

SIGNED.



Dated: March 29, 2011

James M. Marlar
JAMES M. MARLAR
Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:) Chapter 11
GREGORY A. FRIEDMAN and JUDITH)
MERCER-FRIEDMAN,) No. 4:07-bk-02135-JMM
) **MEMORANDUM DECISION**
)
) Debtors.)

Before the court is the Debtors'/Appellants' motion for stay pending appeal pursuant to FED. R. BANKR. P. 8005 (ECF No. 233). Argument was heard on March 23, 2011. The court now rules.

The court weighs the Wymer¹ factors in the following way:

1. Are Appellants likely to succeed on the merits of the appeal?

Noting the split of trial court authority in both of the Ninth Circuit and across the country, the Appellants have a reasonable chance of prevailing on appeal. The odds are 50/50. It is important to the trial bench to obtain some direction from the Bankruptcy Appellate Panel, as this issue on appeal is beginning to be argued more often. In addition, although the appeal issue stems from an interlocutory order, which may be the most usual way in which it is raised (i.e., denial of confirmation), these Debtors have asked leave of the BAP's motions panel to accept the case in this procedural posture. It is certainly possible that the BAP grants the Appellants' motion for leave.

The court finds this factor favors the Appellants.

¹ In re Wymer, 5 B.R. 802, 806 (9th Cir. BAP 1980).

1 **2. Will irreparable injury be suffered by the Appellants if no stay is granted?**

2
3 This factor also favors the Appellants. They may find that their principal business
4 asset is sold in a Chapter 7, leaving them without this ability to earn a living. If their plan is
5 confirmed, they can retain the asset.
6

7 **3. Will the Appellees suffer substantial harm because of the stay?**

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9 This factor weights in favor of the Appellants. The harm to Appellees is merely a
10 short delay, while the critical appellate question is answered. Balancing the harm tips in the
11 Appellants' favor.
12

13 **4. Will the public interest be harmed by reason of the stay?**

14
15 As a policy question, the public interest will be advanced by obtaining a BAP ruling
16 on the applicability of the absolute priority rule in an individual case. Debtors and creditors alike
17 will then finally know which "ground rules" apply to them, and this important legal question may
18 be answered.

19 The Appellants have been more persuasive on this point than the Appellees.
20

21 **RULING**

22
23 A separate order will be entered which:

- 24 1. Grants the Appellants' motion for stay pending appeal (so long as the
25 appeal to the BAP is viable); and
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27
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