

**Objection Deadline:** April 18, 2023 at 12:00 p.m. (prevailing EST)

**Hearing Date and Time:** April 25, 2023 at 10:00 a.m. (prevailing EST)

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

EXTENDED STAY, INC., et al.,

Reorganized Debtors.

FINBARR O’CONNOR, et al.,

Plaintiffs,

v.

DL-DW HOLDINGS, L.L.C., et al.,

Defendants.

DL-DW HOLDINGS, L.L.C., et al.,

Third-Party Plaintiffs,

v.

CWCAPITAL ASSET MANAGEMENT LLC,  
et al.,

Third-Party Defendants.

Chapter 11

Case No. 09-13764 (JLG)

Adv. Pro. No. 11-02254 (JLG)

**MOTION OF PLAINTIFFS THE  
EXTENDED STAY LITIGATION  
TRUST AND FINBARR O’CONNOR  
AS SUCCESSOR TRUSTEE  
PURSUANT TO RULE 9019 OF THE  
FEDERAL RULES OF BANKRUPTCY  
PROCEDURE AND SECTION 105 OF  
THE BANKRUPTCY CODE FOR  
ENTRY OF AN ORDER APPROVING  
SETTLEMENT AGREEMENT**



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By this motion (the “Motion”), Plaintiffs the Extended Stay Litigation Trust and Finbarr O’Connor (“O’Connor”), solely in his capacity as the Successor Trustee of the Trust (together, the “Litigation Trust”), respectfully request that, pursuant to 11 U.S.C. § 105(a), 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), the Court enter the proposed form of order enclosed herewith (the “Proposed Order”), approving the Settlement Agreement, dated March 23, 2023 (the “Agreement”), a copy of which is attached as Exhibit A to the Declaration of Gregory A. Cross in Support of Motion of Plaintiffs the Extended Stay Litigation Trust and Finbarr O’Connor as Successor Trustee Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and Section 105 of the Bankruptcy Code for Entry of an Order Approving Settlement Agreement, dated March 29, 2023 (“Cross Decl.”), and authorizing the Litigation Trust to take and perform such other actions as may be necessary or appropriate to implement and effectuate the Agreement. The Settling Defendants (defined below) have consented to this Motion. In support of its Motion, the Litigation Trust respectfully states as follows:

**PRELIMINARY STATEMENT**

1. After nearly a dozen years of litigating, the parties to this adversary proceeding (the “Adversary Proceeding”) have agreed to settle. The lawsuit arises from the Chapter 11 bankruptcy cases that debtors Extended Stay, Inc. (“ESI”) and its affiliated entities (the “Debtors”) filed nearly 14 years ago.

2. During the Chapter 11 proceedings, the Court appointed an examiner (“the Examiner”) to investigate a variety of matters, which included potential claims arising from the leveraged buyout and payments to the Debtors’ stakeholders prior to the bankruptcy. Following the Examiner’s final report, the Debtors obtained confirmation of a plan that provided

for the Litigation Trust to be created for the benefit of certain creditors of debtors as beneficiaries, and provided for the debtors to transfer to the Litigation Trust all of their right, title, and interest in the potential legal and equitable claims that the Examiner had identified in his report.

3. In mid-2011, approximately one year after this Court confirmed the Debtors' plan of reorganization, the Litigation Trust, by its prior trustee, commenced five lawsuits against numerous defendants. The Litigation Trust pursued those claims for over a year before the original trustee was replaced by O'Connor, who subsequently settled or dismissed many of the claims and parties to those cases. O'Connor then filed an amended complaint in this Adversary Proceeding that significantly narrowed and refocused the Litigation Trust's claims.

4. That 2013 amended complaint, which remains an operative pleading in this case, asserted claims against 26 entities and individuals including parties that had invested in the leveraged buyout, individuals and entities affiliated with those investors, and individuals that held management roles with the Debtors. Generally, the amended complaint asserts claims seeking the return of alleged illegal dividends and alleged damages for authorizing such dividends, under theories of unjust enrichment, breach of fiduciary duty, and fraudulent transfer, among others.

5. If the Agreement is not approved, substantial additional litigation costs will be incurred. While document discovery is substantially complete, fact depositions and expert disclosures have yet to begin. Moreover, complicated and likely protracted summary judgment motion practice, among other disputes, also stand between the parties and a trial date.

6. The Court should approve this settlement. It is fair and reasonable, and avoids all the risk, time, and expensive and complicated legal and factual disputes that the parties would face by continuing to litigate. Pursuant to the Agreement, all defendants except Polar Extended Stay (USA) L.P. ("Polar"), which defaulted, are settling. The settling defendants have agreed to pay

the aggregate sum of \$38 million to the Litigation Trust and provide releases to the Litigation Trust. In exchange, the Litigation Trust has agreed to provide releases to the settling defendants. Further, all settling parties will release each other and the Adversary Proceeding will be dismissed with prejudice.

7. By this Motion, the Litigation Trust therefore respectfully requests that the Court approve the Settlement Agreement and grant the relief requested herein.

### **JURISDICTION AND VENUE**

8. The Court has jurisdiction over this matter 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 pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The statutory predicates for the relief requested herein include, without limitation, 11 U.S.C. §§ 105(a) and 1142; the Confirmation Order and Plan (defined below); and Rules 2002 and 9019 of the Bankruptcy Rules.

### **BACKGROUND**

10. The Adversary Proceeding arises out of the chapter 11 cases of the Debtors. See In re Extended Stay, Inc., Case No. 09-13764-JLG (the “Bankruptcy Proceeding”), BK ECF No. 1 (Voluntary Chapter 11 Petition, filed June 15, 2009).<sup>1</sup>

#### **I. The Mortgage Loan and CMBS Trust**

11. Approximately two years before the Bankruptcy Proceeding, an investment group led by Defendant and Third-Party Plaintiff David Lichtenstein (“Lichtenstein”) purchased the Debtors in an approximately \$8 billion leveraged buyout (the “LBO”). BK ECF No. 3 (Decl. of

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<sup>1</sup> This Memorandum of Law cites to certain documents filed on the Electronic Case Filings docket in the Bankruptcy Proceeding. Citations to those filings are styled as “BK ECF No(s). \_\_\_”. Documents filed on the Electronic Case Filings docket in this Adversary Proceeding are styled as “APECF No(s). \_\_\_”.

Joseph Teichman, filed June 15, 2009) ¶ 16. The investors financed the LBO with, among other things, (a) a mortgage loan in the principal amount of \$4.1 billion (the “Mortgage Debt”), and (b) a \$3.3 billion mezzanine debt structure (the “Mezzanine Loans”). Id. ¶¶ 12, 16, 21-22.

12. Specifically, on or around June 11, 2007, Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc., and Bank of America, N.A. (together, the “Original Lenders”) extended the \$4.1 billion Mortgage Loan (the “Mortgage Debt”) to a group of entities (collectively, the “Mortgage Borrowers”), that later would become some of the Debtors in the Bankruptcy Proceeding. AP ECF No. 357 (Lightstone Parties’ Am. Answer to First Am. Compl. and Third Party Compl., filed October 23, 2020) ¶ 380.

13. The Amended Complaint avers that subsequently, Original Lenders sold and assigned their right and interest in the Mortgage Debt, which was then deposited into an investment vehicle: the Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-ESH (the “CMBS Trust”). AP ECF No. 357 ¶ 401. Wells Fargo Bank, N.A. acted as the original trustee for holders of interests in the CMBS Trust; and U.S. Bank National Association was later appointed successor trustee. BK ECF No. 1098 (Order (I) Pursuant to Sections 105 and 363(b) of the Bankruptcy Code Approving Investment Agreement with Successful Bidder, (II) Approving Disclosure Statement Reflecting the Successful Bid, (III) Establishing Solicitation and Voting Procedures, (IV) Scheduling a Confirmation Hearing, and (V) Establishing Notice and Objection Procedures for Confirmation of the Debtors’ Proposed Plan of Reorganization, filed June 22, 2010), Ex. 1 at 27-28, § IV.D.2.



## II. Debtors' Bankruptcy and Related Events

14. Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, with the majority filing on June 15, 2009 see, BK ECF No. 1, thereby commencing the Bankruptcy Proceeding. Additional Debtors filed petitions on February 18, 2010.

### A. The Mortgage Debt Transfers to Special Servicing

15. When the Debtors commenced the Bankruptcy Proceeding, administration of the Mortgage Debt was transferred to special servicing. BK ECF No. 1098, Ex. 1 at 27-28, § IV.D.2. Following about a year of servicing by another servicer, CWC Capital Asset Management LLC (“CWCAM”) was appointed special servicer to the Mortgage Debt on or about May 2010. Id.

### B. This Court Confirms the Debtors' Plan

16. On July 20, 2010, this Court entered its Order Confirming Debtors' Fifth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as amended (the “Plan”). BK ECF No. 1172 (the “Confirmation Order”) at 28, ¶ 1. The Court attached the Plan as Exhibit A to its Confirmation Order. Id., Ex. A.

17. Section 6.17 of the Plan authorized and directed creation of the Litigation Trust. Id., Ex. A at 29-30. The Plan identified the Litigation Trust Beneficiaries as (i) the Mortgage Facility Trust, (ii) the holders of the Mezzanine Facilities Claims (as defined in Section 1.99 of the Plan), (iii) the Indenture Trustee (as defined in Section 1.77A of the Plan), and (iv) the holders of the General Unsecured Claims (as defined in Section 1.69 of the Plan). Plan §§ 1.90, 4.4, 4.5 & 4.6; *see also* Cross Decl., Ex. B at 1.<sup>2</sup>

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<sup>2</sup> Unless otherwise specified in this Motion, defined terms shall use the meaning assigned to them in the Plan.

18. On the Plan’s Effective Date, the Debtors were deemed to have transferred all their right, title, and interest in and to all of the “Litigation Trust Assets” to the Litigation Trust.<sup>3</sup> Id.; see also Plan, at 37, § 10.2. The Plan defined “Litigation Trust Assets” as (i) “all claims and causes of action of the Debtors or the Debtors in Possession under sections 502(d), 542 through 551, and 553 of the Bankruptcy Code, and (ii) any other potential claims, causes of actions, charges, suits or rights of recovery referenced in” the Examiner’s Report<sup>4</sup> that arose out of or was related to the Acquisition. Id., at 1, § 1.1; id., at 9, § 1.89.<sup>5</sup>

19. Pursuant to the Plan, the Litigation Trust was “established for the sole purpose of liquidating and distributing the Litigation Trust Assets contributed to the Litigation Trust.” Id., at 30, § 6.17(b). Significantly, the Plan gave the Litigation Trustee the “exclusive right, authority and discretion to institute, prosecute, abandon, settle or compromise any and all causes of action that constitute Litigation Trust Assets without the consent or approval of any third party and without any further order of the Bankruptcy Court,” except as was otherwise provided in the Plan or LTA, which, as discussed below, requires Court approval for certain types of settlements including the settlement that is the subject of this Motion. Id., at 31, § 6.17(e). The Plan also provided that from the Effective Date, the Litigation Trustee was to serve as a representative of the Debtors’ Estates and “retain and possess the sole and exclusive right to commence, pursue,

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<sup>3</sup> On October 11, 2010, Debtors filed a notice of the occurrence of the Effective Date pursuant to the Plan, indicating that the Effective Date occurred two days earlier, on October 8, 2010 (the “Effective Date”). BK ECF No. 1254 at 1.

<sup>4</sup> The U.S. Trustee appointed the Examiner on September 28, 2009, see BK ECF Nos. 311 & 312, and the Examiner filed his report on April 8, 2010. BK ECF No. 913.

<sup>5</sup> The definition of “Litigation Trust Assets” carved out certain of Debtors’ assets including “(a) the Windows Litigation (as such term is defined in the Investment Agreement), and (b) any claims, causes of action, suits or rights of recovery against the Debtors, the Reorganized Debtors, NewCo, HVM, the Operating Advisor, the Controlling Holder, the Trustee, the Successor Trustee, the Mortgage Facility Trust, the holders of Mortgage Certificates (solely in such capacity), or the Special Servicer.” Id., at 9, § 1.89. Pursuant to a later amendment to the Litigation Trust Agreement, dated September 12, 2012 (discussed further below), claims against Mezzanine Lender Defendants (solely in such capacities) and holders of Mezzanine Facilities Claims (solely in such capacities) were also excluded from the Litigation Trust Assets. See Section II ¶ 27 nn.12-13 (below).

settle, compromise or abandon, as appropriate, any and all causes of action, whether arising before of [sic] after the Petition Date, in any court or other tribunal.” Id.

### C. The Litigation Trust Agreement (“LTA”)

20. The LTA is dated as of October 8, 2010 and was executed by and among the Debtors, ESI, and the original trustee, Walker, Truesdell, Roth & Associates (the “Original Trustee”). Cross Decl., Ex. B at 1. The Creditors’ Committee and CWCAM were also signatories in a limited capacity. Id. at 1.<sup>6</sup>

21. The LTA explained that the Litigation Trust’s “primary purpose” is to liquidate the Trust’s assets. Id. at 4, § 1.4(a) (directing that the Trust “dispose” of the assets in accordance with the LTA and Plan); id., at 2 (“whereas” clauses explaining that, under the Plan, the Litigation Trust was “organized for the primary purpose of liquidating and distributing assets transferred to the Litigation Trust,” and “established for the benefit of the Litigation Trust Beneficiaries and for the pursuit of Litigation Trust Assets”).

22. In pursuit of that goal, the LTA appointed a Litigation Trustee<sup>7</sup> to hold the assets of the Litigation Trust<sup>8</sup> for the benefit of the Litigation Trust Beneficiaries, and to “in an expeditious but orderly manner, liquidate and convert to Cash the assets of the Litigation Trust.” Cross Decl., Ex. B at 2, § 1.1(b); id. at 4, § 1.4(b)); see also id., at 10, § 3.5(c) & 11-12, § 3.8(a).

23. The LTA appointed the Litigation Trustee as the “representative of the Estates and ESI with respect to the Litigation Trust Assets, and, as such, the Litigation Trustee succeeds to all of the rights and powers of a trustee in bankruptcy with respect to prosecution of the

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<sup>6</sup> The LTA expressly incorporated the Plan and Confirmation Order, among other related Bankruptcy Court orders. Cross Decl., Ex. B at 5, § 1.5. Capitalized terms in the LTA not otherwise defined therein were assigned the meanings ascribed to them in the Plan. Id. at 1. The LTA is governed by New York law. Id. at 23, § 12.3.

<sup>7</sup> As of its initial execution, the LTA appointed the Original Trustee as of the Effective Date of the Plan. Cross Decl., Ex. B at 2 (§ 1.1(b)).

<sup>8</sup> Through the LTA, and in accord with the Plan, Debtors and ESI transferred, assigned, and delivered to the Litigation Trust all of their right and title in and to the Litigation Trust Assets. Id., Ex. B at 2-4 (§§ 1.2(a) & 1.3).

Litigation Trust Assets for the benefit of the Litigation Trust Beneficiaries.” Cross Decl., Ex. B at 5-6, § 1.7); see also id., at 2 (“[T]he Litigation Trustee was duly appointed as a representative of the Estates and ESI . . .”).

24. The LTA also empowered the Litigation Trustee to liquidate the Trust’s assets through “prosecution, compromise and settlement, abandonment or dismissal of any and all claims, rights or causes of action, or otherwise.” Id., Ex. B at 4, § 1.4(b); see also id., at 12 § 3.8(i). The LTA further gave the Litigation Trustee the “absolute right to pursue, settle and compromise or not pursue any and all Litigation Trust Assets as it determines is in the best interests of the Litigation Trust Beneficiaries, and consistent with the purposes of the Litigation Trust.” Id., Ex. B at 4, § 1.4(b); see also id., at 11, § 3.7 (providing that the Litigation Trustee has the “power to (i) prosecute, compromise and settle, abandon or dismiss for the benefit of the Litigation Trust Beneficiaries all claims, rights and causes of action transferred to the Litigation Trustee (whether such suits are brought in the name of the Litigation Trustee or otherwise), and (ii) otherwise perform the functions and take the actions provided or permitted in the Plan or in this Litigation Trust Agreement”); id., Ex. B at 12-13, §§ 3.8(b), (c) and (q).

25. The LTA further defined the Litigation Trustee’s authority in Section 3.8(j) by stating that the Litigation Trustee may

compromise, adjust, arbitrate, sue on or defend, pursue, prosecute abandon, exercise rights, powers, and privileges with respect to, or otherwise deal with and settle, in accordance with the terms set forth herein, all causes of action in favor of or against the Litigation Trust, provided, however, that any settlement that (i) exceeds \$1,000,000 with respect to a Litigation Trust Asset or (ii) involves a Litigation Trust Asset that has an alleged claim amount exceeding \$1,000,000, shall be subject to approval by the Bankruptcy Court, upon notice to the Litigation Trust Beneficiaries.” Id., at 13 § 3.8(j) (emphasis in original).<sup>9</sup>

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<sup>9</sup> “Bankruptcy Court” is defined in the Plan as “the United States Bankruptcy Court for the Southern District of New York, having jurisdiction over the Chapter 11 Cases and, to the extent of any reference made pursuant to section 157 of title 28 of the United States Code, the unit of such District Court constituted pursuant to section 151 of title

### III. Procedural History of Litigation Trust's Lawsuits

26. On June 14 and 15, 2011, the Original Trustee commenced, on behalf of the Litigation Trust, one case in New York State Supreme Court and four adversary proceedings in this Court. AP ECF No. 319 (Memorandum Decision and Order Granting in Part and Denying in Part, the Defendants' Motions to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), filed August 8, 2020) (the "MTD Order") at 43 nn.49-50.<sup>10</sup> After the state court action was removed to this Court, the Litigation Trust was prosecuting five adversary proceedings before this Court ("the "Initial Lawsuits").<sup>11</sup>

27. One year later, on August 28, 2012, the Court entered an order approving certain amendments to the LTA (the "LTA Amendment") and replacing the Original Trustee with O'Connor. BK ECF No. 1674 (Order Appointing Successor Litigation Trustee and Approving Amendment to Litigation Trust Agreement, filed August 28, 2012).<sup>12</sup> These changes were made at least in part because certain parties to the LTA disagreed with certain of the decisions made and strategies pursued by the Original Trustee in the administration of the Litigation Trust, including the Original Trustee's decision to file the Initial Lawsuits. LTA Amendment at 2.<sup>13</sup>

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28 of the United States Code." BK ECF No. 1172, Ex. A at 3, §1.12. And, as already noted above, the Plan is incorporated in and is an express part of the LTA. Cross Decl., Ex. B at 5, § 1.5.

<sup>10</sup> The New York action was captioned: Walker, Truesdell, Roth & Assocs., et al. v. The Blackstone Group, L.P., et al., Index No. 651667/2011 (N.Y. Sup. Ct.). See BK ECF No. 1453.

<sup>11</sup> See BK ECF Nos. 1444, 1445, 1446, 1448, and 1453.

<sup>12</sup> The LTA provides that Litigation Trustee shall continue to serve in the role of trustee until his resignation and the appointment of a successor trustee. Cross Decl., Ex. B at 10, § 3.5(a). The LTA further provides that immediately upon a successor trustee's appointment, all of the predecessor trustee's rights, powers, duties, authority, and privileges are vested in and undertaken by the new trustee. Id. at 10, § 3.5(c).

<sup>13</sup> To address these strategic differences, one of the LTA amendments made the Special Servicer (i.e., CWCAM) the sole advisor to the Trustee with respect to all matters concerning the Litigation Trust and gave the Special Servicer consent rights respecting any material decisions with respect to the Litigations. Id. at 3, § 3.

28. After O'Connor replaced the Original Trustee, the Litigation Trust settled certain claims with approval from this Court. See AP ECF Nos. 180, 193.<sup>14</sup> Shortly thereafter, the Court granted the Litigation Trust leave to file an amended pleading (the "Amended Complaint"). AP ECF Nos. 212, 213.<sup>15</sup>

29. The Amended Complaint asserted claims against 26 defendants (collectively, the "Defendants"), including 16 entities that are alleged to have either directly or indirectly invested in, owned interests in, and/or received dividend payments from Debtors.<sup>16</sup> AP ECF No. 213 (Amended Complaint, filed November 15, 2013) at 1-2. The Amended Complaint also asserted claims against 10 individuals who, among other things, held one or more roles in the pre-petition management of Debtors.<sup>17</sup> Id. at 2. The Amended Complaint alleged that the Defendants were liable for the receipt or authorization of illegal dividends, for unjust enrichment, various breaches of fiduciary duties, and for fraudulent transfers, among other claims. Id. ¶¶ 199-378.

30. Defendants filed motions to dismiss the Amended Complaint, which the Court decided by the MTD Order dated August 8, 2020. AP ECF No. 319. As most relevant here, the MTD Order dismissed certain state law claims and all claims against individual Defendants F. Joseph Rogers, Dae Hum Kim (a/k/a David Kim), and Gary DeLapp, who had been executives of a company, HVM, LLC, that Debtors paid to manage the day-to-day operations of their hotel

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<sup>14</sup> The Court closed Adversary Proceeding number 11-02259 on March 30, 2016. Walker, Truesdell, Roth & Assocs., et al. v. The Blackstone Group, L.P., et al. (In re Extended Stay Inc.), Adv. Pro. No. 11-02259 (JMP) (Bankr. S.D.N.Y. June 15, 2011), ECF No. 54 & Mar. 30, 2016 Docket Entry.

<sup>15</sup> The Court also ordered that the Initial Lawsuits (Adv. Pro. Nos. 11-02254, 11-02255, 11-02256, 11-02259, and 11-02398) be consolidated into one adversary proceeding, i.e., Adv. Pro. No. 11-2254. AP ECF No. 232.

<sup>16</sup> Those entity defendants include DL-DW Holdings, L.L.C., Lightstone Holdings L.L.C., The Lightstone Group, L.L.C., Lightstone Commercial Management, BHAC Capital IV, L.L.C., Park Avenue Funding L.L.C., Arbor ESH II, LLC, Arbor Commercial Mortgage, LLC, Princeton ESH, L.L.C., ABT-ESI LLC, PGRT ESH Inc., Polar Extended (USA) LP, Atmar Associates LLC, Glida One LLC, Mericash Funding LLC, and Ron Invest LLC.

<sup>17</sup> Those individual defendants include Lichtenstein, Bruno de Vinck, Peyton "Chip" Owen, Jr., Joseph Teichman, Joseph Chetrit, Guy R. Milone, Jr., Joseph Martello, F. Joseph Rogers, Dae Hum Kim (a/k/a David Kim), and Gary DeLapp.

properties and businesses. Id. at 281-83.<sup>18</sup> But the MTD Order left intact claims and defendants in such a manner that the Litigation Trust concluded it could continue to seek a full recovery of all damages it originally sought in its Amended Complaint. Compare AP ECF No. 213; with AP ECF No. 319.

31. On October 23, 2020, the Lightstone Defendants<sup>19</sup> filed their Amended Answer, which asserted two third-party claims against both the CMBS Trust and CWCAM. AP ECF No. 357 ¶¶ 462-84. The CMBS Trust and CWCAM moved to dismiss those claims, AP ECF Nos. 371-73, and the Court heard argument on February 22, 2022. AP ECF No. 436. That motion remains pending.

32. Since the Court's MTD Order, the parties have moved forward with discovery.<sup>20</sup> By the fall of 2022, the parties and non-parties had substantially completed document discovery. See, e.g., AP ECF Nos. 473, 476, 478, 484, 487. However certain disputes remain unresolved regarding document productions, including a dispute relating to certain Defendants' assertions of attorney-client and common-interest privileges. See, e.g., AP ECF Nos. 468, 471-73.

33. In addition to the need to resolve the privilege dispute, significant portions of the discovery process remain ahead. For example, the parties have not yet deposed any fact witnesses, of which there are potentially more than two dozen. Cross Decl., ¶ 9. Additionally, expert reports and disclosures remain ahead and are expected to be complex and costly. Id.

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<sup>18</sup> Together, Defendants F. Joseph Rogers, Dae Hum Kim (a/k/a David Kim), and Gary DeLapp are the "HVM Defendants".

<sup>19</sup> The "Lightstone Defendants" include (i) entity defendants DL-DW Holdings, L.L.C.; BHAC Capital IV, L.L.C.; Lightstone Holdings L.L.C.; The Lightstone Group, L.L.C.; Lightstone Commercial Management; and Park Avenue Funding L.L.C.; and (ii) individual defendants Lichtenstein; Bruno de Vinck; Peyton "Chip" Owen, Jr.; and Joseph Teichman. AP ECF No. 357 at 1.

<sup>20</sup> While discovery was underway, the Parties conducted a mediation on September 14, 2021. Cross Decl., ¶ 5. This mediation failed. Id. There had also been settlement discussions among certain of these parties in 2013, particularly a first mediation between the Litigation Trust and the Lightstone Defendants. Id. Those discussions were also unsuccessful. Id.

#### IV. The Settlement Agreement

34. The parties fully executed the Agreement on March 23, 2023. Cross Decl., Ex. A, at pp. 1, 13-29.<sup>21</sup> All parties to the Adversary Proceeding have entered the Agreement, except Defendant Polar Extended Stay (USA) L.P.<sup>22</sup> Id. at 1. The Agreement's material terms are summarized below:<sup>23</sup>

- a. If the Court approves the Agreement, within fifteen business days of the approval order becoming final and no-longer appealable, the Settling Defendants will pay the Litigation Trust \$38 million (the "Settlement Payment"). Id. ¶¶ 2, 4. O'Connor will then hold the Settlement Payment in escrow pending dismissal with prejudice of the Adversary Proceeding. Id. ¶¶ 4-5.<sup>24</sup>
- b. In addition to the Settling Parties providing full and complete releases with respect to the claims in this case, id. ¶ 7<sup>25</sup>, the Settling Defendants have also agreed that neither they nor any entity or individual that is affiliated with or controlled by them would seek to recover the Settlement Payment or make or continue to prosecute any claims, defenses, or offsets for the Settlement Payment in the Action or any other action, including but not limited to the Bankruptcy Proceeding. Id. ¶ 6.

#### **RELIEF REQUESTED**

35. Pursuant to Section 3.8(j) of the LTA, the Litigation Trustee must secure this Court's approval of the Settlement Agreement. Cross Decl., Ex. B at 13.

36. By this Motion, the Settling Parties respectfully request entry of the Proposed Order, pursuant to Bankruptcy Rule 9019(a) and Bankruptcy Code Section 105,

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<sup>21</sup> The Agreement required that the Litigation Trust file this Motion within five business days of when it was fully executed. Id. ¶ 3

<sup>22</sup> Polar has refused to substantively participate in this case since the Court entered its MTD Order. As a result, the Court granted the Litigation Trust's motion for sanctions against Polar. AP ECF No. 482; see also AP ECF Nos. 457-59. That order ruled Polar in default and directed the Litigation Trust to settle order. AP ECF No. 482; see also AP ECF No. 483. Certain Defendants subsequently filed limited oppositions to the Litigation Trust's proposed order, see AP ECF Nos. 486, 490, 496, which opposition is mooted by the Agreement and this Motion.

<sup>23</sup> The Agreement defines the "Settling Parties" as the parties that have entered the Agreement, including Plaintiffs and Settling Defendants. Id. at 1; see also n.24. The "Non-Settling Defendant" is defined as Polar Extended Stay (USA) L.P.. Id. at 2.

<sup>24</sup> The Agreement defines the "Settling Defendants" as all Defendants other than Polar Id. at 1.

<sup>25</sup> Debtors and their Estates are also providing limited releases.



approving the Agreement. The Litigation Trustee has weighed the costs, risks, and disruption that would arise from litigating the Adversary Proceeding against the compromises contained within the Agreement. In the Litigation Trustee’s judgment, the terms and conditions of the Agreement are fair and equitable and serve the best interests of the Litigation Trust Beneficiaries. Accordingly, the Litigation Trust and Litigation Trustee respectfully requests that the Court approve the Agreement.

### **BASIS FOR REQUESTED RELIEF**

#### **1. Legal Standard**

37. This Court has broad equitable powers to approve and authorize the Agreement. Section 105(a) of the Bankruptcy Code, which codified the inherent equitable powers of bankruptcy courts, empowers this Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). In practice, Section 105(a) of the Bankruptcy Code grants bankruptcy courts broad statutory authority to enforce the Bankruptcy Code’s provisions either under the specific statutory language of the Bankruptcy Code, or under equitable common law doctrines. Cf. Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir. 1994) (“It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.”).

38. Bankruptcy Rule 9019(a) also authorizes this Court to approve settlements. Fed. R. Bankr. P. 9019(a) (“On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”).<sup>26</sup> In order to approve a settlement, a court must determine that a

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<sup>26</sup> O’Connor, in his capacity as the Successor Trustee of the Litigation Trust, is a “trustee” as that term is used in Bankruptcy Rule 9019, and thereby has standing under the Plan and LTA to seek an order pursuant to the Bankruptcy Rule. See Cross Decl., Ex. B, § 1.7 (explaining that the Plan appointed the Litigation Trustee “as the duly appointed representative of the Estates and ESI with respect to the Litigation Trust Assets, and, as such, the

settlement is fair, equitable, and “in the best interests of the estate.” In re Drexel Burnham Lambert Grp., Inc., 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991) (citing Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968)); see also In re Purofied Down Prods. Corp., 150 B.R. 519, 523 (S.D.N.Y. 1993) (citing Sandoz v. Bennett (In re Emerald Oil Co.), 807 F.2d 1234, 1239 (5th Cir. 1987).

39. Ultimately, the decision to approve a particular settlement lies within the sound discretion of the bankruptcy court. Nellis v. Shugrue, 165 B.R. 115, 122-23 (S.D.N.Y. 1994). In exercising its discretion, the bankruptcy court should form an informed and independent judgment as to whether a proposed compromise is fair and equitable. Id., 165 B.R. at 122. The court may consider the opinions of the debtor in possession and its counsel that the settlement is fair and reasonable. Id.; see also Purofied Down Prods., 150 B.R. at 522. This discretion should be exercised by the bankruptcy court “in light of the general public policy favoring settlements.” In re Hibbard Brown & Co., Inc., 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998); Nellis, 165 B.R. at 123 (“[T]he general rule [is] that settlements are favored and, in fact, encouraged[.]”).

40. In deciding whether a particular settlement is fair and equitable, courts consider the following “Iridium” factors identified by the Second Circuit Court of Appeals in Motorola, Inc. v.

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Litigation Trustee succeeds to all of the rights and powers of a trustee in bankruptcy with respect to prosecution of the Litigation Trust Assets for the benefit of the Litigation Trust Beneficiaries”); see also id., Ex. B, at 1 (“[T]he Litigation Trustee was duly appointed as a representative of the Estates and ESI . . .”) and 4, §§ 1.3, 1.4(b); BK ECF No. 1172, Ex. A at 30, § 6.17(e) (ordering that the Litigation Trustee serves as a representative, on behalf of the Litigation Trust, of the Debtors’ Estates and “retain[s] and possess[es] the sole and exclusive right to commence, pursue, settle, compromise or abandon, as appropriate, any and all causes of action, whether arising before or [sic] after the Petition Date, in any court or tribunal,” subject only the LTA’s requirements) (emphasis added); cf. Fed. R. Bank. P. 9001(11) (defining “trustee” to “include[] a debtor in possession in a chapter 11 case”). Case law in this district and others have similarly permitted litigation trustees to seek approval of settlements pursuant to Rule 9019. See, e.g., Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), Adv. Pro. No. 09-1198 (ALG), 2014 WL 5819821, at \*1 n.1, 17-18 (Bankr. S.D.N.Y. July 22, 2014) (recommending over objections that the district court grant litigation trust’s Rule 9019 motion and order entry of the approval order filed by movant); see also Whyte v. Kivisto (In re Semcrude, L.P.), Adv. Pro. No. 09-50189 (BLS), 2010 WL 4814377 (Bankr. D. Del. Nov. 19, 2010).

Official Committee of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462  
(2d Cir. 2007):

- (1) the balance between the litigation’s possibility of success and the settlement’s future benefits;
- (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment;
- (3) the paramount interests of the creditors, including each affected class’s relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement;
- (4) whether other parties in interest support the settlement;
- (5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement;
- (6) the nature and breadth of releases to be obtained by officers and directors; and
- (7) the extent to which the settlement is the product of arm’s length bargaining.

Id. (internal quotation marks and citation omitted); see also Tronox, 2014 WL 5819821, at \*14 (applying the Iridium factors to a litigation trustee’s Bankruptcy Rule 9019 motion seeking entry of an order approving settlement agreement).

41. A bankruptcy court is not required to conduct a “mini-trial” to decide the numerous issues of law and fact raised by the settlement. Tronox, 2014 WL 5819821, at \*13. Instead, the court should canvass issues raised by the parties, and determine whether the settlement falls below the lowest point in the range of reasonableness. Id.; see also Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983) (citing Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)). In applying this standard, courts are to make “an educated estimate of the complexity, expense and likely duration of litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed

compromise.” Tronox, 2014 WL 5819821, at \*13 (internal quotation marks and citation omitted). The basic process requires that the court “compare the terms of the compromise with the likely rewards of litigation.” Id.; see also Purofied Down Prods., 150 B.R. at 522 (“[T]he court need not conduct a ‘mini-trial’ to determine the merits of the underlying [dispute].”).

**2. The Agreement is Fair and Reasonable.**

42. The Litigation Trust respectfully submits that the terms of the settlement as set forth in the Agreement are reasonable, fair and equitable, and in the best interest of the Litigation Trust Beneficiaries.

**a. Balancing the Litigation Trust’s Possibility of Success and the Settlement’s Future Benefits Weighs in Favor of the Settlement Agreement.**

43. The terms of the settlement in the Agreement provide an immediate and significant benefit to the Litigation Trust Beneficiaries. The Agreement will result in a substantial payment to the Litigation Trust that O’Connor, a disinterested and experienced fiduciary who has conferred extensively with counsel, has determined will adequately compensate the Litigation Trust, and in turn the Litigation Trust Beneficiaries, for its claims in the Adversary Proceeding given the risks and substantial costs of further litigation. Cross Decl., ¶ 10.

44. Further litigation to resolve the Adversary Proceeding would be uncertain, time-consuming, and expensive. While O’Connor is confident that the Litigation Trust has a strong litigation position, there is always inherent risk and uncertainty in any litigation, and the Litigation Trust has that inherent risk here. Id., ¶ 10. Furthermore, the Settling Defendant profess a high degree of confidence in their defenses and the likelihood of them prevailing before or at trial, and have indicated their intent to continue to defend vigorously absent settlement.

45. The Agreement provides for the immediate resolution of the Litigation Trust's claims without the need for further litigation or the expenditure of further time and expense to obtain a certain and substantial recovery for the Litigation Trust Beneficiaries. This factor should therefore weigh heavily in favor of the Court approving the Agreement.

**b. The Likelihood of Complex and Protracted Litigation Involved with Proceeding with the Adversary Proceeding, including the Attendant Expense, Inconvenience, and Delay, Weighs in Favor of the Settlement Agreement.**

46. This factor also weighs in favor of the Court approving the Agreement. In determining that the Agreement was in the best interests of the Litigation Trust Beneficiaries, O'Connor considered, among other issues, the steps that would likely be involved in continuing to litigate the Adversary Proceeding, the time those steps would take, and the likely attendant costs.

47. The Adversary Proceedings were filed in June 2011. Through the following twelve years, various parties to those proceedings filed multiple pleadings and litigated two rounds of motions to dismiss. The parties have also substantially completed document discovery.

48. Yet, significant, expensive and cumbersome work remains before a trial would be possible. Significantly, the parties have yet to schedule or take depositions, and expert disclosures are still ahead. Moreover, an important open issue remains with respect to document discovery: the parties continue to dispute the scope and categories of privileged documents withheld from certain Defendants' document productions.

49. Once those discovery items are resolved or completed, the parties intend to file summary judgment motions. The briefing, argument and adjudication of such motions is likely to consume considerable party and judicial resources and may cause a protracted postponement of a trial date. Then, assuming a trial is held, at least one party is likely to appeal given the multiple complex contested issues and high stakes—another elaborate and drawn-out process.

50. Further, as is demonstrated in the parties' pleadings and submissions to date, at each of these steps, the parties, their counsel, and the Court will have to confront material disagreements over significant factual and legal issues. First, the parties continue to dispute significant facts, the vast majority of which occurred more than fifteen years ago, primarily between mid-2007 and mid-2009. In the interim, key witnesses have changed employment or moved, memories have faded, certain documents are now more difficult to find, and corporate parties have collapsed and/or been merged into other unrelated companies and businesses. This has posed, and continues to pose, a significant challenge to the parties and their counsel as they have tried to learn the motivations and knowledge of key individuals in the lead up to one of the largest Chapter 11 cases ever filed by a U.S. hotel owner.

51. Once the parties uncover all relevant and discoverable facts, the application of that information to the legal disputes in this case involves intricate issues of corporate finance, formation, and transactions, all of which arise in the context of a complex LBO and corporate structures. Such issues will require a close analysis by the parties, their experts, and the Court, because significant claims of fraudulent transfers, unjust enrichment, fiduciary duty breaches, and related defenses, among other issues, remain at issue in the Adversary Proceeding.

52. Also relevant and weighing in favor of the Agreement is the fact that these significant factual and legal issues continue to be litigated by the large number of parties and law firms to the Adversary Proceeding. Indeed, despite this Court having already dismissed the three HVM Defendants, 27 parties remain, including the two plaintiffs, twenty-three defendants, and two third-party defendants. Those 27 parties include seven individual defendants, one

individual plaintiff, and nineteen entities, which divide into seven primary litigating groups represented by six different law firms.<sup>27</sup>

53. In weighing these litigation challenges against the benefits of the Agreement, O'Connor has considered the costs, both in time and expense, that the Litigation Trust would incur if he were to continue prosecuting these cases, and has determined, and respectfully urges the Court to agree, that the Agreement is in the best interest of the Litigation Trust. Cross Decl., ¶ 10. This Court's approval of the Agreement will eliminate the cost, inconvenience, delay, and necessity of investigating and resolving these issues through litigation.

54. Additionally, while O'Connor is confident in the Litigation Trust's position, he of course has considered the inherent risks and uncertainty that attend any litigation. This Court's approval of the Agreement will eliminate the Litigation Trust's risks and assure recovery of the \$38 million Settlement Payment. Id., ¶ 10.

55. O'Connor has therefore concluded, in the exercise of his business judgment, that the resolution of the Litigation Trust's claims in the Adversary Proceeding under the terms of the Agreement, without the need for protracted and complex litigation, represents a favorable and cost-effective outcome. This factor therefore also weighs strongly in favor of approving the Agreement. See, e.g., In re Dewey & LeBoeuf, LLP, 478 B.R. 627, 640 (Bankr. S.D.N.Y. 2012) ("Settlements and compromises are favored in bankruptcy as they minimize costly litigation and further parties' interests in expediting the administration of the bankruptcy estate." (internal quotations and citation omitted)).

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<sup>27</sup> These numbers do not account for the various third parties, and their counsel, that the parties would likely require be made available for depositions and trial.

**c. Parties in Interest, including Creditors, Either Support or Do  
Not Oppose the Settlement Agreement.**

56. As of the filing of this Motion, the Litigation Trust is unaware of any Litigation Trust Beneficiary, or any other party in interest or creditor, who has objected to the Agreement. Cross Decl., ¶ 11 Contemporaneously with the filing of this Motion, the Litigation Trust is sending a notice of this settlement to all Litigation Trust Beneficiaries.

57. Regarding the parties to the Adversary Proceeding specifically, all Settling Parties support the Agreement, and the Non-Settling Defendant has not objected to date. Cross Decl., ¶ 12.

58. Thus, Iridium factors (3) and (4) above weigh in favor of approving the Agreement.

**d. The Remaining Iridium Factors Also Support Approval of the  
Agreement.**

59. The Settling Parties were all represented by experienced counsel, and the Agreement is the product of their judgment and substantial arm's-length negotiating. Indeed, the Agreement represents the culmination of extensive analysis by the Litigation Trust and negotiations among and between the Settling Parties, and is the result of good faith, arm's length bargaining among the Settling Parties without collusion or fraud.

60. Beyond dismissal of the Adversary Proceeding with prejudice, the Agreement's releases are narrowly tailored and only release the Settling Parties and their present and former directors, officers, employees, agents, representatives, attorneys, successors, and assigns from claims related to or arising out of or in connection with the Adversary Proceeding. And, in exchange for such releases, the Settling Defendants are providing substantial consideration to the Litigation Trust—the \$38,000,000 Settlement Payment. As such, the remaining Iridium factors also weigh in favor of approval of the Agreement.



61. In sum, O'Connor has determined in exercising his business judgment that the proposed Agreement is in the best interest of the Litigation Trust Beneficiaries. As such, the Litigation Trust respectfully submits that the settlement represents a favorable resolution of the Adversary Proceeding that provides a substantial benefit to the Litigation Trust Beneficiaries, is a fair and equitable compromise, and that the terms of the Agreement certainly do not fall below the lowest point in the range of reasonableness. The Litigation Trust therefore respectfully requests that the Court approve the Agreement.

**NOTICE**

62. Notice of this Motion shall be provided to (a) the U.S. Trustee, (b) the parties to the Adversary Proceeding, (c) parties to the Litigation Trust Agreement, and (d) all individuals and entities on the 2002 List maintained by KCC. As noted above, the Litigation Trust is also simultaneously notifying the Litigation Trust Beneficiaries of the Agreement and this Motion by mail. The Plaintiffs respectfully submit that further notice of this Motion is neither required nor necessary.

**NO PRIOR REQUEST**

63. No prior request for the relief sought in this Motion has been made by the Litigation Trust and Litigation Trustee to this or any other court.

**CONCLUSION**

WHEREFORE, the Litigation Trust and Litigation Trustee respectfully request that the Court (i) enter the Proposed Order approving the Agreement, and (ii) grant such other and further relief as is just and proper.

Dated: March 29, 2023

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