



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

SIGNED this 4th day of January, 2024.


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 AJJ'S MOTION FOR RECONSIDERATION IN PART

The parties to this adversary proceeding are plaintiff/counterclaim-defendant The Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated (the “**JQH Trust**”) and defendant/counterclaim-plaintiff JWJ Hotel Holdings Inc. f/k/a AJJ Hotel Holdings, Inc. (“**AJJ**”). On May 25, 2023, this Court entered an order granting in part and denying in part the parties’ cross-motions for summary judgment on Counterclaims One and Three.¹ As to Counterclaim One, the Court ruled that under Ohio law, AJJ’s damages for breach of its right to purchase the JQH Trust’s 50% interest in W&H Realty, LLC (the “**WHR Interest**”) would be measured as:

Damages = Fair Market Value – Offer Price,

which the Court ruled would be calculated as:

Damages = Distributions – 0.01525743(Total Price).

The Court defined “**Distributions**” to mean the proceeds from the sale of WHR’s assets that inured to the benefit of creditor JD Holdings, L.L.C., under the Plans.²

The Court defined “**Total Price**” to mean the sum of (a) all Allowed Claims paid by JD Holdings; (b) all loans reinstated and/or assumed by JD Holdings; (c) JD Holdings’ own \$495,938,161 Allowed Claim, which it subordinated to the payment of all other Allowed Claims; (d) JD Holdings’ contributions to the Charitable Trust

¹ See ECF 145.

² The “**Plans**” are the Modified Amended Joint and Consolidated Chapter 11 Plans of Reorganization for All Debtors Filed by Creditor JD Holdings, L.L.C., Case No. 16-21142, ECF 1946. “**Debtors**” are the JQH Trust and 75 of its subsidiaries and affiliates.

described in Article V of the Plans; and (e) any other amounts paid by JD Holdings under the Plans.

AJJ now moves the Court to reconsider its calculation of JD Holdings' "**Offer Price**" for the WHR Interest.³ First, AJJ argues that instead of calculating Offer Price as 1.525743 percent of the Total Price, the Court should simply "value" the WHR Interest at \$27,311,000 (i.e., the appraisal value listed in Debtors' disclosure statement). Second, AJJ argues that the Total Price should not include JD Holdings' own \$495,938,161 Allowed Claim. Third, AJJ argues that the Total Price should "only include the consideration recited by [JD Holdings] in its pleadings."

The Court will deny AJJ's motion as to the first two points but grant it in part as to the third. Thus: (1) the Offer Price will be calculated as 1.525743 of the Total Price; (2) the Total Price will include JD Holdings' \$495,938,161 Allowed Claim; and (3) the Total Price will not include "(e) other amounts paid by JD Holdings under the Plans."

1. AJJ's motion is not subject to Fed. Rs. Civ. P. 59(e) and 60(b).

Initially, the JQH Trust responds that AJJ's motion does not meet the standards set out in Fed. Rs. Civ. P. 59(e) and 60(b).⁴ However, a motion for reconsideration of an interlocutory order is not subject to Rule 59(e) or Rule 60(b). *See Trujillo v. Bd. of Educ.*, 212 F. App'x 760, 765 (10th Cir. 2007) (citing *Raytheon*

³ ECF 148.

⁴ ECF 150 at 1-3. Fed. Rs. Civ. P. 59 and 60 apply in this adversary proceeding under Fed. Rs. Bankr. P. 9023 and 9024.

Constructors Inc. v. ASARCO, Inc., 368 F.3d 1214, 1217 (10th Cir. 2003), and *Wagoner v. Wagoner*, 938 F.2d 1120, 1122 n.1 (10th Cir. 1991)). Because the Court’s prior order did not fully adjudicate Counterclaim One and was thus interlocutory,⁵ Rules 59(e) and 60(b) do not apply to AJJ’s motion for reconsideration of that order.

2. The Offer Price is 1.525743 percent of the Total Price.

First, AJJ argues that instead of calculating JD Holdings’ Offer Price for the WHR Interest as 1.525753 percent of the Total Price paid by JD Holdings, the Court should simply “value” the WHR Interest at \$27,311,000 (the appraisal value listed in Debtors’ disclosure statement).⁶ However, as explained below, AJJ’s argument conflates the concepts of “value” and “offer price”—whereas Ohio law measures AJJ’s damages as the *difference* between those two amounts.⁷

As stated by the Sixth Circuit, a party’s expectation damages under Ohio law for breach of a right of first refusal (“ROFR”) are measured as 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.

⁵ *Cf.* 10A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2715 (4th ed.) (citing *Fed. R. Civ. P.* 54(b)).

⁶ ECF 148 at 3; *see* Case No. 16-21142, ECF 1583 App’x 4 (“Valuation Data For Debtors’ Assets”).

⁷ Put differently, under Ohio law as stated by *Cincinnati Development*, AJJ’s damages are not measured as the change in the “value” of the WHR Interest over time—they are measured as the difference between the “value” of the WHR Interest and JD Holdings’ “offer price” for that interest at the time AJJ’s purchase right was triggered.

22-3303/3367, 2023 WL 2487348, at *11 (6th Cir. Mar. 14, 2023) (per curiam). This Court's prior order expressed that formula as:

$$\text{Damages} = \text{Fair Market Value} - \text{Offer Price.}^8$$

If the property subject to the ROFR is sold at the highest price obtainable within a reasonable time after the breach, the sale price is evidence of the property's fair market value at the time of breach. *Id.* (quoting *Triangle Props., Inc. v. Homewood Corp.*, 3 N.E.3d 241, 254 (Ohio Ct. App. 2013)). Thus:

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

Here, after AJJ's right to purchase the WHR Interest was triggered by the Plans, WHR's assets were sold and the proceeds distributed to AJJ and the JQH Trust (whose distributions inured to the benefit of JD Holdings under the Plans). Thus:

$$\text{Sale Price} = \text{Distributions}$$

and, therefore,

$$\text{Damages} = \text{Distributions} - \text{Offer Price.}$$

But in this case, there was no "offer price" per se, because JD Holdings never offered to buy the WHR Interest for any particular amount. Nor did JD Holdings offer any particular amount for *all* of Debtors' assets. JD Holdings did, however, *pay* some particular amount for all of Debtors' assets. The Court's prior order defined that amount as the "Total Price."

But if JD Holdings paid the Total Price for all of Debtors' assets, then how much did JD Holdings pay for the WHR Interest? Using the "values data" provided

⁸ ECF 145 at 14.

in Debtors' disclosure statement (i.e., the source of the \$27,311,000 figure cited by AJJ), the Court determined that the WHR Interest represented \$27,311,000/\$1,790,013,138, or 1.525743 percent, of Debtors' assets.⁹ The Court then reasoned that if JD Holdings paid the Total Price for all of Debtors' assets, then JD Holdings paid 1.525743 percent of the Total Price for the WHR Interest.

Finally, because there was no "offer price" for the WHR Interest, the Court used the amount JD Holdings actually paid for that interest—1.525743 percent of the Total Price—as a proxy for its Offer Price. Thus:

$$\text{Offer Price} = 0.01525743(\text{Total Price})$$

and, therefore,

$$\text{Damages} = \text{Distributions} - 0.01525743(\text{Total Price}).^{10}$$

And if the Distributions equal \$32,428,000, then:

$$\text{Damages} = \$32,428,000 - 0.01525743(\text{Total Price}).$$

AJJ now asks the Court to reconsider "its decision to *value* the WHR Interest using its percentage calculation rather than the *value* already relied upon by the Debtors."¹¹ But AJJ's request misunderstands the Court's decision. The Court *valued* the WHR Interest based on the sale proceeds of WHR's assets:

⁹ ECF 145 at 16 (citing Case No. 16-21142, ECF 1583 App'x 4).

¹⁰ *Id.*

¹¹ ECF 148 at 3 (emphases added). According to AJJ, the \$27,311,000 figure listed in Debtors' disclosure statement constitutes "a judicial admission by the JQH Trust." *Id.* at 4. However, nothing about Debtors' disclosure statement—which took the position that the WHR Interest was "worth" \$27,311,000 for purposes of 11 U.S.C. §§ 506(a) and 1129(a)—is inconsistent with a third party (such as JD Holdings) offering or paying *more* than \$27,311,000 for that interest.

Fair Market Value = Sale Price = Distributions.

The Court calculated JD Holdings' *offer price* for the WHR Interest as 1.525743 percent of the total price JD Holdings paid for all of Debtors' assets:

Offer Price = 0.01525743(Total Price).

Ohio law measures AJJ's damages as the difference *between* value and offer price:

Damages = Fair Market Value – Offer Price

i.e.,

Damages = Distributions – 0.01525743(Total Price).

Next, AJJ argues that because JD Holdings is a “rational actor,” JD Holdings would not have paid more for the WHR Interest than the \$27,311,000 appraisal value listed in Debtors' disclosure statement.¹² AJJ concludes that its damages are therefore:

Damages = Distributions – \$27,311,000.

And if Distributions = \$32,428,000, then according to AJJ,

Damages = \$32,428,000 – \$27,311,000 = \$5,117,000.

But AJJ's argument is flawed. If AJJ would prefer to receive \$5,117,000 instead of the damages calculated by the Court, then we know:

\$5,117,000 > \$32,428,000 – 0.01525743(Total Price).

And if that is true, then:

0.01525743(Total Price) > \$27,311,000

and

¹² ECF 148 at 4.

Total Price > \$1,790,013,128.

But if Total Price is greater than \$1,790,013,128, then the total price JD Holdings paid for all of Debtors' assets was *more* than the total appraisal value of those assets.¹³ AJJ's "rational actor" argument, on the other hand—that JD Holdings would not have paid more than \$27,311,000 for the WHR Interest—requires an assumption that JD Holdings would *not* pay more for an asset than its appraisal value. AJJ's argument thus contradicts its own premise.

Although it might be easier (or, as AJJ argues, more "straightforward") to simply assume that JD Holdings offered to buy the WHR Interest for \$27,311,000,¹⁴ it would also be incorrect to do so, because that is not the offer JD Holdings made.¹⁵ Nor did JD Holdings offer to buy all of Debtors' assets for \$1,790,013,138 (i.e., the total appraisal value of those assets). Rather, JD Holdings proposed the Plans—under which, in exchange for all of Debtors' assets, JD Holdings would pay all Allowed Claims, reinstate and/or assume all loans not paid as Allowed Claims, subordinate its own Allowed Claim, and fund the Charitable Trust. The amount JD Holdings *actually paid* to satisfy those obligations—i.e., the Total Price—is capable of determination. The "values data" listed in Debtors' disclosure statement then

¹³ The Court's prior order calculated the total appraisal value of Debtors' assets as \$1,790,013,138. *See* ECF 145 at 16 n.35. The ten-dollar difference represents a rounding error.

¹⁴ ECF 148 at 6.

¹⁵ As AJJ argued in an earlier brief: "[T]he argument . . . that valuing a single asset in a multi-asset sale would be difficult is hardly a compelling argument. Courts are called upon to solve difficult problems every day." ECF 141 at 23. Of course, the issue here is "offer price" rather than "value," but AJJ's point stands.

determines how much of the Total Price should be allocated to the WHR Interest. The Court’s calculation of JD Holdings’ “offer price” for the WHR Interest *does* use the \$27,311,000 figure provided by Debtors—just not in the way AJJ would prefer.¹⁶

3. The “Total Price” includes JD Holdings’ own \$495,938,161 claim.

Second, AJJ argues that JD Holdings’ own \$495,938,161 Allowed Claim should not be included in the “Total Price” paid by JD Holdings for Debtors’ assets.¹⁷ AJJ quotes the first paragraph of Article VII of JD Holdings’ disclosure statement, which provides:

The Plans contemplate a sale of all Assets . . . to JD Holdings pursuant to the APA. . . . In consideration, . . . JD Holdings shall pay all Allowed Claims in full in Cash, except for any Assumed Loans (whether pursuant to the terms of the existing agreements and/or pursuant to new agreements to do so, which shall be paid in accordance with their terms), and contribute certain Cash and Non-Hotel Assets to a new Charitable Trust¹⁸

AJJ argues that because this “recitation of consideration” does not specifically mention JD Holdings’ claim, the Plans’ treatment of that claim is therefore “part of

¹⁶ If the Total Price were *equal* to the total appraisal value of Debtors’ assets (i.e., \$1,790,013,138), then under the Court’s calculation, JD Holdings’ “offer price” for the WHR Interest would be \$27,311,000 (i.e., 1.525743 percent of \$1,790,013,138), and AJJ’s damages would be \$5,117,000.

¹⁷ ECF 148 at 6.

¹⁸ Case No. 16-21142, ECF 1948 Art. VII; *see also* Plans Art. VII (containing identical language). The “APA” is the asset purchase agreement pursuant to which Debtors’ assets were transferred to JD Holdings. See Case No. 16-21142, ECF 2050 Ex. A.

the Plans” but not “part of the Sale.”¹⁹ However, the language AJJ cites requires JD Holdings to “pay all Allowed Claims in full” without exception. And the *third* paragraph of Article VII provides that “JD Holdings has an Allowed Claim of \$495,938,161.00 for its Claims against each Debtor jointly and severally.”²⁰ Because JD Holdings has an “Allowed Claim,” the “recitation of consideration” cited by AJJ includes JD Holdings’ claim by definition.²¹

Next, AJJ argues that JD Holdings did not include its own claim in a “projected calculation of the amounts [it] would pay.”²² The document AJJ cites is a financial disclosure in which JD Holdings demonstrated how it would use a \$1 billion loan from Goldman Sachs and \$200 million of its own equity to fund its

¹⁹ ECF 148 at 7-8. The Plans do separately define the terms “Sale” and “Plans Transactions.” See Case No. 16-21142, Plans Art. I(A)(79) (defining “Sale” as “the sale contemplated by the [Asset Purchase Agreement]”); Plans Art. I(A)(69) (defining “Plans Transactions” as “one or more transactions . . . that may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary or appropriate to effectuate the Plans . . .”). But under the Asset Purchase Agreement, “[t]he consideration for the sale and conveyance of the Property shall be as set forth in the Plan.” See Case No. 16-21142, ECF 2050 Ex. A § 2.1 (“Consideration”). Because the Plans set forth the consideration for the Sale, (1) the terms “Sale” and “Plans Transactions” are not mutually exclusive; (2) both terms can include the consideration paid by JD Holdings in exchange for Debtors’ assets; and (3) AJJ is incorrect in equating “part of the Plans” with “*not as consideration* for the Sale.” Cf. ECF 148 at 7.

²⁰ See Case No. 16-21142, ECF 1948 Art. VII; see also Plans Art. VII.

²¹ According to AJJ, “the Plan states that the consideration for the purchase of the Debtors’ assets is *payment of other creditors’ Allowed Claims*, payoff of loans and contribution to the Charitable Trust.” ECF 148 at 8 (emphasis added). This argument mischaracterizes the Plans, which obligated JD Holdings to “pay *all* Allowed Claims in full” without exception. See Plans Art. VII(A) (emphasis added).

²² ECF 148 at 6-7 (citing Case No. 16-21142, ECF 2050 Ex. B (“Additional Financial Disclosures”)).

obligations under the Plans.²³ But JD Holdings did not need funding to “pay” itself on its own Allowed Claim. Nor did JD Holdings offer to pay \$1.2 billion (the amount described in the document AJJ cites) in exchange for Debtors’ assets—it offered to pay all Allowed Claims in full, reinstate and/or assume all loans not paid as Allowed Claims, subordinate its own Allowed Claim, and fund the Charitable Trust.

Next, AJJ argues that JD Holdings’ Allowed Claim cannot be part of the consideration given for Debtors’ assets because the claim was “subordinated” but not “forgiven” under the Plans.²⁴ Similarly, AJJ argues that the Plans’ treatment of JD Holdings’ claim “actually burdened the Debtors with another \$495 million in debt” because JD Holdings “could just have easily withdrawn its claim.”²⁵ Both arguments fail because Debtors no longer owe the debt; it was discharged on the effective date of the Plans. *See* Plans Art. VIII(B); 11 U.S.C. § 1141(d).

Next, AJJ argues that it would be “inequitable” to include JD Holdings’ Allowed Claim in the consideration given for Debtors’ assets because (1) “the value of the JDH Claim has never been actually litigated and finally determined;” (2) “AJJ did not and could not object to the Plan, including the allowance of the JDH Claim (and the value/amount of it[]);” and (3) “AJJ was deprived of its chance in 2018 to require a true valuation of the WHR Interest rather than an estimate.”²⁶ However: (1) the amount of JD Holdings’ Allowed Claim *was* finally determined, via

²³ *See* Case No. 16-21142, ECF 2050 Ex. B (“Additional Financial Disclosures”).

²⁴ ECF 148 at 10.

²⁵ *Id.* at 12.

²⁶ *Id.* at 11.

the Settlement Agreement and confirmation of the Plans; (2) AJJ *did* object to confirmation of the Plans (and also filed a “limited response” to the Settlement Agreement);²⁷ and (3) the issue here is not the “*value*” of the WHR Interest—the issue is how to calculate JD Holdings’ “*offer price*” for that interest.

Next, AJJ argues that “[a]llowing [JD Holdings’ claim] to nevertheless increase the denominator used to calculate AJJ’s claim confounds the purpose of subordinating [JD Holdings’ claim] in the first place.”²⁸ But AJJ has it backwards. The Plans’ subordination of JD Holdings’ claim meant that a third party could not outbid JD Holdings for Debtors’ assets without paying JD Holdings’ \$495,938,161 Allowed Claim in full. The effect was akin to that of a “credit bid,” where a secured creditor bids for its collateral using the debt it is owed to offset the purchase price.²⁹ When JD Holdings purchased Debtors’ assets, its claim served as a form of

²⁷ See Case No. 16-21142, ECF 2015 (“Objection of AJJ Hotel Holdings, Inc. to Modified Amended Joint and Consolidated Plans of Reorganizations for All Debtors (ECF No. 1946)”); Case No. 16-21142, ECF 1848 (“Limited Response of AJJ Hotel Holdings, Inc. to Debtors’ Motion for Authority to Enter Into Plan Support Agreement”).

²⁸ ECF 148 at 12. To clarify, JD Holdings’ claim increases its Offer Price—i.e., the subtrahend of the damages equation. *Compare denominator*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2020) (“the part of a fraction that is below the line”), *with subtrahend*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2020) (“a number that is to be subtracted”).

²⁹ Cf. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 642 (2012) (Scalia, J.) (explaining practice of credit bidding); 11 U.S.C. § 363(k). Of course, this is only an analogy; JD Holdings was not a secured creditor and Debtors’ assets were not sold under § 363.

currency.³⁰ JD Holdings' claim against Debtors was (and is) a necessary component of the price it paid. *Cf. Rebein v. Cornerstone Creek Partners, LLC (In re Expert S. Tulsa, LLC)*, 842 F.3d 1293, 1299 (10th Cir. 2016) (rejecting argument that “extinguishment [of debt] was an act of generosity divorced from the overall deal.”).

4. The “Total Price” will not include “other amounts.”

Finally, AJJ argues that the Total Price should “only include the consideration recited by [JD Holdings] in its pleadings.”³¹ AJJ is correct. Article VII of the Plans provides:

The Plans contemplate a sale of all Assets . . . to JD Holdings pursuant to the APA. . . . In consideration, . . . JD Holdings shall pay all Allowed Claims in full in Cash, except for any Assumed Loans (whether pursuant to the terms of the existing agreements and/or pursuant to new agreements to do so, which shall be paid in accordance with their terms), and contribute certain Cash and Non-Hotel Assets to a new Charitable Trust

. . .

As part of the Plans, JD Holdings will subordinate its Claim arising from the ROFR to the payment of all Allowed Claims. JD Holdings has an Allowed Claim of \$495,938,161.00 for its Claims against each Debtor jointly and severally arising from the ROFR³²

³⁰ *Cf. In re Phila. Newspapers, LLC*, 599 F.3d 298, 320 (3d Cir. 2010) (Ambro, J., dissenting) (“A credit bid allows a secured creditor to bid the debt owed it in lieu of other currency at a sale of its collateral.”).

³¹ ECF 148 at 12.

³² Plans Art. VII. JD Holdings' claim arose out of a 2005 right of first refusal (“ROFR”) agreement that obligated some Debtors to sell hotels to JD Holdings at a 20% discount and to provide 22.5% subordinate seller financing. JD Holdings sued those Debtors in Delaware for alleged breaches of the ROFR in 2012. Debtors filed

This language includes (a) Allowed Claims paid by JD Holdings; (b) loans reinstated and/or assumed by JD Holdings;³³ (c) JD Holdings' own \$495,938,161 Allowed Claim; and (d) JD Holdings' contributions to the Charitable Trust. It does not include "any other amounts paid by JD Holdings under the Plans." Thus, the Court will grant AJJ's motion for reconsideration in part: the Total Price will be limited to items (a) through (d).³⁴

5. Conclusion

AJJ's motion for reconsideration is hereby granted in part: the Total Price will not include "other amounts paid by JD Holdings under the Plans." The motion is otherwise denied. The parties are directed to submit a pretrial order within 60 days of the date of this order.

IT IS SO ORDERED.

###

for bankruptcy in Kansas in 2016, less than a month before the Delaware trial was set to begin.

JD Holdings filed proofs of claim against each Debtor for \$587,600,000 arising out of the ROFR. *See, e.g.*, Case No. 16-21142, Claim 485-1. Then, after Debtors rejected the ROFR under 11 U.S.C. § 365, JD Holdings filed proofs of claim against each Debtor for \$565,300,000. *See, e.g.*, Case No. 16-21142, Claim 754-1.

³³ *Cf.* Plans Art. I(A)(10) (defining "Assumed Loans").

³⁴ Similarly, the consideration received by JD Holdings is limited to Debtors' "Assets" and excludes "other benefits" that, as AJJ argues, ECF 148 at 5, would render the WHR Interest "a smaller percentage of the asset pool."