

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:)	
)	Chapter 11
)	
CAESARS ENTERTAINMENT OPERATING)	Case No. 15-01145 (ABG)
COMPANY, INC., <u>et al.</u> , ¹)	
)	(Jointly Administered)
Debtors.)	
)	Re: Docket No. 3694, 3779
)	

NOTICE OF DEBTORS’ EMERGENCY MOTION TO CONTINUE THE MOTION OF THE NOTEHOLDER COMMITTEE FOR AN ORDER GRANTING IT STANDING TO COMMENCE, PROSECUTE, AND SETTLE CLAIMS ON BEHALF OF THE DEBTORS’ ESTATE OR, IN THE ALTERNATIVE, MODIFY THE ORDER SETTING A BRIEFING SCHEDULE

PLEASE TAKE NOTICE that on the **7th day of June 2016, at 1:30 p.m. (prevailing Central Time)** or as soon thereafter as counsel may be heard, the Debtors will appear before the Honorable A. Benjamin Goldgar or any other judge who may be sitting in his place and stead, in Courtroom 642 in the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and present the attached *Debtors’ Emergency Motion to Continue the Motion of the Noteholder Committee for an Order Granting it Standing to Commence, Prosecute, and Settle Claims on Behalf of the Debtors’ Estate or, in the Alternative, Modify the Order Setting a Briefing Schedule* (the “Emergency Motion”).

PLEASE TAKE FURTHER NOTICE that parties in interest may, but need not, file objections to the Motion before the presentment date.

PLEASE TAKE FURTHER NOTICE that copies of the Emergency Motion and all other documents filed in these chapter 11 cases are available free of charge by visiting <https://cases.primeclerk.com/CEOC> or by calling (855) 842-4123 within the United States or Canada or, outside of the United States or Canada, by calling +1 (646) 795-6969. You may also obtain copies of any pleadings by visiting the Court’s website at <http://www.ilnb.uscourts.gov> in accordance with the procedures and fees set forth therein.

¹ A complete list of the Debtors and the last four digits of their federal tax identification numbers may be obtained at <https://cases.primeclerk.com/CEOC>.

Dated: May 27, 2016
Chicago, Illinois

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**UNITED STATES BANKRUPTCY COURT
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In re:)	
)	Chapter 11
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CAESARS ENTERTAINMENT OPERATING COMPANY, INC., <u>et al.</u> , ¹)	Case No. 15-01145 (ABG)
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Debtors.)	(Jointly Administered)
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**DEBTORS' EMERGENCY MOTION TO CONTINUE THE MOTION
OF THE NOTEHOLDER COMMITTEE FOR AN ORDER GRANTING IT
STANDING TO COMMENCE, PROSECUTE, AND SETTLE CLAIMS
ON BEHALF OF THE DEBTORS' ESTATE OR, IN THE ALTERNATIVE,
MODIFY THE ORDER SETTING A BRIEFING SCHEDULE**

1. On May 13, 2016, the Noteholder Committee moved for entry of an order granting it derivative standing to commence, prosecute, and settle the Debtors' claims arising out of a series of prepetition transactions and asset transfers. [Dkt. 3694] Five days later, at the May 18, 2016 omnibus hearing, counsel for the Noteholder Committee asked that the Court accelerate the timing on the standing motion and hear it on June 7 (15 days earlier than previously scheduled). The parties agreed on a briefing schedule whereby objections were due June 15, replies were due June 29, and the motion would be heard at the July 20 omnibus hearing. [Dkt. 3779] Throughout the hearing, the Noteholder Committee omitted at least one "super-important fact": they intended to serve massive discovery requests on numerous entities in support of their standing motion.

2. Five days after the omnibus hearing, the other shoe dropped. The Noteholder Committee issued more than 300 requests for production to seven different parties allegedly in

¹ A complete list of the Debtors and the last four digits of their federal tax identification numbers may be obtained at <https://cases.primeclerk.com/CEOC>.

support of their standing motion. CEOC received 63 separate document requests seeking, *inter alia*, all documents relating to the investigation by the CEOC Special Governance Committee (the “SGC”) of the Debtors’ claims, the SGC’s assessment of the value and likelihood of success of those claims, its valuation of the contributions by CEC and its affiliates to settle the claims, and the general governance and makeup of SGC.² The members of the SGC (CEOC independent directors Ronen Stauber and Steven Winograd), CEC, CES, and the sponsors (Apollo and TPG) each received a subpoena *duces tecum* seeking many of the same categories of information.³ These subpoenas also seek, for example, *all* documents from the prior *ten* years regarding any relationship (personal, professional, business, social, or otherwise) between the independent directors and any of the sponsors’ affiliates, present and former officers, directors, members, shareholders, partners, employees, agents, representatives, attorneys, financial advisors, or investment bankers. (Exs. H-I, Request No. 1)

3. The Noteholder Committee’s motion for derivative standing is at best premature, and could well be mooted by the Court’s decision on plan confirmation. There is simply no reason to litigate standing now when the same issues will be litigated in connection with plan confirmation. The Court’s recent decision on the UCC’s derivative standing request—largely ignored by the Noteholder Committee—is dispositive here.⁴ In that case, the Court continued the UCC’s standing motion while the Debtors sought to settle the claims that were the subject of that

² Attached as Exhibit C is a true and correct copy of the requests for production of documents that the Noteholder Committee served on CEOC.

³ Attached as Exhibits D-I are true and correct copies of the subpoenas *duces tecum* that the Noteholder Committee served on Apollo, TPG, CEC, CES, Ronen Stauber, and Steven Winograd.

⁴ See Motion of Statutory Unsecured Claimholders’ Committee for Order, Pursuant to Bankruptcy Code Sections 1103 and 1109, Granting it Derivative Standing to Commence, Prosecute, and Settle Certain Causes of Action on Behalf of Debtors’ Estates. [Dkt. 2029]

motion. The same reasoning applies here. The Noteholder Committee's standing motion should be continued until the Court decides whether to approve the Debtors' settlement of these claims at confirmation.

4. If the Court declines to continue the standing motion, however, the briefing schedule should be modified to allow the parties to respond to the Noteholder Committee's sweeping requests and, where they do not object, collect, review, and produce responsive documents. Accordingly, the Debtors respectfully request that the Court amend the briefing schedule to provide for an objection deadline of September 14, a reply deadline of September 28, and a hearing on October 19.

ARGUMENT

I. THE NOTEHOLDER COMMITTEE'S STANDING MOTION SHOULD BE CONTINUED UNTIL AFTER THE CONFIRMATION HEARING.

5. In their motion, the Noteholder Committee seeks derivative standing to commence, prosecute, and settle the Debtors' claims against CEC, the sponsors and others arising out of a series of prepetition transactions and asset transfers. The Committee argues that the Debtors have "unjustifiably declined to prosecute the claims or allow others to do so" (Mot. ¶ 22), allegedly because the SGC lacks independence and therefore is "in no position to make an independent, conflict-free assessment of the causes of action." (*Id.* ¶¶ 4, 23, 26) The Court should not address this argument now.⁵

⁵ The Debtors expected to file a straightforward brief on June 15 highlighting why the Court's decision on the UCC's standing motion applies equally here, and requires that the Noteholder Committee's motion be continued (or denied). A June 15th response date, however, is no longer realistic in light of the Committee's sweeping discovery requests on the standing issue. More importantly, those requests simply underscore the wisdom of continuing the Committee's motion so that these issues can be litigated once in connection with Plan confirmation.

A. The Court’s Decision on the UCC’s Standing Motion is Dispositive.

6. The Noteholder Committee relegates to a footnote on the penultimate sentence of its standing motion any reference to the Court’s March 16, 2016 decision continuing the UCC’s standing motion. (*See id.* ¶ 29 n.11) Despite its humble placement in the Noteholder Committee’s motion, that decision is dispositive here.

7. In its decision, the Court held that the Debtors’ failure to pursue the claims at issue through litigation was not unjustified where the Debtors were seeking to settle those very claims. The Court “noted that the debtors have supplied an adequate justification for their decision not to pursue the claims. The debtors made that decision, they say, because they favor resolving the claims through a comprehensive plan of reorganization that will provide distributions to creditors.” (3/16/16 Order Continuing UCC Standing Motion [Dkt. 3403] (“Order”) at 14) The Court held that “[t]he debtors’ decision to forego pursuing the claims in favor of settling them through a plan is a reasonable exercise of the debtors’ judgment” and not an “unjustified refusal.” (*Id.*) Based on this reasoning, the Court continued the UCC’s standing motion “for further consideration, should that be necessary” in the event that settlement negotiations were unsuccessful. (*Id.* at 1)

8. That decision guides the analysis here and determines the result. As with the UCC’s standing motion, the Debtors have a perfectly valid justification for their decision not to *litigate* the claims for which the Noteholder Committee seeks standing—namely, the SGC is seeking to compromise those claims as part of what it expects will be a largely consensual plan of reorganization. To that end, the SGC has secured contributions from CEC and its affiliates valued at \$4 billion to resolve these and other claims. In their business judgment, the Debtors believe that these contributions represent a fair and reasonable settlement of the Debtors’ claims that is in the best interests of the Debtors’ estates.

9. Significantly, the cost-benefit analysis that courts apply to determine if a debtor's settlement of estate claims is reasonable largely overlaps with the analysis courts apply to determine if a debtor's refusal to pursue an estate claim is justified. *Compare Lasalle Nat'l Bank v. Holland (In re Am. Reserve Corp.)*, 841 F.2d 159, 161 (7th Cir. 1987) ("Central to the bankruptcy judge's determination is a comparison of the settlement's terms with the litigation's probable costs and probable benefits. Among the factors the bankruptcy judge should consider in his analysis are the litigation's probability of success, the litigation's complexity, and the litigation's attendant expense, inconvenience, and delay (including the possibility that disapproving the settlement will cause wasting of assets).") *with* Order at 13 ("To determine whether a debtor in possession is justified in deciding not to pursue claims, courts typically conduct a cost-benefit analysis," including "the probabilities of legal success and financial recovery in event of success" and "the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce," quoting *In re Archdiocese of Milwaukee*, 483 B.R. 855, 869 (Bankr. E.D. Wis. 2012).

10. If the Court concludes that the proposed settlement embedded in the plan is reasonable, then the claims the Noteholder Committee seeks to litigate will be compromised in exchange for a multi-billion dollar contribution, and the Debtors' decision to settle the claims rather than litigate will by definition be justified. If the Court concludes that the settlement is not reasonable, then those claims, absent resolution, can, should and will be litigated either as part of a different plan or otherwise.⁶ Either way, there is no reason for the parties to litigate, and the Court to decide, the issue twice. Nor should the Noteholder Committee be permitted to "stymie"

⁶ The Debtors agree with the Noteholder Committee that the estate's claims against CEC, its affiliates, the sponsors and other potentially liable parties must be preserved and the Debtors will do so.

the reorganization process by commandeering the claims now (Order at 14), thereby foreclosing the Court's consideration of the proposed settlement, and in the process dealing a death blow to a plan that is the result of extensive arm's length negotiations among the majority of the Debtors' stakeholders and substantial efforts by mediator Joseph J. Farnan (former Chief Judge of the U.S. District Court for the District of Delaware).

B. The Noteholder Committee's Attacks on the Independence of the SGC are Both Baseless and Premature.

11. Recognizing that the Court's prior decision is dispositive, the Noteholder Committee attempts to cast its challenge as one to the SGC's independence, claiming the SGC "lacks sufficient independence to bring or compromise claims against the incumbents who appointed them." (Mot. ¶ 4) But that argument leads to precisely the same result.

12. At the threshold, Courts in this district recognize that alleged conflicts of interest "ought to be adjudicated with extreme caution because they can be used as an abusive tactic in litigation." *Fish v. Hennessy*, 12-C-1856, 2012 WL 3643829, at *4 (N.D. Ill. Aug. 22, 2012); accord *Paloian v. Greenfield (In re Rest. Dev. Grp., Inc.)*, 402 B.R. 282, 289 (Bankr. N.D. Ill. 2009). Such is the case here.

13. At the request of certain parties-in-interest (including the Noteholder Committee), the Examiner "investigated the independence of the members of the Governance Committee." (Examiner Rep. at 78, 925) According to the Examiner, "[c]reditors have argued that both directors are inextricably linked to Apollo by both history and joint business interests, making it exceedingly unlikely that either of them would contradict or oppose the interests of their close colleagues and long-time business partners there." (*Id.* at 925) To assess the validity of this argument, the Examiner interviewed both Mr. Winograd and Mr. Stauber, reviewed the relevant documents, and analyzed the governing law surrounding independence. (*Id.* at 925-30)

14. In a report that the Noteholder Committee has described as “comprehensive,” “detailed,” and “exhaustive,” the Examiner concluded the opposite of what the Noteholder Committee now claims—namely, that both independent directors are, in fact, independent. Specifically, the Examiner “concluded that (i) both directors meet the applicable test for ‘independence,’ and (ii) their prior relationships with Apollo are insufficient to raise a serious question regarding their ability to exercise independent business judgment on behalf of the Debtors.” (*Id.* at 925)

15. Even apart from the Examiner’s conclusions, the Noteholder Committee will have ample opportunity to explore through appropriate discovery and challenge at plan confirmation the SGC’s conduct, conclusions and ultimate settlement decision. There is no reason to do this twice.

II. IF THE STANDING MOTION IS NOT CONTINUED, THE BRIEFING SCHEDULE SHOULD BE MODIFIED BECAUSE OF THE NOTEHOLDER COMMITTEE’S UNEXPECTED AND SWEEPING DISCOVERY REQUESTS.

16. If the Court decides not to continue the Noteholder Committee’s motion in accordance with its decision on the UCC’s standing motion, then the briefing schedule should be modified.

17. When the Debtors agreed to the briefing schedule at the May 18, 2016 hearing, the Noteholder Committee had not served any discovery or even mentioned to the Court or other parties that it intended to do so. Instead, counsel represented to the Court that “it’s important that [the standing motion] be heard at the earliest possible date” and asked for a hearing on June 7 (two weeks prior to when they originally noticed it). (May 18, 2016 Hr’g Tr. at 18:10-19) Several days later, the Noteholder Committee reversed course and served 307 separate document requests on seven parties.

18. Though the Debtors believe that any discovery on the standing motion should be limited given that a standing motion is not a trial on the merits of the claims,⁷ the Debtors and other subpoenaed parties require additional time to respond to the discovery requests and, to the extent they do not object, to collect, review, and produce responsive documents. As a result, the Debtors propose that the schedule be modified as follows:

- Objections to the standing motion are due on or before September 14, 2016.
- Any replies in support of the standing motion are due on or before September 28, 2016.
- A hearing on the standing motion will be held on October 19, 2016.

CONCLUSION

19. For the foregoing reasons, the Debtors respectfully request that the Court continue the standing motion until after the Court issues its confirmation ruling or, in the alternative, modify the briefing schedule.

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⁷ In fact, a court need not even “undertake a mini-trial” when evaluating a creditor’s request for derivative standing. *In re STN Enterprises*, 779 F.2d 901, 905 (2d Cir. 1985).

Dated: May 27, 2016
Chicago, Illinois

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