

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

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In re	:	Chapter 11
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JOHN Q. HAMMONS FALL 2006, LLC, <i>et al.</i> ,	:	Case No. 16-21142 (RDB)
	:	<i>Jointly administered</i>
Debtors.	:	
	x	Related to Doc. No. 1725

**OBJECTION TO DEBTORS' MOTION FOR AUTHORITY TO EXCEED
BUDGETS APPROVED UNDER EXISTING INTERIM CASH COLLATERAL ORDER**

JD Holdings, L.L.C. and its affiliate Rogers Funding LLC (collectively, "JD Holdings") hereby object to Debtors' Motion for Authority to Exceed Budgets Approved Under Existing Interim Cash Collateral Order [ECF No. 1725] (the "Motion").

PRELIMINARY STATEMENT

In their Motion, Debtors disclose *for the first time* that they entered into a contract with Concord Specialty Risk ("Concord") outside the ordinary course of business without first seeking and obtaining the Court's approval. By entering into this unauthorized transaction, Debtors allegedly obligated themselves to make at least \$200,000 in payments—\$50,000 of which Debtors apparently already paid—in exchange for Concord's assistance in obtaining a title insurance policy for a potential sale pursuant to § 363 of the Bankruptcy Code.

In essence, Debtors ask the Court to retroactively approve this unauthorized transaction despite arguing, at the same time, that no approval is even necessary. According to Debtors, their payments to Concord were authorized by previous cash collateral orders because their related budgets contain line items that reference the word "insurance." But those budgets were limited to the ordinary operation of Debtors' hotel properties, and did not contemplate or permit Debtors to spend \$200,000 in search of title insurance without prior Court approval. The cash collateral

orders did *not* contemplate payment to Concord. Nothing in Debtors' Motion obviates the conclusion that Debtors are required to obtain permission from the Court for the Concord transaction.

Separate and apart from the budget and cash collateral order issues, the Motion should be denied because Debtors do not demonstrate any benefit to the estate, it is incomplete, and lacks information critical to evaluating the relief sought by Debtors:

First, Debtors fail to set forth any need for the \$150,000 they seek permission to pay to Concord (the "Proposed Payment"). Debtors allege that it is "critical" that the Court approve the Proposed Payment now because they are still pursuing a sale of their assets. But the Concord transaction is of dubious benefit to the estate, particularly given, by Debtors' own admission, the risks attendant to any future sale. And the limited utility of the Proposed Payment will be further elucidated later this week when JD Holdings' files its own plan of reorganization.

Second, the Preliminary Proposal for Contingent Liability Insurance with Concord (the "Insurance Proposal"), attached to the Motion, conflicts with Debtors' description of the Insurance Proposal in the Motion, making it unclear what value, if any, Concord is supplying to Debtors. Also unclear is how Debtors calculated the Proposed Payment to Concord.

Third, Debtors choose not to attach—and are silent as to whether they will produce—the Preliminary Commitment Letter referenced in the Motion. Debtors provide virtually no details about this document, a material omission given that the Preliminary Commitment Letter appears to potentially obligate Debtors to make **\$22 million** in additional, unauthorized payments.

ARGUMENT

A. Debtors' reliance on prior Court approval of the cash collateral budget is misplaced and does not justify payments outside of the ordinary course.

Debtors claim that the prior cash collateral orders permitted them to retain Concord, make an initial \$50,000 payment, and now, but for a budgeting issue, make the Proposed Payment. (*See* Motion at 1, ¶ 8.) But Debtors' interpretation of the Court's cash collateral orders is without merit. The operative cash collateral order at the time Debtors retained Concord—the Interim Order Authorizing Debtors to Continue Use of Cash Collateral and Grant Adequate Protection, ECF No. 832 (the "2017 Cash Collateral Order")—only authorized expenditures listed on budgets submitted by Debtors. 2017 Cash Collateral Order, ECF No. 832 at 4.

A review of those budgets shows that they do not provide for the type of title insurance Debtors seek from Concord. Rather, those budgets only permit payments for ordinary course expenses one would expect any hotel operator to carry, such as property insurance and umbrella policies:

INSURANCE													
UNINSURED LOSSES	0	0	0	0	0	0	0	0	0	0	0	0	0
INSURANCE	124,215	124,215	124,215	124,215	124,215	124,215	124,215	124,215	124,215	124,215	124,215	124,215	1,490,580
PROPERTY INS	94,242	94,242	94,242	94,242	94,242	94,242	94,243	94,243	94,243	94,243	94,243	94,243	1,130,910
UMBRELLA & OTHER INS	42,359	42,359	42,359	42,359	42,359	42,359	42,359	42,359	42,359	42,359	42,359	42,359	508,312
TOTAL INSURANCE	260,816	260,816	260,816	260,816	260,816	260,816	260,817	260,817	260,817	260,817	260,817	260,821	3,129,802

See 2017 Budget JQH – All Entities Consolidated, ECF No. 731-1 at 14. Indeed, Debtors' original budget submission to the Court—made on the petition date—characterized their budgets as including “*expenditures for the operation of the hotel properties*, the non-hotel properties owned by the Trust, as well as capital expenditures necessary to maintain the condition of the hotels and non-hotel properties and additionally remain in compliance with the various hotel franchisors.” Motion to Use Cash Collateral and Grant of Adequate Protection, ECF No. 18 ¶ 23 (emphasis

added).¹ Debtors were thus clear that whatever insurance expenses were included within the budgets were in furtherance of the operation of the hotel properties.²

It is no surprise then that title insurance for a § 363 sale is not mentioned in the budgets,³ or in the 2017 or 2018 Cash Collateral Orders. To the contrary, the Cash Collateral Orders specifically address insurance payments and makes clear that “[t]he Debtors shall continue to carry all necessary and required insurance in the types and amounts as they did pre-petition *to insure their properties* and shall make and continue to pay applicable real, personal, hospitality, franchise, business, and related taxes as they come due.” *Id.* at 5. Thus, while the Cash Collateral Orders contemplate that Debtors would make regular hotel-related insurance payments as they did pre-petition (when Debtors refused to sell their hotels), they make no allowance for Debtors to purchase title insurance.

Debtors’ claim that Concord’s services are included in the budgets underlying the 2017 and 2018 Cash Collateral Orders, within the line item for general “insurance” expenditures, is similarly misplaced. Motion ¶ 9. The budgets show that Debtors’ general “insurance” costs were

¹ The same language appears in the 2017 Cash Collateral Order, 2017 Cash Collateral Order, ECF No. 832 at 4, and in the Interim Order Authorizing the Debtors to Continue to (A) Use Cash Collateral and (B) Grant Adequate Protection Through April 30, 2018, ECF No. 1587 at 4. (The “2018 Cash Collateral Order” and, together with the 2017 Cash Collateral Order, the “Cash Collateral Orders”).

² In the Objection of JD Holdings, L.L.C. and Rogers Funding, LLC to Debtors’ Motion for Order Authorizing the Debtors to Continue to (A) Use Cash Collateral and (B) Grant Adequate Protection, JD Holdings pointed out several ways in which Debtors have tried to hide extraordinary expenditures (such as private use of Debtors’ corporate jet), arguing that through the 2018 Cash Collateral Order Debtors were seeking extraordinary relief in addition to the use of cash collateral. *See* ECF No. 1523. Of course, the Cash Collateral Order does not provide relief that would otherwise require a separate motion, such as payments outside of the ordinary course of business.

³ The 2017 budgets were proposed in late December 2016, long before the perceived need for title insurance ever arose. *See* Debtor’s Motion for Order Authorizing the Debtors to Continue to (A) Use Cash Collateral and (B) Grant Adequate Protection Each Through December 31, 2017, ECF No. 731.

fairly regular⁴ and, in fact, dropped nearly \$200,000 from 2017 to 2018 despite the fact that Debtors were aware they may incur charges from Concord when formulating the 2018 budget.⁵ Debtors offer no explanation for this decrease. If Debtors contend that the “insurance” line in their 2017 and 2018 budgets contemplates the payments to Concord they should, at the very least, account for this significant variance in either their insurance costs or budgeting procedures.⁶

Thus, the Proposed Payment is not contemplated by the 2018 Cash Collateral Order and any attempt to cast it as such is an after-the-fact justification for Debtors’ failure to obtain the Court’s approval prior to engaging and paying Concord. The Motion should be denied.

B. Debtors have not made any showing that the Proposed Payments outside the ordinary course would benefit the estate.

The Court should also deny the Motion because Debtors fail to explain how the Proposed Payment would benefit the estate and because Debtors omit other critical information concerning the value of the Concord transaction.

First, Debtors claim it is now “critical” that the Court approve the Proposed Payment because they are still pursuing a sale of their assets (Motion ¶ 15), but Debtors have not shown how the expense would benefit the estate and, in fact, appear to have attempted to conceal this expense until a budgeting issue necessitated their Motion. Incurring the expense would be, at best, of questionable benefit to the estate given the risks attendant to any proposed sale, such as the

⁴ Compare 2016 Budget – JQH All Entities Consolidated, ECF No. 18-1 at 14 (allocating \$1,204,121 for “insurance”) with 2017 Budget – JQH All Entities Consolidated, ECF No. 731-1 at 14 (allocating \$1,490,580) and 2018 Budget – JQH All Entities Consolidated, ECF No. 1488-1 at 11 (allocating \$1,299,000).

⁵ If the Proposed Payment is netted out, Debtors’ “insurance” budget for 2018 is just \$1,149,000—\$50,000 less than what was budgeted for 2016. See *id.*

⁶ Although not raised in the Motion, Debtors’ also cannot argue that the payments to Concord fall under the “other” portion of the “Umbrella & Other Ins” budget line. Those costs were also relatively static, rising only \$75,853 from 2016 to 2017 and falling \$412 from 2017 to 2018.

resolution of JD Holdings' pending appeals (which could result in dismissal of some or all of these bankruptcy cases). Indeed, the limited utility of the Proposed Payment will be cast into full view this week once JD Holdings' files its own plan of reorganization, which will demonstrate that there is no need for such an expense.⁷

Second, the Motion's description of the Insurance Proposal conflicts with the Insurance Proposal itself. The Motion refers to a "\$1.2 billion contingent liability insurance policy" (Motion ¶ 7), but the Insurance Proposal lists the "Total Insurance Program Contemplated" as only \$1 billion. (Insurance Proposal, ECF No. 1725-1 at 2.) Likewise, Debtors claim that they "were required to pay Concord \$50,000 upon execution of the Insurance Proposal and an additional \$150,000 upon issuance of preliminary commitment letter" (Motion ¶ 7), but the Insurance Proposal's Fee Schedule only calls for \$50,000 to be paid to Concord upon issuance of a preliminary commitment letter. (Insurance Proposal, ECF No. 1725-1 at 11.) The Fee Schedule does acknowledge that additional fees of up to \$100,000 can be charged if one or more additional insurers join the title insurance program (*id.*), but Debtors fail to explain whether such insurers have joined their program and if this \$100,000 additional fee is part of the Proposed Payment. Debtors should be required to account for these discrepancies and make clear precisely what that the Proposed Payment is meant for before the Court authorizes payment.

⁷ Even if there is a sale process, Debtors have not conducted it fairly. They waited until the filing of the Motion to disclose their outside-the-ordinary-course retention of Concord, and, as set forth below, have omitted significant information that is necessary to evaluate their proposal. More generally, Debtors have conducted the sale process in a manner seemingly designed to prevent JD Holdings from advancing its bid for their assets, such as, for example, instructing Concord not communicate with JD Holdings and by refusing to provide JD Holdings with information regarding their proposed sale that they have shared with other bidders or third parties. *See* Motion of JD Holdings, L.L.C. and Rogers Funding, LLC for the Appointment of an Examiner, ECF No. 1445 ¶¶ 21-22.

Third, Debtors claim that the Preliminary Commitment Letter obligates them to remit the Proposed Payment. (Motion ¶ 10.) Debtors, however, do not attach the Preliminary Commitment Letter to the Motion, or even describe it. Indeed, in their Motion, Debtors do not:

- state when they received the Preliminary Commitment Letter;
- describe the terms of the title insurance policy contemplated by the Preliminary Commitment Letter;
- explain whether or not the terms of the Preliminary Commitment Letter are identical to those outlined in the Insurance Proposal;
- explain if insurers beside Concord are parties to the Preliminary Commitment Letter or participating in the title insurance program (and, if multiple parties are involved, Debtors do not identify them); or
- explain if or when the Preliminary Commitment Letter will obligate Debtors to begin paying insurance premiums, which the Insurance Policy estimates at *\$22 million*.⁸

Each of these is a significant omission that independently renders deficient Debtors' request for authorization to pay the Proposed Payment. Debtors should be required to address these material concerns, and produce a copy of the Preliminary Commitment Letter.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

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⁸ The Insurance Proposal references a \$3.4 million premium paid to Concord for the primary layer of insurance, plus fees totaling at least \$100,000, in addition to \$2.5 million in premiums for the First Excess Layer and \$16 million for the High Excess Layer. *See* Insurance Proposal, ECF No. 1725-1 at 2-3.

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