IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
PLANET HOLLYWOOD	)	Case Nos. 99-3612 (MFW)
INTERNATIONAL, et al.,	)	through 99-3637 (MFW)
	)	
Debtors.	)	(Jointly Administered Under
	)	Case No. 99-3612 (MFW))

MEMORANDUM OPINION[1]

Before the Court is the Motion of Credit Lyonnais New York Branch ("CLNY") Requesting Modification of this Court's August 30, 2001, Order. It is opposed by Planet Hollywood International, Inc. ("the Debtor"). For the reasons set forth below, we deny CLNY's Motion.

I. BACKGROUND

In a Memorandum Opinion and Order dated August 30, 2001, we granted the Motion of CLNY for Summary Judgment on the Debtors' Amended Objection to the Amended Proof of Claim of CLNY and allowed its claim in the amount of $2,294,647. We disallowed a part of that claim (in the amount of $56,338) because CLNY had not provided sufficient evidence to establish that that expense was payable by the Debtor. In all other respects, we allowed the claim.

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

Subsequent to our decision, the Debtor filed a timely appeal. As a result, the Debtor has not paid the CLNY claim, citing the Debtor's confirmed Plan which requires payment only of Allowed Claims, which are defined as claims which have been allowed by a final order no longer subject to appeal. (See Plan at §§ 1.4, 1.52, 6.3.1 and 8.5.)

On September 17, 2001, CLNY filed the instant Motion by which CLNY seeks an Order directing the Debtor to make an immediate distribution of the amounts due to it under the Plan[2] or alternatively to escrow that sum until the appeal is completed. The Debtor objected, asserting that the Motion seeks a modification of the Debtor's confirmed Plan which is not permissible. After a hearing on the Motion held on September 27, 2001, we permitted the parties to submit additional briefs by October 5, 2001.

II. JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 157(b)(2)(B) and (O).

[2] Since the claim was allowed as a general unsecured claim, it is entitled only to a pro rata distribution of cash and notes made available to Class 6 creditors.

III. DISCUSSION

A. Motion for Reconsideration

A motion for reconsideration under Federal Rule of Bankruptcy Procedure 9023 is an extraordinary means of relief in which the movant must do more than simply reargue the facts or law of the case. See North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)(a motion to reconsider must rely on one of three major grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error [of law] or prevent manifest injustice")(quoting Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency, 705 F. Supp. 698, 702 (D.D.C. 1989)); Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."); Dentsply Int'l., Inc. v. Kerr Mfg. Co., 42 F. Supp.2d 385, 417 (D. Del. 1999)("[motions for re-argument] should be granted sparingly and should not be used to rehash arguments already briefed or allow a 'never-ending' polemic between the litigants and the Court").

CLNY asserts that its motion should be granted because of the change in the Debtor's financial condition. See, e.g., Commonwealth of Pennsylvania State Employees' Retirement Fund v. Durkalec (In re Durkalec), 21 B.R. 618, 619-20 (Bankr. E.D. Pa.

1982)(court may vacate or modify order on basis of debtor's changed financial circumstances). Specifically, CLNY points to the Debtor's Annual Report filed with the SEC which evidences a drop in the Debtor's cash reserves from $14.1 million at the end of 2000 to $3.1 million in July 2001 and an increase in the Debtor's accounts payable from $18.4 million to $38.7 million during that same period. (See Exhibits C and D attached to CLNY's Motion.)

Without contesting the facts presented by CLNY, the Debtor argues that CLNY cannot obtain the relief it is requesting because it is essentially seeking a modification of the Debtor's Plan. It asserts that CLNY cannot, under the guise of a motion for reconsideration, modify the plan. See, e.g., Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq), 153 F.3d 113, 116 (3d Cir. 1998)(in holding that motion for reconsideration and revocation of chapter 13 confirmation order could not be granted except to the extent it met the requirements of section 1220(a), court concluded that the Bankruptcy Rules cannot provide a substantive remedy which the Bankruptcy Code has foreclosed); In re Rickel & Assoc., Inc., 260 B.R. 673, 678 (Bankr. S.D.N.Y. 2001)(movant could not use motion under section 105(a) or Rule 60(b) to bypass the requirements of section 1127(b) for modification of a confirmed plan).

We agree with the Debtor's characterization of CLNY's Motion. That Motion asks the Court to modify the August 30 Order in a manner that would conflict with the Plan which has been confirmed. Specifically, CLNY asks that we require the Debtor to pay it a distribution on its claim, before the claim is finally allowed. This conflicts with section 8.5 of the plan which states that "Notwithstanding any other provisions of the Plan, no payments or distributions shall be made on account of a Disputed Claim until such Claim . . . becomes an Allowed Claim. . . ." The Plan binds all creditors and other parties in interest including CLNY.

CLNY is bound by the terms of the Plan and cannot ask for relief inconsistent with the Plan. 11 U.S.C. § 1141 ("the provisions of a confirmed plan bind . . . any creditor").

B. Standing to Modify the Plan

CLNY argues, however, that the Plan should be modified because of changed circumstances since confirmation of the Plan. It asserts that the failure of the Plan to include a reserve for disputed claims may have been warranted at the time of confirmation, but is no longer reasonable given the Debtor's deteriorating financial condition.

The Debtor asserts that CLNY does not have standing to request a modification of the Plan. Section 1127(b) of the

Bankruptcy Code provides that only a plan proponent or the reorganized debtor may modify a plan (and only under certain express circumstances). 11 U.S.C. § 1127(b). See also, United States Trustee v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.), 150 F.3d 1233, 1238 (10th Cir. 1998)("a plan can only be modified by a plan proponent or reorganized debtor"); Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.), 853 F.2d 1149, 1158 n.13 (4th Cir. 1988) ("§ 1127(b) allows only the proponent of a plan or a reorganized debtor to initiate post-confirmation modification"); Goodman v. Phillip R. Curtis Enterprises, Inc. (In re Goodman), 809 F.2d 228 (4th Cir. 1987)(Bankruptcy Court could not sua sponte modify plan, modification had to be sought by proper party under section 1127(b)); In re Charterhouse, Inc., 84 B.R. 147, 151 (Bankr. D. Minn. 1988)(creditors' committee was not plan proponent and therefore lacked standing to seek modification of plan).

We agree with the Debtor. Section 1127(b) provides:

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title.

11 U.S.C. § 1127(b)(emphasis added).

The Plan incorporates section 1127(b) by providing at section 14.13(b) that:

> After the entry of the Confirmation Order, [the Debtor] may, with the consent of the Creditors' Committee and in accordance with Section 1127(b) of the Bankruptcy Code, amend or modify this Plan, or remedy any defect or omission or reconcile any inconsistency in the Plan in such manner as may be necessary to carry out the purpose and intent of the plan. . . .

Therefore, we conclude that CLNY lacks standing to request a modification of the Plan.

C. Requested Modification Is Not Permissible

Even if CLNY had standing, the modification of the confirmed plan requested by it is not permissible. Section 1127(b) permits modifications only if the plan as modified would otherwise be confirmable under the Code. This modification is not. CLNY is requesting that its disputed claim be treated different from (and in preference to) other disputed claims by requiring that the Debtor pay its claim now (or escrow for its benefit alone sufficient funds to pay its claim when allowed). Under the Plan, no other disputed creditor is entitled to that treatment and therefore this modification would violate the provisions of section 1123(a)(4) of the Code. Such a modification is not permissible under section 1127(b).

D. Stay Pending Appeal

CLNY argues that the effect of not requiring the Debtor to pay it a distribution now results in the Debtor obtaining a stay of our August 30 Order pending appeal. CLNY asserts that the Debtor would not be able to obtain such a stay under the standards normally required for such relief. See, e.g., In re Trans World Airlines, Inc., 18 F.3d 208, 211 (3d Cir. 1994). Specifically, CLNY asserts the Debtor does not have a likelihood of success on the merits of its appeal but is merely appealing to delay making any payment to CLNY. Further, CLNY asserts that it will be irreparably harmed by the "stay" because the delay will allow the Debtor's financial condition to deteriorate to the point where it will be unable to pay CLNY at all. It asserts that the balance of the equities favors it and that the Debtor is not entitled to a stay of the effect of our Order.

Even if CLNY is correct, however, we are unable to afford it any relief. We are not being asked to grant the Debtor a stay of our August 30 Order pending appeal. The Plan, which has already been confirmed, in effect already provides such relief. The Bankruptcy Code and the Plan prohibit any modification by CLNY.

E. Inconsistency of the Plan

CLNY also argues that the modification is necessary to correct inconsistencies in the Plan and to prevent the Plan from

violating the Bankruptcy Code. CLNY asserts that not granting it payment now will effectively preclude it from receiving any distribution under the Plan. Because some creditors have already received a distribution, this will result in unequal treatment of creditors in violation of section 1123(a)(4).

We disagree. The Plan provides that all allowed class 6 creditors will receive the same treatment. To get that treatment, CLNY must have an allowed claim. If it does not have an allowed claim, it is not entitled to payment under the Plan (or the Code).

CLNY argues, however, that the Court's finding that the Plan was feasible in the confirmation order is no longer valid. It argues that the Confirmation Order suggests that in such changed circumstances the terms of the Plan should not be enforced. In support of its argument, CLNY cites paragraph 48 of the Confirmation Order which provides that if the Plan is not consummated "nothing contained herein shall be deemed . . . to prejudice in any manner the rights of the Debtors or any Persons in any further proceedings involving the Debtors; and (b) the result shall be the same as if this Order were not entered."

However, CLNY has not presented any evidence that the Debtor has not consummated the Plan. In fact it acknowledges that the Debtor did pay some creditors, it has simply not paid CLNY because its claim is disputed. To the extent that CLNY argues

that the Debtor has not consummated the Plan by not paying it, the Debtor is correct is stating that under the terms of the Plan it has no obligation to pay CLNY yet. In the event that CLNY's claim is ultimately allowed by final order and the Debtor does not comply with the terms of the Plan and Confirmation Order, CLNY would have whatever rights it has under paragraph 48 of the Confirmation Order.

Furthermore, CLNY is not seeking a complete voiding of the Confirmation Order; rather it is seeking to modify only the provisions of the Plan that prevent it from being paid now. As noted above, that is not permissible.

IV. CONCLUSION

For the reasons stated above, we deny the Motion of CLNY Requesting Modification of This Court's August 30, 2001, Order. An appropriate Order is attached.

BY THE COURT:

Dated: October 19, 2001

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Mary F. Walrath
United States Bankruptcy Judge

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	)	
Debtors.	)	(Jointly Administered Under
	)	Case No. 99-3612 (MFW))

O R D E R

AND NOW, this **19TH** day of **OCTOBER, 2001,** upon consideration of the Motion of Credit Lyonnais New York Branch ("CLNY") Requesting Modification of this Court's August 30, 2001, Order, it is hereby

ORDERED that CLNY'S Motion is **DENIED.**

BY THE COURT:

_____
Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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