION RE:  
 ) CONFIRMATION OF PLAN  
Debtor. )  
 )

The matters before the Court are the final approval of Debtor's Amended Disclosure Statement, the confirmation of Debtor's plan dated January 3, 2002, and the objection thereto filed by 1st Financial Bank USA. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052 and 9014. As set forth below, confirmation of Debtor's plan dated January 3, 2002, shall be denied.

I.

King Sea Restaurant No. 3, Inc. ("King Sea"), operates a Chinese buffet in North Sioux City, South Dakota. It is a companion business to Gold City Casino, which is located next door and which is operated by J.Y., Inc. The only stockholders for King Sea are Yoon Keong Yap and his wife Fong Peng Yap. Yoon Yap is the sole shareholder for J.Y., Inc. King Sea leases its business premise from J.Y., Inc.

Both businesses have depended significantly on patronage from Gateway computer employees, who work nearby. Layoffs at Gateway

and changes in the working hours for the remaining employees have hurt both businesses, though King Sea more significantly. In addition, the casino lost income and some clientele when it was closed for two weeks in April 2001 as a penalty for a liquor law violation. The casino also did some remodeling while closed, which increased its expenses by about \$18,000 for the year. In 2001, King Sea's income was half of what it had been in 1999, and its expenses exceeded its income by \$16,619 (when depreciation of \$22,108 is included as an expense).

1st Financial Bank USA ("Bank"), King Sea's primary lender, commenced a foreclosure action against King Sea and Yoon Yap. The Bank obtained a default judgment against both on May 30, 2001.

On August 2, 2001, King Sea ("Debtor") filed a Chapter 11 petition in bankruptcy. In its schedules, Debtor disclosed that it did not have any real property. Debtor scheduled some personalty. It valued its restaurant equipment at \$65,000, its food and beverage inventory at \$2,000, and its trade name at \$38,000 for total assets of \$105,000. Debtor scheduled the Bank, its sole secured creditor, as holding a partially secured claim of \$106,304.<sup>1</sup> Debtor scheduled one general unsecured creditor for

---

<sup>1</sup> Post-petition, the Bank received some payments on its claim against Debtor. None were authorized to be paid from estate funds. The payments included \$1,905 on September 26, 2001, and \$1,905 on October 26, 2001, and a certificate of deposit (owned by Yoon Yap) of \$2,056.99 was set off on November 5, 2001. After the

\$4,000.

Soon after its petition was filed, Debtor was granted relief from the automatic stay so that it could return to state court to have the Bank's default judgment vacated. Though the record does not specifically disclose the outcome of Debtor's effort, it would appear that the effort was unsuccessful.

Confirmation of the first plan proposed by Debtor was denied. Debtor filed an amended disclosure statement and a modified plan dated January 3, 2002, and noticed them for a confirmation hearing and balloting. The Bank objected to the Plan and also balloted against it. Two unsecured creditors, whose claims totaled \$6,250, and the Internal Revenue Service, which had a general unsecured claim for \$1,830.10 and a priority unsecured claim for \$15,765.36, balloted for the plan.

Under the January 3, 2002, plan, Debtor proposed to pay all its creditors in full over time. Its claims included: \$6,000 (estimated) in administrative expenses for Debtor's attorney's fees, which was to be paid upon court approval; \$15,765.36 to the I.R.S. on its priority claim, which was to be paid with 7% interest through 72 monthly payments of \$268.78 beginning in February 2002;

---

evidentiary hearing, the Bank filed a Bank officer's affidavit to dispute some testimony received from Yoon Yap regarding Debtor's payments. Debtor submitted a letter response on April 3, 2002, that appeared to resolve the Bank's concerns. Neither pleading was considered formal evidence in this confirmation hearing.

\$106,646.42 to the Bank, which was to be paid with interest at 1% above prime through about 51 monthly payments of \$1,905 beginning in February 2002; and unsecured or under secured claims (including the general, unsecured claim of the I.R.S.) totaling \$8,080.10, which were to be paid in full with 7% interest through 36 monthly payments of \$249.50 beginning in February 2002.

The plan contained some additional provisions regarding the treatment of the Bank's claim. The Bank would retain its security interests as they existed pre-petition; Debtor would obtain insurance with the Bank as the loss payee; the balance of the claim not paid through the 51 monthly payments would come due April 8, 2006; J.Y., Inc., Yoon Yap, and Fong Peng Yap would unconditionally guarantee the monthly payments to the Bank; and the guarantors would provide financial statements and tax returns to the Bank upon request. Debtor also agreed that should any payments owed to the Bank under the plan become delinquent more than ten days, and if, after notice, the delinquency was not cured within 30 days, the Bank would be allowed to file an affidavit of default and "proceed with state court foreclosure without further notice or hearing."

As attachments to its plan, Debtor projected its yearly income and expenses. It said it would generate income of \$278,000 and would have expenses of \$237,619, leaving a balance of \$40,381 to pay "plan payments, equipment purchases, owner's salary, building

rent, attorney fees[,] and taxes." The income projection was based on Debtor's actual gross receipts of \$278,980 in 2000, as reported on its federal tax return. The liquidation analysis attached to the January 3, 2002, plan indicated Debtor did not have any equity in its property. Finally, Debtor's plan indicated its attorney fees may be paid by someone other than Debtor.

The Bank's objection was three-fold. It complained that the modified plan did not correctly set forth the amount of the Bank's secured claim. Second, the Bank said that Debtor had not produced adequate documentation for a guaranty of its claim by J.Y., Inc. Finally, the Bank argued the modified plan was not feasible.

An evidentiary confirmation hearing was held. The primary issue was the feasibility of Debtor's plan. The Bank's objection regarding the correct amount of its claim was resolved when Debtor agreed to use the Bank's calculation of its claim, which totaled \$107,154.95 on January 16, 2002, plus accruing interest of \$29.36 per day.

Several exhibits, discussed below, were received (some were duplicative). The only witness was Yoon Yap.

The Bank presented a 2001 year-end financial statement for Debtor prepared by a certified public accountant. The CPA valued Debtor's assets at \$108,613, and the CPA reported that Debtor's 2001 net income was <\$16,619>. The Bank also submitted some of

Debtor's recent financial reports to the United States Trustee. According to these reports, Debtor had income of \$2,111.89 in December 2001, had income of \$2,440.50 in January 2002, and lost \$1,511.52 in February 2002. Yoon Yap testified, however, that he thought Debtor's revenue was still trending upward and he expected business to continue to improve.

The Bank introduced 2001 mid-year and year-end financial statements for J.Y., Inc. The CPA reported that J.Y., Inc.'s assets were valued at \$312,897 and that shareholder equity was worth \$130,342 at year's end. As compared to J.Y., Inc.'s mid-2001 financial statement, also prepared by the same CPA, the value of the business' assets had decreased by \$1,279, but stockholders' equity had increased by \$10,708. The CPA found that J.Y., Inc.'s income for the year was \$1,071, which was an improvement from <\$9,637> on July 31, 2001.

A fourth financial statement put into evidence by the Bank was a July 31, 2001, statement for Yoon Yap and Fong Peng Yap. According to the CPAs, the couple's net worth on July 31, 2002, was \$1,864,500, with their interest in several closely-held corporations representing a substantial portion of their assets. Attached to the Yaps' financial statement was a cash flow for J.Y., Inc., and Debtor for years' end 1999 and 2000 and July 31, 2001, that Yoon Yap and Debtor's attorney apparently had prepared. On it,

"Cash Flow - Net" was calculated as net income plus depreciation. J.Y., Inc., had a net cash flow of \$78,865 for 1999, \$107,511 for 2000, and \$7,306 for 2001 through July 31. Debtor had a net cash flow of \$62,214 for 1999, \$44,674 for 2000, and \$11,258 through July 31.

Debtor also offered several exhibits. They included a corporate authorization by J.Y., Inc., to provide an unsecured guarantee of the plan payments owed to the Bank by Debtor, including the balloon payment due in April 2006. Debtor also submitted a personal guarantee of the same debt by Yoon Yap and Fong Peng Yap. During testimony, Yoon Yap conceded that he had given a personal guarantee earlier to the Bank for the loan taken by Debtor and that, after the loan became due, he did not pay the loan as the guarantor. Mr. Yap also acknowledged that he and his wife did not have significant cash on hand and that their personal vehicles are all secured. He further agreed that the bulk of his wealth is tied up in closely held corporations, including Debtor and J.Y., Inc.

Debtor's fourth exhibit was a year 2000 federal income tax return for Debtor. It showed that Debtor had taxable income of \$23,327 that year. Yoon Yap testified that he thought Debtor's 2001 income would be "pretty close" to its year 2000 income.

A fifth exhibit was J.Y., Inc.'s 2000 federal income tax

return. It showed that the corporation had taxable income of \$91,703. Yoon Yap testified that J.Y., Inc.'s 2001 income would be lower, though still a positive number.

Yoon Yap and Debtor's attorney also prepared and offered a second cash flow summary that jointly reflected Debtor's and J.Y., Inc.'s "statement of operations." Both corporations' income and operating expenses were combined. Several expense deductions were then made that would improve the corporations' bottom line: (1) a storage rental expense that J.Y., Inc., would no longer incur; (2) a depreciation expense for both J.Y., Inc., and Debtor since these were not actual cash expenses; (3) the rent that Debtor would normally owe J.Y., Inc., but which J.Y., Inc., would not collect during the plan term; and (4) interest that Debtor would now pay through its plan. With these figures, Debtor's attorney and Yoon Yap calculated that -- combined -- the businesses would have sufficient funds to allow Debtor to make total plan payments of \$29,079.36 per year and still have an income cushion of \$20,371.64.

Yoon Yap testified that Debtor had made a February 2002 payment, though late, to the Bank, and that Debtor had sufficient funds on hand to make its March 2002 payment if its plan were confirmed. Mr. Yap said the debt to the Bank was guaranteed by the Small Business Administration and that its original plan term was

ten years, beginning in 1995.

Mr. Yap presented a profit and loss statement for Gold City Casino that showed it had net income of \$6,854.01 for January 2002. It was prepared by the Casino's bookkeeper. Another statement set forth that Gold City Casino had a net income of \$9,498.80 for February 2002.

Yoon Yap testified that while business was poor in 2001 for both Gold City Casino and the restaurant, he opined that business was improving, especially for the Casino, where it was about back to normal. He said he expected the Casino's business to continue with the positive trend shown in January and February 2002. He also said that the Casino is now producing enough income to make Debtor's plan payments. He said he sees signs that North Sioux City is going to continue to grow, including a new grocery store, a new city hall, and more homes. He said he hopes that layoffs at Gateway and other businesses will be reversed. He is also hopeful that as the town grows, so will his restaurant business.

Yoon Yap conceded that Debtor's projected income for 2002, as set forth in the attachment to Debtor's January 3, 2002, plan, is \$98,000 more than was generated in 2001. The projected income equates to a monthly income for Debtor of \$23,166, which Yoon Yap admitted that Debtor is not currently generating.

To cut costs, Yap testified that Debtor earlier had decreased

buffet portions and variety, decreased employees from six to four, and was now preparing more foods in house rather than using pre-packaged items. Debtor's plan did not propose any other cost saving measures other than not paying building rent to J.Y., Inc.

Section 1129 of the Bankruptcy Code sets forth several requirements for confirming a plan in a typical Chapter 11 case. Two of these requirements are at issue in this case: feasibility under § 1129(a)(11) and compliance with the cram down requirements of § 1129(b). Only the first is reached.

## II.

Under 11 U.S.C. § 1129(a), a plan cannot be confirmed if the confirmation is likely to be followed by liquidation or the need for further financial reorganization. 11 U.S.C. § 1129(a)(11). The plan proponent, usually the debtor, bears the burden of proof on this feasibility requirement by a preponderance of the evidence. *Danny Thomas Properties II Limited Partnership v. Beal Bank (In re Danny Thomas Properties II Limited Partnership)*, 241 F.3d 959, 963 (8th Cir. 2001). To meet this burden, the debtor must show that the plan "offers a reasonable prospect for success and is workable." *Prudential Insurance Co. v. Monnier (In re Monnier Brothers)*, 755 F.2d 1336, 1341 (8th Cir. 1985) (quoting *United Properties, Inc. v. Emporium Department Stores, Inc.*, 379 F.2d 55, 64 (8th Cir. 1967)). Any feasibility determination must be "firmly

rooted in predictions based on objective fact." *Clarkson v. Cooke Sales and Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985).

The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.

*Id.* (citing *In re Bergman*, 585 F.2d 1171, 1179 (2nd Cir. 1978) (quoting 9 COLLIER ON BANKRUPTCY, at 1139)). Factors to consider include the debtor's earning power, the sufficiency of the debtor's capital structure, economic conditions, and managerial quality and efficiency. *Id.* (citing *In re Great Northern Protective Services, Inc.*, 19 B.R. 802, 803 (Bankr. W.D. Wash. 1982)).

A "drop dead" provision in a plan is generally not a substitution for a showing of feasibility. *Danny Thomas Properties II Limited Partnership*, 241 F.3d at 962-63. Such provisions do not render a plan a liquidating plan; instead, drop dead clauses are more akin to a provision that permits the sale of certain estate assets. *Id.* at 962-63.

### III.

It is clear from Debtor's 2001 financial statement and its late 2001 and early 2002 monthly reports that the restaurant is not yet consistently turning a profit. For late 2001 and early 2002, Debtor's monthly income averaged only \$1,013.62 and in February 2002, the business again operated in the red. Thus, there is

little evidence that Debtor will soon turn the corner and be able to regularly generate income sufficient to meet its operating expenses and make plan payments.

The record also does not establish that the personal guarantees of Yoon Yap and Fong Peng Yap are of value to the Bank. Mr. Yap was unable to identify any liquid assets that they had that could be used to make Debtor's plan payments.

The record also does not establish that J.Y., Inc.'s guarantee gives Debtor a reasonable prospect of making its plan payments. Based on the evidence presented, Gold City Casino currently has a net profit of about \$8,000 per month in 2002. However, since J.Y., Inc.'s total net income for 2001 was only \$1,071, the Court cannot conclude that a projection of continued net monthly income of \$8,000 for the Casino is "firmly rooted in predictions based on objective fact" as is required by *Clarkson*, 767 F.2d at 420.

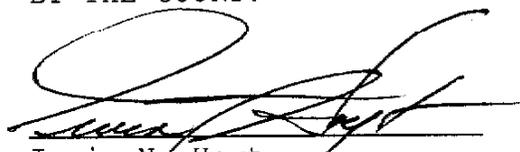
When computing the available income from J.Y., Inc., and Debtor, Debtor essentially asked the Court to not treat depreciation as an actual expense. The Court is reluctant to accept that accounting change, however, absent testimony from a professional justifying or supporting the change. In the absence of an accountant's perspective, the Court is concerned that not recognizing depreciation as an expense may ignore the role depreciation plays in reflecting an actual "use" cost for Debtor's

and J.Y., Inc.'s property or that it may skew the actual picture of Debtor's and J.Y., Inc.'s financial health.

Since Debtor was unable to show feasibility under § 1129(a)(11), the Court does not reach the issue of whether this plan may be confirmed under § 1129(b). An order denying confirmation of Debtor's plan under § 1129(a)(11) will be entered.

Dated this 8 day of April, 2002.

BY THE COURT:

  
Irvin N. Hoyt  
Bankruptcy Judge

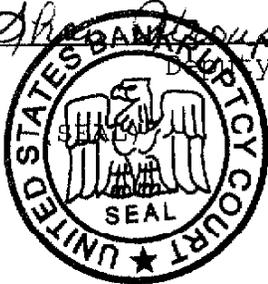
**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 9022(a)  
Entered

**APR 08 2002**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

ATTEST:  
Charles L. Nail, Jr., Clerk

By:   
Clerk



I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

**APR 08 2002**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota  
By: 

Stephanie C. Bengford  
Assistant U.S. Attorney  
PO Box 5073  
Sioux Falls, SD 57117-5073

District Director of the IRS  
316 North Robert Street  
St. Paul, MN 55101

Keith A. Gauer  
PO Box 1030  
Sioux Falls, SD 57101-1030

Bruce J. Gering  
Office of the U.S. Trustee  
230 S Phillips Ave, Suite 502  
Sioux Falls, SD 57104-6321

John E. Harmelink  
PO Box 18  
Yankton, SD 57078

King Sea Restaurant No. 3, Inc.  
PO Box 1757  
North Sioux City, SD 57049