***Structured Dismissal: Permissible Case Resolution or A Scourge on the Code?***

All of the equity of a New Jersey-based trucking company was purchased by a private equity fund in 2006, and the private equity fund thereafter refinanced its acquisition through a $101 million secured loan, with substantially all of the company's assets serving as collateral. The trucking company later sold many assets and leased them back, which sale-leaseback proceeds reduced the secured debt incurred in connection with the leveraged buyout. As of December 2007, the trucking company owed in excess of $50 million on account of this secured debt, and in connection with a forbearance agreement between the company and lender, the private equity fund provided a $2 million guaranty of the debt.

In early 2008, the trucking company began winding down its affairs and operations, and terminated approximately 90% of its employees. The company thereafter filed for chapter 11 protection in the United States Bankruptcy Court for the District of Delaware in May 2008, and the company sought to liquidate its remaining assets and pay off its secured debt. The company's prepetition lenders provided debtor-in-possession financing to the company, pursuant to which the prepetition obligations were "rolled up." The official committee of unsecured creditors retained the right to challenge the secured lender's claims and liens and seek standing to commence estate causes of action. During the chapter 11 case, the committee commenced – and for four years litigated – a fraudulent conveyance action against the prepetition lenders and private equity fund related to the leveraged buyout transaction. During the course of the litigation, the company liquidated all tangible assets and had no unencumbered funds (including to pay the costs of the litigation).

Shortly after the company's chapter 11 filing, former driver employees of the company commenced an action in the Bankruptcy Court under the Worker Adjustment and Retraining Notification Act (WARN), alleging that they were entitled to, but did not receive, 60 days' written notice of termination under WARN. The drivers constituted the largest group of general unsecured creditors on account of the WARN claims (a large portion of which the drivers contended were entitled to priority treatment under sections 507(a)(4) and (a)(5) of the Bankruptcy Code).

Following four years of fraudulent conveyance litigation, the company, the committee, the lenders and the private equity fund entered into a global settlement. The drivers participated in at least some aspects of the settlement negotiations, but were not parties to and did not agree to the settlement. The global settlement provided for:

- releases, including estate releases;
- payment of $2 million by the secured lender to the estates;
- the dismissal of the fraudulent conveyance action;
- assignment of liens on remaining estate assets by the private equity fund to a liquidating trust for the benefit of unsecured creditors and certain priority tax claimants;
- reconciliation of administrative and unsecured claims; and
- dismissal of the chapter 11 cases.

The means by which the settlement was to be implemented was not through a bankruptcy plan of liquidation or a conversion to chapter 7 liquidation, but rather through a "structured dismissal";

the estate would distribute the funds to the creditors specified by and in accordance with the settlement agreement, and upon final distribution, would seek dismissal of their chapter 11 cases.

The settlement did not provide for payment of the drivers' priority WARN claims, or other priority claims (other than those specific tax claims identified in the settlement). The drivers, the Office of the United States Trustee, certain tax claimants, and certain other priority claims objected to the settlement; the settlement was thereafter amended to resolve the objections (and provide for payment of) the tax and other priority claimants, leaving the drivers' priority claims as the only claims against the company not to receive any portion of the settlement proceeds.

The Bankruptcy Court approved the settlement over the objection of the drivers and the U.S. Trustee, and denied the drivers' request for a stay of the court's order. The drivers did not seek a stay from the United States District Court for the District of Delaware, but did appeal the Bankruptcy Court's ruling. The U.S. Trustee did not appeal. The settlement was consummated, all funds were distributed, and the Bankruptcy Court thereafter dismissed the chapter 11 cases. The District Court affirmed the Bankruptcy Court's ruling. The drivers appealed to the Third Circuit, and the U.S. Trustee submitted an *amicus curiae* brief in support of reversal.

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

| | | |
|---|---|---|
| In re:<br><br>JEVIC HOLDINGS CORP., *et al.*,<br><br>Debtors. | ) | Chapter 11<br><br>Case No. 08-11006 (BLS)<br><br>(Jointly Administered) |
| OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the bankruptcy estates of JEVIC HOLDING CORP., *et al.*,<br><br>Plaintiff,<br><br>-against-<br><br>THE CIT GROUP/BUSINESS CREDIT, INC., in its capacity as Agent, and SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, and SUN CAPITAL PARTNERS, INC.,<br><br>Defendants. | ) | Adv. Pro. No. 08-51903 (BLS)<br><br>**Related to D.I. 1346 and 1465 in Case No. 08-11006 and D.I 67 and 69 in Adv. Pro. No. 08-51903** |

**ORDER GRANTING JOINT MOTION OF THE DEBTORS, CIT, SUN CAPITAL AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105(a), 349 AND 1112(b) AND FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER: (I) APPROVING SETTLEMENT AGREEMENT AND RELEASING CLAIMS; (II) DISMISSING THE DEBTORS' CASES UPON IMPLEMENTATION OF SETTLEMENT; AND (III) GRANTING RELATED RELIEF**

Upon consideration of the *Joint Motion of the Debtors*[1], *CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1346; Adv. Pro. Docket No. 67] (the

[1] Defined terms used herein and not otherwise defined herein shall have the meaning ascribed to them in the Joint Motion and Supplement as applicable.

"Joint Motion") and the *Supplement to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1465; Adv. Pro. Docket No. 69] (the "Supplement"); the Court having reviewed the Joint Motion, the Supplement, the Settlement Agreement, the exhibits thereto, and any responses or objections thereto; the Court having considered the evidence presented at the hearing on the Joint Motion, the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having determined that consideration of the Joint Motion and Supplement is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that the legal and factual bases set forth in the Joint Motion and Supplement establish just cause for the relief requested in the Joint Motion and Supplement, and that such relief is in the best interests of the Debtors, their estates, their creditors and the parties in interest; and for the reasons set forth on the record at the telephonic hearing held on November 28, 2012, and the Court finding that notice of the Joint Motion and Supplement was sufficient and that no other notice need be provided; and good and sufficient cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The relief requested in the Joint Motion and Supplement is GRANTED.

Settlement Agreement

2. The Debtors are authorized to enter into the Settlement Agreement, a copy of which is attached as Exhibit A to the Joint Motion, and the Settlement Agreement is approved in its entirety.

3. The Debtors are authorized and instructed to take any and all actions necessary or appropriate to perform their obligations arising under the Settlement Agreement.

4. Within ten (10) business days after the Effective Date, as defined in paragraph 18 of the Settlement Agreement (the "Effective Date"), the following shall occur simultaneously:

(a) CIT shall pay to the Debtors $2,000,000 (the "Administrative Claim Fund");

(b) The Committee, CIT and Sun shall file with the Court a fully executed stipulation of dismissal with prejudice, substantially in the form of Exhibit 2 to the Settlement Agreement;

(c) The releases set forth in paragraph 2(c) of the Settlement Agreement shall become effective upon payment of the Administrative Claim Fund to the Debtors; and

(d) The Estate Releasing Parties, as such term is defined in the Settlement Agreement, shall execute and deliver to CIT releases in favor of the other members of the Lender Group, as such term is defined in the Settlement Agreement, in the form attached as Exhibit 3 to the Settlement Agreement and such releases shall be effective upon payment of the Administrative Claim Fund to the Debtors.

5. Sun has an allowed secured claim secured by a superpriority lien and security interest in the cash and other assets of the Debtors' estates in an amount equal to $2,000,000, plus at least $200,000.00 of accrued and unpaid interest as of May 31, 2012 and at least $250,000 in fees and costs incurred as of May 31, 2012.

6. The failure specifically to describe or include any particular provision of the Settlement Agreement in this Order shall not diminish or impair the effectiveness of such a

provision, it being the intent of this Court that the Settlement Agreement be approved in its entirety; provided that to the extent of any conflict between the provisions of this Order and the Settlement Agreement, this Order shall govern.

7. The Clerk of the Court is authorized to take all necessary and appropriate actions to give effect to the Settlement Agreement.

Dismissal Of Debtors' Chapter 11 Cases

8. Upon payment of the Administrative Claim Fund to the Debtors, the Debtors shall pay the aggregate sum of $200,000 from the Administrative Claim Fund to the professionals retained by the Committee on account of previously approved and unpaid fees and expenses.

9. Unless a later date is agreed to by the Debtors, Sun, and the Committee, within sixty (60) days following the Effective Date, the Debtors shall determine (a) in consultation with the Committee and Sun, the identity of the holders and the amount of the Administrative Claims, as such term is defined in the Settlement Agreement (the "Administrative Claims"), and (b) in consultation with the Committee, the identity of the holders and the amount of the Allowed GUC Claims.

10. Upon reconciliation of the Administrative Claims, the Debtors shall pay in full the Administrative Claims. Upon payment in full of the Administrative Claims as provided in the Settlement Agreement, Sun shall indefeasibly transfer to the Trust, as such term is defined in the Settlement Agreement, as a collateral carve-out from its allowed secured claim and superpriority liens on the assets in the Debtors' estates including the balance of the Administrative Claim Fund after payment in full of the Administrative Claims, a sum equal to all of the remaining funds in the estates (the "Carve-out"). The Trust shall pay from the Carve-Out (i) first, the Allowed

Resolved Priority Claims and (ii) thereafter, with the remaining balance of the Carve-Out funds, the holders of the Allowed GUC Claims on a pro rata basis.

11. Upon payment in full of the allowed Administrative Claims, and after the completion of the transfer of the Carve-out to the Trust, the Debtors and the Committee, by counsel, shall file with this Court a certification substantially in the form of Exhibit 4 attached to the Settlement Agreement that all allowed Administrative Claims have been paid in full and the Carve-out has been transferred to the Trust, and thereupon, the Clerk, without further order of the Court, shall mark the Chapter 11 cases dismissed on the docket as of the date the certification is entered on the docket.

12. Each Party shall bear its own costs and expenses in connection with the Adversary Proceeding and the Settlement Agreement.

Berrios Objection Resolution

13. The withdrawal of the objection by Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios (collectively, "Berrios") and the treatment of the claims filed by Berrios (the "Berrios Claims") in these bankruptcy cases pursuant to the Settlement Agreement shall not impact or prejudice in any way those proceedings presently pending in Providence County Superior Court, entitled Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios v. Jevic Transportation, Inc.,. Craig G. Benfield; First Student, Inc.; Ilba Berrios, Alias; Saia, Inc.; Saia Motor Freight Line , LLC, Alias; and National Union Fire Insurance Company Of Pittsburgh, Superior Court, C.A. No. PO4-2390 (the "Superior Court Action").

14. The treatment of the Berrios Claims in this bankruptcy proceeding shall not serve as a bar to the Superior Court Action and shall not be relied on or raised as a defense by any

party in the Superior Court Action, including, but not limited to, res judicata, estoppell, accord & satisfaction, waiver of claims, laches, or any other defenses that may be raised by Jevic or any other party in the Superior Court Action. The treatment of the Bankruptcy Claims shall not serve to preclude recovery by or on behalf of Berrios as against Jevic, Saia, Inc, or Saia Motor Freight Line, LLC or any other party in accordance with the terms and conditions of the settlement agreement entered into by and between Saia, Inc., Saia Motor Freight Line LLC, Jevic Holding Corp. and other parties (the "Saia Agreement") approved by the Bankruptcy Court by Order dated September 19, 2008 (D.I. 267) (the "Saia Order") and as against any insurance coverage which was in full force and effect on the date of this eventuality.

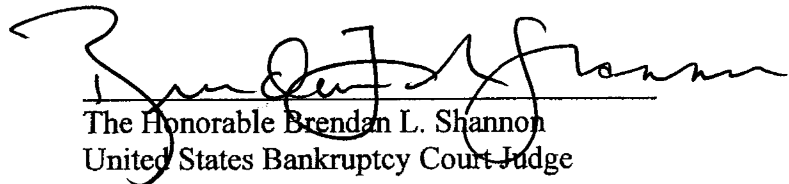
15. Nothing in this order or resulting from the treatment of the Berrios claims in this bankruptcy proceeding shall impair Berrios from pursuing any judgment obtained in the Superior Court Action in accordance with (i) the Saia Agreement and the Saia Order or (ii) the documents contained in the *Exhibit of Documents Relating to Superior Court Action* [Docket No. 1489] filed by Berrios on November 12, 2012, including (a) the insurance coverage afforded for this eventuality described in the affidavit of Gary Swanson dated July 31, 2012 and (b) the Indemnity Agreement dated March 2, 2000 between non-debtor parties USF&G Co., ABC Trucking, Inc., and Regional Holding Corporation.

Additional Relief

16. Notwithstanding entry of this Order, all stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

17. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: December 4, 2012
Wilmington, Delaware



The Honorable Brendan L. Shannon
United States Bankruptcy Court Judge



PHIL1 2511986v.2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | ) | |
| | ) | Chapter 11 |
| JEVIC HOLDING CORP., et al., | ) | Bank. No. 08-11006 (BLS) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |

| | | |
|---|---|---|
| CASIMIR CZYZEWSKI, et al., | ) | |
| | ) | |
| Appellants, | ) | Civ. Nos. 13-104-SLR and |
| | ) | 13-105-SLR (consolidated) |
| v. | ) | |
| | ) | |
| JEVIC HOLDING CORP., et al., | ) | |
| | ) | |
| Appellees. | ) | |

**MEMORANDUM**

At Wilmington this 24th day of January, 2014 having reviewed the appeal taken by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, ("appellants"), and the papers submitted in connection therewith; the court issues its decision based on the following analysis:

1. **Background.**[1] Jevic Holding Corp., Jevic Transportation, Inc. and Creek Road Properties, LLC's (collectively, "debtors") are a trucking company. In June 2006,

[1]The factual background is largely undisputed and is taken from the United States Bankruptcy Court for the District of Delaware's ("bankruptcy court") oral order dated November 28, 2012 and supplemented by the parties' briefing.

Sun Capital Partners IV, LP, Sun Partners Management IV, LLC and Sun Capital Partners, Inc. (collectively, "Sun") bought debtors, and subsequently refinanced the acquisition through a $101 million loan from The CIT Group/Business Credit, Inc. ("CIT"), as agent for the lenders (the "Lender Group"). (D.I. 19 at 3-4)

2. On May 20, 2008 ("the petition date"),[2] debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United Stated Code (the "Bankruptcy Code") in the bankruptcy court. On June 4, 2008, the United States Trustee appointed the Official Committee of Unsecured Creditors of Jevic Holding Corp. et al. ("the committee") (collectively with debtors, Sun, and CIT, "appellees"). Shortly prior to the petition date, the debtors wound-down their business, ceasing substantially all of their operations and terminating approximately 90% of their employees. After the petition date, all of the debtors' tangible assets were liquidated and the proceeds used to partially repay the outstanding obligations owed to CIT.

3. On May 21, 2008, appellants,[3] who are truck drivers[4] whose employment was terminated by debtors, filed a complaint asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et. seq., and the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, PL. 2007, c.212, C.34:21-2.[5] (D.I. 19

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[2]As of the petition date, the debtors' primary secured creditors were Sun and CIT, with an aggregate of approximately $53 million on a first priority senior secured basis. (08-11006-BLS, D.I. 1519 at 5:1-4)

[3]Referred to by the bankruptcy court as "the Warren [sic] plaintiffs."

[4]About 1,200 truck drivers who claim over $20 million and are debtors' largest group of unsecured creditors. (D.I. 19 at 1)

[5]Appellants allege that these claims are priority claims under 11 U.S.C. §§ 507(a)(4) and (a)(5); as such, they allege they should be paid in full before any funds may be paid to general or lower priority creditors. (D.I. 19 at 4)

at 4)

4. Appellees reached a settlement agreement ("settlement"), dated June 22, 2012, which resolved all claims among the debtors and their estates, the committee, CIT, the Lender Group and Sun. Appellants minimally participated in the settlement negotiations, but did not agree to the settlement. (08-11006-BLS, D.I. 1519 at 11; D.I. 1514 at 31:13-21, 68:11-22) The settlement "provided for (a) the exchange of releases, (b) the payment of $2 million by CIT to the [d]ebtors, to be used to satisfy unpaid chapter 11 administrative claims, (c) the dismissal with prejudice of the Adversary Proceeding,[6] (d) the assignment by Sun of its lien on the estates' remaining assets to the Jevic Holding Corp. Liquidating Trust (the "[c]reditors['] [t]rust") for the benefit of the [d]ebtors' unsecured creditors and certain priority tax claimants, (e) the reconciliation of administrative and unsecured claims, and (f) the dismissal of the chapter 11 cases." (D.I. 15 at 5; ex. A at ¶ 3)

5. Appellants objected to the agreement on various grounds.[7] After briefing and an evidentiary hearing, the bankruptcy court concluded that the possibility of recovery for appellants was remote at best, as there were "several independent hurdles that the [c]ommittee would have to clear before it would actually see a material recovery out of the litigation," which would take years (08-11006-BLS, D.I. 1519 at 13:7-9) Further, the debtors possessed no funds that were not subject to the liens of CIT and Sun, to continue with litigation. The bankruptcy court entered the settlement on December 4,

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[6]A proceeding brought by the committee against CIT and Sun, respectively the debtors' senior and junior secured lenders.

[7]The United States Trustee also objected.

2012. (08-11006-BLS, D.I. 1520)

6. On January 2, 2013, appellants filed a motion to stay with the bankruptcy court. (08-11006-BLS, D.I. 1545) After briefing and argument, the bankruptcy court denied the stay on January 18, 2013 but, as a courtesy to the district court, instructed the debtors to refrain from consummating the settlement for ten to fifteen days to give appellants an opportunity to challenge the ruling. (D.I. 16, ex. 6 at 29-30; 08-11006-BLS, D.I. 1567) Appellants did not challenge the denial and have not further sought a stay.

7. At a hearing on February 20, 2013, appellants sought clarification regarding whether the appellees could move forward with implementing the settlement. The bankruptcy court confirmed the lack of a stay. The committee advised that appellees were "actively considering closing. So if [appellants] want to stay . . . they should file a motion promptly." Although appellants indicated that they would be seeking a stay (D.I. 16, ex. 3 at 12-14), no such motion was filed in this court.

8. The appellees instigated a series of transactions to implement the settlement, beginning on August 28, 2013. All funds were distributed under the settlement, with the creditors' trust distributing 1,039 final disbursement checks to holders of allowed general unsecured claims and 29 final disbursement checks to holders of allowed unsecured priority tax claims.[8] (D.I. 15 at 9) The bankruptcy court dismissed the debtors' chapter 11 cases on October 11, 2013.

9. **Standard of Review.** This court has jurisdiction to hear an appeal from the

[8]Of these, 39 checks were returned and "$90,422.58 in checks have not been negotiated by the payees . . . ." (D.I. 16 at 9)

bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101–02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. *In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002).

10. **Analysis.** Appellants largely do not contest the bankruptcy court's factual findings. Instead, appellants fault the bankruptcy court's approval of the settlement on various legal grounds. Contrary to appellants' contentions, the bankruptcy court properly evaluated the proposed settlement, considering the *Martin* test's four criteria[9] and determining that the settlement was "fair and equitable." *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Protective Comm. for Indep. Stockholders of*

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[9]"(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."

*TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). More specifically, the bankruptcy court considered appellants' primary objections to the settlement - that the proceeds did not flow to their claims and that the committee breached its fiduciary duty - in making its determination. (D.I. 1519 at 9:4-10); *see In re Nutraquest, Inc.*, 434 F.3d 639, 644-45 (3d Cir. 2006) (finding that "many cases have applied the *Drexel- TMT Trailer-Martin* factors to settlements involving claims against debtors" and the court should "carefully examine" the settlement and determine if it was fair to "the parties who did not settle") (citations omitted). As discussed below, these objections did not necessitate rejecting the settlement.

11. As to the pending WARN litigation, the bankruptcy court found that the litigation was in the early stages, would be lengthy and expensive, was not "a slam dunk," and the estate was without funds to support any litigation. (D.I. 1519 at 12-14) As to the "paramount interest of creditors" factor, the settlement involves "a substantial distribution to unsecured and certain administrative creditors." (D.I. 1519 at 14:4-17) Further, appellants' claim against the estate is "effectively worthless given that the estate lacks available unencumbered funds to satisfy it if it were allowed." (*Id.*)

12. As to the whether the settlement is "fair and equitable," the bankruptcy court found that all of the major economic stakeholders were involved in the negotiations (including appellants),[10] the committee lacked the resources to continue any litigation,

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[10]The appellants initially participated in the negotiations, but chose not to settle as they wished to continue their pending litigation against debtors and Sun. (D.I. 1519 at 11-12) Appellants argue that the bankruptcy court erred in concluding that they "opted out" of the settlement, however, considering appellants were included in the negotiations, the court does not find this factual conclusion clearly erroneous.

and the settlement offered "the prospect of a meaningful distribution to unsecured creditors, and to some but admittedly not all administrative priority creditors." (D.I. 1519 at 9-10)

13. Appellants contend that the committee breached its fiduciary duty when it agreed to the settlement structure. The court concludes otherwise. The committee fulfilled its charge to investigate and prosecute potential causes of action. (D.I. 1519 at 11:16-25) The committee fully participated in the negotiations and then sought approval of the settlement with the support of the debtor. (*Id.*) The court finds that the settlement was in the best interest of the estate and of resolving the pending Chapter 11 cases.

14. As discussed by the bankruptcy court, the settlement does not follow the absolute priority rule. However, this is not a bar to the approval of the settlement as it is not a reorganization plan.[11] *Cf. In re Armstrong World Indus., Inc.*, 432 F.3d 507, 509 (3d Cir. 2005) (affirming the district court's denial of confirmation of a reorganization plan which violated the absolute priority rule). In *Armstrong*, the Third Circuit distinguished a line of cases approving settlement agreements allowing "creditors . . . to distribute their proceeds from the bankruptcy estate to other claimants without offending section 1129(b)." *Id.* at 514 (discussing *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993); *In re Mcorp Fin., Inc.*, 160 B.R. 941 (S.D. Tex. 1993), and *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001)); *see also In re World Health Alts.,*

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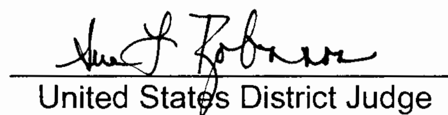
[11]The bankruptcy court found that there was no prospect of a confirmable plan. (D.I. 1519 at 8:6-8) This court has no reason to question this conclusion on the record at bar, nor have the appellants presented any evidence to the contrary.

*Inc.*, 344 B.R. 291, 297-98 (Bankr. D. Del. 2006); *In re Kainos Partners Holding Company, LLC*, 2012 WL 6028927 at *12 (D. Del. Nov. 30, 2012) (finding that the settlement did "not violate the Bankruptcy Code's statutory priority scheme but, instead, satisfie[d] the criteria for approval under Bankruptcy Rule 9019 and the standards set forth under *In re Martin*). In the case at bar, "the funds are indisputably the collateral of the secured creditors, [and] admittedly subject to litigat[ion] challenge." Therefore, the court concludes that the bankruptcy court did not err in confirming the settlement and dismissing the Chapter 11 cases. (D.I. 1519 at 10-11)

15. Alternatively, appellees have moved to dismiss this appeal as equitably moot. (D.I. 14) In determining whether the doctrine applies, courts should consider the following "two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Semcrude, L.P., et al.*, 728 F.3d 314, 321 (3d Cir. Aug. 27, 2013).

16. The court finds that the settlement has been substantially consummated as all the funds have been distributed. Should the court grant the appeal, the settlement will be irreversibly "scrambled," as it did not provide for funds for appellants' speculative recovery and appellants chose not to substantively participate in the negotiation and subsequent settlement. The parties to the settlement reached their negotiated resolution following years of litigation and will be harmed if the settlement is now unwound. The court concludes that the appeal is equitably moot in view of the settlement.

17. For the reasons discussed above, the court dismisses the appeal and affirms the order of the bankruptcy court. An order shall issue.



United States District Judge

**Appeal No. 14-1465**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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In re: JEVIC HOLDING CORP., *et al.,* Debtors

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*

v.

CIT GROUP/BUSINESS CREDIT, INC., in its capacity as Agent; SUN CAPITAL PARTNERS, INC.; SUN CAPITAL PARTNERS IV, LP; SUN CAPITAL PARTNERS MANAGEMENT IV, LLC.

CASIMIR CZYZEWSKI; MELVIN L. MYERS; JEFFREY OEHLERS; ARTHUR E. PERIGARD; and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, CIV. ACTION NOS. 13-104 and 13-105 (SLR)

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**BRIEF OF APPELLANTS**
**AND JOINT APPENDIX VOLUME I**
**(JA-1 through JA-51)**

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# TABLE OF CONTENTS

TABLE OF AUTHORITIES .......... v

JURISDICTIONAL STATEMENT .......... 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .......... 2

STATEMENT OF THE CASE .......... 4

STATEMENT OF FACTS .......... 4

A. Jevic is Saddled with Debt, Terminates its Employees and Files for Bankruptcy .......... 4

B. Jevic Fails to Give the Drivers 60 Days' Notice of Termination as Required by the WARN Acts .......... 5

C. The Drivers File a Class Action for Their Wages and Benefits .......... 6

D. The Committee, Representing Jevic's Bankruptcy Estates, Files a Fraudulent Conveyance Action Against CIT and Sun to Unwind the LBO and Recover Over $100 Million .......... 7

E. The Committee Enters Into a Settlement of the LBO Action With CIT and Sun Under Which Jevic Gets Nothing .......... 8

F. At the Hearing on the Settlement, the Proponents of the Settlement Introduce No Evidence Showing Why the Drivers Were Excluded .......... 10

G. The Bankruptcy Court Approves the Transaction .......... 12

H. The Drivers Seek a Stay Pending Appeal .......... 15

I. The District Court Affirms the Bankruptcy Court and Dismisses the Appeal as Equitably Moot .......... 15

STATEMENT OF RELATED CASES AND PROCEEDINGS .......... 15

SUMMARY OF THE ARGUMENT .......... 16

ARGUMENT ....................................................................................19

I. THE BANKRUPTCY COURT ERRED IN APPROVING A SETTLEMENT OF AN ESTATE CAUSE OF ACTION WHICH DIVERTS THE PROCEEDS TO NON-ESTATE RECIPIENTS ...............19

A. Legal Authority Does Not Support the Settlement .............................19

1. The Code Restricts the Ability of Estate Representatives to Dispose of Estate Assets......................................................19

2. Rule 9019 Does Not Provide a Sufficient Legal Basis to Approve the Settlement, Which Comprises a *Sub Rosa* Plan21

3. The Lower Courts Misapplied the Standards Under Rule 9019.........................................................................26

4. The Lower Courts' Reliance on "Gifting" or "Class Skipping" Decisions Was Misplaced .......................................28

5. Neither Section 105 Nor General Equitable Powers Authorize Earmarked Settlements.......................................32

B. The Diversion of Settlement Proceeds for the Benefit of General Unsecured Creditors Violates the Code's Priority System ...........35

C. The Diversion of Settlement Proceeds From the Estate is Contrary to the Fiduciary Obligations of an Estate Representative ............38

D. "Dire Circumstances" Do Not Justify Re-Writing the Code .........40

E. The Bankruptcy Court's Finding That the Exclusion of the Drivers Was Essential and That There Were No Other Alternatives is Not Supported By the Record ...........................................................41

F. The Record Does Not Support the Bankruptcy Court's Finding That the Drivers Chose Not to Participate in the Settlement, Which is Irrelevant in Any Event.................................................42

II. THE BANKRUPTCY COURT ERRED IN APPROVING THE TERMINATION OF THE CHAPTER 11 CASE IN AN EARMARKED SETTLEMENT AND STRUCTURED DISMISSAL EXPRESSLY DEROGATING THE RULE THAT CASES END ONLY IN EITHER A PLAN, CONVERSION TO CHAPTER 7, OR PLAIN DISMISSAL........44

III. THE DISTRICT COURT ERRED IN DISMISSING THIS APPEAL AS EQUITABLY MOOT........46

A. The *SemCrude* Test for Equitable Mootness in the Third Circuit........47

B. Equitable Mootness Does Not Apply Where There is No Plan of Reorganization........50

C. Even If Equitable Mootness Could Apply to Settlements, The Court Did Not Apply the SemCrude Standard Correctly........52

1. The District Court Misapprehended and Incorrectly Applied the Legal Standard for Equitable Mootness........52

2. The District Court Failed To Consider Alternate Remedies........54

a. Voiding the Releases in Favor of Sun and CIT........55

b. Reforming the Settlement Such that the Proceeds Be Re-Distributed in Accordance with the Bankruptcy Code........56

c. Reversing of the Bankruptcy Court's Holding That the Committee Did not Breach its Fiduciary Duty....57

D. The District Court Improperly Relied on Hearsay Affidavits in Dismissing the Appeal as Equitably Moot........58

CONCLUSION........59

CERTIFICATE OF COMPLIANCE........60

CERTIFICATE OF BAR MEMBERSHIP....................60

CERTIFICATE OF COMPLIANCE....................60

CERTIFICATION OF IDENTIAL COMPLIANCE TO BRIEFS....................60

CERTIFICATION OF VIRUS CHECK....................60

# TABLE OF AUTHORITIES

CASES

*Bank of America Nat. Trust and Sav. Ass'n. v. 203 North LaSalle Street Partnership,* 526 U.S. 434, 465 n. 4 (1999)....................................................17, 18

*Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006)...16

*In re AWECO, Inc.,* 725 F.2d 293 (5th Cir. 1984)............................. 26, 27, 35, 37

*In re Anthanassious*, 418 F. App'x 91, 94 n.3 (3d Cir. 2011)................................51

*In re Armstrong World Industries, Inc.,* 432 F.3d 507 (3d Cir. 2005) ......28, 37, 38

*In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ..............................24

*In re Combustion Engineering, Inc*., 391 F.3d 190, 286 (3d Cir. 2004) .........17, 33

*In re Continental Airlines,* 91 F.3d 553, 568 (3d Cir. 1996) .. 48, 49, 50, 51, 52, 53

*In re Cont'l Airlines*, 203 F.3d 203, 210 (3d Cir. 2000) ........................................50

*In re Cybergenics,* 330 F.3d 548 (3d Cir. 2003)...................................................28

*In re DBSD N. Am., Inc.*, 634 F.3d 79 (2d Cir. 2011) ....................................28, 38

*In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc.*, 465 F. App'x 93, 96 (3d Cir. 2011) ..........................................................................................................18

*In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993).......................33, 34

*In re Foster Mortgage Corp*., 68 F.3d 914, 919 (5th Cir. 1995) ...........................27

*In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) ...........29

*In re Genesis Health Ventures, Inc.*, 204 F. App'x 144, 145 (3d Cir. 2006).........50

*In re Iridium Operating LLC,* 478 F.3d 453 (2d Cir. 2007) ...........................27, 36

*In re LCI Holding Co.,* 2014 WL 974145 (D. Del., Mar. 10 2014) ......................36

*In re Louise's, Inc.,* 211 B.R. 798 (D. Del. 1997) ..........................................24, 25

*In re Lurie Bros., Inc.,* 267 F.2d 33, 34 (7th Cir. 1959) .......................................39

*In re Marvel Entertainment Group,* 140 F.3d 463, 474 (3d Cir. 1998)................20

*In re NJ Affordable Homes,* 2007 WL 3166950, *4 (D.N.J. Oct. 22, 2007)... 21-22

*In re Nationwide Sports Distributors, Inc.,* 227 B.R. 455
(Bankr. E.D. Pa. 1998)..........................................................................23, 24

*In re Nutraquest,* 434 F.3d 639, 644 (3d Cir. 2005).......................................26, 27

*In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000).........................50, 55

*In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 170 (3d Cir. 2012) .............50

*In re SCH Corp., 2014 WL 2724606, *3* (3d Cir. Apr. 8, 2014) .....................54, 55

*In re SGPA, Inc.*, 34 F. App'x 49 (3d Cir. 2002) ..................................................50

*In re SPM Manufacturing Corporation,* 984 F.2d 1305 (lst Cir. 1993).......... 28-29

*In re SemCrude L.P.*, 456 F. App'x at 169 (3d Cir. 2012)....................................50

*In re Smart World Tech.,* 423 F.3d 166, 175 (2d Cir. 2005) ................................22

*In re Swallen's, Inc*., 269 B.R. 634, 638 (BAP 6th Cir. 2001).............................24

*In re TSIC, Inc.,* 393 B.R. 71 (Bankr. D. Del 2008).............................................22

*In re Taub*, 427 B.R. 208, 230 (Bankr. E.D.N.Y. 2010).......................................39

*In re Tubular Technologies, LLC*, 372 B.R. 820, 823 (Bankr. D.S.C. 2007)........39

*In re Turner-Dunn Homes, Inc.,* 2007 WL 3244105
(Bankr. D. Ariz. Nov. 1, 2007) ..........................................................................39

*In re SemCrude, L.P.*, 728 F.3d 314 (3d Cir. 2013) ......... 47, 48, 51, 52, 53, 54, 58

*In re World Health Alternatives, Inc.*, 344 B.R. 291
(Bankr. D. Del. 2006)......................................................................29, 30, 31

*In re Zenith Electronics Corp.*, 329 F.3d 338, 346 (3d Cir. 2003)..................50, 57

*Law v. Siegel*, ___ U.S. ____, 134 S. Ct. 1188 (2014) ...................................17, 34

*Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180 (3d Cir. 2001) ....................50

*Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 423 (6th Cir. 2000)....................33

*Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ....................26

*Whitman v. American Trucking,* 531 U.S. 457, 468 (2001) ....................22

*U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) ....................34

*United Artists Theatre Co. v. Walton*, 315 F.3d 217, 228 (3d Cir. 2003) .......50, 54

*United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992)....................33, 34

*United States v. Real Prop. Located at 6415 N. Harrison Ave*, 2011 WL 4433157, *5 (E.D. Cal. Sept. 21, 2011)....................42

*U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994)....................34

STATUTES

11 U.S.C. § 103....................21, 35

11 U.S.C. § 105....................32, 33, 44

11 U.S.C. § 107....................20

11 U.S.C. § 348....................45

11 U.S.C. § 349....................44, 45

11 U.S.C. § 506....................21, 35

11 U.S.C. § 507....................21, 35

11 U.S.C. § 510....................35

11 U.S.C. § 541....................20

11 U.S.C. § 547....................35

11 U.S.C. § 726 ....................35

11 U.S.C. § 1112 ....................18, 44

11 U.S.C. § 1129 ....................37, 38

28 U.S.C. § 157 ....................1

28 U.S.C. § 158 ....................1

28 U.S.C. § 1291 ....................1

OTHER AUTHORITY

COLLIER ON BANKRUPTCY, ¶1129.01, p. 1129–10 (rev. 15th ed. 1998) ....................16

Fed. R. Bankr. P. 1019 ....................45

Fed. R. Bankr. P. 9019 ....................21, 23. 24

H.R. Doc. No. 93–137, pt. I, p. 255 (1973) ....................18

H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977) ....................45

# JURISDICTIONAL STATEMENT

This is an appeal from the January 24, 2014 opinion and order, JA 13-22[1] (the "District Court Decision") of the United States District Court for the District of Delaware (the "District Court") dismissing as equitably moot and on substantive grounds the appeal of Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and those similarly situated (collectively, the "Drivers") from the December 4, 2012 final order, JA 45-51 (the "Bankruptcy Order"), of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") approving an earmarked settlement and structured dismissal of Jevic's bankruptcy cases.

The chapter 11 filings by Jevic Holding Corp. and its affiliated debtors ("Jevic") conferred jurisdiction on the Bankruptcy Court under 28 U.S.C. §§ 157 and 1334. The Drivers filed timely appeals from the Bankruptcy Order. JA 5-12. The District Court had jurisdiction over the appeal under 28 U.S.C. § 158(a). The Drivers timely filed their appeal from the District Court Decision. JA 1-4. This Court has jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

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[1] Citations to "JA __ - ___" are to pages of the Joint Appendix.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

*I. Did the Bankruptcy Court Err in Approving a Settlement of an Estate Cause of Action Which Diverts the Proceeds to a Non-Estate Trust and Account Benefitting Only Selected Creditors, With a Lower Priority than the Drivers, Instead of the Bankruptcy Estate?*

**Raised Before Bankruptcy Court:**

Legal error: JA 556-61; 566-72 (Drivers' Memorandum of Law In Opposition to Motion to Dismiss, the "Driver Opposition", at 1-6; 11-17); JA 617-19 (Drivers' response to motion supplement, the "Response to Supplement", at 2-4); JA 529-42 (Objection of US Trustee to Settlement Motion, "US Trustee Opposition" at 11-24)[2]; JA 1316-52 (Transcript of 11/13/2012 Hearing, "Hearing Tr.", at 110-146).

Absence of evidentiary support: JA 1261-63; 1341-42; 1351-52 (Hearing Tr. at 55-57, 135-36, 145-46).

**Ruled upon by Bankruptcy Court:** JA 26-36.

**Raised Before District Court:**

Legal error: JA 52-54 (Statement of Issues Presented and Record Designation, "Statement of Issues", nos. 1-4, 7, 13, 14); JA 75-78; 80-106 (Appellants' Brief at 1-4; 18-44).

[2] The Drivers joined with the arguments made by the US Trustee.

Absence of evidentiary support: JA 53-54 (Statement of Issues, nos. 5,7,8); JA-77; 95; 106-07 (Appellants' Brief at 3; 33; 44-45).

**Ruled upon by District Court:** JA 17-20.

*II. Did the Bankruptcy Court Err in Approving the Termination of the Chapter 11 Case in an Earmarked Settlement and Structured Dismissal Expressly Derogating the Rule That Cases End Only in Either a Plan, Conversion to Chapter 7, or Plain Dismissal?*

**Raised Before Bankruptcy Court:**

JA 560-61; 570-74 (Driver Opposition at 5-6; 15-19); JA 542-51 (US Trustee Opposition at 24-33); JA 1316-52 (Hearing Tr. at 110-146).

**Ruled upon by Bankruptcy Court:** JA 26-36

**Raised Before District Court:**

JA 54-55 (Statement of Issues, nos. 10-18); JA 78; 107-112 (Appellants' Brief at 4; 45-50).

**Ruled upon by District Court:** JA 17-20

*III. Did the District Court Err in Dismissing this Appeal as Equitably Moot?*

**Raised Before District Court:**

JA 300; 307-18 (Drivers' Response to Motion to Dismiss, at 2 (n. 3); 9 20).

**Ruled upon by District Court:** JA-20.

## STATEMENT OF THE CASE

This is an appeal from a decision of the District Court (1) affirming the Bankruptcy Court's approval of an "earmarked" settlement and a "structured dismissal" and (2) dismissing the appeal as equitably moot. The hallmark of the settlement is that it provides that the proceeds be paid not to the bankruptcy estate but to a trust and account for the benefit of selected creditors. The Drivers are the only creditors who received nothing. On appeal, the District Court affirmed the Bankruptcy Court on the merits and also dismissed the appeal as equitably moot because the parties to the settlement waived the requirement of a final order and disbursed the settlement proceeds.

## STATEMENT OF FACTS

### A. Jevic is Saddled with Debt, Terminates its Employees and Files for Bankruptcy

Jevic is a defunct trucking company. JA-363 (Motion to approve settlement, the "Settlement Motion"). In 2006, Sun Transportation, LLC, a subsidiary of Sun Capital Partners, IV ("Sun"), acquired Jevic, becoming its ultimate equity holder. *Id.*

Also in 2006, Jevic refinanced through a $101 million facility (the "Prepetition Facility") from CIT Business Credit as agent for various lenders (collectively, "CIT"). JA-779 (Second Amended Complaint in Adv. No. 08-51903, the "LBO Complaint" at ¶46). Thereafter, Jevic sold certain assets and

leased them back resulting in a large reduction of the debt owed to CIT. JA 790-92. (*Id. at* ¶¶101 *et seq.*).

As of December 2007, Jevic owed $53.2 million under the Prepetition Facility. JA-363 (Settlement Motion, ¶6). Under a forbearance agreement between Jevic and CIT, Sun furnished a $2 million guaranty of the Prepetition Facility. *Id.* Sun paid CIT under the guaranty and acquired a subrogation claim against Jevic. *Id.*

Before the bankruptcy, Jevic began to wind down its operations and terminated about 90% of its employees. *Id.* On May 20, 2008 (the "Petition Date"), Jevic filed chapter 11 petitions with the Bankruptcy Court. JA-362.

### B. Jevic Fails to Give the Drivers 60 Days' Notice of Termination as Required by the WARN Acts

Because Jevic, headquartered in Delanco, New Jersey, operated "facilities" and "establishments" (as defined in the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et. seq*. and the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-1 *et seq.* (together, the "WARN Acts")), Jevic was subject to the WARN Acts. JA-1090 (Amended Complaint (the "WARN Complaint") in Adv. No. 08-50662 (the "WARN Action"), at 4, ¶12), and JA-1102 (Jevic's answer thereto, at 3). The Drivers alleged Sun and Jevic operated as a "single employer" as defined by the WARN Acts. JA-1094 (WARN Complaint, at 8, ¶37).

In May 2008, Jevic, acting at Sun's direction, terminated about 1,800 similarly situated employees. JA-1193. The WARN Acts required Jevic to give the Drivers 60 days' written notice of termination, 29 U.S.C. § 2102(a); N.J.S.A. 34-21-2(a). Because Jevic never gave that notice, the Drivers' claim under the New Jersey WARN Act was held by the Bankruptcy Court to be undisputed. JA 1175-76 (5/10/2013 Opinion, at 17-18). That claim is estimated to be $12,400,000 of which the priority portion under section 507(a)(4) is approximately $8,300,000.[3]

## C. The Drivers File a Class Action for Their Wages and Benefits

In May 2008, the Drivers commenced the WARN Action in the Bankruptcy Court against Jevic and Sun, alleging a Rule 23 class claim (the "WARN Claims") under the WARN Acts. JA 1092-99 (WARN Complaint, 6-13, ¶¶26 *et seq.*). In October 2008, the Drivers filed their motion for class certification (WARN Action Adv. DI 21[4]), which Sun opposed. WARN Action Adv. DI 23. The Bankruptcy Court granted class certification. JA 1137-38.

As claims for wages and benefits incurred within 180 days of the Petition Date, the WARN Claims are priority claims under 11 U.S.C. §§ 507(a)(4) and

[3] Due to the dismissal of the bankruptcy under the Settlement, the Drivers were never afforded and opportunity to put on a damages case hence the absence of a record below on this.

[4] Citations to "Adv. DI" are to docket entries in a referenced adversary proceeding before the Bankruptcy Court.

(a)(5). Accordingly, the WARN Claims are entitled to payment in full before any funds may be paid to general unsecured creditors or to creditors with a lower priority.

### D. The Committee, Representing Jevic's Bankruptcy Estates, Files a Fraudulent Conveyance Action Against CIT and Sun to Unwind the LBO and Recover Over $100 Million

Under a debtor-in-possession financing order (JA 319-60, the "DIP Order", 1-40), the Official Committee of Unsecured Creditors (the "Committee") acquired standing to challenge the liens of and assert claims against the prepetition lenders "on behalf of Debtors' estates." JA-772 (LBO Complaint, at 4, ¶10). The Committee later commenced the LBO Action against the CIT to unwind the transactions leading to the Jevic bankruptcy. The Committee also filed an amended complaint adding Sun as a defendant (LBO Action, Adv. DI 17).

Following extensive briefing, the Bankruptcy Court granted in part and denied in part CIT's motion to dismiss. JA 732-61 (9/15/2011 Opinion, 1-30). The Committee filed the 91-page LBO Complaint on October 11, 2011, wherein the Committee sought to recover over $100 million from Sun and CIT. The LBO Complaint alleged: "Sun acquired Jevic on the backs of Jevic's creditors [and] orchestrated a[n] . . . LBO whereby Debtors' assets were leveraged to enable a Sun affiliate to pay . . . $77.4 million . . . with no money down." JA-770. The LBO

Complaint further alleged that Sun was able to obtain financing by preparing unrealistic projections rigged to support the transaction. JA 770-71. The result was financial disaster. *Id.*

### E. The Committee Enters Into a Settlement of the LBO Action With CIT and Sun Under Which Jevic Gets Nothing

On June 27, 2012, the Committee, Jevic, CIT, and Sun ("Appellees") filed the Settlement Motion to approve a settlement agreement (JA 388-405, the "Settlement," at 1-15) and to dismiss Jevic's bankruptcy cases following implementation of the Settlement. Under the Settlement, the proceeds (the "Settlement Proceeds") came from two sources. First, CIT would pay $2 million (the "CIT Settlement Payment") to a bank account (the "Administrative Claims Fund") earmarked to pay administrative creditors (the "Administrative Creditors")[5]. Second, Sun would transfer its putative liens on approximately $1.7 million of Jevic's money (the "Sun Settlement Proceeds") to a trust (the "Settlement Trust"). The Settlement Trust would benefit all of Jevic's general unsecured creditors (the "GUC Claimants"). Not one penny of the Settlement Proceeds was to be paid to Jevic itself or to the Drivers. JA 487-513.

In exchange for the Settlement Proceeds, CIT and Sun received broad releases from Jevic, including releases of the claims asserted against them in the

[5] While he Settlement says that the Administrative Claims Fund is for the "benefit" of Jevic's estates (JA-390), those funds are earmarked to pay only the Administrative Claims.

LBO Action. JA 391-95 (Settlement, 4-8, ¶2(c)(i),(ii)). Those who benefitted from the Settlement (*ie.,* the Administrative Creditors and the GUC Claimants) did not release Sun or CIT. *Id.*

The CIT Settlement Payment was sufficient to pay Administrative Creditors, including Jevic's and the Committee's professionals, in full. JA-366 (Settlement Motion, at 6, ¶13). By contrast, the Sun Settlement Proceeds, which were to be distributed *pro rata* to the Selected Creditors, were only enough to pay a small dividend to those creditors. *Id.* ¶21, JA-368. Significantly, Sun and CIT were not required to fund the Settlement until there was a final, non-appealable order approving the Settlement.[6]

Among those objecting to the Settlement were the Drivers, the Office of the United States Trustee (the "US Trustee"), tax claimants, and other priority creditors who were receiving no part of the Settlement Proceeds. DI 1390-1397.[7] On October 23, 2012, Appellees filed a supplement (the "Supplement," JA 599-615), which modified the Settlement to provide for full payment, from the Sun Settlement Proceeds, to all the priority creditors who had objected to the Settlement, except the Drivers (such priority creditors along with the GUC Claimants, the "Selected Creditors"). The remainder of the Sun Settlement

[6] Paragraph 18 of the Settlement provides that the "Effective Date" does not occur until entry of a Final Order, unless otherwise agreed by the parties. JA-398.
[7] Citations to "DI" are to the docket entries in *In re Jevic Holding Corp., et al.*, No. 08-11006 (BLS).

Proceeds would be paid *pro rata* to the GUC Claimants. *Id.* All in all, the Drivers received nothing. JA-615 (Supplement, Exhibit B).

### F. At the Hearing on the Settlement, the Proponents of the Settlement Introduce No Evidence Showing Why the Drivers Were Excluded

On November 13, 2012, the Bankruptcy Court held a hearing on the Settlement Motion. Two witnesses testified at the hearing: Daniel Dooley for Jevic and Edward Gavin for the Committee. Dooley testified on direct by proffer, and stated "despite numerous efforts by Jevic to include the WARN plaintiffs in this settlement, Jevic were unable to reach a resolution with the WARN Plaintiffs." JA-1237, ll. 18-21. On cross-examination, Dooley testified that he and Jevic's counsel "mediated" discussions among the parties to the Settlement, JA-1240, ll. 14-18. Dooley further testified that during his discussions with CIT, CIT did not reveal why the $2 million payment was earmarked to pay administrative expenses. JA-1241, ll. 10-15. Likewise, he did not know why the Sun Settlement Proceeds were paid to a trust rather than to Jevic:

> Q: Was there any discussion with Sun Capital's counsel or anyone from Sun about why it was being earmarked for general unsecured creditors instead of being paid directly to the estate?
>
> A: I'm not sure of Sun's motivation that specifically. So, no. I -- I don't have any knowledge of that.

JA-1242, ll. 7-12.

Gavin proffered testimony that he had participated in some negotiations with counsel to the Drivers and that counsel allegedly insisted that any settlement of the LBO Action must involve a settlement of the WARN Action. JA-1274, ll. 11-22. On cross, he conceded "[t]here may have been other discussions that happened that--that are not consistent with that that I wasn't a party to." JA-1292. He further testified he was not aware of any direct discussions between the Drivers and Sun. JA 1292-93. He even admitted leaving the March 2012 settlement meeting early. JA 1288-89.

Gavin did not testify why the Settlement Proceeds were paid into an account and trust and why the Drivers were excluded. He also admitted he did not know the origin of the provision that the Sun Settlement Proceeds would go into a trust rather than to Jevic:

> Q: Whose idea was it for the Sun's collateral to be transferred to a trust for the benefit of the general unsecured creditors?
>
> A: I don't know.

JA-1288, ll. 4-7.

He also admitted he was not part of the discussions leading to the establishment of that trust.[8] Indeed, no evidence was introduced as to why the

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[8] "Q: [D]o you understand why . . . the $1.7 million is going into a trust rather than to the estate? . . ..

funds were paid into an account and trust and not to Jevic, or why the Drivers were excluded. No evidence was introduced as to whether there was any push-back by Jevic or the Committee on those terms.

The origin of the exclusion of the Drivers came up during oral argument, however, when Sun's counsel stated:

> [I]t doesn't take testimony for Your Honor . . . to figure out, Sun probably does care where the money goes because you can take judicial notice that there's a pending WARN action against Sun by the WARN plaintiffs. And if the money goes to the WARN plaintiffs, then you're funding somebody who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis.

JA-1363. Sun's counsel was not a witness, and his statement by its own terms is speculative. There is no evidence in the record as to why the Committee agreed to indulge Sun's "probable cares."

## G. <u>The Bankruptcy Court Approves the Transaction</u>

On November 28, 2012 at a telephonic hearing, the Bankruptcy Court read its opinion into the record (JA 23-42, the "<u>Bankruptcy Opinion</u>,"). The Bankruptcy Court first held that the applicable legal standard for the approval of the Settlement Motion was embodied in case law interpreting FED. R. BANKR. P.

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> A:. . . No, I don't understand it, only because I wasn't involved in structuring the mechanics of the deal.

JA-1300, ll. 12-19.

9019 ("Rule 9019") and characterized that standard as not a heavy one. JA 29-30. Nevertheless, the Bankruptcy Court acknowledged the "weight" of the objections and that something beyond Rule 9019 was needed to approve the transaction in light of the fact that the Settlement involved skipping payment to the Drivers:

> There is no expressed [sic] provision in the code for distribution and dismissal contemplated by the settlement motion. However, I do observe that while the practice is certainly neither favored nor commonplace the record does reflect that this, sort of, relief has been granted by this and other Court's in appropriate occasions in the past. And I find that the dire circumstances that are present in this case warrant the relief requested here by the Debtor, the Committee and the secured lenders.

JA-31, ll. 17-25.

The "dire circumstances" alluded to was the fact that Jevic's assets were subject to the (challenged) liens of CIT and Sun, and that in the event of a conversion to chapter 7, the chapter 7 trustee would have no unencumbered assets with which to prosecute the LBO Action. JA-32.

Despite requiring a showing of "dire circumstances" as a condition of granting the Settlement Motion, the Bankruptcy Court accepted Appellees' argument that the existence of Sun's lien on Jevic's cash permitted Sun to dispose of its collateral as it wished:

> I believe that this is consistent with Judge Walsh's opinion in World Health, and case law in this other jurisdictions as consistently recognized and accepted the right of a secured creditor to dispose of its collateral as it

> wishes. Neither Armstrong nor DBSD affect this proposition outside of a Chapter 11 plan.

JA 32-33.

The Bankruptcy Court also rejected the US Trustee's and the Drivers' argument that the Committee had breached its fiduciary duty as an estate representative by negotiating the Settlement:

> I am not satisfied that the proposed settlement represents a breach of the Committee's fiduciary duties as an estate representative... . The fact that the Committee stands in the shoes of the Debtor here does not give every creditor here a veto over the chosen course of action . . .. As I see it fiduciary duties do not really enter into the analysis that is presently before me.

JA 33-34.

Notably, the court found that the Drivers had somehow opted out of the Settlement: "It is clear that the Warren [sic] claimants were invited to and took part in that settlement process, but they have chosen not to be part of this settlement." JA-33, ll. 22-24. Finally, the Bankruptcy Court dismissed the suggestion that a chapter 7 trustee might engage counsel to accept the LBO Action on a contingency fee basis: "I acknowledge that that is a possibility, but on these facts I think any lawyer or firm that signed up for that role should have his head examined." JA 35-36.

On December 4, 2012, the Bankruptcy Court entered the Bankruptcy Order (JA 45-51) granting the Settlement Motion, from which the Drivers appealed.

## H. The Drivers Seek a Stay Pending Appeal

The Drivers moved the Bankruptcy Court for a stay of the Bankruptcy Order pending appeal (JA 682-98) to which the Appellees objected (JA 709-729). The Bankruptcy Court held that the Drivers were not entitled to a stay because the Settlement purportedly did not prejudice them. JA-1552 (Transcript of 2/28/2013 Hearing, at 27). The Bankruptcy Court said it would grant a short stay to permit the Drivers to renew their motion before the District Court. JA-1555. The Drivers did not file a renewed motion.

## I. The District Court Affirms the Bankruptcy Court and Dismisses the Appeal as Equitably Moot

Briefing on the merits before the District Court was completed on April 22, 2013. On November 21, 2013, Appellees filed a motion to dismiss the appeal as equitably moot on the grounds that they had implemented the Settlement and disbursed all the funds. JA 113-73. The Drivers opposed the motion. JA 298-318.

On January 24, 2014, the District Court issued its Opinion affirming the Bankruptcy Court on all grounds and holding that the appeal was equitably moot. JA 13-22. This appeal followed.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

This appeal concerns the Jevic bankruptcy, the LBO Action, and the WARN Action.

## SUMMARY OF THE ARGUMENT

This appeal arises under Chapter 11 of the Bankruptcy Code enacted by Congress in part to secure equal distribution among creditors. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006). At the heart of Chapter 11 is the debtor's filing and confirming of plan of reorganization, one that must be "fair and equitable." COLLIER ON BANKRUPTCY, ¶1129.01, p. 1129–10 (rev. 15th ed. 1998); *Bank of America Nat. Trust and Sav. Ass'n. v. 203 North LaSalle Street Partnership,* 526 U.S. 434, 465 n. 4 (1999) (Stevens, J., dissenting). This appeal presents three issues of first impression before this Court that are central to the integrity of the Chapter 11 process. The first is the lawfulness of a Jevic's pre-plan settlement of an estate cause of action which earmarked settlement proceeds for the benefit of select creditors thereby skipping distribution to the Drivers, the creditors with the higher priority. The second is whether Jevic's settlement, or "structured dismissal," gave Appellees a free pass through Chapter 11, whose only avenues for exit are either a confirmed plan, a conversion of the case to chapter 7, or a plain dismissal. The third is whether the doctrine of equitable mootness, which has only been applied by this Court where there is a confirmed plan, should be expanded to protect such settlements and structured dismissals.

The Drivers contend that Appellees have abused the Chapter 11 process by escaping the confines of a plan in favor of settlement terms they felt they could dictate. They appropriated all the benefits of a Chapter 11 reorganization plan, by giving themselves broad releases and assets, while freezing-out the Drivers from any gain, which no Chapter 11 plan could ever permit.

As to the first issue, the Bankruptcy Court and the District Court (the "Lower Courts") held that Rule 9019 and (implicitly) Code section 105 authorize earmarked settlements, despite the absence of any supporting precedent from this Court. Rule 9019, however, does not expressly provide that a settlement in bankruptcy may earmark proceeds for the benefit of selected creditors. As for section 105, case law is clear that this provision merely authorizes the bankruptcy courts to implement other Code provisions, not to supplement them. *Law v. Siegel*, ___ U.S. ____, 134 S. Ct. 1188 (2014); *In re Combustion Engineering, Inc*., 391 F.3d 190, 286 (3d Cir. 2004) (Section 105(a) "cannot trump specific provisions of the Bankruptcy Code").

Moreover, assuming such earmarked settlements are ever appropriate, they must be subject to the highest level of scrutiny to assure their fundamental fairness to non-parties to the settlement. The inviolable priority system embodied in the Code is that claimants with higher statutory priorities be paid in full before those with lower priorities. *Bank of America Nat. Trust and Sav. Ass'n.* 526 U.S. at 435.

The Bankruptcy Court upheld the Settlement despite the fact that the Drivers' priority claims will receive no distribution.

Congress recognized the danger that debtors dominated by management and major creditors may use the reorganization process to gain unfair advantage over smaller creditors and understood that "'without a clear standard of fairness and judicial control,'" small creditors would be left unable to "'bargain effectively.'" *Id.* at 444, *citing* H.R. Doc. No. 93–137, pt. I, p. 255 (1973). Rather than follow the rules governing confirmation of a Chapter 11 plan, Appellees entered into a denominated "settlement" that collusively removed the Drivers' first-in-line claim from any distribution so that all the estate's funds could flow to the more junior creditors and the Appellees' professionals. Appellees short circuited the Code to an extreme extent not seen in any prior case.

The second issue concerns the Lower Court's approval of an exit from chapter 11 not authorized by Congress, commonly known as a "structured dismissal". Such dismissals typically go hand-in-hand with pre-plan settlements as they involve the distribution of all estate assets. However, Chapter 11 provides debtors only three exits from bankruptcy, either via: a plan, conversion to Chapter 7 or a dismissal of the case that reinstates the status quo ante. § 1112(b)(1). *See In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc.*, 465 F. App'x 93, 96 (3d Cir. 2011). The Bankruptcy Court acknowledged that Appellees'

requested exit was not among the Code's three options, the Court nevertheless approved it.

The third issue is whether the doctrine of equitable mootness protects pre-plan settlements and structured dismissals from appellate oversight. This Court has only applied equitable mootness where there has been a confirmed plan. The doctrine should not be extended to protect transactions, such as earmarked settlements and structured dismissals, that should not exist in the first place.

## ARGUMENT

### I. THE BANKRUPTCY COURT ERRED IN APPROVING A SETTLEMENT OF AN ESTATE CAUSE OF ACTION WHICH DIVERTS THE PROCEEDS TO NON-ESTATE RECIPIENTS

***Standard of Review: error in formulating or applying a legal precept; plenary review. (As to subparts E and F, below, whether the Bankruptcy Court's findings were clearly erroneous)***

#### A. Legal Authority Does Not Support the Settlement

##### 1. The Code Restricts the Ability of Estate Representatives to Dispose of Estate Assets

This case concerns a trend that threatens to eviscerate the core principles of the Bankruptcy Code. The essential facts of this case are simple and undisputed. A lawsuit (the LBO Action) was filed on behalf of a bankrupt company (Jevic) against two defendants (Sun and CIT). The bankrupt and the defendants agreed to a settlement under which the bankrupt released the defendants. In exchange for the release, the defendants were required to pay or transfer money.

To place maters in context, it is important to reflect on the statutory background against which these events occurred. The filing of a bankruptcy petition creates a bankruptcy "estate" (11 U.S.C. § 541), administered by an estate fiduciary. The fiduciary is usually an independent trustee, but in Chapter 11 cases like this, the bankrupt itself plays that role as a "debtor-in-possession" ("DIP"). 11 U.S.C. § 1107. A DIP has most of the powers and is bound by the same duties as a trustee. 11 U.S.C. § 1107(a). Like any trustee, the DIP is a fiduciary for the estate and its beneficiaries, creditors of the estate. *In re Marvel Entertainment Group, 140 F.3d 463, 474 (3d Cir. 1998)* ("When a Chapter 11 petition was filed . . . the debtor-in-possession assumed the same fiduciary duties as would an appointed trustee").

A DIP must abide by stringent rules governing the disbursement of estate assets to creditors—as such distributions are the purpose of bankruptcy. In a chapter 11 case, such disbursement is only supposed to occur under a confirmed plan. Plan confirmation encompasses a process carefully crafted to protect the rights of parties in interest. 11 U.S.C. §§ 1121-1146.

Congress has not only created an intricate system for confirmation of a plan under which estate assets are distributed, but has also established rules governing the priority of payment. This priority system is often analogized to a "waterfall"--creditors with a higher priority must be paid in full before creditors with a lower

priority receive anything. Secured claims come first. 11 U.S.C. § 506. After that, the waterfall follows the ten priorities in 11 U.S.C. § 507. Only after all priority claims are paid in full may distributions be made to non-priority creditors. These provisions apply in all chapters of the Code (except 9 and 15). 11 U.S.C. § 103(a).

Here, Jevic, as the DIP, was bound by the statutory restrictions laid down by Congress. Accordingly, Appellees must identify what in the Code authorizes Jevic to enter into the Settlement, including its earmarking provisions. Jevic must also explain how it can bypass the Drivers who hold priority claims under 11 U.S.C. § 507(a)(4) and (a)(5) in favor of general unsecured creditors. Throughout these proceedings, Appellees have acted as if it is Appellants' burden to show what in the Code prohibits the Settlement. But the shoe is on the other foot. It is up to the Appellees to identify supporting authority. Neither they nor the Lower Courts have found any.

#### 2. Rule 9019 Does Not Provide a Sufficient Legal Basis to Approve the Settlement, Which Comprises a *Sub Rosa* Plan

The Lower Courts erroneously held the review of the Settlement was governed by Rule 9019 (JA 29-30; JA 17-18) which states in pertinent part: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." This rule has been interpreted to serve as a gatekeeper to protect the interests of non-parties to the settlement. *In re NJ Affordable Homes,*

2007 WL 3166950, *4 (D.N.J. Oct. 22, 2007). It affords the bankruptcy court oversight over the reasonableness of settlements. Rule 9019 does not empower a debtor to settle a cause of action under which the settlement proceeds are not paid to the estate but to selected creditors. To the contrary, the rule presumes that "[i]t is the debtor-in-possession who controls the estate's property, including its legal claims, and it is the debtor-in-possession who has the legal obligation to pursue claims or settlements, based upon the best interests of the estate." *In re Smart World Tech.,* 423 F.3d 166, 175 (2d Cir. 2005).

In ruling that Rule 9019 authorizes earmarking, the Lower Courts disregarded the Supreme Court's admonition that Congress does not hide "elephants in mouse-holes." *Whitman v. American Trucking,* 531 U.S. 457, 468 (2001). They found such far reaching power in Rule 9019 as to render plan confirmation superfluous and the congressionally mandated system of distribution a nullity. Rule 9019 becomes a stand-in for the entire confirmation process, with *sub rosa* plans masquerading as settlements. If the Lower Courts were upheld, estate fiduciaries, merely by labeling a transaction a "settlement", would be able to divert the estate's essential funds (obtained from DIP financing, asset sales, and compromises of causes of action) to anyone with enough negotiating leverage. *Cf.*, *In re TSIC, Inc.,* 393 B.R. 71 (Bankr. D. Del 2008) (approving $500,000 earmark for benefit of general unsecured creditors from non-estate funds). Such a diversion

of estate funds would be an end run around the fair and equitable standards imposed by the Code.

Case law teaches that Rule 9019 does not authorize the Bankruptcy Court to approve any transaction denominated a "settlement" that is designed to favor some creditors over others, instead of the estate as a whole. In *In re Nationwide Sports Distributors, Inc.,* 227 B.R. 455 (Bankr. E.D. Pa. 1998), creditors on the committee filed a motion to appoint a trustee based on alleged fraudulent conduct of management. Those creditors entered into a "settlement" under which they would withdraw their motion and sell their claims to an insider of the debtor, who agreed to subordinate those claims for the benefit of other creditors. The court doubted Rule 9019 applied, because while the proposed "settlement" comprised many transactions, it did not involve the release of a claim by or against the bankrupt:

> The standard for the application of Rule 9019(a) . . . presupposes the compromise by a bankruptcy fiduciary of claims belonging to or raised against specific individuals or entities. *See, e.g., In re Martin,* 91 F.3d at 391. The dispute which the debtor proposes to settle . . . does not involve a claim or interest belonging to the seven petitioning creditors. Nor is it clear that the participation of the debtor in the trustee litigation is as a fiduciary on behalf of all creditors and other interested parties in this bankruptcy case. Further, the settlement agreement, as a whole, involves agreements of claims assignment, releases and subordination which extend to issues and parties beyond those involved in the trustee litigation. . . . . For these reasons, the provisions of Rule 9019(a) may not be germane.

*Nationwide Sports,* 227 B.R. at 460.

*Nationwide Sports* stressed that approval of a settlement required a showing of benefit to the estate as a whole, rather than to particular creditors: "[t]he decision to approve or disapprove a settlement pursuant to Bankr. R. 9019(a) looks only to whether the proposed settlement is in the best interests of the bankruptcy estate." *Id.* at 461. Despite the fact that all creditors would benefit under the proposed settlement, the court rejected it. Among the court's concerns was that the remaining creditors would receive a lower dividend than the petitioning creditors.

The court in *In re Louise's, Inc.,* 211 B.R. 798 (D. Del. 1997) similarly recognized the limitations of Rule 9019. There, a proposed settlement of an exclusivity motion included terms beyond of the issues raised in the settled motion, including the transfer of control of the debtor. The court rejected the settlement, holding that it was a disguised plan of reorganization. *Id.* at 800. A settlement which has the purpose and effect of a plan is an impermissible *sub rosa* effort to circumvent the requirements for confirmation in chapter 11. *E.g., In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets."); *In re Swallen's, Inc.*, 269 B.R. 634, 638 (BAP 6th Cir. 2001) ("At least when a party in interest objects, a bankruptcy court

cannot issue orders that bypass the requirements of Chapter 11, such as disclosure statements, voting, and a confirmed plan, and proceed to a direct reorganization on the terms the court thinks best, no matter how expedient that might be.").

Like the settlement in *Louise's*, the Settlement under consideration contains terms and conditions well outside of the issues raised in the LBO Action. And like the settlement in *Louise's,* the Settlement, as a *sub rosa* plan, dictates material terms of a plan (including claims allowance, classification, and distribution) without complying with the Code's procedural requirements for plan confirmation. Indeed, compared to the cases cited above, the facts here weigh more heavily against the Settlement. In *Nationwide* and *Louise's*, no estate cause of action was released. In the case at bar, the Jevic estate released the LBO Action in exchange for funds earmarked to benefit only the favored creditors—estate professionals and the Committee's constituency. Furthermore, the settlements in *Nationwide,* and *Louise's* did not comprise a final distribution and administration of the bankruptcy. The Settlement here distributes all estate assets to favored creditors. If the settlements in these cases could not be authorized under Rule 9019, then *a fortiori*, the far more encompassing and far less fair "Settlement" in Jevic cannot be authorized under that rule.

### 3. The Lower Courts Misapplied the Standards Under Rule 9019

Even if Rule 9019 provided the correct standard, the Lower Courts misapplied it. While settlements "are a 'normal part of the process of reorganization'" (*Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)), like every "important determination in reorganization proceedings, [they must] receive the 'informed, independent judgment' of the bankruptcy court." *Id.* at 424. "[T]he unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them." *In re Nutraquest,* 434 F.3d 639, 644 (3d Cir. 2005) to ensure they are "fair and equitable." The settlement must be fair "to other persons, *i.e.*, the parties who did not settle." *Id*. at 645.

The court's "scrutiny must be great when the settlement is between insiders and an overwhelming majority of creditors in interest oppose such settlement." Moreover, a settlement that entails class skipping is subject to an especially high level of scrutiny to assure fundamental fairness to non-settling creditors. Hence, in *In re AWECO, Inc.,* 725 F.2d 293 (5th Cir. 1984), the Fifth Circuit held that a pre-plan settlement of claims against the estate in exchange for estate assets was not fair and equitable in the absence of evidence that the assets remaining in the estate were sufficient to satisfy priority claimants. *Id*. at 298. Applying similar logic, the Second Circuit vacated a bankruptcy court's approval of a pre-plan settlement that

distributed proceeds of an estate cause of action to a trust for the benefit of general unsecured creditors directly instead of distributing them pursuant to the Code's priority system. *In re Iridium Operating LLC,* 478 F.3d 453 (2d Cir. 2007). *See*, Point I(B), *infra*, pp. 36-39.

Here, the Bankruptcy Court did not refer to its duty of careful examination to ensure fairness to parties that did not settle. Nor did the court subject the Settlement to stringent review despite the fact that it mandates skipping any payment to the Drivers. Instead it described the legal standard governing its review of the settlement as "not a heavy burden." JA-30. Such a limited review falls short of the "careful examination" mandated by *Nutraquest* and disregards the interests of "other persons," namely, the Drivers, Jevic's largest creditor constituency. *In re Foster Mortgage Corp.*, 68 F.3d 914, 919 ($5^{th}$ Cir. 1995) (opposition of majority of creditors warranted denial of approval of settlement).

Not only did the Bankruptcy Court approach the facts here with an articulated bias towards approving the Settlement, it ignored the coincidence of interests between the Committee and Sun which should have triggered skepticism, rather than deference. The record here shows that the interests of the Committee and Sun were not adverse, but coincided as to the exclusion of the Drivers. The Committee's constituency, general unsecured creditors, would receive nothing under a settlement for less than the amount needed to pay the priority WARN

Claims in full–a figure probably around $10 million. It was hence the paramount interest of the Committee to negotiate a deal under which the Drivers were excluded. According to its counsel, Sun's interest coincided with the Committee's because Sun did not want to fund the Drivers. The Bankruptcy Court's conclusion that the Settlement was negotiated at arm's-length is undermined by the common interests of the Committee and Sun to leave the Drivers out in the cold, and most clearly, by the Settlement itself, which did just that.

#### 4. The Lower Courts' Reliance on "Gifting" or "Class Skipping" Decisions Was Misplaced

The Lower Courts misunderstood this case in holding the facts were on all fours with so-called "gifting" or "class-skipping" cases. JA 19-20; JA-33. Under that line of authority, a creditor is not bound by the provisions of the Code in disposing of its claims or collateral. In its landmark decision in *In re Armstrong World Industries, Inc.,* 432 F.3d 507 (3d Cir. 2005), this Court rejected class-skipping in the plan context. *Accord In re DBSD N. Am., Inc.*, 634 F.3d 79 (2d Cir. 2011). But this Court need not decide whether *Armstrong's* proscription against gifting extends beyond the plan context because this case did not involve a gift.

The District Court's misunderstanding of the Settlement is reflected by its reliance on *In re SPM Manufacturing Corporation,* 984 F.2d 1305 (lst Cir. 1993). JA-19. In *SPM,* the committee and a secured creditor agreed to cooperate in pursuing mutually beneficial objectives in chapter 11. In exchange for the

committee's cooperation, the secured creditor agreed that it would share with unsecured creditors proceeds realized from the reorganization. *Id.* at 1308. What completely distinguishes *SPM* is that the committee did not release estate causes of action. Rather, the secured creditor exercised its right to pay other creditors proceeds from its collateral and, since the estate did not release any claims, this transfer may be characterized as a gift. *SPM* is not comparable to what happened below, where the Committee caused the Jevic estate to release causes of action in exchange for consideration flowing to its own constituency. *See also In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) (allowing senior secured lenders to transfer a portion of their proceeds under the plan to holders of unsecured claims).

The Lower Courts also relied on *In re World Health Alternatives, Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006) ("*World Health*"), a distinguishable case which supports the Drivers' position. In *World Health*, the court entered a financing order similar to the DIP Order, permitting the parties-in-interest to bring actions against the debtors' lenders. *Id*. at 293. Contemporaneously, an auction was held on a motion to sell the debtors' assets. *Id.* The committee negotiated a settlement under which it withdrew its objections to the sale and released the lenders from claims to avoid their liens. The lenders agreed to a $1.625 million carve-out from

their collateral to pay the committee's professional fees with the remainder distributed to general unsecured creditors. *Id.* at 294-95.

The US Trustee filed the sole objection to the settlement on the grounds that it permitted a distribution to general unsecured creditors ahead of priority claimants. *Id.* In response, the committee argued the lenders were free to gift their collateral to it. The US Trustee replied the estate, rather than the committee, was entitled to the collateral as consideration for the release.

The Bankruptcy Court squarely addressed the US Trustee's objection, stressing that the record did not support the US Trustee's position because the principal consideration for the release was not the surrender of estate claims but the committee's withdrawal of objections to the sale:

> [G]iving up estate causes of action against CapSource is not the only consideration that CapSource receives under the Letter Agreement. The [c]ommittee gave up *its* right to pursue its objection to the sale motion. This right belonged exclusively to the [c]ommittee.

*World Health*, 344 B.R. at 299.

The Bankruptcy Court also quoted from the committee's own filing:

> One arrow that the [c]ommittee did *not* have in its quiver was a credible threat to challenge the validity and perfection of CapSource's liens, since it could discern no infirmity in those liens.

*Id.* at 300.

The distinction between this case and *World Health* is clear. In this case, the Committee, an estate representative, vigorously prosecuted a $100 million lawsuit against CIT and Sun to unwind the LBO. The Committee successfully defeated the defendants' motion to dismiss. The Committee's witness testified that the LBO Action was meritorious and that it would be unlikely for a case like this to be litigated by any party to its conclusion. JA 1293-94. In *World Health,* by contrast, the committee never filed a complaint—much less took it through significant pleading and briefing. The committee even admitted that it had no plausible challenge to the lenders' liens. The committee in *World Health* extracted the carve-out (the "gift") based on its challenge to the sale process—something the committee did in its own right and *not* as an estate representative.

Unlike *SPM* and *World Health*, the case at bar did not involve gifting of collateral by Sun and CIT. To see why, consider an agreement identical to the Settlement, except that instead of transferring liens, Sun pays cash. Sun opens its own bank account and deposits $1.7 million. Before closing on the settlement, the $1.7 million is Sun's money, and Sun may transfer those funds as consideration for a settlement. It is equally clear that the payment of those funds is not a gift; it is consideration for a release. The problem with the Settlement is not that Sun paid by transferring liens instead of paying cash. The problem is that the consideration benefitted the Committee and not the Jevic estate. Unlike a private party, Jevic, a

statutory fiduciary, was not free to release a cause of action in exchange for consideration benefitting third parties.

Appellees themselves understood that an estate cause of action was being compromised, and that this is not a gifting case. At oral argument, Committee counsel properly conceded Sun's transfer of its liens on the Sun Settlement Proceeds was not a gift, but was made in exchange for the release of an estate cause of action:

> It's not a gift. It's an assignment. It's a settlement of litigation and we candidly admit, Your Honor, it's a settlement of a litigation against them brought on behalf of the estate.

JA-1307. Any other interpretation of the Settlement is not credible. Sun had no reason to make a gift to unsecured creditors. Sun was being sued. Sun is paying the Sun Settlement Proceeds to receive the release of the claims asserted by the Committee in the LBO Action. Settlement, ¶2(c)(1), JA 391-92.

#### 5. Neither Section 105 Nor General Equitable Powers Authorize Earmarked Settlements

Although Section 105 was not explicitly relied on by the Lower Courts, it is important to address because Appellees cited to section 105 in promulgating the Settlement. JA-362 (Settlement Motion, p. 2). Under Section 105(a), "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 105 does not permit the courts to legislate

from the bench and expand the powers conferred by the remainder of the Code. Hence, Section 105 cannot form the basis for earmarking proceeds of estate assets for selected creditors.

The words "'provisions of this title' simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them." *Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 423 (6th Cir. 2000). Section 105(a) cannot be used to create a statutory "work-around." *In re Combustion Engineering, Inc.*, 391 F.3d at 286 (Section 105(a) "cannot trump specific provisions of the Bankruptcy Code"; it "must be exercised within the parameters of the Code itself" and "is cabined by the Code"); *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993) ("[W]hen a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code.") (*citing In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989)). Section 105(a) does not afford bankruptcy courts "a free-floating discretion to redistribute rights in accordance with his [or her] personal views of justice and fairness, however enlightened those views may be." *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992).

Authorizing a chapter 11 debtor to divert funds and disburse them outside of a confirmed plan, under the guise of a "settlement," "would go beyond the authority granted in § 105, which allows [bankruptcy] courts to use their equitable

powers only as necessary to enforce the provisions of the Code, not to add on to the Code as they see fit." *In re Fesco Plastics Corp.*, 996 F.2d at 156. As "section 105 does not 'give the court the power to create substantive rights that would otherwise be unavailable under the Code,'" it cannot be used to create a judge-made remedy. *Pepperman,* 976 F.2d at 131. Section 105(a) is not "a roving commission to do equity." *U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986); *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994) (Alito, J.) ("[B]ankruptcy courts cannot use equitable principles to disregard unambiguous statutory language.").

The Supreme Court had occasion to revisit the limits of Section 105 in its recent decision of *Law v. Siegel*, ___ U.S. ____, 134 S. Ct. 1188 (2014). There, the Court rejected an effort by a trustee to surcharge a debtor's exemption on grounds not stated in the Code. "It is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.' . . . whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* at 1194.

The Settlement here does not implement powers granted elsewhere in the Code. Rather, it compromises an estate action in exchange for which funds are

paid to selected creditors from a settlement trust. Nothing in the Code authorizes this. Section 105 cannot create a new substantive power of the bankruptcy court.

### B. The Diversion of Settlement Proceeds for the Benefit of General Unsecured Creditors Violates the Code's Priority System

The Code sets forth a comprehensive system establishing the order in which claims will be paid. *E.g.,* 11 U.S.C. §§ 503, 506, 507, 510, 547, 726. Section 503 details the types of claims that can be paid as administrative expenses. Section 506 governs the extent to which a claim is secured. Section 507 specifies ten types of claims that will receive priority among unsecured claims and the order in which those claims are paid. These interlocking provisions are found in chapter 5 of the Code, which applies to cases under any chapter of the Code (other than 9 and 15). 11 U.S.C. § 103(a). The Settlement, by allocating proceeds of an estate asset (the LBO Action) for the benefit of general unsecured creditors, circumvents the priority system of the Code.

Courts have rejected attempts by parties to enter into pre-plan settlements in chapter 11 that circumvent the Code's priority system. In *AWECO*, 725 F.2d at 293, the Fifth Circuit reversed the district court's approval of a pre-plan settlement of litigation involving the debtor and a junior unsecured creditor. Senior creditors argued that the settlement would jeopardize their priority position by depleting estate assets. *Id.* at 298. The appellate court held that "a bankruptcy court abuses

its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected." *Id*. It rejected the notion that the Code's comprehensive priority system was only implicated in chapter 11 plans, explaining "[a]s soon as a debtor files a petition for relief, fair and equitable settlement of creditors' claims becomes a goal of the proceedings. The goal does not suddenly appear during the process of approving a plan of compromise." *Id.* Similarly, the Second Circuit in *Iridium,* 478 F.3d 453, held that "whether a pre-plan settlement complies with the Code's priority system is the most important, and often the dispositive factor in determining whether the settlement is 'fair and equitable.'" *Id*. at 464.

Here, Appellees have attempted to evade the Code's priority system by causing general unsecured claims to be paid through the Settlement to the exclusion of the Drivers. That attempt, like those rejected by the Second and Fifth Circuits, cannot be sanctioned. Permitting parties who control a bankruptcy case—the DIP lenders, the debtor and the committee—to circumvent the priority system of the Code not only allows them to avoid paying the priority wage claims of laid off employees, but also has been used to deprive the United States Treasury, which is funded by taxes that constitute the other major 507 priority class. *See In re LCI Holding Co.,* 2014 WL 974145 (D. Del., Mar. 10 2014) (also now on appeal before this Court).

The Lower Courts held, however, that the priority system of the Code is not implicated and emphasized that the Settlement need not comply with the "absolute priority rule" at issue in *Armstrong*. JA-19; JA-32. In so holding, the Lower Courts conflated the absolute priority rule of 11 U.S.C. § 1129(b)(2) with the priority system of the Code. Appellants have never cited *Armstrong* for the proposition that the Settlement violates 11 U.S.C. § 1129(b)(2), but have cited that decision for the broader proposition that the priority system of the Code cannot be circumvented.

The problem is partly semantic. The words "absolute priority rule" appear nowhere in the Code. The term most often to refers to the requirement in 11 U.S.C. § 1129(b)(2)(B) that equity cannot get anything under a plan unless unsecured creditors are paid in full.[9] That rule plainly does not apply here. The "absolute priority rule" also sometimes broadly refers to priority system of the Code which requires claims with a higher priority to be paid before lower priority claims. *E.g., Iridiuim,* 478 F.3d at *463-64* (describing waterfall of distribution as the "absolute priority rule").

This brings us to this Court's landmark decision in *Armstrong*, where the Court held that a plan of reorganization providing for the automatic "gifting" of

[9] Congress intended to codify the "absolute priority rule" in this section. Senate Report No. 95-989, 95th Cong., 2d Sess. 127-128 as reprinted in 2013 Collier Pamphlet Edition Part 1 932.

warrants to equity holders comprised an improper attempt to circumvent the absolute priority rule of 11 U.S.C. § 1129(b)(2)(B). *Armstrong,* 432 F.3d at 514. This Court held that "[a]llowing this particular type of transfer would encourage parties to impermissibly sidestep the carefully crafted strictures of the Code, and would undermine Congress's intention." *Id.* at 514. The Court further rejected the argument that equitable considerations or time constraints could justify a different result. *Id.* at 517. *Accord In re DBSD N. Am.*, 634 F.3d 79 (2d Cir. 2010). These holdings in *Armstrong* stand not only for the proposition that a plan may not evade Section 1129(b)(2)(B), but also that the priority system of the Code cannot be circumvented by augmenting the bankruptcy court's statutory powers.

### C. The Diversion of Settlement Proceeds From the Estate is Contrary to the Fiduciary Obligations of an Estate Representative

Where a committee is appointed as an estate representative under this Court's seminal decision in *In re Cybergenics,* 330 F.3d 548 (3d Cir. 2003), it becomes a fiduciary for the bankruptcy estate. Under *Cybergenics*, if a debtor does not pursue an estate cause of action, the committee may be granted standing to prosecute such actions on behalf of the estate. *Id.* at 568.

That is what happened here. Under the DIP Order, the Committee was granted standing to sue as an estate representative. DIP Order at ¶39, JA 341-44. As an estate representative, the Committee became a fiduciary to all creditors of

the Debtors' estate. *In re Turner-Dunn Homes, Inc.,* 2007 WL 3244105 (Bankr. D. Ariz. Nov. 1, 2007) ("A Trustee is the representative of the estate, 11 U.S.C. § 323, and is charged with a fiduciary duty to act in the best interests of all creditors."). The Committee had a duty to act for the interest of the estate itself, and not its usual constituency. As a fiduciary, it had a duty to treat all parties-in-interest fairly and equably. *In re Tubular Technologies, LLC*, 372 B.R. 820, 823 (Bankr. D.S.C. 2007) ("Trustees appointed under all chapters of the Bankruptcy Code, their attorneys and other professionals, among others, are all fiduciaries to the estate, owing the duty of the utmost good faith and fair dealing to the estate and its beneficiaries."). The Committee was barred from taking any action to favor any beneficiary over any other. *In re Taub*, 427 B.R. 208, 230 (Bankr. E.D.N.Y. 2010) ("A trustee can fulfill the Debtor's fiduciary obligations to the estate and its creditors without any prospect of favoritism or animus."); *In re Lurie Bros., Inc.,* 267 F.2d 33, 34 (7th Cir. 1959) ("'It is true that the creditors have a right to select a trustee, and it is also true that that trustee, by whomever he may be nominated, must be neutral as between all the parties to a proceeding'").

The Committee here breached its fiduciary duty by entering into a deal under which its own constituency profited at the expense of the estate. The Jevic estate did not benefit from the Settlement. Instead, the Committee's professionals and constituency benefitted. Permitting committees to act in this way places

priority creditors, such as the Drivers, in the unenviable position that they can never assume that a committee appointed under a financing order will act for the estate's benefit. Instead, they are subject to the risk that the committee will sell the estate's cause of action for consideration flowing to its own constituency, which is what happened in Jevic.

### D. "Dire Circumstances" Do Not Justify Re-Writing the Code

The Bankruptcy Court fashioned something like a doctrine of necessity to approve the Settlement. But dire straits don't permit a detour from the course set by Congress in the Code. Moreover, the supposedly exceptional circumstances—the absence of unliened assets—are unfortunately the rule, rather than the exception these days.

The Lower Courts cite no authority for a "dire circumstance" exception to abiding by the Code. Formulating a standard under which earmarked settlements may be approved is both unworkable and contrary to the core bankruptcy policies. A settlement that excludes certain claimants because of the litigation strategy of a party can hardly be fair and equitable. Earmarking is a solution for a problem that does not exist. This case exemplifies the kind of necessity which produces earmarking settlements. The coincidence of Sun's litigation priorities with the Committee's pecuniary interest produced a settlement engineered to eliminate any benefit for the truck drivers who lost their jobs.

Moreover, the economic circumstances of the Jevic bankruptcy are anything but exceptional. Cases where the debtor is underwater on a secured basis have increasingly become the norm. But where it is clear that a plan is not feasible due to lack of funds, the congressionally mandated course of action is to convert the case, and not invent a new way out of bankruptcy.

### E. The Bankruptcy Court's Finding That the Exclusion of the Drivers Was Essential and That There Were No Other Alternatives is Not Supported By the Record

Appellees presented the Settlement, including its exclusion of the Drivers, as the only alternative available. However, Appellees introduced no evidence that the exclusion of the Drivers was an essential term. There was also no evidence that a chapter 7 trustee could not negotiate an alternative settlement. The Bankruptcy Court hence erred in concluding that the Settlement was the best and only alternative.

Appellees presented no evidence why the Drivers were excluded. Appellees' witnesses admitted that they did not know why the Settlement Proceeds were to be paid into certain accounts and trusts. JA-1242, 1288, 1300. The record is devoid of any evidence that the exclusion of the Drivers and the establishment of the Settlement Trust were essential terms without which no settlement could be achieved.

Instead of taking evidence on this point, the Bankruptcy Court accepted the representation of Sun's counsel. JA-34. A representation of counsel is not evidence. *United States v. Real Prop. Located at 6415 N. Harrison Ave*, 2011 WL 4433157, *5 (E.D. Cal. Sept. 21, 2011). Such reliance was clear error.

The Bankruptcy Court also found that the LBO Action would not settle in a chapter 7. JA-32. Again, no evidence was introduced to support that conclusion other than the fact that the chapter 7 trustee would not have access to unliened cash. The Bankruptcy Court even speculated, without evidentiary foundation, that no counsel would agree to accept a $100 million lawsuit on a contingency fee basis. JA 35-36. That, too, was a clear error.

### F. The Record Does Not Support the Bankruptcy Court's Finding That the Drivers Chose Not to Participate in the Settlement, Which is Irrelevant in Any Event

The Bankruptcy Court's finding that the Drivers "chose" not to be part of the Settlement is unsupported by the record and represents clear error. It is also irrelevant, because creditors in a bankruptcy are not required to negotiate to receive a distribution.

There was scant testimony about negotiations with the Drivers. Dooley proffered that "despite numerous efforts by the debtors to include the WARN plaintiffs in this settlement, the debtors were unable to reach a resolution with the WARN Plaintiffs." JA-1237. Gavin testified that he was not aware of all of the

settlement discussions that occurred and that he had to leave the March settlement meeting early. JA 1288-89, 1292. He conceded that he was not aware of any direct discussions between the Drivers and Sun. JA 1292-93.

This scant testimony does not support a finding that the Drivers chose not to be part of the Settlement. The record reflects merely that there were discussions among the parties that did not lead to a resolution, for whatever reason. The Bankruptcy Court's factual finding on this point was clearly erroneous.

That factual error should not cause this Court to lose sight of the real issue here, which is that the settlement discussions are irrelevant. The notion that the Drivers, as a result of alleged and unproven demands, somehow chose not to be part of the Settlement presupposes that the Appellees had the right to exclude the Drivers from participating. As creditors of Jevic's estate, the Drivers did not need to do anything to "participate" in the Settlement other than prove up their claims and stand in line. No other creditors were required to "negotiate" to participate in the Settlement. This is a red herring.

## II. THE BANKRUPTCY COURT ERRED IN APPROVING THE TERMINATION OF THE CHAPTER 11 CASE IN AN EARMARKED SETTLEMENT AND STRUCTURED DISMISSAL EXPRESSLY DEROGATING THE RULE THAT CASES END ONLY IN EITHER A PLAN, CONVERSION TO CHAPTER 7, OR PLAIN DISMISSAL

***Standard of Review: error in formulating or applying a legal precept; plenary review.***

The Settlement embodies what is colloquially known as a "structured dismissal." It provides that following the filing a certification, the bankruptcy cases be dismissed under 11 U.S.C. §§ 105 and 1112(b), with a proviso that all orders entered by the court beforehand remain in full force and effect, notwithstanding 11 U.S.C. § 349. The Sun Settlement Proceeds would then be distributed among the Selected Creditors post-dismissal, with no provision for oversight by the Court. JA-396. There is no statutory authority for structured dismissals. The Bankruptcy Court admitted as much. JA-31. The District Court did not even address the issue.

Congress established three avenues for exit from a chapter 11 case: plan confirmation, conversion, or dismissal. Appellees admit that Jevic cannot confirm a plan. JA 374-75 (Settlement Motion, 14-15). Conversion or dismissal are the only remaining options. Under section 1112(b)(1), once cause is established, the bankruptcy court "shall" convert the case to chapter 7 or dismiss it, whichever is in the best interests of creditors and the estate.

Section 1112(b) contains no option for dismissal "with strings attached." Congress articulated the statutory effect of dismissal in Section 349. On dismissal, unless the Court orders otherwise, estate property revests in the debtor. 11 U.S.C. § 349(b)(3). Congress intended the effect of dismissal to be "to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977). The Settlement would have effects not contemplated by Congress. Rather than having property vest with Jevic, the proceeds from Jevic's sole remaining asset (the LBO Action) would be distributed to the Selected Creditors.

Additionally, nothing in Section 349 provides for the distribution of estate funds after dismissal. Following a conversion to chapter 7, by contrast, estate assets would be turned over to the chapter 7 trustee, who would then liquidate and distribute them under the priority system established by Congress. 11 U.S.C. §§ 348, 746; Fed. R. Bankr. P. 1019(4). The Settlement upends congressional directives by distributing funds in a way that the Appellees chose rather than as Congress authorized.

Rather than adhering to one of the three congressionally authorized egresses from chapter 11, structured dismissals blaze a new path without statutory authority: a "cafeteria style" dismissal where the parties pick some parts of the chapter 11

plan process (*e.g.,* a liquidating trust), even though a chapter 11 plan cannot be confirmed; and then pick some parts of the chapter 7 process (*e.g.*, appointment of a trustee), even though the parties do not seek conversion. The structured dismissal adds features that are not provided in either chapter 7 or chapter 11, *e.g*., adjudication of creditor claims by someone other than the Court. This *a la carte* approach violates the comprehensive chapter 11 and chapter 7 constructs established by Congress, and would, if adopted, establish a troubling precedent whereby parties feel emboldened to choose favored portions of the Code to cobble together new kinds of bankruptcy relief never contemplated by Congress.

## III. THE DISTRICT COURT ERRED IN DISMISSING THIS APPEAL AS EQUITABLY MOOT

***Standard of Review: error in formulating or applying a legal precept; plenary review***

The District Court erred in dismissing the appeal as equitably moot. It applied this doctrine to the Settlement notwithstanding the fact that this Court has never invoked it absent a confirmed plan. The District Court also did not analyze the Settlement under the five-part test applicable in this Circuit, including an evaluation of the impact of the legal *rights* of *non-parties* to the Settlement. Compounding these errors, the District Court gave no consideration to any remedies other than dismissal. Finally, the District Court erred in accepting hearsay affidavits without conducting an evidentiary hearing or permitting

discovery.

### A. The *SemCrude* Test for Equitable Mootness in the Third Circuit

This Court recently revisited the doctrine of equitable mootness in *In re SemCrude, L.P.*, 728 F.3d 314 (3d Cir. 2013). *SemCrude* was an appeal of a plan confirmation order. Suppliers of crude oil sought recognition of their lien rights. The bankruptcy court approved procedures to address those rights. Several producers argued that their claims were entitled to be adjudicated in an adversary proceeding and objected to the procedures. A settlement was reached to pay $160 million to the producers. That settlement was incorporated into SemCrude's enormously complex plan. *Id*. at 319. This was a true reorganization because SemCrude emerged as an operating business.

The dissenting producers objected to confirmation of the plan and, following entry of the confirmation order, appealed to the District Court. They did not seek a stay pending appeal. Partly as a consequence, the plan of reorganization went into effect. *Id*. at 320. The District Court dismissed the appeal as equitably moot.

This Court reversed. The Court examined the origins of the doctrine of equitable mootness noting "[e]quitable mootness comes into play in bankruptcy (so far as we know, its only playground) after a plan of reorganization is approved." *SemCrude*, 728 F.3d at 317. It re-affirmed the Third Circuit's 8-6 *en banc* ruling (with then Judge Alito authoring the dissent) adopting the doctrine of equitable

mootness. *In re Continental Airlines,* 91 F.3d 553, 568 (3d Cir. 1996). The Court stressed that equitable mootness, as a judge-created doctrine, must be narrowly construed in light of the "'virtually unflagging obligation' of federal courts to exercise the jurisdiction conferred on them." *Id.* Moreover "before there is a basis to forgo jurisdiction, granting relief on appeal must be almost certain to produce a 'perverse' outcome—'chaos in the bankruptcy court' from a plan in tatters and/or significant 'injury to third parties.'" *SemCrude*, 728 F.3d at 320.

The Court also reaffirmed the test for equitable mootness:

> whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.

*Id.* at 320.

The Court noted that the five-factor test could be thought of as a two-step process:

> (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.

*Id.* at 321.

In the event that the plan has been substantially consummated, dismissal on equitable mootness is not automatic. The court must consider whether granting relief would necessarily undo the entire plan as opposed to modifying the plan in a manner that it does not fall apart. *Id.* at 321.[10] Citing to the dissent in *Continental*, this Court emphasized "[a]s then-Judge Alito explained, the feared consequences of a successful appeal are often more appropriately dealt with by fashioning limited relief at the remedial stage than by refusing to hear the merits of an appeal at its outset . . .. This is particularly true where, as here, the perceived harms are at best speculative." *Id.* at 324-25.

Applying these precepts to the facts then under consideration, the *SemCrude* Court rejected the suggestion that granting relief would harm third parties. While modifying the releases in the plan might give the lenders the right to terminate their exit facility, that did not lead to the conclusion that they would do so. *Id.* at 325. Finally, the Court held there the public policy in the finality of judgments was outweighed by the need for effective appellate oversight, particularly when "equitable mootness is used as a sword rather than a shield." *Id.* at 326.

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[10] The Court also placed the burden of proof on the party seeking dismissal. *Id.* at 321.

### B. Equitable Mootness Does Not Apply Where There is No Plan of Reorganization

The decisions of this Court are clear that equitable mootness applies only where there is a confirmed plan. *Continental*, 91 F.3d at 561 (appeal from confirmation held equitably moot); *In re Cont'l Airlines*, 203 F.3d 203, 210 (3d Cir. 2000) (rejecting application of equitable mootness to confirmation appeal); *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (releases could be stricken without unwinding confirmed plan); *Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180 (3d Cir. 2001) (appeal from confirmation order equitably moot); *In re SGPA, Inc.*, 34 F. App'x 49 (3d Cir. 2002) (same); *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 228 (3d Cir. 2003) (excision of indemnity provision in retention agreement would not undermine confirmed plan); *In re Zenith Electronics Corp.*, 329 F.3d 338, 346 (3d Cir. 2003) (possibility of disgorgement insufficient to dismiss appeal of confirmation); *In re Genesis Health Ventures, Inc.*, 204 F. App'x 144, 145 (3d Cir. 2006) (request to appoint equity committee to re-do confirmed plan held equitably moot); *In re SemCrude L.P.*, 456 F. App'x at 169 (3d Cir. 2012) (appeal of confirmation held equitably moot); *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 170 (3d Cir. 2012) (post-confirmation appeal of denial of $1.8 million administrative claim held not equitably moot). This Court has expressly raised doubts as to whether equitable mootness applies outside of the plan context: "[i]t is questionable whether the

equitable mootness doctrine has any application to an appeal in a Chapter 7 liquidation." *In re Anthanassious*, 418 F. App'x 91, 94 n.3 (3d Cir. 2011).

The judge-made doctrine of equitable mootness should not be extended to apply outside of confirmed plans. *SemCrude,* 728 F.3d at 317 noted that equitable mootness is a bankruptcy specific doctrine—just as plans of reorganization are also unique to bankruptcy. The approval of settlements is not unique to bankruptcy. The issues that arise in the plan context, particularly under a reorganization, are not implicated in a settlement. Unlike a reorganization, no jobs, no business, no investment, and no financing are at stake. There is no reason to extend the doctrine of equitable mootness to settlements in general just because a settlement happens to have arisen in a bankruptcy case.

The legal standard for equitable mootness doesn't even make sense if applied to settlements. *Continental* requires a determination of whether a "confirmed plan" has been "substantially consummated." "Confirmation" and "substantial consummation," however, are bankruptcy terms of art that don't apply to settlements.

Application of equitable mootness to settlements, such as the one at bar, that are really disguised plans is both ironic and especially troubling. Appellees gained the benefit of a doctrine that grew up in the plan context in order to evade appellate review even though no plan was confirmed. What cannot be gainsaid is that the

Settlement, while embodying crucial aspects of a plan, does not implicate the concerns underpinning equitable mootness. There are no jobs at stake; no business; no investors; no exit financing; no substantial reliance by any third party; no complex transactions. Finally, as noted above, there is no authority for earmarked settlements or structured dismissals. The use of equitable mootness to protect these kinds of transactions will protect transactions from appellate oversight that never should exist in the first place.

### C. Even If Equitable Mootness Could Apply to Settlements, The Court Did Not Apply the SemCrude Standard Correctly

#### 1. The District Court Misapprehended and Incorrectly Applied the Legal Standard for Equitable Mootness

This Court in *SemCrude* reaffirmed the long-standing five-part test for equitable mootness contained in *Continental*. While the Court said that the *Continental* test could be thought of analytically as a two-part test, it did not abrogate the five-part test in *Continental*, 91 F.3d 553. The District Court ignored the five-part test.

The first prong of the test asks whether a confirmed plan has been substantially consummated. As noted above, the District Court did not address how this standard is supposed to be applied to settlements.

The second prong asks whether a stay pending appeal was obtained. It is not disputed that no stay was obtained.

The third prong of *Continental* is whether the appeal would affect the rights of parties not before the Court. The District Court did not address that issue. Instead, the District Court held that the Settlement, if unwound, would harm "the parties to the settlement." JA-20. The test is whether reversal would prejudice the rights of third parties who have justifiably relied on plan confirmation, not whether it would prejudice the parties to the settlement. *SemCrude*, 728 F.3d at 321. The only third parties who could even arguably be affected by the Settlement are beneficiaries of the Settlement Trust. Other than a few tax claimants, these parties received a 3.9% dividend on their claims well after four years into the bankruptcy case. JA-212.[11] There is not one iota of evidence in the record that these creditors detrimentally relied on receipt of a nominal distribution—and it would beg credulity to argue otherwise. Even as to tax authorities who received 100% payment, the sums involved were less than $286,000. JA-195. Again, there is no evidence that the tax authorities detrimentally relied on their receipt of relatively modest amounts of money. In any event, the District Court did not make any finding as to prejudice to third parties.

Moreover, absent is a showing of how the *rights* of third parties would be prejudiced. As argued at length above, the Selected Creditors, who do not hold priority claims, were improperly paid before the Drivers, who do. The Selected

[11] Total general unsecured claims are $21,296,252. JA-169. The total amount distributed to general unsecured creditors was $834,175. JA-171.

Creditors received a windfall at the expense of the Drivers. If the Settlement Proceeds had been distributed according to the priorities in the Code, none of the Selected Creditors would have received anything. Their *rights* would not be prejudiced if they were required to disgorge ill-gotten gains. To the contrary, they would properly return those gains to the Jevic estate where they belong.

Finally, the District Court did not address the public interest. The public interest in the finality of judgments is not the only interest to be considered. Also important is the public interest in having effective review of bankruptcy courts, especially where issues of great public importance are implicated. *United Artists Theatre Co.*, 315 F.3d at 228 ("[A]llowing a challenge on public policy grounds to an indemnity provision is itself sound public policy."). That is particularly true in a case like this where a group of laid-off truck drivers are attempting to fight against two multi-billion dollar financial institutions. It is also particularly true where the issues are of central importance to the integrity of the bankruptcy process.

#### 2. **The District Court Failed To Consider Alternate Remedies**

*SemCrude* instructs that even where a plan has been consummated, the district court should, where feasible, exercise its equitable authority to craft an appropriate remedy rather than dismissing the appeal. *SemCrude,* 728 F.3d at 324-25. This Court recently re-affirmed that directive in *In re SCH Corp., 2014 WL*

*2724606, *3* (3d Cir. Apr. 8, 2014), questioning "whether the District Court considered the full range of relief that the [appellants] sought and the specific effect that relief would have on third parties." The Drivers suggested a number of alternative remedies below. The District Court did not consider any remedies.

**a. Voiding the Releases in Favor of Sun and CIT**

The simplest remedy would be to void the releases granted by Jevic in favor of Sun and CIT. This Court has authorized the excision of releases from confirmed plans to avoid dismissal on equitable mootness. *E.g., In re PWS Holding Corp.*, 228 F.3d at 236 (releases could be stricken without unwinding confirmed plan).

If the releases were excised, no third party would be harmed. Sun and CIT might protest that it would be inequitable to deprive them of the release that they bargained for. Three things undermine that argument. First, according to the Bankruptcy Court's own findings, a chapter 7 trustee would have no financial ability to recover anything from Sun or CIT in the LBO Action. JA-32. The chance of any recovery was held to be nearly nonexistent, particularly as any counsel who agreed to accept the LBO Action on a contingency fee "would have to have his head examined." *Id*. at 14.[12] Hence, any alleged harm to CIT and Sun is extremely speculative.

[12] While not essential to their substantive arguments on appeal, the Drivers have challenged these findings. Appellees can't have it both ways—if these factual findings of the Bankruptcy Court are respected then they must be for all purposes.

Second, Sun and CIT engineered a settlement under which they do not pay a penny to Jevic, the party giving them the release. Sun and CIT will not have paid for nothing, however, as they will receive what they paid for—peace with the Committee. The fact that they chose to structure a settlement to assure that the releasing party got nothing should not be used against the Drivers, the very parties who were prejudiced by that choice.

Third, any prejudice to Sun and CIT is of their own making. They disbursed the Settlement Funds, waiving the condition of a final order, for no conceivable reason other than to engineer equitable mootness. Sun and CIT never denied that was their motivation. In waiving the requirement of a final order, they assumed the risk that the Settlement might be undone.

#### b. Reforming the Settlement Such that the Proceeds Be Re-Distributed in Accordance with the Bankruptcy Code

A second possibility would be to equitably reform the Settlement such that the proceeds be re-distributed in accordance with the Code. The Court could leave much of the Settlement intact but require creditors who received payment beyond what they were entitled to under the Code (*i.e.,* creditors with a lower priority than Appellants) to disgorge the funds and have those funds paid, instead, to the Drivers who are in fact entitled to the funds. (Alternatively, the Court could give Sun and CIT the right to pursue such disgorgement as their waiver of the condition of a

final order created the problem). As noted above, requiring beneficiaries of the Settlement, who were entitled to receive nothing under the Code, to disgorge some or all of it would be not be inequitable. *In re Zenith Elecs. Corp.,* 329 F.3d at 343-44.

#### c. Reversing of the Bankruptcy Court's Holding That the Committee Did not Breach its Fiduciary Duty

There is another more modest option that incontrovertibly would not upset the Settlement. If this Court concludes another remedy would be inequitable, it could overturn the Bankruptcy Court's ruling that the Committee (and, implicitly, the Committee's members, Jevic and their respective agents) did not breach its fiduciary duty in negotiating the Settlement.

The Bankruptcy Court held that the Committee had not breached its fiduciary duty. JA 33-34. As things stand, the Drivers or a chapter 7 trustee almost certainly cannot commence an action for breach of fiduciary duty because they would precluded by the *collateral estoppel* effect of the Bankruptcy Court's ruling. Importantly, if this Court were to overturn the Lower Courts on the fiduciary duty issue, that would not unscramble or even alter the Settlement. There is nothing in the Settlement or the associated releases that immunizes anyone from a claim for breach of fiduciary duty. Had the Drivers and the US Trustee never objected to the Settlement, the fiduciary duty issue would never have arisen.

### D. The District Court Improperly Relied on Hearsay Affidavits in Dismissing the Appeal as Equitably Moot

Appellants recognize that the District Court's decision to dismiss an appeal as equitably moot, subject to its proper application of the law, is generally entrusted to the district court's discretion. *SemCrude,* 728 F.3d at 320. However, where, as here, the District Court relied solely on hearsay affidavits without affording the Drivers the opportunity to take discovery or participate in an evidentiary hearing, the District Court commits legal error.

Appellees attached to their Motion to Dismiss hearsay affidavits. JA 138-141; 170-73. In their response, the Drivers noted that an evidentiary hearing should be held and that they should be afforded an opportunity to take discovery. JA-300 n.3. The District Court did not address those concerns and simply granted the motion.

This was not a mere technical oversight. Among other things, the District Court took hearsay affidavits to support the basic contention that all of the settlement funds had been disbursed. Moreover, no opportunity was afforded the Drivers to investigate the reasons for Sun's and CIT's waiver of the condition of a final order.

## CONCLUSION

The District Court's January 24, 2014 Orders dismissing the appeal and affirming the November 28, 2012 Bankruptcy Court Order should be reversed in their entirety. This matter should be remanded to the Bankruptcy Court, which would be required to reopen the cases, to implement this Court's decision, with specific instruction to convert these cases to chapter 7 in light of Appellees' concession that no chapter 11 plan is possible.

DATED: July 8, 2014

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) and L.A.R. 112.9(b). This brief contains 13,637 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

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## CERTIFICATION OF BAR MEMBERSHIP

I certify, pursuant to L.A.R. 46.1(e) that all of the attorneys whose names appear on this brief are members of the bar of this Court.

/s/ Christopher D. Loizides

## CERTIFICATION OF IDENTICAL COMPLIANCE TO BRIEFS

I hereby certify that the text of the PDF filed and hard copies of this brief are identical.

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/s/ Christopher D. Loizides

**Appeal No. 14-1465**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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In re: JEVIC HOLDING CORP., *et al.*, Debtors

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*

v.

CIT GROUP/BUSINESS CREDIT, INC., in its capacity as Agent; SUN CAPITAL PARTNERS, INC.; SUN CAPITAL PARTNERS IV, LP; SUN CAPITAL PARTNERS MANAGEMENT IV, LLC.

CASIMIR CZYZEWSKI; MELVIN L. MYERS; JEFFREY OEHLERS; ARTHUR E. PERIGARD; and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, CIV. ACTION NOS. 13-104 and 13-105 (SLR)

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**JOINT APPENDIX**
**VOLUME I of III**
**(JA-1 through JA-51)**

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# TABLE OF CONTENTS

## JOINT APPENDIX - VOLUME I


| JA # | D.I. | Date | Description |
|---|---|---|---|
| 1-4 | 24[1] | 2/21/2014 | WARN Claimants' Notice of Appeal to the U.S. Court of Appeals for the Third Circuit |
| 5-8 | 1539 (Bankr. Case No. 08-11006) | 12/18/2012 | WARN Claimants' Notice of Appeal to the U.S. District Court, District of Delaware |
| 9-12 | 79 (Bankr. Adv. Proc. No. 08-51903) | 12/18/2012 | WARN Claimants' Notice of Appeal to the U.S. District Court, District of Delaware |
| 13-21 | 22 | 01/24/2014 | District Court Memorandum Opinion Dismissing Appeal/Affirming Bankruptcy Court Order dated 11/28/2012 |
| 22 | 23 | 01/24/2014 | District Court Order Dismissing Appeal/Affirming Bankruptcy Court Order dated 11/28/2012 |
| [Tr. pp. 1-20] 23-44 | 1519 (Bankr. Case No. 08-11006) | 12/04/2012 | Transcript regarding Bankruptcy Court Hearing Held 11/28/12 re: ruling on motion to approve settlement. |
| 45-51 | 1520 (Bankr. Case No. 08-11006) | 12/04/12 | Bankruptcy Court Order Granting Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief |


[1] Unless otherwise indicated, all docket index references in Volume I of the Joint Appendix are to the District Court, Case No. 13-104 (SLR).

## JOINT APPENDIX - VOLUME II

*Docket Entries from District Court Case No. 13-104 (SLR)*

| JA # | D.I. | Date | Description |
|---|---|---|---|
| 52-65 | 2 | 01/17/2013 | Appellants' Statement of Issues and Designation of Items of Record on Appeal |
| 66-73 | 3 | 01/17/2013 | Joint Counter-Designation of Items to Be Included in the Record on Appeal by the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors |
| 74-112 | 9 | 03/08/2013 | Excerpts from Appellants' Opening Brief (Statement of Issues and Argument sections) |
| 113-173 | 15 | 11/21/2013 | Appellees' Joint Brief in Support of Motion to Dismiss Appeal of Settlement Order as Equitably Moot (including exhibits) |
| 174-294 | 16 | 11/21/2013 | Appendix A to Appellees' Joint Brief in Support of Motion to Dismiss Appeal of Settlement Order as Equitably Moot |
| 295-318 | 19 | 12/12/2013 | Appellants' Memorandum of Law in Opposition to Appellees' Joint Motion to Dismiss Appeal of Settlement Order as Equitably Moot |

*Bankruptcy Case No. 08-11006 (BLS) Docket Entries*

| JA # | D.I. | Date | Description |
|---|---|---|---|
| 319-360 | 118 | 06/20/2008 | Final Order (I) Authorizing Debtors-In-Possession to Obtain Senior Debtor-In-Possession Financing; (II) Granting Liens, Security Interests and Superpriority Status; (III) Authorizing Use of Cash Collateral; and (IV) Affording Adequate Protection to Prepetition Lenders |
| 361-513 | 1346 | 06/27/2012 | Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of |

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| | | | Settlement; and (III) Granting Related Relief |
| 514-518 | 1353 | 06/28/2012 | Exhibit(s) E relating to Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief |
| 519-552 | 1389 | 07/25/2012 | U.S. Trustee's Objection to Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief |
| 553-584 | 1396 | 07/25/2012 | WARN Claimants' Memorandum of Law in Opposition to the Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief |
| 585-598 | 1460 | 10/09/2012 | Debtor-In-Possession Monthly Operating Report for Filing Period August 1, 2012 - August 31, 2012 |
| 599-615 | 1465 | 10/23/2012 | Supplement to the Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and |

| | | | |
|---|---|---|---|
| | | | (III) Granting Related Relief |
| 616-623 | 1479 | 11/07/2012 | WARN Claimants' Objection In Opposition to the Supplement to (1) Joint Motion of Debtors, CIT, Sun Capital, and Official Committee of Unsecured Creditors for Entry of Order (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief; and (2) Debtors' Motion for Entry of Order (A) Authorizing Extension of Use of Cash Collateral, and (B) Granting Adequate Protection |
| 624-649 | 1482 | 11/09/2012 | Reply of Debtors to Objections to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting related Relief |
| 650-653 | 1483 | 11/09/2012 | Joint Response of the CIT Group/Business Credit, Inc., as Agent, and Sun Capital to Objections to, and Statement in Support of, the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors Cases Upon Implementation of Settlement; and (III) Granting Related Relief |
| 654-678 | 1484 | 11/09/2012 | Response of the Official Committee of Unsecured Creditors to the Objections to Motion for Approval of Settlement Agreement and Dismissal of the Debtors' Chapter 11 Cases |
| 679-681 | 1506 | 11/19/2012 | WARN Claimants' Letter to Court to clarify position re In re Digital Domain Media. |
| 682-708 | 1545 | 01/02/2013 | WARN Claimants' Motion for Stay Pending Appeal |

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|---|---|---|---|
| 709-729 | 1552 | 01/10/2013 | Joint Objection of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors to WARN Plaintiffs' Motion for Stay Pending Appeal |
| 730-731 | 1567 | 01/23/2013 | Order Denying Motion of Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, for a Stay Pending Appeal |

## JOINT APPENDIX - VOLUME III

*CIT Adversary Proceeding Docket Entries* (Adv. Proc. No. 08-51903 (BLS))

| JA # | Adv. D.I. | Date | Description |
|---|---|---|---|
| 732-761 | 40 | 09/15/2011 | Opinion Regarding Motion to Dismiss filed by CIT Group/Business Credit, Inc. |
| 762-763 | 41 | 09/15/2011 | Order Relating to Opinion Regarding Motion to Dismiss filed by CIT Group/Business Credit, Inc. |
| 764-856 | 43 | 10/07/2011 | Second Amended Complaint and Objection to Claims |
| 857-972 | 44 | 11/04/2011 | Answer to Second Amended Complaint filed by Sun Capital Partners IV, LP, Sun Capital Partners Management IV, LLC, and Sun Capital Partners, Inc. |
| 973-1080 | 45 | 11/04/2011 | Answer to Second Amended Complaint, Counterclaim by The CIT Group/Business Credit, Inc. against the Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.* |
| 1081-1086 | 47 | 11/23/2011 | Answer to Complaint with Counterclaim filed by the Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.* |

*WARN Adversary Docket Entries* (Adv. Proc. No. 08-50662 (BLS))

| JA # | Adv. D.I. | Date | Description |
|---|---|---|---|
| 1087-1099 | 3 | 05/23/2008 | Amended Class Action Adversary Complaint |
| 1100-1113 | 9 | 07/02/2008 | Answer to Amended Complaint and Affirmative Defenses of Jevic Holding Corp. and Jevic Transportation, Inc. |
| 1114-1136 | 10 | 07/07/2008 | Answer to Amended Complaint and Affirmative Defenses of Sun Capital Partners, Inc. |
| 1137-1138 | 28 | 12/10/2008 | Order Granting Class Certification |

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|---|---|---|---|
| 1139-1158 | 240 | 05/10/2013 | Opinion Regarding Cross-Motions for Summary Judgment on Claims Arising Under the WARN Act |
| 1159-1176 | 241 | 05/10/2013 | Opinion Regarding Motion for Summary Judgment on Claims Arising Under the WARN Act |
| 1177-1178 | 242 | 05/10/2013 | Order that Class Plaintiffs' Motions for Summary Judgment is Granted in Part and Denied in Part |
| 1179-1180 | 243 | 05/10/2013 | Order Relating to Opinion Regarding Cross-Motions for Summary Judgment on Claims Arising Under the WARN Act |

*Exhibits Introduced at Trial (Not Otherwise Included Above)*

| JA # | Exhibit # | Date | Description |
|---|---|---|---|
| 1181-1198 | WARN 1 | 06/22/2012 | Settlement Agreement and Release (executed version) |
| 1199-1203 | US Trustee 1 | 11/30/2009 | Proof of Claim of Melvin L. Myers |
| 1204-1206 | US Trustee 2 | 11/28/2009 | Proof of Claim of Jeffrey L. Oehlers |

*Transcripts of Court Proceedings*

| JA # | D.I. | Date | Description |
|---|---|---|---|
| [Tr. pp. 1-172] 1207-1380 | 1514 (Adv. No. 08-50913, D.I. 75) | 11/27/2012 | Transcript regarding Hearing Held 11/13/2012 re: 9019 Motion/Motion to Dismiss. |
| [Tr. pp. 1-143] 1381-1525 | 1555 (Adv. No. 08-50662, D.I. 236) | 01/16/2013 | Transcript regarding Hearing Held 1/11/2013 re: Oral Argument on Summary Judgment Motions |
| [Tr. pp. 1-34] 1526-1561 | 1599 | 02/28/2013 | Transcript regarding Hearing Held 1/18/2013 re: Motion to Stay Pending Appeal |

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

| | |
|---|---|
| In re: | CHAPTER 11 |
| JEVIC HOLDING CORP., *et al.*, Debtors. | Bankr. No. 08-11006 (BLS) (Jointly Administered) |
| | BAP Appeal Nos. 12-68 and 12-69 |
| Casimir Czyzewski, *et al.*, Appellants, v. Jevic Holding Corp., *et al.*, Appellees. | Civil Action Nos. 13-104 SLR and 13-105 SLR (Consolidated) |

**NOTICE OF APPEAL
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, the appellants herein, appeal to the United States Court of Appeals for the Third Circuit from the final memorandum and order of the United States District Court for the District of Delaware dismissing their appeal and affirming the Bankruptcy Court, entered in this case on January 24, 2014 (D.I. 22 and 23).

The parties to the Order appealed from and the names and addresses of their respective counsel are as follows:

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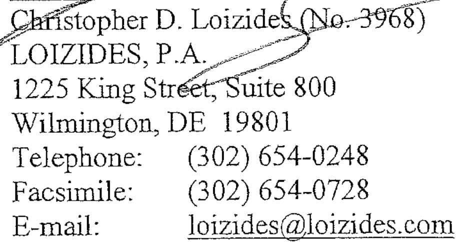
DATED: February 21, 2014



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*Counsel for Appellants*

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

| | | |
|---|---|---|
| In re:<br><br>JEVIC HOLDING CORP., *et al.*,<br><br>Debtors. | ) | CHAPTER 11<br><br>Case No. 08-11006 (BLS)<br>(Jointly Administered)<br><br>**Re: Docket No. 1520** |
| OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the bankruptcy Estates of JEVIC HOLDING CORP., *et al.*,<br><br>Plaintiff,<br><br>v.<br><br>THE CIT GROUP/BUSINESS CREDIT, INC., In its capacity as Agent, and SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, and SUN CAPITAL PARTNERS, INC.,<br><br>Defendants. | ) | Adv. Proc. No. 08-51903 (BLS)<br><br>**Re: Adversary Docket No. 78** |

**NOTICE OF APPEAL**

Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated ("Appellants") hereby appeal under 28 U.S.C. § 158(a) from the Order Granting Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105, 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief, entered at Docket Index 1520 in the above-captioned bankruptcy cases and Adversary Docket Index 78 in the above-captioned adversary proceeding.

The names of all parties to the order appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

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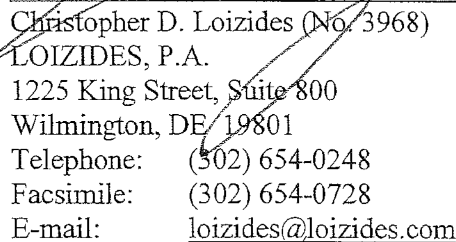
DATED: December 18, 2012



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

| | | |
|---|---|---|
| In re: | ) | CHAPTER 11 |
| JEVIC HOLDING CORP., *et al.*, | ) | Case No. 08-11006 (BLS) (Jointly Administered) |
| Debtors. | ) | **Re: Docket No. 1520** |
| OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the bankruptcy Estates of JEVIC HOLDING CORP., *et al.*, | ) | |
| Plaintiff, | ) | Adv. Proc. No. 08-51903 (BLS) |
| v. | ) | |
| THE CIT GROUP/BUSINESS CREDIT, INC., In its capacity as Agent, and SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, and SUN CAPITAL PARTNERS, INC., | ) | **Re: Adversary Docket No. 78** |
| Defendants. | ) | |

## NOTICE OF APPEAL

Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated ("Appellants") hereby appeal under 28 U.S.C. § 158(a) from the Order Granting Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105, 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief, entered at Docket Index 1520 in the above-captioned bankruptcy cases and Adversary Docket Index 78 in the above-captioned adversary proceeding.

The names of all parties to the order appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Notice of Appeal (FINAL).DOCX

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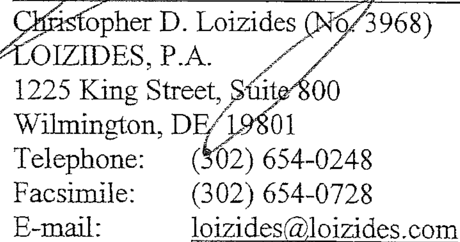
DATED: December 18, 2012



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*Counsel for Appellants*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | ) | |
| | ) | Chapter 11 |
| JEVIC HOLDING CORP., et al., | ) | Bank. No. 08-11006 (BLS) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |
| CASIMIR CZYZEWSKI, et al., | ) | |
| | ) | |
| Appellants, | ) | Civ. Nos. 13-104-SLR and |
| | ) | 13-105-SLR (consolidated) |
| v. | ) | |
| | ) | |
| JEVIC HOLDING CORP., et al., | ) | |
| | ) | |
| Appellees. | ) | |

**MEMORANDUM**

At Wilmington this 24th day of January, 2014 having reviewed the appeal taken by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, ("appellants"), and the papers submitted in connection therewith; the court issues its decision based on the following analysis:

1. **Background.**[1] Jevic Holding Corp., Jevic Transportation, Inc. and Creek Road Properties, LLC's (collectively, "debtors") are a trucking company. In June 2006,

[1]The factual background is largely undisputed and is taken from the United States Bankruptcy Court for the District of Delaware's ("bankruptcy court") oral order dated November 28, 2012 and supplemented by the parties' briefing.

Sun Capital Partners IV, LP, Sun Partners Management IV, LLC and Sun Capital Partners, Inc. (collectively, "Sun") bought debtors, and subsequently refinanced the acquisition through a $101 million loan from The CIT Group/Business Credit, Inc. ("CIT"), as agent for the lenders (the "Lender Group"). (D.I. 19 at 3-4)

2. On May 20, 2008 ("the petition date"),[2] debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United Stated Code (the "Bankruptcy Code") in the bankruptcy court. On June 4, 2008, the United States Trustee appointed the Official Committee of Unsecured Creditors of Jevic Holding Corp. et al. ("the committee") (collectively with debtors, Sun, and CIT, "appellees"). Shortly prior to the petition date, the debtors wound-down their business, ceasing substantially all of their operations and terminating approximately 90% of their employees. After the petition date, all of the debtors' tangible assets were liquidated and the proceeds used to partially repay the outstanding obligations owed to CIT.

3. On May 21, 2008, appellants,[3] who are truck drivers[4] whose employment was terminated by debtors, filed a complaint asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et. seq., and the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, PL. 2007, c.212, C.34:21-2.[5] (D.I. 19

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[2]As of the petition date, the debtors' primary secured creditors were Sun and CIT, with an aggregate of approximately $53 million on a first priority senior secured basis. (08-11006-BLS, D.I. 1519 at 5:1-4)

[3]Referred to by the bankruptcy court as "the Warren [sic] plaintiffs."

[4]About 1,200 truck drivers who claim over $20 million and are debtors' largest group of unsecured creditors. (D.I. 19 at 1)

[5]Appellants allege that these claims are priority claims under 11 U.S.C. §§ 507(a)(4) and (a)(5); as such, they allege they should be paid in full before any funds may be paid to general or lower priority creditors. (D.I. 19 at 4)

at 4)

4. Appellees reached a settlement agreement ("settlement"), dated June 22, 2012, which resolved all claims among the debtors and their estates, the committee, CIT, the Lender Group and Sun. Appellants minimally participated in the settlement negotiations, but did not agree to the settlement. (08-11006-BLS, D.I. 1519 at 11; D.I. 1514 at 31:13-21, 68:11-22) The settlement "provided for (a) the exchange of releases, (b) the payment of $2 million by CIT to the [d]ebtors, to be used to satisfy unpaid chapter 11 administrative claims, (c) the dismissal with prejudice of the Adversary Proceeding,[6] (d) the assignment by Sun of its lien on the estates' remaining assets to the Jevic Holding Corp. Liquidating Trust (the "[c]reditors['] [t]rust") for the benefit of the [d]ebtors' unsecured creditors and certain priority tax claimants, (e) the reconciliation of administrative and unsecured claims, and (f) the dismissal of the chapter 11 cases." (D.I. 15 at 5; ex. A at ¶ 3)

5. Appellants objected to the agreement on various grounds.[7] After briefing and an evidentiary hearing, the bankruptcy court concluded that the possibility of recovery for appellants was remote at best, as there were "several independent hurdles that the [c]ommittee would have to clear before it would actually see a material recovery out of the litigation," which would take years (08-11006-BLS, D.I. 1519 at 13:7-9) Further, the debtors possessed no funds that were not subject to the liens of CIT and Sun, to continue with litigation. The bankruptcy court entered the settlement on December 4,

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[6]A proceeding brought by the committee against CIT and Sun, respectively the debtors' senior and junior secured lenders.

[7]The United States Trustee also objected.

2012. (08-11006-BLS, D.I. 1520)

6. On January 2, 2013, appellants filed a motion to stay with the bankruptcy court. (08-11006-BLS, D.I. 1545) After briefing and argument, the bankruptcy court denied the stay on January 18, 2013 but, as a courtesy to the district court, instructed the debtors to refrain from consummating the settlement for ten to fifteen days to give appellants an opportunity to challenge the ruling. (D.I. 16, ex. 6 at 29-30; 08-11006-BLS, D.I. 1567) Appellants did not challenge the denial and have not further sought a stay.

7. At a hearing on February 20, 2013, appellants sought clarification regarding whether the appellees could move forward with implementing the settlement. The bankruptcy court confirmed the lack of a stay. The committee advised that appellees were "actively considering closing. So if [appellants] want to stay . . . they should file a motion promptly." Although appellants indicated that they would be seeking a stay (D.I. 16, ex. 3 at 12-14), no such motion was filed in this court.

8. The appellees instigated a series of transactions to implement the settlement, beginning on August 28, 2013. All funds were distributed under the settlement, with the creditors' trust distributing 1,039 final disbursement checks to holders of allowed general unsecured claims and 29 final disbursement checks to holders of allowed unsecured priority tax claims.[8] (D.I. 15 at 9) The bankruptcy court dismissed the debtors' chapter 11 cases on October 11, 2013.

9. **Standard of Review.** This court has jurisdiction to hear an appeal from the

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[8]Of these, 39 checks were returned and "$90,422.58 in checks have not been negotiated by the payees . . . ." (D.I. 16 at 9)

bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101–02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. *In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002).

10. **Analysis.** Appellants largely do not contest the bankruptcy court's factual findings. Instead, appellants fault the bankruptcy court's approval of the settlement on various legal grounds. Contrary to appellants' contentions, the bankruptcy court properly evaluated the proposed settlement, considering the *Martin* test's four criteria[9] and determining that the settlement was "fair and equitable." *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Protective Comm. for Indep. Stockholders of*

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[9]"(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."

*TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). More specifically, the bankruptcy court considered appellants' primary objections to the settlement - that the proceeds did not flow to their claims and that the committee breached its fiduciary duty - in making its determination. (D.I. 1519 at 9:4-10); *see In re Nutraquest, Inc.*, 434 F.3d 639, 644-45 (3d Cir. 2006) (finding that "many cases have applied the *Drexel- TMT Trailer-Martin* factors to settlements involving claims against debtors" and the court should "carefully examine" the settlement and determine if it was fair to "the parties who did not settle") (citations omitted). As discussed below, these objections did not necessitate rejecting the settlement.

11. As to the pending WARN litigation, the bankruptcy court found that the litigation was in the early stages, would be lengthy and expensive, was not "a slam dunk," and the estate was without funds to support any litigation. (D.I. 1519 at 12-14) As to the "paramount interest of creditors" factor, the settlement involves "a substantial distribution to unsecured and certain administrative creditors." (D.I. 1519 at 14:4-17) Further, appellants' claim against the estate is "effectively worthless given that the estate lacks available unencumbered funds to satisfy it if it were allowed." (*Id.*)

12. As to the whether the settlement is "fair and equitable," the bankruptcy court found that all of the major economic stakeholders were involved in the negotiations (including appellants),[10] the committee lacked the resources to continue any litigation,

[10]The appellants initially participated in the negotiations, but chose not to settle as they wished to continue their pending litigation against debtors and Sun. (D.I. 1519 at 11-12) Appellants argue that the bankruptcy court erred in concluding that they "opted out" of the settlement, however, considering appellants were included in the negotiations, the court does not find this factual conclusion clearly erroneous.

and the settlement offered "the prospect of a meaningful distribution to unsecured creditors, and to some but admittedly not all administrative priority creditors." (D.I. 1519 at 9-10)

13. Appellants contend that the committee breached its fiduciary duty when it agreed to the settlement structure. The court concludes otherwise. The committee fulfilled its charge to investigate and prosecute potential causes of action. (D.I. 1519 at 11:16-25) The committee fully participated in the negotiations and then sought approval of the settlement with the support of the debtor. (*Id.*) The court finds that the settlement was in the best interest of the estate and of resolving the pending Chapter 11 cases.

14. As discussed by the bankruptcy court, the settlement does not follow the absolute priority rule. However, this is not a bar to the approval of the settlement as it is not a reorganization plan.[11] *Cf. In re Armstrong World Indus., Inc.*, 432 F.3d 507, 509 (3d Cir. 2005) (affirming the district court's denial of confirmation of a reorganization plan which violated the absolute priority rule). In *Armstrong*, the Third Circuit distinguished a line of cases approving settlement agreements allowing "creditors . . . to distribute their proceeds from the bankruptcy estate to other claimants without offending section 1129(b)." *Id.* at 514 (discussing *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993); *In re Mcorp Fin., Inc.*, 160 B.R. 941 (S.D. Tex. 1993), and *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001)); *see also In re World Health Alts.,*

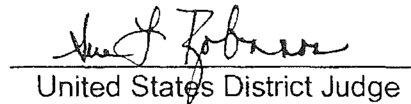
[11]The bankruptcy court found that there was no prospect of a confirmable plan. (D.I. 1519 at 8:6-8) This court has no reason to question this conclusion on the record at bar, nor have the appellants presented any evidence to the contrary.

*Inc.*, 344 B.R. 291, 297-98 (Bankr. D. Del. 2006); *In re Kainos Partners Holding Company, LLC*, 2012 WL 6028927 at *12 (D. Del. Nov. 30, 2012) (finding that the settlement did "not violate the Bankruptcy Code's statutory priority scheme but, instead, satisfie[d] the criteria for approval under Bankruptcy Rule 9019 and the standards set forth under *In re Martin*). In the case at bar, "the funds are indisputably the collateral of the secured creditors, [and] admittedly subject to litigat[ion] challenge." Therefore, the court concludes that the bankruptcy court did not err in confirming the settlement and dismissing the Chapter 11 cases. (D.I. 1519 at 10-11)

15. Alternatively, appellees have moved to dismiss this appeal as equitably moot. (D.I. 14) In determining whether the doctrine applies, courts should consider the following "two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Semcrude, L.P., et al.*, 728 F.3d 314, 321 (3d Cir. Aug. 27, 2013).

16. The court finds that the settlement has been substantially consummated as all the funds have been distributed. Should the court grant the appeal, the settlement will be irreversibly "scrambled," as it did not provide for funds for appellants' speculative recovery and appellants chose not to substantively participate in the negotiation and subsequent settlement. The parties to the settlement reached their negotiated resolution following years of litigation and will be harmed if the settlement is now unwound. The court concludes that the appeal is equitably moot in view of the settlement.

17. For the reasons discussed above, the court dismisses the appeal and affirms the order of the bankruptcy court. An order shall issue.



United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

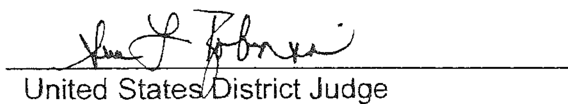
| | | |
|---|---|---|
| In re: | ) | |
| | ) | Chapter 11 |
| JEVIC HOLDING CORP., et al., | ) | Bank. No. 08-11006 (BLS) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |

| | | |
|---|---|---|
| CASIMIR CZYZEWSKI, et al., | ) | |
| | ) | |
| Appellants, | ) | Civ. Nos. 13-104-SLR and |
| | ) | 13-105-SLR (consolidated) |
| v. | ) | |
| | ) | |
| JEVIC HOLDING CORP., et al., | ) | |
| | ) | |
| Appellees. | ) | |

**ORDER**

At Wilmington this 24th day of January, 2014, consistent with the memorandum issued this same date;

IT IS ORDERED that the appeal is dismissed and the order of the bankruptcy court dated November 28, 2012 is affirmed.



United States District Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | ) | Case No. 08-11006 (BLS) |
| | ) | Chapter 11 |
| JEVIC HOLDING CORP. | ) | |
| *et al.* | ) | Courtroom No. 1 |
| Debtors. | ) | 824 Market Street |
| | ) | Wilmington, Delaware 19801 |
| | ) | |
| | ) | |
| | ) | November 28, 2012 |
| | ) | 10:00 A.M. |

TRANSCRIPT OF HEARING
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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1
INDEX

2
Page

NOTICE OF AGENDA MATTERS:

3 For CIT Group, by Mr. Ackerly 15
For Casimir Czyzewski, by Mr. Raisner 15
4 For Sun Capital by, Mr. Gillespie 16
For Interested Party, by Mr. Feinstein 18

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1 THE COURT: Good morning, counsel, this is Judge
2 Shannon. I understand from the operator that all necessary
3 parties are on the call this morning.
4 This hearing is a follow up to an evidentiary hearing
5 that we had in this Court on the 13th of November. The matter
6 that is before the Court is the motion for approval of a
7 settlement between and among the Debtor, the Committee, Sun
8 Capital and CIT. Settlement motion is opposed by the U.S.
9 Trustee and certain claimants that I will refer to as the
10 Warren claimants. At the hearing Mr. Dooley [*phonetic*] and
11 Mr. Gavin [*phonetic*] testified in support of the settlement.
12 Each was subject to cross examination, and the Court heard
13 substantial argument from counsel.
14 I also would note, specifically, that I am giving my
15 ruling orally because of the party's desire for a prompt
16 ruling, and because there are other matters that have been
17 pressing on my docket that preclude me from writing a formal
18 opinion on this dispute. Nevertheless, for the reasons that
19 I will give you this morning I will grant the motion, and I
20 will overrule the objections.
21 I touched, very briefly, on the background. The
22 parties are certainly familiar with the history of this case.
23 Jevic was in the trucking business, and filed for bankruptcy
24 on May 20th, 2008. The Debtors shut down all of its
25 operations either right before or immediately after

1 commencing the bankruptcy. At the time of the filing the
2 Debtors' primary secured creditors were Sun Capital and CIT.
3 Now with an aggregate of, approximately, $53 million dollars
4 on a first priority senior secured basis. The lenders
5 provided the DIP financing facility which was approved by
6 final order of the Court. And among other provisions the
7 final DIP order had a roll up of prepetition debt into the
8 post petition facility, granted the lenders a Section 507(b)
9 super priority, and set a deadline within which challenges to
10 their liens and claims would have to be made.
11 Again, in 2008 the Committee was granted standing to
12 prosecute estate causes of actions against Sun Capital and
13 CIT. And the Committee's complaint that subsequently amended
14 this filing seeking among other things was filed, seeking
15 among other things to avoid the liens of CIT and Sun Capital
16 to disallow their claims and for damages.
17 That litigation has been actively defended by CIT and
18 Sun Capital. In the nearly four years since these cases were
19 commenced, since the Chapter 11 cases were commenced, the
20 record reflects that nearly all of the work to administer
21 these estates has been completed. The undisputed testimony
22 is that all necessary claim objections have been filed and
23 ruled upon, all assets of the Debtor have been sold or
24 otherwise disposed of, all routine preference and avoidance
25 actions have been commenced and settled or otherwise disposed

1 of, and all necessary filings such as schedules of assets and
2 liabilities, statements of financial affairs, and the monthly
3 operating reports have long since been filed or are current,
4 what does remain are several lawsuits.
5 First is the Committee's lawsuit against CIT and Sun
6 Capital, mentioned earlier. Also pending is litigation
7 commenced on behalf of certain former employees against the
8 Debtor, as well as against CIT and Sun Capital for damages
9 and claims arising under various Warren statutes, state and
10 federal.
11 The testimony adduced at last week's hearing reflects
12 that all of the major economic stakeholders in the case
13 including, the Committee, the Warren claimants, CIT and Sun
14 Capital came together at the Debtors' suggestion earlier this
15 year to attempt to negotiate a settlement of the litigation
16 commenced by the Committee.
17 As noted earlier that Committee lawsuit has been
18 pending for well over three years. After what the witnesses
19 testified to as extensive arms length negotiation, certain of
20 the parties reached a global resolution. And the general
21 terms of that settlement are identified in the motion, and
22 are as follows: the payment of $2 million dollars by CIT to
23 the Debtors to be used to satisfy unpaid Chapter 11 allowed
24 administrative claims, the dismissal with prejudice of the
25 Committee's adversary proceeding, the assignment by Sun of

1 its lien on the estate's remaining assets to a liquidating
2 trust for the exclusive benefit of general unsecured
3 creditors, the exchange of releases, the reconciliation of
4 administrative and general unsecured claims during a sixty
5 day period following the effective date of the settlement
6 agreement, and thereafter the dismissal of these Chapter 11
7 cases.

8 The record reflects that the terms of the settlement
9 were embodied in a motion, jointly, tendered by the Debtor,
10 the Committee, CIT and Sun Capital for approval under
11 Bankruptcy Rule 9019. Notice of that motion was provided to
12 all creditors in these cases. Numerous objections to the
13 settlement motion were filed, all but two of which were
14 resolved prior to the November 13, 2012 hearing. I will
15 address the substance to the remaining objections in a
16 moment, but I turn first to the motion and the standard for
17 approval of a settlement agreement under rule 9019.

18 That standard is well settled. The movants must
19 demonstrate that the proposed settlement represents the
20 exercise of the Debtors' reasonable business judgment in
21 light of one, that the probability of success in the
22 litigation; two, the complexity of the litigation and three,
23 the prospect of collection difficulties. The final and most
24 important consideration Court's have identified for
25 consideration under of settlements under Bankruptcy Rule 9019

1 is the paramount interest of creditors. Court's have stated
2 that the standard for approval of a settlement is not a heavy
3 burden on a movant, and that the movant need to, need only
4 demonstrate that the proposed settlement rises above the
5 lowest point on the range of reasonableness.
6 I consider the motion in light of the following
7 facts: this case has been pending for years, presently, with
8 no reasonable prospect of a confirmable plan. All material
9 tasks needed to administer the estates have already been
10 completed other than the litigations that I have mentioned.
11 The Debtor possesses no assets or funds that are not subject
12 to the liens of CIT and Sun Capital. The Debtor, therefore,
13 lacks the resources to creditably prosecute the Committee's
14 lawsuit, and the Committee lacks, therefore, the resources as
15 well.
16 And they lack the resources to, otherwise, wrap up
17 these bankruptcy proceedings. In the absence of a settlement
18 of the settlement that is before the Court it is a virtual
19 certainty that there will be no distribution to unsecured
20 creditors here, and a substantial shortfall for distributions
21 to administrative creditors.
22 The U.S. Trustee objects to the settlement mainly on
23 the ground that the Bankruptcy Code neither contemplates nor
24 permits the relief sought outside of a confirmed plan or a
25 Chapter 7 liquidation and distribution. Additionally, the

1 U.S. Trustee contends that the proposed distributions violate
2 the absolute priority rule, and the code statutory
3 distribution scheme.
4 The Warren claimant's primary objection is that the
5 proceeds of the settlement do not flow to their priority
6 claims, but instead go to junior creditors in derogation of
7 the codes priority structure. The Warren claimants and the
8 U.S. Trustee also contend that the Committee is breaching its
9 fiduciary duty in agreeing to a settlement that, effectively,
10 freezes out the Warren creditors.
11 The theory is that because the Committee has been
12 granted standing to prosecute claims on behalf of the estate
13 it stands as a fiduciary to the estate, generally, and not
14 just to its typical constituency of unsecured creditors. I
15 acknowledge the weight and significance of the U.S. Trustees'
16 argument.
17 There is no expressed provision in the code for
18 distribution and dismissal contemplated by the settlement
19 motion. However, I do observe that while the practice is
20 certainly neither favored nor commonplace the record does
21 reflect that this, sort of, relief has been granted by this
22 and other Court's in appropriate occasions in the past. And
23 I find that the dire circumstances that are present in this
24 case warrant the relief requested here by the Debtor, the
25 Committee and the secured lenders.

1 As previously noted through the settlement there is
2 the prospect of a meaningful distribution to unsecured
3 creditors, and to some but admittedly not all administrative
4 priority creditors. In the absence of this settlement there
5 is no realistic prospect for such a distribution. All of the
6 funds contemplated here are subject to the liens of Sun
7 Capital and CIT. The lenders have stated unequivocally and
8 credibly that they would not do this deal in a Chapter 7.
9 The record reflects that there are no unencumbered
10 assets or assets awaiting administration. So in the event of
11 a conversion it does not appear that a Chapter 7 Trustee
12 would have any money to operate, investigate or litigate. I
13 certainly see nothing upon which I could base a finding of
14 adequate protection if a Chapter 7 Trustee sought to use the
15 liened up funds that are currently held by the estate. To
16 the extent that I am being asked to predict the future, I
17 would say with a measure of confidence that the settlement
18 proceeds would be taken by the secured creditors in
19 relatively short order following a conversion of Chapter 7
20 with nothing leftover for stakeholders.
21 I further acknowledge that the proposed distributions
22 are not in accordance with the absolute priority rule. But
23 because this is not a plan, and there is no prospect here of
24 a confirmable plan being filed, the absolute priority rule is
25 not a bar to approval of this settlement. I believe that

1 this is consistent with Judge Walsh's opinion in World
2 Health, and case law in this other jurisdictions as
3 consistently recognized and accepted the right of a secured
4 creditor to dispose of its collateral as it wishes. Neither
5 Armstrong nor DBSD affect this proposition outside of a
6 Chapter 11 plan.
7 Here the funds are indisputably the collateral of the
8 secured creditors, admittedly subject to litigate challenge.
9 The settlement disposes of litigation, and provides for the
10 handover of their collateral, predictably, with the execution
11 of certain releases to unsecured and administrative
12 creditors. This is a format that the Court has previously
13 approved, and the pendency of objections by the U.S. Trustee
14 and by an economics stakeholder do not change the nature of
15 this case from other cases where this has been permitted.
16 Similarly, I am not satisfied that the proposed
17 settlement represents a breach of the Committee's fiduciary
18 duties as an estate representative. The Committee's charge
19 was to investigate and prosecute potential causes of action
20 against CIT and Sun Capital. This the Committee has done,
21 and it now seeks approval of a settlement with the support of
22 the Debtor. It is clear that the Warren claimants were
23 invited to and took part in that settlement process, but they
24 have chosen not to be part of this settlement. The fact that
25 the Committee stands in the shoes of the Debtor here does not

1 give every creditor here a veto over the chosen course of
2 action.
3 As I see it fiduciary duties do not really enter into
4 the analysis that is presently before me. The litigation has
5 been commenced, and is now sought to be settled. If the
6 movants carry their burden it will be approved. If they do
7 not the settlement would be denied. The Warren claimants,
8 presumably, wish to continue their separate pending
9 litigation against the Debtor, CIT and Sun Capital. And thus
10 chose not to settle for the limited distribution that is
11 available here, and that is their right. And this settlement
12 does effect or impair the Warren claimant's right to
13 prosecute their own litigation.
14 But the decision of the Warren claimants not to
15 participate in this settlement does not give rise to a breach
16 of the Committee's fiduciary duties, particularly, in light
17 of a settlement that has been noticed to all creditors, and
18 presented to the Court for approval on a full evidentiary
19 record.
20 Turning to the applicable standards under Rule 9019 I
21 will address the first two prongs together. They are the
22 probability of success in the litigation, and the cost,
23 complexity and likely duration of such litigation. The
24 Committee's prospect for success in its lawsuit, are
25 uncertain at best. The litigation remains in its earliest

1 stages. It raises challenges to perfected prepetition liens,
2 and liens that have been approved post petition. This
3 lawsuit will require expert witnesses and substantial
4 discovery. Mr. Gavin and Mr. Dooley, both, testified to
5 these to the prospect for the litigation.
6 Without getting too far into the specifics of the
7 lawsuit I note that the record developed at the trial
8 indicates that there are several independent hurdles that the
9 Committee would have to clear before it would actually see a
10 material recovery out of the litigation. For example, even
11 if the Committee succeeds in unwinding the liens or avoiding
12 certain transfers it also has to deal with the consequences
13 of Bankruptcy Code Section 502(h). It is an understatement
14 to say that this litigation is not a slam dunk.
15 Further to that point this litigation would be
16 expensive to prosecute and would, presumably, take years to
17 lend its way through the trial and appellate processes. The
18 Court presumes from its prior experience that CIT and Sun
19 Capital are well healed, and will vigorously defend. The
20 estate, by contrast, as I have noted has no available funds.
21 I do note that both objectors suggest the contingency
22 counsel or a Chapter 7 Trustee might be found to front the
23 substantial expenses, and wait for a return either in Chapter
24 11 or if engaged by a Chapter 7 Trustee. I acknowledge that
25 that is a possibility, but on these facts I think any lawyer

1 or firm that signed up for that role should have his head
2 examined. The third prong relating to collection
3 difficulties does not really enter this analysis.
4 The final and most important consideration according
5 to the case law is the paramount interest of creditors, and
6 here that prong has certainly been satisfied. The record
7 reflects a substantial distribution to unsecured and certain
8 administrative creditors under the settlement. It is a
9 virtual certainty that that distribution would not be
10 available in Chapter 11 absent the settlement. And that this
11 deal is not likely to be available in Chapter 7. The one
12 objecting creditor is not unfairly prejudice. Its claim
13 against the estate is presently, effectively worthless given
14 that the estate lacks available unencumbered funds to satisfy
15 it if it were allowed. The Warren claimant's rights against
16 CIT and Sun Capital are unaffected. They may continue their
17 litigation.
18 So I am presented with two options, a meaningful
19 return or zero. The paramount interest of the creditors
20 mandates approval of the settlement, and I do not find that
21 the Bankruptcy Code precludes this result given substantial
22 precedent in this and other jurisdictions. I would ask that
23 an order approving the settlement be submitted under
24 certification of counsel. Are there any questions?
25 UNKNOWN: None from the Debtor, Your Honor.

1 UNKNOWN: No, Your Honor, thank you very much.
2 MR. ACKERLY: Judge Shannon, this is Ben Ackerly for
3 CIT.
4 THE COURT: Yes, Mr. Ackerly.
5 MR. ACKERLY: I have one small, factual correction.
6 CIT is not a defendant in the Warren Act litigation.
7 THE COURT: Thank you for the correction I appreciate
8 that, and I actually was aware of that that was an
9 overstatement by me. I appreciate the clarification.
10 MR. ACKERLY: Thank you, sir.
11 THE COURT: Right, any questions?
12 MR. RAISNER: Judge Shannon, this is Jack Raisner.
13 THE COURT: Yes, sir.
14 MR. RAISNER: In our opposition to this motion we
15 discussed the, what would be the jurisdictional status of the
16 Warren litigation in the event that Your Honor approved the
17 9019 settlement.
18 THE COURT: I appreciate, I appreciate you raising
19 that because that is a point that I believe is an issue that
20 is, that we do need to deal with. I guess what I would say
21 is that as I understand the timeline there are steps under
22 the settlement agreement that are to play out prior to
23 dismissal. I think in your papers I thought that you raised
24 a legitimate question with respect to the Court's continuing
25 jurisdiction over the pending litigations, and so what I

1 think what I would invite you to do is I am not sure what the
2 easiest or most appropriate path would be with respect to
3 motion practice about where the litigation itself should
4 continue, or does it continue in this Court. But I am not
5 prepared to address that right now, but I would certainly
6 invite you and give you the opportunity to, I guess, raise
7 the question, and we can deal with it on a full record prior
8 to dismissal of the cases.
9 MR. GILLESPIE: Your Honor, this is Jim Gillespie on
10 behalf of the Sun Capital defendants in the Warren action.
11 As the Court, likely, recalls there has been summary judgment
12 filed in the Warren litigation. Briefing has been completed
13 on Sun Capital's motion for summary judgment in the Warren
14 action, so I just draw that Court's attention to that because
15 that is something that is pending while the underlying
16 settlement is being finalized that that is all ready for the
17 Court to rule on.
18 MR. RAISNER: Your Honor, Jack Raisner we have not
19 completed briefing in that matter.
20 THE COURT: Is briefing not complete in that?
21 MR. RAISNER: Your Honor, briefing is completed on
22 the Sun motion for summary judgment. There is motions for
23 summary judgment filed by the Warren plaintiffs where
24 briefing will be completed on December 3rd.
25 THE COURT: Okay, here is what I want to do. I am

1 going to leave it right now to you guys. Mr. Raisner raised
2 a good point. He raised it in his papers. I did not feel it
3 is something that I could, obviously, address in the context
4 of the motion that was before me, but it is clearly an issue
5 that I do need to address. I want the opportunity to I have
6 the Sun motion for summary judgment, and I am aware that that
7 is *sub judice*. The way that our paper flow works within the
8 Court I, generally, do not see motion practice until all of
9 the briefing is complete, and it arrives in Chambers with a
10 notice of completion of briefing. Here is what I want. I am
11 not sure do we have a, Mr. Facitti; do we have a hearing
12 coming up in Jevic at anytime soon?
13 UNKNOWN: No we do not have a omni's scheduled yet,
14 Your Honor.
15 THE COURT: All right, here is what I think would
16 make sense. I am going to ask that the parties confer, and
17 it may make sense to have even just a telephonic status
18 conference about what the best path forward is. It may be
19 that, again, without having studied the submissions, and the
20 competing submissions I want to, I think I would like the
21 benefit of the party's guidance after they have considered my
22 ruling, and sort of figuring out how the process will play
23 out to get on the phone with me on a status conference
24 sometime in the next couple of weeks.
25 And it may be that in order to get the matter, sort

1 of, up and front and center it may be that scheduling the
2 summary judgment motions for argument might make sense. But,
3 again, if there are alternatives to dealing with the pending
4 Warren litigation, and the issues that would be raised by
5 dismissal of the main case, I think I would like the benefit
6 of the lawyer's thoughts and guidance on that.
7 So I would make myself available at the party's
8 convenience, telephonically or live within the next couple of
9 weeks, and we can come up with a game plan going forward.
10 UNKNOWN: Thank you.
11 MR. FEINSTEIN: Judge, Robert Feinstein, Judge, one
12 final thing Your Honor asked for a submission of an order
13 which we will do, and I just want to confirm in light of this
14 this colloquy that we will submit an order under
15 certification that tracks the former order that was submitted
16 with the motion and the amendment to the motion. And we will
17 be silent on the subject of jurisdiction over the Warren Act
18 claim so as not to hang up that order we, you know, we would
19 like to get that order entered as soon as possible.
20 THE COURT: I think --
21 MR. FEINSTEIN: The issue regarding jurisdiction will
22 be dealt with separately.
23 THE COURT: -- I think that that is appropriate. And
24 I have said before that I think it was appropriate that the
25 question be raised by the Warren claimants. I saw it in

1 their briefing. I have not touched on it here, but it is
2 definitely something that we need to deal with it now that we
3 have ruled on the settlement motion itself.
4 So, again, I am happy to deal with that issue, and to
5 make sure that we are promptly and responsibly administering
6 the case. And with respect to the status conference, again,
7 my hope would be that that would give me the benefit of input
8 from the lawyers about, you know, alternatives and the best
9 way to proceed.
10 So I am really at your pleasure, but I would I think
11 a teleconference in the space of the next couple of weeks
12 would give everybody an opportunity to think about it, and if
13 there is an agreed game plan forward than you can expect I
14 will be all ears, and probably on board. So, and if you can
15 touch base with Ms. Bellow once you look at your own
16 schedules and, again, I am happy to make myself available for
17 a status conference, okay?
18 MR. FEINSTEIN: Thank you very much, Your Honor.
19 THE COURT: Thank you very much, counsel, have a good
20 day.
21 (Court Adjourned)
22
23
24
25

1 CERTIFICATE

2

3 I certify that the foregoing is a correct transcript from the
4 electronic sound recording of the proceedings in the above-
5 entitled matter.

6 /s/Mary Zajaczkowski December 3, 2012
7 Mary Zajaczkowski, CET**D-531 Date

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# UNITED STATES BANKRUPTCY COURT
## District of Delaware

**In Re:**
Jevic Holding Corp.
700 Creek Rd.
Delanco, NJ 08075
**EIN:** 20–5118738

**Chapter:** 11

*Case No.*: 08–11006–BLS

*NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION*

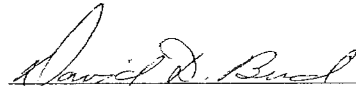
A transcript of the proceeding held on 11/28/2012 was filed on 12/4/2012 . The following deadlines apply:

The parties have 7 Days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 12/26/2012 .

If a request for redaction is filed, the redacted transcript is due 1/4/2013 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 3/4/2013 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.



Clerk of Court

Date: 12/4/12

(ntc)

# Notice Recipients

District/Off: 0311–1 User: DanaM Date Created: 12/4/2012
Case: 08–11006–BLS Form ID: ntcBK Total: 8

**Recipients of Notice of Electronic Filing:**

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TOTAL: 7

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TOTAL: 1

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

| | |
|---|---|
| In re: | Chapter 11 |
| JEVIC HOLDINGS CORP., *et al.*, | Case No. 08-11006 (BLS) |
| Debtors. | (Jointly Administered) |
| OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the bankruptcy estates of JEVIC HOLDING CORP., *et al.*, Plaintiff, | Adv. Pro. No. 08-51903 (BLS) |
| -against- | |
| THE CIT GROUP/BUSINESS CREDIT, INC., in its capacity as Agent, and SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, and SUN CAPITAL PARTNERS, INC., Defendants. | **Related to D.I. 1346 and 1465 in Case No. 08-11006 and D.I 67 and 69 in Adv. Pro. No. 08-51903** |

**ORDER GRANTING JOINT MOTION OF THE DEBTORS, CIT, SUN CAPITAL AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105(a), 349 AND 1112(b) AND FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER: (I) APPROVING SETTLEMENT AGREEMENT AND RELEASING CLAIMS; (II) DISMISSING THE DEBTORS' CASES UPON IMPLEMENTATION OF SETTLEMENT; AND (III) GRANTING RELATED RELIEF**

Upon consideration of the *Joint Motion of the Debtors*[1], *CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1346; Adv. Pro. Docket No. 67] (the

[1] Defined terms used herein and not otherwise defined herein shall have the meaning ascribed to them in the Joint Motion and Supplement as applicable.

PHIL1 2511986v.2

"Joint Motion") and the *Supplement to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1465; Adv. Pro. Docket No. 69] (the "Supplement"); the Court having reviewed the Joint Motion, the Supplement, the Settlement Agreement, the exhibits thereto, and any responses or objections thereto; the Court having considered the evidence presented at the hearing on the Joint Motion, the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having determined that consideration of the Joint Motion and Supplement is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that the legal and factual bases set forth in the Joint Motion and Supplement establish just cause for the relief requested in the Joint Motion and Supplement, and that such relief is in the best interests of the Debtors, their estates, their creditors and the parties in interest; and for the reasons set forth on the record at the telephonic hearing held on November 28, 2012, and the Court finding that notice of the Joint Motion and Supplement was sufficient and that no other notice need be provided; and good and sufficient cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The relief requested in the Joint Motion and Supplement is GRANTED.

Settlement Agreement

2. The Debtors are authorized to enter into the Settlement Agreement, a copy of which is attached as Exhibit A to the Joint Motion, and the Settlement Agreement is approved in its entirety.

3. The Debtors are authorized and instructed to take any and all actions necessary or appropriate to perform their obligations arising under the Settlement Agreement.

4. Within ten (10) business days after the Effective Date, as defined in paragraph 18 of the Settlement Agreement (the "Effective Date"), the following shall occur simultaneously:

(a) CIT shall pay to the Debtors $2,000,000 (the "Administrative Claim Fund");

(b) The Committee, CIT and Sun shall file with the Court a fully executed stipulation of dismissal with prejudice, substantially in the form of Exhibit 2 to the Settlement Agreement;

(c) The releases set forth in paragraph 2(c) of the Settlement Agreement shall become effective upon payment of the Administrative Claim Fund to the Debtors; and

(d) The Estate Releasing Parties, as such term is defined in the Settlement Agreement, shall execute and deliver to CIT releases in favor of the other members of the Lender Group, as such term is defined in the Settlement Agreement, in the form attached as Exhibit 3 to the Settlement Agreement and such releases shall be effective upon payment of the Administrative Claim Fund to the Debtors.

5. Sun has an allowed secured claim secured by a superpriority lien and security interest in the cash and other assets of the Debtors' estates in an amount equal to $2,000,000, plus at least $200,000.00 of accrued and unpaid interest as of May 31, 2012 and at least $250,000 in fees and costs incurred as of May 31, 2012.

6. The failure specifically to describe or include any particular provision of the Settlement Agreement in this Order shall not diminish or impair the effectiveness of such a



PHIL1 2511986v.2

provision, it being the intent of this Court that the Settlement Agreement be approved in its entirety; provided that to the extent of any conflict between the provisions of this Order and the Settlement Agreement, this Order shall govern.

7. The Clerk of the Court is authorized to take all necessary and appropriate actions to give effect to the Settlement Agreement.

Dismissal Of Debtors' Chapter 11 Cases

8. Upon payment of the Administrative Claim Fund to the Debtors, the Debtors shall pay the aggregate sum of $200,000 from the Administrative Claim Fund to the professionals retained by the Committee on account of previously approved and unpaid fees and expenses.

9. Unless a later date is agreed to by the Debtors, Sun, and the Committee, within sixty (60) days following the Effective Date, the Debtors shall determine (a) in consultation with the Committee and Sun, the identity of the holders and the amount of the Administrative Claims, as such term is defined in the Settlement Agreement (the "Administrative Claims"), and (b) in consultation with the Committee, the identity of the holders and the amount of the Allowed GUC Claims.

10. Upon reconciliation of the Administrative Claims, the Debtors shall pay in full the Administrative Claims. Upon payment in full of the Administrative Claims as provided in the Settlement Agreement, Sun shall indefeasibly transfer to the Trust, as such term is defined in the Settlement Agreement, as a collateral carve-out from its allowed secured claim and superpriority liens on the assets in the Debtors' estates including the balance of the Administrative Claim Fund after payment in full of the Administrative Claims, a sum equal to all of the remaining funds in the estates (the "Carve-out"). The Trust shall pay from the Carve-Out (i) first, the Allowed

Resolved Priority Claims and (ii) thereafter, with the remaining balance of the Carve-Out funds, the holders of the Allowed GUC Claims on a pro rata basis.

11. Upon payment in full of the allowed Administrative Claims, and after the completion of the transfer of the Carve-out to the Trust, the Debtors and the Committee, by counsel, shall file with this Court a certification substantially in the form of Exhibit 4 attached to the Settlement Agreement that all allowed Administrative Claims have been paid in full and the Carve-out has been transferred to the Trust, and thereupon, the Clerk, without further order of the Court, shall mark the Chapter 11 cases dismissed on the docket as of the date the certification is entered on the docket.

12. Each Party shall bear its own costs and expenses in connection with the Adversary Proceeding and the Settlement Agreement.

Berrios Objection Resolution

13. The withdrawal of the objection by Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios (collectively, "Berrios") and the treatment of the claims filed by Berrios (the "Berrios Claims") in these bankruptcy cases pursuant to the Settlement Agreement shall not impact or prejudice in any way those proceedings presently pending in Providence County Superior Court, entitled Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios v. Jevic Transportation, Inc.,. Craig G. Benfield; First Student, Inc.; Ilba Berrios, Alias; Saia, Inc.; Saia Motor Freight Line , LLC, Alias; and National Union Fire Insurance Company Of Pittsburgh, Superior Court, C.A. No. PO4-2390 (the "Superior Court Action").

14. The treatment of the Berrios Claims in this bankruptcy proceeding shall not serve as a bar to the Superior Court Action and shall not be relied on or raised as a defense by any

party in the Superior Court Action, including, but not limited to, res judicata, estoppell, accord & satisfaction, waiver of claims, laches, or any other defenses that may be raised by Jevic or any other party in the Superior Court Action. The treatment of the Bankruptcy Claims shall not serve to preclude recovery by or on behalf of Berrios as against Jevic, Saia, Inc, or Saia Motor Freight Line, LLC or any other party in accordance with the terms and conditions of the settlement agreement entered into by and between Saia, Inc., Saia Motor Freight Line LLC, Jevic Holding Corp. and other parties (the "Saia Agreement") approved by the Bankruptcy Court by Order dated September 19, 2008 (D.I. 267) (the "Saia Order") and as against any insurance coverage which was in full force and effect on the date of this eventuality.

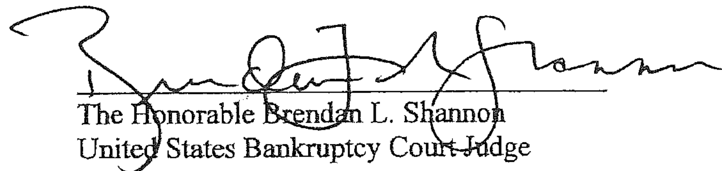
15. Nothing in this order or resulting from the treatment of the Berrios claims in this bankruptcy proceeding shall impair Berrios from pursuing any judgment obtained in the Superior Court Action in accordance with (i) the Saia Agreement and the Saia Order or (ii) the documents contained in the *Exhibit of Documents Relating to Superior Court Action* [Docket No. 1489] filed by Berrios on November 12, 2012, including (a) the insurance coverage afforded for this eventuality described in the affidavit of Gary Swanson dated July 31, 2012 and (b) the Indemnity Agreement dated March 2, 2000 between non-debtor parties USF&G Co., ABC Trucking, Inc., and Regional Holding Corporation.

Additional Relief

16. Notwithstanding entry of this Order, all stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

17. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: December 4, 2012
Wilmington, Delaware



The Honorable Brendan L. Shannon
United States Bankruptcy Court Judge



PHIL1 2511986v.2

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies pursuant to Fed. R. of App. P. 25 and L.A.R. 113.1 that on July 8, 2014, copies of the APPELLANTS' BRIEF (combined with VOLUME I of the JOINT APPENDIX) were served (1) electronically through the Court's CM/ECF filing system; and (2) via electronic mail on all parties specified below:

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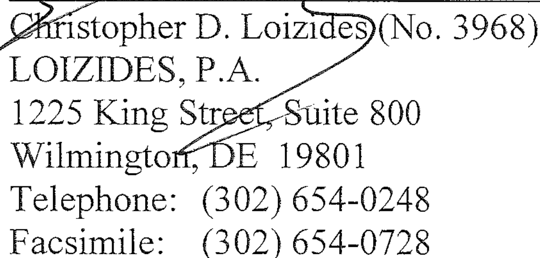
DATED: July 8, 2014



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**No. 14-1465**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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In re: JEVIC HOLDING CORP., *et al.*, Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*,

v.

CIT GROUP/BUSINESS CREDIT INC., in its capacity as Agent; SUN CAPITAL PARTNERS, INC., SUN CAPITAL PARTNERS IV LP; SUN CAPITAL PARTNERS MANGEMENT IV, LLC.

CASIMIR CZYZEWSKI; MELVIN L. MYERS; JEFFREY OEHLERS; ARTHUR E. PERIGARD and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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# BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

---

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# TABLE OF CONTENTS

INTEREST OF THE UNITED STATES ....................1

STATEMENT OF THE ISSUES ....................3

SUMMARY OF ARGUMENT ....................4

ARGUMENT ....................7

I. The District Court Erred in Dismissing the Appeal as Equitably Moot. .....7

A. Under this Court's precedent, the doctrine of equitable mootness does not apply in the absence of a confirmed plan of reorganization. ..............7

B. There is no compelling reason to extend the doctrine to this appeal. .....11

II. The Bankruptcy Court Erred by Approving a Settlement that Violated the Code's Priority Scheme. ....................14

A. The applicable provision is section 507, not section 1129. ....................14

B. The settlement distributed estate funds that were subject to the Code's priorities ....................22

CONCLUSION ....................27

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS ......... 28

CERTIFICATION THAT TEXT OF ELECTRONIC BRIEF AND PAPER COPIES ARE IDENTICAL .................... 28

CERTIFICATION OF VIRUS CHECK .................... 28

CERTIFICATE OF SERVICE .................... 29

## TABLE OF AUTHORITIES

### Cases

*Adventure Resources, Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998) .....................17

*Air Pilots Ass'n v. Shugrue (In re Ionosphere Clubs, Inc.),* 22 F.3d 403 (2d Cir. 1994) .....................17

*Andrus v. Glover Const. Co.*, 446 U.S. 608 (1980) .....................16

*In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005) ............. 20, 24, 25

*Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164 (3d Cir. 2002) .....................23

*Begier v. Internal Revenue Service*, 496 U.S. 53 (1990) .....................14

*In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833 (3d Cir. 1994) ..................... 5, 21

*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) ...5

*In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) ..................... 7, 8, 9, 10

*Curreys of Nebraska, Inc. v. United Producers., Inc. (In re United Producers, Inc.)*, 526 F.3d 942 (6th Cir. 2008) .....................9

*Dill Oil Company, LLC v. Stephens (In re Stephens)*, 704 F.3d 1279 (10th Cir. 2013) ..................... 9, 14

*Dish Network Corp. v. DBSD N. Am. (In re DBSD N. Am., Inc.*), 634 F.3d 79 (2d Cir. 2011) .....................25

*First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (In re ClubAssocs.)*, 956 F.2d 1065 (11th Cir. 1992) .....................9

*Gilman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000) .....................12

*In re Genesis Health Ventures, Inc.*, No. 05-4005, 204 F. App'x 144, 2006 WL 2846259 (3d Cir. Oct. 4, 2006) .....................9

*In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) .............26

*In re Kainos Partners Holding Co., LLC*, No. 10-560-LPS, 2012 WL 6028927
(D. Del. Nov. 30, 2012) ........................................................................ 6, 26

*In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) ........................................... 12, 13

*Law v. Siegel*, 134 S. Ct. 1188 (2014) .....................................................................19

*Manges v. Seattle–First National Bank (In re Manges)*, 29 F.3d 1034
(5th Cir. 1994).............................................................................................................9

*Martin v. Wilks*, 490 U.S. 755 (1989) ........................................................................19

*In re MCorp. Fin., Inc.*, 160 B.R. 941 (S.D. Tex. 1993) .........................................25

*Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*,
677 F.3d 869 (9th Cir. 2012) ........................................................................................9

*Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC),* 478 F.3d 452 (2d Cir. 2007) ......................................................................21

*Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996) ................. 5, 18, 20, 24

*Nathanson v. N.L.R.B.*, 344 U.S. 25 (1952) ...........................................................17

*Nordhoff Invs., Inc. v. Zenith Elects. Corp.,* 258 F.3d 180 (3d Cir. 2001) ...........7, 9

*Official Comm. of Unsecured Creditors v. SGPA, Inc. (In re SGPA, Inc.)*,
No. 02-1090, 34 F. App'x 49, 2002 WL 827176 (3d Cir. Apr. 26, 2002)...............9

*Official, Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing Corp.)*, 984 F.2d 1305 (1st Cir. 1993) ............................................. 23, 24, 25, 26

*In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012) ................ 11, 12

*Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*,
390 U.S. 414 (1968).....................................................................................18

*In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000)........................................12

*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) ..........................................7

*$R^2$ Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*,
691 F.3d 476 (2d Cir. 2012)..........................................................................9

*In re Roth American, Inc.*, 975 F.2d 949 (3d Cir. 1992) .......................................16

*Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*,
728 F.3d 314 (3d Cir. 2013)..................................................................... *passim*

*In re SCH Corp.*, No. 13-3371, – F. App'x –, 2014 WL 2724606
(3d Cir. June 17, 2014) .........................................................................12

*In re Semcrude L.P.*, No. 11-1724, 456 F. App'x 167, 2012 WL 8597
(3d Cir. Jan. 3, 2012)...............................................................................9

*Thompson v. Greenwood*, 507 F.3d 416 (6th Cir. 2007) ..........................................1

*United Artist Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir. 2003).........................12

*United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.*),
33 F.3d 294 (3d Cir. 1994) .......................................................................1

*United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293 (5th Cir. 1984)
.......................................................................................................21

*United States v. Noland*, 517 U.S. 535 (1996)........................................................17

*United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213
(1996).............................................................................................17

*United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) ............................. 22, 23

*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) .................... 5, 21

*U.S. Trustee v. Official Committee of Equity Security Holders (In re Zenith Elecs. Corp.)*, 329 F.3d 338 (3d Cir. 2003).................................................. 8, 10, 11, 12

*In re World Health Alts., Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006) .................. 6, 25

**Statutes**

11 U.S.C. § 103(a) ....................................................................................14

11 U.S.C. § 105(a) ....................................................................................20

11 U.S.C. § 307 ........................................................................................1

11 U.S.C. § 363(m) ....................................................................................7

11 U.S.C. § 364(c) ....................................................................................15

11 U.S.C. § 364(e) ....................................................................................7

11 U.S.C. § 507 ........................................................................................*passim*

11 U.S.C. § 507(a) ....................................................................................14

11 U.S.C. § 507(a)(4) .................................................................... 3, 15, 18

11 U.S.C. § 507(a)(5) .................................................................... 3, 15, 18

11 U.S.C. § 510 ........................................................................................15

11 U.S.C. § 541(a)(3) ................................................................................24

11 U.S.C. § 541(a)(6) ........................................................................... 3, 23

11 U.S.C. § 544 ........................................................................................24

11 U.S.C. § 550 ........................................................................................24

11 U.S.C. § 724(b) ....................................................................................15

11 U.S.C. § 726(a) ....................................................................................16

11 U.S.C. § 726(b) ....................................................................................16

11 U.S.C. § 901 ....................16

11 U.S.C. § 1129 ....................21

11 U.S.C. § 1129(a)(8)(A) ....................16

11 U.S.C. § 1129(a)(9) ....................16

11 U.S.C. § 1129(b)(1) ....................20

11 U.S.C. § 1129(b)(2)(A) ....................25

11 U.S.C. § 1129(b)(2)(B)(ii) ....................20

11 U.S.C. § 1222(a)(2) ....................16

11 U.S.C. § 1222(a)(2)(B) ....................16

11 U.S.C. § 1322(a)(2) ....................16

28 U.S.C. § 158(a) ....................8

28 U.S.C. § 158(c)(2) ....................8

28 U.S.C. §§ 581-589 ....................1

28 U.S.C. § 2075 ....................19

**Other**

4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy (16th ed. 2009) ...18

Fed. R. App. P. 29 ....................1

Fed. R. Bankr. P. 9019 ....................18

H.R. Rep. No. 95-595 (1977), *reprinted at* 1978 U.S.C.C.A.N. 5963 ................1, 14

The United States submits this brief as *amicus curiae*, urging reversal of the bankruptcy court's ruling pursuant to Fed. R. App. P. 29.

## INTEREST OF THE UNITED STATES

United States Trustees are officials of the United States Department of Justice appointed by the Attorney General to supervise the administration of bankruptcy cases. 28 U.S.C. §§ 581-589. Congress gave the United States Trustees broad supervisory responsibilities over bankruptcy cases. *Id*. The United States Trustee "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307. And courts have repeatedly held that the United States Trustee has standing under section 307 to appear and be heard on any issue in any bankruptcy case, despite the lack of pecuniary interest in the outcome. *See, e.g., United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (the United States Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Thompson v. Greenwood*, 507 F.3d 416, 420 n.3 (6th Cir. 2007) ("The United States Trustee is an interested party by statute.").

As the "watchdog" of the bankruptcy system, the United States has important substantive reasons for participating in this case. H.R. Rep. No. 95-595, at 4 (1977), *reprinted at* 1978 U.S.C.C.A.N. 5963, 5966. The bankruptcy court's

decision sanctions a mechanism that permits parties to distribute estate assets (here proceeds from the compromise of estate causes of action) in violation of the priorities established by the Bankruptcy Code for the payment of creditor claims. That decision undermines the fundamental principle of bankruptcy that the debtor's assets will be distributed fairly and threatens to destroy confidence in the bankruptcy system. Moreover, there appears to be no rational reason why the bankruptcy court's rationale could not be extended to permit parties to violate other Code requirements in the context of a settlement, so long as the bankruptcy court found that the settlement benefitted some of the creditors.

The problem is not confined to this case or even this bankruptcy court. The United States has opposed a growing number of similar settlement proposals that sought to disregard the Code, often disproportionately impacting those creditors who had little leverage. The United States Trustees have a duty to protect the integrity of the bankruptcy process by ensuring that Code provisions are not routinely circumvented in this manner.

The United States is equally concerned about the district court's dismissal of the Appellants' (referred to herein as the "Truck Drivers") appeal from the bankruptcy court's order on the basis of equitable mootness. That judge-made law, which deprives parties of their statutory right to appellate review and flies in the face of courts' obligation to exercise their jurisdiction, is not sanctioned by the

Constitution or any statute. This Court has carefully confined the doctrine's reach to cases where a confirmed plan has been substantially consummated and will have to be completely unwound in the event of a reversal. But this case bursts those bounds, opening the door to dismissals of all kinds of live bankruptcy appeals on the grounds of equitable mootness.

## STATEMENT OF THE ISSUES

This brief addresses two issues. The first issue concerns the district court's dismissal of the appeal based on the doctrine of equitable mootness. The second issue concerns the affirmance of the bankruptcy court's order on the merits.

(1) This Court has never approved the dismissal of a bankruptcy appeal pursuant to the judge-made doctrine of equitable mootness where reversal on appeal would not require the complete unraveling of a substantially consummated plan of reorganization. The first issue is whether the district court erred by extending this narrow doctrine to dismiss an appeal where no plan had been proposed, confirmed, or substantially consummated.

(2) Proceeds of a sale or settlement of estate causes of action are property of the estate. 11 U.S.C. § 541(a)(6). Estate property must be distributed among creditors according to the Code's priorities. The Bankruptcy Code expressly grants priority payment to wage and benefit claims like the Truck Drivers' in a chapter 11 case. 11 U.S.C. § 507(a)(4) & (5). The second issue is whether the

bankruptcy court erred by approving a settlement agreement that diverted funds received in settlement of estate claims to general unsecured creditors and bypassed the Truck Drivers' claims in violation of the Code's priorities.

## SUMMARY OF ARGUMENT

From the government's perspective, this is not a difficult case because it involves a clear violation of the Code's priorities for paying creditors in a chapter 11 case. When the bankruptcy estate settles claims that it owns, the settlement proceeds come into the estate and must be distributed according to the priorities established in the Code. The Code's priorities are expressly set forth in section 507.[1]

The Truck Drivers had claims for unpaid wages and benefits that, if allowed, section 507 required to be paid before the claims of the general unsecured creditors. JA-14, 28, 31, 32 (Tr. of bankruptcy court's ruling on motion to approve settlement, hereinafter "b. ct. op."). The settlement agreement violated the Code's priorities by distributing proceeds from the settlement of the estate's claims against Appellees, CIT Group/Business Credit, Inc. ("CIT"), and Sun Capital Partners, Inc., Sun Capital Partners IV, LP, and Sun Capital Partners Management IV, LLC (collectively "Sun"), to general unsecured creditors, while leaving nothing to pay the Truck Drivers.

[1] All statutory references herein refer to title 11 of the United States Code unless otherwise indicated.

The bankruptcy court acknowledged both that the Code did not expressly authorize the distribution contemplated by the settlement (JA-31) and that the contemplated distribution skipped over priority claims. JA-32 (b. ct. op.). The court concluded that it could approve the settlement anyway because it found that the settlement satisfied criteria set forth in *Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996). JA-34-36 (b. ct. op.). But *Martin* does not authorize the bankruptcy court to violate express Code provisions. The bankruptcy court simply failed to address section 507. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 273-75 (2010) (notwithstanding lack of objections, bankruptcy court had independent duty to ensure legality of plan); *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994) (notwithstanding lack of objections, bankruptcy court had independent duty to review fee applications).

Further, the district court should not have dismissed the appeal, because the appeal did not satisfy this Court's stringent criteria for equitable mootness. Equitable mootness conflicts with parties' statutory right to review of final bankruptcy court decisions and federal courts' "virtually unflagging obligation" to exercise their statutory jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). For those reasons, this Court has tightly restricted the doctrine's applicability to appeals that would completely unravel substantially consummated plans of reorganization. *Samson Energy Resources Co.*

*v. Semcrude, L.P. (In re Semcrude, L.P.), L.P.*, 728 F.3d 314, 321 (3d Cir. 2013). In twenty years, it has never found an appeal to be equitably moot where no plan had been confirmed.

The district court's dismissal completely up-ends this standard. The order on appeal does not involve a plan of reorganization, much less completely unravel one. The district court acknowledged that no plan has been confirmed in this case, and none is contemplated. JA-19 n.11 (District court mem. op.). Moreover, the settlement agreement could easily be undone because it essentially involves only the release of claims and the transfer of money. JA-28-29 (b. ct. op.)

The settlement in this case does not implicate the public interest in promoting reorganization or the concern about third parties' reliance on a plan of reorganization that underlie the equitable mootness doctrine. And this Court could enter limited relief that would not unfairly prejudice third parties. In short, there is no justification for stripping the Truck Drivers of their right to appeal.

Dismissal is particularly troubling here because it shields from review an order the bankruptcy court conceded was not expressly authorized by the Code (JA-31 (b. ct. op.)) and one that violated a specific Code provision. Other similar settlements have been approved by bankruptcy courts within the circuit. *See, e.g., In re Kainos Partners Holding Co., LLC*, No. 10-560-LPS, 2012 WL 6028927 (D. Del. Nov. 30, 2012); *In re World Health Alts., Inc.*, 344 B.R. 291 (Bankr. D. Del.

2006). Plainly, this Court needs to resolve the legal issue of whether assets may be distributed in violation of the Code's priorities through a settlement.

## ARGUMENT

### I. The District Court Erred in Dismissing the Appeal as Equitably Moot.

#### A. Under this Court's precedent, the doctrine of equitable mootness does not apply in the absence of a confirmed plan of reorganization.

Federal courts have "a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). The equitable mootness doctrine permits courts "to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J. dissenting). And it can "easily be used as a weapon to prevent any appellate review of bankruptcy court orders . . . ." *Nordhoff Invs., Inc. v. Zenith Elects. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J. dissenting). For those reasons, this Court repeatedly has warned that the doctrine's application must be "limited in scope and cautiously applied."[2]

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[2] Although this Circuit and others have accepted the concept of equitable mootness in bankruptcy cases, the equitable mootness doctrine is a relatively recent judicial construct of questionable foundation. No statute, principle of justiciability, or constitutional command underpins the doctrine of equitable mootness. The Bankruptcy Code specifically says when a particular type of decision is not subject to appellate review or when the relief that can be granted on appeal is limited. *See* 11 U.S.C. § 363(m) (limiting remedies on appeal for certain sales and leases of property of the debtor's estate to a good faith purchaser absent a stay); 11 U.S.C.

*Continental Airlines*, 91 F.3d at 559.

Under this Court's precedent, the following five factors must be weighed in deciding whether an appeal is equitably moot: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments. *Id.* at 560. The first factor—whether the reorganization plan has been substantially consummated—is the "foremost" consideration. *Id.* And, a court "must remain mindful that the underlying purpose of the doctrine is "to prevent [] a court from unscrambling complex bankruptcy reorganizations" when it would be extremely difficult or unfair to do so. *U.S. Trustee v. Official Committee of Equity Security Holders (In re Zenith Elecs. Corp.)*, 329 F.3d 338, 345 (3d Cir. 2003) (internal quotation omitted).

This Court has never approved the use of equitable mootness to deny relief in

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§ 364(e) (similar rule for good faith extensions of credit). Further, equitable mootness bears no relation to actual mootness, which has its origins in the case-or-controversy requirement of Article III. Dismissing an appeal as equitably moot denies litigants their statutory right to appeal a final order in a live dispute, 28 U.S.C. § 158(a) and (c)(2), and it may render an order entered by an Article I court unreviewable by any Article III court. As this Court observed, any anticipated inequitable consequences of a successful appeal are "more appropriately dealt with by fashioning limited relief at the remedial stage than by refusing to hear the merits of an appeal at its outset." *In re Semcrude, L.P.*, 728 F.3d at 325 (citing *Continental Airlines*, 91 F.3d at 571–72 (Alito, J., dissenting)).

chapter 11 bankruptcy appeals where, as here, no plan of reorganization has been confirmed.[3] Since this Court officially recognized the equitable mootness doctrine in *Continental Airlines* almost 20 years ago, it has affirmed dismissals of appeals based on equitable mootness in only four instances. In each case, this Court concluded that a confirmed plan of reorganization had been substantially consummated and that a successful appeal would undermine the plan's foundation or require the complete unraveling of the plan. *See Nordhoff Invs., Inc.*, 258 F.3d at 185-86, 189-90; *In re Semcrude L.P.*, No. 11-1724, 456 F. App'x 167, 170-71, 2012 WL 8597, at *2 (3d Cir. 2012); *In re Genesis Health Ventures, Inc.*, No. 05-4005, 204 F. App'x 144, 146, 2006 WL 2846259, at *2 (3d Cir. Oct. 4, 2006); *Official Comm. of Unsecured Creditors v. SGPA, Inc. (In re SGPA, Inc.)*, No. 02-1090, 34 F. App'x 49, 52, 2002 WL 827176, at *2 (3d Cir. Apr. 26, 2002).

Continuing to limit equitable mootness to appeals involving substantially consummated plans makes sense because the doctrine addresses the difficulty and

[3] Substantial consummation of a confirmed plan of reorganization has been the *sine qua non* for other courts of appeals as well. *See e.g., Dill Oil Company, LLC v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282 (10th Cir. 2013); *$R^2$ Invs., LDC v. Charter Comm'ns, Inc. (In re Charter Commc'ns, Inc.)*, 691 F.3d 476, 482 (2d Cir. 2012); *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881 (9th Cir. 2012); *Curreys of Nebraska, Inc. v. United Producers., Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947-48 (6th Cir. 2008); *Manges v. Seattle–First National Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994); *First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992).

unfairness of unwinding transactions that underpin a plan and is animated by the strong public policy in favor of "allowing approved reorganizations to go forward in reliance on bankruptcy court confirmation orders." *Continental Airlines*, 91 F.3d at 565; *see In re Zenith Elecs., Corp.*, 329 F.3d at 345-47. Reorganization plans may involve corporate mergers or other complex transactions that may be very difficult to unwind. Further, where parties not involved in the bankruptcy case such as investors, financers, trade creditors, and even employees of the reorganized debtor have relied on the terms of the confirmed plan, a court may believe that it would be inequitable to unwind the plan. Where, as here, no plan of reorganization has been confirmed, those concerns do not arise.

The district court abused its discretion by dismissing the Truck Drivers' appeal in the absence of a confirmed plan of reorganization. *See In re Zenith Elecs.*, 329 F.3d at 345 (district court abused its discretion both when it applied the wrong standard for a single factor and when it incorrectly weighed the five factors). The first and most important factor plainly and expressly requires a confirmed plan of reorganization. So does the fourth factor. Indeed, this Court recently recognized that the entire analysis essentially boils down to whether granting relief on appeal will fatally scramble a substantially consummated, confirmed plan of reorganization. *In re Semcrude, L.P.*, 728 F.3d at 321 (equitable mootness should be analyzed in two steps: (1) whether a "confirmed plan has been substantially

consummated"; and (2) if so, whether granting relief on appeal will "fatally scramble the plan" or "significantly harm third parties who have justifiably relied on plan confirmation"). Plainly, that is not the case here because no plan has been substantially consummated or even confirmed. Indeed, the bankruptcy court found there was no prospect of a confirmable plan. JA-30 (b. ct. op.). Because this Court's precedent limits equitable mootness to cases with confirmed, substantially consummated plans that would have to be completely unwound in the event of reversal, it was an abuse of the district court's discretion to dismiss this appeal as equitably moot.

**B. There is no compelling reason to extend the doctrine to this appeal.**

The district court substantially extended the equitable mootness doctrine by applying it to an order approving a settlement in a case where there was no confirmed reorganization plan. But this Court has carefully confined the doctrine's reach over the years, frequently clarifying the restrictions on its use and the narrowness of its applicability. For example, in 2003, this Court clarified that the "the first, and most important factor does not call merely for a formalistic inquiry into whether the plan has been substantially consummated under the Bankruptcy Code definition." *In re Zenith Elecs. Corp.*, 329 F.3d at 346. Instead, "the critical question under the first factor is whether, if successful, the appeal might unravel the reorganization plan." *Id. See also In re Philadelphia Newspapers, LLC*, 690 F.3d

161, 168-69 (3d Cir. 2012). This Court rejected equitable mootness in seven out of eleven cases following *Continental Airlines*, including three in the past two years, even though all of those cases involved confirmed plans.[4] Within the past two months, this Court reiterated that "dismissing an appeal as equitably moot should be rare" and "should occur only where granting relief is almost certain to produce a perverse outcome." *In re SCH Corp.*, No. 13-3371, 2014 WL 2724606, at *3 (3d Cir. June 17, 2014) (internal quotation marks and citation omitted).

Even if equitable mootness could apply in the absence of a substantially consummated confirmed plan, it is not justified in this case for several reasons. *See In re Semcrude*, 728 F.3d 314, 326-27 ("Dismissing an appeal as equitably moot should . . . occur[] only where there is sufficient justification to override the statutory appellate rights of the party seeking review."). First, the settlement does not involve complicated corporate mergers, dissolutions, or sales, but only the parties' agreement to pay money and grant releases. JA 28-29 (b. ct. op.). So, it can be undone as a practical matter. *See In re Kmart Corp.*, 359 F.3d 866, 869-70 (7th Cir. 2004) (rejecting notion that money that had been paid to creditors could

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[4] *In re Semcrude, L.P.*, 728 F.3d 314 (3d Cir. 2013); *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012); *In re Zenith Elecs. Corp.*, 329 F.3d 338 (3d Cir. 2003); *United Artist Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir. 2003); *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000); *Gilman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000); *In re SCH Corp.*, No. 13-3371, – F. App'x. –, 2014 WL 2724606 (3d Cir. Jun. 17, 2014).

not be refunded). As the Truck Drivers point out, this Court may grant effective relief simply by ordering the creditors to disgorge the funds they received to the estate for distribution in accordance with the Code's priorities. Appellants' brief at 55-56.

Second, the concern underlying the equitable mootness doctrine —unfairness to innocent third parties that have relied on the transaction—is not implicated here. Because the settlement does not provide for the continuity of the debtors' operations, no financing, investment, assumption of contracts, agreements with trade creditors or other business relationships have been entered into in reliance on the terms of the settlement. To be sure, certain unsecured creditors may be required to return their distributions. But those funds were unlawfully diverted from creditors holding priority claims. It is not inequitable to require creditors to return distributions to which they were not legally entitled in the first instance. *See In re Kmart Corp.*, 359 F.3d at 869 (noting that estate would be entitled to recoup funds paid to creditors if the orders approving the payments were held to be invalid). Indeed, under the Code, courts routinely order creditors to return voidable and preferential transfers to the estate.

Third, this case involves an issue of public and private importance as to which there is no controlling decision in this circuit. As explained *infra*, no provision of the Code authorizes the distribution of the estate's assets through a

settlement, especially one that reprioritizes the payment of creditors' claims. The bankruptcy court acknowledged as much. JA-31 (b. ct. op.). But parties in other chapter 11cases increasingly are doing the same thing. For that reason, the public has a strong interest in the resolution of this appeal on the merits. *See In re Stephens*, 704 F.3d at 1283.

## II. The Bankruptcy Court Erred by Approving a Settlement that Violated the Code's Priority Scheme.

### A. The applicable provision is section 507, not section 1129.

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). To achieve an equitable distribution, Congress has determined that some types of claims should be paid before others. The Code expressly assigns priority payment to specific kinds of claims, giving holders of those claims a legal right to be paid before holders of general unsecured claims. Those priorities are set forth in section 507 for cases under chapter 7, 11, 12, and 13. H. R. Rep. No. 95-595, at 357-58 (1977) ("Section 507 specifies the kinds of claims that are entitled to priority in distribution, and the order of the priority."). *See* 11 U.S.C. § 103(a) ("chapter 1, 3, and 5 of [title 11] apply in a case under chapter 7, 11, 12, or 13 . . . .").[5]

[5] Section 507 is part of chapter 5 of title 11.

Section 507 provides that "[t]he following expenses and claims have priority in the following order" and enumerates ten categories of priority claims. 11 U.S.C. § 507(a). The priority claims include wage and benefit claims of the type asserted by the Truck Drivers. *See* 11 U.S.C. § 507(a)(4) & (a)(5).

The Code sometimes alters the priorities established by section 507 or permits the court or the parties to do so, but it does it expressly and specifically. For example,

- the Code grants a superpriority under certain circumstances to claims based on unsecured credit extended to the debtor after the petition was filed (11 U.S.C. § 364(c));
- it expressly provides both for contractual and equitable subordination of specific claims where certain criteria are satisfied (11 U.S.C. § 510);
- section 724(b) sets forth a separate priority scheme that applies only to the distribution of proceeds from property subject to certain liens in chapter 7 cases (11 U.S.C. § 724(b));
- in a case converted to chapter 7 from another chapter, section 726 gives an administrative expense claim allowed under section 503(b) incurred in the chapter 7 portion of the case priority over an

administrative expense claim incurred before the conversion (11 U.S.C. § 726(a) & (b));

- chapters 11, 12, and 13 each include a provision that allows creditors holding priority claims to voluntarily relinquish their rights to priority payments under a plan by accepting different treatments (11 U.S.C. §§ 1129(a)(8)(A); 1222(a)(2)(B); 1322(a)(2));[6] and
- the Code limits the types of claims entitled to priority in chapter 9 to administrative claims only (*see* 11 U.S.C. § 901(only subsection 507(a)(2) applies in a case under chapter 9)).

Congress obviously knew how to alter the priorities it established in section 507 when it wanted to do so. Therefore, this Court should not create or authorize exceptions to the Code's priorities that are not plainly expressed in the Code. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992) (refusing to construe section 1113 to create a superpriority and observing that "in

[6] Usually, priority claims must be paid in full in the context of a chapter 11, 12, and 13 plan. *See* 11 U.S.C. §§ 1129(a)(9); 1222(a)(2); 1322(a)(2).

other situations in which Congress intended to alter the priority scheme established in section 507, it has done so explicitly.”).

Absent clear and express statutory authorization, the parties may not alter section 507’s priorities and the bankruptcy court may not approve a settlement that violated those priorities. The Supreme Court has rejected attempts to alter the statutory priorities set forth in the Code based on equitable considerations in other contexts. *See United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996) (categorical reordering of priorities was beyond the scope of the bankruptcy court’s equitable authority); *United States v. Noland*, 517 U.S. 535 (1996) (same). *Cf. Nathanson v. N.L.R.B.*, 344 U.S. 25, 29 (1952) (Because “the theme of the Bankruptcy Act is ‘equality of distribution,’ . . . if one claimant is to be preferred over others, the purpose should be clear from the statute.”).

The Court made clear that “[d]ecisions about the treatment of categories of claims in bankruptcy proceedings . . . are not dictated or illuminated by principles of equity . . . .” *Noland*, 517 U.S. at 541 (citation omitted). It is Congress’s prerogative to decide what types of claims will have priority in bankruptcy; therefore, actions by the bankruptcy court that strip whole categories of claims of their statutory priority for equitable reasons, as approval of the settlement did in this case, impermissibly usurp the legislative function. *Noland*, 517 U.S. at 540-41. *Accord Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796-797 (4th Cir.

1998); *Air Pilots Ass'n v. Shugrue (In re Ionosphere Clubs, Inc.)*, 22 F.3d 403, 408 (2d Cir. 1994). *See also* 4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 507.02[3] (16th ed. 2009) (courts are not free to use equitable or other principles to alter the Code's priorities).

At least a portion of the Truck Drivers' WARN Act claims allegedly qualify for priority payment under section 507(a)(4) and (a)(5) and, therefore, must be paid before unsecured claims with no special priority are paid.[7] The settlement not only stripped the Truck Drivers' claims of the special priority granted them under section 507, it also gave every general unsecured claim priority over the Truck Drivers' claims. The bankruptcy court, however, cited no statutory provision that authorized it to disregard or change the Code's distribution priorities, and the government is not aware of any.[8]

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[7] The bankruptcy court conceded that the settlement distributed funds to general unsecured creditors instead of priority claimants. JA-32 (b. ct. op.).

[8] No statute specifically authorizes the distribution of estate assets to creditors through a settlement in a chapter 11 case. The Supreme Court has approved of compromises as "a normal part of the process of reorganization." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (internal quotation marks and citation omitted). But the settlement in *TMT Trailer Ferry* was part of a reorganization plan and subject to the statutory provisions requiring plans of reorganization to be fair and equitable. *Id*. This Court articulated four factors the bankruptcy court must consider in evaluating a whether a proposed settlement of a claim belonging to the estate would return sufficient value to the estate. *Martin*, 91 F.3d at 393. *Martin* did not authorize or address the distribution of estate assets through settlement. And, it does not provide the necessary statutory authority to disregard section 507.

The bankruptcy court relied on its settlement authority under Bankruptcy Rule 9019. But a rule cannot defeat a statute, so Rule 9019 cannot trump section 507. Rule 9019 provides a procedural mechanism for approving settlements in bankruptcy cases. It does not purport to authorize the court or the parties to distribute the estate's assets through a settlement or to effect a wholesale revision of the Code's distribution priorities. In any event, that bankruptcy rule cannot diminish the substantive rights granted by section 507 of the Code. 28 U.S.C. § 2075.

Although denominated a "settlement," the settlement agreement at issue in this appeal is not a voluntary settlement in the ordinary sense because the Truck Drivers, whose right to priority payment was eliminated in the settlement, rejected its terms. A settlement generally requires the consent of the party who has been deprived of what would otherwise be a legal entitlement. *Cf. Martin v. Wilks*, 490 U.S. 755, 768 (1989) ("A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."). This "settlement" is nothing more than a court-approved agreement among certain interested parties that is being enforced against other interested parties over their objections.

To be sure, bankruptcy courts may approve settlements of estate claims over the objection of one or more creditors if the fair and equitable standard and the *Martin* criteria are satisfied. But the court's settlement authority is not limitless. Bankruptcy courts may not approve settlement terms that violate the Code. *Cf. Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (bankruptcy courts may not use their powers under section 105(a) and inherent powers in contravention of the Code). Because the settlement agreement in this case contemplated the distribution of estate assets in a way that is inconsistent with the Code's priority scheme, the bankruptcy court abused its discretion by approving the settlement agreement.

It appears that the bankruptcy court conflated section 507 with the absolute priority rule codified in section 1129(b)(2)(B)(ii). Under the absolute priority rule, general unsecured creditors may not receive distributions under a chapter 11 plan unless any objecting priority creditors' claims have been paid in full.[9] *See* 11 U.S.C. § 1129(b)(2)(B)(ii). The bankruptcy court ruled that the latter provision only applies to plans and, therefore, did not bar the settlement.

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[9] Section 1129(b)(1) provides that a plan must be "fair and equitable" with respect to any class of claims unless all impaired classes have accepted the plan. 11 U.S.C. § 1129(b)(1). To be fair and equitable with respect to a class of objecting, impaired, unsecured creditors, the plan may not provide for any classes of claimants junior to the impaired, objecting class to receive any property under the plan. 11 U.S.C. § 1129(b)(2)(B)(ii). Section 1129(b)(2)(B)(ii) codifies the "absolute priority rule" that traditionally prevented the debtor from receiving property before all creditors' claims had been paid. *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005).

That statement misses the point. Section 507 gives the Truck Drivers an affirmative right to priority payment in chapter 11 cases. And section 507, unlike section 1129, is not limited to plans. Therefore, a settlement must comply with section 507 before the bankruptcy court can approve it. *See Espinosa*, 559 U.S. at 273-75; *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d at 841.

The two circuits that have addressed the issue agree that the Code's priority scheme must be respected in pre-plan settlements, although neither decision relies specifically on section 507. Noting that the goal of fair and equitable settlement of creditors' claims appears as soon as the debtor files a petition, the Fifth Circuit held that "a bankruptcy court abuses its discretion in approving a [pre-plan] settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 298 (5th Cir. 1984). The Second Circuit ruled that "whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider" when approving a settlement. *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 463 (2d Cir. 2007). Otherwise, courts could prefer junior creditors and deplete the estate through settlement, thereby depriving senior creditors of the priority to which they

are entitled, and colluding parties could improperly employ settlement as a means to avoid the priority strictures of the Code.

That appears to be the case here. Chapter 11 includes detailed requirements intended to protect all of the creditors that must be followed before a plan of reorganization may be confirmed. Instead of proposing a plan that included a settlement of estate claims against CIT and Sun, which would be subject to acceptance by the creditors and confirmation by the court, the settling parties agreed to distribute the estate's assets according to their own interests in violation of the Code's priorities. It seems unlikely that the Official Committee of Unsecured Creditors would have agreed to the settlement absent the diversion of funds to its own constituency.

**B. The settlement distributed estate funds that were subject to the Code's priorities.**

The bankruptcy court also relied on "gifting" cases in support of the settlement, finding that the funds were collateral of CIT and Sun. JA-33 (b. ct. op.). As an initial matter, it makes no difference that the funds constituted the secured lenders' collateral. Secured lenders' collateral is property of the estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (holding that property of the estate includes property in which a creditor has a secured interest). A security interest in the debtor's property does not transfer ownership of the property to the secured creditor or remove the property from the estate. *See*

*Official, Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing Corp.)*, 984 F.2d 1305, 1313 (1st Cir. 1993) (recognizing that the proceeds from sale of the debtor's assets were property of the estate and thus, the Code governed their use and distribution until they were distributed to the secured lender in satisfaction of its lien). And estate property must be distributed according to the Code's priorities.

But even assuming that a so-called "gifting" analysis is valid under any circumstances, this plainly is not a gifting case. While the funds distributed through the settlement may have been collateral, those funds were not gifts. CIT and Sun transferred those funds and liens on estate property as consideration for the estate's dismissal and release of its claims against them—claims that were being actively litigated on behalf of the estate at the time of the settlement. JA-27-29 (b. ct. op.)

The estate causes of action that were settled were property of the estate. *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002) (citing *Whiting Pools, Inc.*, 462 U.S. at 205 n.9). Those claims obviously had value; CIT and Sun were willing to pay two million dollars and give up liens on approximately 1.7 million dollars' worth of estate assets in order to settle them. The estate released its claims, and the consideration for that release belonged to the estate, not one or more third parties. *See* 11 U.S.C. § 541(a)(6)

(proceeds from property of the estate are property of the estate).[10] Any settlement that purported to release valuable estate claims but to provide no value to the estate in return would run afoul of *Martin*. *See In re Martin*, 91 F.3d at 393 (approval of settlement "requires a bankruptcy judge to assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal"). Therefore, the settlement proceeds are estate assets whose distribution is governed by section 507.

The government is not aware of any court of appeals decision that allowed secured creditors to "gift" their collateral to junior creditors to settle estate claims against them, while skipping senior creditors. Moreover, this Court's precedent makes clear that the settlement agreement could not have been confirmed as a plan. *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005). The only court of appeals case cited by either court involving gifting, *In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993), is inapposite.

*SPM* does not authorize the settlement in this case for many reasons. First, the decision does not address whether section 507's priorities apply in chapter 11 settlements. The First Circuit held only that a secured creditor could share the

[10] Because the estate causes of action sought among other things to avoid CIT's and Sun's liens and recover transferred property under 11 U.S.C. §§ 544 and 550, the consideration paid in settlement of those claims is also property of the estate under 11 U.S.C. § 541(a)(3) (estate property includes any interest in property that the trustee recovers under section 550).

proceeds it received through chapter 7 liquidation with junior creditors without violating the Code's priority scheme. *Id.* at 1313. *SPM* does "not stand for the unconditional proposition that creditors are generally free to do whatever they wish with the bankruptcy proceeds they receive." *Armstrong*, 432 F.3d at 514.

This case also is factually distinguishable from *SPM*. Here, the funds paid to general unsecured creditors in the settlement were estate assets subject to contested liens prior to the settlement, and those funds constituted Sun's consideration for the settlement of claims the estate had brought against Sun. By contrast, in *SPM*, the funds that were shared with junior creditors had already been distributed to the secured creditor pursuant to an *uncontested* lien, and they were not paid to settle estate claims.

No court of appeals has applied *SPM* in a chapter 11 context. And both this Court and the Second Circuit have emphasized the limited reach of that decision. *See In re Armstrong World Indus., Inc.*, 432 F.3d at 514 (emphasizing narrow scope of *SPM's* holding); *Dish Network Corp. v. DBSD N. Am. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 98 (2d Cir. 2011) (noting among other differences, that *SPM* involved a case under chapter 7, not a case under chapter 11 whose distribution scheme, unlike chapter 7's, ordinarily distributes all property in the estate, including property subject to security interests) (citing 11 U.S.C. § 1129(b)(2)(A)). The Second Circuit expressly distinguished *SPM* in a chapter 11

case like this one involving a settlement of estate claims challenging secured lenders' liens on the basis that until the settlement was approved, the liens were contested and the money was property of the estate. *Id*. at 461. So too, here.

The bankruptcy and district court cases cited by the lower courts are similarly unpersuasive because they rely on *SPM*. *See In re MCorp. Fin., Inc*., 160 B.R. 941, 960 (S.D. Tex. 1993); *In re World Health Alts., Inc*., 344 B.R. at 297-98; *In re Genesis Health Ventures, Inc*., 266 B.R. 591, 612 (Bankr. D. Del. 2001). *In re Kainos Partners Holding Co., LLC* does not expressly rely on *SPM*, but provides no substantive explanation for its decision other than to baldly state that "the settlement payments slated for distribution . . . arise from a carve-out from the secured creditors' collateral." 2012 WL 6028927, at *4.

## CONCLUSION

For these reasons, the United States asks this Court to reverse the orders entered below.

Dated: August 14, 2014

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because this brief contains 6532 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I certify pursuant to Fed. R. App. P. 25 and L.A.R. 113.1 that on August 14, 2014, copies of the **BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL** were served electronically through the Court's CM/ECF filing system on the parties listed below, all of whom are Filing Users:

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**No. 14-1465**

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re: JEVIC HOLDING CORP., *et al.*, Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*,

v.

CIT GROUP/BUSINESS CREDIT INC., in its capacity as Agent; SUN CAPITAL PARTNERS, INC., SUN CAPITAL PARTNERS IV LP; SUN CAPITAL PARTNERS MANGEMENT IV, LLC.

CASIMIR CZYZEWSKI; MELVIN L. MYERS; JEFFREY OEHLERS; ARTHUR E. PERIGARD and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

**ADDENDUM TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL**

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The United States submits the following corrections to the **BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL** filed in this appeal on August 14, 2014:

1) On page 14 of the brief, heading II.A. currently reads: "The applicable provision is section 507, not section 1129." Heading II.A. should be changed to read "The applicable provision is section 507, not section 1129(b)(2)(B)(ii)."

2) Heading II.A. also appears in the Table of Contents on page i of the brief. Heading II.A. also should be changed on page i to read "The applicable provision is section 507, not section 1129(b)(2)(B)(ii)."

3) On page 21 of the brief, the sentence that begins on the second line currently reads: "And section 507, unlike section 1129, is not limited to plans." That sentence should be changed to read: "And section 507, unlike section 1129(b)(2)(B)(ii) (the absolute priority rule), is not limited to plans."

Dated: August 20, 2014

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**Appeal No. 14-1465**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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In re: JEVIC HOLDING CORP., *et al.,* Debtors

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*

v.

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CASIMIR CZYZEWSKI; MELVIN L. MYERS; JEFFREY OEHLERS; ARTHUR E. PERIGARD; and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, Appellants

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Dated: November 14, 2014

# TABLE OF CONTENTS

TABLE OF AUTHORITIES........................................................................ iii

INTRODUCTION .....................................................................................1

STANDARDS OF REVIEW……………..……………………………………2

ARGUMENT………………………..…………………………………….……4

I. THE PRIORITY RULE SAFEGUARDS UNSECUREDS FROM COLLUSIVE DEVICES……………………………………………........4

A. The Boyd Rule Announced the Priority Rule to Combat Collusive Settlements……………………..……………………………………4

B. Rule 9019 Does not Support Settlements that Circumvent the Priority Rules and are Collusive ………..……………………………………9

1. The *Martin* Factors do not Help Appellees: a Settlement That Evades the Priorities of the Code is *Per* Se Unreasonable …………………………………………………….……….10

2. Adopting The *Iridium* 9019 Standard, Which Applies the Equity and Fairness Standard of Chapter 11, Does Not Permit Left Over Cash To Be Distributed In Violation Of the Priority Rule ……………………………………………………………..10

3. Appellees Do Not Meaningfully Respond to the Showing that Courts Lack the Equity Power to Approve Settlements That Clearly Deviate from the Priority Rule……………………………………………….……17

C. This Court Has Not Adopted Structured Dismissals In Derogation of the Priority Rule……………………………………………………………19

II. EQUITABLE MOOTNESS DOES NOT APPLY TO SETTLEMENTS IN THE ABSENCE OF A PLAN………………………………….………………………..21

1. Alternative Remedies Are Available …………………………………27

a. Voiding the Releases ……………………………..….27

b. Reformation………………………………………28

c. Overturning the Bankruptcy Court's Determination that the Settlement is not a Byproduct of a Breach of Fiduciary Duty……..…29

CERTIFICATE OF COMPLIANCE....................................................................30

CERTIFICATION OF IDENTIAL COMPLIANCE TO BRIEFS ........................30

CERTIFICATION OF VIRUS CHECK ..............................................................30

CERTIFICATE OF SERVICE…………………………………………………31

# TABLE OF AUTHORITIES

## Cases

Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc. ,
309 F. App'x 455 (2d Cir. 2009) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 32
In re Armstrong World Indus.,
432 F.3d 507 (3d Cir. 2005) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11, 14, 15
In re Am. Reserve Corp. ,
840 F.2d 487 (7th Cir. 1988) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24
In re Armstrong World Indus. ,
320 B.R. 523 (D. Del. 2005) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8, 10
In re AWECO ,
725 F.2d 293 (5th Cir. 1984) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19, 20, 21, 22
In re Belk Properties ,
421 B.R. 221 (Bankr. N.D. Miss. 2009) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 25
In re Buffet Partners, L.P. ,
2014 WL 3735804 (Bankr. N.D. Tex. July 28, 2014) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 26
In re Cavic ,
380 Fed. App'x 611 (9th Cir. 2010) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 30
In re Chateaugay Corp. ,
167 B.R. 776 (S.D.N.Y.1994) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 30
In Re Chrysler ,
405 B.R. 84 (Bankr S.D.N.Y. 2009) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 25
In re Club Associates. ,
956 F.2d 1065 (11th Cir. 1992) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28, 29
In re Combustion Eng'g, Inc. ,
391 F.3d 190 (3d Cir. 2004) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14
In re Cont'l Airlines ,
91 F.3d 553 (3d Cir. 1996) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28
In re Delta Airlines ,
374 B.R. 516 (S.D.N.Y. 2007) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 29, 32
In re Dune Deck Owners Corp. ,
175 B.R. 839 (Bankr. S.D.N.Y. 1995) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 25
In re Fleurantin,
429 Fed. App'x 194 (3d Cir. 2011) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 26, 27
In re Focus Media, Inc. ,
378 F.3d 916 (9th Cir. 2004) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 31
In re Fontainebleau Las Vegas Holdings, LLC ,
434 B.R. 716 (S.D. Fla. 2010) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 29, 31
In re Genesis Health Ventures, Inc. ,
280 B.R. 339 (D. Del. 2002) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28
In re Healthco Intern., Inc. ,
136 F.3d 45 (1st Cir. 1998) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 30
In re Iridium Operating LLC ,
478 F.3d 452 (2d Cir. 2007) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10, 17, 18, 19
In re Kainos Partners Holding ,
2012 WL 6028927 (D. Del., Nov. 30 2012) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 31
In re Martin ,
91 F.3d 389 (3d Cir. 1989) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16, 17, 35
In re Marvel Entertainment Group, Inc. ,

222 B.R. 243 (1998) . . . . . . . . . . 25, 29
In re Miller,
730 F.3d 198 (3d Cir. 2013) . . . . . . . . . . 8
In re Nordhoff,
258 F.3d 180 (3rd Cir. 2001) . . . . . . . . . . 28
In re Northwestern Corp.,
2009 WL 2399120 (D. Del. Aug. 4 2009) . . . . . . . . . . 32
In re PC Liquidation Corp.,
2008 WL 199457 (E.D.N.Y. 2008) . . . . . . . . . . 32
In re Pequeno,
246 F. App'x 274 (5th Cir. 2007) . . . . . . . . . . 31
In re Philadelphia Newspapers, LLC,
690 F.3d 161 (3rd Cir. 2012) . . . . . . . . . . 28
In re PWS Holding Corp.,
228 F.3d 224 (3rd Cir. 2000) . . . . . . . . . . 28, 33
In re SCH,
2014 WL 2724606 (3d Cir. Apr. 8, 2014) . . . . . . . . . . 33
In re SemCrude,
728 F.3d 314 (3d Cir. 2013) . . . . . . . . . . 32
In re SemCrude L.P.,
456 F. App'x at 169 . . . . . . . . . . 32
In re SGL Carbon Corp.,
200 F.3d 154 (3d Cir. 1999) . . . . . . . . . . 9
In re SPM Mfg. Corp.,
984 F.2d 1305 (1st Cir. 1993) . . . . . . . . . . 14
In re Strategic Labor, Inc.,
467 B.R. 11 (Bankr. D. Mass. 2012) . . . . . . . . . . 26
In re Technical Knockout Graphics, Inc.,
833 F.2d 797 (9th Cir. 1987) . . . . . . . . . . 21
In re VOIP,
461 B.R. 899 (S.D. Fla. 2011) . . . . . . . . . . 29, 30
In re Wabash Valley Power Ass'n, Inc.,
72 F.3d 1305 (7th Cir. 1995) . . . . . . . . . . 11
King v. United States,
379 U.S. 329 (1964) . . . . . . . . . . 14
N. Pac. Ry. Co. v. Boyd,
228 U.S. 482 (1913) . . . . . . . . . . 10, 11
Stokes v. Gardner,
483 Fed. App'x 345 (9th Cir. 2012) . . . . . . . . . . 31

## Statutes

11 U.S.C. § 507 . . . . . . . . . . passim
11 U.S.C. § 507(a)(2) . . . . . . . . . . 17
11 U.S.C. § 507(a)(4) . . . . . . . . . . 12
11 U.S.C. § 507(a)(8) . . . . . . . . . . 17
11 U. S. C. § 104 (Supp. 1934) . . . . . . . . . . 12
11 U.S.C. § 103(a) . . . . . . . . . . 13
11 U.S.C. § 1112(b)(2)(A) . . . . . . . . . . 13
11 U.S.C. § 1112(b)(4)(A) . . . . . . . . . . 13
11 U.S.C. § 1129(a)(9) . . . . . . . . . . 12
11 U.S.C. § 1129(a)(9)(B)(ii) . . . . . . . . . . 12

11 U.S.C. § 541 . . . . . . . . . . 14
11 U.S.C. § 541(a)(6) . . . . . . . . . . 14
11 U.S.C. § 726(b) . . . . . . . . . . 34
11 U.S.C. §§ 330, 331 . . . . . . . . . . 27
11 U.S.C. §§ 507(a)(4) and (a)(5) . . . . . . . . . . 12
11 U.S.C. § 1121(e)……………………………………………...13
11 U.S.C. § 1129(e) . . . . . . . . . . 13
11 U.S.C. §1129 726 . . . . . . . . . . 13
11 U.S.C. § 726 . . . . . . . . . . 13

## Rules

Fed. R. App. P. 32(a) (5) . . . . . . . . . . 36
Fed. R. App. P. 32(a) (6) . . . . . . . . . . 36
Fed. R. App. P. 32(a) (7) (B) (ii) . . . . . . . . . . 36
Fed. R. App. P. 32(a) (7) (B) (iii) . . . . . . . . . . 36
Fed. R. of App. P. 25 . . . . . . . . . . 37
Fed. R. Bankr. P. 9019 ……………………………………………..passim

## Other Authorities

Applicability of the Six Months' Rule to Workmens' Compensation and Officers' Salary Claims ,
44 Yale L.J. 1107 (1935) . . . . . . . . . . 12
Recalibrating Consent in Bankruptcy ,
83 Am. Bankr. L.J. 663 (2009) . . . . . . . . . . 22
Rethinking Absolute Priority After Ahlers ,
87 Mich. L. Rev. 963 (1989) . . . . . . . . . . 11
The Missing Piece of the Puzzle: Perspectives on the Wage Priority in Bankruptcy ,
16 Am. Bankr. Inst. L. Rev. 121 (2008) . . . . . . . . . . 12

## INTRODUCTION

Appellees argue the normal rules of bankruptcy should not apply to the Jevic estate's distribution of leftover cash. Appellees argue that they – and not the Bankruptcy Code's priority rules – should decide who receives that cash. Such rule avoidance was necessary – they imply – for a distribution to happen. This "greater good" rationale for breaking rules may be compelling when a real party in interest is not victimized. In carrying out their designs, however, the Appellees purposefully hurt the appellants ("Drivers"). Preventing this type of ganging-up is one of the purposes of the bankruptcy laws.

In the Bankruptcy Court, the Drivers objected to the Settlement that eliminated them – and only them – from any distribution. An attorney for Sun, the Debtors' equity owner and lien creditor, stated to the Court that because the Drivers are Sun's litigation opponents, Sun did not want cash to go to the Drivers. And none did. The Appellees' non-consensual Settlement eliminated the Drivers' large priority claim. Appellees passed the Drivers' entire share of the distribution to the junior general unsecured creditors.

Appellees have pointed to no grounds for upholding their Settlement. As the Drivers and the United States have shown, this non-consensual settlement cannot be justified under Rule 9019 which applies only to consensual settlements that comply with the Code. Nor do the equity principles of bankruptcy authorize a settlement that eliminated the Drivers' entire claim.

To prevent this Court from reviewing their Settlement, Appellees urge this appeal be quashed based on equitable mootness. This, too, is misguided. As the Drivers and the United States have shown, the doctrine of equitable mootness presupposes the existence of a Chapter 11 plan and the contemplation of a reorganization that would be derailed by an appeal. The Settlement, however, was not a plan but merely a mechanism to distribute cash to favored parties. The Settlement should be reviewed and rejected. It subjects the law to the will of "creditors-in-possession" to a degree predicted by the courts but not seen in the courtroom until now.

Appellees are the powerful debtors and creditors. As forewarned in *Armstrong,* they want to "decide which creditors get paid and how much those creditors get paid" and "without any reference to fairness." *In re Armstrong World Indus.*, 320 B.R. 523, 540 (D. Del. 2005). Their "legal creativity or counsel's incantation," sends the law down a "slippery slope," and does "violence" to the Code. *Id*. That violence has occurred here.

**STANDARDS OF REVIEW**

The Parties agree that this Court exercises plenary review of the District Court, and reviews a "bankruptcy court's legal determinations *de novo,* its factual findings for clear error, and its exercises of discretion for abuse thereof,'" Appellees' Brief at 15. *In re Miller*, 730 F.3d 198, 203 (3d Cir. 2013).

Appellees claim, however, that an abuse of discretion standard should apply

to a bankruptcy court's approval of a settlement, dismissal of a Chapter 11 case, and values-balancing under the equitable mootness doctrine. *Citing inter alia*, *In re SGL Carbon Corp.*, 200 F.3d 154, 159 (3d Cir. 1999). That standard may be relevant in other cases, but not here. The issues before this Court are purely questions of law. First is whether the priority rule of bankruptcy applies to a non-consensual settlement and if so, was it abrogated. This is subject to *de novo* review. Second is whether the doctrine of equitable mootness should apply at all to such a settlement. This too is subject to *de novo* review. Were this Court to find the equitable mootness doctrine applicable and to test the District Court's application, it would still focus on whether the law was properly applied. "[A]n abuse of discretion exists where the . . . decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or *an improper application of law to fact*." *Id.* at 159 (emphasis added).

# ARGUMENT[1]

## I. THE PRIORITY RULE SAFEGUARDS UNSECUREDS FROM COLLUSIVE DEVICES

Appellees claim they were free from the constraints of the priority rule when they agreed on the distribution of the estate's assets (*i.e.,* the proceeds of the Settlement of the Committee's adversary proceeding against Sun and CIT). In this Circuit, however, "the lessons of history should suffice to impose a *per se* rule that precludes senior creditors from collaborating with junior creditors or equity owners at the expense of intervening classes." *In re Armstrong World Indus.*, 320 B.R. at 540. The Second Circuit similarly holds that rejection of the *per se* rule has "an unfortunate side effect" of heightening "the risk that the parties to a settlement may engage in improper collusion." *In re Iridium Operating LLC*, 478 F.3d 452, 464 (2d Cir. 2007).

### A. The Boyd Rule Announced the Priority Rule to Combat Collusive Settlements

Appellees spend eleven pages explaining how it is that the priority rules of bankruptcy do not apply to settlements – without citing a single case or authority that states so. Appellees' Brief at 28-39. They ignore the fact that since 1868, the priority rule has been a "fixed principle" in bankruptcy law. *In re Armstrong World Indus.,* 320 B.R. at 533 *citing N. Pac. Ry. Co. v. Boyd,* 228 U.S. 482, 508 (1913))

[1] The Drivers will not respond to every point raised by the Appellees but focus on what they believe is the central issue—that the Settlement unlawfully evades the priority structure of the Code. The Drivers do not waive any of their arguments and rely on their opening brief as to any issues not addressed herein.

("*Boyd*").

Known as the "Boyd Rule," it was originally a judicial invention to combat the problem of insider collusion in railroad reorganizations. John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich. L. Rev. 963, 971-72 (1989); *In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1314 (7th Cir. 1995). As the Court declared in 1913, it required "creditors . . . be paid before the stockholders could retain [equity interests] for any purpose whatever." *Armstrong,* 432 F.3d 507 at 512 *quoting Boyd,* 228 U.S. at 508. It was designed to prevent the "'squeezing out' [of] *intermediate* unsecured creditors." *Armstrong*, 432 F.3d at 512-13, *citing In re Wabash Valley Power Ass'n,* 72 F.3d at 1314 (in railroad reorganizations "squeezing out" intermediate unsecured creditors occurred "through collusion between secured creditors and stockholders."). Insider bondholders were suspected of conspiring with insider shareholders at the expense of outsiders of whatever class.

The Supreme Court in *Boyd* made clear the insiders' device was invalid regardless of the "motive or method by which they carry out the scheme." *Boyd*, 228 U.S. at 503. Indeed, the Court declared that:

> [a]ny device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid.

*Id*. at 504.

The wage priority in bankruptcy predates railroads and the *Boyd* Rule, but

the two have travelled together through all iterations of the bankruptcy law. In the Bankruptcy Act of 1841 "Congress determined that one sort of unsecured creditors--employees--have statutory priority over other unsecured creditors in the event of bankruptcy." C. Scott Pryor, *The Missing Piece of the Puzzle*: *Perspectives on the Wage Priority in Bankruptcy*, 16 AM. BANKR. INST. L. REV. 121, 122 (2008). In the 1920's, the Bankruptcy Act (44 Stat. 666 (1926), 11 U. S. C. A. § 104 (Supp. 1934)), accorded a priority to wages earned within three months before the date of the commencement of the bankruptcy. Note, *Applicability of the Six Months' Rule to Workmen's' Compensation and Officers' Salary Claims*, 44 YALE L.J. 1107, 1110 (1935), *citing* 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1467. Congress formulated section 507(a)(3)[2], as the wage priority rule in in the 1978 Code, in which Congress also enacted the modern version of Chapter 11, focusing on reorganization and rehabilitation. Pryor, 16 AM. BANKR. INST. L. REV. at 141.

Under the Code, section 507 claims must be paid in full as a condition of confirming a plan under 11 U.S.C. § 1129(a)(9). Indeed, classes of priority claims under 11 U.S.C. §§ 507(a)(4) and (a)(5), such as those held by the Drivers, which vote to reject the plan are automatically entitled to full cash payment on the effective date. 11 U.S.C. § 1129(a)(9)(B)(ii). Appellees knew that they did not have sufficient funds to satisfy the Drivers' priority wage claims and that they could not, therefore, confirm a plan. Their position is that because they had neither

[2] Now § 507(a)(4).

the ability nor the intention to confirm a plan, the Code provisions governing Title 11 (especially the priority rules of § 507) do not apply and they may distribute assets any way they please. Appellees' Brief at 30-31. Congress, however, provided that where it becomes clear that no plan can be confirmed, the proper remedy is to convert or dismiss the case then and there, not to distribute assets free from the restrictions of the Code under a denominated "settlement." 11 U.S.C. § 1112(b)(4)(A) (providing the "cause" for conversion of dismissal includes "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation."). *See also* 11 U.S.C. § 1112(b)(2)(A) (in the event "cause" is shown, shifting burden of proof to the debtor to prove that "there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) or 1129(e) of this title, or if such sections do not apply, within a reasonable period of time.").

Appellees do not contest the showing by the Drivers and United States that section 507 sets forth priorities and that it applies in all chapters of the Code except 9 and 15. 11 U.S.C. § 103(a).[3] And, when applied to the Settlement, the Settlement

[3] Appellees argue that the Code limits the application of section 507 by its terms to distributions made under Code sections 1129 and 726. Appellees' Brief at 31. However, Code section 103(a), which states that the entirety of chapter 5 applies in all chapters of the Code other than 9 and 15, would be superfluous in that event. Moreover, the Code plainly contemplates that creditor distributions in a chapters 7 and 11 would be made under Code sections 726 and 1129, respectively. But under Appellees' reading, a distribution of assets to creditors in general can be made under Rule 9019 free from *any* of the provisions of the Code, including section

violates those priorities. Appellees' argument is to clothe the Settlement as a newfangled device that does not implicate the priority rules because it is outside a plan. Even the cases Appellees cite, however, make clear that the priority rules are implicated in the Code under Chapters 7 and 11 whenever estate funds are distributed. *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1312 (1st Cir. 1993) (distribution scheme of section 726 and, "by implication, the priorities of section 507" come into play when all valid liens on the property are satisfied – thus when estate funds are distributed,[4] "the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors" *citing King v. United States,* 379 U.S. 329 (1964)).

Efforts by estates to distance themselves from the *Boyd* Rule by claiming settlements in connection with a plan need not comply with the priority rule have been spurned by this Court. In *Armstrong*, the estate agreed to issue new stock

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507. Putting aside that Rule 9019 is not a statutory provision, Appellees disregard the canon of statutory construction that specific provisions of a statute (here, relating to distribution of estate assets) control against more general provisions. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 237 (3d Cir. 2004) (interpreting the "the specific governs the general" canon of statutory construction as "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"). Under Appellees' astonishing statutory interpretation, Rule 9019 governing settlements in general effectively abrogates the specific distribution scheme approved by Congress.

[4] Appellees have properly abandoned their "gifting" argument as there can be no dispute that the LBO Action is estate property under 11 U.S.C. § 541 and that the Settlement funds are hence estate property under 11 U.S.C. § 541(a)(6) (proceeds of estate property are estate property).

warrants to a senior class of creditors that would automatically transfer to a junior class of equity holders in the event the plan was rejected by a co-equally senior impaired class. *Armstrong*, 432 F.3d at 509. This Court held that the absolute priority rule could not be evaded through such a device grounded, as it was, in the canard that creditors are free to transfer their distributions. *Armstrong*, 432 F.3d at 512-16. This Court drew a line protecting the priority rules from evasion, even when doing so would foster the reorganization of an ongoing concern. The *Armstrong* Court acknowledged that the goals of Chapter 11 might be fulfilled if the warrants skipped over the intermediate creditors. It might preserve the business as a going concern and maximize the amount that can be paid to creditors. But the Court declined to permit it because "the absolute priority rule applies" *Id.* at 518.

Here, there is no ongoing business at stake, as there was in *Armstrong*. Appellees have not explained why the Court should totally suspend the priority rules of the Code in a pure liquidation case where nothing is at stake other than the distribution of leftover money, simply because those who control it wish to direct it to whom they favor.

### B. Rule 9019 Does not Support Settlements that Circumvent the Priority Rules and are Collusive

Appellees attempt to ground the Settlement solely on procedural Rule 9019. The Settlement does not withstand scrutiny even under Rule 9019, which does not

authorize end runs around the priority rules.

### 1. The *Martin* Factors do not Help Appellees: a Settlement That Evades the Priorities of the Code is *Per* Se Unreasonable

Appellees place significant reliance on the four-factor test used to evaluate settlements articulated by this Court in *In re Martin,* 91 F.3d 389, 393 (3d Cir. 1989), *i.e*. "(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." Appellees overlook the purpose to which this test is directed, namely assessing "the value of the claim that is being compromised against the value ***to the estate*** of the acceptance of the compromise." *Id*. at 393 (emphasis supplied). Appellees also ignore the issue before this Court in *Martin* – whether an estate representative's fiduciary duty to maximize recovery to the estate overrode the representative's contractual duties to a single creditor. *Id.* at 393-94.

The unique facts in *Martin* were that a trustee agreed to a mutual walk-away in a litigation with a defendant/counterclaimant who had agreed to buy the debtors' house. *Id.* at 391-93. The trustee had entered into the settlement with the buyer based on the mistaken belief that the trial was years away. *Id*. After debtors objected to the settlement, noting that the trial was in fact imminent, the trustee withdrew her support for the settlement. *Id.* Emphasizing that "a trustee has a fiduciary relationship with *all* creditors of the estate," the Court defined the issue

before it as "a conflict between [the trustee's] fiduciary duty to the creditor body as a whole and the alleged duty to go forward with a settlement agreement favoring one creditor but otherwise detrimental to the estate." *Id*. at 394. The Court concluded that the trustee's fiduciary duty was paramount, and approved the bankruptcy court's rejection of the settlement. *Id.*

As is clear from the case law addressed below, the *Martin* factors do not trump the Code because they comprise a rule to weigh settlements that comply with the Code and benefit the estate, not those that abrogate the Code and divert estate funds to favored constituencies.

**2. Adopting The *Iridium* 9019 Standard, Which Applies the Equity and Fairness Standard of Chapter 11, Does Not Permit Left Over Cash To Be Distributed In Violation Of the Priority Rule**

Appellees give this Court no reason to change the priority rule holdings by pointing to a settlement in the Second Circuit that arose in the pre-plan stage. Relying on *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), Appellees argue that once a settlement is divorced from a plan, it is not judged by the Code itself, but only by Rule 9019. Appellees argue that Rule 9019 does not implicate the priority rules, thus this Court is free to ignore those rules. Appellees' Brief at 31. They even go so far so say that we have not cited a single case that applied section 507 to settlements—despite the fact that both *Iridium* (concerning priority administrative claims under § 507(a)(2)) and *AWECO* (concerning priority tax claims under § 507(a)(8)) did just that.

The *Iridium* Court held that the priority scheme travels with chapter 11 devices such as settlement and sales, not just plans themselves. "[W]hether a pre-plan settlement's distribution plan complies with the Bankruptcy Code's priority scheme will be the most important factor for a bankruptcy court to consider in approving a settlement under Bankruptcy Rule 9019. In most cases, it will be dispositive." *Iridium*, 478 F.3d at 455. Compliance with that priority scheme is similarly the most important factor in determining whether a settlement is "fair and equitable." *Id.* at 462. The *Iridium* Court found it could endorse the principal pre-plan settlement that allowed some assets of the estate to fund a litigation trust for the enhancement of the estate over the objection of an administrative creditor. That creditor had reason to object not simply because those funds might otherwise have come to administrative creditors, but because it was the target of the funded litigation. The *Iridium* Court did not approve, however, the terms of the agreement that inexplicably earmarked any cash left in the final wind-down of the litigation trust to general unsecured creditors instead of to the administrative creditors. *Id.* at 466. The administrative priority creditors had the right to the final cash in the estate in *Iridium,* just as the section 507 Drivers do here. *Id.* at 466. Significantly, the Court rejected the appellees' argument that the earmark could be supported as a "gift" as in *SPM*:

> "[h]ere the Settlement perfected and validated the Lenders' liens only upon the entry of an order approving the Settlement and only to the extent authorized by the

> Settlement. Until the Settlement was approved, then, the Lenders' liens were contested and the money held by the Lenders was an asset of the Estate. This case is quite different from *SPM*, where the creditor had an uncontested, 'perfected, first security interest in all of SPM's assets except certain real estate.'"
>
> *Id*. at 460.

The elimination of the Drivers' claim is more egregious than the priority skipping in *Iridium.* First, the *Iridium* Court approved the use of funds for a litigation trust partly because the administrative claims were only hypothetically skipped by that diversion. With respect to final distribution of cash which the *Iridium* Court did not approve, all the administrative creditors were skipped as a group – here, only one creditor group, the Drivers, were singled out for elimination, of not only their priority claim but their general unsecured claim that exceeded the wage priority cap. In *Iridium,* the hypothetical diversion of funds to the class of administrative creditors had a legitimate business purpose to generate funds for all creditors and clear the way for implementation of a reorganization plan (which of course would have paid priority claimants). Here, the purpose of the Settlement was merely to distribute the leftover cash in the estate, without any reorganization plan, with an elimination of the Drivers for an illegitimate purpose.

Appellees attempt to the distinguish the Fifth Circuit holding in *In re AWECO*, 725 F.2d 293 (5th Cir. 1984) by arguing that only when priority creditors are eliminated in a plan is the Code offended, not when they are eliminated by any

other device the creditors create. Appellees' Brief at 34-35. Again, *AWECO* is contrary. In *AWECO*, the Court held that the priority rules of the Code apply to pre-plan settlements. The debtor proposed to settle a pre-petition, general unsecured claim of $27 million in exchange for $5.3 million of cash and other property. *Id.* at 295-96. The debtor introduced testimony that its remaining assets would be sufficient to pay priority claims. *Id.* at 297. The IRS objected as a priority creditor on the grounds that the bankruptcy court abused its discretion and acted on too little information. *Id.*

The *AWECO* Court noted that settlements can be approved within a plan or outside a plan. *Id*. at 298. Contrary to Appellees' incorrect articulation of the applicable legal test, a settlement is not reviewed by the Bankruptcy Court solely under a "lowest range of reasonableness" standard, but must also be "fair and equitable." *Id.* The Court stressed that "[t]he words 'fair and equitable' are terms of art—they mean that 'senior interests are entitled to full priority over junior ones.'" *Id*. (citations omitted). *AWECO* rejected the debtors' argument that the "fair and equitable" standard only applied to settlements under a plan. *Id.* at 298. It reasoned that if the "fair and equitable" test "had *no* application before confirmation of a reorganization plan, then bankruptcy courts would have the discretion to favor junior classes and creditors so long as the approval of the settlement came before the plan. . . . An estate might be wholly depleted in settlement of junior claims—depriving senior creditors of full payment—and still

be fair between the debtor and the settling creditor." *Id*. The Court ruled that "a bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." *Id.*; *accord In re Technical Knockout Graphics, Inc.,* 833 F.2d 797, 803 (9th Cir. 1987) ("[t]he debtor-in-possession is not free to pay whomever it chooses before the plan is confirmed, as this could defeat the priority scheme established by Congress."). The Court concluded that the record did not support a finding that priority creditors would be paid notwithstanding the settlement. *Id*. at 299.

The Court also rejected the debtors' argument that application of the "fair and equitable" test would "preclude all compromises or settlements prior to a plan of reorganization." *Id.* at 298. In response, the Court stressed that its ruling was narrower, because the "fair and equitable" test only applied where a creditor "can validly object to a proposed settlement with a junior claimant on the basis that the settlement will keep the senior claimant from being paid in full. **The answer to this question has no necessary implications beyond the present, limited context."** *Id.* (emphasis added). The "fair and equitable" standard would not be applied unless estate resources were being depleted to pay general unsecured claims leaving other senior claims unpaid.

Appellees quote the bolded language above (Appellees' Brief at 35) to suggest that *AWECO* was limited to unique facts and is inapplicable. The *AWECO*

standard applies to the precise circumstances here. As was the case in *AWECO*, the objecting creditors (the Drivers) hold priority claims against the estate that are skipped under the Settlement—the very situation that triggered the application of the rule against class skipping in *AWECO*. Indeed, the facts here are stronger for the Drivers than for the IRS in *AWECO*. In *AWECO*, there was a muddled record that assets *would* be available to pay priority claims, but the Court held it wasn't enough. *AWECO* at 299. Here, there is no dispute that the Drivers' priority claims will never be paid anything.

*Iridium* and *AWECO* show that in Chapter 11, not just confirmed plans, but any device, a settlement or a sale, must satisfy the *Boyd* Rule, meet the standard of fairness and consent and comply with the priority rules of the Code including section 507. Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 Am. Bankr. L.J. 663, 712-13 (2009)("there is little cause simultaneously to abandon the *Boyd* rule and *encourage settlement,* sale, or reorganization in chapter 11 *that does not meet traditional standards of fairness and consent* in reorganization cases.") (emphasis added).

The Bankruptcy Court was faced with the defendants in the Committee's adversary proceeding, Sun and CIT. The Committee's action on behalf of the estate charged them with having put the assets of Jevic "beyond the reach of its unsecured creditors" when they acquired it risk-free by leveraging "every single asset to the maximum extent possible . . . which turned out to be a disaster for

Jevic." JA-771. Now the Committee, Sun, CIT and the estate have put the last remaining asset of Jevic out of the Drivers' reach. Appellees devised a cash distribution from the proceeds of that adversary proceeding, that fully pays the Committee and estate professionals, leaves a distribution for the Committee's other constituents, but keeps the Drivers who lost their jobs in the "disaster" completely out of the money.

#### 3. Appellees Do Not Meaningfully Respond to the Showing that Courts Lack the Equity Power to Approve Settlements That Clearly Deviate from the Priority Rule

The Drivers and the United States have shown that section 105 does not authorize deviation from the Code's priority structure. Appellants' Brief at 32-35; United States' Brief at 20. Appellees ignore the argument entirely, instead relying on the Bankruptcy Court's equitable powers apart from section 105 to permit that same deviation. Appellees' Brief at 37. Case law, however, does not distinguish between the residual powers of the bankruptcy courts under section 105 and the courts' inherent equitable powers, at least when it comes to whether those powers authorize deviation from the Code. *See* cases cited in Appellants' Brief, 32-35. Equitable powers of the bankruptcy courts can only be exercised within the confines of the Code.

Appellees' argument boils down to the proposition that it is more equitable to provide a distribution to some creditors, but not all, than to dismiss or convert the case, even if it means tossing out the priority scheme. Underlying this

"pragmatism" is a threat: estates may be unable to cut deals with creditors that free up estate funds unless courts have the discretion to throw out the rules. This raises the question of whether junior creditors should rightfully have any expectation of receiving a distribution with no funds to pay them, unless the bankruptcy rules are violated. Specifically, did the parties to the Settlement have any legitimate expectation to the money and releases they received from the Bankruptcy Court, when they were derived by cannibalizing the claims of one non-consenting creditor's share?

The unsecured creditors who settled Jevic's claim against Sun and CIT never had a rightful expectation to receive anything before the Drivers' portion was paid. "[O]ther creditors have no right to the higher share of the debtor's assets they can achieve by excluding rival creditors" and "bankruptcy courts exist to marshal assets and make awards justified by non-bankruptcy entitlements." *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988).

By the same token, Sun and CIT had no rightful expectation to receive releases from the estate as part of a facially wrongful settlement. The tension between Sun and the Drivers and the ulterior motive stated by Sun's attorney (that the Drivers not receive funds with which they might litigate against Sun) suggests bad faith. JA 157-58. Bad faith has been defined as a creditor's attempt to "extort a personal advantage" not available to other creditors in the class, or when the creditor acts "to procure some collateral or competitive advantage that does not

relate to its claim." *In re Dune Deck Owners Corp.,* 175 B.R. 839, 844 (Bankr. S.D.N.Y. 1995). Allowing settlement parties to demand non-bankruptcy benefits from beneficiaries of an estate distribution puts a gun to the head of deserving creditors. Such collusion constitutes an abuse that the Boyd Rule, section 507, and the modern absolute priority rule are meant to stop.

### C. This Court Has Not Adopted Structured Dismissals In Derogation of the Priority Rule

At the same time the Appellees argue the Settlement is not like a plan,[5] they claim for themselves all the entitlements and benefits of a Chapter 11 plan, including releases, and, audaciously, the avoidance of appellate review based on equitable mootness. This is a "best of all worlds" scenario for powerful secured creditors. The device commonly known as "structured dismissals," nevertheless

[5] Appellees argue that the *sub rosa* plan doctrine only applies when a plan of reorganization is contemplated. Appellees' Brief at 33-34. This mischaracterizes the doctrine; a transaction is a *sub rosa* plan either where it dictates the terms of a contemplated plan or where it amounts to a plan in itself and represents an attempt to evade the confirmation process entirely. *Compare In re Belk Properties*, 421 B.R. 221, 225 (Bankr. N.D. Miss. 2009) (DIP financing held to comprise *sub rosa* plan where financing specified "that any plan of reorganization . . .be consistent with the [financing] Term Sheet") to *In Re Chrysler*, 405 B.R. 84, 95-96 (Bankr S.D.N.Y. 2009) (in holding that sale of substantially all assets was not a *sub rosa* plan, court notes that "[a] debtor cannot enter into a transaction that 'would amount to a *sub rosa* plan of reorganization' or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization. . . . If, however, the transaction has 'a proper business justification' which has potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized."); and *In re Marvel Entertainment Group, Inc.,* 222 B.R. 243, 251 (1998) (settlement not a *sub rosa* plan precisely because it was conditioned on subsequent confirmation of a plan and hence "does not bypass the confirmation process.").

has become prevalent in courts which have approved them, but even there, the courts have done so only when two hallmarks are found – compliance with the priority rules and absence of any creditor objection. *In re Buffet Partners, L.P.,* 2014 WL 3735804, at *3-4 (Bankr. N.D. Tex. July 28, 2014). In *Buffet*, the settlement distributed the proceeds of a section 363 sale of estate property and the secured creditor gave up its deficiency claim in return for a release. The Court approved the settlement because it did "not cut off the rights of any parties without giving them the chance to voice an objection and it [did] not violate the absolute priority rule." *Id.* at *3-4 ("It is important to emphasize that not one party with an economic stake in the case has objected to the dismissal in this manner."). Clearly, the Court found that rule applies to non-plan settlements and emphasized that no creditor objected. By contrast, in *In re Strategic Labor, Inc.,* 467 B.R. 11, 18, n. 10 (Bankr. D. Mass. 2012), the "structured dismissal" was rejected because it did not account for significant senior tax claims of the IRS who objected, nor did it account for priority wage claims. Based on the U.S. Trustee's motion, the case converted because the major priority creditor objected to the dismissal that skips over its claim.

Appellees cite to this Court's decision in *In re Fleurantin*, 429 Fed. App'x 194 (3d Cir. 2011) for the proposition that this Court has recognized the validity of structured dismissals. This non-precedential opinion has nothing to do with the structured dismissals in commercial bankruptcies. In *Fleurantin*, a *pro se*

individual had filed a chapter 7 case and afterwards filed a chapter 13. *Id.* at 196. Due to the debtor's abuse of the bankruptcy process, the 13 was converted to 7. *Id.* The debtor filed a motion to dismiss the case unconditionally. *Id.* The trustee filed his own dismissal motion that contained conditions to protect creditors. *Id.* The bankruptcy court granted the trustee's motion and debtor appealed, arguing that he was entitled to an unconditional dismissal. *Id.* This Court stated "the trustee argued that a structured dismissal with conditions was in the best interest of the parties, particularly in light of the estate's continued expenditure of legal fees in response to Fleurantin's motions and other efforts to obstruct its administration." *Id.* at 197. The Court does not identify all the conditions but one was the payment of accrued professional fees (*id.* at 195-96) which are expressly authorized under 11 U.S.C. §§ 330, 331. This simple dismissal bears no resemblance at all to the structured dismissal approved here, involving administration of all claims of the estate and the diversion of estate assets in contravention of the Code.

## II. EQUITABLE MOOTNESS DOES NOT APPLY TO SETTLEMENTS IN THE ABSENCE OF A PLAN

Appellees are silent as to why equitable mootness should apply to the final cash distributed in a liquidating Chapter 11 case, especially through a falsely-denominated "settlement" that lacks statutory foundation. Equitable mootness may insulate the "gifting" and other priority-skipping deal-making tolerated outside this Circuit where the reemergence of a distressed debtor is at stake. The doctrine may

assure needed finality that makes new investors willing to invest and furthers the public interest in reorganizations. *See In re Club Associates.,* 956 F.2d 1065 (11th Cir. 1992) *cited in In re Cont'l Airlines*, 91 F.3d 553, 561 (3d Cir. 1996). Equitable mootness avoids undoing intricate transactions or the "unraveling of the entire plan of reorganization," *In re PWS Holding Corp.,* 228 F.3d 224, 236 (3rd Cir. 2000) (citations omitted). This Court requires that such a public interest be shown before equitable mootness applies.

Serving the public interest is the final and foremost *Continental* factor and "the lens through which the other equitable mootness factors should be viewed." *In re Nordhoff*, 258 F.3d 180, 190 (3rd Cir. 2001). The strong and well-established public policy of encouraging reliance on confirmed plans, the finality of bankruptcy judgments, and the successful reorganization of a company is the same as the public interest policy underlying Chapter 11 in the 1978 Code. *In re Philadelphia Newspapers*, LLC, 690 F.3d 161, 169 (3rd Cir. 2012) (encouraging reliance on confirmation orders "facilitat[es] successful reorganizations"); *In re Genesis Health Ventures, Inc.*, 280 B.R. 339, 347 (D. Del. 2002) ("When investors and other third parties can rely on a confirmed plan . . . they have the footing and confidence they need to pursue investments and business arrangements with the reorganized debtor, all of which foster the debtor's successful reorganization."). Appellees do not articulate any comparable public interest that would be served by protecting cash payout orders from review.

Nor do Appellees provide a reasoned basis for punishing the Drivers' failure to appeal the stay to the District Court with equitable mootness. "The absence of a stay does not compel a finding of mootness in all cases." *In re Club Assocs.*, 956 F.2d 1065, 1070 n. 13 (11th Cir. 1992). Rejecting the need for a stay, the Court in *In re Fontainebleau Las Vegas Holdings, LLC*, 434 B.R. 716, 745 (S.D. Fla. 2010) held equitable mootness did not apply to the appeal of a debtors' distribution of funds to creditors and professionals which arguably failed to follow the priority rule.[6] It found the funds had not been invested into a "Project" that would have to be unwound. *Id.* at 743-45. Rather, the bankruptcy court would simply "be required to order the funds returned to the estate pending a determination of the issue of priority." *Id.* at 745; *accord In re VOIP*, 461 B.R. 899 (S.D. Fla. 2011). Appellees have not pointed to any reliance placed by any third party investors (or any third parties at all) in business transactions that would have to be unwound were the Settlement overturned. They do not even contend that undoing the Settlement would complicate operations or negatively impact the vitality of a reorganized entity, which might contribute to a finding of equitable mootness. *In re Delta Airlines*, 374 B.R. 516, 524 (S.D.N.Y. 2007). As argued in the Drivers' opening brief and noted by the United States, a payment of money in exchange for a release triggers none of the concerns underlying equitable mootness and

[6] "The grounds for applying the doctrine outside the context of plans of reorganization are not as well established; indeed, they have been questioned." *Id.*

bankruptcy courts routinely order creditors to return voidable and preferential transfers to the estate. Appellants' Brief at 51-52; United States' Brief at 13.

Indeed, courts that have considered money-transfer settlements have rejected the claim of equitable mootness and upheld the right of the appellant to seek review of a bankruptcy court's order. *See In re VOIP, Inc.*, 461 B.R. at 904 *citing In re Cavic*, 380 Fed. App'x 611, 612 (9th Cir. 2010)(finding appeal was not moot because only a transfer of money was at issue); *In re Healthco Intern., Inc.*, 136 F.3d 45, 49 (1st Cir. 1998) (appeal is not equitably moot absent a showing that the settlement proceeds could not be recovered with relative ease); *In re Chateaugay Corp.*, 167 B.R. 776, 779 (S.D.N.Y.1994) (appeal from settlement order held not moot, although the settlement was tied to confirmation of plan and settlement payments had been made, when settlement funds could be returned, or other effective relief granted, without preventing the debtor's reorganization).

An additional factor that undercuts Appellees' argument that the Drivers' failure to appeal the stay denial is that it leads to absurdity. To avert equitable mootness, the stay pleading must show irreparable harm, *i.e.*, that relief cannot be practicably granted unless the stay is granted. But when relief can be granted because in a cash distribution the funds are easily recovered, the stay application is not only futile, it is dubious. Forcing the appellant to file and pursue a stay to preserve their right to seek judicial review makes sense only when a plan of reorganization is at stake or the defendants can otherwise carry their "heavy

burden" of demonstrating that there is "no effective relief remaining for a court to provide." *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004). Here, as in the cases above, the "difficulty inherent in trying to reverse a plan of reorganization is absent." *In re Fontainebleau*, 434 B.R. at 745. While it might "not [be] pleasant" for those involved," to return their funds, it was they who chose to receive them over the Drivers' objection. Id. There is no evidence that the return of funds would create an "unmanageable, uncontrollable situation" for the bankruptcy court. *Id.*

While some other courts have extended the doctrine to protect settlements, they have done so without addressing how the concerns giving rise to equitable mootness are implicated. In the non-precedential opinion of *Stokes v. Gardner*, 483 Fed. App'x 345 (9th Cir. 2012), the court does not describe the terms of the settlement and applies equitable mootness without any discussion or reasoning. The non-precedential case of *In re Pequeno*, 246 F. App'x 274 (5th Cir. 2007) applied equitable mootness to a settlement with a chapter 7 trustee without an analysis of the doctrine or whether it should apply to settlements.

The only decision of the Delaware District Court that the Drivers have located which dismissed an appeal of an earmarked settlement as equitably moot in the absence of a plan is *In re Kainos Partners Holding*, 2012 WL 6028927 (D. Del., Nov. 30 2012). *Kainos* assumes without discussion that equitable mootness applies to settlements. While the *Kainos* court cited *Northwestern Corp*. 2009 WL

2399120 (D. Del. Aug. 4 2009), that case involved a settlement and a plan. *Id*. at *2 ("both the Plan and the settlement have been substantially consummated."),

Courts in the Second Circuit have addressed the issue only somewhat more directly. In *In re PC Liquidation Corp*., 2008 WL 199457 (E.D.N.Y. 2008), the court states that equitable mootness applies even when there is no confirmed plan – without explanation. *Id*. at *5. Similarly, the court in *In re Delta Air Lines* held that equitable mootness may apply to settlements, but provides no real analysis supporting that conclusion. 374 B.R. at 522. The Second Circuit affirmed in a short non-precedential opinion without addressing why equitable mootness should apply to settlements. *Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc.*, 309 F. App'x 455 (2d Cir. 2009).

It should be stressed that this Court has not followed the lead of the Second Circuit on other issues related to equitable mootness. For example, in *SemCrude*, this Court rejected the Second Circuit's placing the burden of proof on the appellee. *SemCrude*, 728 F.3d 314, 322 (3d Cir. 2013). The Drivers submit that this Court's judicious approach to the doctrine of equitable mootness, which it has "emphasized should be 'limited in scope and cautiously applied'" cannot apply to the specific type of straight money distribution settlement at bar (*In re SemCrude L.P.*, 456 F. App'x at 169), particularly where the distribution not only lacked statutory foundation but abrogated the priority rules of the Code.

The case at bar is marked by the absence of a plan and the lack of hardships

to either side in going through the appeals procedure in the normal course. Without irreparable harms in the picture, the basis to obtain a stay is missing, as well as its very purpose. With no dynamic reorganization plan taking off from the runway, the doctrine of equitable mootness was not applicable to this case in the first place. Indeed, if this Court affirms the nonconsensual Settlement on grounds of equitable mootness, the practical consequence will be to make such "settlements" immune from all appellate oversight.

**1. Alternative Remedies Are Available**

Despite Appellees' protestations, this Court's direction in *SemCrude* and *SCH* is clear that in evaluating a motion to dismiss on equitable mootness grounds, the District Court must consider "the full range of relief . . . sought and the specific effect that relief would have on *third parties*." *SCH,* 2014 WL 2724606, *3 (3d Cir. Apr. 8, 2014).

**a. Voiding the Releases**

This Court should overturn the approval of the non-consensual release provided to Sun and CIT. *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000). Appellees argue that it would be inequitable to void the releases in favor of Sun and CIT because they were integral to the deal. But Sun and CIT knowingly paid the wrong party (the Committee, rather than the estate) under the Settlement to evade the Drivers' priority claims; and then, to engineer equitable mootness, allowed the Settlement funds to be disbursed. They may have had the right to

waive the condition of a final order—but they did so for no conceivable reason other than to create equitable mootness. In so doing, they assumed the risk that the Settlement could be undone by this Court.

Moreover, Appellees are wrong when they say that the $2 million of Settlement Proceeds benefitted the estate: quite the contrary, those funds were earmarked to pay chapter 11 administrative claimants (read, professionals). Settlement, ¶¶2(a), 6 JA 390, 395-96. Notably, the Settlement earmarks $200,000 from that fund to the Committee's professionals. Settlement, ¶ 5, JA-395. As dismissal of the cases is required under the Settlement (¶8, JA-396), the escrow of the administrative claims fund in the Settlement protects the chapter 11 professional creditors from the prospect that a chapter 7 trustee be appointed and incur expenses that would be senior their claims. 11 U.S.C. § 726(b) (providing that post-conversion administrative expenses have priority over pre-conversion expenses).

**b. Reformation**

Appellees argue that it would be inequitable to reform the settlement to require that the Settlement Proceeds be redistributed in accordance with the Code because Sun and CIT would supposedly never have settled on those terms. But Sun and CIT, other than repeating a statement unsupported in the record, do not explain how such payment would prejudice them. Whatever their visceral dislike of the Drivers, redistribution of the Settlement proceeds would have no effect on

Sun and CIT.

**c. Overturning the Bankruptcy Court's Determination that the Settlement is not a Byproduct of a Breach of Fiduciary Duty**

Appellees argue that the Committee could not have breached its fiduciary duty because the Settlement was in the best interest of creditors. Appellees' Brief at 61. That puts the rabbit in the hat. Obviously, if the Appellees are right on the merits, the issue of equitable mootness itself is moot. But Appellees are not right on the merits. The Committee did not discharge its fiduciary duty to maximize recovery *for the estate*. *In re Martin*, 91 F.3d at 393. Rather, it cooperated with Sun's litigation strategy to guaranty a recovery for its own constituency at the expense of the Drivers.

DATED: November 14, 2014

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a) (7) (B) (ii). This brief contains 6,947 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii) (*i.e.* 7,000 words).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

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## CERTIFICATION OF IDENTICAL COMPLIANCE TO BRIEFS

Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the PDF filed and hard copies of this brief are identical.

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## CERTIFICATION OF VIRUS CHECK

Pursuant to L.A.R. 31.1(c), I hereby certify that a virus check was performed on the electronic copy of this brief, using Symantec Endpoint Protection, and that no virus was indicated.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies pursuant to Fed. R. of App. P. 25 and L.A.R. 113.1 that on November 14, 2014, copies of the REPLY BRIEF OF APPELLANTS were served (1) electronically through the Court's CM/ECF filing system on all counsel who have entered their appearance; and (2) via electronic mail on all parties specified below:

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**No. 14-1465**

# United States Court of Appeals for the Third Circuit

In re: JEVIC HOLDING CORP., *et al.*, *Debtors.*

OFFICIAL COMMITTEE OF UNSECURED CREDITORS on behalf of the bankruptcy estates of Jevic Holding Corp., *et al.*,

v.

THE CIT GROUP/BUSINESS CREDIT, INC., in its capacity as Agent; SUN CAPITAL PARTNERS, INC.; SUN CAPITAL PARTNERS IV, LP; SUN CAPITAL PARTNERS MANAGEMENT IV, LLC.

CASIMIR CZYZEWSKI, MELVIN L. MYERS, JEFFREY OEHLERS, ARTHUR E. PERIGARD, AND DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated, *Appellants*.

On Appeal from the U.S. District Court for the District of Delaware
Civ. Action Nos. 13-104 & 13-105 (The Hon. Sue L. Robinson)

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, appellees make the following disclosures:

Defendant-appellee The CIT Group/Business Credit, Inc. is a wholly owned subsidiary of CIT Group Inc., which is a publicly traded company. No individual shareholder holds 10% or more of the stock of CIT Group Inc.

Defendant-appellee Sun Capital Partners, Inc. has no parent corporation and no publicly held company has a 10% or greater ownership interest.

Defendant-appellee Sun Capital Partners IV, LP, has no parent corporation and no publicly held company has a 10% or greater ownership interest.

Defendant-appellee Sun Capital Partners Management IV, LLC is wholly owned by Sun Capital Advisors IV, LP, and no publicly held company has a 10% or greater ownership interest.

Debtor-appellee Jevic Holding Corp. is a wholly owned subsidiary of Sun Transportation LLC and HIG Sun Partners, Inc., and no publicly held company holds 10% or more of its stock.

Debtor-appellee Jevic Transportation, Inc. is a wholly owned subsidiary of debtor-appellee Jevic Holding Corp., and no publicly held company holds 10% or more of its stock.

Debtor-appellee Creek Road Properties, LLC is a wholly owned subsidiary of debtor-appellee Jevic Transportation, Inc., and no publicly held company holds 10% or more of its stock.

## TABLE OF CONTENTS

**Page**

INTRODUCTION ........................................................................ 1

STATEMENT OF JURISDICTION ........................................................ 2

STATEMENT OF THE ISSUES ............................................................. 3

STATEMENT OF RELATED CASES ..................................................... 4

STATEMENT OF THE CASE AND THE FACTS .................................... 4

A. The Debtors Seek Chapter 11 Protection ................................ 4

B. The Adversary Proceeding Against CIT And The Sun Defendants ........................................................................ 5

C. The Bankruptcy Court Approves The Settlement .................. 9

D. The District Court Affirms The Bankruptcy Court's Order. ........................................................................ 13

STANDARDS OF REVIEW .................................................................. 14

SUMMARY OF ARGUMENT ................................................................ 15

ARGUMENT ........................................................................................ 18

I. The Bankruptcy Court Did Not Abuse Its Discretion By Approving The Settlement. ........................................................ 18

A. The Bankruptcy Court Properly Applied This Court's *Martin* Factors In Analyzing The Settlement. ...................... 19

B. The Bankruptcy Code's Priority Scheme Does Not Apply To Settlements. ........................................................ 28

II. The Bankruptcy Court Did Not Abuse Its Discretion By Dismissing The Debtors' Chapter 11 Cases. .................................. 39

III. The District Court Did Not Abuse Its Discretion By Holding That This Appeal Is Equitably Moot. ............................................ 42

A. The Doctrine Of Equitable Mootness Is Not Limited To Cases Where A Plan Of Reorganization Has Been Confirmed. .......... 43

B. The District Court Correctly Applied The Equitable Mootness Standard. .......... 48

1. The Appeal Was Equitably Moot Under Third Circuit Precedent. .......... 48

2. The WARN Claimants' Suggested Alternatives Would Be Inequitable. .......... 57

a. Voiding The Releases Would Be Inequitable. .......... 57

b. "Reforming" The Settlement Would Be Inequitable. .......... 60

c. Overturning The Bankruptcy Court's Fiduciary-Duty Ruling Would Be Inequitable. .......... 60

CONCLUSION .......... 61

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) ........ 29

*Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir. 1995) ........ 15, 28

*Gass v. Virgin Islands Tel. Corp.*, 311 F.3d 237 (3d Cir. 2002) ........ 27

*In re Anthanassious*, 418 F. App'x 91 (3d Cir. 2011) ........ 48

*In re AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984) ........ 34, 35

*In re Box Bros. Holding Co.*, 194 B.R. 32 (D. Del. 1996) ........ 55

*In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833 (3d Cir. 1994) ........ 32

*In re Capmark Fin. Grp. Inc.*, 438 B.R. 471 (Bankr. D. Del. 2010) ........ 34

*In re Chateaugay Corp.*, 10 F.3d 944 (2d Cir. 1993) ........ 55

*In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993) ........ 44

*In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (*en banc*) ........ 15, 43, 49, 53, 54, 55

*In re Delta Air Lines, Inc.*, 374 B.R. 516 (S.D.N.Y. 2007), *aff'd*, 309 F. App'x 455 (2d Cir. 2009) ........ 46, 54, 58

*In re Dow Corning Corp.*,
456 F.3d 668 (6th Cir. 2006) .......................................................... 29

*In re Fleurantin*,
420 F. App'x 194 (3d Cir. 2011) (*per curiam*) ................................. 42

*In re Foster Mortg. Corp.*,
68 F.3d 914 (5th Cir. 1995) ............................................................ 25

*In re Global Vision Prods., Inc.*,
No. 07-cv-12628, 2009 WL 2170253 (S.D.N.Y. July 14, 2009) ...... 55

*In re Goody's Family Clothing Inc.*,
610 F.3d 812 (3d Cir. 2010)............................................................ 15

*In re Highway Truck Drivers & Helpers Local Union No. 107*,
888 F.2d 293 (3d Cir. 1989)............................................................ 53

*In re ID Liquidation One, LLC*,
555 F. App'x 202 (3d Cir. 2014) ...................................................... 25

*In re Integrated Telecom Express, Inc.*,
384 F.3d 108 (3d Cir. 2004).............................................................. 4

*In re Iridium Operating LLC*,
478 F.3d 452 (2d Cir. 2007).......................................... 32, 33, 35, 37

*In re Kainos Partners Holding Co.*,
No. 10-560-LPS, 2012 WL 6028927 (D. Del. Nov. 30, 2012)45, 54-56

*In re Louise's, Inc.*,
211 B.R. 798 (D. Del. 1997)............................................................ 36

*In re Martin*,
91 F.3d 389 (3d Cir. 1996)................ 13, 19-21, 23-26, 28, 36-37, 39

*In re Metromedia Fiber Network, Inc.*,
416 F.3d 136 (2d Cir. 2005)............................................................ 44

*In re Nationwide Sports Distribs., Inc.*,
227 B.R. 455 (Bankr. E.D. Pa. 1998) ............................................. 36

*In re Northwestern Corp.*,
No. 08-513-JJF, 2009 WL 2399120 (D. Del. Aug. 4, 2009) ............ 46

*In re Nutraquest, Inc.*,
434 F.3d 639 (3d Cir. 2006) .......................................... 15, 20, 21, 24

*In re Pacific Lumber Co.*,
584 F.3d 229 (5th Cir. 2009) .......................................................... 29

*In re PC Liquidation Corp.*,
No. CV-06-1935 (SJF), 2008 WL 199457
(E.D.N.Y. Jan. 17, 2008) ................................................................. 46

*In re Pequeño*,
246 F. App'x 274 (5th Cir. 2007) (*per curiam*) ............................... 47

*In re PWS Holding Corp.*,
228 F.3d 224 (3d Cir. 2000) ............................................................ 29

*In re Semcrude, L.P.*,
728 F.3d 314 (3d Cir. 2013) .......................................... 14, 49, 56, 57

*In re SGL Carbon Corp.*,
200 F.3d 154 (3d Cir. 1999) ............................................................ 15

*In re Shubh Hotels Pittsburgh, LLC*,
439 B.R. 637 (Bankr. W.D. Pa. 2010) ............................................ 34

*In re Summit Metals, Inc.*,
477 F. App'x 18 (3d Cir. 2012) ........................................................ 25

*In re WebSci Techs., Inc.*,
234 F. App'x 26 (3d Cir. 2007) (*per curiam*) .................................. 23

*In re World Health Alternatives, Inc.*,
344 B.R. 291 (Bankr. D. Del. 2006) ......................................... 22, 23

*Mac Panel Co. v. Virginia Panel Corp.*,
283 F.3d 622 (4th Cir. 2002) .......................................................... 44

*Nordhoff Invs., Inc. v. Zenith Elecs. Corp*,
258 F.3d 180 (3d Cir. 2001) ............................................... 43, 45, 52

*Northview Motors, Inc. v. Chrysler Motors Corp.*,
186 F.3d 346 (3d Cir. 1999)....................21

*Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*,
330 F.3d 548 (3d Cir. 2003) (*en banc*)....................25, 37

*Resorts Int'l Hotel Casino v. NLRB*,
996 F.2d 1553 (3d Cir. 1993)....................1

*Stokes v. Gardner*,
483 F. App'x 345 (9th Cir. 2012)....................46, 47

*United Student Aid Funds, Inc. v. Espinosa*,
559 U.S. 260 (2010) ....................32

**Statutes and Rules**

11 U.S.C. § 1102....................5

11 U.S.C. § 1112....................42

11 U.S.C. § 1112(b) ....................41

11 U.S.C. § 1112(b)(1)....................40

11 U.S.C. § 1112(b)(4)....................41

11 U.S.C. § 1112(b)(4)(A)....................41

11 U.S.C. § 1112(b)(4)(M) ....................41

11 U.S.C. § 1123....................4

11 U.S.C. § 1129....................30, 31, 32

11 U.S.C. § 1129(a) ....................30

11 U.S.C. § 1129(b) ....................13, 29

11 U.S.C. § 1129(b)(2)....................30

11 U.S.C. § 1129(b)(2)(B)....................30

11 U.S.C. § 1129(b)(2)(B)(ii) ........ 29, 30

11 U.S.C. § 349........ 42

11 U.S.C. § 349(b) ........ 42

11 U.S.C. § 507........ 30, 31, 32, 38

11 U.S.C. § 726(a) ........ 31

28 U.S.C. § 1291........ 3

28 U.S.C. § 1334........ 2

28 U.S.C. § 157........ 2

28 U.S.C. § 158(a) ........ 3

28 U.S.C. § 158(d) ........ 3

29 U.S.C. § 2102........ 7

Fed. R. Bankr. P. 9019 ........ 9, 20, 21, 31, 33, 34, 35, 38

Fed. R. Civ. P. 62(e) ........ 52

**Other Authorities**

*Collier on Bankruptcy* (16th ed. 2014)........ 19

## INTRODUCTION

This case confirms the wisdom of the old adage that "the best should not be the enemy of the good"—courts "should not allow the infeasible perfect to oust the feasible good." *Resorts Int'l Hotel Casino v. NLRB*, 996 F.2d 1553, 1558 (3d Cir. 1993) (internal quotation and brackets omitted). Appellants, the only creditors who chose not to participate in the settlement of a fraudulent conveyance claim belonging to the debtors' estates, complain that the settlement allocates funds to other creditors with a lower statutory priority. But, as the bankruptcy court below emphasized, the choice here was not between this settlement and *another* settlement or a confirmed plan. Rather, the choice here was between this settlement and *no* settlement or plan. Under these circumstances, which are amply supported by the record, the bankruptcy court did not abuse its discretion by approving the settlement and then granting the debtors' motion to dismiss the Chapter 11 bankruptcy proceedings.

Appellants' suggestion that the settlement represents an end-run around the Bankruptcy Code's priority system misses the basic (and undisputed) point that there was no prospect of a confirmable plan in

this case. Settlement agreements (in sharp contrast to confirmed plans) are not subject to the Code's priority system, and nothing in law or logic requires bankruptcy courts, when "presented with two options, a meaningful return or zero," JA36, to choose zero. As the bankruptcy court below observed, the Bankruptcy Code "is not a suicide pact." JA1318.

In any event, as the district court recognized, appellants' objections to the settlement are equitably moot, because appellants failed to avail themselves of the option of seeking a stay of the bankruptcy court's order approving the settlement and dismissing the Chapter 11 proceedings. As a result, the settlement was substantially consummated and indeed the Official Committee of Unsecured Creditors, which participated in negotiating the deal, no longer exists. Accordingly, either on the merits or on equitable-mootness grounds (or both), this Court can and should affirm the judgment.

## STATEMENT OF JURISDICTION

The bankruptcy court had jurisdiction over the underlying Chapter 11 proceedings under 28 U.S.C. §§ 157 and 1334. That court approved the disputed settlement, and directed that the Chapter 11

cases would be dismissed upon implementation of the settlement, on December 4, 2012. JA45-51. Appellants timely appealed to the district court on December 18, 2012, JA5-12, but did not appeal the bankruptcy court's subsequent denial of a stay pending appeal, or seek such a stay from the district court.

The district court had appellate jurisdiction under 28 U.S.C. § 158(a). That court affirmed the bankruptcy court's order and dismissed the appeal on January 24, 2014. JA13-22. Appellants timely appealed that decision to this Court on February 21, 2014. JA1-4. This Court has jurisdiction over that appeal under 28 U.S.C. §§ 158(d) and 1291.

## STATEMENT OF THE ISSUES

1. Whether the bankruptcy court abused its discretion by approving the settlement.

2. Whether the bankruptcy court abused its discretion by dismissing the debtors' Chapter 11 cases.

3. Whether the district court abused its discretion by holding that this appeal is equitably moot.

## STATEMENT OF RELATED CASES

This case has never previously been before this Court, and appellees are not aware of any related case decided by, pending in, or about to be presented to, this Court.

## STATEMENT OF THE CASE AND THE FACTS

### A. The Debtors Seek Chapter 11 Protection

The debtors—appellees Jevic Transportation, Inc., Jevic Holding Corp., and Creek Road Properties, LLC (collectively "Jevic")—operated a trucking company that serviced the United States and parts of Canada. JA363. On May 20, 2008, they filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. JA362. Chapter 11 bankruptcy enables a debtor either to reorganize or to liquidate the bankruptcy estate. *See* 11 U.S.C. § 1123; *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 126 (3d Cir. 2004). Here, the debtors had no real prospect of reorganization: they wound down their business prior to filing the petitions, ending nearly all of their operations and terminating about 90% of their employees. JA14. With few assets and significant outstanding debts, the debtors began liquidating the estates to pay their creditors. *Id.*

The estates' senior secured creditors were appellees The CIT Group/Business Credit, Inc., in its capacity as Agent ("CIT") and Sun Capital Partners IV, LP ("Sun Fund IV"). Two years earlier, a wholly owned subsidiary of Sun Fund IV had acquired Jevic in a leveraged buyout financed with a loan from CIT. JA1141. When debtors filed their Chapter 11 petitions, they owed money to CIT under a secured credit facility (the "prepetition facility"). JA363. In addition, the debtors owed money to Sun Fund IV, which had paid CIT $2 million as a limited guarantor of the prepetition facility. *Id.* As of the petition date, the debtors owed CIT and Sun Fund IV together about $53 million. JA14. Among the debtors' other obligations was $24 million owed to general unsecured creditors. JA1236. Pursuant to 11 U.S.C. § 1102, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") to represent unsecured creditors in the bankruptcy. JA362. The Committee, although it no longer exists, is also formally an appellee here.

### B. The Adversary Proceeding Against CIT And The Sun Defendants

After filing for bankruptcy, the debtors obtained debtor-in-possession financing from CIT to fund the asset-sale process and thus

enhance CIT's odds of recovering on its investment. The debtors' prior obligations to CIT were "rolled up" into this new financing facility. JA363. Under its terms, the debtors admitted the priority of their obligations to CIT but the Committee was granted time to challenge CIT's claims and liens. JA522-23. Ultimately, the Committee initiated a fraudulent conveyance action on behalf of the bankruptcy estates against CIT, Sun Fund IV, and two other Sun entities, Sun Capital Partners Management IV, LLC and Sun Capital Partners, Inc. ("SCPI") (collectively the "Sun defendants"). JA523. Among other things, the Committee sought avoidance and recovery of transfers made to—and avoidance of liens asserted by—CIT and the Sun defendants, as well as equitable subordination of the Sun defendants' claims to those of general unsecured creditors. *Id.* CIT and the Sun defendants denied liability and raised affirmative defenses. JA389. CIT also asserted a counterclaim. *Id.*

In addition, the debtors, as well as SCPI, were defending against a claim by appellants (the "WARN claimants"), former Jevic employees. The WARN claimants had been paid their wages and benefits in full through the date of their termination (a total of $3 million). JA1264.

Nonetheless, they also sought monetary damages under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2102, and its New Jersey state-law analogue, alleging that they had not received the requisite 60 days' notice before termination. JA14. The WARN defendants disputed liability for these claims, and the debtors had no money left to pay damages even if the WARN claimants prevailed. JA1304.[1]

After almost four years of litigation, the parties to the fraudulent conveyance action ultimately agreed to settle their dispute. By that time, the Committee was cautious about continuing to litigate because the debtors had fully liquidated their tangible assets and had no unencumbered assets to fund the litigation. JA14, 1232, 1277. The estates' only remaining assets were the fraudulent conveyance claim and $1.7 million in cash, which was subject to Sun Fund IV's lien. JA1234-35. Sun Fund IV's secured claim was by then in excess of $2.4 million with fees and interest. JA363, 1233, 1253. The debtors had

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[1] In May 2013, the bankruptcy court granted SCPI's motion for summary judgment on the WARN claims on the ground that SCPI was not a "single employer" with Jevic for purposes of WARN liability. *See*

(Continued…)

paid most post-petition administrative expenses but still owed administrative fees and expenses totaling about $1.7 million, as well as $24 million to general unsecured creditors. JA1236.

The settlement negotiations initially involved all major economic stakeholders in the case, including the Committee, CIT, the Sun defendants, and the WARN claimants. JA28, 1237, 1240, 1274. But the parties could not agree on settlement terms that globally resolved both the fraudulent conveyance claim and the WARN litigation. JA34, 1274. As a result, the final settlement agreement did not resolve the WARN claims against either the debtors or SCPI. And the Sun defendants, in turn, refused to pay any money to the estates that would be distributed to the WARN claimants and then used by them to fund the ongoing WARN litigation against SCPI. JA1363.

On June 27, 2012, appellees filed a joint motion asking the bankruptcy court to approve their settlement and dismiss the Chapter 11 cases upon implementation of that settlement. The final agreement provided that:

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JA1139-58. The WARN claimants appealed that ruling, and the parties are awaiting a ruling by the district court.

- The parties would stipulate to the dismissal of the estates' fraudulent conveyance claim against CIT and the Sun defendants and exchange releases from all claims or liabilities, JA390-95;
- CIT would pay the debtors $2 million, which would be used to pay remaining Chapter 11 administrative claims, JA390;
- The Sun defendants would transfer to a trust for the benefit of debtors' general unsecured creditors an amount equal to all of the remaining funds in the estates (a "carve-out" from Sun Fund IV's lien), JA395-96; and
- Once debtors paid the administrative claims in full and the general unsecured creditors received their *pro rata* share of the trust, the Chapter 11 cases would be dismissed, JA396.

Both the WARN claimants and the U.S. Trustee objected to the proposed settlement. JA30-31.

### C. The Bankruptcy Court Approves The Settlement

After an evidentiary hearing, the bankruptcy court exercised its discretion under Rule 9019 of the Federal Rules of Bankruptcy Procedure to approve the proposed settlement. JA23-43, 45-51. In an oral ruling on November 28, 2012, the court explained that "dire circumstances" justified distribution under the settlement and the subsequent dismissal of the debtors' Chapter 11 cases. JA31. Applying the multi-factor test established by this Court for assessing bankruptcy settlements, the court found that the debtors had "no reasonable

prospect of a confirmable plan," "no assets or funds that are not subject to the liens of CIT and Sun Capital," no "resources to creditably prosecute the Committee's lawsuit," no "resources to, otherwise, wrap up these bankruptcy proceedings," and no reasonable prospect of a meaningful "distribution to unsecured creditors" absent the settlement. JA30. Faced "with two options, a meaningful return or zero," the court chose the former. JA36.

The court also rejected the objectors' argument that the settlement violates the Code's priority system. The court acknowledged that "the proposed distributions are not in accordance with the absolute priority rule" because settlement funds flowed to the general unsecured creditors but not to the WARN claimants. JA32. That point, however, did not foreclose approval of the settlement: "[B]ecause this is not a plan, and there is no prospect here of a confirmable plan being filed, the absolute priority rule is not a bar to approval of this settlement." *Id.*

Finally, the court held that dismissal of the Chapter 11 cases was appropriate because there was no feasible alternative. JA31. The Chapter 11 cases had "been pending for years … with no reasonable prospect of a confirmable plan." JA30. There were no unencumbered

assets left to administer. Aside from the pending litigation, "[a]ll material tasks needed to administer the estate ha[d] already been completed," and the estates "lack[ed] the resources to, otherwise wrap up these bankruptcy proceedings." *Id.* Nor was conversion to Chapter 7 a feasible alternative. A Chapter 7 trustee would have no "money to operate, investigate or litigate" the claims, and the "lenders have stated unequivocally and credibly that they would not do this deal in a Chapter 7." JA32. Thus, in the event of a Chapter 7 conversion, "the settlement proceeds would be taken by the secured creditors in relatively short order … with nothing leftover for stakeholders." *Id.*

On December 4, 2012 the court issued a written order approving the settlement agreement and directing the dismissal of the debtors' Chapter 11 cases upon implementation of the settlement. JA45-51. The WARN claimants appealed to the district court on December 18, 2012. JA5-12. The U.S. Trustee, in contrast, did *not* appeal the bankruptcy court's order, and did not participate in the appellate proceedings in the district court.

The WARN claimants (but not the U.S. Trustee) thereafter moved for a stay in the bankruptcy court. The court denied the WARN

claimants' motion for a stay, but instructed appellees not to consummate the settlement "in the very near future; meaning, in the next ten or fifteen days" to allow the WARN claimants to seek relief from the district court. JA1555; *see also* JA730-31. The WARN claimants, however, never sought any such relief, even after being advised on the record months later, in February 2013, that appellees were actively considering consummating the settlement because the approval order had not been stayed. JA16. After more than six additional months, appellees began to implement the settlement on August 28, 2013. *Id.* All funds were distributed under the settlement, including 1,039 final disbursement checks to general unsecured creditors and 29 final disbursement checks to unsecured priority tax claimants. *Id.* The bankruptcy court dismissed the Chapter 11 cases on October 11, 2013. *Id.* Because they had implemented the settlement and disbursed all funds, appellees filed a motion in district court to dismiss the WARN claimants' pending appeal as equitably moot. JA113-73.

### D. The District Court Affirms The Bankruptcy Court's Order.

The district court affirmed the bankruptcy court's order and dismissed the WARN claimants' appeal. Specifically, the court concluded that, under this Court's precedent, the bankruptcy court had not abused its discretion by approving the settlement. JA17 (citing *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996)). To the contrary, the district court held that the bankruptcy court had reasonably concluded on this record that the settlement "was in the best interest of the estate and of resolving the pending Chapter 11 cases." JA19.

The district court also agreed with the bankruptcy court that the absolute priority rule, codified in 11 U.S.C. § 1129(b), applies only to Chapter 11 plans and thus did not bar the settlement, which "is not a reorganization plan," JA19, and is subject only to the "criteria for approval under Bankruptcy Rule 9019 and the standards set forth under *In re Martin*." JA20 (internal quotation omitted).

In the alternative, the district court held that the appeal was equitably moot. The court applied the equitable-mootness analysis established by this Court: "'(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief

requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.'" JA20 (quoting *In re Semcrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013)). The court held that: (1) the settlement had been substantially consummated because all funds had been distributed; and (2) if the appeal were granted, (a) the settlement would be irreversibly scrambled, "as it did not provide for funds for appellants' speculative recovery and appellants chose not to substantively participate in the negotiation and subsequent settlement," and (b) the parties had negotiated a resolution "following years of litigation and will be harmed if the settlement is now unwound." JA20.

The WARN claimants now appeal to this Court. Although the U.S. Trustee neither appealed the bankruptcy court's order to the district court nor sought a stay of that order, it has filed an *amicus* brief addressing the same issues it litigated in the bankruptcy court and chose not to appeal.

## STANDARDS OF REVIEW

Where, as here, a district court sits as an appellate court to review the bankruptcy court's order, this Court exercises plenary review of the

district court, *see*, *e.g.*, *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1223 (3d Cir. 1995), and "review[s] the Bankruptcy Court's legal determinations *de novo,* its factual findings for clear error, and its exercises of discretion for abuse thereof," *In re Goody's Family Clothing Inc.*, 610 F.3d 812, 816 (3d Cir. 2010).

Specifically, a bankruptcy court's approval of a settlement is reviewed only for abuse of discretion. *See*, *e.g.*, *In re Nutraquest, Inc.*, 434 F.3d 639, 644 (3d Cir. 2006). Likewise, a bankruptcy court's decision to dismiss a Chapter 11 case is "committed to the sound discretion of the bankruptcy … court" and is reviewed for abuse of discretion. *In re SGL Carbon Corp.*, 200 F.3d 154, 159 (3d Cir. 1999). And, because a decision applying the doctrine of equitable mootness "involves a discretionary balancing of equitable and prudential factors," this Court "review[s] that decision generally for abuse of discretion." *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (*en banc*).

## SUMMARY OF ARGUMENT

This Court can resolve this appeal on two separate and independent grounds: (1) the merits, or (2) equitable mootness.

Turning first to the merits, the bankruptcy court did not abuse its discretion by approving a settlement that resolved a long-shot fraudulent conveyance claim against CIT and the Sun defendants that the estates lacked the funds to continue pursuing. Tellingly, the WARN claimants presented *no* witnesses or evidence of their own at the hearing to support their objections to the settlement agreement, and even now make *no* serious challenge to the settlement under the well-settled multifactor standard for evaluating settlements. Instead, they seek to avoid that standard altogether by arguing that, as a matter of law, settlement agreements are governed by the Code's priority system. That argument is incorrect: the Code's priority system does not apply to settlements, and here the bankruptcy court reasonably determined that deviation from the Code's priority system was in the creditors' overall best interest, because there was no prospect either of a confirmable Chapter 11 plan or of a Chapter 11 settlement that allocated money to the WARN claimants. Thus, as the bankruptcy court noted, the choice was between approving this settlement and obtaining some recovery for most creditors, or rejecting this settlement and obtaining nothing for any creditors besides CIT and Sun Fund IV. The WARN claimants

identify nothing in the Code that required the bankruptcy court to reject this pragmatic and equitable solution in favor of—in the WARN claimants' own words—"an economically ugly result." JA1327.

Nor, also on the merits, did the bankruptcy court abuse its discretion by dismissing the Chapter 11 cases after approving the settlement. After the settlement was approved, the estates had no remaining assets to administer, and hence there was nothing further to do. The Code specifically allows bankruptcy courts to dismiss Chapter 11 cases for "cause," and the bankruptcy court here had ample "cause" for such dismissal. The WARN claimants' argument that any such dismissal must restore the *status quo ante* has no basis in principle or precedent. To the contrary, the dismissal order contains standard language specifying that "[n]otwithstanding entry of this Order, all stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality and *res judicata*." JA51.

Turning finally to equitable mootness, the district court did not abuse its discretion by holding in the alternative that this appeal is equitably moot. The bankruptcy court gave the WARN claimants an opportunity to seek a stay from the district court before substantial consummation of the settlement agreement, but the WARN claimants failed to avail themselves of that opportunity, and hence allowed the settlement to take effect and funds to be distributed to all creditors other than the WARN claimants. This appeal can only be described as an attempt to wrest inequity from the jaws of equity: overturning the settlement at this late date would not only require "unscrambling" the settlement and clawing back long-distributed funds, but would almost certainly result in a conversion to a Chapter 7 case in which the estates have no funds to pursue a long-shot fraudulent conveyance claim against CIT and the Sun defendants. Again, nothing in principle or precedent required the district court to choose this inequitable option.

## ARGUMENT

### I. The Bankruptcy Court Did Not Abuse Its Discretion By Approving The Settlement.

The WARN claimants argue, first and foremost, that the bankruptcy court erred by approving a settlement that "earmarked

settlement proceeds for the benefit of select creditors thereby skipping distribution to the [WARN claimants], the creditors with the higher priority." WARN Cls.' Br. 16; *see also id.* at 19-43. According to the WARN claimants (and their *amicus*, the Government), Chapter 11 settlements—just like confirmed plans—are subject to the Code's priority system, and it is *per se* an abuse of discretion for a court to approve a settlement that does not reflect the statutory priorities. *See* WARN Cls.' Br. 21-28, 35-38; Gov't Br. 14-22.

As explained below, that is simply not the law. Rather, this Court has set forth four factors—the so-called "*Martin*" factors—to guide bankruptcy courts in exercising their discretion to approve proposed settlements. *See Martin*, 91 F.3d at 393. Neither the WARN claimants nor the Government advances any serious argument that the bankruptcy court here abused its discretion in applying the *Martin* factors. That point should be the beginning and the end of the matter.

### A. The Bankruptcy Court Properly Applied This Court's *Martin* Factors In Analyzing The Settlement.

As this Court and others have recognized, "[c]ompromises are favored in bankruptcy," *Collier on Bankruptcy* ¶ 9019.01 (16th ed. 2014), and bankruptcy courts are specifically authorized to "approve"

them, Fed. R. Bankr. P. 9019. In assessing a particular settlement under Rule 9019, a bankruptcy court must "balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Martin*, 91 F.3d at 393. This Court has "recognize[d] four criteria that a bankruptcy court should consider in striking this balance: (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." *Id.*; *see also Nutraquest*, 434 F.3d at 644-45 (reaffirming the *Martin* criteria).

*Martin* controls this case, and the courts below carefully considered its four factors. *See* JA29-30, 34-36 (bankruptcy court articulates and applies the "well settled" four-factor analysis governing approval of settlements under Rule 9019); JA17 (district court concludes that "the bankruptcy court properly evaluated the proposed settlement, considering the *Martin* test's four criteria").[2] Because the bankruptcy

[2] The Government suggests in passing that this case does not involve a settlement at all. *See* Gov't Br. 19 ("Although denominated a (Continued…)

court properly identified and applied the governing legal standard, its application of the *Martin* factors commands deference. *See, e.g.*, *Nutraquest*, 434 F.3d at 644. Far from abusing its discretion, the bankruptcy court correctly concluded that the benefits of approving the proposed settlement far outweighed any benefits of continued litigation. *See* JA34-36.

Turning initially to the first and third *Martin* factors, the bankruptcy court noted that "[t]he Committee's prospect for success in

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'settlement,' the settlement agreement at issue in this appeal is not a voluntary settlement in the ordinary sense because the [WARN claimants], whose right to priority payment was eliminated in the settlement, rejected its terms."). That suggestion is mystifying. This case involves a settlement between the adverse parties to the fraudulent conveyance litigation: the plaintiff Committee, litigating on behalf of the estates, and the defendants CIT and Sun. What the Government appears to be suggesting is that the Committee was not entitled to enter into a settlement on behalf of the estates if any creditor objected. But the Government immediately disavows that very point: "To be sure, bankruptcy courts may approve settlements of estate claims over the objection of one or more creditors if the fair and equitable standard and the *Martin* criteria are satisfied." *Id.* at 20. That concession is prudent, because Bankruptcy Rule 9019 provides a panoply of protections, including notice and a hearing, to protect parties "interested in the disposition of the estate but who did not themselves enter into the settlement agreement." *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 351 (3d Cir. 1999). The Bankruptcy Code would be unworkable if every creditor had an absolute right to veto settlements.

its lawsuit, are uncertain at best." JA34; *see also* JA35 ("It is an understatement to say that this litigation is not a slam dunk."). As the court explained, the litigation "raises challenges to perfected prepetition liens, and liens that have been approved post petition." *Id.* "Without getting too far into the specifics of the lawsuit I note that the record developed at the trial indicates that there are several independent hurdles that the Committee would have to clear before it would actually see a material recovery out of the litigation." *Id.*; *see generally* JA1273 (settlement hearing testimony that defendants' expert was prepared to testify that intervening events in 2008 such as the declining economy and shrinking demand for the trucking business, not the leveraged buyout, caused the company's failure); *In re World Health Alternatives, Inc.*, 344 B.R. 291, 302 (Bankr. D. Del. 2006) ("[S]uccessful challenges to a pre-petition first lien creditor's position are unusual, if not rare.").

In addition, the court noted, "this litigation would be expensive to prosecute and would, presumably, take years to [w]end its way through the trial and appellate processes." JA35. Aside from the claims involved in the litigation, however, the estates' only remaining asset was $1.7 million in cash, encumbered by the liens of CIT and Sun

Fund IV. JA30. All else had been liquidated and distributed, and the little money remaining was overshadowed by the tens of millions of dollars that the estates still owed their creditors. JA35; *see also* JA1233-36 (settlement hearing testimony about estates' finances). "The Court presumes from its prior experience that CIT and Sun Capital are well he[e]led, and will vigorously defend. The estate, by contrast ... has no available funds." JA35; *see also* JA30 ("The Debtor ... lacks the resources to creditably prosecute the Committee's lawsuit, and the Committee lacks, therefore, the resources as well."); JA1275-77 (settlement hearing testimony regarding expenses of litigation and estate's lack of funds); *see generally In re WebSci Techs., Inc.*, 234 F. App'x 26, 29 (3d Cir. 2007) (*per curiam*) (approving settlement, in part, because "the estate did not have sufficient funds to support the litigation"); *World Health*, 344 B.R. at 302 (approving settlement, in part, because of "the low probability of success and the estate's limited resources").[3]

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[3] The bankruptcy court observed that "the ... prong [of the *Martin* analysis] relating to collection difficulties does not really enter this analysis." JA36. The WARN claimants do not dispute that conclusion, so that prong effectively drops out of this case. *See Nutraquest*, 434
(Continued…)

Finally, the bankruptcy court noted that "[t]he final and most important consideration according to the case law is the paramount interest of creditors, and here that prong has certainly been satisfied." JA36. "The record reflects a substantial distribution to unsecured and certain administrative creditors under the settlement"—a distribution that would likely be unavailable without the settlement. *Id.*; *see also* JA32. The only objecting creditors, the WARN claimants, would not be unfairly prejudiced by the settlement, because they had already been paid all of their wages in full, and their claim against the estates for statutory WARN damages "is presently, effectively worthless given that the estate[s] lack[] available unencumbered funds to satisfy it if it were allowed." JA36. In any event, nothing in the settlement impaired their ability to continue pursuing their WARN claims against the debtors and SCPI. *Id.*

In short, the court noted, "I am presented with two options, a meaningful return or zero." *Id.* Under *Martin*, that was not a hard call: "[t]he paramount interest of the creditors mandates approval of the

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F.3d at 646 ("The parties agree that … ease of collection[] is not relevant here, so we only discuss three of the four *Martin* factors.").

settlement." *Id.* Better to have some creditors get something rather than all creditors (besides CIT and Sun Fund IV) get nothing. Because the settlement maximized value for—and was endorsed by—the vast majority of creditors, the bankruptcy court reasonably determined that it was in the best interest of the estates. *See*, *e.g.*, *In re ID Liquidation One, LLC*, 555 F. App'x 202, 206 (3d Cir. 2014) (upholding approval of settlement endorsed by parties that "represented the overwhelming economic interests in these cases" and had "the primary economic stake being affected") (internal quotations omitted); *In re Summit Metals, Inc.*, 477 F. App'x 18, 20-22 (3d Cir. 2012) (upholding approval of settlement that maximized value to creditors); *cf. In re Foster Mortg. Corp.*, 68 F.3d 914, 917 (5th Cir. 1995) (settlement not in the best interest of the estate where the "overwhelming majority of creditors" opposed it). The Committee therefore fulfilled its fiduciary duty to the estates by endorsing it. *See* JA33-34; *see generally Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568-69 (3d Cir. 2003) (*en banc*).

Remarkably, given that this appeal presents a challenge to the bankruptcy court's approval of a settlement, the WARN claimants do

not even cite *Martin* in their opening brief, and take only scattered pot-shots at the bankruptcy court's *Martin* analysis. The WARN claimants presented *no* witnesses or evidence of their own at the hearing to support their objections to the settlement agreement, and all of their shots now miss the mark.

*First*, the WARN claimants assert that "Appellees introduced no evidence that the exclusion of [the WARN claimants] was an essential term" of the settlement. WARN Cls.' Br. 41. That assertion is baffling. It is undisputed that the WARN claimants are pursuing their own claims against the debtors and SCPI, and it is a matter of common sense (and certainly a fair inference for the court to draw) that "if the money goes to the WARN plaintiffs, then you're funding somebody who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis." JA1363-64. Indeed, the WARN claimants themselves acknowledge in their brief that "[i]t was ... the paramount interest of the Committee to negotiate a deal under which the [WARN claimants] were excluded" because "Sun did not want to fund the [WARN claimants']" litigation against SCPI. WARN Cls.' Br. 28. In any event, the WARN claimants forfeited this argument by failing to

raise it in the bankruptcy court, where (if there were anything to the argument) appellees could have "develop[ed] a factual record." *Gass v. Virgin Islands Tel. Corp.*, 311 F.3d 237, 246-47 (3d Cir. 2002) (internal quotation omitted).

*Second*, the WARN claimants assert that "there was ... no evidence that a chapter 7 trustee could not negotiate an alternative settlement." WARN Cls.' Br. 41. But the bankruptcy court specifically found that "[t]he lenders have stated unequivocally and credibly that they would not do this deal in a Chapter 7," JA32, and there is ample record support for that finding, *see*, *e.g.*, JA1301. In addition, the bankruptcy court found, based on ample record evidence, that a Chapter 7 trustee would have no "money to operate, investigate or litigate" the claim at all. JA32; *see also* JA1289-91; 1310. And again, the WARN claimants forfeited this argument by failing to raise it in the bankruptcy court. *See, e.g., Gass*, 311 F.3d at 246-47.

*Third*, and related, the WARN claimants argue that it was clear error for the bankruptcy court to find—"without evidentiary foundation"—that no counsel would have agreed to pursue the claims in Chapter 7 on a contingency basis. WARN Cls.' Br. 42. Once again,

however, there was ample testimony to support the court's conclusion that no sane lawyer would "front the substantial expenses" of the litigation in light of the exceedingly long odds of success. JA35-36; *see id.* ("*[O]n these facts* I think any lawyer or firm that signed up for that role should have his head examined"); *see generally* JA1261, 1289-91, 1363. Although the standard for showing clear error is "fairly stringent," the WARN claimants make no effort to show that the bankruptcy court's determination was "completely devoid of minimum evidentiary support displaying some hue of credibility." *Fellheimer*, 57 F.3d at 1223 (internal quotation omitted). Indeed, the WARN claimants offer no reason to doubt the testimony of Edward Gavin, the Committee's financial advisor, who explained why finding contingency counsel was unlikely, JA1261, and they introduced *no* contrary evidence of their own.

### B. The Bankruptcy Code's Priority Scheme Does Not Apply To Settlements.

Wholly independent of the *Martin* analysis, the WARN claimants and the Government insist that the bankruptcy court abused its discretion by approving the settlement because the distribution system established by the settlement does not comport with the Code's priority

system. *See* WARN Cls.' Br. 21-28, 35-38; Gov't Br. 14-22. That argument is incorrect as a matter of law.

The absolute priority rule, as the Supreme Court, this Court, and others have explained, is a traditional common-law rule now codified in 11 U.S.C. § 1129(b)(2)(B)(ii). *See, e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 449 (1999) ("[T]he absolute priority rule now on the books as subsection (b)(2)(B)(ii)."); *In re PWS Holding Corp.*, 228 F.3d 224, 229 (3d Cir. 2000) (referring to "[t]he absolute priority rule, found in 11 U.S.C. § 1129(b)(2)(B)(ii)"); *see also In re Pacific Lumber Co.*, 584 F.3d 229, 244 (5th Cir. 2009) ("The absolute priority rule … is codified in … 11 U.S.C. § 1129(b)."); *In re Dow Corning Corp.*, 456 F.3d 668, 672 (6th Cir. 2006) ("[I]n § 1129(b) of the Code, Congress codified the 'absolute priority rule.'"). Under that rule, creditors are divided into classes according to the priority of their claims, and the claims of senior classes must be paid before the claims of junior classes. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) ("[T]he condition that a *plan* be fair and equitable with respect to a class includes the following requirements ... With respect to a class of unsecured claims ... the holder of any claim or interest that is junior to the claims of such

class will not receive or retain *under the plan* on account of such junior claim or interest any property.") (emphasis added).

By its plain terms, the absolute priority rule applies only to a "plan." Indeed, Section 1129, in which the rule is codified, is entitled "Confirmation of plan" and describes the "requirements" for a court to "confirm a plan." 11 U.S.C. § 1129(a). Not surprisingly, thus, both the WARN claimants and the Government acknowledge that this provision does not apply to the approval of a settlement. *See* WARN Cls.' Br. 37 ("[T]he requirement in 11 U.S.C. § 1129(b)(2)(B) … plainly does not apply here."); Gov't Br. 21 (acknowledging that "section 1129 ... is ... limited to plans").

Instead, the WARN claimants and the Government accuse the bankruptcy court of "conflat[ing] the absolute priority rule of 11 U.S.C. § 1129(b)(2) with the priority system of the Code." WARN Cls.' Br. 37; *see also* Gov't Br. 20 ("It appears that the bankruptcy court conflated section 507 with the absolute priority rule codified in section 1129(b)(2)(B)(ii)."). That accusation is baseless. Section 507 of the Code simply describes the priority of particular "expenses and claims." 11 U.S.C. § 507. It does not specify the circumstances under which

bankruptcy courts are required to apply those priorities. That is why Congress enacted Section 1129 to specify that the priorities set forth in Section 507 apply to plans; Section 507 itself does not impose its priority system upon plans (or anything else). *See* 11 U.S.C. § 1129; *see also* 11 U.S.C. § 726(a) (providing that, in Chapter 7 liquidation, "property of the estate shall be distributed … first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title"). No analogous enabling provision specifies that the priorities set forth in Section 507 also apply to settlements. Certainly, Bankruptcy Rule 9019, which governs judicial approval of bankruptcy settlements, says nothing of the sort. Because this case is governed by Rule 9019, the Government misses the point by insisting that "[t]he applicable provision is section 507, not section 1129." Gov't Br. 14.

Neither the WARN claimants nor the Government cite a *single* case holding that Section 507 applies to settlements. Rather, the Government bases its argument on the following syllogism: "Section 507 gives [senior creditors] an affirmative right to priority payment in chapter 11 cases. And section 507, unlike section 1129, is not limited to plans. Therefore, a settlement must comply with section 507 before the

bankruptcy court can approve it." Gov't Br. 21. But that conclusion simply does not follow, because the minor premise ("[S]ection 507, unlike section 1129, is not limited to plans") is just a play on words. Section 507, as noted above, simply establishes a system of priorities, but does not specify when those priorities become relevant. Tellingly, neither of the cases that the Government cites for its conclusion that "a settlement must comply with section 507 before the bankruptcy court can approve it," has anything to do with this subject. Gov't Br. 21 (citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 273-75 (2010), and *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994)). Indeed, neither of those cases even *mentions* Section 507; the citations are thus unexplained and inexplicable.

Undeterred, both the WARN claimants and the Government invoke the Second Circuit's decision in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), for the proposition that "the Code's priority scheme *must* be respected in pre-plan settlements." Gov't Br. 21 (emphasis added); *see also* WARN Cls.' Br. 26-27, 36. That reliance is not only misplaced, but ironic, because that case specifically *rejected* that very proposition. As the Second Circuit explained, "a rigid *per se*

rule cannot accommodate the dynamic status of some pre-plan bankruptcy settlements." *Iridium*, 478 F.3d at 464. To the contrary, the Second Circuit held, whether a settlement deviates from the Code's priority scheme is merely a factor—albeit, in its view, "the most important factor," *id.*—in the multifactor analysis required under Rule 9019. In particular, "[t]he court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code." *Id.*

The bankruptcy court's decision below is entirely consistent with this approach. In applying the multifactor analysis required under Rule 9019, the court made clear that the settlement here was *not* "a means to avoid the priority strictures of the Bankruptcy Code." *Id.* Specifically, as noted above, the bankruptcy court found (and neither the WARN claimants nor the Government disputes) that there was no prospect of a confirmable plan in this case. *See* JA30; WARN Cls.' Br. 59 (acknowledging that "no chapter 11 plan is possible"). Where, as here, there is no prospect of a confirmable plan, by definition a settlement cannot be characterized as "an impermissible *sub rosa* effort to circumvent the requirements for confirmation in chapter 11." WARN

Cls.' Br. 24. Circumvention of a plan presupposes the prospect of a plan to circumvent. *See*, *e.g.*, *In re Shubh Hotels Pittsburgh, LLC*, 439 B.R. 637, 644 (Bankr. W.D. Pa. 2010) ("Where a transaction has the effect of dictating the terms of a prospective chapter 11 plan, it will constitute a prohibited *sub rosa* plan."); *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 513 (Bankr. D. Del. 2010) ("A settlement constitutes a *sub rosa* plan when the settlement has the effect of dictating the terms of a prospective chapter 11 plan."). Without the prospect of a confirmable Chapter 11 plan, there is no risk that "colluding parties could improperly employ settlement as a means to avoid the priority strictures of the Code." Gov't Br. 22.

For just this reason, the WARN claimants' reliance on *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984), is misplaced. *See* WARN Cls.' Br. 26, 35-36; *see also* Gov't Br. 21. In that case, the Fifth Circuit vacated a bankruptcy court's approval of a settlement under former Bankruptcy Rule 919(a)—the precursor to Bankruptcy Rule 9019—because it deviated from the Code's priority system. *See* 725 F.2d at 297-98. But there, the bankruptcy court approved a settlement that, by distributing estate funds to junior creditors, threatened to "wholly

deplete[]" the estate, thereby thwarting the senior secured creditors' ability to obtain their priority recovery under a plan. *Id.* at 298. That rationale—which, the court emphasized, "has no necessary implications beyond the present, limited context," *id.*, has no bearing where, as here, there is *no* prospect of a confirmable plan. The alternative to the settlement here was not a plan that distributed assets to creditors according to the Code's priority system, but *no* plan and *no* settlement and thus *no* distribution of *any* assets to *any* creditor other than CIT and Sun Fund IV. *See generally Iridium*, 478 F.3d at 464 (disagreeing with *AWECO* to the extent it suggests that a bankruptcy court has no discretion to approve a settlement that does not comply with the Code's priority system). It bears emphasizing again that, at the hearing on the settlement agreement, the WARN claimants presented *no* witnesses or evidence of their own, including any evidence that would allow (much less compel) the conclusion that the WARN claimants would recover anything in a Chapter 7 proceeding.

Similarly, the WARN claimants err by arguing that "[c]ase law teaches that Rule 9019 does not authorize the Bankruptcy Court to approve any transaction denominated a 'settlement' that is designed to

favor some creditors over others, instead of the estate as a whole." WARN Cls.' Br. 23-24 (citing *In re Nationwide Sports Distribs., Inc.*, 227 B.R. 455 (Bankr. E.D. Pa. 1998), and *In re Louise's, Inc.*, 211 B.R. 798 (D. Del. 1997)). The bankruptcy courts in those cases simply declined to approve settlements in their discretionary application of the *Martin* criteria to particular facts. Those courts concluded that the proposed settlements—assuming they qualified as settlements at all, *see Nationwide Sports*, 227 B.R. at 460—were not in the best interest of the estate. Here in sharp contrast, the bankruptcy court reasonably reached the opposite conclusion when "presented with two options, a meaningful return or zero." JA36.

Neither the WARN claimants nor the Government seriously contends that rejecting the settlement here would have been in the best interest of the estates. Rather, they simply insist that rejecting the settlement here was required by law. As the WARN claimants candidly put it below:

> [W]e have to accept the fact that there are times when, for the purpose of upholding the sanctity of the code, we have to accept the fact that we are sometimes going to get a really ugly result, an economically ugly result, but it's an economically ugly result that is dictated by provisions of the code. And we have to ask ourselves is that economically ugly

> result something that is actually better than allowing a perversion of the code, allowing money to be distributed not in accordance with the way that Congress said it should be disposed of.

JA1327.

As explained above, however, nothing in the Code requires bankruptcy courts to reject settlements that do not comply with the Code's priority system. Those priorities, like other provisions of the Code, are certainly relevant in assessing the interests of creditors under the multifactor *Martin* framework, but are not dispositive. In (concededly unusual) cases like this one, a bankruptcy court may reasonably conclude that a settlement that allows some creditors a recovery is better for an estate than no settlement at all. "[T]he code is not a suicide pact." JA1318; *see also Iridium*, 478 F.3d at 466 (bankruptcy court need not force estate to continue litigation where it "would be devastated"). To the contrary, as the Supreme Court and this Court have emphasized time and again, "bankruptcy courts are equitable tribunals that apply equitable principles in the administration of bankruptcy proceedings," and "[t]he enactment of the Code in 1978 ... did not alter bankruptcy courts' fundamental nature." *Cybergenics*, 330 F.3d at 567.

Because nothing in the Code dictates a contrary result, both the WARN claimants and the Government beg the question by arguing that "[b]ankruptcy courts may not approve settlement terms that violate the Code." Gov't Br. 20; *see also id.* at 19 ("[A] rule cannot defeat a statute, so Rule 9019 cannot trump section 507."). No one here is suggesting that Rule 9019 allows bankruptcy courts to rewrite the Code, create additional exceptions to Code provisions, or reorder Congress's priority scheme. *See* WARN Cls.' Br. 32-34; Gov't Br. 16-20. Rather, the WARN claimants and the Government are attempting to rewrite the Code by conjuring up a non-existent provision mandating application of the Section 507 priority system to settlements.

Finally, there is no merit to the WARN claimants' argument that, unless the Code's priority system applies to settlements, "estate fiduciaries, merely by labeling a transaction a 'settlement,' would be able to divert the estate's essential funds … to anyone with enough negotiating leverage." WARN Cls.' Br. 22; *see also* Gov't Br. 21 (arguing that, unless the Code's priority system applies to settlements, "courts could prefer junior creditors and deplete the estate through settlement"). These slippery-slope arguments wholly ignore the

existence and force of the *Martin* analysis. Under *Martin*, bankruptcy courts may not simply rubber-stamp proposed settlements, but must analyze multiple criteria ultimately to decide whether the settlement is in the best interest of the estate. As noted above, the bankruptcy court here properly conducted that analysis, and did not abuse its discretion by approving the settlement.

## II. The Bankruptcy Court Did Not Abuse Its Discretion By Dismissing The Debtors' Chapter 11 Cases.

The WARN claimants next argue that the bankruptcy court's order granting the debtors' motion to dismiss the Chapter 11 cases "gave Appellees a free pass through Chapter 11, whose only avenues for exit are either a confirmed plan, a conversion of the case to chapter 7, or a plain dismissal." WARN Cls.' Br. 16; *see also id.* at 44-46. But they never explain the practical significance of this argument—which may explain why it occupies only two pages of their brief. If, as discussed above, the bankruptcy court did not abuse its discretion by approving the settlement, then it is not clear why the court's subsequent disposition of the Chapter 11 cases makes any difference. The WARN claimants never explain how, separate and apart from their alleged

grievances relating to the settlement, they were aggrieved by the dismissal of the Chapter 11 cases.

After the bankruptcy court approved the settlement, "[a]ll material tasks needed to administer the estates [were] completed," JA30, and there was nothing left to do. The petitions had "been pending for years … with no reasonable prospect of a confirmable plan," *id.*, and all funds had been distributed, JA16. Conversion to Chapter 7 was not an option: there were no unencumbered assets for a Chapter 7 trustee to distribute and no chance of a similar settlement—the "lenders have stated unequivocally and credibly that they would not do this deal in a Chapter 7." JA32. Given the lack of assets in the estate, a Chapter 7 trustee could not even afford to continue litigating the fraudulent conveyance claim. *Id.* Thus, in the event of a Chapter 7 conversion, "the settlement proceeds would be taken by the secured creditors in relatively short order … with nothing leftover for stakeholders." *Id.*

Under these circumstances, the bankruptcy court did not remotely abuse its discretion by granting the debtors' motions to dismiss the Chapter 11 cases for cause. *See* 11 U.S.C. § 1112(b)(1) (authorizing a

court to "convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause"); 11 U.S.C. § 1112(b)(4) (setting forth non-exhaustive list of sixteen factors for "cause"). Here, among other things, there was a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," *id.* § 1112(b)(4)(A), and "inability to effectuate substantial consummation of a confirmed plan," *id.* § 1112(b)(4)(M). No creditors, including the WARN claimants, had any further interest in keeping the Chapter 11 proceedings alive. The court thus reasonably determined that there was "cause" for dismissal.

The WARN claimants insist, however, that "Section 1112(b) contains no option for dismissal 'with strings attached.'" WARN Cls.' Br. 45. In their view, the only permissible dismissal was one that restored all the parties to the *status quo ante*, before the Chapter 11 petitions were filed (and thus a dismissal that undid the settlement). *See id.* They are wrong. The dismissal order here contains standard language specifying that "[n]otwithstanding entry of this Order, all stipulations, settlements, rulings, orders and judgments of this Court

made during the course of the Chapter 11 Cases shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality and *res judicata*." JA51. Nothing in Section 1112 suggests that a dismissal must be unconditional, and indeed this Court has specifically rejected that argument. *See*, *e.g.*, *In re Fleurantin*, 420 F. App'x 194, 197 (3d Cir. 2011) (*per curiam*).

The WARN claimants' reliance on Section 349, *see* WARN Cls.' Br. 45, is equally misplaced. That provision by its plain terms allows courts to specify the effects of a dismissal "for cause," 11 U.S.C. § 349(b), which (as noted above) is the same standard for approving a motion to dismiss in the first place. Accordingly, Section 349 adds nothing to the analysis.

## III. The District Court Did Not Abuse Its Discretion By Holding That This Appeal Is Equitably Moot.

The WARN claimants and the Government finally argue that the district court erred by holding, in the alternative, that this appeal is equitably moot. *See* WARN Cls.' Br. 46-58; Gov't Br. 7-14. In particular, they contend that (1) the doctrine of equitable mootness applies only in cases where a plan of reorganization has been confirmed, *see* WARN Cls.' Br. 46-52; Gov't Br. 7-12, and (2) even if the doctrine

applied in the absence of a confirmed plan, it does not apply here, *see* WARN Cls.' Br. 52-58; Gov't Br. 12-14. Both arguments are unavailing.

### A. The Doctrine Of Equitable Mootness Is Not Limited To Cases Where A Plan Of Reorganization Has Been Confirmed.

The doctrine of equitable mootness authorizes appellate courts to dismiss an appeal on "equitable and prudential" grounds, *Continental*, 91 F.3d at 560, to "prevent[] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before [the transactions] became extremely difficult to retract," *Nordhoff Invs., Inc. v. Zenith Elecs. Corp*, 258 F.3d 180, 185 (3d Cir. 2001). At its core, the doctrine recognizes that where a party objecting to a complex bankruptcy transaction fails to obtain (or even to seek) a stay, and the transaction is thereafter "substantially consummated," it would be inequitable to allow the objector to unscramble the transactions on which others have reasonably relied. *Id.* The doctrine thus reflects the "pragmatic principle" that "'with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.'" *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144

(2d Cir. 2005) (quoting *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)). This principle is "especially pertinent in bankruptcy proceedings, where the ability to achieve finality is essential to the fashioning of effective remedies." *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993).

The WARN claimants assert that "[t]he decisions of this Court are clear that equitable mootness applies *only* where there is a confirmed plan." WARN Cls.' Br. 50 (emphasis added). That assertion is incorrect; this Court has never held that the doctrine "applies only where there is a confirmed plan." *Id.* Rather, prior cases refer to a "plan" because each of the bankruptcies in those cases happened to involve a confirmed plan. There is no reason in law or logic to withhold application of the doctrine where, as here, a bankruptcy does not involve a confirmed plan.

Not surprisingly, the WARN claimants quickly retreat to the argument that "[t]he judge-made doctrine of equitable mootness should not be extended to apply outside of confirmed plans." WARN Cls.' Br. 51. In their view, "[t]he legal standard for equitable mootness doesn't even make sense if applied to settlements," on the theory that only

plans can be "substantially consummated." *Id.* But that theory is groundless; to the contrary, an order approving a settlement agreement, like an order approving any number of other "complex bankruptcy reorganizations," *Nordhoff*, 258 F.3d at 185, can be "substantially consummated." Like a confirmation order, a settlement order may involve distributions to parties, like a debtor's creditors, who may not be before the court and may reasonably rely on those distributions. Like a confirmation order, a settlement order may be stayed in order to prevent the parties from effectuating the settlement. And like a confirmation order, a settlement order may be undermined by the delay associated with litigating an appeal.

Thus, numerous courts (including lower courts in this Circuit) have applied the equitable mootness doctrine to orders approving settlements that have been substantially consummated just as to confirmation orders that have been substantially consummated. *See, e.g.*, *In re Kainos Partners Holding Co.,* No. 10-560-LPS, 2012 WL 6028927, at *3 (D. Del. Nov. 30, 2012) (appeal from order approving settlement was equitably moot where objector failed to seek stay and settlement substantially consummated); *In re Northwestern Corp.*, No.

08-513-JJF, 2009 WL 2399120, at *2 (D. Del. Aug. 4, 2009) (appeal from order approving settlement was equitably moot where objector failed to seek stay and "[t]he settlement was a complex and integrated resolution of the many claims involving the parties, and the Court is not persuaded that relief can be granted ... without causing adverse consequences to numerous parties"); *In re PC Liquidation Corp.*, No. CV-06-1935 (SJF), 2008 WL 199457, at *5 (E.D.N.Y. Jan. 17, 2008) (appeal from order approving settlement was equitably moot; "the doctrine of equitable mootness is not limited to appeals of orders confirming reorganization plans or where the rights of parties bound by a confirmed reorganization plan would be adversely affected"); *In re Delta Air Lines*, *Inc.*, 374 B.R. 516, 522-25 (S.D.N.Y. 2007) (appeal of settlement order was equitably moot), *aff'd*, 309 F. App'x 455 (2d Cir. 2009).

Indeed, the Ninth Circuit recently *reversed* a district court decision refusing to apply the doctrine of equitable mootness to an order approving a settlement agreement between a Chapter 7 trustee and the estate's creditors. *See Stokes v. Gardner*, 483 F. App'x 345, 346 (9th Cir. 2012). The district court had affirmed the settlement order on the

merits; the Chapter 7 debtor appealed, and the Chapter 7 trustee and certain of creditors cross-appealed the denial of their motion to dismiss the debtor's appeal as equitably moot. *See id.* & n.1. The Ninth Circuit did not reach the merits of the appeal; rather, it agreed with the cross-appellants that the appeal should have been dismissed as equitably moot. *See id.* As the appellate court explained, the debtor had not obtained (or even sought) a stay from the bankruptcy court, which resulted in full consummation of the settlement agreement, including transfer of all real and personal property and the distribution of funds. *See id.* Under these circumstances, it "would be inequitable" to allow the debtor to proceed with his appeal. *Id.*; *see also id.* ("A party's failure to seek a stay may, by itself, render that party's claims equitably moot."). "The substantial consummation of the settlement agreement has effected a comprehensive change of circumstances that renders the creation of an equitable remedy extremely difficult." *Id.*; *see also In re Pequeño*, 246 F. App'x 274, 275 (5th Cir. 2007) (*per curiam*) (dismissing appeal from approval of Chapter 7 settlement as equitably moot where settlement was substantially consummated and appellant never sought a stay).

As these cases recognize, there is no reason to limit the application of the equitable mootness doctrine to cases in which a court has confirmed a plan of reorganization—the analysis applies equally in cases in which a court has approved a settlement agreement. The WARN claimants identify no contrary authority from this Court; the closest they come is *dicta* from a footnote in an unpublished case in which this Court simply observed that "'it is questionable whether the equitable mootness doctrine has any application to an appeal in a Chapter 7 liquidation.'" WARN Cls.' Br. 50-51 (quoting *In re Anthanassious*, 418 F. App'x 91, 94 n.3 (3d Cir. 2011)). But that case expressly *declined* to decide that issue, and affirmed the district court's decision on the merits. This Court, of course, could do the same here, or (as explained below) it could affirm the district court's alternative holding that this appeal should be dismissed as equitably moot.

### B. The District Court Correctly Applied The Equitable Mootness Standard.

#### 1. The Appeal Was Equitably Moot Under Third Circuit Precedent.

The district court did not abuse its discretion by concluding that this appeal is equitably moot. This Court applies the following five factors when evaluating equitable mootness: "(1) whether the

reorganization plan has been substantially consummated; (2) whether a stay has been obtained; (3) whether the relief requested would affect the rights of parties not before the court; (4) whether the relief requested would affect the success of the plan; and (5) the public policy of affording finality to bankruptcy judgments." *Continental*, 91 F.3d at 560. These factors are "interconnected and overlapping." *Semcrude,* 728 F.3d at 320. Thus, they can be boiled down to "two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *Id.* at 320-21.

Under either formulation, this appeal satisfies the test. Pursuant to the bankruptcy court's order approving the settlement and dismissing the Chapter 11 cases, as the district court noted, "the settlement has been substantially consummated as all the funds have been distributed." JA20. "Should the court grant the appeal, the settlement will be irreversibly 'scrambled,' as it did not provide for funds for [the WARN claimants'] speculative recovery and [the WARN claimants] chose not to substantively participate in the negotiation and

subsequent settlement." *Id.*; *see also id.* ("The parties to the settlement reached their negotiated resolution following years of litigation and will be harmed if the settlement is now unwound.").

Indeed, the settlement agreement here has not merely been "substantially consummated"; it has been *fully* consummated. CIT paid $2 million to the debtors on August 28, 2013, Sun Fund IV assigned its lien on the estates' remaining assets to the Creditors Trust, and the debtors transferred cash to the Creditors Trust in exchange for the releases and dismissal with prejudice of the fraudulent conveyance action. JA140. The releases became effective by their terms upon payment of the $2 million, and the fraudulent conveyance action was dismissed with prejudice on August 29, 2013. *Id.* The debtors fully satisfied all administrative claims. *Id.* The Creditors Trust also mailed out checks over a year ago totaling approximately $1.12 million in distributions to 29 holders of priority tax claims and 1,039 holders of unsecured claims. JA171. On October 11, 2013, the debtors filed a certification of counsel certifying that all of the conditions set forth in the settlement order had been satisfied, and the cases were deemed dismissed pursuant to the settlement order. JA171-72.

Of critical importance from an equitable perspective, the WARN claimants never asked the district court to stay consummation of the settlement pending appeal. That was not for lack of opportunity. Rather, as the district court noted, "as a courtesy to the district court, [the bankruptcy court] instructed the debtors to refrain from consummating the settlement for ten to fifteen days to give [the WARN claimants] an opportunity to challenge the ruling." JA16. The WARN claimants, however, *did not seek a stay* during that ten to fifteen day period. *See id.* Thereafter,

> [a]t a hearing on February 20, 2013, [the WARN claimants] sought clarification regarding whether the appellees could move forward with implementing the settlement. The bankruptcy court confirmed the lack of a stay. The committee advised that appellees were 'actively considering closing. So if [the WARN claimants] want to stay ... they should file a motion promptly.' Although [the WARN claimants] indicated that they would be seeking a stay, *no such motion was filed in [the district] court.*

*Id.* (emphasis added). Although appellees waited over *six more months*, until the end of August 2013, to consummate the settlement, the WARN claimants never lifted a finger to try to prevent the consummation. To this day, the WARN claimants have never explained why they neither

appealed the bankruptcy court's denial of a stay to the district court, nor moved in the district court for a stay.

Rather, the WARN claimants simply state (in the passive voice, no less) that "[i]t is not disputed that no stay was obtained." WARN Cls.' Br. 52. The WARN claimants could not have *obtained* a stay from the district court because they never *sought* a stay from the district court. Similarly, the U.S. Trustee never sought a stay from the district court (even though the U.S. Trustee is exempted from any bond requirement, *see* Fed. R. Civ. P. 62(e)); indeed, the U.S. Trustee never even appealed the bankruptcy court's order approving the settlement and dismissing the Chapter 11 cases. Having failed to avail themselves of the opportunity to seek a stay, neither the WARN claimants nor the Government is in any position now to seek to unwind the settlement and pry money out of the hands of other creditors. *See*, *e.g.*, *Nordhoff*, 258 F.3d at 187 (appellants' failure to seek a stay "weighs heavily in favor of dismissing" their claims as equitably moot); *id.* at 191-92 (Alito, J., concurring in judgment) (application of equitable mootness doctrine warranted where "the appellants never applied for a stay and have not provided an adequate explanation for their failure to do so");

*Continental*, 91 F.3d at 566 ("There was a clear possibility that [appellants'] claims would become moot after consummation of the Plan, and it was therefore incumbent on [them] to obtain a stay."); *In re Highway Truck Drivers & Helpers Local Union No. 107*, 888 F.2d 293, 297 (3d Cir. 1989) ("[It] is obligatory upon appellant ... to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief ...), if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.").

Nonetheless, the WARN claimants and the Government insist that the settlement agreement can be unwound by simply ordering the settlement funds disgorged. WARN Cls.' Br. 55-56; Gov't Br. 12-13. But even assuming, *arguendo*, that it were possible to unwind the settlement transactions and reinstate the Chapter 11 cases, the fact remains that the debtors cannot confirm a Chapter 11 plan because they have no unencumbered assets to satisfy their obligations. JA30. The settlement also could not be reconstructed if the cases were converted to Chapter 7 cases. JA32. Reversal and reinstatement of the Chapter 11 cases would eradicate the benefits to creditors derived from

the settlement agreement because even if the debtors could recover the funds transferred to the Creditors Trust, the debtors would be left with substantially less cash than they possessed in December 2012, *see* JA140, when the bankruptcy court approved the settlement agreement after concluding that it was faced with two options—a meaningful return or zero. JA36. Finally, in the event of reversal and reinstatement, CIT and the Sun defendants would not agree to a comparable settlement. JA1363, 1367. Thus, reversing the order approving the settlement would "fatally scramble" the settlement.

Because any reversal of the settlement order would irreparably harm third parties not before the Court by requiring them to return distributions they already received, the third *Continental* factor weighs heavily in favor of equitable mootness. Courts have protected a variety of parties from the adverse consequences imposed by unwinding transactions consummated pursuant to unstayed orders. *See, e.g. Kainos*, 2012 WL 6028927, at *3 (overturning the settlement order "would impact numerous third parties not before the Court, namely … unsecured creditors…"); *Delta Air Lines*, 374 B.R. at 524 ("Courts have

found that the effect on creditors who are not a party to an appeal in analogous circumstances weighs in favor of finding an appeal moot.”).

And of course, applying the doctrine of equitable mootness here would advance the strong public policy in favor of affording finality to bankruptcy judgments. *See, e.g. In re Box Bros. Holding Co.,* 194 B.R. 32, 42 (D. Del. 1996). Reversal of an order confirming a plan or an integrated settlement as present here, “knock[s] the props out” from under the authorization for every transaction that has taken place, and does nothing but “create an unmanageable, uncontrollable situation for the Bankruptcy Court.” *Continental*, 91 F.3d at 561 (internal quotations omitted); *see also Kainos*, 2012 WL 6028927, at *3 (finding that the complexity of the litigation, the number of parties involved in the negotiation and implementation of the settlement, and the risk of catastrophic loss if the settlement were not implemented all weighed in favor of leaving the settlement order undisturbed); *In re Global Vision Prods., Inc.*, No. 07-cv-12628, 2009 WL 2170253, at *4 (S.D.N.Y. July 14, 2009) (citing *In re Chateaugay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993)). Public policy favors leaving the settlement order undisturbed because the settlement resolved complex litigation among multiple

parties, the settlement has been consummated for more than a year, distributions were made to over a thousand creditors, and it is far from clear that reversal would in any way benefit the WARN claimants. *See*, *e.g.*, *Kainos*, 2012 WL 6028927, at *3. To overrule the settlement order would greatly undermine public confidence in orders of the bankruptcy courts and deter future settlements.

In weighing policy considerations, this Court has held that "[p]reserving the finality of plan confirmation to encourage parties to move forward with plan execution justifies forbearing the exercise of jurisdiction only where precluding the appeal will prevent a perverse outcome." *Semcrude*, 728 F.3d at 326. Granting relief to the WARN claimants would result in just such a "perverse outcome." *Id.* If this case were to be resurrected from the dead, the administrative, unsecured priority tax, and unsecured creditors would have to repay their distributions, which were presumably spent long ago, and the Committee would have to be created anew. Most importantly, as the bankruptcy court found, the WARN claimants would not likely benefit from such a turn of events because the funds at issue "are encumbered, and they are subject to the liens of the secured creditors; and therefore

... would not likely give rise to an economic return, absent some additional, frankly, speculative steps." JA1552. Thus, reversal and reinstatement of the Chapter 11 cases would have the effect of harming all the other constituencies without necessarily (or even probably) benefiting the WARN claimants. Accordingly, the public policy of affording finality to bankruptcy court judgments weighs heavily in favor of equitable mootness.

**2. The WARN Claimants' Suggested Alternatives Would Be Inequitable.**

While not part of the test for addressing equitable mootness, the WARN claimants, interpreting *Semcrude*, contend that the district court failed to consider "alternative remedies" in lieu of dismissing the appeal. *See* WARN Cls.' Br. 54-57. In particular, they posit three ways in which the district court allegedly could have "exercise[d] its equitable authority to craft an appropriate remedy rather than dismissing the appeal." *Id.* at 54. Each of the proposed "alternative remedies," however, would be inequitable.

**a. Voiding The Releases Would Be Inequitable.**

The WARN claimants assert that "[t]he simplest remedy would be to void the releases granted by [the debtors] in favor of Sun and CIT."

*Id.* at 55. But that is not a narrowly tailored remedy at all: rather, that is a full frontal assault on the settlement. The whole point of the settlement, after all, was to resolve the estates' fraudulent conveyance action against CIT and the Sun defendants. The releases were an integral and appropriate part of the deal. Without the releases, there would be no basis for the settlement; it would be profoundly inequitable for a court to enforce one side of the deal but not the other. *See, e.g.*, *Delta Air Lines*, 374 B.R. at 523-25 (courts cannot "ignore the tradeoff that allowed the parties to settle in the first instance").

None of the WARN claimants' justifications for voiding the releases has merit. They first suggest that "any alleged harm to CIT and Sun is extremely speculative" precisely because the bankruptcy court found that the odds of any recovery in the fraudulent conveyance action are "nearly nonexistent." WARN Cls.' Br. 55. But that suggestion cuts precisely the other way: the WARN claimants, as the parties challenging the district court's finding of equitable mootness, cannot possibly show that the court abused its discretion by dismissing the appeal if the settled fraudulent conveyance claim is worthless. CIT

and the Sun defendants paid the debtors to settle the claim not because it has merit, but because they wanted peace and finality.

The WARN claimants next suggest there is no prejudice to CIT or the Sun defendants in voiding the releases because they "d[id] not pay a penny to [the debtors], the party giving them the release." WARN Cls.' Br. 56. That suggestion is demonstrably incorrect. The record is undisputed that the debtors received $2 million from CIT, and Sun Fund IV allowed a "carve out" from its lien on the debtors' remaining cash to pay the debtors' priority tax and unsecured creditors. JA3906-96. CIT and the Sun defendants bargained for releases because they wanted all claims released, not just by the Committee, but by the debtors and the estates, including their successors and assigns, such as a Chapter 7 trustee.

Finally, the WARN claimants suggest that "any prejudice to Sun and CIT is of their own making" because they "waiv[ed] the condition of a final order." WARN Cls.' Br. 56. But it was clear in the settlement agreement that appellees had the right to waive the final order requirement. JA398. They told the WARN claimants that they were considering doing so in February of 2013 and, on August 28, 2013, they

commenced a very public consummation of the settlement which took over 45 days to consummate. JA124-25.

**b. "Reforming" The Settlement Would Be Inequitable.**

The WARN claimants next assert that the settlement could be "equitably reform[ed] ... such that the proceeds be re-distributed in accordance with the Code." WARN Cls.' Br. 56. But that would not be equitable at all. Putting aside the fact that the proceeds of the settlement were distributed to over a thousand other creditors over a year ago, *see* JA171-72, the WARN claimants fail to address the undisputed fact that the Sun defendants never would have accepted a settlement that funded the WARN claimants because (as the Sun defendants' counsel explained at the evidentiary hearing) "if the money goes to the WARN plaintiffs, then you're funding somebody who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis." JA1363-64.

**c. Overturning The Bankruptcy Court's Fiduciary-Duty Ruling Would Be Inequitable.**

Finally, the WARN claimants offer "another more modest option that incontrovertibly would not upset the Settlement"—overturning the

bankruptcy court's ruling that the Committee did not breach its fiduciary duty in negotiating the settlement. WARN Cls.' Br. 57. But this is yet another collateral attack on the settlement: the Committee could not possibly have violated a fiduciary duty as a matter of law by entering into a settlement agreement that (as the bankruptcy court found) was in the overall best interest of creditors. *See* JA36.

## CONCLUSION

For these foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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I. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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September 26, 2014

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September 26, 2014

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## CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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|---|---|---|
| IN RE: | ) | Case No. 08-11006 (BLS) |
| | ) | Chapter 11 |
| JEVIC HOLDING CORP. | ) | |
| *et al.* | ) | Courtroom No. 1 |
| Debtors. | ) | 824 Market Street |
| | ) | Wilmington, Delaware 19801 |
| | ) | |
| | ) | |
| | ) | November 28, 2012 |
| | ) | 10:00 A.M. |

TRANSCRIPT OF HEARING
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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1
2 INDEX

Page
3 NOTICE OF AGENDA MATTERS:


For CIT Group, by Mr. Ackerly 15
4 For Casimir Czyzewski, by Mr. Raisner 15
For Sun Capital by, Mr. Gillespie 16
5 For Interested Party, by Mr. Feinstein 18


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1 THE COURT: Good morning, counsel, this is Judge
2 Shannon. I understand from the operator that all necessary
3 parties are on the call this morning.
4 This hearing is a follow up to an evidentiary hearing
5 that we had in this Court on the 13th of November. The matter
6 that is before the Court is the motion for approval of a
7 settlement between and among the Debtor, the Committee, Sun
8 Capital and CIT. Settlement motion is opposed by the U.S.
9 Trustee and certain claimants that I will refer to as the
10 Warren claimants. At the hearing Mr. Dooley [*phonetic*] and
11 Mr. Gavin [*phonetic*] testified in support of the settlement.
12 Each was subject to cross examination, and the Court heard
13 substantial argument from counsel.
14 I also would note, specifically, that I am giving my
15 ruling orally because of the party's desire for a prompt
16 ruling, and because there are other matters that have been
17 pressing on my docket that preclude me from writing a formal
18 opinion on this dispute. Nevertheless, for the reasons that
19 I will give you this morning I will grant the motion, and I
20 will overrule the objections.
21 I touched, very briefly, on the background. The
22 parties are certainly familiar with the history of this case.
23 Jevic was in the trucking business, and filed for bankruptcy
24 on May 20th, 2008. The Debtors shut down all of its
25 operations either right before or immediately after

1 commencing the bankruptcy. At the time of the filing the
2 Debtors' primary secured creditors were Sun Capital and CIT.
3 Now with an aggregate of, approximately, $53 million dollars
4 on a first priority senior secured basis. The lenders
5 provided the DIP financing facility which was approved by
6 final order of the Court. And among other provisions the
7 final DIP order had a roll up of prepetition debt into the
8 post petition facility, granted the lenders a Section 507(b)
9 super priority, and set a deadline within which challenges to
10 their liens and claims would have to be made.
11 Again, in 2008 the Committee was granted standing to
12 prosecute estate causes of actions against Sun Capital and
13 CIT. And the Committee's complaint that subsequently amended
14 this filing seeking among other things was filed, seeking
15 among other things to avoid the liens of CIT and Sun Capital
16 to disallow their claims and for damages.
17 That litigation has been actively defended by CIT and
18 Sun Capital. In the nearly four years since these cases were
19 commenced, since the Chapter 11 cases were commenced, the
20 record reflects that nearly all of the work to administer
21 these estates has been completed. The undisputed testimony
22 is that all necessary claim objections have been filed and
23 ruled upon, all assets of the Debtor have been sold or
24 otherwise disposed of, all routine preference and avoidance
25 actions have been commenced and settled or otherwise disposed

1 of, and all necessary filings such as schedules of assets and
2 liabilities, statements of financial affairs, and the monthly
3 operating reports have long since been filed or are current,
4 what does remain are several lawsuits.
5 First is the Committee's lawsuit against CIT and Sun
6 Capital, mentioned earlier. Also pending is litigation
7 commenced on behalf of certain former employees against the
8 Debtor, as well as against CIT and Sun Capital for damages
9 and claims arising under various Warren statutes, state and
10 federal.
11 The testimony adduced at last week's hearing reflects
12 that all of the major economic stakeholders in the case
13 including, the Committee, the Warren claimants, CIT and Sun
14 Capital came together at the Debtors' suggestion earlier this
15 year to attempt to negotiate a settlement of the litigation
16 commenced by the Committee.
17 As noted earlier that Committee lawsuit has been
18 pending for well over three years. After what the witnesses
19 testified to as extensive arms length negotiation, certain of
20 the parties reached a global resolution. And the general
21 terms of that settlement are identified in the motion, and
22 are as follows: the payment of $2 million dollars by CIT to
23 the Debtors to be used to satisfy unpaid Chapter 11 allowed
24 administrative claims, the dismissal with prejudice of the
25 Committee's adversary proceeding, the assignment by Sun of

1 its lien on the estate's remaining assets to a liquidating
2 trust for the exclusive benefit of general unsecured
3 creditors, the exchange of releases, the reconciliation of
4 administrative and general unsecured claims during a sixty
5 day period following the effective date of the settlement
6 agreement, and thereafter the dismissal of these Chapter 11
7 cases.
8 The record reflects that the terms of the settlement
9 were embodied in a motion, jointly, tendered by the Debtor,
10 the Committee, CIT and Sun Capital for approval under
11 Bankruptcy Rule 9019. Notice of that motion was provided to
12 all creditors in these cases. Numerous objections to the
13 settlement motion were filed, all but two of which were
14 resolved prior to the November 13, 2012 hearing. I will
15 address the substance to the remaining objections in a
16 moment, but I turn first to the motion and the standard for
17 approval of a settlement agreement under rule 9019.
18 That standard is well settled. The movants must
19 demonstrate that the proposed settlement represents the
20 exercise of the Debtors' reasonable business judgment in
21 light of one, that the probability of success in the
22 litigation; two, the complexity of the litigation and three,
23 the prospect of collection difficulties. The final and most
24 important consideration Court's have identified for
25 consideration under of settlements under Bankruptcy Rule 9019

1 is the paramount interest of creditors. Court's have stated
2 that the standard for approval of a settlement is not a heavy
3 burden on a movant, and that the movant need to, need only
4 demonstrate that the proposed settlement rises above the
5 lowest point on the range of reasonableness.
6 I consider the motion in light of the following
7 facts: this case has been pending for years, presently, with
8 no reasonable prospect of a confirmable plan. All material
9 tasks needed to administer the estates have already been
10 completed other than the litigations that I have mentioned.
11 The Debtor possesses no assets or funds that are not subject
12 to the liens of CIT and Sun Capital. The Debtor, therefore,
13 lacks the resources to creditably prosecute the Committee's
14 lawsuit, and the Committee lacks, therefore, the resources as
15 well.
16 And they lack the resources to, otherwise, wrap up
17 these bankruptcy proceedings. In the absence of a settlement
18 of the settlement that is before the Court it is a virtual
19 certainty that there will be no distribution to unsecured
20 creditors here, and a substantial shortfall for distributions
21 to administrative creditors.
22 The U.S. Trustee objects to the settlement mainly on
23 the ground that the Bankruptcy Code neither contemplates nor
24 permits the relief sought outside of a confirmed plan or a
25 Chapter 7 liquidation and distribution. Additionally, the

1 U.S. Trustee contends that the proposed distributions violate
2 the absolute priority rule, and the code statutory
3 distribution scheme.
4 The Warren claimant’s primary objection is that the
5 proceeds of the settlement do not flow to their priority
6 claims, but instead go to junior creditors in derogation of
7 the codes priority structure. The Warren claimants and the
8 U.S. Trustee also contend that the Committee is breaching its
9 fiduciary duty in agreeing to a settlement that, effectively,
10 freezes out the Warren creditors.
11 The theory is that because the Committee has been
12 granted standing to prosecute claims on behalf of the estate
13 it stands as a fiduciary to the estate, generally, and not
14 just to its typical constituency of unsecured creditors. I
15 acknowledge the weight and significance of the U.S. Trustees’
16 argument.
17 There is no expressed provision in the code for
18 distribution and dismissal contemplated by the settlement
19 motion. However, I do observe that while the practice is
20 certainly neither favored nor commonplace the record does
21 reflect that this, sort of, relief has been granted by this
22 and other Court’s in appropriate occasions in the past. And
23 I find that the dire circumstances that are present in this
24 case warrant the relief requested here by the Debtor, the
25 Committee and the secured lenders.

1 As previously noted through the settlement there is
2 the prospect of a meaningful distribution to unsecured
3 creditors, and to some but admittedly not all administrative
4 priority creditors. In the absence of this settlement there
5 is no realistic prospect for such a distribution. All of the
6 funds contemplated here are subject to the liens of Sun
7 Capital and CIT. The lenders have stated unequivocally and
8 credibly that they would not do this deal in a Chapter 7.
9 The record reflects that there are no unencumbered
10 assets or assets awaiting administration. So in the event of
11 a conversion it does not appear that a Chapter 7 Trustee
12 would have any money to operate, investigate or litigate. I
13 certainly see nothing upon which I could base a finding of
14 adequate protection if a Chapter 7 Trustee sought to use the
15 liened up funds that are currently held by the estate. To
16 the extent that I am being asked to predict the future, I
17 would say with a measure of confidence that the settlement
18 proceeds would be taken by the secured creditors in
19 relatively short order following a conversion of Chapter 7
20 with nothing leftover for stakeholders.
21 I further acknowledge that the proposed distributions
22 are not in accordance with the absolute priority rule. But
23 because this is not a plan, and there is no prospect here of
24 a confirmable plan being filed, the absolute priority rule is
25 not a bar to approval of this settlement. I believe that

1 this is consistent with Judge Walsh's opinion in World
2 Health, and case law in this other jurisdictions as
3 consistently recognized and accepted the right of a secured
4 creditor to dispose of its collateral as it wishes. Neither
5 Armstrong nor DBSD affect this proposition outside of a
6 Chapter 11 plan.
7 Here the funds are indisputably the collateral of the
8 secured creditors, admittedly subject to litigate challenge.
9 The settlement disposes of litigation, and provides for the
10 handover of their collateral, predictably, with the execution
11 of certain releases to unsecured and administrative
12 creditors. This is a format that the Court has previously
13 approved, and the pendency of objections by the U.S. Trustee
14 and by an economics stakeholder do not change the nature of
15 this case from other cases where this has been permitted.
16 Similarly, I am not satisfied that the proposed
17 settlement represents a breach of the Committee's fiduciary
18 duties as an estate representative. The Committee's charge
19 was to investigate and prosecute potential causes of action
20 against CIT and Sun Capital. This the Committee has done,
21 and it now seeks approval of a settlement with the support of
22 the Debtor. It is clear that the Warren claimants were
23 invited to and took part in that settlement process, but they
24 have chosen not to be part of this settlement. The fact that
25 the Committee stands in the shoes of the Debtor here does not

1 give every creditor here a veto over the chosen course of
2 action.
3 As I see it fiduciary duties do not really enter into
4 the analysis that is presently before me. The litigation has
5 been commenced, and is now sought to be settled. If the
6 movants carry their burden it will be approved. If they do
7 not the settlement would be denied. The Warren claimants,
8 presumably, wish to continue their separate pending
9 litigation against the Debtor, CIT and Sun Capital. And thus
10 chose not to settle for the limited distribution that is
11 available here, and that is their right. And this settlement
12 does effect or impair the Warren claimant's right to
13 prosecute their own litigation.
14 But the decision of the Warren claimants not to
15 participate in this settlement does not give rise to a breach
16 of the Committee's fiduciary duties, particularly, in light
17 of a settlement that has been noticed to all creditors, and
18 presented to the Court for approval on a full evidentiary
19 record.
20 Turning to the applicable standards under Rule 9019 I
21 will address the first two prongs together. They are the
22 probability of success in the litigation, and the cost,
23 complexity and likely duration of such litigation. The
24 Committee's prospect for success in its lawsuit, are
25 uncertain at best. The litigation remains in its earliest

1 stages. It raises challenges to perfected prepetition liens,
2 and liens that have been approved post petition. This
3 lawsuit will require expert witnesses and substantial
4 discovery. Mr. Gavin and Mr. Dooley, both, testified to
5 these to the prospect for the litigation.
6 Without getting too far into the specifics of the
7 lawsuit I note that the record developed at the trial
8 indicates that there are several independent hurdles that the
9 Committee would have to clear before it would actually see a
10 material recovery out of the litigation. For example, even
11 if the Committee succeeds in unwinding the liens or avoiding
12 certain transfers it also has to deal with the consequences
13 of Bankruptcy Code Section 502(h). It is an understatement
14 to say that this litigation is not a slam dunk.
15 Further to that point this litigation would be
16 expensive to prosecute and would, presumably, take years to
17 lend its way through the trial and appellate processes. The
18 Court presumes from its prior experience that CIT and Sun
19 Capital are well healed, and will vigorously defend. The
20 estate, by contrast, as I have noted has no available funds.
21 I do note that both objectors suggest the contingency
22 counsel or a Chapter 7 Trustee might be found to front the
23 substantial expenses, and wait for a return either in Chapter
24 11 or if engaged by a Chapter 7 Trustee. I acknowledge that
25 that is a possibility, but on these facts I think any lawyer

1 or firm that signed up for that role should have his head
2 examined. The third prong relating to collection
3 difficulties does not really enter this analysis.
4 The final and most important consideration according
5 to the case law is the paramount interest of creditors, and
6 here that prong has certainly been satisfied. The record
7 reflects a substantial distribution to unsecured and certain
8 administrative creditors under the settlement. It is a
9 virtual certainty that that distribution would not be
10 available in Chapter 11 absent the settlement. And that this
11 deal is not likely to be available in Chapter 7. The one
12 objecting creditor is not unfairly prejudice. Its claim
13 against the estate is presently, effectively worthless given
14 that the estate lacks available unencumbered funds to satisfy
15 it if it were allowed. The Warren claimant’s rights against
16 CIT and Sun Capital are unaffected. They may continue their
17 litigation.
18 So I am presented with two options, a meaningful
19 return or zero. The paramount interest of the creditors
20 mandates approval of the settlement, and I do not find that
21 the Bankruptcy Code precludes this result given substantial
22 precedent in this and other jurisdictions. I would ask that
23 an order approving the settlement be submitted under
24 certification of counsel. Are there any questions?
25 UNKNOWN: None from the Debtor, Your Honor.

1 UNKNOWN: No, Your Honor, thank you very much.
2 MR. ACKERLY: Judge Shannon, this is Ben Ackerly for
3 CIT.
4 THE COURT: Yes, Mr. Ackerly.
5 MR. ACKERLY: I have one small, factual correction.
6 CIT is not a defendant in the Warren Act litigation.
7 THE COURT: Thank you for the correction I appreciate
8 that, and I actually was aware of that that was an
9 overstatement by me. I appreciate the clarification.
10 MR. ACKERLY: Thank you, sir.
11 THE COURT: Right, any questions?
12 MR. RAISNER: Judge Shannon, this is Jack Raisner.
13 THE COURT: Yes, sir.
14 MR. RAISNER: In our opposition to this motion we
15 discussed the, what would be the jurisdictional status of the
16 Warren litigation in the event that Your Honor approved the
17 9019 settlement.
18 THE COURT: I appreciate, I appreciate you raising
19 that because that is a point that I believe is an issue that
20 is, that we do need to deal with. I guess what I would say
21 is that as I understand the timeline there are steps under
22 the settlement agreement that are to play out prior to
23 dismissal. I think in your papers I thought that you raised
24 a legitimate question with respect to the Court's continuing
25 jurisdiction over the pending litigations, and so what I

1 think what I would invite you to do is I am not sure what the
2 easiest or most appropriate path would be with respect to
3 motion practice about where the litigation itself should
4 continue, or does it continue in this Court. But I am not
5 prepared to address that right now, but I would certainly
6 invite you and give you the opportunity to, I guess, raise
7 the question, and we can deal with it on a full record prior
8 to dismissal of the cases.
9 MR. GILLESPIE: Your Honor, this is Jim Gillespie on
10 behalf of the Sun Capital defendants in the Warren action.
11 As the Court, likely, recalls there has been summary judgment
12 filed in the Warren litigation. Briefing has been completed
13 on Sun Capital's motion for summary judgment in the Warren
14 action, so I just draw that Court's attention to that because
15 that is something that is pending while the underlying
16 settlement is being finalized that that is all ready for the
17 Court to rule on.
18 MR. RAISNER: Your Honor, Jack Raisner we have not
19 completed briefing in that matter.
20 THE COURT: Is briefing not complete in that?
21 MR. RAISNER: Your Honor, briefing is completed on
22 the Sun motion for summary judgment. There is motions for
23 summary judgment filed by the Warren plaintiffs where
24 briefing will be completed on December 3rd.
25 THE COURT: Okay, here is what I want to do. I am

1 going to leave it right now to you guys. Mr. Raisner raised
2 a good point. He raised it in his papers. I did not feel it
3 is something that I could, obviously, address in the context
4 of the motion that was before me, but it is clearly an issue
5 that I do need to address. I want the opportunity to I have
6 the Sun motion for summary judgment, and I am aware that that
7 is *sub judice*. The way that our paper flow works within the
8 Court I, generally, do not see motion practice until all of
9 the briefing is complete, and it arrives in Chambers with a
10 notice of completion of briefing. Here is what I want. I am
11 not sure do we have a, Mr. Facitti; do we have a hearing
12 coming up in Jevic at anytime soon?
13 UNKNOWN: No we do not have a omni's scheduled yet,
14 Your Honor.
15 THE COURT: All right, here is what I think would
16 make sense. I am going to ask that the parties confer, and
17 it may make sense to have even just a telephonic status
18 conference about what the best path forward is. It may be
19 that, again, without having studied the submissions, and the
20 competing submissions I want to, I think I would like the
21 benefit of the party's guidance after they have considered my
22 ruling, and sort of figuring out how the process will play
23 out to get on the phone with me on a status conference
24 sometime in the next couple of weeks.
25 And it may be that in order to get the matter, sort

1 of, up and front and center it may be that scheduling the
2 summary judgment motions for argument might make sense. But,
3 again, if there are alternatives to dealing with the pending
4 Warren litigation, and the issues that would be raised by
5 dismissal of the main case, I think I would like the benefit
6 of the lawyer's thoughts and guidance on that.
7 So I would make myself available at the party's
8 convenience, telephonically or live within the next couple of
9 weeks, and we can come up with a game plan going forward.
10 UNKNOWN: Thank you.
11 MR. FEINSTEIN: Judge, Robert Feinstein, Judge, one
12 final thing Your Honor asked for a submission of an order
13 which we will do, and I just want to confirm in light of this
14 this colloquy that we will submit an order under
15 certification that tracks the former order that was submitted
16 with the motion and the amendment to the motion. And we will
17 be silent on the subject of jurisdiction over the Warren Act
18 claim so as not to hang up that order we, you know, we would
19 like to get that order entered as soon as possible.
20 THE COURT: I think --
21 MR. FEINSTEIN: The issue regarding jurisdiction will
22 be dealt with separately.
23 THE COURT: -- I think that that is appropriate. And
24 I have said before that I think it was appropriate that the
25 question be raised by the Warren claimants. I saw it in

1 their briefing. I have not touched on it here, but it is
2 definitely something that we need to deal with it now that we
3 have ruled on the settlement motion itself.
4 So, again, I am happy to deal with that issue, and to
5 make sure that we are promptly and responsibly administering
6 the case. And with respect to the status conference, again,
7 my hope would be that that would give me the benefit of input
8 from the lawyers about, you know, alternatives and the best
9 way to proceed.
10 So I am really at your pleasure, but I would I think
11 a teleconference in the space of the next couple of weeks
12 would give everybody an opportunity to think about it, and if
13 there is an agreed game plan forward than you can expect I
14 will be all ears, and probably on board. So, and if you can
15 touch base with Ms. Bellow once you look at your own
16 schedules and, again, I am happy to make myself available for
17 a status conference, okay?
18 MR. FEINSTEIN: Thank you very much, Your Honor.
19 THE COURT: Thank you very much, counsel, have a good
20 day.
21 (Court Adjourned)
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1 CERTIFICATE

2

3 I certify that the foregoing is a correct transcript from the

4 electronic sound recording of the proceedings in the above-

5 entitled matter.

6 /s/Mary Zajaczkowski December 3, 2012

7 Mary Zajaczkowski, CET**D-531 Date

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