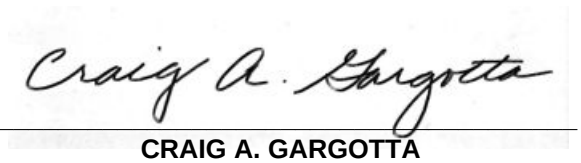
SIGNED this 13th day of June, 2008.



CRAIG A. GARGOTTA
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	
	§	
SAVE OUR SPRINGS (S.O.S.)	§	**Case No. 07-10642-CAG**
ALLIANCE, INC.,	§	
	§	**Chapter 11**
Debtor.	§	

ORDER
DENYING DEBTOR'S MOTION FOR NEW TRIAL
OR TO AMEND ORDER DENYING CONFIRMATION OR, IN THE ALTERNATIVE,
TO PRESENT ADDITIONAL EVIDENCE ON CONFIRMATION

On April 19, 2008, came before the Court for hearing the Motion for New Trial or to Amend Order Denying Confirmation of Debtor's First Amended Plan or, in the Alternative, to Present Additional Evidence on Confirmation of Debtor's First Amended Plan (the "Motion to Reconsider") filed by Save Our Springs (S.O.S.) Alliance, Inc., the Debtor in Possession in the above-entitled Chapter 11 case ("Debtor"). The Debtor appeared through counsel, as did Sweetwater Austin Properties, L.L.C. ("Sweetwater"), a creditor that filed a response in opposition to the Motion to Reconsider, and Kirk Mitchell, a creditor and insider who requested to be heard in support of said Motion. After hearing the arguments of counsel for the Debtor and for Sweetwater (the Court

denied Mr. Mitchell's counsel's request to be heard inasmuch as he had filed no pleading with respect to the Motion to Reconsider), the Court took the matter under advisement. For the reasons stated below, the Court finds that the Motion to Reconsider should be denied.

The Court is requested to (1)(a) alter or amend its order denying confirmation (the "Order") of the Debtor's First Amended Plan of Reorganization (the "Plan") or (b) grant a new trial to allow the Debtor to present additional evidence in support of confirmation of the Plan, or to (2) accept such additional evidence, in the form of an affidavit, without a hearing.

APPLICABLE LEGAL STANDARD

As an initial matter, the parties disagree as to the proper legal standard to be applied by the Court in considering the Motion to Reconsider. As noted by the Debtor, the Motion is brought under Bankruptcy Rule of Procedure 9023. Motion to Reconsider, p. 1. Rule 9023 incorporates Fed.R. Civ.P. 59. *See generally*, ***In re Robintech, Inc.***, 863 F.2d 393, 396 (5th Cir. 1989) ("Federal Rules of Civil Procedure precedent can be helpful, in appropriate instances, in construing the new Bankruptcy Rules [and t]his is true at least where . . . the bankruptcy rule itself or the accompanying advisory committee note makes reference to an analogous or seminal civil rule."). The applicable portions of that Rule provide:

> **Rule 59. New Trial; Altering or Amending a Judgment**
>
> **(a) In General.**
>
> > **(1)** ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:
> >
> > * * *
> >
> > > **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
> >
> > **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
> >
> > * * *

> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

Thus, the Debtor seeks relief both under Rule 59(a), requesting a new trial, and Rule 59(e), requesting the alteration or amendment of the Court's Order Denying Confirmation of Debtor's First Amended Plan and its Memorandum Opinion in support thereof. Rule 59(e) covers motions to vacate judgments, not just motions to modify or amend. ***Edward H. Bohlin Co., Inc. v. Banning Co., Inc.***, 6 F.3d 350, 355 (5th Cir. 1993).

Sweetwater cites Fifth Circuit and other authority for the proposition that "Federal Rule of Civil Procedure 59(e) allows motions to alter or amend judgment [which] serve the narrow purpose of allowing a party 'to correct manifest errors of law or fact or to present newly discovered evidence.'" ***Waltman v. Int'l Paper Co.***, 875 F.2d 468, 473 (5th Cir. 1989), *quoting* ***Keene Corp. v. Int'l Fidelity Ins. Co.***, 561 F.Supp. 656, 665 (N.D. Ill. 1982), *aff'd,* 735 F.2d 1367 (7th Cir. 1984).

On the other hand, Debtor's counsel argued at the hearing on its Motion to Reconsider that the standard ought not to be so strict, and that this Court should be able to reconsider its own decision for almost any reason, suggesting that, like "any trial court [it] has the inherent ability to look it again and to say we didn't get this quite right and we need to revisit this." Counsel admitted, however, that he had not specifically researched the issue, and following the hearing he filed a supplemental brief to support his argument. The Court had not invited additional, post-hearing briefing, however. Therefore, and because the issue is a purely legal one that the Court had itself already begun to examine, it informed the parties that it would not accept the Debtor's supplemental brief nor any responsive filing.

The showings required under a Rule 59(a) motion for new trial and a Rule 59(e) motion to alter or amend a judgment overlap somewhat, but not entirely. First,

> [i]t has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law

> arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

11 Charles Alan Wright, et al., Federal Practice and Procedure § 2805 (2008), *citing, among others*, ***Montgomery Ward & Co. v. Duncan***, 311 U.S. 243, 251 (1940) ("The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."). In addition, a trial court "has discretion to grant a new trial under Fed.R.Civ.P. 59(a) where it is necessary 'to prevent an injustice.'" ***U.S. v. Flores***, 981 F.2d 231, 237 (5th Cir. 1993), *quoting* ***Delta Engineering Corp. v. Scott***, 322 F.2d 11, 15-16 (5th Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

On the other hand,

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

11 Charles Alan Wright, et al., Federal Practice and Procedure § 2810.1 (2008) (footnotes and citations omitted). "[R]elief under Federal Rule 59(e) is an 'extraordinary remedy that should be used sparingly.'" ***In re Hence***, 358 B.R. 294, 308 (Bankr. S.D. Tex. 2006), *quoting* ***Templet v. HydroChem, Inc.***, 367 F.3d 473, 479 (5th Cir. 2004) (citations omitted). Because a Rule 59(e) motion "calls into question the correctness of a judgment," the Fifth Circuit Court of Appeals "has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." ***Id.*** at 478-79 (5th Cir. 2004) (citations and internal quotations omitted).

However, it has also been said that a trial court has "considerable discretion" in deciding a motion to alter or amend a judgment, including a motion to vacate a judgment–although "its discretion is not without limit." ***Bohlin***, 6 F.3d at 355. Further, to avoid reversal on appeal, a trial court's decision to deny a motion to alter or amend its judgment "need only be reasonable." ***Id.*** at 353. Moreover, in ruling on such a motion, "[t]he [trial] court must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." ***Id.*** at 355.

Parties often combine a request for a new trial with one to amend or alter a judgment. Therefore, and especially in bankruptcy proceedings because Rule 9023 encompasses both types of relief, courts do not always carefully distinguish between the grounds applicable to each.[1] Under

[1] For example, in ***In re Hence***, 358 B.R. 294, 308 (Bankr. S.D. Tex. 2006), the court noted that "[i]n its 9023 Motion, [the movant] does not specify whether it is seeking a new trial, an amended judgment, or both, but generally prays that the Debtor's Amended Plan not be confirmed" and, therefore, the court stated that it would "set forth the standard for motions for new trial and amended judgment under Federal Rule of Civil Procedure 59, as incorporated by Bankruptcy Rule 9023." The court then set forth a standard it described as applicable to both motions, quoting ***Pluet v. Frasier***, 355 F.3d 381, 384 n.2 (5th Cir. 2004) and ***Simon v. United States***, 891 F.2d 1154, 1159 (5th Cir. 1990), two non-bankruptcy cases:

> Motions for new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments, which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory.

See also ***Hence***, 358 B.R. at 308 (referring to "a new trial pursuant to Federal Rule 59(e)" rather than Rule 59(a)).

Many Rule 59 cases involve reconsideration of a bench ruling that did not follow a full evidentiary trial or reconsideration of a jury verdict after trial. The first of these invokes a policy

any standard, however, this Court is not convinced that a new trial in this case is merited or that it has made a material error in deciding the facts or the law. Accordingly, for the reasons stated briefly below, the Court finds that the Motion to Reconsider should be denied.

FEASIBILITY

The Debtor challenges, as wrongly decided, two of the Court's rulings: that the Plan was not feasible, and that its classification of Sweetwater's claim was impermissible gerrymandering. With respect to feasibility, the Debtor argues that the Court applied the wrong legal test and that it ignored evidence that would have been material (and persuasive) had the Court considered it.

Specifically, the Debtor first contends that the Court failed to apply a multi-factor test on feasibility that is recognized by Texas bankruptcy courts. The Court in ***In re M & S Assoc., Ltd.***, 138 B.R. 845 (Bankr. W.D. Tex. 1992), among those cited by the Debtor, lists some of those factors:

> Traditional factors have evolved which courts utilize in their feasibility analysis, including: (1) the adequacy of the debtor's capital structure; (2) the earning power of the debtor's business; (3) economic conditions; (4) the ability of the debtor's management; (5) the probability of the continuation of the same management; and (6) and any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

Id. at 849.

---

in favor of deciding cases on the merits, which argues for a more lenient standard under Rule 59; the second raises the serious concern that a judge not substitute his or her judgment for that of the jury, which argues for a more rigorous showing on a Rule 59 motion. Both of those situations are distinguishable on the facts and for policy reasons from this case, in which a motion for new trial is brought after a full, evidentiary bench trial. In such a case, if one assumes that the court's original decision correctly reflects its considered judgment on the applicable law and facts, a Rule 59 motion in essence merely asks the court to change its mind. While it seems unlikely that it would change its mind under those circumstances unless manifest error of fact or law were shown, it also seems a trial court should be allowed the discretion to do so whenever it is convinced of an error, so long as it takes into account the need for finality and the costs associated with a new trial or an amended judgment, in terms of both the time and the expense to the parties and the court. In this case, as discussed above, the Court finds that even under the most lenient standard, there is no error that would warrant a new trial or the alteration or amendment of its previous Order.

Satisfaction of each of these six factors is not mandatory, nor are these the only matters affecting feasibility that may be considered. *See e.g.*, ***T-H New Orleans Ltd. P'ship***, 116 F.3d 790, 801-02 (5th Cir. 1997) (upholding a finding of feasibility where four of the factors were considered, because the bankruptcy court's findings regarding those factors were "not untenable nor unreasonable"). While this Court may not have quoted the "test," or separately and expressly analyzed each factor, it did in fact consider all the evidence presented in light of such factors and concluded, as it still does, that the Debtor failed to sustain its burden of proving by a preponderance of the evidence that the Plan is feasible.

In particular, the Debtor points to evidence it offered at trial regarding its past performance (both pre- and post-petition) and its ability in the past to raise funds, and regarding the proposed post-confirmation continuation of the management that obtained that level of past performance. Its Monthly Operating Reports filed in its bankruptcy case, however, paint a dimmer picture of its current and future ability to raise funds. *See* Exhibit D to Debtor's Exh. 5, Debtor's Monthly Operating Reports for April through August, 2007.

More important, evidence regarding the Debtor's general historical and current performance, in the Court's opinion, has limited bearing on its ability to fund the Creditor Settlement Fund that would pay Sweetwater. That is because of what the Debtor refers to in its Motion to Reconsider as its "chicken-and-egg" problem. It acknowledges that its donors have been unwilling to commit funds to pay its obligations to developers unless and until there is a specific, unconditional plan that will eliminate those obligations. The Debtor's ability to make such an unconditional proposal to its donors (the "egg"), it argues, requires that the Court first have confirmed such plan (the "chicken"). Unfortunately for the Debtor, however, this Court finds that the egg must come before the chicken. There must be a showing, *before* the Court can confirm the Plan, that the Debtor can perform–in this case, a showing that its donors will fund the Creditor Settlement Fund as proposed. The evidence

that the Debtor cites regarding its general past performance and experience is materially different in nature. Therefore, and because evidence *was* presented regarding the donors' lack of, or limited, willingness to donate to pay the Debtor's judgment creditors, the evidence regarding the Debtor's general historical performance and the continuation of its management and their expertise and experience was simply insufficient to show it could raise the funds proposed to be paid under the Plan.

The Debtor also points to the testimony of its principals that its earning power would increase upon plan confirmation and the "lifting of the cloud of bankruptcy," and that its board of directors had extensively and carefully investigated the facts and deliberated before proposing the Plan, illustrating that the Debtor had "proposed a Plan that it both understood and was committed to fund." While that may be true, the Court cannot find the Plan is feasible simply because the board did. Such testimony is self-serving and not corroborated by other more objective evidence, and a board's business judgment can not be substituted for a court's duty to determine feasibility and other confirmation issues. *See e.g.,* ***In re Perry***, 345 F.3d 303, 312-13 (5th Cir. 2003) (holding that, "[i]n the absence of any evidence, other than the self-serving testimony of [the debtor], that the parties did not intend for title to vest . . ., the bankruptcy court's decision that the . . . transfer . . . was legitimate was not clearly erroneous."); *see also* ***T-H New Orleans***, 116 F.3d at 801 ("To allow confirmation, the bankruptcy court must make a specific finding that the plan as proposed is feasible."), *citing* ***M & S Assoc.***, 138 B.R. at 848.

Moreover, the debtor in this case is not an ongoing business; rather, it is a non–profit organization entirely dependant on voluntary donations from its supporters, who have the right and the ability to not only decline to donate, but also to restrict the use of their donations to purposes they choose. There was ample evidence in the form of both testimony and documents to show that the donors had in the past exercised that power to keep the Debtor from using donations to pay the

developer's claims and were continuing to do so as of the date of the confirmation hearing. Without at least firm commitments, there was thus no assurance they would not continue to do so post-confirmation. The Debtor was therefore unable to prove with the requisite certainty that its source of income, the donors, would in fact provide the means for it to make the payments proposed under the Plan. While it admittedly has a fundamentally different "business" than most Chapter 11 corporate debtors, the Debtor has not pointed to, nor is the Court aware of, any instance in which a court has confirmed a plan where the debtor based its ability to make the majority[2] of the payments proposed on only its principals' beliefs and expectations.

Finally, the Debtor requests the Court to consider additional evidence, not presented at trial, on this issue. Specifically, it requests the Court to consider the affidavit of Mr. William Bunch attached to the Motion to Reconsider, attesting that the full amount of the Creditor Settlement Fund has now been raised or pledged. "In deciding whether newly discovered evidence is sufficient to warrant a new trial, the [trial] court should consider whether the evidence: (1) would probably have changed the outcome of the trial; (2) could have been discovered earlier with due diligence; and (3) is merely cumulative or impeaching." ***Diaz v. Methodist Hosp.***, 46 F.3d 492, 495 (5th Cir. 1995). However, the evidence offered by the Debtor is not newly discovered, in that it involves events that had not occurred at the time of the trial. Moreover, even if all the funds had been collected or pledged at the time of the trial, the Debtor gives no explanation or excuse for its failure to offer

[2] In its Memorandum Opinion, the Court found there was evidence that the Debtor had commitments for only $12,500 of the $60,000 needed for the Creditor Settlement Fund. The Debtor argues in its Motion to Reconsider that the figure should be $20,000, not $12,500. The Court does not recall that whatever evidence there was of "pledges" of the additional $7,500 was as unequivocal as the Debtor suggests. Even if it were, whether 1/5 or 1/3 of the amount needed had been pledged is immaterial to the Court's conclusion that there was insufficient evidence at the time of trial that the Debtor could fund the Creditor Settlement Fund.

sufficient, credible evidence of that fact at trial. Its request to supplement the record is therefore denied.

CLASSIFICATION OF SWEETWATER'S CLAIM

The Debtor also contends that the Court erred in finding and concluding that the Plan's separate classification of Sweetwater's claim was impermissible gerrymandering that violated § 1122 (and therefore §1129(a)(1)) of the Bankruptcy Code. In particular the Debtor claims that the Court applied too strict a standard and that Sweetwater had a "non-creditor interest" that gave it a "different stake in the future viability" of the Debtor. It complains that the Court confused the issue of whether Sweetwater's vote should be "designated" as having been cast in bad faith and therefore disallowed, with the issue of whether its claim can be separately classified. In support of its arguments, the Debtor points to testimony during the trial regarding the efforts of an entity related to Sweetwater's managing partner, William Gunn, to obtain a water permit, and to the Debtor's lone challenge of those efforts. The Debtor contends that Gunn's desire to eliminate the challenger, in order that his other entity may obtain the permit, constitutes a non-creditor interest that permits separate classification of Sweetwater's claim. The Debtor also reiterates its more general argument that "Sweetwater/Lazy Nine MUD" has a non-creditor interest in seeing that the Debtor's anti-development activities in the Hill Country cease. In support, it cites the provisions of the drafts of the settlement agreement of the litigation that is the basis of Sweetwater's claim.

First, the draft settlement agreements are between the Debtor as judgment debtor and the Lazy Nine Municipal Utility District and Forest City Sweetwater Development Limited Partnership as judgment creditors–not Sweetwater. *See* Debtor's Exhs.18, 19, and 20. Forest City Sweetwater Development Limited Partnership assigned its interest in the judgment and related interests to Sweetwater (Sweetwater Austin Properties, L.L.C.) on January 26, 2007, after the date of those drafts. Sweetwater Exh. 2, Assignment. The Debtor does not point to any evidence introduced at

trial that would specifically attribute the MUD's (alleged) motives to Sweetwater, other than the Debtor's general "guilt by association" [with Gunn] argument. This argument is merely a rehash of what it argued and failed to prove at trial. *See* ***Templet***, 367 F.3d at 478-79 (a motion for new trial or to alter or amend a judgment "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."). Based on all the evidence that was presented, the Court is still convinced that there was insufficient evidence that Sweetwater had a significant interest other than that of a creditor collecting on its claim.

For all the foregoing reasons, the Court finds that the Debtor's Motion to Reconsider should be denied.

IT IS, THEREFORE, ORDERED that the Motion for New Trial or to Amend Order Denying Confirmation of Debtor's First Amended Plan or, in the Alternative, to Present Additional Evidence on Confirmation of Debtor's First Amended Plan shall be, and hereby is, DENIED.

# # #