The relief described hereinbelow is SO ORDERED.

SIGNED this 13th day of December, 2017.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JOHN Q. HAMMONS FALL 2006, LLC, et al.,	Case No. 16-21142
	Chapter 11
Debtors.	Jointly Administered

ORDER DENYING JD HOLDINGS' MOTION TO TERMINATE THE DEBTORS' EXCLUSIVITY PERIODS

This matter comes before the Court on the motion of creditor JD Holdings, L.L.C. ("JD Holdings") for an order terminating Debtors' exclusive periods in which to file and solicit acceptance of reorganization plans ("Exclusivity Periods"),[1] thus permitting JD Holdings to file

[1] Mot. of JD Holdings, L.L.C. to Terminate the Debtors' Exclusivity Periods to Permit JD Holdings to File Plans of Reorganization and to Solicit Acceptances Thereof, ECF No. 1451.

its own reorganization plans ("Creditor Plans") and solicit acceptances thereof. Creditor SFI Belmont, LLC ("SFI") joins the motion;[2] Debtors oppose it.[3] For the reasons stated below, this Court will deny JD Holdings' motion.

Section 1121(d)(1) of the Bankruptcy Code allows a court to extend or terminate a debtor's exclusivity periods for "cause." Although the Bankruptcy Code does not define "cause," many courts have used a nine-step test for determining whether cause exists:

> (a) the size and complexity of the case;
>
> (b) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
>
> (c) the existence of good faith progress toward reorganization;
>
> (d) the fact that the debtor is paying its bills as they become due;
>
> (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
>
> (f) whether the debtor has made progress in negotiations with its creditors;
>
> (g) the amount of time which has elapsed in the case;
>
> (h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
>
> (i) whether an unresolved contingency exists.

See In re Adelphia Commc'ns Group, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (quoting *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997)). "The determination of whether 'cause' exists is an issue of fact and the burden of proof to establish cause lies with the moving party." *In re Lichtin/Wade, L.L.C.*, 478 B.R. 204, 209 (Bankr. E.D.N.C. 2012) (quoting

[2] SFI Belmont LLC's Joinder in Mot. of JD Holdings L.L.C. to Terminate the Debtors' Exclusivity Periods to Permit JD Holdings to File Plans of Reorganization and to Solicit Acceptances Thereof, ECF No. 1503.

[3] Debtors' Obj. To Mot. to Terminate the Debtors' Exclusivity Periods, ECF No. 1522.

In re Fountain Powerboat Indus., Inc., 2009 WL 4738202, at *2 (Bankr. E.D.N.C. Dec. 4, 2009)). Thus JD Holdings, as the moving party, has the burden of proving that cause exists to terminate the Exclusivity Periods. More specifically, since this Court held on February 13, 2017 that cause existed to extend the Exclusivity Periods through the current deadlines,[4] JD Holdings has the burden of proving "that something has changed to justify altering that determination." *See Dow Corning*, 208 B.R. at 664.

While JD Holdings' motion does not specifically address the elements of the nine-factor test, it argues that cause exists to terminate Debtors' exclusivity periods because:

> (i) the Creditor Plans would move these Chapter 11 cases forward; (ii) the Debtors' Exclusivity Periods are effectively serving to delay reorganization needlessly to the detriment of all creditors; and (iii) the filing of the Creditor Plans would not be prejudicial to the Debtors or any other party in interest—to the contrary, it would benefit the parties in interest.[5]

However, neither a creditor's desire to expedite the reorganization process[6] nor a creditor's readiness to offer its own plans constitutes "cause" to terminate a debtor's exclusivity periods. *See, e.g.*, *In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 134 (D.N.J. 1995). And while JD Holdings' motion also speaks to a policy of "creditor democracy,"[7] that policy is incompatible with the existence of debtor exclusivity periods. *See Eagle-Picher*, 176 B.R. at 148 ("The concept of an exclusivity period in favor of a debtor, a consideration at the heart of the

[4] Debtors' Exclusivity Periods will expire on December 26, 2017 (filing) and February 26, 2018 (acceptance), and cannot be extended further. *See* 11 U.S.C. § 1121(d)(2).

[5] Mot. to Terminate Debtors' Exclusivity Periods ¶ 1.

[6] The Court notes that the presence of a creditor plan would not necessarily expedite the reorganization process. Some courts have held that the filing of competing plans "would undermine the prospects for a prompt resolution of [the] Chapter 11 cases." *See In re Eagle-Picher Indus., Inc.*, 176 B.R. 143, 148 (Bankr. S.D. 1994) (quoting *In re Texaco*, 81 B.R. 806, 811 (Bankr. S.D.N.Y. 1988)).

[7] Mot. to Terminate Debtors' Exclusivity Periods ¶ 37.

Bankruptcy Code, on its face contradicts the notion that parties in a Chapter 11 bankruptcy case be given an equal opportunity to seek confirmation of a plan."). Rather, "[t]he overriding principle under § 1121, which applies here, is that normally the Chapter 11 Debtor gets the first clean shot at proposing and confirming a plan." *In re Energy Conversion Devices, Inc.*, 474 B.R. 503, 510 (Bankr. E.D. Mich. 2012).

JD Holdings' motion also includes arguments that indirectly address some elements of the nine-factor test; however, neither of these arguments justifies altering this Court's previous decision to extend Debtors' Exclusivity Periods through the current deadlines. First, JD Holdings argues that costs and interest are accumulating, and that Debtors "seem to be experiencing operating challenges."[8] However, JD Holdings does not explain how those financial considerations are so severe that JD Holdings must file its competing plans now rather than waiting until February (at the latest) to do so. Second, JD Holdings argues that "Debtors have made no demonstrable progress, and have yet to file a plan of reorganization."[9] If Debtors have indeed made no progress and do not file a plan before the applicable deadline, JD Holdings is free to file plans of its own when that deadline expires, a little less than two weeks from now. Until then, Debtors are within their rights to continue working on plans of their own.

For all of the foregoing reasons, JD Holdings' motion to terminate Debtors' Exclusivity Periods (along with SFI's joinder) is denied—without prejudice to the Court, on its own motion only, revisiting this matter after Debtors have filed their plans.

IT IS SO ORDERED.

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[8] Mot. to Terminate Debtors' Exclusivity Periods ¶¶ 22, 23. JD Holdings also states that "[r]eal estate prices can be volatile," *id.* ¶ 24, but does not explain why prices might not just as easily go up as down.

[9] *Id.* ¶ 18.

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