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8
9 IN THE UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF ARIZONA

11 In re:
12 ARA MACAO HOLDINGS, L.P.,
13
14 Debtor.

Case No. 3:18-BK-03615-PS
In Proceedings Under Chapter 11
EDGEWATER BELIZE INVESTORS,
LLC’S MOTION 1) TO RECONSIDER
ORDERS ARISING FROM 11/10/22
HEARING; 2) FOR RELIEF FROM
SAID ORDERS; AND 3) FOR
CONFIRMATION OF PLAN

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19 Edgewater Belize Investors, LLC (“EBI” or “Movant”) became aware of new
20 evidence almost immediately after entry of (a) this Court’s *Order Granting*
21 *Chapter 11 Trustee’s Motion For Authority To: (1) Sell Belizean Land; (2) Reject*
22 *Related Executory Contracts; And (3) Pay Associated Real Estate Commission And*
23 *Finder’s Fee* entered on November 11, 2022 (“the Sale Order”) and (b) two orders
24 announced from the bench one day prior denying motions by EBI for a continuance
25 and for the right to bid at the 363 sale (the “EBI Motion Orders”). As a result,
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1 Movant, through counsel undersigned, respectfully requests that the Court (1)
2 reconsider and vacate, or otherwise grant relief from the three aforementioned Orders
3 (“collectively, the “Relevant Orders”) and (2) accelerate the December 20, 2022
4 continued confirmation hearing and approve confirmation of the *First Amended Plan*
5 *of Reorganization Proposed by Edgewater Belize Investors, LLC, Plan Proponents*
6 *Dated September 20, 2022* (“Plan”).

7 **I. FACTUAL AND PROCEDURAL HISTORY**

8 November 10, 2022 at 10:30 a.m. was the time set for a continued hearing on
9 confirmation of the Plan proposed by EBI. It was also set for approval of the Trustee’s
10 Motion to Sell Land under § 363. At the time of the November 10th hearings, SF
11 Marina had not yet received an expected approval from the Swedish government
12 export credit agency (“EKN”) regarding the export finance guarantee request for the
13 Belize marina project (the “EKN Approval”). The EKN Approval was critical to the
14 issuance of the financing commitments from SF Marina group entities necessary for
15 Plan confirmation. Since said approval was expected to be announced at an EKN
16 meeting set for the next day, and since the plan has the quasi unanimous support of
17 creditors and is significantly and undisputedly more beneficial to the Estate than is the
18 sale, EBI requested a continuance of both hearings for three business days so that the
19 EKN Approval could be obtained and confirmation of the plan could be approved by
20 the Court before the property that was the subject of the plan was sold by the Estate.

21 In the absence of the EKN Approval and the financing commitments that were
22 conditioned thereon, the Plan could not be confirmed at the November 10th hearing.
23 Considering the representation made by the buyer at the hearing that it would walk
24 away from the sale without approval that day, the EBI Motion to Continue was
25 opposed by the Creditors Committee and by the Trustee and denied by the court. The
26 opposing parties and the Court were not willing to risk losing the buyer for a Plan

1 that, although overwhelmingly supported by and dramatically more beneficial to
2 creditors, was not at that point confirmable due to the absence of the financing
3 commitment. The 363 sale hearing proceeded, during which hearing the Court also
4 denied the EBI Motion to Bid.

5 EBI learned the next day, November 11th, within hours of the entry of the
6 Relevant Orders, that EKN had confirmed to SF Marina the substantive project
7 approval that was critical to SF Marina's decision to provide its financing
8 commitments. Had the hearings been continued as requested, the Plan would likely
9 have been confirmable at the continued hearing.

10 Concomitant with this EKN substantive approval, SF Marina issued to its
11 affiliate, SF Investments Switzerland GmbH ("SFIS"), an irrevocable subscription for
12 USD 5.0 million to its SF Marina Securities FT Luxembourg Compartment BELIZE
13 ONE ("Belize One"). In turn, SFIS, as manager of Belize One, has issued an
14 irrevocable commitment, subject to documentation and customary closing conditions
15 (expected to be promptly completed), to provide USD 4.5 million in funding to EBI in
16 order that EBI be able to meet the initial USD 4.5 million payment, as described in the
17 Plan and the Second Amended Disclosure Statement Dated September 20, 2022.

18 SF Marina has also provided an irrevocable Commitment letter in support of
19 the USD 19 million of product and services described in Article V.C.3. and Article
20 V.C.4 of the Plan, subject only to completing the final administrative task between
21 EKN and SF Marina of confirming in the ordinary course, numbers related to cash
22 flow timing after which EKN issues its final Term Sheet.

23 Deposits of not less than USD 500,000 and not greater than USD 2,000,000
24 will be placed in Parker Schwartz's Trust Account not later than 48 hours before a
25 Hearing on the Motion. These sums will be transferred to an escrow account with
26 Arizona Escrow & Financial with escrow instructions designed 1) to ensure that the

1 parties responsible for the plan perform their obligations thereunder and 2) to provide
2 protection to the Estate in the unlikely case that they do not.

3 The documents described above will be lodged with the Court as supplemental
4 filings not later than 17:00 on Tuesday November 29th.

5 **II. ARGUMENT**

6 **A. Proposed procedure**

7 Movant hereby respectfully requests that the Court set a hearing in
8 approximately 2 weeks to consider Movant's requests herein for reconsideration of
9 the Relevant Orders and confirmation of its Plan, providing interested parties an
10 opportunity to comment prior to the hearing. Allowing Movant this hearing does not
11 create risk to the Estate. Until such time as the Court is in a position to consider and
12 grant the relief requested hereby, the Trustee and the Sec 363 Buyer are free to
13 continue toward consummating the sale.

14 **B. There are various bases for reconsidering and granting relief from**
15 **orders of the Court based on upon newly discovered evidence**

16 A motion for reconsideration after entry of judgement is typically filed in
17 federal court either under Rule 59, Federal Rules of Civil Procedure, to alter or amend
18 a judgment or Rule 60 to obtain relief from a judgment or order. As to the present
19 Motion, there is also sound basis for relief if the Court treats it as a motion to reopen
20 or a motion under 11 U.S.C. § 105.

21 A motion under Rule 59 gives the Court broad authority to modify a judgment.
22 Under Rule 60, there are specific grounds under which relief from a final judgment
23 can be granted. Rule 60(b)(2) allows for relief for judgment if there is "newly
24 discovered evidence that, with reasonable diligence, could not have been discovered
25 in time to move for a new trial under Rule 59(b)". Alternatively, Rule 60(b)(6) allows
26 for relief for "any other reason that justifies relief." Under either rule the new

1 information discovered after the Court's ruling supports granting reconsideration and
2 relief.

3 To succeed on a motion under Rule 59 [by invoking
4 **newly discovered evidence**], a party must show that: (1)
5 it has evidence that was discovered post-trial; (2) it had
6 exercised due diligence to discover the new evidence; (3)
7 the evidence is not merely cumulative or impeaching; (4)
8 the evidence is material; and (5) the evidence is such that a
9 new trial would probably produce a new result. *Cincinnati
Life Ins. Co. v. Beyrer*, 722 F.3d 939, 955 (2013) quoting
Envtl. Barrier Co., LLC v. Slurry Sys., Inc., 540 F.3d 598,
608 (7th Cir.2008) (emphasis added)

10 Had Movant discovered the EKN Approval before the hearing ended, it clearly
11 would have raised it. It would have been a critical fact in satisfying the Court as to
12 feasibility and confirmability of the Plan. Unfortunately, it was discovered post
13 hearing. It was clear from various comments in court that opposing parties would
14 likely have been supportive of continuing the hearings if this fact could have been
15 presented and that the Court would have been more likely to grant the continuance.
16 Evidence of the EKN Approval would have been material and not cumulative. Given
17 the resolution of all formal objections to the plan, the positive ballots of virtually all
18 creditors and the Proponent's proposal on the record of modifications to the Plan to
19 resolve the concerns of the Creditors Committee and the Court as to the use of cash
20 equivalents, evidence of the EKN approval would likely have produced a different
21 result at the November 10th hearing. It should do the same upon reconsideration.

22 **C. Reconsideration of an Order due to newly discovered evidence is**
23 **particularly important in the Bankruptcy Court.**

24 Unlike typical two-party open-and-shut disputes tried in other courts, a
25 bankruptcy case, particularly in Chapter 11, can have a long and broad existence that
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1 goes beyond the specific disputes that must be resolved during the case. There often
2 must be a balancing of multiple competing interests. In this complex setting,
3 changing circumstances are common and often relevant to the resolution of issues for
4 the greater good. The present case is an excellent example of the need to balance
5 multiple competing interests and the importance of the benefit that can result from a
6 court being open to changing a ruling in the right circumstances.

7 In a case, like ours, involving the issue of availability of financing to a party, *In*
8 *re Adelpia Business Solutions, Inc., et al., Debtors*, 280 B.R. 63 (Bankr. S.D.N.Y.
9 2002), the Bankruptcy Court for the Southern District of New York held a hearing and
10 ruled that financing obtained by the debtor would provide adequate assurance of
11 future payment to a utility company. Some period of time after the conclusion of the
12 hearing, which closed the evidentiary record on the relevant motion, the judge was
13 still in the process of preparing lengthy published findings and conclusions. He
14 learned in a status hearing in the same case that the lender providing the financing had
15 developed financial difficulties of some kind and that the Debtor might be looking for
16 new financing. He issued his decision as he had intended from the record at the
17 hearing, denying the utility company's request for a bond. Recognizing, however, the
18 importance of new facts that might constitute relevant changed circumstances, he
19 expressly noted in his published decision the possibility of moving for reconsideration
20 of that very decision if necessary. *Adelpia* at 89 and n.42.

21 As in the present case, an important decision was made by the court based
22 upon the information available to it regarding the financial condition of one of the
23 parties, that condition being a key element of the issue being decided. Recognizing the
24 possible importance of new facts constituting a relevant change of circumstances,
25 Judge Gerber took an opportunity to recognize the importance of the right to
26 reconsideration when appropriate. "While the right to come back to the Court should

1 not be regarded as a license for reargument, it may quite properly be regarded as the
2 right to come back in light of changed circumstances.” *Id.* at 89.

3 **III. RELIEF REQUESTED**

4 EBI hereby requests that the Court:

- 5 A. Grant EBI’s Motion for Reconsideration;
6 B. Vacate the Relevant Orders;
7 C. Confirm the Plan; and
8 D. Such other relief as the Court deems appropriate.

9 Respectfully submitted November 25, 2022.

10 PARKER SCHWARTZ, PLLC

11 By /s/ Jared G. Parker

12 Jared G. Parker

13 *Attorneys for Edgewater Belize Investors, LLC*

14 Original filed and Copies of the foregoing
15 served electronically via the Court’s
16 CM/ECF Notification System this 25th day
17 of November 2022, on all parties that have
18 appeared in this case.

19 By: /s/ Chris Eckert

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