UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS AT KANSAS CITY

In re	:	Chapter 11
JOHN Q. HAMMONS FALL 2006, LLC, *et al.*,	:	Case No. 16-21142 (RDB)
	:	*Jointly administered*
Debtors	:	
	x	Related to: ECF Nos. 1791, 1818

RESPONSE OF JD HOLDINGS, L.L.C. IN OPPOSITION TO CMBS LENDERS' OBJECTION TO DEBTORS' MOTION FOR AUTHORITY TO ENTER INTO PLAN SUPPORT AGREEMENT AND COMPROMISE OF CLAIM

JD Holdings, L.L.C. ("JD Holdings") files this response in opposition to the CMBS Lenders Objection To Debtors' Motion For Authority To Enter Into Plan Support Agreement And Compromise Of Claim [ECF No. 1791] (the "Objection").

INTRODUCTION

JD Holdings does not understand what the CMBS Lenders[1] hope to achieve by opposing the Settlement.[2] What alternatives exist to JD Holdings' proposed Plan of Reorganization ("JD Holdings' Plan" or the "Plan")? [ECF No. 1787] What is wrong with a plan that pays all allowed claims in full? How could the CMBS Lenders fare better under another plan? Are the loan servicers representing the interests of the CMBS Lenders? Or are the loan servicers prolonging these cases to maximize their monthly fees and potential default interest, which the special servicers (and not the lenders or the bondholders) keep? Is the Objection just a crude attempt by the CMBS Lenders to improperly try to obtain leverage for allowance of their claims, even though they have yet to present a payoff calculation to JD Holdings despite repeated requests from Debtors

[1] The CMBS Lenders are identified in the Objection at n.1.

[2] The proposed "Settlement" is embodied in the Plan Support Agreement and Settlement Agreement, attached as Exhibit A to Debtors' Motion For Authority To Enter Into Plan Support Agreement And Compromise Of Claims [ECF No. 1791] ("Motion for Intended Compromise").

and JD Holdings, and assert claims based on what appears to be improper application of payments made by the Debtors to the CMBS Lenders during these cases in violation of prior Court orders?[3]

The Objection is based in large measure on averments the CMBS Lenders ***know*** to be incorrect. Indeed, the Objection contains arguments that contradict arguments that the CMBS Lenders previously made to the Court (*e.g.* the validity of the valuations set forth in the Debtors' rejected disclosure statement ("Debtors' Disclosure Statement") [ECF No. 1686]), and asserts legal contentions that have already been squarely rejected by the Court. The Objection also takes a needlessly hostile tone, especially considering that the CMBS Lenders have repeatedly failed to respond JD Holdings' many requests for information designed to ensure a smooth resolution of their claims. If the CMBS Lenders had provided that information, as commonly supplied in payoff letters, most, if not all, of the CMBS Lenders' concerns could have already been addressed.

It appears to JD Holdings that the Objection lacks any discernible purpose other than to harass the Debtors and JD Holdings, increase the cost of these bankruptcy cases, and unnecessarily delay their resolution. This is particularly strange—and seems contrary to the CMBS Lenders' own interests—as the Objection only serves to delay resolution of these cases and payment in full of all allowed claims. Moreover, for the CMBS Lenders to announce at this late stage that they intend to file their own objection to JD Holdings' claims does not advance the prospects for recovery and represents nothing more than a transparent attempt to inject delay and uncertainty into these bankruptcy cases, which only risks causing the creditor body further, unnecessary harm.

In any event, none of the arguments raised in the Objection demonstrate that the Settlement is unfair, inequitable, or not in the interests of creditors. To the contrary, the Settlement satisfies

[3] Based on information provided by Debtors, JD Holdings is concerned that the CMBS Lenders may not have properly applied the cash collateral adequate protection payments to interest payments on the relevant loans, but rather have used those payments to pay their legal fees in these cases and thereby artificially inflated the interest carry.

the balancing test for approval by the Court. In addition, many of the arguments raised by the Objection concern substantive issues related to allowance of claims, the confirmability of JD Holdings' Plan, or the adequacy of its Disclosure Statement, not whether the Settlement should be approved pursuant to Rule 9019.

After more than six years of active litigation concerning numerous claims against one another on a wide range of issues, the significance of the Settlement and the value that compromise represents to the estates cannot be overstated. Not only does the Settlement permit the Debtors and JD Holdings to move forward together by resolving all of their many disputes, it does so in a manner that leaves no creditor impaired and honors the memory of John Q. Hammons with contributions to a new charitable trust.[4] The Settlement should be approved.

ARGUMENT

I. The Motion for Intended Compromise Satisfies the Standard for Approval of a Rule 9019 Motion.

The CMBS Lenders identify the correct factors considered by courts in the Tenth Circuit to evaluate proposed compromises under Rule 9019: "(1) the chance of success on the litigation on the merits; (2) possible problems in collecting the judgment; (3) the expense and complexity of the litigation; and (4) the interest of the creditors." *In re Southern Medical Arts Cos., Inc.*, 343 B.R. 250, 256 (B.A.P. 10th Cir. 2006). However, the CMBS Lenders appear to challenge only the fourth factor, the interests of the creditors. Objection at 7-8. As discussed more fully below, and in the accompanying Omnibus Response, the Settlement set forth in the Motion for Intended Compromise does not harm the interests of the creditors, and in fact works in their best interest by maximizing their possible recovery and providing a path for their claims to be paid in full sooner

[4] The benefits of the Settlement are set forth more fully in the Motion for Intended Compromise [ECF No. 1791] and in JD Holding's Omnibus Response in Opposition to Certain Objections to Debtors' Motion for Authority to Enter Into Plan Support Agreement and Compromise of Claims (the "Omnibus Response") (filed concurrently herewith).

rather than later. As such, the four-factor *Southern Medical* test is satisfied, and the Objection should be overruled.

II. The Settlement Does Not Impermissibly Waive Debtors' Fiduciary Duties to Their Creditors.

The CMBS Lenders argue that the Settlement (1) impermissibly contains a blanket waiver of Debtors' fiduciary duties, (2) paralyzes Debtors by requiring them to support JD Holdings' Plan, and (3) grants excessive dispute-resolution authority to the Honorable Dale L. Somers, United States Bankruptcy Judge for the United States Bankruptcy Court for the District of Kansas. The CMBS Lenders are wrong on all counts.

a. The Text and Purpose of the Plan Support and Settlement Agreements Do Not Support the CMBS Lenders' Interpretation of the Fiduciary Duty Provisions.

The CMBS Lenders' object that the Settlement operates as a "blanket waiver of debtor fiduciary duties" that "effectively parachute[es JD Holdings] into these cases as a replacement debtor." Objection at 8. This is a total misreading of the relevant provisions of the Plan Support and Settlement Agreements. Read correctly, those agreements show that Debtors are not abandoning their fiduciary duties, but rather fulfilling them by maximizing the value of the estate to all creditors. And approval of settlement agreements that are reached in furtherance of a trustee's fiduciary duties is routine. *See, e.g., In re Age Ref., Inc.*, 801 F.3d 530, 542 (5th Cir. 2015) (affirming approval of settlement agreement that represented "a compromise the Trustee made in discharge of his fiduciary duty"); *In re Mark Techs. Corp.*, 2018 WL 669112, at *11 (B.A.P. 9th Cir. Feb. 1, 2018) (emphasis added) (holding that appeal of orders approving settlement agreement and sale were moot, and alternatively affirming those orders, which found that "Trustee was complying with her fiduciary duty by raising money for creditors[,]" on the merits).

Neither JD Holdings nor the Debtors dispute the obvious proposition that Debtors have a fiduciary duty to the estates and their creditors. Indeed, the Settlement and Plan allow the Debtors to satisfy those obligations by working with JD Holdings on confirmation of a Plan that maximizes value and pays all creditors' allowed claims in full, the only available option that would do so at this time (or possibly ever). The CMBS Lenders know full well that no viable alternative presently exists, there are substantial costs and risks in continuing down the contentious litigation path previously followed, and that JD Holdings' Plan, once confirmed, would pay all allowed claims in full.

In fact, the text of the relevant provisions in the Plan Support and Settlement Agreements simply recognizes that because JD Holdings' Plan will pay all allowed claims in full, Debtors have satisfied their fiduciary obligations to the estates and their creditors, and therefore there would be no basis for any "fiduciary out," since the Debtors could not obtain a better outcome for the creditors:

> from and after the date of this Agreement, Debtors shall not support any alternative to the Plans and shall not have any 'fiduciary duty out' to accept any other plan of reorganization, bid, or proposed sale (***given that the Plans pay all Allowed Claims in full***) as more fully set forth in the Settlement Agreement." [Plan Support Agreement § 6(c) (emphasis added)]
>
> ***Based on JDH's payment of all allowed claims*** as set forth in the Plan, ***the Debtors have no further fiduciary duty to the Estates or their creditors*** and as a result, will neither seek nor accept higher or better offers for their assets. [Settlement Agreement § 1(i) (emphasis added)]

The complained-of language therefore does ***not*** strip Debtors' of their fiduciary obligations but, rather, provides comfort to JD Holdings that Debtors will not take any actions to undermine JD Holdings' Plan, which, again, satisfies all Debtors' fiduciary obligations by paying all allowed claims in full.

The CMBS' Lenders reliance on *Bennitt v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 196-97 (9th Cir. 1977) is inapposite. There, the Ninth Circuit questioned the propriety of a settlement agreement entered into by a trustee and his ***brother***, through which a sales agreement was rescinded, but the brother was not required to repay the consideration originally received. *Id*. at 196. The court, noting that, at the very least, the trustee had engaged in behavior with an appearance of impropriety, remanded for reconsideration of a whether the settlement harmed other creditors in violation of the trustee's fiduciary duties. *Id*. at 197. The situation presently before the Court is entirely different from the one in *Bennitt*, since, (1) the Settlement was the product of an arm's-length negotiation facilitated by a member of this Court, and (2) rather than potentially diluting creditor recovery, the Settlement ***maximizes*** it by providing a mechanism to pay all allowed claims in full. Rather than abdicating fiduciary duties like the settlement in *Bennitt*, the Motion for Intended Compromise allows Debtors to fulfill them, and it should be approved.

b. JD Holding's Ability to Amend the Plan or Withdraw its Support Does Not Paralyze Debtors.

The CMBS Lenders also assert that the Settlement somehow paralyzes Debtors because they have agreed to support JD Holdings' Plan. Objection at 9-10. But this ignores that no other parties are bound to JD Holdings' Plan until it is confirmed, and indeed, other creditors are free to propose their own alternative plans. However, JD Holdings is spending a significant amount of time and money to proceed with its Plan, and is aware of no alternatives that would satisfy JD Holdings' claims (or match JD Holdings' intent and ability to acquire Debtors' hotels). JD Holdings very much intends to proceed to confirmation of its Plan without delay. Debtors' cooperation, as embraced by the Settlement, furthers that goal and Debtors' cooperation is key to prompt consummation of JD Holdings' Plan.

The CMBS Lenders' concern about JD Holdings' ability to amend the plan lacks any basis. JD Holdings understands that any amendment that materially and adversely affects creditors may well require additional disclosure and a delay in the confirmation process such that creditors would have an opportunity to object to the proposed adverse amendments. But the Settlement of which the CMBS Lenders complain actually makes any such amendment less likely because Debtors' cooperation (and allowance of JD Holdings claim as compromised) is dependent on JD Holdings proceeding with a plan that pays all creditors in full and provides value to honor Mr. Hammons' legacy, among other things. Perversely, it is the risk of delay engendered by baseless objections such as the one filed by the CMBS lenders that puts creditors at risk by, for example, delaying their recoveries.

As for the theoretical idea that JD Holdings could withdraw the Plan (*id.* at 10), to even conceive of that concern requires ignoring JD Holdings' dogged, years-long pursuit of its right to purchase the Debtors' hotels and obvious desire to bring these cases to a close. To be clear, JD Holdings fully intends to proceed with the Plan; it is objections such as that interposed by the CMBS Lenders (for no clear purpose) that threaten to derail the process.

c. Judge Somers Will Not Resolve Disputes About the Plan or Strip the Authority of the Court.

The CMBS Lenders are also incorrect in asserting that the Settlement Agreement "impermissibly strip[s] away the authority of the Court" or otherwise denies creditors "an opportunity for meaningful participation." Objection at 10-11. No reasonable interpretation of the Plan Support Agreement or Settlement Agreement could possibly support such a conclusion. Rather, the Settlement Agreement provides Judge Somers—a respected Bankruptcy Judge chosen by the Bankruptcy Court to mediate the parties' dispute—with the ability to resolve disputes between Debtors and JD Holdings concerning the parties' respective compliance with the Settlement Agreement because he helped the parties negotiate the Settlement and knows what was

intended. *See, e.g.*, Plan Support Agreement §§ 3(a), 6(e); Settlement Agreement §§ 1(f), 1(g), 4(a). Judges Somers' potential involvement is limited to potential two-party disputes between Debtors and JD Holdings—disputes the parties may well resolve on their own. Judge Somers' involvement does not remove any rights from the creditor body. Moreover, any amendment to JD Holdings' Plan or Disclosure Statement would remain subject to notice and approval by the Bankruptcy Court and any creditor would still have the opportunity to be heard. None of these arguments bar approval of the Settlement. Moreover, Judge Somers' oversight of the mediated Settlement virtually assures prompt plan confirmation and consummation because the parties have agreed to a method to resolve any key issues that might arise under the Settlement Agreement to keep the process moving along. Thus, Judge Somers' continued involvement evidences the significant change in this case: resolution and consummation by agreement, not litigation. The CMBS Lenders' objection to Judge Somers' continued involvement is a surprising position considering on the CMBS' Lenders repeated calls for the end of litigation and delay.

III. The CMBS Lenders' Attack on JD Holdings' Claims and Settlement Thereof is not Warranted.

In the Objection, the CMBS Lenders both (1) threaten to object to JD Holdings' Claims and (2) allege that JD Holdings is unable to prove its Claims. As explained below, the former is a baseless threat that the Court should not indulge and the latter is not required (although JD Holdings could prove its Claims if required). The Court should decline to entertain these objections.

a. The CMBS Lenders Should Not be Permitted to Object to JD Holdings' Claims at this Late Date and have no Good-Faith Basis to do so.

The CMBS Lenders assert that they "intend to file their own objection to the JDH Claims" (Objection at 14 n.5). The Court should not permit them to do so at this late date, and JD Holdings will oppose any such objection if filed. The Settlement resolves the substantial litigation regarding

JD Holdings' claims, which had been proceeding as a contested matter pursuant to the Scheduling and Procedural Order Governing Discovery and Hearing of Claims Estimation and Objections issued by the Court (the "Estimation Scheduling Order"). *See* ECF No. 1461. Notably, the Estimation Scheduling Order explicitly contemplated that a third party may wish to intervene and take part in the discovery and trial process, noting that SFI Belmont, LLC—which had proposed an alternative scheduling order—was free to object to JD Holdings' claims and that, if and when it did so, the Court would "enter a revised scheduling order permitting SFI's participation in discovery and trial." *Id.* at n.4. Like SFI, the CMBS Lenders could have objected to JD Holdings' claims and sought a revised scheduling order, but they declined to do so.[5] It cannot be the case that a creditor, upset by a proposed settlement of a claim objection to which it did not join, can later commence its own, separate claim objection. To allow that would significantly impair a debtor's ability to compromise claims against it and avoid protracted litigation.

Prior to entering into the Settlement, JD Holdings and the Debtors completed substantial fact discovery, exchanged witness lists and opening expert reports, and were well on their way to a trial that would result in an estimation of JD Holdings' claims. Now, having sat on the sideline, the CMBS Lenders wish to substitute their judgment for that of the Debtors despite not being privy to the wealth of discovery Debtors had available when they entered into the Settlement. If the CMBS Lenders are permitted to object at this late date, it would undermine the very purpose of a Rule 9019 compromise and undercut the favorable treatment compromises receive in bankruptcy.

Even putting the CMBS Lenders' sandbagging tactics aside, were they to object, the CMBS Lenders' proposed objection is troubling because the CMBS Lenders have no good-faith basis for contesting JD Holdings' claims. For example, the CMBS Lenders argue that the Settlement

[5] Indeed, it is JD Holdings' understanding that the CMBS Lenders declined the Debtors' overture to join in the Debtors' objection to JD Holdings' proofs of claims.

between Debtors and JD Holdings is allegedly improper because JD Holdings will receive a "$200 million windfall over and above even the claim JDH now asks the Court to allow." Objection at 14. To support this assertion, the Objection states, as fact, that the "Debtors' assets exceeds the amount of all of the claims against the Debtors by more than of [sic] $790,000,000[,]" citing to Debtors' Disclosure Statement. *Id.* But this Court has already rejected the valuations upon which the CMBS Lenders base their assertion, stating:

> [T]he Disclosure Statement is plagued with ***materially misleading and inaccurate information as to valuation***. . . . Appendix 4 overstates Debtors' "Net Hotel Value" by as much as $240 million (the total cost of the capital improvements) . . . substituting the hotels' actual performance and the revised financial projections contained in Appendix 5 for HVS's projected financial performance, and changing no other assumptions, would reduce the HVS Appraisal values by over $200 million . . . No "hypothetical investor" could ever make an "informed decision" based on such information, particularly where—as here—just two such inaccuracies reduce the funds available to satisfy JD Holdings' claims from the $571 million listed in Appendix 4 to as little as $131 million.[6]

Indeed, the CMBS Lenders' own objection to Debtors' Disclosure Statement identified significant issues with Debtors' valuations, listing a series of "omissions," such as Debtor's failure to disclose the "underlying assumptions for the appraisals," and "whether and to what extent the financial projections developed for the Disclosure Statement impact the assumptions underlying the appraisals," leading the CMBS Lenders to conclude that these "critical omissions demonstrate conclusively that the Disclosure Statement does not contain adequate information for creditors to understand the Debtors' valuations." *See* ECF No. 1648 at 14. And the CMBS Lenders took further issue with a 10% premium Debtors added to their valuations, asserting such a premium

[6] Order Nunc Pro Tunc Denying Approval of Debtors' Disclosure Statement [Doc. No. 1738] at 8, 10-11 (emphasis added).

was "unsupported" (*id*. at 15), but now adopt and rely upon that same premium when assessing value in the Objection. Objection at 14.

For these same reasons the CMBS Lenders' allegation that JD Holdings is receiving a "windfall" (Objection at 14) is unsupportable and inaccurate. Rather than a "windfall," the figures embodied in the Settlement represent a compromise between JD Holdings and the Debtors reflecting the value of JD Holdings' claims given the facts available and the risks inherent in litigation for both parties.

The Settlement also accounts for ***tens of millions*** of dollars in potential liabilities that were not disclosed in Debtors' Disclosure Statement that JD Holdings will be assuming as part of the Settlement. Those previously-undisclosed liabilities include between $30 million and $50 million of tax-related costs, and in excess of $10 million of purported administrative claims. There is simply no support for any allegation that JD Holdings would receive a windfall.

Further, the CMBS Lenders argue that the Settlement is improper because JD Holdings "cannot prove that it is entitled to any claim" due to, among other purported reasons, the assertion that "JDH has no right to enforce its remedies under the ROFR because JDH did not obtain the prior written consent of SFI Belmont, LLC, before JDH sought to enforce the ROFR, as required by the applicable loan documents." Objection at 12-13. But once again, even a cursory review of the record would reflect that the Court already rejected this argument, holding that:

> 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.

Order Denying Motion to Compel Production of Documents [ECF No. 1593] at 7 (emphasis added). Considering that the CMBS Lenders' counsel has traveled from Baltimore to attend

virtually every omnibus hearing in these cases in person, it is stunning that the CMBS Lenders would advance such a contention that has already been rejected by the Court.

In sum, JD Holdings filed its claims—and those claims were deemed allowed until the Debtors alone objected. The Debtors argued there was no basis for the claim, asserting the very same arguments that the CMBS Lenders now advance, but lost. The Debtors then took discovery, evaluated their litigation prospects, and decided to settle as part of a larger global package of concessions. And now, after all that—and despite being told the Plan will pay all allowed claims in full—the CMBS Lenders (or more aptly their special servicers) seek to rehash the entire process. The Court should not allow them to do so.

b. Approval of the Motion for Intended Compromise Does Not Require Evidentiary Findings on Whether JD Holdings' Claims are Allowed or What They Are Worth.

The CMBS Lenders' allegation that JD Holdings "cannot prove that it is entitled to any claim" (Objection at 12) is likewise without merit[7] and ignores hundreds of pages of pleadings (in addition to the voluminous material generated or exchanged by the parties after nearly five years of litigation). Indeed, the risk of JD Holdings' obtaining a recovery far in excess of the Settlement amount, was one of the reasons that Debtors entered into the Settlement Agreement and Plan Support Agreement (just as the certainty of recovery through settlement induced JD Holdings to settle at a lower-than-maximum amount to avoid the risks attendant to a trial). *See* Motion for Intended Compromise at 9. Regardless, there is no need for JD Holdings' to prove some set of facts that support the Settlement[8]—if that were the case it would undermine the entire purpose of

[7] Indeed, this Court has remarked in prior proceedings that JD Holdings holds some claim in the estate.

[8] Nor does JD Holdings need to prove its "claim against each and every Debtor" as the CMBS Lenders suggest. Objection at 13. JD Holdings' claims were asserted jointly and severally to each Debtor, which is supported by a fair reading of the underlying documents. That is what JD Holdings originally asserted, and it is what Debtors have agreed to as part of the settlement. This does not "substantively consolidate all of the Debtors[.]" Objection at 7.

Rule 9019 settlement and JD Holdings and Debtors would have been better served by advancing directly to trial (where, indeed, JD Holdings was prepared to prove the value of its claims). Moreover, Rule 9019(a) does not require that the Court hold an evidentiary hearing before approving the Motion for Intended Compromise. *See Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) (affirming approval of settlement agreement and holding that bankruptcy court was not required to conduct an evidentiary hearing prior to approval).

CONCLUSION

For the forgoing reasons, the Objection should be overruled and the Motion for Intended Compromise should be granted.

Dated: February 26, 2018
Kansas City, Missouri

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