UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*[1] Debtors.	Chapter 11 Case No. 15-01145 (ABG) (Jointly Administered)
STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE, Plaintiff, v. BOKF, N.A., as successor indenture trustee, paying agent, and notes custodian under that certain Indenture, dated as of April 16, 2010, et al., Defendants.	Adversary Proceeding No. 15-00571 (ABG)

NOTICE OF MOTION OF
DEFENDANTS MOTION TO DISMISS

PLEASE TAKE NOTICE that on March 2, 2016, Delaware Trust Company ("Delaware Trust"), BOKF, N.A. ("BOKF") and Wilmington Savings Fund Society, FSB ("WSFS") (collectively, "Defendants") filed a *Motion to Dismiss* (the "Motion").

PLEASE TAKE FURTHER NOTICE that, on **March 16, 2016, at 1:30 p.m. (prevailing Central Time)** or as soon thereafter as counsel may be heard, the Noteholder Committee will appear before the Honorable A. Benjamin Goldgar, or any other judge who may be sitting in his place and stead, in the Ceremonial Courtroom (Room No. 2525), in the Everett

[1] The last four digits of the tax identification number for debtor Caesars Entertainment Operating Company, Inc. ("CEOC"), are 1623. A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and present the Motion.

PLEASE TAKE FURTHER NOTICE that copies of the Motion as well as copies of all documents filed in these chapter 11 cases are available free of charge by visiting the case website maintained by Prime Clerk LLC, the claims and noticing agent for these chapter 11 cases, available at https://cases.primeclerk.com/CEOC or by calling (855) 842-4123. You may also obtain copies of any pleadings by visiting the Court's website at www.ilnb.uscourts.gov in accordance with the procedures and fees set forth therein.

[*Signatures on following page*]

Dated: March 2, 2016
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UNITED STATES BANKRUPTCY COURT
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MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, Delaware Trust Company ("Delaware Trust"), BOKF, N.A. ("BOKF") and Wilmington Savings Fund Society, FSB ("WSFS") (collectively, "Defendants"),[2] move to dismiss Count V of the

[1] The last four digits of the tax identification number for debtor Caesars Entertainment Operating Company, Inc. ("CEOC"), are 1623. A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

[2] Count IV of the Complaint, which also seeks a declaratory judgment, is directed only against the "Collateral Agents," which includes Delaware Trust in its capacity as collateral agent but not the other Defendants. That count, among other deficiencies, fails to allege an actual justiciable dispute, and should therefore be dismissed. *See Medlmmune, Inc. v. Genentech,*

complaint [ECF No. 1] (the "Complaint") filed by the Statutory Unsecured Claimholders' Committee (the "UCC").

PRELIMINARY STATEMENT

1. Count V of the Complaint seeks a declaratory judgment against Defendants that they waived their right to assert unsecured deficiency claims against the Subsidiary Pledgors[3] pursuant to 11 U.S.C. § 1111(b)(1), and otherwise are not entitled to assert such claims against the Subsidiary Pledgors or recover payment from them beyond the value of the Collateral.

2. Count V fails as a matter of law for the following reasons, any of which provide a basis for dismissal with prejudice: a) section 1111(b)(1) of the Bankruptcy Code is a "contract-defeating provision" that cannot be waived or otherwise modified by contract; b) by its plain language, section 7.17 of the Collateral Agreement does not waive section 1111(b)(1); and c) any waiver of section 1111(b)(1) is unenforceable under New York law, which governs the Collateral Agreement.

FACTUAL BACKGROUND

3. Delaware Trust is the successor collateral agent (in such capacity, the "Collateral Agent") under a collateral agreement, dated as of December 24, 2008 (the "Collateral Agreement"), among CEOC, each subsidiary of CEOC identified therein, and U.S. Bank National Association ("U.S. Bank"), the predecessor collateral agent to Delaware Trust. *See* Declaration of Joshua M. Mester ("Mester Decl."), Ex. A. Under the Collateral Agreement, each Subsidiary Pledgor pledged its assets to the Collateral Agent as agent for holders of second

(continued…)

Inc., 549 U.S. 118, 127 (2007); *Deveraux v. City of Chicago*, 14 F. 3d 328, 330 (7th Cir. 1994). Delaware Trust will be filing a separate motion seeking dismissal of Count IV.

[3] Capitalized terms not otherwise defined herein have the meaning used in the Complaint.

priority notes ("Second Priority Notes") issued under three separate indentures (the "Indentures"). BOKF, WSFS, and Delaware Trust are the indenture trustees under the Indentures.

4. Section 7.17 of the Collateral Agreement provides: "Notwithstanding anything to the contrary in this Agreement, no recourse shall be had, whether by levy or execution, or under any law, or by the enforcement of any assessment or penalty or otherwise, for the payment of any of the Obligations, against any Pledgor or any of the assets of any Pledgor, other than the Collateral, it being expressly understood that the sole remedies available to the Collateral Agent and the Secured Parties pursuant to this Agreement with respect to the Obligations shall be against the Collateral." Mester Decl., Ex. A, at § 7.17.

5. On May 20, 2015, Delaware Trust, in its capacity as Collateral Agent timely filed a proof of claim against each of the Subsidiary Pledgors. Mester Decl., Ex. B. Separately, BOKF, WSFS and Delaware Trust, in their capacities as indenture trustees, timely filed proofs of claim in May 2015. Mester Decl., Ex. C, D and E.

6. Wilmington Trust, N.A. (the "10.75% Trustee"), as indenture trustee for 10.75% Senior Unsecured Notes, has filed objections to proofs of claim filed by the First Lien Parties (the "1L Claim Objections"). [ECF Nos. 2030-31]. An evidentiary hearing on those objections took place on February 2, 2016, with closing arguments on February 17, 2016. The Official Committee of Second Priority Noteholders and Defendants filed a joint pretrial brief, and also participated in closing argument. [ECF No. 3143]. To date, however, the 10.75% Trustee has not filed any objection to Defendants' proofs of claim, and as stated at the evidentiary hearing, any decision by this Court on the 1L Claim Objections will not have preclusive effect on any proceeding to adjudicate Defendants' claims. Mester Decl., Ex. F, at 5:1-9:10.

ARGUMENT

A. Section 1111(b)(1) is a "Contract-Defeating Provision" That Preempts Section 7.17 of the Collateral Agreement.

7. The UCC alleges that Section 7.17 of the Collateral Agreement constitutes a pre-petition "waiver" of the treatment afforded to Defendants' secured claims pursuant to section 1111(b)(1)(A) of the Bankruptcy Code. The UCC asks this Court to enter a declaratory judgment that would deprive Defendants of their unsecured deficiency claims that arise by operation of law under section 1111(b)(1). As made clear by Supreme Court and Seventh Circuit precedent, the UCC is wrong.

8. The analysis begins (and ends) with section 1111(b)(1)(A) of the Bankruptcy Code, which is mandatory and unambiguous:

> A claim secured by a lien on property of the estate ***shall be*** allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—
>
> (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
>
> (ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

11 U.S.C. § 1111(b)(1)(A) (emphasis added).[4]

9. The Seventh Circuit, citing Supreme Court precedent, has made clear that a "contract-defeating provision" in the Bankruptcy Code defeats any contrary language in a contract. In *In re Wright*, 492 F.3d 829 (7th Cir. 2007), the court considered the effect in chapter

[4] Section 1111(b)(2) provides that "If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed." 11 U.S.C. § 1111(b)(2).

13 of the "hanging paragraph" in section 1325(a), which provides that section 506 does ***not*** apply to certain secured loans. *Id*. at 830. The Seventh Circuit affirmed the Bankruptcy Court's ruling that "by knocking out § 506, the hanging paragraph leaves the parties to their contractual entitlements." *Id*. at 832. But in so ruling, the Seventh Circuit cited the Supreme Court's decision in *Butner v. United States*, 440 U.S. 48 (1979), which provides that "state law determines rights and obligations ***when the Code does not supply a federal rule***." *Wright,* 492 F.3d at 832 (emphasis added). Likewise, in *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000), the Court held that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, ***subject to any qualifying or contrary provisions of the Bankruptcy Code***." *Id*. at 20 (emphasis added). The Court in *Raleigh* held that state law burden of proof should be applied only after noting the Bankruptcy Code's "silence" on the question. *Id*. at 22.

10. Based on the above, the Seventh Circuit held in *Wright* that "rights under state law count in bankruptcy ***unless the Code says otherwise***." *Wright*, 492 F.3d at 832 (emphasis added). In section 1111(b)(1), the Bankruptcy Code "says otherwise," as made clear by the Seventh Circuit in *In re B.R. Brookfield Commons No. 1 LLC*, 735 F.3d 596 (7th Cir. 2013). In *Brookfield*, the Seventh Circuit recognized that "Congress promulgated § 1111(b)(1)(A) to allow a creditor's loan ***to surpass the limitations of nonrecourse agreements and state law***, and instead receive treatment as a recourse claim . . . ." *Id*. at 600 (emphasis added) (citing 7 Colliers on Bankruptcy ¶ 1111.03[1][a] (Alan N. Resnick & Henry J Sommer eds., 16th ed. 2013)). The relevant legislative history, quoted in *Brookfield*, confirms the Congressional intent for section 1111(b)(1) to serve as "the general rule that a secured claim is to be treated as a recourse claim in chapter 11 ***whether or not the claim is nonrecourse by agreement or applicable law***." *Id*. at 599

(emphasis added) (quoting 124 Cong. Rec. 32406 (1978)). Thus, like section 506, section 1111(b)(1)(A) is a "contract-defeating provision."

11. During the recent oral argument on the 1L Claim Objections, this Court inquired whether certain language in section 1111(b)(1) – specifically providing that an otherwise nonrecourse secured claim "shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim" – effectively incorporates section 502(b)(1), which generally provides for disallowance of a claim that "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . ." 11 U.S.C. §§ 502(b)(1), 1111(b)(1). The answer is no. In *Brookfield*, the Seventh Circuit expressly declined to adopt the "outlier opinion" in *In re SM 104 Ltd*., 160 B.R. 202 (Bankr. S.D. Fla. 1993), where a Florida bankruptcy court held that "since the loan is nonrecourse, § 502(b)(1) prevents Capital Bank from maintaining any unsecured deficiency claim." *Brookfield*, 735 F.3d at 601.

12. Moreover, reading section 502(b)(1) to limit the application of section 1111(b)(1) would violate the "general/specific canon" of statutory interpretation recently articulated by Supreme Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012). That canon applies "to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id*. at 2071. In *RadLAX*, which Justice Scalia described as an "easy case" to decide, the Court unanimously held that the specific provision of section 1129(b)(2)(A)(ii), which makes any sale of property under a plan "subject to section 363(k)," overcomes the general provision in section 1129(b)(2)(A)(iii) allowing the debtor to provide a secured creditor with the "indubitable equivalent" of its claim. Similarly, the specific provision of section 1111(b)(1), providing for treatment of a secured claim as recourse "whether or not

such holder has such recourse," takes precedence over any general rule in section 502(b)(1) barring a claim that is unenforceable "under any agreement or applicable law."

13. Faced with the "contract-defeating" language of section 1111(b)(1), the UCC seeks to circumvent it by characterizing section 7.17 of the Collateral Agreement as a "waiver" provision that applies to section 1111(b)(1) itself. Complaint, at ¶¶ 58-68. In support, the UCC contends that the phrase "under any law," as used in section 7.17, encompasses federal bankruptcy law (including section 1111(b)(1)). Complaint, at ¶¶ 64-65. But because the purported waiver is contained within the very agreement whose limitations are "surpassed" by section 1111(b)(1), *see Brookfield*, 735 F.3d at 600, the UCC's argument is circular and unavailing. If accepted, the UCC's position would enable borrowers to draft non-recourse provisions in a manner that would eviscerate the benefits afforded to secured creditors under section 1111(b)(1), in contravention of well settled rules of statutory interpretation. *See In re Worlds of Wonder Sec. Litig*., 35 F.3d 1407, 1422 (9th Cir. 1994) (rejecting interpretation of section 11 of Securities Act of 1933 that "would eviscerate the statute" by allowing companies and their auditors to immunize themselves from liability for fraudulent financial statements simply by refusing to admit their falsity prior to filing of suit); *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 92 A.D.3d 148, 937 N.Y.S.2d 63 (App. Div. 2011) ("[a] court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose").

14. Section 1111(b)(1) does not authorize debtors and creditors to enter into pre-petition agreements that change the treatment of secured claims under section 1111(b)(1). Section 1111(b) contains two narrow exceptions to the mandatory treatment of non-recourse secured debt as recourse debt under chapter 11, neither of which is applicable here. The first exception requires an election, by at least two-thirds in amount and more than half in number of

the allowed claims of such class, that section 1111(b)(2) apply to the secured claim. 11 U.S.C. § 1111(b)(1)(A)(i). The second exception applies to a sale of the secured property pursuant to section 363 of the Code or the plan; in those circumstances, the protections afforded by section 1111(b)(1) are unnecessary because the secured creditor receives the benefit of its pre-petition bargain through its right to credit bid in lieu of a judicial valuation of the property. *Cf. Brookfield*, 735 F.3d at 600, quoting *In re 680 Fifth Avenue Associates*, 29 F.3d 95, 97 (2d Cir. 1994). The UCC does not contend that either exception applies here.

15. Section 1111(b)(1) does not contain any other statutory exception to the mandatory treatment prescribed therein, let alone one based on a pre-petition agreement of a secured creditor to modify such treatment. Had Congress intended for such an agreement to be enforceable in a bankruptcy case, it could have inserted language into section 1111(b)(1) similar to that found in 11 U.S.C. § 510(a), which provides that "[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. § 510(a).[5] The fact that Congress knew how to draft such language, but omitted it from section 1111(b)(1), is presumptive. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

16. Consistent with the above, this Court and others have found to be unenforceable pre-petition agreements or waivers by creditors that purport to change their treatment in

[5] Section 7.17 of the Collateral Agreement is not a subordination provision. Subordination relates to the priority of a claim relative to other claims, or of a lien relative to other liens. *E.g.*, *In re Lack's Stores, Inc.*, No. 10-60149, 2012 WL 3043093, at * 10 (S.D. Tex. Jul. 25, 2012)("By definition, a subordination agreement merely alters the priority of different parties' liens . . . .").

bankruptcy or otherwise rewrite the Bankruptcy Code. *In re 203 North LaSalle Street Partnership* , 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000); *In re Hart Ski Mfg. Co., Inc.*, 5 B.R. 734, 736 (Bankr. D. Minn. 1980); *In re ABC-Naco, Inc.*, 331 B.R. 773, 782 (Bankr. N.D. Ill. 2005). In *ABC-Naco*, for example, this Court, ruling in favor of a bank, held that a pre-petition agreement between the bank and debtor providing that "only existing preference law would be applicable" would be unenforceable. *Id*. This Court relied upon *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223-24 (1986), where the Supreme Court explained that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Id*. (quoting *Norman v. Baltimore & O. R. Co.*, 294 U.S. 240, 307-08 (1935)). Applying that reasoning, this Court held that "ABC-Naco and the Bank could no more decide by contract that only current preference law would apply to their dealings than they could decide by contract that no preference law at all would apply to their dealings." *ABC-Naco*, 331 B.R. at 783.

17. In *203 North LaSalle*, this Court reached a similar result in determining that an agreement by a creditor to allow another party to vote its claim on a plan of reorganization was not enforceable, holding that "[i]t is generally understood that prebankruptcy agreements do not override contrary provisions of the Bankruptcy Code." *203 N. La Salle*, 246 B.R. at 331. As explained by this Court, "since bankruptcy is designed to produce a system of reorganization and distribution different from what would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply." *Id*. Likewise in, *Hart Ski*, the court held that a creditor could not waive its

statutory right to adequate protection under the Bankruptcy Code, finding that such rights "cannot be affected by the actions of the parties prior to the commencement of a bankruptcy case when such rights did not even exist." *Hart Ski*, 5 B.R. at 736.[6]

18. The above cases confirm that debtors and creditors cannot, by pre-petition contractual agreement, rewrite the provisions of the Bankruptcy Code. This is particularly so where the provision in question *mandates* specific treatment of claims by the Bankruptcy Court. Statutes trump private contracts, and not the other way around. If a secured creditor could waive the treatment of its claim mandated by section 1111(b), private parties could similarly render ineffective other provisions of the Bankruptcy Code – including the protections of section 1129 and many of those regarded as fundamental by this Court and others, such as the right to vote on a plan or the right to adequate protection. For example, debtors could insert provisions into agreements with trade creditors that would provide for waiver of the absolute priority rule or the best interest of creditors test, or strike out of the Code the unfair discrimination test. Taken to the extreme, a debtor and creditor could rewrite the distribution scheme under chapter 11 and its mandatory requirements for confirmation under chapter 11. That is obviously neither contemplated nor permitted by the Bankruptcy Code.[7]

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[6] The Supreme Court appears to recognize that section 1111(b)(1) is a mandatory provision incapable of being overridden by contract. In *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 439 n.6 (1999), the Court stated that "[h]aving agreed to waive recourse against any property of the Debtor other than the real estate, the Bank had no unsecured claim outside of Chapter 11. Section 1111(b), however, provides that nonrecourse secured creditors who are undersecured must be treated in Chapter 11 as if they had recourse." *Id*. at 439 n.6 (emphasis added).

[7] Section 1129(a) of the Bankruptcy Code provides that a plan can be confirmed "only if all of the following requirements are met." 11 U.S.C. § 1129(a). This is true whether or not any objection to the plan is filed. *E.g.*, *In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 281, 315 (Bankr. N.D. Ill. 2008) (court held that it "must address the remaining portions of § 1129(a) even though no objection has been asserted"). One of those plan requirements is section 1129(a)(1), which mandates that "[t]he plan complies with the applicable provisions of this title." 11 U.S.C.

19. Accordingly, the UCC's argument that anything in the Collateral Agreement, including section 7.17, can modify the mandatory operation of section 1111(b)(1), should be rejected by this Court as contrary to well established and binding precedent.

B. Section 7.17 Does Not, By Its Plain Language, Constitute a Waiver of Defendants' Statutory Treatment Under Section 1111(b).

20. Even if section 1111(b) did not operate to defeat contrary contractual provisions, section 7.17 does not, by its plain terms, constitute a waiver of the statutory treatment of Defendants' claims under section 1111(b). The provision states:

> Notwithstanding anything to the contrary ***in this Agreement***, no recourse shall be had, whether by levy or execution, ***or under any law***, or by the enforcement of any assessment or penalty or otherwise, for the payment of any of the Obligations, against any Pledgor or any of the assets of any Pledgor, other than the Collateral, it being expressly understood that the sole remedies available to the Collateral Agent and the Secured Parties ***pursuant to this Agreement*** with respect to the Obligations shall be against the Collateral.

Mester Decl., Ex. A, § 7.17 (emphasis added).

21. The opening phrase of the provision, "[n]otwithstanding anything to the contrary ***in this Agreement***," defines and limits its scope, which excludes applicability of the Bankruptcy Code. Had it been possible for the provision to override a statute, and had the parties intended to do so, that opening phrase should have been drafted to read "Notwithstanding anything to the

(continued…)

§ 1129(a)(1). Although the Code's legislative history suggests that the phrase "applicable provisions" is aimed at compliance with sections 1122 and 1123 of the Code, *Sentinel Mgmt.*, 398 B.R. at 292, at least one court has stated that section 1129(a)(1) could also require compliance with section 1111(b)(1). *See In re Grandfather Mountain Ltd. P'ship*, 207 B.R. 475, 494 n.6 (Bankr. M.D.N.C. 1996) (plan's elimination of unsecured claim upon sale or refinancing of property contravenes section 1111(b) and arguably renders plan unconfirmable under section 1129(a)(1)).

Just as the absence of any objection to a plan does not eliminate this Court's obligation to deny confirmation if the plan does not comply with section 1111(b), the waiver of any rights under section 1111(b) would not obviate this Court's duty to deny confirmation of a plan that provided treatment of a secured claim in a manner inconsistent with the statute.

contrary in this Agreement or under any law, . . ." When read together with the last part of the provision, which states "it being expressly understood that the sole remedies available to the Collateral Agent and the Secured Parties ***pursuant to this Agreement*** with respect to the Obligations shall be against the Collateral," it is evident that the drafters did not intend to provide for a waiver of statutory rights, and that Section 7.17 is nothing more than a garden variety non-recourse provision of the kind that section 1111(b)(A)(1) was designed to override.

22. Also significant is the omission of the word "waiver" from Section 7.17. *Cf. Piccarreto v. Mura*, 971 N.Y.S.2d 74 (Sup. Ct. 2012) (finding absence of waiver under stipulation where the word "waiver" was never used). The word is used elsewhere in the Collateral Agreement, *see* Mester Decl., Ex. A, at § 7.09 (waivers and amendment), § 7.10 (waiver of jury trial), § 7.14(b)(waiver of objection to venue), showing that its omission from Section 7.17 was deliberate. *See, e.g., Russello*, 464 U.S. at 23.

23. In any event, the inclusion of the phrase "under any law" in section 7.17 does not support the UCC's position. Even in cases where courts have suggested that creditors can waive statutory rights affecting the "distribution" provisions of the Bankruptcy Code, those courts have insisted that any waiver language must be "clear beyond peradventure," such as a specific reference to the Bankruptcy Code provision subject to any waiver. *E.g.*, *In re Boston Generating, LLC*, 440 B.R. 302, 319 (Bankr. S.D.N.Y. 2010); *see also In re MPM Silicones, LLC*, 518 B.R. 740, 750 (Bankr. S.D.N.Y. 2014). In *Boston Generating,* the court rejected arguments that junior creditors had waived their right to object to a sale under section 363 of the Bankruptcy Code, finding that the contractual provision at issue did not explicitly reference the specific bankruptcy right being waived. The same is true here.

24. Accordingly, Section 7.17 cannot be read to provide for a waiver of Defendants' treatment afforded under section 1111(b)(1).

C. Even if Section 7.17 Operated as a Waiver as the UCC Contends, Such Waiver Would Not Be Enforceable Under New York Law.

25. Finally, any "waiver" by a secured creditor of the treatment afforded under section 1111(b), even if permitted under the Bankruptcy Code and contained in section 7.17 of the Collateral Agreement, is separately prohibited under applicable New York law.

26. While New York does not impose a *per se* bar on waiver of statutory rights, parties cannot waive statutory and/or constitutional rights if "such waiver contravenes public policy considerations." *Matter of Brooklyn Union Gas Company v. City of New York*, 428 N.Y.S. 2d 564, 104 Misc. 2d 441, 444 (Sup. Ct. 1980); *see Matter of Abromowitz v. Board of Educ. of Cent. Sch. Dist. No. 1 of Brookhaven & Smithtown*, 46 N.Y. 2d 450 (1979).

27. The purported waiver under section 7.17 of the Collateral Agreements contravenes public policy. Under New York law, "when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or the judicial records." *Glaser v. Glaser*, 276 N.Y. 296, 301-02 (1938). Public policy applicable to federal bankruptcy law can be found in the U.S. Constitution and in federal laws and judicial decisions.

28. Here, any pre-petition waiver by a secured creditor of the treatment required under section 1111(b) would contravene public policy by undermining the purpose of that statute, which is intended to apply whether or not the agreement provides for recourse. More generally, any waiver of rights under section 1111(b) would also contravene well established public policy in favor of protecting secured creditors. In *River Road Hotel Partners, LLC v. Amalgamated Bank,* 651 F.3d 642, 653 (7th Cir. 2011), *aff'd*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012), the Seventh Circuit carefully reviewed the various

provisions of the Bankruptcy Code applicable to secured creditors and, based on that review, concluded that "the Code has an expressed interest in insuring that secured creditors are properly compensated." *Id*. at 653. Section 1111(b) manifests that public policy, as made evident in *Brookfield*, where the Seventh Circuit commented that the purpose behind the addition of section 1111(b) was to "strike a balance between debtor protections and equitable treatment of creditors." *Brookfield*, 735 F.3d at 600.

29. Consistent with that public policy, as discussed above, courts have rejected as unenforceable contractual provisions that deprive creditors of the right to vote on a plan, or the right to receive adequate protection. *203 N. LaSalle*, 246 B.R. at 331 (right to vote); *Hart Ski*, 5 B.R. at 736 (adequate protection). Ignoring those cases, the UCC advocates a broad interpretation of the phrase "under any law" that would violate public policy by eliminating those fundamental rights and others afforded to secured creditors under the Code. For example, depriving a secured creditor of its deficiency claim under section 1111(b) would prevent it from voting for or against a plan as an unsecured creditor. *In re Montgomery Ward, LLC*, 634 F.3d 732, 740 (3d Cir. 2011) ("This unsecured deficiency claim enables the undersecured nonrecourse creditor to vote on the debtor's plan of reorganization. . . . If the debtor elects to continue using the collateral, section 1111(b) ensures that the creditor has the ability to vote on the debtor's plan"). For a secured creditor, that right to vote is critical – without it, "the nonrecourse undersecured creditor would not be able to challenge the appraisal process." *Id*.

30. Beyond the right to vote, section 1111(b) affords fundamental protections to secured creditors against other provisions in chapter 11 that grant to debtors enhanced rights that do not exist outside of bankruptcy and that were never part of the contractual "bargain" under the applicable loan agreements. Those enhanced rights, which are purely a creature of the

Bankruptcy Code under the cramdown provisions of section 1129, permit a debtor to retain property subject to a lien, and to reduce the amount of that lien based on a judicial valuation. In *Brookfield*, the Seventh Circuit expressed concern that the Bankruptcy Code "deprives a lienholder of the right to bid on the collateral and the opportunity to 'benefit from any unanticipated post-valuation appreciation.'" *Brookfield*, 735 F.3d at 600. The court found that section 1111(b) restores the proper balance, by preventing a windfall to the debtor.

31. Indeed, if the UCC's reading of the phrase "under any law" were adopted to include all bankruptcy law, the result would be a broad waiver of other fundamental rights under the Bankruptcy Code that would extend beyond the treatment afforded to secured creditors under section 1111(b)(1). For example, if precluded from seeking recourse against non-collateral, a secured creditor would not be entitled to receive adequate protection in the form of an additional or replacement liens on non-collateral, or in the form of cash payments if such cash was unencumbered. 11 U.S.C. § 361(1), (2). Nor would a secured creditor be entitled to a superpriority administrative expense claim under section 507(b) if any adequate protection proved to be inadequate. 11 U.S.C. § 507(b). Depriving secured creditors of the right to adequate protection contravenes public policy considerations and further renders section 7.17 unenforceable under New York law.

32. In sum, the UCC's purported waiver would eviscerate fundamental Bankruptcy Code protections of secured creditors, including those in section 1111(b)(1). Under New York law, such a waiver contravenes public policy and therefore cannot be enforced as a matter of law.

CONCLUSION

33. For the reasons stated above, Count V against the Defendants should be dismissed with prejudice.

Dated: March 2, 2016
Chicago, Illinois

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*[1] Debtors.	Chapter 11 Case No. 15-01145 (ABG) (Jointly Administered)
STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE, Plaintiff, v. BOKF, N.A., as successor indenture trustee, paying agent, and notes custodian under that certain Indenture, dated as of April 16, 2010, et al., Defendants.	Adversary Proceeding No. 15-00571 (ABG)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Upon consideration of the *Motion to Dismiss* filed by Delaware Trust Company ("Delaware Trust"), BOKF, N.A. ("BOKF") and Wilmington Savings Fund Society, FSB ("WSFS") (collectively, "Defendants"), and the Court being fully advised in the premises and after due deliberation thereon, it is hereby;

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.

[1] The last four digits of the tax identification number for debtor Caesars Entertainment Operating Company, Inc. ("CEOC"), are 1623. A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

2. Count V of the complaint in the above-captioned action, as against Defendants, is dismissed with prejudice.

Dated: _____, 2016
Chicago, Illinois

_____
Judge A. Benjamin Goldgar
United States Bankruptcy Judge