UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	Case No.: 24-55507-PMB
LAVIE CARE CENTERS, LLC, et. al.,	Chapter 11
	Cases Jointly Administered
Debtor.	
_____/	

RECOVERY CORP.'S COMBINED (A) REPLY IN OPPOSITION TO STANDING OBJECTIONS AND (B) MOTION FOR RELIEF FROM FINAL FINANCING ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 60

Pursuant to Federal Rule of Civil Procedure 60(b), Federal Rules of Bankruptcy Procedure 9024 and 9014, and other applicable law, Healthcare Negligence Settlement Recovery Corp. ("Recovery Corp."), hereby (a) replies to the "Response of the Omega Parties in Opposition to Recovery Corp.'s Motion to Establish Standing to Challenge Final DIP Financing Order" [471] (the "Omega Objection") filed by the "Omega Parties", as defined in the Omega Response, the "OHI DIP Lender, LLC's Response in Opposition to Recovery Corp.'s Motion to Establish Standing to Challenge Final DIP Financing Order" [Doc. 485] (the "OHI

Joinder"); filed by OHI DIP Lender, LLC ("OHI"), the "Debtors' Objection to Recovery Corp.'s Motion to Establish Standing to Challenge Final DIP Financing Order" [Doc. 486] (the "Debtors Objection"), filed jointly by the 282 chapter 11 debtors (collectively, the "Debtors") whose reorganizations are jointly administered and pending before this Court (collectively, the "Reorganizations") under the lead debtor, parent entity of the remaining Debtors, LaVie Care Centers, LLC (the "Parent Debtor"); and the "Joinder of MidCap Funding IV Trust to the Debtors' and Omega Parties' Objections and Responses to Recovery Corp.'s Motion to Establish Standing to Challenge Final DIP Financing Order" [Doc. 490], filed by MidCap Funding IV Trust ("MidCap"), all of which were filed in response to "Recovery Corp.'s Motion to Establish Standing to Challenge Final DIP Financing Order" [Doc. 433] (the "Standing Motion") and are referred to herein as the "Standing Objections"; and (b) seeks the order of this Court granting relief from the "Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief" [Doc. 189] (the "Final Financing Order").

I. PRELIMINARY STATEMENT

Recovery Corp. is a Florida corporation that holds one hundred (100) claims originally asserted by as many Florida-based claimants (collectively, the

"Florida Claimants"). The Florida Claimants' claims originally arose from nursing home negligence at a series of skilled nursing facilities ("SNFs") formerly owned and/or operated by fifty of the Debtors (collectively, the "Florida DivestCo Debtors")[1]. The Florida DivestCo Debtors divested their SNFs prepetition (the "DivestCo Debtors"), in contrast to the forty-three (43) Debtors that maintained and continue to operate their SNFs (the "OpCo Debtors").

In these Reorganizations, the Debtors originally sought substantive consolidation of all 282 Debtors. The purpose of consolidating disparate debtors such as the DivestCo Debtors and OpCo Debtors was clear: The Debtors seek to have the DivestCo Debtors release the only valuable assets they have—their

[1] 1010 Carpenters Way Operations LLC, 1120 West Donegan Avenue Operations LLC, 11565 Harts Road Operations LLC, 195 Mattie M. Kelly Boulevard Operations, LLC, 12170 Cortez Boulevard Operations LLC, 1465 Oakfield Drive Operations LLC, 15204 West Colonial Drive Operations LLC, 1550 Jess Parrish Court Operations LLC, 1615 Miami Road Operations LLC, 1851 Elkcam Boulevard Operations LLC, 216 Santa Barbara Boulevard Operations LLC, 2333 North Brentwood Circle Operations LLC, 2826 Cleveland A venue Operations LLC, 3001 Palm Coast Parkway Operations LLC, 3101 Ginger Drive Operations LLC, 3735 Evans Avenue Operations LLC, 3920 Rosewood Way Operations, LLC, 4200 Washington Street Operations LLC, 4641 Old Canoe Creek Road Operations LLC, 518 West Fletcher A venue Operations LLC, 5405 Babcock Street Operations LLC, 6305 Cortez Road West Operations LLC, 6414 13th Road South Operations LLC, 6700 NW 10th Place Operations LLC, 702 South Kings Avenue Operations LLC, 710 North Sun Drive Operations LLC, 741 South Beneva Road Operations LLC, 777 Ninth Street North Operations LLC, 7950 Lake Underhill Road Operations LLC, 9311 South Orange Blossom Trail Operations LLC, 9355 San Jose Boulevard Operations LLC, Baya Nursing and Rehabilitation, LLC, Brandon Facility Operations, LLC, Consulate Facility Leasing, LLC, Epsilon Health Care Properties, LLC, Floridian Facility Operations, LLC, Jacksonville Facility Operations, LLC, Josera, LLC, Kissimmee Facility Operations, LLC, Lidenskab, LLC, LV CHC Holdings I, LLC, Melbourne Facility Operations, LLC, Miami Facility Operations, LLC, New Port Richey Facility Operations, LLC, North Fort Myers Facility Operations, LLC, Orange Park Facility Operations, LLC, Port Charlotte Facility Operations, LLC, Tallahassee Facility Operations, LLC, Tosturi, LLC, and West Altamonte Facility Operations, LLC.

claims against insiders of the Debtors that facilitated the transfers of their SNFs for little or no consideration.

In this regard, the DivestCo Debtors and OpCo Debtors are co-dependent on each other to successfully achieve their broader goal. If there were only DivestCo Debtors in these Reorganizations and no OpCo Debtors there would be nothing to reorganize, and the cases would be subject to dismissal or conversion. If the DivestCo Debtors had filed liquidations, then the Debtors would be unable to compromise and release the DivestCo Debtors' claims through the plan process under Bankruptcy Code § 1123(b)(3)(A). A key component of the Debtors' gambit to obtain releases of claims against insiders was to seek post-petition financing from insiders TIX 33433 LLC ("TIX"), and the Omega Parties (the "DIP Lenders"), and then provide them with security interests on those causes of action as well as releases. The Final Financing Order, inter alia, (a) authorized funding of the DIP Facility, (b) made the DivestCo Debtors obligors under the same, (c) caused the DivestCo Debtors to give releases in favor of the DIP Lenders. However, no appreciable benefit has materialized for creditors of DivestCo Debtors as a result of the DIP Facility.

Recovery Corp. has sought dismissal or conversion of the Florida DivestCo Debtors' Reorganizations.[2] In opposition, the Debtors have argued, inter alia, that

[2] Recovery Corp. incorporates by reference herein "Recovery Corp.'s Motion to Dismiss or Convert Florida DivestCo Reorganizations" [Doc. 310].

dismissal or conversion would be detrimental because it would trigger a default under the DIP Facility that was fundamentally unnecessary for the Florida DivestCo Debtors. See Doc. 401 at ¶31. Under the operative version of the combined plan and disclosure statement, the Debtors have backtracked on their claim that substantive consolidations of all of the Debtors is necessary and have placed OpCo Debtors and DivestCo Debtors in separate silos. Since the Debtors have admitted that the DivestCo Debtors do not need to be consolidated with the OpCo Debtors, there is no basis to cause the DivestCo Debtors to be liable under the DIP Facility or give releases of their only valuable assets. Accordingly, under Federal Rule of Civil Procedure 60 Recovery Corp. seeks relief from the Final Financing Order to the extent necessary to extricate the Florida DivestCo Debtors from the same.

II. RESPONSE TO THE STANDING OBJECTIONS

Recovery Corp.'s Standing Motion was filed pursuant to paragraph 23 of the Final Financing Order, seeking the order of this Court establishing that Recovery Corp. has standing to challenge the stipulations, admissions, and agreements contained therein and attaching a draft complaint (the "Draft Complaint") to be filed upon receiving authorization from the Court. In the Standing Objections, the Debtors, the Omega Parties, OHI, and MidCap (collectively, the "Objecting Parties") argue that (a) the Standing Motion is

untimely, (b) Recovery Corp. lacks standing to challenge the Final Financing Order, (c) that the Draft Complaint lacks specificity required under the Final Financing Order, and (d) that the relief sought by Recovery Corp. would be detrimental to the Debtors' estates.

a. Timeliness of the Standing Motion

The Standing Motion should be considered timely because the Challenge Deadline of September 15, 2024, fell on a Sunday. Accordingly, the deadline should have continued to the next business day as provided under Federal Rule of Bankruptcy Procedure 9006. The Objecting Parties argue that the Challenge Deadline was not extended because the Advisory Committee Notes relating to the 2009 amendments to Rule 9006 indicate that the time computation provisions do not apply when the date is a fixed date. However, as the Objecting Parties admit, the Advisory Committee Notes are not binding on this Court, and Recovery Corp. was unable to find an opinion of this Court on the issue of whether a deadline of a specific date gets extended if it falls on a nonbusiness day. Further, as set forth in Dragash, there is no logical reason to treat a deadline that falls on a nonbusiness day differently merely because it was a period measured in days as opposed to a specific date:

> May 30, 1993, the deadline prescribed by the Court, was a Sunday followed by Memorial Day on May 31, 1993. The next business day, therefore, was Tuesday, June 1, which was the date on which the Trustee filed her Objection. Although this Court fixed a specific date

> on or by which the Trustee's Objection had to be filed instead of a "period of time," common sense dictates that Rule 9006(a) still governs. The purpose of the rule is to avoid a forfeiture of rights when a deadline falls on a day when the courts are closed for business. Matter of American Healthcare Management, Inc., 900 F.2d 827 (5th Cir.1990).
>
> When this Court determined that it would extend the time-frame in which the Trustee could object, this Court was not constrained by a certain time-period prescribed by the Rules or Code. The Court merely chose a date it deemed appropriate by which the Trustee had to file an Objection. Had the Court been aware that May 30th was a Sunday, surely it would have chosen the next non-holiday weekday as the deadline, i.e., Tuesday, June 1, 1993. In view of the foregoing, this Court is satisfied that the Trustee's Objection was timely filed.

In re Dragash, 164 B.R. 676, 677–78 (Bankr. M.D. Fla. 1993). Although decided prior to the 2009 amendments to the Rule, the analysis in Dragash remains sound and should be applied. Accordingly, the Standing Motion should be deemed to have been filed timely.[3]

The Objecting Parties also argue that even if the Standing Motion was timely filed, that Recovery Corp. was required to obtain an order granting standing to challenge the Final Financing Order prior to the Challenge Deadline. However, that argument ignores that the Final Financing Order provides that the filing of the Standing Motion tolls the Challenge Deadline "until such motion is resolved or adjudicated by this Court". See Final Financing Order at ¶23(d).

[3] Notably, the Operative Plan [Doc. 461] provides that "[i]f the date on which a transaction may occur pursuant to the Plan shall occur on a day that is not a Business Day, then such transaction shall instead occur on the next succeeding Business Day."

Assuming the Standing Motion was timely filed, it tolled the Challenge Deadline pending a ruling on Recovery Corp.'s standing to challenge the Final Financing Order.

b. Recovery Corp.'s Standing to Object

The Objecting Parties cite case law that stands for the general proposition that avoidance actions belong to the estate and can only be brought by the debtor-in-possession or trustee. In re Prime Motor Inns, Inc., 135 B.R. 917, 919 (Bankr. S.D. Fla. 1992); In re Smith & Kelly Co., Inc., 92-4007, 1992 WL 12004005, at *3 (Bankr. S.D. Ga. June 11, 1992). However, standing to bring avoidance actions can be granted to creditors with authorization from the Court. See In re Smith & Kelly Co., Inc., 92-4007, 1992 WL 12004005, at *4 (Bankr. S.D. Ga. June 11, 1992). The Final Financing Order provided the mechanism for seeking standing to bring the avoidance actions. It is clear at this point that the Debtors and Creditors Committee have no intent to initiate any challenges to the Final Financing Order. Accordingly, those claims should flow back to Recovery Corp. having been abandoned by the Debtors and Creditor Committee. See In re Wilton Armetale, Inc., 968 F.3d 273, 284 (3d Cir. 2020).

Although the Objecting Parties can make a colorable argument that Recovery Corp.'s objections to stipulations regarding the prepetition obligations and liens are in the nature of avoidance actions, the same cannot be said regarding

the gratuitous releases given by the DivestCo Debtors under the Final Financing Order. The issue of the releases given by the DivestCo Debtors and whether the same are appropriate, is in the nature of a compromise of a claim under Federal Rule of Bankruptcy Procedure 9019, to which Recovery Corp. undoubtedly has the requisite standing to object. In re Bertsos, 97-34158 (AMN), 2022 WL 4690333, at *3 (Bankr. D. Conn. Sept. 30, 2022) (quoting In re Dunne, 684 Fed. Appx. 85 (2d Cir. 2017)) ("A party has standing to object to a motion pursuant to Fed.R.Bankr.P. 9019 if they are "directly and adversely affected pecuniarily by the challenged order of the bankruptcy court.'"). Recovery Corp. is adversely impacted by the DivestCo Debtors' release of the DIP Lenders because there is no indication of what the DivestCo Debtors are receiving in return for giving the releases. Notably, in terms of claims against the DIP Lenders, the Omega Parties as landlords benefitted substantially from the transfers of the DivestCo Debtor SNFs as they were able to sell their properties at substantial profit in connection with the transfer of operations of the SNFs, presumably because the SNFs continued business as usual when passed from each Florida DivestCo Debtor. And as admitted by the Debtors, TIX shares beneficial ownership with FC Investors XXI LLC, the ultimate parent of the Parent Debtor that facilitated the transfers of the DivestCo Debtors' SNFs. See Operative Plan [Doc. 461] at pg. 46.

Ironically, the Objecting Parties contend that it is somehow inappropriate to seek relief that would only benefit the creditors of estates of the DivestCo Debtors despite the fact that under the Operative Plan, the DivestCo Debtors and OpCo Debtors have been placed into separate silos, and are being paid from segregated and disproportionate asset pools. See Operative Plan at pgs. 13-14. Moreover, it was fine for the Debtors to obligate the DivestCo Debtors under the DIP Facility in the first place despite the funds being used solely to fund the OpCo Debtors SNF operations, but somehow wrong to seek relief from the DIP Facility on behalf of the DivestCo Debtors that received no benefit from the funds.

c. Specificity of the Draft Complaint

What the Draft Complaint lacks in specificity is attributable to the lack of discovery compliance by the Debtors, and the fact that Recovery Corp. is hamstrung by a confidentiality agreement it entered into with the Creditors Committee, and as a result, there is material information that Recovery Corp. is precluded from referencing in its papers and pleadings filed in these Reorganizations. However, discovery is ongoing, and Recovery Corp. reserved the right to amend the Draft Complaint in the event that it was granted standing to file the same. Regardless, the Draft Complaint contains sufficient information to proceed.

d. Best Interest of the Estates

The Objecting Parties argue that it is not in the best interest of the estates to allow Recovery Corp. to challenge the Final Financing Order. As a threshold matter, that is not the determination that the Court is supposed to undertake in determining whether Recovery Corp. has standing to challenge the Final Financing Order. Bracketing that the analysis is inapplicable to whether Recovery Corp. has standing to file the Draft Complaint, the Objecting Parties' argument that extricating the DivestCo Debtors from the Final Financing Order would somehow cause the unwinding of the DIP Facility is utterly baseless. It cannot be gainsaid that the DivestCo Debtors have nothing to offer the DIP Lenders in terms of collateral or ability to repay the DIP Facility. The only assets of value that the DivestCo Debtors apparently have to offer the DIP Lenders is releases and liens on causes of action against them. And the DIP Lenders' efforts to avoid losing the releases is telling.

Based on the foregoing, the Standing Objections should be overruled, and the Court should authorize Recovery Corp. to initiate an adversary proceeding challenging the Final Financing Order.

III. MOTION FOR RELIEF FROM FINAL FINANCING ORDER

The Debtors are refusing to pursue any claims against nondebtor insiders and affiliates, despite proposing as low as a one (1%) percent recovery to creditors

of DivestCo Debtors. See Operative Plan at pg. 14. The Creditors Committee, which has settled with the Debtors, is similarly not going to pursue those claims. The Debtors are no longer proposing to substantively consolidate all of the Debtors; therefore, it is not necessary that all of the Debtors be collectively liable under the DIP Facility. Only the OpCo Debtors that need the funding to operate their SNFs should be obligated for the post-petition financing.

Because the DivestCo Debtors have not received any identifiable benefit from the DIP Financing, relief from the Final Financing Order is justified under Federal Rule of Civil Procedure 60 to relieve the DivestCo Debtors of liability for payment of the DIP Facility, to revoke any releases given by the DivestCo Debtors, and to extinguish any liens on the DivestCo Debtors' assets, namely their claims for fraudulent transfer and successor liability.

Relief under Federal Rule of Civil Procedure 60 for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

In re Gunn, 13-2271-JCO, 2017 WL 3172750, at *3 (Bankr. S.D. Ala. July 25, 2017). "A motion brought under Rule 60(b)(6) should be granted if appropriate to accomplish justice." Id. at *4 (Bankr. S.D. Ala. July 25, 2017). '"Rule 60(b) motions are directed to the sound discretion of the… court.'" Skinner v. Legal Advocacy Ctr. of Cent. Florida, Inc., 6:11-CV-1760-ORL-37, 2012 WL 2814348, at *3 (M.D. Fla. July 10, 2012) (quoting Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 849 n. 2 (11th Cir.1996)). This motion is timely as it is being filed within a reasonable time of the entry of the Final Financing Order entered on June 28, 2024. In re Sun Healthcare Group, Inc., 245 B.R. 779, 783 (Bankr. D. Del. 2000), aff'd, 99-3199-MFW, 2002 WL 31155179 (D. Del. Sept. 27, 2002). "The reasonableness element must be satisfied even where the motion is brought within a year from the entry of the order at issue." In re Waugh, 367 B.R. 361, 366 (Bankr. E.D.N.Y. 2007).

The Debtors have argued that substantive consolidation of the Debtors is appropriate because of (a) the presence of consolidated financial statements, (b) the existence of parent and intercorporate guarantees on loans, (c) the degree of difficulty in segregating and ascertaining individual assets and liabilities amongst the Debtors, (d) the existence of transfers of assets without formal observance of corporate formalities, and (e) the commingling of the Debtors' assets and business functions. See Operative Plan at 64-65. Despite all of this apparent difficulty, the

Debtors now seek to substantively consolidate the OpCo Debtors and DivestCo Debtors into separate silos. If the DivestCo Debtors can be carved out of the substantive consolidation process, they should also be relieved of their obligations under the DIP Facility.

It is now clear given the apparent ability to segregate the OpCo Debtors and DivestCo Debtors, and given the DivestCo Debtors' utter lack of need for post-petition financing, that the DivestCo Debtors were only included in the DIP Facility for purposes of giving releases and liens on their causes of action, and to the very parties that the DivestCo Debtors have claims against: the DIP Lenders and their affiliates. This prejudices creditors of the DivestCo Debtors, including Recovery Corp., as its only meaningful recovery on its claim will come against the insiders and affiliates that facilitated the fraudulent transfers of the DivestCo Debtors' SNFs. The Financial Financing Order has been interposed to block pursuit of those claims against nondebtors by creditors such as Recovery Corp. Accordingly, under Federal Rule of Civil Procedure 60(b)(6), to avoid the manifest injustice of providing nondebtors with releases for no consideration, the Court should grant relief from the Final Financing Order, causing the DivestCo Debtors to no longer be obligated under the same.

WHEREFORE, Recovery Corp. respectfully requests the order of this Court:

a. granting the Standing Motion;

b. authorizing the filing of the Draft Complaint;

c. granting the motion from relief from the Final Financing Order; and

d. granting any other and further relief this Court deems just and proper.

DATED this 8th day of October, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on October 8, 2024, by electronic means to:

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