

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

In re:

ONH AFC CS INVESTORS LLC, *et al.*¹

Debtors.

Chapter 11 (Subchapter V)

Case No. 23–10931 (CTG)

(Jointly Administered)

Ref. Docket No. 378

OBJECTION OF SCHWARTZ-NIGHTINGALE PARTIES TO LIQUIDATING TRUST’S MOTION FOR ENTRY OF AN ORDER (I) ENFORCING THE CONFIRMATION ORDER, SCHWARTZ NIGHTINGALE SETTLEMENT, AND SECURITY AGREEMENT, (II) APPROVING THE TRUST’S EXERCISE OF VOTING RIGHTS AND THE TRUST ACTING AS ATTORNEY-IN-FACT OF CERTAIN SCHWARTZ NIGHTINGALE PARTIES, AND (III) GRANTING RELATED RELIEF

The Schwartz-Nightingale Parties,² by and through undersigned counsel, hereby object (this “Objection”) to the *Motion for Entry of an Order (I) Enforcing the Confirmation Order, Schwartz Nightingale Settlement, and Security Agreement, (II) Approving the Trust’s Exercise of Voting Rights and the Trust Acting as Attorney-in-Fact of Certain Schwartz Nightingale Parties, and (III) Granting Related Relief* filed by the Liquidating Trustee of the ONH Liquidating Trust (the “Trustee”) on January 15, 2025 [D.I. 378] (the “Motion”). In support of this Objection, the Schwartz-Nightingale Parties respectfully state as follows:

¹ The last four digits of the Debtors’ federal tax identification numbers are 1199 (ONH AFC CS Investors LLC) and 6326 (ONH 1601 CS Investors LLC). The Debtors’ mailing address is 3445 Peachtree Road, Suite 1225 Atlanta, GA 30326.

² The Schwartz-Nightingale Parties comprise: Mr. Elchonon (“Elie”) Schwartz; One Night Holdings LLC Nightingale Properties, LLC; One Night Properties LLC; ES 28 Holdings LLC; 2 ES28 Investments LLC; Nightingale Property Group LLC; The Nightingale Group, LLC; Nightingale Realty, LLC; Nite Sky Management LLC; AAF 1601 Washington Ave TIC; ONH 2226 Third Ave LLC; Five Park 3003 LLC; 1 Westend PH-A LLC; 320 Mountain Road LLC; 1835 Market Investors LLC; 1635 Market Investors LLC; 1500 Spring Garden Investors LLC; NG 1601 Washington Ave LLC; Midnight Capital Partners LLC; ONH Promote LLC; ES 1 Westend Residence Trust; The Elchonon Schwartz Family Trust; ES28 Investments Trust; ES ONH Trust; and ES Family Life Insurance Trust dated 06.22.2022.

PRELIMINARY STATEMENT³

1. The Motion is a meandering airing of grievances building up to an almost incoherent request for relief (when comparing what the Motion says it is asking for with what the Proposed Order actually provides), which seems to have been put together hastily for the principal purpose of preventing the Schwartz-Nightingale Parties from being the only ones moving forward with a motion at the February 5, 2025, hearing.⁴

2. Much of the “Relevant Background” section (in particular, ¶¶ 11-32) is actually *irrelevant* to the relief sought in the Motion⁵ and is transparently geared toward establishing Mr. Schwartz as a “bad guy”—which is perhaps to be expected, as it could serve to distract from the fact that the relief sought is, on its face, procedurally improper. This relief boils down to three things. First, the Trustee seeks an abstract declaration that she has the voting rights and powers of attorney set forth in the security documents executed in connection with the Settlement Agreement, and that as a result she is entitled to do X, Y, and Z at some indefinite time in the future. (*See* Prop. Ord. ¶ 2.) Second, she seeks entry of a money judgment against certain of the Schwartz-Nightingale Parties from whom she previously had not obtained a confessed judgment.⁶ (*Id.* ¶ 3.)

³ Capitalized terms not defined in this Preliminary Statement have the meanings ascribed to them in the body of this Objection.

⁴ On January 6, 2025, certain of the Schwartz-Nightingale Parties filed a motion to quash Rule 2004 subpoenas issued by the Trust [D.I. 371], which is scheduled for hearing on February 5, 2025.

⁵ In an action in federal court, relevant facts are those that are “of consequence in determining the action.” *See* Fed. R. Evid. 401. The Schwartz-Nightingale Parties are at a loss to understand how most of the background facts asserted by the Trustee (particularly in ¶¶ 11-32) are “of consequence in determining” whether the Trustee is entitled to entry of the Proposed Order.

⁶ The Trustee asserts these entities “refused to provide” such confessions of judgment (Mot. ¶ 4), which is false. The Schwartz-Nightingale Parties who *did* provide the Trustee with confessions of judgment did so because she provided them with forms to sign and asked them to. Those who did not, did not because she did provide them with forms to sign and ask them to.

Third, she seeks a declaration that Mr. Schwartz is in default of the Settlement Agreement and to compel specific performance of his obligations under the Settlement Agreement, including (but not limited to) with respect to vacating the Apartment. (*See id.* ¶ 5.)

3. As discussed below, all of this relief is required by Bankruptcy Rule 7001 to be sought by adversary complaint rather than by motion. The declaratory relief in paragraph 2 of the Proposed Order is also improper as it would constitute an advisory opinion beyond the scope of this Court’s subject-matter jurisdiction. And even if the Court were inclined to entertain the Trust’s request for specific performance in paragraph 5 of the Proposed Order, such relief would be inappropriate because under New York law, which governs the Settlement Agreement, the Trustee would not be entitled to the remedy of specific performance. This is because, among other reasons, she is herself in material breach of the Settlement Agreement by reason of her failure to remit the Schwartz-Nightingale Parties their 10% share of asset liquidation proceeds and to reasonably consider alternative proposals for disposition of the Apartment as required by the Settlement Agreement. Indeed, on the latter point, the Motion entirely omits discussion of the three alternative proposals for disposition of the Apartment that were brought to the Trustee by Mr. Schwartz, any one of which would have yielded between \$500,000 and \$1.5 million *more* in net proceeds to the ONH Liquidating Trust—and *quicker*—than the “compelling offer” (Mot. ¶ 6) she now seeks to pursue.

4. In sum, the Motion should be summarily denied.

BACKGROUND

5. The Schwartz-Nightingale Parties disagree with many of the Trustee’s factual assertions in the Motion, but as noted above, much of it is irrelevant to the relief sought. What

follows is some additional background (and where appropriate, factual corrections) to provide further context for the Motion and the arguments in this Objection.⁷

A. The Family Trusts and Apartment

6. Well prior to the events giving rise to these chapter 11 cases, as part of his lifetime estate planning, Mr. Schwartz had established a number of trusts for the benefit of his children and/or descendants, into which assets were contributed for their benefit. Mr. Schwartz is neither the trustee nor a beneficiary of any of these trusts.

7. Property owned by the trusts include, among other things, (i) 50% of the equity of The Nightingale Group LLC and One Night Holdings LLC, which entities, in turn, own various real estate investment entities (all of which are included in the Schwartz-Nightingale Parties), (ii) 100% of the equity of ES 28 Holdings LLC, which owns non-real estate assets, and (iii) 100% of the equity of 1 Westend PH-A LLC (the "Apartment Owner"), which owns the apartment at 1 Westend Avenue in New York City (the "Apartment") where Mr. Schwartz lives with his wife and five (soon to be six) children. (For the avoidance of doubt, Mrs. Schwartz and the children are not Schwartz-Nightingale Parties and are not parties to the Settlement Agreement or the Side Letter Agreement (defined below).)

8. The Apartment was purchased in 2018 and is subject to a mortgage with approximately \$14.7 million of outstanding principal and \$600,000 of outstanding interest and penalties currently.

⁷ To be clear, the lack of a specific denial or rebuttal of any particular assertion made by the Trustee in the Motion does not constitute an admission of such assertion, and the Schwartz-Nightingale Parties reserve all rights with respect to such assertions (including, without limitation, the right to object to the introduction of evidence regarding them and to offer rebuttal evidence in response to them) for the hearing on the Motion.

B. The Settlement Agreement and Apartment Side Letter

9. Following the appointment of their Independent Manager (who is now the Trustee), the Debtors asserted they had potential claims against the Schwartz-Nightingale Parties, including the various family trusts and the entities owned by them, arising from certain pre-petition transactions (the “Potential Claims”). (*See* Sett. Agmt. At 2.⁸) The Schwartz-Nightingale Parties disagreed, particularly as regards any claims with respect to assets, such as the Apartment, that were acquired well prior to the events giving rise to these chapter 11 cases.

10. Nevertheless, as stated in the recitals to the Settlement Agreement, the Debtors and the Schwartz-Nightingale Parties (including the various family trusts and the entities owned by them) entered that agreement (i) to “avoid the delay, uncertainty, inconvenience and expense of litigation relating to the Potential Claims or any other causes of action that could be asserted against the Schwartz Nightingale Parties by or on behalf of the Debtors’ estates,” and (ii) to “facilitate the prompt payment by the Schwartz Nightingale Parties to the Debtors.” (Sett. Agmt. at 2.) These recitals were incorporated by reference “and made an express part of” the Settlement Agreement, and were “an integral part” of it. (*Id.* ¶ 1.)

11. The Settlement Agreement called for an initial payment by the Schwartz-Nightingale Parties of \$3 million on or before December 31, 2023, followed by equal quarterly payments of the remaining settlement amount beginning March 31, 2024, subject to a 10-day grace period for missed payments. (*Id.* § 3.) As the Trustee acknowledges, the Schwartz-Nightingale Parties made the initial payment of \$3 million under the Settlement Agreement. (Mot. ¶ 55.)

12. The Settlement Agreement also required the Schwartz-Nightingale Parties to liquidate all of their material assets and have the net proceeds thereof remitted directly to the

⁸ A copy of the Settlement Agreement is included in Exhibit A to the Motion.

Debtors. But it required the Debtors, in turn, to “pay the Schwartz Nightingale Parties 10% of the net proceeds within three (3) business days of receiving such proceeds.” (*Id.* § 4(b).) The right to a 10% share of any asset liquidation proceeds was a material inducement for the family trusts to sign on to the Settlement Agreement (and to permit their wholly-owned subsidiaries to do so), because otherwise the beneficiaries of such trusts (i.e., Mr. Schwartz’s children and/or descendants, none of whom had anything to do with the events giving rise to these chapter 11 cases) would be left with nothing and no way to pay for basic living expenses. It was also important to Mr. Schwartz, insofar as his ability to pay the full settlement amount would depend on future business dealings, which would be difficult to muster if he and his family were struggling to stay afloat financially.

13. With respect to the Apartment specifically, the Settlement Agreement provided that the Schwartz-Nightingale Parties would hire an unaffiliated broker (in consultation and with the consent of the Debtors⁹) to market the property beginning six months following confirmation of the Debtors’ Plan, and the Schwartz-Nightingale Parties would retain 10% of the proceeds payable to the Debtors from any sale of the Apartment. During the six-month period post-confirmation, Mr. Schwartz and his family would be permitted to live in the Apartment. (*Id.* §§ 4(f)(viii)(1)-(4).) The Settlement Agreement also included the following provision:

To the extent the Schwartz Nightingale Parties can originate an alternative transaction that provides *equivalent* amount of proceeds to the Debtors and would not inhibit the Schwartz Nightingale Parties’ ability to comply with the completion of payments under the Agreement, in the Debtors’ *reasonable judgment*, then at their election, the Debtors can pursue this alternative transaction. Within thirty (30) days of the Execution Date, the parties shall meet and

⁹ As it actually happened, and contrary to the Settlement Agreement, the Trustee simply dictated which broker must be used.

confer regarding the parameters of a transaction that would be deemed reasonably acceptable under this section.¹⁰

(*Id.* § 4(f)(viii)(5) (emphasis added).) This provision was a material inducement for the Apartment Owner and ES 1 Westend Residence Trust (which owns the Apartment Owner) to sign on to the Settlement Agreement, because it provided a mechanism whereby the trust’s beneficiaries (i.e., Mr. Schwartz’s descendants) could avoid being displaced from their home so long as “equivalent” value was provided to the Debtors’ estates in an alternative transaction. And again, it was also important to Mr. Schwartz, insofar as his ability to pay the full settlement amount would depend on future business dealings, which would be difficult to muster if he and his family were displaced from their home.

14. On May 23, 2024, the Trustee, Apartment Owner, and Mr. Schwartz entered a side letter agreement (the “Apartment Side Letter”),¹¹ providing for the Apartment Owner and Mr. Schwartz to enter into a month-to-month lease for the Apartment (the “Lease”) and “to comply with all reasonable instruction and direction provided by the [Trustee] with respect to the [Apartment,] the Lease, and the marketing of the [Apartment].” (Apt. Side Lett. at 2.) The Apartment Side Letter also provided for the retention of a broker designated by the Trustee to market the Apartment, and for Mr. Schwartz and the Apartment Owner to provide the broker with access to the Apartment “to prepare marketing materials, marketing events, and showing the [Apartment] during reasonable hours.” (*Id.* at 3.)

¹⁰ This meet-and-confer never happened. The Schwartz-Nightingale Parties suspect that the Debtors (and now, the Trustee) never intended to consider to any transaction that would result in Mr. Schwartz remaining in the Apartment, notwithstanding the express language of the Settlement Agreement clearly contemplating such a result.

¹¹ A copy of the Apartment Side Letter is attached as Exhibit F to the Motion.

15. On May 23, 2024, the Apartment Owner engaged the Trustee’s designated broker (the “Broker”) under a listing agreement providing for a \$19 million listing price for the Apartment.

16. Mr. Schwartz fully cooperated with the Broker to accommodate showings of the Apartment—including, from time to time, on unreasonably short notice and at unreasonable hours. He stopped cooperating only when it became obvious that the Trustee was not abiding by her obligation under the Settlement Agreement to reasonably consider alternative transactions that would provide “equivalent” (in fact, *superior*) economics to the potential transactions that had been sourced by the Broker, as discussed below.¹²

C. The Trustee’s Unreasonable Refusal to Consider Alternative, Economically Superior Transactions for the Apartment

17. Prior to the commencement of the marketing period for the Apartment under the Settlement Agreement, Mr. Schwartz, through counsel, outlined a proposal to the Trustee for an alternative transaction for the Apartment whereby the ONH Liquidating Trust would receive equivalent value to a sale at the proposed \$19 million asking price, but without the necessity of paying brokers’ fees (which would be potentially \$800,000)¹³ or transfer taxes/title charges (which would be potentially \$400,000). By Mr. Schwartz’s estimation, such a transaction would yield approximately **\$3 million** of value to the Trust. If these economics were acceptable to the Trustee, Mr. Schwartz anticipated obtaining funding for this proposed transaction from a friend or family

¹² The Trustee acknowledges in passing that Mr. Schwartz “initially cooperated” with the broker (Mot. ¶ 6), but states that he stopped cooperating “once the ONH Trust located sufficiently serious buyers” (*id.* ¶ 7). However, and as the Trustee well knows, it was not the presence of “serious buyers” for the Apartment that caused Mr. Schwartz to stop cooperating with the Broker—it was the Trustee’s refusal to reasonably consider alternative transactions as contemplated by the Settlement Agreement.

¹³ Transactions sourced by Mr. Schwartz are carved out from the Broker’s fee arrangement.

member taking a junior lien position against the Apartment. However, to proceed with securing a funding commitment, he needed assurance that the Trustee was in agreement on the proposed economics of the transaction.

18. On May 15, 2024, Mr. Schwartz and his then counsel met with the Trustee and her counsel to discuss cooperation in the liquidation of the Schwartz-Nightingale Parties' assets. Mr. Schwartz reiterated his proposal for the Apartment and was told that he needed to sign the Apartment Side Letter and Lease as a precondition to any discussion of an alternative transaction for the Apartment. (Despite that the Settlement Agreement required no such thing, and in fact obligated the Debtors to meet and confer to discuss a potential transaction, which had never happened.)

19. In a follow-up email to Mr. Schwartz on May 20, 2024, the Trustee stated that any proposal for an alternative transaction for the Apartment “needs to be approved by the [Liquidating Trust C]ommittee before it is capable of being accepted”—which is not true, legally, because nothing in the Plan, the Confirmation Order, or the Trust Agreement requires the Trustee to obtain approval from the Liquidating Trust Committee to do *anything*.¹⁴ In a further email to Mr. Schwartz on May 21, 2024, the Trustee reiterated, “we need all the documents for the [Apartment] signed prior to discussions on any transaction with you.”

¹⁴ Article VIII of the Liquidating Trust Agreement and Declaration of Trust [D.I. 190 Ex. 1] (the “Trust Agreement”), titled “Liquidating Trust Committee,” does not specify any rights or powers of the committee or its members other than (i) to approve new members, (ii) authorize dissolution of the committee, or (iii) have their reasonable out-of-pocket expenses paid from assets of the Trust. Nor does any other provision of the Trust Agreement condition the Trustee's rights or powers to take actions on behalf of the Trust on approval of the Liquidating Trust Committee. Indeed—and strangely—the Liquidating Trust Committee does not even have the power to remove the Trustee for cause or otherwise. Rather, the Trustee can only be removed (i) if she is determined by a final, non-appealable ruling of a court of competent jurisdiction to have “intentionally embezzled funds derived from the Trust” or “committed fraud relating to the Trust,” and (ii) even then, only upon the affirmative vote of a majority of Trust beneficiaries. (*See* Trust Agmt. § 9.3.)

20. As noted above, Mr. Schwartz and the Apartment Owner signed the Apartment Side Letter and Lease on May 23, 2024. Both documents had been drafted and provided by the Trustee's counsel, with certain minor changes to the Apartment Side Letter negotiated by Mr. Schwartz prior to execution.

21. In a May 28, 2024, email to Mr. Schwartz, the Trustee stated that the Liquidating Trust Committee was meeting next on June 12, 2024, was "open to receiving a proposal" regarding the Apartment, and would be "focused on net cash to the estate." In response, Mr. Schwartz reiterated that he had already outlined his proposal but that in order to secure funding he needed to know there was an agreement on economics. The Trustee responded, "they won't explicitly sign off on economics at this point, but you can assume based on being given the go ahead to go source the funding they are open to a deal based on the economics you proposed."

22. Mr. Schwartz does not know whether his proposal was discussed with the Liquidating Trust Committee at its June 12, 2024, meeting—the Trustee never got back to him one way or the other.

23. On July 29, 2024, Mr. Schwartz conveyed to the Trustee's financial advisor a second proposal for an alternative transaction with respect to the Apartment, which would also resolve potential litigation between the Trustee and an investment partner of certain of the Schwartz-Nightingale Parties. The proposal was multi-faceted, but in essence would provide for the investment partner to make a payment to the ONH Liquidating Trust in exchange for release of the Apartment and all furnishings from the Trust's collateral pool, with the investor to take a junior lien position on the Apartment to secure repayment of the amounts paid by the investor. Closing could occur within a few days of agreement, and assuming a prompt closing, the Trust would be expected to yield net proceeds of approximately **\$2,999,250** from this transaction.

(Delays in closing would reduce the amount because the investor was offering a fixed amount of money but would require for interest on the mortgage to be paid current from the transaction proceeds.) The Trustee's financial advisor rejected this proposal later the same day, without much elaboration.

24. The Broker received several offers for the Apartment, most of which were below \$16 million (which would net the Trust almost nothing). The highest offer was for \$18.15 million all cash, but inclusive of all furniture, fixtures, and art. The approximate net proceeds to the Trust from this transaction, after payoff of the mortgage, payment of brokers' fees, transfer taxes, title fees and closing costs, and payment of the Schwartz-Nightingale Parties' 10% share of the net sale proceeds, would be approximately **\$1,543,500** (assuming mortgage interest accrual as of October 31, 2024).

25. On October 21, 2024, Mr. Schwartz conveyed yet another alternative proposal for the Apartment to the Trustee's financial advisor, whereby an investor would purchase the Apartment and all furnishings for **\$2,000,000** above the mortgage amount and the Schwartz-Nightingale Parties would waive their 10% share of net proceeds (\$200,000), in consideration of which the Trust would release a house in New Jersey (which is currently upside down in its mortgage, as well as significantly water-damaged and in need of repair), and the right to the insurance claim relating to that house, from its collateral pool.¹⁵ Mr. Schwartz's October 21 proposal would have netted the Trust nearly \$500,000 more than the \$18.15 million proposal sourced by the Broker, with a much faster turnaround time of only two weeks.

¹⁵ The investor intended to remove the Apartment from the market for 6-12 months and then relist it when interest rates are lower and the economy is performing better. Mr. Schwartz and his family would be allowed to remain in the Apartment for six months from closing, after which time they would move into the house in New Jersey and use the insurance proceeds to make it habitable. (Even in habitable form, the house is expected to have no equity value.)

26. On October 23, 2024, the Trustee emailed Mr. Schwartz to advise that she had met with the Liquidating Trust Committee regarding his latest proposal, and the committee had “requested that we decline your offer and move forward to accept the [\$18.15 million] offer” for the Apartment. Mr. Schwartz asked for the reason his proposal was declined, to which the Trustee responded that she “presented the facts and the committee members each voted,” and that she “did not ask any committee member to detail the rationale for their vote.” Given this, the Trustee’s prior statement that the Liquidating Trust Committee was “focused on net cash to the estate” seems dubious.

D. The Trustee’s Failure to Remit the Schwartz-Nightingale Parties’ 10% Share of Proceeds

27. On information and belief, the Trustee received proceeds from the liquidation of the Schwartz-Nightingale Parties’ assets both before and after the Schwartz-Nightingale Parties’ payment default under the Settlement Agreement. The Schwartz-Nightingale Parties believe the aggregate amount of such proceeds is between \$4-\$7 million.¹⁶ However, the Schwartz-Nightingale Parties lack more precise information at this time because the Trustee has refused to disclose the amount realized from asset liquidations.

28. To date, the Trustee has never remitted any share of asset liquidation proceeds to the Schwartz-Nightingale Parties.

ARGUMENT

I. The Motion Seeks Relief that Can Only Be Obtained in an Adversary Proceeding

29. Bankruptcy Rule 7001 defines as “adversary proceedings” the following, among others:

¹⁶ This is \$4-\$7 million *in addition* to the \$3 million initial payment made by the Schwartz-Nightingale Parties, which itself comprised asset liquidation proceeds.

(a) a proceeding to recover money or property . . . ;

(b) a proceeding to determine the validity, priority, or extent of a lien or other interest in property . . . ; [and]

(i) a proceeding to obtain a declaratory judgment related to any proceeding described [above].

Fed. R. Bankr. P. 7001. Relief in an adversary proceeding must be commenced by the filing of a complaint. Fed. R. Bankr. P. 7003 (incorporating Fed. R. Civ. P. 3). A matter commenced by motion when an adversary complaint is required should be dismissed, and any order entered in such a matter is subject to vacatur on appeal. *See In re Perkins*, 902 F.2d 1254, 1257-58 (7th Cir. 1990).

30. While the Motion is styled as one to “enforce the Confirmation Order,” the actual relief requested in the Motion—as apparent from the terms of the Proposed Order the Trustee asks the Court to enter—is the entry of a declaratory judgments, *see id.* ¶ 2 (“The trust is entitled to exercise voting rights and act as attorney-in-fact . . .”) and ¶ 5 (“Schwartz is in default of . . .”), money judgments, *see id.* ¶ 3 and Ex. A, and recovery of property, *see id.* ¶ 5 (“[Schwartz] is directed to comply with . . . Section 4(f)(viii) of the Settlement Agreement”).

31. It is well settled that a proceeding to obtain a money judgment is “a proceeding to recover money” that must proceed by adversary complaint rather than motion. *E.g., Kelley, Lovett, Blakey & Sanders P.C. v. Guardian Bank (In re Hood Farms, Inc.)*, 639 B.R. 788, 790 (Bankr. M.D. Ga. 2022); *In re Andrews*, No. 05-67769, 2007 Bankr. LEXIS 374, *3 (Bankr. N.D. Ohio Jan. 31, 2007); *Logan Med. Found., Inc. v. Hayflich & Steinberg (In re Logan Med. Found., Inc.)*, 346 B.R. 184, 188 (Bankr. S.D. W. Va. 2006); *In re Smith & Son Septic & Sanitation Service*, 88 B.R. 375, 380 (Bankr. D. Utah 1988).

32. The declaratory judgment sought in paragraph 2 of the Proposed Order pertains to “the validity, priority, or extent of a lien or other interest in property” – namely, the voting rights

and powers of attorney with respect to collateral that the Trustee asserts she was conferred under the Security Agreements. The declaratory judgment sought in paragraph 5 of the Proposed Order, as well as the requested direction to Mr. Schwartz to comply with Section 4(f)(viii) of the Settlement Agreement, pertain to the Trustee’s recovery of property from Mr. Schwartz – namely, possession of the Apartment. These requests for relief also must proceed by adversary complaint rather than motion. *See, e.g., In re Fin. Oversight & Mgmt Bd.*, 631 B.R. 589, 594 (D.P.R. 2021) (motion seeking declaration regarding and recovery of motor vehicle); *Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 459 B.R. 190, 195 (Bankr. S.D.N.Y. 2011) (motion seeking declaration regarding validity of assignment agreement); *In re DBSI, Inc.*, 432 B.R. 126, 135 (Bankr. D. Del. 2010) (motion seeking declaration as to movant’s entitlement to funds in certain accounts).

33. Because substantially all of the relief sought in the Motion was required to be sought by way of an adversary complaint under Bankruptcy Rule 7001, the Court should deny the Motion outright and need not reach the other issues presented herein.

II. The Motion Seeks Impermissible Advisory Rulings With Respect to the Trustee’s Voting Rights and Powers of Attorney

34. Federal courts, including bankruptcy courts, are “barred from giving opinions advising what the law would be upon a hypothetical state of facts.” *In re Cubic Energy, Inc.*, 587 B.R. 849, 855 (Bankr. D. Del. 2018) (internal quotation marks, citations omitted). “To allow decisions on these types of matters would be to open the door to advisory opinions, over which the court has no jurisdiction.” *Id.* In the bankruptcy context, an opinion is *not* considered advisory where it “actually invalidates a clause, orders a party to do something, or otherwise resolves the parties’ litigation.” *Id.* (citing *In re Lazy Days’ RV Center Inc.*, 724 F.3d 418, 421-22 (3d Cir.

2013)). But if it “does nothing to resolve whether courts would be required to abide by it, the opinion has no legal effect and is merely advisory.” *Id.* (cleaned up).

35. Paragraph 2 of the Proposed Order provides, in pertinent part, as follows:

The Trust is entitled to exercise voting rights and act as attorney-in-fact for the following entities: [lists fifteen of the Schwartz-Nightingale Parties]; the Trust’s authority to act for the foregoing entities shall include the right to sell or liquidate any assets owned by these entities, control any account owned by these entities, and take any and all actions in furtherance of these rights.

(emphasis added). On its face, this decree does not invalidate a clause of an agreement, order a party to do anything, or resolve any litigation between the parties. And it does nothing to resolve whether courts would be required to abide by it, rendering it “without legal effect” and “merely advisory.”

36. *Coffin v. Malvern Federal Savings Bank*, 90 F.3d 851 (3d Cir. 1996), is instructive. In that case, following confirmation of the debtor’s chapter 13 plan, a bank creditor filed a motion to lift the automatic stay so it could foreclose on its mortgage on the debtor’s real property. The bankruptcy court denied the motion, finding there had been no default under the debtors’ chapter 13 plan, but it went on to find that the bank’s lien on the property ““is not discharged by this Chapter 13 proceeding and that upon lifting of the stay at the conclusion of this case or sooner, [the bank] will be free to exercise its state law remedies under its mortgage and applicable law.”” *Coffin*, 90 F.3d at 853 (quoting bankruptcy court opinion). The bank did not appeal from the order denying its lift-stay motion, but the debtor filed a motion for reconsideration challenging the court’s finding that the bank’s lien would survive the bankruptcy proceeding. The debtor’s motion was denied, and the debtor appealed to the district court, framing the issue on appeal as ““whether certain liens survive a bankruptcy proceeding.”” *Id.* (quoting district court opinion). The district court affirmed, and the debtor appealed. The Third Circuit found it unnecessary to reach the merits

of the appeal, concluding that the bankruptcy court's finding regarding lien survival and, in turn, the order denying reconsideration and the district court's order affirming it, were not justiciable controversies:

The bankruptcy court's "finding"—that the Bank's lien was not discharged and that at the end of the case it would be free to exercise its state law remedies under its mortgage—was an advisory opinion. Its order denying [the debtor's] motion for reconsideration decided no actual controversy between the parties: [The debtor] had not moved for an order of lien avoidance . . . ; the issue of whether the lien survived was not before the court for adjudication; and the "finding" it made did not determine whether the Bank would succeed in a subsequent foreclosure action in state court. If the lien survived, it survived by reason of the prior proceedings, including the confirmed Plan, not because of the court's "finding." Were the Bank to go to state court to foreclose on its mortgage, its right to do so would have to be determined by that court in light of its interpretation of the terms of the Confirmed Plan, as well as the terms of the mortgage, applicable state law and, of course, that court's findings of fact. To put it differently, had the bankruptcy court made a "finding" that the Bank's lien did *not* survive, the state court in the foreclosure proceeding would clearly not be precluded from ordering a foreclosure, if under applicable law the lien remained enforceable; such a finding, not being necessary to the decision, would be mere dictum and not give rise to *res judicata* or collateral estoppel.

The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions. We have addressed the question when a justiciable controversy exists—although under the rubric of ripeness—in the context of suits for declaratory relief. Although the parties did not invoke the declaratory relief statute, 28 U.S.C. § 2201, the case before us in its present posture is somewhat analogous to one seeking a declaration of rights. In *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643 (3rd Cir.1990), plaintiff sought a declaration that its suppliers are responsible for any liability that plaintiff may have to its customers as a result of the pending customers' suits. The district court dismissed the complaint and this court affirmed. It defined certain basic principles guiding the determination whether an actual controversy exists, "the most important of which are the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility of that judgment." *Id.* at 647. Here, while there is no question of the adversity of the interest of the parties, conclusiveness of judicial judgment and any utility of

that judgment are totally lacking. The determination of whether the Bank's lien is enforceable will eventually have to be made by another court in foreclosure proceedings and the bankruptcy court's advice will have no legal effect. *See Id.* at 649 n. 9.

Coffin, 90 F.3d at 853–54 (cleaned up).

37. In *In re Cubic Energy, Inc.*, 587 B.R. 849 (Bankr. D. Del. 2018), is also instructive. In that case, a creditor (Gloria's Ranch) who had obtained a prepetition judgment in Louisiana state court against the chapter 11 debtor (Cubic) and a non-debtor party (TEI) filed a pre-confirmation motion for relief from the automatic stay to confirm its ability to enforce its judgment against TEI. The motion was later resolved through the addition of certain language to Cubic's chapter 11 plan and confirmation order. Gloria's Ranch commenced a second, separate action in Louisiana state court against TEI and others, including TEI's owner and principal (Wallen), asserting claims related to the joint and several liability under the original judgment, including claims for fraudulent transfer, alter ego, and veil piercing. TEI filed for chapter 11 relief in the Northern District of Texas, and the second Louisiana state court action was removed to the bankruptcy court by virtue of TEI's status as a party. A chapter 11 plan for TEI was confirmed that provided for the creation of a liquidating trust for the benefit of TEI creditors. The TEI plan identified various claims and causes of action that could be pursued by the TEI liquidating trustee, including claims against Wallen relating to the transfer of funds away from TEI to Wallen and companies controlled by him.

38. Apparently in anticipation of the TEI liquidating trustee asserting claims against them in some forum,¹⁷ Wallen and another potential litigation target (Fossil) filed a motion in the Cubic bankruptcy proceedings styled as a “Motion for Order in Aid of Confirmation and Consummation of Chapter 11 Plan Interpreting and Enforcing the Release, Discharge, and Injunction of Certain Claims and Causes of Action.” *Cubic*, 587 B.R. at 851. In their motion, Wallen and Fossil sought determinations (i) that they were “Released Parties” as defined in the plan, (ii) that TEI was a “Releasing Party” as defined in the plan, (iii) that any claims by TEI against them relating to the Louisiana judgment were within the scope of the plan’s release and injunction provisions, and (iv) that the TEI liquidating trustee was barred from bringing such claims against them. *Id.* at 854-55. The TEI liquidating trustee objected to the motion, arguing (among other things) that it sought an impermissible advisory ruling from the bankruptcy court. Following *Coffin*, Judge Sontchi agreed:

The present Motion does not ask the Court to strike a provision in the Cubic Plan, prevent ongoing litigation, or force the parties to do something. Movants rightly point to language in the Liquidating Trust’s objection that signals a willingness to file or join claims against the Movants, but the [TEI] Trustee has yet to do so. The only action currently pending against Movants that has been brought to the Court’s attention is the adversary proceeding filed against them by Gloria’s Ranch.

That the [TEI] Trustee’s litigation may be imminent, however, is not a sufficient reason to provide an advisory opinion. Even were the Court to consider the merits of the Motion, the same dispute would need to be re-litigated in front of the Texas Bankruptcy Court or a Louisiana state court once the [TEI] Trustee joins or brings claims against the Movants. The type of claims the [TEI] Trustee brings may have a significant impact on the effect of the Cubic Plan, which

¹⁷ It is unclear from the opinion what happened to the removed litigation following confirmation of the TEI plan, but presumably the litigation would have been stayed insofar as it asserted causes of action belonging to the bankruptcy estate, and the TEI liquidating trustee would have had the option to either intervene as plaintiff in that proceeding or commence his own proceeding.

will require a future court to come up with its own interpretation of the Cubic Plan, applicable state law, and appropriate fact finding. Indeed, “the parties’ legal rights cannot be decided until the underlying factfinding has been done.” [*Step-Saver*, 912 F.2d at 649 n.9.]

In other words, to decide on the Motion at this stage would be to indulge in appraising a “hypothetical set of facts.” [*Lazy Days*, 724 F.3d at 421.] Pivotal to this Motion is whether the claims the [TEI] Trustee brings fall within certain exceptions to the Cubic Plan’s releases and injunctions. Yet these exceptions may very well hinge on the nature of the claims brought by the [TEI] Trustee and the factual and legal grounds surrounding them.

Cubic, 587 B.R. at 856–57 (footnotes omitted). Because he concluded the motion constituted a request for an advisory opinion beyond the court’s jurisdiction, Judge Sontchi denied the motion without consideration of the TEI liquidating trustee’s remaining objections.¹⁸ *Id.* at 57.

39. Like the debtor’s request for reconsideration in *Coffin* and the Movants’ request for interpretation of the plan confirmation order in *Cubic*, the Trustee’s request for the relief set forth in paragraph 2 of the Proposed Order does not pertain to any issue that is currently “live” between the parties—rather, it pertains to hypothetical exercises of voting rights or powers of attorney by the Trustee at some point in the future. While it appears the Trustee may intend to commence an eviction proceeding with respect to the Apartment in New York state court, she has not yet done so. And even if she had, a decision by this Court on the abstract issue of whether voting rights and/or a power of attorney exist, devoid of any factual context, would be of no use to (and in no way binding upon) the New York court in determining whether the *actual exercise* of such voting

¹⁸ As here, these objections included that the motion was procedurally improper because an adversary complaint was required under Bankruptcy Rule 7001. The Rule 7001 argument was addressed first in this Objection because it touches on all of the relief sought in the Motion, whereas the justiciability argument applies only to a subset of the relief sought (i.e., the requested declaratory relief regarding the Trustee’s voting rights and powers of attorney). But in terms of analytical priority, justiciability is indeed the threshold issue, because it goes to the Court’s subject-matter jurisdiction.

rights and/or power of attorney, in the context of a particular eviction proceeding and after appropriate fact finding, comported with applicable nonbankruptcy law. Thus, for the reasons set forth by the courts in *Coffin* and *Cubic*, the Court should find the Trustee’s request for the relief sought in paragraph 2 of the Proposed Order is an impermissible request for an advisory opinion over which the Court has no subject-matter jurisdiction.

III. The Trustee Is Not Entitled to Specific Performance of Mr. Schwartz’s Obligations Under the Settlement Agreement

40. Paragraph 5 of the Proposed Order is a decree “direct[ing Mr. Schwartz] to comply with the Settlement Agreement, Plan, and Confirmation Order, including Section 4(f)(viii) of the Settlement Agreement.” However, the Motion does not discuss any provision of the Plan or Confirmation Order for which compliance is sought (apart from, perhaps, their general incorporation of the Settlement Agreement). Thus, this request for relief is, in essence, a request to compel specific performance of the Settlement Agreement.

41. The Settlement Agreement is governed by New York law. (Sett. Agmt. § 20.) In New York, as elsewhere, the ordinary rule is that a party in breach of a contract pays damages, and specific performance is available only under limited circumstances. *BOCA Aviation Limited v. AirBridgeCargo Airlines, LLC*, 669 F. Supp. 3d 204, 240 (S.D.N.Y. 2023). For a party to be compelled to perform its contractual obligations under New York law, four requirements must be satisfied: “(1) there is a valid contract, (2) plaintiff has substantially performed under the contract and is willing and able to perform its remaining contractual obligations, (3) defendant is able to perform its obligations, and (4) plaintiff has no adequate remedy at law.” *Id.* (quoting *La Mirada Prod. Co. v. Wassall PLC*, 823 F. Supp. 138, 140 (S.D.N.Y. 1993)).

42. Mr. Schwartz does not dispute that the first requirement is satisfied—i.e., the Settlement Agreement is a valid contract. The remaining requirements, however, are not satisfied.

43. First, the Trustee has not substantially performed under the Settlement Agreement because she is in material breach of (i) her obligation to remit 10% of net asset liquidation proceeds to the Schwartz-Nightingale Parties, and (ii) her obligation to reasonably consider alternative proposals for the Apartment that would provide an “equivalent” recovery to the Trust, as noted above.¹⁹

44. Second, Mr. Schwartz does not have the ability to perform under the Settlement Agreement—at least, not in the way that the Trustee seems to be seeking. Even if he were to vacate the Apartment, he could not compel his wife and children to do so. They were not parties to the Settlement Agreement or the Apartment Side Letter, and they all have rights under New York’s landlord-tenant laws by virtue of the Lease that the Trustee required Mr. Schwartz and the Apartment Owner to sign.

45. Third, and perhaps most importantly, the Trustee has an adequate remedy at law because any harm resulting from delays in selling the Apartment (which is the complained-of consequence of Mr. Schwartz’s alleged breach of the Settlement Agreement) is economic in nature and remediable by an award of damages (if appropriate).

46. In sum, because the Settlement Agreement is governed by New York law, a motion to enforce the Settlement Agreement must likewise be informed by New York law. And where, as here, specific performance of the contract would not be permitted under New York law, the Trustee should not be permitted to obtain specific performance simply by styling her request as a

¹⁹ The Trustee is also in breach of the Settlement Agreement’s recital provisions to the extent she seems insistent on raising and litigating issues relating to Potential Claims that were obviated by the Settlement Agreement and, if anything, are already subsumed within the judgments granted in favor of the Trustee against certain of the Schwartz-Nightingale Parties.

motion to enforce the Plan and Confirmation Order (neither of which governs the issue presented, apart from their general incorporation of the Settlement Agreement by reference).

IV. If a Money Judgment is to Issue, it Must Be Reduced to Account for Amounts Received by the Trust from the Liquidation of Assets

47. In the event that the Court is inclined to entertain the Trustee's request for entry of a money judgment (which it should not, as that would require an adversary proceeding under Bankruptcy Rule 7001, as discussed above), it should require the Trustee to provide an accounting of receipts and disbursements by the Trust so that the amount of the judgment properly reflects the current amount of the judgment debtors' outstanding obligations the Settlement Agreement.

RESERVATION OF RIGHTS

48. The Schwartz-Nightingale Parties reserve the right to respond further to any new arguments or evidence presented in the Trustee's reply to this Objection, to object to the admission of any evidence offered by the Trustee at the hearing on the Motion, and to offer any evidence at such hearing in further support of this Objection.

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CONCLUSION

49. WHEREFORE, the Schwartz-Nightingale Parties respectfully request that this Court (a) enter an order denying the Motion and (b) grant the Schwartz-Nightingale Parties such other relief as is just and proper.

Dated: January 29, 2025

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