

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

IN RE: § CASE NO. 15-12670-MFW  
SWIFT ENERGY COMPANY, et al. § CHAPTER 11  
DEBTOR § JOINTLY ADMINISTERED  
§

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LOUISIANA DEPARTMENT OF REVENUE'S  
OBJECTION TO CONFIRMATION OF DEBTOR'S FIRST AMENDED JOINT PLAN OF  
REORGANIZATION

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The Secretary of the Louisiana Department of Revenue ("LDR"), through undersigned counsel, objects to confirmation of the Debtor's First Amended Joint Plan of Reorganization ("Plan").

1.

LDR is a creditor and a party in interest holding several priority-pre-petition claims against the Debtors, Swift Energy Company and Swift Energy Operating, LLC, some of which are undetermined due to audits in progress.

2.

(A) To date, Swift Energy Company has not filed Sales Tax Returns with LDR for the filing periods 2/28/2015 and 4/30/2015.

(B) To date, the Swift Energy Operating, LLC has not filed the following returns with LDR:

- (i) Sales Tax for 2/28/2015 and 4/30/2015;
- (ii) Oilfield Tax (Oil) for 9/30/2014 through and including 12/31/2015;
- (iii) Oilfield Tax (Gas) for 9/30/2014 through and including 12/31/2015; and
- (iv) Severance Tax (Gas) for 12/31/2014 and 11/30/2015.



3.

LDR currently has an audit in progress for Swift Energy Company for Severance Tax (Oil) for the filing period 1/1/2014 through 12/31/2015 and Swift Energy Operating, LLC for Sales Taxes for the filing periods 1/1/2013 through 1/31/2014.

4.

To the extent that the Debtors have a continuing duty to report and pay taxes to LDR of various kinds, that obligation will continue through the Effective Date of the Plan. These taxes would constitute Administrative Expenses of the Estates for which LDR should not have to file any request for payment in order to be paid pursuant to 11 U.S.C. §503(b)(1)(D), including for any penalties due on account of such tax. See Article III.A.1.e.ii.B. However, Article III.A.1.a fails to provide for payment of interest and penalties in the event that any Administrative Claim that may be filed by LDR prior to the bar date is not an “Allowed Claim” as of the Effective Date of the Plan. Accordingly, the plan is objectionable in that it fails to provide interest from the effective date until such time as the LDR’s claim is paid as an Allowed Claim. To the extent any Administrative Claims related to taxes are not paid on the effective date, interest and penalties are specifically required to be paid by 11 U.S.C. §503(b)(1)(B) and (C). LDR does not agree to the current treatment as it violates 11 U.S.C. §503(b)(1)(B) and (C) and 1129(a)(9)(A). Therefore the plan is not confirmable pursuant to 11 U.S.C. §1129(a)(1).

5.

To the extent that LDR’s pre-petition Priority Tax Claims are not paid in full in cash on the Effective Date, the LDR objects to the plan’s failure to provide for the interest required by 11 U.S.C. §1129(a)(9)(C) (requires payment of “total value, as of the effective date, equal to the allowed amount of such claim”).

6.

LDR further objects to Article III's treatment of Priority Tax Claims because it fails to provide an outside date by which the payment of LDR's claim must be made that allows for payment within the five years from the petition date as required by 11 U.S.C. §1129(a)(9)(C) or alternatively, provide for payments pursuant to 11 U.S.C. §1129(a)(9)(C). That is, the Plan fails to provide for an outside date by which LDR's claim must either be determined to be an Allowed Claim and paid in full, or any date by which the determination regarding the allowance of LDR's claim must be made in order to allow for it to be paid (whether in installments on a regular basis or in a lump sum) within the five years of the Petition or to provide for any distributions to LDR on a regular basis. Accordingly, the plan is not confirmable pursuant to 11 U.S.C. §1129(a)(1).

7.

LDR also objects to the provision in the plan which bars its right to claim undeliverable distributions in Article VI.G.2 "after the later of (i) the Effective Date and (ii) the last date on which a Distribution was attempted to be made to such holder shall have its claim for such undeliverable Distribution discharged and shall be forever barred from asserting any such claim against the Reorganized Debtors or their respective property." LDR and taxing authorities in general should be exempt from this, particularly with respect to, but not limited to trust taxes. Until the money is received on an allowed claim or the debt prescribes (statute of limitations have run), it is owed to the taxing authorities for Administrative Claims and pre-petition Priority Tax Claims.

8.

By this Objection, the LDR objects to the Plan to the extent that it attempts to alter any right of set off LDR may have in any manner. Specifically, Article IX.B.1.a(iv) of the Plan states

all setoff rights are barred in violation of §553. And other plan provisions are so broad and generalized that they might also be argued to impede setoff rights. Any right of setoff that a creditor possessed prior to the bankruptcy case is not affected by the Bankruptcy Code. See 11 U.S.C. §553; *Citizen's Bank of Maryland v. Strumpf*, 516 U.S. 16, 20, 116 S.Ct. 286, 289, 133 L.Ed. 2d 258, 263 (1995). Section 1141 of the Bankruptcy Code does not affect set off rights pursuant to 11 U.S.C. § 553. See *IRS v. Luongo (In re Luongo)*, 259 F.3d 323 (5<sup>th</sup> Cir. 2001); *In re DeLaurentis Entertainment Group, Inc.*, 963 F.2d 1269, 1277 (9<sup>th</sup> Cir. 1992), 963 F.3d 1269, 1276-78 (9<sup>th</sup> Cir. 1992) *cert. denied*, 506 U.S. 918, 113 S.Ct. 330, 121 L.Ed.2d 249 (1992); *Davidovich v. Welton (In re Davidovich)*, 901 F.2d 1533, 1537 (10<sup>th</sup> Cir. 1990); *In re O'Brien*, 414 B.R. 92, 101 (S.D.W.Va. 2009); *United States v. Munson*, 248 B.R. 343, 345 (C.D. Ill. 2000); *In re Wiegand*, 199 B.R. 639, 641 (W.D. Mich. 1996); *Pettibone Corp. v. United States*, 161 B.R. 960, 964 (N.D. Ill 1993); *Posey v. United States*, 156 B.R. 910 (W.D.N.Y. 1993); *Womack v. United States (In re Womack)*, 188 B.R. 259 (Bankr. E.D. Ark. 1995); *In re Conti*, 50 B.R. 142 (Bankr. S.D.Va. 1985); *In re Ford*, 35 B.R. 277 (Bankr. N.D. Ga. 1983). A pre-confirmation objection to the Plan preserves the creditor's setoff rights. See *In re Alta+Cast, LLC*, 2004 WL 484881 (Bankr. D.Del. 2004). See also, *United States of America v. Continental Airlines (In re Continental Airlines)* 134 F.3d 536 (3d Cir. 1998) *cert. denied*, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed. 2d 277 (1988). Accordingly, the plan cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1).<sup>1</sup> LDR, and taxing authorities in general, should be expressly excluded from the Plan provision.

9.

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<sup>1</sup> As of this date, LDR is unaware of any setoff or recoupment right it may have against the Debtors, but all audits have not been concluded and all returns have not been filed to date. Unless and until all returns are filed and all audits are concluded, the LDR's setoff and recoupment rights should not be barred.

The broad releases and injunctions and exculpation provisions of Article IV of the Plan violate the Tax Injunction Act, 28 U.S.C. §1341. Any attempt to prevent LDR from pursuing a non-debtor is a violation of the Tax Injunction Act. *McCrary Corp. v. Texas Comptroller of Public Accounts*, 212 B.R. 229, 231 S.D.N.Y. 1997). See also the cases construing the similarly worded federal statute, the Tax Anti-Injunction Act, 26 U.S.C. §7421(a). *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390 (7<sup>th</sup> Cir. 1987); *In re American Bicycle Association*, 895 F.2d 1277 (9<sup>th</sup> Cir. 1990); *In re Heritage Village Church and Missionary Fellowship, Inc.* 851 F.2d 104 (4<sup>th</sup> Cir. 1988); *A to Z Welding & Mfg. Co. v. IRS*, 803 F.2d 932 (8<sup>th</sup> Cir. 1986). The Bankruptcy Code does not confer jurisdiction to enjoin the LDR from pursuing any non-debtor. *United States v. Prescription Home Health Care, Inc. (In re Prescription Home Health Care, Inc.)*, 316 F.3d 542 (5<sup>th</sup> Cir. 2002). “Exceptional circumstances” have not been demonstrated as required by *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001). This Honorable Court has also previously held that a non-debtor release over a creditor’s objection “would not pass muster.” *In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011). None of the factors in *Genesis* have been demonstrated.

10.

Article IV.J.2 is objectionable in that it declares the Plan a settlement pursuant to §363 of the Code and Bankruptcy Rule 9019 that is approved *ipso facto* by the confirmation of the Plan. 11 U.S.C. §1129(a)(9) requires that priority claims for taxes (pre-petition, post-petition/administrative and/or secured) be treated pursuant to the relevant 11 U.S.C. §1129(a)(9) unless the creditor agrees otherwise. LDR has not, and does not, agree to be treated other than as provided in 11 U.S.C. §1129(a)(9)(A) with respect to any Administrative Tax Claim or 11 U.S.C. §1129(a)(9)(C) with respect to any pre-petition Priority Tax Claim. Providing the

statutorily required treatment for the Administrative Claims and pre-petition Priority Tax Claims of LDR is not a settlement. The plan is not confirmable pursuant to 11 U.S.C. §1129(a)(1).

WHEREFORE, LDR prays that after all due legal proceedings are had, that this Honorable Court will deny confirmation of the Debtors' First Amended Joint Plan of Reorganization and grant such other relief to which it may be entitled.

Respectfully submitted by:

LOUISIANA DEPARTMENT OF REVENUE

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