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: April 10, 2023 at 10:30 a.m.** **Objection Deadline: April 3, 2024 at 4:00 p.m.** Re: D.I. 609, 835, 954, 974, 992, 1059, 1062 and 1072

UNITED STATES TRUSTEE'S OBJECTION TO 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 (D.I. 1059)

Andrew R. Vara, the United States Trustee for Regions Three and Nine (the "U.S. Trustee"), through his undersigned counsel, files this objection (the "Objection") to 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* (the "Motion") [D.I. 1059], and respectfully states:

[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.

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I. PRELIMINARY STATEMENT

1. The Debtors have filed the Motion seeking to approve a "settlement" that would result in the distribution of all the cash in the estates, in an unequal manner, while simultaneously requiring all creditors and parties in interest to grant non-consensual releases of the Debtors, their estates and SSCP Restaurant Investors, LLP ("SSCP"). After distributing all the remaining cash, other than a small stipend for a chapter 7 trustee, the cases would convert.

2. If approved, SSCP will receive a minimum of $669,000 in cash, plus the right to receive an additional payment of up to $214,360.42 in cash, and over $2 million in administrative expense claims assigned to it from estate professionals. SSCP apparently will not be providing a release to the Debtors or their estates.

3. All other creditors, including administrative claimholders who did not receive full payment on their claims, will have to release the Debtors, their estates, and SSCP.[2] Thus, if a chapter 7 trustee is successful in liquidating additional assets (primarily D&O insurance assets), SSCP will be the only creditor remaining with any right to be paid.

4. While the motion indicates that administrative creditors may "opt out", this is ***not*** an opt out of the release. It is, in fact, an *opt out of* ***not getting paid***. If an administrative creditor ***does not*** "opt out," such creditor will be entitled to ***no*** payment on its administrative claim, while still providing the releases. The administrative creditor ***that does*** "opt out" must certify, under

[2] The release is provided by all "Notice Parties," defined as all creditors and parties in interest receiving service of the Notice of the Motion (and not the Motion itself). The Notice is being served on the entire creditor matrix and other "special notice parties." Thus, the release will be binding on all creditors, including secured, administrative, priority and general unsecured creditors, despite potential distributions being offered only to administrative creditors.

penalty of perjury, that (a) it will accept an unknown *pro rata* payment on its claim; and (b) it will agree to limit its recovery to such amount, i.e. still provide the functional equivalent of a third-party release.[3] Creditors who do not wish to provide the release must file an objection to the motion, but by doing so, ***will waive any right to payment***.

5. Compounding the unfairness of this "settlement," there are numerous procedural issues that make it nearly impossible for a creditor to understand the implications of the Motion.

a. First, the Motion is not being served on the creditor matrix, but only the Notice of Motion. While the Motion is difficult to understand and does not contain adequate information to permit creditors to determine the appropriateness of the proposed distribution and releases, the Notice – standing alone -- provides even less information.

b. Second, the Motion indicates that Exhibit B is the Wind Down Budget. Exhibit B was not filed with the Motion, but rather was filed 16 days after the motion was filed, and one week prior to the objection deadline. (D.I. 1073).

c. Third, the Motion indicates that Exhibit C is the list of Disputed Vendors who provided Disputed Invoices that may be entitled to administrative priority status. This, too, was not filed with the Motion, but was filed one week prior to the objection deadline. (D.I. 1073).

d. Fourth, the late-filed exhibits include a not-previously-disclosed Exhibit D, which is the Professional Fee Summary. (D.I. 1073). This summary is the first time creditors could determine that, through this motion, SSCP will be

[3] Further, the Opt Out form requires the creditor to certify under oath that it is owed money for goods or services provided between February 22, 2023 and June 14, 2023. The release however, is broader, and releases *any* right to payment.

assigned $1,996,923 in administrative expense claims owed to the estate professionals, that, when included with the Committee's previously-assigned claims, would leave SSCP with a total of $2,236,901 in administrative expense claims unrelated to anything provided by SSCP.

e. Fifth, the Motion states that, "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." As of the date of this Objection, the Settlement Agreement has not been filed.

f. Sixth, the Motion did not include the proposed form of Notice or the proposed "Opt Out" form.

g. Seventh, while the Motion was filed on March 3, the Notice of Motion was not served until March 20, and was not filed on the docket until March 21. The Motion itself was apparently not served on any creditor or party in interest who is not receiving ECF service of pleadings.

h. Eighth, the Notice included several inaccuracies, including the objection deadline (listed as both April 3 and March 28), the dates for administrative claims (listed as any claims arising between February 22, 2023 and June 14, 2024), and titled as including a request for "***procedures***" for filing an Opt-Out Notice and Payment Request, and not clearly titled as notice of a deadline to file requests for payment or opt out for releases.

i. Ninth, the Notice was not approved by the Court and does not contain adequate information to inform creditors that their rights are being affected.

j. Tenth, the Notice includes a provision not found in the Motion itself, namely, that to opt out of providing releases, the creditor must waive their right to any payment: "(a) filing an objection or response to the Motion opting out of such releases **and waiving their right to participate in distributions from the Remaining Cash**; or (b) filing a request for payment with the Bankruptcy Court—which may be in the form the attached Opt-Out Notice and Payment Request—and serving it on the Debtors, SSCP, and their counsel at the addresses set forth below no later than 7 days prior to the first scheduled hearing on the Motion." (emphasis added)

6. The substantive and procedural issues with the proposed settlement are many. A chapter 7 trustee should be appointed to determine the appropriate distribution of the Debtors' remaining assets and evaluate potential causes of action. As such, the Motion should be denied, and the cases should be immediately converted to cases under chapter 7.

II. JURISDICTION AND STANDING

4. Pursuant to (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine the Motion and this Objection.

5. Under 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this judicial district. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

6. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Motion. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

III. FACTUAL BACKGROUND

General Case Background

7. On February 22, 2023, the Debtors filed voluntary chapter 11 petitions in this Court. The Debtors continue to operate their business(es) as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

8. An official committee of unsecured creditors was appointed on March 20, 2023. D.I. 158.

9. The Court entered an order authorizing the Debtors to sell substantially all of their assets to SSCP on June 9, 2023. D.I. 609. The sale closed on June 14, 2023. Mot. ¶ 9.

The Disputes Between the Debtors and SSCP

10. The Debtors filed their Enforcement Motion less than four months after the sale closed. D.I. 853.[4] The Debtors asserted that SSCP was not complying with their obligations under the APA and Transition Services Agreement. The current Motion describes the Debtors' position as: (a) SSCP failed to pay $508,000 to satisfy liabilities that they agreed to assume, and that the estates instead has to pay these claims; (b) SSCP retained $150,000 in trust fund taxes that should have been used to pay taxes owed by the Debtors, and that the estates instead had to pay these claims; (c) SSCP collected and retained $350,000 in royalties belonging to the

[4] The various pleadings relating to the disputes between the Debtors and SSCP can be found at D.I. 853, 859, 870, 880, 888, 954 and 974.

Debtors; (c) SSCP asserts that $185,000 in checks held by the Debtors needed to be paid to SSCP, whereas the Debtors assert that these are estate funds. As such, the Debtors assert that the estates were owed $1,058,000 from SSCP and were entitled to retain an additional $185,000 for the benefit of the estates. Mot. ¶¶ 15-18.

11. SSCP filed a cross motion, denying the Debtors' allegations, and asserting that the Debtors had breached the APA and engaged in other misdeeds. SSCP requested (a) that the Debtors remit the $185,000 in post-closing collections of A/R; (b) remit $633,000 in marketing and advertising fees collected from franchisees post-petition; (c) provide immediate access to QuickBooks; and (d) provide immediate access to the Debtors' Instagram account. D.I. 954. SSCP also disputed the Debtors' allegations, disputed that it had to turn over any funds and disputed that it was liable to pay the liabilities or taxes paid by the estates. Mot. ¶¶ 19-21.

12. The Debtors further assert that SSCP was required to honor outstanding PTO for those employees offered employment by the Buyer; SSCP disputes this allegation. Mot. ¶¶ 22-23. The Debtors assert that SSCP agreed, through the Transition Services Agreement, to pay certain fees of the Debtors' professionals, totaling $159,000; SSCP disputes this. Mot. ¶ 23.

The Settlement Terms

13. Through the settlement, SSCP will receive (a) assignment of KCC's unpaid administrative expense claims ($330,424; Mot. ¶ 31.c-e and D.I. 1073-1, p.7); (b) assignment of Culhane's unpaid administrative expense claims ($471,893; Mot. ¶ 31.f-g and D.I. 1073-1, p. 7); (c) payment in cash of $247,000, representing the amount allocated under the Professional Fee Reserve to CR3, as well as assignment of CR3's remaining unpaid administrative expense claim ($947,606; Mot. ¶ 31.h-l and D.I. 1073-1, p. 7); (d) payment in cash of $222,000, representing the amount allocated under the Professional Fee Reserve to the Committee, which was

previously assigned to SSCP (Mot. ¶ 31.n); (e) payment in cash of $200,000 representing an amount in place of the $500,000 allocated to Foley in the Wind Down Budget (although the Debtors' Professional Fee Summary indicates that the Lender Professionals were previously paid in full) (Mot. ¶ 31.0 and D.I. 1073-1, p. 7); and (f) and payment in cash of the Remaining Cash ($214,360.42) within 30 days after entry of the Settlement Order, minus any *pro rata* payments to Opt Out administrative expense creditors (Mot. ¶ 31.r-v). Thus, SSCP will receive a guaranteed cash payment of $669,000, assignment of $1,996,923 worth of administrative expense claims,[5] and a potential further recovery of $214,360.42.

14. The Debtors will not receive any payment from SSCP. While SSCP has agreed to withdraw its cross-motion to enforce the APA with prejudice, SSCP does not appear to be providing any releases to the Debtors or their estates. Mot. ¶ 31.

15. The Debtors and SSCP retain their rights to seek recovery from the Debtors' D&O policies, but the estates and SSCP agree to limit their damages to the D&O policies, and not to seek damages from the Director or any other non-estate insurance policy. Mot. ¶ 31, m and q).

16. SSCP is provided standing to object to any Payment Request, and is granted the ability to determine whether to do so in its "sole and absolute discretion." Mot. ¶ 31.aa.

Third Party Releases

17. The Motion states, "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

[5] When added to the remaining administrative claim of the Committee previously assigned to SSCP, SSCP will hold administrative expense claims in an amount not less than $2,236,901, representing professional fee claims assigned to SSCP, and excluding any priority or superpriority claim that SSCP asserts. D.I. 1073-1, p. 7.

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." Mot. ¶ 31.y.

18. The Motion further indicates that the notice of motion will be served on Disputed Vendors via electronic mail and overnight mail and on all other creditors and parties in interest, including special notice parties. *Id.* at ¶ 31.x.

19. The original Notice, filed on March 20, was filed at Docket 1062, and included only two means for opting out of the release: "(a) filing an objection or response to the Motion opting out of such releases ***and waiving their right to participate in distributions from the Remaining Cash***; or (b) filing a request for payment with the Bankruptcy Court – which may be in the form the attached *Opt-Out Notice and Payment Request* – and serving it on the Debtors, SSCP, and their counsel . . . no later than 7 days prior to the first scheduled hearing on the Motion." D.I. 1062, emphasis added. Thus, parties' options are object to the relief and receive no distribution, or grant the release and receive only the *pro rata* distribution of the Remaining Cash.

20. The original Notice included an opt out deadline of *both* April 3 and March 28. (D.I. 1062).

21. An amended notice was filed on March 27 which corrected the time period for affected administrative claims from February 22, 2023 through June 14, 2024, to February 22, 2023 through June 14, 2023. D.I. 1072.

22. The Opt-Out Notice further states that the opt out is not a proof of claim. D.I. 1062, 1072.

Payment of Administrative Expense Claims

23. The Motion indicates that there are at least $226,000 in unpaid invoices that may be administrative expense claims owed by the estates. Mot. ¶ 29. While the Motion was filed on March 11, 2024 with an objection deadline of April 3, 2024, the exhibit listing the Disputed Invoices was not filed until March 27, 2024. (D.I. 1073). To date, no certificate of service has been filed regarding this document, so it is unclear if creditors were served with this spreadsheet.

24. Upon information and belief, there are disputed PTO claims owed to former employees of the Debtors and stub rent owed to landlords that were not included in this spreadsheet, for which the former employees and landlords have asserted a right to payment.

25. *Any* administrative expense claimholder who does not file an Opt-Out Notice will receive no distribution on their claims and will release the Debtors, the estates and SSCP. Any administrative creditor who does file an Opt-Out Notice will, if such claim is allowed, receive its distribution of the Remaining Cash. Mot. ¶ 31.y.

26. However, the Motion is unclear if the up-to $222,000 Disputed Invoices or other creditors asserting an administrative expense claim will share the $214,360 of Remaining Cash amongst themselves, or if they will share it with SSCP's $2,236,901 administrative expense claim. If the entirety of the Disputed Invoices assert claims, the payment would equal approximately 97% of the claims. If they have to share with SSCP's assigned administrative

expense claims, the payment would equal approximately 9% of the claims. In addition, the Motion indicates that SSCP asserts a superpriority claim against the Remaining Cash, and neither the Motion nor the Notice states whether SSCP will assert a right to the full $214,360 on that basis.

27. Further, no administrative claims bar date has been established in these cases. Creditors may assert administrative expense claims in excess of the Disputed Invoices.

Procedural Issues

28. The Motion was filed on March 11, 2023, with no hearing date or objection deadline listed. The "Opt-Out" form was not filed as part of the Motion.

29. The Motion indicates that the Settlement Agreement will be filed as a supplement. Mot. ¶ 31. As of the date of this Objection, the Settlement Agreement has not been filed with the Court.

30. The Notice of Motion was not served until March 20, 2024, and the Notice was not filed on the Docket until March 21, 2024. An errata to the Notice was filed on March 27, 2024. It is unclear if this errata was served on the Notice Parties.

31. The Motion itself appears to have not been served on creditors. D.I. 1074.

32. The Notice was not approved by the Court. Nevertheless, it substantively acts as an administrative claims bar date, a notice regarding the unequal distribution of remaining cash to administrative expense creditors, and provides for third-party releases. These types of provisions are typically contained in a Plan, where a disclosure statement must be approved as containing adequate information. The Notice does not contain adequate information to inform parties that (a) there is a *de facto* administrative claims bar date; (b) that creditors who do not object will be releasing the Debtors, who are not otherwise entitled to a discharge; (c) that

creditors who do not object will be releasing SSCP or (d) the expected distribution to administrative expense creditors.

33. The Notice includes a "death trap." Creditors must either file a request for a payment out of the Remaining Cash and agree to release SSCP, or they will not be able to participate in the distribution of the Remaining Cash. D.I. 1062, 1072.

IV. OBJECTION

A. The Settlement Violates the Priority Distribution Rules.

34. "Chapter 11 foresees three possible outcomes." *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451, 456 (2017). These outcomes are:

(1) a "bankruptcy-court-confirmed plan;"

(2) conversion to a chapter 7 liquidation case; or

(3) dismissal of the chapter 11 case under 11 U.S.C. § 1112. *Id.*

35. Thus, if a bankruptcy estate lacks sufficient funds to pay administrative expense claims and priority creditors in full, as required by 11 U.S.C. § 1129(a), and the priority creditors do not consent to less favorable treatment, the debtor's case must be converted or dismissed. Both dispositions respect the relative rights of creditors under federal bankruptcy and state law. The rights of priority creditors are protected in chapter 7 by the requirement that priority creditors be paid first, and in the order specified in section 507. 11 U.S.C. § 726(a). Non-priority general unsecured claims are paid pro rata after all claimholders with higher priorities have been fully paid. 11 U.S.C. § 726(b).

36. In the alternative, a chapter 11 case may be dismissed, leaving creditors free to pursue their claims outside bankruptcy. 11 U.S.C. § 349. As the Supreme Court explained, a dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." *Jevic,* 580 U.S. at 456 (citing 11 U.S.C. §

349(b)). It thus "aims to return to the prepetition status quo." *Id.* While the Court acknowledged that a bankruptcy court may, "for cause, orde[r] otherwise" under the statute, section 349 of the Bankruptcy Code is "designed to give courts the flexibility to 'make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.'" *Id.* at 466 (quoting H.R. Rep. No. 95-595 at. 338 (1977)). It does not authorize a court to make "final distributions that do not help to restore the status quo ante or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a chapter 7 liquidation or chapter 11 plan because they violate priority without the impaired creditors' consent." *Id.*

37. Here, there is no plan that requires that all administrative expense and priority claims are paid in full. Rather, under the proposed settlement, administrative creditors will be paid vastly different amounts. Some preferred administrative creditors have been paid in full, including creditors paid via estate funds that the Debtors assert should have been paid by SSCP. Some preferred administrative creditors will be paid a directly-negotiated discounted amount, i.e. the estate professionals that negotiated the settlement (Culhane: 75%; CR3: 33%; Hilco: 100%; UCC professionals: 49%; KCC: 60% -- D.I. 1073-1, p. 7)). Others who (a) actually receive the Notice, (b) understand the need to reply to preserve the right to payment, (c) agree to release SSCP, and (d) negotiate or successfully litigate their claims with SSCP will receive either 97% or 9% of their claim, or some other unknown percentage of their claim (and potentially nothing). Creditors who reject to the settlement, object to providing a release to SSCP, or fail to respond to the Notice will receive nothing.

38. This is not the appropriate standard. Non-consenting administrative creditors should be treated equitably.

B. Plan Relief Cannot Be Achieved Through a Dismissal Order.

39. Even if there were no disparate treatment of administrative creditors, the Motion should be denied.

40. A fundamental purpose of the bankruptcy laws is to bring about an equitable distribution of the bankrupt's estate. *Begier v. Internal Revenue Service*, 496 U.S. 53, 58 (1990).

41. The administration of a corporate debtor's estate is accomplished either through a proceeding commenced under chapter 7 or chapter 11 of the Bankruptcy Code. In a chapter 7 bankruptcy, the company's pre-petition assets are liquidated and distributed to creditors by a chapter 7 trustee. 11 U.S.C. § 701 et seq.

42. In a chapter 11 bankruptcy, in contrast, the debtor remains in possession and distributes estate assets through a "plan" that assigns to "classes" the various allowed claims and specifies the treatment each class of claims shall receive. 11 U.S.C. §§ 1122, 1123, 1141.

43. Chapter 11 of the Bankruptcy Code includes many protections for creditors and equity holders. Primary among those protections is the right of creditors and equity holders to vote for or against the proposed plan, along with the prohibition against soliciting acceptances or rejections of a proposed plan prior to transmitting "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). "Adequate information" is defined as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgement about the plan."

44. Chapter 11 contains numerous other protections to ensure that the plan is fair. *See, e.g.*, 11 U.S.C. §§ 1123 (contents of a plan); 1126 (right to vote on a plan); 1129

(confirmation requirements, including that plan be proposed in good faith and be fair and equitable to any rejecting class).

45. The present Motion anticipates providing an unapproved notice that will not contain "adequate information" to enable such party to make an informed decision. The Motion itself, which was not served on creditors, does not contain critical information. The notice includes even less information. First, it is unclear whether SSCP is releasing the estates from all claims or whether SSCP is preserving its asserted superpriority claims and assigned administrative expense claims. Creditors are not informed whether their *pro rata* share of the Remaining Cash is illusory, as SSCP may claim superpriority, or if their ratable share is worth 97% of their allowed claims (where SSCP waives its assigned administrative claims) or 9% of their allowed claims (where SSCP asserts its assigned administrative claims), while having to decide whether to accept such payment and provide releases to SSCP. The Notice does not highlight that the release covers more than the administrative claims, and releases all parties' right to *any* payment from the Debtors, the estates, or SSCP. Further, while creditors are informed of the amount of the Disputed Invoices, as there was no administrative claims bar date asserted in the cases, the total amount of asserted (or allowed) administrative claims is not disclosed.

46. Further, the Debtors present creditors with an improper death-trap via the Motion. Creditors are permitted to either agree to release the Debtors, the estates and SSCP to obtain a disbursement, but if they object, they will not receive any disbursement. This is not a provision that would be approved in a plan.

47. The proposed settlement provides for the type of relief that is not permitted in a chapter 11 plan absent consent from administrative expense creditors and further includes relief

that would be objectionable even in a plan. The proposed settlement: (a) provides an end-of-case distribution scheme of the estates' assets; (b) requires broad releases of all claims against non-debtors; and (c) potentially eliminates certain holders of allowed claims from participating in distributions, all without the protections of sections 1121-1129 of the Bankruptcy Code.

48. Even if the distributions were strictly compliant with sections 507(a) and 726, that does not end the inquiry. Approval of the settlement here is the functional equivalent of a "structured conversion," as it would result in an end-of-case distribution of the remaining cash of the Debtors, eliminate all of the claims of all creditors receiving notice of the motion, and permit SSCP to be the sole creditor entitled to any disbursements from the chapter 7 estates.

49. First, the Supreme Court's decision did not approve end-of-case distributions through a dismissal or conversion order. Rather, it left unresolved whether structured dismissals that do not violate priority are permissible. *Id.,* at 467 ("We express no view about the legality of structured dismissals in general."). Indeed, the *Jevic* court discussed the type of transfers of estate assets that the Bankruptcy Code expressly permits in connection with a dismissal. It concluded that, other than the reversal of transfers that occurred in the case to "restore all property rights to the position in which they were found at the commencement of the case," "[n]othing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter 11 plan . . . ." *Id*. at 466.

50. Second, the proposed settlement contains significantly greater relief than merely approving a distribution scheme that comports with the priority required by the Bankruptcy Code. Such relief "circumvents the Bankruptcy Code's procedural safeguards" and should be

denied. *Id.* at 466-67 (citing with approval cases that denied approval of sales and other transactions that short circuited the requirements of Chapter 11).

51. The Supreme Court recognized that it cannot "alter the balance struck by the statute" even in rare cases. *Jevic*, 580 U.S. at 471. The Bankruptcy Code balances the interests of the Debtors to remain in possession and restructure or control a liquidation with the rights of creditors and equity holders by requiring that distributions of estate assets in Chapter 11 be made pursuant to a confirmed Chapter 11 plan.

52. In the present cases, the Debtors seek court approval to disburse the remaining cash in the estates by paying some preferred administrative creditors over others, requiring administrative creditors to provide third-party releases to receive an unknown *pro rata* distribution, requiring all creditors to provide third-party releases, and then converting the cases to chapter 7 cases. This type of remedy goes too far in ignoring the distribution scheme embodied in the Bankruptcy Code and the limits imposed by Congress on relief that can accompany case conversion.

C. <u>The Releases Should Not Be Approved.</u>

53. The settlement requires all creditors to grant broad releases to the Debtors, their estates and SSCP.

54. First, there is no basis for the Debtors or their estates to obtain releases from creditors. The Debtors are liquidating corporate debtors and would not be entitled to a discharge. 11 U.S.C. § 1141(d)(3). In addition, should a chapter 7 trustee recover assets for the estates, there is no justification for requiring all creditors, other than SSCP and objecting creditors, to waive their right to distribution from the chapter 7 estates.

55. Second, the releases in favor of SSCP by all creditors are unwarranted. Some courts in this District have determined that third party releases of non-debtors through confirmed plans should be allowed only to the extent the releasing parties have given affirmative consent. *See In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual* the Court held that "any third party release is effective only with respect to those who *affirmatively consent* to it by voting in favor of the Plan and not opting out of the third party releases." *Id.* at 355 (emphasis added). Moreover, the Court clarified that merely having an opt out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (*or are not entitled to vote in the first place*). *Failing to return a ballot is not a sufficient manifestation of consent* to a third party release." *Id.* (emphasis added; citing *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999)).

56. In *Emerge Energy Services LP*, Case No. 19-11563, 2019 Bankr. LEXIS 3717 (Bankr. D. Del. Dec. 5, 2019), the Court ruled that consent to a third-party release "cannot be inferred by the failure of a creditor or equity holder to return a ballot or Opt-Out Form." *Id.* at *52. The *Emerge* Court reached this conclusion even though the Opt-Out Forms provided conspicuous notice of how to opt out and the consequences of not doing so. The Court also rejected the debtor's argument that inferring consent from "silence" should be approved as typical, customary, and routine. *Id.* The Court held that it could not, "on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations." *Id.* at *53.

57. Here, the Debtors propose to impose third party releases on creditors in the

absence of a plan, an approved disclosure statement, or even an approved notice. The title of the notice doesn't make clear that there is any third-party release, and the third-party release itself is not disclosed until the second page. This Court in *Emerge* indicated that it "has concluded that a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present." *Id.* at *54-55. The Court clarified that, "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as such circumstances. *Id.* at *55. In these cases, the facts are worse than those presented in *Emerge* in that there is no plan, there is no approved notice, and there is a death trap provision that provides that objecting to the settlement eliminates the right to any disbursement. In sum, the settlement cannot be approved if it forces releases on creditors and other parties in interest who have not affirmatively agreed to the releases.

58. Other decisions from Courts in this District are in accord with *Washington Mutual* and *Emerge*. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *Zenith*, 241 B.R. at 111 (noting the release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan).

59. The U.S. Trustee is unaware of any case in which the Court approved releases granted by creditors to a non-debtor in connection with a settlement agreement, based on an opt-out mechanism, and not in connection with a confirmed plan. The notices provided in these cases

did not contain the kinds of information that is included in plans. The releases are deemed to have been given by parties who are receiving no distribution. There is simply no authority for imposing third party releases on non-responding creditors who received an unapproved notice of a settlement motion.

D. <u>The Settlement Should Not Be Approved and the Cases Should Be Converted</u>

60. Bankruptcy Rule 9019 provides, in relevant part:

> (a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019 (a).

61. Under Rule 9109, a court must determine whether "the compromise is fair, reasonable, and in the interest of the estate." *In re Marvel Entm't Grp., Inc.,* 222 B.R. 243, 249 (D. Del. 1998) (*quoting In re Louise's Inc.,* 211 B.R. 798, 801 (D. Del. 1997)). The court shall also consider whether the settlement falls "above the lowest point in a range of reasonableness." *In re Coram Healthcare Corp*., 315 B.R. 321, 330 (Bankr. D. Del. 2004) (citations omitted); *accord, Travelers Cas. & Sur. Co. v. Future Claimants Representative*, No. 07-2785, 2008 WL 821088, at *5 (D.N.J. Mar. 25, 2008) (*citing Matter of Jasmine, Ltd.,* 258 B.R. 119 (D.N.J. 2000).

62. The Court of Appeals for the Third Circuit set forth the following "four criteria that a bankruptcy court should consider" in determining whether to approve a compromise: "(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 Martin,* 91 F. 3d 389, 393 (3rd Cir. 1996) (citations omitted).

63. It clearly is not in the paramount interest of creditors to require *all* creditors and all parties in interest, even priority and general unsecured creditors who will receive nothing through this settlement, to waive any and all rights to payment from the Debtors, their estates and SSCP. Even demanding releases of the unpaid portion of administrative expense claims by those creditors who may share in the Remaining Cash is overreaching. There is nothing in the record indicating any basis for demanding such broad releases, the net effect of which would leave SSCP as the sole chapter 11 creditor in the chapter 7 cases.

64. The Motion appears to ground the settlement on how strident SSCP is that it owes no additional finds, its willingness to exhaust all litigation remedies, and the failure of mediation to come to a resolution. However, the Debtors are receiving nothing on their claims that SSCP was obligated to pay over $500,000 in assumed liabilities under the APA, that SSCP was required to turn over $350,000 in royalty payments, that SSCP was required to return $150,000 in trust fund taxes, that SSCP was required to reimburse over $150,000 in professional services under the TSA, and that the Debtors are entitled to retain $185,000 in uncashed checks. SSCP, however, is receiving $669,000 in cash, the potential recovery of an additional $214,000, assignment of professionals' administrative expense claims in excess of $2 million, and chapter 7 cases where all chapter 11 creditors, including administrative expense creditors, have released their claims.

65. It is especially problematic that the parties to the Settlement include professionals who are not being paid in full and continue to incur costs litigating against SSCP, as well as the Debtors' independent director, who also has not been paid in full and continues to incur costs and threats of continuing litigation. These parties are placed in a position where the failure to settle will continue to cost them.

66. SSCP has overreached in its settlement and is seeking a conversion of these cases that benefits it and it alone.

67. The cases should convert with the estates' cash intact, and a chapter 7 trustee should review the disputed professional fee claims, the sale agreement, the TSA, the positions of the parties and determine an appropriate path forward consistent with the trustee's fiduciary duties.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Motion and grant any such other and further relief that the Court deems just and proper.

Respectfully Submitted,

ANDREW R. VARA,
UNITED STATES TRUSTEE
REGIONS 3 AND 9

Dated: April 3, 2024

By: */s/ Linda J. Casey*
Linda J. Casey, Esq.
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 N. King Street, Room 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
Linda.Casey@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2024, I caused the *United States Trustee's Objection to 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* to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of such filing to all ECF registrants in this case. I further certify that the courtesy service copies of the foregoing were emailed to the following:

Marcus A. Helt MCDERMOTT WILL & EMERY LLP 2501 North Harwood Street, Suite 1900 Dallas, Texas 75201-1664 Email: mhelt@mwe.com	Mette H. Kurth CULHANE MEADOWS, PLLC 3411 Silverside Road Baynard Building, Suite 104-13 Wilmington, Delaware 19810 Email: mkurth@cm.law

/s/ *Linda J. Casey*

Linda J. Casey, Trial Attorney