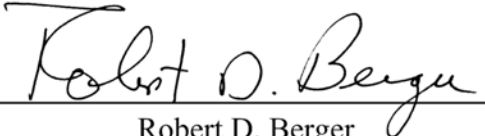




The relief described hereinbelow is **SO ORDERED**.

SIGNED this 29th day of April, 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.

Chapter 11

Case No. 16-21142

Jointly Administered

**THE REVOCABLE TRUST OF JOHN Q.
HAMMONS DATED DECEMBER 28, 1989
AS AMENDED AND RESTATED,**

Adv. No. 18-6055

Plaintiff,

v.

**JWJ HOTEL HOLDINGS INC. *f/k/a*
AJJ HOTEL HOLDINGS, INC., *et al.*,**

Defendants.

**ORDER DENYING AJJ'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING THE JQH TRUST'S MOTION FOR SUMMARY JUDGMENT AS
TO COUNTERCLAIMS I AND III**

When Debtors¹ filed for Chapter 11 bankruptcy in 2016, the JQH Trust owned 50% of the shares in non-debtor W&H Realty, Inc. Following the 2017 restructuring of that entity, the plaintiff JQH Trust and defendant AJJ² each owned a 50% interest in the subject of this adversary proceeding: non-debtor W&H Realty, LLC (“WHR”). This adversary proceeding has been narrowed to two of AJJ’s three counterclaims: (1) whether AJJ has a right to purchase the JQH Trust’s membership interest in WHR (Counterclaim I) and (2) whether AJJ has the right to manage WHR as its sole member (Counterclaim III). AJJ and the JQH Trust have filed cross-motions for summary judgment.³ For the reasons stated below, AJJ’s motion will be denied and the JQH Trust’s motion will be granted.

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010). There is no genuine dispute “unless the evidence, construed in the light most favorable to the nonmoving party, is such that a reasonable jury could return a verdict for the nonmoving party.” *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

¹ “Debtors” are the Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated (the “JQH Trust”) and 75 of its affiliates.

² “AJJ” is JWJ Hotel Holdings Inc., formerly known as AJJ Hotel Holdings, Inc.

³ ECF 92; ECF 99. The Court rejects AJJ’s attempt to characterize the JQH Trust’s motion as “delay” or “a second bite at the apple”; as the JQH Trust correctly points out, “[t]he relief the JQH Trust requests is only possible at this stage if the JQH Trust makes its own motion seeking summary judgment.”

248 (1986)). Because the parties' cross-motions for summary judgment address the same issues, and because AJJ and the JQH Trust agree that there are no disputed issues of fact remaining in this proceeding, this order will address both motions together.

1. **Background**

John Q. Hammons and Roy E. Winegardner were hotel developers.

Hammons, who created the JQH Trust in 1989, died in 2013; Winegardner, in 2009.

When the JQH Trust filed for bankruptcy in 2016, it held 50% of the stock in W&H Realty, Inc., a subchapter S corporation; three trusts formed for the separate benefit of Winegardner's widow and two daughters (the "**Winegardner Trusts**") held the other 50%. Because the JQH Trust's eligibility for the "flow-through" tax treatment afforded by subchapter S was set to expire on May 26, 2017 (four years after Hammons's death), the parties decided to convert W&H Realty, Inc., into an LLC.⁴ To do so, the JQH Trust and the Winegardner Trusts formed AJJ Hotel Holdings, Inc., and contributed all of their stock in W&H Realty, Inc., to AJJ. On May 17, 2017, AJJ's shareholders converted W&H Realty, Inc., into WHR. AJJ then distributed a 50% membership interest in WHR to the JQH Trust.

2. **Undisputed Facts**

On May 18, 2017, AJJ and the JQH Trust executed WHR's First Amended and Restated Operating Agreement (the "**Operating Agreement**"). The parties

⁴ See generally Case No. 16-21142, [ECF 920](#) (Debtors' Motion for Authority to Convert Certain S-Corporation Debtor and Non-Debtor Entities to Limited Liability Companies).

exchanged multiple drafts of the Operating Agreement before they executed the final version.⁵

After the Court terminated Debtors' exclusive period in which to file and solicit acceptance of Chapter 11 plans,⁶ creditor JD Holdings, L.L.C., filed Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors (the "Plans") on March 30, 2018.⁷ Article VII.A of the Plans states:

The Plans contemplate a sale of all Assets (including Equity Interests) free and clear of all Liens and Claims (except as set forth in these Plans) pursuant to Bankruptcy Code sections 105, 363, 365 and 1129 (among others) to JD Holdings pursuant to the APA. . . . In consideration, on or shortly after the Effective Date, JD Holdings shall pay all Allowed Claims in full in Cash

. . . The APA contemplates a series of closings, starting on the Effective Date and ending no later than the Outside Closing Date. Notwithstanding the foregoing, if JD Holdings is unable to obtain a required consent for certain Assets, a waiver of a third-party termination right that would be triggered by the sale of certain Assets or consent

⁵ The prior drafts of the Operating Agreement, which the JQH Trust cites in its motion for summary judgment, are attached to the Zluticky Affidavit. See [ECF 100-5](#). AJJ "disputes" that Mr. Zluticky, counsel for the JQH Trust, "can be a competent witness as he was not an author of the original drafts of the Operating Agreement and is not listed as a recipient or sender on any of the emails referenced in his Affidavit." The Court rejects AJJ's argument because [Fed. R. Civ. P. 56\(c\)\(1\)\(A\)](#) only requires citation to "materials in the record"; it does not necessarily require the cited evidence to be admissible *in its present form*. If AJJ believed that the materials attached to the Zluticky Affidavit were not admissible in *any* form, it could have made an argument to that effect under Rule 56(c)(1)(B) or (c)(2). Notably, AJJ has not done so. The Court further notes that Exhibit B to the Kammerer Affidavit contains multiple emails in which Mr. Kammerer was neither the sender nor a recipient. See [ECF 94-2](#).

⁶ Case No. 16-21142, [ECF 1750](#).

⁷ Case No. 16-21142, [ECF 1946](#) (Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C.).

for the assumption of the Assumed Loans, by such Outside Closing Date (the “Delayed Assets”), but all Allowed Claims existing as of the Outside Closing Date have been paid by the Outside Closing Date, Debtors shall retain such Delayed Assets free and clear of all Liens and Claims until such time that such Delayed Assets are transferrable to JD Holdings. In such case, all economic benefits and interests from such Delayed Assets shall inure to the benefit of JD Holdings pending such closing on the Delayed Assets.

JD Holdings filed a “Plans Supplement” on April 20, 2018.⁸ Exhibit A to the Plans Supplement was an asset purchase agreement: the “APA” referenced in Article VII.A of the Plans. Section 1.1 of the APA, in which Debtors are the “Sellers” and JD Holdings is the “Purchaser,” provides:

Pursuant to section 105, 363, 365 and 1129 of the Bankruptcy Code and on the terms and subject to the conditions set forth herein and in the Confirmation Order, on the Closing Date or Closing Dates as set forth herein, Sellers agree to sell and convey unto Purchaser, and Purchaser agrees to purchase and accept from Sellers, . . . the following:

. . .

(s) All of Sellers’ Equity Interest (as defined in the Plan), in . . . the entities set forth on Schedule 1.1(s)(2) attached hereto (the “Acquired JV Entities”)

One of the “Acquired JV Entities” listed on Schedule 1.1(s)(2) is “W&H Realty, LLC (50%).” However, Exhibit K to the Plans Supplement lists WHR among “Assets to Remain with JQH Trust Temporarily,” stating that “[t]he conveyance of the JQH

⁸ Case No. 16-21142, [ECF 2050](#) (Notice of Filing of Plans Supplement in Connection with the Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C.).

Trust's 50% ownership interest in W&H Realty, LLC and its subsidiaries is subject to resolution or settlement of certain disputes between JQH Trust and AJJ Holdings, LLC," and that "this asset may remain in the JQH Trust until the resolution or settlement of such dispute."

The Plans were confirmed on May 11, 2018.⁹ Paragraph 7(b) of the confirmation order contains language similar to that in Article VII.A of the Plans:

The APA contemplates a series of closings starting on the Effective Date and ending no later than the Outside Closing Date. Notwithstanding the foregoing, if JD Holdings is unable to obtain a required consent for certain Assets, a waiver of a third-party termination right that would be triggered by the sale of certain Assets, or consent for the assumption of the Assumed Loans, by such Outside Closing Date (the "Delayed Assets"), . . . the Debtors shall retain such Delayed Assets free and clear of all Liens and Claims until such time that such Delayed Assets are transferrable to JD Holdings, all as set forth in more detail in section 7.1(c) of the APA. In such case, all economic benefits and interests from such Delayed Assets shall inure to the benefit of JD Holdings pending such closing on the Delayed Assets and the Debtors and JD Holdings shall execute such agreements as are necessary to effect and evidence that such benefits inure to the benefit of JD Holdings. [page 23]

Paragraph 15 of the confirmation order approves certain settlement agreements, including one with AJJ. Paragraph 6 of the JQH Trust's settlement agreement with AJJ¹⁰ states in turn:

⁹ Case No. 16-21142, [ECF 2188](#) (Corrected Order Confirming Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C.).

¹⁰ Case No. 16-21142, [ECF 2231](#) (Attachment to Corrected Order Confirming Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C.).

At such time as the [JQH Trust] advises AJJ of the mechanism or procedure by which it intends to transfer [its] interests in WHR to JD Holdings . . . , AJJ reserves all rights to dispute such mechanism or procedure, including, but not limited to, asserting their right to purchase the [JQH Trust's] interests in WHR under the WHR Operating Agreement and/or the failure of such mechanism or procedure to comply with the WHR Operating Agreement.

On July 25, 2018, in a brief seeking to enjoin AJJ from pursuing a separate lawsuit in Ohio against Jacqueline Dowdy, Gregory Groves, and WHR¹¹ on the ground that the lawsuit was barred by exculpation provisions in the Plans and the confirmation order, the JQH Trust argued:

Each of the acts Ms. Dowdy or Mr. Groves took that forms the basis for the claims asserted in the AJJ Action were in an effort to implement and effectuate the Plan and the Plan Transactions, specifically, the transfer of the JQH Trust's in [sic] WHR to JD Holdings and the transfer of all economic benefits of the JQH Trust's in [sic] to JD Holdings, which occurred on the Effective Date.

On July 30, 2018, counsel for the JQH Trust represented to the federal district court in Ohio:

We agreed that we would disclose to AJJ the mechanism by which the trust will transfer its interest [in WHR] to JD Holdings, and we will do that. But we haven't done

¹¹ AJJ brought the Ohio case against Dowdy in her capacity as the JQH Trust's co-manager of WHR and against Dowdy and Groves in their capacities as co-successor trustees of the JQH Trust. In the Ohio case, AJJ alleged that Dowdy and Groves had breached their fiduciary duty to WHR; AJJ sought to appoint a receiver over WHR and to enjoin the JQH Trust from appointing Daniel Abrams to replace Dowdy as the JQH Trust's co-manager of WHR. AJJ voluntarily dismissed the case after the JQH Trust successfully removed it to federal district court and transferred venue to the District of Kansas.

that yet and we haven't transferred the interest to JD Holdings yet.

...

... [W]e're trying to figure out the best way to transfer the interest to JD Holdings that would maximize their rights under the LLC without triggering the right of first refusal.

On October 15, 2018, counsel for the JQH Trust informed the Court that "we really do want to transfer this interest [in WHR] and exit Jackie and Gregg from this process and close the trust case."

On March 8, 2019, in a separate contested matter between JD Holdings and Debtors' financial advisor, UBS Securities LLC,¹² this Court held that both a "Restructuring Transaction" and a "Sale Transaction," as those terms were defined in the letter agreement between Debtors and UBS, had occurred for purposes of UBS's fee application.¹³ In the order, the Court observed that "[a]ll economic benefits from . . . all . . . assets whose transfer under the Joint Plans has been delayed by litigation (such as Debtors' interest in W&H Realty, LLC), are now flowing to JD Holdings." Later in the order, the Court observed that "the economic

¹² Case No. 16-21142, [ECF 2640](#) (Memorandum Opinion and Order).

¹³ According to AJJ, the Court "held that all of the Debtors' assets (including the JQH Membership Interest) were sold pursuant to the APA," and that "[t]herefore under *res judicata*, the Debtor Trust cannot dispute, and is bound by this Court's earlier ruling, that a sale of all assets, including the JQH Membership Interest has occurred." This characterization is incorrect because (1) the Court's ruling was about the meaning of defined terms in Debtors' letter agreement with UBS, not whether the JQH Trust's interest in WHR had been "sold" to JD Holdings, and (2) the JQH Trust was not a party to the UBS matter in any event.

benefits from all assets, even those to which JD Holdings does not yet have legal title, are flowing to JD Holdings under the Joint Plans.”

On April 3, 2019, AJJ (as JWJ Hotel Holdings, Inc.) and the JQH Trust stipulated¹⁴ in arbitration in Ohio that, inter alia:

[D]issolution, winding up, and liquidation of the assets of W&H Realty LLC (“WHR”) under the terms of the First Amended and Restarted Operating Agreement of [WHR] is warranted and justified; and that the Members’ agreement to dissolve, wind up and liquidate the assets of WHR set forth herein cannot be revoked or withdrawn for any reason.

The assets of WHR are currently being liquidated as part of a dissolution process approved by, and under the supervision of, the Ohio arbitrator.

On July 22, 2020, counsel for the JQH Trust informed the Court that “[WHR] is going to dissolve, it will liquidate, and so we will not transfer to JD Holdings. It will be converted to cash and the cash will be distributed to the members in a final distribution and both parties will go their separate ways.”

As of July 24, 2020, the only assets left in WHR were cash and a 25% interest in an entity that owned vacant land in Hartford, CT.¹⁵

¹⁴ [ECF 100-9](#) (Stipulation Regarding Issues in Arbitration and Briefing Schedule).

¹⁵ AJJ denies this statement on the ground that WHR’s remaining assets also “include receivables that are intangible and not ‘cash.’” However, AJJ acknowledges that its objection “is not a material fact or in any way relevant to the legal issues before this Court.”

3. **AJJ does not have the right to purchase the JQH Trust’s membership interest in WHR under § 1.6 of the Operating Agreement because only WHR, not its members, is bound by the “Corporation Documents” under § 1.6.**

Section 12.3 of the Operating Agreement provides, and the parties agree, that the Operating Agreement is governed by Ohio law. On March 10, 2020, this Court held that § 6.5 of the Operating Agreement does not apply to the JQH Trust as an original member of WHR.¹⁶ AJJ now argues that it has a right to purchase the JQH Trust’s membership interest arising out of § 1.6 instead. That section of the Operating Agreement (under which WHR is the “**Company**” and its predecessor, W&H Realty, Inc., is the “**Corporation**”) provides:

The parties recognize, acknowledge and agree that the Company, by operation of law and through the prior merger of REW/JQH Holdings, Inc. into the Corporation before its conversion into the Company assumes all of the rights and obligations of the predecessor companies, including those arising under any contract to which the predecessor companies were a party. Without limitation of the scope of the previous sentence, the parties also specifically agree that the following documents (collectively the “**Corporation Documents**”) remain in force and effect and shall bind the Company through the applicable statute of limitations for any claim or right pursuant thereto regardless of any expressed termination date therein:

...

(iv) W&H REALTY, INC. Stock Purchase and Buy-Out Agreement dated as of April 16, 1993

¹⁶ [ECF 89](#).

In turn, § 1.1 of the W&H Realty, Inc. Stock Purchase and Buy-Out Agreement dated as of April 16, 1993 (“**Buy-Out Agreement**”) provides:

In the event a Shareholder desires to sell, assign, encumber, transfer or make any other disposition of all of his Shares or transfer any of his right, title or interest in all of his Shares . . .

(a) The Corporation shall have the first right to purchase the Offered Shares pursuant to and in accordance with the Terms of Proposed Sale.

(b) If the Corporation elects not to purchase the Offered Shares, then the Other Shareholders shall have the right (but not the obligation) to purchase the Offered Shares pursuant to and in accordance with the terms of the Proposed Sale.

AJJ argues that (1) the Buy-Out Agreement “remain[s] in force and effect” pursuant to § 1.6 of the Operating Agreement; (2) § 1.1 of the Buy-Out Agreement contains a right-of-purchase provision triggered by the other party’s “desire” to sell or transfer its shares in W&H Realty, Inc.; and (3) the APA conclusively demonstrates the JQH Trust’s desire to sell or transfer its membership interest in WHR; such that (4) AJJ has the right, arising out of § 1.6, to purchase the JQH Trust’s interest in WHR.

The JQH Trust responds that only WHR, not its members, is bound by the Buy-Out Agreement under § 1.6.

The Court agrees with the JQH Trust. The statement in § 1.6 that the Corporation Documents “remain in force and effect and shall bind the Company” is

ambiguous as to its intended effect on WHR's members.¹⁷ Because the statement is ambiguous, the parol evidence rule does not prohibit the Court from considering extrinsic evidence as to the contracting parties' intent. *See Ill. Controls, Inc. v. Langham*, 639 N.E.2d 771, 789 (Ohio 1994); *cf. Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920, 923 (Ohio 1989) (observing that a court's primary objective is to ascertain, and give effect to, the contracting parties' intent).¹⁸

Here, the JQH Trust has submitted undisputed evidence that, in an earlier version of the Operating Agreement, section 1.6 stated that the Corporation Documents “remain in force and effect and shall bind the Company *and its Members*” (emphasis added)—and that, having added § 6.7¹⁹ to the Operating Agreement, the parties specifically agreed to *remove* “and its Members” from § 1.6. It is thus undisputed that the JQH Trust and AJJ did not intend for WHR's members to be bound by the Corporation Documents under § 1.6. For this reason, AJJ does not have a right arising out of § 1.6 to purchase the JQH Trust's interest in WHR. Because AJJ does not have such a right, the Court will deny AJJ's motion for summary judgment as to Counterclaim I.²⁰

¹⁷ The statement is particularly ambiguous when compared to the preceding sentence, in which the Company (with no mention of its members) assumes the liabilities of its predecessor companies.

¹⁸ This is the case even though the Operating Agreement contains an integration clause at § 12.1. *See Galmish v. Cicchini*, 734 N.E.2d 782, 790 (Ohio 2000).

¹⁹ Section 6.7 provides that “no Membership Interest shall be transferred in violation of . . . any of the Corporation Documents.”

²⁰ The Court would deny AJJ's motion for summary judgment as to Counterclaim I even if § 6.5 of the Operating Agreement applied to the JQH Trust as an original Member of WHR. The record before this Court demonstrates that the JQH Trust

4. **The JQH Trust has not violated § 6.7 of the Operating Agreement because the JQH Trust has not transferred any of its rights as a member of WHR.**

Section 6.7 of the Operating Agreement provides:

Notwithstanding anything to the contrary contained in this Agreement, no Membership Interest shall be transferred in violation of any franchise agreement (or equivalent) or loan document binding the Company or any entity owned directly or indirectly by the Company or any of the Corporation Documents.

Exhibit A of the Operating Agreement defines “Membership Interest” as “[t]he rights of all Members or, in the case of an Assignee, the rights of the assigning Member in Distributions (liquidating or otherwise) and allocations of the profits, losses, income, gains, deductions and credits of [WHR].” AJJ argues that the JQH Trust transferred part of its Membership Interest in WHR by agreeing that the economic benefits of WHR would inure to the benefit of JD Holdings. However, as the JQH Trust correctly points out,²¹ AJJ’s argument conflates economic benefits and the *right* to those benefits. While there is evidence (and the JQH Trust admits) that the Trust agreed to transfer the economic *benefits* of WHR to JD Holdings, the right (*vis-à-vis* WHR) to those benefits has always remained with the JQH Trust.

was “willing to accept” an offer from JD Holdings to purchase its interest in WHR *if and only if* it could do so without AJJ attempting to exercise a right of first refusal. Because AJJ has consistently maintained that it would exercise that right, there is evidence that the JQH Trust was never “willing to accept” an offer from JD Holdings, and therefore never triggered § 6.5.

²¹ In its brief opposing AJJ’s motion for summary judgment, the JQH Trust observes that this Court’s holding in the UBS matter “recognized the distinction between receiving economic benefits and an actual transfer of economic rights and acknowledged that some assets remained with the JQH Trust under the Plan.”

Because there is no evidence that the JQH Trust has transferred any of its *rights* in WHR, there is no evidence that the JQH Trust has transferred any part of its Membership Interest in WHR. The undisputed evidence before the Court, therefore, is that the JQH Trust has not violated § 6.7 of the Operating Agreement. For this reason, and because WHR's members are not bound by the Corporation Documents under § 1.6 (see section 3 *supra*), the Court will grant the JQH Trust's motion for summary judgment as to Counterclaim I.

5. **AJJ does not have the right to manage WHR as its sole member because the JQH Trust has not transferred any of its rights as a member of WHR.**

The JQH Trust argues that Counterclaim III, in which AJJ seeks a declaration that it has the right to manage WHR as its sole member, is moot because the parties have irrevocably agreed to the liquidation of WHR, such that there is nothing left to manage. However, because AJJ argues that liquidation still requires managerial input, and because WHR still has at least one non-cash asset (a minority interest in vacant land), the Court will address Counterclaim III on the merits.

AJJ's argument that it has the right to manage WHR as its sole member hinges upon its argument that the JQH Trust has transferred some or all of its Membership Interest in WHR to JD Holdings. As stated above, because there is no evidence that the JQH Trust has transferred any of its rights in WHR, there is no evidence that the JQH Trust has transferred any part of its Membership Interest in

WHR. For this reason, the Court will grant the JQH Trust's motion for summary judgment on Counterclaim III.

6. Conclusion

For all of the foregoing reasons, the Court will (1) deny AJJ's motion for summary judgment on Counterclaims I and III and (2) grant the JQH Trust's motion for summary judgment on Counterclaims I and III.

IT IS SO ORDERED.

###