

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE:

JOHN RIVA, RIVA DEVELOPMENT
CORPORATION d/b/a BURGER KING
#1395 and #4499 and RIVA
MANAGEMENT CORPORATION d/b/a
BURGER KING #1774,

BK. NO. 90-21609
BK. NO. 90-21636
BK. NO. 90-21635

Debtors.

This matter is on this morning for adjourned confirmation hearings in the above cases as well as adjournments of motions in the John Riva case by Burger King Corporation to convert the case by Carrols Corporation for the appointment of a Chapter 11 trustee and by the landlord of the Debtor's Jefferson Road property to terminate a sublease and for relief from the automatic stay -

Burger King has filed objections to the plan of the Debtor, John Riva, as finally modified. Its principal objection is that the Debtor's proposal to pay Burger King's unpaid prepetition franchise fees, lease and royalty payments at the rate of \$16,220 per month until paid in full without interest, as part of his assumption of the franchise lease and sublease executory contract agreements, does not meet the requirements of Section 365(b)(1). Burger King's specific objections are that the Debtor's proposal does not propose to cure these prepetition default arrearages immediately upon confirmation nor does it provide adequate assurance that those defaults will be promptly cured, and it does not propose to compensate Burger King for its actual pecuniary loss.

This Court agrees with those courts that have held that the determinations under Section 365(b)(1)(A) as to whether: (1) there must be a cure of any arrearages at the time of confirmation when the assumption of the executory contract is as part of a confirmed plan or whether there can be deferred cure payments; and (2) there is adequate assurance that the debtor will promptly cure any default, must be made after a review of the totality of the facts and circumstances of each case. In that regard I would cite to you In re Mako, Inc., 102 B.R. 818 and In re Gold Standard at Penn, Inc., 75 B.R. 669. These and other cases have held that it is not necessary in all cases under Section 365(b)(1)(A), as the clear language of the statute indicates, that a full cure be made upon the effective date of confirmation, and what constitutes a prompt cure and adequate assurance of a prompt cure depends upon the facts and

circumstances of the case. In this case even with interest on the arrearages, at a rate which will be hereinafter discussed, at the monthly repayment rate proposed by the Debtor Burger King will be repaid its arrearages in approximately two years. Given that: (1) the success of the Debtor at its three locations is clearly in the best interests not only of the Debtor and its employees and the public but of Burger King as a franchisor; (2) the Debtor's three stores are operationally well run and have high customer satisfaction; (3) the Debtor's projected cash-flow allows for the repayment of the arrearages in addition to the ongoing requirements of the business; and (4) Burger King as a franchisor and landlord has continuous interactions with the Debtor and its stores and as such has the ability at all times to assist the Debtor in maintaining high quality operations and achieving a maximum profitability, thus further insuring Burger King's ongoing best interests and that the cure payments will be made, this Court finds that the Debtor's proposal meets the requirements of Section 365(b)(1)(A). Under the facts and circumstances of this case the proposal constitutes a prompt cure and provides Burger King with adequate assurance of such a prompt cure.

With respect to the requirements of Section 365(b)(1)(B) that the Debtor promptly compensate Burger King for any pecuniary loss resulting from the default, the Court had previously advised the parties that it would require interest to be paid on the arrearages and requested that the parties make submissions in connection with setting an appropriate interest rate. In response, the Debtor has suggested that the interest rate should be set at the federal judgment interest rate. Burger King has suggested that the interest rate be set at the New York State legal rate of interest. The Debtor's proposed rate, which is a floating rate, would the Court believes be approximately 4-4 1/2% over the period in question. The rate proposed by Burger King would be 9%.

As each of the parties has stated in their submissions, generally the setting of an appropriate rate of interest is considered to be a matter of discretion for a trial judge. In this case the Court does not believe that judgment interest rates are an appropriate measure when the purpose is compensating a party for its actual pecuniary loss resulting from a debtor's failure to make payments (in this case franchise fee, royalty and lease and sublease payments). Although judgment interest rates may be an appropriate

measure for determining the value of a stream of payments for confirmation purposes under Section 1129 and Section 1325 or for adequate protection purposes, the Court does not believe it appropriate for compensating for actual pecuniary loss. The Court believes that in this case a proper measure of compensation for Burger King's pecuniary loss is the prime rate of interest. As a multi-national corporation, this Court assumes that Burger King has numerous revolving lines of credit available to it, some of which may actually have been used by Burger King during the default period in question, and others commonly referred to as "standby" lines of credit. Given Burger King's financial status, the Court assumes that at least some of these lines of credit provide for repayment at a prime rate of interest. To the extent that Burger King has suffered a pecuniary loss by not having available to it the monies which the Debtor should have paid, monies which Burger King could have used for expenses or investment or reinvestment in any form, any such expense requirement investment or reinvestment opportunity could have been met by Burger King drawing on any of its lines of credit, the cost of which would be repayment together with interest at prime. For convenience the Court will require the prime rate to be that published in the Wall Street Journal.

As to the respective Debtor's plans of reorganization, this Court finds that as to each, the requirements of Section 1129 of the Bankruptcy Code have been met, including that the plans were filed in good faith, are feasible and in the best interests of creditors. On the issue of feasibility, the Court finds the testimony of David J. Connor, the President of Carrols Corporation, which itself operates at approximately 160 Burger King locations, and Mr. Riva, to be credible and convincing in connection with the Debtor's projections and ability to generate the cashflow set forth in its projections necessary to meet the payments required by the plan.

Burger King's objections to confirmation were principally with regard to feasibility and the treatment of Burger King under Section 365 which have been addressed.

It statement that it will terminate.

