The relief described hereinbelow is SO ORDERED.

SIGNED this 27th day of March, 2019.

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.*,	Chapter 11
	Case No. 16-21142
Debtors.	Jointly Administered

THE REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED,	Adv. No. 18-6055
Plaintiff/Counterclaim-Defendant,	
v.	
JWJ HOTEL HOLDINGS INC. f/k/a AJJ HOTEL HOLDINGS, INC., *et al.*,	
Defendant/Counterclaim-Plaintiff.	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

Plaintiff/counterclaim-defendant The Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated (the "**Trust**"), along with 75 of its subsidiaries and affiliates (together with the Trust, "**Debtors**"), filed for bankruptcy under Chapter 11 in 2016. Debtors' confirmed joint plans of reorganization ("**Joint Plans**") provide, *inter alia*, that the Trust will transfer its 50% interest in W&H Realty, LLC ("**WHR**"), to creditor JD Holdings, L.L.C. ("**JD Holdings**"). Defendant/counterclaim-plaintiff JWJ Hotel Holdings Inc. f/k/a AJJ Hotel Holdings, Inc. ("**AJJ**") owns the other 50% interest in WHR and opposes the transfer of the Trust's interest to JD Holdings.

The Trust and AJJ are parties to WHR's First Amended and Restated Operating Agreement ("**Operating Agreement**"), which imposes restrictions on the parties' ability to transfer their membership interests. AJJ's three counterclaims in this adversary proceeding seek declarations of AJJ's rights under the Operating Agreement pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a)[1] and 2202. This matter comes before the Court on the Trust's motion to

[1] Section 2201(a) provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

dismiss AJJ's counterclaims.[2] For the reasons stated below, the Trust's motion will be granted as to Count II and denied as to Counts I and III.

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the defendant bears the burden of showing that the plaintiff has not stated a claim. *See, e.g.*, *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 300 n.4 (3d Cir. 2016); *Crugher v. Prelesnik*, 761 F.3d 610, 614 (6th Cir. 2014); *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 402 (5th Cir. 2013). The court's inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Here, while the Trust's motion cites only Fed. R. Civ. P. 12(b)(6) and contends that AJJ has "failed to state a claim," much of the Trust's argument has to do with whether a "case of actual controversy" currently exists for purposes of the Declaratory Judgment Act. This argument is one about ripeness—i.e., subject matter jurisdiction.[3] Thus, this order considers the Trust's motion to dismiss under Fed. R. Civ. P. 12(b)(1) where appropriate. *Cf. Exec. Risk Indem. Inc. v. Sprint*

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[2] ECF 17.

[3] "[T]he phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). "Under Article III of the Constitution, federal courts have subject matter jurisdiction only over 'cases and controversies.' Whether a claim is ripe for adjudication, and therefore presents a case or controversy, bears directly on this jurisdiction." *United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir. 2001) (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995)).

Corp., 282 F. Supp. 2d 1196, 1202 (D. Kan. 2003) (observing that the Declaratory Judgment Act "is . . . procedural and does not create a substantive cause of action"). "The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction." *Port City Props. v. Union Pacific R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008) (citing *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)).

Count I of AJJ's counterclaim seeks a declaration that AJJ has a current right to purchase the Trust's 50% interest in WHR ("**Purchase Right**") under § 6.5 of the Operating Agreement, which provides:

> Notwithstanding anything to the contrary contained in this Agreement, if 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. . . . Any Membership Interest which the Company does not elect to purchase shall be subject to the right of purchase by the other Members . . . .

The Trust argues that Count I should be dismissed for two reasons. First, the Trust argues that § 6.5 only applies to a potential sale or transfer from an Assignee or *substitute* Member, such that a potential sale or transfer from the Trust—an *original* Member of WHR—could never trigger AJJ's Purchase Right. Second, the Trust argues that there is no "case of actual controversy" as to AJJ's Purchase Right because the Trust has not yet transferred its interest in WHR to JD Holdings.

AJJ responds that the Trust's first argument conflicts with § 1.1 of the W&H Realty, Inc. Stock Purchase and Buy-Out Agreement dated as of April 16, 1993 ("**Buy-Out Agreement**"),[4] under which:

> 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.

Because the purchase right described in § 1.1 of the Buy-Out Agreement is triggered by a potential transfer from any Shareholder (including, therefore, the Trust as an *original* Member of WHR), and because the Trust offers no argument to rebut AJJ's citation of that provision, the Trust's first argument fails.[5]

As to the Trust's ripeness argument, AJJ correctly points out that the Purchase Right in § 6.5 of the Operating Agreement is triggered not by a *transfer*, but by an acceptable *written offer*. AJJ's theory is that the Joint Plans, along with

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[4] Section 6.7 of the Operating Agreement provides: "[n]otwithstanding anything to the contrary contained in this Agreement, no Membership Interest shall be transferred in violation of . . . any of the Corporation Documents." Per § 1.6(iv) of the Operating Agreement, those "Corporation Documents" include the Buy-Out Agreement. The Operating Agreement thus incorporates the Buy-Out Agreement's restrictions on membership transfer.

[5] This order expresses no opinion as to whether § 6.5 of the Operating Agreement applies to transfers from the Trust as an original Member of WHR.

the Asset Purchase Agreement appended to the Joint Plans, satisfy the "written offer" aspect of § 6.5. Because AJJ's purchase-right claim is thus based on non-hypothetical events that have already occurred, it is ripe for decision.[6] Therefore, the Trust's second argument fails, and its motion to dismiss will be denied as to Count I of AJJ's counterclaim.

Count II of AJJ's counterclaim seeks a declaration that JD Holdings may neither participate in the management of WHR, nor be admitted as a substitute member of WHR, without AJJ's consent "in the event that the Purchase Right is not or cannot be exercised" by AJJ. The Trust's argument for dismissal of Count II, and AJJ's response thereto, focus on whether the Trust has transferred or will necessarily transfer its interest in WHR to JD Holdings in a way that would implicate AJJ's consent rights under the Operating Agreement. However, the Court need not resolve that issue, because Count II does not satisfy Article III's case-or-controversy requirement.[7] To satisfy that requirement, a declaratory-judgment

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[6] This order expresses no opinion as to whether the Joint Plans and Asset Purchase Agreement actually do constitute a "written offer" under the Operating Agreement. However, the Court does reject the Trust's contention that AJJ has waived that argument by not raising it earlier. Over the past 11 months, the Trust has repeatedly told AJJ, this Court, and the United States District Court for the Southern District of Ohio that it will soon announce the "mechanism" by which it plans to transfer its interest in WHR to JD Holdings. AJJ reserved its right to challenge the transfer in reliance on the Trust's statements. With no announcement of a transfer mechanism forthcoming, AJJ now elects to challenge the status quo as a de facto transfer. The Trust cannot complain of a delay induced by its own statements.

[7] "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties . . . have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

dispute cannot merely request "an opinion advising what the law would be upon a hypothetical state of facts." *See MedImmune*, 549 U.S. at 127 (quoting *Aetna*, 300 U.S. at 241). Count II, by its plain language, does just that—it asks for an opinion as to the parties' rights under the Operating Agreement if, hypothetically, AJJ cannot or elects not to exercise the Purchase Right. Because Count II therefore does not present a justiciable case or controversy, the Trust's motion to dismiss will be granted under Fed. R. Civ. P. 12(b)(1) as to Count II.

Count III of AJJ's counterclaim asks for a declaration that:

> (i) The Trust is no longer a Member and may not exercise any rights or powers of a Member;
>
> (ii) The Trust no longer has any right to appoint a Co-Manager; and
>
> (iii) AJJ may manage the business and affairs of WHR as the sole Manager without interference from the Trust or [JD Holdings].

The Trust argues that Count III should be dismissed on three grounds.

First, the Trust argues that Count III should be dismissed because it is "predicated on the theory of a *de facto* transfer" (of the Trust's interest in WHR to JD Holdings), which the Trust contends has not occurred. However, AJJ has alleged that all economic benefits of WHR currently inure to the benefit of JD Holdings under the Joint Plans; that the Trust appointed Daniel Abrams, an officer of a JD Holdings affiliate, as the Co-Manager of WHR; that Mr. Abrams is not acting on behalf of the Trust; and that the Trust derives no benefit from WHR. The Trust offers no argument as to why these allegations do not adequately allege a

"transfer" of the Trust's interest in WHR to JD Holdings under the Operating Agreement. Therefore, the Trust's first argument fails.

Second, the Trust argues that the relief requested by AJJ in Count III is inconsistent with § 9.1(A) of the Operating Agreement, under which "[t]here shall always be two (2) Co-Managers, one (1) Co-Manager representing the then holder(s) of the JQH Membership Interest . . . and the other single Co-Manager representing the then holder(s) of the AJJ Holdings Membership Interest." AJJ responds that under § 6.2 of the Operating Agreement:

> [a]n Assignee who/which has not been admitted as a substitute Member shall have no right to participate in the management of the business and affairs of the Company . . . . As to the assigned Membership Interest, the assigning Member (Assignor) shall cease to be a Member and cease to exercise any rights or powers of a Member.

Because § 6.2 of the Operating Agreement would allow the relief requested by AJJ in Count III, the Trust's second argument fails.[8]

[8] This order expresses no opinion as to which provision controls: § 9.1(A) or § 6.2. While AJJ also argues that the Trust's second argument conflicts with the Agreement of Shareholders dated April 16, 1993 ("**Shareholders Agreement**"), that argument is less persuasive. Paragraph 7 of the Shareholders Agreement provides that upon a shareholder's sale or assignment of his shares of WHR, "the 'Other Shareholders' shall assume sole and exclusive responsibility for the management, operation and direction of all of the business affairs of WHR . . . ." However, according to ¶ 7(b) of the Shareholders Agreement, the term "Other Shareholders" specifically excludes any entity who acquired its shares in WHR from (among others) Roy Winegardner. Since AJJ presumably acquired its interest in WHR from Roy Winegardner, the term "Other Shareholders" would appear to specifically exclude AJJ. In that case, the Trust's second argument would not conflict with the Shareholders Agreement.

Third, the Trust argues that Count III should be dismissed as "an attempt to seek a second bite at the apple," the first "bite" having occurred in the United States District Court for the Southern District of Ohio. The Ohio case was a lawsuit by AJJ against the Trust's trustees, Jacqueline Dowdy and Greggory Groves; AJJ's two-count complaint sought (1) damages for the trustees' alleged breach of fiduciary duty to WHR and (2) appointment of a receiver to perform certain actions on WHR's behalf. The Ohio district court denied AJJ's motion for preliminary injunction and transferred the case to the District of Kansas, where it was voluntarily dismissed by AJJ. Here, because the Trust does not explain how denial of a preliminary injunction as to AJJ's breach-of-fiduciary-duty claim could have any *res judicata* effect on AJJ's contract-based claims under the Operating Agreement, the Trust's third argument fails. The Trust's motion to dismiss will therefore be denied as to Count III of AJJ's counterclaim.

For all of the foregoing reasons, the Trust's motion to dismiss is DENIED as to Count I; GRANTED without prejudice as to Count II; and DENIED as to Count III of AJJ's counterclaim.

IT IS SO ORDERED.

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