

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	
	)	Chapter 11
	)	
HUDSON 1701/1706, LLC, <i>et al.</i> ,	)	Case No. 25-11853 (KBO)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	Related to Docket No. 461

**MEMORANDUM ORDER GRANTING
GROUND LESSOR’S MOTION TO CERTIFY DIRECT APPEAL**

On April 22, 2026, the Court entered an order (the “Section 365 Order”) that found and concluded that a ground lease between the debtors Hudson 1701/1706, LLC and Hudson 1702, LLC (together, the “Debtors”) and 356W58 Ground Lessor (“Ground Lessor”) dated May 4, 2022 (the “Ground Lease”) constitutes a lease of “residential real property,” as that term is used in section 365(d)(2) of the Bankruptcy Code (the “Code”).¹ The Ground Lessor has appealed that decision. Currently before the Court is the *Motion of 356W58 Ground Lessor LLC to Certify Direct Appeal to the Court of Appeals Under 28 U.S.C. § 158(d)* (the “Certification Motion”).² The Certification Motion seeks an order certifying the Section 365 Order for direct appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 158(d)(2)(A). For the reasons set forth below, the Court will grant the Certification Motion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Ground Lease relates to the Debtors’ intended redevelopment of real property located at 353-361 West 57th Street in New York City (the “Property”). The Debtors maintain that the Ground Lease is not a true lease and should be recharacterized as a loan. They commenced an adversary proceeding to do so, but the Court dismissed it under Rule 12(b)(6) of the Federal Rules of Civil Procedure with leave to amend.³ An amended complaint has not yet been filed, but the Debtors have stated their intention to file one.

¹ D.I. 443 (*Order Granting Debtors’ Motion for an Order Determining that Purported Ground Lease, if a True Lease, is a Lease of Residential Real Property Under Section 365 of the Bankruptcy Code*).

² D.I. 461.

³ See Adv. Proc. No. 25-52471, D.I. 86.

While pursuing recharacterization of the Ground Lease, the Debtors filed a motion (the “Section 365 Motion”),⁴ which the Ground Lessor opposed,⁵ seeking a determination that the Ground Lease is a lease of residential real property rather than a lease of nonresidential real property. This determination affects, among other things, the deadline under section 365 of the Code for the Debtors to assume or reject the Ground Lease.⁶

The Code does not define the terms “residential real property” and “nonresidential real property”. The Court and the parties agree that there are no guiding decisions from either the Third Circuit Court of Appeals or the United States Supreme Court on the issue. Bankruptcy courts faced with determining whether real property is residential or nonresidential have applied one of three frameworks: the “property test”, the “economics test”, or the “totality of the circumstances test”. While the property test looks to the character of the property itself,⁷ the economics test considers the contractual intent behind the lease (*i.e.* whether the lease is for commercial or non-commercial purposes).⁸ The totality of the circumstances test, as the name suggests, examines all facts and circumstances of a given case and allows for a more “comprehensive assessment that captures the property’s purpose, use, and intent.”⁹

In deciding the Section 365 Motion, the Debtors urged the Court to adopt the property test or the totality of the circumstances test. Ground Lessor advocated for the economics test. After considering the parties’ arguments as well as the decisions applying the three tests, the Court concluded that both the property test and the economics test lacked the flexibility necessary to be applied whole cloth to any situation. Accordingly, the Court held that the “totality of the circumstances test” was the appropriate test to apply.¹⁰

The next step was for the Court to consider and weigh the totality of the circumstances presented to determine whether the Ground Lease is a lease of residential real property as the Debtors claim. On April 21, 2026, the Court held an evidentiary hearing on that issue and found that the evidence demonstrated that the Property is residential in nature. In doing so, the Court considered and weighed a number of factors, including the present state of the property as a

⁴ D.I. 344.

⁵ D.I. 354.

⁶ Compare 11 U.S.C. § 365(d)(2) (providing that a chapter 11 trustee “may assume or reject an . . . unexpired lease of residential real property . . . at any time before the confirmation of a plan . . .”), with 11 U.S.C. § 365(d)(4) (requiring a debtor to assume or reject “an unexpired lease of nonresidential real property” by the earlier of 120 days after the petition date (subject to a 90-day ordered extension and further extensions with written consent from the lessor) or the date of the entry of the confirmation order).

⁷ See, e.g., *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354 (Bankr. W.D. Wash. 2020) (applying the “property test”).

⁸ See, e.g., *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367 (Bankr. S.D. W. Va. 2017) (applying the “economic test”).

⁹ See *Erie Acquisition, LLC v. Guardian Elder Care at Johnstown, LLC (In re Guardian Elder Care at Johnstown, LLC)*, 665 B.R. 270, 277 (Bankr. W.D. Pa. 2024) (applying the “totality of the circumstances” test).

¹⁰ D.I. 373 (March 12, 2026 Hr’g Tr. at 48-50).

partially developed but stalled construction site, the presence of twenty-nine single room occupancy (“SRO”) residents on the Property, the stated residential redevelopment purpose of the Ground Lease, the Debtors’ past, present, and future plans and efforts consistent with that purpose to develop the Property into residential housing units, the limited presence of one commercial tenant, and the applicable local regulators and regulations governing the residential redevelopment of the Property and the current SRO residents.¹¹

The Court thereafter entered the Section 365 Order memorializing its ruling. On May 5, 2026, the Ground Lessor filed its Notice of Appeal and Certification Motion.¹² Argument on the Certification Motion occurred May 22, 2026.

II. LEGAL STANDARD

Generally, a party’s appeal from a bankruptcy court’s order “is entertained by the court of appeals only if the district court affirms the bankruptcy court’s order and the party appeals the district court’s decision.”¹³ However, 28 U.S.C. § 158(d)(2)(A) provides the court of appeals with the discretion to exercise jurisdiction over an appeal taken directly from a bankruptcy court’s order if either the bankruptcy court or the district court certifies that:

- (i) the . . . order . . . involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the . . . order . . . involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the . . . order . . . may materially advance the progress of the case or proceeding in which the appeal is taken.¹⁴

Pursuant to 28 U.S.C. § 158(d)(2)(B), the bankruptcy or district court must make this certification if, either *sua sponte* or on request of a party, “the court determines that any one of the

¹¹ D.I. 447 (Apr. 21, 2026 Hr’g Tr. at 67-69) (noting that evidence presented showed that the purpose of the lease was to convert the property to residential units with only a small part of the space to be converted for commercial use, that this remains the only plan currently being pursued by the parties, and that certain New York City regulators view the building and the proposed construction as residential in nature).

¹² D.I. 459 (Notice of Appeal); D.I. 460 (Certification Motion).

¹³ *Vara v. FTX Trading LTD (In re FTX Trading LTD)*, No. 23-241 (CFC), 2023 U.S. Dist. LEXIS 93529, at **1-2 (D. Del. May 30, 2023) (citing 28 U.S.C. § 158(a)).

¹⁴ *Id.* (quoting 28 U.S.C. § 158(d)(2)(A)).

circumstances specified in § 158(d)(2)(A)(i)-(iii) exist.”¹⁵ Here, Ground Lessor argues that certification is mandatory because the Section 365 Order involves a question of law as to which there is no controlling decision. It also argues that direct appeal will materially advance the progress of the Debtors’ bankruptcy cases. The Debtors disagree with both arguments.

III. DISCUSSION

“The direct-appeal pathway for a bankruptcy court order under 28 U.S.C. § 158(d)(2) was enacted to ‘foster the development of coherent bankruptcy-law precedent’ by facilitating ‘guidance on pure questions of law’ from the circuit courts of appeals.”¹⁶ Accordingly, certification of issues that are fact intensive is not appropriate.¹⁷

Included in the Court’s ruling on the Section 365 Motion currently on appeal is the following question: What legal standard or test should courts apply to determine if a lease of real property is a “lease of residential real property” as that phrase is used in section 365(d)(2) of the Code? In entering the Section 365 Order, the Court determined that the answer should be the totality of the circumstances test. The Ground Lessor’s appeal of this holding involves a pure question of law for which there is no controlling precedent. Therefore, the Court must certify the Section 365 Order for direct appeal consistent with 28 U.S.C. § 158(d)(2)(A)(i).¹⁸

¹⁵ *Id.* See also 28 U.S.C § 158(d)(2)(B) (“If . . . the bankruptcy court . . . on its own motion or on the request of a party, determines that a circumstance specified in [§ 158(d)(2)(A)] exists[.], . . . the bankruptcy court . . . shall make the certification described in subparagraph (A).”) (emphasis added).

¹⁶ *Weber v. United States*, 484 F.3d 154, 158-59 (2d Cir. 2007).

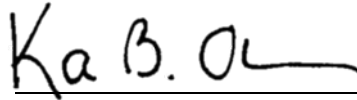
¹⁷ See e.g., *In re Trib. Co.*, 477 B.R. 465, 472 (Bankr. D. Del. 2012) (“The issue concerning how this Court measured materiality is not a pure legal issue; it is not appropriate for direct appeal.”); *American Home Mortg. Inv. Corp. v. Lehman Bros., Inc. (In re American Home Mortg. Inv. Corp.)*, 408 B.R. 42, 43-44 (D. Del. 2009) (finding that issues identified for certification were “mixed questions that implicate the particular circumstances of this case, and as such, they are not pure legal questions warranting direct certification”); *Bepco LP v. Globalsantafe Corp., et al. (In re 15375 Memorial Corp.)*, No. 08-313-SLR, 2008 WL 2698678, at *1 (D. Del. July 3, 2007) (holding direct appeal was inappropriate because “a pure question of law has not been stated”).

¹⁸ Given the satisfaction of 28 U.S.C. § 158(d)(2)(A)(i), the Court need not address the Ground Lessor’s argument under subsection (iii) that direct certification will materially advance the progress of the Debtors’ bankruptcy cases. Notwithstanding, should the Court ultimately find that the Ground Lease is not a true lease, then a direct appeal will not advance the bankruptcy proceedings because the issues on appeal will be moot. If the Court finds that the Ground Lease is a true lease and the Ground Lessor prevails on appeal, then direct appeal may advance the cases. The Debtors however have not amended their recharacterization complaint. To be fair, they have stated their intention to do so and their deadline to amend has not yet expired. But given the present state of the proceedings, the Court is unable to determine the effect that a direct appeal could have on the bankruptcy cases.

IV. CONCLUSION

For the reasons stated, it is hereby **ORDERED** that the Section 365 Order is certified for direct appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 158(d)(2)(A)(i).

Dated: May 28, 2026
Wilmington, Delaware

A handwritten signature in black ink, appearing to read "Ka B. Owens", written over a horizontal line.

Karen B. Owens
Chief Judge