The relief described hereinbelow is SO ORDERED.

SIGNED this 1st day of February, 2018.

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

ORDER TERMINATING DEBTORS' EXCLUSIVITY PERIODS

This Court has twice extended Debtors' exclusive periods under 11 U.S.C. § 1121 in which to file and solicit acceptance of reorganization plans ("Exclusivity Periods"),[1] both times over the limited objections of creditors. On November 17, 2017, creditor JD Holdings, L.L.C., moved for an order terminating Debtors' Exclusivity Periods.[2] Creditor SFI Belmont, LLC,

[1] ECF 595, 881.

[2] ECF 1451.

joined JD Holdings' motion;[3] Debtors opposed it.[4] On December 13, 2017, the Court denied JD Holdings' motion "without prejudice to the Court, on its own motion only, revisiting this matter after Debtors have filed their plans."[5] Debtors have since filed their plans. Accordingly, the Court now revisits the matter on its own motion.

Section 1121(d) of the Bankruptcy Code allows a court to extend or terminate a debtor's exclusivity periods for "cause." Although the Bankruptcy Code does not define "cause," many courts have used a nine-step test for determining whether cause exists:

> (a) the size and complexity of the case;
>
> (b) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
>
> (c) the existence of good faith progress toward reorganization;
>
> (d) the fact that the debtor is paying its bills as they become due;
>
> (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
>
> (f) whether the debtor has made progress in negotiations with its creditors;
>
> (g) the amount of time which has elapsed in the case;
>
> (h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
>
> (i) whether an unresolved contingency exists.[6]

[3] ECF 1503.

[4] ECF 1522.

[5] ECF 1577.

[6] *See In re Adelphia Commc'ns Group*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (quoting *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997)).

The determination of whether "cause" exists is an issue of fact.[7] Because this Court held on February 13, 2017, that cause existed to extend the Exclusivity Periods,[8] the question now before the Court is "whether something has changed to justify altering that determination."[9] In answering that question, the Court notes that "[t]he purpose of § 1121 is two-fold."[10] While "[t]he overriding principle under § 1121 . . . is that normally the Chapter 11 Debtor gets the first clean shot at proposing and confirming a plan,"[11] "[§] 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors."[12]

Debtors filed their Joint Unimpairment Plan of Reorganization ("Plan")[13] and Amended Disclosure Statement with Respect to Debtors' Joint Unimpairment Plan of Reorganization ("Disclosure Statement")[14] on December 20, 2017, and January 22, 2018, respectively. Debtors thus had the "first clean shot at proposing and confirming a plan" contemplated by § 1121. However, the Court denied approval of the Disclosure Statement on the grounds that the Disclosure Statement did not contain "adequate information" as required by § 1125(b); or, in the

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[7] *In re Lichtin/Wade, L.L.C.*, 478 B.R. 204, 209 (Bankr. E.D.N.C. 2012) (quoting *In re Fountain Powerboat Indus., Inc.*, Nos. 09-07132-8-RDD, 09-07133-8-RDD, 09-07134-8-RDD, 09-07135-8-RDD, 2009 WL 4738202, at *2 (Bankr. E.D.N.C. Dec. 4, 2009)).

[8] Debtors' Exclusivity Periods were extended through December 26, 2017 (filing), and February 26, 2018 (acceptance), and cannot be extended further. *See* 11 U.S.C. § 1121(d)(2).

[9] *See Dow Corning*, 208 B.R. at 664. In denying JD Holdings' motion to terminate back in December, the Court held that JD Holdings had not made such a showing.

[10] *In re Mich. Produce Haulers, Inc.*, 525 B.R. 408, 411 (W.D. Mich. 2015) (quoting *In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993)).

[11] *In re Energy Conversion Devices, Inc.*, 474 B.R. 503, 510 (Bankr. E.D. Mich. 2012).

[12] *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990).

[13] ECF 1584. Debtors filed the Plan six days before their exclusive filing period ran out.

[14] ECF 1686. Debtors filed their original disclosure statement (ECF 1583) on December 20, 2017.

alternative, that the Plan was patently unconfirmable under § 1129.[15] With this background in mind, the Court turns to the factors of *Dow Corning*'s nine-step test, and whether the relevant facts of this case have changed since February 13, 2017:

(a) No change.

(b) No change.

(c) Debtors have sold eight non-hotel properties in Missouri, Wisconsin, and Utah for a total gross sales price of $15,176,000. However, as noted in the Court's order denying approval of the Disclosure Statement,[16] Debtors' strategy of an orderly sale of assets has otherwise not come to fruition.

(d) No change.

(e) The Plan submitted by Debtors on December 20, 2017, was patently unconfirmable.

(f) Mediation between Debtors, JD Holdings, and SFI Belmont did not result in presentation of a mediated settlement to this Court.

(g) These proceedings have now been pending for 19 months. Debtors' remaining exclusive period in which to obtain acceptance of a plan expires on February 26, 2018, and may not be extended further.[17]

(h) Not applicable.

(i) No change.

Reviewing the list above, the Court finds that all of the changed facts weigh in favor of terminating exclusivity. Moreover, due to the 28-day notices required by Fed. R. Bankr. P. 2002(b), Debtors cannot possibly obtain acceptance of a new plan in the 25 days before their exclusive period expires. To require JD Holdings to wait another 25 days before filing plans of their own, then, would serve no purpose other than delay. The Court therefore finds cause to

[15] ECF 1738.

[16] *Id.*

[17] *See* 11 U.S.C. § 1121(d)(2)(B).

terminate Debtors' Exclusivity Periods pursuant to § 1124(d). JD Holdings and the other creditors in these proceedings have been hostage to Debtors' exclusivity long enough.

IT IS THEREFORE ORDERED that Debtors' Exclusivity Periods are hereby terminated, effective immediately.

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