UNITED STATES BANKRUPTCY COURT

DISTRICT OF KANSAS

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

CMBS LENDERS' OBJECTION TO SUBSTANTIVE CONSOLIDATION

The CMBS Lenders[1] submit this objection (the "Substantive Consolidation Objection") because the plan proponent JD Holdings, L.L.C. (the "Plan Proponent" or "JDH") is proposing a *de facto* substantive consolidation of the bankruptcy estates of the Revocable Trust of John Q. Hammons, dated December 28, 1989, as Amended and Restated (the "JQH Trust") and seventy-five of its subsidiary and affiliated debtor entities in the above-captioned bankruptcy cases (collectively, the "Debtors") pursuant to the Plan Proponent's Executed Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors [Doc. 1787] (the "JDH Plan") that it filed on February 12, 2018, or to the extent that the JDH Plan can otherwise be construed as a *de facto* substantive consolidation.

[1] The CMBS Lenders include the following secured creditors: (a) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2006-LDP7, by and through LNR Partners, LLC, solely in its capacity as Special Servicer (holder of the loan known as the "Nomura Portfolio Loan") ; (b) Wilmington Trust, National Association, as Trustee for the registered holders of Wells Fargo Commercial Mortgage Trust 2015-C26, Commercial Mortgage Pass-Through Certificates, Series 2015-C26 by and through Midland Loan Services, a division of PNC Bank, National Association, solely in its capacity as Special Servicer (holder of the loan known as the "Chateau Lake Loan"); (c) Deutsche Bank Trust Company Americas, as Trustee, on behalf of the Registered Holders of Citigroup Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2015-GC33, by and through LNR Partners, LLC, solely in its capacity as Special Servicer (holder of the loan known as the "Goldman Portfolio Loan"); (d) U.S. Bank National Association, as Trustee for the Registered Holders of Banc of America Commercial Mortgage, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-3, by and through C-III Asset Management LLC, solely in its capacity as Special Servicer (holder of the loan known as the "Euro-Hypo Portfolio Loan"); and (e) Wells Fargo Bank, N.A., as successor to LaSalle Bank National Association, as Trustee for the registered holders of COMM 2006-C8 Commercial Mortgage Pass-Through Certificates, by and through LNR Partners, LLC, solely in its capacity as Special Servicer (holder of the loan known as the "Barclays Portfolio Loan").

In support of the Substantive Consolidation Objection, the CMBS Lenders respectfully state as follows:

PRELIMINARY STATEMENT[2]

This case, involving seventy-six Debtors, 35 Hotels, and many creditors, is approaching the second anniversary of its filing without a confirmable plan in sight. On January 30, 2018, the Court rejected the Debtors' proposed plan for myriad reasons. Now, the Debtors propose to support the plan recently filed by JDH that suffers from many of the very same deficiencies as the Debtors' defective plan. The JDH Plan, in its present form, cannot be confirmed for a number of reasons, the most prominent of which for the CMBS Lenders are (i) the failure to provide for full payment of their oversecured claims, (ii) the failure to provide impaired creditors, like the CMBS Lenders, the right to vote to accept or reject the plan; and (iii) as discussed in this objection, the improper substantive consolidation of the seventy-six Debtors' estates.

Ultimately, creditors will be given a right to vote on the JDH Plan. Ironically, the reasons that voting must be allowed on the JDH Plan are the same bases of objection successfully raised by JDH and others to the *Debtors'* disclosure statement – the JDH Plan alters the rights of creditors, including the CMBS Lenders, and cannot be confirmed without creditor voting.

The Debtors are all separate and distinct legal entities, with distinct assets and claims.[3] Accordingly, plan voting and confirmation under Section 1129 of the Bankruptcy Code must be

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[2] Capitalized terms used in this Preliminary Statement have the definitions set forth in this Objection.

[3] The CMBS Borrowers are all single purpose entities or "SPEs." "'Sometimes referred to as a 'single-purpose entity' or 'bankruptcy remote entity,' an SPE has been described by one commentator as 'an entity, formed concurrently with, or immediately prior to, the closing of a financing transaction, one purpose of which is to isolate the financial assets from the potential bankruptcy estate of the original entity, the borrower or originator.'" *In re Lake Michigan Beach Pottawattamie Resort LLC*, 547 B.R. 899, 911 (Bankr. N.D. Ill. 2016)

accomplished on a debtor-by-debtor, estate-by-estate basis. Confirmation of a plan governing seventy-six separate Debtors cannot and should not go forward on the affirmative vote of just one class of creditors of just one of the seventy-six Debtors. This is especially true for the CMBS Lenders who expressly bargained for and received in their loan documents guaranties of collateral isolation and the maintenance of special purpose entities who agreed for the life of the loan to isolate their assets and liabilities from those of any other entity.

The CMBS Lenders object to substantive consolidation[4] of the Debtors at this stage of the case to preserve their objections in light of the recent decision of the Ninth Circuit Court of Appeals, *In re Transwest Resort Properties, Inc.*, __ F.3d __, 2018 WL 615431 (9th Cir. Jan 25, 2018). The *Transwest Resort* court held that a secured creditor's failure to object to substantive consolidation in a joint, multi-debtor plan can serve as a *de facto* substantive consolidation and waiver of objections *even though, as here, (i) the Transwest plan did not expressly provide for substantive consolidation, and (ii) the debtors did not file a motion for substantive consolidation or present proof to support substantive consolidation*. *Id.* at *5; *see also* Id. at *7 (Friedland, J. concurring).

In *Transwest Resort*, the Ninth Circuit held that in the absence of objection, a multi-debtor joint chapter 11 plan can be "crammed down" with the consent of a single impaired class

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(quoting David B. Stratton, Special–Purpose Entities and Authority to File Bankruptcy, 23–2 Am. Bankr. Inst. J. 36 (March 2004)). "'Bankruptcy-remote structures are devices that reduce the risk that a borrower will file bankruptcy or, if bankruptcy is filed, ensure the creditor procedural advantages in the proceedings.'" *Id.* (quoting Michael T. Madison, et. al., The Law of Real Estate Financing, § 13:38 (2008)).

[4] The JDH Disclosure Statement appears to contemplate the possibility of some sort of substantive consolidation. For example, the JDH Disclosure statement defines "Plan Transactions" to mean "one or more transactions to occur on or before the closing dates set forth in the APA or other Plan Documents . . . that may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary or appropriate to effectuate the Plans, including: (a) **the execution and delivery of appropriate agreements or other documents of** merger, amalgamation, **consolidation**, equity issuance, sale, dissolution, certificates of incorporation, certificates of partnership, operating agreements, bylaws, or other documents containing terms that are consistent with or necessary or appropriate to implement the terms of the Plans and that satisfy the requirements of applicable law . . . ." JDH Disclosure Statement, ¶ 68 (emphasis added).

on the basis that the voting requirements applied on a "per plan" rather than a "per debtor" basis. The secured lender in *Transwest Resort* was found to have waived its right to challenge the *de facto* substantive consolidation under the joint plan by failing to affirmatively object to substantive consolidation during the confirmation process. *Id.* The Tenth Circuit has not yet ruled on the "per-plan v. per-debtor" voting issue. The CMBS Lenders wish to make clear their objection to any *de facto* substantive consolidation of the seventy-six Debtors bankruptcy estates and their objection to any attempt to allow creditors of estates other than their own individual CMBS Borrowers to support a cram-down plan.

In further support of this Objection, the CMBS Lenders respectfully state as follows:

BACKGROUND FACTS

1. ***Bankruptcy Filing***

On June 26 and July 5, 2016 (the "Petition Date"), the Debtors filed voluntary Chapter 11 petitions initiating the above-captioned bankruptcy cases (the "Bankruptcy Cases"). The Bankruptcy Court entered orders jointly administering the Debtors' bankruptcy estates on June 29, 2016, July 12, 2016, and July 18, 2016 [Doc. Nos. 40, 52, 53, 123, and 197]. Neither the Debtors nor the Plan Proponent have sought the entry of an order seeking to substantively consolidate the Debtors' bankruptcy estates either by motion or express plan provision.

2. ***The CMBS Lenders' Claims***

The CMBS Lenders collectively hold prepetition claims against certain of the Debtors (the "CMBS Borrowers") totaling at least $783,651,527.89 (the "Secured Claims") secured by, among other things, valid and perfected first priority liens and security interests in 24 of the Debtors' 35 hotels (the "Hotels"). The JQH Trust unconditionally, irrevocably, and absolutely guaranteed the payment and performance of the CMBS Borrowers on the loans held by the

CMBS Lenders (collectively, the "Guarantee Claims" and, together with the Secured Claims, the "CMBS Claims").

The CMBS Lenders timely filed proofs of claim numbered 614-616 and 624-630 (the "Proofs of Claim") against their respective CMBS Borrowers and against the JQH Trust as guarantor. The amounts owed and legal bases for the CMBS Claims are more fully set forth in the respective Proofs of Claim which are hereby incorporated by reference.[5]

3. ***The Debtors' Plan and Disclosure Statement***

On December 20, 2017, the Debtors filed a plan [Doc. No. 1584] (the "Debtors' Plan") and supporting disclosure statement [Doc No. 1583] (the "Debtors' Disclosure Statement"). On January 18, 2018, the CMBS Lenders objected to the Debtors' Disclosure Statement on a variety of grounds and on January 30, 2018 the Court entered an Order Nunc Pro Tunc Denying Approval of Debtors' Disclosure Statement. [Doc. No. 1738] on the grounds that, among other things: (i) the Debtors' Plan was patently unconfirmable because it, among other things, (a) impaired creditors but impermissibly denied them the right to vote in violation of Section 1129(a)(8) of the Bankruptcy Code, and (b) was not feasible given the substantial likelihood that the Debtors materially underestimated their liabilities, and depended on the outcome of pending litigation regarding the allowed amount of JDH's claims; and (ii) the Debtors' Disclosure Statement did not contain adequate information regarding the Debtors' proposed valuation, omitted the capital improvement costs and overly-optimistic financial projections that were subject to disagreement, and thus, was materially misleading and inadequate.

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[5] Consistent with the Debtors' position since the very beginning of these cases, all of the Claims held by the CMBS Lenders are oversecured based upon the collateral values provided by in the Debtors' Disclosure Statement (no valuations are included in the JDH Disclosure Statement.) While the CMBS Lenders agree that they are materially oversecured, they do not by this pleading adopt or validate the specific valuations assigned to the Hotels in the Debtors' Disclosure Statement. Nothing in this Substantive Consolidation Objection is to be interpreted as an adoption or validation of any specific values for the Hotels. The CMBS Lenders further reserve all rights to object to, and to seek judicial findings of, the valuations of their Hotel collateral.

4. ***The JDH Plan and Disclosure Statement***

On February 12, 2018, JDH filed its Plan and the Corrected Disclosure Statement with Respect to Joint and Consolidated Chapter 11 Plans of Reorganization for all Debtors [Doc. 1788] (the "JDH Disclosure Statement"). Surprisingly for a case of this complexity, the JDH Plan and the JDH Disclosure Statement describe just four classes of claims, purportedly for "each of the Debtors for all purposes, including Confirmation and Plans Distributions":

- Class 1 – Other Priority Claims
- Class 2 – Secured Claims
- Class 3 – General Unsecured Claims
- Class 4 – Equity Interests

See JDH Disclosure Statement, Section V.B.2.

Like the Debtors' Disclosure Statement, the JDH Disclosure Statement does not provide adequate information to enable creditors to determine whether to accept or reject the Plan. The JDH Disclosure Statement is also objectionable because the JDH Plan is patently unconfirmable. Most glaringly, the JDH Plan, just like the ill-fated Debtors' Plan, purports to treat all Classes of Claims as unimpaired even though the treatment of secured claims classified as "Class 2 Claims" materially alters the rights of the CMBS Lenders.

ARGUMENT

A. The JDH Plan Effectuates a *De Facto* Substantive Consolidation of the Debtors

Both the form and substance of the JDH Plan suggest a *de facto* substantive consolidation. Indeed, this was precisely the issue that the secured lender faced in *In re Transwest Resort Properties, Inc.*, __ 3d. ___, 2018 WL 615431 (9th Cir. Jan 25, 2018), which involved an appeal from a plan confirmation order entered by the United States Bankruptcy Court for the District of Arizona. As the JDH Plan is written, a single impaired class of creditors

from any one of the seventy-six Debtors could be used as a consenting class to confirm a CMBS Borrower plan over the rejecting vote of the CMBS Lenders, *even if no creditors of the applicable CMBS Borrower vote to accept the JDH Plan*. This is improper without a ruling allowing substantive consolidation in these cases.

B. JD Must Satisfy a Multi-Pronged Test Before It Can Treat these Bankruptcy Estates as if they Were Consolidated

Substantive consolidation permits the bankruptcy court to "'disregard…the separate existence of a constituent corporation'" thereby "eliminat[ing] inter-company liabilities and requir[ing] the general creditors of the separate entities to share in pooled assets." *In re Circle Land & Cattle Corp.*, 213 B.R. 860, 875 (Bankr. D. Kan. 1997). As the *Circle Land* court noted, substantive consolidation "is judge-made law developed in a series of cases under the Bankruptcy Act of 1898 in which the courts consolidated the separate estates of pending bankruptcy cases." *Id.* (citations omitted).

Some bankruptcy courts have found that the power to order substantive consolidation derives from their inherent equitable powers under Section 105(a) of the Bankruptcy Code. However, "substantive consolidation is considered a ***disfavored, last resort, extreme remedy*** because the process creates one common pool consisting of assets, liabilities and a single body of creditors, while extinguishing the liabilities of the consolidated entities." *In re Kretchmar*, __ B.R. __, 2018 WL 722498, at *8 (Bankr. W.D. Okla Feb. 5, 2018) (citing *SE Property Holdings, LLC v. Stewart*, 571 B.R. 460, 470 (Bankr. W.D. Okla. 2017) (other citations omitted)). "Because of its extreme nature, substantive consolidation is, 'no mere instrument of procedural convenience ... but a measure vitally affecting substantive rights.'" *Id.* (quoting *In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 (2d Cir. 1970)).

Given the potentially harmful effect of substantive consolidation on claims held by certain creditors, the courts that recognize their equitable powers to order substantive consolidation ***have admonished that this remedy be used sparingly***, and that the moving party has a heavy burden of proof to rebut the presumption against consolidation because of the potentially detrimental effect consolidation may have on innocent creditors of the consolidated entity. *In re Auto-Train Corp., Inc., 810 F.2d 270, 276 (D.C. Cir. 1987)*; *see also Matter of Gulfco Inv. Corp.*, 593 F.2d 921, 928 (10th Cir. 1979) ("Courts have been reluctant to consolidate related corporations due to the possibility of creating an unfair program from the standpoint of creditors who have dealt with a corporation having a surplus or who have dealt solely with one debtor without knowledge of there being a relationship with others…."); *Flora Mir Candy*, 432 F.2d at 1062-63 (holding that "'The power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others,'") (citations omitted); *see also Commerce Bank, N.A. v. Liebau-Woodall & Assocs., L.P.*, 28 Kan. App. 2d 664, 679, 20 P.3d 88, 92 (noting that the "*Circle Land* decision suggests that substantive consolidation is rarely proper unless the party seeking the consolidation can demonstrate that no creditor will be harmed by the consolidation") (citing *Circle Land, supra*, 213 B.R. at 875-76).

Bankruptcy Courts have generally followed one of two tests to determine if substantive consolidation is appropriate:

1. <u>*Auto-Train Test*</u>

The United States Court of Appeals for the District of Columbia Circuit in *Auto-Train, supra*, employed a three-part test that requires the moving party to demonstrate that: (a) a substantial identity exists between the entities to be consolidated; (b) consolidation is necessary

to avoid harm or to achieve some benefit; and (c) the benefits of consolidation heavily outweigh the harms. *Auto-Train*, 810 F.2d at 276.

2. *Augie/Restivo Test*

The Second Circuit in *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988) employed a two-part test that allows the bankruptcy court to order substantive consolidation if either of the following criteria is met: (i) whether creditors dealt with the entities as a single economic unit and "did not rely on their separate identity in extending credit"; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. *Id.* at 518.

3. *Tenth Circuit Law on Substantive Consolidation*

The Tenth Circuit has not yet adopted a legal test for substantive consolidation. However, one Bankruptcy Judge for the United States Bankruptcy Court for the District of Kansas has recognized both the *Auto-Train* and *Augie/Restivo* tests, noting that "[u]nder these equitable guidelines . . ., the remedy of substantive consolidation is sparingly granted." *Circle Land,* 213 B.R. at 875. As "[o]ne commentator has noted, '[b]etter, we think, to ask are any creditors going to be hurt by this consolidation and, if the answer to that is yes (or more properly, if the one seeking consolidation cannot prove the opposite), consolidation should be denied in almost every case.'" *Id.* at 875-76 (quoting 3 David G. Epstein, et al., Bankruptcy, § 11-41, at 190 (1992)).

A recent Oklahoma bankruptcy case articulated a slightly different standard for substantive consolidation in the Tenth Circuit:

> The most commonly cited case on substantive consolidation in the Tenth Circuit, and elsewhere, is that of the Third Circuit in *In re Owens Corning*, 419 F.3d 195, 211–212 (3rd Cir. 2005). There, the Third Circuit stated its test as follows:
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> > * * * In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the

> breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.
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> * * * A prima facie case for [substantive consolidation] typically exists when, based on the parties' prepetition dealings, a proponent proves corporate disregard creating contractual expectations of creditors that they were dealing with debtors as one indistinguishable entity .... Proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity. Creditor opponents of consolidation can nonetheless defeat a prima facie showing under the first rationale if they can prove they are adversely affected and actually relied on debtors' separate existence.
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> * * * [B]ecause substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this "rough justice" remedy should be rare and, in any event, one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code).

Kretchmar, *supra*, 2018 WL 722498, at *7.

C. JD Holdings Has Not Met, and Cannot Meet, Its Burden of Proof to Support Substantive Consolidation

Substantive consolidation would be inappropriate in the instant case because JDH has not shown, and cannot show, that, (a) a substantial identity exists between the Debtors, many of which are separate special purpose entities ("SPEs") with their own separate real estate assets and with distinct secured and unsecured claims not shared by creditors of their affiliated debtor entities, (b) consolidation is necessary to avoid harm or to achieve some benefit, or (c) the benefits of consolidation heavily outweigh the harms. *See Auto-Train*, 810 F.2d at 276. In addition, the Plan Proponent has not shown, and cannot show, that (i) creditors dealt with each of the debtor entities as a single, consolidated economic unit and "did not rely on their separate identity in extending credit"; or (ii) that the affairs of the Debtors are so entangled that consolidation will benefit all creditors. *See Augie/Restivo Baking Co., Ltd.*, 860 F.2d at 518.

To the contrary, the CMBS Lenders and/or their predecessor entities expressly negotiated for and relied upon the separate identity of each of the CMBS Borrowers when extending credit. Indeed, "[s]pecial purpose vehicles are commonly used in asset-backed securities and structured finance transactions; they are set up specifically for the purpose of financing a specific group of assets and isolating those assets from the originator of those assets." *Paloian v. LaSalle (In re Doctors Hospital of Hyde Park Inc.)*, 507 B.R. 558, 665 (Bankr. N.D. Ill. 2013). Here, the various loan agreements entered into by the CMBS Lenders and the CMBS Borrowers (the "CMBS Loan Agreements") include covenants requiring each borrower to serve as an SPE.

As SPEs, each of the CMBS Borrowers were (i) required to own and operate specific real estate assets, secured by the CMBS Lenders' liens, (ii) prohibited from acquiring other property or operating any other business, or *incurring any other debt* except with respect to the real property collateral, and (iii) prohibited from commingling assets, including cash from Hotel revenue. No evidence whatsoever exists that the CMBS Debtors or any of the other Debtors held themselves out as a single, consolidated entity.

Indeed, any actions to the contrary would have constituted an immediate default under the Loan Agreements triggering full recourse liability by the guarantor at the time of the breach. More specifically, the Loan Agreement among other things required the CMBS Borrowers:

- Not "engage in any business or activity other than the acquisition, development, ownership, operation, leasing, managing and maintenance of the Properties, and entering into the Loan, and activities incidental thereto and with respect to any Principal, engage in any business or activity other than the ownership of its interest in Borrower, and activities incidental thereto"

- Not "acquire or own any material assets other than (i) the Properties, and (ii) such incidental Personal Property and intangible property as may be necessary for the operation of the Individual Property or Properties, as the case may be and with respect to any Principal, acquire or own any material asset other than its interest in Borrower"

- Not "merge into or consolidate with any person or entity or dissolve, terminate or liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure"

- Not, "without the prior written consent of Lender, amend, modify, terminate or fail to comply with the single-purpose/bankruptcy remoteness provisions or any other material provisions of Borrower's Partnership Agreement, Articles of Organization or similar organizational documents

- Not, "other than any Principal's ownership interest in Borrower own any subsidiary or make any investment in, any Person without the prior written consent of Lender"

- Not, "commingle its assets with the assets of any of its members, general partners, Affiliates, principals or of any other Person or entity, participate in a cash management system with any other entity or Person or fail to use its own separate stationery, telephone number, invoices and checks"

- Not, "with respect to Borrower, incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than the Debt, except for…any trade payables and operational debt in the ordinary course of its business of owning and operating the Individual Property or Properties as applicable"

- Not, "fail either to hold itself out to the public as a legal entity separate and district from any other Person or to conduct its business solely in its own name or a name franchised or licensed to it by an entity other than an Affiliate of Borrower or of any Principal, as the case may be, and not as a division or part of any other entity . . . ."

Loan Agreement dated October 12, 2006 between John Q. Hammons Fall 2006, LLC and Barclays Capital Real Estate Inc., § 4.1.35, pp. 46-48, cited pages of which are attached hereto as Exhibit 1.[6]

The CMBS Lenders would be substantially and irreparably harmed by substantive consolidation. These cases are not dissimilar to *In re Schupbach Invs., LLC*, in which Judge

[6] *See also* (i) Loan Agreement dated Apr. 17, 2007 between Richardson Hammons, LP, and Eurohypo AG, New York Branch, § 3.1.24, pp. 35-40; (ii) Loan Agreement dated Aug. 13, 2015 between JQH-Allen Development, LLC, JQH-Concord Development, LLC, JQH-Glendale, AZ Development, LLC, Hammons of Huntsville, LLC, JQH-Kansas City Development, LLC and JQH-Murfreesboro Development, LLC, as Borrower, and Goldman Sachs Mortgage Company, as Lender, § 4.17, pp. 62-63, § 6.15, p. 94; (iii) Loan Agreement dated Mar. 30, 2006 between Hammons Oklahoma City, LLC, Hammons of Lincoln, LLC, Hammons of South Carolina, LLC, Hammons of New Mexico, LLC, Hammons of Tulsa, LLC and Hammons of Sioux Falls, LLC, as Borrower, and Nomura Credit & Capital, Inc., as Lender, § 4.17, pp. 43-45; and (iv) Loan Agreement dated Dec. 11, 2014 between Chateau Lake, LLC and Prudential Mortgage Capital Company, LLC, § 2.28, pp. 71-76.

Somers denied substantive consolidation of the bankruptcy estates of a debtor company that owned residential rental property with the individual bankruptcy estates of the debtor's members, holding that:

> by making the loans in the company's name and taking mortgages and security interests in the company's name, as the lenders did in this case, the lenders are treating the company as existing separate from the individual or couple. In fact, any individual or married couple whose only major asset is a business operated through a corporation or limited liability company with substantial financing from banks and other lenders could probably provide evidence about the lenders' alleged failure to rely on the company's separate credit that is substantially similar to the evidence the Debtors presented here. The Court is not convinced such an individual or couple, having chosen to create a separate legal entity to own or otherwise deal with some aspects of their business, should be able to file bankruptcy and routinely obtain orders substantively consolidating their bankruptcy estates.

2012 WL 3564159, at *6 (Bankr. D. Kansas Aug. 17, 2012); *see also In re Schupback Invs., LLC*, 521 B.R. 449, at *2-3 (B.A.P. 10th Cir. Nov. 25, 2014) (unpublished) (referencing bankruptcy court's denial of motion for substantive consolidation).

In another case, the Bankruptcy Court for the Eastern District of North Carolina denied a creditor committee's motion for substantive consolidation where, among other things, (a) creditors "dealt with the debtors as single purpose entities in widely disparate areas of the southeast," (b) "each bank issued an acquisition and development loan to an LLC on an individual basis", (c) "the banks did not cross-collateralize between projects", (d) "builders contracted with the entities individually when entering into lot purchase agreements", and (e) "[t]hese creditors either did not know or did not care that the same business plan was being run in other places." *In re Eagle Creek Subdivision, LLC*, 407 B.R. 206, 210 (Bankr. E.D.N.C. 2008); *see also, In re Central European Industrial Development Company, LLC*, 288 B.R. 572, 576 (Bankr. N. D. Cal. 2003)(finding that substantive consolidation is an equitable power of the bankruptcy court and that "it would not be equitable for this court to ignore the prepetition

wishes of Lehman and the Debtors by disregarding the [SPE] corporate structure the parties so carefully created by agreement.")

Like the secured creditors in *Schupbach Invs.* and *Eagle Creek*, each of the CMBS Lenders dealt with the CMBS Borrowers as SPEs in geographically disparate areas, issued loans to each SPE on an individual basis, did not cross-collateralize the CMBS Borrowers' Hotels, and relied on the separate SPE structure expressly negotiated with each Borrower and embedded into the governing loan documents. A contrary ruling here would have a long-lasting negative impact not only upon the CMBS Lenders, but more generally on commercial real estate lending which is dependent upon the use of independent, bankruptcy-remote special purpose structures.

In sum, no factual or legal basis exists to support substantive consolidation of these Debtors. Accordingly, the CMBS Lenders, who should have a right to vote on the JDH Plan as impaired creditors, demand that plan voting proceed on a Debtor-by-Debtor, estate-by-estate basis, with the confirmation requirements imposed by Section 1129 of the Bankruptcy Code imposed upon each and every one of the seventy-six Debtors' estates.

CONCLUSION

For the foregoing reasons, the CMBS Lenders respectfully request that the Court sustain this Substantive Consolidation Objection and deny substantive consolidation of the Debtors' bankruptcy estates, be it on either a *de jure* or *de facto* basis. The CMBS Lenders request all other and further relief that the Court deems just and proper.

Dated: Kansas City, Kansas
February 22, 2018

Respectfully Submitted,

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