

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

CBCRC LIQUIDATING CORP., et al.,¹

Debtors.

Chapter 11

Case No. 23-10245 (KBO)
(Jointly Administered)

Hearing Date: TBD
Objection Deadline: TBD

Re: D.I. Nos. 609, 853, 954, 974, 992

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER: (I) APPROVING THE SETTLEMENT AGREEMENT IN CONNECTION WITH THE ASSET PURCHASE AGREEMENT BY AND AMONG THE DEBTORS AND SSCP RESTAURANT INVESTORS, LLP DATED JUNE 14, 2023; (II) AUTHORIZING THE DEBTORS TO CONVERT THESE CASES TO CASES UNDER CHAPTER 7 ; AND (III) GRANTING RELATED RELIEF

CBCRC Liquidating Corp. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (the "Debtors"), respectfully state the following in support of this motion (the "Motion").

I.
RELIEF REQUESTED

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"): (a) approving the settlement (the "Settlement") by and among the Debtors, SSCP, and certain other parties (the "Parties") arising under, in connection with, or related to the *Asset Purchase Agreement By and Among CBC Restaurant Corp., Corner Bakery Holding Company, and CBC Cardco, Inc. and SSCP Restaurant Investors, LLC* dated June 14,

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include CBCRC Liquidating Corp. (0801), CBHC Liquidating Company (3981), and CBCCI Liquidating Inc. (1938). The Debtors' service address is Corner Bakery, c/o CR3 Partners, Attn: Greg Baracato, Chief Restructuring Officer, 13355 Noel Road, Suite 2005, Dallas TX 75240.



2023 (the "APA"), the material terms of which are set forth in the Term Sheet at Section IV.C, below; (b) authorizing the Debtors to convert these cases to cases under Chapter 7 of the Bankruptcy Code upon entry of a final, non-appealable Order approving the Settlement (the "Settlement Order"); and (c) granting related relief. The Debtors, SSCP, and CR3 are preparing a written agreement incorporating the provisions of the Term Sheet (the "Settlement Agreement"), which the Debtors will file as a supplement to this Motion as soon as practicable.

II. JURISDICTION & VENUE

2. The United States Bankruptcy Court for the District of Delaware (the "Court") 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 (Sleet, C.J.).

3. Moreover, pursuant to Paragraph 63 of the *Order Authorizing CBC Restaurant Corp. and Its Affiliated Debtors to (I) Sell Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, and Interests, (II) Authorizing and Approving the Debtors' Performance Under the APA, (III) Authorizing and Approving the Assumption and Assignment of Certain of the Debtors' Executory Contracts, Unexpired Leases, and Permits Related Thereto, and (IV) Granting Related Relief* [D.I. No. 609] (the "Sale Order"), this Court retained jurisdiction to, among other things, "interpret, implement, and enforce the terms and provisions of [the] Sale Order and the APA, all amendments thereto as well as any waivers and consents thereunder and each of the agreements executed in connection therewith to which the Debtors are a party and adjudicate, if necessary, any and all disputes concerning or relating in any way to the Sale."

4. The Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and 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 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. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

III. BASIS FOR RELIEF

6. The bases for the relief requested in this Motion are Sections 105(a), 363, and 1112(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) and Bankruptcy Rules 6004 and 9019.

IV. FACTUAL BACKGROUND²

7. On February 22, 2023 (the “Petition Date”), the Debtors commenced these cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are now winding down their business and managing their affairs as debtors and debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in these chapter 11 cases.

A. The Debtors’ Sale Process and the SSCP APA.

² The background facts set forth herein are set forth in greater detail in both the *Motion of the Debtors for Entry of an Order: (A) Enforcing the Order Authorizing CBC Restaurant Corp. and Its Affiliated Debtors to (I) Sell Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, and Interests, (II) Authorizing and Approving the Debtors’ Performance Under the APA, (III) Authorizing and Approving the Assumption and Assignment of Certain of the Debtors’ Executory Contracts, Unexpired Leases, and Permits Related Thereto, and (IV) Granting Related Relief; and (B) for Related Relief* [D.I. No. 853] (the “Enforcement Motion”) and *SSCP Restaurant Investors, LLC’s (I) Supplemental Response to the Debtors’ Motion to Enforce the Sale Order and (II) Cross-Motion to Enforce the Sale Order* [D.I. No. 954] (the “SSCP Response”).

8. The Debtors engaged advisors to file these “free fall” Chapter 11 cases several days before a foreclosure sale scheduled for February 23, 2023. While they succeeded in obtaining limited financing from SSCP, their secured lender, after the filing they operated at constant risk of administrative insolvency. Later, as the Debtors pursued a going-concern sale of their business, they indicated that only bids providing for the administrative solvency of the Debtors' estates would be considered qualified bids.

9. SSCP elected to participate in the auction for substantially all the Debtors' assets in late May 2023, after which it was declared the winning bidder and its APA was approved by the Court. The sale to SSCP occurred on or about June 14, 2023 (the “Closing” or the “Closing Date”). Pursuant to the APA, the aggregate consideration provided by SSCP for the Purchased Assets³ consisted of a \$14,999,065 credit bid, a \$870,000 prepaid rent reimbursement, and—to address the question of the estate’s administrative solvency—a Wind Down Fund of up to \$1,159,000 and its agreement to assume, pay, or otherwise satisfy, among other things: (a) Assumed PACA Claims of up to \$376,000; and (b) Assumed A/P of up to \$723,000.

10. The APA provided that the Wind Down Fund would be disbursed pursuant to a Wind Down Budget agreed to between SSCP and the Debtors to cover the use of the Debtors’ cash—consisting of a projected \$1,848,000 in cash at Closing (net of a \$500,000 budgeted line item for Foley & Lardner LLP (“Foley”) and certain other expenses), the \$870,000 rent reimbursement, \$81,000 in utility reserves, and the Wind Down Fund—to pay outstanding and estimated Allowed Administrative Expenses that Debtors had and were expected to incur during the administration of these cases, including, without limitation: (a) Allowed Professional Fees and

³ Capitalized terms used herein and not otherwise defined have the meanings set forth in the Enforcement Motion, if therein, and otherwise in the APA.

Expenses; and (b) the Allowed Administrative Expenses incurred in connection with winding down the Debtors' bankruptcy estates from and after the Closing Date.

11. The Wind Down Budget⁴ agreed to by the Debtors and SSCP contemplated that the Debtors would have \$2.799 million in cash on hand to wind down their estates, supplemented by an additional \$1.159 million Wind Down Fund provided by SSCP, for a total of \$3.958 million. From this amount, \$1.14 million was budgeted to cover: (a) \$570,000 in fees that the professionals for the Debtors (*i.e.*, CR3 Partners, LLC ("CR3") and Culhane Meadows, PLLC ("Culhane," and collectively with CR3, the "Debtor Professionals") and the Official Committee of Unsecured Creditors (the "UCC Professionals," and collectively with the Debtor Professionals, the "Estate Professionals"), had accrued through May 31, 2023; (b) \$420,000 in projected fees for Estate Professionals through the Closing Date; and (c) \$150,000 for estimated post-Closing Date fees for Estate Professionals (the "Professional Fee Reserve").

12. The Wind Down Budget provided that, if estimates were correct and net of the \$1.14 million budgeted for the Debtor Professionals, the Debtors would have \$2.818 million in cash that was allocated to pay budgeted ordinary course administrative expenses and case administration, as follows: (a) \$2.288 million in accrued payroll; (b) \$174,000 in post-petition, accrued A/P (food, utilities, other trade vendors); (c) \$82,000 for PACA creditors; (d) \$65,000 in interest to be paid to SSCP; \$250,000 for quarterly U.S. Trustee fees; and (f) \$50,000 for other administrative costs. This left a projected \$91,000 budgeted shortfall under the Wind Down Budget; however, the Debtors' Chief Restructuring Officer (the "CRO") testified at the sale hearing that the Debtors had continued to exceed budget—though he did not anticipate any Remaining Cash. At this time, net of payments made to date, the Debtors' cash on hand is

⁴ A copy of the Wind Down Budget is attached hereto as **Exhibit B**.

\$1,135,860.42, consisting of \$894,000 in the Professional Fee Reserve and \$241,860.42 in general operating funds.

13. Under Section 6.12 of the APA: (a) the Debtors were required, on and after the Closing Date, subject to and in accordance with the Wind Down Budget, to use their cash on hand (including the Wind Down Fund) to pay all Allowed Administrative Expenses of the Debtors, with all cash and cash equivalents remaining after the payment the Wind Down Expenses (the “Excess Cash”) constituting a Purchased Asset.

B. The Post-Closing Disputes Between the Debtors and SSCP.

14. Disputes arose between the Debtors and SSCP after the sale Closing, giving rise to substantial claims by the Debtors against SSCP as well as substantial counterclaims asserted by SSCP against the Debtors, their estates, and their CRO. Each party disputes and disagrees with the other party’s assertions; their respective positions and related responses are summarized below and also set forth in detail in the Enforcement Motion and the SSCP Response.

i. The Debtors Assert That SSCP Has Breached the APA, Depriving the Estate of Funds Needed to “Pay the Freight” of These Cases Under the APA and Wind Down Budget.

15. Among other things, following the Closing Date, the Debtors assert that their CRO paid roughly \$508,000 from the Operating Account to satisfy invoices that he believed to be Assumed A/P liabilities. The CRO made these payments as an accommodation to SSCP on the understanding that the Debtors would be reimbursed. In mid-July, the Debtors made demand on SSCP for reimbursement, which was initially denied on various grounds, including that payments of Assumed A/P were discretionary as an “up to” amount, which could be zero, that reimbursement

was not expressly contemplated under APA, that SSCP is merely a “secondary obligor,” and later on the grounds that claims comprising the Assumed A/P are not owed by the estates.⁵

16. The Accounts Receivable sold to SSCP included outstanding catering accounts, but not the estimated \$150,000 in associated trust fund taxes that would be paid by catering customers with respect to pre-Closing sales. The Wind Down Budget assumed that SSCP would turn over these trust fund sales taxes to the Debtors upon collection, and the Debtors have made a turnover demand. SSCP, however, has refused to turn over these funds, asserting, among other things, that such amounts are not owed by SSCP. To meet their obligations to taxing agencies, the Debtors have been forced to pay these trust fund taxes from their Operating Account.⁶

17. At the time of the auction, the Wind Down Budget contemplated that some \$350,000 in royalties (the "Royalty Fees") would be collected and retained by the Debtors as pre-Closing cash. When the abrupt termination of services by Pandya Management, LLC, delayed processing of the royalty drafts, to maintain the APA's economics and avoid a windfall to SSCP, the Wind Down Budget was adjusted to provide that the Debtors would retain these royalty fees, although they would now be collected post-Closing. However, SSCP has since collected and retained these fees, asserting that they are entitled to these amounts under the APA.⁷

18. As of the Closing Date, the Debtors had received, but not deposited, approximately \$185,000 in checks. Consistent with both general accounting definitions and applicable case law, the Debtors assert that the undeposited checks are Cash, which is retained by the Debtors under the APA. SSCP, however, has asserted that the checks are Accounts Receivables under the Debtors'

⁵ See the Enforcement Motion at ¶¶ 25-27.

⁶ See the Enforcement Motion at ¶ 29; SSCP Response at ¶¶ 31(j).

⁷ See the Enforcement Motion at ¶¶ 30-32 and SSCP Response at ¶¶ 4, 18(i).

books and records because they represent payments on accounts; therefore, they are Purchased Assets under the APA.⁸

ii. **SSCP Filed a Cross Motion to Enforce the Sale Order and Alleged that the Transition Was Mismanaged to SSCP's Detriment.**

19. In response to the Enforcement Motion, in addition to positions set forth above, SSCP has asserted defenses and affirmative claims against the Debtors. For example, one such claim is that, although it was aware that it was acquiring a distressed business, it expected that the Debtors' books and records as they were maintained during the course of the bankruptcy to be accurate, at least consistent with representations made by the Debtors during the sale process, that the Debtors' did not have a handle on their administrative costs, that the Wind Down Budget was itself flawed and that the Debtors were deficient in maintaining and controlling their books and records,⁹ that the Debtor's breached various representations and warranties under the APA, and that the Debtors failed to provide SSCP with timely access to Purchased Assets, including accounting and business records¹⁰ and intellectual property,¹¹ all causing substantial damage to SSCP. Furthermore, SSCP has asserted that the CRO agreed to pay \$500,000 in fees to Foley from the Debtors' Wind Down Budget out of the Professional Fee Reserve, which the Debtors have not

⁸ See Enforcement Motion at ¶¶; SSCP Response at ¶¶ 18(ii), 32(a).

⁹ Although SSCP was not provided with access to the Debtors' QuickBooks account on the Closing Date, Debtors' counsel issued a subpoena to Intuit and obtained and provided to SSCP the Debtors' QuickBooks data and all necessary passcodes. This issue therefore appears to be largely resolved, though SSCP still asserts unspecified damage claims.

¹⁰ This appears to be a reference to SSCP's request for a copy of the Debtors' D&O policy, which was subsequently provided to it. This issue therefore appears to be resolved.

¹¹ SSCP has complained that the Debtors failed to deliver control of certain social media accounts. In fact, the CRO's staff obtained and delivered to SSCP all social media account information, log in credentials, and passwords in the possession of the Debtor's IT manager. However, a Corner Bakery account administrator who was not engaged by SSCP post-Closing had "two-factor authentication" for Instagram linked to his cell phone number. SSCP demanded that the CRO reset the administrator rights—something he was unable to do as the Debtors had no access to, or ownership over, the social media accounts after delivering them to SSCP. To address the issue, Debtors' counsel contacted Instagram's general counsel, who then worked directly with SSCP to set up their new account administrator. This issue appears to be largely resolved, though SSCP continues to assert unspecified, "substantial" damage claims.

done and dispute.¹² SSCP has asserted that it has suffered substantial damages, giving rise to superpriority, administrative claims that take precedence over all other administrative claims in these cases, including any claims under the APA and Wind Down Budget, and that it has grounds to seek disallowance and disgorgement of the fees and expenses sought and payments made to the Estate Professionals as well as their claims and noticing agent, Kurzman Carson, LLC (“KCC”).

20. The Debtors’ CRO and CR3 strongly dispute SSCP’s allegations and believe that they are largely baseless because they either (i) pertain to certain actions of the Debtors that occurred prior to the CRO’s engagement; (ii) involve issues concerning the non-existent state of the Debtor’s books and records on and before the Petition Date; or (iii) are simply actions which are outside the scope of the CRO’s duties. The Debtors further assert that SSCP conducted extensive due diligence both before acquiring the Debtor’s distressed debt and before executing the APA and was well aware both of the condition of the company’s books and records and operations and that it was buying the business on an “as is” and “where is” basis. Moreover, the Debtors assert that the disputes at issue and conduct complained of have in many issues been remedied and that have otherwise not caused substantial harm to SSCP. The Debtors therefore dispute that SSCP’s allegations, even if supportable, excuse its performance under the APA.

21. SSCP has also demanded that the Debtors remit an estimated \$633,000 in fees collected from the franchisees post-petition, which SSCP asserts the Debtors failed to properly spend on marketing and advertising. SSCP first raised this assertion in March 2023, months before the Closing. After auditing their franchise agreements, the Debtors advised SSCP that, while franchisees are assessed certain non-refundable marketing fees, the franchise agreements provide that: (a) the Debtors may use the marketing funds in their sole discretion for any or no

¹² See SSCP Response at ¶¶ 24-33.

merchandising and advertising activities, including related administrative costs and overhead; (b) the Debtors had the right to reallocate marketing funds, modify their marketing programs, or alter the way in which the marketing funds were used in their sole discretion and could spend in any fiscal year an amount less than the franchisee's marketing contributions; and (c) the Debtors were not required to segregate marketing funds nor were such funds held in trust or in a fiduciary capacity. Moreover, to the extent that a franchise agreement was assumed by SSCP, any breaches or defaults by the Debtors have been cured pursuant to Section 365 of the Bankruptcy Code.

iii. **Additional Disputes Under the Transition Services Agreement.**

22. Disputes have also arisen between the Debtors and SSCP under Transition Services Agreement (the "TSA"), most of which the Debtors have been able to find ways to work around but which give rise to unresolved claims by SSCP. For example, disputes arose regarding the extent of SSCP's obligation to provide the Debtors with access to books and records and personnel post-Closing and to assist the Debtors with the termination of their 401(k) plan, on one hand, and demands by SSCP to the Debtors that they provide plan participants with access to their funds, on the other hand. The plan administrator advised the Debtors and SSCP that, pursuant to the plan documents and applicable law, it could not terminate the plan and make distributions to plan participants until audits could be completed and Form 5500s filed for the years 2021, 2022, and 2023, and that, until that time, it was required to freeze all plan withdrawals or rollovers. To circumvent the disputes, the Debtors obtained the plan administrator's cooperation in making accommodations and developing work-around solutions to facilitate the termination of the 401(k) without SSCP's assistance.¹³ Similar disputes also arose regarding the post-Closing preparation and filing of sales tax returns, with the Debtors asserting that SSCP improperly suspended post-

¹³ See Enforcement Motion at ¶ 36; SSCP Response at ¶ 31(e), (h).

closing assistance under the TSA and SSCP asserting that the Debtors have improperly failed to remit sales taxes in a timely manner. The Debtors again found a work around, this time by engaging Quattro Business Support Services, Inc. to prepare and file the returns.¹⁴

23. At least two issues remain unresolved. First, the Debtors' CRO did not include a line item in the Wind Down Budget for payment of accrued paid time off ("PTO") for terminated employees, reflecting his understanding that SSCP would honor outstanding PTO for those of employees who were offered employment by the Buyer. SSCP, however, has refused to update its systems for such PTO requests and has countered by demanding that the Debtors satisfy any such employee obligations.¹⁵ SSCP has also indicated that it has allowed some PTO on a one-off basis as requested. The extent of the Debtors' liabilities, if any, is unknown. In addition, Culhane and KCC have incurred approximately \$97,0000 and \$62,000, respectively, in fees and expenses for TSA services provided directly to SSCP at its request and for which it is directly responsible under Paragraph 6 of the TSA, which amounts SSCP has refused to pay.¹⁶

C. The Settlement Efforts, Mediation, and Settlement Agreement.

24. Over the past eight months, SSCP's management and the Debtors' CRO and his staff have engaged in substantial efforts to reconcile the Debtors' accounting records to determine what has been paid, what needs to be paid, and who is responsible to pay under the APA. These efforts have included, among other things, regular conference calls—often daily and sometimes twice daily—between the Debtors' CRO and his staff and SSCP's management team; review by the CRO and his staff of several hundred invoices provided by SSCP which the CRO and his staff reviewed and evaluated for delinquent payments; and multiple in-person meetings at SSCP's

¹⁴ See Enforcement Motion at ¶ 37.

¹⁵ See Enforcement Motion at ¶ 38; SSCP Response at ¶16 and 31(e).

¹⁶ See Enforcement Motion at ¶ 39 and the second supplement to the Enforcement Motion [D.I. No. 974] at ¶¶ 5-9.

offices to work through these reconciliations and other issues. Counsel for the Debtors and SSCP have also engaged in extensive meetings and ongoing discussions to seek a resolution of the wide-ranging disputes between the parties.¹⁷ These efforts have been extremely challenging by any measure.

25. On November 9, 2023, at the request of the Debtors and SSCP, the Court entered an Order assigning the APA disputes to mediation before Ret. J. Harlin D. Hale of JAMS [D.I. No. 992]. The parties participated in a one-day mediation session in Dallas, TX on November 14, 2023, and the mediator subsequently participated in many follow up phone calls with the Debtors, SSCP, and CR3 in a further effort to resolve the many, complicated disputes among the parties. That mediation was ultimately unsuccessful, but it went a long way to paving the groundwork for the economics and structure of this proposed Settlement.

26. In mid-December 2023, the Debtors' independent board member determined to address certain conflicts by taking the lead in handling negotiations on behalf of the estate directly, with assistance and advice from the Debtors' legal counsel. CR3 continued to engage in settlement discussions on its own behalf. Around the same time, SSCP engaged new counsel to take over settlement efforts.

27. As a result of renewed settlement efforts following the mediation, and following extensive accounting and financial reconciliations, formal and informal discovery, and exhaustive negotiations and efforts among the various parties over the nearly six months that have passed since the filing of the Enforcement Motion, the Parties have finally reached a full and final resolution of their disputes. That Settlement has been approved by the Debtors' independent

¹⁷ See SSCP Response at ¶¶ 15, 19.

director on behalf of the estate as well as by SSCP. The Settlement is also supported by the Debtors' CRO and CR3, Culhane, and KCC.

28. The Settlement contains the following key elements. ***First***, the Debtors, SSCP, and the Debtor Professionals¹⁸ have reached an agreement regarding the allocation of the Professional Fee Reserve, with the Debtor Professionals agreeing to substantial write offs of their fees and expenses, assigning the balance of the funds in the Professional Fee Reserve to SSCP, and waiving any further payment from the Wind Down Fund, SSCP, or the Debtors' estates. ***Second***, all claims and causes of actions of the Debtors, their estates, or SSCP to seek recovery from the Debtors' D&O policy and its proceeds will survive entry of the Settlement Order and any order approving CR3's fees on a final basis. ***Third***, all claims and causes of action against SSCP related to these cases and the APA are released. ***Finally***, the Settlement contains a mechanism for establishing whether there are any outstanding Allowed Administrative Expenses to Disputed Vendors (as defined below) that were provided for under the Wind Down Budget and providing for their payment from the Wind Down Fund (net of the Professional Fee Reserve), with any Excess Cash to be distributed to SSCP.

29. To the best of his knowledge, the CRO now believes that the Debtors have made all payments contemplated under the Wind Down Budget other than certain payments to the Estate Professionals, KCC, and Foley. At various times throughout these cases, vendors delivered invoices either directly to the Debtors or to locations now operated by SSCP (which SSCP forwarded to the Debtors' CRO). The CRO and SSCP have identified at least \$226,000 in alleged unpaid invoices (the "Disputed Invoices") presented by 58 vendors identified on **Exhibit C** (collectively with any other creditor, vendor, or other party who asserts that it is owed for post-

¹⁸ The UCC Professional previously assigned their rights to the Professional Fee Reserve to SSCP.

Petition Date / pre-Closing goods or services provided, the “Disputed Vendors”) with respect to purported services provided or goods delivered to the Debtors between the Petition Date and the Closing Date. In mid-February 2024, the CRO informed the Debtors and SSCP that, because the Debtors’ books and records were always in disarray, and because he is no longer operating the Debtors’ business, does not have possession of its books and records or access to its former employees, and has no confidence in the Debtors’ books and records or its internal cost-control procedures, he cannot confirm with any confidence that the goods and services pertaining to the Disputed Invoices were provided to the Debtors, are equal in value to the alleged invoices, or that the good and services in question were provided and conferred benefit to the Debtors. Moreover, none of the Disputed Vendors has filed a motion for payment of an administrative expense in the roughly 8 months since the Closing. Accordingly SSCP and the Debtors dispute that the amounts set forth in the Disputed Invoices or that may otherwise be asserted by Disputed Vendors constitute Allowed Administrative Expenses to be paid under the Wind Down Budget or the APA. Besides, even if such amounts were owed by the Debtors, SSCP asserts that it has substantial offsets to any amounts owed for damages it suffered by the Debtors’ breaches of the APA, that such damages would be cloaked with super priority status, and that all cash in the Debtors’ possession now—eight months after Closing—constitute SSCP’s Excess Cash under the APA.

30. The Debtors have decided to support this Settlement and believe that it is in the best interest of the estates and their creditors under the circumstances. One of the principal benefits of the Settlement is that it creates a straightforward mechanism for Disputed Vendors to make payments requests with respect to any such amounts that they believe should be paid under the Wind Down Budget, and for any such requests to be resolved by the parties or this Court, so that a final determination can be made regarding any further payments to be made under the Wind

Down Budget and the extent to which any Excess Cash must be delivered to SSCP. The Disputed Vendors identified on **Exhibit C** will receive notice of this proposed Settlement by overnight mail, and all other parties identified on the Debtors' creditor matrix will receive notice of this proposed Settlement by first-class mail. That notice will indicate that parties who assert rights to the remaining balance of the Wind Down Fund must file a request for payment no later than 7 days prior to the original hearing date on this Motion. If any party fails to file such a request, it will be forever barred from seeking such recovery from the estates, the Wind Down Fund, SSCP, or any professional of the Debtors. Moreover, the Settlement preserves any claims or causes of action of the Debtors or their estates to seek recovery from the Debtors' D&O policy and its proceeds, providing the Chapter 7 trustee with an opportunity to conduct further investigation and bring additional claims if appropriate, and leaving \$25,000 for the Chapter 7 trustee to use for that investigation.

31. The Term Sheet reflecting the key terms of the Settlement is as follows. **The Parties are preparing a formal settlement agreement (the "Settlement Agreement"), which will be filed with the Court as soon as practicable but in no event later than 14 days prior to the Hearing Date.**

SETTLEMENT TERM SHEET	
The Settling Parties	
a) The parties to the Settlement are: (a) the Debtors; (b) the Debtors' Professionals; (c) KCC; (d) the Debtors' independent board member (the " <u>Director</u> "); and (e) SSCP (collectively, the " <u>Parties</u> ").	
The Debtors' Cash On Hand	
b) The Debtors hold at least \$1.135 million in cash (" <u>Cash on Hand</u> "), consisting of \$894,000 in the Professional Fee Reserve and \$241,860.42 in non-Professional Fee Reserve money .	

Allocation of the Professional Fee Reserve & Resolution of SSCP's Fee Objections

KCC:

- c) KCC's invoices for services provided for the periods from the Petition Date through the filing date of this Motion will be allowed in full. KCC will not be entitled to payment of any further fees or expenses on account of its outstanding, unpaid fees and expenses, as any further amounts KCC would be entitled to will be assigned to SSCP. KCC will be entitled to retain the fees and expenses that it has already received from the Debtors.
- d) KCC has agreed to cap its recovery pursuant to the Wind Down Budget to the amounts that it has already received from the Estates, and it assigns all other rights to recover from the estates to SSCP. KCC will also waive and release all rights (not otherwise assigned to SSCP) against the Debtors, their estates, and SSCP for payment of fees other than as provided herein.
- e) The Debtors, their estates, SSCP, and CR3 waive all objections to the final allowance and payment of KCC's fees and expenses.

Culhane:

- f) Culhane's monthly fee applications submitted for the periods from the Petition Date through January 2024 will be allowed in full. Culhane will be allocated from the Professional Fee Reserve under the Wind Down Budget, and receive payment in the amount of, **\$195,000** on account of outstanding, unpaid fees and expenses allowed on an interim basis, and additionally, will be entitled to retain the fees and expenses that it has already received from the Debtors. Other than the \$195,000 allowed to be paid under this Agreement—which amount will be paid to Culhane by the Debtors within three business days following entry of the Order approving this Settlement—and retention of the \$1,232,000 that it previously received, Culhane will not be entitled to payment of any further fees or expenses on account of its outstanding, unpaid fees and expenses, as any further amounts Culhane would be entitled to will be assigned to SSCP.
- g) Culhane's receipt of payments previously received (\$1.232 million) together with the \$195,000 payment from the Professional Fee Reserve provided herein and application of its remaining retainer balance of \$3,179.70 will cap its recovery pursuant to the Wind Down Budget and will be in full and final satisfaction of all unpaid amounts owed by the Debtors, their estates, or SSCP to Culhane, and Culhane waives all rights against the Debtors, their estates, and SSCP for payment of fees other than as provided herein.

The Debtors and their estates, SSCP, and CR3 waive all objections to the final allowance and payment of Culhane's fees and expenses.

CR3:

- h) CR3's fees and expenses as set forth on the monthly staffing reports filed with Court and submitted for the periods from the Petition Date through January 31, 2024, will be allowed in full.
- i) CR3 will be entitled to retain the fees and expenses that it has already received from the Debtors.
- j) The Parties agree that CR3 will be allocated **\$247,000** from the Professional Fee Reserve under the Wind Down Budget; *provided, however*, that CR3 will not be entitled to payment of any further fees or expenses on account of its outstanding, unpaid fees and expenses, as its agreed allocation from the Professional Fee Reserve and any further amounts CR3 would be entitled to will be assigned to SSCP under the Settlement.
- k) CR3's receipt of payments previously received (\$588,349) will cap its recovery pursuant to the Wind Down Budget and will be in full and final satisfaction of all unpaid amounts owed by Debtors, their estates, or SSCP to CR3, and CR3 waives all rights against the Debtors, their estates, and SSCP for payment of fees other than as provided herein. Other than to keep the \$588,349 that it had previously received, CR3 will not be entitled to payment of any further fees or expenses on account of its outstanding, unpaid fees and expenses, as any further amounts CR3 would be entitled to will be assigned to SSCP.
- l) The Debtors, their estates, SSCP, KCC, and Culhane waive all objections to the final allowance and payment of CR3's fees and expenses.
- m) Notwithstanding anything to the contrary in this Motion, all rights, claims, and causes of action of the Debtors, their estates, or SSCP to seek recovery from the Debtors' D&O policy and its proceeds will survive entry of the Settlement Order and any order approving CR3's fees on a final basis. Stated differently, entry of an order allowing CR3's fees in any amount is not preclusive to the estates' or SSCP's rights collectively or individually to assert claims or causes of action against Greg Baracato in his capacity as a CRO or CR3 to collect insurance policy proceeds under the Debtor's D&O insurance policy. Any right to recover on such claims or causes of action is limited to a claim against Greg Baracato in his capacity as the Debtors' CRO or CR3 and only to recover from the estates' D&O policy. In waiving any right to any claim or damage over and above the amounts that may be paid by the Debtor's D&O carrier under the D&O policy, the estate and SSCP covenant and agree that: (i) no such damages other than those recovered from the D&O policy will be sought from CR3 or Greg Baracato, in his capacity as CRO or personally; and (ii) no damages will be sought from any other non-estate insurance policy.

The UCC Professionals:

- n) The Parties agree that the UCC Professionals will be allocated **\$222,000** from the Professional Fee Reserve under the Wind Down Budget, the rights to which were assigned to SSCP by the UCC Professionals in December 2023.

SSCP's Counsel (Foley & Lardner LLP):

- o) The Parties Agree that **\$200,000** of the Professional Fee Reserve will be allocated to SSCP under the Wind Down Budget on account of its rights to payment of legal fees incurred by Foley as adequate assurance in connection with the DIP financing provided by SSCP. This amount will be paid to SSCP upon entry of the Settlement Order.

The Directors' Fees:

- p) The Director's compensation for services provided for the periods from the Petition Date through the filing date of this Motion are allowed in full and the Director will be entitled to retain the fees that he has already received from the Debtors. The Director's receipt of such payments cap his payments pursuant to the Wind Down Budget and will be in full and final satisfaction of all unpaid amounts owed by Debtors, their estates, or SSCP to the Director, and the Director waives all rights against the Debtors, their estates, and SSCP for payment of unpaid Directors' fees (currently estimated to be \$100,000) other than as provided herein. The Debtors, their estates, SSCP, KCC, and Culhane waive all objections to the Directors' retention of the compensation previously received by the Director from the Debtors.
- q) Notwithstanding anything to the contrary in this Motion, all rights, claims, and causes of action of the Debtors, their estates, or SSCP to seek recovery from the Debtors' D&O policy and its proceeds will survive entry of the Settlement Order. Stated differently, entry of the Settlement Order is not preclusive to the estates' or SSCP's rights collectively or individually to assert claims or causes of action against the Director in his capacity as Director or to collect insurance policy proceeds under the Debtor's D&O insurance policy. Any right to recover on such claims or causes of action is limited to a claim against the Director in his capacity as the Debtors' Director and only to recover from the estates' D&O policy. In waiving any right to any claim or damage over and above the amounts that may be paid by the Debtor's D&O carrier under the D&O policy, the estate and SSCP covenant and agree that: (i) no such damages other than those recovered from the D&O policy will be sought from the Director, in his capacity as such or personally; and (ii) no damages will be sought from any other non-estate insurance policy.

The Debtors' Remaining Cash

- r) After the \$195,000 payment to Culhane pursuant to this Settlement, the balance in the Professional Fee Reserve will be \$698,000. In addition, roughly \$30,000

will be used to serve notice of this Motion. The remaining \$669,000 balance will be paid to SSCP upon entry of the Settlement Order in indefeasible payment. .

- s) The \$669,000 is allocated as follows: (i) the UCC professionals' collective *pro-rata* share of the Professional Fee Reserve, which is agreed to be \$222,000; (ii) CR3's *pro rata* share of the Professional Fee Reserve, which is agreed to be \$247,000; and (iii) \$200,000 to SSCP for the \$500,000 allocated to Foley in the Wind Down Budget.
- t) For the avoidance of doubt: under this Settlement: (i) KCC, Culhane, and CR3 all agreed to assign their respective rights to receive any share of the Professional Fee Reserve (other than the \$195,000 payment to Culhane provided for herein) to SSCP upon entry of the Settlement Order; and (b) nothing herein impairs or alters SSCP's rights to receive the UCC Professionals' rights to receive any share of the Remaining Cash, which was previously assigned to SSCP pursuant to the settlement of the adversary proceeding.
- u) Exclusive of the Professional Fee Reserve, the estimated cash held by the Debtors upon entry of the Settlement Order will be \$214,360.42 (\$241,860.42 less \$28,500 additional payment for extending the D&O policy).(the "Remaining Cash").
- v) The Remaining Cash will be paid to SSCP, thirty (30) days after entry of the Settlement Order, subject to the Opt-Out Procedures set forth below.

Disputed Administrative Expenses: The Opt-Out Procedures

- w) The Debtors and SSCP will set a hearing on this Motion (the "Hearing") on at least 21 days' notice.
- x) Notice of this Motion (the "Hearing and Opt-Out Notice") will be served on: (a) the Disputed Vendors, who will be served via electronic mail, if available, and also by overnight mail; and (b) all other creditors and parties in interest, including special notice parties, who will be served by electronic mail if they have consented or been deemed to consent to service by electronic mail (such as ECF parties), and otherwise by first-class mail (collectively, the "Notice Parties").
- y) The Hearing and Opt-Out Notice will clearly indicate that, upon entry of the Settlement Order, all parties served with notice of this Motion (the "Notice Parties") will be deemed to have released all rights, including rights to payment, from or against the Debtors, their estates, SSCP, and the Remaining Cash for any reason, including payment or otherwise for anything related to the APA, the Wind Down Budget, these Chapter 11 cases, the Remaining Cash, and the Professional Fee Reserve unless they "opt-out" by filing a request for payment with the Bankruptcy Court—which may be in the form of the 1-page "Opt-Out Notice and Payment Request" provided with the Hearing and Opt-Out Notice—

and serving it on the Debtors, SSCP, and their counsel no later than 7 days prior to the first scheduled hearing date on the Motion.

- z) Upon entry of the Settlement Order, the Notice Parties will be deemed to have released all rights, including rights to payment from or against the Debtors, their estates, SSCP, and the Remaining Cash for any reason, including payment or otherwise for anything related to the APA, the Wind Down Budget, these Chapter 11 cases, the Remaining Cash, and the Professional Fee Reserve and set forth in the Notice of the Motion.
- aa) For those creditors who “opt out” and assert Administrative Claims against the Debtors’ estates or the Remaining Cash (the “Payment Requests”), SSCP will work with Debtors prior to the Hearing to analyze the Payment Requests and determine, in SSCP’s sole and absolute discretion, whether SSCP will object to, settle, or stipulate to the allowance of such Payment Requests. The Debtors and their professionals have no obligation to file or pursue any such claim objections under this Settlement; any such objections that SSPC determines to file or pursue will be the sole responsibility of SSCP to be undertaken solely at its own expense, and the Settlement Order provide SSCP with standing to pursue any such objections on behalf of the Debtors and their estates.
- bb) The amount of any timely asserted Payment Request will be reserved from the Remaining Cash and such amount will be placed into an escrow or blocked account and will not be delivered to SSCP under the APA or Settlement until the asserting creditors’ entitlement to payment under the Wind-Down Budget, in a *pro rata* amount, from the Remaining Cash is determined either by (i) agreement with SSCP, in its sole and absolute discretion, or (ii) by Court Order. All unreserved Remaining Cash will be paid to SSCP.

Miscellaneous:

- cc) SSCP and the Debtors retain the right to terminate the Settlement until it is approved pursuant to the Settlement Order.
- dd) Upon entry of the Settlement Order, the Debtors withdraw, and will be deemed to withdraw, with prejudice, their Enforcement Motion.
- ee) Upon receipt of the \$669,000 and the Remaining Cash, SSCP will withdraw, and will be deemed to withdraw, with prejudice, the cross-motion to enforce the APA set forth in the SSCP Response.

Conversion of the Chapter 11 Case to Chapter 7

- ff) As soon as practicable following entry of the Settlement Order, the Debtors will file a notice of conversion of these cases to cases under Chapter 7 of the Bankruptcy Code.

gg) The Settlement will be binding on any Chapter 7 Trustee.

32. Absent the Court's entry of the Settlement Order, the Debtors' estates will be subject to increasing and uncertain litigation costs relevant to the foregoing disputes, depleting the estates' assets available to pay creditors and likely subjecting any creditors asserting Administrative Claims to significant delay, further litigation, and uncertainty. Therefore, the Debtors have determined that, after weighing the risks to these estates absent the Settlement, the Court's approval of the Settlement is better than any likely alternative and in the best interests of the estates.

D. Conversion of These Cases to Chapter 7 Upon Approval of the Settlement.

33. The Debtors have now sold all their assets of any meaningful value. Since the Closing, the Debtors have taken various steps to wind-up their estates, including ensuring the payment of all "trust fund" sales and payroll taxes incurred by the Debtors' during the administration of these Chapter 11 cases. The majority of these efforts have been focused on resolving the extensive disputes with SSCP to ensure that the Debtors' have sufficient resources to satisfy all obligations provided for under the Wind Down Budget and to provide for an orderly conversion of these cases to cases under Chapter 7 of the Bankruptcy Code.

34. In addition, the Debtors have insufficient funds to confirm a chapter 11 plan of reorganization. With the cessation of operations and no significant assets left to administer, a successful rehabilitation under the auspices of chapter 11 of the Bankruptcy Code is not possible. Thus, drawing out the chapter 11 process will result in additional administrative expense with little or no benefit to the Debtors' estates.

35. After entry of the Settlement Order, the Debtors do not believe that their estates will continue to benefit by remaining in Chapter 11.

V.
BASIS FOR RELIEF

A. The Settlement is Fair, Reasonable, and in the Best Interest of the Estate Under the Circumstances.

36. It is well established that compromises are favored in bankruptcy to minimize litigation and expedite the administration of bankruptcy estates.¹⁹ Bankruptcy Rule 9019(a) provides that “on motion by the trustee and after a hearing, the court may approve a compromise or settlement.” Considering whether to approve a settlement falls within the bankruptcy court’s sound discretion. In exercising this discretion, the bankruptcy court is called upon to determine whether the compromise is fair, reasonable, and in the best interest of the debtor’s estate.²⁰

37. To determine whether a settlement is “fair and reasonable,” courts in the Third Circuit consider the following factors:

- (a) the probability of success in litigation;
- (b) the likely difficulties in collection;
- (c) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
- (d) the paramount interest of the creditors.²¹

¹⁹ *Myers v. Martin (In re Martin)*, 91 F. 3d 389, 393 (3d Cir. 1996).

²⁰ *In re Northwestern Corp.*, 2008 WL 2704341, at *16 (Bankr. D. Del. Jul. 10, 2008) (quoting *Key3media Group, Inc. v. Pulver.Com, Inc. (In re Key3media Group, Inc.)*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (“In exercising this discretion, the bankruptcy court must determine whether the compromise is fair, reasonable, and in the best interest of the estate.”)).

²¹ *Martin*, 91 F. 3d at 393; *Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006); see also *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (recognizing that in applying Bankruptcy Rule 9019(a), whether a court should approve a settlement depends on several factors, including the probability of success in the litigation; the difficulties to be encountered in collection; the complexity of the litigation and the related expense and inconvenience, and the interests of the creditors).

38. When determining whether a settlement is in the “best interests of the estate,”²² the bankruptcy court should not substitute its judgment for that of the debtor in possession.²³ Nor is the bankruptcy court called on to decide the numerous questions of law or fact raised in the litigation. Rather, the bankruptcy court should canvass the issues to assess whether the settlement falls below the lowest point in the range of reasonableness.²⁴ A settlement that does not fall below that low threshold should be approved.²⁵

39. As set forth in greater detail below, the Debtors believe that the weight of the *Martin* factors favors approval of the Settlement. The Settlement eliminates the cost and uncertainty of litigating and allows for a final resolution of the extensive issues set forth in the Enforcement Motion as well as highly contentious allegations raised in the SSCP Response. Those disputes, which arose almost immediately following the Closing Date, could not be resolved even with the assistance of a mediator. Finally, after nearly eight months of financial reconciliations, arms’ length negotiations, and much perseverance, the Parties have reached a hard-fought global resolution that goes beyond the original disputes raised in the Enforcement Motion, addresses the legal and financial issues at play as well as the emotive or value based obstacles to settlement, and lays the groundwork for a smooth transition of these cases from Chapter 11 to Chapter 7 while creating a streamlined process to determine, and provide payment for, any Allowed Administrative Expenses

²² *In the Matter of Energy Coop., Inc.*, 886 F. 2d 921, 927 (7th Cir. 1989).

²³ *In re Martin*, 91 F.3d at 395; *In re Decade, S.A.C., LLC*, No. BR 18-11668 (CSS), 2020 WL 564903, at *4 (D. Del. Feb. 5, 2020).

²⁴ *In re Woodbridge Grp. of Companies, LLC*, 592 B.R. 761, 772–73 (Bankr. D. Del. 2018); *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F. 2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983); *In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004) (“In approving a settlement, the court does not have to be convinced that the settlement is the best possible compromise . . . [it] must only conclude that the compromise or settlement . . . be above the lowest point in the range of reasonableness.”) (internal quotation and citations omitted).

²⁵ *In re Geller*, 74 B.R. 685, 688 (Bankr. E.D. Pa. 1987) (a settlement will be approved if it clears a low threshold of reasonability); *Official Unsecured Creditors' Comm. of Pennsylvania Truck Lines, Inc. v. Pennsylvania Truck Lines, Inc. (In re Pennsylvania Truck Lines, Inc.)*, 150 B.R. 595, 598 (E.D. Pa. 1992), *aff'd* 8 F. 3d 812 (3d Cir. 1993) (settlement must not fall below the lowest point in the range of reasonableness).

that may still be entitled to payment from the Remaining Cash under the Wind Down Budget. Under all of the circumstances at play in these cases, the Debtors respectfully submit that the Settlement falls above the lowest point in the range of reasonableness and should be approved by this Court.

40. ***Probability of Success.*** Absent approval of the Settlement, especially in view of the failed mediation efforts that the parties have already attempted, the Parties and the Chapter 7 Trustee will almost certainly be faced with continuing, intractable litigation over a wide range of highly charged, factually intensive issues that this Court will be left to resolve. Many of the issues could not likely be resolved via summary judgment, and so the Parties would be forced to trial, a path made unnecessary by this Settlement. Moreover, over the eight months that the Debtors, SSCP, and CR3 have participated in difficult and extensive negotiations, they have focused carefully on the strengths and weaknesses of their respective positions, their likelihood of success on the merits, and various legal, economic, and principled obstacles to settlement. After going through this process, the Debtors have reached a carefully thought out and extremely well-informed position that all the myriad of disputes outlined above, and the complex issues that they raise, present substantial litigation risk, and that the probability of success on the merits for any of the Parties is highly uncertain. Accordingly, this factor favors approval of the Settlement.

41. ***Complexity of Litigation.*** The Debtors believe that this factor is strongly established by the facts and circumstances as well. Absent approval of this Settlement, SSCP, the Estate Professionals, and the Chapter 7 Trustee must litigate myriad factual and legal issues that can only be described as complex, as set out in detail above and in the Enforcement Motion and SSCP Response. As previously noted, such litigation would require extensive fact finding and discovery that would unnecessarily cost the estate both resources and time, ultimately at the expense of creditors. Moreover, the Chapter 7 Trustee will be sorely disadvantaged in any post-

conversion litigation as consequence of both a lack of institutional knowledge and familiarity with the APA and the circumstances of the Chapter 11 cases. The recognition of these complexities has weighed significantly in the Debtors' decision to persevere in pursuing this Settlement. After roughly eight months of negotiations, the Debtors have come to a highly informed conclusion that the considerable complexities involved here are best avoided through the Settlement, which avoids the complexity of litigation while creating a mechanism to protect administrative creditors, if any, who assert unpaid claims against the Debtors' estates. Given the foregoing, this factor favors approval of the Settlement.

42. ***Difficulties in Collection.*** The Debtors believe that SSCP has substantial assets; therefore, SSCP appears to have the ability to pay any amounts owed to the estates. However, because SSCP has been strident in stating its positions and that it does not believe that it owes anything related to these cases and the APA, and it appears prepared to exhaust all litigation remedies against the Debtors, the estates, and others, the Debtors believe this Settlement makes business sense. It is likely that the length of the litigation and seemingly inevitable appeals alone will strip the estates from the benefits of prevailing in any litigation. In contrast, the Settlement provides an immediate and substantial benefit to the estates. Accordingly, this factor favors approval of the Settlement.

43. ***Paramount Interests of Creditors.*** After careful consideration over the course of mediation and eight months of negotiations, the Debtors have concluded that the Settlement is in the best interest of all creditors for all the reasons set forth above. Rather than litigate the facts surrounding the Enforcement Motion and SSCP Response, the Settlement saves valuable estate resources by avoiding the litigation and resolves the underlying issues. Moreover, the timing of

litigation is often unpredictable and lengthy and would complicate the Debtors' claim resolution process. Accordingly, this factor favors approval of the Settlement.

44. For these reasons, entry into the Settlement constitutes a sound exercise of the Debtors' business judgment and is in the best interests of their creditors and their estates. The Settlement falls above the lowest point in the range of reasonableness, and it should be approved.

B. The Settlement Resolving the Disputes that Have Arising under the APA Represents a Sound Exercise of the Debtors' Business Judgment.

45. To the extent the Settlement pertains to disputes under the APA, and therefore, the sale of the Debtors' property, Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."²⁶ Section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the use of a debtor's assets outside of the ordinary course of business. Courts in this district and others have required that the decision to sell or use assets outside of the ordinary course of business be based upon the sound business judgment of the debtor.²⁷

46. A debtor's showing of a sound business purpose need not be unduly exhaustive. Rather, a debtor is "simply required to justify the proposed disposition with sound business reasons."²⁸ Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. *Lionel*, 722 F.2d at 1071; *Montgomery Ward*, 242 B.R. at 155.

²⁶ 11 U.S.C. § 363(b)(1).

²⁷ See *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); see also *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999).

²⁸ *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984).

47. For all the reasons set forth above with respect to approval of the Settlement under Rule 9019, entry in the Settlement is also within the Debtor's sound business judgment.

C. Approval of the Settlement Will Further the Orderly Administration of These Estates and Is Further Warranted under Bankruptcy Code Section 105(a)

48. Additionally, section 105(a) of the Bankruptcy Code provides a bankruptcy court with broad powers in the administration of a case under the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”²⁹ Section 105 of the Bankruptcy Code codifies the bankruptcy court's inherent equitable powers.³⁰

D. Conversion of These Cases Following Entry of an Order Approving the Settlement Agreement Is Appropriate under the Circumstances

49. Section 1112(a) of the Bankruptcy Code entitles a debtor to convert its case from Chapter 11 to Chapter 7, unless: (a) the debtor is not a debtor in possession; (b) the case was originally commenced as an involuntary case under chapter 11; or (c) the case was converted to a chapter 11 case at the request of a non-debtor party.³¹ Absent these exceptions,³² Section 1112(a) “gives the debtor [in possession] the absolute right to convert a voluntarily commenced chapter 11 case . . . to a liquidation case” under chapter 7.³³

²⁹ 11 U.S.C. § 105(a).

³⁰ See *Management Tech. Corp. v. Pardo* (*In re Management Tech. Corp.*), 56 B.R. 337, 339 (Bankr. D. N. J. 1985) (indicating that court's equitable powers are derived from section 105).

³¹ See 11 U.S.C. § 1112(a).

³² See *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1161 (5th Cir. 1988) (finding that “[a] debtor has the absolute right to convert his or her Chapter 11 case to a Chapter 7 case” under section 1112(a)); *Results Sys. Corp. v. MQVP, Inc.*, 395 B.R. 1, 5 (E.D. Mich. 2008) (“[§] 1112(a) gives the debtor the right to convert a chapter 11 case to a liquidation case under chapter 7 at any time.”) (internal citation omitted); see also Fed. R. Bankr. P. 1017(f)(1) and 1017(f)(2) (conversion under section 1112(a) is requested by motion under Bankruptcy Rule 9013 but is not to be treated as a contested matter under Bankruptcy Rule 9014).

³³ *In re Schuler*, 119 B.R. 191, 192 (Bankr. W.D. Mo. 1990) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 405 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 117 (1978)); see also *In Dieckhaus Stationers of King of Prussia*,

50. The requirements for conversion set forth in section 1112(a) are satisfied. In particular, the Debtors are debtors in possession under Sections 1107 and 1108 of the Bankruptcy Code, they commenced these chapter 11 cases voluntarily, and there have been no prior conversions. Further, as required under Section 1112(f), the Debtors are eligible for chapter 7 bankruptcy and could have initiated their cases under that chapter. Accordingly, Section 1112(a) provides an independent basis and absolute right under the circumstances for the Debtors to convert their Chapter 11 cases.

51. Bankruptcy Code section 1112(b) authorizes the same relief if the Debtors can demonstrate “cause” in accordance with the statute.³⁴ “Cause” includes “continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation.”³⁵ Courts have held that continuing to incur quarterly U.S. Trustee fees and legal fees may constitute a continuing loss for purposes of this prong.³⁶ The list of factors set forth under section 1112(b)(4) is non-exclusive, and a bankruptcy court may consider other factors and employ its equitable powers to reach the appropriate result in a particular case.³⁷ Courts have found that where a debtor’s business operations have ceased, the best interests of creditors and the estate are served by converting the reorganization proceedings to chapter 7 cases.³⁸

Inc., 73 B.R. 969, 971 (Bankr. E.D. Pa. 1987) (stating that the plain language of section 1112(a) “gives the debtor an absolute right to convert” unless one of the enumerated exceptions applies); 7 Collier on Bankruptcy ¶ 1112.02[1], at 1112-8 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

³⁴ See 11 U.S.C. § 1112(b)(1).

³⁵ *Id.* § 1112(b)(4)(A).

³⁶ See *In re FRGR Managing Member LLC*, 419 B.R. 576, 581 (Bankr. S.D.N.Y. 2009).

³⁷ See *Camden Ordnance Mfg. Co. of Ark., Inc. v. U.S. Trustee (In re Camden Ordnance Mfg. Co. of Ark., Inc.)*, 245 B.R. 794, 798 (E.D. Pa. 2000); *In re Congoleum Corp.*, 414 B.R. 44, 61 (D. N.J. 2009); *In re Ramreddy, Inc.*, 440 B.R. 103, 115 (Bankr. E.D. Pa. 2009).

³⁸ See *In re Great Am. Pyramid Joint Venture*, 144 B.R. 780, 791 (Bankr. W.D. Tenn. 1992) (“when no or substantially no business is left to reorganized, [the] chapter 11 cases do not serve [the purposes of the Bankruptcy Code] and ‘cause’ exists” to convert the cases to chapter 7 proceedings); see also *In re Tracey Serv. Co.*, 17 B.R. 405, 410 (Bankr. E.D. Pa. 1982); *In re W.J. Rewolt Co.*, 22 B.R. 459, 461–462 (Bankr. E.D. Mich. 1982).

52. Given that the Debtors: (a) have sold all their assets of any meaningful value, (b) have no business operations, and (c) do not have the resources necessary to propose and confirm a chapter 11 plan, the Debtors submit that conversion of these cases to cases under chapter 7 of the Bankruptcy Code is necessary and appropriate in addition to the reasons articulated under section 1112(a). Further, if the Debtors remain in chapter 11, they will incur additional administrative expenses without concomitant benefit to their estates. Under the circumstances, the Debtors respectfully submit that the interests of all stakeholders would best be served by converting these cases to cases under chapter 7 of the Bankruptcy Code.

53. Accordingly, Debtors respectfully request that the Court approve and authorize the Parties to enter into the Settlement and authorize the conversion of these cases to Chapter 7.

VI.
WAIVER OF BANKRUPTCY RULE 6004(A) AND 6004(H)

54. To implement the foregoing successfully and facilitate the resolution of the disputes among the Parties with respect to the APA as well as the wind down of these Chapter 11 cases and their prompt conversion to Chapter 7, the Debtors request that the Court enter an order providing that notice of the relief requested in this Settlement Motion satisfies Bankruptcy Rule 6004(a), to the extent applicable, and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

VII.
NOTICE

55. The Debtors have provided notice of this Settlement Motion to the following parties (collectively, the “Notice Parties”): (a) by email only, if they have consented to such service, and otherwise by first-class mail; to (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel to the Official Committee of Unsecured Creditors; (iii) all known creditors

and parties in interest; and (iv) any party that has requested notice pursuant to Bankruptcy Rule 2002; and additionally (b) by electronic mail, if available, and also by overnight mail, to the Disputed Vendors. The Debtors submit that, considering the nature of the relief requested, no other or further notice need be given.

VIII.
NO PRIOR REQUEST

56. No prior request for the relief sought in this Motion has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: March 11, 2021
Wilmington, Delaware

/s/ Mette H. Kurth
Mette H. Kurth (DE Bar No. 6491)
CULHANE MEADOWS, PLLC
3411 Silverside Road
Baynard Building, Suite 104-13
Wilmington, Delaware 19810
Telephone: (302) 289-8839 Ext. 100
Email: mkurth@cm.law

Exhibit A

PROPOSED ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

CBCRC LIQUIDATING CORP., et al.,¹

Debtors.

Chapter 11

Case No. 23-10245 (KBO)
(Jointly Administered)

Re: D.I. No. [•]

**ORDER APPROVING THE MOTION OF THE DEBTORS FOR ENTRY OF AN
ORDER: (I) APPROVING THE SETTLEMENT AGREEMENT IN CONNECTION
WITH THE ASSET PURCHASE AGREEMENT BY AND AMONG THE DEBTORS
AND SSCP RESTAURANT INVESTORS, LLP DATED JUNE 14, 2023; (II)
AUTHORIZING THE DEBTORS TO CONVERT THESE CASES TO CASES UNDER
CHAPTER 7 ; AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Settlement Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”), approving the Settlement by and among the Debtors, SSCP Restaurant Investors, LLC, and the Debtors’ Professionals and independent board member, as more fully set forth in the Motion; and this Court having 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; and the Court having found that it may enter an order or judgment consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include CBCRC Liquidating Corp. (0801), CBHC Liquidating Company (3981), and CBCCI Liquidating Inc. (1938). The Debtors' service address is Corner Bakery, c/o CR3 Partners, Attn: Greg Baracato, Chief Restructuring Officer, 13355 Noel Road, Suite 2005, Dallas TX 75240.

² Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion or the Settlement, as applicable.

on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Settlement Agreement, the terms of which are described in the Settlement Motion and which is attached hereto as **Exhibit A**, is approved and its terms are incorporated into this Order.
3. The Debtors and SSCP are all authorized to perform under the Settlement.
4. Notice of the Settlement Motion as provided therein shall be deemed good and sufficient notice of the Settlement Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.
5. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.
6. The Debtors are authorized to take all actions necessary to implement the Settlement and to effectuate the relief granted in this Order in accordance with the Settlement.
7. Effective as of the date of filing of a *Notice of Conversion* (the “Effective Date”), the Debtors’ chapter 11 cases shall be converted to cases under chapter 7 of the Bankruptcy Code pursuant to section 1112 of the Bankruptcy Code.

8. The U.S. Trustee shall appoint an interim trustee pursuant to section 701 of the Bankruptcy Code to serve in the Debtors' chapter 7 cases pending the qualification of a permanent trustee under sections 702 of the Bankruptcy Code.

9. The Debtors shall:

- a. Within seven days of the Effective Date, turn over to the interim chapter 7 trustee, once one is appointed, all records and property of the estate under its possession or control as required by Bankruptcy Rule 1019(4);
- b. Within fourteen days of the Effective Date, file schedules of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim, as required by Bankruptcy Rule 1019(5); and
- c. Within thirty days from the Effective Date, file and transmit to the U.S. Trustee a final report and account as required by Bankruptcy Rule 1019(5)(A).

10. Consistent with the terms of the Court's prior Order approving its employment, CR3 Partners, LLC is not required to file a final application for fees and expenses [D.I. No. 321]. Subject to the terms of the settlement set forth herein, CR3's fees and expenses as set forth on the monthly staffing reports filed with Court and submitted for the periods from the Petition Date through January 31, 2024, are allowed in full; *further provided, however*, that CR3's payment on account of its allowed fees and expenses shall be limited and capped as set forth in the Motion and the Settlement Agreement.

11. Consistent with the terms of the Court's prior Order approving its employment, KCC is not required to file applications, final or otherwise, for fees and expenses incurred in its capacity as the Debtors' claims and noticing agent [D.I. 85]. Subject to terms of the settlement set forth herein, KCC's fees and expenses as set forth in the invoices previously presented to the Debtors for the period from the Petition Date through the date of the filing of this Motion are allowed in full; *provided, however*, that other than costs of serving notice of the Settlement Motion (estimated to be \$30,000), KCC's payment on account of its allowed fees and expenses incurred s

the Debtor's claims and noticing agent shall be limited and capped as set forth in the Motion and the Settlement Agreement.

12. To the extent not already done, all professionals for the Official Committee of Unsecured Creditors, Culhane, and KCC (solely to the extent of its services as the Debtors' administrative advisor) are required to file final fee applications, within 45 days of the Effective Date, for approval of all fees and expenses incurred through the Effective Date.

13. The Debtors are hereby authorized and empowered to take all actions necessary to implement and effectuate the terms of this Order.

14. This Court shall retain exclusive jurisdiction with respect to all matters relating to the interpretation or implementation of this Order and to hear and determine all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

15. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding the provisions of Bankruptcy Rules 6004(a), and to any extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054, the Court expressly finds that there is no just reason for delay in the implementation of this Order, expressly waives any stay, and expressly directs immediate entry of judgment as set forth herein.