

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' OMNIBUS OBJECTION TO
BREACH CLAIMS OF JD HOLDINGS, L.L.C.**

The CMBS Lenders,¹ pursuant to 11 U.S.C. § 502(a) and (b) and Rule 3007(a) of the Fed. R. Bankr. P., submit this objection (the “Objection”) to the seventy-six ROFR breach proofs of claim filed by JD Holdings, L.L.C. (“JDH”) in the above-captioned, jointly-administered Chapter 11 cases. In support of the Objection, the CMBS Lenders respectfully state as follows:

PRELIMINARY STATEMENT²

JDH filed one hundred fifty-two virtually identical proofs of claim in all of the Debtors’ seventy-six bankruptcy cases. One set of seventy-six proofs of claim were for damages in the amount of \$587,600,000 asserted against each Debtor as a result of the Debtors’ breach of JDH’s

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”) (collectively, the “CMBS Lenders”).

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

right-of-first-refusal agreement. A second set of seventy-six proofs of claim were for damages in the amount of \$565,300,000 asserted against each Debtor as a result of the Debtors' rejection of the ROFR. This Objection is to the first set of seventy-proofs of claim—the Breach Claims—but is equally applicable to all of JDH's Claims.³

While the Debtors have previously objected to JDH's Claims, as part of the Plan Support Agreement the Debtors would award JDH with an allowed claim *against all of the Debtors* in the amount of \$495,938,161, without any evidentiary support and in direct contravention of the facts of these cases. JDH appears to have no allowable claim in these cases, let alone a \$496 million claim against every one of the seventy-six Debtor entities. Therefore, this Objection applies equally to the Claims filed by JDH and the proposed settlement of those Claims. JDH is neither entitled to such Claims against each Debtor, nor has it proven that it has damages in the amount of its Claims.

JURISDICTION AND VENUE

These Chapter 11 bankruptcy were commenced by the filing by 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") of Chapter 11 bankruptcy petitions on June 26, and July 4, 2016. Since the filing of the petitions, the Debtors have continued in possession of their property and control of their operations pursuant to §§ 1107 and 1108 of the Bankruptcy Code. This Objection arises under 11 U.S.C. § 502(a) and (b). The Court has subject matter jurisdiction to determine this Objection pursuant to 28 U.S.C. § 1334(b). This Objection is a core proceeding

³ The JDH Breach Claims are proof of claim nos. 470, 475, 485, 487-553, 589, 591, 593, 596, 598, and 599, and are incorporated herein by reference.

pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O) and Fed. R. Bankr. P. 3007. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

1. *The 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].

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 26 of the Debtors’ 35 hotels (the “Hotels”). The JQH Trust unconditionally, irrevocably, and absolutely guaranteed the payment and performance of the Borrowers on the loans held by the CMBS Lenders (collectively, the “Guarantee Claims” and, together with the Secured Claims, the “CMBS Claims”). All of the CMBS Lenders’ loans are in default.

3. *The JDH Plan and Disclosure Statement and The Proposed Settlement Between the Debtors and JDH*

On February 12, 2018, JDH filed its Executed Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors [Doc. No. 1787] (the “JDH Plan”) and its Corrected Disclosure Statement with Respect to Joint and Consolidated Chapter 11 Plans of Reorganization for all Debtors [Doc. 1788] (the “JDH Disclosure Statement”).

On February 13, 2018, the Debtors filed its Motion for Authority to Enter into Plan Support Agreement and Compromise of Claims [Doc. No. 1791] (the “Plan Support and

Settlement Motion”), requesting Court approval on an expedited basis of the Plan Support Agreement and Claims Allowance (the “Plan Support Agreement”) and Settlement Agreement attached as an exhibit to the Plan Support Agreement, to which the CMBS Lenders have filed an objection. No real justification was given for expedited treatment of such a case-dispositive motion. Pursuant to the Plan Support Agreement and Settlement Agreement, the Debtors would consent to an allowed claim in favor of JDH in the amount of \$495,938,161, in contravention of their previously filed objection. This Objection applies equally to the Claims and the proposed settlement of the Claims. JDH is neither entitled to such claims against each Debtor, nor has it proven that it has damages in the amount of its claims.

4. The Right of First Refusal Agreement

The purported basis for the JDH Claims, as well as the proposed settlement of those Claims, is the agreement between the Debtors and JDH regarding the so-called right of first refusal. The Debtors consist of a top-level holding company, the JQH Trust, and seventy-five wholly-owned subsidiaries and affiliates. The Debtors, directly through the JQH Trust and indirectly through other Debtors and affiliates, own nearly thirty five hotels located between North Carolina and Arizona. The Debtors also own other real estate assets including office buildings, a federal courthouse, convention centers, undeveloped real estate assets, directly or indirectly, including storage facilities, a car park, and a baseball stadium.

A document called the Sponsor Entity Right of First Refusal Agreement, dated September 16, 2005 (the “Original ROFR”) was executed by the Debtors’ now-deceased principal, John Q. Hammons, and JDH. The Original ROFR was amended by a writing dated December 10, 2008 (the “ROFR Amendment” and along with the Original ROFR, the “ROFR”). Also in 2005, interests in the entities owning hotels formerly owned by affiliates of John Q.

Hammons (“Hammons”) were transferred by Hammons’ affiliates to Atrium L.P. and such affiliates became owners of preferred equity interests in Atrium, L.P. (“Atrium”). Section 3.2 of the Original ROFR required the Hammons entities bound by the document to sell the hotels it owned subject to the ROFR (the “JQH Subject Hotels”) on the later to occur of (a) two years after the death of John Q. Hammons or (b) “full redemption or other permitted disposition by” John Q. Hammons or his affiliates of their preferred interests in Atrium.

The Original ROFR provided that in the event of a breach, JDH “shall be entitled, in addition to any other remedy that may be available at law or in equity as a result of such failure, to obtain an injunction and/or specific performance of any such obligations as a remedy for such breach” Original ROFR § 3.14(a). The Original ROFR further provided that in the event of a default by an obligated Hammons entity, JDH has the right to recover attorneys’ fees and costs along with the right to purchase the JQH Subject Hotels for 80% of the value of the hotels.

The parties entered into the ROFR Amendment on December 10, 2008, following allegations by JDH that Hammons had breached the Original ROFR by entering into financings that did not comply with the terms of the Original ROFR. The ROFR Amendment required that in addition to the 20% discount provided for in the Original ROFR, the obligated Hammons entities were to provide seller financing of at least 22.5% of the sales price of the JQH Subject Hotels.

The Debtors filed a motion to reject the ROFR on July 26, 2016. [Doc No. 338]. Over the objection of JDH, the Court entered an order granting rejection of the ROFR on December 13, 2016. [Doc No. 694].

JDH filed one hundred fifty-two virtually identical proofs of claim in the Debtors’ cases. One set of seventy-six proofs of claim were for damages in the amount of \$587,600,000 asserted

against each Debtor as a result of the Debtors' breach of JDH's ROFR (the "Breach Claims"). JDH filed the Breach Claims on December 22, 2016. A second set of seventy-six proofs of claim (the "Rejection Claims" and together, with the Breach Claims, the "Claims") were for damages in the amount of \$565,300,000 asserted against each Debtor as a result of the Debtors' rejection of the ROFR. JDH filed the Rejection Claims on January 10, 2017. As part of the Settlement Agreement, the Debtors and JDH agreed that JDH would have an allowed claim in the amount of \$495,938,161. See Settlement Motion at ¶ 17(c), Plan Support Agreement at § 2. JDH has not proven and cannot prove that it is entitled to any claim in the Debtors' bankruptcy cases, let alone a claim for \$496 million, \$565 million, or \$587 million, all of which are duplicative of each other, against each and every Debtor.

ARGUMENT

I. JDH's Claims are Unsupported by the Available Evidence and JDH Has Not Satisfied Its Burden of Proof

JDH is neither entitled to its Claims against each Debtor, nor has it proven that it has damages in the amount of its claims or the proposed settlement amount.

The Breach Claims and the Rejection Claims are comprised of the following amounts:⁴

	Breach Claims	Rejection Claims
Debtors' breach of contractual obligation to sell ROFR assets to JDH at 20% discount	\$290,800,000	\$290,800,000
Prejudgment interest on Debtors' breach	\$ 13,300,000	
Debtors' contractual obligation to sell ROFR assets net of any broker's commission	\$ 12,800,000	\$ 12,800,000
Debtors' contractual obligation to provide 22.5% subordinated financing	\$261,700,000	\$261,700,000
Debtors' contractual obligation to reimburse JDH for attorneys' fees and costs	\$ 9,000,000	
Total	\$587,600,000	\$565,300,000

⁴ The Plan Support and Settlement Agreement Motion does not identify the components of the \$496 million claim for which allowance is sought.

JDH offers nothing in support of its demand to be awarded a claim in the amount of \$587,600,000 or any other amount it seeks against each and every Debtor. When there is an objection to a claim, the burden of proving the validity of the claim shifts to the creditor, and the court must hold a hearing to determine the amount, if any, of the claim. See 11 U.S.C. § 502(b); Wilson v. Broadband Wireless Int’l Corp. (In re Broadband Wireless Int’l Corp.), 295 B.R. 140, 145 (B.A.P. 10th Cir. 2003) (setting forth “well-established burdens of proof” for claims objections, including the claimant has the ultimate burden of proof as to the validity and amount of the claim, once an objecting party has produced evidence or raised legal issues equal to the probative force of the allegations contained in the proof of claim). JDH has the burden of proving its claim.

II. The Debtors Are Not Jointly and Severally Liable

JDH asserted its claims against all of the Debtors. That assertion is in direct contravention of the terms of the ROFR and the SPE covenants agreed to by each Borrower. The Claims treat the ROFR as if it created joint and several liability and made all of the Borrowers liable for each other Borrower’s debts. That is incorrect. Nothing in the ROFR provides for joint and several liability. JDH does not have recourse against any Borrower as a result of a breach of the ROFR by any other Borrower. Rather, JDH’s remedies for any breach of the ROFR were limited so that it only had recourse against a particular Borrower for that Borrower’s breach. As set forth in the ROFR:

In the event that any JQH Entity shall default in the performance of any of its obligations hereunder in any material respect, then the Sponsor Entity shall have the right (i) to payment by such JQH Entity of any and all attorneys’ fees and costs, including any court costs and costs of any consultants incurred by such Sponsor Entity in seeking to enforce its rights under this Agreement, and (ii) to purchase any JQH Subject Hotel in relation to which the JQH Entity failed to perform its obligations under this Agreement, in accordance with the provisions of this Agreement

ROFR § 3.14(b). Similarly, nothing in the ROFR provided that any one Borrower was a guarantor of any other Borrower.

This is consistent with the SPE covenants that are in the CMBS Lenders' loan documents, which prohibit any one Borrower from incurring debts on behalf of or being liable for any other entity's debts or liabilities: 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 “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, “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 distinct 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 1.⁵ Any actions contrary to these covenants, including entering into an agreement that made a particular Borrower liable, even on a contingent basis, for any other entity's debts, would have constituted an immediate default under the Loan Agreements triggering full recourse liability by the guarantor at the time of the breach.

III. JDH Cannot Have a Damages Claim Against the CMBS Borrowers

Any claim JDH could assert is negated by the terms of the JDH Plan, pursuant to which JDH will receive all of the Debtors' and non-debtor affiliates' assets and equity interests (there are no equity interests in the JQH Trust), including all of the assets subject to the ROFR agreement.

More specifically, JDH could not "purchase" the CMBS hotel properties for less than is being paid or for less than the amount of the outstanding debt owed on each CMBS Loan. That is all that JDH is paying under its Plan and as such JDH is paying the lowest price possible for each property that was subject to the ROFR. According to the Debtors' Disclosure Statement (the only valuations in the case), this amounts to a windfall to JDH in excess of \$100 million to \$200 million because the Debtors' aggregate assets exceed its liabilities by that amount. Therefore regardless of whether or not JDH possesses a claim against another Debtor it has no claim against the CMBS Debtors.

⁵ 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.

IV. The JDH Claims Are Improper for other Reasons

The Debtors' Omnibus Objection to Proofs of Claim Filed by JD Holdings, L.L.C., and Certain of Its Affiliates (the "Debtors' Claims Objection") [Doc. No. 1251] is correct when it asserts:

- JDH has not identified the specific claim amount against each particular Debtor resulting solely from that specific Debtor's breach of the ROFR
- The 80% purchase price/20% discount in the ROFR is an unenforceable penalty
- Damages for the Debtors' failure to provide the 22.5% loan are miscalculated and overstated
- Claims for broker and financing fees are speculative
- There is no basis for prejudgment interest.

For these reasons, the Court should disallow the JDH Claims in their entirety. However, if JDH believes it can prove that it has a claim, it must do so on a Debtor by Debtor basis and should only be entitled to a claim against any particular individual Debtor in the amount and to the extent that it proves that particular Debtor breached the ROFR, is liable to JDH, and in what amount.

CONCLUSION

For the foregoing reasons, and such other reasons as may be raised at a hearing on this matter, the CMBS Lenders respectfully request that the Court enter an order (i) disallowing the Breach Claims and all JDH Claims in their entirety and (ii) granting such other and further relief as the Court deems just and proper.

Dated: Kansas City, Kansas
February 27, 2018

Respectfully Submitted,

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