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

In re	)	Chapter 11
LAVIE CARE CENTERS, LLC, *et al.*[1]	)	Case No. 24-55507-PMB
Debtors.	)	(Jointly Administered)
	)	**Re: D.I. 825**

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO DEBTORS' MOTION FOR ENTRY OF ORDER (A) AUTHORIZING DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, ERC SETTLEMENT WITH INTERNAL REVENUE SERVICE, (B) APPROVING THE ERC SETTLEMENT, AND (C) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors"), by and through its undersigned counsel, hereby objects (this "Objection") to the *Debtors' Motion for Entry of Order (A) Authorizing Debtors' Entry Into, and Performance Under, ERC Settlement with Internal Revenue Service, (B) Approving the ERC Settlement, and (C) Granting Related Relief* [D.I. 825] (the "Motion").[2] In further support of this Objection, the Committee represents as follows:

PRELIMINARY STATEMENT

1. The IRS has asserted a claim for the return of approximately $31.8 million in employee retention tax credits ("ERCs") that the IRS alleges were granted to the Debtors in error.

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 Debtors in these chapter 11 cases, which are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://www.kccllc.net/LaVie. The location of LaVie Care Centers, LLC's corporate headquarters and the Debtors' service address is 1040 Crown Pointe Parkway, Suite 600, Atlanta, GA 30338.

[2] Capitalized terms not defined herein are defined in the Motion.

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If allowed, approximately $29 million of the IRS's claim as asserted by the IRS under penalty of perjury would be entitled to priority under 11 U.S.C. § 507(a)(8). To the Committee's knowledge, that entitlement to priority status is undisputed.

2. The IRS has now apparently agreed to accept a distribution estimated to be worth approximately $795,000 in satisfaction of its Priority Tax Claim.[3] Under existing law, the IRS claim cannot be magically transformed into a non-priority claim. The only issue is whether it is a priority claim or no claim at all. Furthermore, the confirmed Plan expressly provides that Priority Tax Claims cannot be paid from the GUC Trust. Thus, the proposed IRS settlement is prohibited by the very terms of that Plan and the IRS Priority Tax Claim, to the extent allowed, must be assumed or paid by the Reorganized Debtors.[4]

3. The Debtors appear to argue that the Court should ignore the impact of the IRS settlement on unsecured creditors because that impact will allegedly be "minimal."[5] First, regardless of whether the impact on unsecured creditors is or is not minimal (and it is not minimal), the Motion cannot be granted because it is in direct conflict with the confirmed Plan.

4. Second, the impact on unsecured creditors will not be minimal. The Debtors are seeking to pay a $795,000 Priority Tax Claim out of the hard-fought $12.75 million set aside under the Plan solely for unsecured creditors, effectively reducing the bargained-for GUC Contribution—the very basis on which the Committee settled with the Debtors and agreed to support the Plan—to $11.955 million. Based on the Debtors' own analysis,[6] the impact on holders

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[3] *See* Motion ¶ 21.

[4] *See* Plan, Art. IV.B.

[5] *See* Motion ¶ 2.

[6] The Committee does not agree with the Debtors' analysis but accepts it for purposes of evaluating the impact of the IRS settlement on unsecured creditors.

of Allowed General Unsecured Claims in Class 6A is a reduction from a 10.8% distribution to a 10.0% distribution.[7] While an .8% reduction may not seem material if measured against a starting number of 100%, the Plan does not propose a 100% distribution to holders of claims in Class 6A. Rather, based on the Debtors' analysis, the Plan proposes a distribution of about 10.8%. And when a .8% reduction is applied to a starting number of 10.8%, the result is a ***7.5%*** reduction in distributions to holders of General Unsecured Claims in Class 6A that were negotiated for by the Committee and agreed to by the Debtors and the Plan Sponsor.

5. The Debtors cannot unilaterally re-trade the Committee settlement at the heart of the confirmed Plan. The IRS's Priority Tax Claim must be paid (if at all) by the Reorganized Debtors, not the unsecured creditors.

BACKGROUND

A. The Disclosure Statement and Plan, Confirmation Order, and IRS ERC Claim

6. On September 26, 2021, the Debtors filed their *Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [D.I. 461] (as applicable, the "Disclosure Statement" or "Plan"). The Plan embodied a settlement among the Debtors, Plan Sponsor and the Committee that had been ground out over the course of several months and multiple days of mediation. Pursuant to that settlement, the Debtors and Plan Sponsor agreed to contribute $12.75 million, as well as certain other assets, to the GUC Trust. The Plan provides that the GUC Contribution "shall solely be used to fund distributions to Holders of Claims in Class 6A, Class 6B and Class 6C." Plan, Art. II.A.1.127. Class 6A, Class 6B and Class 6C all consist of General Unsecured Claims, which are expressly defined under the Plan to exclude Priority Tax Claims. *Id.*, Art. II.A.1.122.

[7] *See* Motion ¶ 21.

7. The Committee worked hard to ensure that the assets of the GUC Trust could not be diverted to pay any claims other than General Unsecured Claims. For example, one of the terms of the settlement reached at mediation was that "[t]he GUC Trust / GUC Contribution will not fund/pay Administrative Expense Claims (including 503(b)(9) and Priority Claims)." *Id.*, Art. III.C.5. The Committee bargained for language in the Plan clarifying the treatment of Priority Tax Claims: "For the avoidance of doubt, Allowed Priority Tax Claims shall not be paid by the GUC Trust or funded by the GUC Contribution. Rather, the Reorganized Debtors (not the Plan Sponsor) shall either assume or pay Allowed Priority Tax Claims." *Id.*, Art. IV.B.

8. The Disclosure Statement was conditionally approved by order of the Court [D.I. 480] (the "Disclosure Statement Order") on October 1, 2024. That same day, the solicitation version of the Disclosure Statement and Plan was filed [D.I. 481] in these Chapter 11 Cases.

9. The solicitation version of the Disclosure Statement and Plan, as conditionally approved by the Disclosure Statement Order, did not disclose the scope or magnitude of claims that could be asserted by the Internal Revenue Service (the "IRS"), including without limitation the IRS ERC Claim. Nor did the Disclosure Statement disclose that certain employee retention tax credits the Debtors received before the Petition Date may be required to be refunded and that such obligation could create a Priority Tax Claim in the approximate amount of $29 million dollars. Last, the Disclosure Statement did not disclose the risk that, notwithstanding the express language in the Plan regarding treatment of Allowed Priority Tax Claims, such claims might be paid from the GUC Trust and GUC Contribution, reducing the recoveries to general unsecured creditors.

10. On the eve of the confirmation hearing on the Plan, the IRS filed the *Objection to Debtors' Second Amended Combined Disclosure Statement and Confirmation of the Joint Chapter 11 Plan of Reorganization* [D.I. 626] (the "IRS Objection"). The IRS Objection noted that the IRS

was "evaluating the validity of" certain employee retention tax credits to determine the Debtors' tax liability and may file a claim on account of such credits. IRS Objection ¶ 17.

11. On November 14, 2024, the court held a hearing to confirm the Plan and approve, on a final basis, the adequacy of the Disclosure Statement. One of the concerns raised at the confirmation hearing was the feasibility of the Plan in light of the IRS's potential $29 million Priority Tax Claim—as Debtors' counsel described it, "a looming issue as to whether this plan is effective and whether the last six months of negotiations . . . is all for naught." Hr'g Tr. 49:3-5. At the same time, Debtors' counsel made it clear that the IRS's claim could not be treated as a General Unsecured Claim: "I'll just note the irony, of course, is that ***if it's not a priority claim, then the IRS is not paid anything***." *Id.* 49:6-8 (emphasis added).

12. On November 29, 2024, the IRS filed Claim No. 5247 (the "IRS ERC Claim"). The IRS ERC Claim totaled $31,866,380, which included the assertion of $29,043,355 as a Priority Tax Claim under 11 U.S.C. § 507(a)(8).

13. On December 5, 2024, the Court entered its *Findings of Fact, Conclusions of Law, and Order Approving on Final Basis and Confirming Debtors' Modified Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 735] (the "Confirmation Order"), confirming the Plan despite the issues surrounding the IRS ERC Claim. As negotiated by the Committee, the Confirmation Order reflected and reiterated that the Reorganized Debtors—not the unsecured creditors—would be responsible for satisfying the IRS ERC Claim. *E.g.*, Confirmation Order ¶ 53(d) ("The Reorganized Debtors shall satisfy all Priority Tax Claims held by the IRS.").

14. On December 10, 2024, the Debtors filed their objection to the IRS ERC Claim [D.I. 751] (the "IRS Claim Objection"). Through the IRS Claim Objection, the Debtors asserted

entitlement to the employee retention credits they received from the IRS, disputed that the IRS is owed any amounts on account of such credits, and sought to have the IRS Claim disallowed in its entirety. On December 19, 2024, Committee joined in the IRS Claim Objection [D.I. 766] (the "Committee IRS Claim Objection"), adopting the Debtors' arguments and adding the Committee's own objections. *See, e.g.,* Committee IRS Claim Objection at ¶ 13 ("Notably, the Plan was voted on by unsecured who may not have known or understood the magnitude and potential consequences of the IRS ERTC Claim. The Disclosure Statement does not discuss the IRS ERTC Claim or the Debtors' potential tax liability. The liquidation analysis likewise assumes there were no prepetition priority tax claims.").

15. Following the filing of the Objections, the parties engaged in discovery, a discovery conference, and trial preparation. Evidently, the Debtors, Plan Sponsor and IRS also engaged in settlement discussions during this period, but the Committee was not brought into those discussions nor kept apprised of them in real time.

B. The Priority Tax Claim Settlement

16. On or about January 27, 2025, counsel for the Committee learned for the first time of a potential resolution of the IRS ERC Claim, although it did not appear to be a done deal. The proposed terms, which largely track the proposed settlement ultimately agreed by the Debtors and the IRS, involved the payment of hundreds of thousands of dollars of the IRS's Priority Tax Claim out of the GUC Trust. Counsel for the Committee immediately expressed strong objections to any settlement that would—contrary to the express terms of the Plan—require the GUC Trust to pay a Priority Tax Claim.

17. Despite the Committee's protests and ignoring the still-pending Committee IRS Claim Objection,[8] the Debtors filed the Motion seeking approval of a settlement in principle with the IRS, subject to approval of the Department of Justice (the "Priority Tax Claim Settlement").

18. Under the proposed Priority Tax Claim Settlement, the IRS ERC Claim would be allowed as "an erroneous refund under 26 U.S.C. § 7405"—that is, ***as a claim entitled to priority under 11 U.S.C. § 507(a)(8)***—but treated as "an Allowed General Unsecured Claim in the aggregate amount of $20.0 million."

19. Boiled down to its essence, the Priority Tax Claim Settlement would transfer an estimated $795,000 from general unsecured creditors to the IRS in satisfaction of a claim that is indisputably entitled to priority under 11 U.S.C. § 507(a)(8) and is thus (no matter how the Debtors try to dress it up) an Allowed Priority Tax Claim under the Plan. In other words, the Debtors and Plan Sponsor seek to satisfy the Reorganized Debtors' obligations under the Plan with other people's money.

ARGUMENT

20. Under Bankruptcy Rule 9019, the Court may approve a settlement or compromise if the proposed settlement falls below the lower point in the range of reasonableness. *In re Diplomat Construction, Inc.*, 454 B.R. 917, 920 (Bankr. N.D. Ga. 2011). However, even under this generous standard, a settlement that conflicts with the terms of a confirmed plan of reorganization cannot be approved. *See, e.g.*, *In re Northwestern Corp.*, 352 B.R. 32, 36 (D. Del. 2006) (affirming bankruptcy court's denial of a Rule 9019 motion where the proposed settlement contradicted the terms of the confirmed plan); *In re U.S. Brass Corp.*, 301 F.3d 296, 309 (5th Cir.

[8] The Committee has not withdrawn the Committee IRS Claim Objection and reserves its right to prosecute the objection.

2002) ("Because the Appellants' proposed agreement would alter the parties' rights, obligations, and expectations under the plan, the bankruptcy court's denial of the motion [to approve the settlement] was correct as a matter of law.").

21. As the Court is aware, the Committee fought hard for the GUC Contribution that it managed to wring out of these cases for the benefit of unsecured creditors. The mediated settlement with the Debtors, embodied in the Plan, constitute the rights and expectations of the unsecured creditors that the Debtors cannot simply abrogate. The Plan and Confirmation Order expressly and repeatedly provide—because the Committee was concerned about exactly the scenario it now faces—that Priority Tax Claims will be paid or assumed by the Reorganized Debtors and not out of the GUC Trust or GUC contribution. As noted above:

- The GUC Contribution "shall solely be used to fund distributions to Holders of Claims in Class 6A, Class 6B and Class 6C." Plan, Art. II.A.1.127.
- "The GUC Trust / GUC Contribution will not fund/pay Administrative Expense Claims (including 503(b)(9) and Priority Claims)." Plan, Art. III.C.5.
- "For the avoidance of doubt, Allowed Priority Tax Claims shall not be paid by the GUC Trust or funded by the GUC Contribution. Rather, the Reorganized Debtors (not the Plan Sponsor) shall either assume or pay Allowed Priority Tax Claims." Plan, Art. IV.B.
- "[T]he Reorganized Debtors shall satisfy all Priority Tax Claims held by the IRS in Cash pursuant to Article IV.B[.]" Confirmation Order ¶ 53(d)

22. The proposed Priority Tax Claim Settlement does exactly what the Plan and Confirmation Order say is not permitted. Rather than being paid by the Reorganized Debtors, as required by the Plan, the $795,000 distribution on the IRS's Priority Tax Claim will come straight out of the GUC Trust and the GUC Contribution.

23. To be clear, regardless of how the IRS ERC Claim is "treated," it meets the definition of, and cannot be anything other than, a Priority Tax Claim. As set forth in the Plan:

> **"Priority Tax Claim"** means a Claim that is entitled to priority under Bankruptcy Code section 507(a)(8).

Id., Art. II § 1.230. Not only was approximately $29 million dollars of the IRS ERC Claim asserted as a Priority Tax Claim, the claim actually meets the requirements to be "entitled to priority under 11 U.S.C. § 507(a)(8)."[9] As Debtors' counsel argued to the Court at the confirmation hearing, either the IRS's claim is a Priority Tax Claim, or it isn't a claim at all.

24. The Priority Tax Claim Settlement cannot (and does not) change the fact that the IRS ERC Claim is "entitled to priority under 11 U.S.C. § 507(a)(8)" and thus is a Priority Tax Claim under the Plan. Rather, in the Motion, the Debtors confirm that the IRS ERC Claim "will be allowed, in full, as an erroneous refund under 26 U.S.C. § 7405." Motion ¶ 20(b). If the IRS ERC Claim is allowed in full as an erroneous refund, then cannot be anything other than an Allowed Priority Tax Claim. It's really that simple.

25. The Committee also notes that treating the IRS Allowed Priority Tax Claim as a General Unsecured Claim violates Section 1122(a) of the Bankruptcy Code because it would result in the placement in one class (in this case, Classes 6A and 6B) of claims that are not substantially similar.

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[9] *See, e.g., In re Whitson*, 2013 WL 5965745, at *2-7 (Bankr. E.D. Tenn. Nov. 7, 2013). In *Whitson*, the court addressed whether an erroneous refund arising from the debtor's claim to certain public tax credits was a priority claim under 507(c). There, the debtor filed tax returns that claimed entitlement to certain Earned Income Tax Credits and Additional Child Tax Credits. *Id.* at *1–2. After the IRS issued a refund based on the debtor's claimed credits, the IRS realized the debtor was not entitled to the credits. *Id.* The IRS filed a priority claim relating to the erroneous funds and the debtor objected to it. *Id.* at *2. The court rejected the debtor's attempt to characterize the tax credits as something other than a tax or something related to a tax and held that the IRS' claim had priority under §§ 507 and 507(c). *Id.* at *5–7. In doing so, the court noted that "the EITC and the CTC are created by the Internal Revenue Code. Both are referred to as tax credits. The size of each is directly related to the income of the individual claiming the credit. In the event that there is more credit than tax due, the credits are refundable. All of these characteristics are indicative of a tax." *Id.* at *3. Here, the employee retention credits and related provisions are outlined in the CARES Act and section 3111 of the internal revenue code. The employee retention credit is a credit against applicable employment taxes for each calendar quarter. 26 U.S.C.A. § 3134(a). The credit and tax are directly related as the credit cannot exceed the applicable employment taxes on the wages paid in the calendar quarter. *Id.* § (b)(2). The CARES Act refers to it as a "refundable tax credit," and contains provisions relating to providing refunds.

26. The Committee has no objection to the IRS's claim being granted an Allowed Priority Tax Claim. The Committee certainly has no objection to the IRS's agreement to accept $795,000 on its Allowed Priority Tax Claim, rather than $29 million. But under the heavily-negotiated, unambiguous terms of the Plan and Confirmation Order, that amount must be paid or assumed by the Reorganized Debtors.

27. The Debtors cannot cure the fatal defect in their proposed Priority Tax Claim Settlement by arguing that it only deviates from the requirements of the Plan by an immaterial amount. As noted above, the settlement would result in a 7.5% reduction in distributions to holders of Claims in Class 6A. That is not a *de minimis* amount by any stretch.

28. Further, regardless the impact on the unsecured creditors, the Debtors cannot simply violate the terms of the Plan and Confirmation Order or walk away from the hard-fought settlement with the Committee, just because it is expedient or because the Reorganized Debtors regret having agreed to pay the IRS's Priority Tax Claim.

29. The Committee agreed to settle with the Debtors and Plan Sponsor and support the Plan in exchange for a $12.75 million cash contribution to the GUC Trust, solely for the benefit of general unsecured creditors. The Committee would *not* have agreed to settle, nor would it have supported the Plan, for an $11.995 million cash contribution, which is the ultimate effect of the settlement.

CONCLUSION

For the foregoing reasons, the Priority Tax Claim Settlement violates the terms of the Plan and Confirmation Order and cannot be approved. The Committee respectfully requests that the Court sustain the Committee's Objection and deny the Motion.

[Signature Page Follows]

Dated: February 3, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2025, all ECF participants registered in this case were served electronically with the foregoing through the Court's ECF system at their respective email addresses registered with the Court.

I further certify that on February 3, 2025, I caused a true and correct copy of the Motion to be served by first class mail to the entities on the service list attached here to as **Exhibit I**.

/s/ Pierce E. Rigney

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Exhibit I

Limited Service List

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