The relief described hereinbelow is SO ORDERED.

SIGNED this 31st day of October, 2018.

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 GRANTING EMERGENCY MOTION FOR RELIEF FROM STAY

This matter comes before the Court on the emergency motion of AJJ Hotel Holdings, Inc., n/k/a JWJ Hotel Holdings, Inc. ("**AJJ**"), for relief from the automatic stay to allow arbitration of the internal business matters of nondebtor W&H Realty, LLC ("**WHR**"),[1] specifically:

[1] ECF 2494.

1. Tax distributions to AJJ;

2. Extension of the Lexington Embassy Suites loan;

3. Development of a new Lexington Hampton Inn;

4. Marketing and sale of the Chicago Marriott; and

5. Any other management deadlocks between AJJ and the Trust or JD Holdings that may arise in the future.

AJJ and debtor The Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated (the "**Trust**") each hold a 50 percent interest in WHR. Under Debtors' confirmed joint plans of reorganization ("**Joint Plans**"), the Trust will transfer its interest in WHR to creditor JD Holdings, L.L.C. ("**JD Holdings**").[2] Pending that transfer (the mechanism for which has not yet been disclosed), all economic benefits from WHR flow to JD Holdings.

The Trust and JD Holdings ("**Joint Objectors**") object to AJJ's motion for stay relief.[3] The Court has considered the parties' briefs along with counsel's oral argument at the October 15, 2018, hearing. For the reasons stated below, AJJ's motion will be granted.[4]

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[2] While AJJ argues in a separate adversary proceeding that the transfer to JD Holdings has already occurred, that issue is not before the Court for purposes of this motion.

[3] ECF 2537.

[4] This order does not decide whether the automatic stay or discharge injunction would otherwise prevent AJJ from taking these issues to arbitration; rather, the order simply grants relief to the extent necessary for arbitration of the issues to proceed.

A. Did the Parties Agree to Submit These Disputes to Arbitration?

The Court must first determine whether AJJ and the Trust agreed, via WHR's Operating Agreement,[5] to submit these particular disputes to arbitration. It is "well settled" that this question is typically one "for judicial determination." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010). The relevant section of the operating agreement (the "**Arbitration Provision**") provides:

> **11.1 Dispute Resolution**
>
> A. In the event of a "deadlock" among the Members[6] and/or the two Co-Managers[7] and in the event that the failure to resolve such deadlock is having (or will have) a materially adverse effect upon the Company[8] and/or in the event of any dispute, controversy, or claim arising out of, or in connection with, or relating to this Agreement, or any breach, or alleged breach hereof, the same shall, upon the request of any party involved, be submitted to and settled by arbitration in Hamilton County, Ohio. The arbiters shall be specifically directed: that the award be definite, certain and final as to the matters submitted; and to permit or deny the relief sought in its entirety without partial allocations between the parties (i.e. the proceedings shall be a "**baseball arbitration**") . . . .
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> B. The scope and breadth of any disputes that will be subject to the foregoing shall be broadly construed to the fullest extent permitted under applicable law.

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[5] First Amended and Restated Operating Agreement of W&H Realty, LLC ("**Operating Agreement**"), ECF 1916-1.

[6] WHR's "**Members**" are AJJ and the Trust.

[7] For purposes of this order, WHR's two "**Co-Managers**" are Michael Kammerer (for AJJ) and Dan Abrams (for the Trust). Although AJJ challenges the Trust's appointment of Mr. Abrams as Co-Manager in a separate adversary proceeding, that issue is not before the Court for purposes of this motion.

[8] The "**Company**" is WHR.

The Joint Objectors argue that the disputes at issue are not subject to arbitration under the Operating Agreement because (1) there is no "deadlock," (2) the disputes do not have a materially adverse effect on WHR, and (3) the Arbitration Provision is so ambiguous as to be unenforceable.

Because the Operating Agreement does not define "deadlock," the Joint Objectors present Merriam-Webster's definition: "a state of inaction or neutralization resulting from the opposition of equally powerful uncompromising persons or factions."[9] They then argue that there is no "deadlock" (as defined by Merriam-Webster) because the parties have not yet mediated their disputes, claiming that "there is no 'state of inaction' as long as mediation is an option." This argument fails because it rests on the Joint Objectors' reasoning that there can be no deadlock if "the parties have not exhausted their avenues to resolve their disagreements." There exist any number of avenues to resolve a dispute, from the rational (mediation), to the physical (arm-wrestling), to the random (coin toss). If it were true that there can be no deadlock if the parties have not mediated, then it would be equally true that there can be no deadlock if the parties have not arm-wrestled or engaged in a coin toss—an absurd result. Thus, the *existence* of mediation as an unexercised option cannot determine whether deadlock exists.

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[9] *Deadlock*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996).

Section 12.3 of the operating agreement provides that the agreement is to be construed according to Ohio law. "A dictionary definition does not amount to parol evidence. It is a reliable source for finding the plain and ordinary meaning of a word." *Commercial Intertech Corp. v. Guyan Int'l, Inc.*, No. 99-P-0119, 2001 WL 314869, at *2 (Ohio Ct. App. Mar. 30, 2001).

Rather, the determinative point here is that AJJ *refuses* to mediate. This refusal creates a state of inaction between the parties: a deadlock.

Next, the Joint Objectors argue that the disputes are not subject to arbitration because AJJ has not proved that the failure to resolve the deadlock is having, or will have, a "materially adverse effect" on WHR. This argument fails because AJJ has demonstrated the parties' inability to agree on WHR's core business matters. In effect, WHR's management has been replaced with inertia. If this inertia is not already having a materially adverse effect on WHR, it will undoubtedly do so in the future.

Finally, the Joint Objectors argue that the Arbitration Provision's use of the term "and/or" renders that provision fatally ambiguous. The Joint Objectors correctly point out that respected commentators have criticized the term on grounds both substantive and stylistic. However: "*[a]nd/or*, though undeniably clumsy, does have a specific meaning (*x and/or y = x or y or both*).[10] The Arbitration Provision, then, mandates arbitration under the following circumstances:

1. Deadlock plus materially adverse effect on WHR; or
2. (Dispute, controversy, or claim) (arising out of, or in connection with, or relating to the Agreement), or (breach or alleged breach) (of the Agreement); or
3. Both 1 and 2.

There is no ambiguity here. AJJ has demonstrated deadlock as to the management

[10] Bryan A. Garner, *A Dictionary of Modern Legal Usage* 56 (2d ed. 1995).

of WHR plus a materially adverse effect on WHR resulting from that deadlock. The Arbitration Provision clearly mandates arbitration[11] under these circumstances.

B. Should this Court Evaluate AJJ's Motion Under *Curtis* or *National Gypsum*?

The parties disagree as to the legal standard applicable to AJJ's motion. According to AJJ, this Court should apply the list of factors identified in *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984),[12] that courts often use to determine whether relief from the automatic stay should be granted "for cause" under § 362(d)(1) of the Bankruptcy Code.[13] The Joint Objectors respond that because the

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[11] The Joint Objectors argue, without citation to legal authority, that the term "baseball arbitration" is "irreconcilably ambiguous and unenforceable" because there are two types of baseball arbitration: "day" and "night." This argument is unavailing absent any showing that the parties disagree as to the meaning of the term. *Cf.* Restatement (Second) of Contracts § 201(1) (Am. Law Inst. 1979) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

[12] The *Curtis* factors are (1) whether the relief will result in a partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) whether the foreign proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal has been established to hear the particular cause of action; (5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; (7) whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties; (8) whether the judgment claim arising from the foreign action is subject to equitable subordination under § 510(c); (9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under § 522(f); (10) the interest of judicial economy and the expeditious and economical determination of litigation for the parties; (11) whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and (12) the impact of the stay on the parties and the "balance of hurt." *Curtis*, 40 B.R. at 799-800.

[13] Section 362(d)(1) of the Bankruptcy Code provides: "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay

particular question here is whether *arbitration* should be permitted, this Court should look to *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), which applies to a motion for a stay pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 3.[14] This Court need not resolve the issue, as AJJ is entitled to pursue arbitration of WHR's management deadlocks under either case. Under *Curtis*, factors 1, 2, 6, 7, and 12 favor AJJ; factors 3, 5, 8, and 9 are inapplicable.[15] Factor 10, judicial economy, favors AJJ as well:

> If the parties cannot agree on whether WHR, a non-debtor in which the Trust's 50% interest is referred to as merely a "Delayed Asset," should enter into or renew a lease, seek financing, hire or fire professionals, enter into a contract, or sell a property, must the parties, with each such conflict, come to this Court for resolution? For how long? These are business decision deadlocks, not legal issues, which need to be resolved. The Court is ill-equipped to resolve such disputes.[16]

In these circumstances, cause exists to modify the discharge injunction,[17] or grant relief from the automatic stay under § 362(d)(1), to the extent necessary to allow

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provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—(1) for cause . . . ."

[14] Section 3 of the Federal Arbitration Act provides: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."

[15] *See* ECF 2494 ¶¶ 47-52.

[16] *Id.* ¶ 53.

[17] *Cf. In re Robben*, 562 B.R. 469, 475-76 (Bankr. D. Kan. 2017) (applying *Curtis* factors to determine whether discharge injunction should be modified).

arbitration of management deadlocks over the internal business matters of WHR.

In *National Gypsum*, the Fifth Circuit held that a bankruptcy court has discretion to deny enforcement of an arbitration clause in a *core* proceeding where (1) enforcement would irreconcilably conflict with the Bankruptcy Code or (2) the only rights at issue were created by the Bankruptcy Code rather than inherited from a debtor's pre-petition property. The issues here, however—pure business disputes—are decidedly non-core. Thus, the Court's inquiry likely ends there. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1150 (3d Cir. 1989) ("[T]he Bankruptcy Code, as amended, does not conflict with the Arbitration Act so as to permit a district court to deny enforcement of an arbitration clause in a non-core adversary proceeding brought by the trustee in a district court."). Moreover, even if WHR's internal business matters could somehow be construed as core, they are wholly unrelated to any rights created by the Bankruptcy Code. Therefore, these issues are arbitrable under *National Gypsum* as well.

Accordingly, AJJ's motion for relief is hereby granted to the extent necessary for AJJ to initiate arbitration of the following issues pursuant to the Operating Agreement:

1. Tax distributions to AJJ;
2. Extension of the Lexington Embassy Suites loan;
3. Development of a new Lexington Hampton Inn;
4. Marketing and sale of the Chicago Marriott; and

5. Any other management deadlocks between AJJ and the Trust or JD Holdings that may arise in the future.

IT IS SO ORDERED.

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