IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY

In re:	)	**Case No. 16-21142-RDB**
	)	**Chapter 11**
JOHN Q. HAMMONS FALL 2006, LLC, *et al.*,	)	**(Jointly Administered)**
Debtors.	)	**(Re: ECF 2044, 2159)**

REPLY OF AJJ HOTEL HOLDINGS INC. (N/K/A JWJ HOTEL HOLDINGS, INC.)("AJJ") TO THE JOINT RESPONSE OF THE DEBTORS AND JD HOLDINGS, L.L.C. ("JDH")

For its Reply to the Joint Response of the Debtors and JDH, AJJ states as follows:

Introduction

The Joint Response states that AJJ's Stay Relief Motion seeks to prevent the Trust from selling or transferring its 50% ownership in W&H Realty LLC (the "**Interests**"). (ECF No. 2159 at 1.) The Joint Response further states that "AJJ seeks to stay plan confirmation and initiate arbitration against the Debtor Trust to dispute a future disposition of property of the estate." (ECF. No. 2159 at 7 n.3.) Those statements are baseless, incorrect and in the same vein of the prior unsuccessful pleadings filed by JDH and Debtor Trust against WHR and AJJ. (*See* Debtor Trust's Motion to Compel Turnover (ECF No. 1885, denied as moot); Adversary Proceeding No. 18-06022 (dismissed by Debtor Trust); and Debtor Trust's Motion to Assume the WHR Operating Agreement (ECF No. 1971, withdrawn by Debtor Trust).)

Debtor Trust and JDH have not specified any action taken by AJJ to prevent or impede a sale or transfer by the Debtor Trust of the Interests. Other than defending against the above-listed unnecessary pleadings filed by Debtor Trust and JDH, AJJ's appearance in this case, at all times, has been solely to insist that any sale and/or transfer of the Interests be consistent with the terms of the WHR Operating Agreement.

As the Court is aware, the JDH Plan originally proposed to sell or transfer the Interests from Debtor Trust to JDH and require WHR and Blue Hills to accept JDH as a member. (*See* ECF No. 1947, 2050 *et al*.) Counsel for AJJ[1] repeatedly notified Debtor Trust that any sale and/or transfer must follow the terms of the underlying Operating Agreements and that AJJ and the REW Owners have a right to purchase the Interests if the proposed purchaser/transferee is not the person designated in § 5.1 of the WHR Operating Agreement and § 5.3 of the Blue Hills Operating Agreement (collectively, the "**Operating Agreements**"). Debtor Trust ignored AJJ (and the REW Owners) and continued down its path to sell/transfer the Interests to JDH free and clear of the restrictions contained in the underlying Operating Agreements. Despite requests, Debtor Trust and JDH also refused to provide AJJ with their valuations of the Interests or a copy of the JQH Trust. Faced with the impending transfers as proposed in the JDH Plan, AJJ (and the REW Owners) submitted a demand to Debtors for arbitration to protect AJJ's rights, *inter alia*, AJJ's right to purchase. Debtor Trust then responded that any demand for arbitration was subject to the automatic stay. (*See* Exhibit A to ECF No. 2044.)

Based on Debtor Trust's response, and without conceding that the stay applies, AJJ filed this Motion for Relief from Stay (the "**Motion**"). The Joint Response now asserts that the AJJ's demand to proceed with arbitration is (1) moot or not justiciable and (2) that the rights at issue are not subject to arbitration. The Joint Response is incorrect.

[1] Counsel for AJJ also notified Debtor Trust and JDH on more than one occasion that the same analysis applied to the affiliated non-debtor entity Blue Hills Co., LLC ("Blue Hills"), in which Debtor Trust also owns 50% together with the REW Owners. Hence Blue Hills is included in this Reply.

ARGUMENT

I. AJJ's (and the REW Owners') Claims for Arbitration are Not Moot and Are Justiciable Issues.

Debtor Trust and JDH's arguments and positions obfuscate the sole issue before this Court: Which venue should determine disputes arising under the WHR (and Blue Hills) Operating Agreement – this Court or mandatory arbitration in Ohio, as provided in § 11 - the Dispute Resolution Section of the Operating Agreements. These disputes could include any one or all of the following:

(i) When the Debtor Trust and/or JDH disclose the proposed purchaser/transferee, whether such proposed purchaser/transferee meets the requirements of § 5.1 of the WHR Operating Agreement (§ 5.3 of the Blue Hills Operating Agreement);

(ii) If not, whether AJJ (and the REW Owners) can then exercise their rights under the Operating Agreements, including but not limited to, §§ 1.6, 6.7, and their right to purchase under § 6.5 of their respective Operating Agreements; and then

(iii) Determine the purchase price pursuant to § 6 of the respective Operating Agreements, including any costs and damages incurred or that may be incurred by WHR/Blue Hills and/or AJJ/REW Owners.

Debtor Trust and JDH still have not disclosed the proposed purchaser/transferee. At the April 27, 2018, plan confirmation hearing, counsel for JDH advised the Court that it had at least three proposed "mechanisms" for the sale and transfer of the Interests. None of those mechanisms have been presented to AJJ or the REW Owners. There is also no pending Motion

to Sell the Interests that would provide notice and opportunity to AJJ or the REW Owners to object and to assert their right to purchase. However, notwithstanding that there is no mechanism in place, JDH asked the Court at the April 27, 2018, hearing to issue a confirmation order stating that a transfer of the Interests could take place, with the exact nature of that transfer to be determined later. With that request, the underlying issue is justiciable: any sale and/or transfer of the Interests is subject to the restrictions and terms of the Operating Agreements and any dispute to such proposed sale and/or transfer must be heard in arbitration, not by this Court. Therefore, no matter what mechanism Debtor Trust and JDH eventually propose, this matter is ripe for the Court to determine whether it or the arbitrator in Ohio should resolve the above described disputes.

The issues also are not moot for the following additional reason: Assuming (without concession) that the Interests constitute property of the estate, nothing in Bankruptcy Code § 541(c)(1) relieves the Debtor Trust of the statutory and contractual restrictions in the Operating Agreements. *See, e.g.*, *In re Paul*, 355 B.R. 64 (Bankr. N.D. Ill. 2001). In *In re Paul*, the trustee sought to sell the debtor's right to receive payments under an annuity free of the anti-assignment clause contained therein, contending that § 541(c)(1) authorized the trustee to sell property without regard to state law restrictions on transfer. The court denied the trustee's motion, holding that § 541(c) does not relieve the trustee of the statutory and contractual restrictions. The court held that § 541 governs what is property of the estate; it does not address what a trustee is allowed to do with that property. The *Paul* Court cited *Butner v. United States*, 440 U.S. 48 (1979) and a similar case, *In Re Crossman*, 259 BR 301 (Bankr. N.D. Ill. 2001) (finding that nothing in the language of § 541(c)(1) authorized the trustee to ignore state law or contractual agreements relating to property of the estate that restrict the right to transfer the

property). Likewise, in *In Re Sanders*, 969 F.2d 591 (7th Cir. 1992), the Seventh Circuit held that the bankruptcy trustee succeeds only to the title and rights in property that the debtor held at the time of the bankruptcy petition. Filing a bankruptcy petition does not expand or change a debtor's interest in an asset; it merely changes the party that holds that interest. Further, a trustee takes the property subject to the same restrictions that existed as the commencement of the case. To the extent an interest is limited in the hands of a debtor, it is equally limited as property of the estate.

The trustee in *Paul* also argued that § 363(b) allowed him to sell the debtor's rights to payments. Dismissing the trustee's arguments, the *Paul* Court held that neither § 541(c) nor § 363(b) enlarged post-petition the trustee's rights in property of the estate beyond those held by the debtor pre-petition.

Likewise here, the issue before the Court is whether the Interests may be sold and/or transferred by Debtor Trust subject to the terms and restrictions contained in the Operating Agreements. That is the sole issue before the Court. If the Court determines that any sale and/or transfer is subject to the Operating Agreements, then AJJ and REW Owners submit that the arbitration provisions of the Operating Agreements require the mandatory arbitrator – not this Court – determine all disputes, including their rights to purchase. *See also In re Ehmann*, 319 BR 200 (Bankr. D. Ariz. 2005) (the trustee stepping into the shoes of the debtor - member of the LLC - could only enforce the terms of the operating agreement in accordance with the limitations of individual member's rights as set forth in that agreement). Similarly, in *Warner v. Warner*, 480 BR 641 (Bankr. N.D. W.Va. 2012), the trustee who held only the rights of the debtor could not require liquidation of the LLC thereby expanding the trustee's rights to allow him to choose which provisions of the operating agreement conflicts with § 541(c)(1), and the trustee could not

redefine the nature and extent of the debtor's property interest in the LLC, for that interest is defined by state law.

The *Warner* Court acknowledged the trustee's policy arguments regarding the practical problems for trustees for maximizing value for the estates. In *Warner*, the Court also recognized that supplanting a debtor "grinds against the notion of *delectus personae*." *See* 480 B.R. at 657. Likewise here, the Debtor Trust and JDH's attempts to force JDH into the membership of WHR (and Blue Hills) and into a relationship with AJJ and the REW Owners contradicts the notion of *delectus personae*. AJJ and the REW Owners cannot be compelled to associate with another person. Therefore, Debtor Trust and JDH's argument that AJJ's demands will reduce the value of the Interests is not an issue or a factor to be considered by this Court.

II. Arbitration Will Not Undermine Congressional Intent, and Any Prejudice to JD Holdings is Irrelevant to Whether the Arbitration Clause is Enforceable.

Debtor Trust and JDH wrongly argue that the dispute at issue is within the Court's exclusive jurisdiction, and thus cannot be arbitrated. That position is not at all consistent with the law. The vast weight of authority holds that the Arbitration Act is on equal footing with the Bankruptcy Code, and that arbitration clauses are presumed to be enforceable unless they *inherently* conflict with the Bankruptcy Code. Debtor Trust and JDH next argue that, even if the Court does not have exclusive jurisdiction (which it does not), the Court should exercise discretion to deny arbitration. But the arguments Debtor Trust and JDH rely on for that position have been rejected time and again. This is a contractual dispute that does not arise under the Bankruptcy Code and the outcome of which will not impact the proposed plan to repay all creditors in this case. This is the exact kind of dispute courts have held must be arbitrated under a valid arbitration clause.

A. The Court does not have exclusive jurisdiction over this dispute.

Debtor Trust and JDH first improperly attempt to elevate the Bankruptcy Code over the Arbitration Act by arguing that Bankruptcy Courts have exclusive jurisdiction over certain types of "core" disputes; namely in this case, a dispute that affects property of the estate. First, that is not the law. Second, this dispute does not truly impact property of the estate in the way property of the estate was impacted in the cases relied upon by Debtor Trust and JDH. The purported property of the estate in this case will not be used to pay creditors or to enrich the estate. It will only be used to make the JDH Plan more profitable for JDH.

The Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon* is the leading authority on the enforceability of arbitration clauses and the permissive policy on enforcement. *See* 482 U.S. 220, 225, 107 S.Ct. 2332, 2337 (1987) (citations omitted) (holding that the Arbitration Act was created to "reverse centuries of judicial hostility to arbitration agreements"); *see also Gilmer v. Interstate/Johnson Laner Corp.*, 500 U.S. 20, 25 (1991) (the FAA provisions "manifest a liberal federal policy favoring arbitration agreements"). After the *McMahon* decision, bankruptcy courts recognize that the Arbitration Act is on equal footing with the Bankruptcy Code, that the Bankruptcy Code does not conflict with the Arbitration Act and that arbitration clauses must be enforced unless the "underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 885 F.2d 1149, 1156 (3d Cir. 1989). That standard applies in both core and noncore cases. *In re Mintze*, 434 F.3d 222, 230 (3d Cir. 2006); *Whiting-Turner Contracting Co. v. Elec. Mach. Enters. (In re Elec. Mach. Enters.)*, 479 F.3d 791, 796 (11th Cir. 2007) ("even if a proceeding is determined to be a core proceeding, the bankruptcy court must still analyze

whether enforcing a valid arbitration agreement would inherently conflict with the underlying purposes of the Bankruptcy Code").

Courts have often enforced arbitration clauses where property of the estate could be impacted. Indeed, the fact that property of the estate is impacted does not even render a dispute automatically "core." *See In re MF Global Holdings Ltd.*, 571 B.R. 80, 95 (Bankr. S.D.N.Y. 2017). In situations where property of the estate is involved, but that property is not the most important asset of the estate or the sole source of recovery for a creditor group, claims that merely impact property of the estate without further impact to creditors have been held not to be "core." *See In re MF Global Holdings Ltd.*, 571 B.R. at 95 ("courts in this Circuit routinely recognize that bankruptcy disputes solely involving the 'catch-all'" definition of core relating to matters that affect liquidation of estate assets are not core); *Rescap Liquidating Trust v. CMB Mortg. Inc. (In re Residential Capital)*, No. 14-4950, 2014 WL 4652664, at *2-3 (S.D.N.Y. Sept. 10, 2014) (rejecting argument that case was core because it concerned administration of the estate and affected liquidation of estate assets); *In re EMS Fin. Servs. LLC*, 491 B.R. 196, 203 (E.D.N.Y. 2013) (contract claims are not core simply because they involve property of the estate). Also, proceedings that do not depend on bankruptcy laws for their existence and could proceed in a court that lacks federal jurisdiction typically are not core. *In re EMS Fin. Serv.*, 491 B.R. at 203; *In re Elec. Mach.*, 479 F.3d at 798. And when a matter is noncore, courts generally lack discretion to refuse enforcement of an arbitration clause. *In re MF Global Holdings*, 571 B.R. at 93.

Even if this was a core proceeding because property of the estate is affected (which AJJ does not concede), the Court does not have "exclusive jurisdiction" such that arbitration is precluded. As AJJ demonstrated in its Motion, courts often enforce arbitration clauses in core

proceedings. (*See* Motion, ECF No. 2044 at pages 6-10 and n.3.) Moreover, the fact that property of the estate is generally implicated also is not sufficient to automatically preclude arbitration. For example, in *SFC New Holdings, Inc. v. The Eargrains Company (In re GWI, Inc.)*, 269 B.R. 114 (D. Del. 2015), the reorganized debtor sought turnover of funds that were held in escrow under a stock purchase agreement. The defendant sought arbitration. The reorganized debtor argued that, as a core matter, the bankruptcy court should exercise exclusive jurisdiction. *Id.* at 117. The court held that core matters are often referred to arbitration and that, although issues involving property of the estate sometimes are not subjected to arbitration, "as a matter of law, the bankruptcy court may not hear all matters which affect the estate." *Id.* at 117, 118. Where arbitration would not interfere with the bankruptcy function, arbitration clauses should be enforced. *Id.* at 118. The court also found it important that the arbitration clause had been ratified post-petition, which indicated the debtors intended to be bound by the arbitration agreement. *Id.* at 117.

The case at bar is not even a core proceeding. Although potentially property of the estate is generally at issue, how that property is treated will have no impact on creditors other than JDH. Nothing in JDH's proposed plan is dependent on JDH gaining control of the Interests. Moreover, this case could easily proceed without a bankruptcy court's jurisdiction because this is merely a dispute over the interpretation of a contract. Under the *In re MF Global* and *In re EMS Financial Services* cases, this is not even a core matter in which the Court can exercise discretion to refuse arbitration. Debtor Trust and JDH's suggestion that the Court should exercise exclusive jurisdiction therefore is based on an improper premise in the first place.

Even if this was a core proceeding, the great weight of authority holds that the distinction between core and noncore is not determinative. Rather, the Court still must consider whether

arbitrating this matter would create an inherent conflict with the Bankruptcy Code or undermine the purpose of bankruptcy.[2] As discussed in more detail below, there is no conflict and there would be no undermining of the purpose of bankruptcy.

The cases relied upon by Debtor Trust and JDH for their "exclusive jurisdiction" argument are not persuasive. The primary cases relied upon by JDH and Debtor Trust are the 1963 Sixth Circuit decision in *In re Muskegon Motor Specialties Co.*, 313 F.2d 841 (6th Cir. 1963) and *In re Wade*, 523 B.R. 594 (Bankr. W.D. Tenn. 2014). First, both cases involve core disputes and thus are not applicable here. But even if this were a core dispute, those cases were not actually decided based on the idea of "exclusive jurisdiction" and their authority is questionable in any event.

The *Muskegon* court had held that a bankruptcy court has exclusive jurisdiction over both the debtor and the debtor's property, and that the court is not required to abdicate that jurisdiction absent exceptional circumstances. That holding was rejected by the Supreme Court's holding in *McMahon*, 482 U.S. at 226. The *McMahon* Court held that the Arbitration Act must be enforced unless a statute indicates an intent by Congress to make an exception to the Arbitration Act. *Id.* Since the *McMahon* decision, courts have not been willing to hold that a Bankruptcy Court has broad discretion to ignore arbitration clauses. Rather, Courts must enforce arbitration agreements unless doing so would inherently conflict with the Bankruptcy Code. Under that analysis, courts have generally held that only claims arising out of the Bankruptcy

[2] AJJ cited several cases in its motion supporting this proposition. *See, e.g., In re Mintze*, 434 F.3d at 230, 231; *Whiting-Turner Contracting Co. v. Elec. Mach. Enters. (In re Elec. Mach. Enters.)*, 479 F.3d 791, 796 (11th Cir. 2007); *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006).

Code inherently conflict with arbitration.[3] *See, e.g., In re Elec. Mach. Enters.*, 479 F.3d at 796 (contract claim not arising out of the Bankruptcy Code must be arbitrated).

Even the *In re Wade* decision did not turn on the concept of exclusive jurisdiction. The *In re Wade* court held that the dispute in that case, which raised issues of fraud and embezzlement, was inextricably intertwined with a pending dischargeability claim under Code § 523(c), and that the claims should therefore be decided in a centralized forum rather than split up between the court and an arbitrator. The *In re Wade* case therefore *did* involve a claim created by the Bankruptcy Code, which makes *In re Wade* consistent with the other courts that have held that causes of action actually created by the Bankruptcy Code should remain with bankruptcy courts. Furthermore, the *In re Wade* court's permissive view on a Bankruptcy Court's discretion to ignore arbitration clauses is an outlier (compared with the many courts that have followed *McMahon*'s holding that arbitration clauses should be permissively enforced) and should be limited to its ultimate holding, i.e., that Bankruptcy Courts have discretion to deny arbitration where the dispute arises under the Bankruptcy Code.

Given that this matter does not even fit within the definition of "core," and in light of the weight of authority holding that arbitration clauses are presumably enforceable in bankruptcy absent an *inherent* conflict with the Bankruptcy Code, the Court should not hold that it has exclusive jurisdiction over this matter. Rather, if the Court finds that this is a core proceeding, it must determine whether arbitration would conflict with the Bankruptcy Code. Only upon a finding of such a conflict does the Court have discretion to refuse to enforce the arbitration clause.

[3] The *Muskegon* decision has been cited only four times since the *McMahon* ruling, and only the *In re Wade* decision references the "exclusive jurisdiction" language.

B. Arbitration of this matter would not conflict with the Bankruptcy Code.

Debtor Trust and JDH ask the Court to use its discretion to ignore the arbitration clause based on an improper attempt to subjugate the Arbitration Act to the Bankruptcy Code. Debtor Trust and JDH first argue that this dispute over the meaning of the Operating Agreement is a "hard core" matter, and is therefore "clearly not subject to arbitration." That is the same argument Debtor Trust and JDH made with regard to the Court purportedly having exclusive jurisdiction. As demonstrated above, this is not even a core matter, and even if it was, core matters are often referred to arbitration. In addition, as discussed above, Debtor Trust and JDH's reliance on the *In re Wade* case for the concept of "hard core" is faulty because that case turned not on the mere fact that a core matter was at issue, but on the fact that dischargeability was at issue, which is an issue created by the Bankruptcy Code.

The Court should reject Debtor Trust and JDH's attempt to elevate the Bankruptcy Code over the Arbitration act and apply the standard the vast majority of courts apply: Does arbitration in this case inherently conflict with the Bankruptcy Code or undermine the purposes of bankruptcy? The answer to those questions is "no."

Even as to core proceedings, a bankruptcy court cannot override an arbitration agreement unless the court finds that the proceedings "are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code." *Hill*, 436 F.3d at 108. The "the appropriate analysis [of whether arbitration conflicts with the Bankruptcy Code] turns upon whether the claims are derived from the debtor or the claims are those 'that the Bankruptcy Code created for the benefit of creditors of the estate.'" *In re Olympus Healthcare Group, Inc.*, 352 B.R. 603, 610 (Bankr. D. Del. 2006).

In light of that analysis, courts have repeatedly held that arbitration of a claim does not inherently conflict with the Bankruptcy Code where the claim does not derive from a provision of the Bankruptcy Code or involve rights created under the Bankruptcy Code. *See, e.g., In re Mintze*, 434 F.3d at 231-32 ("Mintze has failed to raise any statutory claims that were created by the Bankruptcy Code," and thus "we cannot find any inherent conflict" with the Bankruptcy Code); *In re Olympus*, 352 B.R. at 610 (arbitration clause enforceable where claims are not based on rights created for creditors under the Bankruptcy Code); *Great Spa Mfg. Co., Inc., v. Costco Wholesale Corp.*, No. 09-2009, 2009 WL 1457740, at *6 (Bankr. E.D. Tenn. May 22, 2009); *In re Farmland Indus., Inc.*, 309 B.R. 14, 20 (Bankr. W.D. Mo. 2004) (in core matter, where parties' dispute involved mostly contractual and state law claims rather than rights granted by the Bankruptcy Code, arbitration clause was enforced); *In re Nu-Kote Holding, Inc.*, 257 B.R. 855, 864 (Bankr. M.D. Tenn. 2001) (enforcing arbitration agreement because "none of the claims or defenses raised by [the parties] was created by the Bankruptcy Code"); *In re Elec. Mach. Enters.*, 479 F.32 at 796 (enforcing arbitration clause because "a determination of whether Whiting-Turner owes EME money under their contractual agreement does not involve a right created by federal bankruptcy law"). Thus, where the claims are derivative of the rights and obligations of the parties under a contract, an applicable arbitration clause should be enforced. *In re Nu-Kote Holding, Inc.*, 257 B.R. at 864. Courts also have rejected the idea that minor conflicts with general bankruptcy principals such as maximizing the estate value, centralizing disputes or equalizing distributions are not sufficiently direct and important to find that arbitration undermines the purposes of bankruptcy. *See, e.g., In re Shores of Panama, Inc.*, 387 B.R. 864, 867 (Bankr. N.D. Fla. 2008) (holding that decentralization of dispute, risk of unequal distribution and impact on value of estate were too tangential to preclude arbitration); *In re Olympus*, 352

B.R. at 612 (holding that concerns over equal distribution and delays of distribution were not sufficient to create a conflict with arbitration).

Debtor Trust and JDH next argue that arbitration of this matter would conflict with the Bankruptcy Code because arbitration would require a stay of confirmation of the proposed plan until the parties' rights under the Operating Agreements can be adjudicated. (ECF No. 2159 at page 13.) But JDH already demonstrated its willingness to delay transfer of the Interests in its Plans Supplement by agreeing to allow the Interests to remain in the Debtor Trust until these issues are resolved. (ECF 2050 at 350 of 350.) The proposed plan already contemplates a "delayed closing" as to the Interests. Allowing arbitration, as the parties agreed, therefore would have no impact.[4]

Debtor Trust and JDH next argue that AJJ's right to purchase the Interests impacts the Debtors' rights under section 363 of the Bankruptcy Code, making this a core issue. Section 363 allows the sale of property of the estate. Assuming without conceding that the Interests are property of the estate, there is no real dispute regarding § 363. As discussed in Section I, above, a sale under § 363 is subject to whatever limitations apply to that sale by contract or state law. *See In re Paul*, 355 BR 64 (holding that neither § 541 nor § 363 enlarges the rights of the trustee to sell more than what the Debtor already had); *Hays*, 885 F.2d at 1154 (enforcing arbitration clause over trustee objection because, "as successor to the debtor's interest under section 541, the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor"). AJJ does not dispute that, if the Interests are property of the estate, they may be sold. AJJ (REW Owners) merely takes the uncontroversial position that such sale is subject to the terms of the Operating Agreements. Regardless, whether the Interests are sold to JDH or not,

[4] As discussed in Section I, above, the primary reason this matter is before the Court now is because JDH stated at the Confirmation Hearing that it is seeking to have the confirmation order state that transfer of the Interests may occur now, with the nature of that transfer to be determined later.

all creditors are being paid the full amounts of their allowed claims. Again, this entire exercise is about JDH maximizing its profit from its purchase of the Interests, none of which profit will inure to the benefit of the estate or the creditors. That is not the purpose of the Bankruptcy Code.

Debtor Trust and JDH's next argument is that arbitration would conflict with the Bankruptcy Code's policy of centralizing disputes. Courts have held on multiple occasions that the policy of centralizing disputes does not rise to the level of creating an inherent conflict between arbitration and the Bankruptcy Code. *See In re Farmland Industries, Inc.*, 309 B.R. 14, 21 (Bankr. W.D. Mo. 2004); *In re Shores of Panama,*387 B.R. at 866. That is particularly true where, as here, the outcome of the dispute will not impact the administration of the estate assets to creditors. JDH's argument that it will be prejudiced by arbitration also fails. The purpose of the Bankruptcy Code is not to give JDH, as the buyer of the Debtors' assets, the biggest bang for its buck. The purpose of the Bankruptcy Code is to ensure that all creditors are treated equitably. In this case, that is happening because all allowed claims are being paid in full regardless of how the Operating Agreements are interpreted. This dispute is about whether JDH can make the JDH Plan more lucrative for itself. Note that JDH has nowhere argued that the value of the Interests will be passed along to the estate or to creditors. The Bankruptcy Code's purpose still will be fully realized even if JDH does not get what it wants from AJJ (and the REW Owners).

Debtor Trust and JDH also list eight factors the Court may consider, all of which relate to general bankruptcy principals, and none of which are dispositive. Responding briefly, AJJ has not appeared voluntarily in this case. AJJ was dragged in by JDH's attempts to gain control of WHR, and AJJ has always maintained that the Court does not have jurisdiction over AJJ with regard to enforcement of the Operating Agreements. Also, the issues raised in the Motion will

not affect the bankruptcy estate because JDH plans to keep the benefit of the Interests for itself; those interests will not benefit the estate.

Finally, as a factual and practical matter on a more global level, arbitrating the parties' rights under the Operating Agreement will not conflict with the Bankruptcy Code, and certainly will not present an "inherent conflict." In this case, JDH's proposed plan calls for JDH to purchase substantially all of the Debtors' assets and to pay all allowed claims of creditors. The plan to pay all allowed claims in full is in no way dependent on the value of the assets JDH is purchasing. Creditors will be paid in full regardless of whether JDH ultimately is allowed to acquire the Interests and regardless of the nature of those Interests. The only issue is how much JDH will profit from its plan. As the cases above hold, an issue that only impacts two parties to a contract, and does not impact creditors in general is exactly the type of case that should remain subject to an applicable arbitration clause. *See also In re Olympus*, 352 B.R. at 611-12 (holding that turnover claim that could have brought money into the estate was nevertheless arbitrable). Indeed, courts have held that, where the amount of money available to pay creditors could be impacted by the outcome of a dispute, such disputes still must be arbitrated because such an attenuated relation to the Bankruptcy Code is not sufficient to overcome the presumption of arbitrability under the Arbitration Act and the Supreme Court's holding in *McMahon*. *See, e.g., In re Olympus*, 352 B.R. at 612; *In re Shores of Panama*, 387 B.R. at 867 ("The Debtor is essentially arguing that arbitration should not be enforced because the outcome will have an impact on the ultimate distribution of the estate since all creditors will eventually be paid from the same pot of money. This connection is too tangential to disregard the agreement to arbitrate"). As the *In re Olympus* court held, arbitrating claims that are derivative of a debtor's rights under a contract does not conflict with the Bankruptcy Code. 352 B.R. at 611-612.

The claims in this dispute are derived solely from Debtor Trust's rights under the Operating Agreements. For that reason, and the rest of the foregoing reasons, the Court should enforce the arbitration clause in those Agreements.

WHEREFORE, AJJ and the REW Owners respectfully request that the Court grant the Motion and require any issues relating to the enforcement or interpretation of the Operating Agreements, and any sale and/or transfer of the Interests under those Agreements to be arbitrated.

Dated: May 11, 2018

Respectfully submitted,

POLSINELLI PC

By: */s/ Daniel S. Dooley*

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ATTORNEYS FOR AJJ HOTEL HOLDINGS, INC

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, a true and correct copy of the foregoing *Reply of AJJ Hotel Holdings, Inc. (n/k/a JWJ Hotel Holdings, Inc.)("AJJ") to the Joint Response of the Debtors and JD Holdings, L.L.C. ("JDH")* was served electronically to Debtors' counsel, the U.S. Trustee, and the interested parties registered to receive ECF notification from the court.

/s/ Daniel S. Dooley