

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

In re: Lodging Enterprises, LLC,

Case No. 24-40423-11

Debtor.

---

**United States Trustee's Objection to Debtor's Amended Motion  
to Authorize Settlement Under Bankruptcy Rule 9019**

---

The United States Trustee objects to Lodging Enterprises' amended motion to approve a settlement with its secured lender<sup>1</sup> because (1) the settlement may violate priority rules without creditors' consent, (2) the settlement may be a *sub rosa* plan, (3) key settlement terms are unclear, and (4) Lodging failed to give creditors sufficient notice.

**Background**

Debtor Lodging Enterprises, LLC, is a real estate holding company that entered bankruptcy in June 2024 with 44 hotels and 27 restaurants. During bankruptcy, it sold four of those hotels with Court approval. On March 27, 2025, Lodging filed a motion to approve a settlement with its secured lender and a motion to approve bid procedures for the planned sale of the rest of its hotels and restaurants.

---

<sup>1</sup> Doc. #448.

In the settlement motion, Lodging specifies that the proposed settlement provides for “the successful resolution of the Chapter 11 Case.”<sup>2</sup> The settlement would also dictate the eventual split of any sales proceeds, the order of application of proceeds, and permit the lender to credit bid in a sale.

Lodging and the lender sell the settlement as resolving complex and challenging disputes regarding the amount of the lender’s claim and providing a \$30 million discount on what the lender claims it is owed. But the proposed settlement does not result in a concrete number or one that can be ascertained or mathematically arrived at. The settlement would fix the lender’s claim at “approximately \$113,238,568.23 plus accrued and unpaid interest, fees, charges, and amounts due under the Loan Agreement....”<sup>3</sup>

Lodging’s counsel provided information to counsel for the U.S. Trustee when asked about the amount of the settlement, from which it’s clear that the figure is an estimate of what might be due in December 2025—after the sale process is concluded but not counting any

---

<sup>2</sup> *Id.* at 1 ¶1.

<sup>3</sup> *Id.* at 4 ¶8(iv).

application of sale proceeds. Based on that estimate, and depending on the amount of sale proceeds available, the lender would receive approximately \$121,532,089.60 of sale proceeds. Nearly all of what the lender would give up as part of this settlement—\$28.9 million—is default interest. Notably, the lender’s agreement to take less only applies if the sale process is closed “timely.”<sup>4</sup> Although the amount of the lender’s claim under the proposed settlement is somewhat fluid, sale proceeds would be paid to the lender “at closing.”<sup>5</sup>

Under the proposed settlement, the lender would receive the right to credit bid at the proposed sales and not have to contribute the cash portion of the sale that is needed for sale expenses, statutory fees, administrative expenses, priority unsecured creditors, and the carve-out for general unsecured creditors. If there are too many credit bids by the lender, Lodging is unlikely to have enough cash, and claimants will be paid only part of their claim.

The proposed settlement would release any claims that the debtor has against the lender. And the lender would release any claims against

---

<sup>4</sup> *Id.* at 18 fn. 6.

<sup>5</sup> *Id.* at 21 ¶(h)ii.

the debtor and third parties such as Avantic and current and former managers, officers, and directors. The proposed settlement would also apply a cap on the amount the lender could seek against third-party guarantors: Tom Vukota and related entities, who are ultimately the equity holders of Lodging.<sup>6</sup>

## **Argument**

### **I. The proposed settlement may skip priorities without the creditors' consent.**

In *Jevic*, the United States Supreme Court rejected a non-plan priority-skipping distribution of estate assets in a chapter 11 case that three lower courts had approved.<sup>7</sup> Although *Jevic* presented the Supreme Court with an end-of-case, “structured dismissal” scenario, the Supreme Court’s reasoning is not limited to either structured dismissals or case-ending distributions. Rather, the *Jevic* reasoning applies whenever a bankruptcy court in a chapter 11 case is presented with distributions of estate assets that “violate priority without the impaired creditors’ consent.”<sup>8</sup>

---

<sup>6</sup> *Id.* at 19 ¶(f); *see also* 22 ¶(i)ii.

<sup>7</sup> *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017).

<sup>8</sup> *Id.* at 466.

Thus, when analyzing a request to make non-plan priority-skipping distributions in a chapter 11 case, this Court must examine the Bankruptcy Code for “some affirmative indication of intent” that Congress actually meant to make [the proposed disbursement] a backdoor means to” circumvent the statutory priority system established by § 507.<sup>9</sup> “The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure.”<sup>10</sup>

Here, there is no guarantee that creditors’ claims will be paid in full. It is entirely dependent on 1) how much the sales proceeds end up being, and 2) how many of the sales are to third parties as opposed to credit bids of the lender, which result in no cash to pay sales costs, administrative expenses, priority claims, or general unsecured claims. Yet the equity holders, who are guarantors, would receive benefits including a reduction of their liability by virtue of a cap. No Bankruptcy Code provision provides for the priority-skipping proposed in the settlement motion. As a result, it is not allowed.

---

<sup>9</sup> *Id.* at 465.

<sup>10</sup> *Id.*, citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (“Congress ... does not, one might say, hide elephants in mouseholes”).

Lodging may claim that the settlement—and the sale it requires—are not a final disposition, and thus *Jevic* is not applicable. But the settlement sets in motion a disposition that becomes inevitable. After the sales process required by the settlement, all that will be left is a dismissal. The proposed settlement does not preserve Lodging as a going concern as it would require the sale of all its hotels. It does not make the estate more solvent as it would transfer all its assets. And it does not promote the possibility of a confirmed plan—it replaces a plan. Lodging even refers to the settlement as providing for the successful resolution of the case.

Although the Supreme Court acknowledged in *Jevic* that some courts have approved interim distributions outside of the usual priority, such as first-day wage orders, critical-vendor orders, and “roll-ups,” it noted that “these courts have usually found that the distributions at issue would enable a successful reorganization and make even the disfavored creditors better off.”<sup>11</sup>

Such is not the case here. No “reorganization” will be possible once Lodging’s assets have been sold, and once the proceeds of the sale have

---

<sup>11</sup> *Id.* at 468.

been disbursed there will be little likelihood that the skipped creditors will later be made “better off.” Therefore, even if the settlement motion is not viewed as proposing an end-of-case distribution, under the *Jevic* reasoning the settlement motion should be denied because it proposes a non-plan priority-skipping distribution in circumvention of the Bankruptcy Code’s priority system and procedural safeguards, without any offsetting bankruptcy-related justification.

Ultimately, to pass the *Jevic* test, Lodging needs to show creditors’ consent. It is difficult to imagine how it could show that absent a vote on a plan with proper disclosure. Failure to object to a motion styled as a settlement with the lender—on fourteen days negative notice—does not show creditors’ consent.

## **II. The settlement agreement may be an impermissible *sub rosa* plan.**

Proposed pre-confirmation § 363 sales of substantial portions of a debtor’s assets “must be scrutinized closely by the court” because they may short circuit the requirements of a reorganized plan by establishing the terms of the plan and therefore deprive parties of

substantial rights inherent in the plan confirmation process.<sup>12</sup> “Where a transaction has the effect of dictating the terms of a prospective chapter 11 plan, it will constitute a prohibited *sub rosa* plan.”<sup>13</sup> “The debtor and the bankruptcy court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa*.”<sup>14</sup>

Courts treat a proper asset sale or settlement as “a step towards possible confirmation of a plan of reorganization and not an evasion of the plan confirmation process.”<sup>15</sup> Courts generally disapprove asset sales or settlements that “short circuit...the Code’s carefully crafted scheme for creditor enfranchisement,”<sup>16</sup> including “the safeguards of disclosure, voting, acceptance and confirmation.”<sup>17</sup>

---

<sup>12</sup> See, e.g., *Woods v. Kenan (In re Woods)*, 215 B.R. 623 (10th Cir. B.A.P. 1998).

<sup>13</sup> *In re Podzemny*, Case No. 09-14226-j11, 2011 Bankr. LEXIS 567 \*27 (Bankr. D.N.M. Feb. 8, 2011) (“Sub rosa literally means under the rose and historically is used to mean confidential, secret, or not for publication”) (cleaned up).

<sup>14</sup> *In re Millennium Multiple Emplr. Welfare Benefit Plan*, Case No. 10-13528-WV, 2011 Bankr. LEXIS 1973 \*22 (Bankr. W.D. Okla. Feb. 18, 2011), quoting *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983).

<sup>15</sup> See *Motorola Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 467 (2d Cir. 2007).

<sup>16</sup> *PBGC v. Braniff Airways Inc. (In re Braniff Airways Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983).

<sup>17</sup> *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d

Here, there is not yet a proposed sale motion, but the proposed settlement at issue requires and kick-starts—and is entirely contingent on—a sales process in a way that is an impermissible *sub rosa* plan and should not be approved.

The proposed settlement would require Lodging to market and sell its entire portfolio of hotels and restaurants. The proposed settlement dictates what would happen to the proceeds of those sales. The settlement is essentially nullified if the sales don't close. And the sales would leave nothing in Lodging—unless things went so well that there is leftover cash. At that point, creditors would have received whatever percentage payout is available and a dismissal is all that would remain. In other words, in this “settlement” Lodging will have executed a plan. Yet creditors will not have been allowed to vote on it, and no party in interest will be able to compare the “plan” to § 1129. Without the disclosure required for plan confirmation, creditors and shareholders can neither assess whether the lender is resolving potential litigation claims nor determine whether the settlement amount is proper.

---

1063, 1071 (2d Cir. 1983).

And this is more than simply a procedural lack of due process, because the “plan”—the proposed settlement—has not been proposed in good faith because it is not in a plan, does not provide sufficient disclosure about insiders (equity holders), has not been accepted by creditors, and does not pay certain claims. In other words, it may fail to satisfy the requirements of at least § 1125 and § 1129(a)(3), (5), (7), (8), (9), (10), and (12). In addition, it may violate the absolute priority rule of § 1129(b)(2) because equity holders who are also guarantors would receive a release of part of their guarantees even though creditors are not guaranteed to be paid in full.

Because Lodging’s settlement motion is really an impermissible *sub rosa* plan, the Court should deny the motion.

### **III. The settlement terms are not sufficiently clear.**

If this settlement is going to govern the sale of all Lodging’s assets and how the proceeds are disbursed, it would need to be clearer. The amount the lender would be paid should be more concrete. The main purpose of the settlement is to resolve the amount Lodging owes the lender, but the actual total is not in the motion or proposed order. Notwithstanding this difficulty, sale proceeds would be paid to the

lender “at closing” on each of the 40 hotels. If Lodging and the lender are going to settle the claim amounts, parties should not have to wait until a motion to sell six months from now to find out the amount.

Nor is it sufficiently clear what would occur if the sale proceeds were not enough to pay the priority unsecured claims and significant administrative expenses—or if the ten percent carve-out is not enough to pay general unsecured creditors. And that proposition grows if the lender credit-bids on any number of properties.

#### **IV. The notice given is less than required by Rule 2002.**

The Bankruptcy Rules require 21 days’ notice to all creditors for the hearing on a settlement motion “unless the court for cause shown directs that notice not be sent.”<sup>18</sup> Here, Lodging filed its settlement motion on March 27 on negative notice with an objection deadline of 14 days—April 10.<sup>19</sup> Although the motion was filed exactly 21 days before the possible hearing date, a party would have to object within 14 days for there to even be a hearing. And although it is unclear who the motion and notice were sent to and when, Kroll’s email notice sending

---

<sup>18</sup> Fed. R. Bankr. P. 2002(a)(3).

<sup>19</sup> Doc. #449.

the documents to parties entered in the case did not occur until April 7. Especially considering the settlement motion essentially governing the rest of the case, this shortened notice is not sufficient.

### **Conclusion**

Lodging and its lender working out their differences is a welcomed development in this case. But the proposed settlement is a plan without the Bankruptcy Code's protections and obligations for a plan, and it benefits equity interests without guaranteeing creditors full payment. The Court should deny the proposed settlement motion and await a plan and disclosure statement with full notice to all creditors.

Respectfully submitted,

ILENE J. LASHINSKY,  
UNITED STATES TRUSTEE

By: s/Richard A. Kear  
Richard A. Kear, #20724  
Trial Attorney  
301 N. Main St., Suite 1150  
Wichita, KS 67202  
202-573-6945 (phone)  
Richard.Kear@usdoj.gov

### **CERTIFICATE OF SERVICE**

I certify that on April 10, 2025, a true and correct copy of this **Objection** was electronically filed with the Court using the CM/ECF

system, which sends notification to all parties of interest participating in this case through the CM/ECF system.

By: s/Richard A. Kear