

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

In re:)
)
JOHN Q. HAMMONS FALL 2006, LLC, et al.,¹) **Case No. 16-21142**
)
Debtors.)
)

**JOINT MOTION OF DEBTORS AND SFI BELMONT LLC FOR ORDER
AUTHORIZING TRANSFER OF CERTAIN ESTATE PROPERTY AND
RESERVATION OF RIGHTS**

Debtors John Q. Hammons Fall 2006, LLC, *et al.* (“Debtors”) and SFI Belmont LLC (“SFI”), as a party-in-interest and secured creditor of certain of the above-captioned debtors and debtors-in-possession, by and through their respective counsel of record, agree and jointly move as follows:

Background

¹ The Debtors in this case are: ACLOST, LLC, Bricktown Residence Catering Co., Inc., Chateau Catering Co., Inc., Chateau Lake, LLC, Civic Center Redevelopment Corp., Concord Golf Catering Co., Inc., Concord Hotel Catering Co., Inc., East Peoria Catering Co., Inc., Fort Smith Catering Co., Inc., Franklin/Crescent Catering Co., Inc., Glendale Coyotes Catering Co., Inc., Glendale Coyotes Hotel Catering Co., Inc., Hammons, Inc., Hammons of Colorado, LLC, Hammons of Franklin, LLC, Hammons of Huntsville, LLC, Hammons of Lincoln, LLC, Hammons of New Mexico, LLC, Hammons of Oklahoma City, LLC, Hammons of Richardson, LLC, Hammons of Rogers, Inc., Hammons of Sioux Falls, LLC, Hammons of South Carolina, LLC, Hammons of Tulsa, LLC, Hampton Catering Co., Inc., Hot Springs Catering Co., Inc., Huntsville Catering, LLC, International Catering Co., Inc., John Q. Hammons 2015 Loan Holdings, LLC, John Q. Hammons Fall 2006, LLC, John Q. Hammons Hotels Development, LLC, John Q. Hammons Hotels Management I Corporation, John Q. Hammons Hotels Management II, LP, John Q. Hammons Hotels Management, LLC, Joplin Residence Catering Co., Inc., JQH — Allen Development, LLC, JQH — Concord Development, LLC, JQH — East Peoria Development, LLC, JQH - Ft. Smith Development, LLC, JQH — Glendale AZ Development, LLC, JQH - Kansas City Development, LLC, JQH - La Vista Conference Center Development, LLC, JQH - La Vista CY Development, LLC, JQH - La Vista III Development, LLC, JQH - Lake of the Ozarks Development, LLC , JQH — Murfreesboro Development, LLC, JQH — Normal Development, LLC, JQH — Norman Development, LLC, JQH — Oklahoma City Bricktown Development, LLC, JQH — Olathe Development, LLC, JQH — Pleasant Grove Development, LLC, JQH — Rogers Convention Center Development, LLC, JQH — San Marcos Development, LLC, Junction City Catering Co., Inc., KC Residence Catering Co., Inc., La Vista CY Catering Co., Inc., La Vista ES Catering Co., Inc., Lincoln P Street Catering Co., Inc., Loveland Catering Co., Inc., Manzano Catering Co., Inc., Murfreesboro Catering Co., Inc., Normal Catering Co., Inc., OKC Courtyard Catering Co., Inc., R-2 Operating Co., Inc., Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated, Richardson Hammons, LP, Rogers ES Catering Co., Inc., SGF — Courtyard Catering Co., Inc., Sioux Falls Convention/Arena Catering Co., Inc., St Charles Catering Co., Inc., Tulsa/169 Catering Co., Inc., and U.P. Catering Co., Inc.

1. On June 26, 2016 (the "Petition Date"), certain of the Debtors filed their respective petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Kansas.

2. SFI is the holder of a loan made to certain of the Debtors (the "Loan"), and in this proceeding, is a creditor, and asserts it is a secured party. The Revocable Trust of John Q. Hammons dated December 28, 1989, and its wholly-owned subsidiary, Hammons, Inc. (together, "Guarantors"), both Debtors, guaranteed the Loan.

3. On November 7, 2016, SFI filed a proof of claim against each of the Guarantors, along with its borrower, John Q. Hammons Hotels Development, LLC, asserting a secured right to payment totaling \$183,815,766.98 (together, the "SFI Claims"). The SFI Claims were assigned claim numbers 220-222 by Debtors' claims agent. The parties reserve their rights and remedies with respect to the SFI Claims and any defenses to the SFI Claims or any other claims.

4. As collateral for guarantying the Loan, the Guarantors pledged their respective interests in and to certain preferred equity interests ("PEI") in Atrium Hotels, L.P. ("Atrium"), an affiliate of JD Holdings, LLC.

5. On account of the PEI, in the event of a liquidation of Atrium, the Debtors are entitled to collect up to the first \$335 million in proceeds of that liquidation. SFI asserts a first-priority pledge of and security interest in any proceeds received by or owed to the Debtors on account of the PEI (the "Proceeds").

6. Debtors and SFI have been informed that Atrium asserts that it has been liquidated. In connection with the purported liquidation, Guarantors received two cashier's checks totaling \$934,000.00 allegedly on account of such liquidation (the "Cashier's Checks"). Debtors: (a) dispute that the Cashier's Checks represent the total amount due and owing in

connection with the PEI and the liquidation; (b) have been informed and believe that substantially more proceeds from the liquidation of Atrium have been (or should have been) realized and should be remitted to Debtors, subject to SFI's security interests; (c) assert that additional liquidation proceeds are available, and reserves their rights to pursue collection of those proceeds; (d) reserve the right to collect the additional amounts the Debtors contend are owing on account of the PEI, subject to SFI's security interests; and (e) reserve any other rights, claims, defenses, and remedies in any way associated with the PEI and liquidation, whether as a right, claim, defense, offset, counterclaim, defense or remedy to any claim, whether filed by JD Holdings, its affiliates, or otherwise (collectively the "Collection and Other Rights").

7. The Stipulated Order Approving Debtors' Motion To Use Cash Collateral And Grant Of Adequate Protection To SFI Belmont LLC entered in these cases at ECF Doc. 500 (the "Stipulated Order") provides:

Delivery of Certain Collateral. No later than two (2) business days following the entry of this Order, the Debtors shall deliver and, if necessary, endorse to SFI the certified checks received from Atrium Hotels, L.P. dated September 21, 2015, in the aggregate amount of \$934,000 (the "Atrium Checks"). Any such delivery or endorsement of the Atrium Checks shall not constitute any accord and satisfaction, waiver, estoppel, or release and shall not prejudice in any way any claim or argument that additional amounts are due and owing in connection with the Debtors' Preferred Equity Interest in Atrium Hotels, L.P. f/k/a John Q. Hammons Hotels, L.P. The issue of how the proceeds of the Atrium Checks will be applied is expressly reserved. The delivery and endorsement shall be accomplished in a manner mutually acceptable to the Debtors and SFI to assure the safety of the Atrium Checks. The Debtors and SFI intend to move the Court for entry of any order confirming that the endorsement by the Debtors, and/or SFI's negotiation, depositing, and/or cashing, of the Atrium Checks will not in any way result in accord and satisfaction, release, waiver, estoppel, or prejudice any further attempt to recover money owed on account of the Preferred Equity Interest.

Stipulated Order at ¶ 15. Despite the required delivery date set out in the Stipulated Order, the parties have been in discussions about the appropriate method of endorsement, delivery,

acceptance, and negotiation of the Cashier's Checks and the terms of this Motion, and accordingly have consented to the extension of time for delivery set forth in the Stipulated Order.

8. The parties will agree on a method of delivery of the Cashier's Checks to SFI that will maximize the safety of the transmission.

Relief Requested

9. By this Motion, Debtors and SFI request that the Court enter an order authorizing Debtors to endorse and deliver to SFI, and for SFI to negotiate, the Cashier's Checks and for SFI to apply the proceeds of the Cashier's Checks to the SFI Claims (collectively, the "Check Process"). Additionally, Debtors and SFI request that the Court find and conclude that the implementation of the Check Process will not be subject to any defenses by Atrium or any of its affiliates, including the defenses of accord and satisfaction, release, waiver, and equitable estoppel and will not otherwise affect the Collection and Other Rights.

Jurisdiction and Venue

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b).

11. The statutory predicates for the relief requested herein are section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and Fed. R. Bankr. P. 9014.

Argument

12. Debtors seek to pay a portion of the SFI Claims with proceeds of SFI's collateral now, and not wait until a plan has been confirmed. Those collateral proceeds are in hand now and are not otherwise being used by Debtors. No party will be prejudiced by the application of the Cashier's Checks to the SFI Claims as the use of those proceeds to pay a portion of the SFI

Claims benefits the Debtors and these estates as set forth herein.

13. Out of an abundance of caution, and to ensure the parties' rights to enforce the Collection and Other Rights, Debtors and SFI seek an order of the Court to make it clear that by implementing the Check Process, the parties will not prejudice or diminish the Collection and Other Rights.

14. No argument exists that would support the notion that implementation of the Check Process will diminish or eliminate their Collection and Other Rights. But, given that the amount of money at issue in enforcement of the Collection and Other Rights is tens, if not hundreds, of millions of dollars, and considering that the Debtors do not wish to waive or relinquish any other rights, claims, defenses, offsets, or other remedies associated with third parties, including JD Holdings and its affiliates, the Debtors believe it is prudent to obtain the requested Court order approving the Check Process before such process is implemented.

15. The requested order is sought to ensure and preserve the Collection and Other Rights, which the Debtors assert will benefit the entire estate. As a consequence, Debtors and SFI seek an order concluding that the Collection and Other Rights are preserved, undiminished and undisturbed by the Check Process.

16. As set forth hereafter, approval of the Check Process is consistent with applicable law with respect to the Collection and Other Rights.

The Defense of Accord and Satisfaction Could Not Be Established.

17. The Check Process will not constitute an accord and satisfaction of Atrium's obligation under the PEI. Accord and satisfaction requires three elements: (1) "a bona fide dispute existed as to the amount owed that was based on mutual good faith," (2) "the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of

the debt,” and (3) “the creditor agreed to accept the payment in full satisfaction of the debt.” *CitiSteel USA, Inc. v. Connell Ltd. P’Ship.*, 758 A.2d 928, 931 (Del. 2000). In *Delaware Site Excavating, LLC v. Double S. Fine Homes, Inc.*, No. 99C-06-059-JOH, 2001 WL 845664 (Del. Apr. 24, 2001), the Delaware Supreme Court found that the third element of accord and satisfaction had not been satisfied where the creditor accepted a partial payment from the debtor but actively sought repayment of the remaining balance of the debt. *Id.* at *6.

18. Accord and satisfaction clearly is absent here. No language on the Cashier’s Checks or otherwise indicates that Atrium intends the Cashier’s Checks to represent full payment of its obligation under the PEI. Plus, Debtors have not agreed to accept the Cashier’s Checks in full satisfaction of the amounts due under the PEI. Rather, Debtors expressly assert that more amounts are due and owing.

No Waiver or Release of Rights Would Occur.

19. The transfer and cashing of the Cashier’s Checks by Debtors and SFI would not constitute a waiver. “Waiver is the voluntary and intentional relinquishment of a known right either conferred by statute or secured by contract.” *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc.*, C.A. No. 5745-VCS, 2010 WL 5276991, at *9 (Del. Ch. Dec. 17, 2010) (citation omitted). Establishing waiver involves a “quite exacting” standard. *Am. Family Mortg. Corp. v. Acierno*, No. 290, 1993, 1994 WL 144591, at *5 (Del. Mar. 28, 1994). The party asserting that a contractual right has been waived must establish: “(1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive that requirement or condition.” *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

20. Waiver cannot be established here, as neither Debtors nor SFI intend to waive any

of the Collection and Other Rights with respect to the PEI or any other loan, guaranty, security agreement, or contract between the parties. Nor can release. Release is an intentional act manifested by the parties. Here, the Debtors expressly and deliberately do not release Atrium or any of its affiliates. Furthermore, Debtors do not wish to waive, release, or relinquish any other rights, claims, defenses, rights of offset or other remedies associated with third parties, including JD Holdings and its affiliates.

The Defense of Equitable Estoppel Would Not Be Available.

21. Implementation of the Check Process also will not implicate the doctrine of equitable estoppel. The standard for proving equitable estoppel is “stringent; the doctrine is applied cautiously and only to prevent manifest injustice.” *Pilot Point Owners Ass’n v. Bonk*, No. 2717-CC, 2008 WL 401127, at *2 (Del. Ch. Feb. 13, 2008). A party asserting the defense of equitable estoppel must demonstrate by clear and convincing evidence that: (1) it “lacked knowledge or the means of obtaining knowledge of the truth of the facts in question,” (2) it “reasonably relied upon the conduct of the party against whom the estoppel is claimed[,]” and (3) it “suffered a prejudicial change of position as a result of [its] reliance upon that conduct.” *Id.*

22. Equitable estoppel will not be available upon implementation of the Check Process. Atrium is well aware of the movants’ intent to seek and recover the remaining amounts owed in connection with the PEI. Further, any reliance by Atrium based on Debtors’ or SFI’s use of the Cashier’s Checks would be unreasonable and unjustifiable, given the clear assertions that the Cashier’s Checks do not satisfy Atrium’s obligation under the PEI. Finally, Atrium would suffer no change in position if it relied on the transfer and cashing of the Cashier’s Checks.

Bankruptcy Law Would Not Permit the Waiver of the Collection and Other Rights by Implementation of the Check Process.

23. Moreover, the post-petition relinquishment of the Collection and Other Rights, a valuable asset in these cases, by waiver, accord and satisfaction, release, and equitable estoppel would constitute an act taken by the Debtors out of the ordinary course of business and could not be effective without an order of the Court permitting the Debtors to relinquish the Collection and Other Rights.

24. Thus, a ruling that implementation of the Check Process does not in any way adversely affect the Collection and Other Rights is simply a ruling that the Court does not approve of any such act out of the ordinary course of business.

Conclusion

For all of the foregoing reasons, Debtors and SFI respectfully request that the Court enter an order granting their joint motion:

- (a) Authorizing the Debtors to endorse and deliver the Cashier's Checks to SFI;
- (b) Authorizing SFI to negotiate the Cashier's Checks and apply the amounts to the SFI Claims;
- (c) Finding that the implementation of the Check Process in no way constitutes an accord and satisfaction, release, waiver, or equitable estoppel, or prejudice any further attempts to seek and recover the remaining amounts owed by Atrium under the PEI and to enforce the Collection and Other Rights;
- (d) Finding that the Debtors and SFI reserve their rights and remedies with respect to the SFI Claims and any defenses to the SFI Claims or any other claims; and

(e) Granting such other relief as is just and proper under the circumstances.

Dated: January 27, 2017

Respectfully submitted,

By: /s/ Mark A. Shaiken

By: /s/ Peter A. Siddiqui

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