

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Case No. 17 -22394
)	
Market Square Hospitality, LLC,)	Chapter 11
)	
Debtor-in-Possession.)	Judge Baer

NOTICE OF MOTION

To: See service list attached.

PLEASE TAKE NOTICE that on the 28th day of November, 2017, at 10:00 a.m., or as soon as counsel may be heard, I shall appear before the Honorable Janet S. Baer in Room 615 of the United States Bankruptcy Court, 219 S. Dearborn Street, Chicago, Illinois, 60604, and shall then and there present **Motion of Debtor-in-Possession for Entry of an Order Extending Debtor's Exclusive Period Within Which to File a Chapter 11 Plan and Solicit Acceptances**, a copy of which is hereby served upon you.

Market Square Hospitality, LLC

By: /s/ Abraham E. Brustein
One of its attorneys

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CERTIFICATE OF SERVICE

The undersigned, a non-attorney, hereby certifies that by 5:00 p.m. on the 21st day of November, 2017, she caused to be served upon the persons list listed below, via the court's CM/ECF system, a copy of **Motion of Debtor-in-Possession for Entry of an Order Extending Debtor's Exclusive Period Within Which to File a Chapter 11 Plan and Solicit Acceptances**, and this Notice.

/s/ Jenna Jarke

Service List

Via ECF

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Case No. 17 -22394
)	
Market Square Hospitality, LLC,)	Chapter 11
)	
Debtor-in-Possession.)	Judge Baer

**MOTION OF DEBTOR-IN-POSSESSION FOR ENTRY OF AN ORDER EXTENDING
DEBTOR’S EXCLUSIVE PERIOD WITHIN WHICH TO FILE A CHAPTER 11 PLAN
AND SOLICIT ACCEPTANCES**

Market Square Hospitality, LLC, (øMSHö)(øDebtorö) by its attorneys, Abraham Brustein and Julia Jensen Smolka, brings this motion for entry of an order (i) extending debtor’s exclusive period within which to file a chapter 11 plan and solicit acceptances; and (ii) providing such other relief as may be appropriate under the circumstances(øMotionö). In support of this Motion, the Debtor states the following:

Introduction

1. The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on July 27, 2017 (øPetition Dateö). The Debtor is a limited liability company organized under the laws of the State of Colorado.

2. No trustee has been appointed to this case. Debtor continues to operate its business as Debtor-in-Possession pursuant to the provisions of Sections 1107 and 1108 of the Bankruptcy Code. No committee has been appointed as of the date of this Motion.

3. Debtor is in the business of owning and operating a hotel that includes related business activities described below, and also the leasing of retail space to tenants within the Debtor’s hotel property (øPropertyö). The Debtor’s business is commonly known as The Inn at Market Square and operates from 2723 Sheridan Road, Zion, Illinois.

4. By this motion, Debtor seeks entry of an order extending its exclusive period within which to file a Chapter 11 plan for and additional ninety (90) days, from November 25, 2017 to February 23, 2018. Additionally, Debtor seeks a sixty (60) day period from that date, until May 3, 2018, to have the exclusive right to solicit acceptances of its plan.

5. This Court has subject matter jurisdiction to grant the relief requested in this motion, as a core proceeding pursuant to 28 U.S.C. §§ 1334(a), (b) and 28 U.S.C. §§ 157(a), (b)(2)(A). This Court has the authority to grant the relief requested by this Motion pursuant to §1121 (d) of the Bankruptcy Code¹ and Bankruptcy Rule 9006.

6. Pursuant to §1121(b), only a debtor may file a plan in the first 120 days after filing a voluntary Chapter 11 petition. If the debtor files a plan within the initial period of exclusivity, § 1121 (c) gives the debtor the exclusive right to solicit acceptances of the plan until 180 days after the voluntary petition is filed.

7. Section 1221(d) vests the bankruptcy court with authority to extend the initial 120 day period of exclusivity for cause, provided the extension does not go beyond 18 months after the date a voluntary petition is filed. It further permits the extension of the period of time in which the debtor will have the exclusive right to solicit acceptances of a plan filed within the period of exclusivity. The term "cause" is not defined in the statute.

8. A debtor seeking an extension has the burden of demonstrating cause by affirmatively showing there is a sound, factual basis for the requested extension. *In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 487 (Bankr. D. Conn. 2007).

¹ All references of "§" or Section refer to the Bankruptcy Code.

9. The standards governing the application of §1121(d) were succinctly summarized in *In re Borders Group, Inc.*, 460 B.R. 818, 821-22 (Bankr. S.D. N.Y. 2011) as follows:

The determination of cause under section 1121(d) is a fact-specific inquiry and the court had broad discretion in extending or termination exclusivity. See *In re Adelphia Commc'ns Corp.*, 352 B.R. 578,586 (Bankr. S.D.N.Y. 2006) (‘‘A Decision to extend or terminate exclusivity for cause is within the discretion of the bankruptcy court, and is fact-specific.’’); see also *In re Lehigh Valley Prof'l Sports Club, Inc.*, No. 00-11296DWS, 2000 WL 290187, at *2 (Bankr.E.D.Pa. March. 14, 2000) (relief under section 1121(d) is committed to the sound discretion of the bankruptcy judge); *In re Sharon Steel Corp.*, 78 B.R. 762, 763 (Bankr.W.D.Pa. 1987) (‘‘The decision of whether or not to extend the debtor’s period of exclusivity rests with the discretion of the Court.’’).

10. The court should exercise its discretion to promote the maximize flexibility required to accommodate the specific facts of the case. *In re AMKO Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio, 1996).

11. Courts have looked to the nine factors articulated and discussed in *In re Dow Corning Corp.*, 208 B.R. 661,669 (Bankr. E. D. Mich. 1997) and further explained in *In re Adelphia Communications Corp.*, 352 B.R. 578,587 (Bankr. S.D.N.Y. 2006) in making a determination on a request to increase or reduce the initial 120 day period of exclusivity. As set forth in *Dow Corning* and *Adelphia*, those factors are:

- (a) the size and complexity of the case;
- (b) the necessity for sufficient time to permit the debtor to negotiate a plan or reorganization and prepare adequate information;
- (c) the existence of good faith progress toward reorganization;
- (d) the fact that the debtor is paying its bills as they become due;
- (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- (f) whether the debtor has made progress in negotiations with its creditors;
- (g) the amount of time which has elapsed in the case;

- (h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
- (i) whether an unresolved contingency exists.

352 B.R. at 587.

12. *Adelphia* recognized that a bankruptcy court should not be limited by these nine factors. The court should also be guided by the underlying policy governing Section 1121. *Id.* at 590, citing *Dow Corning*, 208 B.R. at 670. *Dow Corning* concluded that the application of the nine factors had to be made in the context of the primary consideration of determining whether to extend or terminate a debtor's exclusivity. The court gives primary consideration to whether limiting or extending exclusivity would "would facilitate moving the case forward." *Id.* If so, that consideration trumps the nine factors. *Id.* *Adelphia* reformulated this analysis of the underlying policy, stating:

the test is better expressed as determining whether terminating exclusivity would move the case forward materially, to a degree that wouldn't otherwise be the case. Certainly practical considerations, or other considerations in the interest of justice, could override, in certain cases, the result after analysis of the nine factors.

352 B.R. at 590.

13. **The first factor, size and complexity of the case.** Debtor's size and debt structure are not particularly complicated. However, its exit strategy for a successful Chapter 11 is complicated because of the loss of its principal pre-petition customer, the Cancer Center of America ("CTCA"). In order to successfully reorganize, the Debtor must find a new customer base for long term operations as a hotel; new revenue sources to replace the CTCA business in order to facilitate a prospective sale of the business; or find a buyer or joint venture partner to move forward with transitioning the current hotel to more productive use as a senior living or assisted living facility. The court heard most of this evidence in the trial this court conducted on

the motion to modify stay (õTrialö). The Debtor, as opposed to any other party in interest in this case, is best situated to formulate a plan of reorganization that can deal with this complexity.

14. **The second factor, need for sufficient time to negotiate and propose plan and disclosure statement.** It will necessarily take additional time for the debtor to replace the lost CTCA business and at the same time proceed with the evaluation of the feasibility of converting the hotel to a congregate living or assisted living facility. The Debtor needs the time to stabilize the Property and also to perform the due diligence required to evaluate the contemplated conversion to a new use. Debtor expects to market the Property for sale pursuant to Section 363 or become a joint venture partner with a developer that already is in the congregate living-assisted living market place.

15. **The third factor, the existence of good faith progress towards reorganization.** Debtor has made substantial progress in the retention of professionals to assist in developing a viable reorganization plan. In addition to the work done by Mr. Gaines that he described in detail at the Trial, the following has occurred:

A) Subsequent to the Trial, Mr. Delisle and Mr. Delach engaged Mr. Gaines to perform a follow up market study and a follow up feasibility study, based upon the work done by ARCH described below;

B) The Debtor engaged ARCH to do preliminary drawings for an assisted living facility prior to the Petition Date. Subsequent to the trial, Mr. Delisle and Mr. Delach retained ARCH to perform follow up design services. ARCH has prepared designs for two potentially viable concepts for conversion of the hotel. One is a combined assisted living facility and memory care facility of 76 units. It is contingent upon

obtaining variances from applicable code requirements in order to reduce construction costs. Mr. Gaines and ARCH believe obtaining a variance is feasible. The second concept is an independent senior living facility (i.e. congregate living) consisting of 46 living units;

C) The Debtor retained special counsel to seek relief from the Lake County Board of Review on the 2017 assessment of the hotel pursuant to an order entered on August 23, 2017 (Dkt. No. 60). The Board of Review held a hearing on October 25, 2017 at which it announced it would propose a reduction in the assessed valuation. When that becomes final in February or March 2018, the reduction from the assessed valuation will reduce the 2017 real estate taxes, to be billed in 2018. Special counsel has indicated that the 2017 taxes would likely have been \$280,000. Based on the reduction in the assessed valuation, the 2017 taxes are likely to be \$239,000.

D) On November 1, 2017, the Debtor submitted a formal written proposal to the Veterans Administration to become a participate in the Emergency Housing Program at the rate of \$55.00 per day. Participants would use rooms that would otherwise be unoccupied. Participation in this program would help stabilize the hotel pending proposal a plan of reorganization. On November 21, 2017, the VA informed Mr. Delach that it would have a decision on Debtor's participation during the week of November 27, 2017;

E) The Debtor and HoiKima restaurant have executed an Addendum to the restaurant's lease, a copy of which is attached to this motion as **Exhibit A**. The Addendum provides (i) that the tenant will begin paying CAM of \$1,407.90 in November 2017; (ii) the tenant will pay a security deposit of \$5,000 in November 2017; (iii) the

tenant will pay a fee of \$2,500 in November 2017 for renegotiating the terms of the lease; and (iv) the tenant will begin paying monthly base rent in January 2018. In November 2017, HoiKima paid the Debtor \$8,907.90 for CAM, security deposit, and the renegotiating fee; and

F) Subsequent to the Trial, the Debtors' Managers have had communications with various mortgage brokers and developers in the senior living and assisted living market. The people contacted include Bob Welstead, Jeff Smith, Mike Speilman, Brett Murphy, Jeff Hyman, Noel Escolona, Patrick Taylor, and representatives of AIC Ventures. Each of these persons has expressed an interest in obtaining more information about the conversion of the hotel to a new use as senior living or assisted living.

16. Additionally, Debtor filed an adversary proceeding in early September 2017 against Illinois Medical Services Corp. (IMSCö) to recover rents due to it under its lease. Those rents are approximately \$8,800.00 per month. The current outstanding balance is approximately \$44,000.

17. The Debtor has already taken steps in this reorganization case to further stabilize the hotel and obtain the professional advice needed to put forward a feasible plan of reorganization. The Debtor needs an additional period of exclusivity in order to further advance its efforts to propose a plan.

18. **The fourth factor, whether the debtor is paying its bills as they become due.** The debtor is delinquent in payment of 2016 real estate taxes that first came due after the petition date (i.e. second installment). The Debtor is not currently able to pay for the accrued costs of its professionals in this case. However, Debtors' Managers have personally paid for the engagement

of Stuart Gaines and ARCH to move the reorganization process forward. Even though the Debtor is not able to pay all of its post-petition expenses as they become due, terminating exclusivity is not likely to alter or correct that state of affairs.

19. **The fifth factor, whether the debtor has demonstrated reasonable prospects for filing a viable plan.** The Debtor believes that Mr. Gaines will be able to complete his second market and feasibility studies based on the two options developed by ARCH by the end of 2017 or in January 2018. That information will enable the Debtor to make the decision on whether it should continue to pursue a conversion of the use of the hotel or begin plans for marketing the Property based on its current use as a hotel and retail/office complex. The Debtor is open to proposing any plan that will achieve a better result than a foreclosure sale of its assets. Given the apparent condition and value of the property; the steps the Debtor has taken to stabilize the Property and enhance its value in this Chapter 11 case; and the prospect that Olson can be cashed out through a sale or refinance of the property in Chapter 11, there is a reasonable prospect the other principal constituencies, the SBA and the unsecured creditors, will support a plan proposed by the Debtor that provides for at least partial payment of their respective claims.

20. **The sixth factor, whether the debtor has made progress in negotiations with its creditors.** The Debtor has been unable to engage Olson in a dialogue over how this case can come to a successful conclusion². It believes it has to be further along in its efforts to stabilize its business and formulate a plan before it can engage the SBA and unsecured creditors in a meaningful dialogue.

² On November 8, 2017, Debtor's attorneys proposed beginning a dialogue with Olson with an attorneys only meeting during the week of November 13 to discuss possible consensual resolutions for this Chapter 11 case, to be followed by meetings with the clients if progress was made. Olson's attorneys did not respond to this invitation.

21. **The seventh factor, the time that has elapsed in the case.** The initial period of exclusivity will terminate on November 24, 2017. The Debtor has not asked for any prior extensions of the period of exclusivity.

22. **The eighth factor, whether the debtor is seeking an extension to pressure creditors to its reorganization demands.** That is not the case here. The Debtor is seeking the extension so that it go forward with a plan that will materially benefit all classes of creditors and parties in interest. If exclusivity is not extended, the only party that is likely to plan is Olson. However, Olson has not duty to any of the other creditors or the estate. He has no incentive to propose a plan that does anything other than pay his over-secured claim.

23. **The ninth factor, whether any unresolved contingency exists. This does not appear to be an issue in this case.** The only existing contingencies are whether the Debtor will be successful in recovering on its rent claim against IMSC and whether it will meet its projections concerning its ability to pay the balance of the 2016 real estate taxes. If those contingencies turn out favorable to the Debtor, the Debtor's prospects for proposing a confirmable plan will be substantially enhanced.

24. The underlying policy concerning a request to extend or terminate exclusivity is whether, as a practical matter the elimination of exclusivity would move the case forward materially, to agree that wouldn't otherwise be the case. *Adelphia*, 352 B.R. at 590. The policy is best served by extending the period of exclusivity.

25. This case is similar to *AMKO Plastics*, where the debtor was in the beginning stages of a restructuring of its business model at the time it filed its Chapter 11 case. 197 B.R. at 76. The debtor had made a decision that it had to change the nature of its plastic products it was

manufacturing to become more profitable. *Id.* Prepetition, it purchased new machinery, it reduced staff, vacated two warehouses to save rent and cut unprofitable business products. *Id.* The debtor's business was seasonal and the positive effects of its turnaround efforts had not yet been realized when the initial period of exclusivity was terminating. Despite the opposition of the Committee and individual creditors, the court granted the request for an extension of exclusivity based upon the efforts the debtor had undertaken and the need for additional time in which to determine whether it would achieve success. *Id.*

26. The Debtor should be granted an additional 90 days of exclusivity for filing a plan and for soliciting acceptance of its plan.

27. Notice of this motion has been given to the U.S. Trustee, the twenty largest unsecured creditors, known secured creditors and taxing authorities.

Respectfully submitted,

Market Square Hospitality, LLC

By: /s/Abraham Brustein
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