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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Judge: Vincent F. Papalia, U.S.B.J.
PETERSBURG REGENCY, LLC,	Case No.: 15-17169 (VFP)
Debtor.	Chapter 11
	Hearing Date: June 23, 2015 at 10:00 a.m.
	Cross-Motion Objection Date: June 19, 2015

CROSS-MOTION FOR ENTRY OF ORDER DIRECTING DISBURSEMENT OF INSURANCE PROCEEDS IN CONNECTION WITH ORDER DISMISSING CASE

Jim Burt, by and through his undersigned counsel Porzio, Bromberg and Newman, P.C., on his own behalf and on behalf of a total of twelve (12) creditors[1] of the Debtor Petersburg Regency, LLC (the "**Debtor**") herein, brings this cross-motion for distribution of $9,993,325.14 in estate funds (the "**Cross-Motion**") currently on deposit with the Circuit Court of Petersburg, Virginia (the "**Interpleader Funds**") in accordance with the distribution schedule annexed hereto as Exhibit "A" (the "**Distribution Schedule**"), and respectfully states as follows:

[1] The creditors supporting this Cross-Motion are, in addition to the movant, James Burt, the following: Ittleson Trust-2010-1 ("**Ittleson**"), LeClairRyan, the Honorable Anthony J. Sciuto (the "**Arbitrator**"), Accardi & Mirda, Law Office of Steven M. Kalebic, WCD Consultants, Keiter, Stephens, Hurst, Gary & Shreaves, PC, the City of Petersburg, Ramada Worldwide, Inc., Thyssenkrupp Elevator, and A.H. Realty.

PRELIMINARY STATEMENT

1. At a status conference before this Court on May 7, 2015, the Debtor objected to a distribution scheme that had been ordered in the Virginia Interpleader Action (defined below) just three weeks earlier. The Debtor's objection focused on five (5) creditors who allegedly had been "shut out" of the distribution scheme ordered by the Virginia Court: (i) A.H. Realty, (ii) R. Oshinsky & Co., Inc., (iii) ThysenKrupp Elevator, (iv) Specialized Environmental, and (v) William Spier (collectively, the "**Shut-Out Creditors**")[2]. According to the Debtor, it filed the New Jersey bankruptcy proceeding in order to protect the valid claims of the Shut-Out Creditors that had not been fairly addressed the Virginia Interpleader Court's Order.

2. In the intervening period following the May 7 status conference with this Court, the secured creditors addressed in the Virginia Distribution Order have: (i) voluntarily discounted their distributions further than they had agreed to do in the Virginia Interpleader, and (ii) engaged in discussions with certain of the Shut-Out Creditors, reaching agreement with two (2) of the five (5), i.e. A.H. Realty and Thyssenkrupp Elevator. The Secured Creditors' have further created an additional pot of $237,301.50 for the remaining three (3) non-consenting Creditors. Annexed hereto as Exhibit "A" is the proposed Distribution Schedule.

3. In a motion the Debtor filed on February 25, 2015, seeking to dismiss the Virginia Involuntary (defined below), the Debtor successfully argued that because amounts owed to its secured creditors exceeded the Interpleader Funds, secured creditors would take all, and a bankruptcy proceeding would therefore be "futile," would provide no added value, and would

[2] The IRS also appeared as a "new" creditor following the date of the May 7 status conference. The IRS's secured claim is proposed to be paid in full pursuant to the relief requested in this cross-motion. In the case of the IRS only, its consent is assumed (*see* Exhibit "A") because the secured claim listed in its proof of claim filed herein is being paid in full.

waste time and judicial resources. *See* Debtor's Motion to Dismiss Virginia Bankruptcy, Exhibit "B" hereto, at pp. 13-16.

4. The proposal contained in this Cross-Motion resolves all but three (3) of the creditors' claims, and also resolves the Debtor's concern that a long, drawn out bankruptcy including a plan process, would be a wasteful "no value added" proposition, particularly where, as the Debtors pointed out in Virginia, the secured creditors take all.

5. *In re SPM Management* and *In re Jevic Holding Corp* (citations below) provide authority for the relief requested here, i.e., a structured dismissal rather than a straight dismissal, allocating the Interpleader Funds among the senior secured creditors, with those creditors agreeing to share their respective recoveries with each of the other creditors as set forth on the Exhibit "A" Distribution Schedule attached hereto.

BACKGROUND – PROCEDURAL HISTORY

6. On September 18, 2003, the Ramada Plaza Hotel in Petersburg, Virginia (the "**Hotel**"), then owned by the Debtor, Petersburg Regency, LLC, suffered property damage from Hurricane Isabel. The property was insured by Selective Way Insurance Company ("**Selective**").

7. One year later, on September 20, 2004, the Debtor filed an action in the Superior Court of New Jersey, Bergen County, Law Division, captioned *Petersburg Regency, LLC v. Selective Way Insurance Company,* Docket No. Ber-L-1279-04 (the "**Bergen County Action**").

8. On consent of the parties (at least initially), the matter was referred to arbitration, and after ten years of exhaustive litigation in two different states (New Jersey and Virginia), including appeals and reversals on appeal, on December 23, 2104, Judge Anthony J. Sciuto (retired), acting as arbitrator, issued his decision in the Debtor's favor and against Selective, in the amount of $9,697,423.17, plus interest.

9. On December 30, Selective deposited the Interpleader Funds of $10,230,626.64 with the Clerk of the Circuit Court in Petersburg, Virginia. This sum represented the amount of Judge Sciuto's award, plus interest. Simultaneously, Selective filed an interpleader action there against the Debtor and several of its secured creditors, (the "**Interpleader Action**") captioned *Selective Way Insurance Co. v. Petersburg Regency, LLC, et al*, docketed therein as Case No. CL14-848.

10. On January 7, 2015, the Debtor submitted an application to Judge Harz in the Bergen County Action, seeking: (i) confirmation of the arbitration award; (ii) judgment in favor of the Debtor and against Selective for the amount of the arbitration award, and (iii) an injunction against Selective' s prosecution of the Interpleader Action in Virginia.

11. On February 3, 2015, three allegedly unsecured creditors of the Debtor filed an involuntary chapter 7 petition against the Debtor in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division (the "**Virginia Bankruptcy Court**"), captioned *In re Petersburg Regency, LLC,* Bankruptcy Case No. 15-30526 (the "**Virginia Involuntary**"), thereby temporarily staying the Interpleader Action.

12. On March 18, 2015, based largely on representations to the Virginia Bankruptcy Court by the Debtor, the Virginia Involuntary was dismissed.

13. On April 15, 2015, following a motion made in the Interpleader Action by a group of the Debtor's senior secured creditors, the Virginia Court entered a "Final Order," (the "**Distribution Order**") directing distribution of the Interpleader funds to primarily secured creditors in accordance with the following schedule:

Ittleson Trust-2010-1	$4,092,610.44
James Burt	$4,392,610.44
LeClairRyan	$816,186.08 + $85,653.00
City of Petersburg	$250,000.00

Honorable Anthony J. Sciuto (Arbitrator)	$34,000.00
Accardi & Mirda	$159,566.68
Law Offices of Steve M. Kalebic	$300,000.00
Ramada Worldwide, Inc. f/k/a Ramada Franchise Systems, Inc.	$100,000.00
TOTAL	**$10,230,626.64**

14. The only unsecured creditors included in that schedule were the City of Petersburg, who has now reduced its demand from $250,000 to $25,000, and the arbitrator, Judge Anthony Sciuto (retired) whose claim is just $34,000. Both of these parties join in this cross-motion.

15. On April 20, 2015, just one month after arguing that a bankruptcy proceeding was futile and unnecessary, and after obtaining dismissal of the Virginia Involuntary, the Debtor filed its own voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Petition**") before this Court.

16. On April 20, the Debtor faxed a letter to Judge Baskerville of the Petersburg Circuit Court regarding the application of the automatic stay, and on April 21, Judge Baskerville entered an order vacating the Distribution Order of April 15, without explanation.

17. On May 21, 2015, secured creditor LeClairRyan filed its motion here seeking dismissal of the Debtor's Petition pursuant to 11 U.S.C. § 1112(b), on grounds of bad faith.

18. This Cross-Motion seeks entry of an order distributing the Interpleader Funds on the consent of all but three (3) of the Debtors' creditors (*See* Exhibit "A" hereto) on the authority of *In re SPM Management* and *In re Jevic Holding Corp.,* and in accordance with the Distribution Schedule annexed hereto as Exhibit "A". The distribution can be made as a condition of the dismissal and thus is properly the subject of this Cross-Motion.

BACKGROUND - BURT AND ITTLESON TRUST-2010-1 LIEN POSITIONS

a. Ittleson Trust-2010-1 ("**Ittleson**")

19. On or about August 31, 2007, the Debtor executed and delivered that certain Promissory Note (the "**Original Note**"; together with the amendments as described below, the "**Note**") in favor of CIT Lending Services Corporation ("**Original Lender**") in the original principal amount of $5,500,000.00. By allonge (the "**Allonge**") dated as of November 30, 2010, Original Lender assigned the Note to Ittleson.[3] By guaranties (the "**Ittleson Guaranties**"), Robert T. Harmon and Marlene Harmon (the Debtor's principals) guarantied the full and prompt payment, observance and performance of the Note and all other obligations of the Debtor to the Original Lender.

20. As partial security for the full and timely performance of all payments and other obligations under the Note, the Debtor executed and delivered in favor of Stefan Calos as Trustee that certain Deed of Trust and Security Agreement dated as of August 31, 2007 (the "**Deed of Trust**"). Pursuant to the Deed of Trust, the Debtor mortgaged certain real property, including one on which they owned and operated a hotel (the "**Hotel**"), located in the city of Petersburg, Virginia (the "**Property**"), together with certain other property rights and proceeds thereof, to secure the Debtor's obligations under the Note.

21. Original Lender perfected its liens, security interests and rights under the Deed of Trust by recording the Deed of Trust with the land records of the Clerk's Office of the City of Petersburg, Virginia as Instrument Number 07-004827, page 320 et sec. The Deed of Trust was

[3] Through a series of amendments to the Note, the Note was modified to provide that, notwithstanding the original terms and conditions of the Note, twelve installments of interest only were payable on the first day of the month immediately following the day of the Note, with equal monthly installments of principal and interest to be due thereafter monthly in an amount to be determined on the Conversion Date (as defined in the Note). The Maturity Date of the Note as amended was August 1, 2033.

assigned by Original Lender to Ittleson pursuant to Assignment Instrument dated November 30, 2010.

22. The Debtor also executed and delivered to the Original Lender the security agreement (the "**Security Agreement**"), pursuant to which the Debtor granted a first priority security interest in favor of Original Lender in Collateral (as defined in the Security Agreement). The Collateral includes "all accounts, inventory, general intangibles, contract rights, leases, chattel paper, equipment, machinery, furniture, fixtures, tools, documents and instruments, and all other personal property of Debtor, all accession, parts, accessories, attachments and accessions thereto, substitution therefore and replacements thereof, and all proceeds and products of all of the foregoing, including, without limitation, insurance proceeds, in all cases whether now owned or hereafter acquired by Debtor and wherever located." A financing statement of record in favor of Ittleson, Number 50522444, filed on May 15, 2013, covers the Collateral.

23. A certain forbearance agreement (the "**Forbearance Agreement**") was executed May 23, 2011 between Lender, the Debtor, Robert and Michelle Harmon (the "**Guarantors**"). The Forbearance Agreement contains a recital by the Borrower in which it "acknowledges that Ittleson has a perfected first priority lien on the proceeds from that Litigation" − referencing the insurance recovery litigation against Selective. The Forbearance Agreement provides for forbearance by Ittleson until December 31, 2011 (subsequently amended by amendment dated December 28, 2011 extending the forbearance period, previously extended to March 31, 2012, to December 30, 2012).

24. The Forbearance Agreement further provides that if the Debtors (defined in the Forbearance Agreement as the Debtor together with the Guarantors) "comply with the requirements of Section 2.3 [of the Forbearance Agreement] and Lender received $2,000,000.00

on or before December 31, 2011, then the Note should be deemed to be paid in full." Ittleson did not receive $2,000,000 on or before December 31, 2012 (the extended date under the Forbearance Agreement modifications). The Forbearance Agreement provides that the indebtedness to Ittleson must be paid under the Loan Documents except as otherwise provided in the Forbearance Agreement.

25. Since the $2,000,000 was not timely paid, the Debtor and the Guarantors owe Ittleson $8,229,977.58. On June 12, 2015, Ittleson filed a proof of claim in this amount in this case (claim no. 8 on the Court's claim registry in this case).

b. Burt

26. On July 10, 2009, Burt, the Debtor and Robert Harmon entered into a "Promissory Note" (the "**Promissory Note**"), pursuant to which Burt loaned and the Debtor agreed to repay the principal amount of $750,000. As security for repayment of all indebtedness under the Promissory Note, the Debtor granted to Burt "all of Borrower's right, title and interest to the recovery of any proceeds in [the Bergen County Action]." (Promissory Note at ¶ 5.a).

27. During the period from January 2010 to May 2012, the parties amended the Promissory Note on six different occasions. Among other things, the amendments to the Promissory Note evidenced additional advances of principal by Burt and an increase in the amount of litigation proceeds payable to Burt. To date, the Debtor has not repaid any amounts to Burt under the Promissory Note.

28. On January 15, 2010, the parties entered into the First Amendment to the Promissory Note, wherein Burt agreed to advance an additional $750,000, thereby increasing the aggregate amount loaned to the Debtor to $1,500,000 as of that date. On January 14, 2011, the parties entered into the Third Amendment to the Promissory Note (the "**Third Amendment**"),

wherein in addition to the $1,500,000 Burt had loaned to the Debtor under the original Promissory Note as amended, the Debtor agreed to sign on as co-borrower for a loan of $1,000,000 which Burt had made to the Debtor's affiliate, Packaging Systems, Inc. on January 8, 2011. As a result of the Third Amendment, the outstanding principal amount advanced under the Debtor's Promissory Note as amended stood at $2,500,000 as of January 14, 2011.

29. The Third Amendment also clarified that Burt would receive no interest as remuneration for his loans. Instead, Burt would receive nothing other than his principal back if the litigation was unsuccessful,[4] but would receive $5,000,000 ($2,500,000 + $2,500,000) if the litigation recovery achieved at least this amount.

30. On March 7, 2011, the parties entered into the Fourth Amendment to the Promissory Note ("**Fourth Amendment**"), wherein the Debtor re-acknowledged receipt of $2,500,000 from Burt, reiterated its pledge of $5,000,000 of the litigation proceeds to Burt and also granted "a security interest and lien in the amount of $5,000,000" on the proceeds of the litigation.

31. On May 11, 2012, the parties entered into the Sixth Amendment to the Promissory Note, wherein Burt advanced an additional $250,000, which increased the aggregate outstanding principal amount to $2,750,000. The Sixth Amendment also contemplated future advances of loan proceeds by Burt "in [his] sole and subjective discretion," and agreed that to the extent future advances were made, the Debtor would repay, according to the prior quid pro quo, double the amount of any such future advances, to be funded from the Litigation Proceeds. (Sixth Amendment at ¶¶ 5-6.)

32. Pursuant to a Comprehensive Reaffirmation Agreement dated February 1, 2013 Burt advanced another $250,000, and an additional $267,000 was loaned thereafter, bringing

[4] This provision appears in paragraph 4 of the Fourth Amendment.

Burt's total principal loaned to the Debtor up to at least $3,267,000. Under the Comprehensive Reaffirmation Agreement, the Debtor represented that "the proceeds of this litigation have been otherwise not pledged or hypothecated or assigned to any other third party and that Petersburg Regency, L.L.C., has the rights to those proceeds." (Comprehensive Reaffirmation Agreement ¶ 1.)

33. The Debtor stipulated at p. 13 of Exhibit "B" hereto, at footnote 4, that the amounts loaned by Burt to the Debtor totaled no less than $3,177,000. Without conceding the point, for the purpose of this cross-motion, Burt will accept the Debtor's figure of $3,177,000, which, under the terms of the documents, would put the amount due on account of Burt's secured claim at $6,354,000.

34. On June 7, 2011, Burt perfected his security interest in the litigation proceeds by filing a UCC-1 financing statement with the New Jersey Department of Treasury, which describes Burt's collateral as "[a]ny and all proceeds to be recovered by Debtor Petersburg Regency, L.L.C. arising out of the matter captioned 'Petersburg Regency, L.L.C. vs. Selective Way Insurance Company, et. als' (Docket No. BER-L-12179-04)."

35. As a result of the foregoing and as repeated in the admissions made by the Debtor, Burt and Ittleson together hold properly perfected senior secured claims against the Debtor which far exceed the $10.2 million in Interpleader Funds. By this Cross-Motion, Burt and Ittleson are willing to share those proceeds with all other creditors in accordance with Exhibit "A" hereto in connection with this Court's dismissal order.

ARGUMENT

I. THE COURT SHOULD ENTER AN ORDER DIRECTING DISTRIBUTION OF THE INTERPLEADER FUNDS IN ACCORDANCE WITH THE ATTACHED DISTRIBUTION SCHEDULE PRIOR TO APPROVING ANY DISMISSAL OF THE CASE

36. The aggregate amount of secured claims is substantially greater than the amount of the Interpleader Funds. The Interpleader Funds are the only asset of the Debtor's estate. The secured creditors holding liens on the Interpleader Funds have worked out an agreed distribution with all but four (4) of the Shut-Out Creditors for whom the secured creditors are voluntarily setting aside $237,301.50 in funds that would otherwise belong to the secured creditors. Absent such an agreement, the secured creditors would be entitled to all of the Interpleader Funds. This proposed distribution, i.e., this "structured dismissal" of this case, is proper and consistent with both long-established precedent and recent Third Circuit authority.

37. In the landmark decision of *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1312-15 (1st Cir. 1993), the First Circuit recognized the right of a senior secured creditor to enter into an agreement with the committee, pursuant to which it would share proceeds of the debtor's asset sale with unsecured creditors, even though priority tax creditors would not receive any portion of such proceeds. 984 F.2d at 1309. Since the secured creditor, by virtue of its lien position, was entitled to the entire amount of any proceeds of sale of the debtor's assets, any money siphoned to unsecured creditors came essentially from the secured creditor and not from the estate. *See id*. at 1312. Without the sharing agreement, the secured lender would have received the entire allotted distribution under the reorganization plan, while tax creditors would have received nothing. *Id*. at 1312-1313. Thus, the First Circuit concluded, "[w]hile 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, including to share them with other creditors." *Id*. at 1313. *SPM* stands for the proposition that if a creditor receives a valid distribution from a bankruptcy estate, that that creditor may sell, share or otherwise "gift" its distribution with anyone it wishes absent bad faith, a breach of fiduciary duty, or fraud. *Id*. at 1314.

38. In *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005), the Third Circuit prohibited a debtor from accomplishing the same result in a plan. In *Armstrong*, the Third Circuit adopted the legal analysis of the district court, which had distinguished *SPM* in three ways: "(1) *SPM* involved a distribution under Chapter 7, which did not trigger 11 U.S.C. § 1129(b)(2)(B)(ii); (2) the senior creditor [in *SPM*] had a perfected security interest, meaning that the property was not subject to distribution under the Bankruptcy Code's priority scheme; and (3) the distribution [in *SPM*] was a 'carve out,' a situation where a party whose claim is secured by assets in the bankruptcy estate allows a portion of its lien proceeds to be paid to others." *See id.* at 514.

39. Based on the distinction above, the Third Circuit in *Armstrong* did not rule out the possibility that senior class give-ups might pass muster under different circumstances similar to *SPM*. Just three weeks ago, those "different circumstances" were the subject of the Third Circuit's "hot off the press" May 21, 2015 ruling in *In re Jevic Holding Corp*., -- F.3d --, 2015 WL 2403443 (3d Cir. May 21, 2015). *Jevic* has now confirmed that distributions—even distributions that do not adhere to section 507 priorities and "skip" a class or classes—may be made in connection with a dismissal of a chapter 11 case.

40. In *Jevic*, the creditors' committee and the secured creditors (CIT and Sun Capital), who were plaintiff and defendants, respectively, in a fraudulent conveyance action, negotiated a

settlement whereby CIT would contribute $2 million to an account to pay Jevic and the Committee's legal fees and administrative expenses, Sun would transfer its lien on Jevic's only remaining assets ($1.7 million in cash) to a trust set up to first pay administrative and tax creditors, followed by unsecured creditors on a pro rata basis, and then the entire bankruptcy case would be dismissed pursuant to a structured dismissal. *Id.* at *2. Labor (Jevic's former drivers) and the U.S. Trustee objected because the settlement would "skip" over their priority wage claims and deliver funds directly from secured creditors to unsecured creditors, all in the absence of the protections present in the plan process. *Id.* at *3.

41. The Court of Appeals viewed the case as presenting two discrete questions: (1) whether structured dismissals were permissible as a matter of law (*id.* at *4-6), and (2) whether a settlement arising as part of a structured dismissal may ever skip a class of objecting creditors in favor of more junior creditors (*id*. at *6-11).

42. With respect to structured dismissals, the court held that "absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order [a structured dismissal]." *Id.* at *6. The court suggested that different facts might warrant a different result in a future case, such as if there is the prospect of a plan process or worthwhile conversion—noting that the drivers did not seriously dispute the bankruptcy court's factual findings regarding the absence of prospects for a confirmable plan and the likelihood that conversion to chapter 7 would be ineffective. *Id.*

43. The court also addressed the question of "whether [pre-plan] settlements in th[e] context [of structured dismissals] may ever skip a class of objecting creditors in favor of more junior creditors." *Id.* at *6. The court began its analysis by holding that "bankruptcy courts may

approve settlements that deviate from the priority scheme" of Bankruptcy Code section 507 if "specific and credible grounds … justify [the] deviation." *Id.* at *9 (quoting *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007)). The court then turned to whether such specific and credible grounds were present. Based upon the bankruptcy court's factual findings, including that the settlement and structured dismissal presented "the least bad alternative since there was 'no prospect' of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in 'short order[,]'" the court affirmed. *Id.* at *9.

44. *Jevic* could not be more on point with the situation present here.. Like Jevic, Petersburg Regency has no business to reorganize, no possibility of a successful reorganization, and no basis even for a chapter 7 to proceed. As the Debtor put it on February 25, 2015: "even if an order for relief was entered, a Chapter 7 Trustee would likely conclude that there was (sic) no assets available for distribution to unsecured creditors, and he would abandon his interest in the Arbitration Award and file a 'no asset report.'" This Court is respectfully referred to pages 13-14 of Exhibit "B" hereto,[5] where the Debtor lays out $19,628,369 in secured claims against the Interpleader Funds of $10.2 million, not to mention the additional $1,192,885 judgment lien of Ramada Worldwide, which puts the total secured claims against the Interpleader Fund at over $20 million.

45. Moreover, the only "class" being skipped here, if any, is any insider claim of the Debtor's principal, Robert Harmon. But again, insofar as it is secured creditor funds being used in connection with the distributions to be made under a dismissal order, it is perfectly appropriate under *SPM, Armstrong* and now *Jevic*, for the secured creditors to share or "gift" their

[5] The Debtor's entire brief on its motion to dismiss the Virginia bankruptcy was included as Exhibit F to the Certification of Douglas McGill (Doc. # 26-2).

distributions to arm's length unsecured creditors (*see* proposed Distribution Schedule annexed hereto as Exhibit "A") as opposed to sharing those distributions with the Debtor's equity owner.

46. This is all the more so appropriate given that at least three creditors of the Debtor hold Harmon's guaranties. Even if Harmon would otherwise have a colorable claim to a distribution, were his creditors holding guaranties to remain unpaid to any extent, they would have the right to recover from him any distributions he might otherwise receive from the Debtor. Those guaranties survive any plan. 11 U.S.C §524(e). Ittleson, Burt and Ramada hold guaranties from Harmon. These creditors collectively are holders of claims in excess of $17 million.

47. This Court is also respectfully directed to *In re World Health Alternatives, Inc.,* 344 B.R. 291 (Bankr. D. Del. 2006), a Delaware Bankruptcy Court decision that presaged *Jevic*. In *World Health*, the creditors' committee had objected to the proposed auction procedures and DIP financing motion. A settlement was reached whereby the lender would agree to a carve out from its liens to be distributed to general unsecured claimants. *See id.* at 293. But priority tax claims asserted by the Internal Revenue Service would not be paid in full. *Id.* at 295. The U.S. Trustee objected to the settlement, arguing, among other things, that the Third Circuit's ruling in *Armstrong* prohibited any payment to general unsecured creditors before priority claims. *Id.*

48. The *World Health* court ruled that absolute priority rule did not apply because the settlement agreement was not part of any plan, and as a result, *Armstrong* did not control. *Id.* The court found the facts before it much more comparable to the those in *SPM*, which involved, among other things, (i) a settlement agreement (*SPM*) rather than a chapter 11 plan (*Armstrong*), (ii) property that was fully encumbered and, thus, not subject to distribution according to the Bankruptcy Code's distribution scheme, and (iii) a carve-out of the secured creditor's collateral.

See id. at 298. As the court observed, a carve-out from a secured creditor's collateral "does not offend the absolute priority rule or the Bankruptcy Code's distribution scheme because the property belongs to the secured creditor — not the estate." *Id.* at 299.

49. Here, (i) all but three (3) creditors have for the most part agreed to the distributions outlined in Exhibit "A" hereto, (ii) a motion to dismiss this bankruptcy case is pending, and (iii) the Debtor has recently argued that a bankruptcy proceeding, whether under chapter 11 or chapter 7, would have no purpose here insofar as there is nothing to reorganize and secured claims greatly exceed the value of the Debtor's assets. As a result, the Debtor should be judicially estopped from arguing differently now, and this Court should enter an order of dismissal which, prior to dismissing the case, provides for distributions to all creditors save the non-contesting creditors in accordance with the Distribution Schedule annexed hereto as Exhibit "A", with a pot of $237,301.50 to remain in Interpleader Funds which can be used by the Debtor, post-dismissal, to address the three (3) non-consenting creditors.[6]

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[6] The fact that the Debtor filed a plan (without filing a disclosure statement concurrently) should be given no weight. The plan that the Debtor filed is patently unconfirmable for several reasons. First, the creditors who have joined in this Cross-Motion are sufficient in number and type that no plan can be confirmed over their objection, and their joinder in this Cross-Motion is conclusive demonstration that the lesser distributions proposed by the Debtor are not acceptable. Second, the Debtor's plan is unconfirmable as it ignores the classification mandates of *In re Swedeland Development Group, Inc.,* 16 F.3d 552 (3d Cir. 1994) and *John Hancock Mutual Life Ins. v. Route 37 Business Park Associates,* 987 F.2d 154 (3d Cir. 1993).

CONCLUSION

Wherefore, it is respectfully requested that this Court, in connection with entering its dismissal order, enter the proposed order submitted herewith granting this Cross-Motion and thereby directing distribution of the Interpleader Funds to the creditors listed and in the amounts listed on Exhibit "A" hereto.[7]

Dated: June 16, 2015

Respectfully submitted,

PORZIO BROMBERG & NEWMAN, P.C.
Counsel to Jim Burt

By: */s/ Warren J. Martin Jr.*
Warren J. Martin, Jr.

[7] The concessions made herein are made only for the purpose of this Cross-Motion only. To the extent that this Cross-Motion is not granted on its return date on June 23, 2015, Burt and the 12 joining creditors reserve the right to assert and seek payment of the full amounts of their claims.