IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: TRUMP ENTERTAINMENT RESORTS, INC., *ET AL.*[1], Debtors.	Case No. 14-12103 (KG) Chapter 11 (Jointly Administered) **Re: Docket Nos. 565, 681, 807 & 816**

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' 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, (IV) GRANTING LIENS AND SUPERPRIORITY CLAIMS, AND (V) MODIFYING AUTOMATIC STAY

The Official Committee of Unsecured Creditors (the "Committee") of Trump Entertainment Resorts, Inc. ("TER") and its affiliated chapter 11 debtors and debtors-in-possession (collectively, the "Debtors"), by and through its counsel, hereby submits this limited objection ("Limited Objection") with respect to the Debtors' motion seeking, *inter alia*, the entry of an order authorizing and approving a secured postpetition debtor-in-possession financing facility ("DIP Facility") to be provided by IEH Investments I LLC acting individually or through one or more of its affiliates (the "DIP Lenders" or "Icahn Parties"), and authorizing use of cash collateral in connection therewith [Docket. No. 565] (as amended/modified/revised, the "DIP Motion"),[2] and respectfully represents as follows:

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

[2] Capitalized terms not defined herein have the meaning ascribed to them in the DIP Motion.

I. PRELIMINARY STATEMENT

1. The Icahn Parties are not "new money" lenders—although they would be putting in new money via the DIP Facility, the Icahn Parties already have nearly $300 million invested in the Debtors by way of the Amended and Restated Credit Agreement dated as of July 16, 2010 (the "Prepetition Debt"). Indeed, the Icahn Parties have attempted to use their asserted first lien position to dictate the course of the Debtors' chapter 11 cases throughout. This was evident from the outset in the overreaching and prejudicial demands made by the Icahn Parties in response to the Debtors' request for consensual use of cash collateral. It took a firm objection by the Committee and judicious intervention from the Court to achieve the much more balanced terms that are reflected in the Court's *Final Order (A) Authorizing Postpetition Use of Cash Collateral, (B) Granting Adequate Protection to the Secured Parties, and (C) Granting Related Relief* [D.I. 342] (the "Cash Collateral Order**")**.

2. Yet once again, in connection with the DIP Facility, the Icahn Parties are attempting to impose overreaching and prejudicial terms on the Debtors that would undermine the careful balance preserved in the Cash Collateral Order. And once again it falls to the Committee to object and seek the Court's intervention, to rein in the offending terms of the DIP Facility in order to prevent the Icahn Parties from unfairly improving their position as holders of the Prepetition Debt at the expense of the Debtors' estates and their other constituents.

3. The Committee acknowledges that the Debtors have a real need for postpetition financing. However, the Court should not allow the Debtors' need for financing to override all other concerns. Approval of the DIP Facility without modification of the objectionable terms discussed below would shift the already one-sided nature of these chapter 11 cases completely and irrevocably in favor of the Icahn Parties. Therefore, the Committee respectfully requests that the Court condition any approval of the DIP Facility on modifications consistent with this Limited Objection.

II. RELEVANT BACKGROUND

4. On September 9, 2014 (the "Petition Date"), each of the Debtors commenced voluntary cases under chapter 11 of title 11 of the 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.

5. 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.

6. On November 26, 2014, the Debtors filed the original version of the DIP Motion, which provided for a $5 million facility and contemplated that the Debtors would cease operations at the Taj Mahal during December 2014.

7. On December 19, 2014, the Debtors announced that they would be keeping the Taj Mahal open based upon the negotiation of an enhanced debtor-in-possession financing facility.

8. On December 22, 2014, the Debtors filed their *Notice of Filing DIP Facility Commitment Letter* [D.I. 681] which set forth terms for the revised $20 million DIP Facility. The Court set a hearing on January 9, 2014 at 10:00 a.m. for approval of the DIP Facility, with a deadline of December 31, 2014 for the Debtors to file the DIP credit agreement ("DIP Credit Agreement") and a proposed form of order (the "Proposed DIP Order").

9. The Debtors did not file the DIP Credit Agreement and the Proposed DIP Order on December 31, 2014.

10. The hearing on the DIP Motion was subsequently continued to January 28, 2015.

11. On January 26, 2015, the Debtors filed versions of the DIP Credit Agreement and the Proposed DIP Order. *See* [Docket Nos. 807 & 816].[3]

III. LIMITED OBJECTION

12. As set forth below, the DIP Facility includes several overreaching and prejudicial provisions designed to unfairly improve the Icahn Parties' position as holder of the Prepetition Debt.

[3] Citations to the DIP Credit Agreement and the Proposed DIP Order *infra* refer to Docket Nos. 807 and 816.

Many of these provisions are directly contrary to protections and limitations specifically mandated by the Court in connection with the Cash Collateral Order.

(a) The Termination Provision Goes Too Far.

13. Paragraph 12(a) of the Proposed DIP Order provides that the automatic stay would be modified to permit the DIP Agent to take the following actions upon the occurrence of a Termination Event:

> (i) immediately terminate the Debtors' limited use of any Cash Collateral; (ii) terminate the DIP Facility and any DIP Loan Document as to any future liability or obligation of the DIP Secured Parties, but without affecting any of the DIP Obligations or the DIP Liens securing the DIP Obligations; (iii) declare all DIP Obligations to be immediately due and payable; (iv) freeze monies or balances in the Debtors' accounts; (v) immediately set-off any and all amounts in accounts maintained by the Debtors with the DIP Agent or the DIP Lenders against the DIP Obligations, or otherwise enforce any and all rights against the DIP Collateral in the possession of any of the applicable DIP Lenders, including, without limitation, disposition of the DIP Collateral solely for application towards the DIP Obligations; and (vi) take any other actions or exercise any other rights or remedies permitted under this Final Order, the DIP Loan Documents or applicable law…

Proposed DIP Order ¶12(a).

14. The exercise of the rights set forth in clauses (i), (iv), (v) and (vi) is subject to a three (3) business day "DIP Cure Period." *Id.* However, paragraph 12(b) of the Proposed DIP Order provides:

> Unless during such DIP Cure Period the Court determines that a Termination Event has not occurred, the DIP Agent (on behalf of the DIP Secured Parties), shall be deemed to have received relief from the automatic stay and may foreclose on all or any portion of the DIP Collateral, collect accounts receivable, and apply the proceeds thereof to the DIP Obligations, occupy the Debtors' premises to sell or otherwise dispose of the DIP Collateral, or otherwise exercise remedies against the DIP Collateral permitted by applicable nonbankruptcy law.

Proposed DIP Order ¶12(b).

15. Therefore, under the Proposed DIP Order, the Icahn Parties would be free to seize the Debtors' cash and foreclose on any other DIP Collateral a mere three (3) business days after the occurrence of **any** Termination Event, which would include, *inter alia*, (a) the occurrence of any Event of Default under the DIP Credit Agreement, (b) the occurrence of the Termination Date under the Cash Collateral Order, (c) a confirmation order satisfactory to the Icahn Parties not having been entered by March 13, 2015, or (d) the failure by the Debtors to timely perform any of the terms, provisions, conditions, covenants, or other obligations under the Proposed DIP Order. *See* Proposed DIP Order ¶11(a). Moreover, the **only** ground upon which parties in interest could seek intervention from this Court to contest the Icahn Parties' exercise of these remedies would be to obtain a ruling that a Termination Event has not occurred.

16. Notably, the termination provisions of the Cash Collateral Order are far more circumscribed. Paragraph 5 of the Cash Collateral Order provides that the Debtors' authorization (and the Secured Parties' consent) to the use of cash collateral shall terminate on the occurrence of a Termination Date. Cash Collateral Order ¶ 5. Paragraph 11 of the Cash Collateral Order provides that the Debtors' right to use (and the Secured Parties' consent) shall cease as of the expiration of a Cure Period (absent timely cure) following the issuance of a Default Notice. Cash Collateral Order ¶ 11. Any further rights and remedies of the Icahn Parties would remain subject to the automatic stay under the purview of this Court. Thus, the Cash Collateral Order carefully preserves the ability of this Court to balance the interests of the Icahn Parties and the interests of other constituents in the event of an alleged default or termination.

17. In contrast, the combination of the draconian termination provision in the Proposed DIP Order and the extremely broad and restrictive terms of the DIP Facility effectively would write the Court's authority and equitable powers out of the Bankruptcy Code entirely, and transfer complete control over the Debtors' estates to the Icahn Parties. This would dramatically expand the already considerable leverage of the Icahn Parties and wreak a devastating effect on the ability of the Committee and other constituents to protect their interests. Therefore, the Court should refuse to grant the DIP Motion unless the termination provision is modified to preserve the Court's ability to balance

the interests of the Icahn Parties and all other constituents of the Debtors' estates upon the occurrence of an Event of Default.

(b) The Court Already Refused to Grant a Preemptive Waiver of the Equities of the Case Exception Under Section 552(b).

18. One of the key modifications reflected in the Cash Collateral Order was to eliminate the preemptive waiver of the "equities of the case" exception under section 552(b) of the Bankruptcy Code that was demanded by the Icahn Parties. Notwithstanding the Court's clear indication that it would not be granting such a waiver in the Debtors' cases, the Icahn Parties are once again trying to obtain this unwarranted protection in connection with the DIP Facility. *See* Proposed DIP Order ¶¶4(a); DIP Credit Agreement § 6.01(n). *See also* Proposed DIP Order ¶ 6.

19. Moreover, the Icahn Parties are not limiting their demand for a section 552(b) waiver to borrowings under the DIP Facility—they are expressly seeking to have this waiver apply for the benefit of the Prepetition Debt as well. *See* Proposed DIP Order ¶ 4(a). The DIP Credit Agreement provides for an Event of Default if the Court grants relief under the "equities of the case" exception provided for in section 552(b) of the Bankruptcy Code not only with respect to the DIP Liens and Obligations, but also with respect to the First Lien Adequate Protection Liens. *See* DIP Credit Agreement § 6.01(n).

20. The Icahn Parties were not entitled to a waiver of the "equities of the case" exception in connection with the use of cash collateral, and they are not entitled to such a waiver now, particularly with respect to their Prepetition Debt. The Court should refuse to grant the DIP Motion unless the restrictions on the applicability of this key protection are removed.

(c) The Committee's Rights to Challenge the Icahn Parties' Prepetition Liens and Claims Would be Eviscerated.

21. The Cash Collateral Order contains carefully negotiated provisions that preserve the right of the Committee (and other parties in interest) to challenge the Icahn Parties' prepetition liens and claims. The Committee is authorized to use up to $75,000 of Cash Collateral to investigate the Icahn Parties' liens and claims. Cash Collateral Order ¶ 3(e). The Committee has a period of time to assert a challenge (or seek standing to do so), which period has been extended (with the consent of the Icahn

Parties) through and including February 13, 2015. *Id.* at ¶ 4(b). *See also* [D.I. 804]. The Committee intends to file on the same date of this Limited Objection a motion seeking standing to prosecute claims against the Icahn Parties.

22. However, the Proposed DIP Order and DIP Credit Agreement contain provisions that would eviscerate the Committee's ability to exercise its investigation and challenge rights under the Cash Collateral Order. First, section 8.21 of the DIP Credit Agreement contains a purported ratification by the Debtors of the Icahn Parties' prepetition liens, which is not made subject to the challenge provisions of the Cash Collateral Order. This provision must be clarified so that it does not impact the Committee's challenge rights under the Cash Collateral Order.

23. In addition, paragraph 13 of the Proposed DIP Order would impose an extremely overbroad restriction on the use of proceeds from any source to fund a Committee challenge against the Icahn Parties:

> Notwithstanding the foregoing, but subject to paragraph 3(e) of the Cash Collateral Order, no DIP Collateral, proceeds of the DIP Facility, or any other amounts may be used directly or indirectly by any of the Debtors, the official committee of unsecured creditors appointed in the Chapter 11 Cases (the "**Committee**"), or any trustee or other estate representative appointed in the Cases (or any successor case) or any other person or entity (or to pay any professional fees, disbursements, costs or expenses incurred in connection therewith): (a) to seek authorization to obtain liens or security interests that are senior to, or on a parity with, the DIP Liens or the Superpriority DIP Claims (each as defined below) (except to the extent expressly set forth herein); or (b) to investigate, prepare, assert, join, commence, support or prosecute any action for any claim, counter-claim, action, proceeding, application, motion, objection, defense, or other contested matter seeking any order, judgment, determination or similar relief against, or adverse to the interests of, in any capacity, against any of the DIP Agent, the DIP Lenders, the Prepetition Secured Parties, and each of their respective officers, directors, controlling persons, employees, agents, attorneys, affiliates, assigns, or successors of each of the foregoing, with respect to any transaction, occurrence, omission, action or other matter, including, without limitation, (i) any claims or causes of action arising under chapter 5 of the Bankruptcy Code; (ii) any so-called "lender liability" claims and causes of action; (iii) any action with respect to the validity,

> enforceability, priority and extent of, or asserting any defense, counterclaim, or offset to, the DIP Obligations (as defined below), the Superpriority DIP Claims, the DIP Liens, the DIP Loan Documents, the Prepetition Facility, or the obligations thereunder (the "**First Lien Obligations**"); (iv) any action seeking to invalidate, modify, set aside, avoid or subordinate, in whole or in part, any of the DIP Obligations or the First Lien Obligations; (v) any action seeking to modify any of the rights, remedies, priorities, privileges, protections and benefits granted to either (A) the DIP Agent or the DIP Lenders hereunder or under any of the DIP Loan Documents, or (B) the Prepetition Secured Parties under any of the Prepetition Loan Documents (in each case, including, without limitation, claims, proceedings or actions that might prevent, hinder or delay any of the DIP Agent's, or the DIP Lenders' assertions, enforcements, realizations or remedies on or against the DIP Collateral in accordance with the applicable DIP Loan Documents and this Final Order; or (vi) objecting to, contesting, or interfering with, in any way, the DIP Agent's or the DIP Lenders' enforcement or realization upon any of the DIP Collateral once an Event of Default (as defined below) has occurred.

Proposed DIP Order ¶13 (emphasis added). *See also* DIP Credit Agreement at § 5.01(a)(ii).[4]

24. This provision is overbroad in at least two key respects. First, it purports not only to limit the use of DIP Collateral and proceeds of the DIP Facility, but also the use of "any other amount" for a wide variety of prohibited purposes. *Id.* Thus, this provision as currently drafted would restrict the use of wholly unencumbered funds (i.e. such as the proceeds of Avoidance Actions). Second, prohibited uses are not limited only to actions that would challenge the interests of the Icahn Parties in their capacity as DIP Lenders, but also to actions that would challenge the interests of the Icahn Parties (and affiliated entities) in their capacity as Prepetition Secured Parties. *Id.* Thus, for example, if the Committee were to prosecute a successful challenge against the Icahn Parties in their capacity as Prepetition Secured Parties (which would be a prohibited use under the restriction), and the challenge

[4] Section 5.01(a)(ii) of the DIP Credit Agreement contains the following proviso that is not included in paragraph 13 of the Proposed DIP Order:

> provided, however, that, as set forth in the Cash Collateral Order, no more than $75,000 in the aggregate of the Term Loans, the Carve-Out, any Prepetition Collateral, any Cash Collateral or the proceeds thereof may be used by the Creditors Committee solely to investigate the foregoing matters within the Challenge Period (as defined in the Cash Collateral Order), as extended.

However, even if this proviso were added to paragraph 13 of the Proposed DIP Order, the restriction would still be overbroad for the reasons set forth herein.

were to result in a monetary recovery (which would not be DIP Collateral nor proceeds of the DIP Facility, but which apparently would be "any other amount"), then the proceeds of the challenge could not be used to fund the cost of bringing it. The Committee cannot exercise its challenge rights if it is preemptively barred from using "any other amount" to fund a challenge.

25. The chilling effect of the restriction provision is further exacerbated by section 6.01(ee) of the DIP Credit Agreement, which provides for an Event of Default if:

> the Bankruptcy court shall enter an order allowing any party to prosecute a Challenge (as defined in the Cash Collateral Order), including pursuant to an order granting a Standing Motion (as defined in the Cash Collateral Order) without preserving the Debtors' ability to settle such Challenge pursuant to Fed. R. Bank. 9019 or in the Plan of Reorganization.

DIP Credit Agreement at § 6.01(ee).

26. This provision would put the Committee (and the Debtors' estates) in a completely untenable position where the price of merely asserting an entirely meritorious challenge to the Icahn Parties' prepetition liens and claims would be an Event of Default and (presumably) the exercise of remedies by the Icahn Parties under the DIP Facility unless the Debtors are granted the ability to settle the challenge out from under the Committee.

27. In connection with the Cash Collateral Order, the Debtors fully compromised and waived their ability to assert claims against the Icahn Parties, without prejudice to the Committee's right to assert such claims. *See* Cash Collateral Order at pp. 6-7, 10-11, 27. Further, the Debtors have asserted a "common interest protection" with the First Lien Lenders with respect to "the Debtors' strategy and efforts to prosecute and ultimately confirm the plan of reorganization." *See* Email from Ken Pasquale dated Oct. 24, 2014 [D.I. 389-1]. The Committee is filing a Standing Motion (as defined in the Cash Collateral Order) on the same date as this Limited Objection. If the Court gives the Committee standing to pursue claims against the Icahn Parties, the Debtors are in no position to be seeking to compromise these claims over the objection of the Committee. Allowing the Icahn Parties to assert an Event of Default unless the Debtors are granted the right to do so would completely undermine

the whole purpose of the investigation and challenge rights granted to the Committee under the Cash Collateral Order.

28. Indeed., the Cash Collateral Order provides for an Event of Default only upon "the entry of an order or judgment" having certain adverse impacts on the interest of the Icahn Parties. Cash Collateral Order at ¶11(g). Therefore, the Court should refuse to grant the DIP Motion unless the Proposed DIP Order and the DIP Credit Agreement are modified to preserve Committee's right to challenge the liens and claims of the Icahn Parties.

(d) The DIP Liens and DIP Superpriority Claim Improperly Prime the Rights of the Estates to Avoid and Preserve Liens Under 11 U.S.C. § 551.

29. In connection with the Cash Collateral Order, the Court refused to grant the Icahn Parties adequate protection liens on Avoidance Actions. *See* Cash Collateral Order ¶ 8(a). Although the DIP Liens nominally exclude Avoidance Actions and proceeds thereof, the Proposed DIP Order provides that the DIP Liens and the DIP Superpriority Claim "shall not be subordinate to, or *pari passu* with. . . any lien that is avoided and preserve for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or otherwise." Proposed DIP Order ¶ 3(j).

30. This provision would completely undermine the Court's efforts to insulate Avoidance Actions from the liens and claims of the Icahn Parties. The ability to preserve avoided liens for the benefit of the estates may be one of the most valuable aspects of the Avoidance Actions that could be asserted for the benefit of the Debtors' unsecured creditors. Indeed, the Committee's Standing Motion will seek authority to prosecute claims to avoid and preserve liens asserted by the Icahn Parties on millions of dollars in cage cash. The Court should not permit the Icahn Parties to use the DIP Liens and DIP Superpriority Claim to nullify this key protection.

(e) Findings Regarding the Icahn Parties' Credit Bid Rights and Good Faith Protections are Premature and Unwarranted.

31. The Proposed DIP Order and the DIP Credit Agreement purport to provide the Icahn Parties with an "unqualified" right to credit bid up to the full amount of the DIP Obligations in any sale of the Debtors' assets. Proposed DIP Order ¶ 14; DIP Credit Agreement § 3.01(e). The Proposed DIP

Order further provides that the Icahn Parties automatically shall be deemed to be a "qualified bidder" and that a credit bid by the Icahn Parties shall be a "qualified bid" in any sale. *Id.*

32. These provisions would preempt the Court's discretion over credit bid rights under sections 363(k) and 1129(b)(2)(A)(ii) of the Bankruptcy Code, which expressly condition any credit bid right on the Court's authority to order otherwise "for cause." 11 U.S.C. § 363(k); 11 U.S.C. §1129(b)(2)(A)(ii). Parties in interest and the Court are not in a position to evaluate any potential cause for restricting a credit bid by the Icahn Parties at this time. The Debtors have not proposed a sale of any significant assets nor a chapter 11 plan to which a credit bid by the Icahn Parties would apply. In addition, as set forth in the Committee's Standing Motion, the Committee has not yet completed its investigation of the Icahn Parties' prepetition liens and claims, which includes an assessment of the Icahn Parties' pre and postpetition conduct. Therefore, because the circumstances surrounding any credit bid by the Icahn Parties are unknown and purely speculative, it would be improper and premature for the Court to grant such extraordinary relief under these circumstances.

33. The Proposed DIP Order also purports to confer the "good faith" protections of section 364(e) of the Bankruptcy Code not only for the benefit of borrowings under the DIP Facility, but also for the benefit of the Icahn Parties in their capacity as holders of **Prepetition Debt**. *See, e.g.*, Proposed DIP Order ¶H(iii) and 15(a). However, section 364(e) applies to protect only credit obtained, debt incurred, or liens granted "under this section." 11 U.S.C. § 364(e). The only credit to be obtained and debt to be incurred under section 364 is the DIP Facility, and the only liens to be granted under section 364 are the DIP Liens. The Prepetition Secured Parties' Adequate Protection is not being provided under section 364, and therefore is not entitled to the good faith protections of section 364(e).

(f) The Proposed DIP Order Fails to Incorporate Technical Changes Reflected in the Cash Collateral Order.

34. In response to the Committee's objection, certain technical modifications were made to the Cash Collateral Order. The Proposed DIP Order fails to reflect the following technical modifications, which should be incorporated as a condition to the Court granting the DIP Motion:

- Reasonableness of Icahn Parties' Legal Fees: Pursuant to the Cash Collateral Order, the Debtors' payment of the Icahn Parties' legal fees is subject to a reasonableness standard/review. *See* Cash Collateral Order ¶ 10. However, the Proposed DIP Order would exempt certain of the Icahn Parties' legal fees from any reasonableness standard/review. *See* Proposed DIP Order ¶3(a), (e)&(f). Consistent with the Cash Collateral Order, all of the Icahn Parties' legal fees to be paid by the Debtors' estates should be subject to a reasonableness standard/review.
- Committee Reporting Rights: The Cash Collateral Order was modified to provide for the Committee to receive financial reporting concurrently with the Icahn Parties. However, the Proposed DIP Order fails to provide for financial reporting to be delivered to the Committee. *See* Proposed DIP Order ¶¶ 3(c)&(d), 12(d), 17(a); *see also* DIP Credit Agreement § 5.03. Consistent with the Cash Collateral Order, the Committee should receive financial reporting concurrently with the Icahn Parties.
- Definition of Adequate Protection: The Cash Collateral Order clearly limits any adequate protection for the Icahn Parties' prepetition claims to the extent of "any postpetition diminution in value as of the Petition Date (as determined by the Court after notice and a hearing) of the Secured Parties' interests in the Prepetition Collateral (including the Cash Collateral)." Cash Collateral Order ¶8(a). The Proposed DIP Order fails to fully incorporate this limitation. *See* Proposed DIP Order ¶4(a), 17(f). Any adequate protection provided to the Icahn Parties (and Levine, Staller, Sklar, Chan & Brown, P.A.) should be subject to the same limitations set forth in the Cash Collateral Order.
- Waiver of Disgorgement: The Cash Collateral Order provides that the Icahn Parties "waive any right to seek disgorgement of allowed fees, expenses and disbursements paid to the Case Professionals pursuant to the Carve-Out." Cash Collateral Order ¶ 8(f). This same waiver is omitted from the Proposed DIP Order, and should be

included in paragraph 17 to ensure that the Carve-Out is honored by the Icahn Parties.

IV. RESERVATION OF RIGHTS

35. The Committee reserves all of its rights to supplement this Limited Objection with respect to any modifications, revisions, amendments, exhibits or further documentation related to the DIP Motion that are filed or otherwise submitted to the Court at or prior to the hearing.

V. CONCLUSION

WHEREFORE, the Committee respectfully requests that this Court (i) sustain the Limited Objection, (ii) condition any approval of the DIP Facility on modifications consistent with this Limited Objection, and (iii) and grant such other and further relief as the Court deems just and proper.

Dated: January 27, 2015
Wilmington, Delaware

GIBBONS P.C.

/s/ Natasha M. Songonuga

Natasha M. Songonuga, Esq. (Bar No. 5391)
1000 N. West Street, Suite 1200
Wilmington, DE 19801-1058
Telephone: (302) 295-4875
Facsimile: (302) 295-4876
E-mail: nsongonuga@gibbonslaw.com

-and-

Karen A. Giannelli, Esq. (admitted *pro hac vice*)
Mark B. Conlan, Esq.(admitted *pro hac vice*)
One Gateway Center
Newark, New Jersey 07102-5310
Telephone: (973) 596-4500
Facsimile: (973) 639-6278
E-mail kgiannelli@gibbonslaw.com
E-mail mconlan@gibbonslaw.com

-and-

LAW OFFICE OF NATHAN A. SCHULTZ, P.C.

Nathan A. Schultz, Esq. (admitted *pro hac vice*)
10621 Craig Road
Traverse City, MI 49686
Telephone: (310) 429-7128
Facsimile: (231) 421-5731
E-mail nschultzesq@gmail.com

Co-Counsel to the Official Committee of Unsecured Creditors