DELAWARE BANKRUPTCY AMERICAN INN OF COURT

TUESDAY
MAY 18, 2010

ALTERNATIVE CHAPTER 11 EXIT STRATEGIES

Bankruptcy American Inn of Courts Meeting
Tuesday, May 18, 2010

PRESENTATION AGENDA OF ALTERNATIVE STRATEGIES

1. SPM GIFTS/ NON- PLAN LIQUIDATING TRUSTS

Mock Argument before the "Honorable" Mark Minuti.

Debtor's Counsel – Carl Kunz
Committee Counsel – Rufus McNeill
U.S. Trustee – Matthew Ward
Objecting Landlord – Patrick Reilley
Lender/Purchaser – Sally Veghte

2. STRUCTURED DISMISSALS

Post sale discussion of alternatives between stake holders: Thomas Macauley, Jami Nimeroff, Leigh-Anne Raport, Tyler Semmelman, Kate Stickles and Eric Sutty.

3. CONVERSION

- Standards for Conversion: Justin Rucki
- Discussion of Recently Converted Case: Evelyn Meltzer, Richard Riley and John Schanne
- Post Conversion Obligations

MATERIALS INDEX

- VACCINE CORPORATION FACT PATTERN AND **ADDENDUM**

- SPM GIFTS/NON-PLAN LIQUIDATING TRUSTS

  - THE *SPM* DECISION AND THE CONCEPT OF "GIFTING"

  - *ARMSTRONG*, GIFTING AND THE ABSOLUTE PRIORITY RULE

  - SUBSEQUENT INTERPRETATION OF *SPM* AND *ARMSTRONG*

  - GIFTING NOT APPROVED AS VIOLATION OF ABSOLUTE PRIORITY RULE OR SERVING AN IMPROPER PURPOSE

  - DISTRIBUTIONS TO CREDITORS THROUGH TRUSTS FUNDED BY "GIFTS" OUTSIDE OF A PLAN

- STRUCTURED DISMISSALS

- CONVERSION MATERIALS

  - STANDARDS OF CONVERSION

  - CHART OF CASES THAT CONVERTED FROM CHAPTER 11 TO CHAPTER 7 FROM JULY 2009 THROUGH APRIL 2010

  - POST-CONVERSION OBLIGATIONS CHECKLIST (CHAPTER 11 TO CHAPTER 7)

2009-2010 FACT PATTERN

Our Inn's 2009-2010 pupilage team presentations will be guided by the following fact pattern:

Vaccine Corporation ("VC") is a privately held company that develops and manufactures vaccines. VC has two lines of business: (i) the development and manufacture of vaccines and (ii) the development of new technology (the "IP") which permits production of new vaccines at an accelerated rate. VC is an operating company, with 100 employees, many customers and many trade suppliers. Its original capitalization (a combination of debt and equity) was the result of investment by its current Chief Executive Officer ("CEO") and current Chief Operating Officer ("COO"), but since that time many other investors, both individual and institutional have provided equity investment in VC.

VC has been developing a promising new swine flu vaccine ("Vaccine"), which is currently in the clinical trials phase and showing excellent results. While both the Vaccine and the IP are promising, VC has been having financial trouble for the past two years due to unexpected costs and delay in obtaining FDA approval for the Vaccine as well as unexpected costs of developing the IP. While these investments appear to be on the verge of paying off, VC has been unable to pay a number of debts that recently became due, and certain of its creditors are losing patience.

Due to VC's difficulty paying its debts, VC entered into negotiations and signed a letter of intent, subject to shareholder approval, to sell all of its assets to Medical Organization Incorporated ("MOI"). In anticipation of the potential sale and it order to aid cash flow, MOI loaned VC $50 million evidenced by a promissory note (the "Note") secured by a lien on substantially all of VC's assets.

Unfortunately, the VC shareholders did not approve the proposed asset purchase of VC. MOI subsequently sued VC in state court alleging that the CEO and COO had fraudulently obtained shareholder disapproval. For its part, VC accused MOI of disavowing critical portions of its LOI. Needless to say, there was no love lost between VC and MOI, and VC did not pay the Note when it became due. VC attempted to line up several investors willing to purchase MOI's debt at full price, but MOI refused to cooperate with any of the potential investors.

While that action was pending, VC signed a multi-million dollar contract with the U.S. government for the development of the Vaccine (the "Government Contract"). The Government Contract has a base value of $37M, and may be worth a total of $147 million to VC.

The next day, MOI filed an involuntary petition (the "Involuntary Petition") under chapter 7 of the Bankruptcy Code naming VC as the alleged debtor. MOI was joined by in its petition by CR1 and CR2. VC alleges that it is owed $51.5 million based on the Note. CR1 is owed $1,200,000 in connection with some clinical testing services it provided to VC, and CR2 is owed $300,000 in connection with consulting services it provided to VC in connection with the potential sale to MOI.

VC moved to dismiss the Involuntary Petition and extensive discovery ensued. At the hearing regarding the motion to dismiss, the court determined that MOI had satisfied its burden of proof under 11 U.S.C. § 303. However, the court dismissed the Involuntary Petition under § 305 because it found that MOI was using bankruptcy as a vehicle for obtaining VC's assets, particularly the Government Contract and the IP, at a discount price.

After the dismissal, VC continued its business as usual for almost one year, but it was unable to generate enough cash to begin paying its debts. Worse, while the Vaccine was finally FDA approved, an R&D problem set the development of the IP back several years. The potential investors, concerned over the setback, were not as willing to fund into potential losses. And, the litigation was ready to go to trial. As a result, VC filed its own chapter 11 petition (the "Petition") and VC remains a debtor in possession. At the time of the Petition, VC owed a total of $75 million to its creditors (including the CEO and COO), $51.5 million of which was owed to MOI and secured by all the VC assets.

The Office of the United States Trustee formed a creditors committee consisting of the seven largest creditors, including VC's distributor, trade creditors, landlords, CRI and CR2. Because of both the potential need for DIP financing and the possibility of a sale, the Committee has retained a financial advisor and is reviewing weekly reports, budgets and projections, and is performing a recovery analysis.

VC has no real exit strategy. VC believes that it can survive in standalone mode, but simply needs time. At the urging of the Committee, however, VC is considering a sale of some or all of the company. If it does entertain a sale, VC has not yet determined whether to sell the company in a private sale or a public auction. VC's current management would be interested in purchasing VC, and the Committee suspects that MOI may be interested as well. Further, some interest has been expressed by those investors who, several months back, had shown an interest in buying MOI's Note.

****END OF FACT PATTERN****

Addendum to Fact Patter

At the auction, there were several bidders. MOI was the successful bidder. MOI ultimately submitted a credit bid in the amount of $30 million. MOI's deficiency claim is $21.5 million.

In the context of a hearing to approve bidding procedures, the creditors' committee had challenged provisions permitting MOI to credit bid. Contemporaneously with filing its objection, the Committee filed an adversary proceeding to determine the validity, extent and priority of MOI's liens. The complaint also alleged claims for equitable subordination and recharacterization of MOI's secured claim.

MOI was eager to avoid prolonged litigation and engaged in negotiations with the creditors' committee over the terms under which the committee would dismiss the adversary proceeding. The committee and MOI had discussed the possibility of having MOI fund a plan of reorganization. However, MOI was unwilling to provide the necessary funding.

MOI was eager, however, to continue to do business with the debtor's trade creditors. To mollify those creditors, MOI agreed to fund a trust with a $3 million "gift," to be distributed exclusively to trade creditors on account of their general unsecured claims. In exchange for this payment, the creditors' committee agreed to dismiss its adversary proceeding.

The court has scheduled a hearing to approve the sale to MOI. At the same hearing, the court will hear the committee's motion, pursuant to Rule 9019, to approve the committee's settlement with MOI, under which MOI will fund the trade creditor trust. Prior to the hearing, objections were filed by the Office of the United States Trustee and by creditors who were not characterized as "trade creditors" under the terms of the trade creditor trust.

SPM GIFTS/NON-PLAN LIQUIDATING TRUSTS

Materials and Presentation by:

Michael R. Lastowski
Carl Kunz (the Debtor)
R. Stephen McNeill (the Creditors' Committee)
Mark Minuti (the Judge)
Patrick J. Reilly (the Objecting Party)
Sally E. Veghte (the Lender/Purchaser)
Matthew P. Ward (Office of the United States Trustee)

SPM GIFTS/NON-PLAN LIQUIDATING TRUSTS

The SPM Decision and the Concept of "Gifting"

"SPM Gifts" derive their name from the decision of the United States Court of Appeals for the First Circuit in *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993). In *SPM*, the debtor had filed a petition for relief under chapter 11. An Official Committee of Unsecured Creditors (the "Committee") was appointed. The proceedings were contentious. The Committee concluded that a reorganization was impossible and that a liquidation would result in a distribution only to the debtor's secured lender (the "Secured Lender"), which had a lien on substantially all of the debtor's assets and which was undersecured. The Committee negotiated with the Secured Lender to develop a strategy to maximize the value of the debtor's assets and to provide some return to unsecured creditors.

The Committee and the Secured Lender entered into an agreement (the "Agreement") under which the Committee agreed to cooperate with the Secured Lender in bringing the case to a satisfactory resolution and the Secured Lender agreed to share a portion of the proceeds of its collateral with general unsecured creditors.

Eventually, all of the debtor's assets were sold pursuant to 11 U.S.C. § 363 and the debtor's case was converted to a case under chapter 7. Thereafter, the Committee and the Secured Lender filed a motion seeking approval of a distribution of sale proceeds pursuant to the Agreement. The debtor and its principals objected to the motion, arguing that the distribution improperly paid general unsecured creditors ahead of priority tax creditors (whose claims could also be pursued against the debtor's principals). The bankruptcy court denied the motion and ordered that, while the Secured Lender would receive its distribution under the Agreement, the proceeds earmarked for general unsecured creditors would be paid to the chapter 7 trustee for distribution in accordance with the Bankruptcy Code. The District Court affirmed.

The First Circuit reversed and rejected the argument that the Agreement violated the distribution scheme under the Bankruptcy Code:

> [T]he distribution scheme of section 726 (and, by implication, the priorities of section 507) does not come into play until all valid liens on the property are satisfied. *See United States v. Speers*, 382 U.S. 266, 269, 15 L. Ed. 2d 314, 86 S. Ct. 411 n.3 (1965); *Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 126-127, 93 L. Ed. 543, 69 S. Ct. 469 (1949). If a lien is perfected and not otherwise invalidated by law, it must be satisfied out of the assets it encumbers before any proceedings of the assets are available to unsecured claimants, including those having priority (such as priority tax creditors). *In re Darnell*, 834 F.2d 1263, 1265 (6th Cir. 1987). Citizens held a valid lien on all of the SPM assets; these were sold for $5 million. The bankruptcy court allowed Citizens' secured claim in that amount. Clearly, then, absent the order, the entire $5 million belonged to Citizens in satisfaction of its lien, leaving nothing for the estate to distribute to the other creditors,

> including the I.R.S. The bankruptcy court's order forced Citizens to transfer to the estate a portion of its own $5 million notwithstanding the court's recognition of Citizens' right to receive that sum in full.
>
> Because Citizens' secured claim absorbed all of SPM's assets, there was nothing left for any other creditor in this case. Ordinarily, in such circumstances, the distributional priorities of sections 726 and 507 would have been mooted. Appellees defend the outcome below on the ground that the Agreement improperly siphoned proceeds to the general, unsecured creditors 'at the expense of priority creditors.' However, it is hard to see how the priority creditors lost anything owed them given the fact there would have been nothing left for the priority creditors after the $5 million was distributed to Citizens. The 'siphoning' of the money to general, unsecured creditors came entirely from the $5 million belonging to Citizens, to which no one else had any claim of right under the Bankruptcy Code.

In re SPM, 984 F.2d at 1312. The court concluded that, while the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors, "creditors are generally free to do whatever they wish with the bankruptcy dividends they receive." *Id.* at 1313.

Armstrong, Gifting and the Absolute Priority Rule

Confirmation of a plan of reorganization over the dissenting vote of a class of creditors is often referred to as a "cram down." Section 1129(b)(1) of the Code specifically authorizes cram downs by providing that, if all of the other requirements for confirmation are satisfied, a plan may be confirmed "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *See* 11 U.S.C. § 1129(b)(1) (2008). The requirement that a plan be fair and equitable to dissenting creditors is further explained in § 1129(b)(2), which sets forth what is commonly referred to as the "absolute priority rule." *See* 11 U.S.C. § 1129(b)(2((2008). For example, the absolute priority rule provides that a plan may be confirmed, despite rejection by a class of unsecured creditors, if the plan does not offer a junior claimant (*e.g.*, equity interests) any property before each other of the rejecting class of unsecured claims services full satisfaction of its allowed claim. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (2008).

In *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit affirmed a district court decision that a proposed plan of reorganization violated the absolute priority rule. Armstrong World Industries, Inc. ("AWI") faced tremendous potential liabilities to asbestos personal injury claimants. AWI's plan adopted a compromise among the debtor, equity interest holders and asbestos personal injury claimants pursuant to which stock warrants would be issued directly to equity interest holders on the condition that both classes of general unsecured creditors (*i.e.*, asbestos personal injury claimants and trade creditors) accept the plan. In the alternative, if the asbestos personal injury claimants rejected the plan, the stock warrants would be distributed to trade creditors, who would be

deemed automatically to waive distribution of the stock warrants in favor of equity interest holders. The personal injury claimants rejected the plan. *Id.* at 514.

The Third Circuit Court of Appeals ruled that any distribution to equity holders before unsecured creditors were paid in full violated the absolute priority rule. The Third Circuit rejected the proponents' argument that the absolute priority rule was not implicated because the warrants were distributed to trade creditors, who then waived such distribution in favor of equity holders. Further, the Third Circuit noted that where personal injury claimants rejected the plan, trade creditors automatically waived the warrants without any means to object. "Allowing this particular type of transfer would encourage parties to impermissibly sidestep the carefully crafted structures of the Bankruptcy Code, and would undermine Congress' intention to give unsecured creditors bargaining power in this context." *Id.* at 514-15. The Third Circuit also rejected the proponent's argument that the transfer of warrants to equity was not "on account of" their equity interests, but rather was consideration for the equity holders' settlement of intercompany claims. The Third Circuit found it significant that the intercompany claims were valued at $12 million and the warrants were valued at $35 to $40 million.

The District Court had distinguished *SPM* on three grounds: (1) *SPM* arose in a chapter 7 proceeding, where the absolute priority rule is not implicated; (2) the property in dispute was subject to the lien of an undersecured creditor; and (3) the distribution in *SPM* was, in effect, a "carve – out," which is generally permitted. The Third Circuit adopted this reasoning. *Armstrong*, 423. F.2d. at 514.

About eight months after the Third Circuit's decision, the district court confirmed the debtors' subsequently modified plan, which deleted the distribution of warrants to equity holders. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136 (D. Del. 2006).

Subsequent Interpretation of SPM and Armstrong

In *In re World Health Alternatives*, 344 B.R. 291 (D. Del. 2006), the bankruptcy court approved a settlement agreement among the debtors, the committee, and the secured lenders, whereby the committee withdrew its objections to the debtor's sale motion and the secured lender agreed to carve out approximately $1.6 million for the benefit of unsecured creditors. Priority creditors were not paid in full. The trustee objected to the settlement and argued that it violated the absolute priority rule. The court rejected the trustee's argument and approved the settlement because the gifting took place in the context of a settlement and not a plan.

In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the debtor's plan classified certain punitive damage claims separately from other general unsecured claims. The debtor's senior secured creditors agreed to gift a certain portion of the value they would have otherwise received on account of their secured claims to the holders of general unsecured claims, but not to the punitive damage claimants. The bankruptcy court confirmed the plan over the objection of the punitive damage claimants, ruling that creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including sharing them with other creditors, even if that sharing conflicts with the Code's distribution and priority scheme.

In *In re Journal Register Co.*, 407 B.R. 520, 530 (S.D.N.Y. 2009), the senior secured lenders agreed to "gift" approximately $7 million, which was to be distributed pro rata to unsecured trade creditors who did not object to confirmation of the plan and consented to the release of any claims against the debtor and the lenders arising during the chapter 11 case or from confirmation of the plan. The "gift" would be placed in a trade account.

All classes of creditors voted in favor of the plan. However, the securities claimants and equity classes were deemed to reject the plan, and the debtor therefore sought confirmation under the cram down provisions of section 1129(b) of the Bankruptcy Code. The beneficiaries of the employee pension plan argued that the secured lenders' gift violated sections 1122 and 1129(b) of the Bankruptcy Code. The debtor's chief restructuring officer testified that the trade account distribution was critically important to the debtor's ability to fulfill its business plan. The bankruptcy court overruled the objection and held that there was no forced distribution from one class to a junior class over the objection of an intervening dissenting or objecting class. The gift was from a small group of secured lenders and was wholly consensual.

In *In re Worldcom, Inc.*, 2003 WL 23861928, Case No. 02-13533, *61-62 (Bankr. S.D.N.Y.), the court approved a voluntary distribution from one class to another class ruling that as long as there was no impact on other creditor recoveries, the absolute priority rule was inapplicable. The court further ruled that agreements by creditors to share their recoveries under a plan of reorganization with other creditors need not benefit an entire class and that the contributing class did not have to be secured.

In *In re Parke Imperial Canton, Ltd.*, 1994 WL 842777, Case No. 93-61004, *11 (Bankr. N.D. Ohio), the court approved a secured creditor's plan contribution to one class of unsecured creditors but not to another. The contribution did not "unfairly discriminate." Proponents plan confirmed over the debtor's plan.

Gifting Not Approved as Violation of Absolute Priority Rule or Serving an Improper Purpose

In *In re OCA, Inc.*, 357 B.R. 72 (E.D. La. 2006), the bankruptcy court followed *Armstrong* in denying confirmation of a plan. The court held that the gift violated the absolute priority rule. The plan provided that the secured creditor would be paid in full and would extend participation rights to equity holders, even though general unsecured creditors' claims were not fully satisfied.

In *In re Scott Cable Communications, Inc.*, 227 B.R. 596, 603 (Bankr. D.Conn. 1998), the debtor proposed a liquidating chapter 11 plan that provided for payment of administrative, priority and unsecured claims from recoveries that were otherwise payable to secured creditors. The plan did not provide for payment of capital gains taxes arising from the sale of its assets. The bankruptcy court refused to confirm the plan, ruling that is principal purpose was to avoid taxes, in violation of section 1129(d). The court further declared that gifting should not be condoned when it is used for an ulterior or improper purpose.

DISTRIBUTIONS TO CREDITORS THROUGH TRUSTS FUNDED BY "GIFTS" OUTSIDE OF A PLAN

In re TSIC, Inc., 393 B.R. 71 (Bankr. D. Del. 2008). In *In re TSIC, Inc.*, the creditors' committee filed a motion under Rule 9019 seeking approval of a settlement agreement with the highest bidder of certain of the debtor's assets. The settlement agreement resolved the committee's objections to the sale. The agreement provided, in part, that the committee would support the sale and would waive the right to challenge the bidder's reduction of its original bid. *Id.* at 74. In exchange for the committee's agreement to withdraw its objections, the bidder agreed to fund a trust account for the exclusive benefit to the debtor's general unsecured creditors. *Id.* The U.S. Trustee objected to the motion on the grounds that the settlement unfairly favored unsecured creditors and violated the absolute priority rule. *Id.*

The Court approved the settlement and held that the absolute priority rule was not violated where a non-creditor stalking horse bidder paid non-estate funds for the benefit of general unsecured creditors. *Id.* at 75. The Court stated that the purchaser's funds were "not proceeds from a secured creditor's lien, do not belong to the estate, and will not become part of the estate even if the Court does not approve the Settlement." *Id.* at 77. The Court reasoned that money to be paid to the general unsecured creditors was non-estate property and that the settlement did not violate any provision of the Bankruptcy Code. *Id.*

In re Kainos Partners Holding Company, LLC et al., Case No. 09-12292 (BLS)(March 31, 2009). In *Kainos,* the Debtors and the Committee filed a joint motion (the "9019 Motion") to approve terms and conditions of an asset purchase agreement ("APA") and a certain mutual release ("Mutual Release") between Dunkin Brands, Inc. ("DBI"), Dunkin Franchising LLC, DBI Stores, Dunkin Donuts Franchised Restaurants, LLC, the Committee, the Debtors, CIT Group/Equipment Financing, Inc. ("CIT"), Kainos Investment Partners I, LLC ("KIP I"), Kainos Investment Partners II, LLC ("KIP II"), and PCEP II KPHC Holdings, Inc. ("Palisade").

On the Petition Date, the Debtors were indebted to CIT in the principal amount of approximately $25.9 million. Also on the Petition Date, the Debtors had outstanding obligations to DBI of $4.1 million, and to Palisade of $530,000. An initial DIP facility was approved in the amount of $1.5 million. In February 2010, the Debtors sought approval of a second DIP facility to secure funding until an auction and sale of substantially all the Debtors' assets could be completed.

Also in February 2010, the Debtors, CIT, Palisade, DBI and the Committee entered into a term sheet (the "Term Sheet") regarding the terms and conditions under which the Debtors could conduct a sale of their assets. DBI agreed to be the stalking horse for such a sale.

The Term Sheet provided that DBI would lend up to an additional $500,000 to fund the Debtors' expenses through the closing date of the proposed sale. Additionally, if DBI were the successful bidder at the sale, it agreed to assign to the estate, for the benefit of the general unsecured creditors, and the fees of the Committee professionals in excess of $125,000, DBI's right to repayment of $250,000 of the CML Subsidy Loans and CML Subsidy Loan Obligations

(as defined in the Amended and Restated DIP Financing, Ratification and Intercreditor Agreement) (the "Carve-Out"). In addition, as further consideration for the Carve-Out, the Debtors, Committee, DBI, CIT, KIP I, KIP II and Palisade granted each other specific mutual releases. In sum, the Term Sheet, the contemplated APA and the Mutual Release effected a global settlement (the "Global Settlement") of the various issues between the parties.

The 9019 Motion proposed that the Carve-Out being granted to the general unsecured creditors was not proceeds from the sale of the Debtors' assets and therefore was not property of the Debtors' estates. Rather, the Carve-Out was merely a "gift" being provided by DBI out of what would otherwise be its collateral. The gift was in consideration of the Committee's agreement to support the Debtors' asset sale and the releases being given by the Committee. The 9019 Motion cautioned that if the Court did not approve the Global Settlement, then DBI's obligation to grant the Carve-Out and waive other rights would be extinguished and general unsecured creditors would receive no benefit from the proposed settlement.

The United State Trustee ("UST") objected to the 9019 Motion on the basis that the proposed Global Settlement violated the absolute priority rule and the plan confirmation requirements set forth in 11 U.S.C. § 1129. The UST objected that the "Committee cannot sell its procedural right to challenge the sale or rights to assert claims and causes of action owned by the Debtors' estates . . . for the payment of cash or other consideration to general unsecured creditors that may be inconsistent with the treatment that a plan proponent is obligated to give to claimants and creditors senior in priority to the Committee's constituency." "[T]he Committee should not be permitted to accomplish by means of a settlement what it cannot do by litigating the matter at issue and/or by proposing a chapter 11 plan – that is, move its constituency ahead of allowed administrative and unsecured priority creditors in priority of distribution." Accordingly, the UST requested that the Court condition approval of the settlement on claimants and creditors senior to general unsecured creditors being made whole.

In particular, the UST argued that, under 9019 standards, the proposed Global Settlement was unreasonable because cash payment was not one of the remedies available to the Committee if the estates' claims against DBI were litigated. The UST further proposed that the Global Settlement violated the teachings of *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005) where the Third Circuit noted that, in the context of a plan of reorganization, one classes' handoff of certain warrants to a junior class of creditors violated the absolute priority rule by skipping over the rights of members of intervening classes.

The UST also noted that the Third Circuit, in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986), had also cautioned that it would not tolerate the use of section 363(b)(1) to evade creditor protections contained in Section 1129. Likewise, the Court in *In re On-Site Sourcing, Inc.*, 412 B.R. 817 (Bankr. E.D. Va. 2009), concluded that a sale that included creation and funding (from the secured creditors' collateral) of a trust for the benefit of general unsecured creditors was problematic: "The provision effectively pre-determines, in significant part, the structure of an as yet to be drafted plan of reorganization and effectively evades the 'carefully crafted scheme' of the chapter 11 confirmation process." *Id.* at 826.

At oral argument, counsel for the Committee distinguished the Abbotts Dairies case, and noted that: (i) the present matter did not involve a plan; (ii) the Abbotts Dairies case specifically distinguished the SPM line of cases; and (iii) the settlement involved settlement of Committee claims, not claims of creditors with higher priority (for whom the deadline to bring such claims had long expired).

The UST took exception to what it regarded as the Committee compromising estate claims and causes of action for cash payment when there were claimants senior in priority to general unsecured claims. The UST noted in contrast that avoidance actions were not being put solely in the hands of the Committee's constituents, but rather were available for all creditors, including CIT, who, as part of the Global Settlement, was receiving a portion of any avoidance recoveries toward its deficiency claim.

The Court rejected the UST's view that the Committee was a fiduciary for all creditors "until I cloak him with that authority," so the Court found no breach of fiduciary duty by the Committee in the negotiation of the Global Settlement. The Court also rejected the UST's view that the settlement disadvantaged administrative creditors: to the contrary "the record before me supports the finding that in the absence of the settlement there would be catastrophic loss of value to admin creditors."

In rendering its opinion in favor of the Global Settlement, the Court noted that the Carve-Out for the benefit of the general unsecured creditors was consideration for resolving and releasing certain potential claims and causes of action against the secured creditors. The Court ruled that the Global Settlement did not violate Armstrong; the Global Settlement did not arise in the context of a plan and there is no expectation that the Debtors would be moving forward with a plan. The Court also noted that he was not satisfied that the Global Settlement meaningfully impaired the rights or interests of administrative creditors; indeed, the Court held that in the context of the proposed sale, and attendant payment of cure costs and other costs as part of the sale, administrative creditors themselves were likely better off because of the Global Settlement. Finally, the Court found that, based upon the testimony of the witnesses, it would have been "exceedingly unlikely" that any meaningful effort would have been made to prosecute the claims that were being released as part of the Global Settlement – especially in the absence of funds to do so. Finally, after considering the requirements for approval of 9019 motions generally, the Court held that the Global Settlement should be approved and was not violative of the Bankruptcy Code.

In re Butler Services International, Inc., Case No. 09 11914 (KJC) (Bankr. D. Del.) is one in which the approval of SPM gifts was first sought in the context of a conversion, but when the Court denied that request, the SPM gifts were then sought to be approved in the context of a structured dismissal, which the Court ultimately granted. This case is included in these materials largely for the purpose of demonstrating that an SPM gift might show up in a wide variety of contexts.

Butler Services, like many current cases, started as a "quick sale" case. The debtors filed a bidding procedures and sale motion on the first day, June 1, 2009 (Docket No. 19) (the "Sale Motion"), requesting authority to sell substantially all of their assets to a stalking horse bidder,

Butler America LLC. On June 26, 2009, the debtors filed a notice cancelling the auction (Docket No. 139), and advising that no qualified bidders, other than Butler America, had offered to purchase the assets. The Court entered an order on July 1, 2009 (Docket No. 208) (the "Sale Order") approving the sale.

After the completion of the debtors' sale of assets, one category of potentially valuable assets that remained were claims under a directors and officers insurance policy. However, the debtors were unable to pursue those claims because of an "insured – versus – insured" exception in the policy. Accordingly, the major constituencies in the case concluded that a conversion that resulted in a chapter 7 trustee being put into place would allow the trustee (who would not be an insured) to pursue those claims.

Therefore, on December 23, 2009, the debtors and the committee filed a joint motion to convert the debtors' cases to chapter 7 (Docket No. 463) (the "Conversion Motion"). The Conversion Motion also requested approval of a stipulation among the debtors, the committee, and the prepetition second lien lender. The stipulation provided for two gifts to be provided by the prepetition second lien lender, one in the form of a winddown reserve in the amount of approximately $1 million to be used to pay administrative expense claims, and the second in the form of a distribution reserve for the benefit of general unsecured claims in the amount of up to $500,000 plus a portion of proceeds recovered on account of the director and officer claims. The stipulation further provided that conversion would occur immediately upon the funding of these two gifts. Finally, in planning for an anticipated chapter 7 trustee election, the stipulation expressly provided for the secured creditor to have a fixed and allowed unsecured deficiency claim, presumably to avoid the frequent issue in trustee elections of a secured creditor having an unliquidated deficiency amount.

The Office of the United States Trustee filed an objection to the Conversion Motion (Docket No. 483). The Trustee maintained that the Conversion Motion was nothing more than a pseudo-chapter 11 plan, which the parties were attempting to combine with a chapter 7 conversion, after practically all assets had been removed from the estates. The Trustee further maintained that the gifts violated the absolute priority rule, *citing Armstrong*.

On January 25, 2010, the Court entered an order denying the Conversion Motion (Docket No. 522). At the hearings on the Conversion Motion, the Court expressed a couple of concerns with the concept of an SPM gift in the context of a conversion motion. First, the Court indicated that it has a preference for a "clean break" when an SPM settlement is being proposed. Specifically, the Court indicated that it opposes a situation that would expose creditors to competing claims administration by both a general unsecured creditors trustee as well as by a chapter 7 trustee. This possibility would have been avoided if the SPM gifts had been implemented in the context of a structured dismissal. Second, the Court was concerned with the mechanical issue of avoiding a burden upon the clerk's office following conversion for any notices that would have to be issued. The Court indicated that it would not approve an SPM motion that called for conversion absent a suitable reserve for the Court-appointed claims agent to serve out the anticipated notices needed in chapter 7. However, in denying the Conversion Motion, the Court indicated that SPM settlements are well-settled within the Third Circuit, in terms of the ability of a secured creditor to gift its collateral outside of the bankruptcy priority

scheme (especially when there were no priority claimants objecting), provided that it does not leave the Court or the clerk's office with any open loops or additional burdens.

Following the Court's ruling, on March 1, 2010, the debtors and the committee filed a joint motion to dismiss the cases (Docket No. 557) (the "Dismissal Motion"). The Dismissal Motion also sought authority to approve a stipulation among the debtors, the committee, and the prepetition second lien lender. The stipulation provided for two gifts to be provided by the prepetition second lien lender, one in the form of a winddown reserve in the amount of $728,000 to be used to pay administrative expense claims, and the second in the form of a distribution reserve for the benefit of general unsecured claims in the amount of $150,000 plus a portion of proceeds recovered on account of the director and officer claims.

On March 21, 2010, the Trustee filed an objection to the Dismissal Motion (Docket No. 576). The Trustee maintained the structured dismissal was a *sub rosa* plan that would inappropriately result in the rights of claimants being altered outside of the bankruptcy court. The Trustee further maintained that the gifts violated the absolute priority rule, citing Armstrong.

On April 13, 2010, the Court entered an order granting the Dismissal Motion (Docket No. 603).

In re Electroglas, Inc., et al., Case No. 09-12416 (PJW). The debtors and the purchaser of the debtors' assets asked the Court to approve a $250,000 gift to unsecured creditors, pursuant to an asset sale agreement, wherein the purchaser would give money to the debtors' estates to ensure the estates' administrative solvency and to the holders of allowed general unsecured claims. No parties objected to the gift aspect of the sale. The money for holders of general unsecured claims came directly from the purchaser and, therefore, was never part of the debtors' estates. In an Order issued October 2, 2009, the Court approved the sale and the gift.

In re Wickes Holdings, LLC and Wickes Furniture Company, Inc., Case No. 08-10212 (KJC). The debtors asked the Court to approve a trust for the benefit of general unsecured creditors, pursuant to a DIP financing agreement, wherein the Committee would not pursue any claims as to the validity and priority of liens against the DIP lender and in exchange, the DIP lender agreed to fund a GUC Trust out of funds that the DIP lender would have been entitled to receive under its liens. In an Order dated March 27, 2008, the Court approved the DIP financing agreement and the creation of the GUC Trust.

Over one year later, the debtors asked the Court to for an order approving the distribution of funds from the GUC Trust to the general unsecured creditors and dismissing the debtors' chapter 11 cases. The United States Trustee objected, arguing that the Court did not have subject matter jurisdiction over the proceeds of the trust because those funds were not property of the estate. Certain WARN Act Plaintiffs also objected to the dismissal of the cases because the motion sought to approve a *sub rosa* plan. Ultimately, in an order dated May 11, 2009, the Court approved the distribution of the GUC Trust funds and dismissed the debtors' chapter 11 cases.

In re NetVersant Solutions, Inc., et al. Case No. 08-12973 (PJW). The Committee asked the Court to approve a settlement, pursuant to a Bankruptcy Rule 9019 motion, with a pre- and post-petition secured lender and the purchaser of the debtors' assets wherein the Committee

would release its claims as to validity and priority of liens against the secured lender and not pursue any objections to the sale in exchange for the purchaser funding a $3,000,000 trust account and issuing a $2,000,000 note for the benefit of the debtors' general unsecured creditors. On December 19, 2008, the Court issued an order approving the settlement, without objection.

In re Avado Brands, Inc., et al. Case No. 07-11276 (MFW). The Committee asked the Court to approve a settlement, pursuant to Bankruptcy Rule 9019 motion, with a pre-petition secured lender, who was attempting to credit bid on the debtors' assets, wherein the Committee would release all potential objections to the sale and claims as to validity and priority of liens against the secured lender in exchange for a gift of a percentage of the recoveries realized by the secured lender's pursuit of some of the debtors' litigation rights, which were subject to the secured lender's liens, and a $75,000 cash give-up from the secured lender's liens. The settlement called for the secured lender to pay the funds directly to a trust, bypassing the debtors' estates. The United States Trustee filed a limited objection to the motion arguing that it violated Armstrong, constituted a *sub rosa* plan, was procedurally deficient because the Court was not authorized to approve third-party settlements under 9019 and violated the priority scheme of the Bankruptcy Code. In an Order dated January 11, 2008, the Court approved the settlement over the United States Trustee's objection.

In re World Health Alternatives, Inc., et al., 344 B.R. 291 (Bankr. Del. 2006) (PJW). The debtors asked the Court to approve a settlement, pursuant to a Bankruptcy Rule 9019 motion, between the Committee and a pre- and post-petition secured lender wherein the Committee would release its claims as to validity and priority of liens against the secured lender and withdraw its objections to the sale of the debtors' assets to the secured lender in exchange for the secured lender wiring a $1,625,000 collateral carve-out from its liens directly to an escrow account for counsel to the Committee. The United States Trustee objected to the settlement because it violated Armstrong and was unfair to priority creditors. In an order dated July 7, 2006, the Court approved the settlement.

The United States Trustee appealed the decision. Given the harm to the estates that would occur if the United States Trustee were successful on appeal, the Debtors, the Committee, the United States Trustee, and the Lender agreed to dismiss the appeal as part of an arranged settlement whereby the case would convert to chapter 7, and the settlement funds would be paid to the debtors' estates.

In re PSO Successor Corp. f/k/a PSA Quality Systems (Ohio), Inc., et al. Case No. 04-13030 (MFW). The debtors asked the Court to approve a settlement, pursuant to Bankruptcy Rule 9019 motion, between the Committee and a senior secured lender wherein the Committee would waive any objections to a DIP financing motion, bid procedures motion, and sale motion, and the secured lender would gift proceeds from the debtors' tax returns, which were subject to the secured lender's liens, up to a maximum of $400,000. In addition, the debtors asked the court to authorize the Committee to distribute the funds in accordance with the terms of the settlement agreement. The United States Trustee objected, arguing that the motion violated the absolute priority rule and that conversion would be in the best interests of all the debtors' creditors. In an order dated February 1, 2006, the Court approved the settlement and authorized the Committee to distribute the gift to non-priority general unsecured creditors.

In re CFM U.S. Corporation, Case No. 08-10668 (KJC). On April 9, 2008, CFM U.S. Corporation and CFM Majestic U.S. Holdings (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On April 17, 2008, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee").

On September 12, 2008, the Committee initiated an adversary proceeding by filing a complaint against the Debtors' prepetition secured lender, which sought, in part, (i) declaratory relief to recharacterize the subordinated secured claims asserted by the lender; (ii) equitable subordination of secured claims asserted by the lender; and (iii) avoidance of fraudulent transfers and disallowance of the claims. The Committee and the lender, along with the Debtors, conducted multiple mediation sessions to resolve the issues raised in the adversary proceeding.

The parties reached a settlement and agreed that $3,100,000 would be disbursed to a distribution agent for distribution to creditors. Under the terms of the settlement, the parties initially agreed that the bankruptcy case should be converted to a chapter 7 case. However, the parties subsequently agreed that the case should be dismissed after the disbursement agent made distributions to creditors. On June 30, 2009, the Court approved the settlement agreement. After the entry of the order approving the settlement agreement, the Debtors and Committee filed claim objections to reduce the amount of claims against the estate. In December 2009, the disbursement agent made distributions to creditors. On February 1, 2010, the Court entered an order dismissing the bankruptcy case.

STRUCTURED DISMISSALS

Structured dismissal motions were considered in the following cases:

In re Butler Servs. Int'l, Inc., Case No. 09-11914 (KJC) (Bankr. D. Del. 2010) (order D.I. 603).

In re KB Toys, Inc., Case. No. 08-13269 (KJC) (Bankr. D. Del. 2010) (order D.I. 993).

In re Foamex Int'l, Case No. 09-10560 (KJC) (Bankr. D. Del. 2010) (order D.I. 712).

In re BT Holding III, LLC, Case No. 09-11173 (CSS) (Bankr. D. Del. 2009) (motion denied).

In re CFM U.S. Corporation., Case No. 08-10668 (KJC) (Bankr. D. Del. 2009) (order D.I. 1097).

In re Wickes Holdings, LLC, Case No. 08-10212 (KJC) (Bankr. D. Del. 2009) (order D.I. 1418).

In re Bag Liquidation, Ltd., Case No. 08-32096 (Bankr. N.D. Tex. 2009) (order D.I. 688).

In re Levitz Home Furnishings, Inc., Case No. 05-45189-brl (Bankr. S.D.N.Y. 2008) (order D.I. 1167).

In re Princeton Ski Shop, Inc., Case No. 07-26206 (Bankr. D.N.J. 2008) (order D.I. 546).

In re Harvey Elecs., Inc., Case No. 07-14051-alg (Bankr. S.D.N.Y. 2008) (order D.I. 177).

In re Dawahare's of Lexington, LLC, Case No. 08-51381-jms (Bankr. E.D. Ky. 2008) (order D.I. 316).

In re Magnolia Energy, L.P., Case No. 06-11069 (MFW) (Bankr. D. Del. 2007) (order D.I. 196).

In re CSI Incorporated, Case. No. 01-1292-reg (Bankr. S.D.N.Y. 2006) (order D.I. 284).

In re New Weathervane Retail Corp., 04-116349 (PJW) (Bankr. D. Del. 2005) (order D.I. 566).

In re Blades Board & Skate, LLC, Case No. 03-48818 (Bankr. D.N.J. 2004) (order D.I. 126).

Structured dismissal motions are presently pending in this District in the following cases:

In re TLG Liquidation Corp., Case No. 10-10206 (MFW)

In re Thompson Products, Inc., Case No. 08-10319 (PJW)

In re Pappas Telecasting Inc., Case No. 08-10916 (PJW)

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Attorneys for the Debtor and Debtor-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	Chapter 11
HARVEY ELECTRONICS, INC.,	Case No. 07-14051 (ALG)
Debtor.	

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MOTION TO DISMISS CHAPTER 11 CASE

TO: THE HONORABLE ALLAN L GROPPER,
UNITED STATES BANKRUPTCY JUDGE:

Harvey Electronics, Inc., debtor and debtor-in-possession herein (the "Debtor"), by its counsel, Ruskin Moscou Faltischek, P.C., respectfully submits this motion ("Motion") for an order pursuant to § 1112 (b) of the Bankruptcy Code and Fed. R. Bankr. P. 1017 and 2002 dismissing the chapter 11 case and fixing the form, manner and extent of notice of such hearing.

BACKGROUND AND PROCEDURE

1. The Debtor is a retailer and installer of high-end audio and video equipment. It currently operates one store plus a corporate office and a warehouse, each pursuant to a separate lease. At the time it filed for Chapter 11 relief, it operated eight stores, but, as explained *infra*, it has since closed seven stores.

2. On December 28, 2007 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code ("Bankruptcy Code").

3. The Debtor continues to operate its business as debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

4. On January 11, 2008 (amended January 24, 2008), the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Committee"). Cooley Godward Kronish, LLP, represents the Committee. The Debtor's sole secured creditor, YA Global Investments, LP (hereinafter "YA Global"), has a duly perfected and valid security interest in most of the Debtor's assets with limited exceptions and is owed approximately $3.7 million.

JURISDICTION

5. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and other predicates for the relief sought herein is §§ 1112(b) and 105(a) of the Bankruptcy Code.

RELIEF REQUESTED

6. Previously, the Debtor applied to this Court for the authority to sell its remaining inventory through a going out of business sale procedure. The Debtor ultimately selected Hudson Capital Partners, LLC and ClearBid, Inc in accordance with this Court's order of March 21, 2008. Unfortunately, the GOB sales did not generate the expected sales. The debtor wound up selling off less merchandise than anticipated and closed six stores.

7. The Debtor then applied to the Court for authority to enter into a Purchase Agreement and Sale of Assets with HNY Acquisition Corp. The proposed sale was designed to generate $1,700,000 for the Debtor's estate, which proceeds would in turn be distributed in accordance with a settlement agreement reached among the Debtor, the Creditors Committee and YA

Global. The Court approved the sale pursuant to an order dated August 21, 2008. Once again, the Debtor was faced with the prospect of a sale, which fell short. The buyer, HNY Acquisition, could not raise the necessary capital required to complete the sale due to the sharp downturn in the financial markets in September and October 2008 and continuing to this date.

8. The Debtor then decided to close the store it operated within the Bang & Olufsen store at 927 Broadway, New York City and sell the remaining merchandise, inventory and miscellaneous equipment to Bang & Olufsen Retail East LLC for approximately $90,000. The Debtor has only one store remaining at the ABC Carpet Store at 888 Broadway, New York City. The Debtor has tried to find alternative sources of capital to complete a sale on modified terms. It has not been able to find such sources.

9. The Debtor has on hand in its bank account the sum of $312,529. The cash balance will be subject to the payment of ongoing administrative expenses such payroll, rent, etc. The Debtor has deposited in escrow with Cooley Godward Kronish, LLP ("CGK"), attorneys for the Unsecured Creditors Committee, the sum of $200,000, an amount agreed upon and approved in the Court's order of March 21, 2008 representing a carveout from the YA Global secured claim.

10. In furtherance of the aforesaid order, CGK has reviewed the claims filed and schedules of unsecured creditors and has reconciled those claims where there was discrepancy. Annexed hereto as Exhibit "A" is a Claims Schedule for those persons who will receive a *pro rata* share of the $200,000 carveout.

11. Pursuant to the final Order of this Court dated March 21, 2008 ("Final Cash Collateral Order"), the Court approved a settlement agreement by and among the Debtor, the Committee and YA Global to utilize the proceeds of the GOB Sales as follows:

a. The Professionals agreed to accept $140,000 as and for compensation on a go-forward basis for the period March 6, 2008 through the conclusion of the case;

b. A carve out was established for the benefit of general unsecured creditors in the amount of $200,000, which is presently being held by Committee counsel;

c. After payment of the go-forward budget for the Professionals, and funding the payment to the general unsecured creditors, the next $1 million in proceeds from the GOB sales would be paid to YA Global on the approved YA Global claim;

d. The next $350,000 was set aside for payment to the Professionals for accrued administrative fees and expenses incurred from the Petition Date through and including March 6, 2008;

e. To the extent available, the next $310,000 recovered from the GOB sales was to be paid to be YA Global on the approved YA Global claim

f. To the extent available, the next $100,000 of the proceeds from the GOB sales was to be paid on a *pro rata* basis to YA Global on the approved YA Global claim and the Professionals;

g. To the extent available, any further proceeds from the GOB sales were to be paid to YA Global on the approved YA Global claim to the extent of its claim; and

h. To the extent available, after payment in full to the YA Global claims, any remaining proceeds were to be paid to the Debtor's estate for distribution in the bankruptcy case.

12. As mentioned above, neither The GOB Sales nor the proposed sale to HNY Acquisition raised funds as anticipated.

13. The Debtor presently has approximately $678,000 in inventory on a cost basis at the ABC Store and its warehouse. However, a significant portion this inventory consists of product that is used in the Debtor's installation business or is several years old and thus has little value at this time. Further continuation of business will only erode the remaining cash on hand. The Debtor expects, upon dismissal of this case, to turn over its remaining cash to YA Global, less

the $140,000 estimated for the professionals as outlined in the March 21, 2008 order, plus surrender the remaining inventory and fixtures to it as the secured creditor.

14. In short, it makes little sense for the Debtor to continue to operate any further. Whatever assets and cash remain are all subject to the secured claim of YA Global, which is owed approximately $3.7 million. The value of the remaining assets is substantially below what is owed YA Global. The Committee has investigated the Debtor's pre petition activities and financials and has concluded that any potential recoveries it or a trustee appointed in a Chapter 7 case may make are not cost effective.

15. The Debtor has discussed dismissal of the case with both the Committee and YA Global and each have expressed their support for dismissal at this time.

16. Beside dismissal, all that remains for the Court is to determine the professional fees and expenses of the Debtor and Committee's attorneys and accountants who, by the terms of the March 21, 2008 order, are limited in the aggregate to $140,000 under the circumstances of the case. The professionals, in the aggregate, have incurred substantially more since the inception of the case and, regardless of how much they are ultimately awarded, will have suffered a considerable loss.

REQUEST FOR NOTICE

17. Rule 2002(a) of the Fed. R. Bankr. P. requires that the parties-in-interest be given 20 days notice of a motion to dismiss. The Debtor respectfully submits that cause exists to schedule and conduct the hearing on 20 days notice. A form of notice is annexed hereto as Exhibit "B."

WAIVER OF MEMORANDUM OF LAW

18. The Debtor respectively requests that the Court waive and dispense with the requirements set forth in Rule 9013-1(b) of the Local Bankruptcy Rules that any motion filed shall have an accompanying memorandum of law. There is nothing novel presented in the

Motion. Accordingly, the Debtor submits that a waiver of Rule 9013-1(b) requirement is appropriate in these circumstances.

NO PRIOR RELIEF

19. No prior application for the relief requested herein has been made to this or any other Court.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Debtor respectfully requests that this Court enter an order, in substantially the form annexed hereto as Exhibit "C," pursuant to § 1112 (b) of the Bankruptcy Code and Fed. R. Bankr. P. 1017:

1. Dismissing the Chapter 11 petition together with such other and further relief as this Court deems just and proper; and

2. Determining the amount of fees and expenses to be awarded to the professionals retained by Debtor and the Committee upon presentment of appropriate applications therefor.

Dated: Uniondale, New York
November 7, 2008

RUSKIN MOSCOU FALTISCHEK, P.C.
Attorneys for Debtor and Debtor-in-Possession

By: _____
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re: Chapter 11

HARVEY ELECTRONICS, INC., Case No. 07-14051 (ALG)

Debtor.
----------X

ORDER GRANTING MOTION TO DISMISS CHAPTER 11 BANKRUPTCY CASE OF HARVEY ELECTRONICS, INC. PURSUANT TO SECTION 1112(b) OF THE BANKRUPTCY CODE AND TO AUTHORIZE DISTRIBUTION OF CARVEOUT FUNDS TO GENERAL UNSECURED CREDITORS

Upon the motion dated November 7, 2008 (the "Motion")[1] of Harvey Electronics, Inc. (the "Debtor"), for an order pursuant to §§ 105(a) and 1112(b) of Title 11 of the United States Code (the "Bankruptcy Code") (a) dismissing the Debtor's Chapter 11 bankruptcy case; (b) authorizing Cooley Godward Kronish, LLP ("CGK"), counsel to the Official Committee of Unsecured Creditors (the "Committee"), to distribute any funds remaining in their possession to general unsecured creditors identified on Exhibit "A" to the Motion; and (c) granting such other and further relief as the Court deems just and proper; and this Court having reviewed the Motion and having conducted a hearing on the Motion on December 9, 2008, at which time the Debtor and all parties in interest were given an opportunity to be heard; and it appearing that the notice of the Motion haven been given to (a) the Office of the United States Trustee; (b) the Committee; (c) the Debtor's secured lender; and (d) all creditors who (i) have filed claims, (ii) are listed in the Debtor's Schedules; or (iii) who have filed a notice of appearance; and objections to the Motion having been filed by Fairfield Property Associates, Merchants Rent-A-Car, Inc. and 205

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[1] Capitalized terms not otherwise defined herein shall have the meaning thereto in the Motion.

Chubb Avenue, LLC and stipulations settling the objections having been spread on the record and said objections were withdrawn and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (b) notice of the Motion and the opportunity for a hearing thereon were adequate and appropriate and no other notice need be given; (c) the legal and factual basis set forth in the Motion constitute just cause for the relief granted herein; (d) the professionals retained in the case have acted in good faith in the performance of their duties; and (e) the requested relief in the Motion is in the best interests of the Debtor's estate and its creditors; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED, ADJUDGED AND DECREED, THAT:

1. The Motion is hereby granted.

2. Pursuant to section 1112(b) of the Bankruptcy Code, the Debtor's Chapter 11 bankruptcy case is hereby dismissed effective December 22, 2009.

3. CGK is authorized to distribute the funds in the Carveout Fund to the beneficiaries of the GUC Trust identified on amended Exhibit "A" to the Motion, which was compiled as a result of an informal claims review process undertaken by the Committee wherein claims were allowed in their filed or scheduled amount, unless otherwise agreed to be modified by the claimant.

4. CGK shall administer the GUC Trust as follows:

   a. CGK will make the first and final distribution from the Carveout Funds no

later than 60 days from the date this Order becomes final and non-appealable.

b. CGK shall determine whether to make any distribution that would result in a distribution of less than $25.00.

c. Any distributed checks that have not been claimed and/or cashed after 90 days from the date of such check(s) shall be deemed void and the claim disallowed.

d. Any funds remaining in the Carveout Funds after said 90-day period shall be paid to a recognized charitable organization operating in New York City.

5. Any party objecting to the relief requested by the Motion is barred from asserting any claims against the CGK, as custodian for the Carveout Funds, except for its acts of willful misconduct or gross negligence.

6. Notwithstanding § 349 of the Bankruptcy Code, prior Orders of the Court shall survive dismissal of these cases.

7. Any creditor not objecting to the relief requested herein shall be forever barred from asserting any claims against the (i) Carveout Fund except as set forth herein and (ii) CGK, in its capacity as custodian of the Carveout Fund, and will be deemed to have accepted the distribution procedures as set forth in this Order as may be modified.

8. The Debtor shall pay all U.S. Trustee fees arising under 28 U.S.C. § 1930 and costs imposed by the Clerk of the Court.

9. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or relating to the implementation of any Order of this Court and to rule on the allowance of the interim and final compensation of professionals retained in this case.

Dated: New York, New York
December 15, 2008

/s/ Allan L. Gropper
THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	Chapter 11
CSI INCORPORATED, *et al.*,	Case Nos. 01-12923 (REG) 01-12926 (REG)
Debtors.	(Jointly Administered)

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ORDER AUTHORIZING THE (I) RETENTION OF A DISTRIBUTION AGENT, (II) DISTRIBUTION OF ASSETS, AND (III) STRUCTURED DISMISSAL OF THE CASE PURSUANT TO 11 U.S.C. § 305(A)(1)

Upon the joint motion of CSI Incorporated, *et al.* (the "Debtors"), and the Official Committee of Unsecured Creditors (collectively, the "Movants"), for an order authorizing, *inter alia*, the (i) retention of a distribution agent, (ii) distribution of assets, and (ii) structured dismissal of the above-captioned Chapter 11 Case (the "Motion"); and no objections having been filed thereto; and a hearing on the Motion having been held on July 12, 2006; and at the hearing, the Movants having demonstrated that they are unable to satisfy the requirements of 11 U.S.C. § 1129 and thus cannot confirm a plan of reorganization or liquidation; and this Court having determined that the granting of the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; and notice of the Motion being good and sufficient and no further notice being required; and all objections having been withdrawn; and after due deliberation and cause appearing therefore; it is hereby

ORDERED, that the Motion is GRANTED; it is further

ORDERED, that Wells Fargo Bank, N.A. is appointed Distribution Agent for the Debtors' estates upon the terms of the Agreement attached to the Motion; and it is further

ORDERED, that the Movants and the Distribution Agent are hereby authorized to take all necessary actions to effectuate the Distribution (as defined in the Motion); and it is further

ORDERED, that the creditors holding the unsecured claims listed on Exhibit A hereto are entitled to receive a pro rata payment of the Distribution; and it is further

ORDERED, that the debtors will pay all United States Trustee quarterly fees due and owing as of the dismissal date within 10 days after dismissal. The professionals have agreed to receive payment for professional fees only when United States Trustee quarterly fees have been reconciled and paid; and it is further

~~ORDERED, that this Chapter 11 Case is hereby dismissed pursuant to 11 U.S.C. 305 §~~ (A)(1).

Dated: New York, New York
July ***24***, 2006

S/ Robert E. Gerber

UNITED STATES BANKRUPTCY JUDGE

Exhibit A

Claimant	Claim No.	Amount of Allowed Claim
Canada Customs & Revenue Agency	1(a)	$3,221.82
Public Service of Oklahoma	1	$2,085.76
MCSI	3	$934.59
/N Software	4	$3,746.90
Barrett Psareas	5	$2,062.00
Jeff Dawes	6	$232.24
American Waste Control Inc.	7	$45.00
IRS	9	$235.67
Team Air Express	10	$19,025.28
Paul Dozier	11	$2,487.14
Paul Dozier	12	$195.83
Mediatropolis	13	$3,369.00
Women's Sports Foundation	14	$200.00
Glenn Blanchard	16	$336.27
Glenn Blanchard	17	$3,749.86
AMC Computer Corp.	18	$62,256.48
Megabye (Kevin Ku)	19	$36,584.49
Dixon Sports	20	$40,804.00
Java Dave's	22	$186.97
Nextira	24	$89,843.69
Barry Goldberg	25	$4,800.00
Southwestern Bell	26	$22,100.95
Ken Gordon	29	$1,500.00
Manhattan Mini Storage	30	$992.00
Ken Gordon	31	$154.02
NYS Dept of Taxation and Finance	35	$200.00 – Agreed Allowed Administrative Expense Claim
Mary Frost	36	$511.09
Mary Frost	37	$6,089.74
Errol Ansalone	38	$1,320.00
Lightyear Communications	39	$1,463.51
Cyntergy LLC	44	$192,012.79
Raymond Cross	46	$332.48
Raymond Cross	47	$3,730.77
Corey Sohmer	49	$2,115.38
David Levine	50	$4,384.62
Doug Roedel	51	$2,293.98
John Simms	56	$673.00
Head, Johnson & Kachigian	57	$16,240.87
Stats Inc	61	$88,750.00
Comark Corp. Sales, Inc.	63	$6,472.43
Compuware	64	$609.45
Massachusetts Dept of Revenue	74	$4,938.00 - Agreed Allowed Priority Claim

CONVERSION MATERIALS

Materials and Presentation by:

Evelyn J. Meltzer
Richard W. Riley
Justin Rucki
John H. Schanne, II
Gary Seitz

STANDARDS OF CONVERSION

I. Initial Circumstances for Conversion

A. Debtor must be a debtor-in-possession. 11 U.S.C. § 1112(a)(1).

B. The chapter 11 case must have been commenced voluntarily by the debtor. 11 U.S.C. § 1112 (a)(2).

1. Cannot convert if it was commenced involuntarily. 11 U.S.C. § 1112(a)(2).

2. Cannot convert if original case was converted to a chapter 11 case involuntarily. 11 U.S.C. § 1112(a)(3).

C. The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion. 11 U.S.C. § 1112(c).

D. a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter. 11 U.S.C. § 1112(f).

II. Request for conversion must be made by a party in interest (typically a creditor, secured or unsecured). 11 U.S.C. § 1112(b)(1).

III. Party in interest must then show cause for converting. 11 U.S.C. § 1112(b)(1). Causes include, but are not limited to:

A. Substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation. 11 U.S.C. § 1112(b)(4)(A).

B. Gross mismanagement of the estate. 11 U.S.C. § 1112(b)(4)(B).

C. Failure to maintain appropriate insurance that poses a risk to the estate or to the public. 11 U.S.C. § 1112(b)(4)(C).

D. Unauthorized use of cash collateral substantially harmful to 1 or more creditors. 11 U.S.C. § 1112(b)(4)(D).

E. Failure to comply with an order of the court. 11 U.S.C. § 1112(b)(4)(E).

F. Unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter. 11 U.S.C. § 1112(b)(4)(F).

G. Failure to attend the meeting of creditors convened under section 341 (a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor. 11 U.S.C. § 1112(b)(4)(G).

H. Failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any). 11 U.S.C. § 1112(b)(4)(H).

I. Failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief. 11 U.S.C. § 1112(b)(4)(I).

J. Failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court. 11 U.S.C. § 1112(b)(4)(J).

K. Failure to pay any fees or charges required under chapter 123 of title 28. 11 U.S.C. § 1112(b)(4)(K).

L. Revocation of an order of confirmation under section 1144. 11 U.S.C. § 1112(b)(4)(L).

M. Inability to effectuate substantial consummation of a confirmed plan. 11 U.S.C. § 1112(b)(4)(M).

N. Material default by the debtor with respect to a confirmed plan. 11 U.S.C. § 1112(b)(4)(N).

O. Termination of a confirmed plan by reason of the occurrence of a condition specified in the plan. 11 U.S.C. § 1112(b)(4)(O).

P. Failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition. 11 U.S.C. § 1112(b)(4)(P).

IV. If cause is shown, the court is obligated to convert (or dismiss) the case. 11 U.S.C. § 1112(b)(1).

A. The court may refuse to convert/dismiss the case if the court can identify unusual circumstances showing that conversion/dismissal is not in the best interest of the estate and creditors. 11 U.S.C. § 1112(b)(2).

B. Unusual circumstances include the likelihood that a plan will be confirmed in a reasonable amount of time, or the time periods set forth in sections 1121(e) and 1129(e) if applicable to the case. 11 U.S.C. § 1112(b)(2)(A).

C. Unusual circumstances also include a showing that there is a reasonable justification or excuse for the debtor's act or omission providing "cause" for dismissal, provided that it also is shown that the act or omission will be cured in a reasonable time. 11 U.S.C. § 1112(b)(2)(B).

Case That Converted from Chapter 11 to Chapter 7 From July 2009 Through April 2010

Company Name	Petition Date	Case No.	Where Filed	Business Description	Pre-Petition Assets in $ mils	Conversion Date	Party Who Sought Conversion	Reason for Conversion
Applied Solar, Inc.	7/24/2009	09-12623	Delaware	Renewable Energy Company	$27	12/23/2009	Debtors	The Debtors sold substantially all of their assets. In the motion to convert, the Debtors maintained that conversion was appropriate because the Debtors were no longer operating, almost all of their assets had been converted to cash and there was no prospect for reorganization.
Indalex Holdings Finance, Inc.	3/20/2009	09-10982	Delaware	Aluminum Extruder	$439	10/30/2009	Committee	The Debtors sold substantially all of their assets. Thereafter, the Debtors filed a cash collateral motion to support the wind down of their business and the liquidation of their assets. The Committee argued that the Cash Collateral Motion would strip the estate and the creditors thereof of any opportunity to effectively prosecute potentially viable avoidance actions against insiders, the only potential value that remained for creditors. An agreed order converting the case was entered.
Life Sciences, Inc.	3/9/2009	09-04322	M.D. Florida	Prod. & Sells Molecular Bio. Enzymes	$1	10/21/2009	UST	The Debtors were administratively insolvent and were not paying their employees. The Debtors had failed to file monthly operating reports for two months, failed to respond to requests for information by the UST and failed to remit to the UST certain quarterly fees. Thus, the UST sought to have the case converted.
Linens 'n Things, Inc.	5/2/2008	08-10832	Delaware	Home Furnishings Retailer	$1,740	2/26/2010	Debtors	The Debtors' plan of reorganization was confirmed. In order for the Effective Date to occur, the Debtors had to pay in full admin claims totaling approximately $40 million. The Debtors were administratively insolvent and could not get the necessary consents from admin claimants for further extensions of the Effective Date. Thus, the Debtors sought to convert the case. The conversion motion requested that conversion be effective at the end of the month in order to avoid the inefficiencies and disruption caused by an abrupt conversion.
Mega Media Group, Inc.	8/10/2009	09-46811	E.D. New York	A Multi-Media Company	$2	11/25/2009	Debtors	The Debtors operated their radio station under an air time agreement with Island Broadcasting Company ("IBC"). IBC moved for an order compelling the Debtors to assume or reject the agreement. The parties entered into a stipulation pursuant to which the Debtors were required to pay $500,000 to IBC by October 30, 2009 or the agreement would automatically terminate. Because the Debtors were unable to get DIP financing or sell their assets, they were unable to make the required payment and were forced to cease operations. The Debtors sought to convert the case on the basis that they were no longer operating and that the chapter 7 trustee might be able to liquidate certain assets for the benefit of creditors.
Nanogen, Inc.	5/13/2009	09-11696	Delaware	Diagnostic Product Co.	$98	12/1/2009	Debtors	The Debtors sold substantially all of their assets. Approximately $350,000 of the sale funds was set aside for the Debtors' ongoing business, wind down expenses and eventual distribution to general unsecured creditors. The Debtors exhausted almost the entire $350,000 through the operation and wind down of their business, including the payment of admin claims. As such, there was no funds available for a meaningful distribution under a plan or to even satisfy admin claims. The Debtors therefore sought conversion in order to preserve what little funds existed.
Phoenix Associates Land Syndicate	6/10/2009	09-11743	E.D. Louisiana	Acquires & Develops New Companies	$0	7/31/2009	Debtors	No reason was provided in motion for conversion.
Platina Energy Group Inc.	12/2/2008	09-32394	N.D. Texas	Oil & Gas Exploration Company	$10	8/11/2009	Ch. 11 Trustee	The Debtors owned shut in oil and gas wells in two states. The cost to repair the wells was in excess of $1 million. The Debtors lacked the necessary funds and the ability to borrow such funds in order to complete the project. The Debtors were administratively insolvent and there was no reasonable likelihood of rehabilitation. Thus, the case was converted.
Retail Pro, Inc.	1/10/2009	09-10087	Delaware	Provides Retail Store Mgmt. Systems	$40	12/9/2009	Debtors	The Debtors sold substantially all of their assets. The Debtors obtained $400,000 of unencumbered funds from the sale. After winding down their estates, there was approximately $235,000 of funds remaining. The Debtors sought to convert the case because they were continuing to incur admin claims and the unencumbered cash was diminishing.

Santa Fe Holding Company	7/15/2009	09-07856	M.D. Tennessee	Restaurant Holding Co.	$13	3/29/2010	Debtors	The Debtors sold substantially all of their assets. The Debtors filed a motion seeking to convert the case because the estates were administratively insolvent and no party-in-interest opposed conversion.
SLS International, Inc.	3/3/2009	09-10696	Delaware	Manufactures Premium Audio Products	$3	12/11/2009	Debtor	The Debtor sold substantially all of its assets. The Debtors had no further access to financing. The Debtor argued that conversion would permit the chapter 7 trustee to pursue potential causes of action and thus conversion was in the best interest of creditors.
South Texas Oil Company	10/29/2009	09-54228	W.D. Texas	Independent Energy Company	$68	3/31/2010	Debtor	The Debtors sold substantially all of their assets. Although the motion does not state that the estates were administratively insolvent, it can be assumed. The motion notes that neither the UST or the Committee opposed conversion.
TWL Corporation	10/19/2008	08-42773	E.D. Texas	Technology-Enabled Solutions	$12	4/2/2010	UST	The Debtors sold substantially all of their assets. The Debtors had no ongoing operations and their assets consisted of $430,000 in cash and various claims in different phases of litigation. The Debtors had failed to file monthly operating reports for 6 months and owed money to the UST. The Committee and the UST reached an agreement whereby conversion was delayed for approximately two months to allow the Committee to "clean up" pending matters which could be resolved and hand off any pending litigation and other outstanding matters to the chapter 7 trustee.

Post-conversion obligations checklist (Chapter 11 to Chapter 7)

NO.	DESCRIPTION	DEADLINE	AUTHORITY
___ 1.	Debtor in possession or Chapter 11 trustee ("DIP") to turn over to the chapter 7 interim trustee all records and property of the estate	Forthwith	BR 1019(4)
___ 2.	DIP to file a schedule of unpaid debts incurred after the commencement of the case including the name and address of each creditor	14 days	BR 1019(5)
___ 3.	DIP to file unfilled schedules and statements	14 days	BR 1019(1)(A) and 1007(b)
___ 4.	DIP to file a final report and account	30 days	BR 5005(b)(2)
___ 5.	If converted after confirmation, DIP to file a schedule of property not listed in the final report and account acquired after filing the original petition but before the entry of the conversion order	14 days	BR 1019(5)
__ 6.	If converted after confirmation, DIP to file a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order	14 days	BR 1019(5)
__ 7.	If converted after confirmation, DIP to file a schedule of executory contracts and unexpired leases entered into or assumed after filing the original petition but before entry of the conversion order	14 days	BR 1019(5)
__ 8.	Debtor rep to attend the meeting of creditors	Set by court	Code §341(a)
__ 9.	Claims actually filed in Chapter 11 (can not rely on Scheduled claims) are deemed filed in the Chapter 7	N/A	BR 1019(3)
__ 10.	Creditors to file request for payment of postpetition claims under §503(a)	Before conversion or as set by court	BR 1019(6)
___11.	Trustee to assume or reject executory contracts or unexpired leases	60 days	§365(d)(1)