AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

Best Practices in Settlements After *Jevic*

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2018

American Bankruptcy Institute
26th Annual Spring Meeting
April 20, 2018

Best Practices in Settlements After *Jevic*

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INTRODUCTION

There has been ample commentary on the implications raised by the United States Supreme Court's ruling in the *Jevic* case – we need not discuss that in these materials beyond an overview, which you will find in the first section of these materials from ABI's Editor-At-Large Bill Rochelle, as published in ABI's Rochelle's Daily Wire column in March 2017 when the decision was handed down. In contrast, these materials will highlight what practitioners have attempted, successfully and unsuccessfully, since the Jevic decision.

Included in these materials are an overview of several post-Jevic cases and how their approaches differed, including an analysis as to whether the Third Circuit's holding in LifeCare (*see In re LCI Holdings Co, 802 F. 3d 547 (3d Cir. 2015))* survives *Jevic*:

- *In re Pioneer Health Services* 570 BR. 228 (Bankr. S.D. Miss. 2017)
- *In re Hansen* 2017 Bankr. LEXIS 1120 (Bankr. D. N.H. Apr 25, 2017)
- *In re Fryar* 570 B.R. 602 (Bankr. E.D. Tenn. 2017)
- *In re Short Bark Industries, Inc. et al* **(**Bankr. D. Del. Case No. 17-11502 (KG))
- *In re United Road Towing Company, et al* (Bankr. D. Del. Case No. 17-10249(LSS))
- *In re Constellation Enterprises LLC et al* (Bankr. D. Del Case No. 16-11213 (CSS))

Included also are the motions and decisions related to the settlement proposed and approved in *Short Bank Industries* and the transcript of argument and the ruling from the bench denying the proposed settlement in *Constellation Enterprises LLC*.

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March 22, 2017

Supreme Court Reverses Jevic, Bars Structured Dismissals that Violate Priority Rules

Jevic opinion continues to permit first-day wage and critical vendor orders, although its effect on gift plans is debatable.

Reversing the Third Circuit in *Czyzewski v. Jevic Holding Corp.*, the Supreme Court ruled 6/2 today in an opinion by Justice Stephen G. Breyer that the bankruptcy court, without consent from affected parties, cannot approve so-called structured dismissals that "deviate from the basic priority rules," not even in rare cases.

Justice Breyer was careful to narrow the Court's holding so the opinion would not be interpreted to preclude first-day wage or critical vendor orders.
Joined by Justice Samuel A. Alito, Jr., Justice Clarence Thomas dissented, saying that the writ of *certiorari* should have been dismissed as improvidently granted.

The Facts

In the unsuccessful reorganization of Jevic Holding Corp., the official unsecured creditors' committee had sued the secured lender for receipt of a fraudulent transfer. The committee and the lender negotiated a settlement calling for the lender to set aside some money for distribution to general unsecured creditors following dismissal in a scheme that did not follow the ordinary priority rules contained in Section 507. Since it would give them nothing on their $8.3 million in wage priority claims, workers objected to the settlement because some settlement proceeds were to be held in a trust exclusively for lower-ranked general unsecured creditors.
The bankruptcy court in Delaware approved the settlement and structured dismissal and was upheld in district court. The Third Circuit, in a 2-1 opinion, upheld the

structured dismissal, eliminating any chance of recovery by priority wage claimants through the bankruptcy. Although the dissenter in the Third Circuit concurred that structured dismissals could be approved on occasion, he did not believe *Jevic* was a proper case.

The Supreme Court granted *certiorari* in June 2016 to resolve a split of circuits. Before granting *certiorari*, the Supreme Court sought comment from the Solicitor General, who subsequently urged granting the petition and reversing the court of appeals.

Justice Breyer's Opinion

Justice Breyer cited the American Bankruptcy Institute Commission report's definition of structured dismissals. He went on to say that the ABI report referred to structured dismissals as "increasingly common."

Justice Breyer observed that the Bankruptcy Code "does not explicitly state what priority rules – if any – apply to a distribution" when a chapter 11 case is dismissed. He noted, however, that a chapter 11 plan cannot violate rules of priority over objection from an impaired creditor class.

Since Section 349(b) does not say when there is "cause" to depart from the ordinary rules governing the effects of dismissal, he said the propriety of structured dismissals was a "complicated question." Nonetheless, he said, the answer is "simple": Structured dismissals are not permissible.

The Bankruptcy Code's "priority system constitutes a basic underpinning of business bankruptcy law," the opinion says. Justice Breyer said the Court "would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the [Bankruptcy] Code prohibits in chapter 7 liquidations and chapter 11 plans."

Justice Breyer was careful to ensure that the opinion is not read broadly to prohibit common practices in chapter 11 cases that depart from the rules and timing of distributions, such as first day orders allowing payment of pre-petition wages and claims of so-called critical vendors. Those practices, he said, are designed to enhance the chance for a successful reorganization.
On the other hand, Justice Breyer said, a "priority-violating" distribution in a structured dismissal "is attached to a final disposition; it does not preserve the debtor as a going concern."

He left the door open to other priority-defying practices if there is a "significant offsetting bankruptcy-related justification."

Justice Breyer ended his discussion of the merits by saying that a structured dismissal is not permissible even in a "rare case." He said that allowing them sometimes would result in "similar claims being made in many, not just a few, cases." He concluded that "Congress did not authorize a 'rare case' exception."

The Standing Question

Justice Breyer's majority opinion had a three-page discussion of standing that may be pertinent if the question avoided in *Spokeo Inc. v. Robbins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (Sup. Ct. May 16, 2016), comes back to the Supreme Court.

The respondents contended that the workers had no standing because they suffered no injury. Although they got nothing under the settlement, the bankruptcy judge said they likewise would have received nothing if the settlement were disapproved.
The workers had standing, Justice Breyer said, because "a settlement that respects ordinary priorities remains a reasonable possibility." Furthermore, he said, the fraudulent transfer claim "could have litigation value" because the defendants were willing to pay $3.7 million in settlement. Consequently, "the structured settlement cost petitioners something. They lost a chance to obtain a settlement that respected their priorities. Or, if not that, they lost the power to bring their own lawsuit."
On an issue that may arise if a case like *Spokeo* comes back to the high court, Justice Breyer cited *McGowan v. Maryland*, 366 U.S. 420 (1961), and said that "a loss of even a small amount of money is ordinarily an 'injury'" that gives rise to standing.

'Gift' Plans

The majority opinion does not explicitly discuss the related question of so-called gift plans, where a lender allows some typically small portion of its collateral to be diverted to a low-ranking class, passing over a higher ranking class.

The holding in *Jevic* could be authority to bar gift plans to the extent they result from settlements negotiated by creditors' committees based on claims that belong to the estate.

On the other hand, gift plans arguably are permissible if they promote "significant Code-related objectives" that *Jevic* would allow.

The Dissent

Joined by Justice Alito, Justice Thomas dissented, saying the *certiorari* petition should have been denied as having been improvidently granted. He said the petitioners argued a different issue from the one for which the Court granted *certiorari* to resolve a circuit split.

On the question presented in the petitioners' brief, Justice Thomas said there is no circuit split.

The opinion in the Supreme Court is *Czyzewski v. Jevic Holding Corp.*, 15-649 (Sup. Ct.). The opinion in the Third Circuit is *Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. May 21, 2015).

Opinion Link: https://www.supremecourt.gov/opinions/16pdf/15-649_k53m.pdf

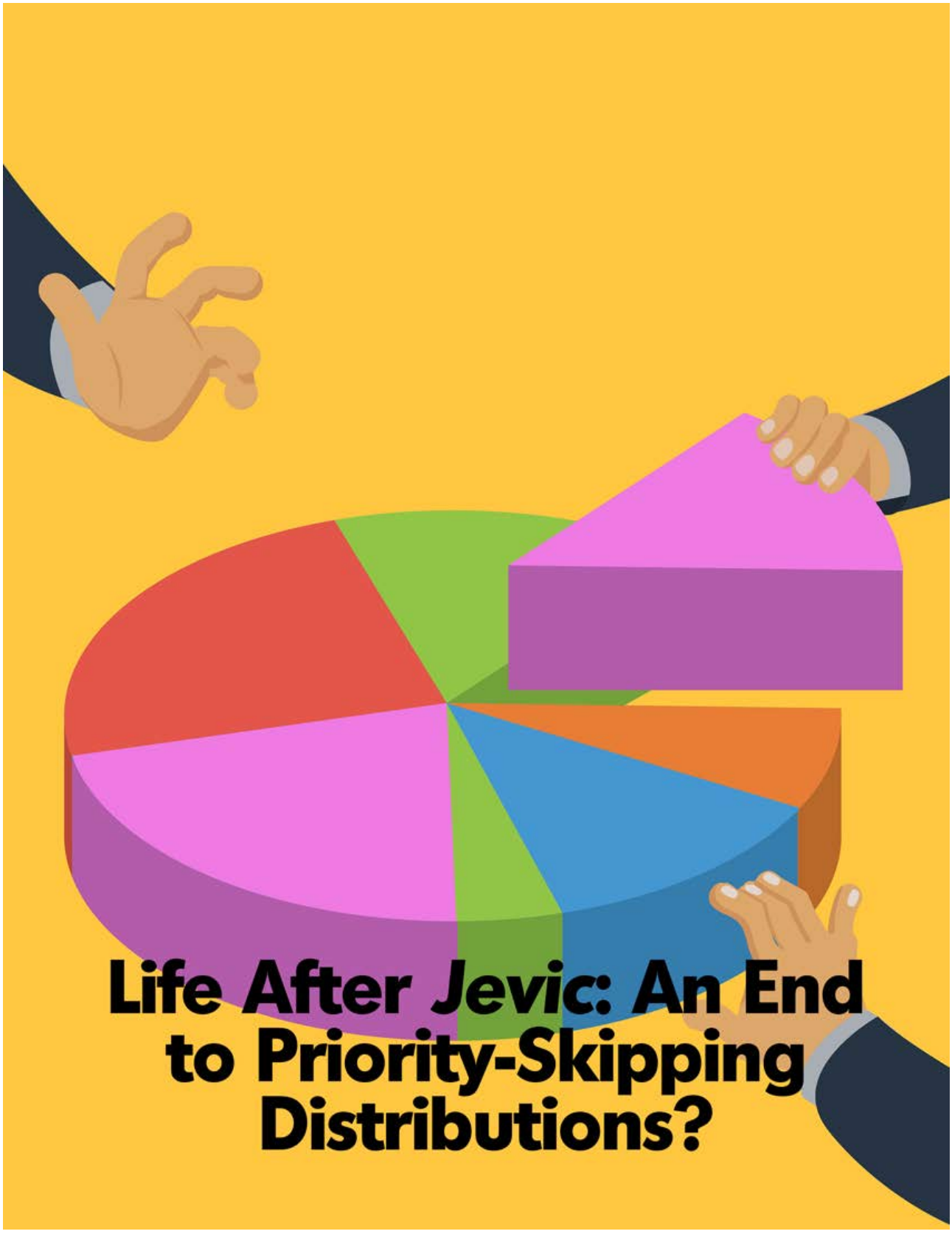
Judge Name: Supreme Court

Case Citation: Czyzewski v. Jevic Holding Corp., 15-649 (Sup. Ct.)

Case Name: Czyzewski v. Jevic Holding Corp.

Case Type: Business

Court: Supreme Court


Life After Jevic: An End to Priority-Skipping Distributions?

Life After *Jevic*: An End to Priority-Skipping Distributions?

September 2017

By Robert J. Keach and Andrew C. Helman

Last spring, in *Czyzewski v. Jevic Holding Corp.*, the U.S. Supreme Court held that a bankruptcy court cannot authorize a nonconsensual "structured dismissal" of a chapter 11 petition that ends the case by distributing assets in a manner that deviates from the Bankruptcy Code's priority scheme.[1] While the *Jevic* Court arguably framed the question before it as a narrow one focused on permissible distributions upon *dismissal* of a chapter 11 petition, its reasoning, borrowing from sale and *sub rosa* plan cases, suggests that the requirement that in-case distributions observe the Code's priority scheme and other substantive and procedural protections might reach beyond structured dismissals.

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Not surprisingly, a number of recent bankruptcy court decisions have begun to extend *Jevic*'s reach. These decisions relied on *Jevic* to deny other types of interim and final distributions — contained in settlements, sales and a critical-vendor motion — that sought to deviate from the normal priority rules in the absence of, for example, evidence "that disregard of the priority scheme will promote 'a significant Code-related objective.'"[2]

Jevic's full reach may not be known for some time. However, this much is clear: Prudent practitioners should be prepared to offer evidence that priority-skipping distributions, whether on an interim or final basis, serve an overriding reorganization purpose, or they will run the risk that the relief will not be granted. While such a showing is necessary, whether it is sufficient is an open question.

The Court's Decision in *Jevic*

The facts of *Jevic*, which have been discussed previously in the *ABI Journal*,[3] followed a familiar pattern of a leveraged buyout (LBO) leading to a bankruptcy. As is often the case, the LBO transaction in *Jevic* gave rise to preference and fraudulent transfer litigation during the chapter 11 case. More specifically, the official committee of unsecured creditors alleged that the LBO buyer and LBO lender had burdened the debtor with too much debt for the company to service, which accelerated its demise.[4] Meanwhile, the chapter 11 case was also the forum for litigation brought by some of the debtor's former employees: A group of truck drivers, who alleged that the debtor and LBO buyer violated state and federal labor laws

1 137 S. Ct. 973 (2017).

2 *In re Fryar*, No. 1:16-BK-13559-SDR, 2017 WL 1489822, at *6 (Bankr. E.D. Tenn. April 25, 2017) (quoting *Jevic*, 137 S. Ct. at 985).

3 Anna Haugen, Courtney A. McCormick and Kathryn Z. Keane, "Re-'Structuring' Dismissal Flexibility: An Analysis of the Supreme Court's *Jevic* Decision," XXXVI *ABI Journal* 5, 12, 71-73, May 2017, *available at* abi.org/abi-journal.

4 *Jevic*, 137 S. Ct. at 981 (quoting *In re Jevic Holding Corp.*, 787 F.3d 173, 176 (3d Cir. 2015) (describing committee's argument)).

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when the debtor terminated them on the eve of the bankruptcy filing without sufficient notice.[5]

What happened next propelled the case to the Supreme Court. The LBO buyer, the LBO lender, the debtor and the committee reached a settlement that included a dismissal of the fraudulent-transfer case in exchange for the LBO buyer allowing a distribution to general unsecured creditors, and for dismissal of the chapter 11 case.[6] However, the truck drivers' claims were left out of the settlement distributions "because [their ...] suit ... was still pending and [the LBO buyer] did not want to help finance that litigation."[7] Despite this, the bankruptcy court approved the settlement because it "predicted that without the settlement and dismissal, there was 'no realistic prospect' of a meaningful distribution for anyone other than secured creditors."[8]

The truck drivers' claims were allegedly out of the money, and the general unsecured creditors would benefit, so what was the harm, and what standing did the truck drivers have to object to the settlement? The Supreme Court quickly dispensed with this issue.

During the course of the appeals, the bankruptcy court entered summary judgment for the truck drivers, "leaving them (and *this* is the point to remember) with a judgment that [they] say is worth $12.4 million."[9] Of that amount, $8.3 million was a priority-wage claim that had to be paid before the debtor's general unsecured claims.[10] According to the Court, the bankruptcy court's approval of the structured dismissal cost the truck drivers their "chance to obtain a settlement that respected their priority," which was sufficient to give them standing.[11]

On the question of whether a bankruptcy court can "approve a structured dismissal that provides for distributions that [violate] ordinary priority rules without the affected creditors' consent," the Court grounded its statutory interpretation on the text of §§ 1112(b) and 349(b) of the Bankruptcy Code and the Code's priority-based distributive policies.[12]

Section 1112(b) authorizes a chapter 11 case to be dismissed, after notice and a hearing, if doing so is in the best interests of creditors. As the Supreme Court emphasized, § 349(b) governs the effect of such a dismissal and seeks "a restoration of the prepetition financial status quo."[13] The *Jevic* Court stated:

> The Code gives a bankruptcy court the power to "dismiss" a Chapter 11 case. [Section] 1112(b). But the word "dismiss" itself says nothing about the power to make nonconsensual priority-violating distributions of estate value. Neither the word "structured," nor the word "conditions," nor anything else about distributing estate value to creditors pursuant to a dismissal appears in any relevant part of the Code. Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. Section 349(b), we concede, also says that a bankruptcy judge may, "for cause, orde[r] otherwise." But, read in context, this provision appears designed to give courts the flexibility to "make the appropriate orders to protect rights acquired in reliance on the bankruptcy case."[14]

While the Court went to great lengths to clarify that it was expressing "no view about the legality of structured dismissals in general," it distinguished orders approving *final* distributions in violation of the priority rules from orders approving priority-skipping *interim* distributions, such as *In re Iridium*

5 *Id.* at 980. The truck drivers alleged that they were entitled to at least 60 days' notice before their termination pursuant to 29 U.S.C. § 2102 and N.J. Stat. Ann. § 34:21-2.

6 *Id.* at 981. The LBO buyer claimed a lien on the property to be distributed pursuant to the settlement.

7 *Id.*

8 *Id.* at 982 (quoting *Jevic Holding Corp. v. Group/Business Inc. (In re Jevic Holding Corp.)*, Bk. No. 08-11006 (BLS), Adv. No. 08-51903, 2011 WL 4345204 (Bankr. D. Del. Sept. 15, 2011)).

9 *Jevic*, 137 S. Ct. at 980 (emphasis in original).

10 *Id.*

11 *Id.* at 983.

12 *Id.* at 983-84.

13 *Id.* at 984.

14 *Id.* (internal authorities omitted).

Operating LLC,[15] a case relied upon by the Third Circuit in the decision on appeal.[16] The *Jevic* Court stated:

> Courts, for example, have approved "first-day" wage orders that allow payment of employees' pre-petition wages, "critical-vendor" orders that allow payment of essential suppliers' pre-petition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their pre-petition claims. In doing so, these courts have usually found that the distributions at issue would enable a successful reorganization and make even the disfavored creditors better off. By way of contrast, in a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the status quo ante; and it does not protect reliance interests.[17]

Not only did the Court distinguish these types of interim distributions, it also then analogized the structured dismissal that it was reviewing to a number of "proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards."[18] By way of example, the Court cited *In re Braniff Airways Inc*.[19] and characterized it as prohibiting an asset sale under the *sub rosa* plan doctrine; *In re Lionel Corp*.[20] and characterized it as reversing approval of an asset sale and holding that "§ 363 does not 'gran[t] the bankruptcy judge carte blanche' or 'swallo[w] up Chapter 11's safeguards'"; and *In re Biolitec Inc*.,[21] and characterized it as "rejecting a structured dismissal because it 'seeks to alter parties' rights without their consent and lacks many of the Code's most important safeguards.'"[22] The Court also cited *In re Chrysler LLC*,[23] in which the Second Circuit observed that "the bankruptcy court demonstrated 'proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority.'"[24]

Bankruptcy Courts Applying *Jevic*

The Court's reliance on *Braniff*, *Lionel*, *Bioletic* and *Chrysler* paved the way for several recent bankruptcy court decisions withholding approval of certain interim and final distributions of estate assets based on *Jevic* — not only sales and settlements, but also at least one critical-vendor motion when there was no evidence that the proposed distribution would have served a reorganization purpose.

For example, in *In re Fryar*, a bankruptcy court refused to approve a settlement that would have authorized a priority-skipping distribution without the consent of the affected creditors.[25] Relying on *Jevic*, the court reasoned that the settlement not only had to be "fair and equitable," but also that its approval required evidence "that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective."[26] The court detailed the proof required as follows:

> The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and

15 478 F.3d 452 (2d Cir. 2007).

16 *Jevic* at 985.

17 *Id.* at 985-86 (internal authorities and quotations omitted).

18 *Id.* at 986.

19 700 F.2d 935, 940 (5th Cir. 1983).

20 722 F.2d 1063, 1069 (2d Cir. 1983).

21 528 B.R. 261, 269 (Bankr. D.N.J. 2014).

22 *Jevic* at 986.

23 576 F.3d 108, 118 (2d Cir. 2009).

24 *Jevic* at 986.

25 *See supra* n. 2 at *6 (quoting *Jevic* at 985).

26 *Id.*

> maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.[27]

However, the settlement before the court "fail[ed] to meet this standard."[28] The case — the debtor's second, after an earlier dismissal for failure to propose a plan — had lingered on the docket for months, and the court was "hard pressed to determine what business remains to be revived or reorganized."[29] In other words, the proposed settlement was akin to a "*sub rosa* plan or a precursor for conversion or dismissal in which the Code's priority scheme is ignored" and could not be approved.[30]

In *In re Constellation Enterprises*, another recent case applying *Jevic*, a bankruptcy court denied the approval of a settlement that would have distributed the proceeds of a sale of substantially all of the debtor's assets in violation of the absolute priority rule and the rule against intra-class discrimination.[31] The court reasoned that the settlement was proposed "at the end of this case's" life, and assumed that "the case [was] either going to dismiss or convert very shortly."[32] Thus, like *Fryar*, the bankruptcy court found no evidence that the proposed distribution of sale proceeds promoted a reorganization purpose.[33]

The *Constellation* decision is also notable for its critical observation that *Jevic* involved non-estate assets. Thus the court suggested that *Jevic* could apply to an out-of-priority distribution, or one that discriminates unfairly, regardless of whether it involves non-estate property, such as assets of a purchaser or creditor, or where a nondebtor entity controlled or dictated the distribution. According to the bankruptcy court:

> [T]here were non-estate property elements of that settlement that were not ... approved, and the Court really didn't delve into it one way or another, but a distinction that simply says *Jevic* doesn't apply because none of the property here is property of the estate, I think that goes too far. I don't think we can say with certainty that's the distinguishing factor that would rule. *Jevic* wasn't pure, estate property versus non-estate property.[34]

The bankruptcy court in *In re Hansen* faced a slightly different issue of whether to grant a trustee's motion to sell certain assets to the trustee's preferred buyer with an incorporated settlement, or approve a competing offer that did not settle the same claim.[35] On the one hand, the trustee sought approval of a settlement that promised a full recovery for general unsecured claims, a nearly complete recovery for administrative creditors, and a dismissal of litigation against the party making the offer.[36] On the other hand, another creditor made an offer that would have paid all creditors in full and then provide the debtor with value — but the payments depended on a favorable outcome in speculative litigation against the party that submitted the trustee's preferred offer.[37] In light of *Jevic*, "the Court finds that the certainty of payment to creditors through [one offer] over the uncertainty of payment to creditors and a surplus to the Debtors through [the other offer] warrants a finding that this ... [settlement] factor weighs in favor of approving the [trustee's preferred offer]."[38] Thus, for this reason and others, the court granted the trustee's motion and rejected the competing offer.

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27 *Id.*

28 *Id.* at *7. The court's refusal to approve of the compromise doomed a sale motion based on the compromise. *Id.*

29 *Id.* at *6.

30 *Id.* at *7.

31 No. 16-bk-11213, Order Denying Joint Motion Approving Settlement, entered at Docket Entry 963 (Bankr. D. Del. May 16, 2017). The court's reasoning was set forth orally. A copy of the transcript is available from the authors upon request and will be cited as "Tr. of Hr'g, [page]:[line]."

32 Tr. of Hr'g, 252:9-18.

33 Tr. of Hr'g, 251:11-252:18.

34 Tr. of Hr'g 248:16-251:4.

35 Bk. No. 12-11907-JMD, 2017 WL 1491765 (Bankr. D.N.H. April 25, 2017).

36 *Id.* at *1-2. The trustee agreed to a slight reduction in her claim.

37 *Id.* at *2-3. The debtor was not going to get paid. Rather, there was a stipulation that payment to another party was to be treated as value attributable to the debtor for purpose of the motion.

38 *Id.* at *11.

Finally, the bankruptcy court's decision in *In re Pioneer Health Services Inc*. provides another data point on *Jevic*'s reach.[39] In that case, the bankruptcy court denied a health care debtor's request to treat certain physician creditors as critical vendors who could be paid on account of their pre-petition claims.[40] While the debtor argued that the physicians would refuse to continue providing medical services to patients without payment of their pre-petition claims, the bankruptcy court found this *argument* to be unpersuasive due to insufficient *evidence*.[41] *Pioneer Health* is notable because the *Jevic* opinion apparently blessed most critical-vendor payments as having a reorganization-related purpose. This case suggests that the conclusion is not a given, but a matter of proof.

Unresolved Questions

The common thread tying these cases together is their application of *Jevic*'s apparent requirement that a nonconsensual, priority-skipping transfer be supported by evidence that it furthers a reorganization objective. With that being said, *Jevic*'s ultimate reach is still unknown.

On the one hand, it is safe to say that settlements and asset sales providing for final distributions of estate assets must either follow the Bankruptcy Code's priority rules or have consent from affected parties — and that this was foreseeable given the Court's reliance on and characterization of *Braniff*, *Lionel*, *Bioletic* and *Chrysler*. On the other hand, it is too soon to tell if *Pioneer Health*'s application of *Jevic* to interim distributions makes it an outlier. Perhaps it is, or perhaps it isn't. Either way, the prudent practitioner will be prepared with evidence, not just an argument, when seeking approval of critical-vendor motions, wage motions and borrowing motions involving a pre-petition roll-up.

Another unanswered question is whether carve-outs of a secured creditor's collateral can continue to be used in class-skipping "gifts" without implicating the absolute priority rule and *Jevic*. The practice has become accepted in some districts following *Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.)*,[42] a chapter 7 case in which the First Circuit held that "the distribution scheme of section 726 (and, by implication, the priorities of section 507) does not come into play until all valid liens on the property are satisfied." The First Circuit reasoned that while the lender's collateral was property of the estate subject to the Bankruptcy Code's priority rules, "once the court lifted the automatic stay and ordered those proceeds distributed to [the lender] in proper satisfaction of its lien, that money became property of [the lender], not of the estate."[43]

Is relief from stay all it takes to avoid *Jevic*'s reach, or does that merely elevate form over substance? Early decisions applying *Jevic* arguably do not distinguish between priority-skipping distributions based simply on whether the estate has title to the assets. Thus, *Jevic* might spell the end of "gifting" — both inside and outside of plans, and particularly in all asset-sale transactions. Selling first, and settling distributions later, might not work either, as *Constellation Enterprises* suggests.

Conclusion

Practitioners can certainly argue to limit the reach of *Jevic* to the structured-dismissal context. However, the Court's reasoning strongly indicates that, at a minimum, any distribution ignoring the priority rules or other protections, including the prohibition against intra-class discrimination, must serve "a significant Code-related objective," such as having a direct nexus to the reorganization of the debtor. Sales of all assets,

39 Case No. 16-01119-NPO, 2017 WL 1279030 (Bankr. S.D. Miss. April 4, 2017).

40 *Id.* at *5.

41 *Id.* at *6-7.

42 984 F.2d 1305, 1312 (1st Cir. 1993).

43 *In re SPM Mfg. Corp.*, 984 F.2d at 1313.

case-determinative settlements and other transactions that preclude a bootstrap restructuring and substitute a "sale model of reorganization" might just have to follow all of the rules. abi

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Life After Jevic: How will the Supreme Court's decision affect chapter 11 practice?

American Bankruptcy Institute

Annual Spring Meeting

April 20, 2018

Jeffrey N. Pomerantz
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DOCS_LA:307066.4 68700/001

LIFE AFTER JEVIC: HOW WILL THE SUPREME COURT'S DECISION AFFECT CHAPTER 11 PRACTICE?

BY JEFFREY N. POMERANTZ[1]

"Once again, the Supreme Court screws up our bankruptcy world". That is how one commentator[2] has characterized the recent decision in *Czyzewski v. Jevic Holding Corp.,* 137 S. Ct. 973, 197 L. Ed. 2d 398 (2017).

Whether one agrees or disagrees with this description of *Jevic*, the decision indisputably raises more questions than it answers. Its application to structured dismissals with different fact patterns and its potential impact on numerous other, more common, aspects of a case—from first day motions to asset sales—will only unfold over time through decisions, published and unpublished, by courts across the country.

The Case

The United States Supreme Court issued the *Jevic* decision on March 22, 2017, effectively reversing decisions of the bankruptcy court, the district court and the Third Circuit Court of Appeals. At its core, *Jevic* holds that a court cannot approve a structured dismissal[3] which provides for distributions different from the standard priority scheme in a chapter 11 or chapter 7 case without the consent of affected parties.

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[1] Jeffrey N. Pomerantz is a partner and Co-Chair of the creditors' committee practice at Pachulski Stang Ziehl & Jones LLP, the nation's leading corporate restructuring boutique, resident in the Los Angeles office. He sits on the Executive Committee of the American Bankruptcy Institute and served as its President from April 2016-2017. Mr. Pomerantz would like to acknowledge the contributions to these materials by Jeffrey Kandel, Of Counsel at Pachulski Stang Ziehl & Jones LLP.

[2] In re Jevic: Once Again the Supreme Court Screws up our Bankruptcy World—And Justice Thomas is Wise in his Dissent, Donald L. Swanson, Mediatbankry (March 30, 2017), https://mediatbankry.com/2017/03/30/. The reference to previous times the Supreme Court "screwed up" the bankruptcy system is primarily to *Stern v. Marshall*, 564 U.S. 462 (2011).

[3] "Structured dismissals" are mechanisms to conclude a chapter 11 case which provide for distributions and address other issues without a plan or a conversion to chapter 7. They are most commonly used following a sale of assets which leaves the chapter 11 estate with insufficient assets to distribute to general unsecured creditors.

Factual Background

Jevic Transportation, Inc. ("Jevic"), a New Jersey trucking company, was acquired by Sun Capital Partners ("Sun") in 2006 through a leveraged buyout financed by the CIT Group ("CIT"). Within less than two years, Jevic ceased operations, terminated its employees and commenced a case under chapter 11 of the Bankruptcy Code, owing $53 million to senior secured creditors Sun and CIT and in excess of $20 million to the taxing authorities and general unsecured creditors.

Two lawsuits were filed in the bankruptcy case. First, ex-employee truck drivers filed suit alleging violations of state and federal Worker Adjustment and Retraining Notification ("WARN") Acts. The Bankruptcy Court granted judgment in favor of the truck drivers in the amount of $12.4 million, $8.3 million of which constituted a priority wage claim under Bankruptcy Code §507(a)(4).

Second, the Official Committee of Unsecured Creditors appointed in the Jevic chapter 11 filed a fraudulent conveyance action on behalf of the bankruptcy estate against Sun and CIT, alleging that they had "'hastened Jevic's bankruptcy by saddling it with debts that it couldn't service'". The Committee and Sun and CIT reached agreement for the following structured dismissal of Jevic's chapter 11 case: (1) the fraudulent conveyance action would be dismissed with prejudice; (2) CIT would deposit $2 million in a segregated account earmarked to pay the Committee's legal fees and administrative expenses; (3) Sun would assign its lien on the debtor's remaining $1.7 million of cash to a trust; (4) thereby permitting the trust to use the funds to pay taxes and administrative expenses, with the remainder to be distributed pro rata among general unsecured creditors; and (5) Jevic's bankruptcy case would be dismissed. *Jevic,* 137 S. Ct. at 981. However, no funds were permitted to be paid to the WARN plaintiffs on account of their

judgement, including on account of their wage claims which held priority over general unsecured creditors. Sun insisted on this provision in order to deprive the ex-employees of funds to bankroll further litigation against Sun.[4] *Id.*

The Lower Court Decisions

While acknowledging the proposed settlement's divergence from the Code's priority scheme, the bankruptcy court approved the settlement, including the structured dismissal embedded therein, in recognition of the "dire circumstances" present in the case, finding that neither priority nor general unsecured creditors would receive any recovery absent approval of the settlement. *See id.* at 981-82. The district court and the Third Circuit both affirmed, with the Third Circuit holding that Congress had only "'codified the absolute priority rule . . . in the specific context of plan confirmation'" and that in "'rare instances'" such as these, structured dismissals which did not adhere to the Bankruptcy Code's priority scheme could be approved. *Id.* at 9.

The Supreme Court Decision

The Supreme Court first considered and dismissed the argument that the WARN claimants did not have standing. Noting that even a small financial interest is sufficient to establish standing, the Court found that if the present settlement was not approved a different settlement which provided a recovery to the WARN claimants remained a "reasonable possibility" and that appellants might be able to find an attorney to pursue the fraudulent conveyance action on a contingency basis. *Id.* at 982-83.

[4] Separate from the WARN claims filed against the Jevic estate, the WARN plaintiffs also asserted state court claims against Sun on the grounds that Sun was a statutory employer. Sun was not willing to allow the WARN plaintiffs to receive part of the distribution being made through the bankruptcy estate while at the same time retaining their rights to pursue the WARN claims against Sun in state court. Because Sun and the WARN plaintiffs could not reach a global resolution, the settlement contemplated distributions skipping over the priority WARN claims. Subsequently, Sun prevailed in the state court action with the WARN plaintiffs.

Addressing the merits, the Supreme Court turned to the core issue of the case: can a bankruptcy court approve a structured dismissal providing for distributions that deviate from the ordinary priority rules of the Bankruptcy Code without the consent of the affected party. The Court's "simple answer to this complicated question" was "'no'". *Id.* at 983. The Court noted that the Code's distribution priority scheme was "fundamental," and that something more than "simple statutory silence"-- an "affirmative indication of intent"-- would be expected if Congress intended to permit dismissals which allow for a major departure from the scheme. *Id.* at 984.

The Court then addressed respondent's contention that Code §349(b), which authorizes a bankruptcy judge to dismiss a case "for cause," permits courts to approve a dismissal which does not comport with the standard priority distribution scheme. The Court concluded that this provision, "read in context", merely granted courts the "flexibility to 'make the appropriate orders to protect rights acquired in reliance on the bankruptcy case'". *Id.* at 984 (citation to legislative history omitted). As nothing in the Code authorizes a court to make "end-of-case" distributions of estate assets that violate the chapter 11 and chapter 7 priority schemes, that do not restore the *status quo ante* as is normally required in a dismissal and that do not protect "reliance interests acquired in the bankruptcy", the Court held that "the word 'cause' is too weak a reed upon which to rest so weighty a power." *Id.* at 984-85.

The Supreme Court's basic ruling appears to be unequivocal, though limited:

> A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.

Id. at 978.

However, in what one bankruptcy court has termed "dicta" (*see* discussion of *In re Fryar*, below) *Jevic* also contrasts the structured dismissal before the Court with certain permissible wage and critical vendor payments, and even lender "roll-ups" which

allow lenders who provide postpetition financing to be paid first on their prepetition claims, all of which have been approved by courts:

> We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example have approved "first-day" wage orders that allow payment of employees' prepetition wages, "critical vendor" orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their prepetition claims [citations omitted]. In doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off." *In re Kmart Corp,* 359 F.3d 866, 872 (CA7 2004)…. By way of contrast…[the structured dismissal] does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmed plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests.

Id. at 985-86.

The Dissent

Justice Thomas, joined by Justice Alito, dissented in favor of dismissing the writ granted by the Court, because the majority "answer[ed] a novel and important issue of bankruptcy law…without the benefit of any reasoned opinions on the dispositive issue from the court of appeals…and with briefing on that issue from only one of the parties." *Id*. at 987. Justice Thomas was upset at what he thought was a bait and switch by the appellant. The Supreme Court granted certiorari to decide "whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme." With respect to that issue there was a clear circuit split. However, in the briefing to the Supreme Court the appellants reframed the question to be "whether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme." With respect to that issue there was no circuit split. Justice Thomas noted that the field of structured

dismissals was "rapidly developing" and that the Court would benefit from further lower court opinions on the topic before taking up the issue. Justice Thomas objected to the Court permitting the appellant to change the question presented to the Court, especially since respondents appropriately "declined to brief the question that the majority" decided. *Id*. at 988. Accordingly, the Court was prematurely deciding a "novel and important issue" with insufficient input regarding the issues involved.

Decisions Subsequent to *Jevic*

Several opinions of note have cited the "priority" portion[5] of *Jevic* in reaching decisions. Notably, none of them relates to structured dismissals, demonstrating that *Jevic*'s application will likely extend to many other issues which arise in a case.

In *In re Pioneer Health Services*, 570 B.R. 228 (Bankr. S.D. Miss. 2017), a Mississippi bankruptcy court cited *Jevic* in determining that increased scrutiny was required in assessing a request to pay prepetition amounts owing to alleged critical vendors. Noting that the Supreme Court distinguished critical vendor motions from structured dismissals, the bankruptcy court quoted *Jevic*'s contrast of the structured dismissal before the Supreme Court with other, permissible, deviations from standard distribution priorities, but understanding *Jevic* to require "increased scrutiny" of even these permissible deviations. *Pioneer*, 570 B.R. at 235.

"Mindful of the increased scrutiny required by *Oxford Management, CoServ,* and *Kmart*, and, apparently, by *Jevic*", the court found that the debtor hospital had failed to establish that payments to three emergency room doctors qualified as critical vendor payments because the debtor had presented no evidence that the doctors were irreplaceable or that they would leave if prepetition amounts owing to them were not paid. *Id*. The bankruptcy court further noted that if the debtor could establish that the doctors were leaving because the debtor would not pay them

[5] Several other cases have cited *Jevic* for its holdings regarding standing and other issues.

prepetition amounts owing, the debtor could threaten the doctors with an action for violating the automatic stay for failure to perform under their employment agreements. *Id*. at 236[6]

In *In re Hansen*, 2017 Bankr. LEXIS 1120 (Bankr. D. N.H., Apr. 25, 2017), the chapter 7 trustee brought a motion to sell certain patent assets which involved the settlement of litigation and which the court deemed to be a compromise of controversy. The trustee accepted an offer which compromised litigation and provided funds for payment in full of all prepetition claims, but left no surplus for the debtor. *Hansen*, 2017 Bankr. LEXIS 1120 at *4. The objections to the sale-settlement argued that the trustee should instead have opted for a different offer which contemplated pursuing, rather than settling, pending litigation, because success in the litigation could result in a surplus for the debtor.

In overruling the objections to the settlement, the court cited *Jevic* for the unremarkable proposition that the Code gives priority to payment of creditors over payment of debtors. *Id.* at *32. The court described *Jevic* as holding that a bankruptcy court may not approve structured dismissals which "do not follow the Bankruptcy Code's ordinary priority rules without the affected creditors' consent". *Id*. at fn. 17.

In *In re Fryar*, 570 B.R. 602 (Bankr. E.D. Tenn. 2017), a motion seeking approval of the sale of real property which included a compromise of controversy was denied where (1) the settlement distribution scheme did not follow ordinary Code priorities, (2) three creditors and the Office of the United States Trustee objected, which required the court to consider whether significant Code-related objectives existed to justify deviation from ordinary Code priorities, and (3) the debtor failed to establish sufficient Code-related objectives.

[6] If this logic is accepted, it might prohibit debtors from including anyone working pursuant to an employment agreement in a first day motion, though this factor is only one among several mentioned by the *Pioneer Health* decision.

In simplification of a complicated fact pattern, the following are the relevant facts: Pinnacle Bank was an undersecured creditor. Part of the unsecured portion of its claim was being paid concurrently with the sale under the settlement, when other unsecured claims, and even a priority claim, was not. The court found that even though a sound business purpose exists for the sale of the property, because the "sale also involve[s] a settlement and a payment of one unsecured creditor ahead of other prior parties and other unsecured creditors, the court must also review the standards for approval of a settlement" and determine whether the compromise is "fair and equitable". *Fryar*, 570 B.R. at 607-08.

The bankruptcy court reviewed case law in the area, noting that the Fifth Circuit holds that a settlement cannot be used to circumvent the Code priority scheme but that the Second Circuit is more flexible, allowing "a settlement reordering distribution from some assets [where] necessary to allow the estate to pursue its most significant assets and where the nature and extent of the estate and the priorities were not fully resolved." *Id*. at 608.

Turning to *Jevic* and its holding regarding structured dismissals, the bankruptcy court noted that courts sometimes allow distributions other than in accordance with the priority scheme under a chapter 11 plan or in a chapter 7 case, as in the case of certain first day orders regarding wages and critical vendors, but only where the distributions would assist in a reorganization and make even dissenting creditors better off. As the court noted, Pinnacle jumping ahead "might be acceptable if all of the creditors were consenting; however, three creditors and the U.S. Trustee have objected, so the court must consider whether there are Code-related objectives being served that are so significant that deviation is justified." *Id*. at 609. But the debtor failed to demonstrate promotion of significant Code-related objectives. Thus, even though the failure to approve the compromise may result in unsecured creditors ultimately receiving nothing, the court held that it is "their decision to make if they want to see if they can find a better deal". *Id*. at 610.

The court directly based its ruling on *Jevic*:

> In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the factors to be considered by the Sixth Circuit, *Bauer*, 859 F.2d at 441, but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective. The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.

Id.

In a September 2017 case from the Delaware bankruptcy court, Judge Kevin Gross approved a settlement among the debtors, the postpetition lender and the creditors' committee as part of final approval of DIP financing/factoring which provided for the priority-skipping distribution of proceeds upon the contemplated sale of substantially all of the estates' assets. The facts presented a sympathetic case for approval of priority-skipping.

In *In re Short Bark Industries, Inc. et al*., Case No. 17-11502 (KG) (Bankr. D. Del. September 14, 2017), the committee withdrew its objection to entry of a final order approving a factoring arrangement between the debtors and undersecured lender LSQ after an agreement was reached that all proceeds of a pending sale of the debtors' assets would be paid to LSQ, which would escrow at least $110,000 of such proceeds and use the funds to make pro rata distributions to general unsecured creditors. The settlement (but not the underlying financing) was opposed by an alleged priority creditor and by the Office of the United States Trustee.

The debtor and the committee filed a joint motion and argued before the court (*see* transcript of hearing, docket no. 209 in the case), *inter alia*, the following: that *Jevic* applies by its terms only to case-ending distributions while here (*i.e.,* in *Short Bark*) the issue was before the court on a financing motion; that *Jevic* involved disposition of proceeds of estate assets while

here the secured creditor was first being paid all proceeds and thus was using its own funds to make distributions to unsecured creditors; that *Jevic* mentioned a financing roll-up as a situation where priority-skipping might be allowed and this matter was before the court on final approval of financing;[7] and that creditors being passed over in *Jevic* had no other means of recovery, while here most or all administrative claimants were expected to paid from the proceeds of the financing and of potential avoidance action and D&O claims.

The UST filed what the court termed a "very strong objection" which primarily raised *Jevic*-based objections to the proposed settlement and its deviation from the Code-mandated distribution priority scheme. In oral argument (repeating its strongest points in its written objection), the UST argued, *inter alia*, as follows: *Jevic* was not limited to case-ending distributions, and in any event the contemplated distribution here was to happen upon a sale of substantially all the assets of the estate—the practical equivalent of a case-ending distribution (even if certain causes of action potentially remained). Further, *Jevic* noted that critical vendor motions and the like which proposed potentially permissible priority-skipping distributions "have usually found that the distributions at issue would enable a successful reorganization, and even make the favored creditors better off". Neither circumstance is found here since all assets were to be sold. In addition, "[i]n this case, the settlement motion [as cautioned by *Jevic*]…changes the bargaining power of creditors, such as administrative priority creditors, non-favored creditors left out of the money, even if this case does not end in a structured dismissal. And it evinces that teaming up between LSQ and the committee to squeeze out priority unsecured creditors". The UST pointed out that the Third Circuit's decision in *LifeCare* (discussed below) expressly noted that its result would have been different if, as is the case here, the proposed distribution was of proceeds upon which the secured creditor has a lien, rather than its own assets, explicitly

[7] The Court interjected that while approval was being sought as part of a financing motion, the proceeds in question were from the sale of estate assets.

distinguishing use of proceeds of a sale of estate property subject to a lien. Further, the debtors are providing releases of causes of action which are estate property; in *LifeCare* they were not parties to the agreement and no estate claims were relinquished.[8] In any event it is likely that *LifeCare* did not survive *Jevic*.[9]

Judge Gross did not publish an opinion or issue detailed findings of fact and conclusions of law addressing these issues. Rather, from the bench, he noted that he initially was inclined to rule in favor of the UST and to not allow the settlement, and that the decision was a difficult one, but that he changed his mind after re-reading *Jevic*. The court found *Jevic* distinguishable on two fundamental bases. First, *Jevic* was "all about a structured dismissal" and end of case distributions, pointing out that SCOTUS distinguished its facts from those in *Iridium* [10] which noted that "it is difficult to employ the rule of priorities" because "the nature and extent of the estate and the claims against it are not yet fully resolved". And [even though the distribution was to be made only when all assets were sold], that's what we have here. (transcript, docket no. 209, at 107:11-15). Further, *Jevic* found no "offsetting, bankruptcy-related justification", but here approval would save 500 jobs "while preserving the committee's rights to bring actions against insiders" (transcript at 107:16-22), and administrative creditors would still likely be paid in full. Perhaps in its most telling statement (which appeared to ignore *Jevic*'s admonishment against making "rare case" exceptions), the bankruptcy court observed that the settlement

[8] The UST also argued that (1) the settlement was a sub rosa plan, and one which could not be confirmed because the equivalent of "votes" in favor (*i.e.*, support for the settlement) had not been procured in good faith because payments by a third party were made to the parties voting (here, general unsecured creditors), violating §1129(a)(3); (2) distributions to general unsecured creditors were to be made without an adequate claims assessment and procedure for determining which claims should be allowed, and (3) not all employees—priority creditors who were the victims of the priority-skipping distribution—received notice of the proposed settlement, which was a violation of due process. The court considered and rejected each of these arguments.

[9] See discussion below regarding this issue.

[10] *In re Iridium Operating, LLC*, 478 B.R. 452 (2d Cir. 2007).

preserves the business with "some, but not great offense to administrative claimants" (transcript at 108:10-12).[11]

The Third Circuit's *LifeCare* Decision

At about the same time that the Third Circuit was deciding *Jevic* it also decided *In re LCI Holdings Co*., 802 F. 3d 547 (3d Cir. 2015) ("*LifeCare")*. In *LifeCare*, the Third Circuit affirmed an order of United States District Court for the District of Delaware, granting a 363 motion for the sale of the debtor's property which included the payment of claims outside the standard Code distribution scheme. The stalking horse (and winning) bid was made by the (under)secured creditor, which credit bid 89% of the amount of its debt and deposited funds into an escrow to pay legal and accounting fees of the Committee. The Committee objected to the sale because the proceeds were insufficient to provide a recovery to unsecured creditors or even to pay all administrative expenses. The United Sates objected because it would be owed $24 million of capital gains taxes as an administrative claim if the sale were to be consummated, but all cash from the sale was to be used solely to pay other administrative expenses (fees of the Committee's professionals) with which its claim had equal priority. Eventually the Committee withdrew its objection when the secured creditor agreed to escrow monies to fund a partial return to general unsecured creditors. Not surprisingly, the United States now objected to payment of not only other, *pari passu*, administrative claimants to its exclusion, but also to lower-in-the-priority-scheme general unsecured creditors.

The bankruptcy court overruled the government's objection and approved the sale, finding that the credit bid was the best and only bona fide bid, and that the alternative to the sale was a liquidation of assets which could endanger patients and would provide no recovery

[11] The UST appealed the court's ruling. But when the proposed sale did not yield additional proceeds over the $110,000 generated for general unsecured creditors from the stalking horse bid, the UST and the committee stipulated that the $110,000 would to go to the estate instead, in order to investigate claims against insiders. The UST appeal was dismissed so the case could be converted. *Short Bark*, Docket No. 305.

whatsoever to any creditor including the government. *LifeCare,* 802 F. 3d at 551. Moreover, the court found that because the escrowed funds came directly from the secured creditor/purchaser and never passed through the estate, such funds were not sales proceeds and thus not property of the estate. *Id*. Accordingly, the Code distribution priorities did not apply to them.

In affirming, the Third Circuit rejected the government's argument that the Committee itself had conceded that its settlement with the purchaser "'allocate[d] proceeds from the sale'" and therefore implicated property of the estate, declining to "elevate form over substance and give legal significance to the Committee's description of the settlement funds". *Id*. at 556. Further, the originally-escrowed funds to pay professional fees were likewise not property of the estate even though the Asset Purchase Agreement referred to them as "consideration" for the debtor's assets and part of the purchase price. Because the purchaser was buying, among other assets, all of the debtor's cash and thus the excess over professional fees would be returned to the buyer, these funds could not be termed property of the estate. *Id*. Rather, these were funds to assure a smooth transfer of assets and to resolve objections to the sale rather than as partial consideration for the debtor's assets. *Id*. at 557.

The United States did not appeal the *LifeCare* decision. As discussed below, it is unclear whether *LifeCare* remains good law after *Jevic*.

Beyond *Jevic*

The holding in *Jevic* directly addresses a structured dismissal to which parties objected. The narrow circumstances of *Jevic*, however, should not obscure the more fundamental and commonly-occurring circumstances to which it may—or may not—be applied, as well as several other issues.

(1) Issue: Is *Jevic*'s holding limited to structured dismissals, or do its principles and analysis apply to any potential distribution made during the course of a chapter 11 case which does not comport with the absolute priority rule (or to distributions in a chapter 7 case contrary to the distribution priorities set forth in the Code)? For example, does it apply to a proposed settlement which includes a distribution of proceeds or to first day motions seeking to pay certain prepetition obligations?

Analysis: It is as of yet unclear from the limited number of post-*Jevic* cases addressing these issues to what extent *Jevic* will have broad application. *Jevic* explicitly contrasts structured dismissals with first-day motions and the like by identifying the former's deficiencies (*e.g.,* doesn't preserve the debtor as a going concern, doesn't promote reorganization). But the bankruptcy courts in two subsequent cases (discussed above) clearly apply *Jevic* beyond structured dismissals. In *Pioneer Health Services,* the court explicitly cites the *Jevic* list of deficiencies in evaluating (and denying) a critical vendor motion, noting that *Jevic* "apparently" requires increased scrutiny of such motions. And in *Fryar*, the court cited *Jevic* in refusing to approve a settlement which involved a distribution of proceeds which deviated from the standard Code priority scheme. In contrast, however, the court in *Short Bark* (unpublished, ruling from the bench) focused heavily on the fact that *Jevic* "was all about a structured dismissal" in refusing to deny a priority-skipping settlement, noting that *Jevic* cited with approval the Second Circuit's decision in *Iridium* for the proposition that it is "difficult to employ the rule of priorities" early in the case when the "nature and extent" of claims have not been fully resolved.[12] Thus, whether, and to what extent, *Jevic* will be more widely applied—including whether courts will require a more robust evidentiary showing to support first day motions seeking to pay prepetition claims (ala *Kmart*)--remains to be seen.

[12] The *Short Bark* court also rested its decision on the fact that a "significant, offsetting, bankruptcy-related justification" existed since the settlement would save the debtors' business and the employment of 500 people.

(2) Issue: If *Jevic* applies beyond structured dismissals (which almost always, by their nature, have most of the deficiencies identified in *Jevic*), can a court approve a deviation from the standard distribution scheme if "Code-related objectives" are achieved even if the affected creditor objects?

Analysis: On the one hand, *Jevic* appears to state a bright-line holding: a deviation from standard Code distribution priorities can only be approved with the consent of the affected creditor. Perhaps this bright line applies to other situations as well. On the other hand, *Jevic* contrasts its circumstances with those of potential first day orders, reciting its laundry list of deficiencies which go well beyond the fact that the affected creditor has not consented. As noted above, post-*Jevic* cases *Pioneer Health* and *Fryar* apply *Jevic*'s more nuanced analysis. Indeed, *Fryar* explicitly analyzed whether Code-related objectives were being achieved only once it noted that creditors had objected. *Fryar*, 570 B.R. at 609. However, *Fryar* also noted that the Supreme Court's listing of deficiencies under the facts of *Jevic* was dicta to *Jevic*'s fundamental, narrow holding applicable to structured dismissals. *Id*. at 608-09. The context of *Jevic* made it difficult to argue that the settlement was achieving Code-related objectives—the company had shut its doors pre-bankruptcy and all that was happening through the settlement was a resolution of estate owned fraudulent conveyance actions. But the more typical context of a class-skipping structured dismissal involves a creditors committee giving up its rights to object to a sale or DIP financing in exchange for a fund earmarked to its constituency. In those cases, the elimination of potential sale or DIP litigation often paves the way for a going concern sale without the attendant costs and risks of litigation. Since the Code promotes value maximization one could argue that such a fact pattern is distinguishable and that *Jevic* does not apply. Indeed, this largely was the fact pattern in *Short Bark*, wherein the court distinguished *Jevic* and

approved a settlement which included a priority-skipping distribution of future sales proceeds. Whether other courts will take that view remains to be seen.

(3) Issue: As noted by the Supreme Court, affected parties objected to the structured dismissal in *Jevic*. Presumably if all affected parties consent, a deviation from distribution priorities would be permitted. *Cf. Fryar*, 570 B.R. at 609 (analysis of whether Code-related objectives have been met undertaken after noting that parties have objected, though states only that the plan "*might* be acceptable if all of the creditors were consenting." (emphasis added)). Does the lack of an objection after notice and opportunity to object constitute consent?

Analysis*:* *Jevic* sheds no light on the issue; the affected parties affirmatively objected, as they did in *Short Bank*. In *Fryar*, the bankruptcy court noted that creditors were not consenting, that three creditors and the UST objected. This *may* imply that had no objections been filed, consent would have been inferred. *Pioneer Health* did not address the issue of consent at all.

Even if consent can be inferred through failure to object, first day motions are of course heard on an emergency basis following limited notice. Perhaps debtors, where possible, should bring critical vendor and similar motions on regular notice sent to all creditors.

(4) Issue: Can a priority-skipping payment be authorized over an objection if there is evidence of "significant Code-related objectives" even if the payment will not benefit the affected party? For example, if unsecured creditors would be paid in full on a liquidation, can a critical vendor motion be granted over an objection by such a creditor, who has nothing to gain but whose recovery in full is put at risk by an authorization based on Code objectives of reorganization and preserving the debtor as a going concern?

Analysis: In rejecting the class-skipping payments in *Jevic* the Court reasoned that the structured dismissal pursuant to which they were proposed to be made "does not

preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests." *Jevic*, 137 S. Ct. at 985-86. That language would imply that if the class-skipping payments further fewer than all —or perhaps even any one— of those Code-related objectives then the payments can be approved even if the payments do not benefit the objecting party. However, the bankruptcy court in *Fryar* appears to go further than the Court in *Jevic*, stating that a settlement which deviates from Code distribution priorities should state how it is serving code related objectives "and should demonstrate that it makes even the disfavored creditors better off." *Fryar*, 570 B.R. at 610 (and at 609, quoting *In re Kmart Corp*., 359 F. 3d 866, 872 (7th Cir. 2004) discussing justifications for critical vendor motions). Although benefit to the objecting creditor was not stated as a requirement, the bankruptcy court in *Short Bark* observed that the objecting administrative claimant would "participate in the settlement to a small degree" and that there was no guarantee that skipped-over administrative claimants would receive any distribution if the settlement was disallowed, thereby finding that the settlement thus involved "some, but not great offense to administrative claimants" (*Short Bark* transcript at 108:6-12). Although inconclusive, *Jevic*'s laundry list implies, at a minimum, that not all of the listed elements must be met.

(5) Issue: Are there creative ways to structure a dismissal which do not run afoul of *Jevic*? Does the methodology and do the principles enunciated in *LifeCare* survive *Jevic*, *i.e.,* do the *Jevic* requirements apply to funds which are not property of the estate? Recently, the United States Bankruptcy Court for the District of Delaware approved a credit bid sale to a junior lender under Section 363 which sale included an assumption of $750,000 of prepetition general unsecured claims on a pro rata basis in *United Road Towing Company, et al*., case no 17-10249 (LSS). Although the buyer was also paying known administrative and priority claims, would the

assumption of liabilities construct work even if certain priority or administrative claims were not satisfied?

Analysis: The issue of whether *LifeCare* survives *Jevic* was hotly contested in *Constellation Enterprises, LLC, et al.*, case no. 16-11213 (CSS) pending in the Delaware bankruptcy court (*see,* primarily, docket nos. 944-948, 955 & 956). Among the arguments put forth that *LifeCare* did not survive *Jevic* were the following: (1) The assets at issue in *Jevic* were also not estate property: $2 million was contributed by secured creditor CIT (clearly not property of the estate) and a lien on $1.7 million was "contributed" by secured creditor Sun. (2) If the assets being used are so divorced from the estate that *Jevic* does not apply, then the court does not have subject matter jurisdiction over such assets and can neither approve nor disapprove their use.

The Committee replied that no portion of *Jevic* addresses or overrules *LifeCare*. $1.7 million of the funds being used in *Jevic* were estate funds even though they were subject to a lien. And despite that the CIT $2 million was not property of the estate, *Jevic* refused to hold that the use of *any* estate assets which are to be distributed outside the standard distribution scheme is improper. In fact, *Jevic* acknowledged the permissible use of such funds in certain first day and settlement motions. Further, the alleged jurisdictional Catch-22 is merely a red herring, as the settlement resolves numerous disputes in the case regarding, for example, previous objections to DIP financing orders.

In declining to approve the settlement in *Constellation*, Judge Sontchi, for the most part, avoided this issue, finding that though the property in question was currently owned by the purchaser of the estate's assets, the property had once been property of the estate and the parties always contemplated that it would be transferred back. Accordingly, the property in question was considered property of the estate, *LifeCare* was thus inapplicable and the settlement would

be disallowed under *Jevic*. Judge Sontchi acknowledged that the Supreme Court in *Jevic* wasn't focused on the issue of property vs. non-property of the estate. Since he concluded that *Constellation* dealt with estate property he was able to sidestep the issue. Accordingly, it is unclear how the Court would have ruled had the property involved been unequivocally non-estate property. Nevertheless Judge Sontchi did reason that "if [*LifeCare]* hasn't been overturned by *Jevic* altogether, and I'm not ruling that it has been, I think it probably has been significantly narrowed…". Transcript of May 16, 2017 hearing in *Constellation*, at 247-48. Elsewhere, however, Judge Sontchi noted that if faced with a true *LifeCare* scenario where unequivocally only non-estate property was being used, "I think I'd be constrained to follow or enforce [it]". *Id*. at 250.

In a post-*Jevic* world, can the partial assumption of liabilities in *United Road Towing Company* be utilized in a circumstance where higher priority creditors are not being paid in full? If *LifeCare* survives *Jevic*, a sale including *United Road Towing*'s partial assumption of liabilities likely does as well. In the parlance of the *LifeCare* decision, non-estate property is being used to "smooth" the transfer of assets by resolving objections to the sale, rather than to purchase assets.

One can argue that *United Road Towing*'s assumption is even more removed from use of estate assets than the funding of a creditor trust in *LifeCare* with non-property of the estate. No assets whatsoever—estate or non-estate owned—are being transferred. Moreover, it is common practice for a purchaser of assets to selectively assume liabilities. Just as a purchaser is allowed to select which liabilities to assume based on its future business necessities, so too a purchaser should be permitted to select liabilities to assume based on the business necessity of garnering support for the proposed sale transaction.

However, if the purpose of an *United Road Towing*esque partial assumption of liabilities is clearly to bypass the standard Code priority scheme, the issue may still come down to whether *LifeCare* survives or not. A court may either determine that the approach is permitted because estate assets are not being used in violation of Code distribution priorities, or will instead view the structure as form over substance, focusing on the fact that funds paid (as in *LifeCare*) or to be paid (as in *United Road Towing*) are monies the purchaser is willing to pay for the debtor's assets, which monies are being used to pay the debtor's liabilities.

In The Matter Of:

In re: Constillation Enterprises, LLC, et al.

Hearing

May 16, 2017

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Constellation Enterprises LLC, et al.,	)	Case Number 16-11213 (CSS)
Debtors.	)	

Courtroom 6
824 Market Street, 5th Floor
Wilmington, Delaware
Tuesday, May 16, 2017
10:00 a.m.

BEFORE:

THE HONORABLE CHRISTOPHER S. SONTCHI, Judge

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THE COURT: Good morning.

MR. SHAPIRO: Good morning, your Honor. For the record, Zac Shapiro of Richards, Layton & Finger here today on behalf of the Debtors. With me at counsel table are my colleagues, Mr. Ramos and Mr. Barsalona. Behind me is Mr. Dana LaForge, who is among other things a board member of Constellation.

We have two items on today's agenda. The first is a joint motion filed by the Debtor and the Committee to seek approval of the settlement; and the second is what we call the Committee's related mechanics motion. We would propose to take those items in the order which they're listed on the agenda.

We would also propose to get right into evidence. We have one witness; the Committee has one witness. And then after each of us do our direct and redirect and our cross and redirect, then we would get into arguments of counsel. And at this point, I would pause to see if that proposal is acceptable to your Honor or other parties wish to weigh in.

THE COURT: Anyone wish to be heard on that?

MR. KAPLAN: Your Honor, if I may, we had discussed with Debtor and the Committee beforehand that we thought we brief openings would be helpful just to frame the testimony here, but obviously, we would defer to your Honor.

THE COURT: Brief openings are fine. I did read the briefs, so I'm aware of the issues, obviously. But if people would like to make openings, that's fine. So I'll turn to the Debtors first and the Committee. If you don't want to, that's fine, as well.

MR. SHAPIRO: Your Honor, I'm going to make my opening very brief. I think the papers made clear that at the very outset of these cases, our goal was to achieve one or more going concern sales of the Debtors' businesses. And to do that, we needed financing and a buyer or buyers. And it was critical, in our view, to achieve those goals that we obtain as much support as we could from our key creditors. And just one day

before the August 16th hearing, which was at that time the hearing on the approval of the sales, and it was going to be the hearing on approval of the DIP but we adjourned that into later, and that was three months into the case, we hadn't yet received final approval of our DIP and neither of our sales were approved.

And I think as the testimony will make clear, at that stage, we didn't have support for either sales or the DIP. And then on the morning of August 16th, we were sent a term sheet that not only resolved inner-creditor disputes and provided funding to out of the money creditors solely from non-estate sources, but it resolved the Committee's objections to the sales and the DIP.

And importantly, it also resulted in the Committee supporting the sales and the DIP, something that I think it's safe to say carries a lot of weight in this court. And to us, that sounded like a no-brainer. So we agreed to the term sheet.

But it was clear that the term

sheet was still subject to further documentation and finalization. In fact, the record makes clear that counsel to each party stated on the record in no uncertain terms that there was still a lot of work that needed to be done with respect to the settlement, and the Debtors even expressly said we would work in good faith to finalize it. In fact, it was not until more than three weeks later that the term sheet was finalized and filed with the Court.

But what we really agreed with on August 15th and 16th, and I think this is important, is the concept. And the concept was get the support from the Committee for your sales and your DIP, give up nothing, and get something for certain of your creditors, but admittedly not for others. Or don't get the Committee support for your sales and the DIP. Give up nothing, and get nothing for none of your creditors.

And I would submit, your Honor, that really wasn't a difficult choice. Was it a perfect settlement? No. We would not be

here today before your Honor if it were a perfect settlement. Would it have been better if the objectors in this room received what we thought they were entitled to? Sure. Of course, that would have been great. And the record will reflect that we tried to help as much as we could in that regard. But the fact is, as is true in most Chapter 11 cases, the Debtors didn't control the economics. We were limited in what we could do.

But I don't think anyone can credibly argue that the Debtors' decision to enter into the settlement was anything but a sound exercise in their business judgment, nor can they argue the settlement does not fall above the lowest point in the range of reasons.

And I think that's it from me, your Honor. Thank you.

THE COURT: You're welcome.

MR. ABER: Good morning, your Honor. Norman Kinel, Squire Patton Boggs, on behalf of the Creditors' Committee.

I don't have much to add to what

Mr. Shapiro had to say. We're obviously the co-movant on the settlement motion. We brought our own motion which we referred to as the mechanics motion, which to some degree was precipitated by the first round of objections where the objecting parties wanted to know exactly what the mechanic would be for distribution of the settlement proceeds, assuming it was approved by this Court.

I think your Honor, and I think the reasons that the Debtors and the Committee didn't see the need for opening statements, I think there's going to be a lot of noise in the courtroom today, not necessarily loud, but a lot of things that are distracting for what's really at issue before the Court. And what's at issue before the Court is approval of the settlement, and the standard for approval is, as we all know, pretty low. Not that I think this is even close to approaching the lowest level, but certainly we believe that both the Debtors and the Committee, to the extent relevant, entered into a hard-fought, good-faith settlement after

lengthy negotiations, primarily between the Committee and the noteholders, and that the parties, the constituency that we represent, the Unsecured Creditors Committee, this settlement is the only last-best-chance hope for obtaining substantial consideration, consideration that would not have been predicted to have been possible to obtain at the outset of the cases given the huge amount of debt that came before unsecured creditors. And that only through the Committee's efforts in pressing its objections to the DIP, to the sale motions, and conducting investigations and doing all that a Committee should do, has the results which we're seeking approval of come before your Honor for approval.

We took a long detour easily referred to as the Jevic detour. We're back we believe where we started, and as we'll get into argument at closing, we don't believe that Jevic is relevant or in any way precluding the Court's approval of the settlement, and we believe that, frankly, it should be almost a routine matter to approve

this type of settlement given the binding third circuit precedent at LCI.

And as to the mechanics motion, your Honor, the Committee is faced with economic realities that there was never a bar date set in these cases and that there is a claims resolution process that needs to occur, we're asking the Court to approve a mechanism which we think is fair with respect to which all creditors have been on notice for many, many months, and the only parties who have ever objected are sitting in this room. And we think it's an efficient way to get a substantial distribution to unsecured creditors in these cases. Thank you.

THE COURT: Mr. Kaplan?

MR. KAPLAN: Thank you. Good morning, your Honor. For the record, Gary Kaplan from Fried, Frank, Harris, Shriver & Jacobson on behalf of the DDTL parties.

First, your Honor, I wanted to start with one of the issues that was covered in the reply and one of the reasons why I wanted some openings was there's a lot of the

argument that the Debtors and the Committee make is, well, the APA always provided that certain of these assets were going to be sold, and that's all that's relevant is look at what the APA said, and we're trying to relitigate the APA. We're not trying to relitigate the APA. We understand what the APA said, but that's besides the point.

Because what we're here on today is a settlement term sheet. And the record is going to show, and we put it in our brief and it will come very clear as we go through the testimony today, when the Debtors and the Committee announced that they had a settlement, there were assets that were going to be left behind by the purchaser in the estate and then the estate was going to be distributing out. That is what was announced in court on August 16th. That is the settlement that was approved by the Debtor and the Committee.

And we're going to also show that then after that, because of Jevic or otherwise , it changed, so that assets that

were going to be left in the estate, plainly estate assets that had agreed to be carved out, were now going to be sold to the purchaser and immediately contributed back to the Debtor.

And when the Committee and the Debtor want your Honor to consider this, they sort of want to you bifurcate pieces of the settlement which you're assessing. What we argue is when you're looking at the claims and causes of action, you can't look at anything today because clearly the sale has closed, the DIP has been assumed by the purchaser, so you have to step back and look at the world on August 16th when they stood up in court and announced the settlement. That's when they argue you have to look at the claims that are being settled. But don't look at the facts and what was agreed to on the 16th, because that would run smack into Jevic and that would be impermissible.

So they want you to sort of bifurcate how you look at the settlement and what you look at the settlement. And frankly,

we don't think there's any precedent for that.

Now, Mr. Kinel mentioned you're going to hear a lot of noise today. Well, that noise is the facts. They may be inconvenient, they may be unhelpful to the Debtors, but that's what you're going to hear.

In terms of the settlement and the Martin factors and the Committee's argument that this was a home run considering where, you know, what their claims were, we think that sort of misses the point on this. Because what we're really not talking about is a settlement. What we are talking about is effectively a distribution scheme to wrap up the Chapter 11 case. You have a Debtor who as the testimony show cannot, has no hope of confirming a plan. So they have to figure out a way, how do we get out of Chapter 11, and that's what they created. They've done it under the guise of 9019 and they're trying to use the 9019 standard, but we're not talking about a settlement, because as the facts will show, there was really nothing to be settled. The challenge period had expired. There were

no claims against the noteholders. They say, oh, look at what we extracted from them, they had to release them. There were no claims against them. They were negotiating a distribution mechanism, and that's it.

And then lastly, in terms of the Debtors' business judgment, the record is going to be pretty clear that the Debtor, as they said and it says in the declaration, they had a take it or leave it proposition right before the hearing. They said, hey, it's better than nothing, it gets our DIP and our sale approved, we'll take it. That may be fine, maybe the Debtor can do it, it wasn't conditioned, none of those orders were conditioned on approval of the settlement, so I'm not criticizing them for making that judgment. But this Court has a role in reviewing that settlement and looking at it, saying, okay, it's nice they did it, they got their sale approved, but is it the appropriate thing and does it actually comply with the law?

And it's important to consider,

as Mr. Shapiro said, the Debtors had already addressed the DIP objection. We're not talking about an exigent circumstance with a deadline blowing up where they were about to lose the DIP. They had already moved a deadline or, I'm sorry, moved the hearing on the DIP. So it wasn't an exigent situation where they could have taken time to actually negotiate.

And one other point is that, and the Committee has already made the point and will continue to make the point, if this settlement is denied, there's going to be a windfall to noteholders and the creditors are going to be out and they're not going to get anything. You know what, your Honor? It's a little bit like the child that kills his parents and then begs mercy because they're an orphan. The Committee and the Debtor structured this in this way. Evidence will show it wasn't the noteholders who insisted you must skip priority claimants, you must skip the DDTL parties deficiencies. The Committee and the Debtors decided, gee, maybe

we can try to get around Jevic if we structure it this way, then they'll beg and say, well, Judge, but if you deny it, then we won't get anything. They could have simply accepted the terms that the noteholders proposed and said, yeah, we'll make it correct amongst creditors, we'll follow the absent priority rule. If they did that, we wouldn't have an objection, none of the parties on this side would have an objection. They chose to go down that path, your Honor, and whether the outcome ultimately is negative for them, you know, we make strategic decisions all the time, and they have to live with those strategic decisions.

So to avoid beings repetitive, in closing I will address ICL and Jevic and all those other issues. Thank you.

THE COURT: Ms. Casey?

MS. CASEY: Good morning, your Honor. Linda Casey on behalf of the United States Trustee.

Your Honor, while we have some technical objections to both the settlement motion and the procedures motion, I think the

main issue today can be framed by the following: Can the Supreme Court's Jevic decision be interpreted so narrowly as to permit an end-of-case priority skipping distribution of assets by finding that the consideration paid to resolve objections to a sale and thereby permit the sale to move forward are not estate assets, and therefore continue the harms that the Supreme Court attempted to avoid, altering the balance struck by the code; changing the parties' negotiating positions; decreasing the likelihood of settlement; and increasing the uncertainty of distributions resulting in a battle between all parties to obtain the purported side deals or gifts provided by the purchaser?

THE COURT: Thank you, Ms. Casey:

MR. RAISNER: Good morning, your Honor. Jack Raisner on behalf of the WARN class.

We have joined in Ms. Casey's objection and made our own. I just want to

highlight a chief concern of ours. Regardless of whether this is a gifting case or this is not quite a Jevic case and may be a Jevic case, the way which the distribution of proceeds have been set up in a lopsided way, which has none of the hallmarks of fairness, of a disinterested broker looking over the process, puts the employees' claims fully to the discretion of the Debtor and the noteholders and control that process and all the decisions that are made, except potentially for a person who would come for a full hearing in court. But that is not a convention that belongs within any Bankruptcy Code or bankruptcy resolution, your Honor. Thank you.

THE COURT: Thank you, sir. Anyone else?

MR. RAMOS: Good morning, your Honor. Marcos Ramos, Richards, Layton & Finger.

Your Honor, as Mr. Shapiro indicated, we intended to call Debtors' witness first on the settlement motion.

THE COURT: Okay.

MR. RAMOS: Then we would be, after the other parties are finished, proceeding with the Committee witness on that motion, as well. The Debtors' witness is Mr. Dana LaForge. And your Honor, we included in the binders that we provided to the court and to the clerk the Debtors' exhibits. Volume 3 includes the declaration of Mr. LaForge. It's volume 3, and it's Exhibit 13 in volume 3. I have some extra copies of the declaration itself, if I can approach.

Your Honor, the declaration of Mr. LaForge was filed shortly before the December hearing at which the settlement motion was last considered by the Court. We intend to proceed by way of his declaration in terms of offering it as his direct testimony with only a few limited follow-up questions. We've advised the parties of that, and there's no objection to proceeding in that fashion.

THE COURT: Any objection to the admission of the declaration? Okay; it's admitted without objection.

MR. RAMOS: And we would call Mr. LaForge to the stand, your Honor.

THE COURT: Okay, very good. Mr. LaForge, if you would step up to the stand, remain standing for your affirmation.

DANA LAFORGE, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAMOS:

Q. Good morning, Mr. LaForge.

Mr. LaForge, can I ask you to pull out the binder that I was just referring the Court to? It's identified as binder 3 of 3. And in that binder, ask you to turn to what's identified as Debtors' Exhibit 13.

A. I'm there.

Q. Sir, can you identify that document for the record?

A. Yes. It's the declaration I submitted in December.

Q. Are you familiar with the contents of that declaration?

A. I am.

Q. Can I ask you to take a quick look at paragraph 1?

A. Okay.

Q. And would you please describe whether the information set forth in paragraph 1 is accurate as of today?

A. It's all accurate. It leaves out the fact that I'm also the chairman and sole director of all those companies.

Q. With that caveat, Mr. LaForge, regarding your position with the Debtors, do you affirm the contents of this declaration as your testimony today in support of the joint settlement motion?

A. I do.

Q. Mr. LaForge, let me ask you to stay in binder 3 and ask you to turn to tab 9.

A. I'm there.

Q. And I'd ask you to turn two pages in or so into the document and ask you if you can identify that document.

A. I can identify it. It's our motion to approve the settlement.

Q. And is this the motion under which

you're today appearing?

A. It is.

Q. And let me refer you to Exhibit A to that motion, and Exhibit 1 to Exhibit A, two or three pages into what's under Exhibit A.

A. Okay, I'm there.

Q. And sir, are you familiar with that document?

A. I am.

Q. What is it?

A. This is the executed version of the settlement term sheet.

Q. And is this the settlement agreement for which the Debtors and the Committee jointly today seek Court approval?

A. Yes, it is.

Q. Sir, just stay on page 1 of the settlement term sheet, about three or four paragraphs down. See the reference to CD Star Holdings, LLC?

A. I do.

Q. It refers in that same paragraph to an APA, correct?

A. Yes, it does.

Q. And sir, do you know, has the closing occurred?

A. The closing occurred in late November.

Q. Do you remember the date that that closing occurred?

A. The date?

Q. In November?

A. I believe it was -- the document is dated the 28th of November.

Q. Sir, to your knowledge, was the APA referred to here in the settlement term sheet, was that amended prior to the closing?

A. My understanding is it was amended prior to the closing.

Q. May I ask you to turn to tab 16 in the same binder that you have before you?

A. I'm there.

Q. And sir, can you identify that document?

A. Yes, this is its amended asset purchase agreement that I was referring to.

Q. You're familiar with this document, sir?

A. I am.

Q. Is it your understanding this is the final form of the APA referred to in the settlement term sheet?

A. Yes, that's my understanding.

Q. I'm going to ask you to do a little flipping back to tab number 9 for me, sir. And back to the settlement term sheet that you were just discussing.

A. I'm there.

Q. And, sir, do you know whether or not under the settlement term sheet an escrow agreement was contemplated?

A. It was.

Q. And do you know in connection with the closing we were just referring to whether that agreement was executed by the Debtors?

A. It was executed, yes.

Q. Let me ask you to turn to tab 17.

A. Okay, I'm there.

Q. Are you familiar with that document, sir?

A. I am.

Q. And can you just describe what it is for the record?

A. Yes. As part of the settlement, there was some funding as part of the settlement that needed to be put into escrow, and this is the agreement that contemplated that.

Q. To your knowledge, sir, is that the final form of the escrow agreement executed by the Debtors as of the closing?

A. Yes, it is.

Q. Thank you. One last question from me, Mr. LaForge. Tab number 9 again; I'm sorry. Put you right back where I started you.

A. Okay.

Q. Let me ask you to turn to page 3 on the settlement term sheet.

A. Okay, I'm there.

Q. It's page number 3 at the bottom. And sir, you see the second bolded header on the left-hand side called Claims and Causes of Action?

A. I do, yes.

Q. And that long paragraph, that's next to it, right?

A. I do, yes.

Q. Let me refer you to the last sentence

of that long paragraph, sir. Have you reviewed that, sir?

A. I have, yes.

Q. Sir, can you just clarify for me, are the Debtors today asking the Court to approve the Debtors' contribution of any claims or causes of action to the trust?

A. We are not.

Q. And sir, have the Debtors considered whether to add a clarifying provision to that effect in the proposed order that they will submit to the Court in connection with this joint settlement action?

A. I believe we have added that clarification to the order, and have indicated that they would be prepared to augment that as any matter that would be helpful.

MR. RAMOS: Thank you, Mr. LaForge.

Your Honor, subject to redirect, I'll pass the witness to the objecting parties.

THE COURT: All right.

MR. KAPLAN: Good morning, your

Honor. Your Honor, for the record, again, Gary Kaplan, Fried Frank.

Your Honor, because we haven't killed enough trees, we also have our own witness binder, if we may approach the witness and your Honor to hand out the binders.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. KAPLAN:

Q. Good morning, Mr. LaForge. As you know, Gary Kaplan from Fried Frank on behalf of the DDTL parties.

I want to start actually back on August 16th. At the hearing on August 16th, the Debtors announced that a settlement had been reached, correct?

A. Correct. Yes, an agreement to move forward and consummate the settlement that had been agreed to, yes.

Q. And the first that you had learned that settlement had been reached was actually the morning of August 16th, right?

A. Of that settlement and that structure, yes.

Q. You were at Richards Layton's offices when you learned of it?

A. I was.

Q. And at that point in time, you weren't the sole director of the Debtors, right?

A. That's correct, I was not.

Q. Mr. Dennis Smith was the other director?

A. That's correct.

Q. But Mr. Smith wasn't present in Delaware at that time, was he?

A. He was not.

Q. And just to be clear, you were not involved in any way in the negotiation of the August 16th term sheet, correct?

A. Of that term sheet, no.

Q. And you were, in fact, completely unaware of the structure of the term sheet, meaning use of the trust and the contribution of assets or cash, prior to receiving it on the morning of the 16th, right?

A. That structure was new to me on the 16th, yes.

Q. And so then after receiving the term

sheet that morning of the 16th, you then came to the courthouse for the hearing, right?

A. Correct.

Q. And when you got to the courthouse, it was your first chance to actually discuss the term sheet at all with any of the representatives, correct?

A. That's right.

Q. And prior to the start of the hearing, you had a brief conversation with Committee counsel about the term sheet, right?

A. I did.

Q. But because of the time constraints of the start of the hearing, you were somewhat limited in the amount of time you could discuss it, right?

A. That's correct.

Q. And in that brief conversation, there was one item of the term sheet that you were attempting to negotiate, right?

A. Yes, there was a -- yes.

Q. And that item was expanding the released parties under the term sheet?

A. That's correct.

Q. But the Committee wasn't prepared to negotiate any of the terms with you, were they?

A. The Committee was not prepared to discuss the term that I raised, and so, yeah, there was the term sheet that was given to me was the one that we had to make a choice on.

Q. Okay. And you didn't talk to the noteholders prior to the start of the hearing, did you?

A. That morning? Not between receiving the term sheet or the concept of the term sheet and the hearing, no.

Q. And so you don't know, between that time, you don't know whether the noteholders would have been willing to make any modifications to the term sheet, do you?

A. I don't know.

Q. And the Debtors didn't seek to adjourn the August 16th hearing to have more time to try to negotiate, did they?

A. We did not.

Q. Okay. And then after receipt of the term sheet and your conversations, at some

point, the Debtors approved the term sheet, right?

A. It actually was a little bit different. We had had a discussion among the directors. We had had a discussion before, and I don't recall if we had one afterwards, but we had a -- the directors, which were only two, had a discussion about how we would handle each of the alternatives. That is that term sheet or, you know, one with changes.

Q. And let's take a look at the August 16th term sheet. If you could turn to tab 20 in your binder.

A. I have it.

Q. And you see that the cover page of this document is an email transmittal from Ms. Hazan, counsel to the Committee, to a number of parties saying here's a black line, the term sheet showing changes to circulate this morning?

A. I do.

Q. And is this -- obviously a clean version, but is this version of the term sheet like the board approved on the 16th?

A. Yes. This is the version of the term sheet that the board agreed to give our commitment that we would work forward to documentation to apply the concept, yes.

Q. But it's the one that the board members met and decided --

A. That's correct.

Q. And approved?

A. Yes.

Q. And this term sheet provided for -- this term sheet changed over time from the one you're seeking approval of today, right?

A. Yes, it did.

Q. And were there any significant changes to the terms?

A. The concept never changed that we agreed to, no.

Q. And when you say the concept never changed, could you just be more specific about what it is that you're referring to?

A. Sure. There were -- this was simply, this was what it was. And as we documented, we drilled, my understanding is, between the sides, they drilled down the language to

accurately document the verbal discussions that our counsel had had prior to me coming to the courthouse and talking to the Committee counsel.

Q. Wasn't it your understanding when you approved the term sheet that none of the Debtors' assets were going to be distributed?

A. Yeah, that is my -- that was my understanding, yes.

Q. And your understanding was because all the assets were going to be sold to the purchaser, so it was up to the purchaser and the Committee how they were going to allocate the assets, right?

A. That's correct.

Q. And were you aware at the time that the term sheet contemplated that the APA would be amended so that certain assets of the estate would be excluded assets and remain back in the Debtors' estate?

A. I don't think that's -- let me try to answer, see if I've accomplished what you want. I was -- in a deposition, I acknowledged that I was unaware of the

mechanic that the assets that were being sold to the purchaser would get to the trust. There was never, as part of this transaction, a situation where assets were coming back to the Debtor for the Debtor to do something with.

The concept, as I referred to it, was that assets would be contributed, assuming the purchase was approved, those assets purchased by the buyers, the purchasers, would then be contributed to the GUC. The mechanism of how that happened was, quite frankly, not a big discussion that morning.

Q. You testified on direct that you're familiar with the asset purchase agreement, correct?

A. I am, yes.

Q. And are you familiar with the concept of excluded assets?

A. I am.

Q. I'd like you to turn to page 2 of the term sheet, and in particular the side where it says claims and causes of action.

A. Yes.
Q. And if you see there at the beginning, it says, "The purchaser shall cause the APA to be amended at closing so that the following shall be excluded assets under the APA." Do you see that?
A. That's what it says, yes.
Q. So doesn't that mean that the term sheet that you agreed to on the 16th contemplate that had certain assets would be excluded assets and thus remain with the Debtor under the APA?
MR. RAMOS: Objection, your Honor. It mischaracterizes the term sheet, pause it was an incomplete referral to the term sheet, his question, because he omitted the clause after the term APA. But he's calling for a legal conclusion in addition to that.
THE COURT: Overruled.
THE WITNESS: Would you repeat the question, please?
BY MR. KAPLAN:
Q. Sure. Doesn't the term sheet that you

approved on the 16th provide for the APA to be amended so that certain assets would be excluded assets from the APA to remain back with the estate and then contributed to the GUC trust?

A. The mechanism was not something we got into that morning. The discussion was whose assets would end up in the GUC trust. The settlement agreement would only be relevant if the purchase agreement was approved. If the purchase agreement was approved, then there were no assets that the Debtor estate would still have that would be contributed. In my mind, that language there was simply a mechanism to distribute the assets which would or wouldn't work to be determined by the professionals, legal professionals, when they had time. We never assumed that the assets were being contributed back to the estate for it to, you know, for it to do something with.

Q. Why not? I mean, doesn't the term sheet clearly say that they are going to be excluded assets?

A. We were very interested that morning

in whether or not there were any estate assets being contributed. There was a fulsome discussion about that. Not about the term sheet, but about whether or not any of our assets would be included. And it was presented to me by our counsel that the very fact it wasn't helped make this a term sheet that we could consider.

So the thought that there might be language that if I went back and mapped to a definition would imply something to a different reader wasn't the issue. I had a concept in mind. I confirmed verbally that that was the concept, and we ensured that by the time we had an executed version, that that's what was in the agreement.

Q. By prior to receiving the term sheet, you never heard of the concept that is in the term sheet, right?

A. I hadn't seen the structure.

Q. So how could you have a concept of mind of what the term sheet would provide until you got the term sheet and read it and understood what it provided for?

A. The discussion, I think the way, if you can imagine the way this would play out in the offices that morning, was there was a term sheet. The time on this term sheet was 10:23. I don't know what time the hearing was; I believe it was a late morning hearing. The discussion wasn't about the language as much as that the board was involved with, it was about the concept. The concept was that the purchasers would contribute their, the assets that they would have acquired under the APA, and they would contribute that to the GUC trust. If I thought for a moment there was a chance I could get those assets back, I would have done that. I would have tried to do that.

Q. And you didn't try to do that, though, after receiving and approving this timesheet, did you?

A. I did not try to do that; that's correct.

Q. Now if we could turn to tab 21?

A. I'm there.

Q. You see there's a cover email, and

this one comes from Nava Hazan to Kramer Levin and to Akin Gump attaching another draft of the term sheet, right?

A. Yes.

Q. And this one says attached is the draft term sheet that reflects the agreement reached yesterday, right?

A. It does, yes.

Q. Let's turn to, just going to the same provision we just looked at on page 2, this term sheet continues to provide that same language about the APA being amended so that certain assets would be excluded assets under the APA and contributed to the GUC trust, right?

A. It does, yes.

Q. Do you remember reviewing this term sheet?

A. I don't remember reviewing this term sheet.

Q. Let's turn to 21; tab 21.

A. We're on 21.

Q. I'm sorry, 22.

MR. KINEL: Excuse me, your

Honor, I'm going to object at this time. I could save it until the end, but if Mr. Kaplan is going to go through numerous iterations of term sheets, the objection is relevance. What's before the Court today is the settlement term sheet that was marked by Mr. Ramos earlier, not these drafts.

THE COURT: Overruled, Mr. Kinel. Of course it's relevant.

BY MR. KAPLAN:

Q. Mr. LaForge, if you could turn to the, again, the language on claims and causes of action. Actually, before you get there, to be clear, if you go to the first page, this is actually an email from Kramer Levin, Debtors' counsel, to the other parties, the purchaser and the Committee, right?

A. That is, yes, that's the email.

Q. And then if you turn, we'll go to the black line because it's easier to see the changes, so page 2 of the black line?

A. Yes.

Q. You see that the Debtors have added in some language into that provision that we've

been focused on, right?

A. I see the changes that, yeah. It's a KL draft, yes.

Q. And in particular, the Debtors, Debtors' counsel drafted to this draft term sheet was clarification that these assets which were going to be excluded assets would be contributed to the GUC trust by the debtors. Do you see that?

A. I see that, yes.

Q. Were you aware that at least your counsel was continuing to propose that the Debtors would be receiving these assets and contributing them to the GUC trust after you had approved the settlement?

A. I can't -- I don't recall reviewing any of these term sheets from the first one we saw to the last one. I don't know what the thinking of the marked change was. It reads as you read it. I know what the board approved, and I know what the final term sheet said, and I'm just afraid I can't get at this with any more information than what it says on the page.

Q. And the board certainly, as far as you're aware, didn't authorize this change, did it?

A. I don't recall seeing this, so no, the board would not have approved interim drafting.

Q. We may get back to the term sheets, but we can move to another topic for a few minutes.

Do you have your declaration in front of you still?

A. I'm sure it's...

Q. 13.

A. 13 of 3?

Q. Yes.

A. I have it.

Q. I'd like to you turn to paragraph 22, if you would, which is on page 6.

A. I'm there.

Q. All right. You see in there you testify that the terms of the settlement are fair and reasonable, right?

A. I see that, yes.

Q. Do you remember being deposed a couple

of weeks ago?

A. I do.

Q. And do you remember that we had a dialog about whether it was fair or not?

A. I do.

Q. And do you recall saying that you couldn't answer whether the settlement was fair?

A. I recall telling you I wouldn't answer the question the way you had phrased it.

Q. And do you recall why you said that?

A. Yes, because the question was getting at an equitable -- in my mind, it was a question about equity that was not a matter that the board or I would have considered at the time. I'd be happy to entertain the question again, but that's the best recollection I have.

Q. Okay. Do you recall that I asked you whether the allocation of value to some creditors and not others was fair?

A. I do recall that, yes.

Q. And do you recall saying that you could not answer that question?

MR. RAMOS: Your Honor, perhaps he could refer him to his deposition transcript.

MR. KAPLAN: Yeah, I was going to ask him the question first.

THE WITNESS: Yeah, it would be helpful to see it. Thank you.

MR. KAPLAN: May I approach, your Honor?

THE COURT: Sure. Thank you.

BY MR. KAPLAN:

Q. And in particular, let's go to the bottom of page 48, line 24. Let me know when you're there.

A. I'm sorry, 48?

Q. Yeah, page 48, then there's a question beginning on line 24. Mr. Diaz asked you, "But sitting here today, you're not prepared to say that the settlement, that the allocation of value in the settlement to some creditors and not others is fair?" Mr. Ramos objected. Then you can read your answer. And you can read it out loud and tell me if it's changed.

THE COURT: It's a long answer.

THE WITNESS: I was criticized for that.

MR. RAMOS: Your Honor, I'd just note, as well, that he directed him to 24, starting in line 24. For completeness, it may be appropriate to direct the witness starting at line 8 of the same page, 48.

BY MR. KAPLAN:

Q. I'm happy to start there, if that's easier. You can start at page 48, line 7, to avoid the objection; that's fine. Again, it's going to be another long answer.

THE COURT: All right, read to us.

THE WITNESS: Would you like me to read it out loud?

BY MR. KAPLAN:

Q. Read it and tell me if that's still your view today.

A. I'm sorry, am I being asked to read it out loud or just read it?

Q. Yeah, you can read it out loud and let me know if that's still your testimony today.

A. I want to go back before 7 to get the question.

Q. Let me know where you need to start.

A. Maybe someone can help me.

Q. You can start, if you'd like, on 46.

A. Yeah, yeah. So look, starting on 47, the question is, you were going to the fairness, and I don't recall if it was earlier or later, but we certainly talked about a settlement, a more wholesome settlement that I would have much preferred. And I believed what you were asking here was whether in my heart of hearts I personally thought this was fair.

And I had said what -- and I believe at some point in this, I referred to that I had a responsibility when I came to work every day, and what I would have preferred to see, I had to leave at home. And the determination at the time we had this term sheet was given the situation we were facing, which was we had vendors, all the normal constituents in any operating company, vendors, employees, clients, customers, et

cetera. And we were trying to preserve the value of the ongoing operation, that with the decision we had in front of us, which is what I believe we get at on page 6, paragraph 22 of my declaration, was that was a fair determination of what the right thing to do was for the -- taken as a whole for the estate. It is not, and I have not ever tried to imply, that it is the agreement that I would have drafted myself.

I'm sorry if I didn't answer your question.

Q. Yeah, just go to the basic question, which is do you believe that the terms of the settlement, including the disparate treatment of unsecured creditors, is fair?

MR. RAMOS: Objection, your Honor. No foundation in terms of the disparate treatment issue embedded in this question.

THE COURT: Overruled.

THE WITNESS: I'm sorry, I've got to get some context, a little more context for the question. And I'm sorry that I need

to do that, but I do.

Do I personally think, or do I think it was a fair decision -- it was fair to make that decision?

BY MR. KAPLAN:

Q. Do you think the term sheet -- putting aside your decision-making process, and I'm not questioning your decision-making, I'm asking you sitting here today, is it your testimony that you believe the term sheet and the disparate treatment of creditors is fair?

MR. RAMOS: Objection, your Honor; relevance. He's appearing on behalf of the Debtors as their board member and to discuss the decision he made in that capacity. So his personal view --

THE COURT: He says in his declaration it's fair. Overruled.

THE WITNESS: I said in my declaration it's fair. It was -- yes, it was fair.

BY MR. KAPLAN:

Q. So today it is your view that it is fair?

A. It is fair.

Q. And why is it fair to have certain creditors -- you're aware, for example, that priority creditors don't receive any distribution from the GUC trust, right?

A. I am aware of that.

Q. And you're aware that under the Bankruptcy Code priority scheme, they're called priority creditors because they're supposed to be paid before general unsecured creditors, right?

A. I am aware of that.

Q. And why is it fair to have a settlement that provides -- that the priority creditors don't receive any value?

A. It is -- they were assets of the purchaser. The purchaser and the Committee negotiated this term sheet and presented it to us. Taken as a whole, I believe it was fair. I had a decision to make, and my decision was that the term sheet was fair, taken as a whole to the overall company, the value of the estate.

Q. Was it fair to those creditors, to the

priority creditors?

A. There's never -- when people -- there's not much of an answer to that. There is -- there were all throughout the case and my term at the companies, there were parties exercising their contractual rights. They made those determinations. I wish in many cases those determinations were different.

Q. You haven't tried to negotiate the terms of the term sheet since you received it back on August 16th, right?

A. I have had discussions around changes to -- I've had discussions around agreements that were not in the term sheet that I would have liked to have had in the term sheet, yes. So I have -- I didn't pull the term sheet out, send it to someone, and say let's negotiate this paragraph. There were elements of the term sheet, of the settlement, that I preferred would have been different, and I on several occasions had those discussions.

Q. You never had specific discussions, for example, to have priority creditors receive a distribution from the GUC trust,

right?

A. I did not have that discussion.

Q. And you never had specific discussions about the deficiency claimants getting any distribution from those aspects of the GUC trust?

A. I did not.

MR. KINEL: Objection; it assumes facts knots in evidence.

THE COURT: Which facts?

MR. KINEL: That deficiency claimants are not receiving anything under the term sheet. That's just factually incorrect.

MR. KAPLAN: I said under the provisions of the term sheet under which they do not receive a distribution.

THE COURT: The objection is overruled.

BY MR. KAPLAN:

Q. Let's go back just to make sure that we get the record complete with respect to the term sheets. So we can go back to the binder of the term sheets. Go to 24.

THE COURT: You can use our

handy shelf there. Isn't that a nice shelf?
BY MR. KAPLAN:
Q. I apologize; I'll wait until you get it in front of you.
A. So I'm at the witness binder, correct?
Q. Correct, and tab 24.
A. Yeah.
Q. Are you there, Mr. LaForge?
A. I'm there.
Q. It's an email forwarding from Nava Hazan to Steve Leonard, and below is an email from Joe Shifer to Nava, right?
A. Yeah.
Q. And this is also attaching a revised term sheet red lined to the prior one, right?
A. Yes, it is.
Q. Okay. And now if you could turn to on the black line, that's actually what we've been focusing on, the claims and causes of action?
A. The black line, page 2?
Q. Yeah, the black line, page 2.
A. I'm there.
Q. And you see now there's markup, it now

provides that the purchasers will cause the APA to be amended, so rather than being excluded assets, that upon the later date the bankruptcy court enters an approval order on the formation of the GUC trust, these assets will be contributed to the GUC trust.

A. Yes.

Q. Did you authorize that change to the term sheet?

A. I don't recall seeing an interim term sheet, so I don't recall authorizing it, no.

Q. Did you recall any discussion about the fact that this change was being made to modify it from these assets being excluded assets to now being assets that would be sold to the purchaser?

A. There was -- I don't recall any discussion on the mechanism of transferring from the purchaser to the GUC trust, which this is an element of. As I said, when I read it the first time, given the timing, how they got there was irrelevant to the decision that we made at the time. So no, there was no discussion about making this change.

Q. We talked a little bit about the decision-making back on August 16th. Let's fast forward to where we are today.

A. Okay.

Q. You testified earlier that the C Star transaction closed at the end of November, right?

A. I did, yes.

Q. And the Columbus sale closed, as well?

A. The Columbus sale was closed. I don't remember the specific date, but yes, it closed about the same time.

Q. And the DIP has long been approved in this case, right?

A. The DIP has been assumed by the purchasers.

Q. And you personally, I guess it's your testimony in deposition was you're continuing to support the settlement because you gave your word you would support it, right?

A. That's correct.

Q. And what is the reason that the Debtors are continuing to seek approval today, besides your word? Is there any other reason?

A. I think it's been covered, but not by me, so I'll say it. When we negotiated the APA, that is the point in time where we crossed the bridge of letting these causes of action leave the estate. And it was with great reluctance that we agreed with that provision of the APA. And I recall during those discussions trying to change that all along the way. Those assets were no longer ours. Somebody had acquired them as part of the APA. The ability to share those among some of the creditors struck me as, continues to strike me as maybe not as good as sharing them with all the creditors, but better than not sharing them at all.

Q. When you say that ship sailed, you were unaware that the actual terms of the term sheet contemplated modifying the APA so they wouldn't be transferred, correct?

MR. RAMOS: Objection, your Honor; misstates his prior testimony.

THE COURT: Overruled.

THE WITNESS: I've tried to reply to that by telling you I did not believe

that's what the term sheet said. The words are what the words are. We, because of the time that we had, much of the discussion on what we were agreeing to was verbal, and I believe that the terms were read into the hearing that day, which probably didn't address the mechanics, but certainly addressed the concept that I had agreed to either in RLF's offices or out in the hallway here that the board had agreed to. And that was not that we were getting the assets back. There may have been a mechanism proposed in my mind amended as proposed that there was a mapping, but it was never my assumption that we would get those assets without a quid pro quo that they would be directed to the GUC trust.

Q. But it's different between getting the asset back and directing them to the GUC trust and never getting them back and having the purchaser deal with it as they please, right?

A. I'm not sure of the distinction you're trying to draw.

Q. Do you see a distinction between that?

A. Between?

Q. The Debtor retaining certain causes of action and contributing them to a trust versus the purchaser buying them and contributing to the trust.

A. If that were the case, I would see a distinction, yes.

Q. If that were the case -- explain that; I don't think I follow that. I apologize.

A. You created a hypothetical that in my mind didn't exist at the time.

Q. Not with standing the words of the term sheet?

A. Notwithstanding the words of the term sheet.

Q. We talked a little bit earlier about the time before the hearing. Do you recall that prior to the August 16th hearing, the Debtors had already agreed to adjourn the DIP hearing?

A. Can you repeat the question?

Q. Yes. Do you recall that prior to the morning of August 16th, the Debtors had already agreed to adjourn the DIP hearing?

A. So I recall that now, after reading

some documents preparing for this, I did not -- I didn't, certainly didn't recall that at deposition time.

Q. And you weren't expecting the sale to close immediately upon approval of the sale order, were you?

A. No.

Q. And in fact, it took several months for it to close after the sale order, right?

A. It did.

Q. And would there have been any harm during the sale hearing for a week while the term sheet was finalized?

A. There was pressure all the time from the three operating companies. They weren't strong companies to begin with. Usually in the food chain of making the product, they were not the strongest provider, and so I can't calibrate sitting here the effect of being able to go to employees and customers and say the sale has been approved I can't recall what actions were taken upon the approval, pardon me, the approval of the sale and the closing of the transaction. But it's

not like those were three months where nothing, where no -- where we didn't utilize the benefit of the information of the sale being approved by the Court.

Q. But sitting here today, you can't say one way or another whether adjourning the sale by a week would have had any impact?

MR. RAMOS: Objection; calls for speculation.

THE COURT: Overruled.

THE WITNESS: I can't say that.

BY MR. KAPLAN:

Q. And just to go back to a couple of questions before, you said you sort of refreshed your recollection that the DIP hearing, that the DIP motion had been adjourned prior to August 16th. On the morning of the 16th when you approved the settlement term sheet, were you aware that the DIP hearing had already been adjourned?

A. I don't recall. I'm sorry.

MR. KAPLAN: One minute, your Honor.

THE COURT: Mm-hmm.

MR. KAPLAN: I have nothing further.

THE COURT: Okay. Any other objectors wish to cross-examine the witness? No? Yes. Okay. Before you do so, we're going to take a short recess, then we'll have your cross.

During our break, you may not discuss your substance of your testimony with any person. Okay?

THE WITNESS: Understood.

THE COURT: About five minutes.

(A brief recess was taken.)

CROSS-EXAMINATION

BY MR. RAISNER:

Q. Good morning, Mr. LaForge, Jack Raisner, the Trevor Miller WARN class.

A. Good morning.

Q. Mr. LaForge, it's correct to say you are familiar with the August 19, 2016 sale order?

A. The sale of Columbus?

Q. Correct, the sale of Columbus.

A. Yes, I am.

Q. And you're familiar with the provision in that sale order which provides for something called an employee funding escrow?

A. Yes, I am.

Q. Are you also familiar with something called the CFC Employee Reserve?

A. I may be mixing those terms. I'm familiar with an escrow of $4.6 million. I believe it may fall under the latter, not the former.

Q. Is it correct to say or does this refresh your recollection that after the September 13th closing of the Columbus assets, the escrow was renamed the CSC Employee Reserve, that the two things are one in the same, or is that not correct?

MR. RAMOS: Your Honor, if I could just lodge a quick objection. I'm not sure of the relevance of these questions. I think the questions are arising under the terms of the sale order, which is not at issue today; we're here under the settlement term sheet.

MR. RAISNER: Your Honor, the

question before there Court is a hearing on the settlement, the global settlement of this case leading to the dismissal of the case, and what provisions have been made for creditors in this case. And therefore, I'm asking questions that are not precisely pertinent to the declaration that Mr. LaForge provided in his direct testimony, but he has knowledge as a witness that is pertinent to the fairness and the appropriateness of this entire transaction.

THE COURT: Yeah, overruled. Do you recall the question?

THE WITNESS: Well, I think the question is about a change in names of an escrow agreement. And in preparation for this, in reviewing public documents, I didn't review public documents. And I'm afraid I can't answer the question of the name change. I'm very familiar with an escrow of $4.6 million, whatever its name may be, if that's helpful.

BY MR. RAISNER:

Q. Is it your understanding that this

escrow of $4.6 million is part of the Debtors' estate, or is it your understanding it has been alienated from the estate of the Debtors?

A. It never was the Debtors estate, to the best of my knowledge. It is an escrow provided by the purchasers or the noteholders, it's an overlapping group, that the directors insisted upon after the sale or during the sale process to provide in the event that -- well, there are a couple of elements. To provide certain claims that employees might have with respect to severance and vacation, of the Columbus entity only; and in the event it was deemed that the company was responsible for any WARN wages, that it would cover that, too, and legal fees.

Q. Whose legal fees?

MR. RAMOS: Your Honor, if I may renew an objection. I think counsel is examining him without the benefit of putting the documents before him, and so it's unfair to the witness to ask for his recollection in that way. And I'd simply note that we have some sensitivity as we understand that these,

that there are ongoing issues with the WARN claimants in the separate adversary proceeding, so we're cautious in terms of the scope of what counsel is inquiring into.

THE COURT: I think the witness said he was familiar with the escrow and with the APA, although he didn't review the documents, so I think he can answer the questions. Overruled.

BY MR. RAISNER:

Q. Mr. LaForge, I'm correct that your testimony is that the escrow in question is not part of the Debtors' estate. My question to you, is there any provision that the Debtors have made in its estate to pay for any employee priority claims of any sort?

A. Of the Columbus estate?

Q. Yes.

A. Assuming that the priority claims include severance and vacation, which I assume is the case, we have made a provision. We have negotiated as part of that sale agreement that $4.6 million would be escrowed that would revert back to the folks that funded it in the

event that it was not used.

Q. But my question a moment ago was whether it is your understanding that at present, this escrow is part of the estate of the Debtors or is alienated from the estate? And I understood you to say that you thought it had never been part of this estate, and now you just said that the Debtors are relying on this $4.6 million to pay the claims of the estate. And am I correct that without that $4.6 million from the escrow, the Debtors have no capability or intention to pay any employee priority claims?

MR. RAMOS: Objection; compound and argumentative.

THE COURT: Overruled.

THE WITNESS: There are a few questions in there; I'll do my best to sort them out. Taking them in reverse order, from a capacity standpoint, in the absence of the escrow, there would be no ability, probably no, I can't think of any, ability to pay claims. That was the primary reason that we negotiated that into the agreement.

Help me, what didn't I answer? What's the second part?

THE COURT: I think that was the question. I didn't hear more than one question.

BY MR. RAISNER:

Q. Are you aware of any documentation that exists that set terms for this escrow?

A. I don't believe there's an escrow agreement, to the best of my knowledge. I believe the only reference to it is in a file -- a document that was filed with the Court, and I can't remember which document it was. But it does refer to it as an escrow. I have since that date looked for an escrow agreement and have been told there is not one.

Q. So there is nothing that describes whether this escrow is revocable or not, is there?

A. The only --

MR. RAMOS: Objection, your Honor; calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: The only

documentation is what appears in the documents that were provided to the court. I would have to -- I would have to read that again. I'm sorry, but I would have to read that again to know if there are any provisions.

BY MR. RAISNER:

Q. Is there any understanding as to whether that escrow will survive if the Debtors' estate is converted into a Chapter 7?

A. Is there any -- will it survive?

Q. Yes.

A. I don't know the answer to that.

Q. And do you know or have any understanding as to whether the escrow would survive if the Debtors' estate is dismissed?

A. I'm sorry, I don't know the answer to that.

Q. The escrow as it's described in the sale order and in the Debtors' dismissal order, which is docket 685, refers to an amount that the escrow would contain that would satisfy what are called the estimated or anticipated employee priority claims if they are non-WARN claims, and would pay the

anticipated or estimated WARN claim. Are you familiar with that language generally?

A. I'm familiar that that is the intent that the directors had when they negotiated that provision.

Q. Is there any provision that you're aware of that purports that the employee priority claims will be paid in full?

MR. RAMOS: Objection, your Honor. The question is based on the dismissal motion which is not before your Honor this morning. And we renew the relevance motion.

THE COURT: Look, I know you and Mr. Kinel have a very specific theme, which is you want me to focus, laser focus on one thing. I have to say I disagree. I think it's a package deal. So I'm not going to not have testimony that's focused on the dismissal motion. I don't see how you can separate them.

THE WITNESS: Can you repeat the question, please?

BY MR. RAISNER:

Q. Sure.

A. Thanks.

Q. Are you aware of any document or do you have any understanding whatsoever based on anything that the Debtors and the noteholders intend to use the escrow to pay the priority claims in full?

A. The calculation that was done, there was a calculation done by the CFO of Columbus that came up with an amount. And the intent of the amount was -- and it was to ensure that if, in fact, some court or some other party determined that there were amounts owed, that there would be adequate funding to cover those amounts. That included, remembering the columns from that lengthy spreadsheet, which I believe you have, was vacation pay, severance pay, and potential WARN, in the WARN subject, there's a WARN case going on at the moment. And in the event that the company were deemed by a court to be responsible for the WARN wages, that the intent initially was to calculate an adequate amount to cover that, plus an amount for the taxes around that, workers' comp, payroll taxes, and legal fees.

So the intent would have been, would be to pay vacation, to pay severance, and to see if the company is responsible under WARN. As most people probably know, there's two sides, two differing opinions on the liability there, and that will be sorted out in another venue, I suppose.

Now, the reason I went through that is because if the question is is it fully adequate, as I think you know and there have been the issue raised with us, or your partners have, that there are different calculations when you go from Columbus court to Delaware court with respect to how you calculate some of those numbers. To the extent that those, that post funding the escrow those amounts have gone up, then there would not be enough to cover all of those claims in full. But that doesn't change the vacation, severance, and the non-WARN priority claims.

Q. So there is a reasonable scenario in which the escrow at $4.6 million would fall short of what a court might award the

claimants in that fund; is that correct?

A. If -- I don't know about a reasonable chance. I can imagine a scenario where that's the case where it is fully determined without any settlement that the company is responsible for the full WARN wages as calculated subject to the caps that exist, that given the fact that it is moved from Columbus to Delaware or that was just not factored in, if you will, at the time of the calculation, that that would not cover it. So that's correct.

Q. And in the event that the funds in the escrow were insufficient to cover the employees' priority claims, what would happen then? Would the distribution then be at some fraction of the full amount of those claims, or would there be added funds to the escrow in order to pay the claims in full?

A. At the moment, there have been no discussions about adding funds. So it would be, if we got there, we would have to answer that question, but it's quite frankly hard to know who would come up with that money and why they would.

Q. And that would be up to whom to determine whether funds should be added or could be added?

A. Well, whoever the board at the time -- I say board, it's just me, right? So whoever I would go to and ask if they would consider topping that up.

Q. And you would go to the noteholders?

A. That would be the only relevant place to go, although it's hard -- I'll just stop there. I don't know what their reaction would be. I suspect -- I don't know what their reaction would be.

Q. But they would have veto power to not fund the claims in full by topping up the escrow?

A. Well, the -- I'm sorry to interrupt.

Q. That's okay.

A. It's not an agreement that they made that they have a veto over, it's that there was a calculation made, there was a deal cut at the time to protect the employees. In the event -- and it still would fully cover the employees under the assumptions of the laws

that were deemed the calculations would be made. Because, as you've pointed out to us, that in the event that the company is, in fact, responsible for those WARN wages, and there are defenses that suggest it's not, but if it is, and since we are in Delaware, there's additional -- the calculation is different. Same number of days, but business days, work days, and it becomes more money and there's inadequate funds.

Q. Mr. LaForge, I'd just like to return to your itemization of what would be payable out of the escrow, and you mentioned the various types of claims, and you also mentioned at the end attorneys' fees. So I just wanted to ask you your understanding of what the attorneys' fees payment would be. Are you referring to the attorneys' fees that might be part of a statutory remedy to the claimant, or are you referring, as well or as opposed to, the fees and expenses of the defendant who is defending the claims against the employee claims?

A. I think, you know, depending on what

the company chose to do, it will probably come to court to, you know, to see. But this was -- although for the reasons I mentioned before, the numbers turn out to be somewhat inadequate in Delaware calculation rather than Ohio calculation where they are adequate, the attorneys' fees were a bit of a sway. There's a lengthy spreadsheet, as you know, a lengthy, hard-to-follow spreadsheet.

But in fact, what the directors were trying to protect themselves and to ensure we could do is if the defenses that the company has and believes are strong held up, this went to court and held up in court -- pardon me, did not hold up in court, and the full amount was, the full WARN wages were granted to the employees, then we estimated that what the legal expenses would be, and I think that was without -- it was a very, it was around -- it was $500,000.

Q. Legal expenses of whom, Mr. LaForge?

A. I don't believe -- I would have to look back to the document to see if it's referred to exactly who that would be.

Q. So you're not sure if it refers to the legal expenses of the plaintiffs' counsel or the defendants' counsel?

A. Well, we were -- as directors, we were interested in both. So I don't know that there's any specific language that deals with that. I think that would be a matter, if we get to the point where the company believes it needs to defend the claims in court, that we would have to see, you know, we'd have to figure out how to pay for that, and that's a source of funding.

Q. Would it be consistent with your understanding of this fee provision element that the defending Debtor would be able to have its attorneys have its fees paid and expenses out of the fund, even without a court order?

A. It is not my -- and I'd rather see the document and understand what it says before I comment on it, but I'll tell you my understanding in the absence of that, which is that there are multiple signatories to that document. We would probably err on the side

of cautiousness and reach out to other parties, whether it's the Court or not. But I would certainly take advice from counsel as to what would be the prudent way to deal with the situation.

Q. Turn for a moment, Mr. LaForge, to the non-WARN employee priority claims. Are you familiar with a process whereby a notice would be sent upon a dismissal to holders of the non-WARN employee claims which they would be informed that they were being allowed a certain amount of money for one of their claims?

A. Only in the most general terms from reviewing a potential settlement agreement with respect to this. Prior to that, I have not participated in WARN claims before.

Q. So you have no personal understanding of the terms of that sequence of events or the procedures, other than what the documents themselves say?

A. That is correct.

Q. Mr. LaForge, you're aware of the GUC trust which is I think indisputably part of

today's agenda?

A. I am.

Q. And you're familiar with the terms of the GUC trust in that it creates a body of oversight, board members of whom a majority of creditors, correct?

A. I am aware that there's a mechanism, and that, whether it's been fully worked out or not, I'm not sure. But yeah, there's oversight.

Q. And there's a disinterested trustee who is handling the administration of that trust, the distributions, and all of the operative functions of that trust; is that more or less true?

MR. RAMOS: Your Honor, I don't know if a document could be put in front of the witness. I think he just testified he wasn't familiar.

THE COURT: If you don't know the answer, that's an adequate answer.

THE WITNESS: I don't believe I know the answer to that.

BY MR. RAISNER:

Q. You're aware that a liquidating trustee is contemplated to administer that trust?

A. I'm aware of that.

Q. Was there ever any discussion of there being a liquidating trustee of sorts or a set of written procedures for the employees' priority claims as there is for the GUC trust?

A. There was never a discussion, to the best of my knowledge.

Q. Do you know why that was never discussed?

A. I don't know why it was never discussed.

Q. Do you know of any participation that employees are contemplated as having in administering or overseeing the employee priority claims distribution mechanism?

A. I don't. I'm not aware of that. I think there's a -- I won't draw the distinction between the GUC trust, which was negotiated by parties other than the directors of the company, and the task undertaken by, the negotiation undertaken by the directors of

the company and their professional advisors to protect the employees in a sale that generated cash. And with great confidence, I can say that we've got somebody looking after, you know, that can handle this. It's law, and the law will be what it is as opposed to a highly structured GUC trust that needs to be administered.

Q. Who is the person who will be handling this?

A. Well, there are calculations which will be shared among the parties, have been shared among the parties, the interested parties, the professionals, and that will be worked out. But on the Debtor side, I am the, other than the assistance of the former CFO who has access to the information, it is me.

MR. RAISNER: No further questions.

THE COURT: Thank you.

MR. RAISNER: Thank you.

THE COURT: You're welcome.

MR. BENSON: Your Honor, for the record, Ward Benson, Department of Justice tax

division here on behalf of the Internal Revenue Service.

CROSS-EXAMINATION

BY MR. BENSON:

Q. Just a few questions, Mr. LaForge.

Are you aware that the Internal Revenue Service has filed proofs of claim in this case?

A. Has what? I'm sorry.

Q. Has filed proofs of claim in this case? In these cases, I should say.

A. I'm sorry, I'm not familiar with the term. I'm not familiar with the term.

Q. When you say term, proof of claim?

A. Proof of claim.

Q. Okay. Are you aware that the Internal Revenue Service has asserted that it has claims against the Debtors?

A. Oh, yes. Yes.

Q. Do you know what I mean by the phrase priority claim?

A. I do, generally.

Q. What does that mean?

A. It means it comes ahead of other

creditors. Priority claim comes ahead of other creditors.

Q. Would a priority claim come ahead of the beneficiaries of the GUC trust?

A. I'd have to remember who all the beneficiaries -- it's just the unsecured Creditors' Committee. If the company were distributing money, that's correct, the priority claims would come ahead of the unsecured claims, non-priority claims.

Q. Okay. Do you have any reason to believe that the asserted priority claims of the Internal Revenue Service are not, in fact, entitled to priority?

MR. RAMOS: Objection, your Honor; calls for a legal conclusion. Not relevant.

MR. BENSON: As to relevance, it goes to the fairness of the settlement. It also goes, the direction I'm going in, in terms of bringing in priority creditors, which the Jevic court said was very important.

As to legal conclusion, I'm not asking him to determine whether they're

entitled to priority, I just want to know if the Debtors have any reason to believe we're not entitled to priority.

THE COURT: Overruled.

BY MR. BENSON:

Q. Do you have any reason to believe --

A. No. As a matter of fact, I assume they are priority claims. I just didn't want to make a -- draw a conclusion that I can't back up with the law. But I'm assuming they are priority claims.

Q. And are you aware that the priority claims of the Internal Revenue Service are approximately 2.4 million?

A. That sounds right, yes.

Q. Do you have any reason to believe that the amount the IRS has asserted in claims is incorrect?

A. I haven't looked at the numbers, but it would not surprise me that that's the correct amount.

Q. Okay. Now, at any point between the initiation of the negotiation of the settlement term sheet and the filing of the

objection by the Department of Justice to the settlement, did you or any of the Debtors' professionals reach out to the Internal Revenue Service or the Department of Justice to include them in negotiations?

A. I just want to make sure I -- did the Debtors or any of their professionals reach out to the participants to the, did you say the UCC or the noteholders?

Q. Did you or the professionals reach out to the Internal Revenue Service or the Department of Justice?

A. Not to the best of my knowledge of my knowledge.

Q. Did you ever ask the professionals whether they should be reaching out to either the Internal Revenue Service --

A. I did not.

Q. And as to the Department of Justice? Did you ask them or ask whether you should be reaching out to the Department of Justice?

MR. RAMOS: I apologize, your Honor, could I just clarify the time period? I'm afraid I didn't hear that part of the

question.
BY MR. BENSON:
Q. From when the negotiations of the term sheet commenced, term sheet versions, Mr. Kaplan asked you about, to the filing of the objection by the United States to this settlement motion.
A. And the question was did I think to ask the professionals if they should?
Q. Yes.
A. I did not think to ask the professionals if they should.
Q. Why not?
A. It comes back to the decision that we were making on August the 16th, which was the only situation where the settlement would be relevant would be where the purchase was approved, and the purchase approved all of the assets would be owned by the purchaser. And we could have reached out to the IRS, but we didn't have anything to share with them, unfortunately, and it was the purchaser who decided to contribute those assets to the GUC trust. So we wouldn't have reached out

directly to the -- why it did not cross my mind to reach out to the IRS.

Q. Did it occur to you you should reach out just to let the IRS know that this type of settlement was being contemplated?

A. Not to hide here, but I was a director. Whether things get filed, we reach out to professionals. We've been blessed to have good advisors, and I rely on them to make those kind of suggestions.

Q. Was there any discussion that perhaps the sale hearing should be adjourned to allow the inclusion of priority creditors such as the Internal Revenue Service?

A. Sale hearing on the 16th of August?

Q. Correct.

A. There was no discussion of that.

Q. Is there any reason why the sale could not have been postponed to include the Internal Revenue Service as a negotiating party?

A. The only answer, two answers to that, first is the pressure was extraordinary at these companies. I answered Mr. Kaplan

earlier in his follow-up questions, so those will speak for themselves. To suggest that we come out of a hearing with no decision and that there would not have been damage caused was not a risk we were prepared to take at that moment. And risk -- these were fragile companies that were relying on people paying their bills, were relying on people to ship, and fulfilling, more importantly, fulfilling orders and keeping employees.

So that was the primary decision for feeling a sense of urgency that morning in spite of the fact pattern that's been discussed.

Q. Okay. And so as a result of that sense of urgency, it was deemed unnecessary to bring in priority creditors to these negotiations?

A. As I said in my deposition, while the term sheet was new on the 16th to me and the structure and the narrowness of it, discussions of a settlement had been going on in some form or another since prior to filing. There were inner creditor matters that we

tried to resolve at every step along the way. There were -- I can't give you specific dates in the context, but our professionals were encouraging the parties to get together to talk, to come up with what I would have termed a global resolution. We had come to the conclusion that that was probably not happening since we were a couple of days before the settlement, and -- pardon me, the August 16th hearing, and we didn't have anything.

So when the term sheet was handed to us, it was the transaction that appears in the settlement term sheet, which was the purchasers and the Unsecured Creditors' Committee coming up with that arrangement, and the Creditors' Committee would drop their oppositions. It wasn't that -- we weren't doing something, we weren't distributing some of our assets. We didn't feel like we had anything to bring people in. We had made the case for months that we would prefer a settlement that would resolve these cases and end litigation, and this one has

seemed to, you know, keep it going for some obvious, you know, legal reasons outside of this case. But nonetheless. Our -- we were not giving anything -- we were not giving anything we had to anyone at the time.

Q. You mentioned that there were negotiations, including between creditors starting before the petition date through the sale hearing, and there was a hope that there would be a global settlement. Did those parties ever include the Internal Revenue Service?

A. When you say include, did they talk to -- if the question is did they actually reach out and talk to them, as I mentioned in the deposition, if we go pre-filing, there was a settlement with the IRS. The IRS claim, I believe, is primarily from one company, Columbus Metal Forming, and the claim was larger. And there was a settlement reached with the IRS where payments were made, monthly payments were made to the IRS to whittle down, if you will, that obligation. Prior to fully whittling it down, there was a filing.

So again, the timing matters here. To the best of my knowledge post filing, I don't know of any conversations directly with the IRS by any of the parties. I'm just not aware.

MR. BENSON: All right, that's all, your Honor.

THE COURT: Thank you, Mr. Benson. Any further questions? Any redirect?

MR. RAMOS: Two very quick ones, your Honor.

REDIRECT EXAMINATION

BY MR. RAMOS:

Q. Mr. LaForge, you were asked during the cross-examination whether after the August 16th date, after that term sheet that was being looked at with counsel for the DDTL parties, did you try to negotiate for the assets to come back into the estate, and I believe your answer was no. But my question to you is prior to that time period, from the outset of these cases, had you tried to have claims and causes of action kept in the estate

that otherwise were going under the proposed purchase agreements?

A. I -- yes. The answer is yes. And it was one of the more important matters for me, because to the extent that damage had been caused, and there were causes of actions that would with Stan, you know, the scrutiny of people who determined that, those struck me as better belonging to the estate than to the purchasers. There were, I think it's been documented here there was a term sheet about mid May from the purchasers that included all the causes of actions, and then there was an APA in late May from the same people with the same causes of actions. We had, I believe, filed with the Court an APA after that date keeping the causes of action.

It was very important to me personally, and I know the directors as a whole, to maintain those. And in the negotiation of the sale and the results of the sale auctions, that's where we ended up, disappointingly.

Q. So in the context of the sales, then,

the Debtors were not successful in terms of those discussions to try to retain claims and causes of action?

A. We were not successful.

Q. Sir, I think you testified, there was discussion during your examination about the August 16th hearing and the DIP motion and the timing issues related to that. But my question is do you have any recollection as to whether the Committee's objections to the DIP, were they actually withdrawn?

A. They were -- to the best of my recollection, they were withdrawn. That was important, there's a timing difference there that was pointed out to me, but, yeah, they were withdrawn.

MR. RAMOS: No further questions, your Honor.

THE COURT: Thank you, sir; you may step down.

THE WITNESS: May I leave the books?

THE COURT: Yes, please.

MR. RAMOS: Just one

housekeeping matter, then, your Honor. From the Debtors' perspective, we would move the introduction of the exhibits in the binders, which I understand there was no objection to by the various parties. That would be Debtors 1 through 17, and your Honor, just so you know, we handed copies to you; we're obviously retaining the originals of the exhibits being offered into evidence.

THE COURT: Right. Any objection to the admission of Debtor 1 through 17?

MR. KAPLAN: No objection, your Honor.

THE COURT: They're admitted.

MR. RAMOS: Thank you, your Honor.

THE COURT: You're welcome. Next witness? Let's at least get started on the next witness before we break for lunch.

MR. KINEL: Your Honor, the Committee calls Steven Sass.

THE COURT: All right, Mr. Sass, please take the stand and remain standing,

please.

STEVEN D. SASS, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KINEL:

Q. Good afternoon, Mr. Sass.

A. Good afternoon.

Q. Could you briefly describe your educational background?

A. Sure. In addition to an undergraduate degree, I have an MBA in management, I have a law degree and am admitted as an attorney in Maryland, state and federal, and I'm qualified for CPA certification.

Q. Are you in good standing in the bar?

A. I'm sorry? Yes, I'm in good standing.

Q. And do you practice law currently?

A. I do at times, yes.

Q. Can you tell us what your role is in the Constellation cases?

A. Sure. In the Constellation case, I participate as a member of the Creditors Committee on behalf of Praxair, one of the

large creditors.

Q. And how big is the Committee?

A. The Committee has seven members.

Q. And you are Praxair's representative on the Committee?

A. That's correct.

Q. Do you participate in Committee meetings and calls?

A. Yes. It's very important to me and it's important to the process, so yes, I do?

Q. Would you say that you've participated in nearly all of the Committee meetings and calls?

A. Yes, I would say if not all, very close to all.

Q. Okay. Have you ever been on a Creditors' Committee before?

A. I've been on approaching 100 Creditors Committees over the last 20-some-odd, 30-some-odd years. Thirty-ish.

Q. So you have a lot of experience in Committee matters?

A. Yes.

Q. Would you consider the Creditors'

Committee in these cases to have been active?

A. This particular Committee was very active, much more so than average.

Q. Did there come a time when the Committee, you as a Committee member, became aware of settlement negotiations that were occurring between the Committee on behalf of the Committee and the noteholders?

A. Yes, settlement negotiations -- well, this case moved very fast in the beginning and then went into a hiatus more recently through a bunch of extraneous reasons. So yes, I was aware of negotiations ongoing.

Q. And was the Committee kept apprised of the developments in those negotiations?

A. Yeah, in my opinion, Committee professionals did a very good job keeping the Committee apprised of the ebb and flow and development of the negotiations, both through -- mostly through conference calls, but through a few emails, as well.

MR. KINEL: Your Honor, may I approach?

THE COURT: Mm-hmm.

MR. KINEL: I apologize, we're doing this out of order. But I've handed the witness what has been marked as Committee 3, which is simply the settlement term sheet, which I believe is already in the Debtors' binder, but not to make people look through binders.

BY MR. KINEL:

Q. Mr. Sass, I direct your attention to Committee 3. Do you recognize that document?

A. Yes, I do.

Q. Was this document approved by the Creditors' Committee?

A. Yes, it was. It was brought to the Committee's attention and approved through a Committee meeting, telephonically, I believe.

Q. Was there a discussion about the terms of this settlement?

A. As was all of the calls that we had about the ebb and flow of the negotiations, there was extensive discussion, questions raised and answered, so yes, there was a lot of discussion.

Q. Mr. Sass, do you believe the

settlement embodied in Committee 3 is fair?

A. Is it fair? Yes, I believe it's fair.

Q. Do you believe it's a reasonable settlement?

A. Given the circumstances in which the creditor body found itself, it's a more than reasonable settlement to the general unsecured creditors.

Q. To your knowledge, was it negotiated at arm's length?

A. I'm sorry, say that again?

Q. To your knowledge, was the Committee settlement negotiated arm's length?

A. Yes, absolutely.

MR. KAPLAN: Objection, your Honor. There's been no foundation whatsoever about any firsthand knowledge. All the testimony so far was he learned everything through counsel.

THE COURT: Overruled.

MR. KINEL: I asked to his knowledge.

THE COURT: Overruled.

MR. KINEL: Thank you. You can

answer.

THE WITNESS: I'm sorry, what was the question again?

MR. KINEL:

Q. To your knowledge, was the settlement negotiated at arm's length between the parties?

A. Oh, yes, it was.

MR. KINEL: May I approach once again?

THE COURT: Mm-hmm.

BY MR. KINEL:

Q. Mr. Sass, I've handed you what's been marked as Committee Exhibit 1. Do you recognize that document?

A. Yes, I do.

Q. What is that?

A. This is the liquidating trust agreement presented here as an exhibit to one of the other documents.

Q. Okay. Have you had a prior opportunity to review this document?

A. Yes, I did, more than once.

Q. Do you believe that the terms of the

liquidating trust agreement are fair and reasonable under the circumstances?

A. I do. For the most part, they are not unusual as to liquidating trust agreements I've seen before.

Q. I direct your attention to Committee Exhibit 2. Could you identify that document?

A. Yes. That is the, as it's called, the binding claims mediation agreement.

Q. I'm sorry, could you --

A. Yes, I do recognize it.

Q. What's the title of that document, for the record?

A. Liquidated trust binding claims mediation agreement.

Q. Have you seen that document before?

A. I have.

Q. You've had a chance to review it before?

A. I have.

Q. Do you believe that the terms of the proposed mediation procedures are fair and appropriate under the circumstances of these cases?

A. Yes, I believe they are fair and appropriate and created for the situation we find ourselves in.

Q. Why is that?

A. Well, we've got a situation right now where, as I understand it, the claims are unknown, so the GUC trust that's created in the case is kind of going into an unknown situation which normally would create a lot of work for the Court and for the trust. And this mediation structure seems to be a much more efficient way of dealing with it and saving the Court and the trust money and time.

Q. Mr. Sass, you said you served on approximately 100 creditors' committees. Do you believe the creditors' committees in these cases have exercised their fiduciary duties?

A. Absolutely.

MR. KINEL: Thank you; no further questions.

THE COURT: Cross?

MR. KAPLAN: Should I continue?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. KAPLAN:

Q. Good afternoon, Mr. Sass. Gary Kaplan from Fried Frank on behalf of the DDTL parties. I believe you have a witness binder still up there; we're going to go through that in a few minutes. I just want to make sure it's still up there in front of you.

Just to go back to --

THE COURT: You want to help him out? I don't think he knows which one.

THE WITNESS: I don't know which one. Which one are we talking about?

BY MR. KAPLAN:

Q. You had no involvement in the negotiation of the settlement, correct?

A. I was not on hand at the negotiation, that's correct.

Q. You didn't witness a single conversation between any representative of the Committee and the noteholders in negotiating the settlement, correct?

A. That's correct.

Q. All of those negotiations were handled by counsel and the financial advisors,

correct?

A. That's correct.

Q. And in fact, in your deposition, you testified there would be nobody on the Committee who would have firsthand knowledge of the negotiations between the Committee and the purchaser on the terms of the agreement, right?

A. I think I said I wasn't aware of anybody. If I wasn't clear enough, I wasn't aware of anybody.

Q. Now, your counsel you asked you some questions about your fiduciary duties. Do you recall those?

A. Yes, sir.

Q. And you testified that you think the settlement is consistent with your fiduciary duties to unsecured creditors, correct?

A. That's correct.

Q. And as a member of the Committee, your fiduciary duties run through all unsecured creditors, correct?

A. The general unsecured creditors, yes.

Q. When you say general unsecured, is

there a category of unsecured creditors that are excluded from your fiduciary duties?

A. Is there a category excluded from general unsecured? No, not that I'm aware of.

Q. So your fiduciary duties run to priority creditors, right?

A. Priority are not unsecured, they're priority.

Q. So you don't have duties to priority creditors?

A. I don't believe so.

Q. How about creditors to the extent they have a -- secured creditors to the extent they have a deficiency claim, do you have a duty to those creditors?

A. Secured creditors as to their secured interest, we would not. As to an unsecured deficiency, we would be at times looking after them, as well.

Q. At times, you said. When would you not be looking after those deficiency claims?

A. It depends in how they got to where we are at that point in time. General unsecured, unsecured creditors for the most part, those

that serve on committees tend to be think trade employees and related. Other groups that tend to be priority may not be in that category and come in with a different perspective and different ability to represent themselves. May not need our help as much.

Q. So is it your testimony that your fiduciary duty is to those who serve on the Committee as opposed to those who hold unsecured claims?

A. No, no. It's very clear, it's to all of the creditors that hold claims, specifically not to our own companies or just those on the Committee, but to all creditors.

Q. And that would include secured creditors to the extent they have an unsecured deficiency claim?

A. Yes, it would.

Q. Are there any exceptions that you're aware of to that?

A. Exceptions? No, not normally.

Q. Let's go to the binder, if you will, and start on tab 17. Let me know when you're there.

A. I'm at tab 17.

Q. And the first page of it is an email from a lawyer at Akin Gump to Committee counsel, right?

A. It appears to be, yes.

Q. And the email says that it attaches a term sheet for global resolution and asks that it be shared with the Committee?

A. Yes.

Q. Do you recall this term sheet being shared with the Committee?

A. It probably was. I believe so. But there were a lot of term sheets that went back and forth. Most of them were shared with us, and mostly tracked to the one that came out at the end of the day that's now in the documents before the Court. So probably yes, but I don't recall this specific one.

Q. If you could turn to page 2 of the term sheet.

A. Mm-hmm.

Q. And you see there's a paragraph close to the bottom that talks about, that says the beneficiaries of the litigation trust. Do you

see it starts there, and it's highlighted on the screen if that's easier.

A. Yes, I see that.

Q. So the term sheet proposed by the noteholders proposed a litigation trust, and goes on to say it shall be all of the Debtors' general unsecured creditors, including noteholders to the extent of any deficiency claim, right?

A. Yes, it says that.

Q. So this proposal didn't carve out any specific unsecured creditors, it said all would receive the benefit of the liquidation trust, right?

A. Not as far as the paragraphs we looked at, so I don't see it, where they carve anything out.

Q. And then if you go down to the bottom of the next paragraph on that page, the bottom of page 2, you see it talks about specified causes of action?

A. Yes.

Q. And you see it says the proceeds recovered from the proceed of any specified

causes of action will be allocated on a ratable basis among the holders of general unsecured claims. Do you see that?

A. Yes.

Q. So the noteholders' proposal that was sent to the Committee in mid July proposed that the allocation of what was being put into trust, if you will, would go to all unsecured creditors, right?

A. That's what this one appears to do, yes.

Q. And after receiving that term sheet, do you recall the Committee discussing that it shouldn't be allocated, that proceeds to the unsecured should not be allocated ratably, and instead should only go to certain creditors?

A. No, I don't recall a discussion of that nature.

Q. Let's turn to tab 18, if you would.

A. Yes, I'm there.

Q. And tab 18, we've already established, this term sheet is on August 10th, and this goes from Nava Hazan, who is Committee counsel, to the noteholders' counsel,

Mr. Rubin and Mr. Alberino, right?

A. Yes.

Q. And it attaches a revised version of a term sheet, right?

A. There is a version of the term sheet there, yes.

Q. Okay. And let's turn to page 3, if we will.

A. Of the term sheet? Yes.

Q. And in the middle, there's a paragraph that starts the exclusive beneficiaries of the GUC trust.

A. I see that.

Q. And this term sheet provided, and you can read the language, provided that the beneficiaries of the GUC trust would be holders of allowed general unsecured claims, and the only carve out was the deficiency claims of the holders of the notes, of the purchasers with whom you're negotiating, right?

A. That's what that paragraph says, yes.

Q. And then you see the next paragraph talks about, again, the specified causes of

action, and there, too, it says the proceeds recovered from the pursuit of any specified causes of action will be allocated on a ratable basis among the GUC trust beneficiaries, right?

A. Yes.

Q. So here, too, there was no carve outs for deficiency claims or priority claims, that they wouldn't be beneficiaries of the distributions, right?

A. I don't see language that does that; that's correct.

Q. Let's see if we can turn to tab 19. And this one, the cover page, it's an email from Committee counsel back to the counsel to the noteholders or purchasers that says attached please find a revised draft of the term sheet. Do you see that?

A. I see that, yes.

Q. And if we could turn to, the black line would be easier, turn to page 3, if you will.

A. Is this the black line attached?

Q. Yeah, the black line should be

attached.

A. I'm on page 3.

Q. You see there's a paragraph in the middle that says the holders of general allowed unsecured claims --

A. Actually, my page 3 is not the black line.

Q. They're repaginated, so if you go past the claims, you'll see the black lines after that, and the page numbers start again.

A. There it is; thank you. I'm sorry, you were saying?

Q. And you see there's language in the middle of the page that says the holders of allowed general unsecured, and new language now, non-priority claims against the Debtors, excluding deficiency claims of pre-petitioned secured creditors. Do you see that that's been added?

A. I do see that addition.

Q. Do you recall the Committee directing its counsel to change the term sheet so as to exclude certain creditors from participating in the GUC recovery?

A. No, I do not recall us directing them to do that.

Q. Do you recall discussion amongst the Committee about changing the term sheet so that holders of priority claims and deficiency claims would no longer receive a distribution under the -- from the GUC recovery?

A. As I think I mentioned, there were numerous versions of the settlement term sheet. We discussed many of them. I can't even say that we discussed all of them. There were probably some we didn't see where the change was very minor. I don't recall this particular change coming in at a particular point in time, but it did come in. I can't tell you why it came in at that point in time.

Q. But you can't tell us why this change was made, right?

A. That's correct.

Q. You certainly can't say it was because the noteholders were insisting on it, right?

A. I can't say that. I have no knowledge.

Q. Let's move on. Now, you've testified

earlier that you thought that the settlement was fair and reasonable to all unsecured creditors, right?

A. Yes, I did.

Q. And you understand, obviously, based on your experience, that priority creditors ordinarily would receive a distribution ahead of other unsecured creditors, right?

A. Often, that's correct.

Q. When you say often, is there -- other than when priority creditors agree to not come first, you understand that under the Bankruptcy Code, priority creditors are supposed to be paid before general unsecured creditors are paid?

A. When the Debtor is making payments, yes, that's correct.

Q. Okay. But as we've seen here, the term sheet no longer provides for priority creditors to be paid ahead let alone receive any recovery from the GUC trust, right?

A. Well, the discussion here, unless I missed something, was mostly about their deficiency portion. I didn't see a lot of

discussion about the priority payments.

Q. Well, let's go back. The language is on the screen if it's easier, but obviously if you need to refer to the whole document, you should. But you see the first addition is to add the word non-priority, right?

A. Right.

Q. So that would carve out priority claims?

A. Right. It's not addressing what happens with priority, correct. It's saying what isn't happening with the priority.

Q. But under this, based on this language, because it says the holders of allowed general unsecured non-priority claims against the Debtors excluding deficiency claims, will be the sole and exclusive beneficiaries of the GUC trust, correct?

A. It does say that, yes.

Q. So we both agree that priority claimants will not be a beneficiary of the GUC trust, correct?

A. Under this language, that's correct.

Q. Why is that fair to holders of

priority claimants?

A. The holders -- there's a lot of reasons that the holders of the priority claims are more favorably situated in the entire process than the general unsecured creditors. Well, first of all, by nature of priority claim, they're going to get payments first for the priority portion. Typically, and as was the case here, many of them had their own counsel and were very vocal and visible in the process as compared to the general unsecured creditors, which tend not to be and need the support and protection of the general unsecured creditor committee, Official Committee of Unsecured Creditors.

So it's not unusual in my experience for priority claimants to end up with a lesser than standard distribution in a case through a plan or other vehicles.

Q. When they don't agree to it?

A. Most often they agree to it, but not always.

Q. Which circumstances are you aware of where priority claimants haven't agreed to it

and in a plan or otherwise, they've been forced to --

A. It's not the Debtors' money when it's coming from a third party, often a third party can have a very strong influence, I won't say dictate, but can have a very strong influence on the structure of where the money goes, what happens to it, and who gets it. And I've seen that before on occasion.

Q. How many cases have you've been involved with have you seen that?

A. Not a lot. Of the approaching 100 committees I've been on, probably single digits.

Q. But let's go back to the situation in front of us that you testified previously was fair, okay?

A. Yes.

Q. My question was is the treatment being afforded to the priority claims fair under this settlement?

A. Yes, I think it is for a number of reasons. As I said before, they are getting distribution of the priority portion. Without

this settlement structure coming forth, the unsecured creditors would be getting nothing. So is there a trade-off happening that is less than optimum? Sure. But that happens sometimes, and in order to get something for the creditors, that was a structure that had to happen.

Q. Explain to me what you mean, if you would, they're getting paid on their priority portion?

A. If they have a priority claim. They're not getting paid by us, but pursuant to any other money in the estate or any other vehicle for payment, they would be getting paid before us.

Q. And it's your understanding there's other money in the estate to pay other priority claims?

A. I don't know that.

Q. You're on the Committee, right?

A. Yes.

Q. And you're an active member of the Committee, right?

A. Yes.

Q. And you understand the Debtors' current financial circumstances, right?

A. That's correct.

Q. And you understand that the Debtors, for example, haven't been paying Committee counsel for some time, right?

A. That's my understanding.

Q. So are you aware of any source of funds that the Debtors have to pay any of the priority claims aside from the WARN act claimants?

A. I am not.

Q. And under the terms of this settlement, there's no money allocated to pay the priority creditors, right?

A. That's correct.

Q. So go back to my question, then. If we've established there's no money to pay the priority claimants, putting aside the WARN claimants, we've established there's no money in the Debtors' estate to pay the priority claimants, they're going to receive nothing under this settlement, how is this settlement fair to priority claimants?

MR. KINEL: Objection, your Honor. It assumes facts not in evidence. We haven't established that there's no money in the estate. Mr. Sass testified he's not aware of any method of payment from the estate. That's not dispositive of the issue.

THE COURT: Mr. Ramos, how much money is in the estate?

MR. RAMOS: Your Honor, I can't answer that question just standing here today. Obviously, in addition to whatever funds there might be, there are claims and causes of action in the estate that have some value, and those have quantified.

MR. KAPLAN: Your Honor, the Debtors have put on the record repeatedly, including in refusing to set a bar date, that these estates are administratively insolvent. And again, we've had the fight about a bar date and the Debtors' refusal to do it. It is clear, we can pull out their pleadings and admissions, but to have this debate right now about whether the Debtors have funds or don't have funds is a little bit silly.

MR. RAMOS: Your Honor, I frankly wasn't trying to be part of a debate, I was trying to ask the question that the Court posed. Certainly, as counsel indicated, the Debtors have made filings including with regard to the bar date issue and talk about the exigent circumstances from a financial perspective of the estates.

THE COURT: I'll allow it, overrule the objection. I think that, you know, it actually boggles my imagination why we would even be having this debate if there was -- well, maybe with you, Mr. Kaplan, but why we'd be having this debate if there was sufficient money to pay unsecured creditors.

So I'm not going to close my eyes to the reality of this case. You know, if I'm wrong, if this case is fully administratively solvent and there's enough money to pay priority unsecured claimants in full, that still doesn't solve Mr. Kaplan's problem. But I'd be shocked.

So I think, you know, based on my experience with the case, to sort of get up

here and imply there's no evidence that there's insufficient money to pay priority unsecured claimants I think is unrealistic. So I'll allow the question. Do you want to restate it?

BY MR. KAPLAN:

Q. So Mr. Sass, having established that the priority creditors will receive nothing under the terms of this settlement, and that there's no money in the estate to pay priority creditors, how is this settlement fair to priority creditors?

A. There's no money in the estate to pay the priority creditors except for the ones that are getting paid that you mentioned, so we have a structure that even treats priority claimants differently. We had a situation here where we could try to get some money for the creditors through someone willing to put some into a put through a trust, and it was the best deal that could be negotiated. It still seems fair.

Q. You previously testified that you have no idea who insisted on this language and how

this language got in here, right?

A. That's correct.

Q. So you can't sit here and testify that that's the best deal you could have gotten, right?

A. I can, because I trust my professionals. They seem to have been doing a good job. I've seen professionals -- this was a difficult negotiation from what I could see from a distance, but yet it kept moving and kept move ing in a direction that had the result of turning up some money for my constituency. That's fair. That's a good result. They worked hard.

Q. But we established your constituency includes, for example, the holders of deficiency claims, right?

A. Normally who would be included.

Q. Do you think they did their best job to get a recovery for the holders of deficiency claims?

A. Yes.

Q. Then let's look back at this paragraph. Do you see the language that was

added by Committee counsel excluding holders of deficiency claims from the GUC recovery trust?

A. I don't know it was added by Committee counsel, but it is in this version, yes.

Q. And we established at the beginning that this was a term sheet that was sent with changes sent by Committee counsel, right?

A. Right, subject to I think a discussion they had previously, so I don't know -- I mean, they did the crafting of the words and sent it around, but I don't know who put the concept in.

Q. You are aware that the current version of the term sheet contemplates that certain claims and causes of action will be purchased by the or were purchased by the purchaser then contributed to the GUC trust, right?

A. Yes, I'm aware of that.

Q. And you're also aware that that provision changed over time, right?

A. Yes.

Q. And that that provision originally provided that those claims and causes of

action would be excluded assets and thus left behind for the Debtor to contribute to the trust, right?

A. I'm gathering that from the flow of documents. I didn't really recall it otherwise, but yes, that makes sense.

Q. But you don't recall that, right?

A. No.

Q. And you don't know why that changed?

A. I do not.

Q. And you certainly are not testifying it was insisted by the purchaser or any other party, right?

A. I generally cannot ascribe any particular change to any particular party. I wasn't there for the discussion.

Q. Any particular changes that you can ascribe to the Committee having demanded?

A. Not specifically, no.

Q. Okay. Sitting here today, what benefits are there to the Debtors of pursuing this approval of the settlement?

A. I'm sorry, say again, please?

Q. Sitting here today, what benefits, if

any, do the Debtors receive from approval of the settlement?

A. It moves them towards completion of the case.

Q. And how does it move them towards completion?

A. Well, we get a trust created to pay creditors, and I presume there's a settlement, that the settlement is approved, and they get an opportunity to be left with very little to do to get out of the bankruptcy.

Q. The case could be concluded tomorrow by converting it to Chapter 7, right?

A. It would, and nobody would get anything. Except the noteholders I guess I would get a bonus.

Q. When you say nobody would get anything, is that -- aren't there -- why do you say that?

A. As we were discussing, I don't think there are substantial assets in the estate. I'm not up to date on the numbers, but my general understanding is there wouldn't be any money coming in that would flow to the

creditors.

MR. KAPLAN: I have nothing further.

THE COURT: All right, thank you. Anyone else? Ms. Casey?

CROSS-EXAMINATION.

BY MS. CASEY:

Q. Good afternoon. Linda Casey on behalf of the Committee -- excuse me, on behalf of the U.S. Trustee.

I'm a little confused, and I just want to see if I can drill down on one point. I believe your testimony was you were not aware who requested that the deficiency claims be excluded from the distribution of the cash portion of the GUC trust, correct?

A. Yes, that's correct.

Q. And I believe your testimony was that you are not sure why they were excluded from the distribution of the cash portion of the GUC trust?

A. I think I expressed that I was not at those discussions, so I really wasn't -- didn't have much direction as far as who

requested which change and what the quid pro quo might have been. It was give and take. We got a little bit of a flavor of that from counsel reporting back, but I wasn't there, so I don't know.

Q. I'm not sure if you were asked and I'm not sure if I heard, when the Committee approved the settlement agreement, what did the Committee rely upon to determine that the exclusion of the deficiency claims from the distribution of the cash portion was fair?

MR. KINEL: I'm going to object to the extent it calls for attorney-client communications.

THE COURT: Without saying the substance, I mean, if you can answer the question without disclosing any attorney-client communication, or the specifics of any attorney --

THE WITNESS: Can you restate the question, please?

BY MS. CASEY:

Q. Yes. When the Committee approved the settlement agreement, what did it rely upon to

determine that the exclusion of the deficiency claims from the distribution of the cash portion of the GUC trust was fair?

A. Let me give you a little bit of a flavor of what was happening as we looked at these various versions, including the last one. We would get reports from our professionals of what had changed and what the impact of that change was on us. They typically would highlight the pros and cons, people would have questions, and it would be explained and discussed as to whether it was a good thing or not. So I think without giving any specifics, that's...

Q. Are you aware of any facts that would justify the exclusion of the deficiency claims from the distribution of the cash portion of the GUC trust?

A. To justify the exclusion? Well, there's the arithmetic and the economics. You have parties involved who are negotiating who are in equal bargaining positions which gets you to a point where they'll willing to put together a deal of this nature. But I'm not

sure what you're looking for in particular.

Q. I'm not sure what you mean by the economics. Are you aware that there are secured creditors in this case who have 100 percent deficiency claims and are not going to be receiving any payments as a secured creditor?

A. That's my understanding, yes.

Q. So are you aware of any facts that would establish that a fully unsecured deficiency claim, it is fair to not include them with the other general unsecured creditors sharing the cash portion of the GUC trust?

A. If we were talking about the distribution of assets of the Debtor, I would be looking at it somewhat differently. But we're looking at a third party making a payment to a trust to give to the creditors, giving them a lot more influence on how that should be structured. So it's really not -- as I mentioned, I've seen this a few times, but it's an unusual circumstance and not the one contemplated by the code I think for the

most part.

Q. I'm a little confused. How is the fact that the money is not the Debtors', if you can't testify that the person providing the money insisted that it not go to the deficiency claims, affects the analysis as to whether it's fair to exclude the 100 percent deficiency claims?

A. Well, the end result is they accepted a structure that had it that way, meaning they thus approved it. Whether they proposed it or not probably isn't all that relevant; they approved it. And I would thus say that, you know -- and it isn't money of the Debtor, it's money being provided to a GUC trust from a third party.

Q. So is it your testimony that the fact that the Committee relied upon to exclude the deficiency claims was that it wasn't money of the Debtors?

A. That's a large component, yes, a recommendation of professionals and so forth.

MS. CASEY: Thank you; no further questions.

THE COURT: Any further questions? Mr. Benson?

CROSS-EXAMINATION

BY MR. BENSON:

Q. Mr. Sass, first I want to clarify something you said earlier. Did you say that priority creditors are not included in the class to which Committee professionals owe a fiduciary duty?

A. I didn't say Committee professionals. I was referring to the Unsecured Creditors Committee. If I wasn't clear on that, I'm sorry.

Q. I'll rephrase it. Did you say that priority creditors are not within the class to which Committee members, such as yourself, owe a fiduciary duty?

A. I believe the fiduciary duty of the members of the Official Committee of Unsecured Creditors are to the unsecured creditors, not the priority creditors.

Q. You've, I guess, distinguished priority creditors versus unsecured creditors. Are you aware that an unsecured creditor could

have a claim entitled to priority?

A. I'm sorry, say again?

Q. An unsecured creditor could have a claim entitled to priority under section 507 of the Bankruptcy Code?

MR. KINEL: Objection; calls for a legal conclusion.

MR. BENSON: He is --

THE COURT: He's an attorney. I've known Mr. Sass my entire career. If he can't answer this question, nobody in the room can.

THE WITNESS: Can we restate it one more time? Thank you, your Honor.

THE COURT: You're welcome.

MR. KINEL: Can we qualify him as an expert, your Honor?

BY MR. BENSON:

Q. Are you aware that a priority creditor -- withdraw that.

Are you aware that an unsecured creditor could have an unsecured claim that is entitled to priority under section 507 of the Bankruptcy Code?

A. Yes.

Q. So the fact that a creditor is a priority creditor is not exclusive with being an unsecured creditor?

A. That's true, but the entire priority structure relates to the property of the Debtor and is contemplated that way under the code. We're talking about property not of the Debtor, which I don't think is contemplated.

Q. But we're talking about your fiduciary duties and to whom they're owed. And are you saying that your fiduciary duties are inapplicable when dealing with non-estate property?

A. It's an interesting question. I haven't really thought about that. I don't know.

Q. Okay. Moving on. I have some questions similar to what I asked Mr. LaForge. Are you aware that the IRS has filed proofs of claim in this case?

A. Yes.

Q. Are you aware that the IRS has asserted priority claims?

A. Yes.

Q. Are you aware that the IRS has asserted priority claims in the approximate amount of $2.4 million?

A. That's a number I heard, yes.

Q. Do you have any reason to believe that the asserted priority is invalid?

A. No, although I do believe that our professionals reached out to the IRS more than once to discuss whether to address that claim, make some or all unsecured, and those attempts to have been not fruitful.

Q. Two parts to that. Were those attempts by the Committee to, I guess, negotiate down the priority claim based on a perceived inaccuracy as to the asserted priority?

A. I don't know. I don't recall what they were, where they arose from, but there was a $2.4 million claim out there.

Q. But you have no reason to believe that the IRS erred in claiming a priority claim?

A. No, I have no information on that.

Q. Do you have any reason to believe the

IRS erred in calculating the amount of the claim?

A. I have no information on that.

Q. So you don't have any reason to believe the claim is inaccurate in its --

A. I have no reason to believe it's inaccurate, that's correct.

Q. Do you know if there's any intention by the Committee or the Debtor to challenge either the amount of priority the IRS has claimed?

A. You know, we have the procedures that have been promulgated under some of the documents we've looked at, and there is a claims procedure. It's intended for the unsecured claims, but I guess if the IRS wanted to come in as an unsecured claim and assert it, we could have a discussion.

Q. That answer was about your ability to challenge it. My question was is there any intention to challenge it?

A. Not being in that position, I really don't have any intention to do anything yet. It's not ripe yet.

Q. You mentioned your professionals reaching out to counsel for the IRS. I want to specifically talk about the period from the petition date to the time the United States of America filed an objection to the settlement. At any time during that period, do you know if anyone acting on behalf of the Committee reached out to either the Internal Revenue Service or the Department of Justice?

A. I don't have the dates, but I believe so, but I'm not sure. I don't know when it took place, so let me not say. I don't know.

Q. When you say let you not say, are you --

A. I don't know when the dates were that they reached out.

Q. Okay. So you have --

A. Relevant to the IRS.

Q. Do you have any reason to believe that there was any attempt to reach out to the IRS before the sale hearing, for instance?

A. Again, I don't know the timing relevant to the other events.

Q. Do you know if there was any attempt

by the noteholders to reach out to the Internal Revenue Service from the petition date to the sale hearing regarding treatment of their priority claim?

A. I do not know.

MR. BENSON: That's all I have, your Honor.

THE COURT: Thank you, Mr. Benson. Any other questions? Any redirect, Mr. Kinel?

MR. KINEL: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. KINEL:

Q. Mr. Sass, if you could just turn back again to Committee 3, the term sheet.

A. Yes, I have it.

Q. I want to just direct your attention to the bottom of page 4, the last full paragraph. It starts with the net proceeds.

A. I have that.

Q. Take a moment, just read it to yourself.

Having read that, the Committee

approved a settlement that does provide a recovery to deficiency claims of secured creditors; is that not correct?

A. Yes, thanks for refreshing my memory. There is a provision that provides for some payment to the deficiency claims.

Q. So deficiency claims such as Mr. Kaplan's clients would share in the net proceeds and any specified causes of action?

A. That's correct.

MR. KINEL: Thank you; no further questions.

THE COURT: Thank you, Mr. Sass.

THE WITNESS: Thank you.

THE COURT: Any further evidence by any party? Mr. Kinel, you need to move your documents. I assume you want 1 through 3 admitted?

MR. KINEL: Yes, your Honor.

THE COURT: Any objection?

MR. KAPLAN: No objection, your Honor.

THE COURT: Committee Exhibits 1 through 3 are admitted without objection.

Mr. Kaplan, you had some documents?

MR. KINEL: Your Honor, I have one more.

THE COURT: Oh, you have one more? Okay. Sorry.

MR. KINEL: May I approach?

THE COURT: Yes.

MR. KINEL: Your Honor, we'd like to move Committee 4, which is an official transcript of a hearing held before this court on October 6, 2016.

THE COURT: Any objection?

MR. KAPLAN: No objection, your Honor.

THE COURT: It's admitted.

MR. KINEL: Thank you, your Honor.

MR. KAPLAN: Your Honor, we have several documents that we used, and that's DDTL 1 through 8, which are the tabs in our binder, tab 17, 18, 19, 20, 21, 22, and 24.

THE COURT: Any objection?

MR. KINEL: For the record, I'm

going to object, but I know it will be overruled.

THE COURT: Based on relevancy, I take it?

MR. KINEL: Yes.

THE COURT: That is overruled, so they're admitted.

MR. KAPLAN: And your Honor, I know the Debtors' binders have a lot of pleadings that are already on the docket. I think the Court can take judicial notice; we're not going to burden the record unless you want us to move in all of the different pleadings into the record. But there's a whole host of pleadings that relate to this, and we think the record -- we don't think they need to go in as evidence by evidence.

MR. KINEL: I would agree with Mr. Kaplan on that.

MR. RAMOS: No objection.

THE COURT: I'm not going to disagree.

MR. KAPLAN: Thank you.

THE COURT: Very good. All

right. Last call? That will close the evidentiary record. Let's break for lunch, then we'll hear argument when we return. And let's try to reconvene promptly at 2:00 p.m., if we could. Thank you very much.

MR. KINEL: Thank you, your Honor.

(Whereupon, a lunch recess was taken.)

THE COURT: Good afternoon.

MR. SHAPIRO: Good afternoon, your Honor. For the record, Zac Shapiro on behalf of the Debtors.

I just have a few remarks, and I'll save the balance in response, if that's all right.

What's before your Honor is a settlement. And the standard that your Honor should consider is whether the settlement falls above the lowest point in the range of reasonableness. The standard is not whether everyone is happy. That simply can't be the standard. If it was, no settlement would ever be approved. For example, often the parties

to the settlement themselves aren't happy. So I think, your Honor, while the settlement isn't perfect, it achieved something good, and it did so at no cost to the Debtor.

You can argue about the merits of the Committee's objections, you can argue about the timing of when everything happened. But what you can't argue is as a result of the Debtor agreeing to move forward with this settlement at the August 16 hearing, subject to final documentation, that we gained the support of the Committee. And you can't argue that that support doesn't mean something. Therefore, for that reason, the Debtors would submit that this settlement meets the relevant standards and should be approved.

MR. KINEL: Thank you, your Honor. Norman Kinel, Squire Patton Boggs, on behalf of the Committee.

There are actually two motions pending before your Honor, so I'll mention the second one, and that is the Committee's motion for entry of an order approving the liquidating trust agreement and the binding

claims mediation agreements.

Your Honor, as I said earlier this morning, the settlement is the best possible outcome in these cases for the creditor body as a whole, and the only outcome in which any constituency other than the senior secured creditors receive anything in consideration of their claims against the Debtors. If the objectors today prevail, it will not improve their position, but rather simply ensure that unsecured creditors will receive no recovery in these cases.

The settlement clearly settled the Committee's DIP motion and non-CSC sale motions. And as we said in our papers, the best indicator of the value of the Committee's claims and the Committee's position is what a third party was willing to pay to get rid of those objections, and what the Debtors were willing to pay to get rid of those objections. Mr. LaForge, I don't know if he used the word today, but during his deposition, he testified it would have been catastrophic if either of those motions had not been approved. And

whether or not they were approved together on the same day or whether there could have been a possibility of coming back and dealing with a DIP later, obviously this was an integrated settlement that addressed a number of issues.

It also meets the standards of 9019 because it certainly does not fall below the lowest point in the range of reasonableness. From Mr. LaForge's testimony, it's simply not possible to conclude that it was unreasonable for the Debtors to have accepted this settlement. And his unhappiness had largely to do with the fact that there were not additional releases given to other parties who remain potential targets in the settlement.

The settlement resolved highly contentious litigation, and the objecting parties would like to create a narrative where somehow the timing is suspicious, somehow there wasn't enough time for people to consider the settlement. I can assure the Court that there was a hard-fought negotiation, that while Mr. LaForge may not

have been involved and as Committee members were not involved, counsel for all parties were involved. And the Committee had pending DIP objections, had filed three different objections to the DIP that were still pending, had objections to the sale motion. And there's no question that something was settled on August 16, 2016.

The standard that the parties would have this court require for a settlement that a claim or cause of action in particular was settled is not a -- there's no authority for that, and it's not a realistic standard. Settlements are approved every day in this court and other bankruptcy courts around the country which resolve controversies. That's all the rule says. You can resolve a controversy or settle a matter, but there's no requirement as to there being property of the estate involved in the settlement.

What was before your Honor were two core proceedings. A motion to approve a sale and a motion to approve final DIP financing. Admittedly, that was being

adjourned, but in the broader sense, they were both before the Court. There's no doubt, those core matters, the Court had jurisdiction over. And there was no objection at the time of sales, of the sale or the DIP objection, to the court's jurisdiction to hear those matters. If the court had jurisdiction to hear them, the Court certainly had jurisdiction to settle them. And that's all that was put on the record. And I'm not sure what counsel is getting that there's some deviation between what was put on the record and what ultimately was approved. The core terms of the settlement were put on the record by counsel for the noteholders, they were echoed by my partner who was here that day, and they were also confirmed by the Debtors. And those terms were the economic terms of the settlement, and those have never changed throughout.

What has changed, what counsel pointed out and of course we objected as to the relevancy of those changes, is there were many iterations of a term sheet that went back

and forth over a period of a couple of weeks between three different sets of counsel, with each taking a look at the document and making whatever suggestions, improvements, or changes they believed appropriate. There's no evidence that this was a Jevic plot. As a matter of fact, I sort of find that comical, because Jevic, if it were applicable, and we maintained throughout it was not, would have supported the settlement. So the idea that lawyers were running around conspiring to structure a settlement that would address a Supreme Court ruling that wasn't going to come for six months in the future, is kind of ridiculous.

The economics were always the same. The APA from the very first day, before the Creditors' Committee was ever even formed, provided that the purchaser would purchase all claims and causes of action. And there were excluded assets, but those were a small subset of the assets that were purchased. And from the beginning until the end, that never changed. And while in hindsight some of the

wording in the term sheet may not have been the best, no matter how many lawyers looked at it, it's clear that the economics were always the same. There was no wandering of estate assets. This is what you heard Mr. LaForge testify earlier today, that he fought hard to keep those assets within the estate. It's exactly the opposite of what the other parties are contending. It's not that people conspired to get them out of the estate and then sent them to a GUC trust. The Debtors agreed to give those up before the Committee even was alive and kicking.

We're going to hear from the objectors about Jevic. I argued before your Honor on I think it was December 16th when we had essentially a status conference on Jevic and whether the settlement should go forward on that day. We argued that Jevic was inapplicable. And the Supreme Court's ruling has not changed that argument one bit in our opinion. The Supreme Court in Jevic dealt with a case-ending dismissal coupled with a settlement in a distribution of predominantly

property of the estate, and how that was not permitted where it was inconsistent with normal code priorities, and if the settlement lacked any Bankruptcy Code offsetting value.

The Court expressly declined to prohibit other non-case ending distributions which occur earlier or do not involve property of the estate or have other code-based justifications. It did not endorse a blanket rule that all structured dismissals are pro se and valid.

The settlement here falls squarely within the range of permitted settlements and distributions under Jevic. The deciding factor in Jevic and the one missing here is that Jevic involved predominantly the distribution of estate assets. It is not uncontroverted, it wasn't in December, because I remember your Honor indicating that we would need to have an evidentiary hearing as to whether estate assets were being transferred or not. I believe it is uncontroverted that no estate assets are contributed; and indeed, the

Debtors have modified the proposed form of order to specifically say that to allay any misconception, misperception, or poor draftsmanship that might have been involved along the way. So this is not Jevic.

The Court approved the CSC sale and the non-CSC sale. The appeal period passed; no appeal was filed. The sale closed, and it's now beyond legal challenge. The purchased assets as defined in the APA became property of the noteholders at closing. They cannot be considered property of the estate. Under the settlement, the purchased assets include the specified causes of action, and accordingly, the settlement contemplates the contribution of only non-estate property to the GUC trust.

The DDTL parties do not dispute that the settlement calls for a transfer of the specified causes of action by the purchaser, and they do not allege the distribution of estate assets will be made to the GUC trust. Because of this, they argue that the distinction between property of the

state and non-estate property is not relevant to Jevic and that it's a fallacy. Your Honor, we assert that the Supreme Court's decision turned precisely on that issue, and in our brief, we go through the transcripts of the Jevic hearing, what various of the justices said. And it is clear that the issue of a non-estate property distribution is not decided by the Supreme Court.

On the other hand, we have ICL Holdings, binding precedent in this jurisdiction. And as hard as the objecting parties might try to distinguish it, I see no distinguishing characteristics between ICL and this case.

I also see nothing that renders it non-viable or controlling at this point. The dispositive issue in ICL Judge Ambrose said was whether there was a distribution of estate assets in violation of the priority scheme. Absent a finding that estate assets were involved, there could be no priority violation, and the Court found that estate assets were not implicated.

This case is virtually identical to ICL. The purchaser has acquired substantially all of the estate's assets. The purchaser is contributing them, some of them, to a trust. That trust will make distributions to unsecured creditors together with additional funds from the noteholders.

The claims and causes of action that will be contributed were purchased by the purchaser and belong to them. The $1.25 million that is chartered to go to unsecured creditors is coming from the noteholders pockets. Those were funds that were never in the estate, were never part of the consideration. The $1 million funding for the GUC trust, the exact same thing applies. There is nothing coming from the estate.

So for these reasons, we believe that Jevic is inapplicable, and ICL is good law and in fact binding precedent here.

The U.S. Trustee would like to extend Jevic and ask this court effectively to do so, and to take up the solicitor general's arguments during oral argument, and wants to

turn this into a gifting case or a class-skipping case which involved property of the estate and which involved a plan scenario or some other scenario which is not this scenario. This is not a gifting case. This is a case -- this is not a class-skipping case. This is a case where a settlement was reached and where through an arm's length negotiation, a third party has agreed to provide funding and other assets to a trust for the benefit of unsecured creditors.

U.S. Trustee also attempts to distinguish ICL in four ways. Mentioning releases that the secured lenders and others were getting. However, that argument fails, because all of those claims were released at the time that the final DIP order was entered. In fact, they were released by the Debtors on the first day of these cases pursuant to the stipulations set forth in the first interim DIP order. They became final after the Committee six days before this settlement was reached. There was no ability to challenge them. That was actually the U.S. Trustee's

second argument as to why this is different than ICL.

U.S. Trustee also argues that certain payments for Committee counsel somehow implement each other. That's simply not correct. The fees that were set forth in the DIP orders were capped. The fees for Committee counsel throughout the cases. And as part of the settlement term sheet, one component was an increase in that cap, and an elimination of a sub-cap that had been in all the orders. This was not a gift through a carve out as the U.S. Trustee has alleged, but it was a settlement, part of a settlement of a final DIP order which is hardly unusual. The funding did not come from anyone's collateral, it did not come from estate assets, it came directly from the increase in the cap which was funds that were negotiated as part of this settlement.

I should also note that the analysis falls apart, because attorneys's fees are administrative expenses of the Debtors' estates. So under any scenario , those funds,

administrative claims would have to be paid before priority claims or unsecured claims, even if we were dealing with estate property and even if we followed the absolute priority rule. So we don't believe there's any applicability to that argument.

I want to address a few other issues, and then I will end for now. Part of what your Honor has to consider is the fairness and the appropriateness of the settlement, and there was testimony regarding whether it's fair to skip over the IRS, whether it's fair for the noteholders' unsecured deficiency claim to be treated differently. Not excluded, but to be treated differently under the settlement.

And the question came up during Mr. Sass's testimony as what duties does an unsecured creditors Committee have to priority claimants and to unsecured deficiency claimants or under-secured secure creditors who have deficiency claims? This is an issue we've thought long and hard about. And while it may seem one that most bankruptcy lawyers

would think there's an easy answer to, I hope the Court can trust me, there is no easy answers to those questions.

There is precedent, however, and I'll cite to SPM Manufacturing Corp, 984 F. 2d. 1305 for the proposition that specifically that a Committee's appointment pursuant to 11 U.S.C. Section 1102 charged it only with representation of the general unsecured creditors, not with representation of the IRS or other priority creditors. That case was superceded on other grounds. That's one case that we were able to locate on that specific issue.

With respect to deficiency claimants, the Court in In Re: Fidelity American Mortgage Code, 1981 Bankruptcy Lexus 3272, recognized that the interests of an unsecured creditors committee and an under-secured creditor very well might be different, and suggests that an unsecured creditors committee's fiduciary duty may only be to general unsecured creditors. I will submit that we found no binding authority on

that particular issue.

But let's talk for a moment about the objectors in this case. And as counsel indicated, a lot of people aren't happy. But let's look at who they are. So we have the DDTL lenders. They're a secured creditor. And I had marked as Committee 4 the transcript of the October 16th hearing before this court. If I could only put my hands on it, it would be great. I don't know if your Honor has it before him. But the transcript, the hearing that day was about the DDTL lenders' motion for a $5 million administrative claim. Your Honor ultimately denied that motion. However, throughout that transcript, there are numerous references by Mr. Kaplan on behalf of the DDTL lenders and to the court to the secured status of the DDTL lenders. Specifically, your Honor held on page 66 of the transcript, "As we sit here today, they have an allowed secured claim in the amount listed on the Debtors' schedules. That is the law."

That followed several places in

the transcript where Mr. Kaplan argued that his client was a secured creditor and his collateral had diminished during the case.

On page 12 of the transcript, I can quote him as saying -- I apologize; wrong cite. On page 51 of the transcript, Mr. Kaplan says, "Your Honor, that simply can't be true that a secured creditor who the Debtors corrected, they originally said we were listed as a contingent claim, were disputed, and we were not; it was part of the proffer. So we have a prima facie valid secure claim. We have a claim that the Debtors have acknowledged they have done no investigation whatsoever of any claims."

Mr. Kaplan goes on on page 53, "Let's take a look at some of the other arguments that they make. As I said, we talk about the fact that, well, we were never unsecured. We were never a secured claim. Because of the petition date, we were unsecured." But they have no basis for that. The only basis they attempt to argue is, well, look at the auction results. But the auction

results actually prove the complete opposite. Because as we have noted in our papers, the CE Star transaction contemplated paying off their PNC facility with a first lien on their revolving priority collateral in full regardless of the outcome of the Columbus sale. So even if the Columbus sale had generated zero proceeds, the PNC was paid off in full.

There's another reference of Mr. Kaplan on page 16 of the transcript. "So in sum, your Honor, I think the evidence is uncontroverted and crystal clear that there has been diminution of value, that we have a prima facie allowed claim, that we have a diminution of value under the DIP order."

Then your Honor says to the Debtors on page 64, "You schedule them as undisputed as a secured creditor that the claim is allowed."

And finally, in Your Honor's ruling on page 100 -- I particularly like this passage because your Honor made the observation that I said something astute that

day. On page 100, your Honor said, "To my point to that question, is the value of your collateral actually may not have diminished, it may have increased. I don't know, because you haven't established what the value of your collateral is on the petition." That was Your Honor's ruling in denying the motion.

For the DDTL lender to stand up today and argue, woe is me, we're an unsecured creditor, we haven't been treated fairly, yet in October, months after the settlement, they came before this court and said, we're a secured creditor. And your Honor found that there was no value that's been proven as to what their collateral is worth. So the idea that the Unsecured Creditors' Committee should have somehow figured out at some point along the way in these cases that they were an under-secured creditor and that we owed some fiduciary obligations to them, notwithstanding that they were represented from the very first day by very able counsel who was clearly able to advocate for its interests.

So to rely on the idea that

they're being discriminated against unfairly because they're an unsecured creditor and the Committee has, whatever Mr. Sass says, and I have the utmost respect for Mr. Sass, as I said earlier, there's not a lot of authority on this. But if you look at the situation practically, I think the Committee could only have been said to discharged its duty to general unsecured creditors. Priority creditors are different. Mr. Kaplan's client is different.

The IRS filed two priority claims. Did they do anything to protect their interest in these cases? No, they didn't do anything. They weren't heard from throughout the cases. They were never in the process. They could have come in and objected to the sales motion, they could have objected to the DIP financing, they could have objected to the settlement terms when they were put on the record. They didn't do anything during the cases. Instead, the Committee was aggressive and went out and tried to create value for its constituency. And now that that value has

been created, they want to jump on the bandwagon and receive a portion of that distribution. Number one, it's not property of the estate, it's not the estate's assets, and if they wanted to be involved and if they want to have a voice in these cases, you don't come in in the 11th hour and try to take away what was heavily negotiated months earlier.

They also didn't come in here and complain when the employees who also hold priority claims, when millions of dollars was set aside for them. I didn't see the IRS here that day when those arrangements were made. Why didn't they object to that? Why are we now? Why was it okay for millions of dollars in priority claimants to be paid ahead of others?

That leads me to the WARN claimants who are the last people who should be here objecting. If I were them, I wouldn't come anywhere near this courtroom. They're being paid in violation of the absolute priority rule, exactly what they're alleging today, assuming that their argument holds up

that somehow these are estate assets or are controlled by Jevic. Why were they getting paid? What is the basis for that? They shouldn't be objecting, they should be grateful that that money was set aside for them specifically, and their objections really don't go to this settlement, it goes to the fact that they are being forced to litigate the validity of their claim, and not simply being handed all those funds. And by the way, any funds that aren't handed to them from that pot go back to the noteholders.

So that leads me to my conclusion, at least for now, and that's the noteholders. I want to give them credit, your Honor. They are sitting pretty today, because if the court rules against and does not approve the settlement, they walk off with two and a quarter million dollars plus all kinds of causes of action that otherwise are going to go to general unsecured creditors. To their credit, they have stood by the settlement, have not tried to weasel out of it. I give them a lot of credit for that.

They have been supportive throughout, and certainly have earned the respect of me and the Committee. And are here today, even, and I'm sure will comment, if necessary.

But as much as they have earned our respect and as much as we had a hard fought negotiation, it would be inappropriate for them to walk away today with a multi-million dollar windfall, and I think they understand that, and that's why they have been supportive. And that's what they will be handed if this settlement is not approved. Your Honor, we urge the Court not to set a precedent today that would reverberate around the country, that out of the money unsecured creditors shouldn't even waste their time at a Chapter 11 case such as this in trying to obtain a recovery for their constituency.

The secured creditors in these cases got recoveries, they got assets, the DIP letter got paid off. But we often talk about paying the freight and using the process and not abusing the process. And I would respectfully submit that's exactly what

occurred here. The process played out as it should. Unfortunately, this was not a case where a plan could be confirmed and the Committee created significant leverage, was able to obtain a settlement for its constituency. And it would be respectfully a terrible shame if they weren't able to realize on that after all this effort. Thank you, your Honor.

THE COURT: Thank you.

MR. KAPLAN: Your Honor, Gary Kaplan from Fried Frank on behalf of the DDTL parties. I have some slides that I want to put up, but before I do that, I just want to respond to a couple of the points.

First, I always love when I lose in a hearing and somehow all of my arguments are quoted back to me. There was a fundamental change since that hearing, and that is my collateral is gone, it was sold. I have no collateral left. We have an estate that everybody has admitted has no assets left. So them to argue, no, they're really a secured creditor because they argued pre sale

closing that they were a secured creditor is a little bit ridiculous. I wish I was a secured creditor, I wish I still had my collateral here, but that ship sailed a long time ago. So we are a completely unsecured creditor, have been for some time, and it was well-known to the Committee when they were negotiating that there was no collateral left and no value left for us.

Your Honor, I'll put up the slides. If it will be helpful, I can hand you a hard copy, as well.

THE COURT: That would be great. Thank you.

MR. KAPLAN: So your Honor, yes, Mr. Kinel was right, we are going to start with Jevic, because we think it's pretty clear that what's happening here is simply a back-door means to avoid Jevic, move assets that the documents themselves are very clear, or at least at the time of this settlement contemplated to go into the estate, and then in a change which no witness could explain who insisted on it, why it was there, there was

certainly zero testimony that the purchaser insisted on it, somehow it shifted from assets being left behind in the estate and words of Debtors' counsel, and we'll go through the exhibits, Debtors' counsel changed it and made it crystal clear that the APA was to be amend sod that there would be excluded assets, and then contributed to the GUC trust by the Debtor. You have some very talented lawyers on that side that everybody all of a sudden is saying, oh, gee, that's not what we meant, never meant it, I guess it was really sloppy by the multiple firms from the Committee, from the Debtor, everybody was sloppy, everybody who was using defined terms somehow just completely messed up term sheet after term sheet after term sheet. Even in the documents that say this was the agreement, crystal clear these assets were to come into the estate, be contributed by the Debtor to the trust, then all of a sudden, and it's something that nobody, no witness could explain why there was a change, but all of a sudden, we got a change that now these assets are not going to be

excluded assets, but rather they're going to go to the purchaser.

And so as when I started my opening about the boy who kills his parents, they made this change. If they had kept the term sheet as it was when it was announced, then we wouldn't be dealing with this issue and we wouldn't be, and we wouldn't be standing up saying, woe is me, if you deny this, your Honor, we're not going to get anything. Because under the terms of this, the estate would be getting these causes of action.

The Committee says just ignore all of it, the only thing that's relevant is to look at the final and ignore all of the facts and all of the background.

And then if we continue on in Jevic, I notice Mr. Kinel's terminology changed a little bit from their pleadings to now when they say predominantly. Jevic involved predominantly estate assets. Admittedly it wasn't the focus of the court, it wasn't argued in Jevic about the estate

versus non-estate asset distinction, but the facts in Jevic are pretty close to the facts here. Okay, we had CSC contributing cash and some contributing a lien. They had assets subject to a lien, they contributed. Neither of those are estate assets, and based on the same theory that's being used today, neither of those are estate assets. Granted, it wasn't argued, but to make this distinction and say Jevic was crystal clear, it was only focused on estate assets, well, when the facts according to them were all non-estate assets, it means there's something wrong; the Jevic decision just doesn't make sense.

And this settlement here clearly involves estate assets or estate value, if you want to go to Armstrong and the gifting cases. You have funding to pay estate professionals. You have, again, requiring an increase of the wind-down budget, and directing how the funds are going to be spent, including buying tail insurance for the company's directors. It provides for a lease by the Debtors, and to this point, Mr. Kinel said, oh, no, well

remember the challenge period had expired, so the noteholders got releases. Yes, but the settlement term sheet contemplates broader releases than that. For example, the Debtors' officers, directors, agents, affiliates, et cetera, are not obviously released by the fact that the DIP challenge period expired, and yet under the terms of the settlement, there are these broad releases that goes to the parties. So you get broad releases, including by the Debtor of their claims against officers, et cetera. So you do have estate assets that are being dealt with by the releases.

This settlement involves the Debtor continuing to be involved in the claims reconciliation process. This isn't some assets outside the estate that the Debtor has nothing to do with; the Debtor has to be involved. Then you have the pursuit of Chapter 5 and other causes of action, which we dealt with a lot in our brief and I'm not going to belabor it now. But you have, again, it goes to, and I hate when we use the word launder, but you have estate causes of action

that under the Bankruptcy Code can be brought by the trustee or the Debtor on behalf of creditors, and somehow they're saying, well, those were purchased for a moment and now back in the estate, and the estate can now somehow bring those causes of action. And if those causes of action can only be brought by the estate, and there have been some courts that have granted standing where it benefits the estate. But here they're saying there is zero benefit to the estate because it's outside of the estate, that, Judge, frankly doesn't make sense to say we're going to have a settlement that transfers those assets to a court-approved trust that is now going to be able to pursue it.

And so, you know, part of Jevic was very clear, and as discussed, the Supreme Court was very clear that talked about that there are certain times where you can have non-priority or priority-violating distributions where there's a significant bankruptcy related objective. And the situations they talked about was contributing

to the reorganization. And here, and in Jevic they found, as your Honor knows, that when it was attached to a final disposition, it didn't preserve the Debtor as a going concern, and it didn't promote the possibility of a confirmable bound. There was no bankruptcy -- there was no reason to approve it, and certainly no objective of the Bankruptcy Code that would be further.

And the same is certainly true here. In fact, and going to the woe is me argument at the end, again, that was the argument in Jevic. The creditors will get nothing. If you deny this, if you overturn it, we will get nothing. And the Third Circuit said that was a justification, and Jevic said, no, that's not. The fact that certain creditors will not get the benefit of what they bargained for, if it violates the code, that doesn't matter, and that's not the appropriate justification. And that is the only justification that has been posited.

And one of the things that I think is important was that, you know, there's

an argument, oh, your Honor is going to set this major precedent on limitation of Jevic. Frankly, I don't think your Honor needs to go that far. This case, you don't need to get into the contours of Jevic. Frankly, you can say, I can leave Jevic to another day as to if it's non-estate assets, whether it can be a priority skipping distribution. Because here you're clearly dealing with estate assets. And so your Honor can rule on this and say, we'll deal with Jevic another day, and Mr. Kinel and other committees want to come in some other time and say Jevic still exists, that under Jevic I still have the ability to do this, that may or may not be true. But certainly under the facts here, we are not dealing where a clear issue of non-estate assets, we are dealing with estate assets that we're trying to sort of create this fiction to say they're not estate assets for today.

Then we turn to ICL, which, again, there are questions about whether ICL continues to be viable under Jevic. Again, not something that frankly needs to be

addressed today, because this is clearly distinguishable from ICL. And when you look apartment what ICL did, and in our brief reattached the term sheet that was approved in ICL. And what you had in ICL was a simple cash contribution, period, and that was it. Avoidance actions were purchased and then eliminated, versus here where you have them contributed back and then being pursued, which is a fundamental difference. You had Committee Chapter 11 fees. ICL just had a little bit of fees just for their distribution of the trust, that permitted them to use some of the trust funds for when they distributed the assets. This is actually dealing with incurred fees during the course of a Chapter 11 case.

And again, I talked about earlier the Debtors acted in the reconciliation and the releases. But I think the quote at the bottom from ICL shows the distinction between ICL and this case. And there, the Court was talking about Armstrong and talking about TSIC, and the Court found,

and this was the quote from the Court, the trustee presented no evidence that the settlement funds were, quote, otherwise intended for the Debtors' estate. All are true here. The settlement sums paid by the purchaser were not proceeds from its liens, did not at any time belong to Life Care's estate, and will not become part of its estate even as a pass-through.

We have showed and the documents show absolutely definitively that these were assets of the Debtors' estate, and then, in fact, at the time of the settlement, they contemplated through mean assets of the Debtors' estate, and it was only through this mechanism and through, you know, changes to the term sheet that they now flipped it and said we're going to move these assets outside of the Debtors' estate.

And that takes us to jurisdiction. Your Honor, we don't disagree with the fact that obviously if they settle a DIP objection or settle the sale objection, and that your Honor has jurisdiction to hear

that settlement. But there's a limitation to that jurisdiction. They would have that say as long as it's in connection with resolving a DIP, anything in the world that happens, even if it's between third parties, no matter what the claims are, that now resides with you and you're stuck with it, your Honor. And we can put in our agreements that bankruptcy court has exclusive jurisdiction, they get all the benefits of the different provisions of the Bankruptcy Code.

That frankly can't be, and it just doesn't work that way. If what they are saying is true, that your Honor, don't worry about the Bankruptcy Code, and we don't have to worry about fiduciary duties because this is not estate assets have nothing to do with either the purchaser directing it, these are outside the bankruptcy court. If that is true, how can your Honor hear claims that are being brought by this non-debtor party that has nothing to do with the estate against third parties? And your Honor is going to hear them, there's core matters related, how

are those related if those are assets that are not part of the Debtors' estate, according to them, it's just the purchaser gratuitously giving money off to the side. Your Honor can't hear those. The bankruptcy court wouldn't have jurisdiction overall of those. Yet they want your Honor not only to hear those, they want the chapter 5 actions to somehow be resurrect had, and they want your Honor to establish procedures where every claimant who is, again, apparently some third party creditors who will have claims against this non-Debtor asset that has nothing to do with the Chapter 11 so we don't have to worry about Jevic, we don't have to worry about absolute priority. And your Honor should mandate how they go and seek those funds and require mediation and all of that. Your Honor has to, in essence, create a new sort of Bankruptcy Code just for those type of distributions. And your Honor, we submit that that is well beyond the jurisdictional limits of this court.

And then we'll turn to the

Debtors' business. I have no doubt that the Debtors wanted to get their DIP approved, wanted to get the sale done, and said, hey, if we can get rid of some objections, we'll take it. And the testimony was that's what happened. That, frankly, the term sheet as written, even though the Debtors have a sophisticated director, they didn't even recognize that one of the things he testified was so key to him that he wanted to keep those actions, that the term sheet that he was agreeing to actually contemplated that the estate would keep those actions. But instead, he thought, no, I'm not keeping those, so it's not fair, but I'm going to approve it anyway.

And the Debtors had a rushed process, which they admitted, they never heard of this structure before the morning of the hearing, had no idea this was coming to them, they got a term sheet, said we have a hearing, even though we've adjourned the DIP, even though there's no testimony that there would actually be harm in delaying the hearing by any time, that, well, you know what, let's

just take it, we'll get one objection out of the way and we'll deal with it later. And that frankly is not an exercise of sound business judgment. Yes, the standard -- assuming the settlement actually complies with law, which we argue we don't believe it does, we don't disagree with them on the 9019 standards, although we'll talk about Martin factors in a moment. But this does have to be an exercise of sound business judgment. And a rushed judgment where the Debtors had a take it or leave it proposal that they didn't even have time to understand or read what was in it, didn't negotiate one iota, and just took it, that does not meet the standard of an exercise of their sound business judgment.

And one of the things I started with in my opening, your Honor, was the fact that this wasn't sold. There were no claims and causes of action that were actually being sold. There was a reservation of rights that had been filed , and when we have all the pleadings that we discuss this our brief, the Committee had stood up and said, okay, we're

okay on the sale. The Committee told the Court that the sale produced the highest and best value. As the Committee acknowledged, all of their claims against the noteholders had been waived. The noteholders had under the terms of the DIP order valid binding liens that were not subject to challenge by anyone. So they had liens on all of the assets, there were no claims left by the Committee. So what we have here, as I said before, this isn't a settlement. They would love to use the 9019 standard, but this isn't a settlement. What they're effectively trying to do is create in essence a Chapter 11 plan but have it blessed under a 9019 standard because they could never comply with the standards for approval of anything with any greater scrutiny.

And your Honor, there are standards that courts in this district, as your Honor knows very well, there are standards that need to be looked at when approving a 9019. And they didn't even bother to put on a case to show that they satisfied the Martin factors. They said, well, we had

the DIP objection, we had a sale objection, that should be sufficient. No evidence, no testimony by either their Committee witness or the Debtors' witness as to the viability of those claims, whether they thought there was any likes to those claims. In fact, we heard the opposite; they just wanted to be done with as many objections as they could.

Likely you heard of difficulty in collection and complexity of litigation. It was a DIP objection at most and a sale objection; certainly not anything complex.

Then that takes us to the paramount interest of creditors. And the paramount interest of creditors, when you look at the disparate treatment that's here, it certainly is not in the paramount interest of creditors. For a creditors' committee who now spends a lot of time trying to dig up cases to prove that they don't have fiduciary duties to those people with whom they are actually harming by this settlement is astounding. In fact, if you listen to the argument, it was we think we don't have fiduciary duties to the

DDTL parties' deficiency claims well, because they were represented by counsel, they were active in this case, and since they were active, they didn't need to worry about them so we could ignore our fiduciary duty. And that darn IRS, they just sat quiet the whole time. They could have spoken up. They never spoke up and they were silent the whole time, so we didn't need to deal with them at all. So somehow they don't have duties to you if you're active in the case, they don't have duties to you if you're silent in the case.

And what the record shows that the documentary evidence shows, that it is the Committee itself, not the purchaser, that changed the term sheet and changed it to carve out the priority claimants and to carve out the deficiency claims. I understand why they're worried about breaching their fiduciary duty and why they're very worried to try to point out case law to say, gee, we didn't breach our fiduciary duties. But for them to sit here and for a creditors' committee to be an architect of a priority

violating scheme that discriminates against unsecured creditors to whom they owe a fiduciary duty is pretty outstanding. And for the argument to be that somehow that satisfies the Martin factors that's in the paramount interest of creditors to approve such a scheme, frankly, it just doesn't make sense even arguing it.

So in conclusion, your Honor, the settlement motion has to be denied. This is not a difficult case. Even if we were to agree with them that Jevic applies only to estate assets, there clearly is involvement of estate assets here, and this is clearly tied in instrumentally to the estate. They just failed to exercise any modicum of business judgement. They failed to satisfy their burden under 9019. And as I started and as I'm going to end, your Honor, this is something that they created. The term sheet that's in the record that the noteholders proposed from day one, more than a month before this settlement was reached, said pull out a treatment, everybody can get it. And

also said certain assets would come into the estate. The Committee and of perhaps the Debtors' counsel for whatever reason decided, no, we want to be Smarter, we want to make sure it never comes into the estate so we want to remove that, and we want to take all of this for those people who are on the Creditors' Committee. That was their choice, your Honor, and unfortunately for them, by controlling case law, the settlement must be denied. Thank you, your Honor.

THE COURT: Thank you, Mr. Kaplan.

Ms. Casey?

MS. CASEY: Good afternoon again, your Honor; Linda Casey for the United States Trustee.

Your Honor, the Committee and the Debtors are urging an overly simplified analysis of whether this court can approve the settlement agreement. They argue that the Third Circuit's ICL decision remains binding Third Circuit precedent that this court must apply full stop, and because the assets are

purportedly not estate assets today, then the settlement should be approved.

This is overly simplistic in two ways. First, while it is true that the Jevic decision directly dealt with an end of case distribution of admittedly estate assets, it did not specifically address whether consideration paid to objecting parties in order to obtain the Debtors' assets through a 363 sale could be classified as anything other than estate assets. And a comprehensive analysis of the Jevic decision demonstrates that ICL's holding cannot survive.

In short, the potentially serious consequences that the Supreme Court sought to avoid by refusing to adopt a rare case exception to an end of case priority skipping distribution scheme will be present if the fiction of non-estate assets continues as a viable means of structuring an end of case priority skipping distribution in the context of a case involving a 363 sale.

The second way that the Committee and the Debtors overly simplified

this analysis is even if ICL remains good law, they urge the determining whether the settlement proceeds can constitute assets of the estate must be determined as of today, wholly ignoring that as of the date the settlement agreement was entered into, the majority of the considerations should be provided were clearly estate assets. The willingness of the Committee to provides its quid pro quo, withdraw of its objections and the entry of the orders prior to approval of the settlement does not alter the fact that the parties negotiated and settled upon ultimately class-skipping distributions of estate assets.

So we start with the first step in analyzing whether the settlement agreement can be approved by looking at the Jevic decision. The Committee urges this court to adopt its narrowest possible holding, that only end of case priority skipping distributions of estate assets are prohibited. Those were the facts in Jevic. The distribution was an end of case distribution,

and the assets to be distributed were with no objection estate assets. But Jevic cannot be read so narrowly on either port. The Jevic decision does not authorize any and all distribution of estate assets, but rather sets forth the test to determine whether any proposed interim class-skipping distribution is appropriate. The Supreme Court stated that an interim distribution of estate assets in violation of the code's priority scheme must have a significant offsetting bankruptcy related justification, setting forth several examples, including preserving the Debtor as a going concern, or promoting the possibility of a confirmable plan.

Courts applying Jevic cannot simply ignore those injunctions and say, well, the Supreme Court only discussed end of case distributions, and therefore, all interim distributions are appropriate. Rather, they must apply Jevic's rationale and look at all interim distributions to see if there is, in fact, a significant offsetting bankruptcy related justification before permitting it.

And that same principle applies here whether determining that their justification that there's this fiction of non-estate assets continues to survive Jevic. The Supreme Court specifically addressed whether to create a rare case exception to an end of case priority skipping distribution scheme. It declined to do so. Its reasoning in declining such an exception must be reviewed and analyzed. The Supreme Court noted that if a rare case exception were permitted, the fact that it is difficult to give precise content to the concept of sufficient reasons, would turn the exception into a general rule resulting in uncertainty. This uncertainty, in turn, would result in consequences that would be potentially serious. These serious consequences include the departure from the protections Congress granted particular class of creditors; changes in bargaining power of different classes of creditors, even in bankruptcies that do not end in structured dismissals; risk of collusion where high priority creditors and

low priority creditors team up to squeeze out mid priority creditors; and making a settlement more difficult to achieve.

The Supreme Court specifically noted the importance of clarity and predictability in light of the fact the Bankruptcy Code standardizes an expansive and sometimes unruly area of law, and concluded that the Court cannot alter the balance struck by the statute.

Today we are faced with a different exception to the prohibition of end of case class-skipping distributions, and that is that such distributions are not estate assets. Resting upon a Third Circuit decision that rejected the notion that a payment directly from the purchaser of the Debtors' offers' assets to an objecting party constituted proceeds of the property of the estate.

So what we are really faced with here today is deciding whether ICL's holding can survive Jevic is the following question: Can Jevic be read so narrowly as to create a

rush to the courthouse by individual creditors, an official or ad hoc committee of creditors, perhaps even equity holders or ad hoc committees of equity holders, seeking their share of the side deals or gifts offered by the purchaser of the Debtors' assets?

To continue the holding of ICL that allows this fiction of non-estate assets is to adopt a fiction that creates the same uncertainty that the Supreme Court's decision in Jevic was designed to address. Here my argument was going to go on simply with the facts of Jevic. We have, however, a record now established that shows the exact harm that the Supreme Court was addressing. And your Honor, I would posit that we have that record today, because as the Committee and the Debtors have argued, they weren't trying necessarily to get around Jevic, they were trying to get an opinion with the Third Circuit's decision. And perhaps in future cases we won't have quite the same record, because lawyers will know to dot their I's and cross their T's a little bit better to not

have a record so clearly show the harms that the Supreme Court was trying to address.

But here what we have is the same situation. It is difficult to give precise content to the concept of what is non-estate assets when discussing a sale of the Debtors' assets through a 363 sale. It creates uncertainty. How much is the purchaser willing to gift to rid itself of the objections? Who is the purchaser willing to gift to? How will the purchaser permit such gift to be distributed?

This exception would incentivize future stalking horse bidders and even other bidders at the auction to hold back part of their consideration they would otherwise be willing to pay to ensure that funds would still be available for it to pay objecting parties, thus further depressing the liquidation value of assets already in bankruptcy.

And how does the fiction permitting the ICL fiction to continue despite the Supreme Court's admonition result in the

harm? The first is the departure from protections Congress granted particular classes of creditors. In Jevic, they talked about the fact that Congress established employee party to alleviate the hardships employees face when their employers file bankruptcy and to encourage employees not to abandon ship. Permitting the major parties in a case to structure a sale such that the transfer of consideration goes to some individual creditors rather than the estate, and therefore deeming that structure to create non-estate assets results in that harm.

The record here demonstrates that harm. The record here, the Committee and the purchaser negotiated a payment to certain unsecured creditors while not protecting priority creditors. In fact, what we see here is an email from Committee counsel specifically providing that the priority creditors will not even be able to participate in a pro rata distribution of the assets to the GUC trust. And certainly not protecting the code balance that gives them priority over

everybody else.

This also has the second harm of Jevic, changes in bargaining power of different classes of creditor, even in bankruptcies that do not end in structured dismissals. Continuing the fiction that money is paid to overcome objections to sales are not considerations paid by the purchaser to obtain the assets, shifts the balance struck by the statute, and grants all creditors and all equity holders an equal chance to obtain a payment, as long as it directly comes from the purchaser, altering the code's balance and changing the bargaining power.

Here, again, we have testimony that priority creditors and the deficiency claims of the disfavored unsecured creditors were excluded in a manner that appears not to be directed by the owner of the assets allegedly being contributed but by the Committee.

We also have here the third harm that Jevic addressed, risks of collusion, where high priority creditors and low priority

creditor teams team up to squeeze out mid priority creditors. Sophisticated, well-funded parties, major unsecured creditors, large equity holders committees, can use this non-estate assets fiction exception to 363 sales to force a bargain with a purchaser where the deal is structured in a way that mid priority creditors are squeezed out.

Query, would the Court shall comfortable to approve this same settlement if the settling party were not the Committee but were rather than ad hoc group of equity holders, squeezing out not just priority and administrative creditors, but also unsecured creditors, all with the fiction that, well, it's not estate assets anyway.

The record here shows an attempt to structure this settlement to exclude certain estate assets from the estate prior to contributing it to the GUC trust. We don't really know why. The DDTL parties have indicated that perhaps it's to get around Jevic. That may be the case. It may be the

case to get around a Martin valuation, with a valuation of the settlement -- excuse me, the specified causes of action might be too great compared to the benefit received by the estate for the release of the Committee's objections.

But we see that attempt. We see the attempt to take assets that belong to the estate and find a structure where it can come into this court and say it's no longer an asset to the estate, and now it can go to the preferred creditors and skip over the unpreferred creditors.

We also have a situation here where you not only have the priority creditors and the admin creditors not being invited to participate in this distribution, but you have fully unsecured secured lenders, clearly a disfavored, probably a very large claim that would swamp the unsecured creditors, and they're kicked out of this distribution.

And finally, we have the last harm that the Supreme Court tried to address, which was making a settlement more difficult to achieve. If all parties know the playing

field and any money paid to acquire the assets of the Debtors is proceeds and estate property, then all parties will be invited to the settlement table, and a global resolution is more likely to result. If on the other hand all parties know that, structured correctly, any money paid by the purchaser could go directly to any creditor, settlement will be more difficult to achieve, and there will be a free for all to be the one that the purchaser deems worthy enough of the separate side deal.

The Jevic court did not close the window on end of case priority-skipping distributions, but leaves the barn door wide open to permit creative lawyers to craft individual solutions that transfer estate property into purportedly non-estate property, resulting in the very harm that the Supreme Court was addressing. ICL's blessing of the fiction that consideration paid directly to a creditor to obtain the Debtors' assets without objection is not proceeds of the Debtors' property cannot survive the Jevic decision.

It is also worth to know that the procedures here, the settlement procedures, as your Honor said, we cannot look at this in a vacuum, the settlement procedures that are proposed by the Committee go far beyond anything in Jevic and go far beyond anything that the code or the bankruptcy rules provide. I do have specific objections, and if we get to that point where we have to discuss it, I'll go through them. But in general, the Bankruptcy Code and the rules are flipped on their head. There's no right to take discovery, no right to even provide testimony supporting the claim, binding claims mediation where the claimant has to pay half of the mediation. None of these are in the code, and the entire scheme is just basically saying, as long as there aren't estate assets or as long as this court adopts the fiction that these are not estate assets, we then can just ignore the entirety of the code and the rules and put whatever in place makes sense.

We also heard something very telling in the Committee's argument today.

The Committee said if you disapprove this, then the purchaser will have received a multi-million dollar windfall. That would not be fair. That, your Honor, is exactly what the argument is. This is not a gift, it is not a side deal, it is the purchase of the assets, and that payment came in as consideration to be able to get those assets. And the Committee admitted it. If you disapprove of this, they've received the windfall without paying everything they agreed to pay to get those assets.

The Committee also warned your Honor that if you disapprove this, it will reverberate across the nation and prevent committees in future cases from being able to enter into settlements. But your Honor, it will not be your decision that will reverberate across the nation, it is the Supreme Court's decision. The Supreme Court specifically said that the importance of clarity and predictability in light of the fact that the Bankruptcy Code standardizes an expansive and sometimes unruly area of law

resulted in the Supreme Court saying it cannot alter the balance of the code. Right here, the balance of the code is unsecured creditors cannot get paid out of estate assets until all senior creditors are paid in full. And if that makes it more difficult for a Committee to enter into an agreement with this fiction of a side deal, the fiction of non-estate assets, and forces them to comply with the Bankruptcy Code, that's what the Supreme Court said in Jevic.

As such, the settlement agreement here cannot be approved as it does skip higher priority claims, discriminates against disfavored unsecured creditors, and the fiction that it is all done by non-estate assets cannot be continued post Jevic.

However, even if your Honor determines that ICL does continue to have viability, it does not shield the settlement agreement in this case. And despite what the creditors' Committee stated in their argument today, there is a dispute as to whether the assets are estate assets. There are at least

four distinguishing factors. First, the Debtors and the Committee are providing mutual releases. The Debtor in ICL were not providing any releases. But here, as the DDTL parties already pointed out, these releases are broader than the releases that were contained -- or excuse me, than the stipulations and waivers contained in the final DIP order, and they are also the Committee's releases, as well, which of course they're releasing estate causes of action. This is clearly estate property, and anything received in exchange for the Debtors' releases, the Debtors' broader releases than the final DIP order, the Committee's broader releases than the final DIP order, are estate assets.

Second, the settlement releases the Committee's right to pursue claims against the secured lenders which claims are estate causes of action. The Committee hangs its hat now on the fact that the challenge periods set in the interim order expired, the final order had not been entered as of the date of this

settlement.

Third, the settlement provides an increased payment to the secured lender to pay professional fees. And in this respect, we need to look at the settlement agreement which specifically provides how those increased funds are going to come to the Committee. And that is the Committee's professional fees shall be paid solely through the wind-down budget and the applicable amount of seller retained third party professional fees, i.e. Debtor retained third party fees, included in the wind-down budget. And section 3.1 A-2 of the APA shall be amended to reflect the updated total amount of seller, i.e., Debtor retained third party professional fees or the wind-down budget. So this is being paid by the Debtor, according to the terms of the settlement sheet. In their papers, they argue that, well, final DIP order was already approved, the escrow was already funded, the fee applications have been approved, we've been paid, there's no Debtors' assets being transferred in this. But clearly that's not

true. At the time of the settlement, none of that had occurred, and the quid pro quo was the favor of the DIP objection to allow the DIP order to be entered, to allow that money to be funded, and therefore, at the time the settlement was entered into, it was clearly estate assets.

There's also an issue the Committee says, well, it's not priority skipping because we're admin creditors, we have to be paid. As your Honor indicated, you have to look at this case in its totality, and in the case in its totality, we are currently administratively an insolvent estate; we have the WARN act creditors establishing a record that there's a possibility that their admin claims have not been appropriately reserved for, and that they might not be paid in full. So therefore, you can't just say, well, because we are admin creditors, there's no priority skipping. There are other admin creditors here who are not being paid.

Finally, there is the transfer here of estate causes of action again

purportedly sold to the purchaser and then transferred to the GUC trust. ICL did not address whether this indirect transfer of estate assets could be deemed to be a transfer of non-estate assets, and it's clear it should not be. Again, at the time the settlement was entered into, not today, they were estate assets. The sale had not closed, the sale had not been approved. At the time that the Committee and the noteholders were negotiating over whether the Committee should be able to -- excuse me, the GUC trust should be able to get these causes of action, they were estate causes of action.

They became non-estate causes of action, arguably, when the Committee agreed to withdraw its objection and let the sale order be entered. But at the time of the settlement, they were clearly undeniably estate causes of action. They may come back and say, your Honor, we had testimony that the Debtor tried to get them to not be included in the APA and worked hard not to get them into the APA and they were into the APA. The APA

was not approved. At the time they entered into the settlement, the APA was subject to objection, had not been approved, the cause of action were clearly estate causes of action. Thus, even if ICL does remain good law, the assets transferred pursuant to the settlement cannot be deemed to be non-estate assets, and the settlement cannot be approved.

I do have one technical point. If your Honor were inclined to approve the settlement agreement, the settlement agreement provides that the Debtors and the Committee will not object to fee applications brought by any of the parties' professionals. There is a fiduciary out so that the Debtors and the Committee can meet their fiduciary obligations to review and object to fee statements of estate professionals. But, of course, the parties include the DIP lender and the purchaser, and therefore, their professionals, they're not estate professionals, and the fiduciary out in the settlement agreement does not extend to that. And if your Honor were to approve the settlement agreement , we do

object to the provision that says that the Committee and the Debtors agree not to object to the fee statements of the DIP lenders or the purchasers' agreements -- excuse me, professionals.

I do have specific objections to the procedures motion. I don't know if your Honor would like me to go through it now. I don't believe that that's where we are; I think we're waiting --

THE COURT: Yeah, let's wait on that.

MS. CASEY: If your Honor doesn't have any further questions, that's all.

THE COURT: I don't. Thank you.

We're going to take a short recess, then I'll hear the next set of objectors, so about five minutes.

(A brief recess was taken.)

THE COURT: Next? Mr. Raisner?

MR. RAISNER: Thank you, your Honor. Good afternoon. Jack Raisner on behalf of the WARN class.

Your Honor, the Jevic court did rule that in a case ending distribution by an estate, the priority code must be followed. It is true that the distinction between estate and non-estate assets were by that point a non-issue, and that's because the appellees rendered itself by not pursuing that argument rather early in the appeal process, recognizing it as a non-starter.

And Mr. Kaplan and Ms. Casey did an excellent job of showing how intertwined the distributed assets were to the estate that differentiated from ICL. The argument we did not attend that afternoon in the Third Circuit. So I'm not going to argue those differences.

But I would like to make one point that I think might have been lost and may not even have surfaced in the Jevic opinion, but is important here. And that is that when the assets are being used by the Debtor, they are not just serving as a messenger agent for the secured lender as a passive intermediary, taking the money from

the lender and giving it to the creditors in their pockets. They're using the money to settle claims against the estate which are claims against the Debtor itself. The Debtor is playing the role of a self-interested agent, in agency principles, being such an agent is liable personally. And when the Debtor is using the money as it does here, to extinguish claims against it from creditors, then it is liable to have to follow due process and the Bankruptcy Code. And that is a way to, again, differentiate ICL in which this didn't happen, but it's compelling I think in light of the procedures here that were proposed in the dismissal motion for the non-WARN CSC employee claimants. Their claims were supposedly going to be, are going to be sent to them in the form of a notice saying that they're allowed certain amount of money, and they will have 14 days from receipt in order to object to that with particularity and with documentation if they want to preserve their claim. And if they don't respond in the 14 days, in the event that the Debtors do not

receive a timely claim objection to the proposed disbursement notice, the Debtors may make the appropriate distribution from the CSC employee reserve in full and final satisfaction of the related non-WARN CSC employee claims.

So what they are doing is setting up a system to extinguish claims as they see fit with the amount of money that the Debtor sees fit. And that is the finality of taking away of someone's claim which is a due process issue that I do think that the Jevic decision does recognize. And you hear certain bankruptcy lawyers saying that after Jevic, they didn't realize that the Constitution played such a part under the Bankruptcy Code. So there is that, your Honor.

But I'd like to focus then on the other side of Jevic and what the Supreme Court did and what was supposed to be done, and that is to make priority skipping final distributions, of course, but with consent. And the motivation to reach consent is to have a dialog, to have some sort of settlement with

those priority claimants so that there's a basis for reaching consent. Here there was, I think, a purpose of putting certain amount of money into an escrow which was going to induce some kind of resolution of claims, both the Jevic -- I'm sorry, the WARN claim and also the non-WARN claims.

The problem here is that the procedures are hollow. Our concern at the outset was that we didn't have information. And so we lodged our first objection based on that alone, and then as we found it harder and harder to pull out any details or terms regarding this amount of four-and-a-half million dollars roughly, it turned out it was hard, because there was no there there. There are no terms. There is nothing to stake that money in the ground with certainty such that one can even talk about settling no less relinquishing an objection to the fact that the estate is trying to get out of bankruptcy with no provision to pay priority claims in full.

But there's an opportunity when

there is supposedly $4.6 million to reach a settlement, to reach a consensual resolution. And that's a missed opportunity here.

Our objections were raised and they were not responded to in the most recent reply by the Debtor and Committee, and the Debtor and Committee has put on no case whatsoever to show that there is any there there to this supposed $4.6 million. So to say they don't understand why we're here rebuffing us the way they have done from day one, what are you worrying about? There is this one here for you. That would be wonderful. And get to go a resolution and settlement includes, however, a proportionate responsibility on our part to kick the tires, do the due diligence, and keep litigating until we see there's been some there there, and there has been no case put on that there is any.

So it does seem as though there was an awareness that in order to, quote, get around Jevic in order to try to at least create the possibility or illusion of a

consensual settlement, something was done to put some rules, a few sentences down in some orders. But it unfortunately turns out to be a losery, that the 4.6 million would even used to pay employees is suspect, because the first sentence of the sale order of August 19th, the very first sentence leaves an open-ended, ambiguous clause as to what the money might even be used for. I'll just read it into the record. "The ad hoc notes and Creditors Committee, PE and CE, GSPEO, and the DIP lenders, the creditor parties, agree funds will be set aside (in an escrow or other acceptable manner) the employee funding escrow from the net proceeds from the sale in an amount sufficient to pay the estimated amount of all allowed security priority and administrative claims of the employees of CSC, whether they're working or not, or such other amounts as may be agreed upon." The money of the proceeds may be set aside to pay other amounts as may be agreed upon. That's completely open-ended.

And of course when we first read

it, we didn't know what that means, and we tried to fathom it. But as you can see from the testimony today, nobody knows what will ultimately be the agreed upon use of whatever money has been in some way segregated. And so there is a -- there was a sense in Jevic that the one plaintiffs were offered something and they didn't take it, and their recalcitrant or the step up artists or something, and unfortunately here, there's an idea that somehow we're looking a gift horse in the mouth. But if the result of whatever the Court's disposition is would be to have some certainty placed in the use of these funds that have been used in this settlement so that a constructive settlement can be talked about and perhaps reached, that should be the way cases end in a final distribution, not with terms thrown at creditors and then close the doors and ears and come into court and say we can't do anything else about this. That is not the best practice. Thank you, your Honor.

THE COURT: You're welcome.

Mr. Benson?

MR. BENSON: Thank you, your Honor. Just a few brief points. I know we're not currently discussing objections to the mechanics motion as it's called, but I want to direct the Court's attention to two provisions of the liquidating trust agreement, because I think they're directly relevant to the issue of just jurisdiction over the settlement.

I first note in the liquidating trust agreement Section 2.2 H, which entitles the liquidating trustee to seek a determination of tax liability or refund under section 505 of the Bankruptcy Code. 10.6 entitles the trust to request an expedited determination of taxes and tax refunds, tax refund rights, excuse me, of the CE liquidating trust, including the disputed reserves under section 505 B of the Bankruptcy Code for all the terms or claims filed by the CE liquidating trust for all taxable periods through the determination of the CE liquidating trust.

Now, section 505, the broad granted jurisdiction to bankruptcy courts to

determine tax liability has been limited by the Third Circuit in the Qualcomm case to tax liabilities of the Debtor or the estate for the most part unless, very rare circumstances, it says, but generally 1334 says you have to have related jurisdiction. If the liability is not of the Debtor or the estate, it's unclear how that relates to administration of an estate, and therefore, as a general matter, there can be no jurisdiction for the liquidating trust, or no jurisdiction over tax liabilities of the liquidating trust unless it is, in fact, the estate. Same holds true for the expedited determination request under 505 B under the code. That procedure is only available to determine liabilities of the estate.

Now, exceptions are made sometimes when you have liquidating trust that is deemed to be a de facto successor to the estate. But that is only where you have a liquidating trust that is administering the estate assets. So here, in order for the Court to have the jurisdiction that is being

sought under the liquidating trust agreement, the liquidating trust must be a de facto successor to the estate, meaning it must be administering estate assets. If that's true, then there's a Jevic problem. If the liquidating trust has no estate assets, it is not a successor to the estate, then there's no jurisdiction, and we continue our objection to the liquidating trust.

Moving on, I'd just like to respond to Mr. Kinel's comment about how the United States and the IRS were not involved up until very recently. We weren't involved because as far as I know, no one at the tax division or the IRS was alerted that any of this was happening. We do not have the resources to have the DOJ attorney attend ever sale hearing and DIP hearing and hearing of any kind to make sure that there is no settlement put in place that affects us down the line and cuts out our priority claim. It's just totally unrealistic, it's unrealistic to all other priority claims, employee claims when not represented by class

counsel. And that also goes to what the Supreme Court was saying about the whole importance of priority, is it forces the insiders to the case to bring in the con congressionally preferred priority creditors. Because if the priority doesn't matter, then there's no reason to bring us in, we don't find out until it's essentially a fait accompli, or patricide, as Mr. Kaplan described it.

So for that reason, I think it's very important, however you want to talk about it, as ICL, Jevic, the priority claims need to be given their congressionally granted status if we're ever to be brought in and allowed to participate in these negotiations, which the Supreme Court highlighted as the crucial part of its Jevic decision.

THE COURT: Thank you, Mr. Benson. Reply?

MR. SHAPIRO: I'd like to respond to just a few points raised by the parties.

First, I'd like to address the

allegation that the Debtors did not exercise sound business judgment in agreeing to enter into a settlement. So I think, again, the context here is important in what was put in front of the Debtors. And specifically, what was put in front of the Debtors were the following terms. The purchaser would contribute causes of action that it purchased to a GUC trust. The purchaser would contribute its own cash to the GUC trust. Certain out of money creditors would be the beneficiaries of those assets, and the Committee would support the sales and the debt and drop any objections there to.

And importantly, that document on August 16th was subject to further documentation. And I have a couple -- in case that wasn't clear, I have a few quotes from the August 16th hearing from each of the parties. First was Mr. Rubin, counsel to the ad hoc Committee. And there Mr. Rubin said, "The Debtors are not today committing to these things. We know we have steps to take to get there. The Debtors are supportive of the

terms." Mr. Wehrer, counsel to the Committee: "There are certain elements regarding process that we need to work through." And finally, Mr. Rogoff, counsel to the Debtors: "The Debtors are prepared and committed to work in good faith with them, and the other parties memorialized this agreement.

And then if you wanted to look at what happened with the benefit of hindsight when determining whether the Debtors exercised sound business judgment, the Court did, in fact, approve the sales on August 16th and the DIP on September 9th. So in other words, the Debtors' key goals were achieved, and the Debtors gave up nothing in the process. And in the reasonable view of the Debtors, the Committee support helped achieve those goals.

And it can't simply be the case that in order to enter into a settlement, all parties must be treated fairly. That simply can't be right. Why? Most importantly because on August 16th and even on September 9th, there was a binding Third Circuit opinion that was binding on this court that allowed

for class skipping in the context of settlements. But at least in part what the DDTL parties are saying is that the Debtors couldn't have possibly signed on to the settlement the same day that it received it. That's just not enough time to digest the document and make a determination as to whether to enter into it subject to final documentation. To me that sounds like an argument that the Debtors breached some kind of duty of care.

But let's assume that underlying premise is true and a few hours isn't enough time to review and understand a six-page document. Fine. But what about three weeks? Because it was not until September 8, more than three weeks later, that the settlement term sheet was finalized, executed, and filed with this court. Three weeks is surely enough time to review and understand a six-page document.

Now, let's just talk about why it was important to have the sale go forward on August 16th and not adjourn it so that we

could get this settlement in a term that was more fair to all the parties. And I think the testimony there, uncontroverted, we needed an approved sale to show the market, the vendors, employees, et cetera, that we had a buyer and that this business would survive. That surely is a valid reason to move forward with a sale on August 16th, not where standing that the term sheet wasn't finalized and notwithstanding that the term sheet didn't make everybody happy.

And my next point speaks to the allegation by the objectors, and really the DDTL parties, that the settlement was some kind of a laundering scheme that was the result of some conspiracy between the Debtors and the Committee. We found this particular accusation offensive, especially given the use of the word laundering, and that connotes some kind of criminal conduct. But let's assume the DDTL parties are right, we used the purchaser to transfer state causes of action to the trust to get around Jevic. But how could that be laundering? How could that be

in any way criminal? As I noted, at the time the settlement was entered into, the Third Circuit's opinion in Jevic was binding. It permitted class skipping in limited circumstances. There could be nothing criminal about what was done.

But let's talk about why that allegation is nonsensical. From the outset of these cases, the purchaser contemplated acquiring what the settlement refers to as specified causes of action. In fact, just days after the petition date and before the Committee was even formed, the Debtors filed a term sheet on the Court's docket that provided such causes of action were proposed to be purchased assets. So in other words, this so-called conspiracy began before the Committee was even formed. Now, it's been a while since I've taken criminal law, but my recollection is much like the tango, a conspiracy requires at least two parties.

But let's assume there was a conspiracy. What would that conspiracy be? Well, the Debtors and the Committee, before

the Committee was even formed, conspired to to ensure that the purchaser acquire the specified causes of action. The Debtors and the Committee then conspired to get the purchaser to agree to contribute those causes of action to the GUC trust if and only if the summit was approved with knowledge and downright clairvoyance that the Supreme Court would overrule the Third Circuit in Jevic. In other words, we were really playing the long game, and we were really coy if I dent that this settlement would be approved. Because if it isn't approved, these causes of action will remain as they are today since November 28, 2016, with the purchaser. All criminal conduct is risky, but this experience just defies common sense.

In further support of their experience theory, the DDTL parties point to various drafts of the term sheet which they say demonstrate we were manipulating the term sheet to contravene Jevic. Let's assume that's correct. Well, isn't that our job? Isn't our job to comply with the law and to

structure transactions so they comply with the law? We tried to structure the transaction in such a way to remove any concern that to the extent Jevic was implicated wouldn't be an issue.

But getting past that, the only item that changed of any relevance to the issues before your Honor today was the precise mechanic of how assets would be contributed.

THE COURT: Which is the entire thrust of your current argument that Jevic doesn't apply. So you dismiss it and rely on it at the same time.

MR. SHAPIRO: So I only rely on it inasmuch as on August 16th when the Debtors made the determination to exercise sound business judgment, at that time, Third Circuit law permitted class skipping. That's the extent I rely on it.

THE COURT: On August 16th, the document your client approved had the causes of action coming back to the Debtor, and then you changed it.

MR. SHAPIRO: That's fair.

THE COURT: And you say it doesn't matter that you changed it, but of course it matters you changed it, because as we sit here today, if you hadn't changed it, you'd be DOA. That's my point.

MR. SHAPIRO: And that's a fair point. But I think the record makes clear both on August 16th at the transcript that when Mr. Wehrer said that the mechanic was to be worked out, and it was worked out. And on September 8th when we filed the executed term sheet, that was the mechanic that's before your Honor, that was the ultimate mechanic that was decided.

THE COURT: Who does Mr. Wehrer represent?

MR. SHAPIRO: The Committee.

So getting back to the term sheet, there was never a -- so before August 16th, we had an auction. And at that auction, we declared the winning bidder for the non-CSC assets. And the purchase agreement that we filed with the Court, the one that we declared the winning bid, provided that the CE Star

entity would acquire these specified causes of action.

So from our perspective, on August 15th up until the morning of August 16th, it was always our understanding that the purchaser was acquiring these causes of action, because that's what the APA that won the auction provided for.

So that morning when we were told that the APA was going to be amended so that these causes of action could be contributed to a trust, from our perspective, in sound exercise of our business judgment, we were never entitled to those causes of action to begin with. We had already declared them the winning bidder, and that bid contemplated the purchase of those assets.

And the other thing that's telling is --

THE COURT: But at that time, they were still your assets.

MR. SHAPIRO: That's correct. But the settlement that we entered no -- sorry. The settlement that we agreed in good

faith to pursue on August 16th was always subject to court approval. A Debtor just can't just enter into a settlement at that time and have it be binding on him. It's still not binding on him; it has to be approved by your Honor.

So what happened between then is the sale closed and the causes of action are owned by the purchaser. And if the settlement today is not approved, the causes of action will still be owned by the purchaser.

THE COURT: Look, the problem you have is that most of the arguments I'm hearing from you and from Mr. Kinel are the exact same arguments that Judge Shannon relied on when he did the lower court ruling in Jevic, okay? But that doesn't carry weight anymore. The Supreme Court has made it very clear that those kind of arguments and the kind of arguments you're making right now, that if I don't approve this transaction, this money will go away and everybody will be worse off. That was the exact rationale that was overturned by the Supreme Court, and they say

that has to fall to the wayside when you're talking about altering the priority scheme without some bankruptcy related purpose. Right?

MR. SHAPIRO: That's true, your Honor.

THE COURT: And that was the thrust of Mr. Kinel's closing at the very end was you can't do this to us. Well, I didn't do it to you, eight people in Washington, D.C. did it to you. Well six, I guess in washing done D.C. did it to you, I didn't do it to you.

MR. SHAPIRO: And I understand, your Honor; that wasn't my argument. The only point would make to that is what distinguishes this case from other cases and perhaps that case is right now what's being contributed if this settlement is approved is coming from a non-Debtor.

THE COURT: Yes and no, okay? Yes, they currently have it after the closing. No, it started off as a Debtor asset. This isn't -- is it ICL? I'm no good with

acronyms.

MR. SHAPIRO: That's right.

THE COURT: This isn't ICL. This isn't even Jevic to the extent we're talking about the CIT cash distribution or the lien contribution. In ICL, that was money that was never in the estate's coffers that was going from the purchaser to the creditor.

In this case, you start, the very proposition on as of the petition date, this was property of the estate. It's always property of the estate. So say it's not estate property that's being distributed is ignoring its origins. And doesn't that distinguish it from ICL because it started off as state property?

And importantly, at the time the settlement was reached on August 16th, and even on September 8th, it still was property of the estate.

MR. SHAPIRO: What I think distinguishes that is they're not co-dependent on one another. We're not saying that you can't approve the sale unless the settlement

is approved. They really truly are two independent things. Because right now, the sale has closed, the sale has been approved, and those assets belong with the buyer. They're with the buyer. The only string attached is if this settlement is approved, at that point, it's transferred. But they're not tied together. They're independent, and that's the way that we required them to be.

So I don't know that you can -- I think you need to distinguish it in that way. There has to be the sale. The sale is done, the sale has closed, the sale is a final order. This settlement is separate and apart from that. And if you don't approve the settlement, then this sale is unchanged and nothing happens to the sale. But if they were tied, and I could see that being a concern, because you would say, well, isn't this just some creative two-step process to get around Jevic? In some sense maybe it is, but it's a very risky one. Because at this point we have a sale that closed with the assets in the purchaser's pocket with no obligation to

contribute them whatsoever unless your Honor approves this settlement. And so if somebody wants to structure a deal that way, in such a risky way, I don't think that's a legitimate concern.

THE COURT: I'm speculating, but I don't see it as an attempt to get around a Supreme Court decision that hasn't come down yet as much as I see it as an attempt to fit into the ICL model, which was controlling law as of the settlement date. But that's sort of neither here nor there. It doesn't matter why it's being done this way. You're right that an independent sale order that's become final has transferred these assets, and that's separate from approval or disapproval of the settlement.

But that doesn't answer my fundamental point, which was to distinguish this from ICL. And I don't have the brief in front of me, but the quoted -- yeah, this is in Mr. Kaplan's depth from ICL, "And the Trustee presented no evidence that the settlement funds were otherwise intended for

the Debtors' estate. All are true here. The settlement sums paid by the purchaser were not proceeds from its liens, did not at any time belong to Life Care's estate, and will not become part of its estate even as a pass-through."

Did not at any time belong to life care's estate. This did at one time belong to this estate. There's no question there. So doesn't that distinguish ICL?

MR. SHAPIRO: You know, if you take that out of context, I suppose. And it's true, I mean, you could at one point trace assets to a lot of people and you could follow where they go.

THE COURT: I'm telling you you take it out of context, it's the whole thing --

MR. SHAPIRO: Well, let me --

THE COURT: -- of the case.

MR. SHAPIRO: Sorry. Let me rephrase. Yes, they were at one time owned by the Debtor, but they were sold, and a purchase price was negotiated, and that purchase price

was paid and the buyer bought them. They're theirs. The buyer owns those causes of action, no questions asked. And they're only obligated to contribute them to the trust if your Honor approves the settlement.

So yes, at one point the Debtor did own them, but the Debtor doesn't own them now. We have no claim to those causes of action. We can't ask the purchaser to return them, we can't ask the purchaser to do anything with them. For all we know, the purchaser brought them and started suing individuals on account of those -- we don't know. We have no control over that. And as far as, yes, we did at one time own the causes of action, but we don't anymore.

THE COURT: Well, I don't see how the purchaser can pursue Chapter 5 causes of action on its own behalf if it's not on behalf of the estate, they're simply not able to be pursued.

MR. SHAPIRO: That's fair, your Honor, but that was only one component of the specified causes of action. I was just using

it as an illustration, but that is a fair point.

THE COURT: Fair enough. I get it, I get it. You don't control the causes of action. I understand.

MR. SHAPIRO: And just a couple more points. I heard your Honor loud and clear, and I should probably keep my mouth shut. But I just wanted to make one point. We haven't yet made a final determination as to whether we're moving forward with dismissal or conversion, but I think in both Mr. LaForge's deposition testimony and other filings we made before the Court, including one in response to the dismissal motion, I think that, it's safe to say that conversion is the most likely outcome. I don't think that this is going to be a dismissal. There are causes of action that were not acquired by the buyer, specifically causes of action that belonged to the Columbus entities, and that was a separate sale, that was a liquidation sale, so they did not buy causes of action. So while we've not valued what those causes of

action are, we cannot, we don't think, dismiss those cases while they're there, because they have some value, we just don't know what they are.

THE COURT: I think that goes to the point does Jevic live and die on the fact that it has to be a structured dismissal. And I think Ms. Casey did a nice job of going through the concerns that the Supreme Court had, and I don't think it's necessarily tied to a dismissal, because there's certainly language in the opinion that allows intermediate settlements, like the Iridium case, or critical vendor motions, orders, wage orders that have this sort of bankruptcy purpose or reorganization purpose.

But I think, you know, you're right, I think this case is headed, if I deny the settlement -- or if I grant it, I'm sorry. If I grant the settlement, I think the case is headed to dismissal or conversion, and probably conversion. But where it's not headed is a plan. And when it's headed to dismissal or conversion, it's headed there

soon. So I think, you know, while I certainly understand your point about how the dismissal motion isn't necessarily tied to the settlement motion, I think, you know, the case is such, I don't have to ignore my common sense, this case is either approval or not approval of the settlement, is either headed to dismissal or conversion in short order. I may be wrong, I don't know. That's my feel.

MR. SHAPIRO: So a couple more points, your Honor. On the releases, it is true that we are providing, the Debtors are providing some releases. But it can't be that they are releases that makes this settlement, you know, prohibited by Jevic. Then every settlement would be prohibited by Jevic.

THE COURT: Why? Maybe every settlement is prohibited by Jevic.

MR. SHAPIRO: Okay.

THE COURT: Well, I don't know. Maybe every case ending priority skipping settlement is off the table. I think it was the Middle District of Tennessee, but Bankruptcy Court in Tennessee just issued an

opinion that one could argue broadly interpreted Jevic to deny a settlement. I don't know where we are.

MR. SHAPIRO: I'm glad we're in Delaware, I guess.

THE COURT: We'll see.

MR. SHAPIRO: Just one more point, and this addresses the WARN claimants' response. I want to be clear, the WARN claimants had a bunch of issues with the procedures in a dismissal motion. I informed your Honor we're not going forward with that dismissal motion. Even if by some miracle we do dismiss and not convert, we're not seeking approval of those procedures. So to the extent the WARN claimants has an issue with those procedures, that's certainly not relevant to the court's consideration of the settlement motion.

Finally, to the extent the WARN claimants have an issue with us providing them with information, they have an adversary proceeding, they can seek discovery in the context of that. Of course, we're trying, as

I think the WARN claimant's counsel said himself, we are trying to resolve that. But there is a mechanism for them to get the information that they want.

And I think that's it for me, your Honor.

THE COURT: Okay. Thank you. Mr. Kinel? You get the last word.

MR. KINEL: I hope it's a good one.

Your Honor, I'm just going to address a few points. I think it's pretty clear that the U.S. Trustee is asking your Honor to reverse the Third Circuit's ICL decision. I heard Your Honor's comments a few minutes ago, and I think the distinguishing factors have been pointing to don't distinguish the case at all. And I think that the only way this settlement doesn't get approved under ICL is to basically for this court to conclude that ICL is no longer good law.

The point made about -- well, actually Ms. Casey said Jevic leads the door

wide open for creative lawyers. Well, if that's the case, I don't know if it is or isn't, but the point, I think that's effectively a concession that Jevic doesn't deal with this case, and that the U.S. Trustee would like it to, but it simply doesn't. The idea that it's a fiction that there are non-estate causes of action when somebody buys something and returns them, and I heard your Honor say something similar a moment ago, number one, if I buy your house and I live in it, yeah, once upon a time, you owned it, but I owned it now, why does it matter? I don't understand, no one has articulated a rule of law as to why that was a distinguishing feature in any case --

THE COURT: Well, and I'm not saying you have the facts now, but if it's a sham transaction, you can ignore the fact that it was sold. I'm not saying these are the facts, but if it was part of the conspiracy to avoid Jevic and go back on what the documentation said on August 16th and change it to make sure that it stayed out of the

estate, I can collapse that transaction. I don't have to honor it. And there are plenty -- if those are the facts, you could do that -- you know, it's in effect a fraudulent conveyance. It's a transfer that's not a transfer.

So there are plenty of ways to avoid that kind of transaction if the Court deems that that's the appropriate based on the facts of the case.

MR. KINEL: Well, respectfully, those are not the facts of this case.

THE COURT: Fair enough.

MR. KINEL: There's not a shred of evidence that the economics of this transaction ever changed or that the noteholders would have paid an extra nickle for this estate for the assets. As a matter of fact, the noteholders kept their powder dry and didn't even fully credit bid what they could have in order to win that auction. The idea that they just would have written a check on top of -- if they had to increase their credit bid, which they could have, that they

instead would have just written a check is really just beyond credulity. It's not this case. It's not what happened here.

The idea that the assets were still the assets of the estate on the date the parties came before the Court on approval of the settlement, I don't see how that's relevant. Nobody objected. If the U.S. Trustee or some other party thinks that every one of these transactions is a sham and that you can't purchase estate causes of action, then why not object at that point? That's the point when somebody should have objected and, said a minute, why are these estate causes of action going through the noteholders? What business does the Debtor have selling those? What's the consideration for them? That entire unless shouldn't be done today, it should have been then. And nobody objected, and this court approved that transaction.

And I just wanted to address one of the apparently big distinguishing factors that people are relying on and arguing about the difference between ICL and this case is

the releases. And I think Mr. Shapiro touched on it. But the releases that are set forth on the term sheet, they released the noteholders and the officers and directors and all that. That was already done in the DIP. And that was done, and didn't need to be a final DIP order, that was gone in connection with the interim, first interim DIP order.

The only other release that the Debtor is giving is a release of the Committee. That's worth nothing, okay? And I'll represent to the Court that if that's the deciding factor in this deal, we'll take that out of the settlement, because that doesn't distinguish this case from ICL, the fact that the Debtors, just like every other settlement you see, the parties who sign off on it want mutual releases and exculpation. There's zero value that came out of the estate for that release. And that doesn't distinguish ICL.

The other factors -- I mean, sure , you can pick apart, and do they line up exactly? No. And the phrase that your Honor quoted, does that sort of imply that, it says

did not at any time belong to the estate. Yes, it says that. But I'm not sure that's the holding. If you look at the opinion, and actually, I read it again yesterday and thought I had lost a page, because it ends very strangely for a circuit court decision. It really has no conclusion.

The last paragraph of the decision is, "As noted, the Bankruptcy Code's creditor payment hierarchy only becomes an issue when distributing estate property. Thus, even assuming the rules for bidding equal ranked creditors from receiving unequal payouts and lower ranked creditors from being paid before higher ranking creditors apply. In the 363 context, neither was violated here."

So I guess we could debate what the actual holding of ICL is, but I don't think that that one phrase taken in isolation versus that phrase or others is enough to distinguish ICL from the facts of this case.

And yes, I apologize for appealing to perhaps the Court's equitable

considerations here, but, you know, I believe that you don't have to rely on that in order to approve the settlement. I believe that the burden has been met under the standards for a 9019 settlement. I don't believe any evidence of any conspiracy, breach of duties, lack of business judgment, I don't believe any of that has been proven. It's conjecture. Why things change and who changed them, the fact that an email came from one person and went to another doesn't mean that it was their idea. So we don't have a lot of those facts, and the reason we don't have them is our position has been since day one, and I told Mr. Kaplan this in our various discovery disputes. We don't think they're relevant. The Court indicated earlier today that it does think they're relevant.

But the intentions of the parties were to document a settlement whose economic terms were put on the record on August 16th, and nothing changed. There was never any contemplation that those assets would remain with the estate or that the

purchaser would have paid more had they not agreed to this arrangement with the Committee and the Debtors. Thank you, your Honor.

THE COURT: You're welcome.

All right, I'm going to take a recess and then I'll come out and give my ruling.

(A brief recess was taken.)

THE COURT: All right. Thank you very much for your paper submissions. Thank you very much for your arguments today and your professional presentation of the evidence and the argument. I really do appreciate it. One of the real pleasures of this job is the lawyers that appear in front of me are so good.

I'm ready to rule, and I am going to deny the settlement motion. And I do that with some reluctance because looking at the equities, as Mr. Kinel referenced in his reply, doing this takes money away from creditors and keeps it in the hands of the purchaser, both the potential loss proceeds of the avoidance actions as well as the cash that

was going to be paid. However, I am constrained to do so by the facts and by the law. And I'll talk about the law first.

As we all know and as we talked a lot about, the Supreme Court ruled recently in the Jevic case with regard to what the courts can and cannot do in priority skipping or class skipping settlements that don't have the consent of the affected class. And the argument that's primarily been made that Jevic doesn't apply in this case is really focused on the fact that the facts, and importantly, the causes of action are not property of the estate, they rest in the control and ownership of the purchaser. And since they're not property estate, ICL, the Third Circuit's opinion in ICL, specifically provides that they can be dealt with however the parties wish without regard to the priority scheme or the Bankruptcy Code, because it's simply not applicable, and that Jevic doesn't apply because of that.

So there are a couple of things going on there. One, there's a question about

whether ICL applies to the facts of this case. And I think it does not. I think the fact that thesis state causes of action were property of the estate on the petition date, they were property of the estate on the day of settlement, they were property of the estate when the settlement motion was filed. They are no longer property of the estate, but they were at some point property of the estate. And I don't think you can claim them for purposes of the ICL ruling by transferring them for some time to the purchaser with them just to be transferred back. And at the time of the closing of the transaction when they were transferred, it was contemplated that they would be transferred back hopefully very shortly; we had a hearing set for December 16th.

So I think you can't -- I think ICL is a narrow exception. I also think it's not applicable here. And I think that if it hasn't been overturned by Jevic altogether, and I'm not ruling that it has been overturned, I think it probably has been

significantly narrowed even further by the Supreme Court's ruling in Jevic.

But in any event, assuming ICL is still good law, assuming it has not been affected by Jevic, I find that this case is not controlled by ICL and doesn't fit ICL because the causes of action were property of the estate at one time. And the language that I quoted during argument made a point, the language from the opinion, makes a point in approving the transaction in ICL that it is important, among other things, that the transferred assets did not at any time belong to the Debtors' estate. So ICL is not applicable.

Is Jevic applicable? I think Jevic is applicable because even Jevic involved, in part, transfer of assets that were not property of the estate as part of the settlement. There was the $2 million from Citi, and the lien contributed by Sun, and neither of those were property of the estate. Nevertheless the Court didn't draw a distinction in its analysis in Jevic that was

focused one way or the other on whether the property of the estate issue mattered or not; it simply wasn't focused on by the Court. And counsel who was there and represented the WARN act plaintiffs represented to the Court, which is fine, I certainly accept it at face value, that it wasn't present in the Court's mind because the appellees pretty much abandoned the argument at some point during the appellate process. But one way or another, it wasn't on the mind of the Court.

So I don't think you can get too into, you know, Jevic doesn't apply to this because it's not property of the estate. That sort of falls away, because there were non-estate property elements of that settlement that were not, and it was not approved, and the Court really didn't delve into it one way or another, but a distinction that simply says Jevic doesn't apply because none of the property here is property of the estate, I think goes too far. I don't think we can say with certainty that's the distinguishing factor that would rule.

However, if I were faced with a true ICL situation post Jevic, I'd be in a tough spot. But I think I'd be constrained to follow or enforce ICL. But again, I find it's not applicable in this instance.

Also, the settlement here isn't just the cash and the estate asset or the causes of action. The Debtor is significantly involved in this settlement. We've talked a lot about the releases by the Debtors, the releases by the Committee. There's a continued, proposed continued involvement of the Debtors in the claims reconciliation process. We have the causes of action themselves which will stay in the court and arguably can only be brought by somehow affecting property of the estate, so I'm not even sure how that would work as a procedural or jurisdictional matter.

But in any event, the releases in particular, we're talking about actual property of the Debtors' estate beyond the causes of action. They're implicated by this settlement. So it's not a pure, just like

Jevic wasn't pure, estate property versus non-estate property, this settlement isn't pure estate property versus non-estate property.

So where does that leave us? I think that we're in a situation, when you think about Jevic here, is this more along the lines of a wage order or a critical vendor order or even a settlement order like in Iridium that happens sort of halfway through the case? The types of things the Court went out of its way to say, look, you know, these kinds of things may be okay as long as there's some Bankruptcy Code related objective that justifies violating the normal priority scheme. And there's a focus on things like does it promote a plan, does it promote reorganization of the business? None of that is going on here. It doesn't promote a plan, it doesn't promote saving the business. It promoted at the time a Code- related objective, which was the sale of the assets under 363. And it's a little awkward and unfair to the Debtors and the Committee here

that we're looking at this settlement nine months after it was reached and six months after the claim, you know, the case, the asset sales closed, so it kind of loses its immediacy.

But I don't see the exception that was talked about in Jevic applying under the facts of this case. And I think it's important, too, that we're not at the beginning, we're not in the middle, we're at the end of this case's Chapter 11 life. I assume the case is either going to dismiss or convert very shortly. I assume if I had approved it, it was going to dismiss or convert very shortly. The fact that this settlement wasn't tied specifically to the dismissal motion I don't think distinguishes Jevic, either.

I'm not going to get into the arguments about whether business judgment was satisfied, whether there was a breach of fiduciary duty by the Committee or by the Debtors. I'm going to rule based on the merits as I've described them. My alternative

ruling, though, is this -- or alternative comment, rather, not ruling. Is forget Jevic ever was written, and we were back where we were in August of 2016 where the Third Circuit had ruled on the Jevic opinion that they had ruled on, and ICL is still good law, and you can do structured dismissals in the Third Circuit and anywhere else. I'm still not at all convinced that I would have approved this even under the quote/unquote old rules. And that's because I don't believe the facts support freezing out the priority creditors in the way that the facts generally have supported that in other structured dismissal cases, for example, Judge Shannon's ruling in Jevic, and the fact that the WARN act claimants had to be frozen out because Sun didn't want to fund litigation against itself, so they weren't going to pay the WARN act claimants, and that's just the way it was.

We don't have any evidence here today that indicates why the priority creditors were cut out of the equation and why the deficiency claim creditors are being

treated differently. There's no evidence that said, look, this had to be done, this was a part of the deal. There was a lot of movement between August and September over the terms of the settlement. The economics may not have changed, but certainly the details changed, and I think the economics for priority creditors changed, and I think the economics for deficiency creditors changed, because the document that was alive in August was not the document that ultimately ended up controlling the transaction in September.

So I'm not ruling on this basis, but I just simply note that I think that even under the old rules of structured dismissals that are no longer applicable, I was still very troubled, and I think I had real concerns and may not have approved the settlement in that instance. But that's neither here nor there, because we live under the new rules and the new order, and in the first Jevic world, this just doesn't satisfy the law.

So sorry it's a rather lengthy ruling, but for those reasons, I am going to

deny the motion. The Court will enter an order. And I think that moots the procedures motion.

MR. RAMOS: Thank you, your Honor. Marcos Ramos. I think that's correct, and therefore, nothing further on the agenda. We thank your Honor very much for the time you scheduled today and for spending the day with us.

THE COURT: Of course; happy to do that. Thank you very much; we're adjourned.

(Hearing adjourned at 4:35 p.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Jennifer M. Guy, Registered Professional Reporter and Notary Public, do hereby certify that the foregoing record, pages 1 to 256 inclusive, is a true and accurate transcript of my stenographic notes.

Jennifer M. Guy, RPR

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SHORT BARK INDUSTRIES, INC., *et al.*[1]	Case No. 17-11502 (KG) Jointly Administered
Debtors.	**Hearing Date**: September 11, 2017 at 11:00 a.m. (ET)[2] **Objection Deadline**: September 5, 2017 at 4:00 p.m. (ET)

MOVANTS' JOINT SUPPLEMENTAL MOTION (I) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FACTORING AND OTHER FINANCIAL ACCOMMODATIONS, (II) AUTHORIZING THE USE OF CASH COLLATERAL, (III) GRANTING LIENS AND SUPERPRIORITY CLAIMS, (IV) GRANTING RELATED RELIEF, AND (V) SEEKING APPROVAL OF COMPROMISES RELATED TO FINANCING AND SALE MOTIONS

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors") and the Official Committee of Unsecured Creditors (the "Committee") appointed in the Debtors' chapter 11 cases (collectively, the "Movants"), through their undersigned counsel, hereby submit this supplemental joint motion (the "Joint Motion") for entry of a final order (the "Final DIP Order"),[3] substantially in the form attached hereto as Exhibit A, (i) authorizing the Debtors to obtain post-petition factoring and other financial accommodations, (ii) authorizing the use of cash collateral, (iii) granting liens and superpriority claims, (iv) granting related relief, and

[1] The Debtors in these jointly administered cases are Short Bark Industries, Inc. (Tax ID: 66-0655657) and EXO SBI, LLC (Tax ID: 46-5210695).

[2] The Movants have respectfully requested via separate Application that this Joint Motion be heard on shortened time.

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the proposed Final DIP Order.

(v) approving compromises related to the Debtors' financing and sale motions. In support of this Joint Motion, the Movants respectfully state as follows:

PRELIMINARY STATEMENT[4]

1. It goes without saying that the Debtors need additional liquidity to fund their post-petition operations and their ongoing sale marketing efforts. In an effort to reach a consensual agreement regarding post-petition financing and the sale process and avoid further cost and expense that the Debtors and their estates cannot afford, the Movants have agreed to a form of a Final DIP Order with LSQ Funding Group, L.C. ("LSQ") that resolves the majority of the Committee's concerns, enables LSQ to continue funding the Debtors' business operations and these chapter 11 cases, and optimizes the likelihood of a value maximizing sale process. The proposed Final DIP Order enables the Debtors to avoid an immediate shut-down and the resulting termination of over 500 of their employees.

2. Importantly, the proposed Final DIP Order resolves the Committee's (and other parties') material concerns over the financing terms and sale process. Under the proposed Final DIP Order, the Debtors' previously unencumbered assets, such as chapter 5 causes of action and proceeds, as well as D&O actions and proceeds (together, "Avoidance Actions"), will not be subject to LSQ's liens, claims or other interests. These assets will remain in the Debtors' estates for the benefit of unsecured creditors. Similarly, by LSQ's agreement to waive any unsecured deficiency claim and share a portion of any upside above any stalking horse bid, the proposed Final DIP Order ensures that unsecured creditors realize a distribution from any sale proceeds and that such distributions (if any) are made promptly following a closing of any such sale. Such agreements, as set forth in paragraph 19 of the proposed Final DIP Order, are not a result of the

[4] Capitalized terms used but not otherwise defined in this Preliminary Statement shall have the meanings ascribed to them in the remainder of this Joint Motion.

Movants' settlement of estate causes of action. They are a result of the Movants' desire to limit administrative cost that would continue to be incurred in the furtherance of pending disputes, as they relate to post-petition financing and the sale process. Further, the terms of the proposed Final DIP Order are meant to send a strong message to the market place that the Debtors are not liquidating, but continuing their daily business activities and focusing on maximizing value for the benefit of all stakeholders.

3. Simply put, the Debtors have met their burden related to the approval of their post-petition financing on the terms set forth in the proposed Final DIP Order. And, to the extent applicable, the terms of the proposed Final DIP Order easily satisfy the *Martin* factors related to compromises of pending disputes. As such, the Movants respectfully request that the Court approve the post-petition financing by entry of the proposed Final DIP Order.

JURISDICTION & VENUE

4. This Court (defined below) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and the Movants confirm their consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") to the entry of a final order by the Court in connection with this Joint Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. The statutory predicates for the relief requested herein are sections 105, 361, 362, 363, 364, 507, and 552 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq*. (the

"Bankruptcy Code"), Rules 2002, 4001, 6004, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Local Rule 4001-2.

FACTS & BACKGROUND

I. General Background

6. On July 10, 2017 (the "Petition Date"), Short Bark Industries, Inc. ("SBI") and EXO SBI, LLC each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, commencing the Debtors' chapter 11 cases (the "Chapter 11 Cases") in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Chapter 11 Cases are being jointly administered for procedural purposes only.

7. The Debtors are operating their business and managing their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

8. The Committee was appointed on July 18, 2017 and presently consists of six members: Global Enterprises, Atlantic Diving Supply, Inc., Milliken & Company, MMI Textiles, Inc., SSM Industries, Inc., and Southern Mills, Inc.

9. A detailed description of the Debtors' businesses and the facts surrounding the commencement of the Chapter 11 Cases is set forth, in part, in the *Declaration of Phil Williams in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* (the "First Day Declaration") [D.I. 5].

II. The Debtors' Prepetition Capital & Debt Structure

(i) Senior Secured Debt

10. On January 10, 2013, SBI entered into a certain Factoring and Security Agreement (the "Factoring Agreement") with LSQ. The Factoring Agreement was and is the Debtors' primary source of funding.

11. The Debtors have asserted that, under the Factoring Agreement, LSQ has a secured interest in substantially all of SBI's assets.

12. SBI allegedly defaulted under the Factoring Agreement, resulting in SBI and LSQ entering into a forbearance agreement dated October 25, 2016 (the "Forbearance Agreement"). Under the Forbearance Agreement and various extensions thereof, LSQ agreed to forego pursuing any claims arising from any alleged defaults under the Factoring Agreement until August 31, 2017.

13. On July 3, 2017, LSQ terminated the Forbearance Agreement due to alleged defaults by SBI.

14. LSQ asserted in its default letter that it was owed $9,598,281.11 under the Factoring Agreement and Forbearance Agreement. *Id.* Though the Debtors stated in the First Day Declaration that they dispute this amount, the Debtors have since retracted the assertions made in the First Day Declaration and, as indicated in the Second Interim DIP Order (defined below), the Debtors now stipulate that the Debtors were obligated to LSQ in the approximate principal amount of $9,853,433.00 as of the Petition Date. *See* Second Interim DIP Order (defined below), at ¶ 5(a) [D.I. 53].

(ii) Subordinated Secured Debt

15. In addition to obligations arising under the Factoring Agreement, Jerry Armstrong Consulting, LLC ("JAC") contends that it and the Debtors are parties to a separate agreement that purports to be a factoring agreement. JAC asserts that the Debtors owe JAC the principal

amount of $1,000,000.00. Further, while JAC claims to have a lien on substantially all of the Debtors' collateral, it appears that JAC's purported liens, to the extent they exist and to the extent they are properly perfected, are junior to those of LSQ and are otherwise limited to the specific factored invoices unpaid as of the Petition Date (value unknown) and certain fixtures (value unknown). The Debtors believe that JAC's either does not have a lien on assets of the Debtors or is an out of the money creditor when considering the value of the Debtors' assets and the outstanding senior obligations under the Factoring Agreement.

(iii) Unsecured Debt

16. In addition to the secured debt held by LSQ and other alleged secured claims set forth in the Debtors' schedules filed with the Court on August 15, 2017 [D.I. 126], the Debtors assert that they had approximately $7.1 million in unsecured trade debt as of the Petition Date. The Committee understands that the Debtors may be obligated for substantial other amounts to parties not referenced or identified in the First Day Declaration, such as insider obligations of questionable origin.

III. The DIP Motions

17. On July 11, 2017, the Debtors filed the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Use of Cash Collateral, (II) Scheduling a Final Hearing, and (III) Granting Related Relief* (the "Cash Collateral Motion") [D.I. 9]. The Cash Collateral Motion was granted by the Court on an emergency interim basis by court order entered on July 13, 2017 (the "First Interim Order") [D.I. 21], before the Committee was appointed in these Chapter 11 Cases.

18. Subsequently, on July 17, 2017, the Debtors filed the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Factoring and Other Financial Accommodations, (II) Authorizing the Use of Cash Collateral, (III) Granting*

Liens and Superpriority Claims, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief [D.I. 34] (the "DIP Motion," and together with this Joint Motion, the "DIP Motions"). On the following day—which was the day the Committee was appointed and selected counsel—the Committee filed its preliminary objection to the DIP Motion (the "Preliminary DIP Objection") [D.I. 46]. Through its Preliminary DIP Objection, the Committee identified various objections it had with respect to the proposed post-petition financing provided by LSQ.

19. The Court held an interim hearing on the DIP Motion on July 19, 2017 (the "Second Interim DIP Hearing"), at which time the parties were not able to reach an agreement to resolve the concerns raised by the Committee and ultimately, after a contested hearing that followed, overruled the Committee's objections to the interim financing.

20. Following the Second Interim DIP Hearing, the Court entered a second interim order approving the DIP Motion (the "Second Interim DIP Order") [D.I. 53], but preserved the Committee's rights and scheduled a further interim hearing on the DIP Motion for July 31, 2017, at 10:00 a.m. (ET) (the "Third Interim DIP Hearing"). *See* Second Interim DIP Order, at ¶ 23.

21. At the request of the Debtors (and over the objection of the Committee), the Court agreed to limit the scope of the Third Interim DIP Hearing. The sole issue subject to objections in connection with the Third Interim DIP Hearing was the scope and appropriateness of the new budget presented by the Debtors at the Third Interim DIP Hearing. Accordingly, the Committee filed a supplemental objection to the DIP Motion on July 27, 2017 [D.I. 81], explicitly reiterating its prior objections and reserving its rights to further supplement its prior objections or raise additional objections at the final hearing on the DIP Motion.

22. Following the Third Interim DIP Hearing, the Court entered, on July 31, 2017, a third interim order approving the DIP Motion [D.I. 91]. On August 18, 2017, the Court entered a

Fourth Interim DIP Order permitting funding through August 24, 2017, which order contemplates the entry of a Fifth Interim DIP Order extending interim financing through a final hearing on the DIP Motion scheduled for September 11, 2017.

23. As evidenced by the record in these Chapter 11 Cases, the Committee has raised various objections to the initial terms of the post-petition financing obtained by the Debtors from LSQ. The Committee raised its concerns with respect to, among other things: (i) the Roll-Up, (ii) the amount of LSQ's prepetition claim, (iii) the releases provided to LSQ and its affiliates, (iv) the likelihood that the estates are administratively insolvent, (v) the short length of time of the Challenge Period, (vi) the fact that the Committee was not granted standing to pursue a Challenge (if any), (vii) the granting of liens on and security interests in previously unencumbered assets such as avoidance actions and D&O claims and proceeds thereof, (viii) waivers of the estates' rights under sections 552(b) and/or 506(c) of the Bankruptcy Code, (ix) LSQ's ability to credit bid the full amount of its alleged debt, (x) LSQ's charging of default interest on outstanding prepetition obligations, and (xi) LSQ's entitlement to the payment of fees and expenses in connection with its defense of any challenge proceeding.

24. In connection with its opposition to the proposed financing and sale procedures, the Committee issued multiple discovery requests upon the Debtors and LSQ. During this discovery process, the Debtors and LSQ each consensually produced a significant amount of documents for the Committee to review. In addition, on August 14, 2017, the Committee conducted a F.R.C.P. 30(b)(6) deposition of a representative of LSQ. Throughout this discovery process, the Debtors, the Committee, and LSQ engaged in extensive negotiations to resolve the Committee's outstanding objections to the DIP Motion and the sale process. These efforts culminated in a resolution regarding the post-petition financing provided by LSQ, as well as the

sale process originally requested by the Debtors, and the Committees' various objections thereto. This resolution is memorialized by and incorporated into the proposed Final DIP Order attached hereto as Exhibit A.

25. The proposed Final DIP Order represents the resolution reached by the Movants and LSQ with respect to the Committee's objections to the DIP Motion and the pending sale process of substantially all of the Debtors' assets. The salient relevant terms of the proposed Final DIP Order are as follows:[5]

- Granting of DIP-financing, including a Roll-Up, not to exceed $17.7 million;
- Extension of the Committee's challenge period to the earlier to occur the closing of an asset sale or October 23, 2017, and the tolling of said challenge period upon the filing of a motion seeking standing;
- Preservation of previously unencumbered assets, including Avoidance Actions and claims against certain Reserved Parties, for the benefit of the Debtors' estates and stakeholders.
- Establishment of a mechanism determining the amount of LSQ's pre-petition claim;
- Modifications to the Carve-Out allocated to Committee professionals;
- Reservation of the Committee's rights with respect to sale-related matters; and
- Distribution of sale proceeds to LSQ on account if its senior secured claim and to general unsecured creditors, which unsecured creditor distributions being contingent upon the occurrence of a section 363 sale and subject to increases based on competitive bidding at the auction.

[5] The relevant material terms of the Final DIP Order are summarized in this Joint Motion for reference purposes only. All representations made herein are subject to and qualified by the terms and conditions set forth in the Final DIP Order Agreement attached hereto. All parties are encouraged to review the Final DIP Order in its entirety.

RELIEF REQUESTED

26. By this Joint Motion, the Movants seek entry of the Final DIP Order reflecting the terms of the proposed post-petition financing and the resolution of the Committee's objections to the DIP Motion and the sale process.

BASIS FOR RELIEF

A. The Terms of the Proposed Financing are Reasonable and Should be Approved

27. Section 364(c) of the Bankruptcy Code provides, among other things, that if a debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, the Court may authorize the debtor to obtain credit or incur debt (a) with priority over any and all administrative expenses specified in section 503(b) or 507(b) of the Bankruptcy Code, (b) secured by a lien on property of the estate that is not otherwise subject to a lien, or (c) secured by a junior lien on property of the estate that is subject to a lien. 11 U.S.C. § 364(c).

28. In seeking to obtain post-petition financing under section 364(c) of the Bankruptcy Code, the Debtors have the burden of demonstrating that:

> (1) They are unable to obtain unsecured credit pursuant to 11 U.S.C. § 364(b), *i.e.*, by allowing a lender only an administrative expense claim pursuant to 11 U.S.C. § 503(b)(1)(A);
>
> (2) The credit transaction is necessary to preserve the assets of the estate; and
>
> (3) The terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender.

In re Los Angeles Dodgers, LLC, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011). *See also In re Aqua Assocs.*, 132 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991); *In re Crouse Grp., Inc*., 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987).

29. Here, the Debtors have been unable to obtain unsecured credit by allowing a lender only an administrative claim. The Debtors assert that LSQ is the only lender that would provide post-petition financing to the Debtors on the proposed terms. The Debtors are severely leveraged and have minimal unencumbered assets, so few lenders, if any, could or would extend the necessary credit or factoring to the Debtors. Thus, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." *In re Sky Valley, Inc.,* 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom., Anchor Sav. Bank FSB v. Sky Valley, Inc.,* 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

30. The post-petition factoring provided by LSQ on the terms set forth in the proposed Final DIP Order is absolutely necessary to preserve the assets of the estate and the Debtors' decision is an exercise of their sound business judgment. *See In re Barbara K. Enters., Inc.*, 2008 WL 2439649, at *14 (Bankr. S.D.N.Y. Mar. 5, 2009) (explaining that courts defer to a debtor's business judgment). Without this financing, there is an extremely significant risk that the Debtors would be forced to shut down operations and liquidate their assets. The post-petition financing memorialized in the of the Final DIP Order provides the Debtors with sufficient liquidity to pay their limited ongoing operating expenses while enabling the Debtors to pursue the sale of substantially all of their assets for the benefit of all stakeholders in these Chapter 11 Cases. Without the post-petition factoring provided by LSQ, the Debtors would need to liquidate under chapter 7 with no chance of recovery for unsecured creditors.

31. The resolution of the Committee's objections via the terms of the proposed Final DIP Order is absolutely necessary to ensure that the Debtors receive the necessary post-petition financing to successfully sell their assets, provide a recovery for their estates, and pursue Avoidance Actions and other claims for the benefit of their estates and creditors.

32. The Final DIP Order does not memorialize, and is not intended to memorialize, a structured dismissal of the Debtors' Chapter 11 Cases. In fact, the Final DIP Order is designed to encourage just the opposite—it leaves unencumbered assets available for the Debtors' estates in order to come up with viable alternatives following the sale of substantially all of their assets. Avoidance Actions, D&O claims, and other claims, such as those against the Reserved Parties, are all remaining in the estates for the benefit of all stakeholders.

33. LSQ has agreed to provide the necessary financing on the terms set forth in the Final DIP Order. If such financing is not approved, there is no guarantee that LSQ would continue to provide funding in the face of increasing administrative expenses and an uncertain outcome to these cases.

34. The allocation of sale proceeds is also appropriate. LSQ is a senior secured lender of the Debtors and thus in the first position to receive any sale proceeds. By agreeing to fund distributions to unsecured creditors, which would be triggered only if there is a section 363 sale (whether by a credit bid or otherwise), LSQ is resolving the Committee's objection to initially proposed financing terms and a sale timeline and, in essence, is providing unsecured creditors with a portion of its collateral. Unlike in *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017), the Joint Motion is not a request for approval of a dismissal (structured or otherwise). Further, distributions (if any) to unsecured creditors are not made as a result of the Debtors' estates settling claims. The proposed distributions to unsecured creditors (again, if they

are triggered), are being made by LSQ from proceeds received by LSQ upon the sale of its collateral. *See, e.g., In re ICL Holding Co., Inc.*, 802 F. 3d 547, 555-56 (3rd Cir. 2015) (affirming compromise involving lender's distribution of sale proceeds directly to unsecured creditors). S*ee also In re Nuverra Environmental Solutions, Inc., et al.*, Case No. 17-10949 (Bankr. D. Del. July 25, 2017) (KJC) (overruling objection and entering confirmation order providing for "gifting" from secured lender to unsecured trade creditors who would otherwise receive no distribution under Bankruptcy Code's priority scheme, and rejecting objector's argument that the gift was from estate property), *motion for stay pending appeal denied*, Case. No. 17-1024, 2017 WL 3326453 (D. Del. Aug. 3, 2017) (RGA) (holding that a gift is a voluntary carve-out from lenders' collateral and does not violate the absolute priority rule). The Movants submit that nothing in the proposed Final DIP Order infringes upon the ruling of *Jevic*.[6]

35. Thus, the terms of the proposed Final DIP Order are fair and reasonable in light of the circumstances. The Final DIP Order was negotiated in good faith and at arm's length not only between the Debtors and LSQ, but between the Committee as well. The Final DIP Order represents the sound exercise of the Debtors' business judgment, and must be approved by the Court accordingly. *See, e.g., Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.),* 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving post-petition loan and receivables facility because such facility "reflect[ed] sound and prudent business judgment.").

B. The Terms of the Proposed Financing Reflect a Fair Compromise of Related Disputes

36. To the extent applicable, the terms of the proposed Final DIP Order, including paragraph 19 thereof, also meet the standards applicable for the approval of settlements.

[6] *See, e.g., Jevic*, 137 S.Ct. at 985 (distinguishing itself from the Second Circuit Court of Appeals' decision, *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), which involved a pre-plan settlement, because *Iridium* "does not state or suggest that the Code authorizes nonconsensual departures from the ordinary priority rules in the context of a dismissal—which is a *final* distribution of estate value . . . ."

37. Bankruptcy Rule 9019(a) provides that "on motion by the trustee and after a hearing, the Court may approve a compromise or settlement." Fed. R. Bankr. 9019(a). "Although Courts have discretion to approve settlements, the business judgment of the debtor in recommending the settlement should be factored into the court's analysis." *In re Motors Liquidation Company*, 555 B.R. 355, 365 (Bankr. S.D.N.Y. 2016). As one District Court for the District of Delaware noted, a bankruptcy court should examine a proposed settlement using the following factors derived from the Third Circuit Court of Appeals' decision of *In re Martin,* 91 F.3d 389, 393 (3d Cir. 1996):

> (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors.

In re Ashing Corporation, 552 B.R. 80, 83 (D. Del. 2015) (quoting *Martin*, 91 F.3d at 393). For the same reasons discussed above, the Movants respectfully submit that these factors weigh in favor of entering the Final DIP Order.

38. Here, while it is very difficult to predict the likelihood of success of the Committee's objections to the post-financing originally proposed by the Debtors, one thing is certain: the litigation would be time consuming and expensive. Litigating the complex issues raised by the Committee would drive up costs in these Chapter 11 Cases, where there are already significant budget constraints. Further, such continued litigation could result in the conversion of these cases to chapter 7, thereby diminishing the likelihood for a sale and, similarly, reducing the prospects of creditor recoveries.

39. Finally, the proposed Final DIP Order is in the best interest of all creditors of the estates. As discussed above, the consensual Final DIP Order alleviates the need for costly litigation and allows the Debtors, the Committee, and other stakeholders to focus on a value-

maximizing sale process. Moreover, the resolution memorialized by the Final DIP Order also increases the likelihood of a meaningful recovery for the Debtors' estates by creating a process for assessing the amount of the LSQ's prepetition claim and ensuring that previously unencumbered assets, such as Avoidance Actions and claims against the Reserved Parties remain unencumbered for the benefit of the Debtors' estates. Prior to the resolution reached by the Movants, the proposed financing would have encumbered these critical estate assets.

40. The proposed mechanism for the distributions by LSQ to general unsecured creditors is also meant to reduce cost and avoid undue delay. For instance, LSQ will be provided with a list of unsecured creditors who have either filed a claim or who have been listed on the schedules filed by the Debtors as having claims not otherwise identified as disputed, contingent, or unliquidated. After initial screening by the Committee for disputed, amended, superseded, or insider claims (including by the Reserved Parties), distributions will be made on the requested amounts. In sum, the resolution of disputes set forth in paragraph 19 of the Final DIP Order, including distribution mechanics of paragraph 19(e), are in the best interests of the Debtors and their creditors.

41. While the Movants believe that the resolution of the Committee's objections to the DIP Motion and certain sale matters via the modifications contained in the proposed Final DIP Order does not require approval by the Court under Bankruptcy Rule 9019, they are seeking such approval out of an abundance of caution. For the foregoing reasons, the Movants' resolution memorialized by the proposed Final DIP Order is in the best interest of the estates and, therefore, the relief requested herein should be approved. *In re Motors Liquidation Company*, 555 B.R. at 366-67 (approving a settlement which finally resolved a complex dispute regarding proper allocation between the DIP lender and general unsecured creditors of avoidance

claims and terms of proposed financing because the settlement was negotiated at arm's length and was in the best interest of the estate); *see also In re Martin,* 91 F.3d 389, 393 (3d Cir. 1996).

NOTICE

42. Notice of this Joint Motion has been served upon: (a) the UST, (b) all known creditors of the Debtor, (c) counsel for LSQ, (d) the Internal Revenue Service, and (e) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Movants request that the Court consider such notice to be sufficient notice under applicable rules.

[*Remainder of page intentionally left blank*]

WHEREFORE, for the foregoing reasons, the Movants respectfully request that this Court enter an order, substantially in the form submitted herewith as the Final DIP Order, authorizing the Debtors to incur post-petition financing on a final basis and approving the compromises memorialized therein, and granting the Movants such other and further relief as the Court deems just or proper.

Dated: August 22, 2017 Respectfully submitted,

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Ex. A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
SHORT BARK INDUSTRIES, INC.,[1]	)	Case No. 17-11502 (KG)
Debtors.	)	(Jointly Administered)
	)	**Related to Docket Nos. 9, 14, 23, 34, 53 and 91**

FINAL ORDER (I) AUTHORIZING DEBTORS TO OBTAIN SECURED POSTPETITION FACTORING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e), (II) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY CLAIM, (IV) AUTHORIZING USE OF CASH COLLATERAL BY THE DEBTOR AND PROVIDING FOR ADEQUATE PROTECTION (V) MODIFYING THE AUTOMATIC STAY, AND (VI) GRANTING RELATED RELIEF

Upon the motions and supplement [Docket Nos. 9, 14 and 34] (collectively, the "Motion") of EXO SBI, LLC ("EXO") and Short Bark Industries, Inc. ("Short Bark" and collectively with EXO, the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases"), under sections 105, 361, 362, 363(b), 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (as amended, the "Bankruptcy Code"), Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the corresponding Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") seeking, among other things:

(1) authorization for Short Bark to enter into and obtain secured post-petition factoring, consisting of the purchase by LSQ Funding Group, LC, as purchaser, (the

[1] The Debtors in these jointly administered cases are Short Bark Industries, Inc. (Tax ID: 66-0655657) and EXO SBI, LLC (Tax ID: 46-5210695).

"Purchaser" or "LSQ") of certain of Short Bark's Accounts[2] up to an aggregate maximum amount (including pre-Petition Date purchases of Accounts) not to exceed $17.8 million including the Roll-Up (as defined below) of the outstanding balance of the Pre-Petition Obligations (as defined below) (the "DIP Financing") for the Interim Period (defined below).

(2) authorization for Short Bark to execute the Ratification and Amendment Agreement, dated as of July 19, 2017, substantially in the form attached as Exhibit A to the Motion (including all amendments thereto, the "Ratification and Amendment Agreement" and collectively with any other related agreement, instrument or other document delivered or executed in connection with the Ratification and Amendment Agreement, including the "Budget" (as defined in the Ratification and Amendment Agreement and attached as Schedule C thereto and Exhibit A attached hereto) (collectively, the "DIP Documents"), by and among Short Bark, as seller and LSQ;

(3) authorization for Short Bark to use "cash collateral" as such term is defined in section 363 of the Bankruptcy Code (the "Cash Collateral") in which LSQ has an interest;

(4) grant LSQ the Replacement Liens and Pre-Petition Superpriority Claims (each as defined below) to the extent of any Pre-Petition Diminution in Value (as defined below) of LSQ's interest in the Pre-Petition Collateral (as defined below) as adequate protection for the granting of the DIP Liens (as defined below) to LSQ, the use of Cash Collateral, and for the imposition of the automatic stay;

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms as used in the Ratification and Amendment Agreement.

(5) authorization for Short Bark to execute and enter into the related DIP Documents and to perform such other and further acts as may be required in connection with the DIP Documents;

(6) Debtors' waiver of any right to surcharge against collateral, including the Collateral and Cash Collateral (as defined herein), under section 506(c) of the Bankruptcy Code;

(7) modification of the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Documents and this order (the "Final Order"); and

(8) waive the fourteen (14) day stay provisions of Bankruptcy Rule 6004(h) and provide for immediate effectiveness of this Final Order.

And the Court having entered the *Emergency Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 23] (the "Interim Order") after conducting an interim hearing on the Motion on July 13, 2017 (the "Interim Hearing");

And the Court having entered the *Second Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 53] (the "Second Interim Order") after

conducting the second interim hearing on the Motion on July 19, 2017 (the "Second Interim Hearing");

And the Court having entered the *Third Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 91] (the "Third Interim Order") after conducting the third interim hearing on the Motion on July 31, 2017 (the "Third Interim Hearing") (The First Interim Hearing, Second Interim Hearing and Third Interim Hearing are collectively referred to as, the "Interim Hearings" and the First Interim Order, Second Interim Order and Third Interim Order are collectively referred to as, the "Interim Orders");

And the Court having found that due and sufficient notice of the Motion and the final hearing on the Motion (the "Final Hearing") was provided by the Debtors as set forth in paragraph 3 below, in accordance with the Bankruptcy Rules and the Local Rules; and the Court having held the Final Hearing on the Motion on August 18, 2017; and the Court having considered all the pleadings filed with this Court, including any objections to the Motion; and as further stated on the record at the Interim Hearing and Final Hearing; and upon the record made by the Debtors at the Interim Hearing and Final Hearing; and upon the entire record of the Bankruptcy Case; and after due deliberation and consideration and sufficient cause appearing therefor;

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Disposition*. The Motion is granted on a final basis for the period ending October 13, 2017 (the "DIP Period") in accordance with the terms set forth herein. Any objections to the

relief sought in the Motion, and any reservations of rights with respect to such relief, that have not been previously resolved or withdrawn, are overruled on the merits. This Final Order shall be valid, binding and enforceable on all parties in interest and fully effective immediately upon entry.

2. *Commencement of the Bankruptcy Case, Jurisdiction and Venue*. On July 10, 2017 (the "Petition Date"), the Debtors each filed a petition with this Court commencing a case under chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate their businesses and managing their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. This Court has jurisdiction over the Bankruptcy Case and the Motion as a core proceeding, and over the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334.

3. *Notice*. Notice of the Final Hearing and the proposed entry of this Final Order has been provided to: (i) counsel to the Official Committee of Unsecured Creditors (the "Committee"); (ii) the twenty (20) largest unsecured creditors of the Debtor; (iii) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"); (iv) counsel to LSQ; (v) all known parties asserting a lien against the Collateral; (vi) any taxing authority having a claim against the Debtors; and (vii) any other party that has filed a request for notice pursuant to Bankruptcy Rule 2002 or is required to receive notice under the Bankruptcy Rules and the Local Rules. The notice given by the Debtors of the Final Hearing and the proposed entry of this Final Order constitutes appropriate, due and sufficient notice thereof under the circumstances and complies with sections 102(1), 363 and 364 of the Bankruptcy Code, Bankruptcy Rules 4001(b) and (c) and the Local Rules, and no other notice need be provided prior to entry of this Final Order.

4. *Findings Regarding the Financing*.

(a) Good cause has been shown for the entry of this Final Order.

(b) Short Bark has a critical need to obtain the DIP Financing and use of the Collateral and Cash Collateral in order to permit, among other things, the orderly continuation of the operation of its businesses, to maintain business relationships with vendors, suppliers and customers, and to make payroll. Access to sufficient working capital and liquidity through the incurrence of new indebtedness for borrowed money and other financial accommodations is vital to Short Bark's restructuring efforts and the preservation and maintenance of the going concern value of Short Bark.

(c) Short Bark is unable to obtain financing on more favorable terms from sources other than LSQ under the DIP Documents and is unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. Short Bark is also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) or 364(c)(3) of the Bankruptcy Code without Short Bark granting to LSQ, subject to the Carve-Out (as defined herein) as provided for herein, the DIP Liens and the Superpriority Claims (each as defined herein) under the terms and conditions set forth in this Final Order and in the DIP Documents. Short Bark is also unable to obtain credit for borrowed money without allowing LSQ to consummate a Roll-Up of the Pre-Petition Obligations into the DIP Financing by applying all collections received by the Debtors and advances to Short Bark under the DIP Financing in the following order: (x) first, to reduce the remaining outstanding obligations pursuant to the Pre-Petition Obligations (the "Roll-Up"), and (y) second, to reduce the DIP Obligations and otherwise deeming the Pre-Petition Obligations part of the DIP Obligations,

which arrangement shall be administered pursuant to the terms and conditions of this Final Order and the Ratification and Amendment Agreement.

(d) Based on the record presented to the Court at the Interim Hearings and Final Hearing, the terms of the DIP Financing and the use of the Collateral and Cash Collateral are fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with its fiduciary duties and constitute reasonably equivalent value and fair consideration.

(e) The DIP Financing and the use of Collateral have been negotiated in good faith and at arm's length among the Debtors, and LSQ, and all of Short Bark's obligations and indebtedness arising under, in respect of or in connection with the DIP Financing and the DIP Documents, including without limitation, (i) all loans incurred by or made to Short Bark under the Ratification and Amendment Agreement and (ii) any other "Obligations" (as defined in the Ratification and Amendment Agreement), (collectively, the "DIP Obligations"), shall be deemed to have been extended by LSQ and their affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. The Roll-Up and any compensation or payment that may be received by LSQ incremental to what would have been received had such Roll-Up not occurred, constitute compensation for, in consideration for, and solely on account of, the agreement of LSQ to make available the DIP Financing and not as payments under, adequate protection for, or otherwise on account of, the Pre-Petition Obligations.

(f) The Debtors have requested entry of this Final Order pursuant to Bankruptcy Rules 4001(c), 4001(d) and the Local Rules. Short Bark requires access to the DIP

Financing provided by the DIP Financing and use of the Collateral and Cash Collateral in order to continue its operations. Consummation of the DIP Financing and authorization of the use of the Collateral and Cash Collateral in accordance with this Final Order and the DIP Documents is therefore in the best interests of the Debtors' estates.

5. *Debtors Acknowledgements, Agreements and Stipulations.* Subject to the applicable Challenge Period set forth in paragraph 18 of this Final Order, the Debtors (on behalf of themselves and their estates) admit, stipulate, acknowledge and agree that (collectively, the "Debtors' Stipulations"):

(a) Pursuant to the Pre-Petition Documents, Short Bark was indebted to LSQ in the approximate principal amount of $9,853,433 plus accrued and accruing interest, costs, expenses, fees (including attorneys' fees and legal expenses) other charges and other obligations, (collectively the "Pre-Petition Obligations").

(b) To secure the Pre-Petition Obligations, Short Bark granted security interests and liens (the "Pre-Petition Liens") to LSQ upon all of Short Bark's personal property and fixtures, and proceeds thereof, including without limitation: accounts; chattel paper; inventory; equipment; instruments, including promissory notes; investment property; documents; deposit accounts; letter of credit rights; general intangibles; and supporting obligations (collectively, the "Pre-Petition Collateral"), with priority over all other liens except any liens otherwise permitted by the Pre-Petition Documents and all other liens that were in fact senior in priority to the Pre-Petition Liens as of the Petition Date, if any (which were valid, properly perfected, unavoidable, senior to the Pre-Petition Liens, and not subject to a subordination agreement, are referred to herein as the "Permitted Prior Liens"). To avoid any doubt, the term "Permitted Prior Liens" does not include, and specifically excludes, the liens securing the Pre-

Petition Obligations, which Pre-Petition Liens and claims are to be subordinated to, and junior solely to, the DIP Liens.

(c) As of the Petition Date (i) the Pre-Petition Liens were valid, binding, enforceable, perfected first-priority liens and are not subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and subject only to any Permitted Prior Liens, (ii) the Pre-Petition Obligations constituted legal, valid and binding obligations of Short Bark, enforceable in accordance with the terms of the Pre-Petition Documents (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), no offsets, defenses or counterclaims to any of the Pre-Petition Debt exists, and no portion of the Pre-Petition Obligations is subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and (iii) the Pre-Petition Obligations constitute allowable secured claims, and (b) on the date that the Interim Order was entered, the Debtors have waived, discharged and released LSQ, together with their affiliates, agents, attorneys, officers, directors and employees, of any right the Debtors may have (x) to challenge or object to any of the Pre-Petition Obligations, (y) to challenge or object to the security for the Pre-Petition Obligations, and (z) to bring or pursue any and all claims, objections, challenges, causes of action and/or choses in action arising out of, based upon or related to the Pre-Petition Documents or otherwise. The Debtors do not possess and will not assert any claim, counterclaim, setoff or defense of any kind, nature or description which would in any way affect the validity, enforceability and non-avoidability of any of the Pre-Petition Documents or the Pre-Petition Liens, and/or security interests in the Pre-Petition Collateral, or any claim of LSQ pursuant to the Pre-Petition Documents.

(d) In entering into the DIP Documents, and as consideration therefor, the Debtors hereby agree that until such time as all DIP Obligations are indefeasibly paid in full in cash and the DIP Documents are terminated in accordance with the terms thereof, the Debtors shall not in any way prime or seek to prime the Pre-Petition Liens and the security interests and DIP Liens provided to LSQ under this Final Order by offering a subsequent lender or a party-in-interest a superior or *pari passu* lien or claim pursuant to section 364(d) of the Bankruptcy Code or otherwise.

(e) LSQ has a security interest and lien in Cash Collateral, including on all amounts on deposit in Debtors' banking, checking, or other deposit accounts and all proceeds of Pre-Petition Collateral to secure the other deposit accounts and all proceeds of Pre-Petition Collateral to secure the Pre-Petition Obligations, to the same extent and order of priority as that which was held by each such party pre-petition.

6. *Authorization of the DIP Financing and the DIP Documents and Use of Cash Collateral*.

(a) The DIP Documents are approved, and Short Bark is hereby authorized to sell to LSQ all Accounts of Short Bark and incur indebtedness (including pre-Petition Date purchases of Accounts and the Roll-Up) and use Cash Collateral in the aggregate maximum amount not to exceed $17.8 million on a final basis, plus interest, fees and other expenses and amounts provided for in the DIP Documents, in accordance with the terms of the DIP Documents, which only shall be used for the purposes permitted under the DIP Documents and in accordance with the Budget, including (i) to provide for working capital needs and for general corporate purposes of Short Bark, and (ii) to make payments or fund amounts otherwise permitted in this Final Order and the DIP Documents.

(b) In furtherance of the foregoing and without further approval of this Court, the Debtors are authorized and directed to perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements), and to pay all fees that may be reasonably required or necessary for the Debtors' performance of its obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the Ratification and Amendment Agreement and the other DIP Documents, any security documents contemplated thereby and any exhibits attached thereto;

(ii) the non-refundable payment to LSQ of the fees referred to in the Ratification and Amendment Agreement, and reasonable costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained by LSQ as provided for in the DIP Documents;

(iii) the execution, delivery and performance of one or more amendments, waivers, consents or other modifications to and under the DIP Documents for, among other things, in each case in such form as LSQ may agree, it being understood that no further approval of the Court shall be required for amendments, waivers, consents or other modifications to and under the DIP Documents or the DIP Obligations that do not materially and adversely impair the rights of Short Bark, its estate or other parties in interest (other than the parties to the Ratification and Amendment Agreement) thereunder; and

(iv) the performance of all other acts required under or in connection with the DIP Documents.

(c) The DIP Documents constitute valid and binding obligations of the Debtors and are enforceable against the Debtors in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Documents or this Final Order shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under sections 502(d) or 548 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

7. *Accounts.*

(a) The Debtors' existing cash management system and all bank accounts and investment accounts established in connection therewith and with the DIP Financing in accordance with the Ratification and Amendment Agreement (the "Cash Management System") shall be used for the purposes and on the terms and conditions set forth in the Ratification and Amendment Agreement and the other DIP Documents. The Debtors are authorized and directed to establish and maintain control agreements on any such bank accounts used as part of the Cash Management System (the "Accounts") as may be required by the Ratification and Amendment Agreement, the other DIP Documents, or as directed by LSQ, and the banks at which such accounts are maintained are authorized to execute and deliver such control agreements as required by this Final Order and the Ratification and Amendment Agreement. The control agreements shall confirm the first priority perfected lien on the Accounts granted pursuant this Final Order in favor of LSQ.

(b) Each depository institution at which the Debtors maintain a depository account shall immediately share dominion and control with LSQ over each such depository

account of the Debtors that was subject to a deposit account control agreement in favor of any such party as of the Petition Date, and, as of the date of this Final Order and hereafter, such deposit account control agreements shall be additionally enforceable by LSQ against, and binding upon, each depository institution party thereto until the DIP Obligations have been paid in full in cash and the Ratification and Amendment Agreement shall have been terminated, after which such deposit account control agreements shall again be solely enforceable by the depository institution that is a party thereto.

8. *Adequate Protection for LSQ.* As adequate protection for the interest of LSQ in the Pre-Petition Collateral (including Cash Collateral) (a) on account of the granting of the DIP Liens, (b) for Short Bark's use of the Collateral and Cash Collateral and (c) for other decline in value arising out of the automatic stay or Short Bark's use, sale, depreciation, or disposition of the Pre-Petition Collateral (collectively, the "Pre-Petition Diminution in Value"), LSQ shall receive adequate protection as follows:

(a) Pre-Petition Replacement Liens. Solely to the extent of any Pre-Petition Diminution in Value of the interests of LSQ in the Pre-Petition Collateral, LSQ shall have, subject to the terms and conditions set forth below, pursuant to sections 361, 363(e) and 364(d) of the Bankruptcy Code additional and replacement security interests and Liens in the DIP Collateral (the "Pre-Petition Replacement Liens"), which shall be junior only to the DIP Liens, Permitted Prior Liens, if any, and the Carve-Out as provided herein.

(b) Pre-Petition Superpriority Claim. To the extent of any Pre-Petition Diminution in Value of LSQ's interest in the Pre-Petition Collateral, LSQ shall have an allowed superpriority administrative expense claim pursuant to Bankruptcy Code section 507(b) (the "Pre-Petition Superpriority Claim") which shall have priority (except with respect to the DIP

Liens, the DIP Superpriority Claim, and the Carve-Out) over any other claims under sections 364(c)(1), 503(b) and 507(b) of the Bankruptcy Code and otherwise over all administrative expense claims and unsecured claims against the Debtors and their estate, now existing or hereafter arising, of any kind or nature whatsoever including, without limitation, administrative expenses of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 503(a), 503(b), 507(a), 507(b), 546(c), 546(d), 726(b), 1113, and 1114 of the Bankruptcy Code and, if approved in the Final Order, section 506(c) of the Bankruptcy Code, whether or not such expenses of claims may become secured by a judgment or other non-consensual lien, levy or attachment.

9. *DIP Superpriority Claims*. Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed claims against the Debtors with priority over any and all administrative expenses, diminution claims and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment (the "DIP Superpriority Claims"), which allowed DIP Superpriority Claims shall be payable from and have recourse to all pre- and post-petition property of the Debtors and all proceeds thereof, subject only to the payment of the Carve-Out to the extent specifically provided for herein. (The Pre-Petition Superpriority Claim and DIP Superpriority Claim are collectively referred to as, the **"**Superpriority Claims**"**)

10. *DIP Liens*. As security for the DIP Obligations, effective and perfected upon the date of this Final Order and without the necessity of the execution, recordation of filings by the Debtors of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or the possession or control by LSQ of, or over, any Collateral, LSQ shall receive, and is granted by Short Bark, for its own benefit, a fully perfected pledge of all equity, and a fully perfected security interest in all prepetition and post-petition assets of Short Bark (including the Accounts), all property identified in clauses (a), (b) and (c) below, and in each case, all proceeds resulting therefrom (such property being collectively referred to as the "DIP Collateral"), subject only to the Permitted Prior Liens, if any, and payment of the Carve-Out as set forth in this Final Order and the Ratification and Amendment Agreement (all such liens and security interests granted to LSQ, for its benefit, pursuant to this Final Order and the DIP Documents, the "DIP Liens"):

(a) First Lien on Cash Balances and Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and post-petition property of the Debtor, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens (collectively, "Unencumbered Property"), including without limitation, all inter-company notes or inter-company receivables due to the Debtors, any and all cash and cash collateral of the Debtors and any investment of such cash and cash collateral, inventory, any accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties,

patents, copyrights, trademarks, trade names, other intellectual property, capital stock of all subsidiaries and the proceeds of all the foregoing.

(b) Liens Priming the Prepetition Liens and Other Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, subject only to the Permitted Prior Liens, if any, and payment of the Carve-Out, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre- and post-petition property of the Debtors (including, without limitation, any and all cash and Cash Collateral of the Debtors (whether maintained with LSQ or otherwise) and any investment of such cash and cash collateral, inventory, any accounts, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock of subsidiaries, and the proceeds of all the foregoing), whether now existing or hereafter acquired.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected security interest in and lien upon all pre- and post-petition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 10, as to which the liens and security interests in favor of LSQ, for its benefit, will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the Petition Date or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which liens in favor of LSQ are immediately junior to such valid, perfected and unavoidable liens ("Third Party Liens").

(d) Liens Senior to Certain Other Liens. The DIP Liens shall not be (a) subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or (ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any liability of the Debtors or (b) subordinated to or made *pari passu* with any other lien or security interest under sections 363 or 364 of the Bankruptcy Code or otherwise.

11. *Protection of LSQ's Rights*.

(a) All Collateral shall be free and clear of all liens, claims and encumbrances, except for those liens, claims and encumbrances expressly permitted under this Final Order (including Third Party Liens) and the DIP Documents.

(b) So long as there are any DIP Obligations outstanding (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) under the Ratification and Amendment Agreement, LSQ may file any financing statement or other document to perfect the liens granted pursuant to this Final Order, or as may be required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(c) Notwithstanding section 362 of the Bankruptcy Code, without further order or application to the Court, the automatic stay is hereby vacated and modified to the extent necessary to permit LSQ to exercise, upon the occurrence and during the continuation of any Event of Default, all rights and remedies provided for in this Final Order, the DIP Documents or applicable law, including, without limitation, upon three (3) business days' written notice to the Debtors, the Committee and the U.S. Trustee one or more of the following actions, at the same or

different times: (A) reduce the amount of, suspend or terminate any outstanding Commitments; (B) terminate the Financing; (C) charge default interest on the DIP Loans; (D) declare all or any portion of the DIP Loans to be due and payable; (E) subject to the Carve-Out, realize on any or all Collateral and exercise any and all remedies under the DIP Documents, any applicable control agreement and applicable law, including the right to set off or seize amounts in accounts, including the Accounts, maintained with or under control of LSQ.

(d) In any hearing before this Court within such three (3) business day period regarding any exercise of rights or remedies, the only issue that may be raised by the Debtor, Committee or any party in interest shall be whether, in fact, an Event of Default has occurred. The Debtors hereby waive their right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of LSQ set forth in this Final Order or the DIP Documents. In no event shall LSQ be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the Collateral. The delay or failure of LSQ to seek relief or otherwise exercise or enforce its rights and remedies under the DIP Documents or this Final Order shall not constitute a waiver of LSQ's rights or remedies hereunder, thereunder or otherwise.

(e) The Debtors shall pay, no later than ten (10) days following receipt by the Debtors of any invoice (which may be provided in summary fashion or redacted to protect privilege), with a copy going to the Committee and United States Trustee: the reasonable and documented fees and out-of-pocket expenses for the professionals of LSQ; provided that no payment shall be made by the Debtors if an objection is made by the Debtors, the Committee or the United States Trustee within such ten (10) day period, except to the extent such fees and expenses are not subject to the objection, unless consensually resolved by the affected

professional and objecting party or approved by the Court. The fees and expenses paid hereunder shall not otherwise be subject to separate approval by the Court or to the United States Trustee Guidelines and no recipient of any such payment shall be required to file with respect thereto any interim or final fee application with this Court. All such unpaid fees, costs, expenses and other amounts owed or payable shall be secured by the Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Final Order and the DIP Documents.

12. *Carve-Out.*

(a) A "Carve-Out Event" shall mean an "Event of Default" (as defined in the Ratification and Amendment Agreement) written notice of which has been given by LSQ to the Debtors and counsel to the Committee; provided that no Carve-Out Event shall be deemed to have occurred for purposes of this Final Order if any such Event of Default is subsequently waived by LSQ.

(b) (i) LSQ's liens on the Collateral and all other claims and liens thereon, including any Superpriority Claims, shall be subject to a carve out (the "Carve-Out") in an amount not to exceed: (A) all accrued but unpaid professional fees and disbursements of professional persons retained by the Debtors and the Committee by order of this Court and payable under sections 328, 330 and/or 331 of the Bankruptcy Code (collectively, the "Professional Expenses") incurred by the Debtors or the Committee prior to the occurrence of a Carve-Out Event (the "Pre-Carve Out Amount"), provided that such Pre-Carve Out Amount shall not exceed the amounts set forth in the Budget for such items through the occurrence of such Carve-Out Event, provided further that with respect to the Committee professionals (i) the Pre-Carve-Out Amount shall be $75,000 and the (ii) Carve-Out shall be automatically increased

(irrespective of the DIP Budget) to an aggregate total of $190,000 upon the occurrence of a Sale Closing Date, plus (B) fees incurred and payable to the clerk of the Bankruptcy Court and to the U.S. Trustee pursuant to 28 U.S.C. § 1930, to the extent such fees were incurred prior to delivery by LSQ to the Debtors and the Committee of a notice of an Event of Default. In no event shall any of the Carve-Out be used to pay any fees or expenses of any person retained in a chapter 7 case under sections 326, 327 or 328 of the Bankruptcy Code. Notwithstanding the foregoing, no portion of the Carve-Out and no portion of any amounts approved for payment prior to an Event of Default shall be utilized in a manner prohibited under the Ratification and Amendment Agreement and paragraph 12 of this Final Order.

(c) No portion of the DIP Financing, the Collateral, Cash Collateral, or the Carve-Out shall be used or be available to pay any fees, disbursements, costs or expenses incurred by any party in connection with: (i) challenging the amount, extent, validity, perfection, priority or enforceability of, or asserting any defense, counterclaim or offset to, the DIP Obligations, or the security interests and liens of LSQ in respect thereof; or (ii) any investigation (including discovery proceedings), assertion, initiation or prosecution of any other claims, causes of action, adversary proceedings or other litigation against LSQ. Provided, however, that, such exclusion does not encompass any investigative work conducted by the professionals for the Committee, prior to bringing any action relating to the foregoing.

13. *Limitation on Charging Expenses Against Collateral*. Except to the extent of the Carve-Out, no expenses of administration of the Bankruptcy Case or any future proceeding that may result therefrom, including conversion of the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral under section 506(c) of the Bankruptcy Code or any similar

principle of law, without the prior written consent of LSQ, and no such consent shall be implied from any other action, inaction, or acquiescence by LSQ.

14. *Perfection of DIP Liens*.

(a) Subject to the provisions of paragraph 11 above, LSQ is hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, or take possession of or control over, or take any other action (including taking or releasing any liens or pledges granted by this Final Order) in order to validate and perfect the DIP Liens granted to it hereunder. Whether or not LSQ shall, in its sole discretion, choose to file such financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments that may be otherwise required under federal or state law in any jurisdiction, or take any action, including taking possession, to validate and perfect such security interests and liens, and, or take possession of or control over, or otherwise confirm perfection of the liens and security interests granted to it hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, as of the date hereof. The failure of the Debtors to execute any documentation relating to the enforceability, priority or perfection of the DIP Liens shall in no way affect their validity, perfection or priority.

(b) If LSQ, in its sole discretion, elects to file any financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise to confirm perfection of the DIP Liens, the Debtors shall cooperate with and assist in such process, the stay imposed under section 362 of the Bankruptcy Code is hereby lifted to permit the filing and recording of a certified copy of this Final Order or any such financing

statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, and all such documents shall be deemed to have been filed and recorded at the time of and on the date of the entry of this Final Order. Upon the request of LSQ, without any further consent of any party, the Debtors are authorized and directed to take, execute, deliver and file such instruments (in each case without representation or warranty of any kind) to enable LSQ to further validate, perfect, preserve and enforce the DIP Liens.

(c) A certified copy of this Final Order may, in the discretion of LSQ, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Final Order for filing and recording.

(d) Any provision of any lease or other license, contract or other agreement that requires (i) the consent or approval of one or more landlords or other parties or (ii) the payment of any fees or obligations to any governmental entity, in order for the Debtors to pledge, grant, sell, assign, or otherwise transfer any such leasehold interest, or the proceeds thereof, or other Collateral related thereto, is hereby deemed to be inconsistent with the applicable provisions of the Bankruptcy Code. Any such provision shall have no force and effect with respect to the transactions granting the DIP Liens, in such leasehold interest or the proceeds of any assignment and/or sale thereof by the Debtors, in favor of LSQ in accordance with the terms of the Ratification and Amendment Agreement or this Final Order. Notwithstanding anything to the contrary contained herein and for the avoidance of doubt, the liens granted in this Final Order with respect to the Collateral shall include the proceeds of leased real property which are not direct liens on the Debtors' leases of real property.

15. *Preservation of Rights Granted Under the Final Order*.

(a) Unless all DIP Obligations shall have been indefeasibly paid in full, it shall constitute an Event of Default and terminate the right of Short Bark to use the Financing and/or any cash provided by the DIP Loans if there is entered (i) any modifications or extensions of this Final Order without the prior written consent of LSQ, and no such consent shall be implied by any other action, inaction or acquiescence by LSQ, or (ii) an order converting or dismissing the Bankruptcy Case. If an order dismissing the Bankruptcy Case under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (A) the DIP Liens granted to LSQ pursuant to this Final Order shall continue in full force and effect and shall maintain their priorities as provided in this Final Order until all DIP Obligations shall have been paid and satisfied in full (and that such DIP Liens shall, notwithstanding such dismissal, remain binding on all parties in interest), (B) the other rights under this Final Order shall not be affected and (C) this Court shall retain jurisdiction, notwithstanding such dismissal to the fullest extent permitted by law, for the purposes of enforcing the liens and security interests referred to in this paragraph.

(b) If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect (i) the validity of any DIP Obligations incurred prior to the actual receipt of written notice by LSQ, of the effective date of such reversal, modification, vacatur or stay or (ii) the validity or enforceability of any lien, or the priority thereof authorized or created pursuant to the Ratification and Amendment Agreement or this Final Order with respect to any DIP Obligations. Notwithstanding any such reversal, modification, vacatur or stay, any use of cash Collateral, or DIP Obligations incurred by the Debtors to LSQ before the actual receipt of written notice by LSQ of the effective date of such reversal, modification, stay or vacatur shall be governed in all

respects by the original provisions of this Final Order, and LSQ shall be entitled to all the rights, remedies, privileges and benefits granted in sections 363(m) and 364(e) of the Bankruptcy Code, this Final Order and pursuant to the DIP Documents with respect to all uses of cash Collateral and DIP Obligations.

(c) Except as expressly provided in this Final Order or in the DIP Documents, the DIP Liens and all other rights and remedies of LSQ granted by the provisions of this Final Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting the Bankruptcy Case to a case under chapter 7 or dismissing the Bankruptcy Case, or (ii) the entry of an order confirming a chapter 11 plan in the Bankruptcy Case. The DIP Liens and all other rights and remedies of LSQ granted by the provisions of this Final Order and the DIP Documents shall continue in full force and effect in this Bankruptcy Case or in any succeeding chapter 7 case under the Bankruptcy Code until the DIP Obligations are indefeasibly paid in full in cash. The Debtors shall not propose or support any plan of reorganization or liquidation or entry of any confirmation order that is not conditioned upon the indefeasible payment in full in cash of all DIP Obligations on or prior to the earlier of (i) the effective date of such plan of reorganization or liquidation (unless LSQ shall have consented in writing to such plan) and (ii) an Event of Default.

16. *LSQ's Right to Credit Bid.* LSQ shall have the right to "credit bid" the full amount of its allowed claims, including without limitation, claims on account of outstanding principal, interest and any other amounts due and owing under the DIP Documents, during any sale of the Debtors' assets, including without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code or included as part of any restructuring plan subject to confirmation under section1129(b)(2)(A)(iii) of the Bankruptcy Code.

17. *Limitation on Use of DIP Financing Proceeds and Collateral*. The Debtors shall use the DIP Financing and the Collateral solely as provided in DIP Documents and this Final Order. The Debtors have released and waived any and all claims and causes of action against LSQ, and its agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, each in their capacities as such, related to the DIP Financing, this Final Order or the negotiation of the terms thereof. Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings under the Ratification and Amendment Agreement, Collateral, or the Carve-Out may be used to: (a) object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under this Final Order, the DIP Documents, or the liens or claims granted under this Final Order or the DIP Documents; (b) assert any claims and causes of action under sections 502(d), 542, 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, "Avoidance Actions") or any other claims, counterclaims or causes of action, objections, contests or defenses against LSQ, or its agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors; (c) oppose LSQ's assertion, enforcement or realization on the Collateral or cash collateral in accordance with the DIP Documents or this Final Order; (d) seek to modify any of the rights granted to LSQ hereunder or under the DIP Documents without such parties' prior written consent; or (e) unless such payments are approved by an order of this Court and otherwise permitted by the Ratification and Amendment Agreement and the Budget, pay any amount on account of any claims arising prior to the Petition Date.

18. *Reservation of Certain Third Party Rights and Bar of Challenges and Claims*. Nothing in this Final Order or the Ratification and Amendment Agreement, including, without

limitation, the Debtors' Stipulations, shall prejudice whatever rights a party in interest with requisite standing (other than the Debtors) may have to file a contested matter, adversary proceeding or otherwise to object to or challenge the findings herein, including, but not limited to: (a) the validity, extent, perfection, enforceability or priority of the mortgage, security interests and Pre-Petition Liens of LSQ in and to the Pre-Petition Collateral, (b) the validity, allowability, priority, status or amount of the Pre-Petition Obligations, (c) the Pre-Petition Documents, or the actions or inactions of LSQ arising out of or related to the Pre-Petition Documents, or (d) any claim against LSQ in the nature of a setoff, counterclaim or defense to the Pre-Petition Obligations (including but not limited to, those under sections 506, 544, 547, 548, 549, 550 and/or 552 of the Bankruptcy Code or by way of suit against LSQ (collectively, a "Challenge"), provided, however, that: (a) any party in interest (other than the Debtor or Committee) with requisite standing must commence a Challenge by September 8, 2017 (the "Party-In-Interest Challenge Period"); and (b) the Committee with requisite standing must commence a Challenge by the *earlier* to occur of (i) the Sale Closing Date (as defined below) or (ii) October 23, 2017 (the "Committee Challenge Period" and together with the Party-In-Interest Challenge Period, the "Challenge Period"), provided, further, that the Committee Challenge Period shall be automatically extended by the Committee's prior filing of the requisite motion seeking standing until such time as the Bankruptcy Court rules on such motion.

If a Challenge is not commenced by the applicable Challenge Period then the applicable Challenge Period shall be deemed to have expired (the "Challenge Period Termination Date") and (a) any party (including, without limitation, all creditors, the Committee and all other official committee(s), any chapter 11 or chapter 7 trustee appointed herein or in any Successor Case, receivers, administrators, examiners with expanded powers, responsible officers, other estate

representatives appointed in this Case or any Successor Case or in any jurisdiction, and all other parties in interest) shall be deemed to forever waive and be barred from commencing or prosecuting a Challenge, (b) the Pre-Petition Obligations shall be deemed to be allowed in full and shall be deemed to be allowed as fully secured claims within the meaning of section 506 of the Bankruptcy Code for all purposes in connection with these Cases and any Successor Cases, (c) the Liens in favor of LSQ shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected security interests and Liens, not subject to recharacterization, subordination or otherwise avoidable, (d) the Debtors' Stipulations shall be binding on all parties (including, without limitation, all creditors, the Committee and any other official creditors' committee(s), any chapter 11 or chapter 7 trustee appointed herein or in any Successor Case, receivers, administrators, examiners with expanded powers, responsible officers, other estate representatives appointed in this Case or in any Successor Case or in any jurisdiction, and all other parties in interest).

To the extent any such contested matter, adversary proceeding or other objection or challenge is filed, LSQ shall be entitled to include such costs and expenses, including but not limited to reasonable attorneys' fees, incurred in defending the objection or complaint as part of the Pre-Petition Obligations, in each case, to the extent allowable under section 506(b) of the Bankruptcy Code.

19. *Agreement of Committee, Debtors and their Estates, and LSQ.* The Committee, Debtors (on their own behalf and on behalf of the Debtors' bankruptcy estates) and LSQ agree as follows:

(a) Preservation and Reservation of Claims: Notwithstanding anything to the contrary, nothing in this Final Order, the Pre-Petition Documents or the DIP Documents

constitutes, or shall be deemed to constitute, a release of the Debtors' current or former officers, directors, shareholders, affiliates or any entities under the ownership or control of any of the foregoing, including but not limited to the following: Sonya Dockery, Lisa Held-Janke, Steven R. Crandall, Terry Vaughen, John Baltz, George Samarin, Ricardo Rivera, Lowell Russell, Donald E. Haviland, Jr., VI Capital Company, Jerry Armstrong Consulting, Indian Creek Investments, LLC, Safariland, LLC, AXIS Capital, Phil Williams, Anthony J. Gallo, Cedar Croft Consulting, Ltd., Patrick Walsh., iNetworks, LLC, Robert Vito, Unequal, Inc., and EXO SBI Holdings, Inc. (collectively, the "Reserved Parties"). All causes of action of the Debtors, including Avoidance Actions and other actions under chapter 5 of the Bankruptcy Code, shall remain in the Debtors' estates and available for the Debtors' estates to, among other things, assert a defense, reduction, setoff, recoupment or counterclaim against any claim asserted against the Debtors or the Debtors' estates by any party.

(b) Unencumbered Assets: Notwithstanding anything to the contrary in this Final Order (including paragraphs 8, 9, and 10 thereof) or the DIP Documents, and the Pre-Petition Documents, the Pre-Petition Obligations, DIP Obligations, the Collateral and the DIP Collateral shall not be secured by or otherwise encumber or include the Debtors' Avoidance Actions, including proceeds thereof, as well as any D&O claims and claims against the Reserved Parties and proceeds thereof, and the Pre-Petition Liens, the Pre-Petition Replacement Liens, DIP Liens, and the Superpriority Claims shall not attach to such assets of the Debtors' estates or the proceeds thereof which assets and proceeds shall remain free of any liens or claims in favor of LSQ. For purposes of clarity, Avoidance Actions, including proceeds thereof, as well as any D&O claims and claims against the Reserved Parties, shall remain available to the Debtors'

estates and may be used as a defense, reduction, setoff, recoupment or counterclaim against any claim asserted against the Debtors or the Debtors' estates by any party.

(c) Stalking Horse Agreement: Subject to input with respect to certain terms of a stalking-horse asset purchase agreement (the "Stalking Horse APA") and the preservation for the Debtors' estates (i.e., non-sale) of any and all claims and causes of action against the Reserved Parties, the Committee will not object to the approval of a Stalking Horse APA and related bid protections.

(d) Amount of Pre-Petition Obligations (including the Roll-Up): LSQ and the Committee shall work cooperatively to determine the actual amount of the Pre-Petition Obligations. Such determination may be made by agreement of LSQ and the Committee, or, in the event that an agreement is not reached by September 1, 2017, the matter shall be promptly submitted by the parties for a determination by the Bankruptcy Court. The parties will agree to an expedited schedule so that a determination of the amount of LSQ's Pre-Petition Obligations is rendered by the Bankruptcy Court by September 19, 2017 (the currently scheduled hearing date for approval of a sale transaction). LSQ agrees to provide the Committee with back-up information supporting its asserted amount of the Pre-Petition Obligations, including a detailed schedule of all interest, fees, principal, and other charges, and such reasonable information requested by the Committee on August 17, 2017 as may be agreed to by LSQ, by no later than August 21, 2017. The dates set forth in this paragraph may be modified by agreement of LSQ and the Committee and without further order of the Court.

(e) Closing of a Section 363 Sale: provided a closing occurs on a sale by the Debtors of substantially all of their assets under section 363 of the Bankruptcy Code, whether under the Stalking Horse APA, a third party bid or through a credit bid of LSQ (the "Sale

Closing Date"), the Challenge Period Termination Date shall have occurred on such Sale Closing Date and all releases in favor of LSQ set forth in this Final Order shall have been deemed effective. Upon the Sale Closing Date, the proceeds of the sale of the Debtors' assets shall be used for distribution on account of LSQ's claim, and:

(i) Carve-Out for Distribution to General Unsecured Creditors (the "GUC Funds"):

i. Minimum Distribution Amount: The first $110,000 of the sale proceeds (whether from the Stalking Horse APA, a bidder at auction or LSQ's credit bid) will be escrowed by LSQ and set aside for a *pro rata* distribution by LSQ to creditors of the Debtors holding Unsecured Claims, plus

ii. Additional Distribution Amount: ten percent (10%) of the actual sale proceeds (whether from the Stalking Horse APA, a bidder at auction or LSQ's credit bid) that *exceeds* the purchase price payable under (i) the Stalking Horse APA or (ii) the first opening bid at the auction if there is no Stalking Horse APA approved by the Bankruptcy Court prior to the start of the auction, net of any payments on account of any bidding protections, will be escrowed by LSQ and set aside for a *pro rata* distribution by LSQ to creditors of the Debtors holding Unsecured Claims.[3]

(f) Methodology For Distribution of the GUC Funds: Distribution of the GUC Funds to creditors of the Debtors holding non-priority and non-administrative general unsecured claims (the "Unsecured Claims") shall be made by LSQ on a *pro rata* basis, no later than ten (10) after the occurrence of the Sale Closing Date and receipt of the sale proceeds, unless otherwise agreed to by the Committee and LSQ. The distribution shall be made to creditors holding Unsecured Claims as identified on a list (the "List") of Unsecured Creditors provided to LSQ by the Committee no later than five (5) days after occurrence of the Sale Closing Date and receipt of the sale proceeds, unless otherwise agreed to by the Committee and

[3] LSQ shall receive 90% of the remaining sale proceeds up to the allowed amount of its claim.

LSQ. The List will (i) include Unsecured Claims that were either scheduled by the Debtors on their schedules or proofs of claim filed by creditors in these Case in both instances by the Sale Closing Date (the "Distribution Record Date"), with the filed claim superseding the scheduled claim, (ii) exclude any Unsecured Claim that is scheduled as unliquidated, contingent or disputed, (iii) exclude any duplicate or amended Unsecured Claim, (iv) exclude Unsecured Claims scheduled for or filed by any of the Reserved Parties, (v) exclude any Unsecured Claim on account of which a *pro rata* distribution of the GUC Funds would be less than $50.00, and (vi) include any other information necessary to make distributions to creditors holding Unsecured Claims. Other than the limited cost incurred in connection with the actual issuance of checks, LSQ shall bear no costs or liability associated in any way with making such distributions to the holders of Unsecured Claims. Under no circumstances, absent agreement of the Committee, shall the Minimum Distribution Amount be used for the payment of fees, commissions or expenses of trustees or other estate professionals, whether in this chapter 11 case, a chapter 7 case, or otherwise.

(g) Waiver of Distribution: LSQ waives any and all rights to a distribution from the GUC Funds or any asset of the Debtors (including Avoidance Claims and any other claims against the Reserved Parties, including proceeds thereof) other than proceeds from the sale by the Debtors of substantially all of their assets consistent with this Final Order, including under the Stalking Horse APA or any higher bidder at auction.

(h) Cooperation: LSQ, the Debtors and the Committee agree to work cooperatively on all case-related matters to minimize estate expenses and speed up the wind down of these cases. LSQ and the Debtors will not object to the Committee's proposed retention

of its professionals and the Bankruptcy Court's allowance of any related expense consistent with this Final Order and the DIP Budget.

20. *Modifications of, and Waivers under, the DIP Documents*. The Debtors and LSQ, after consultation with the professionals for the Committee, are hereby authorized to implement, in accordance with the terms of the DIP Documents, any non-material modifications (including without limitation, any change in the number or composition of LSQ) of the DIP Documents without further notice, motion or application to, order of, or hearing before, this Court. Material modifications or amendments to the DIP Documents shall be filed with this Court and only permitted upon order of this Court, which may be obtained upon certification of counsel, provided 10 days prior written notice of such material change(s) and of the opportunity to object thereto has been given to the U.S. Trustee. The Debtors and LSQ shall be permitted to enter into waivers under the DIP Documents in accordance with the terms thereof without further order of this Court.

21. *Final Order Governs*. In the event of any inconsistency between the provisions of this Final Order and the DIP Documents, the provisions of this Final Order shall govern.

22. *Binding Effect; Successors and Assigns*. The DIP Documents and the provisions of this Final Order, including all findings herein, shall be binding upon all parties in interest in this Bankruptcy Cases, including, without limitation, LSQ, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of the Debtors) and shall inure to the benefit of LSQ and the Debtors and their respective successors and assigns; provided, however, that LSQ shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estate of the Debtors. In determining to make any loan under the Ratification and Amendment

Agreement or in exercising any rights or remedies as and when permitted pursuant to this Final Order or the DIP Documents, LSQ shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors.

23. *Effectiveness*. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062 or 9024 or any other Bankruptcy Rule or Local Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution of effectiveness of this Final Order as provided in such Rules.

22. *Retention of Jurisdiction.* This Court has and will retain jurisdiction to enforce this Final Order according to its terms.

Dated: September __, 2017

HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A
Budget

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
SHORT BARK INDUSTRIES, INC.,[1]	)	Case No. 17-11502 (KG)
Debtors.	)	(Jointly Administered)
	)	**Related to Docket Nos. 9, 14, 23, 34, 53 and 91**

FINAL ORDER (I) AUTHORIZING DEBTORS TO OBTAIN SECURED POSTPETITION FACTORING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e), (II) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY CLAIM, (IV) AUTHORIZING USE OF CASH COLLATERAL BY THE DEBTOR AND PROVIDING FOR ADEQUATE PROTECTION (V) MODIFYING THE AUTOMATIC STAY, AND (VI) GRANTING RELATED RELIEF

Upon the motions and supplement [Docket Nos. 9, 14 and 34] (collectively, the "Motion") of EXO SBI, LLC ("EXO") and Short Bark Industries, Inc. ("Short Bark" and collectively with EXO, the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases"), under sections 105, 361, 362, 363(b), 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (as amended, the "Bankruptcy Code"), Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the corresponding Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") seeking, among other things:

(1) authorization for Short Bark to enter into and obtain secured post-petition factoring, consisting of the purchase by LSQ Funding Group, LC, as purchaser, (the

[1] The Debtors in these jointly administered cases are Short Bark Industries, Inc. (Tax ID: 66-0655657) and EXO SBI, LLC (Tax ID: 46-5210695).

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"Purchaser" or "LSQ") of certain of Short Bark's Accounts[2] up to an aggregate maximum amount (including pre-Petition Date purchases of Accounts) not to exceed $17.8 million including the Roll-Up (as defined below) of the outstanding balance of the Pre-Petition Obligations (as defined below) (the "DIP Financing") for the Interim Period (defined below).

(2) authorization for Short Bark to execute the Ratification and Amendment Agreement, dated as of July 19, 2017, substantially in the form attached as Exhibit A to the Motion (including all amendments thereto, the "Ratification and Amendment Agreement" and collectively with any other related agreement, instrument or other document delivered or executed in connection with the Ratification and Amendment Agreement, including the "Budget" (as defined in the Ratification and Amendment Agreement and attached as Schedule C thereto and Exhibit A attached hereto) (collectively, the "DIP Documents"), by and among Short Bark, as seller and LSQ;

(3) authorization for Short Bark to use "cash collateral" as such term is defined in section 363 of the Bankruptcy Code (the "Cash Collateral") in which LSQ has an interest;

(4) grant LSQ the Replacement Liens and Pre-Petition Superpriority Claims (each as defined below) to the extent of any Pre-Petition Diminution in Value (as defined below) of LSQ's interest in the Pre-Petition Collateral (as defined below) as adequate protection for the granting of the DIP Liens (as defined below) to LSQ, the use of Cash Collateral, and for the imposition of the automatic stay;

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[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms as used in the Ratification and Amendment Agreement.

(5) authorization for Short Bark to execute and enter into the related DIP Documents and to perform such other and further acts as may be required in connection with the DIP Documents;

(6) Debtors' waiver of any right to surcharge against collateral, including the Collateral and Cash Collateral (as defined herein), under section 506(c) of the Bankruptcy Code;

(7) modification of the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Documents and this order (the "Final Order"); and

(8) waive the fourteen (14) day stay provisions of Bankruptcy Rule 6004(h) and provide for immediate effectiveness of this Final Order.

And the Court having entered the *Emergency Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 23] (the "Interim Order") after conducting an interim hearing on the Motion on July 13, 2017 (the "Interim Hearing");

And the Court having entered the *Second Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 53] (the "Second Interim Order") after

conducting the second interim hearing on the Motion on July 19, 2017 (the "Second Interim Hearing");

And the Court having entered the *Third Interim Order (I) Authorizing Debtors to Obtain Secured Postpetition Factoring and Financing (II) Granting Liens, Security Interests and Superpriority Claim (IV) Authorizing Use of Cash Collateral By the Debtor and Providing for Adequate Protection (V) Modifying the Automatic Stay (VI) Scheduling a Further Interim Hearing and (VII) Granting Related Relief* [Docket No. 91] (the "Third Interim Order") after conducting the third interim hearing on the Motion on July 31, 2017 (the "Third Interim Hearing") (The First Interim Hearing, Second Interim Hearing and Third Interim Hearing are collectively referred to as, the "Interim Hearings" and the First Interim Order, Second Interim Order and Third Interim Order are collectively referred to as, the "Interim Orders");

And the Court having found that due and sufficient notice of the Motion and the final hearing on the Motion (the "Final Hearing") was provided by the Debtors as set forth in paragraph 3 below, in accordance with the Bankruptcy Rules and the Local Rules; and the Court having held the Final Hearing on the Motion on August 18, 2017; and the Court having considered all the pleadings filed with this Court, including any objections to the Motion; and as further stated on the record at the Interim Hearing and Final Hearing; and upon the record made by the Debtors at the Interim Hearing and Final Hearing; and upon the entire record of the Bankruptcy Case; and after due deliberation and consideration and sufficient cause appearing therefor;

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Disposition.* The Motion is granted on a final basis for the period ending October 13, 2017 (the "DIP Period") in accordance with the terms set forth herein. Any objections to the

relief sought in the Motion, and any reservations of rights with respect to such relief, that have not been previously resolved or withdrawn, are overruled on the merits. This Final Order shall be valid, binding and enforceable on all parties in interest and fully effective immediately upon entry.

2. *Commencement of the Bankruptcy Case, Jurisdiction and Venue.* On July 10, 2017 (the "Petition Date"), the Debtors each filed a petition with this Court commencing a case under chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate their businesses and managing their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. This Court has jurisdiction over the Bankruptcy Case and the Motion as a core proceeding, and over the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334.

3. *Notice.* Notice of the Final Hearing and the proposed entry of this Final Order has been provided to: (i) counsel to the Official Committee of Unsecured Creditors (the "Committee"); (ii) the twenty (20) largest unsecured creditors of the Debtor; (iii) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"); (iv) counsel to LSQ; (v) all known parties asserting a lien against the Collateral; (vi) any taxing authority having a claim against the Debtors; and (vii) any other party that has filed a request for notice pursuant to Bankruptcy Rule 2002 or is required to receive notice under the Bankruptcy Rules and the Local Rules. The notice given by the Debtors of the Final Hearing and the proposed entry of this Final Order constitutes appropriate, due and sufficient notice thereof under the circumstances and complies with sections 102(1), 363 and 364 of the Bankruptcy Code, Bankruptcy Rules 4001(b) and (c) and the Local Rules, and no other notice need be provided prior to entry of this Final Order.

4. *Findings Regarding the Financing.*

(a) Good cause has been shown for the entry of this Final Order.

(b) Short Bark has a critical need to obtain the DIP Financing and use of the Collateral and Cash Collateral in order to permit, among other things, the orderly continuation of the operation of its businesses, to maintain business relationships with vendors, suppliers and customers, and to make payroll. Access to sufficient working capital and liquidity through the incurrence of new indebtedness for borrowed money and other financial accommodations is vital to Short Bark's restructuring efforts and the preservation and maintenance of the going concern value of Short Bark.

(c) Short Bark is unable to obtain financing on more favorable terms from sources other than LSQ under the DIP Documents and is unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. Short Bark is also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) or 364(c)(3) of the Bankruptcy Code without Short Bark granting to LSQ, subject to the Carve-Out (as defined herein) as provided for herein, the DIP Liens and the Superpriority Claims (each as defined herein) under the terms and conditions set forth in this Final Order and in the DIP Documents. Short Bark is also unable to obtain credit for borrowed money without allowing LSQ to consummate a Roll-Up of the Pre-Petition Obligations into the DIP Financing by applying all collections received by the Debtors and advances to Short Bark under the DIP Financing in the following order: (x) first, to reduce the remaining outstanding obligations pursuant to the Pre-Petition Obligations (the "Roll-Up"), and (y) second, to reduce the DIP Obligations and otherwise deeming the Pre-Petition Obligations part of the DIP Obligations,

which arrangement shall be administered pursuant to the terms and conditions of this Final Order and the Ratification and Amendment Agreement.

(d) Based on the record presented to the Court at the Interim Hearings and Final Hearing, the terms of the DIP Financing and the use of the Collateral and Cash Collateral are fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with its fiduciary duties and constitute reasonably equivalent value and fair consideration.

(e) The DIP Financing and the use of Collateral have been negotiated in good faith and at arm's length among the Debtors, and LSQ, and all of Short Bark's obligations and indebtedness arising under, in respect of or in connection with the DIP Financing and the DIP Documents, including without limitation, (i) all loans incurred by or made to Short Bark under the Ratification and Amendment Agreement and (ii) any other "Obligations" (as defined in the Ratification and Amendment Agreement), (collectively, the "DIP Obligations"), shall be deemed to have been extended by LSQ and their affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. The Roll-Up and any compensation or payment that may be received by LSQ incremental to what would have been received had such Roll-Up not occurred, constitute compensation for, in consideration for, and solely on account of, the agreement of LSQ to make available the DIP Financing and not as payments under, adequate protection for, or otherwise on account of, the Pre-Petition Obligations.

(f) The Debtors have requested entry of this Final Order pursuant to Bankruptcy Rules 4001(c), 4001(d) and the Local Rules. Short Bark requires access to the DIP

Financing provided by the DIP Financing and use of the Collateral and Cash Collateral in order to continue its operations. Consummation of the DIP Financing and authorization of the use of the Collateral and Cash Collateral in accordance with this Final Order and the DIP Documents is therefore in the best interests of the Debtors' estates.

5. *Debtors Acknowledgements, Agreements and Stipulations.* Subject to the applicable Challenge Period set forth in paragraph 18 of this Final Order, the Debtors (on behalf of themselves and their estates) admit, stipulate, acknowledge and agree that (collectively, the "Debtors' Stipulations"):

(a) Pursuant to the Pre-Petition Documents, Short Bark was indebted to LSQ in the approximate principal amount of $9,853,433 plus accrued and accruing interest, costs, expenses, fees (including attorneys' fees and legal expenses) other charges and other obligations, (collectively the "Pre-Petition Obligations").

(b) To secure the Pre-Petition Obligations, Short Bark granted security interests and liens (the "Pre-Petition Liens") to LSQ upon all of Short Bark's personal property and fixtures, and proceeds thereof, including without limitation: accounts; chattel paper; inventory; equipment; instruments, including promissory notes; investment property; documents; deposit accounts; letter of credit rights; general intangibles; and supporting obligations (collectively, the "Pre-Petition Collateral"), with priority over all other liens except any liens otherwise permitted by the Pre-Petition Documents and all other liens that were in fact senior in priority to the Pre-Petition Liens as of the Petition Date, if any (which were valid, properly perfected, unavoidable, senior to the Pre-Petition Liens, and not subject to a subordination agreement, are referred to herein as the "Permitted Prior Liens"). To avoid any doubt, the term "Permitted Prior Liens" does not include, and specifically excludes, the liens securing the Pre-

Petition Obligations, which Pre-Petition Liens and claims are to be subordinated to, and junior solely to, the DIP Liens.

(c) As of the Petition Date (i) the Pre-Petition Liens were valid, binding, enforceable, perfected first-priority liens and are not subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and subject only to any Permitted Prior Liens, (ii) the Pre-Petition Obligations constituted legal, valid and binding obligations of Short Bark, enforceable in accordance with the terms of the Pre-Petition Documents (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), no offsets, defenses or counterclaims to any of the Pre-Petition Debt exists, and no portion of the Pre-Petition Obligations is subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and (iii) the Pre-Petition Obligations constitute allowable secured claims, and (b) on the date that the Interim Order was entered, the Debtors have waived, discharged and released LSQ, together with their affiliates, agents, attorneys, officers, directors and employees, of any right the Debtors may have (x) to challenge or object to any of the Pre-Petition Obligations, (y) to challenge or object to the security for the Pre-Petition Obligations, and (z) to bring or pursue any and all claims, objections, challenges, causes of action and/or choses in action arising out of, based upon or related to the Pre-Petition Documents or otherwise. The Debtors do not possess and will not assert any claim, counterclaim, setoff or defense of any kind, nature or description which would in any way affect the validity, enforceability and non-avoidability of any of the Pre-Petition Documents or the Pre-Petition Liens, and/or security interests in the Pre-Petition Collateral, or any claim of LSQ pursuant to the Pre-Petition Documents.

(d) In entering into the DIP Documents, and as consideration therefor, the Debtors hereby agree that until such time as all DIP Obligations are indefeasibly paid in full in cash and the DIP Documents are terminated in accordance with the terms thereof, the Debtors shall not in any way prime or seek to prime the Pre-Petition Liens and the security interests and DIP Liens provided to LSQ under this Final Order by offering a subsequent lender or a party-in-interest a superior or *pari passu* lien or claim pursuant to section 364(d) of the Bankruptcy Code or otherwise.

(e) LSQ has a security interest and lien in Cash Collateral, including on all amounts on deposit in Debtors' banking, checking, or other deposit accounts and all proceeds of Pre-Petition Collateral to secure the other deposit accounts and all proceeds of Pre-Petition Collateral to secure the Pre-Petition Obligations, to the same extent and order of priority as that which was held by each such party pre-petition.

6. *Authorization of the DIP Financing and the DIP Documents and Use of Cash Collateral.*

(a) The DIP Documents are approved, and Short Bark is hereby authorized to sell to LSQ all Accounts of Short Bark and incur indebtedness (including pre-Petition Date purchases of Accounts and the Roll-Up) and use Cash Collateral in the aggregate maximum amount not to exceed $17.8 million on a final basis, plus interest, fees and other expenses and amounts provided for in the DIP Documents, in accordance with the terms of the DIP Documents, which only shall be used for the purposes permitted under the DIP Documents and in accordance with the Budget, including (i) to provide for working capital needs and for general corporate purposes of Short Bark, and (ii) to make payments or fund amounts otherwise permitted in this Final Order and the DIP Documents.

(b) In furtherance of the foregoing and without further approval of this Court, the Debtors are authorized and directed to perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements), and to pay all fees that may be reasonably required or necessary for the Debtors' performance of its obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the Ratification and Amendment Agreement and the other DIP Documents, any security documents contemplated thereby and any exhibits attached thereto;

(ii) the non-refundable payment to LSQ of the fees referred to in the Ratification and Amendment Agreement, and reasonable costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained by LSQ as provided for in the DIP Documents;

(iii) the execution, delivery and performance of one or more amendments, waivers, consents or other modifications to and under the DIP Documents for, among other things, in each case in such form as LSQ may agree, it being understood that no further approval of the Court shall be required for amendments, waivers, consents or other modifications to and under the DIP Documents or the DIP Obligations that do not materially and adversely impair the rights of Short Bark, its estate or other parties in interest (other than the parties to the Ratification and Amendment Agreement) thereunder; and

(iv) the performance of all other acts required under or in connection with the DIP Documents.

(c) The DIP Documents constitute valid and binding obligations of the Debtors and are enforceable against the Debtors in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Documents or this Final Order shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under sections 502(d) or 548 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

7. *Accounts.*

(a) The Debtors' existing cash management system and all bank accounts and investment accounts established in connection therewith and with the DIP Financing in accordance with the Ratification and Amendment Agreement (the "Cash Management System") shall be used for the purposes and on the terms and conditions set forth in the Ratification and Amendment Agreement and the other DIP Documents. The Debtors are authorized and directed to establish and maintain control agreements on any such bank accounts used as part of the Cash Management System (the "Accounts") as may be required by the Ratification and Amendment Agreement, the other DIP Documents, or as directed by LSQ, and the banks at which such accounts are maintained are authorized to execute and deliver such control agreements as required by this Final Order and the Ratification and Amendment Agreement. The control agreements shall confirm the first priority perfected lien on the Accounts granted pursuant this Final Order in favor of LSQ.

(b) Each depository institution at which the Debtors maintain a depository account shall immediately share dominion and control with LSQ over each such depository

account of the Debtors that was subject to a deposit account control agreement in favor of any such party as of the Petition Date, and, as of the date of this Final Order and hereafter, such deposit account control agreements shall be additionally enforceable by LSQ against, and binding upon, each depository institution party thereto until the DIP Obligations have been paid in full in cash and the Ratification and Amendment Agreement shall have been terminated, after which such deposit account control agreements shall again be solely enforceable by the depository institution that is a party thereto.

8. *Adequate Protection for LSQ.* As adequate protection for the interest of LSQ in the Pre-Petition Collateral (including Cash Collateral) (a) on account of the granting of the DIP Liens, (b) for Short Bark's use of the Collateral and Cash Collateral and (c) for other decline in value arising out of the automatic stay or Short Bark's use, sale, depreciation, or disposition of the Pre-Petition Collateral (collectively, the "Pre-Petition Diminution in Value"), LSQ shall receive adequate protection as follows:

(a) Pre-Petition Replacement Liens. Solely to the extent of any Pre-Petition Diminution in Value of the interests of LSQ in the Pre-Petition Collateral, LSQ shall have, subject to the terms and conditions set forth below, pursuant to sections 361, 363(e) and 364(d) of the Bankruptcy Code additional and replacement security interests and Liens in the DIP Collateral (the "Pre-Petition Replacement Liens"), which shall be junior only to the DIP Liens, Permitted Prior Liens, if any, and the Carve-Out as provided herein.

(b) Pre-Petition Superpriority Claim. To the extent of any Pre-Petition Diminution in Value of LSQ's interest in the Pre-Petition Collateral, LSQ shall have an allowed superpriority administrative expense claim pursuant to Bankruptcy Code section 507(b) (the "Pre-Petition Superpriority Claim") which shall have priority (except with respect to the DIP

Liens, the DIP Superpriority Claim, and the Carve-Out) over any other claims under sections 364(c)(1), 503(b) and 507(b) of the Bankruptcy Code and otherwise over all administrative expense claims and unsecured claims against the Debtors and their estate, now existing or hereafter arising, of any kind or nature whatsoever including, without limitation, administrative expenses of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 503(a), 503(b), 507(a), 507(b), 546(c), 546(d), 726(b), 1113, and 1114 of the Bankruptcy Code and, if approved in the Final Order, section 506(c) of the Bankruptcy Code, whether or not such expenses of claims may become secured by a judgment or other non-consensual lien, levy or attachment.

9. *DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed claims against the Debtors with priority over any and all administrative expenses, diminution claims and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment (the "DIP Superpriority Claims"), which allowed DIP Superpriority Claims shall be payable from and have recourse to all pre- and post-petition property of the Debtors and all proceeds thereof, subject only to the payment of the Carve-Out to the extent specifically provided for herein. (The Pre-Petition Superpriority Claim and DIP Superpriority Claim are collectively referred to as, the "Superpriority Claims")

10. *DIP Liens.* As security for the DIP Obligations, effective and perfected upon the date of this Final Order and without the necessity of the execution, recordation of filings by the Debtors of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or the possession or control by LSQ of, or over, any Collateral, LSQ shall receive, and is granted by Short Bark, for its own benefit, a fully perfected pledge of all equity, and a fully perfected security interest in all prepetition and post-petition assets of Short Bark (including the Accounts), all property identified in clauses (a), (b) and (c) below, and in each case, all proceeds resulting therefrom (such property being collectively referred to as the "DIP Collateral"), subject only to the Permitted Prior Liens, if any, and payment of the Carve-Out as set forth in this Final Order and the Ratification and Amendment Agreement (all such liens and security interests granted to LSQ, for its benefit, pursuant to this Final Order and the DIP Documents, the "DIP Liens"):

(a) First Lien on Cash Balances and Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and post-petition property of the Debtor, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens (collectively, "Unencumbered Property"), including without limitation, all inter-company notes or inter-company receivables due to the Debtors, any and all cash and cash collateral of the Debtors and any investment of such cash and cash collateral, inventory, any accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties,

patents, copyrights, trademarks, trade names, other intellectual property, capital stock of all subsidiaries and the proceeds of all the foregoing.

(b) Liens Priming the Prepetition Liens and Other Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, subject only to the Permitted Prior Liens, if any, and payment of the Carve-Out, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre- and post-petition property of the Debtors (including, without limitation, any and all cash and Cash Collateral of the Debtors (whether maintained with LSQ or otherwise) and any investment of such cash and cash collateral, inventory, any accounts, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock of subsidiaries, and the proceeds of all the foregoing), whether now existing or hereafter acquired.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected security interest in and lien upon all pre- and post-petition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 10, as to which the liens and security interests in favor of LSQ, for its benefit, will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the Petition Date or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which liens in favor of LSQ are immediately junior to such valid, perfected and unavoidable liens ("Third Party Liens").

(d) Liens Senior to Certain Other Liens. The DIP Liens shall not be (a) subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or (ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any liability of the Debtors or (b) subordinated to or made *pari passu* with any other lien or security interest under sections 363 or 364 of the Bankruptcy Code or otherwise.

11. *Protection of LSQ's Rights.*

(a) All Collateral shall be free and clear of all liens, claims and encumbrances, except for those liens, claims and encumbrances expressly permitted under this Final Order (including Third Party Liens) and the DIP Documents.

(b) So long as there are any DIP Obligations outstanding (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) under the Ratification and Amendment Agreement, LSQ may file any financing statement or other document to perfect the liens granted pursuant to this Final Order, or as may be required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(c) Notwithstanding section 362 of the Bankruptcy Code, without further order or application to the Court, the automatic stay is hereby vacated and modified to the extent necessary to permit LSQ to exercise, upon the occurrence and during the continuation of any Event of Default, all rights and remedies provided for in this Final Order, the DIP Documents or applicable law, including, without limitation, upon three (3) business days' written notice to the Debtors, the Committee and the U.S. Trustee one or more of the following actions, at the same or

different times: (A) reduce the amount of, suspend or terminate any outstanding Commitments; (B) terminate the Financing; (C) charge default interest on the DIP Loans; (D) declare all or any portion of the DIP Loans to be due and payable; (E) subject to the Carve-Out, realize on any or all Collateral and exercise any and all remedies under the DIP Documents, any applicable control agreement and applicable law, including the right to set off or seize amounts in accounts, including the Accounts, maintained with or under control of LSQ.

(d) In any hearing before this Court within such three (3) business day period regarding any exercise of rights or remedies, the only issue that may be raised by the Debtor, Committee or any party in interest shall be whether, in fact, an Event of Default has occurred. The Debtors hereby waive their right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of LSQ set forth in this Final Order or the DIP Documents. In no event shall LSQ be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the Collateral. The delay or failure of LSQ to seek relief or otherwise exercise or enforce its rights and remedies under the DIP Documents or this Final Order shall not constitute a waiver of LSQ's rights or remedies hereunder, thereunder or otherwise.

(e) The Debtors shall pay, no later than ten (10) days following receipt by the Debtors of any invoice (which may be provided in summary fashion or redacted to protect privilege), with a copy going to the Committee and United States Trustee: the reasonable and documented fees and out-of-pocket expenses for the professionals of LSQ; provided that no payment shall be made by the Debtors if an objection is made by the Debtors, the Committee or the United States Trustee within such ten (10) day period, except to the extent such fees and expenses are not subject to the objection, unless consensually resolved by the affected

professional and objecting party or approved by the Court. The fees and expenses paid hereunder shall not otherwise be subject to separate approval by the Court or to the United States Trustee Guidelines and no recipient of any such payment shall be required to file with respect thereto any interim or final fee application with this Court. All such unpaid fees, costs, expenses and other amounts owed or payable shall be secured by the Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Final Order and the DIP Documents.

12. *Carve-Out.*

(a) A "Carve-Out Event" shall mean an "Event of Default" (as defined in the Ratification and Amendment Agreement) written notice of which has been given by LSQ to the Debtors and counsel to the Committee; provided that no Carve-Out Event shall be deemed to have occurred for purposes of this Final Order if any such Event of Default is subsequently waived by LSQ.

(b) (i) LSQ's liens on the Collateral and all other claims and liens thereon, including any Superpriority Claims, shall be subject to a carve out (the "Carve-Out") in an amount not to exceed: (A) all accrued but unpaid professional fees and disbursements of professional persons retained by the Debtors and the Committee by order of this Court and payable under sections 328, 330 and/or 331 of the Bankruptcy Code (collectively, the "Professional Expenses") incurred by the Debtors or the Committee prior to the occurrence of a Carve-Out Event (the "Pre-Carve Out Amount"), provided that such Pre-Carve Out Amount shall not exceed the amounts set forth in the Budget for such items through the occurrence of such Carve-Out Event, provided further that with respect to the Committee professionals (i) the Pre-Carve-Out Amount shall be $75,000 and the (ii) Carve-Out shall be automatically increased

(irrespective of the DIP Budget) to an aggregate total of $190,000 upon the occurrence of a Sale Closing Date, plus (B) fees incurred and payable to the clerk of the Bankruptcy Court and to the U.S. Trustee pursuant to 28 U.S.C. § 1930, to the extent such fees were incurred prior to delivery by LSQ to the Debtors and the Committee of a notice of an Event of Default. In no event shall any of the Carve-Out be used to pay any fees or expenses of any person retained in a chapter 7 case under sections 326, 327 or 328 of the Bankruptcy Code. Notwithstanding the foregoing, no portion of the Carve-Out and no portion of any amounts approved for payment prior to an Event of Default shall be utilized in a manner prohibited under the Ratification and Amendment Agreement and paragraph 12 of this Final Order.

(c) No portion of the DIP Financing, the Collateral, Cash Collateral, or the Carve-Out shall be used or be available to pay any fees, disbursements, costs or expenses incurred by any party in connection with: (i) challenging the amount, extent, validity, perfection, priority or enforceability of, or asserting any defense, counterclaim or offset to, the DIP Obligations, or the security interests and liens of LSQ in respect thereof; or (ii) any investigation (including discovery proceedings), assertion, initiation or prosecution of any other claims, causes of action, adversary proceedings or other litigation against LSQ. Provided, however, that, such exclusion does not encompass any investigative work conducted by the professionals for the Committee, prior to bringing any action relating to the foregoing.

13. *Limitation on Charging Expenses Against Collateral.* Except to the extent of the Carve-Out, no expenses of administration of the Bankruptcy Case or any future proceeding that may result therefrom, including conversion of the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral under section 506(c) of the Bankruptcy Code or any similar

principle of law, without the prior written consent of LSQ, and no such consent shall be implied from any other action, inaction, or acquiescence by LSQ.

14. *Perfection of DIP Liens.*

(a) Subject to the provisions of paragraph 11 above, LSQ is hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, or take possession of or control over, or take any other action (including taking or releasing any liens or pledges granted by this Final Order) in order to validate and perfect the DIP Liens granted to it hereunder. Whether or not LSQ shall, in its sole discretion, choose to file such financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments that may be otherwise required under federal or state law in any jurisdiction, or take any action, including taking possession, to validate and perfect such security interests and liens, and, or take possession of or control over, or otherwise confirm perfection of the liens and security interests granted to it hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, as of the date hereof. The failure of the Debtors to execute any documentation relating to the enforceability, priority or perfection of the DIP Liens shall in no way affect their validity, perfection or priority.

(b) If LSQ, in its sole discretion, elects to file any financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise to confirm perfection of the DIP Liens, the Debtors shall cooperate with and assist in such process, the stay imposed under section 362 of the Bankruptcy Code is hereby lifted to permit the filing and recording of a certified copy of this Final Order or any such financing

statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, and all such documents shall be deemed to have been filed and recorded at the time of and on the date of the entry of this Final Order. Upon the request of LSQ, without any further consent of any party, the Debtors are authorized and directed to take, execute, deliver and file such instruments (in each case without representation or warranty of any kind) to enable LSQ to further validate, perfect, preserve and enforce the DIP Liens.

(c) A certified copy of this Final Order may, in the discretion of LSQ, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Final Order for filing and recording.

(d) Any provision of any lease or other license, contract or other agreement that requires (i) the consent or approval of one or more landlords or other parties or (ii) the payment of any fees or obligations to any governmental entity, in order for the Debtors to pledge, grant, sell, assign, or otherwise transfer any such leasehold interest, or the proceeds thereof, or other Collateral related thereto, is hereby deemed to be inconsistent with the applicable provisions of the Bankruptcy Code. Any such provision shall have no force and effect with respect to the transactions granting the DIP Liens, in such leasehold interest or the proceeds of any assignment and/or sale thereof by the Debtors, in favor of LSQ in accordance with the terms of the Ratification and Amendment Agreement or this Final Order. Notwithstanding anything to the contrary contained herein and for the avoidance of doubt, the liens granted in this Final Order with respect to the Collateral shall include the proceeds of leased real property which are not direct liens on the Debtors' leases of real property.

15. *Preservation of Rights Granted Under the Final Order.*

(a) Unless all DIP Obligations shall have been indefeasibly paid in full, it shall constitute an Event of Default and terminate the right of Short Bark to use the Financing and/or any cash provided by the DIP Loans if there is entered (i) any modifications or extensions of this Final Order without the prior written consent of LSQ, and no such consent shall be implied by any other action, inaction or acquiescence by LSQ, or (ii) an order converting or dismissing the Bankruptcy Case. If an order dismissing the Bankruptcy Case under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (A) the DIP Liens granted to LSQ pursuant to this Final Order shall continue in full force and effect and shall maintain their priorities as provided in this Final Order until all DIP Obligations shall have been paid and satisfied in full (and that such DIP Liens shall, notwithstanding such dismissal, remain binding on all parties in interest), (B) the other rights under this Final Order shall not be affected and (C) this Court shall retain jurisdiction, notwithstanding such dismissal to the fullest extent permitted by law, for the purposes of enforcing the liens and security interests referred to in this paragraph.

(b) If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect (i) the validity of any DIP Obligations incurred prior to the actual receipt of written notice by LSQ, of the effective date of such reversal, modification, vacatur or stay or (ii) the validity or enforceability of any lien, or the priority thereof authorized or created pursuant to the Ratification and Amendment Agreement or this Final Order with respect to any DIP Obligations. Notwithstanding any such reversal, modification, vacatur or stay, any use of cash Collateral, or DIP Obligations incurred by the Debtors to LSQ before the actual receipt of written notice by LSQ of the effective date of such reversal, modification, stay or vacatur shall be governed in all

respects by the original provisions of this Final Order, and LSQ shall be entitled to all the rights, remedies, privileges and benefits granted in sections 363(m) and 364(e) of the Bankruptcy Code, this Final Order and pursuant to the DIP Documents with respect to all uses of cash Collateral and DIP Obligations.

(c) Except as expressly provided in this Final Order or in the DIP Documents, the DIP Liens and all other rights and remedies of LSQ granted by the provisions of this Final Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting the Bankruptcy Case to a case under chapter 7 or dismissing the Bankruptcy Case, or (ii) the entry of an order confirming a chapter 11 plan in the Bankruptcy Case. The DIP Liens and all other rights and remedies of LSQ granted by the provisions of this Final Order and the DIP Documents shall continue in full force and effect in this Bankruptcy Case or in any succeeding chapter 7 case under the Bankruptcy Code until the DIP Obligations are indefeasibly paid in full in cash. The Debtors shall not propose or support any plan of reorganization or liquidation or entry of any confirmation order that is not conditioned upon the indefeasible payment in full in cash of all DIP Obligations on or prior to the earlier of (i) the effective date of such plan of reorganization or liquidation (unless LSQ shall have consented in writing to such plan) and (ii) an Event of Default.

16. *LSQ's Right to Credit Bid.* LSQ shall have the right to "credit bid" the full amount of its allowed claims, including without limitation, claims on account of outstanding principal, interest and any other amounts due and owing under the DIP Documents, during any sale of the Debtors' assets, including without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code or included as part of any restructuring plan subject to confirmation under section1129(b)(2)(A)(iii) of the Bankruptcy Code.

17. *Limitation on Use of DIP Financing Proceeds and Collateral.* The Debtors shall use the DIP Financing and the Collateral solely as provided in DIP Documents and this Final Order. The Debtors have released and waived any and all claims and causes of action against LSQ, and its agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, each in their capacities as such, related to the DIP Financing, this Final Order or the negotiation of the terms thereof. Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings under the Ratification and Amendment Agreement, Collateral, or the Carve-Out may be used to: (a) object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under this Final Order, the DIP Documents, or the liens or claims granted under this Final Order or the DIP Documents; (b) assert any claims and causes of action under sections 502(d), 542, 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, "Avoidance Actions") or any other claims, counterclaims or causes of action, objections, contests or defenses against LSQ, or its agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors; (c) oppose LSQ's assertion, enforcement or realization on the Collateral or cash collateral in accordance with the DIP Documents or this Final Order; (d) seek to modify any of the rights granted to LSQ hereunder or under the DIP Documents without such parties' prior written consent; or (e) unless such payments are approved by an order of this Court and otherwise permitted by the Ratification and Amendment Agreement and the Budget, pay any amount on account of any claims arising prior to the Petition Date.

18. *Reservation of Certain Third Party Rights and Bar of Challenges and Claims.* Nothing in this Final Order or the Ratification and Amendment Agreement, including, without

limitation, the Debtors' Stipulations, shall prejudice whatever rights a party in interest with requisite standing (other than the Debtors) may have to file a contested matter, adversary proceeding or otherwise to object to or challenge the findings herein, including, but not limited to: (a) the validity, extent, perfection, enforceability or priority of the mortgage, security interests and Pre-Petition Liens of LSQ in and to the Pre-Petition Collateral, (b) the validity, allowability, priority, status or amount of the Pre-Petition Obligations, (c) the Pre-Petition Documents, or the actions or inactions of LSQ arising out of or related to the Pre-Petition Documents, or (d) any claim against LSQ in the nature of a setoff, counterclaim or defense to the Pre-Petition Obligations (including but not limited to, those under sections 506, 544, 547, 548, 549, 550 and/or 552 of the Bankruptcy Code or by way of suit against LSQ (collectively, a "Challenge"), provided, however, that: (a) any party in interest (other than the Debtor or Committee) with requisite standing must commence a Challenge by September 8, 2017 (the "Party-In-Interest Challenge Period"); and (b) the Committee with requisite standing must commence a Challenge by the *earlier* to occur of (i) the Sale Closing Date (as defined below) or (ii) October 23, 2017 (the "Committee Challenge Period" and together with the Party-In-Interest Challenge Period, the "Challenge Period"), provided, further, that the Committee Challenge Period shall be automatically extended by the Committee's prior filing of the requisite motion seeking standing until such time as the Bankruptcy Court rules on such motion.

If a Challenge is not commenced by the applicable Challenge Period then the applicable Challenge Period shall be deemed to have expired (the "Challenge Period Termination Date") and (a) any party (including, without limitation, all creditors, the Committee and all other official committee(s), any chapter 11 or chapter 7 trustee appointed herein or in any Successor Case, receivers, administrators, examiners with expanded powers, responsible officers, other estate

representatives appointed in this Case or any Successor Case or in any jurisdiction, and all other parties in interest) shall be deemed to forever waive and be barred from commencing or prosecuting a Challenge, (b) the Pre-Petition Obligations shall be deemed to be allowed in full and shall be deemed to be allowed as fully secured claims within the meaning of section 506 of the Bankruptcy Code for all purposes in connection with these Cases and any Successor Cases, (c) the Liens in favor of LSQ shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected security interests and Liens, not subject to recharacterization, subordination or otherwise avoidable, (d) the Debtors' Stipulations shall be binding on all parties (including, without limitation, all creditors, the Committee and any other official creditors' committee(s), any chapter 11 or chapter 7 trustee appointed herein or in any Successor Case, receivers, administrators, examiners with expanded powers, responsible officers, other estate representatives appointed in this Case or in any Successor Case or in any jurisdiction, and all other parties in interest).

To the extent any such contested matter, adversary proceeding or other objection or challenge is filed, LSQ shall be entitled to include such costs and expenses, including but not limited to reasonable attorneys' fees, incurred in defending the objection or complaint as part of the Pre-Petition Obligations, in each case, to the extent allowable under section 506(b) of the Bankruptcy Code.

19. *Agreement of Committee, Debtors and their Estates, and LSQ.* The Committee, Debtors (on their own behalf and on behalf of the Debtors' bankruptcy estates) and LSQ agree as follows:

(a) Preservation and Reservation of Claims: Notwithstanding anything to the contrary, nothing in this Final Order, the Pre-Petition Documents or the DIP Documents

constitutes, or shall be deemed to constitute, a release of the Debtors' current or former officers, directors, shareholders, affiliates or any entities under the ownership or control of any of the foregoing, including but not limited to the following: Sonya Dockery, Lisa Held-Janke, Steven R. Crandall, Terry Vaughen, John Baltz, George Samarin, Ricardo Rivera, Lowell Russell, Donald E. Haviland, Jr., VI Capital Company, ~~Jerry Armstrong Consulting~~, Indian Creek Investments, LLC, Safariland, LLC, AXIS Capital, Phil Williams, Anthony J. Gallo, Cedar Croft Consulting, Ltd., Patrick Walsh., iNetworks, LLC, Robert Vito, Unequal, Inc., and EXO SBI Holdings, Inc. (collectively, the "Reserved Parties"). All causes of action of the Debtors, including Avoidance Actions and other actions under chapter 5 of the Bankruptcy Code, shall remain in the Debtors' estates and available for the Debtors' estates to, among other things, assert a defense, reduction, setoff, recoupment or counterclaim against any claim asserted against the Debtors or the Debtors' estates by any party.

(b) Unencumbered Assets: Notwithstanding anything to the contrary in this Final Order (including paragraphs 8, 9, and 10 thereof) or the DIP Documents, and the Pre-Petition Documents, the Pre-Petition Obligations, DIP Obligations, the Collateral and the DIP Collateral shall not be secured by or otherwise encumber or include the Debtors' Avoidance Actions, including proceeds thereof, as well as any D&O claims and claims against the Reserved Parties and proceeds thereof, and the Pre-Petition Liens, the Pre-Petition Replacement Liens, DIP Liens, and the Superpriority Claims shall not attach to such assets of the Debtors' estates or the proceeds thereof which assets and proceeds shall remain free of any liens or claims in favor of LSQ. For purposes of clarity, Avoidance Actions, including proceeds thereof, as well as any D&O claims and claims against the Reserved Parties, shall remain available to the Debtors'

estates and may be used as a defense, reduction, setoff, recoupment or counterclaim against any claim asserted against the Debtors or the Debtors' estates by any party.

(c) Stalking Horse Agreement: Subject to input with respect to certain terms of a stalking-horse asset purchase agreement (the "Stalking Horse APA") and the preservation for the Debtors' estates (i.e., non-sale) of any and all claims and causes of action against the Reserved Parties, the Committee will not object to the approval of a Stalking Horse APA and related bid protections.

(d) Amount of Pre-Petition Obligations (including the Roll-Up): LSQ and the Committee shall work cooperatively to determine the actual amount of the Pre-Petition Obligations. Such determination may be made by agreement of LSQ and the Committee, or, in the event that an agreement is not reached by September 1, 2017, the matter shall be promptly submitted by the parties for a determination by the Bankruptcy Court. The parties will agree to an expedited schedule so that a determination of the amount of LSQ's Pre-Petition Obligations is rendered by the Bankruptcy Court by September 19, 2017 (the currently scheduled hearing date for approval of a sale transaction). LSQ agrees to provide the Committee with back-up information supporting its asserted amount of the Pre-Petition Obligations, including a detailed schedule of all interest, fees, principal, and other charges, and such reasonable information requested by the Committee on August 17, 2017 as may be agreed to by LSQ, by no later than August 21, 2017. The dates set forth in this paragraph may be modified by agreement of LSQ and the Committee and without further order of the Court.

(e) Closing of a Section 363 Sale: provided a closing occurs on a sale by the Debtors of substantially all of their assets under section 363 of the Bankruptcy Code, whether under the Stalking Horse APA, a third party bid or through a credit bid of LSQ (the "Sale

Closing Date"), the Challenge Period Termination Date shall have occurred on such Sale Closing Date and all releases in favor of LSQ set forth in this Final Order shall have been deemed effective. Upon the Sale Closing Date, the proceeds of the sale of the Debtors' assets shall be used for distribution on account of LSQ's claim, and:

(i) Carve-Out for Distribution to General Unsecured Creditors (the "GUC Funds"):

i. Minimum Distribution Amount: The first $110,000 of the sale proceeds (whether from the Stalking Horse APA, a bidder at auction or LSQ's credit bid) will be escrowed by LSQ and set aside for a *pro rata* distribution by LSQ to creditors of the Debtors holding Unsecured Claims, plus

ii. Additional Distribution Amount: ten percent (10%) of the actual sale proceeds (whether from the Stalking Horse APA, a bidder at auction or LSQ's credit bid) that *exceeds* the purchase price payable under (i) the Stalking Horse APA or (ii) the first opening bid at the auction if there is no Stalking Horse APA approved by the Bankruptcy Court prior to the start of the auction, net of any payments on account of any bidding protections, will be escrowed by LSQ and set aside for a *pro rata* distribution by LSQ to creditors of the Debtors holding Unsecured Claims.[3]

(f) Methodology For Distribution of the GUC Funds: Distribution of the GUC Funds to creditors of the Debtors holding non-priority and non-administrative general unsecured claims (the "Unsecured Claims") shall be made by LSQ on a *pro rata* basis, no later than ten (10) after the occurrence of the Sale Closing Date and receipt of the sale proceeds, unless otherwise agreed to by the Committee and LSQ. The distribution shall be made to creditors holding Unsecured Claims as identified on a list (the "List") of Unsecured Creditors provided to LSQ by the Committee no later than five (5) days after occurrence of the Sale Closing Date and receipt of the sale proceeds, unless otherwise agreed to by the Committee and

[3] LSQ shall receive 90% of the remaining sale proceeds up to the allowed amount of its claim.

LSQ. The List will (i) include Unsecured Claims that were either scheduled by the Debtors on their schedules or proofs of claim filed by creditors in these Case in both instances by the Sale Closing Date (the "Distribution Record Date"), with the filed claim superseding the scheduled claim, (ii) exclude any Unsecured Claim that is scheduled as unliquidated, contingent or disputed, (iii) exclude any duplicate or amended Unsecured Claim, (iv) exclude Unsecured Claims scheduled for or filed by any of the Reserved Parties, (v) exclude any Unsecured Claim on account of which a *pro rata* distribution of the GUC Funds would be less than $50.00, and (vi) include any other information necessary to make distributions to creditors holding Unsecured Claims. Other than the limited cost incurred in connection with the actual issuance of checks, LSQ shall bear no costs or liability associated in any way with making such distributions to the holders of Unsecured Claims. Under no circumstances, absent agreement of the Committee, shall the Minimum Distribution Amount be used for the payment of fees, commissions or expenses of trustees or other estate professionals, whether in this chapter 11 case, a chapter 7 case, or otherwise.

(g) Waiver of Distribution: LSQ waives any and all rights to a distribution from the GUC Funds or any asset of the Debtors (including Avoidance Claims and any other claims against the Reserved Parties, including proceeds thereof) other than proceeds from the sale by the Debtors of substantially all of their assets consistent with this Final Order, including under the Stalking Horse APA or any higher bidder at auction.

(h) Cooperation: LSQ, the Debtors and the Committee agree to work cooperatively on all case-related matters to minimize estate expenses and speed up the wind down of these cases. LSQ and the Debtors will not object to the Committee's proposed retention

of its professionals and the Bankruptcy Court's allowance of any related expense consistent with this Final Order and the DIP Budget.

20. *Modifications of, and Waivers under, the DIP Documents.* The Debtors and LSQ, after consultation with the professionals for the Committee, are hereby authorized to implement, in accordance with the terms of the DIP Documents, any non-material modifications (including without limitation, any change in the number or composition of LSQ) of the DIP Documents without further notice, motion or application to, order of, or hearing before, this Court. Material modifications or amendments to the DIP Documents shall be filed with this Court and only permitted upon order of this Court, which may be obtained upon certification of counsel, provided 10 days prior written notice of such material change(s) and of the opportunity to object thereto has been given to the U.S. Trustee. The Debtors and LSQ shall be permitted to enter into waivers under the DIP Documents in accordance with the terms thereof without further order of this Court.

21. *Final Order Governs.* In the event of any inconsistency between the provisions of this Final Order and the DIP Documents, the provisions of this Final Order shall govern.

22. *Binding Effect; Successors and Assigns.* The DIP Documents and the provisions of this Final Order, including all findings herein, shall be binding upon all parties in interest in this Bankruptcy Cases, including, without limitation, LSQ, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of the Debtors) and shall inure to the benefit of LSQ and the Debtors and their respective successors and assigns; provided, however, that LSQ shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estate of the Debtors. In determining to make any loan under the Ratification and Amendment

Agreement or in exercising any rights or remedies as and when permitted pursuant to this Final Order or the DIP Documents, LSQ shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors.

23. *Effectiveness.* Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062 or 9024 or any other Bankruptcy Rule or Local Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution of effectiveness of this Final Order as provided in such Rules.

22. *Retention of Jurisdiction.* This Court has and will retain jurisdiction to enforce this Final Order according to its terms.

Dated: September 11, 2017

HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE