NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MARSHALL WAYNE BAKER, doing business as Wayne Baker Farms, doing business as Baker Farms; JO ANNA BAKER, doing business as Wayne Baker Farms, doing business as Baker Farms; BLACKWATER FARMS, INC.; and ABCO FARMING, INC., doing business as Las Lomas Farm, Debtors.	BAP No. NM-02-018
BANK ONE, NA, Appellant, v. BLACKWATER FARMS, INC., MARSHALL WAYNE BAKER, JO ANNA BAKER, and ABCO FARMING, INC., Appellees.	Bankr. No. 11-00-14545 MR Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before PUSATERI, CORNISH, and NUGENT, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Bank One, N.A. is the principal creditor in the Chapter 11 bankruptcies of debtors Marshall Wayne Baker and JoAnna Baker (the "Bakers"), Blackwater

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Farms, Inc. ("Blackwater") and Abco Farming, Inc. ("Abco"). Bank One appeals the bankruptcy court's confirmation of the Debtors' joint plan of reorganization, contending that the plan fails to comply with 11 U.S.C. § 1129(a)(11). The sole issue presented by this appeal is the feasibility of the Debtors' plan. After careful review of the record and argument in this matter, we AFFIRM.

1. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. Bank One timely filed its notice of appeal, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of New Mexico.

The order of confirmation is a final, appealable order under 28 U.S.C. § 158(a)(1).[1]

2. Standard of Review

Bank One challenges the bankruptcy court's finding of feasibility. We apply the clearly erroneous standard of review.[2] We review the record in this case to determine whether there is factual support in the record for the trial court's finding. If after a review of the record we are left with a "'definite and firm conviction that a mistake has been made,'" we may find clear error.[3]

3. Factual Background

The Bakers, Blackwater, and Abco, collectively referred to as Appellees or Debtors, are principally engaged in peanut farming. Wayne Baker, the manager and operator of all three farming operations, has been engaged in farming for

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[1] *Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus. Equip., Inc.),* 23 F.3d 311, 315 (10th Cir. 1994).

[2] Fed. R. Bankr. P. 8013; *In re Pikes Peak Water Co.*, 779 F.2d 1456, 1458 (10th Cir. 1985).

[3] *Homestead Golf Club, Inc. v. Pride Stables,* 224 F.3d 1195, 1199 (10th Cir. 2000) (quoting *Conoco, Inc. v. Styler (In re Peterson Distrib., Inc.)*, 82 F.3d 956, 959 (10th Cir. 1996)).

approximately forty years. As a result of a collapse in the peanut market in 1999, Debtors filed separate petitions for Chapter 11 relief on August 25, 2000. By later order of the bankruptcy court, these cases were jointly administered.

After evidentiary hearings on November 9 and 15, 2001, and an additional hearing on December 12, 2001, at which certain stipulated financial evidence was admitted, the bankruptcy court confirmed the Debtors' joint plan of reorganization. The bankruptcy court made an explicit finding that the plan was feasible. The bankruptcy court stated:

> I determine feasibility mainly by taking a very hard look at what the debtor did during 2001. And it seems to me that the debtor got at least very close to the projections made as to what its income and expenses would be during 2001 and based on that I am going to find that its projections for 2002 and thereafter are reasonable and can be relied on for the purpose of making a finding that [it is] feasible.[4]

During the pendency of the case, Debtors liquidated substantial real estate holdings as well as part of their stock in Sunland, Inc. and reduced their secured indebtedness by approximately $3.5 million. At filing, their obligations to Bank One exceeded $2.5 million. By the time of confirmation, Debtors had paid Bank One's secured claim down by nearly a million dollars. Moreover, the Debtors paid Bank One some $170,000 in adequate protection payments. In sum, Bank One received approximately $1,457,000 from Debtors prior to confirmation, thereby reducing the Debtors' loan balance to $1,550,000 plus attorneys fees.

Debtors' plan provided that they would sell another farm (State Line Farm) as well as surplus equipment and remit the net proceeds to Bank One, further reducing its secured claim to about $854,000. In fact, the bankruptcy court conditioned confirmation of the plan upon the Debtors' payment to Bank One of $295,000 as loan principal reduction within several months of confirmation.[5]

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[4] Transcript at 6, *in* Appellant's App. at 817.

[5] *See id.* at 4, *in* Appellant's App. at 816.

Debtors intended to implement their plan by continuing peanut farming on leased farmland – ground that they have leased over a period of 18 years. They also intended to supplement their leasehold holdings by acquiring other leased acreage. Debtors asserted that the leased land was better ground than that which they sold; the improved quality of the soils would allow the Debtors substantial economies concerning water and fertilizer usage, thereby increasing their efficiency and profitability.

The principal evidence bearing on the feasibility of Debtors' plan consisted of the testimony of Wayne Baker; Debtors' experts, Patrick Sullivan and Steve Hudson; Bank One's expert, Charles Napier; and a stipulated exhibit covering the Debtors' income and expenses over the 2001 crop year, which was presented to the bankruptcy court at the December 2001 hearing.[6] This exhibit apparently formed the basis of the bankruptcy court's factual findings concerning feasibility. It reflects that in 2001, the three debtors had a combined $501,445 net operating income.[7] Notwithstanding this evidence, Bank One maintains that the Debtors did not sufficiently demonstrate the feasibility of their plan as required by 11 U.S.C. § 1129(a)(11).

4. Discussion

Bank One argues that the Debtors' plan as confirmed by the bankruptcy court constitutes a "visionary scheme," which merely represents the Debtors' hopes and aspirations rather than a rational attempt to reorganize. Bank One is correct in asserting that 11 U.S.C. § 1129(a)(11) burdens the proponent of a Chapter 11 plan to demonstrate that confirmation of the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the

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[6] *See* Exhibits, *in* Appellant's App. at 797-801.

[7] *See* Br. of Appellees at 15-16 for analysis and calculations.

debtor . . . unless such liquidation or reorganization is proposed in the plan."[8]

Section 1129(a)(11) requires courts to carefully scrutinize the plan to determine whether it offers a reasonable prospect of success and is workable.[9] In *In re Pikes Peak Water Co.*, the Tenth Circuit Court of Appeals expressed and applied this standard in the following manner:

> "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promises creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."
>
> . . . "[I]n determining whether [a plan] is feasible, the bankruptcy court has an obligation to scrutinize the plan carefully to determine whether it offers *a reasonable prospect of success and is workable.*"[10]

As Bank One concedes, debtors need not *prove* to a certainty that their plans will succeed, but their plans must offer a reasonable prospect of success. Application of this standard leaves Bank One with an arduous task on appeal.

Bank One finds fault with the bankruptcy court's finding of feasibility on a number of grounds, all of which can be boiled down to three categories: (1) Debtors' overly optimistic projections; (2) Debtors' failure to account and allow for certain expenses such as income taxes and equipment acquisition; and (3) the plan's vulnerability to conditions and uncertainties beyond the Debtors' control such as the forces of nature and the lack of availability of leasehold land. Discussion of each of these categories of alleged error and the evidence in the record that supports the conclusions of the bankruptcy court dictate that we affirm.

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[8] 11 U.S.C. § 1129(a)(11) (2002).

[9] 7 *Collier on Bankruptcy* ¶ 1129.03[11] (Lawrence P. King ed., 15th ed. rev. 2000).

[10] *In re Pikes Peak Water Co.*, 779 F.2d at 1460 (emphasis added) (*quoting In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) and *In re Monnier Bros.*, 755 F.2d 1336, 1341 (8th Cir. 1985)).

Bank One takes issue with the bankruptcy court's acceptance of the Debtors' cash flow projections. Bank One asserts in its brief and at oral argument that the Debtors failed to meet their projections during the year preceding confirmation. Stating that a debtor's financial performance during the pendency of the case is probative of a plan's feasibility,[11] Bank One contends that a comparison of the Debtors' 2001 projections with their 2001 monthly operating reports demonstrates that Debtors under-projected expenses by some $700,000. Debtors explain that the operating reports are submitted on an accrual basis while the projections were submitted on a cash basis. An actual comparison of the expenses to projections suggests that the three Debtors' expenses were in fact *lower* than their projections and, in any event, the Debtors, taken together, were profitable in 2001.

Bank One places particular reliance on *In re Snider Farms, Inc.,*[12] yet the confirmation standards set out in *Snider* do not require that debtors guarantee their performance under a plan, but merely require that they support their plan with projections that have some basis in fact and experience.[13] In *Snider*, the Chapter 12 debtors failed to place before the bankruptcy court objective evidence of anticipated or historical yields, county averages, or historical prices. There, the court said, "[t]he Debtors have failed to supply this court with sufficient information to allow a valid assessment of whether their future yield and income projections are within the realm of probability."[14] The same can hardly be said of these Debtors. They provided detailed projections of income and expense and, based upon the record on appeal, met those projections during the year preceding

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11 *In re Snider Farms, Inc.*, 83 B.R. 1003, 1012 (Bankr. N.D. Ind. 1988).

12 *Id.*

13 *Id.* at 1013.

14 *Id.*

confirmation.

Bank One also questions the Debtors' alleged failure to budget for certain ordinary expenses and capital expenditures. In particular, Bank One asserts that the Debtors failed to provide for the payment of income taxes on their operations post-confirmation. Yet, Debtors' accounting expert, Mr. Hudson, testified that of his 200 farm clients, about 75 percent make money, but only 25 percent pay income taxes. Even Bank One's expert, Mr. Napier, agreed that the Debtors could safely defer the payment of income taxes beyond the eight year period in which, under the plan's terms, Bank One's claim is to be paid. It is well-known (and was well-documented in this record) that farmer-debtors can and often do generate positive cash flow while managing taxes through depreciation, water depletion and the expensing of certain capital assets.

There was also testimony in the record that these Debtors believe they will not need to acquire new equipment during the life of the plan. They argue that their present line of equipment is adequate for their needs. Moreover, they have included repair expense in their projections. Further, should they need equipment, it can be leased or hired, rather than purchased. Bank One has provided no evidence to the contrary.

Bank One also complains that the Debtors' plan relies on the occurrence of conditions beyond their control. In particular, Bank One points to Debtors' real estate leases, which will terminate prior to the end of the eight year plan period and which must be renewed in order for the Debtors to continue farming. Bank One also fears that Debtors will not be able to obtain sufficient leased ground to support their operations at a level necessary to fund the plan. Finally, Bank One contends that Debtors' reliance upon favorable weather and market conditions requires that their projections contain some cushion against unexpected hard times.

Implicit in the bankruptcy court's finding of feasibility is its conclusion that adequate farm ground would be available to lease by the Debtors. The record reflects that the Debtors were in the second ten-year term of the Gentry lease and, in fact, had erected substantial improvements on the property, including irrigation equipment. There was also competent, uncontroverted evidence in the record that the Debtors would be granted lease rights on other property as well. These events or contingencies do not rise to the level of "uncertainty" that would demand denial of confirmation.[15]

The relatively short plan period (8 years versus the 20 and 30 year plans sometimes proposed in the farming context), along with the relatively few and minor contingencies relied on by Debtors make this a far more feasible plan than the plan before the court in *In re Sunflower Racing, Inc.*[16], where the success of the plan relied upon three eventualities entirely beyond the control of the debtor. While Debtors here cannot force their landlords to renew their leases, they can certainly wield powerful influence by their substantial development of the lease and continued favorable farming performance.[17]

There is also competent evidence that the Debtors have taken reasonable measures to hedge their crop risks by retaining some ownership in Sunland, Inc. Their participation in this company enables them to preserve a market for peanuts that might be otherwise unmarketable.

Certainly there is little the Debtors can do or be expected to do to control climactic conditions. It seems to us that weather risk is a factor inherent in every farm loan and can hardly be the basis for a successful challenge to feasibility. As

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[15] *See e.g., In re Sunflower Racing, Inc.*, 226 B.R. 673, 690 (D. Kan. 1998).

[16] *Id.*

[17] *See In re Kloberdanz*, 83 B.R. 767, 773 (Bankr. D. Colo. 1988) (Chapter 12 plan was feasible even though large portion of debtor's farming operation used leased farmland.).

noted by one bankruptcy court in the feasibility context of a Chapter 12 plan:

> As for the Bank's argument concerning the factors that are beyond the Debtors' control, such as weather and disease, the factors present in this case are no different than those in every other Chapter 12 case. Farming – whether it involves raising cattle or turkeys or producing corn or soybeans – is an uncertain business at best. Chapter 12 debtors, like all farmers, are largely at the mercy of the weather, plant and animal diseases, market prices, and various other factors that are far beyond their power to control. If Chapter 12 plans cannot be confirmed because the future is uncertain, then no Chapter 12 plan (or Chapter 11 or Chapter 13 plan, for that matter) would ever be confirmed.[18]

Debtors need not have convinced the bankruptcy court that they could guarantee success. Rather, they need only convince the court that their plan has a reasonable assurance of success.[19]

In short, on the record before us and applying the standard of review called for in this case, we cannot conclude that the bankruptcy court erred in finding the Debtors' plan to be feasible. While another bankruptcy judge, sitting as a trier of fact, might have reached a different conclusion on this record, we do not sit as the trier of fact. Rather, we are obligated to determine if the record contains evidence supporting the bankruptcy court's findings. It does. That said, we are not definitely and firmly convinced that a mistake has been made.

5. Conclusion

The bankruptcy court's Order of Confirmation is AFFIRMED.

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[18] *In re Lockard*, 234 B.R. 484, 493 (Bankr. W.D. Mo. 1999).

[19] *See In re Pikes Peak Water Co.*, 779 F.2d at 1460; *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).