

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO**

IN RE:

ESJ TOWERS, INC.

Debtor.

Case No. 22-01676 (ESL)

Chapter 11

**JOINT MOTION FOR APPROVAL OF AGREEMENT BY AND BETWEEN ESJ
TOWERS, INC., ESJ TOWERS HOMEOWNERS' ASSOCIATION
AND ATTENURE HOLDINGS TRUST 1**

TO THE HONORABLE ENRIQUE S. LAMOUTTE
UNITED STATES BANKRUPTCY JUDGE:

COME NOW debtor ESJ Towers, Inc. ("Debtor"), ESJ Towers Homeowners Association (the "HOA"), Attenure Holdings Trust 1 ("Attenure") and HRH Property Holdings LLC ("HRH") and together with Attenure, the "Attenure Entities" and, collectively with the HOA and the Debtor, the "Parties") through their respective undersigned legal counsel, and respectfully submit this joint motion (the "Rule 9019 Motion") respectfully requesting that the Court enter an order, substantially similar in form and substance to that attached herein as **Exhibit 1** (the "Rule 9019 Order"), approving the *Agreement To Authorize Attenure To Negotiate And Litigate The Insurance Claim Against Chubb Insurance Company Of Puerto Rico And To Ratify The Assignment Documents, As Amended Herein* (the "Agreement") attached as **Exhibit A**. In support of this Rule 9019 Motion, the Parties hereby state and pray as follows:

PRELIMINARY STATEMENT¹

The Agreement, and the relief sought in this 9019 Motion are critical for the continued, uninterrupted prosecution of the insurance claims relating to the damages suffered by Debtor and

¹ The Parties include, throughout this 9019 Motion, a summary of the terms, conditions, and obligations under the Agreement. The summaries and descriptions of the Agreement made in this 9019 Motion are intended solely as a summary of the Agreement; the Agreement sets forth the obligations and agreements reached by the Parties and, accordingly, in the event of any inconsistency between the 9019 Motion and the Agreement, the Agreement shall govern.

HOA assets as a result of Hurricanes Irma and María. The resolution of these claims is important as they should ultimately yield recoveries to Debtor and the HOA, to be used to repair the ESJ Towers Condominium, located at Ave. Isla Verde, State Rd. 187, KM 1.5, Carolina, PR 00979 and 6165 Ave. Isla Verde, Carolina, PR 00979, (the “Condominium”). As detailed herein, the Attenure Entities’ continued litigation against Chubb Insurance Company (“Chubb”) provides for the most adequate prosecution of the insurance claim (the “Insurance Claim”) under the circumstances, considering the substantial costs and expertise required to do so. The Agreement, in turn, (i) resolves all controversies regarding the Attenure Entities’ authorization to continue the prosecution, litigation and negotiations against Chubb, on behalf of the Debtor, the HOA, and their own behalf, (ii) which will provide for the prompt receipt of insurance proceeds funds (the “Insurance Proceeds”) to repair the Condominium, as provided in the confirmed plan in the captioned case. The negotiations giving rise to the Agreement have been lengthy and complex, and involved the Parties to ensure a global resolution. As the result of such negotiations—the Agreement—provides the most direct path forward towards collecting from Chubb, which direct path would simply be unavailable without the Agreement. The Agreement provides a clear and defined path to promptly resolve the claims and obtain distribution in reference thereto. For these reasons, and those detailed below, the Parties submit, as **Exhibit A** to this 9019 Motion, the Agreement that they have reached, and respectfully request that the Court enter an order substantially similar in form and substance to the one attached as **Exhibit B** to this 9019 Motion granting the same and approving the Agreement.

BACKGROUND

A. Nature of the relationship between the Parties.

1. On June 10, 2022 (the “Petition Date”), Debtor filed a voluntary petition for relief under the provisions of Chapter 11 of the Bankruptcy Code. See, Docket No. 1.

2. Prior to the Petition Date, on September 6 and 20, 2017, Hurricanes Irma and María respectively caused damages to the Condominium, as to which, Debtor filed the Insurance Claim with Chubb on its behalf and that of the HOA. See Docket No. 138

3. Thereafter, a *Purchase And Sale, Assignment And Conveyance Agreement* (the “Assignment Agreement”) was executed dated February 28, 2019, authenticated under affidavits number 674, 675 and 676 of Notary Public Rubén G. Fernández Agramonte and a special power of attorney deed on behalf of HRH allowing HRH to appear on behalf of Attenure (the “Special Power”) and together with the Assignment Agreement, the “Assignment Documents”). Through the Assignment Agreement the rights and interests that Debtor and the HOA may have had against Chubb were assigned in *común pro-indiviso* to Attenure.

4. Also prior to the Petition Date, on September 5, 2019, the Parties filed a complaint against Chubb Insurance Company of Puerto Rico (“Chubb”) in the case styled *Consejo de Titulares del Condominio ESJ Towers, ESJ Towers, Inc., Attenure Holdings Trust 1 y HRH Property Holdings LLC v. Chubb Insurance Company of Puerto Rico*, Civil Case Num. CA2019CV03427 in the Court of First Instance of Carolina (the “State Court Action”). Through the State Court Action, the Attenure Entities, on behalf of the Parties, are seeking payment of damages caused by the passing of Hurricane María, for which, in spite of such damages being covered by Chubb Commercial Property Policy Núm. 08-95PR-00100607-0 (the “Policy”), and in spite of the Policy being in full force and effect at the time of the passing of Hurricane María, Chubb refused to make payment.

5. Debtor and the HOA agree that Attenure should continue negotiating and litigating the State Court Action against Chubb on behalf of Debtor and the HOA.

6. On May 21, 2024, this Honorable Court entered an order (the “Confirmation Order”) (Docket No. 1838) confirming *Debtor’s Second Amended Chapter 11 Plan as Supplemented* (the “Plan”).

7. The Plan, which is attached as an exhibit to the Confirmation Order, provides, in its pertinent part, as follows:

It is Debtor’s position that Case No. CA2019cv03427 should be continued to be litigated by Attenure and that any resulting award arising therefrom, after payment of Attenure’s fees are to be deposited in an escrow account with Banco Popular de Puerto Rico (the Escrow Account”) on behalf of the Council of Homeowners of the ESJ Towers Condominium (“Council”) and will be exclusively used by the Council for the repairs of the Condominium. The Escrow Account will be managed and controlled by the Board of Directors of the Council (the “Board”) and Albert Tamarez, CPA and shall only be used in accordance with Article 63 of Act 129 of 2020 (the Puerto Rico Condominium Act of 2020), 31 L.P.R.A. §1923h. All checks to be issued from the Escrow Account will require the signature of a member of the Board and that of Mr. Tamarez.

See, Docket No. 1838-1, p. 29, *Article XII of the Plan*

8. In the abundance of caution, and for the avoidance of any doubt, the Parties have agreed to enter into the Agreement to finally and consensually resolve all contested matters between them in connection with the Assignment Documents, and to henceforth avoid any unnecessary future litigation over any and all such matters in this and any other forum, so they can focus on prosecuting the claims against Chubb in connection with the Policy and/or the State Court Action by virtue of the Assignment Documents.

B. Standard for the Requested Relief.

9. Bankruptcy Rule 9019(a) provides that a court may approve a debtor’s “compromise and settlement” after notice and a hearing. See, Bankruptcy Rule 9019(a). The Court of Appeals for the First Circuit (the “First Circuit”) has emphasized that “[s]tipulations of settlement are favored by the courts, and they will rarely be set aside absent fraud, collusion, mistake or other

such factor.” In re Indian Motorcycle Co., 289 B.R. 269, 282 (B.A.P. 1st Cir. 2003); See also, In re Healthco Int’l, Inc., 136 F.3d 45, 50 n.5 (1st Cir. 1998).

10. The approval of settlements is within the court’s “wide discretion.” See, Jeremiah v. Richardson, 148 F.3d 17, 22 (1st Cir. 1998). However, while a court should apply its own independent judgment to determine whether to approve a settlement, it should also afford deference to the judgment of the trustee or debtor in possession. See, In re Receivership Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 21 (D. Mass. 2003) (the court should give “substantial deference to the business judgment of a bankruptcy trustee when deciding whether to approve a settlement”); Hill v. Burdick (In re Moorhead Corp.), 2008 B.R. 87, 89 (B.A.P. 1st Cir. 1997) (“The [bankruptcy] judge . . . is not to substitute her judgment for that of the trustee, and the trustee’s judgment is to be accorded some deference.” (citation omitted)); City Sanitation, LLC v. Allied Waste Serves. Of Mass., LLC (In re Am. Cartage, Inc.), 656 F.3d 82, 92 (1st Cir. 2011).

11. A court should consider four factors in striking the balance between the value of the compromise and the value of the claim:

- (i) the probability of success in the litigation being compromised;
- (ii) the difficulties, if any, to be encountered in the matter of collection;
- (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and,
- (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise.

See, In re C.P. del Caribe, Inc., 140 B.R. 320, 325, (Bankr. D.P.R. 1992); In re Robotic Vision Sys., Inc., No. 04-14151-JMD, 2006 WL 929322, at *4 (B.A.P. 1st Cir. Apr. 11, 2006) (citing Jeremiah v. Richardson, 148 F.3d 17, 23 (1st Cir.1998)).

12. “The court's consideration of these factors should demonstrate whether the compromise is fair and equitable, and whether the claim the debtor is giving up is outweighed by the advantage to the debtor's estate.” In re Robotic Vision Sys., Inc., 2006 WL 929322, at *4.

13. The standard for approving a settlement, whether it is in the best interest of the estate, entails an examination of the settlement’s terms with the litigation’s probable cost and benefits. When an agreement provides tangible benefits to the estate in return for sacrifice of uncertain

claims against a creditor, the bankruptcy court does not err in approving the settlement. In re Bond, 16 F.3d 408, 30 C.B.C.2d 784 (4th Cir. 1994).

14. The entering into a settlement agreement under Rule 9019 must be accorded some deference by the courts. See, In re Healthco Int'l, Inc., 136 F.3d 45, 54 at fn. 5 (1st Cir. 1998) (citing In re Moorhead Corp., 208 B.R. 87, 89 (B.A.P. 1st Cir. 1997) (“the [bankruptcy] judge...is not to substitute her judgment for that of the trustee [debtor-in-possession], and the trustee's judgment is to be accorded some deference.”). Furthermore, “[c]ompromises are favored in bankruptcy.” See, Richard Levin & Henry J. Sommer, 10 Collier on Bankruptcy ¶9019.01 (16th ed. 2020).

15. The Parties submit that the Agreement should be approved as it constitutes a sound exercise of Debtor’s business judgment, is in the best interest of the creditors, the estate and all parties in interest, is entered into to facilitate the implementation of the terms and conditions of the Plan, resolves the controversy regarding whether Attenure is authorized to negotiate and litigate the State Court Action, and paves the way towards the repair of the damages caused by Hurricanes Irma and María to the Condominium.

C. The Agreement Should be Approved Pursuant to Rule 9019.

16. The Parties submit the following in support of the approval of the Agreement.

17. First, the Agreement is a sound exercise of Debtor’s business judgment and provides numerous benefits to the estate, the creditors, and all parties-in-interest in the captioned case, as it provides a path to collect and ultimately resolve, through litigation or settlement, the Insurance Proceeds, the Insurance Claim and the State Court Action.

18. Second, the Agreement resolves how the Insurance Claim will be litigated or settled - through Attenure - and how the Insurance Proceeds will be paid to and divided.

19. Thirdly, at an extraordinary meeting of the HOA held on May 31, 2024, the Agreement was approved in compliance with Article 63 of the Puerto Rico Condominium Act, 31 Puerto Rico Laws Ann. § 1923h.

20. Lastly, the approval and enforcement of this Agreement is conditioned upon the occurrence of the Effective Date of the Plan– wherein the interests of secured claimants over the Insurance Proceeds will be extinguished, per the terms and conditions of the Plan.

21. Therefore, the facts and circumstances of Debtor’s Chapter 11 show an overwhelming need to expedite the resolution of the State Court Action and to finally resolve the controversies regarding Attenure’s authorization to negotiate and litigate the State Court Action on behalf of Debtor and the HOA.

D. Procedure.

22. As set forth in paragraph 10 of the Agreement, the HOA will provide notice, in form and substance similar to that set forth on **Exhibit B** (the “Rule 9019 Notice”), of this Rule 9019 Motion, the Agreement (with all exhibits) and the proposed Rule 9019 Order (i) through the CM/ECF system, to all CM/ECF participants in this case; (ii) by U.S. mail and, where practicable, by email, to the Rule 9019 Notice Parties (as defined in the Agreement).

23. Upon entry of the Rule 9019 Order, the Agreement shall be binding on the Parties, and shall inure to the benefit of and bind their respective successors and assigns. Further, upon entry of the Rule 9019 Order, the Agreement shall be binding upon each of the Rule 9019 Notice Parties, excluding solely the United States Trustee.

24. Accordingly, the entry of the Rule 9019 Order shall constitute a factual and legal determination, binding –with a *res judicata* effect – on each of the Parties and Rule 9019 Notice Parties, excluding solely the United States Trustees, finding and decreeing that: (i) Attenure is authorized to negotiate and litigate the State Court Action, Insurance Claim, and/or Insurance Proceeds on behalf of Debtor, the HOA on its own behalf, subject to the terms of this Agreement; (ii) the Assignment Documents are valid and binding, as amended through the Agreement; (iii) the distributions of the Insurance Proceeds shall be made as set forth in this Agreement and (iv) upon the Bankruptcy Court’s approval of this Agreement, the Parties and the Rule 9019 Notice Parties shall be forever barred, precluded and estopped from asserting any allegation or argument in any

way challenging the validity of the Assignment Documents, as amended herein, or any of the factual or legal determinations included in this Agreement or the Rule 9019 Order, whether in this Court, the State Court or any other forum.

25. Further, the entry of the Rule 9019 Order shall constitute a factual and legal determination, binding on all Rule 9019 Notice Parties, that: (a) the Rule 9019 Notice constitutes adequate and appropriate notice to the Rule 9019 Notice Parties under the circumstances; (b) no other or further notice of the Agreement or Rule 9019 Motion is required; (c) the Rule 9019 Notice Parties served with the Rule 9019 Notice have been provided adequate and appropriate notice of the Agreement and Rule 9019 Motion and afforded an opportunity to be heard with respect to the Rule 9019 Motion, any potential objection to the Agreement, and all other relief otherwise requested therein; and (d) that the persons executing the Agreement are duly authorized to execute this Agreement on behalf of the Party.

26. The Bankruptcy Court shall retain jurisdiction to hear and determine any and all matters or disputes (a) arising from or related to the implementation, enforcement, or interpretation of the Agreement; and (b) any challenge to any of the legal or factual determinations included in the Agreement.

27. The Agreement is subject to the approval of the Bankruptcy Court and constitutes the entire agreement and understanding of the Parties regarding the Assignment Documents and/or the State Court Action described herein-above, and the subject matter hereof, and it supersedes any prior or contemporaneous representations, statements, understandings, or agreements concerning the subject matter of this Agreement.

28. The Parties acknowledge that they have thoroughly reviewed this Rule 9019 Motion and the Agreement by themselves and with the assistance of their respective counsels, warrant that the terms and conditions set forth herein are reasonable under the circumstances and that they have

acted in good faith in connection with the negotiations of the Agreement and in moving the Bankruptcy Court for an order approving the same.

REQUEST FOR EXPEDITED DETERMINATION

Given the importance of the requested relief to the Parties, the Parties hereby request that the Court consider this Rule 9019 Motion with a shortened objection period of seven (7) days, so that objections, if any, must be received on or before July 1, 2024 (or July 5, 2024, if served by mail).

WHEREFORE, Debtor, the Attenure Entities and the HOA, respectfully request that this Court enter a Rule 9019 Order substantially in the form attached hereto as **Exhibit 1**, granting the Motion; approving the Agreement set forth in **Exhibit A**, in its entirety and granting such other and further relief as the Court may deem proper and just.

RESPECTFULLY SUBMITTED.

San Juan, Puerto Rico, this 24st day of June, 2024

NOTICE TO CREDITORS AND PARTIES IN INTEREST

Within seven (7) days after service as evidenced by the certification, and an additional three (3) days pursuant to Fed. R. Bank P. 9006(f) if you were served by mail, any party against whom this motion has been served, or any other party to the action who objects to the relief sought herein, shall serve and file an objection or other appropriate response to this paper with the Clerk's office of the U.S. Bankruptcy Court for the District of Puerto Rico. If no objection or other response is filed within the time allowed herein, this motion will be deemed unopposed and may be granted unless: (i) the requested relief is forbidden by law; (2) the requested relief is against public policy; or (iii) in the opinion of the Court, the interest of justice requires otherwise.

WE HEREBY CERTIFY that on this same date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case, including, but not limited to, the U.S. Trustee.

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