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.	Hearing Date: January 28, 2015 at 1:00 p.m.
	Re: Docket Nos. 757 and 758

FIRST LIEN PARTIES' REPLY TO LEVINE STALLER, SKLAR, CHAN & BROWN, P.A.'S SUPPLEMENTAL OBJECTIONS TO THE DEBTORS' MOTION FOR APPROVAL OF (1) POSTPETITION FINANCING [D.I. 757] AND (2) DISCLOSURE STATEMENT [D.I. 758]

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 Reply to *Supplemental Objections of Levine Staller, Sklar, Chan & Brown, P.A. with Respect to the Debtors' Motion for Order Authorizing Debtors to Obtain Postpetition Financing* [D.I. 757] (the "**LS DIP Objection**" 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). The mailing address for each of the Debtors is 1000 Boardwalk at Virginia Avenue, Atlantic City, NJ 08401.

"**Levine Staller**," respectively), and Levine Staller's Objection to the Debtors' Motion for Order Approving the Proposed Disclosure Statement [D.I. 758] (the "**LS DS Objection,**" and together with the LS DIP Objection, the "**Objections**"). In support of this Reply, the First Lien Parties respectfully state as follows:

SUMMARY OF ARGUMENT

1. Stripped to its essence, Levine Staller argues that in its prior motion [D.I. 295], it sought to have it secured claim allowed as fully secured and that the Court granted such relief. Both assertions are baseless. As the party allegedly requesting the Court to value its interest in the collateral, Levine Staller had the burden of proof to establish that the collateral securing its claim is of sufficient value to support a fully (or partial) secured claim. That it had failed to do.

2. Searching through the prior motion, however, one cannot find a single reference, not to mention evidence, even discussing the value of the collateral. Nor was valuation mentioned during oral argument. Simply put, Levine Staller failed to address the value of the collateral securing its claim. As a result, there was nothing for the First Lien Parties or the Debtors to rebut; the valuation of the collateral was simply not put before the Court.

3. Adding insult to injury, Levine Staller argues that, although no evidence whatsoever was before the Court as to the value of the collateral, this Court nevertheless determined that it is fully secured. The Court, of course, did no such thing. First, as mentioned above, Levine Staller neither argued, nor presented any evidence as to the valuation of the collateral. Second, this Court's ruling is clear that the Court addressed only perfection and priority, not valuation.

4. Evidence before this Court as to value, however, conclusively establishes that Levine Staller is unsecured. First, as the Debtors acknowledged in the final cash collateral order [D.I. 342] (the "**Cash Collateral Order**"), the First Lien Parties are holding a secured claim for

not less than $292 million. The challenge period under the Cash Collateral Order has expired for all parties (including Levine Staller) other than the creditors' committee. Second, the valuation of the Debtors attached to their proposed disclosure Statement (the "**Disclosure Statement**"), values the Debtors at $170 to $207 million. *See* Disclosure Statement, D.I. 713, at p. 118. In its objection to the approval of the Disclosure Statement [D.I. 758], Levine Staller did not contest that valuation, nor presented any evidence or arguments to rebut the Debtors' valuation.

5. Thus, since the Court held that Levine Staller's lien is junior to and should be enforced behind the liens of the First Lien Parties, *see* Order, D.I. 601 ("Levine Staller's secured claim shall be enforced … behind any liens that may or have been granted to the Secured Parties"), and since the First Lien Parties are under-secured, there is no collateral to support Levine Staller's claim. Having no collateral to support it, Levine Staller's secured claim, is unsecured under Section 506(a) of the Bankruptcy Code.

BACKGROUND

6. Levine Staller, the Debtors and the First Lien parties previously briefed and argued the *Motion of 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 11 U.S.C. § 506(A) and Rule 3012 of the Federal Rules Of Bankruptcy Procedure* (the "**LS Lien Motion**"), as well as the objections, reply, sur-reply, declarations, and other documents filed in relation thereto. [D.I. 295, 407, 410, 412, 413, 456, 458 and 494].

7. On November 24, 2014, the Debtors filed their *Motion for Order (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to Section 364 of the Bankruptcy Code, (II) Granting Adequate Protection to the Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, (III) Granting Liens and Superpriority Claims, and (IV)*

Modifying Automatic Stay (the "**DIP Motion**") [D.I. 565]. The Debtors also subsequently filed the *DIP Facility Commitment Letter* (the "**DIP Commitment Letter**") [D.I. 681-1].

8. Levine Staller filed an objection and reservation of rights to the DIP Motion [D.I. 583], asking that a reservation of rights language similar to the one used in the Cash Collateral Order be inserted in the order granting the DIP Motion. *See Id.*, ¶ 5. Both the First Lien Parties and the Debtors were agreeable to doing so. After the Court issued its decision on the LS Lien Motion, however, Levine Staller rejected that resolution.

9. On December 5, 2014, this Court issued a *Memorandum Opinion Re Motion of 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* (the "**Opinion**") [D.I. 600], and entered an order deciding the LS Lien Motion (the "**Order**") [D.I. 601]. In the Opinion, the Court addressed two issues, and two issues only: (1) the validity and perfection of Levine Staller's lien, *see* Opinion, at 6-8, and (2) the relation back and priority of Levine Staller's lien, *see* Opinion, at 8-9. As is perfectly clear, the Opinion does not address valuation of the collateral securing Levine Staller's claim, and thus, includes no ruling on whether, under Section 506(a) of the Bankruptcy Code, Levine Staller's claim is fully, partially or un-secured. Similarly, the Order does not address the valuation of the collateral securing Levine Staller's claim but provides that Levine Staller has a secured claim, which claim is subordinated to the First Lien Parties' claim.

10. On January 13, 2015, Levine Staller filed the LS DIP Objection to the Debtors' DIP Motion and DIP Commitment Letter. In addition, Levine Staller filed a supplemental objection to the approval of the Disclosure Statement [D.I. 758].

11. Prior to this Court's Opinion and Order, Levine Staller objected to the approval of the Disclosure Statement [D.I. 366] arguing that notwithstanding its secured claim, the proposed

plan does not treat it as such and that the Disclosure Statement fails to contain sufficient information in this regard. Levine Staller's objection to both, the DIP Motion and the Disclosure Statement are premised on the flawed argument that this Court has valued the collateral securing Levine Staller's claim and that such valuation is sufficient to pay Levine Staller's claim in full.

12. It is noteworthy, that as early as November 3, 2014, when the Debtors filed their amended disclosure statement [D.I. 406], the valuation made part thereof established that the First Lien Parties are under-secured. *See* D.I. 406 at p. 110. Levine Staller has never contested the Debtors' valuation, nor presented any valuation evidence of its own.

ARGUMENT

I. This Court Did Not Determine the Value of the Collateral Securing Levine Staller's Claim

13. Under Section 506(a)[2] of the Bankruptcy Code, a claim that is secured under state law, is secured to the extent of the value of the collateral securing the claim, and unsecured to the extent of any deficiency.

14. Section 506(a) requires an analysis of the amount of the creditor's allowed claim as compared to the value of the creditor's collateral, in order to determine the extent to which the creditor's claim is to be treated as secured for the purposes of the Bankruptcy Code. *See* 4 *Collier on Bankruptcy* ¶ 506.03 (16th ed., 2014). A secured creditor's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the

[2] 11 U.S.C. § 506 provides, "(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim."

collateral. *See Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961 (1997); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239 (1989) ("[A] claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of the claim is considered unsecured.").

15. Even a secured creditor, is unsecured in bankruptcy to the extent that the collateral is insufficient to meet its value. *See In re Heritage Highgate, Inc.*, 679 F.3d 132, 146 (3d Cir. 2012) (affirming creditor's treatment as general unsecured creditor where value of collateral was less than secured claim's value); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606, 611 (3d Cir. 2000) (junior lienholder whose collateral is valued at less than amount due to senior lienholder "does not have a secured claim" under Section 506(a)); *Kennedy v. Fulton Bank (In re Kennedy)*, No. 12-11223 (BLS), 2013 Bankr. LEXIS 2350, at *4-5 (Bankr. D. Del. June 10, 2013) ("stripping off" junior lien when there existed no excess equity beyond amount due on senior liens); *Verratti v. PNC Bank (In re Verratti)*, 517 B.R. 564, 572 (Bankr. E.D. Pa. 2014) (same); *see also Pioneer Credit Co. v. Detamore (In re Detamore)*, No. 04-78987 (JM), 2005 Bankr. LEXIS 2182, at *18 (Bankr. N.D. Ga. Sept. 27, 2005) (creditor failed to show that its claim for bankruptcy purposes was a secured claim, even though it might be proper to refer to it as a secured claim under state law).

16. A review of the Opinion and Order establishes that the Court did not engage in valuation of the collateral securing Levine Staller's claim. The Court's detailed Opinion analyzed the disputed issues that the parties put in front of it, to wit, (i) whether Levine Staller's claim was perfected under New Jersey law, and (ii) the competing priorities among Levine Staller and the First Lien Parties. With respect to perfection, the Court held that "the Firm's charging lien is a perfected, secured claim." *See* Opinion, at 7. With respect to priority, the

Court held that while Levine Staller's lien relates back, it is subordinated to the earlier lien in favor of the First Lien Parties. *See* Opinion, at 9 ("Accordingly, the Firm's Charging Lien, although secured, is behind the lien of the Icahn Entities."). Nowhere in the Opinion, did the Court engage in valuation of the collateral . That is not surprising of course, because Levine Staller did not make any argument, nor presented any evidence in that regard.

17. Taking one sentence in the Order (*see* Order, at 2 "Levine, Staller is allowed a fully secured claim *for the entire amount* of the $1.25 million …" (emphasis added)) out of context, however, Levine Staller argues that the Court nevertheless valued the collateral securing its claim. Levine Staller ignores that this sentence was necessary since the Debtors disputed the *amount* sought by Levine Staller. *See* Opinion, at 6 ("Debtors do not merely contest the validity of the Charging Lien on legal grounds. Debtors instead denigrate the amount of the fee…."); *see also* Debtors' Objection to LS Lien Motion, D.I. 412, ¶ 56.

18. But even more fundamental, is that the Court could not have possibly ruled on valuation, when no argument or evidence concerning valuation was presented to it. *See* Point II, *infra*.

II. Levine Staller Failed to Meet Its Burden of Valuing its Secured Claim

19. As the moving party who filed the LS Lien Motion, Levine Staller had the burden to prove that the value of the collateral securing its claim is sufficient for it to have a fully secured claim under Section 506(a) of the Bankruptcy Code. *See In re Heritage Highgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012) (holding that "the ultimate burden of persuasion is upon the creditor to demonstrate by a preponderance of the evidence both the extent of its lien *and the value of the collateral securing its claim*" (emphasis added) (*quoting In re Robertson*, 135 B.R. 350, 352 (Bankr. E.D. Ark. 1992)). *Accord Official Comm. of Unsecured Creditors v. UMB*

Bank, N.A. (In re Capital), 501 B.R. 549, 590 (Bankr. S.D.N.Y. 2013) ("[I]n all cases, the creditor bears the burden in the first instance of establishing the amount and extent of its lien under section 506(a)"); *In re Richard Buick, Inc.*, 126 B.R. 840, 851 (Bankr. E.D. Pa. 1991) ("Throughout the Code, the burden of proving the 'validity, priority, and extent' of security interests lies upon the creditors asserting such interests.").

20. But nowhere in the LS Lien Motion did Levine Staller even attempt to do so. In none of the pleadings filed by Levine Staller in connection with the LS Lien Motion is there a single argument (not to mention evidence), concerning the valuation of the collateral securing its claim. As such, not only did Levine Staller fail to meet its burden, it failed to put this issue before this Court.[3]

21. Levine Staller's argument that it must be granted recognition as a fully secured creditor because the Debtors and First Lien Parties did not show that its lien was *not* fully secured, *see* LS DIP Objection, ¶ 8, reverses the legal standard under Section 506(a) and Rule 3012. As stated above, the law is clear on the burden regarding valuation: it was the moving party, Levine Staller, who had the burden of presenting evidence that its claim could be fully satisfied out of the collateral.

[3] Playing "gotcha" Levine Staller argues that by its reference to Section 506 and Rule 3012 in the title of the pleading it "specifically asked the Court to value Levine Staller's claim...." *See* LS DIP Objection, ¶ 3. First, it is disingenuous for Levine Staller to argue that the mere mention of these statutes in the title gave sufficient notice to the parties and the Court that Levine Staller sought valuation of the collateral. Second, as stated above, even if it did, by failing to argue this issue in its pleadings, or to present any evidence on the subject, Levine Staller both failed to meet its burden of proof and waived the argument. Third, as Section 506 provides, the valuation is to "be determined in light of the purpose of valuation and the proposed disposition or use of such property." *See* 11 U.S.C. § 506(a)(1). No argument or evidence in that regard was presented to the Court. Finally, Rule 3012 provides that the "court *may determine the value* of a claim secured by a lien…." *See* Fed. R. Bankr. P. 3012 (emphasis added). While the Court may do so, this Court clearly has not done so.

22. In fact, it is Levine Staller who waived this argument by not briefing or arguing it. *See In re Ginsberg*, 164 B.R. 870, 876 n.4 (Bankr. S.D.N.Y. 1994) (movants who purported to invoke Section 105 of the Bankruptcy Code, but did not brief or otherwise discuss how that section relates to the relief they seek, waived their Section 105 arguments, if any); *Chaney v. Grigg (In re Grigg)*, No. 11-71206 (JAD), 2013 Bankr. LEXIS 3983, at *31 (Bankr. W.D. Pa. Sept. 20, 2013) (brief that only alluded to issues in perfunctory manner, waived them); *Harrison v. N.J. Cmty. Bank (In re Jesup & Lamont, Inc.)*, 507 B.R. 452, 468 n. 13 (Bankr. S.D.N.Y. 2014) (party who raised defense in preference liability action, but did not brief it, waived defense).

III. Levine Staller's Claim is Unsecured

23. By the time the Court issued its Opinion and Order, the Debtors have filed their amended Disclosure Statement. The valuation made part of the amended Disclosure Statement established that the First Lien Parties are under-secured. *See* D.I. 406, at p. 110. The same is true under the most recent version of the Disclosure Statement. *See* D.I. 713, at p. 118. Thus, Levine Staller's argument that the Court took into account various valuations presented to it and, therefore, must have meant to decide that there is sufficient collateral to secure its claim, *see* LS DIP Objection, ¶ 13, is demonstrably false. No valuation evidence exists in the record of this case, except for the valuation attached to the Disclosure Statement.

24. Levine Staller failed to object to the Debtors' valuations, nor did it present any valuation evidence of its own. As such, the only evidence before the Court as to valuation, is the Debtors'. According to that evidence, the First Lien Parties are under-secured.

25. Since Levine Staller's lien is subordinated to the First Lien Parties' lien, Section 506(a) mandates that Levine Staller's claim be treated as an unsecured claim in this case.

CONCLUSION

For all of the foregoing reasons, the First Lien Parties respectfully request that the Court overrule Levine Staller's Objections in their entirety and grant the First Lien Parties such other and further relief as is just.

Dated: January 23, 2015
Wilmington, Delaware

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