UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **SEFCAK, LLP**, Debtor.	Case No. **16-60845-11**

O R D E R

At Butte in said District this 22nd day of June, 2017.

In this Chapter 11 case, after due notice a hearing was held at Missoula on June 5, 2017, on final approval of Debtor's Second Amended Disclosure Statement (Docket No. 114) and on confirmation of Debtor's Second Plan of Reorganization (Docket No. 113). First Interstate Bank, formerly known as Flathead Bank of Bigfork ("First Interstate")[1] filed the only objections to confirmation, and was represented at the hearing by attorney Paul A. Sandry ("Sandry") of Johnson, Berg & Saxby, PLLP, of Kalispell, Montana. The Debtor filed a Third Amended Plan of Reorganization on a June 3, 2017 (the "Plan") immediately prior to the hearing and was represented at the hearing by attorney James A. Patten ("Patten") of Patten, Peterman, Bekkedahl & Green P.L.L.C., of Billings. The Office of U.S. Trustee ("UST") was represented by attorney Gary Dyer. This Court has exclusive jurisdiction of this Chapter 11 bankruptcy under 28 U.S.C. § 1334(a). Confirmation of Debtor's Plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

Danette Sefcak ("Danette") testified on behalf of Debtor in support of confirmation. Exhibits ("Ex.") 1, 2, 5, A, and D were admitted into evidence without objection. Sandry

[1] The First Interstate claim in this case is premised on a loan made by Flathead Bank. As a result, although references throughout the Order are to First Interstate, the loan documents were entered by Debtor with Flathead Bank.

advised the Court that First Interstate withdrew, or considered cured two of its four grounds for objection to confirmation. At the conclusion of the parties' cases-in-chief the Court took confirmation under advisement. After review of the Debtor's Third Amended Plan of Reorganization, First Interstate's remaining objections, the record, and applicable law, First Interstate's remaining objections are overruled and the Court will confirm Debtor's Third Amended Plan of Reorganization.

No timely objection was filed to final approval of Debtor's Second Amended Disclosure Statement[2], and no appearance was made at the hearing in opposition to final approval. After review of the Second Amended Disclosure Statement, and in the absence of any outstanding objection after notice and hearing, the Court finds and concludes that the Debtors' Second Amended Disclosure Statement provides adequate information[3] and satisfies the requirements of § 1125(a). It will be approved.

The ballot report reflects that Classes 1, 4, and 5 voted to accept the Plan. No ballots were submitted rejecting Debtor's Plan.[4] Based on the ballot report and statements of counsel, the Court finds and concludes that at least one class of impaired claims has accepted the Plan in satisfaction of 11 U.S.C. § 1129(a)(10)[5].

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[2] The Second Amended Disclosure Statement was conditionally approved by Order entered on May 15, 2017, with the parties granted until May 31, 2017, to file objections. No objections were filed timely, so final approval is uncontested.

[3] "Adequate information" as defined at § 1125(a) means "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . ." *See, Official Comm. of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 725 (Bankr. E.D. Cal. 1992).

[4] Although First Interstate objected to the Debtor's proposed Plan, it did not submit a ballot.

[5]Debtor's Third Amended Plan of Reorganization was filed immediately after the ballots were submitted. The Court found at the hearing that with the exception of First Interstate, the modifications found in the Third Amended Plan did change the treatment of any other creditors. And, further, at least one of the modifications eliminated one of First Interstate's objections. Therefore pursuant to Fed. R. Bankr. P. 3019(a) it is not necessary to require another

FACTS & PROCEDURAL HISTORY

Danette and her husband Tommy Sefcak ("Tommy") (together "Sefcaks") are the principal partners in Sefcak, LLP, a limited liability partnership, ("Debtor" and "Sefcak, LLP") which is engaged in the manufacture and sale of distilled alcohol spirits such as rum, whiskey, tequila and vodka under applicable state and federal permits. Tommy is the distiller, and Danette is the operations manager.

Sefcaks decided to open a liquor distillery in Whitefish, Montana. They resigned from their prior positions with Halliburton and returned to Whitefish, where they own a home. They cashed in their 401(k) accounts and used their retirement and savings to invest in and develop a distillery. In addition to their savings, through Sefcak, LLP, financing from Flathead Bank was obtained and a security interest in the distilling equipment and other furniture and equipment was granted to Flathead Bank. First Interstate is the successor to Flathead Bank. After taking a local business development course, Sefcaks drafted a business plan for their distillery which included on-site sales of spirits in their tasting room, and distribution to state liquor stores. In addition to their sales of spirits, their tasting room would offer restaurant food, and they would sell premium cigars. Danette testified that they have not been able to execute their business plan for any extended period of time.

Sefcak, LLP, opened for business in the last week of December, 2015. However, it opened only to sell food because it lacked permits to sell distilled spirits until March of 2016. The food sales did not generate enough revenue, and Sefcak, LLP closed the tasting room in February 2016, until it could sell spirits. Sefcak, LLP, reopened the Whitefish tasting room after

round of balloting for Debtor's Third Amended Plan.

it obtained the appropriate permits, and reinitiated the sale of tapas and spirits. Sales of spirits rose consistently. Sefcak, LLP, has been able to expand their sales into almost all the Montana state liquor stores, casino package liquor stores, and restaurants. By the time it filed its Chapter 11 petition, Danette testified, Sefcak, LLP, had at least $280,000 in gross revenues for 2016, and had approximately $36,000 in average gross monthly income. Sales were consistently rising, and exceeded Debtor's projections.

During this same time period, early 2016, Debtor encountered problems with its lessor, Swift Creek Cabins, LLC ("Swift Creek") in Whitefish. Construction liens attributable to cost overruns were placed on the leased premises where Debtor conducted its operations, resulting in Swift Creek terminating the lease. Although its revenues were rising and exceeded projections, Debtor could not cure the alleged default under its lease. Debtor filed a voluntary Chapter 11 petition on August 23, 2016, to stay the eviction proceeding by Swift Creek. Swift Creek immediately filed a motion to modify stay on September 30, 2016, seeking relief from the stay to proceed with its eviction and regain possession of Debtor's premises. Debtor filed an objection. On the eve of a hearing on Swift Creek's motion the parties filed a stipulation (Dkt. 36) (the "Stipulation") resolving Swift Creek's motion.

The Stipulation provided for the rejection of the Swift Creek lease and removal of the distillation equipment by the Debtor, for possession of the leased premises to be surrendered to Swift Creek after removal of equipment, and for a mutual release of claims by Debtor and Swift Creek. The stipulation also required that the Debtor "leave a fully functioning and ready-to-use kitchen with equipment" on the vacated premises, which included items subject to the security interest now held by First Interstate. At paragraph 4 on page 3, the Stipulation provides that after the Debtor ceases to have any interest in the leased premises "the automatic stay will no longer

be in place [subject to an irrelevant exception] ….” This Court approved the stipulation on November 3, 2016, in an Order incorporating its terms. Dkt. 38.

A motion to approve compromise (Dkt. 44) (the “Motion”) between the Debtor and Swift Creek with respect to Swift Creek’s relief from stay motion, and remaining disputes, was filed on November 22, 2016. Objections were filed by creditors (including Swift Creek), which were resolved at a hearing on February 16, 2017. Another stipulation (Dkt. 77) (the “Second Stipulation”) was filed by Debtor and Swift Creek on February 27, 2017, and approved by Order entered on March 1, 2017.

The Debtor retained its distillery equipment after it vacated the leased premises. During March of 2017, Debtor continued to make sales of spirits from their inventory. Debtor found a new location for its tasting room and distillery in Evergreen, outside of Kalispell, Montana. Danette testified that the Debtor has not had to pay any rent for the new location until they reopen after construction[6]. Danette testified that Debtor estimates that it will open their tasting room in Kalispell in July of 2017. The improvements to the Kalispell location are being paid for by the Debtor’s new landlord, who also is an investor in the proposed new LLLP.

First Interstate filed Proof of Claim No. 11, asserting a total claim in the amount of $351,532.4. A portion of the claim, $300,375.90 is secured by inventory, chattel paper, accounts, equipment, general intangibles, and distiller’s liquor license, assignment of life insurance policy, leasehold improvements and fixtures. First Interstate also has a second mortgage on Sefcaks’ residence. No objection has been filed to First Interstate’s Proof of Claim and it is deemed allowed. The full amount of First Interstate’s allowed claim is provided for in Debtor’s Third Amended Plan of Reorganization.

[6] Debtor’s new landlord is a prospective limited partner.

First Interstate objected to confirmation on 4 independent grounds, as follows:

1. Debtor's Plan of Reorganization cannot unilaterally impair the Bank's perfected security interest (this objection relates to Debtor's abandonment of certain property);

2. The Debtor's attempt to make such claimants [certain creditors] equity holders in the reorganized Debtor is both improper and will unduly complicate the business structure of Debtor;

3. Debtor failed to incorporate the terms of our loan documents into the Plan; and,

4. The Plan is not feasible as required by 11 U.S.C. §1129(a)(11).

At the hearing, First Interstate withdrew objection 2 and 3, leaving only objections 1 and 4 for consideration.

First Interstate has an impaired secured claim in the amount of $300,376, to be paid over 120 months, with interest accruing at an annual rate of five percent (5%) and monthly payments of $3,186 per month under the Plan. Danette testified that the 5% interest rate is comprised of the prime rate of 4% plus 1% for additional risk, and that First Interstate will retain its lien during the term of the Plan. First Interstate offered no evidence on interest rate or market term, and did not object on those grounds.

Debtor's Ex. A is the annual cash flow projections for the Debtor's sales from distribution, tasting room, food and cigars. Danette testified that their cash flow projections on Ex. A will not be realized as projected, because Debtor failed to open in their new Evergreen location in April as expected. However, she testified that if the projections on Ex. A are pushed back a couple of months the Plan remains feasible, because Debtor expects to open their tasting room in Evergreen in July 2017, serving spirits, food and selling cigars.

DISCUSSION

Having withdrawn 2 of its objections to confirmation at the hearing, all that remains for this Court to consider are First Interstate's objections that (i) Debtor's Plan of Reorganization

cannot unilaterally impair the Bank's perfected security interest (this objection relates to Debtor's abandonment of certain property), and (ii) that the Plan is not feasible as required by 11 U.S.C. §1129(a)(11).

1. Debtor's Plan does not impair the Bank's perfected security interest.[7]

Based on the argument presented at the hearing, this objection is premised on a flawed understanding of this Court's prior orders approving stipulations between Debtor and Swift Creek.[8] Although Swift Creek withdrew its proof of claim on June 19, 2017, it is not immune to this Order because a bankruptcy court has jurisdiction to interpret and enforce its own prior orders. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). To eliminate any confusion and provide clarity to Debtor, Swift Creek and First Interstate, the Court will consider briefly the basis for the parties' claims and review its prior orders.

First Interstate is a secured creditor with a claim in the amount of $351,532.47 secured by inventory, chattel paper, accounts, equipment, general intangibles, and distiller's liquor license, assignment of life insurance policy, leasehold improvements and fixtures. Most relevant here is the equipment, leasehold improvements, and fixtures. Swift Creek fully and completely resolved any claim it had with Debtors through a series of stipulations, and execution of a mutual release that was characterized as, "DIP and Swift Creek shall mutually release all claims against each other arising out of or related to the Triple Net Lease." Stipulation at ¶15. The Stipulation was

[7] This objection's nexus to the requirements for confirmation under 11 U.S.C. § 1129 is unclear to the Court because neither a statute nor case are cited. Given the absence of legal authority to support it, the Court could simply overrule the objection. However, doing so without addressing the objection would likely compound any confusion that already exists regarding this Court's prior Orders.

[8] At the confirmation hearing, the Court was surprised to discover that First Interstate has not liquidated its collateral and applied any funds from the liquidation to its claim. The Court was advised that Swift Creek has taken the position that the property abandoned by Debtor is now, property of Swift Creek. There is no basis in the record before this Court for Swift Creek to assert this position.

filed with the Court on November 2, 2016. Along with resolving the claims between the parties, the Stipulation required Debtor to leave certain property in the possession of Swift Creek.

First Interstate was not a party to the Stipulation, or Second Stipulation. Further, nothing in the Stipulation, Motion, or Second Stipulation or orders approving them, implicitly or explicitly sought to extinguish First Interstate's rights in its collateral. And, nothing in either the Stipulation, Motion or Second Stipulation or Orders approving the same conveyed any property from Debtor to Swift Creek. There is nothing in the record reflecting Debtor executed a bill of sale or otherwise transferred property it owned to Swift Creek. Indeed, the language agreed to in the Stipulation simply requires that Debtor leave property at the premises. The Stipulation is silent on the manner of disposition, or effect of the Stipulation between Debtor and Swift Creek on third-parties that may have an interest in the property left in Swift Creek's possession, including First Interstate.

Absent an ownership interest or a lien, this Court cannot conceive of a legal or factual basis upon which Swift Creek may assert any right in the property[9] superior to any lien of First Interstate that would justify its refusal to turn over the property to First Interstate, so that First Interstate may liquidate its collateral and apply the proceeds to its claim for the benefit of the Debtor. Having fully released Debtor of any claim as of November 2, 2016, this Court cannot discern a legal basis upon which Swift Creek may claim a lien or other interest in the property. Swift Creek's proof of claim did not assert that it was secured claim.[10] *See* Proof of Claim No.

[9] The stipulations identify various property that was to be left by Debtors at the premises, and also has language prohibiting the removal of any property not specifically identified. Thus, the Court cannot discern with precision a complete list of property that is subject to First Interstate's lien and that Swift Creek may be withholding from First Interstate.

[10] Although Swift Creek has withdrawn its proof of claim, as of the date the proof of claim was filed, January 3, 2017, it affirmatively represented that it was an unsecured creditor. Given the Stipulation signed by Swift Creek's counsel on November 2, 2016, included mutual release language, the Court is puzzled as to the basis for Swift Creek's proof of claim filing January 3, 2017, signed by the same counsel.

14. And, notably, Swift Creek did not object to the First Interstate proof of claim, which plainly indicated that it was secured, and included a copy of the security agreement that identifies equipment, leasehold improvements, and fixtures as collateral securing its claim.

Debtor's decision to abandon certain property as part of a compromise and settlement was not a conveyance of property to Swift Creek and nothing in this Court's prior Orders approving the Stipulation and Second Stipulation supports such a construction. If Swift Creek is relying on this Court's prior Orders as the basis for refusing to turnover First Interstate's collateral, or worse, in an effort to extort from First Interstate some economic concession that unreasonably delays First Interstate's collection and liquidation efforts under non-bankruptcy law, depriving Debtor of the benefit and application of any liquidation proceeds to the debt, such actions are not justified by an order of this Court.[11]

Contrary to First Interstate's objection, neither the Plan, the Stipulation, Motion, Second Stipulation nor Orders approving the Stipulations reflect an agreement between Debtor and Swift Creek that impairs or prejudices the rights of First Interstate. Based on the record before this Court any interest Swift Creek may claim in property abandoned by the Debtor, is at best a possessory interest subject to the rights of First Interstate. As a result, neither the Plan nor confirmation will impair any perfected security interest held by First Interstate Bank. Thus, First Interstate's objection on these grounds will be overruled.

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[11] Although First Interstate characterized its objection as "unilaterally impair[ing] the Bank's perfected security interest," the objection highlights that Debtor has been potentially prejudiced by Swift Creek's conduct after execution of the mutual release. By preventing First Interstate from timely liquidating its collateral, Debtor has been deprived of any amounts that would otherwise have been applied to its debt and reduced the First Interstate claim. Alternatively, Swift Creek's conduct has potentially prejudiced First Interstate and Debtor because the delay has resulted in a diminution in value of the collateral to be liquidated. The Court acknowledges that Swift Creek did not appear at the confirmation hearing on June 5, 2017, and absent Swift Creek's participation this Court cannot adequately analyze the First Interstate objection to confirmation.

2. There is adequate evidence supporting a finding of feasibility.

First Interstate's remaining objection challenges feasibility and contends that Debtor's Plan is not feasible. The feasibility requirement is set forth at § 1129(a) (11), which requires that a court confirm a plan only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." *In re Harbin*, 486 F.3d 510, 517 (9th Cir. 2007); *In re Indian National Finals Rodeo Inc.*, 453 B.R. 387, 402 (Bankr. D. Mont. 2011); *In re Brotby*, 303 B.R. 177, 191 (9th Cir. BAP 2003).

Debtors bear the burden of establishing feasibility of their plans by a preponderance of the evidence. *Indian National Finals Rodeo*, 453 B.R. at 402. This Court has a duty under § 1129(a)(11) to protect creditors against "visionary schemes." *Id*.; *In the Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985). However, to demonstrate that a plan is feasible a debtor need only show a reasonable probability of success. *Id.*; *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1984).

Brotby notes that the Code does not require the debtor to prove that success is inevitable, *In re WCI Cable, Inc.*, 282 B.R. 457, 486 (Bankr. D. Or. 2002), and a relatively low threshold of proof will satisfy § 1129(a)(11), *In re Sagewood Manor Assocs. Ltd.*, 223 B.R. 756, 762 (Bankr.D.Nev.1998), so long as adequate evidence supports a finding of feasibility. *Brotby*, 303 B.R. at 191-92; *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th 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." *In re Jorgensen*, 66 B.R. 104, 108 (9th Cir. BAP 1986), citing *In re Clarkson*, 767 F.2d 417 (8th Cir. 1985); *In re Mont-Mill Operating Company*, 16 Mont. B.R. 61, 64

(Bankr. D. Mont. 1997), quoting *Clarkson*, 767 F.2d at 420 (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2nd Cir. 1978) (other citations omitted).

Danette was the only witness that testified at the hearing. The Court observed Danette testify under oath, and under cross examination and concludes that Danette is a credible witness. Debtor's affairs are managed by Danette and Tommy. The Court finds that the Sefcaks have been honest, competent, professional, diligent, clear-eyed, flexible, adaptable, and creative in overcoming the obstacles Debtor has faced. Following the dispute with the landlord, Debtor moved to a new location and revised its business plan. At its new location, it resumed manufacturing and distribution of its craft spirits while preparing to resume the sale of food and on-site sale of spirits. Although Sefcaks have received a nominal salary, generally it appears that they have put the needs of the Debtor ahead of themselves. As a result of the Sefcaks efforts, additional capital has been raised and investors have been retained.

Danette testified that Debtor's cash flow projections in Ex. A remain accurate so long as the projections are pushed back a few months to correspond to the opening of the Debtor's new tasting room in July 2017. Although Debtor's performance during this case calls into question its projections, Debtor has managed to overcome significant hurdles and is on the cusp of stabilizing its operations at its new location, which should result in improved performance and realization of its projections. This is a relatively close call. But, after review of Danette's testimony and the record, this Court finds and concludes that there is adequate evidence supporting a finding of feasibility. *Brotby*, 303 B.R. at 191-92; *In re Pizza of Hawaii, Inc*., 761 F.2d at 1382.

The Court finds that the Debtor has satisfied the test to show that the things which are to be done after confirmation can be done as a practical matter under the facts. *Mont-Mill*, 16

Mont. B.R. at 64, quoting *Clarkson*, 767 F.2d at 420. The Court concludes that the Debtor will find a way to commence making the payments due under the Plan by the Effective Date sixty days hence. In reaching this conclusion, the Court has placed great weight on Danette's testimony that the Debtor will open its new location in July 2017. Given the effective date of the Plan, it is imperative that Debtor open in July. After review of the Debtors' Third Amended Plan of Reorganization and the record, the Court finds that the Plan is feasible, fair and equitable, proposed in good faith, and satisfies all confirmation requirements of 11 U.S.C. § 1129(b).

IT IS ORDERED the Debtor's Second Amended Disclosure Statement filed on May 12, 2017 (Dkt. 114) is granted final approval; and,

IT IS FURTHER ORDERED Third Amended Plan of Reorganization filed on June 3, 2017 (Dkt.128) is confirmed.

Honorable Benjamin P. Hursh
U.S. Bankruptcy Judge