IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	Chapter 11
BABE'S ENTERTAINMENT, INC., an Arizona corporation,	NO. 04-00726-PHX-JMM
MJS HOLDINGS, LLC, an Arizona limited liability company,	NO. 04-00727-PHX-JMM (Jointly Administered)
Debtor.	**MEMORANDUM DECISION RE: MOTION FOR STAY PENDING APPEAL**

The court heard argument on the debtors' Motion for Stay Pending Appeal on March 5, 2004. The debtors were represented by Carolyn Johnsen; the principal secured creditors were represented by David Damore. After consideration of the arguments, pleadings and applicable law, the court now rules.

In order to receive a stay pending appeal, the court must review both Bankr. R. 8005 and what are commonly known as the Wymer factors. See, In re Wymer, 5 B.R. 802 (9th Cir. BAP 1980). Those factors are (1) whether there is a likelihood of success of the merits, (2) a balancing of the harm to both the appellants and the appellees, and (3) public policy, if applicable.

After discussing with counsel the possibility of a consensual stay pending appeal which would require a regular monthly payment, during the appeal process, the court was unable to structure a consensus. Thus, it is necessary to consider the Wymer factors.

As for the possibility that Appellants have a likelihood of success of success on the merits, the court which initially ruled on the issue has to attempt to second-guess itself, and determine if it likely erred. More rational, however, is simply to ascertain whether the probabilities of success on the appeal justify a stay. This can sometimes be a close and discretionary call.

As for balancing the harm, the court must weigh the equities as to each party, and balance them.

In the instant case, there are no public policy issues.

Turning first to the likelihood of success on the merits, the court has once again reviewed the merits of the underlying memorandum decision and order, as well as the spirit and legal basis for a

court's dismissal of a two-party dispute as a "bad faith" filing. In so doing, the court remains convinced that this case presents the classic scenario. Unable to pay on the very short maturity date of the notes used to acquire this night-club in the first place, the debtors ducked into their first chapter 11. Rather than litigate confirmation of a plan, the parties opted to settle and re-write the offending promissory notes. This gave the debtors the second chance they needed in order to reorganize their affairs.

But instead of performing, the debtors quickly defaulted and again sought chapter 11 protection, seeking a third chance to get it right. Because of the nature of the debtors' business, they have few creditors, none of whom hold significant debt when compared to the primary secured creditor here. This case, then, does not present the equities necessary to continue this reorganization effort.

Based on the facts of this case, and the law, this court therefore reasonably concludes that the likelihood of success on the merits is more unlikely than not.

Turning to the balancing of harm, the court also finds that this factor favors the appellee. Here, the appellee sold its going concern on the expectation that the debtors would honor their promise to pay upon the notes' short maturity. Their expectations were rewarded with a chapter 11, and protracted negotiations leading finally to the execution of restructured notes. With new hope and new promises, the parties dismissed the chapter 11 and once more sallied forth, only to have the debtors once again seek refuge in chapter 11 and at the same time gain the benefits of the automatic stay of 11 U.S.C. § 362(a). For several months, the debtors have operated the business and failed to even partially pay the secured party, all the while collecting, using and paying themselves from the admitted $130,000-200,000 that the business earns each month.[1] This is, as a matter of equity, certainly not a factor which weighs in the debtors' favor. To the contrary, the lack of payment to the secured party, under these circumstances, is inequitable in the extreme. The balancing of harms thus tilts heavily in favor of the appellee.

Accordingly, the court finds and concludes that this case is undeserving of a stay pending appeal. A separate order will be entered. However, the court will grant a temporary stay of ten (10) calendar days

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[1] The attorneys have argued that this figure is more slack in the summers.

in order to enable the reviewing court to exercise its appellate authority under Bankr. R. 8005.

Dated this 5 day of March, 2004.

JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing ~~mailed~~ faxed this 5 day of March, 2004, to:

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