The relief described hereinbelow is SO ORDERED.

SIGNED this 21st day of December, 2017.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JOHN Q. HAMMONS FALL 2006, LLC, et al.,	Case No. 16-21142
	Chapter 11
Debtors.	Jointly Administered

JOHN Q. HAMMONS FALL 2006, LLC, et al.,

Movants,

v.

JONATHAN D. EILIAN,

Respondent.

ORDER DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This matter comes before the Court on Debtors' Motion to Compel Complete Production of Documents from Jonathan D. Eilian Pursuant to Subpoena ("Motion to Compel").[1] Mr. Eilian, who is not a party to these cases, opposes the motion.[2] The Court heard oral argument on December 11, 2017. For the reasons set forth below, Debtors' Motion to Compel will be denied.

Creditor JD Holdings, L.L.C.'s ("JD Holdings") proofs of claim against Debtors arise out of a Sponsor Right of First Refusal Agreement dated September 16, 2005 and an Agreement and Amendment dated December 10, 2008 (collectively, the "ROFR"). In Count I of their Omnibus Claims Objections, Debtors object to JD Holdings' claims on the ground that JD Holdings has no right to enforce the ROFR.[3] Debtors base this objection on a $275 million loan agreement between Atrium Lendco, LLC ("Lendco") and iStar Financial, Inc. ("iStar") dated September 16, 2005, as amended effective December 19, 2008 and June 30, 2015 (collectively, the "Loan Agreement"), which iStar assigned to its wholly-owned subsidiary, SFI Belmont LLC ("SFI"), in March 2011,[4] and which SFI assigned to Harmony LendCo, LLC ("Harmony") on October 16, 2015.[5] Section 5.8 of the Loan Agreement, as amended, provides:

> **5.8 ROFR Agreement**. Solely during such time as there is a continuing Event of Default; and provided that [iStar] is not a Defaulting Lender, [Lendco] will not allow any rights of first refusal held by JD Holdings and any of its affiliates under the ROFR Agreement to be exercised by JD Holdings and any of its Affiliates without iStar's prior written approval which shall not be

[1] Mot. to Compel Complete Produc. of Docs. from Jonathan D. Eilian Pursuant to Subpoena, ECF No. 1475.

[2] Opp'n to Debtors' Mot. to Compel Produc. of Docs. from Jonathan D. Eilian Pursuant to Subpoena ("Opposition"), ECF No. 1528.

[3] Omnibus Objs. to Proofs of Claim Filed by JD Holdings, L.L.C. and Certain of Its Affiliates ("Omnibus Objs.") ¶¶ 13-23, 36-37, ECF No. 1251.

[4] Opp'n 4.

[5] Opp'n 4.

unreasonably withheld or delayed. . . .

Debtors argue that Section 5.8 of the Loan Agreement precludes JD Holdings from enforcing the ROFR because "upon information and belief, an Event of Default existed under the Loan Agreement on the date that [JD Holdings] sought to exercise such alleged rights without prior written consent from SFI."[6]

JD Holdings responds that Debtors' argument is invalid for a number of reasons, two of which are relevant to this motion to compel. First, JD Holdings argues Debtors' argument is invalid under Section 8.1(A) of the Loan Agreement, which provides:

> (A) Assignment by Lender
> . . . In no event shall [iStar] assign or sell its rights under Section 5.8 and such rights of [iStar] shall terminate upon [iStar's] sale or assignment of all of its rights and obligations under the Loan Documents. . . .

JD Holdings argues that because SFI assigned the Loan Agreement to Harmony on October 16, 2015, "any rights that iStar or SFI might have had under Section 5.8 terminated pursuant to Section 8.1(A) of the Loan Agreement on October 16, 2015."[7] Put differently, if no one has any rights under Section 5.8, then Section 5.8 cannot operate to bar enforcement of the ROFR. However, Debtors respond that "the 'sale' to Harmony may be a sham transaction which would negate § 8.1 of the Loan Agreement, and therefore, the § 5.8 bar to enforcement of the ROFR would still be operative."[8]

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[6] Omnibus Objs. ¶ 36.

[7] Resp. of JD Holdings, L.L.C., Atrium Gaming, LLC, Eastgate Funding, LLC, Jonesboro Funding, LLC, Atrium TRS IV LP, and Atrium Finance IV, L.P. to Debtors' Aug. 30, 2017 Omnibus Obj. to Proofs of Claims 39, ECF No. 1345.

JD Holdings does not suggest that iStar's rights under Section 5.8 terminated when iStar transferred the Loan Agreement to SFI in March 2011.

[8] Mot. to Compel ¶ 13.

Debtors' "sham transaction" argument gives rise to the present Motion to Compel. On October 20, 2017, Debtors served a subpoena on Mr. Eilian seeking discovery of information regarding the October 16, 2015 transfer of the Loan Agreement from SFI to Harmony.[9] In response to the subpoena, Mr. Eilian agreed to produce only the documents evidencing the transfer itself, arguing that the remaining documents requested by Debtors were "not relevant to the issues presented in the above-captioned cases."[10] Debtors rejected Mr. Eilian's relevancy argument and filed the present motion, contending that

> If the SFI / Harmony transaction is a sham, then § 8.1 of the Loan

[9] Mot to Compel Ex. E. Specifically, Debtors' request included:

> Documents (including emails and all forms of communications) evidencing, discussing, and reflecting the transfer to Harmony Lendco LLC (the "Transfer") of the loan agreement (and related loan documents) by and between Atrium Lendco, LLC and iStar Financial, Inc. dated September 16, 2005 as amended from time to time (collectively, the "Loan Documents"), including all documents: (a) evidencing the negotiations leading up to the Transfer; (b) evidencing the Transfer; (c) evidencing the consideration paid for the Transfer; (d) evidencing the current holder of the Loan Documents; (e) evidencing any restructuring or forbearance of the Loan Documents after the Transfer; (f) evidencing the payment history under the Loan Documents under the Transfer; (g) discussing, reflecting, or addressing any assets owned by the John Q. Hammons Revocable Trust of 1989 (the "Trust"), and any entity whose name includes the word "Hammons" (each a "Hammons Entity"); (h) evidencing the method and source of repayment of amounts owing under the Loan Documents after the Transfer; (i) evidencing communications between Jonathan Eilian and Mark Lotke regarding the Loan Documents, § 5.8 of the above loan agreement, or the Trust or any Hammons entity; (j) discussing or addressing § 5.8 of the loan agreement set forth above including any request for consent under § 5.8 of such agreement; (k) evidencing communications addressing the categories of documents set forth in the foregoing subparagraphs (a)—(j) hereof.

Mot. to Compel Ex. F at 4.

[10] Mot. to Compel Ex. F at 5.

> Agreement does not operate to terminate the bar to ROFR enforcement under §5.8 of the Loan Agreement. Thus, the Debtors are entitled to take discovery of Eilian to determine the *bona fides* of the alleged sale of the loan to Harmony.[11]

However, Debtors' contention might have merit only if Debtors are actually entitled to enforce Section 5.8 of the Loan Agreement. This brings us to JD Holdings' second response to Debtors' Section 5.8-based objection to JD Holdings' proofs of claim.

JD Holdings' second response is that Debtors, who are not parties to the Loan Agreement, have no right to enforce that agreement as third-party beneficiaries under New York law.[12] Under New York law:

> For cases in which the claimant is not a party to the contract, but claims third-party rights therefrom, New York has adopted the standard set forth in the Restatement (Second) of Contracts. In order to claim third-party benefits, the putative third-party beneficiary will be deemed an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" *and* either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here]; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

LaSalle Nat'l Bank v. Ernst & Young, 285 A.D.2d 101, 108 (N.Y. App. Div. 2001) (alteration in original). Under New York law, then, Debtors can only enforce the Loan Agreement as third-party beneficiaries if the parties to the Loan Agreement intended that Debtors have that right.

However, Section 9.7 of the Loan Agreement provides:

> **9.7 Miscellaneous**. . . . This Agreement is made for the sole benefit of [Lendco] and [iStar], and no other Person shall be deemed to have any privity of contract hereunder nor any right to rely hereon to any extent or for any purpose whatsoever, nor shall any other person have any right of action of any kind hereon or be

[11] Mot. to Compel ¶ 26.

[12] Resp. to Omnibus Objs. at 40. The Loan Agreement is governed by New York law, whereas the ROFR is governed by Delaware law.

deemed to be a third party beneficiary hereunder. . . .

Thus, under the plain language of the Loan Agreement, Debtors cannot be deemed third-party beneficiaries of that agreement under New York law.[13]

During oral argument, Debtors contended that the language of 11 U.S.C. § 501(b)(1) is broad enough to support their objection. Under section 501(b)(1), an objected-to claim will not be allowed "to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, *under any agreement* or applicable law for a reason other than because such claim is contingent or unmatured" (emphasis added). Debtors argue that because other sections of the Bankruptcy Code, e.g., section 365, refer to a "contract *of the debtor*" (emphasis added), section 501(b)(1) ought not be read as applying only to an agreement to which the debtor is a party. Debtors' argument is unavailing because the Court's holding today does not require it to read section 501(b)(1) in such a limited fashion. It does, however, require that section 501(b)(1) be read as applying only to an agreement that the debtor (whether or not a party to that agreement) has the *legal right to enforce*. To read section 501(b)(1) more broadly would preempt state law regarding third-party beneficiaries by creating a contract-enforcement right that does not exist outside of bankruptcy, which this Court declines to do. *Cf.* 4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 502.03[2][b] (16th ed. 2017) ("The effect of section 502(b)(1)

[13] The first and second amendments to the Loan Agreement include a third contracting party, JQH Acquisition LLC, as "Guarantor." Each of those amendments contains a "No Third Party Rights" section under which "Nothing in this agreement will be construed to give any Person other than [iStar/SFI] and [Lendco and Guarantor] and their Affiliates any legal or equitable right, remedy or claim under or with respect to this Agreement." However, JQH Acquisition LLC is not an "Affiliate" of Debtors (despite the similarity in names), but rather an acquisition vehicle formed by Mr. Eilian in 2005. *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *1, *2 (Del. Ch. Oct. 2, 2009). Therefore, the first and second amendments to the Loan Agreement do not alter this Court's conclusion that Debtors cannot be third-party beneficiaries of that agreement under the plain language of Section 9.7.

is to make available to the trustee any defense to a claim that might have been available to the debtor."). In order to benefit from the "under any agreement" provision of section 501(b)(1), a debtor who is not a party to the agreement at issue must be a third-party beneficiary of that agreement under applicable state law.

Because Debtors cannot be deemed third-party beneficiaries of the Loan Agreement under New York law, Debtors have no right to enforce Section 5.8 of that agreement. Because Debtors have no right to enforce Section 5.8, Debtors' argument that Section 8.1(A) of that agreement does not operate to bar enforcement of Section 5.8 is irrelevant to the issues presented in these cases. Because Debtors' argument arising out of Section 8.1(A) is irrelevant, the "*bona fides*" of the transfer of the Loan Agreement from SFI to Harmony are likewise irrelevant. Because the *bona fides* of the transfer are irrelevant, Debtors' Motion to Compel (along with all relief requested therein) will be denied.

IT IS SO ORDERED.

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