IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	**Chapter 11**
TRUMP ENTERTAINMENT RESORTS, INC., et al.,[1]	**Case No. 14–12103 (KG)**
	(Jointly Administered)
Debtors.	**Ref. Docket No. 295**

FIRST LIEN PARTIES' OBJECTION TO LEVINE, STALLER, SKLAR, CHAN & BROWN, P.A.'S MOTION FOR AN ORDER FIXING THE VALUE AND PRIORITY OF, AND ALLOWING ITS CLAIM AS SECURED IN FULL

Icahn Agency Services, LLC, in its capacities as Administrative Agent and Collateral Agent for the First Lien Lenders (in either such capacity, the "**First Lien Agent**") and Icahn Partners LP, Icahn Partners Master Fund LP, and IEH Investments I LLC, in their capacity as lenders (in such capacity, the "**First Lien Lenders**" and, together with the First Lien Agent, the "**First Lien Parties**") under that certain *Amended and Restated Credit Agreement*, dated as of July 16, 2010, as amended, supplemented, or modified from time to time (together with all related loan and security documents), hereby submit this Objection to *Motion to Allow Levine, Staller, Sklar, Chan & Brown, P.A. for Entry of an Order Fixing the Value and Priority of, and Allowing its Claim as Secured in Full, Pursuant to U.S.C. Section 506(a) and Rule 3012 of the Federal Rules of Bankruptcy Procedure* [Docket No. 295] (the "**LS Motion**" and "**Levine Staller**," respectively). In support of this Objection, the First Lien Parties respectfully state as follows:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Trump Entertainment Resorts, Inc. (8402), Trump Entertainment Resorts Holdings, L.P. (8407), Trump Plaza Associates, LLC (1643), Trump Marina Associates, LLC (8426), Trump Taj Mahal Associates, LLC (6368), Trump Entertainment Resorts Development Company, LLC (2230), TER Development Co., LLC (0425) and TERH LP Inc. (1184). The mailing address for each of the Debtors is 1000 Boardwalk at Virginia Avenue, Atlantic City, NJ 08401.

SUMMARY OF ARGUMENT

1. The LS Motion suffers from fatal, multiple, incurable defects each of which mandates its denial. First, contrary to its repeated assurances to the New Jersey court as well as to this Court, Levine Staller failed to perfect its alleged charging lien as required by New Jersey law. New Jersey law required Levine Staller to give the Debtors a written notice 30 days prior to filing the petition to enforce its charging lien. Levine Staller, however, gave the Debtors no prior written notice. Having failed to perfect its alleged lien, Levine Staller holds a general unsecured claim in this case. See Point I, infra.

2. Second, even if Levine Staller holds a perfected lien, which it does not, the First Lien Parties' lien dates back to 2007 and thus primes the lien that Levine Staller itself alleges dates back to 2008. See Point II, infra.

3. Third, even if the charging lien had been perfected, Levine Staller would still be required to trace its funds since, as the Debtors repeatedly argued, the tax refunds proceeds have been spent in their ordinary course of business. State laws that establish "secret," unrecorded liens free of tracing principles are preempted and not respected in bankruptcy. See Point III, infra.

4. Fourth, Levine Staller's reliance on the lowest intermediate balance rule to trace the funds subject to its alleged lien fails because the rule simply does not apply. Tracing principles apply to cure a wrong, e.g. breach of trust or prohibited commingling. None of this occurred here. The Debtors were not acting in any trust capacity with respect to Levine Staller, nor is one even alleged. The Debtors were not prohibited from commingling the funds, or subject to any restrictions as to their use. Nor is any such prohibition or restriction alleged.

Absent breach of trust or prohibited commingling, tracing rules simply do not apply. See Point IV, ¶¶ 35-39, infra.

5. Fifth, even if the lien was perfected, and even if the lowest intermediate balance rule applied, Levine Staller is required to trace the funds to specific Debtors' account or accounts; it cannot obtain a lien on funds in accounts absent tracing the funds into these specific accounts. See Point IV, ¶ 40, infra. Therefore, Levine Staller's assertion that its lien applies to the Debtors' existing cash "in gross" must be rejected.

6. Finally, the equities clearly favor the estates and First Lien Parties. Levine Staller has already been paid $6 million out of the $7.25 million in contingency fees it is alleged to be entitled to; 82.75% recovery. Meanwhile, the Debtors' proposed Joint Plan of Reorganization provides for the First Lien Lenders to equitize a large part of their senior secured debt and commit to supplying an additional $100 million in new funding. General unsecured creditors receive no distribution at all. It is inequitable for Levine Staller to be paid in full while every other constituency in this case suffers extreme hardship. See Point V, infra. For all of these reasons, the LS Motion should be denied.

ARGUMENT

I. Levine Staller Failed to Perfect its Attorney's Charging Lien

7. The validity and extent of Levine Staller's charging lien is determined under New Jersey law. See Hoffman & Schreiber v. Medina, 224 B.R. 556, 560 (D.N.J. 1998) (citing Electronic Metal Prods. v. Bittman, 916 F.2d 1502, 1504 (10th Cir. 1990) ("The validity and extent of an attorney's lien in bankruptcy is determined by state law."). The New Jersey Attorney's Lien Statute provides,

> After the filing of a complaint or third-party complaint or the service of a pleading containing a counterclaim or cross-claim, the attorney or counsellor at law, who shall appear in the cause for the

> party instituting the action or maintaining the third-party claim or counterclaim or cross-claim, shall have a lien for compensation, upon his client's action, cause of action, claim or counterclaim or cross-claim, which shall contain and attach to a verdict, report, decision, award, judgment or final order in his client's favor, and the proceeds thereof in whose hands they may come. … The court in which the action or other proceeding is pending, upon the petition of the attorney or counsellor at law, may determine and enforce the lien.
>
> N.J.S.A. § 2A:13-5.

8. As Levine Staller recognizes (LS Motion, at 12 fn. 14), to establish a charging lien, the attorney must commence an action in the court where the underlying action was filed, for a determination of the attorney's right to the statutory lien. See H. & H. Ranch Homes, Inc. v. Smith, 54 N.J. Super. 347, 353-4 (App. Div. 1959). The attorney may commence the action either before or after the underlying case results in settlement or judgment. See Musikoff v. Jay Parrino's the Mint, L.L.C., 172 N.J. 133, 136 (2002) ("the Act does not require an attorney to file a petition to acknowledge and enforce an attorney's lien prior to settlement or judgment in the matter that has given rise to the lien itself").

9. An attorney cannot sue for fees that are subject to a statutory charging lien under N.J.S.A. § 2A:13-5 unless the attorney has first complied with New Jersey Court Rule 1:20A-6, which requires that the attorney give notice to the client about the availability of fee arbitration and await the expiration of a 30-day period prior to filing suit to recover a fee.[2] The notice advises the client of the right to have a fee dispute submitted to the New Jersey Fee Committee

[2] Rule 1:20A-6 states, "No lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving Pre-action Notice to a client; however, this shall not prevent a lawyer from instituting any ancillary legal action. Pre-action Notice shall be given in writing, which shall be sent by certified mail and regular mail to the last known address of the client, or, alternatively, hand delivered to the client, and which shall contain the name, address and telephone number of the current secretary of the Fee Committee in a district where the lawyer maintains an office. … The attorney's complaint shall allege the giving of the notice required by this rule or it shall be dismissed."

for adjudication. The Rule also provides that "[t]he attorney's complaint shall allege the giving of the notice required by this rule or *it shall be dismissed.*" R. 1:20A-6 (emphasis added).

10. The pre-action notice requirement applies to a petition to establish and enforce an attorney's lien and failure to comply mandates a dismissal of the petition. Schepisi & McLaughlin, P.A. v. Lofaro, 430 N.J. Super. 347, 357 (App. Div. 2013); Rosenfeld v. Rosenfeld, 239 N.J. Super. 77, 78 (Ch. Div. 1989) ("R. 1:20A-6 provides that before an attorney files a *complaint* to recover a fee the attorney must first notify the client of the remedy of arbitration. The sole issue here is whether the rule applies to a *petition* [to determine and enforce an attorney's lien] filed under N.J.S.A. 2A:13-5. The court determines that it does."). See also Kevin H. Michels, New Jersey Attorney Ethics, ¶ 38:9 (2014) (arbitration notice requirement "applies to certain actions *ancillary* to a suit for a fee, such as an action to enforce an attorney's statutory lien."); Mateo v. Mateo, 281 N.J. Super. 73, 80 (App. Div. 1995) ("There is no sense in requiring an attorney to inform a client that litigation over a fee dispute may be avoided by bringing the matter before the [Arbitration] Fee Committee, yet binding the client to a judgment in such litigation where the attorney failed to give the required notice.").

11. Levine Staller acknowledges that the pre-action notice applies to the petition to establish the lien: "In order to perfect a lien under the Attorney Lien Statute… The attorney must notify the client of the intent to perfect the lien with a Pre-Action Notice in compliance with New Jersey Court Rule 1:20A-6 and commence an action to enforce the lien by making an application to the court where the underlying action was filed for a determination of the attorney's right to an attorney's lien…" See LS Motion, at 12 fn. 14.

12. Courts have invalidated attorneys' liens for failure to give the required notice, even where giving the notice would have been futile since clients refused to arbitrate. See e.g.,

Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, 292 N.J. Super. 453, 459 (App. Div. 1996). See also Nieschmidt Law Office v. Leamann, 399 N.J. Super. 125, 130 (Super. Ct. App. Div. 2008) (court dismissed attorney's suit for fees because "[t]o permit a plaintiff to avoid the Pre-Action Notice simply because a defendant opts not to participate in fee arbitration would render the rule nugatory.").

13. Levine Staller failed to give the Debtors the required 30 days' notice. According to its own pleadings, Levine Staller gave the Debtors the required pre-action notice on December 5, 2012, *the same day* that Levine Staller filed its motion to perfect the attorney's lien. See Declaration of Michael Sklar attached to the LS Motion [Docket No. 295-3] (the "Sklar Decl."), ¶ 9; Exhibit B thereto [Docket No. 295-5, p. 6 of 10], ¶ 7 ("On December 5, 2012, pursuant to R. 1:20A-6, Levine Staller caused to be served on Plaintiffs a "pre-action" fee arbitration notice."). Thus, instead of waiting 30 days, Levine Staller commenced the action on the same day it gave the Debtors the required notice. To add insult to injury, the decision allegedly perfecting the charging lien was issued on December 24, 2014, a mere 19 days after the Debtors were given the pre-action notice. See Sklar Decl., ¶ 11.

14. Levine Staller's alleged perfection of its alleged lien in July 2013 fares no better, as no notice whatsoever was given by Levine Staller to the Debtors. In its July 2013 motion to the New Jersey court, Levine Staller mentioned only the pre-action notice given to the Debtors in December 5, 2012 with respect to the motion filed in December 2012, but does not reference any pre-action notice with respect to its July 2013 motion. See Sklar Decl., Exh. D [Docket No. 295-7, p. 6 of 11], ¶ 7.

15. Thus, it is clear on the face of Levine Staller's own pleadings that it failed to comply with Rule 1:20A-6, which requires the pre-action notice to be given before its motions to

perfect its liens were filed. The notice with respect to its 2012 motion was given on the same day the motion to which it relates was filed, and no notice whatsoever was given with respect to the July 2013 motion.

16. Holders of unperfected attorney's charging liens in bankruptcy have either been denied recovery altogether, or been recognized as general unsecured creditors. See In re Elec. Metal Products, Inc., 916 F.2d 1502, 1506-7 (10th Cir. 1990) (unperfected attorney's charging lien is not enforceable against third parties, including client's other creditors and the trustee or debtor-in-possession); Hoffman & Schreiber v. Medina, 224 B.R. 556, 564 (D.N.J. 1998) (because attorney failed to perfect its charging lien, its "entire claim against debtor is in the nature of an unsecured claim"); In re Microbilt Corp., 2013 Bankr. LEXIS 4566, at *11 (Bankr. D.N.J. 2013) (citing In re Rapid Freight, 2011 Bankr. LEXIS 1328, at *7) (attorney with unperfected charging lien can still seek redress as a general unsecured creditor).[3]

II. The First Lien Parties' Lien Predates Levine Staller's Alleged Lien

17. Assuming arguendo that Levine Staller perfected its lien, which it did not, its lien would still be junior to the First Lien Parties' lien. Levine Staller's sole argument in this regard is that its lien relates back to 2008 and thus primes the First Lien Parties' lien since, according to Levine Staller, the First Lien Parties received their lien in 2010. See LS Motion, ¶ 41. Not so. The First Lien Parties' lien dates back to 2007.

18. Attached to the Declaration of Shmuel Vasser, dated as of November 3, 2014 and filed simultaneously herewith (the "**Vasser Decl.**") as Exhibits A, E and I are copies of Uniform

[3] It is noteworthy that Levine Staller represented to the New Jersey court that it complied with the pre-action notice requirement, although, as demonstrated above, it did not. During the August 2014 oral argument on the motion to enforce the July 2013 charging lien, the Tax Court commented to Levine Staller, "you indicated to the taxpayer they had the opportunity to go to arbitration, fee arbitration. They did not take up that opportunity. And you made a motion in this court December of 2012 to perfect a charging lien?" (LS Motion, Exh. F, at 6, ln. 4-8 [Docket No. 295-9, p. 6 of 26 top table]). Michael Sklar from Levine Staller answered, "Correct." (Id., Exhibit F, at. 6 ln. 9).

Commercial Code ("**UCC**") financing statements (the "**Original Financing Statements**") evidencing the grant of security interests by Trump Plaza Associates, LLC ("**Plaza**"), Trump Marina Associates, LLC ("**Marina**") and Trump Taj Mahal ("**Taj**" and together with Plaza and Marina, the "**Relevant Debtors**") to Beal Bank as collateral agent under that certain $493,250,000 credit agreement among the Debtors and the various lenders thereto (the "**2007 Credit Agreement**"). A copy of the 2007 Credit Agreement is attached to the Vasser Decl. as Exhibit M. The debt under the 2007 Credit Agreement was secured pursuant to that certain Security Agreement (the "**2007 Security Agreement**") executed by the Debtors in favor of Beal Bank. A copy of the 2007 Security Agreement is attached to the Vasser Decl. as Exhibit N.

19. Under the 2007 Security Agreement the Debtors were required to maintain certain pledged deposit accounts constituting Beal Bank's collateral. See 2007 Security Agreement, Vasser Decl., Exh. N, §§ 1(f)(i), 5(c); Schedule II. As will be established by the Debtors, the tax refunds in which Levine Staller claims an interest were deposited in one of these pledged deposit accounts.

20. Attached to the Vasser Decl. as Exhibits B, F and J are copies assigning the security interests granted by the Relevant Debtor to Beal Bank from Beal Bank to the First Lien Agent.

21. Attached to the Vasser Decl. as Exhibits C, G and K are copies of UCC continuation statements filed on behalf of the First Lien Agent continuing the effectiveness of the Original Financing Statements which remain in force and effect.

22. As is evidenced from documents filed in the Debtors' prior bankruptcy case, the debt issued to the First Lien Agent under the confirmed chapter 11 plan, was not *new* debt, but *amended and restated* debt.

23. Attached to the Vasser Decl. as Exhibit O is a copy of the Amended and Restated Credit Agreement, dated as of July 16, 2010 among the Debtors and the First Lien Parties (the "**2010 Credit Agreement**"). The 2010 Credit Agreement specifically recites that the debt under the 2007 Credit Agreement, referred to as the Existing Credit Agreement, "is to be restructured as provided in this Agreement" and that "[t]he parties hereto now desire to restructure the Existing Credit Agreement as contemplated by the Plan of Reorganization and as provided in this Agreement." See 2010 Credit Agreement, at 5.[4]

24. The Debtors also entered into an Amended and Restated Security Agreement, dated as of July 16, 2010 (the "**2010 Security Agreement**"), to secure the 2010 Credit Agreement. A copy of the 2010 Security Agreement is attached to the Vasser Decl., as Exh. P. The 2010 Security Agreement in turn provides that the parties "wish to amend and restate the [2007 Security Agreement] in its entirety … to secure the obligations under the [2010 Credit Agreement]." See Vasser Decl., Exh. P, at 1 (preliminary statement (6)). Pursuant to the 2010 Security Agreement the Debtors' deposit accounts, including the account in which the tax refunds were deposited, were pledged to secure the 2010 Credit Agreement. See Vasser Decl., Exh. P, Schedule II.

25. The Debtors' entry into the 2010 Credit Agreement and its related documents, was specifically authorized by the order confirming the Debtors' chapter 11 plan in their prior bankruptcy cases. A copy of said confirmation order is attached to the Vasser Decl. as Exhibit Q. See Vasser Decl., Exh. Q. ¶ 19.

26. Since the First Lien Parties' lien dates back to 2007, even if Levine Staller properly perfected its lien in 2008, which it did not, its lien is junior to the First Lien Parties' lien as the later perfected one.

[4] While the First Lien Agent filed UCC-1 financing statements in 2012 against the Relevant Debtors as well, copies of which are attached to the Vasser Decl. as Exhibits D, H and L, these do not detract from the continued effectiveness of the Original Financing Statements.

III. To the Extent that New Jersey Law Provides that Levine Staller's Charging Lien Attaches to Debtors' Cash In Gross it is Preempted by the Bankruptcy Code

27. Nowhere does the LS Motion dispute the Debtors' public statements that the refunds paid in settlement of the tax appeals were spent in their ordinary course of business. Thus, the funds in which Levine Staller asserts an interest no longer exist. As a result, in Part III of its Motion, Levine Staller argues that its alleged lien attaches to all of the Debtors' cash in gross without a need for it to trace the funds allegedly the subject of its lien. See LS Motion, ¶ 47 ("Thus, the lien 'attaches to the judgment, decision, award, etc., in gross, not to specific assets.'"). That argument is also asserted in part of Part IV of the LS Motion, where Levine Staller argues that because cash is fungible tracing is not required. See LS Motion, ¶ 52 ("Indeed, courts have held that because 'cash is fungible,' tracing is not required or feasible when cash collateral has been commingled with other debtor funds"). But, tracing is required in bankruptcy and state laws that attempt to enforce liens "in gross" with no need for tracing to a specific fund are preempted.

28. In stark contrast to Levine Staller's stance that tracing into commingled funds "is not required or feasible," the law is to the contrary. Courts have universally held that in the context of bankruptcy, state laws allowing for recovery from commingled funds without tracing are preempted. Tracing into commingled funds, "because it pertains to distribution of assets from an entity in federal bankruptcy proceeding, is exclusively a question of federal law." Goldberg v. New Jersey Lawyers' Fund for Client Protection, 932 F.2d 273, 280 (3d Cir. 1991) (citing Connecticut Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 618-19 (1st Cir. 1988)).

29. For reasons of federalism and public policy, courts have widely refused to enforce state laws providing, as Levine Staller argues is true in New Jersey, that tracing is not required. "If state law is contrary to federal bankruptcy law, the state law must yield. Giving effect to the provisions of [the state law], which would impress [an expressive trust] upon commingled funds, would open the door to state creation of priorities in favor of various classes of creditors by labeling such priorities as 'trusts.' This would tend to thwart or obstruct the scheme of federal bankruptcy." Elliott v. Bumb, 356 F.2d 749, 755 (9th Cir. 1966)).

30. In Elliott, the seminal case on the issue, a California statute required that vendors of money orders segregate all payments received and, if the vendor failed to do so, the law impressed a statutory trust on all of the vendor's funds needed to honor the money orders. The Ninth Circuit held that the statute's imposition of a trust on the commingled funds without tracing could not be given effect, for "[a] state rule which purports to fasten a general lien on a person's estate in the event of solvency or a general liquidation must be regarded as a priority in disguise and incompatible with the order of distribution prescribed for bankruptcy." Id., at 544 (quotation omitted); see also In re Faber's, Inc., 360 F. Supp. 946, 950 (D. Conn. 1973) ("United States v. Randall, as well as [Elliott v. Bumb and Lusk Corp. v. Arizona State Tax Commission], suggests that even though the trustee has violated the statutory requirement by commingling the funds, if the beneficiary cannot identify his money he will have to take his place at the end of the line behind those favored by the priorities set out in § 64(a) [of the Bankruptcy Act]"); Callaway v. Memo Money Order Co., 381 B.R. 650, 656 (E.D.N.C. 2008) (federal bankruptcy law preempts the North Carolina Money Transmitters Act, which eliminated the need to trace trust funds within a bankruptcy estate (citations omitted)).

31. In fact, not a single one of the cases cited by Levine Staller allowed a lien on commingled cash without tracing. Levine Staller principally relies on Martin v. Martin, 335 N.J. Super. 212 (App. Div. 2000), in which the New Jersey Superior Court stated, "the lien attaches to the judgment, decision, award, etc., in gross, not to specific assets." It did so, however, in a very different context: dividing the client's assets among multiple attorneys *who each held valid charging liens on funds in a specific account*. The court ruled that the funds in that account "in gross" should be divided among the attorneys on a pro rata basis. Id., at 225. It did not consider any other assets not located in that specific account, nor any additional accounts. Martin does not support Levine Staller's claim that its charging lien may be satisfied out of any of the Debtors' cash wherever held. The remaining New Jersey cases cited by Levine Staller explain the equitable rationale for the attorney's lien and note that the New Jersey statute expanded attorneys' common law entitlement to a lien. They do not allow a lien on assets free of tracing principles. See In re Rapid Freight Sys., Inc., 2011 WL 1300441, at *4 (Bankr. D.N.J. Mar. 31, 2011); Schepisi & McLaughlin, P.A. v. LoFaro, 430 N.J. Super. 347, 355 (App. Div. 2013); Bresnahan v. Bresnahan, 2014 WL 3407087, at *4 (N.J. Super. Ct. App. Div. 2014); Norrell v. Chasan, 125 N.J. Eq. 230, 237 (E.&A. 1939).

32. Nor does the federal case cited by Levine Staller support its motion. Levine Staller cites In re Cybridge Corp., 304 B.R. 681 (D.N.J. 2004) for the proposition that tracing is not required because cash is fungible. Cybridge is simply irrelevant. Cybridge involved an avoidance action by a trustee against a creditor who provided the debtor with factoring loans and continued to collect the debtor's accounts receivable post petition since it was not notified of the bankruptcy. The amount of post petition loans made by the creditor exceeded the amounts it collected from the debtor's accounts receivable post petition. Since cash is fungible, the

bankruptcy court allowed the creditor a full offset of the post petition advances, resulting in zero recovery by the trustee. Id., at 691. Cybridge does not even once mention the word "tracing."

33. Consistent with the foregoing principles, courts reject arguments that beneficiaries of trusts may recover debtors' funds without a showing that the funds they claim can be traced. See e.g., Taylor Assocs. v. Diamant (In re Advent Mgmt. Corp), 104 F.3d 293, 296 (9th Cir. 1997) ("Under the strict tracing standard applicable to bankruptcy cases involving commingling funds, Taylor bears the burden of tracing the alleged trust property 'specifically and directly' back to the illegal transfers"); In re Kennedy & Cohen, Inc., 612 F.2d 963, 965 (5th Cir. 1980) (court declined to impress constructive trust on all of bankrupt company's assets for money damages arising from the bankrupt's breach of its service contracts; court rejected the argument that tracing is not required and held that "[p]laintiffs cannot trace the funds that were paid for these contracts").

34. Therefore, to the extent that the New Jersey's Attorney's Lien Statute does not require tracing, the charging lien is unenforceable under preemption principles discussed above.

IV. Tracing Principles Do Not Apply in this Case

35. Assuming arguendo, that Levine Staller holds a perfected security interest, which it does not, it still fails in tracing the funds in which it alleges an interest. Tracing principles apply, when appropriate, to remedy a breach of trust or misuse of funds. Stated differently, tracing principles are used to remedy a wrong committed by one which resulted in an injury to another. No wrong or breach of trust was committed by the Debtors herein. The Debtors were not required to segregate the funds in which Levine Staller claims an interest and Levine Staller does not argue otherwise. Nor did the Debtors act in a trust or fiduciary capacity towards Levine Staller, and Levine Staller does not argue otherwise. Simply stated, there is no wrong that gives rise to the application of tracing principles. See e.g., Harley J. Goldstein & Craig A. Sloane,

Spending Other People's Money: Creditors' Remedies for the Misuse of Cash Collateral in Bankruptcy, 7 U. Miami B. L. Rev. 243, 245 (1999) ("[S]crutinize the Bankruptcy Code for a statutory remedy for the misuse of cash collateral, and you will search in vain. In response, courts have been forced to devise judicially created remedies," including "tracing."; 5 Collier on Bankruptcy, ¶ 541.28[2][b] (16th ed. 2014) ("One of the more common forms of constructive[5] or involuntary trusts created by conduct is that of the trust *ex maleficio* that is created by wrongdoing. Such a trust is usually invoked as a result of the conversion of money or property belonging to another."); Deckert v. Independence Shares Corp., 311 U.S. 282, 290-1 (1940) (preliminary injunction issued to preserve status quo as to an account in which the defendant commingled trust funds); Coronation Sheet Metal, Inc. v. Interchange Bank (In re K.I. Liquidation, Inc.), 2007 Bankr. LEXIS 4235, at *15-17 (Bankr. D.N.J. 2007) (denying imposition of constructive trust because unpaid subcontractors could not establish that general contractor wrongfully withheld their fees).

36. Levine Staller cites cases applying the lowest intermediate balance tracing rule in order to remedy a wrong. Off'l. Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington (In re Catholic Diocese of Wilmington), 432 B.R. 135, 151 (Bankr. Del. 2010) featured a violated resulting trust, while In re Connecticut General Life Ins. Co., 838 F.2d 612,

[5] Many bankruptcy courts "recognize the tension that exists between the state law principle of constructive trust, which benefits just one party, and the bankruptcy principle favoring general equality among those having similar rights." In re CRS Steam, Inc., 225 B.R. 833, 839 (Bankr. D. Mass 1998). In a leading case, the Sixth Circuit explained, "[A] claim filed in bankruptcy court asserting rights to certain assets 'held' in 'constructive trust' for the claimant is nothing more than that: a claim. Unless a court has already impressed a constructive trust upon certain assets or a legislature has created a specific statutory right to have certain kinds of funds held as if in trust, the claimant cannot properly represent to the bankruptcy court that he was, at the time of the commencement of the case, a beneficiary of a constructive trust held by the debtor." XL/Datacomp v. Wilson (In re Omegas Grp.), 16 F.3d 1443, 1449 (6th Cir. 1994) ("The equities of bankruptcy are not the equities of the common law. Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor." Id., at 1452).

619-20 (1st Cir. 1988) concerned an alleged breach of trust. The debtor in In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1063 (3d. Cir. 1993) had improperly retained funds, leading to the imposition of a constructive trust. In re Oriental Rug Warehouse Club, Inc., 205 B.R. 407, 410-11 (Bankr. D. Minn. 1997) similarly featured a petitioner who argued that the debtor had improperly used sales proceeds that it should have remitted to the petitioner. United States v. McConnell (In re Flying Boat), 258 B.R. 869, 874 (N.D. Tex. 2001) likewise concerned a debtor that had improperly kept user fees it should have transmitted to government agencies for tax purposes. Without exception, Levine Staller refers to cases where courts applied tracing after a misuse of funds in a trust relationship. The Debtors, of course, did not misuse the funds in which Levine Staller claims an interest, nor does Levine Staller even suggest as much.

37. In Rent-A-Center East, Inc. v. Leonard (In re Web2B Payment Solutions, Inc.), 2014 U.S. Dist. LEXIS 97581 (D. Minn. 2014), the court considered whether a creditor's check processing agreement with a debtor gave the funds held in the debtor's account the status of trust funds. The court held that permitted commingling results in a debtor-creditor relationship: "[I]n the context of bank accounts, [w]here the depositor of cash consents to commingling it with other funds of the depositee, the relationship resulting from the transaction is not that of trustee and beneficiary, even though the deposit is for the latter's benefit, but that of debtor and creditor." Id., at *7, quoting In re LGI Energy Solutions, Inc., 460 B.R. 720, 729 (B.A.P. 8th Cir. 2011)). The court then held that since the creditor consented to the commingling of its funds, no trust had been created in the absence of fund segregation.

38. The same principle has been applied in the Third Circuit. See In re Shervin, 112 B.R. 724, 734 (Bankr. E.D. Pa. 1990) ("In general, it is understood that when the 'trustee' of the funds is entitled to use them as his or her own and commingle them with his or her own money, a

debtor-creditor relationship exists, not a trust.") (citing In re Penn Central Transp. Co., 486 F.2d 519, 524 (3d. Cir. 1973); 4 Collier on Bankruptcy, ¶ 541.13 (15th ed. 1990)).

39. Levine Staller has not met the burden of justifying its application of trust fund and tracing principles, including the lowest intermediate balance rule. Unlike the respondents in the cases cited by Levine Staller, the Debtors have not committed an unauthorized use of the proceeds of the tax appeals. The terms of the charging lien were set out in the tax court orders establishing Levine Staller's charging liens, and in the fee agreements between the Debtors and Levine Staller. The court orders establishing the charging liens did not specify that the funds could not be used, or used only in restricted ways. Nor did the orders require the funds to be segregated from non-lien funds and placed in a separate account. When the Debtors made use of the tax refunds funds, they did not violate the terms of their use under the court orders and fee agreements, nor is such violation alleged. Levine Staller has not, and cannot, point to a misuse of funds by the Debtors that would make tracing principles applicable.

40. As almost an afterthought, Levine Staller cites U.S. v. McConnell (In re Flying Boat), 258 B.R. 869, 874 (N.D. Tex. 2001), for the proposition that all of the Debtors' bank accounts should be aggregated for the application of the lowest intermediate balance. This point is purely academic since the lowest intermediate balance is not applicable at all. But if it was, case law is clear that Levine Staller is required to trace the funds into the Debtors' specific accounts and may not benefit from cash in accounts to which none of the funds it claims an interest can be traced. See In re Catholic Diocese of Wilmington, Inc., 432 B.R. at 161 (court refused to apply lowest intermediate balance rule to an account where beneficiaries had not traced funds, because "The point of tracing is to follow the particular entrusted assets, not simply to identify some assets."(quotation omitted)); Connecticut General Life Ins. Co. v. Universal Ins.

Co., 838 F.2d 612, 619 (1st Cir. 1988) ("On the other hand, 'there can be no recovery . . . where all that can be shown is enrichment of the trustee. [The trust property] must be clearly traced and identified in specific property." (citation omitted)); In re Oriental Rug Warehouse Club, Inc., 205 B.R. at 411 (court denied recovery to the petitioner in the case because "[t]he secured party has the burden of establishing that something constitutes identifiable proceeds from the sale or disposition of the secured party's collateral."); In re Flying Boat, 258 B.R. at 876 (the bankruptcy court aggregated the Debtors' accounts in applying the "lowest intermediate balance" rule, but only after the government agencies traced the fees to all of the debtor's accounts).

41. Thus, in all four cases relied upon by Levine Staller to support its application of the lowest intermediate balance rule to the Debtors' existing cash, the court required a showing that funds could be traced to specific accounts. There is no precedent providing Levine Staller a lien on the Debtors' aggregated accounts and "existing cash."

V. Equitable Principles Mandate Denial of the LS Motion

42. Levine Staller's equitable argument falls flat. As demonstrated above, Levine Staller failed to perfect its lien; as such it stands in the shoes of every secured creditor who fails to perfect its lien. Even if Levine Staller had perfected its lien, its lien would have been junior to the First Lien Parties' lien. And even if Levine Staller was not junior to the senior lien, it is not entitled to the benefit of tracing principles, including the use of the lowest intermediate balance rule, because the Debtors' use of the funds in which Levine Staller claims an interest was not restricted in any way. Thus, when these funds were spent by the Debtors, there remained no fund to which Levine Staller's interest may attach.

43. Levine Staller's plea to equity also ignores the realities of this case. The fee arrangement between Levine Staller and the Debtors provided for a contingency fee of 30%, or approximately $15 million, which was revised to approximately $7.25 million after negotiations.

Levine Staller has already been paid $6 million. Contrast this with the treatment of the First Lien Parties in the Debtors' Joint Plan of Reorganization. Under the Plan, the First Lien Parties equitize a major part of their senior secured debt and are committed to providing additional $100 million to fund the Debtors' business post emergence. General unsecured creditors receive no distribution at all. Meanwhile, Levine Staller has already been paid the major part of its fee (82.75%), and argues that it should receive $1.25 million (plus interest, costs and attorney's fees) in addition to the $6 million it was already paid. Thus, according to Levine Staller's view of equity, it should be paid 100% notwithstanding the hardship that is suffered by every other constituency in this case. The equities are clearly in favor of the Debtors' estates and their creditors.

44. In Microbilt, the New Jersey Bankruptcy Court addressed the status of an attorney holding an unperfected charging lien relative to a debtor's other creditors. In a ruling affirmed on appeal by the district court, the bankruptcy court treated an attorney who had failed to perfect his charging lien by sending a pre-action notice to the client as a general unsecured creditor: "In the bankruptcy setting, the issue of whether or not a lien has been perfected still leaves an attorney with a general unsecured claim that could be prosecuted in the bankruptcy case. In fact, in [In re] Rapid Freight, the Bankruptcy Court noted the validity of such an unsecured claim: 'The result may seem harsh to [the attorneys], however, they are not left wholly without remedy or redress. They will still have a general unsecured claim for alleged amounts owed based upon pre-petition services provided to Debtor…'" In re Microbilt Corp., 2013 Bankr. LEXIS 4566, at *11 (Bankr. D.N.J. 2013) (citing In re Rapid Freight, 2011 Bankr. LEXIS 1328, at *23-4). The same result applies here.

CONCLUSION

For all of the foregoing reasons, the First Lien Parties respectfully request that this Court deny Levine Staller's Motion.

Dated: November 3, 2014
Wilmington, Delaware

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