

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS AT KANSAS CITY**

In re:)
)
JOHN Q. HAMMONS FALL 2006, LLC, et al.,) **Case No. 16-21142**
)
Debtors.)
)

**REPLY IN SUPPORT OF MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 105
AND 365 AUTHORIZING THE DEBTORS TO ASSUME CERTAIN UNEXPIRED NON-
RESIDENTIAL REAL PROPERTY LEASES AND EXECUTORY CONTRACTS**

NOW COME the above-captioned debtors (collectively, the "Debtors") and hereby submit their reply in support of the Debtors' Motion for an Order Pursuant to 11 U.S.C. §§ 105 and 365 Authorizing the Debtors to Assume Certain Unexpired Non-Residential Real Property Leases and Executory Contracts (ECF Doc. 1971) (the "Motion"). In support thereof, the Debtors represent as follows:

I. PRELIMINARY STATEMENT

1. The Motion seeks to assume the following agreements: (1) a Management and Lease Agreement and related Master Development Agreement (collectively, the "Glendale Lease") between JQH – Glendale, AZ Development, LLC ("JQH Glendale") and the City of Glendale, Arizona ("Glendale"); (2) a Garage Parking Purchase and Sale Agreement With Parking Services Agreement¹ and Ground Lease and attached Development Agreement (collectively, the "Huntsville Agreements") between the Hammons of Huntsville, LLC (the "Huntsville Debtor"), the Revocable Trust of John Q. Hammons Dated December 28, 1989 as amended and restated (the "Trust") and the City of Huntsville, Alabama ("Huntsville"); and (3) a First Amended and

¹ The Garage Agreement is arguably not a lease, but rather a disguised mortgage in part because the Garage Agreement includes a provision that the real estate shall be transferred to the applicable debtors at the end of the term. See Garage Agreement, Exhibit C to the Motion, § 2.4. In an abundance of caution, however, in light of § 365(d)(4) of the Bankruptcy Code and the inability of the Debtors to obtain further extensions of the time to assume leases of non-residential real property, the Huntsville Debtor and the Trust seek an order permitting assumption of the Garage Agreement.

Restated Operating Agreement of W&H Realty, LLC (the "WHR LLC Agreement") between The Revocable Trust of John Q. Hammons dated December 28, 1989, as Amended and Restated (the "JQH Trust") and AJJ Hotel Holdings, Inc. ("AJJ").

2. JD Holdings LLC ("JDH"), the Debtors and the City of Glendale have reached an agreement resolving all issues with respect to the Glendale Lease. JDH, the Debtors and AJJ Hotel Holdings, Inc. ("AJJ") have further agreed to a continuance of the Motion with respect to the WHR LLC Agreement to April 27, 2018. Accordingly, this reply will address the issues raised in Objection to the Motion filed by the City of Huntsville, Alabama ("Huntsville") (ECF Doc. 1990) (the "Huntsville Objection"). The Debtors reserve the right to file an additional reply in advance of April 27, 2018, to address the objection filed by AJJ.

3. For the reasons set forth herein, the Huntsville Objection is without merit and should be overruled.

II. THE HUNTSVILLE OBJECTION

4. The transaction documents with Huntsville involve a Ground Lease and attached Development Agreement between the Huntsville Debtor and Huntsville, and a Garage Parking Purchase and Sale Agreement (the "Garage Agreement") initially between Huntsville and the Trust. Numerous documents reflect that the Garage Agreement was subsequently assigned by the Trust to the Huntsville Debtor but to date, that assignment has not been located by the Debtors. Only the Ground Lease contains a right of first refusal with respect to the Huntsville Hotel only.

5. By the Motion, the Debtors seek only: (a) to assume the Ground Lease and Development Agreement at this time; and (b) to assume the Garage Agreement if it was assigned by the Trust to the Huntsville Debtor, or if it was not previously assigned, to have the Trust

assume the Garage Agreement and assign it to the Huntsville Debtor. Thus, the relief sought by the Debtors at this time is to assure that before they lose the right to assume the Ground Lease and Garage Agreement, they have assumed these agreements and that the agreements are held by the Huntsville Debtor, where they were always intended to be held. Nothing in this process will trigger Huntsville's right of first refusal at this time, because by the Motion, the Debtors do not seek to sell the Hotel or to assign rights under the agreements to JDH.

Huntsville's Objections.

6. Huntsville asserts in its objection that it disputes the Debtors' contention that no default exists under the Huntsville Leases; Huntsville, however, fails to identify any defaults. The only allegation that could be interpreted as a potential default is that "the condition of the Huntsville Property has declined precipitously in recent months, causing concern to The City and its continued tourism efforts." Huntsville Objection at ¶ 8. This statement is devoid of any factual support. As set forth herein, the Huntsville Debtor has complied with all maintenance and repair obligations under the Hotel Ground Lease.²

7. Huntsville previously made this same allegation in its objection (ECF Doc. 1903) to JDH's Disclosure Statement with respect to the Plan (the "Huntsville DS Objection"). Huntsville DS Objection at ¶ 12. The DS Objection also failed to identify any specific alleged defaults.

8. In response to the Huntsville DS Objection, JDH offered Huntsville an opportunity to list its specific issues with the Huntsville Hotel in the Disclosure Statement. Huntsville declined to do so, instead continuing to make to same general allegation that the Huntsville Hotel is "woefully neglected." Amended Disclosure Statement (ECF Doc. 1948) at p. 10. As set forth herein, the Huntsville Debtor has complied with all its maintenance and repair obligations under

² All capitalized, undefined terms shall have the meaning set forth in the Motion.

the Huntsville Agreements and the Huntsville Hotel remains in excellent condition.

9. Under the terms of the Hotel Ground Lease, the "Lessee shall be required and obligated to maintain at its expense the Premises and the Hotel in good order and repair and in a safe condition, *as more particularly set forth in the Development Agreement.*" Hotel Ground Lease, art. VII (emphasis added). Thus, based on the express terms of the Hotel Ground Lease, the terms of the Development Agreement (attached to and made a part of the Ground Lease) provide the sole standard by which the condition of the Premises and the Hotel are to be judged.

10. Under the Development Agreement (which is attached to the Hotel Ground Lease) the only "condition" requirement is that the Huntsville Debtor "shall maintain the Hotel as an Embassy Suites Hotel or a hotel of equal or better quality during the term of this Agreement." Development Agreement, § 6. Thus, the Development Agreement defers to the satisfaction of the franchisor – Hilton – to ensure that the Hotel is maintained in a condition sufficient to remain an Embassy Suites hotel.

11. As a consequence, under the express language of the Huntsville Agreements, the condition, maintenance and repair obligations are not established by Huntsville; rather, Hilton, as franchisor, establishes the sole standards to which the Huntsville Debtor must adhere.

12. The Huntsville Debtor has consistently met all the requirements established by Hilton to maintain the hotel as an Embassy Suites hotel. Attached as Exhibit A hereto is a Quality Assurance Evaluation of the Huntsville Hotel performed by an auditor for Hilton dated August 8, 2017 (the "August 2017 Evaluation"). As set forth in the August 2017 Evaluation, the Huntsville Hotel maintained an Acceptable rating under Hilton's evaluation standards.

13. In addition, AAA reviewed and rated the Huntsville Hotel on October 17, 2017, awarding it a 3-Diamond Rating, as evidenced by the Inspection Report attached as Exhibit B

hereto. AAA defines a 3-Diamond Rating as: "Distinguished, multifaceted with enhanced physical attributes, amenities and guest comforts." AAA further explains: "The descriptive ratings are assigned exclusively to properties that meet and uphold AAA's rigorous Approval standards." AAA further states: "Every AAA Inspected & Approved establishment is acceptable for the type of experience it provides; AAA does not approve substandard properties." In addition, the Hotel is "A" rated by AAA meaning the hotel is in the "Top 25% of all hotels, based on cleanliness and condition."

14. In all respects, the Huntsville Debtor has consistently maintained the Huntsville Hotel to and exceeding the standards provided for by Hilton, has maintained its Embassy Suites branding, has a stellar AAA rating, and has otherwise complied with the Hotel Ground Lease and Development Agreement.

15. Of note, in order to assume the Hotel Ground Lease and Development Agreement, the Huntsville Debtor must demonstrate that it has exercised its sound business judgment in deciding to assume the agreements. The agreements are integral to the operation of the subject hotel, which is worth more than \$26 million. In the absence of assumption, the time period to extend the decision to assume or reject will shortly expire pursuant to § 365(d)(4) of the Bankruptcy Code, and the Huntsville Debtor will lose significant rights with respect to the Hotel. Thus, the business decision to assume is an easy one given the need to retain such a valuable asset.

16. Apart from its business decision, there are no other requirements to assumption in this context. Section 365(b) of the Bankruptcy Code, which sets out three factors for assumption, has no application if there is no default. As Collier observes:

By its terms, section 365(b) applies only when there has been a default other than a default relating to bankruptcy or financial condition. If there has been no

default, the trustee need not comply with the cure, compensation and adequate assurance requirements of section 365(b). Instead, the trustee, subject to court approval, may simply assume a contract or lease, unless such assumption is barred by other provisions of subsection 365, such as section 365(c) or (e). However, adequate assurance of future performance by the assignee is a condition of assignment of an executory contract or unexpired lease whether or not there has been a default.

3 COLLIER ON BANKRUPTCY ¶ 365.06 (16th ed. 2018) (emphasis added).

17. Here, there are no defaults, and the only issue for the Court to consider is the assumption of the subject agreements. Therefore, the only issue is the Huntsville Debtor's sound business judgment, which is virtually unassailable under these facts, and is not questioned by Huntsville.

18. Therefore, Huntsville's objection to the assumption of the Ground Lease should be overruled and an order should be entered permitting the Huntsville Debtor to assume the Hotel Ground Lease and Development Agreement.

19. Huntsville raises no specific objections to the assumption of the Garage Agreement. Moreover, there are no defaults under the Garage Agreement, and as such, under § 365(b) of the Bankruptcy Code, the assumption of the Garage Agreement should be approved.

20. To the extent that the Garage Agreement has already been assigned by the Trust to the Huntsville Debtor, the debtors seek an order permitting the Huntsville Debtor to assume the Garage Agreement. To the extent that the Garage Agreement has not already been assigned by the Trust to the Huntsville Debtor, the debtors seek an order permitting the Trust to assume the Garage Agreement pursuant to § 365(b) of the Bankruptcy Code, and assign the Garage Agreement to the Huntsville Debtor pursuant to § 365(f)(2) of the Bankruptcy Code. In light of the fact that there is no default under the Garage Agreement, as adequate assurance of future performance under the Garage Agreement, the Debtors offer that the Huntsville Debtor will continue to perform under the Garage Agreement as it has from inception.

21. Huntsville also asserts in its objection that it has a right of first refusal under the Ground Lease with respect to the Huntsville Hotel. The right of first refusal, however, is only triggered by a sale of the Hotel. By the Motion, the Huntsville Debtor only seeks to assume the Ground Lease and the issue of the sale of the Huntsville Hotel, if it is even sold, is left for another day.

22. Thus, any concerns raised by Huntsville as to an assignment of the Ground Lease to JDH are not ripe for decision at this time; and the Huntsville Debtor reserves the right to later seek authority to assign any of the Huntsville Leases to JDH under the terms and conditions set forth in the Plan.

WHEREFORE, for the foregoing reasons, the Debtors request the entry of an order (a) authorizing the Huntsville Debtor to assume the Ground Lease and attached Development Agreement, (b) authorizing the applicable debtor to assume the Garage Agreement and, if necessary, to assign it to the Huntsville Debtor; and (c) granting such other and further relief as is just and proper.

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