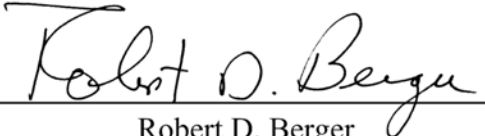




The relief described hereinbelow is **SO ORDERED**.

SIGNED this 25th day of May, 2023.


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

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

Plaintiff,

v.

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

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART
THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are cross-motions for summary judgment filed by plaintiff The Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated (the “**JQH Trust**”) and defendant JWJ Hotel Holdings Inc. f/k/a AJJ Hotel Holdings, Inc. (“**AJJ**”) on AJJ’s two remaining counterclaims in this adversary proceeding.¹ The JQH Trust’s motion for summary judgment will be granted in part as to Counterclaim Three (the remainder of which is moot) and otherwise denied. AJJ’s motion for summary judgment will be granted in part as to Counterclaim One and otherwise denied.

I. 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 Debtors² filed for bankruptcy in 2016, the JQH Trust held 50% of the stock in W&H Realty, Inc.; the other 50% was held by three trusts benefiting Winegardner’s widow and two daughters. Because the JQH Trust’s eligibility for “flow-through” tax treatment of its income from W&H Realty was set to expire on May 26, 2017 (i.e., four years after Hammons’s death), the owners of W&H Realty agreed to convert the company into an LLC.³ To do so, the JQH Trust and the three

¹ ECF 134 (AJJ); ECF 136 (the JQH Trust).

² “**Debtors**” are the JQH Trust and 75 of its affiliates.

³ *See generally* Case No. 16-21142, Debtors’ Motion for Authority to Convert Certain S-Corporation Debtor and Non-Debtor Entities to Limited Liability Companies, ECF 920.

Winegardner trusts formed AJJ Hotel Holdings, Inc., and contributed all of their stock in W&H Realty to AJJ. On May 17, 2017, AJJ's shareholders converted W&H Realty into the subject of this adversary proceeding: W&H Realty, LLC ("**WHR**"). AJJ then distributed a 50% membership interest in WHR to the JQH Trust.

II. Undisputed Facts

On May 18, 2017, AJJ and the JQH Trust executed WHR's First Amended and Restated Operating Agreement (the "**Operating Agreement**"). Section 6.5 of the Operating Agreement (the "**Purchase Right**") provides:

[I]f a Person holding, whether as an Assignee or as a substitute Member, all or any part of a Membership Interest (herein "Seller") receives a written offer (the "Offer") which Seller is willing to accept from a third Person(s) ("Offeror") to sell or transfer any or all of Seller's Membership Interest, Seller shall, within five (5) business days after receiving the Offer, provide written notice (the "Notice of Offer") to the Company, the other Members and the Co-Managers containing the identity of Offeror and all the terms and conditions of the Offer. . . . The Company shall have sixty (60) days after receiving such Notice of Offer to elect to purchase all or any part of the subject Membership Interest described in the Notice of Offer upon the terms and conditions stated in the Notice of Offer by serving written notice of such election (the "Notice of Election") upon Seller within such sixty (60) day period in the manner provided in this Agreement for serving notices. Any Membership Interest which the Company does not elect to purchase shall be subject to the right of purchase by the other Members (pro rata or in such other proportion as they may agree); such right of purchase to be exercised within sixty (60) days after the period during which the Company may serve the Notice of Election; any election to purchase by any Member shall be evidenced by a written notice (a "Member Notice of Election") served upon all other Members and the Co-

Managers. . . . If all of Seller’s Membership Interest is not subject to a Notice of Election and/or one or more Member Notice[s] of Election, Seller may thereafter sell such Membership Interest only to Offeror and only under the terms and conditions stated in the Notice of Offer. . . . Notwithstanding anything to the contrary contained in this Agreement, any Offeror who/which acquires all or any of Seller’s Membership Interest takes the same subject to the terms and conditions of this Agreement including, without limitation, of Sections 6.1, 6.2, and 6.3 and this Section 6.5 and, accordingly, any such Offeror shall hold only the rights of an Assignee as to the Membership Interest acquired thereby, shall have no right to participate in the management of the business and affairs of the Company or to become a Member and shall be admitted as a substitute Member only with the approval of all Members and each Co-Manager in their sole discretion.⁴

On March 30, 2018, after Debtors’ exclusive period in which to file Chapter 11 plans ended,⁵ creditor JD Holdings, L.L.C., proposed Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors (the “Plans”).⁶ The Plans provided that JD Holdings would pay all “Allowed Claims” against Debtors in exchange for substantially all of Debtors’ “Assets,” which included 35 hotels, 66 parcels of developed land, 64 parcels of vacant land, and 100 entities owned by the JQH Trust.⁷ However, as to certain “**Delayed Assets**” (which

⁴ Operating Agreement § 6.5, ECF 1-2.

⁵ See Case No. 16-21142, Order Terminating Debtors’ Exclusivity Periods, ECF 1750.

⁶ See Case No. 16-21142, Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C., ECF 1946; see also Notice of Filing of Plans Supplement, ECF 2050.

⁷ See Case No. 16-21142, Plans Supp. Ex. A, ECF 2050. JD Holdings also agreed to contribute cash and certain assets to a charitable trust, to subordinate its own \$495,938,161 allowed claim to the payment of all other allowed claims, to reinstate

term includes the JQH Trust's interest in WHR), the Plans provided that (1) "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" and (2) in the meantime, "all economic benefits and interests" from such Delayed Assets "shall inure to the benefit of JD Holdings."⁸

AJJ objected to confirmation.⁹ Its objection was resolved by a settlement agreement (the "**Settlement**") in which AJJ and the JQH Trust agreed, *inter alia*, that (1) the Operating Agreement was not an "executory contract" and (2):

At such time as the [JQH Trust] advises AJJ of the mechanism or procedure by which it intends to transfer the [JQH Trust's] 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.¹⁰

The Plans were confirmed on May 11, 2018. The Settlement was incorporated into the confirmation order.¹¹

and/or assume loans, and to assume a variety of contracts and leases, including 15 ground leases and 40 facility agreements. *See id.*

⁸ Case No. 16-21142, Plans Art. VII.A, ECF 1946; Plans Supp. Ex. K, ECF 2050; Confirmation Order ¶ 7(b), ECF 2188.

⁹ *See* Case No. 16-21142, Objection of AJJ Hotel Holdings, Inc. to Modified Amended Joint and Consolidated Plans of Reorganization for All Debtors (ECF No. 1946), ECF 2015.

¹⁰ Case No. 16-21142, ECF 2231, Ex. A.

¹¹ *See* Case No. 16-21142, Confirmation Order ¶ 15, ECF 2188. To be clear: all parties to this case—including AJJ—understood at confirmation that all economic benefits from the JQH Trust's interest in WHR would inure to the benefit of JD Holdings pending the JQH Trust's announcement of a "mechanism or procedure" by

The JQH Trust filed this adversary proceeding on July 25, 2018.¹² WHR's assets at that time included three hotels in Lexington, Kentucky; Cincinnati, Ohio; and Columbus, Ohio; the Chicago Marriott hotel; a 25% minority interest in an entity that owns vacant land in Hartford, Connecticut; claims; and cash.

The following month, AJJ filed an answer that asserted three counterclaims against the JQH Trust.¹³ Counterclaims One and Three, which include a request for “such other and further relief as the Court deems just and proper” and which are discussed in more detail below, are the only claims remaining in this adversary proceeding.¹⁴

The JQH Trust never announced a mechanism by which its interest in WHR would be transferred to JD Holdings. Instead, it went with AJJ to arbitration. On April 3, 2019, AJJ (by then known as JWJ Hotel Holdings, Inc.) and the JQH Trust agreed to liquidate and dissolve WHR. On April 10, 2019, they stipulated that:

[D]issolution, winding up, and liquidation of the assets of W&H Realty LLC (“WHR”) under the terms of the [Operating Agreement] is warranted and justified; and that the Members’ agreement to dissolve, wind up and

which the interest itself would be transferred to JD Holdings. AJJ's current assertion that “[o]nly three months after the Court confirmed the [Plans], AJJ learned money had begun flowing to JD Holdings, leading AJJ to file its counterclaims in this action,” Def.'s Stmt. Additional Mat. Facts ¶ 31, ECF 141—as if the Plans did not explicitly so provide—mischaracterizes the history of this case.

¹² ECF 1.

¹³ ECF 15.

¹⁴ The Court dismissed Counterclaim Two on March 27, 2019, and granted AJJ's motion for judgment on the pleadings as to the JQH Trust's claims (but not Counterclaims One and Three) on March 10, 2020. *See* ECF 33; ECF 89.

liquidate the assets of WHR set forth herein cannot be revoked or withdrawn for any reason.¹⁵

AJJ and the JQH Trust both submitted bids for WHR's three hotels in Kentucky and Ohio. The arbitrator selected the JQH Trust's bids as the winning ones.¹⁶ On September 27, 2019, WHR sold the three hotels to the JQH Trust for a total of \$61,800,000.¹⁷ The following year, WHR sold the Chicago Marriott to Hoffmann Estates Hotel Group, LLC, for \$8,500,000. WHR distributed the proceeds from sale of the four hotels equally to the JQH Trust (whose distributions inured to the benefit of JD Holdings) and AJJ.¹⁸

On April 29, 2021, this Court entered summary judgment in favor of the JQH Trust as to Counterclaims One and Three.

On September 1, 2021, WHR filed a Certificate of Dissolution with the Ohio Secretary of State.¹⁹ WHR now owns nothing but cash and the potential to receive a nominal tax refund.

¹⁵ Stipulation Regarding Issues in Arbitration and Briefing Schedule, ECF 100-9.

¹⁶ The JQH Trust apparently bid "the amount AJJ offered 'plus \$200,000' per hotel." *See* JQH Trust's Mem. 30 n.11, ECF 143.

¹⁷ The JQH Trust's statement of material facts appears to have flipped some numbers: it states that the Trust paid \$9,400,000 for the Cincinnati hotel (which it says was appraised at \$18,900,000), and that the Trust paid \$19,200,000 for the Columbus hotel (which it says was appraised at \$7,300,000). *See* JQH Trust's Stmt. Undisputed Mat. Facts ¶¶ 40, 48.

¹⁸ According to AJJ, JD Holdings has received \$32,428,000 so far; it is unclear whether the JQH Trust disagrees with that dollar amount. *Compare* Def.'s Stmt. Undisputed Mat. Facts ¶ 64, ECF 135, *with* JQH Trust's Resp. Stmt. Undisputed Mat. Facts ¶ 64, ECF 142.

¹⁹ The JQH Trust did not include citations to the record for some of the facts listed in its statement of material facts. *See, e.g.,* Stmt. Undisputed Mat. Facts ¶¶ 1-4, ECF 137. AJJ argues that such facts "should be stricken" even though AJJ does not

On January 18, 2022, the United States District Court for the District of Kansas reversed this Court’s summary judgment for the JQH Trust on Counterclaims One and Three, holding:

[U]nder [the] Operating Agreement and Ohio law, a membership interest consisting of the right to distributions may be transferred even while the transferor member retains the membership and other membership rights.

That is exactly what occurred here. . . . [A]lthough the Trust retained (and has not yet transferred) its full membership in the LLC and the entirety of its membership rights, all economic benefits from the LLC inured in – and thus were transferred to – JDH (who has in fact been receiving the Trust’s share of distributions made by the LLC). Section 6.5 applies to the transfer of a Membership Interest as defined by [] the Operating Agreement, which means that Section 6.5 is triggered by any transfer of a member’s right to receive LLC distributions. JDH has been given the right to receive the LLC distributions; thus, as a matter of law, a transfer of the Trust’s Membership Interest has taken place.

...

The Court thus concludes as a matter of law that a transfer of the Trust’s Membership Interest has occurred, and that AJJ’s purchase right under Section 6.5 of the Operating Agreement has therefore been triggered.”²⁰

The District Court remanded the case (1) “for further proceedings on [Counterclaim One] to the extent based on Section 6.5, consistent with this opinion, so that the

actually dispute the majority of the facts themselves. *See, e.g.*, Resp. to Trust’s Stmt. Undisputed Mat. Facts ¶¶ 1-4, ECF 141. To the extent AJJ does not actually dispute such facts, the Court will treat them as undisputed for purposes of the JQH Trust’s motion. *Cf.* Fed. R. Civ. P. 56(e)(2) (permitting court to do so).

²⁰ Mem. Order 15-16, ECF 124.

bankruptcy court may in its discretion consider any other defense asserted by the Trust” and (2) “for further consideration of [Counterclaim Three] after AJJ’s purchase right claim ([Counterclaim One]) has finally been resolved.”²¹ The parties’ cross-motions to this Court for summary judgment on Counterclaims One and Three followed.

III. Analysis

As to Counterclaim One, AJJ now seeks a judgment that “AJJ’s right to purchase the JQH Membership Interest [in WHR] became ripe on the Effective Date of the [Plans] – May 17, 2018, and AJJ is entitled to damages resulting from the JQH Trust not allowing AJJ to exercise that right.”²² The JQH Trust argues:

- (1) The Purchase Right is unenforceable because it “limits the trustee’s ability to maximize the value of JQH Trust assets”;
- (2) The Purchase Right is unenforceable because JD Holdings took the transferred interest in WHR “free and clear” of any claims under § 363(f)(4);
- (3) AJJ cannot recover damages because AJJ did not timely file an administrative claim; and
- (4) AJJ cannot recover damages because it has not suffered any damages.²³

As to Counterclaim Three, AJJ now seeks a judgment that “AJJ is the sole member of [WHR] as of the Effective Date of the [Plans].”²⁴ The JQH Trust argues

²¹ Mem. Order 15-16, ECF 124.

²² AJJ’s Mot. Summ. J. 1, ECF 134.

²³ JQH Trust’s Mem. Supp. Summ. J. 19, 25, 26, 29, ECF 137.

²⁴ AJJ’s Mot. Summ. J. 1, ECF 134.

that AJJ's request (1) is moot and (2) seeks relief prohibited by the Operating Agreement.²⁵

Fed. R. Civ. P. 56 applies to this adversary proceeding via Fed. R. Bankr. P. 7056. Under Fed. R. Civ. P. 56(a), a 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. There is no genuine dispute of material fact “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).

The JQH Trust and AJJ do not appear to dispute the facts themselves. Their disputes are legal and—unfortunately—editorial.²⁶

A. Maximizing Asset Value (Counterclaim One)

First, citing *In re Mr. Grocer*, 77 B.R. 349 (Bankr. D.N.H. 1987), and *In re Adelpia Communications Corp.*, 359 B.R. 65 (Bankr. S.D.N.Y. 2007), the JQH Trust argues that the Purchase Right is unenforceable because it “limits the trustee’s ability to maximize the value of the JQH Trust’s assets.”²⁷ This argument fails because (1) both *Mr. Grocer* and *Adelpia* relied on 11 U.S.C. § 365(f) in

²⁵ JQH Trust’s Mem. Supp. Summ. J. 30, 31, ECF 137.

²⁶ *Compare, e.g.*, Def.’s Resp. to JQH Trust’s Mot. Summ. J. 14, ECF 141 (“The JQH Trust’s audacity knows no bounds.”), *with, e.g.*, JQH Trust’s Reply Supp. Summ. J. 17, ECF 143 (“The space devoted to this hollow, baseless rhetoric would have been more appropriately spent on the actual issues before the Court”); *see also* Def.’s Stmt. Mat. Facts ¶ 60, ECF 135 (“to add insult to injury”); Def.’s Reply 10, ECF 144 (“shameless”); *id.* at 11 (“ridiculous”).

²⁷ *See* JQH Trust’s Mem. Supp. Summ. J. 19-24, ECF 137.

declining to enforce the rights-of-first-refusal at issue in those cases; (2) section 365(f) only applies to executory contracts and unexpired leases; and (3) the Operating Agreement, which the parties executed post-petition, is not an executory contract or unexpired lease. *See* 11 U.S.C. § 365(f) (applying to executory contracts and unexpired leases); *supra* page 5 (noting parties’ agreement that Operating Agreement was not an executory contract).

The JQH Trust argues that the reasoning of *Mr. Grocer* and *Adelphia* extends to post-petition contracts:

In both cases, the court based its holding on concerns that due to the nature of complex, multi-asset sales, in many such circumstances enforcing rights of first refusal as to one subset of assets would have a chilling effect and interfere with the purpose of maximizing the value of the debtors’ assets, and where allocation was not simple nor done by the parties, it presented another challenge vitiating against enforcement.²⁸

But even if the concerns of *Mr. Grocer* and *Adelphia* extend to post-petition ROFRs, the statutory authority for those cases—namely, section 365(f)—does not. *See Collier on Bankruptcy* ¶ 365.02[2][e] (Richard Levin & Henry J. Sommer eds., 16th ed.) (“Section 365 applies only to a contract or lease in existence at the commencement of the case.”). Without § 365(f), *Mr. Grocer* and *Adelphia* do not provide a basis for nonenforcement of a post-petition ROFR, even in the context of a multi-asset sale. *Cf. Butner v. United States*, 440 U.S. 49, 55 (1979) (“Property interests are created and defined by state law. Unless some federal interest requires

²⁸ *See* JQH Trust’s Reply Supp. Summ. J. 20, ECF 143.

a different result, there is no reason why such interests should be analyzed differently simply because an interested party is in bankruptcy.”).²⁹

B. “Free and Clear” (Counterclaim One)

Second, citing *Jubber v. Bird (In re Bird)*, 577 B.R. 365 (B.A.P. 10th Cir. 2017), and *In re Railyard Company*, 572 B.R. 766 (Bankr. D.N.M. 2017), the JQH Trust argues that the Purchase Right was “in bona fide dispute” when the Plans were confirmed, such that JD Holdings therefore took the JQH Trust’s interest in WHR “free and clear” of the Purchase Right under 11 U.S.C. § 363(f)(4). This argument fails because the transfer at issue here took place pursuant to a confirmed Chapter 11 plan, not § 363. *Cf. In re Golf, L.L.C.*, 322 B.R. 874, 877 (Bankr. D. Neb. 2004) (“Section 363(f) is not operational once the plan is confirmed.”).³⁰ Moreover, even if § 363(f) applied to the transfer at issue, AJJ would

²⁹ Nor is it apparent that enforcement of post-petition ROFRs would decrease the overall value of bankruptcy estates (and thus distributions to creditors). Although the ROFR itself may have a “chilling effect” on later bidding for estate assets, *see Mr. Grocer*, 77 B.R. at 353, a rational trustee or debtor-in-possession will not grant a ROFR unless the estate receives some benefit in return—and the grantee will have no incentive to participate in that transaction unless the ROFR is enforceable. Here, for example, when the JQH Trust granted AJJ a post-petition ROFR, it preserved its own eligibility for “flow-through” tax treatment of its income from WHR. Either way, enforcement of *this* post-petition ROFR will not decrease distributions to creditors in the JQH Trust’s bankruptcy case—in which a 100% plan funded by JD Holdings has already been confirmed.

³⁰ *See also* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 236 (2002):

The Bankruptcy Code provides two separate and distinct sets of provisions under which a Chapter 11 debtor or trustee may sell property free and clear of claims or interests. Sections 363(b) and 363(f) govern sales prior to plan approval and impose only the Bankruptcy Code’s minimal requirements for notice and a hearing. Sections

have been entitled to adequate protection of its interest under § 363(e)³¹—i.e., AJJ’s reservation-of-rights in the Settlement. Either way, § 363(f)(4) does not preclude an award of damages to AJJ.

C. Administrative Expense Claim (Counterclaim One)

Third, the JQH Trust argues that AJJ cannot recover damages because AJJ did not file an administrative expense claim prior to the bar date established by the Plans.³² This argument fails because (a) the JQH Trust provides no support for its argument that AJJ’s damages (if any) *are* an administrative expense and (b) AJJ’s reservation of rights (in the Settlement, which was incorporated into the order confirming the Plans) takes precedence over the Plans’ more general bar date. *Cf. Lacy v. FDIC (In re Lacy)*, 183 B.R. 890, 892 n.1 (Bankr. D. Colo. 1995) (characterizing confirmed plan as “new contract”); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474, 480 (10th Cir. 1996) (stating that specific provisions in a contract take precedence over more general ones).

1123(a)(5)(D) and 1141(c) govern sales made a part of a plan of reorganization confirmed after extensive disclosure and a multiple hearing process.

³¹ See 11 U.S.C. § 363(e) (“Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.”).

³² See JQH Trust’s Mem. 26, ECF 137; *see also* Case No. 16-21142, Plans Art. I.A(3), ECF 1946 (providing that “Administrative Claims Bar Date” is “thirty (30) days after the Effective Date”). Neither the Bankruptcy Code nor the Bankruptcy Rules provide a deadline for filing administrative expense claims. *See Collier on Bankruptcy* ¶ 503.02[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).

D. Damages (Counterclaim One)

Fourth, the JQH Trust argues that AJJ has not suffered any damages.

Under Ohio law, expectation damages for breach of a ROFR are measured by the difference between the third-party offer and the fair market value of the property at the time of the breach. *See Cincinnati Dev. III, LLC v. Cincinnati Terrace Plaza, LLC*, Nos. 22-3303/3367, 2023 WL 2487348, at *11 (6th Cir. Mar. 14, 2023) (per curiam). “For fair market value, [i]t has been held that when the sale of real estate after a breach of contract is made within a reasonable time and at the highest price obtainable after the breach, it is evidence of the market value on the date of the breach.” *Id.* (quoting *Triangle Props., Inc. v. Homewood Corp.*, 3 N.E.3d 241, 254 (Ohio Ct. App. 2013)) (alteration in original). In other words:

$$\text{Damages} = \text{Fair Market Value} - \text{Offer Price}$$

and

$$\text{Sale Price} = \text{Fair Market Value}$$

Here, WHR’s assets were sold and the proceeds distributed to AJJ and the JQH Trust (whose distributions inured to the benefit of JD Holdings). Thus:

$$\text{Sale Price} = \text{Distributions} = \text{Fair Market Value}$$

In arguing that AJJ has not suffered any damages, the JQH Trust reasons:

AJJ claims that it should have had a right to purchase the 50% of WHR it did not own and thus own 100% of these real estate assets. Because the offer AJJ would have been theoretically matching was part of the Plan[s], any allocation would have been at or above fair market value. Thus, for AJJ’s damage claim to be valid, and, indeed, for this case to proceed, the amounts AJJ received from the liquidation of these assets would have to be less than fair

market value. But the amounts AJJ has received from the sale of the hotels are unequivocally *more* than fair market value, eclipsing the appraisal values by more than \$4 million³³

The JQH Trust thus assumes that (1) JD Holdings paid more than fair market value for Debtors' assets under the Plans, (2) the distributions from the liquidation of WHR's assets exceeded the fair market value of those assets, and (3) WHR would not have been liquidated if the Plans had not been confirmed. But the JQH Trust points to no evidence of (1) or (3)—and (2) is inconsistent with the statement above that Distributions = Fair Market Value. For those reasons, the JQH Trust's motion does not establish that AJJ suffered no damages.

In its own motion, AJJ argues that its damages are \$5,117,000, which is the difference between the Distributions (\$32,428,000, according to AJJ) and the appraised value of the JQH Trust's interest in WHR as of 2016 (\$27,311,000, according to the JQH Trust's disclosure statement).³⁴ The Court agrees with AJJ that the Distributions, which represent the fair market value of the Trust's interest, are the starting point when calculating AJJ's damages (if any). The issue—because the record contains no evidence that JD Holdings offered to buy the JQH Trust's interest in WHR for its appraised value (or offered to pay any particular amount for any particular asset)—is how to calculate JD Holdings' offer price for the transferred interest.

³³ JQH Trust's Mem. Supp. Summ. J. 29, ECF 137..

³⁴ Def.'s Mem. Supp. Summ. J. 27, ECF 135.

The Court will calculate (or, rather, approximate) that Offer Price as a percentage of the total amount paid by JD Holdings under the Plans. To find that percentage, the Court turns to Appendix 4 of Debtors' disclosure statement, which contains "values data" for all of Debtors' assets. That data, which includes the \$27,311,000 appraisal value cited by AJJ, is the only evidence before the Court of the value of Debtors' assets relative to one another.

According to Appendix 4, the JQH Trust's 50% interest in WHR represented $\$27,311,000/\$1,790,013,138.80$,³⁵ or 1.525743 percent, of Debtors' total asset value. And if the JQH Trust's interest in WHR represented 1.525743 percent of Debtors' total asset value, then JD Holdings' offer price for that interest is best represented by 1.525743 percent of the total amount paid by JD Holdings under the Plans.

Thus:

$$\text{Damages} = \text{Distributions} - 0.01525743(\text{Total Price}),$$

where "**Total Price**" equals the sum of (a) all Allowed Claims paid by JD Holdings; (b) all loans reinstated and/or assumed by JD Holdings;³⁶ (c) JD Holdings' own \$495,938,161 claim, which it subordinated to the payment of all other Allowed Claims; (d) JD Holdings' contributions to the Charitable Trust described in Article V of the Plans; and (e) any other amounts paid by JD Holdings under the Plans. If

³⁵ See Case No. 16-21142, Disclosure Statement App. 4, ECF 1583.

$\$792,029,825.73 + \$960,099,253.07 + \$34,695,753 + \$2,805,979 + \$382,328 = \$1,790,013,80.$

³⁶ Loans were paid as Allowed Claims if they were neither reinstated nor assumed by JD Holdings. See Case No. 16-21142, Plans 13 n.4, ECF 1946.

the parties cannot stipulate to the amounts of the Total Price and the Distributions, the Court will conduct an evidentiary hearing to determine them.

E. Willing and Able to Exercise (Counterclaim One)

AJJ argues that whether it was actually able to exercise the Purchase Right in 2018 is “irrelevant”³⁷ to whether it may recover damages now. But under Ohio law as recited by the Sixth Circuit, that is not the case. If AJJ cannot provide some evidence that it would—and could—have paid 1.525743 percent of the Total Price for the JQH Trust’s interest in WHR in 2018, then expectation damages would be an “improper windfall.” See *Cincinnati Development*, 2023 WL 2487348, at *12; see also *Christiansen v. Schuhart*, 193 Ohio App. 3d 89, 100 (Ohio Ct. App. 2011) (affirming determination that plaintiffs were not entitled to damages for breach of ROFR where evidence showed plaintiffs were not interested in buying property at issue). The Court is cognizant that almost five years have passed since the Plans were confirmed. But while the passage of time might affect the quantum and type of evidence AJJ is able to provide, it does not excuse AJJ from providing any evidence at all—particularly in light of AJJ’s prior representations to this Court, in March 2018, that AJJ was “primarily a passive investor with limited resources” that “[did] not have the funds, financing, or interest in proceeding” with a different transaction involving WHR.³⁸

³⁷ AJJ’s Mem. Supp. Summ. J. 24, ECF 135.

³⁸ Case No. 18-6022, ECF 21 at 8, 10. On September 17, 2018, AJJ also stated that “as of October 15, [AJJ] will owe the federal government approximately \$3 million

The issues of AJJ's willingness and ability in 2018 to pay 1.525743 percent of the Total Price will therefore be set for evidentiary hearing.

F. Management and Membership (Counterclaim Three)

The JQH Trust argues that Counterclaim Three is moot because “both [AJJ] and the JQH Trust have given up any right” to manage WHR and “there is simply nothing left [in WHR] to manage.”³⁹ It is undisputed that the parties' stipulation to liquidate and dissolve WHR is irrevocable and that all of WHR's manageable assets have been liquidated. Under these undisputed facts, Counterclaim Three is now moot as it relates to the management of WHR.⁴⁰

As to the remainder of Counterclaim Three, AJJ seeks a judgment that “AJJ is the sole member of [WHR] as of the Effective Date of the [Plans].”⁴¹ AJJ argues that under Ohio Rev. Code § 1705.18, which provides that “an assignor ceases to be a member upon assignment of all the assignor's membership interest,” “the JQH Trust has relinquished its membership and managerial rights and powers as of the

in taxes, and they don't have the cash to pay it.” Case No. 16-21142, Hearing Tr. 7:21-24, Sep. 17, 2018, ECF 2699.

³⁹ JQH Trust's Mem. Supp. Summ. J. 30-31, ECF 137.

⁴⁰ Because the management issues are now moot, the Court does not reach the JQH Trust's argument that AJJ's requested relief would violate § 9.1 of the Operating Agreement (which provides that “[t]here shall always be two (2) Co-Managers”). *Cf. WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1183 (10th Cir. 2012) (observing that mootness “is a jurisdictional doctrine originating in Article III's ‘case’ or ‘controversy’ language”).

⁴¹ Def.'s Mot. Summ. J. 1, ECF 134. According to AJJ, “the JQH Trust continues to prosecute claims in the Ohio arbitration that only a member has standing to prosecute.” Def.'s Resp. to JQH Trust's Mot. Summ. J. 35, ECF 141.

Effective Date” of the Plans.⁴² But the ruling AJJ seeks is inconsistent with that of the District Court, which held that the Plans did *not* transfer all of the JQH Trust’s membership interest to JD Holdings:

[U]nder the Operating Agreement and Ohio law, a membership interest consisting of the right to distributions may be transferred even while the transferor member retains the membership and other membership rights.

That is exactly what occurred here. . . .⁴³

Because the District Court has already ruled that the JQH Trust retained its membership and other membership rights in WHR following the effective date of the Plans, the JQH Trust is entitled to summary judgment on the relief AJJ now requests as to Counterclaim Three.

IV. Conclusion

AJJ’s motion for summary judgment is granted in part as to Counterclaim One—its Purchase Right was triggered as of the effective date of the Plans. The parties’ motions for summary judgment on Counterclaim One are otherwise denied.

The JQH Trust’s motion for summary judgment is granted in part as to Counterclaim Three—it retained its membership in WHR following the effective date of the Plans. The remainder of Counterclaim Three is moot.

⁴² Def.’s Resp. to JQH Trust’s Mot. Summ. J. 35, ECF 141.

⁴³ Mem. Order 15, ECF 124.

The Court will hold an evidentiary hearing on AJJ's willingness and ability to exercise its Purchase Right in 2018—i.e., to pay 1.525743 percent of the Total Price for the JQH Trust's interest in WHR. If AJJ was willing and able to do so, then AJJ's damages for its lost purchase right are:

$$\text{Damages} = \text{Distributions} - 0.01525743(\text{Total Price}).$$

If the parties cannot stipulate to the Distributions and the Total Price, the evidentiary hearing will include those issues as well. The parties are directed to submit a pretrial order within 60 days of the date of this order.

IT IS SO ORDERED.

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