

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

In re:

TRUMP ENTERTAINMENT RESORTS,
INC., et al.¹,

Debtors.

Case No. 14-12103 (KG)
(Jointly Administered)

Chapter 11

Hearing Date: January 16, 2015 at 9:30 a.m.

Objection Deadline: January 13, 2015 at 4:00 p.m.

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
COMPEL PRODUCTION OF DOCUMENTS FROM THE ICAHN ENTITIES**²

The Official Committee of Unsecured Creditors (the “Committee”) of Trump Entertainment Resorts, Inc. and its affiliated debtors and debtors-in-possession (collectively, the “Debtors”), by and through its undersigned counsel, hereby moves this Court for entry of an order in the form attached hereto as Exhibit A (the “Order”), pursuant to 11 U.S.C. § 105(a), Rule 2004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2004-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), compelling the production of documents from the Icahn Entities (the “Motion”). The present motion concerns a discovery dispute that ripened in October 2014. The filing of this motion has been deferred several times in accordance with tolling stipulations agreed to by the parties in an effort to provide time for global settlement negotiations. [Dkt. Nos. 474, 548, 608, 636, 709.] Unfortunately, settlement discussions have not been successful, and

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).

² The Icahn Entities means Icahn Partners LP; Icahn Partners Master Fund LP; Icahn Partners Master Fund II LP; Icahn Partners Master Fund III LP; IEH Investments I LLC; and Icahn Agency Services, LLC.

the latest tolling of discovery expired today. [Dkt. No. 709.] Therefore, the Committee is obliged to proceed with its investigation and needs the assistance of this Court to compel the Icahn Entities' cooperation with that investigation. In support of the Motion, the Committee respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this case and this Motion are proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The legal authorities for the relief requested herein are section 11 U.S.C. § 105(a), Bankruptcy Rule 2004, and Local Rule 2004-1.

BACKGROUND

2. On September 9, 2014 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11, title 11, United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). The Debtors are operating their businesses and managing their assets as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On September 23, 2014, the Office of the United States Trustee for Region Three appointed the Committee, consisting of the following members: (i) Thermal Energy Limited Partnership I; (ii) Bally Gaming, Inc.; (iii) UNITE HERE Local 54; (iv) National Retirement Fund; (v) Atlantic City Linen Supply, LLC; (vi) South Jersey Paper Products; and (vii) Conner Strong & Buckelew Companies, Inc.

4. On January 5, 2015, the Debtors filed their *Third Amended Joint Plan of Reorganization* [Dkt. No. 712] (the "Plan") along with their Disclosure Statement describing the Third Amended Plan [Dkt. No. 713] (the "Disclosure Statement"). The Plan provides \$1.0 million in cash to a Distribution Trust for the benefit of general unsecured creditors. It also assigns certain avoidance actions (excluding "Released Parties") to the Distribution Trust for the

benefit of general unsecured creditors. The Debtors' Disclosure Statement currently estimates total general unsecured claims to be between \$212,000,000 to \$232,000,000, before the addition of any claims that may result from the rejection of various executory contracts and/or unexpired leases. Thus, the Debtors' current Plan caps general unsecured creditors' recovery at less than one-half of a cent on the dollar.

5. The Final Cash Collateral Order [Dkt. No. 342] entered by the Court permits the Creditors' Committee to, *inter alia*, investigate potential claims against the Icahn Entities. *See* Final Order at 11-12. The Final Order further provides that nothing in the Final Order shall prejudice the rights of the Committee:

to assert claims (including Released Claims) against any of the Secured Parties or their successors or assigns in these Cases, on behalf of the Debtors or the Debtors' creditors or to otherwise challenge the Debtors' Stipulations, including, but not limited to those in relation to (i) the validity, extent, priority, or perfection of the mortgages, security interests, and liens of the Secured Parties or their successors or assigns in these Cases, (ii) the validity, allowability, priority, or amount of the Secured Obligations, or (iii) any liability of any of the Secured Parties or their successors or assigns in these cases with respect to anything arising from the First Lien Credit Documents.

See Final Order at ¶ 4(b).

6. The Final Order provides that the Committee must commence a contested matter or adversary proceeding raising such claim, objection, or challenge, including, without limitation, any claim or cause of action against either the First Lien Agent or any First Lien Lender no later than sixty (60) days after the Committee's formation. *See* Final Order at 13. The Committee was formed on September 23, 2014, making the Committee's original challenge deadline November 22, 2014. That deadline has since been consensually extended several times, making the current deadline January 20, 2015 (the "Challenge Deadline"). [*See* Dkt. Nos. 474, 548, 608, 636, 709.]

A. Rule 2004 Subpoena

7. On October 10, 2014, counsel for the Committee submitted informal document requests to counsel for the Icahn Entities, noting that the informal document request was being submitted in light of the time constraints of the Challenge Deadline and that a formal document demand in the form of a subpoena would be forthcoming. *See* Lower Decl. Ex. A. On October 14, 2014, counsel for the Committee sent the formal subpoena to counsel for the Icahn Entities, along with a letter requesting consent to accepting the subpoena without need for a formal motion. *See* Lower Decl. Ex B. After receiving that consent late the next day, the subpoena was formally served. *See* Lower Decl. Ex. C.

8. Following service of the subpoena, technical personnel for the Committee and for the Icahn Entities conferred and reached agreement concerning electronic discovery production formatting issues. Thereafter, and in accordance with routine e-discovery practice, (*e.g.*, Local Rule 7026-3(e)), on October 21, 2014, counsel for the Committee sent an email to counsel for the Icahn Entities seeking the proposed custodians and search terms that the Icahn Entities intended to implement to respond to the Committee's Rule 2004 subpoena. *See* Lower Decl. Ex. D. After receiving no response, counsel for the Committee again emailed counsel for the Icahn Entities on October 22, 2014. *Id.* That night, counsel for the Icahn Entities responded stating that they would "be in touch tomorrow morning." *Id.* However, they failed to do so. Instead, on the afternoon of October 23, 2014, counsel for the Committee again had to email counsel for the Icahn Entities to inquire as to the custodians and search terms. *Id.* Counsel for the Icahn Entities finally called later that day; however, during that call counsel provided no information regarding the Icahn Entities' proposed custodians or search terms and instead questioned the need to do so—which notably counsel could have been done through email when

Committee counsel first asked for a list of custodians and search terms earlier in the week, rather than delaying the issue unnecessarily. *See* Lower Decl. ¶ 7; *id.* at Ex. D.

9. On October 24, 2014, counsel for the Committee again wrote to counsel for the Icahn Entities to demand that they provide a list of proposed custodians and search terms, and to inform them that their delay was particularly unhelpful in light of the then upcoming deadlines. *See* Lower Decl. Ex. D. That afternoon, counsel for the Icahn Entities finally responded and provided a list of custodians and search terms and proposed a call to discuss the same. *Id.* On October 27, the parties conferred by telephone to discuss Committee counsel's concerns, edits, and additions to the custodian list and search terms, including the fact that noticeably absent from the custodian list was Carl Icahn himself. *See* Lower Decl. ¶ 8. The Icahn Entities' counsel provided no explanation for Mr. Icahn not being included as a custodian, but said they would look into it. *Id.* Counsel for the Icahn Entities requested that any edits and additions to the custodians and search terms be provided in writing. Committee counsel provided a redlined version of the custodian and search terms list later that day and requested a time to discuss the matter further the next day. *See* Lower Decl. Ex. D.

10. On the night of October 28, 2014, having still not received a response from the Icahn Entities' counsel, counsel for the Committee sent another email and expressly asked whether the Icahn Entities would be adding the additional custodians and search terms. *Id.* Counsel for the Icahn Entities responded by stating that they would be providing written responses and objections to the Rule 2004 subpoena the following day. *Id.*

11. On October 29, 2014, nineteen days after first receiving the list of the Committee's document requests, counsel for the Icahn Entities served written responses and objections to the Committee's Rule 2004 subpoena. *See* Lower Decl. Ex. E. Among other

things, these objections made clear for the first time that there were entire categories of subpoenaed documents that the Icahn Entities were refusing to produce, as discussed in further detail below. That night, Committee counsel again inquired via email as to whether the Icahn Entities intended to include the custodians and search terms that were provided by Committee counsel and expressly asked whether the Icahn Entities were refusing to include any custodians or search terms that had been proposed. *See* Lower Decl. Ex. D. The Icahn Entities' counsel responded by taking the position, and informing counsel for the Committee for the first time, that they had already collected and were in the process of reviewing documents based on their search terms, and that requiring them to "re-run searches based on any new custodians or search terms ... at this stage will only delay the process." *Id.* Counsel for the Committee sought to further discuss the issue, and on November 3, 2014, conferred with counsel for the Icahn Entities' by telephone. *See* Lower Decl. ¶ 9. During that call, the Icahn Entities' counsel took the position that they were refusing to add any additional custodians or search terms at that time and that if there are any concerns with their custodians or search terms they should be addressed after the Committee has received and reviewed the Icahn Entities' document productions. *Id.*

B. The Icahn Entities' Document Production

12. On Friday, October 31, 2014, the Icahn Entities counsel sent an email with an FTP link to the first of the Icahn Entities' "rolling productions." *See* Lower Decl. ¶ 10. That production—made 21 days after first receiving the Committee's request—consisted of a total of only approximately 232 documents. On Wednesday, November 5, 2014, the Icahn Entities made their second document production, this time consisting of approximately 171 additional documents. *Id.* ¶ 11. Since that time, the Challenge Deadline and the date for the Icahn Entities compliance with the Rule 2004 subpoenas have been tolled several times. The Icahn Entities'

counsel has not provided Committee counsel with any estimated timeline for further document productions or when they will be finished with their document productions.

RELIEF REQUESTED

13. By this Motion, the Committee seeks entry of an order compelling the production of documents by the Icahn Entities in furtherance of the Committee's investigation concerning the acts, conduct, property, liabilities and/or financial condition of the Debtors and/or the Icahn Entities, as secured lenders and/or agents for the secured lenders. The Committee must obtain these documents to properly discharge its duties under section 1103(c) of the Bankruptcy Code. In carrying out its statutory duties, the Committee must investigate all areas that could increase the recovery to the unsecured creditors.

14. It is unfortunate that the Committee has been compelled to file this Motion, but it is necessary under the circumstances of these cases. Prior to the tolling stipulations (described above) and the filing this Motion, counsel for the Committee conferred with counsel for the Icahn Entities as required by Local Rule 2004-1(c). However, counsel for the Icahn Entities refused to produce categories of responsive documents within the scope of Rule 2004 and even to designate appropriate custodians for document requests they concede are relevant, making the instant motion necessary. At this point the Committee believes that any further discovery conference with the Icahn Entities would be futile.

15. Because of the Challenge Deadline of January 20, 2015, the Committee is in urgent need of an Order overruling the Icahn Entities sundry objections and compelling the Icahn Entities to comply with the Rule 2004 subpoena and produce responsive documents that are essential for the Committee to complete its investigation.

BASIS FOR RELIEF

16. Bankruptcy Rule 2004 provides that “[o]n motion of any party in interest, the court may order the examination of any entity.” Fed. R. Bankr. P. 2004(a). Furthermore, Rule 2004(c) further authorizes the Court to Order the production of documents. Fed. R. Bankr. P. 2004(c). Examinations under Bankruptcy Rule 2004 include within their scope, *inter alia*, any matter that may relate to the property and assets of the estate; the financial condition of the debtor; and any matter that may affect the administration of a debtor’s estate. *See* Fed. R. Bankr. P. 2004(b); *see also In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 354 n.6 (3d Cir. 2007) (Rule 2004 allows parties with an interest in the bankruptcy estate to conduct discovery into matters affecting the estate); *Official Committee of Unsecured Creditors of Cybergenics Corp.*, 330 F.3d 548, 564-65 (3d Cir. 2003) (“creditors’ committee may certainly assist a debtor in locating property under Bankruptcy Rule 2004”); *In re Washington Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2010) (“purpose of the examination is to enable the trustee to discover the nature and extent of the bankruptcy estate.”); *Keene Corp. v. Johns-Manville Corp. (In re Johns-Manville)*, 42 B.R. 362, 364 (Bankr. S.D.N.Y. 1984).

17. Courts have consistently recognized the extraordinarily broad scope of an examination under Bankruptcy Rule 2004. *See, e.g., Washington Mutual*, 408 BR. at 50 (A “Rule 2004 [examination] is commonly recognized as more in the nature of a ‘fishing expedition.’”) (citations omitted); *In re 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 456 (Bankr. D.N.J. 1998) (“A Rule 2004 examination has been explained as a broad investigation into the financial affairs of the debtor for the purpose of the discovery of assets of the estate and the exposure of fraudulent conduct.”); *In re Summit Global Logistics, Inc.*, Case No. 08-11566 (DHS), 2008 WL 1446722 at * 2 (Bankr. D.N.J. Apr. 9, 2008) (“Courts, in fact, recognize that

Rule 2004 examinations are broad, unfettered and in the nature of fishing expeditions.”); *In re Mezvinsky*, 2000 WL 33950697 *6 (Bankr. E.D. Pa. 2000) (recognizing that the scope of inquiry permitted under a Rule 2004 examination is generally broad and that such inquiry can “legitimately be in the nature of a ‘fishing expedition’”).

18. The scope of inquiry is extraordinarily broad because “[t]he purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred.” *In re Recoton Corp.*, 307 B.R. 751, 755 (S.D.N.Y. 2004).

19. This broad inquiry extends to third parties as well: “Because the purpose of the Rule 2004 investigation is to aid in the discovery of assets, any third party who can be shown to have a relationship with the debtor can be made subject to a Rule 2004 investigation.” *In re Ionosphere Clubs*, 156 B.R. 414, 432 (S.D.N.Y. 1993); *see also In re Recoton Corp.*, 307 B.R. at 755 (“Any third party who has a relationship with a debtor may be made subject to a Rule 2004 investigation.”); *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. D. Wis. 1984) (“When there is a showing that the purpose of the examination is to enable a party to probe into matters which may lead to the discovery of assets by examining not only the debtor, but also other witnesses, such inquiry is allowed.”). This is because “[t]he clear intent of Rule 2004 . . . is to give parties in interest an opportunity to examine individuals having knowledge of the financial affairs of the debtor in order to preserve the rights of creditors.” *In re GHR Companies, Inc.*, 41 B.R. 655, 660 (Bankr. D. Mass. 1984).

20. Furthermore, a committee is expressly authorized to investigate the acts and conduct of a debtor, and may use Rule 2004 examinations to detect wrongdoing. *In re Recoton*, 307 B.R. at 755. The investigation of potential claims on behalf of a debtor’s estate is a proper

use of Rule 2004 discovery, even where the examination is undertaken to determine whether an action may lie against the examinee. *In re Hughes*, 281 B.R. 224, 226 (Bankr. S.D.N.Y. 2002) (rejecting argument that a subpoena issued against an accounting firm seeking the production of documents was improper because it was primarily sought for the purpose of investigating potential claims that the debtor may have against the accounting firm).

21. The Committee is a party in interest in these cases (11 U.S.C. § 1109(b)) and, *inter alia*, is specifically authorized by the Bankruptcy Code to “investigate the act, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or the formulation of a plan.” 11 U.S.C. § 1103.

22. As set forth above, because the Debtors’ Plan primarily seeks to benefit only the Icahn Entities at the expense of all other creditors of the Debtors, the Committee seeks documents and information from the Icahn Entities related to, *inter alia*, the First Lien Credit Agreement (including actual or alleged defaults, requests for modification or forbearance of terms, or restructuring); the attempted marketing and sale of Trump Plaza; future budgets, plans or uses for Trump Plaza and Trump Taj Mahal; certain collective bargaining agreements and gaming agreements of the Debtors; discussions with state or local officials regarding tax relief; the Debtors’ Trump-related trademarks and associated intellectual property license agreements with Trump AC Casino Marks, LLC; documents that may reveal the extent to which the Icahn Entities’ conduct has been influenced by a desire to serve their competitive interests as owners of the Tropicana; and analysis and communications regarding the Debtors’ net operating losses. Accordingly, the requested documents are within the permissible scope of a Rule 2004 examination. Yet, as addressed below, the Icahn Entities are largely objecting and refusing to

produce whole categories of documents and even refusing to search for documents from particular relevant custodians, including Carl Icahn himself.

A. Failure to Designate Relevant Custodians

i. *Carl Icahn*

23. Despite the fact that Carl Icahn is the principal for the Icahn Entities, the Icahn Entities' counsel has refused to designate Mr. Icahn as a custodian for purposes of collecting and producing documents in response to the Rule 2004 subpoena. *See* Lower Decl. ¶ 9. Counsel for the Icahn Entities has taken the position that because they have designated Mr. Icahn's assistant, Susan Gordon, as a custodian, and because any email sent to Mr. Icahn is purportedly forwarded to Ms. Gordon's email account, designating her in place of Mr. Icahn is sufficient. *Id.* First, even if it were true that any emails sent to Mr. Icahn are forwarded to Ms. Gordon, that does not mean that all of the emails that Mr. Icahn composed are captured in Ms. Gordon's email account. Second, even if that were the case, that still does not make Ms. Gordon a more appropriate custodian with regard to emails sent to or from Mr. Icahn than Mr. Icahn himself. Finally, the selection of Ms. Gordon as a custodian in place of Mr. Icahn does nothing to preserve, collect, and produce non-email documents that may be located on Mr. Icahn's computers or network drives. There is simply no basis for the refusal to include Mr. Icahn as a custodian, and any assertion that Ms. Gordon is a more appropriate custodian for Mr. Icahn's documents than Mr. Icahn himself strains credulity.

ii. *Outside Counsel Acting on Behalf of the Icahn Entities*

24. The Icahn Entities have also refused to collect and produce documents from relevant outside counsel who have acted on behalf of Icahn with regard to the topics identified and documents requested in the Rule 2004 subpoena, even if those documents are admittedly responsive and highly relevant. Instead, the Icahn Entities have objected to any and all requests

“to the extent they seek documents that are not in the possession, custody, or control of the Icahn Entities, including but not limited to documents in the possession of law firms not currently engaged by the Icahn Entities to provide legal services related to the above-captioned chapter 11 cases.” *See* Lower Decl. Ex. E, General Objection No. 3.

25. There is no basis for the Icahn Entities’ assertion that documents in the possession of their own attorneys are somehow outside of their possession, custody, or control; the Icahn Entities have the right and ability to collect such documents from their own attorneys. Nor is there any basis for the refusal to collect and produce responsive non-privileged documents from such counsel, whether they be responsive communications between the Icahn Entities and the Debtors, responsive communications between the Icahn Entities and third parties, or other non-privileged documents responsive to the Rule 2004 subpoena document requests. Indeed, upon information and belief, the Icahn Entities acted through outside counsel at several law firms, including Brown Rudnick, White & Case, and Duane Morris, with regard to the majority of the subjects identified in the Rule 2004 subpoena. The Icahn Entities are flatly refusing to collect, search for, and produce any documents in the possession of these custodians, regardless of whether the document is directly relevant and responsive to the Rule 2004 subpoena document requests. That objection is unfounded, and the Icahn Entities should be ordered to immediately collect and produce responsive non-privileged documents from outside counsel that possess documents responsive to the Rule 2004 subpoena document requests.

B. Objection to Producing Documents Related to the Tropicana

26. The Icahn Entities have objected to producing any documents in response to document requests relating to the Tropicana Casino & Resort (the “Tropicana”) and have refused to designate any of the Tropicana’s management as a custodian for purposes of document collection and production. *See* Lower Decl. Ex. E, Responses to Requests Nos. 1, 16, 22, and

23; Lower Decl. ¶ 9. Specifically, the Icahn Entities have objected to the following document requests related to the Tropicana:

Request No. 1: All Documents . . . constituting or referring or relating to Communications between TER and the Icahn Entities relating in any way to . . . the Tropicana Casino & Resort

Request No. 16: All Documents containing, evidencing or referring to procedures or protocols for maintaining separation between the business operations of the Debtors and the business operations of the Tropicana.

Request No. 22: All Documents, including memoranda or analyses of any kind, discussing or projecting the impact on the Tropicana of the sale, or closure, or acquisition of the Plaza and/or the Taj Mahal.

Request No. 23: All Documents constituting or reflecting any Communications with or by anyone charged with the operation or management of the Tropicana, concerning the status or future of the Plaza, the status or future of the Taj Mahal, the status or future of TER, or the status or future of the First Lien Credit Agreement.

27. The Icahn Entities have objected to every one of these document requests based on the contention that the request is overly broad, unduly burdensome, and not relevant. With regard to Request No. 23, the Icahn Entities have qualified their response to state that they will produce documents reflecting communications with the Debtors; however, because counsel for the Icahn Entities has refused to include any of the management of the Tropicana as a custodian, that qualification is meaningless.

28. Contrary to the Icahn Entities' assertion, the documents sought relating to the Tropicana, including internal communications and analyses within the Icahn Entities, are highly relevant. These documents are necessary to fully investigate the acts, conduct, property, and liabilities of the Debtors and the Icahn Entities, as secured lenders and/or agents for the secured lenders, including potential claims against the Icahn Entities. Whether the Icahn Entities' acts

and conduct with regard to decisions made and actions taken against the interests of the Debtors were related to any plan or intention to benefit the Tropicana to the detriment of the Debtors, as direct competitors with the Tropicana, is highly relevant to the Committee's investigation. Courts have recognized that the actions of a creditor that may be motivated by its status as a competitor of the debtor warrant particular scrutiny. *See, e.g., Mid-Continent Racing & Gaming Co. v. Sunflower Racing (In re Sunflower Racing)*, 218 B.R. 972, 975 (D. Kan. 1998) (holding that a reorganization plan should proceed, partially because the objecting creditor group is "basically a competitor here seeking to do its own plan with this property if it can obtain control of it"); *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 627 (4th Cir. 2002) (noting that VPC "is not solely a creditor and has not been guided solely by the instincts of a creditor"); *In re LightSquared*, 513 B.R. 56, 82-83 (Bankr. S.D.N.Y. 2014) (separately classifying the claims of a creditor whose "sole interest was to acquire the [debtor] company by one means or another"); *DISH Network Corp. v. DBSD North America, Inc. (In re DBSB North America, Inc.)*, 634 F.3d 79 (2d Cir. 2011) (designating DISH's vote due to its actions as debtor's competitor); *LightSquared LP v. SP Special Opportunities LLC (In re LightSquared Inc.)*, 511 B.R. 253, 346 (Bankr. S.D.N.Y. 2014) (equitably subordinating the claims of a competitor-creditor). In that regard, documents reflecting communications between TER and the Icahn Entities related to the Tropicana, documents evidencing protocols for maintaining separation between the business operations of the Debtors and the Tropicana, documents projecting the impact on the Tropicana of the sale or closure of the Plaza or Taj Mahal, and documents reflecting communications by or with the management of the Tropicana concerning the future of the Plaza, the Taj Mahal, TER or the First Lien Credit Agreement are properly within the scope of Rule 2004 and should be produced by the Icahn Entities. The Icahn Entities effectively forced Trump Plaza to be

shuttered, with the concomitant harm to the Debtors, their employees and the community, rather than allow it to be sold 20 months ago to a buyer that would have kept it open as a competitor to the Tropicana. The Committee is entitled to thoroughly explore the true motivations behind that seemingly unreasonable action.

C. Objection to Producing Documents Dated Prior to September 9, 2012

29. In the Rule 2004 subpoena, the Committee sought all documents from May 1, 2010 to the present. The Icahn Entities have objected to producing any documents dated prior to September 9, 2012, except with regard to a few specific document requests. *See* Lower Decl. Ex. E, General Objection No. 13. In response to that objection, counsel for the Committee proposed the alternative date of October 6, 2010, which was the date proposed by the Debtors with respect to the Rule 2004 subpoena served on them because that is the date that TER and the senior lenders (including Icahn) closed the transactions and settled all disputes arising out of the prior bankruptcy case. *See* Lower Decl. ¶ 9. Counsel for the Icahn Entities, however, has refused that proposal and contends that the September 9, 2012 date, chosen because it is two years prior to the filing of the petition, is sufficient. *Id.* The Icahn Entities' objection as to the relevant time period is entirely without merit. There is no basis for the contention that documents dated prior to the arbitrary September 9, 2012 date are irrelevant and outside the scope of the Rule 2004 subpoena. The Icahn Entities should be required to search for and produce responsive documents dated from October 6, 2010, through the present.

D. Objection to Producing Internal Documents and Communications with Third Parties

30. One of the most expansive objections lodged by the Icahn Entities is the objection to producing internal documents and communications with third parties. For ten (10) of the twenty-seven (27) document requests in the Rule 2004 subpoena, the Icahn Entities have

objected to producing anything other than “communications with the Debtors.” *See* Lower Decl. Ex. E, Response to Requests Nos. 6, 11, 18, 19, 20, 21, 24, 25, 26. In those requests, the Committee has sought documents concerning the following, summarized, topics:

- future budgets, plans or uses for the Plaza and/or the Taj Mahal (Nos. 6 and 11);
- the status of, possible default under, or the restructuring of the First Lien Credit Agreement (No. 18);
- the actual or potential closure of the Plaza or Taj Mahal (No. 19);
- the Trump Trademark License, including alleged defaults (No. 20);
- scenarios for the post-Bankruptcy or post-restructuring use or disposition of the Plaza or the Taj Mahal (No. 21);
- communications between Icahn and any third party regarding UNITE HERE Local 54 (No. 24);
- communications between Icahn and any third party regarding NRF (No. 25); and
- the net operating losses of TER (No. 26).

31. All of these requests are fully within the scope of Rule 2004 and highly relevant to the Committee’s investigation, for the same reasons described above. There is no basis for the Icahn Entities’ objection to producing anything other than “communications with the Debtor” with regard to these subjects. The Icahn Entities should be required to produce all responsive documents, including internal documents and documents reflecting communications with third parties.

E. Objection to Producing Documents Already in the Possession of the Debtor

32. The Icahn Entities have also objected to the Committee’s document requests to the extent they call for production of documents that are available to the Committee through discovery from the Debtors and TER. There is simply no basis for such an objection. The fact that the Debtors and the Icahn Entities may have certain documents in their possession that are the same does not absolve the Icahn Entities from their obligation to search for and produce such responsive documents. The Debtors have advised that many of their relevant documents are

housed only on computer back-up tapes, thus significantly delaying their retrieval and production. The Icahn Entities have claimed no such impediment.

COMPLIANCE WITH LOCAL RULE 2004-1

33. Pursuant to Local Rule 2004-1, undersigned counsel certify that they have communicated with counsel for the Icahn Entities regarding, in substance, the scope of production. As of the date hereof, the parties have been unable to reach an agreement.

NOTICE

34. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for Region Three; (ii) counsel for the Debtors; (iii) counsel for the Icahn Entities; and (iv) all other parties having requested notice under Bankruptcy Rule 2002. The Committee submits that the foregoing constitutes good and sufficient notice and that no other or further notice need be given.

NO PRIOR REQUEST

35. No previous motion or application for the relief sought in this Motion has been made to this Court or any other court.

WHEREFORE the Committee, respectfully requests that the Court entry the Order attached hereto Exhibit A granting the relief requested herein.

Dated: January 6, 2015
Wilmington, Delaware

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

TRUMP ENTERTAINMENT RESORTS, INC.,
*et al.*¹,

Debtors.

Case No. 14-12103 (KG)
(Jointly Administered)

Chapter 11

Objection Deadline: January 13, 2015 at 4:00 p.m.
Hearing Date: January 16, 2015 at 9:30 a.m.

NOTICE OF MOTION

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR REGION THREE; (II) COUNSEL FOR THE DEBTORS; AND (III) COUNSEL TO THE DEBTORS' SECURED LENDERS; AND (IV) ALL PARTIES ENTITLED TO NOTICE UNDER DEL. BANKR. L.R. 2002-1(b) WHO HAVE ELECTRONICALLY FILED A NOTICE OF APPEARANCE THROUGH THE COURT'S CM/ECF SYSTEM:

PLEASE TAKE NOTICE that on January 6, 2015, The Official Committee of Unsecured Creditors of Trump Entertainment Resorts, Inc., *et al.* (the "Committee"), appointed in the Chapter 11 cases of Trump Entertainment Resorts, Inc., and its affiliated debtor entities, through their undersigned proposed counsel, filed the *Motion of the Official Committee of Unsecured Creditors to Compel Production of Documents from the Icahn Entities* (the "Motion"), with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that **January 13, 2015 at 4:00 p.m. (Eastern Time)** (the "Objection Deadline") is the deadline by which objections to the Motion must be made in writing, filed with the Bankruptcy Court, and served upon the following so as to actually be received on or before the Objection Deadline:

i. *Counsel for The Official Committee of Unsecured Creditors:* Natasha M. Songonuga, Esq., GIBBONS P.C., 1000 N. West Street, Suite 1200 Wilmington, DE 19801-1058; Karen A. Giannelli, Esq. and Mark B. Conlan, Esq., GIBBONS P.C., One Gateway Center, Newark, New Jersey 07102-5310; and Nathan A. Schultz, Esq., LAW OFFICE OF NATHAN A. SCHULTZ, P.C., 10621 Craig Road, Traverse City, MI 49686; nsongonuga@gibbonslaw.com, kgiannelli@gibbonslaw.com, mconlan@gibbonslaw.com, nschultzesq@gmail.com;

ii. *The Office of the United States Trustee for Region Three:* Jane M. Leamy, OFFICE OF THE U.S. TRUSTEE, 844 King St., Suite 2207, Wilmington, DE 19801; jane.m.leafy@usdoj.gov;

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).

iii. *Counsel for the Debtors*: Kristopher M. Hansen; Erez E. Gilad; and Gabriel E. Sasson, STROOCK & STROOCK & LAVAN LLP, 180 Maiden Lane, New York, NY 10038; khansen@stroock.com, egilad@stroock.com, gsasson@stroock.com; and Matthew B. Lunn; and Robert F. Poppiti, Jr.; Ian J. Bambrick; and Ashley E. Markow, YOUNG CONAWAY STARGATT & TAYLOR, LLP, 1000 North King St., Rodney Square, Wilmington, DE 19801; bankfilings@ycst.com, ibambrick@ycst.com;

iv. *Counsel for the Debtors' Secured Lenders*: Robert J. Dehney and Andrew R. Remming, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, 1201 North Market Street, 18th Fl., P.O. Box 1347, Wilmington, Delaware 19899; rdehney@mnat.com, aremming@mnat.com; and Allan S. Brilliant and Craig P. Druehl, DECHERT LLP, 1095 Avenue of the Americas, New York, New York 10036; allan.brilliant@dechert.com, craig.druehl@dechert.com.

PLEASE TAKE FURTHER NOTICE that the Committee requests that the Motion be heard before the Honorable Kevin Gross in the United States Bankruptcy Court, 824 Market Street, 6th Floor, Courtroom #3, Wilmington, Delaware 19801, at the next scheduled hearing on **January 16, 2015 at 9:30 a.m. (Eastern Time)**.

PLEASE TAKE FURTHER NOTICE that if no objection to the Motion is timely filed in accordance with the procedures enumerated above, the Court may enter an order approving the Motion without further notice or hearing.

Dated: January 6, 2015
Wilmington, Delaware

GIBBONS P.C.

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*Co-Counsel for the Official Committee of
Unsecured Creditors*

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

In re:

TRUMP ENTERTAINMENT RESORTS,
INC., et al.¹,

Debtors.

Case No. 14-12103 (KG)
(Jointly Administered)

Chapter 11

**ORDER GRANTING MOTION OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO COMPEL PRODUCTION
OF DOCUMENTS FROM THE ICAHN ENTITIES²**

Upon the motion (the “Motion”)³ of the Official Committee of Unsecured Creditors (the “Committee”) in the above-captioned chapter 11 cases for an Order, pursuant to 11 U.S.C. § 105(a), Rule 2004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2004-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), compelling the production of documents from the Icahn Entities; and, the Court having jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 to consider the Motion and the relief requested therein; and venue being proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court being satisfied that notice of this Motion and the opportunity for a hearing on this Motion was appropriate under the particular circumstances and no further notice need be given; and the Court having determined that the relief sought in the Motion is in the best interests of the Committee, the Debtors, their creditors, and all parties in interest; and this Court

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² The Icahn Entities means Icahn Partners LP; Icahn Partners Master Fund LP; Icahn Partners Master Fund II LP; Icahn Partners Master Fund III LP; IEH Investments I LLC; and Icahn Agency Services, LLC.

³ Capitalized terms not otherwise defined herein shall have the meaning attached to them in the Motion.

having determined that the legal and factual bases set forth in the Motion and at the hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED that:

1. The Motion is hereby GRANTED.
2. Notwithstanding, any provision in the Bankruptcy Rules to the contrary, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
3. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation of this Order.

Dated: January __, 2015

Honorable Kevin Gross
United States Bankruptcy Judge