

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

In re:)	Case No. 15-21142-11
)	
JOHN Q. HAMMONS FALL 2006, LLC, <i>et al.</i>,)	(Jointly Administered)
)	
Debtors.)	[Re: Doc. No. 1791]

**LIMITED OBJECTION OF UBS SECURITIES LLC TO MOTION FOR AUTHORITY
TO ENTER INTO PLAN SUPPORT AGREEMENT AND COMPROMISE OF CLAIMS
WITH RESERVATION OF RIGHTS**

COMES NOW UBS Securities LLC (“UBS”), by and through its undersigned counsel, and hereby gives notice of its Limited Objection and Reservation of Rights to the *Motion for Authority to Enter Into Plan Support Agreement and Compromise of Claims* (the “9019 Settlement Motion”) (Docket No. 1791) filed by The Revocable Trust of John Q. Hammons, dated December 29, 1989, as amended and restated (“JQH Trust”), and the other debtors and debtors in possession in these chapter 11 cases (collectively, the “Debtors”). In support of its Objection, UBS respectfully states as follows:

BACKGROUND

1. On September 29, 2016, Debtors filed their *Application of the Debtors and Debtors in Possession, Pursuant to Sections 327(a) and 328 of the Bankruptcy Code, Bankruptcy Rule 2014, and Local Bankruptcy Rule 2014.1, for an Order Authorizing the Debtors and Debtors in Possession to Retain UBS Securities LLC to provide Financial Advisory Services* (Docket No. 528) (the “Application to Employ UBS”).

2. Only two parties objected to the Debtors’ Application to Employ UBS, SFI Belmont, LLC (“SFI”) and Samuel K. Crocker, the United States Trustee for Region 20 (the “U.S. Trustee”). J.D. Holdings, LLC (“JDH”) did not file an objection to the Debtors’ Application to Employ UBS.

3. After an October 17, 2016 hearing on Debtors' Application to Employ UBS, this Court overruled the objections and entered its Order granting said Application (the "Approval Order") (Docket No. 596). Although present at the hearing, counsel for JDH did not object to the approval of UBS's engagement. *See* Transcript of October 17, 2016 hearing on Debtors' Application (the "Transcript"), at pg. 70:7. As the Court stated on the record following entry of the Approval Order, "there will **not** be a review by any party including the U.S. Trustee's Office" of UBS's fees under § 328. *See* Transcript, at pg. 26:17-18.

4. In the Approval Order, the Court authorized the Debtors' retention of UBS under 11 U.S.C. § 328 "on the terms and conditions of [the] engagement letter, including but not limited to payment of any success fee from the proceeds of asset sales, restructuring or any financing transactions as applicable." *See* Approval Order, at ¶ 6. Pursuant to the Engagement Agreement between Debtors and UBS (the "Engagement Agreement") so approved by the Court, UBS is entitled to certain fees and expenses relating to sales and restructuring transactions, and ***payment of any success fee is payable from the proceeds of asset sales.***¹

SETTLEMENT WITH JDH

5. On February 13, 2018, JQH Trust and Debtors filed their 9019 Settlement Motion, which incorporates their proposed Plan Support Agreement (the "PSA") and related Settlement Agreement in support of the Executed Joint and Consolidated Chapter 11 Plans of Reorganization (the "Plan"). The Plan provides for, among other things, the sale of Debtors' assets to JDH. Under the Plan, JDH, a non-estate fiduciary, undertakes sole and exclusive rights to object to claims. The Settlement Agreement (i) specifically mentions a potential objection relating to UBS, and then (ii) neutralizes the Debtors as to any potential objection with UBS.

¹ In addition, the Engagement Agreement provides that "[JQH Trust] ***shall support*** UBS's fee applications that are consistent with this Agreement."

These provisions are not only inconsistent with the terms and conditions of the Engagement Agreement, but they render the Plan unconfirmable as UBS's professional fees are pre-approved allowed administrative claims that must be paid in full. At a minimum, the Settlement Agreement introduces uncertainty over payment of UBS's pre-approved compensation.²

6. While the Settlement Agreement appears to obligate JDH to pay all outstanding professional fees, including UBS, JDH appears to reserve the right to object to UBS's fees despite (i) that the fees have already been approved, and (ii) having not raised any such objections over eighteen months ago when the Debtors retained UBS under § 328 of the Bankruptcy Code. Pursuant to the Settlement Agreement, Debtors also agreed that "[t]o the extent JDH objects to any claims of UBS, the Debtors will take no position with respect to such objection, other than to respond to any subpoena and testify truthfully." See Exhibit 1 to Plan Support Agreement and Claim Allowance, at ¶ 1(j).

LIMITED OBJECTION AND RESERVATION OF RIGHTS

7. As the Engagement Agreement was pre-approved by this Court under § 328 of the Bankruptcy Code, UBS has every right to rely upon the Court approved compensation arrangement already agreed to by the Debtors, including the component of its fees that are triggered by the Settlement Agreement, the Plan and the Debtors' sale of its assets to JDH on the terms set forth in the Engagement Agreement.³ Such fees are required to be paid from the net proceeds of this sale, not months later as contemplated under the Plan and not subject to an objection and allowance process.

² Failure to honor compensation agreements approved under 11 U.S.C. § 328 is inconsistent with the intention of Congress in passing the Bankruptcy Code of 1978, where Congress desired to encourage high quality professionals to work in bankruptcy by compensating them at rates comparable to what they are paid by the market. See *In re National Gypsum Co.*, 123 F.3d 861, 862 (5th Cir. 1997). Section 328(a) eliminates the uncertainty of payment inherent in a review for "reasonableness" under § 330. *Id.*

³ It should also be noted that the approval of the Settlement Agreement should trigger the Debtors' obligation to pay restructuring and other fees to UBS.

8. UBS expressly reserves all rights and remedies afforded under the terms of the Approval Order and its Engagement Agreement, any applicable state law and under the Bankruptcy Code.

WHEREFORE UBS Securities LLC respectfully requests relief consistent with the foregoing objection, including for the Court to strike any provisions of the Plan Support Agreement and Settlement Agreement that are inconsistent with UBS's approved Engagement Agreement; reserves its right to object to the Plan and related Disclosure Statement; all rights and remedies under the terms of the Approval Order and its Engagement Agreement, any applicable state law and under the Bankruptcy Code; and for such other and further relief as may be just and appropriate under the circumstances.

Dated: February 21, 2018

Respectfully submitted,

CARMODY MACDONALD P.C.

By: /s/ Spencer P. Desai

Spencer P. Desai (#78484)
120 South Central Avenue, Suite 1800
St. Louis, Missouri 63105
(314) 854-8600
(314) 854-8660 – FAX
spd@carmodymacdonald.com

and

Christopher J. Lawhorn (*Admitted pro hac vice*)
Danielle A. Suberi (*Admitted pro hac vice*)
CARMODY MACDONALD P.C.
120 S. Central Avenue, Suite 1800
Saint Louis, Missouri 63109
Telephone: (314) 854-8600
Facsimile: (314) 854-8660
cjl@carmodymacdonald.com
das@carmodymacdonald.com

Counsel for UBS Securities LLC