IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| In Re: | . |
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| LAVIE CARE CENTERS, LLC, et al., | . Docket No. 24-55507-Pmb |
| | . |
| Debtors. | . |
| | . Atlanta, GA |
| . . . . . | . November 22, 2024 |
| | 10:08 AM |

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE PAUL BAISIER
UNITED STATES BANKRUPTCY COURT

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Continued Hearing on Debtors' Combined Disclosure Statement and Plan, at Docket Number 481, as Amended and Supplemented To Date.

Transcribed by: Sharona Shapiro

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(All present by Zoom)

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I N D E X

THE CLERK: Good morning, Your Honor. Today is November 22nd, 2024, and the time is now 10:08 a.m.

We are here for case number 24-55507, LaVie Care Centers, LLC, et al., for the virtual continued hearing on debtors' combined disclosure statement and plan, at docket number 481, as amended and supplemented to date.

I believe you're still muted, Your Honor.

THE COURT: All right. There we go. Good morning, everyone. When we were last together a week ago, we had concluded the confirmation hearing in this matter, and apparently I left to ponder the issue of the third-party releases contained in the plan. So that's what we're here today to rule upon.

Also I'm going to deliver my ruling, but just with respect to confirmation generally, which I also didn't do on the record last time, so without any further ado, unless anyone thinks they have anything to add before I get started, I will go ahead.

We're here on the debtors' second amended combined disclosure statement and joint Chapter 11 plan of liquidation, which is at docket 481, later amended by docket number 679, which came before the Court for confirmation of the plan and final approval of the disclosure statement on November 14th, 2024.

At the hearing, the Court accepted as evidence,

without objection, four declarations filed by the debtors. Those are at dockets 647 and 655 through 657. The four declarants were in the courtroom and available for cross-examination. No party sought to cross-examine any of the declarants.

The debtors also tendered their hearing Exhibits A through J into evidence without objection. The official committee of unsecured creditors further tendered an additional declaration of its financial advisor, which is a docket 662, which was also admitted without objection.

The Court heard argument from several creditors who had filed objections to various aspects of confirmation. All these objections were resolved on the record by the conclusion of the hearing, except that of the United States Trustee. The U.S. Trustee's objection was confined to the propriety of third-party releases contained in the plan, the associated injunction provided for in the plan in support of those same releases, and certain language approving a settlement. At the conclusion of the hearing, the Court took these matters under advisement.

Having considered the plan as amended, including the plan supplements and amendments thereto, the resolution of various objections announced on the record, the objections to confirmation pending at the conclusion of the confirmation hearing, the arguments of counsel at the hearing, and the

evidence presented, the debtors' brief in support of the plan, and the record in these bankruptcy cases, the Court finds that, subject to the satisfaction of what follows as to third-party releases contained in Article 10(D)(2) of the plan and the associated injunction, the debtors have satisfied all the requirements for confirmation of the plan under 11 U.S.C. 1129(a) and (b), by preponderance of the evidence, and the Court will enter an order confirming the plan and approving the disclosure statement on a final basis.

The structure of the plan is a result of a settlement between the debtors, their secured creditors, including the DIP lender, the primary landlord, and the official committee of unsecured creditors that resulted from a mediation conducted by Judge Jeffrey Cavender, of this district, over a period of weeks in September of 2024.

It provides for 10.75 million dollars to be paid by the plan sponsor, a waiver of a twenty-million DIP loan, the restructuring and assumption of obligations of the secured creditors and landlords of the debtor, and the payment of administrative and priority creditors.

Without the significant consideration provided by the nondebtors, the plan wouldn't be possible for the unsecured creditors, and even certain of the secured creditors would most likely get nothing from any other possible resolution of these cases.

The plan proposes to pay administrative and priority claims in full. It proposes to pay pre-petition secured creditors on the terms they have agreed to, in accordance with the negotiated settlement. It proposes to waive the DIP loan. It proposes to restructure and assume the lease with the debtors' largest landlord. It proposes to substantively consolidate the debtors into two groups for voting and distribution purposes, generally to those that still operate skilled nursing facilities and those that do not.

It then divides the general unsecured creditors of the debtors into three groups for voting and distribution purposes: creditors of the forty-three debtors that currently operate, creditors of the debtors that no longer operate or never operated a skilled nursing facility, and the creditors that held joint and several claims.

Proposals to pay these groups from assets assigned to a general unsecured creditors' trust, set up for the benefit of general unsecured creditors, from the contributions made by the plan sponsor, from collection of certain accounts receivable, partially backed by the plan sponsor, and from the potential prosecution of D&O claims.

Payment to these creditors had been estimated in the disclosure statement between one and ten cents on the dollar for their allowed claims. Assets of the operating debtors and their executory contracts and unexpired leases will be

transferred to new entities formed by the plan sponsor before the effective date.

The mediated global settlement also includes a broad release of all claims belonging to the debtor against various parties. It further provides for the full release of claims against various third parties who made substantial contributions to this case, and their affiliates, by any creditor who is going to affirmatively opt out of the release.

No one has objected to the basic structure of the plan, the classification of the claims, the substantive consolidation, the specific treatment of any class under the plan or the liquidating trust, including the form of the trust agreement.

Ten parties filed written objections to the plan. They are at dockets number 470, 623, 624, 625, 626, 627, 628, 633, 637, and 650. There were no continuing objections to the disclosure statement. Counsel for the objecting parties made arguments in opposition at confirmation. Each objecting party also had the opportunity to put on evidence in opposition to confirmation, but none chose to put on any evidence or to cross-examine the declaring witnesses.

All of the objections to confirmation, other than that of the United States Trustee, were resolved by the conclusion of the confirmation hearing. Some were resolved by promises to include language in the confirmation order.

The remaining main controversy revolves around the opt-out third-party releases set forth in the plan, the United States Trustee's objection to the plan's release of nondebtors by creditors, in other words, the third-party releases. The U.S. Trustee argues that the plan's mechanism allowing creditors to opt out of the release does not result in the third-party release being a consensual release, thus making it a nonconsensual release recently precluded by a decision of the United States Supreme Court in Harrington v. Purdue Pharma.

Because the outstanding objections do not challenge the vast majority of the issues this Court must decide to confirm the plan, this oral ruling is limited to an analysis of those objections and the facts and conclusions relevant to those objections.

The Court, however, as it is required to do, has undertaken its own independent investigation and has confirmed that the plan otherwise satisfies all the requirements for confirmation under the Bankruptcy Code, including the requirements for cramdown of the plan under 1129(b), in light of the fact that the plan did not garner the necessary votes of the creditors in Class 6B voting on the plan.

The plan's third-party releases provide broad releases of all creditor claims related to the debtors against certain nondebtors, including the unsecured creditors'

committee and each of its members, solely in their respective capacities as such; Omega, the debtors' largest landlord; the ABL secured parties; their accounts receivable under OHI DIP lender and TIX 33433 LLC, who together are the DIP lender, and TIX is also the plan sponsor; the CRO; the independent manager; and affiliates of a number of those parties.

The plan, however, provides any creditor or interest holder with the opportunity to opt out of the third-party release, if they take affirmative action to either file an objection to the release, or check the opt-out box on their voting ballots or opt-out form, and timely return them to the claims agent. Any creditor or interest holder that either voted in favor of the plan, or failed to affirmatively opt out, is deemed to be a releasing party under the plan, and thus grants a third-party release.

The question before the Court is whether this opt-out mechanism creates a consensual release, as the debtors contend, or a nonconsensual release, which is foreclosed by Purdue, as the U.S. Trustee asserts.

No one has cited, nor has the Court found any circuit level decisions addressing the issue of whether an opt-out mechanism renders a third-party release consensual, but many cases at the bankruptcy court level address this issue. Together with Purdue, they confirm that consensual releases are permitted in bankruptcy plans.

And contrary to the few cases cited by the United States Trustee, an overwhelming majority of these cases find that a creditor's vote to accept the plan containing a third-party release makes the release consensual. And this Court agrees with that conclusion.

A somewhat harder question is whether a party that votes to reject the plan, or sends in a ballot abstaining to vote for the plan, has consented to the release if they choose not to opt out. But the hardest question is what to do with creditors that take no action.

As is true in most bankruptcy cases, notwithstanding the significant efforts undertaken in this case to make sure all creditors and interest holders received notice of the opportunity to vote and to opt out, a substantial number of the creditors took no action, failing to return a ballot, and did nothing. In this case, that is roughly 5,550 out of the 6,400 ballots sent out, or around 87 percent of the parties that could have voted proceeded in this fashion.

The question is, should these nonvoting nonacting creditors and interest holders be deemed to have consented to the third-party release? As Judge Cavender found last year in Envistacom, a review of the case law in this area indicates there's a case to support a review. Some cases apply state law contract principles, usually to deny approval of opt-out releases, and others apply federal bankruptcy principles,

usually to approve them.

Regardless of the framework of analysis, the courts are markedly split on the issue, with some categorically finding that the release cannot be consensual absent an affirmative act to opt in, and others finding that the opt-out mechanisms that, as is the case here, provide adequate notice, and a simple process can result in consensual releases.

Also like Judge Cavender, I have yet to find a case, or even a basic method of analysis that I find completely satisfying. On the one hand, as Judge Goldblatt recently noted in the Smallhold decision, there must be some underlying law that supports the inclusion of releases in a plan and their enforceability. Saying, as Judge Sontchi did in, Extraction Oil & Gas, that if the release arises out of the Bankruptcy Code and Rules, is not particularly satisfying in the absence of the identification of a particular Bankruptcy Code section or sections or Bankruptcy Rule or Rules from which it germinates.

The best I can do on that score is to say the releases are permitted plan provisions under 11 U.S.C. 105 and 1123(b)(6). Although the Supreme Court in Purdue held that these two specific provisions are not available to support inclusion of nonconsensual release provisions in a plan, it also took great pains to say that it was not calling into question the validity of consensual releases, without

explaining how one could be included in a plan under Section 1123 but the other could not.

To the extent that 1123(b)(6) is relevant, then the standard is whether such a provision is appropriate. If Section 1123(b)(6) is not relevant, federal support must come from the structure of the Code and the Rules as they relate to confirmation more generally which, as I just noted, is not particularly satisfactory.

I also agree with Judge Cavender that analogies to other circumstances under the Bankruptcy Code and Rules, where a response is required or rights can be lost, is not entirely satisfying either, as they're all based on specific Code provisions or Bankruptcy Rules.

I also note that, to the extent they are relevant, they don't necessarily result in the immediate and irrevocable loss of those rights, as defaults can be opened, late proofs of claim can be deemed timely filed or otherwise allowed, and objections to claim reconsidered based on lack of notice.

Although it seems, from the foregoing, that basing the releases on federal law might be problematic, analyzing them based on state contract law is no better. First, no answer has been provided as to which state's law should be applied, the law of the state in which the bankruptcy court sits, the law where the debtor is headquartered, the law applicable to the claims to be released, some other state's

law?

Second, we do not -- do we mean to incorporate all of state contract law or just the offer and acceptance part? Because the few cases that address the points say that specific consideration is not required for a consensual release, that it's either not relevant to the analysis, or there does not have to be any separate consideration, other than what is being provided in the plan to support the release.

Finally, and maybe most importantly, the basis for the enforcement of consensual releases has not, as far as this Court has been able to determine, been described anywhere as a contract or an agreement. The Supreme Court did not describe them that way or use those words. They referred to them as consensual releases, because what they rely on is the consent of the releasing party.

So evidence of consent, rather than whether they are appropriate, or constitute a contract, appears to be the touchstone for determining whether a creditor can be bound to the release. Or maybe, said differently, finding consent is what is necessary to make the release either a binding contract or appropriate as to the individual creditor in a bankruptcy context.

Based on that standard, the following creditors can clearly be bound in this case under contract-like notions of

offer and acceptance or federal common law regarding appropriate plan provisions.

First, creditors who voted for the plan. Now, the plan and the ballot say explicitly that if you vote for the plan you are giving the release. If you vote for the plan, you have consented to the release. That conclusion is supported by many cases, including the Specialty Equipment Companies case, which is the single case on consensual releases cited by the majority in Purdue.

Second, creditors who vote to reject the plan that do not opt out. Similarly, if the plan says that if you vote to reject the plan, and you don't want to give the release, in the event the plan is nevertheless confirmed, you must check the conspicuous box located on the same ballot you are returning, to indicate that not only do you wish to reject the plan, but you do not wish to give the release if the plan is nevertheless confirmed.

Said differently, if you send in the ballot, having filled out your name and the amount of your claim, having signed it, and indicating you reject the plan, but you do not check the conspicuous opt-out box on the ballot, you have communicated consent to giving the release of the plan as confirmed. Third, creditors who send in a ballot that's not counted for voting for any reason also do not opt out, essentially for the same reasons as the rejecting voters.

The last group of creditors and interest holders in this case is the largest, roughly 5,500 persons and entities, who were sent the lengthy plan and voting package and took no action whatsoever. What of them? This Court generally agrees with the courts that say that creditors are obligated to pay attention to and read their mail, and that failure to do so has consequences.

So if a creditor gets materials in a bankruptcy case, and if the materials say, if you don't take action, you will be bound by the consensual release, you must do something; you cannot simply ignore it. If you do, you may be deemed to consent to the release, or you may have waived your rights, or you might be estopped from enforcing them.

With regard to a limiting principle on this rule, it might be the difference between a simple waiver or release of rights, which can happen through inaction, versus a requirement to take some affirmative action.

Also, as noted by the debtors here, the good-faith confirmation requirement would likely preclude requiring actions entirely unrelated to the debtors like making a contribution to a college fund.

As far as it goes, such a rule would bind all the creditors who do not respond in this case, as they were all sent some piece of paper that provided an opportunity to opt out. However, that cannot be the end of the story. That does

not end the story because, although it may be reasonable and even necessary to assume that, in general, the creditors who are mailed a solicitation package received the package in a timely fashion, recognized that it was related to this case, and made the determination, however brief, to do something or nothing with or about it, and thus should be bound by their inaction.

As noted by the U.S. Trustee's objection, that may not be the case as to every creditor. In other words, such an assumption can give rise to a presumption, but the presumption must be rebuttable. As to any individual creditor, there may be some set of facts, some circumstances, that would make it unreasonable to assume that their failure to respond constitutes their consent to the result.

Maybe the creditor was in an acute care hospital during the voting period. Maybe they were not living at the place where their voting materials were sent at the time. Maybe they were deployed overseas in service of our country. Maybe, as the U.S. Trustee posits, they mailed their ballot and opt-out form in timely but it was never received.

The possibilities are myriad, and of course need not relate solely to the unavailability of the creditor. As a result, an opportunity must be provided in the confirmation order for those people to make the case to this Court, after confirmation, that they should not be bound, that they should

not be deemed to have consented.

That opportunity cannot be time bounded, but must include -- may include some provision that requires the party seeking relief to identify the claim or claims that would otherwise be released, that they seek to pursue, and the identity or types of defendants they intend to pursue them against.

To be clear, this process need only be available to those who did not respond at all. Those who responded in any way are bound by their response and the consequences of it under the plan, whatever they may have been.

Somewhat similar relief was provided in the Mallinckrodt case in Delaware, in which Judge Dorsey provided that any creditor that claimed they did not receive notice of their right to opt out, an opportunity to seek relief from the Court, and also in the Stein Mart case, where Judge Funk refused to make any determination that a third-party release binds any individual shareholder.

This Court further agrees with Judge Cavender, in Envistacom, that third-party releases should not be commonplace or be reduced to a matter of procedural routine, but instead should be rare and must meet certain procedural requirements and be justified under the particular circumstances of the case.

In that regard, the Court finds that the opt-out

releases in this case were clear and conspicuous, properly noticed, justified under the facts, and provided a consensual third-party release, subject to the rights of those who failed to respond to prove the facts and circumstances that would rebut the presumption of consent.

Like Judge Cavender, I decline the opportunity to create any universal test or set of standards for approving all opt-out releases in plans, as the analysis in each case must be fact specific. But highlighting facts relevant in approving opt-out releases in this case is important.

Here those are as follows. The opt-out mechanism used here is clear and conspicuous in the plan and the associated notices and ballots. The notices and ballots are clear and conspicuous, and those are the shorter documents the creditors are most likely to read. The precise form of ballot was approved by and included revisions recommended by the U.S. Trustee. The opt-out mechanism is relatively simple and easy to understand for all creditors and interest holders. They needed only check a box on a ballot or an opt-out form and return it to the claims agent.

Creditors not entitled to vote were required to file an objection or an opt-out form, but under the circumstances of this case, I don't find that to be problematic. As I explained at the confirmation hearing, Class 1 was not expected to have any claimants, Class 2 was primarily or

entirely the IRS, which opted out, and Classes 7 through 9 all consist of claims that are interests held by the debtors or their affiliates.

The releases are limited to either estate fiduciaries, parties providing substantial consideration under and in support of the plan, and their affiliates. The plan, and the settlement embodied in it, was the product of significant hard-fought negotiations, including a multi-day mediation, in which the interests of unsecured creditors were represented by the committee, which consisted of a cross-section of creditors, and was represented by sophisticated Chapter 11 counsel and an experienced Chapter 11 financial advisor, both of whom are familiar with the types of causes of action that creditors might hold and had the necessary litigation mechanisms and professional assistance to evaluate the merits and collectability of such claims if they were not settled.

The releases of the nondebtors are an integral part of the plan and the settlement on which it's based. Creditors affected by the opt-out releases -- in other words, general unsecured creditors -- are receiving substantial consideration in exchange for the releases.

The evidence presented at the confirmation further satisfies me that the claims likely held by these parties are mainly derivative claims that are otherwise being settled by

the debtors in the plan, would present substantial logistical challenges simply to endeavor to pursue, and to the extent that they have any value, they do not have sufficient recoverable value, given the significant secured and priority claims in these cases, to provide a better return to unsecured creditors than the settlement, as confirmed by the investigations conducted in this case by both the committee and the independent manager.

In particular, the committee investigated these claims and determined, on behalf of the unsecured creditors, that the consideration provided by the plan, pursuant to the settlement, resulted in the best payout to unsecured creditors that could be achieved, all things considered.

The plan, the global settlement, and the opt-out releases are supported by the major constituents in this case, including the debtors' secured lenders, including the DIP lender, their landlords, and the committee. The plan was accepted by a majority of the creditors voting by number and the vast majority by dollar amounts.

Under these facts, the plan and the solicitation procedures approved in connection with the plan provided a simple and conspicuous disclosed mechanism for creditors to opt out of the third-party releases in this case. Over 400 creditors and interest holders followed the simple procedures and opted out of the releases and will not be bound by them.

For those that voted for the plan, and for those that voted against the plan, or submitted a ballot abstaining for voting for the plan and did not opt out, and for those who did not vote, object, or otherwise respond to the solicitation, the Court finds they have consented to the third-party releases by their failure to timely opt out or be bound by them, subject to the individual ability of those who did not vote, object, or otherwise respond to the solicitation to vote to establish that their failure to opt out should not be considered consent.

The U.S. Trustee's objection to the third-party release is therefore overruled, except to the extent provided in its ruling. The U.S. Trustee's objection to the injunction contained in the plan is also overruled, to the extent the injunction supports the releases provided for in the plan.

As for the channeling portion of the injunction, the U.S. Trustee's objection is sustained, to the extent that no complaint will be required to be filed with this Court if the Court does not, for any reason, have jurisdiction to hear the claims sought to be asserted, other than the purported retention of jurisdiction in the plan.

The U.S. Trustee's objection to the plan being considered a settlement is also overruled. The plan is based entirely on the mediated settlement in this case and constitutes a single settlement in that regard. That

settlement meets the Justice Oaks factors, and considering all the Justice Oaks factors, the Court is satisfied that the settlement falls clearly within the range of reasonableness, and the Court is satisfied that the debtor is the independent manager, and the committee properly investigated any and all relevant claims and took each of the Justices Oaks factors into account in reaching the settlements embodied in the plan.

The declarations admitted into evidence represented that they analyzed potential estate causes of action against parties proposed to receive the releases under the plan, they weighed the probability of success on those claims, and the realities of the debtors' ability to pursue and ultimately collect those claims, and they considered the effect on the creditor body as a whole in negotiating and reaching the settlement.

The U.S. Trustee does not challenge the debtors' or the committee's conclusions that the alternative to the settlement leaves the debtors and the creditors in a worse position. Nor has the U.S. Trustee or any creditor offered any viable alternative that would result in greater returns for creditors in this case.

The Court concludes, after considering all of the evidence before it, that the global settlement embodied in the plan includes the third-party releases, and is reasonable and appropriate under the circumstances of this case, and

satisfies all the criteria for approval under Justice Oaks. Of course, to the extent they are considered consensual hereunder, the third-party releases in the plan are part of that settlement.

The Court will enter an order confirming the debtors' plan and giving final approval to the disclosure statement provided it includes the provision required by this ruling. I understand the parties have been working diligently, in the past week since confirmation, on a form of confirmation order. Counsel for the debtors is instructed to upload that order once those discussions have concluded.

And lastly, the Court reserves the right to issue a memorandum decision consistent with this ruling, but providing greater detail and, of course, some additional case citations. And that is that.

MR. SIMON: Thank you, Your Honor. We appreciate it. We have been working closely with counsel to the committee. We hope to have an order uploaded, optimistically, later today, or certainly early next week. And we'll include the language at your request.

THE COURT: Okay. Mr. Adams, did you want to say something?

MR. ADAMS: Thank you, Your Honor. Jonathan Adams, on behalf of the United States Trustee.

We do appreciate the Court's opinion. We would ask

that the Court reduce its opinion to writing.

THE COURT: All right. Anybody else?

MR. LAWALL: No, Your Honor. Well, Your Honor, Frank Lawall, on behalf of the committee.

Thank you for your time this morning. Mr. Simon is correct. We are trying to work through a couple of issues, some of which you raised at the end of the confirmation hearing. We think we have an agreement, in concept, with the other parties, which will be reduced to writing. And whether it will be today or Monday remains open, but we are passing language back and forth.

THE COURT: Well, very good. I'll look forward to receiving the confirmation order when you all think it's ready. Otherwise, I think we've done all we can do with respect to this case today.

MR. SIMON: Your Honor, I was just going to note that, when the language stops moving, it will probably be through a revised form of confirmation order, a slightly revised plan and plan supplements, which would include a revised GUC trust agreement and revised unliquidated claims procedures, all in the context of basically addressing the issues that you raised on the record last week and in working with the committee on those. They would all be minor modifications.

THE COURT: Okay. I assume, as you have been

consistently, you'll file a redline of the documents against their prior versions.

MR. SIMON: Of course.

THE COURT: All right. Well, I'll leave everyone, including me, with a lot of reading to do. So --

MR. SIMON: Thank you, Your Honor. We appreciate your time today.

THE COURT: I'll let you get to work, and I look forward to taking a look at it when you're done.

MR. SIMON: Thank you.

MR. ADAMS: Thank you.

THE CLERK: Thank you, parties . That concludes all matters. I'm going to stop the recording and end the conference. Have a good day.

(Whereupon these proceedings were concluded at 10:38 AM)

C E R T I F I C A T I O N

I, Sharona Shapiro, the court-approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Sharona Shapiro
SHARONA SHAPIRO

November 24, 2024
DATE

AAERT Certified Transcriber, CET-492