

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

In re:

Piccadilly Restaurants, LLC, *et al.*,

Debtors.

Case No. 12-51127

(Joint Administration)¹

Chapter 11

Judge Robert Summerhays

**MOTION FOR APPROVAL OF IMMATERIAL MODIFICATIONS TO THE FIRST
AMENDED JOINT CHAPTER 11 PLAN**

Atalaya Administrative, LLC, Atalaya Funding II, LP, Atalaya Special Opportunities Fund IV, LP (Tranche B), and Atalaya Special Opportunities Fund (Cayman) IV, LP (Tranche B) (collectively, “Atalaya”) submit this motion (the “Motion”) seeking Court approval of immaterial modifications to the *First Amended Joint Chapter 11 Plan of Piccadilly Investments, LLC, Piccadilly Restaurants, LLC and Piccadilly Food Service, LLC, Proposed by Atalaya Administrative, LLC, Atalaya Funding II, LP, Atalaya Special Opportunities Fund IV, LP (Tranche B), Atalaya Special Opportunities Fund (Cayman) IV, LP (Tranche B) and the Official Committee of Unsecured Creditors*, (the “Plan,” Docket No. 1241), without the need for further solicitation of votes regarding the Plan. In further support of the Motion, Atalaya respectfully states as follows:

¹ Jointly administered with *In re Piccadilly Food Service, LLC*, 12-51128 (Bankr. W.D. La. 2012), and *In re Piccadilly Investments, LLC*, 12-51129 (Bankr. W.D. La. 2012).

Preliminary Statement

1. The Court has entered an order confirming the Plan which provides a framework for allowing the Debtors to successfully emerge from bankruptcy and make payments to their creditors that greatly exceed the distributions such creditors would receive absent Plan confirmation. Implementation of the Plan depends upon Atalaya's provision of exit financing, which will furnish the Debtors with the additional liquidity needed to make distributions to creditors on the Effective Date.

2. At the time that the Plan was proposed, it was projected that a \$6.0 million exit financing facility would be sufficient to fund distributions contemplated on the Effective Date. However, because of circumstances including a longer than anticipated confirmation process, higher than anticipated professional and administrative fees, and lower Debtor cash reserves, it is now apparent that the Debtors will require additional availability under their exit financing facility to ensure liquidity. Atalaya has agreed to increase its Plan exit financing commitment, and respectfully requests that the Court approve an immaterial modification to the Plan increasing availability under the exit facility from \$6.0 million to \$7.75 million. Such modification will not adversely affect any of the Debtors' creditors, and will merely ensure that the Debtors' creditors will finally begin to receive their contemplated Plan distributions.

Background

3. On January 13, 14, and 15 of 2014, the Court held a hearing (the "Confirmation Hearing") to consider confirmation of the Plan, which had been proposed jointly by Atalaya and the Official Committee of Unsecured Creditors (the "Committee").² After weighing extensive evidence presented by Atalaya, the Committee, and the Debtors' prepetition equity holder,

² Capitalized terms used within this Motion that are not specifically defined herein shall have the meaning ascribed to them in the Plan.

Yucaipa Corporate Initiatives Fund I, L.P. (collectively, with its affiliates, “Yucaipa”) during the Confirmation Hearing, the Court announced oral findings of fact and conclusions of law on February 4, 2014 confirming the Plan. On February 13, 2014, the Court entered an order (the “Confirmation Order,” Docket No. 1420), consistent with its oral findings of fact and conclusions of law.

4. The Plan, among other things, provides for meaningful distributions to all of the Debtors’ unsecured creditors. Specifically, the Plan provides for:

- Payment in full, on the Effective Date, of all Allowed Administrative Claims (including Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code);
- Payment in full, on the Effective Date, of all Allowed Convenience Claims, up to the \$500,000 Convenience Claim Cap;
- Distribution of \$1.0 million, plus all proceeds from the BP Tort Claim (if any) to the Administrator, for the benefit of Holders of Allowed General Unsecured Claims;
- Additional distributions to Holders of Allowed, General Unsecured Claims, of up to \$4,750,000;
- Deferral of Atalaya’s repayment with respect to its DIP Financing Claims against the Debtors, by rolling such amounts up into term loans that will receive only interest payments until obligations under the General Unsecured Creditor Note are paid in full; and
- Conversion of \$9.0 million of Atalaya’s prepetition secured claim into equity of the Reorganized Debtors.

5. Key features of the Plan’s implementation include Atalaya’s willingness to defer immediate payment on a meaningful portion of its prepetition and postpetition secured debt, and willingness to provide additional exit financing (the “Exit Facility”), which the Debtors will use to fund distributions to all creditors pursuant to the Plan. Evidence adduced at the Confirmation Hearing established that absent the provision of new capital via the Exit Facility, the Debtors would likely be administratively insolvent.

6. Following entry of the Confirmation Order, Atalaya began preparations for closing under the Plan. During those preparations it became apparent that many of the Debtors' administrative expenses, including fees payable to Committee professionals, were higher than previously budgeted at the time the Plan was proposed. Furthermore, the Debtors' cash balances were lower than anticipated as a result of operational losses attributable to, among other things, severe winter weather. To date, no distributions have been under the Plan, and the Plan's Effective Date has not occurred.

7. Because administrative expenses are higher than anticipated, and the Debtors' cash balances were lower than anticipated, it is necessary to increase the size of the Exit Facility in order to provide the Debtors with initial liquidity needed to fund the Plan's Effective Date distributions. Consequently, Atalaya seeks approval of immaterial modifications to the Plan in order to increase availability under the Exit Facility from \$6,000,000 to \$7,750,000.

Basis for Relief

8. The Bankruptcy Code permits plan proponents to modify a confirmed chapter 11 plan after confirmation, but prior to substantial consummation. Specifically, Section 1127 of the Bankruptcy Code provides, in relevant part:

(b) *The proponent of a plan ... 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. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified ...*

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

11 U.S.C. § 1127 (emphasis added).

9. Here, Atalaya's requested Plan modification increasing the amount of the Exit Facility satisfies the modification standard set forth in Section 1127 because (a) the circumstances warrant increasing the Exit Facility; (b) the Plan has not gone effective or been substantially consummated; (c) the modified Plan will continue to meet the requirements of Sections 1122, 1123, and 1129 of the Bankruptcy Code; and (d) the Plan proponents have complied with Section 1125 of the Bankruptcy Code, so that all holders of Claims that accepted the original Plan should also be deemed to accept the modified Plan.

A. An Increase of the Exit Facility is Warranted

10. Unforeseen circumstances constitute good cause for modifying a plan after confirmation. *See In re Boylan International, Ltd.*, 452 B.R. 43, 50 (Bankr. S.D.N.Y. 2011)(unforeseen circumstances constituted good cause for approving plan modification); *In re Temple Zion*, 125 B.R. 910, 913 (Bankr. E.D. Pa. 1991)(unforeseen delays in obtaining zoning approval justified post-confirmation plan modification). In the event that plan proponents encounter such unforeseen circumstances, courts approve plan modifications to address such unforeseen contingencies, unless the proposed modification would "upset the expectations of creditors." *Boylan International*, 452 B.R. at 50.

11. Here, approving Atalaya's requested increase of the Exit Facility is warranted, as increased Exit Facility availability is necessary to address unforeseen circumstances regarding the Plan's implementation. Although Atalaya initially believed that a \$6.0 million Exit Facility would be sufficient to fund such distributions, unforeseen circumstances, including the incurrence of administrative expense claims in amounts higher than expected and lower than expected cash balances for the Debtors have necessitated an increase in the Exit Facility.

12. Furthermore, Atalaya's requested increase of the Exit Facility will not impair the expectation of any creditors. To the contrary, the Plan's proponent, Atalaya, is requesting an increase in Exit Facility availability to ensure that the Debtors will have sufficient funds available to make the distributions contemplated under the Plan that are consistent with the expectations of all of the Debtors' creditors. Because such Exit Facility proceeds will be disbursed principally to the Debtors' administrative claimants and unsecured creditors, the only party that will be affected by an increase to the Exit Facility is Atalaya, who has agreed to such modification. Thus, modifying the Plan to increase the Exit Facility, as requested herein, is warranted.

B. The Effective Date has not Occurred and the Plan has not been Substantially Consummated

13. The Bankruptcy Code provides that a plan has been "substantially consummated" when all of the following have occurred:

- (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
- (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
- (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2).

14. Here, the Effective Date has not yet occurred, the Plan's proponents have not commenced any distributions under the Plan, and Atalaya has not yet assumed operation of the Debtors' businesses, as contemplated by the Plan. Because the Plan has not yet been substantially consummated, its proponents may still modify the plan, subject to the other requirements set forth in Bankruptcy Code Section 1127(b).

C. The Modified Plan Continues to Satisfy Plan Confirmation Requirements

15. The Plan, as modified, will continue to meet the requirements of Sections 1122, 1123, and 1129 of the Bankruptcy Code. The proposed Plan modification is limited to the amount of the Exit Facility, will not alter the classification or treatment of any Claims under the Plan, and will otherwise comply with all other aspects of Sections 1122, 1123, and 1129 of the Bankruptcy Code. Moreover, an increase in total Exit Facility availability will not affect the Court's prior findings of fact and conclusions of law set forth in the Confirmation Order that the Plan satisfies the requirements of Bankruptcy Code Sections 1122, 1123, and 1129.

D. No Additional Solicitation of Plan Votes is Required

16. Modification of the Plan does not require that the proponent re-solicit acceptances of the Plan before the modification may be approved. *In re American Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988)(immaterial plan modifications do not require “preparation of a new disclosure statement and resolicitation of the plan ...”). Re-solicitation is only necessary where the proponent intends to solicit votes from previously dissenting creditors, or when the modification materially and adversely impacts parties that previously voted for the plan. *Id.* A plan modification will only be considered material where it “so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance.” *Id.* at 824.

17. Here, the proposed increase in Exit Facility availability does not constitute a “material” plan modification because it will not adversely affect the treatment of *any* creditors under the Plan. The proposed Plan amendment is merely intended to ensure that the Debtors will have sufficient funds available on the Effective Date to fund the contemplated distributions to be made on such date.

18. Because the Plan does not materially or adversely affect the interests of any creditors, Atalaya requests that the Court hold that all Holders of Claims that voted to accept the Plan are deemed to have accepted the Plan, as modified herein. *See* 11 U.S.C. § 1127(d).

E. The Proposed Plan Modifications Should Become Effective Immediately Following Approval by this Court

19. In the event that the Court approves the immaterial modification proposed herein, Atalaya does not believe that any stay would prohibit the proposed immaterial modification to the Plan from immediately becoming effective after this Court's approval of the Motion. However, in the unlikely event that any interested party alleges that the effectiveness of Atalaya's proposed immaterial modification increasing Exit Facility availability is subject to any stay, including, without limitation, any stays imposed by Bankruptcy Rules 4001, 6004, 6006, 7062, 9014, or otherwise, Atalaya submits that good cause exists for waiving all such stays and allowing the Plan modifications proposed herein to become immediately effective upon Court approval.

20. The effectiveness of Atalaya's proposed immaterial modification increasing Exit Facility availability is a prerequisite to the consummation of the Plan. The Debtors' creditors have waited for years to receive distributions with respect to their claims, and delaying the Plan's consummation by staying the effectiveness of the Exit Facility amendment proposed herein will merely delay the Plan's Effective Date and unnecessarily impose additional hardship upon the Debtors' creditors. In light of such circumstances, the Plan modifications proposed herein must become effective immediately upon the Court's approval of the Motion.

WHEREFORE, Atalaya respectfully requests that the Court: (i) enter an order, substantially in the form of the proposed order attached hereto, approving the immaterial Plan

modifications requested in this Motion; and (ii) grant Atalaya such other and further relief as is just and equitable.

Dated: April 2, 2014.

Respectfully Submitted,

/s/ Brent R. McIlwain

HOLLAND & KNIGHT, LLP

Robert W. Jones

Texas State Bar No. 10951200

Brent R. McIlwain

Texas State Bar No. 24013140

Brian Smith

Texas State Bar No. 24066101

200 Crescent Court, Suite 1600

Dallas, Texas 75201

Counsel for Atalaya Administrative LLC, Atalaya Funding II, LP, Atalaya Special Opportunities Fund IV, LP (Tranche B), and Atalaya Special Opportunities Fund (Cayman) IV, LP (Tranche B)

CARVER, DARDEN, KORETZKY,

TESSIER, FINN, BLOSSMAN &

AREAUX, LLC

David F. Waguespack, T.A. (#21121)

1100 Poydras Street, Suite 3100

New Orleans, LA 70163

Certificate of Service

This is to certify that service of this document has been made on the 2nd day of April, 2014 by electronic service through the Court's transmission facilities upon those persons listed as recipients of electronic notice on the Notice of Electronic Filing document generated by the Court's System at the time of the filing of this document.

/s/ Brian Smith
Brian Smith