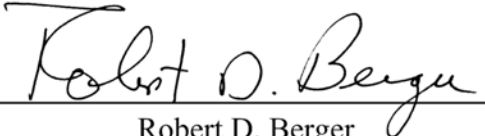


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 22nd day of February, 2021.




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.,
Debtors.

Case No. 16-21142
Chapter 11
Jointly Administered

ORDER GRANTING MOTION FOR RELIEF FROM AUTOMATIC STAY

This matter comes before the Court on the motion of creditor Interquest North No. 1, LLC ("Interquest"), for relief from the automatic stay to proceed with pending litigation in the Circuit Court of Greene County, Missouri. For the reasons that follow, Interquest's motion will be granted with limitations.

Jacqueline Dowdy is a trustee of the debtor Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated (the "Trust").¹ In

¹ The "Debtors" in these jointly-administered Chapter 11 cases are the Trust and 75 of its subsidiaries and affiliates.

2014, Interquest sued Dowdy (both as an individual and in a number of representative capacities,² including as trustee of the Trust) and ten unnamed defendants in Greene County, Missouri, in a case arising out of a failed hotel development in Colorado. Counts I through IV of Interquest’s petition (“Breach of the LLC Operating Agreement,”³ “Breach of Fiduciary Duty,” “Fraud,”⁴ and “Negligent Misrepresentation”) assert claims against all the defendants; Count V (“Tortious Interference with Business Relationship”) asserts a claim against Dowdy in particular. The petition alleges (among other things) that Dowdy and the unnamed defendants deliberately withheld money from the hotel development in order to inflate Dowdy’s compensation, while leading Interquest to believe that financing would continue, and that Interquest’s damages include \$4,297,411.80 for the 19.731 acres of real property Interquest contributed to the development. The case was still at the pleading stage when Debtors filed for bankruptcy in 2016. Interquest now seeks stay relief to allow the Greene County litigation to proceed.

² Interquest’s petition names Dowdy as a defendant individually and in her following representative capacities: trustee of the Trust; attorney-in-fact for John Q. Hammons (whose death in 2013 precipitated the litigation that led to Debtors’ eventual bankruptcies); alleged successor president/manager/member of non-debtor John Q. Hammons Colorado Springs, LLC; and alleged successor member/manager of non-debtor JQH Colorado Springs, LLC. *See* Claim 416-2 at 4.

³ The “Operating Agreement,” which Interquest entered into with non-debtor John Q. Hammons Colorado Springs, LLC, created non-debtor JQH Colorado Springs, LLC, a Missouri limited liability company, whose stated purpose was to develop, construct, own, and operate a hotel and convention center in El Paso County, Colorado. *See* Claim 416-1 at 28, 31.

⁴ Count III, initially titled “Fraud,” is titled “Fraudulent Misrepresentation” in the proposed amended petition attached to Interquest’s amended claim. *See* Claim 416-1 at 21; Claim 416-2 at 27.

The Bankruptcy Code provides that a court shall grant stay relief “for cause.” [11 U.S.C. § 362\(d\)\(1\)](#). As the moving party, Interquest has the burden of going forward with evidence that cause for stay relief exists; the burden then shifts to the Trust to prove that the stay should remain in place. See [11 U.S.C. § 362\(g\)](#); *In re Busch*, [294 B.R. 137, 140-41](#) (B.A.P. 10th Cir. 2003).

In deciding whether to modify the stay so that litigation can proceed in another forum, bankruptcy courts commonly apply the factors identified in *In re Curtis*, [40 B.R. 795](#) (Bankr. D. Utah 1984).⁵ Those factors are:

- (1) Whether the relief will result in a partial or complete resolution of the issues;
- (2) The lack of any connection to, 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 and has the expertise to hear such cases;
- (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;

⁵ *Busch*, [294 B.R. at 141](#); see *Jim’s Commercial Cleaning Ltd. v. Target Corp. (In re Jim’s Maint. & Sons Inc.)*, [418 F. App’x 726](#) (10th Cir. 2011) (unpublished).

- (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 the 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."

See *Curtis*, [294 B.R. at 799-800](#). An additional factor—one that can be dispositive in the Tenth Circuit—is whether the movant has a probability of prevailing on the merits of the foreign litigation. See *Chizzali v. Gindi (In re Gindi)*, [642 F.3d 865, 872](#) (10th Cir. 2011), *overruled on other grounds by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, [661 F.3d 495](#) (10th Cir. 2011).

Applying these factors to Interquest's motion for stay relief, the Court finds that stay relief will result in complete resolution of the parties' liability (factor 1); determination of liability in Greene County will not interfere with the Trust's bankruptcy case (factor 2); the Greene County court has expertise in the Missouri law out of which Interquest's causes of action arise (factor 4); litigation in Greene County will not prejudice the interests of any other parties (factor 7); and judicial

economy favors resolution of liability in Greene County because this Court likely does not have jurisdiction over the non-debtor defendants (factor 10). Interquest has thus met its burden of going forward with evidence that cause for stay relief exists.

In response, and citing *Gindi*, the Trust argues that Interquest has no probability of prevailing on the merits of the Greene County litigation, and that the automatic stay should therefore remain in place. The Trust reasons that the following “Third-Party Releases” in Debtors’⁶ confirmed Chapter 11 plans (the “Plans”) have released Dowdy—both individually and in her various representative capacities—from all liability to Interquest:

Except as otherwise specifically provided in the Plans, . . . each present and former Holder of a Claim . . . (a “Third-Party Releasing Party”) shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, fully and forever released and discharged . . . the Debtors Released Parties . . . and the Trustees Released Parties from any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, whether for tort, contract, violations of any federal, state or other laws or otherwise, that each Third-Party Releasing Party have asserted, could have asserted or might be entitled to assert (whether individually or collectively, based on or relating to, or in any manner arising from, or in connection with, in whole or in part, (i) the Debtors; (ii) the Chapter 11 Cases; (iii) the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is the subject of the Plans; . . . and (xi) any other act or omission, transaction,

⁶ “Debtors” in these jointly-administered Chapter 11 cases are the Trust and 75 of its subsidiaries and affiliates.

agreement, event, or other occurrence taking place on or before the Effective Date.⁷

While it is undisputed that Interquest is a “Holder of a Claim” and that Dowdy is a “Trustees Released Party,”⁸ the Trust’s argument is nevertheless incorrect for two reasons. First, the order confirming the Plans specifically provides that the Third-Party Releases “do not relieve any Person of liability arising out of an act or omission constituting willful misconduct or fraud.”⁹ Second, the Trust’s argument ignores the initial clause of the Third-Party Releases: *except as otherwise specifically provided in the Plans*.¹⁰ That clause is significant here because the Plans *specifically provide for the payment in full of all Allowed Claims*¹¹—this means that the Third-Party Releases do not release Dowdy from *any* liability that would give rise to an allowed claim in bankruptcy against the Trust.¹² Thus, the Third-Party Releases would not prevent Interquest from prevailing on the merits of its Greene County litigation against Dowdy to the extent that such litigation (1) arises out of Dowdy’s alleged willful misconduct or fraud *and/or* (2) would give rise to an allowed claim in bankruptcy against the Trust. Because the Third-Party

⁷ ECF 1946 at 30.

⁸ See ECF 1946 at 7 (“Claim”), 10 (“Holder”), 13 (“Trustees Released Party”).

⁹ ECF 2188 at 19.

¹⁰ This omission appears deliberate, as the Trust replaces the initial clause with ellipses when quoting the Third-Party Releases. See ECF 2739 at 6; *id.* at 8; ECF 2926 at 5.

¹¹ ECF 1946 at 19.

¹² Interquest has not filed a claim against any debtor other than the Trust. *Cf.* Claim 416-2 at 1, 2.

Releases thus do not foreclose the possibility that Interquest will prevail on the merits of the Greene County litigation, *Gindi* does not require the automatic stay to remain in place. And although the Greene County litigation has not progressed past the pleading stage (factor 11), none of the other *Curtis* factors weigh in the Trust's favor. In light of the several *Curtis* factors that weigh in Interquest's favor, the Trust has not proved that the automatic stay should remain in place. This Court therefore concludes that the Greene County litigation should proceed.

For these reasons, Interquest's motion for relief from the automatic stay is hereby granted as follows: Interquest may proceed to final judgment in, but not execution on, the Greene County litigation subject to further order of this Court.

IT IS SO ORDERED.

###