

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

In re:

TRUMP ENTERTAINMENT RESORTS,  
INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 14-12103 (KG)

Jointly Administered

**Ref. Docket No. 826**

**DEBTORS' OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE  
OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER GRANTING  
LEAVE, STANDING, AND AUTHORITY TO PROSECUTE CLAIMS ON  
BEHALF OF THE DEBTORS' ESTATES AND FOR RELATED RELIEF**

Trump Entertainment Resorts, Inc. (“**TER**”) and its above-captioned affiliated debtors and debtors-in-possession (each, a “**Debtor**,” and collectively, the “**Debtors**”) hereby submit this objection (the “**Objection**”) to the *Motion of the Official Committee of Unsecured Creditors for Entry of an Order Granting Leave, Standing, and Authority to Prosecute Claims on Behalf of the Debtors' Estates and for Related Relief* [Docket No. 826] (the “**Motion**”).<sup>2</sup> In support of this Objection, the Debtors respectfully represent as follows:

**PRELIMINARY STATEMENT**

1. As set forth in the Debtors' Court-approved disclosure statement, there is insufficient value to pay the Debtors' first lien debt in full. Thus, unfortunately, general unsecured creditors are “out-of-the-money” and not otherwise entitled to receive a distribution. By its Motion, however, the Committee suggests that a number of infirmities in the lenders'

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

collateral package exist such that successful prosecution of the Committee's proposed complaint (the "**Complaint**") would materially enhance recoveries to general unsecured creditors relative to the terms of the Debtors' plan of reorganization currently on file (the "**Plan**"). Yet the Committee offers no quantitative analysis or other evidence demonstrating the impact of its lien avoidance actions (if successful) upon recoveries to holders of general unsecured claims (other than the lender deficiency claims). Nor does the Committee offer any estimate of the cost associated with the prosecution of the Complaint or whether any enhanced recovery for unsecured creditors would be substantially eroded by the administrative expenses incurred in pursuit of such litigation. Accordingly, the Committee failed to meet its burden of demonstrating the benefit of proceeding with its proposed Complaint.

2. Moreover, the Committee fails to show that it would be efficient to proceed with its claims by way of a separate adversary proceeding, rather than have such claims adjudicated as part of the confirmation proceedings. Ultimately, the Committee's allegations (with the exception of Counts Six and Seven, which, as discussed below, should not be permitted to go forward at all) primarily involve confirmation-related issues, such as whether the lenders' claim should be valued on the petition date versus the confirmation date, on a going concern versus liquidation value basis, and whether the value of the lenders' secured claim should include the section 1113 savings and NOLs. Any discovery needed (which the Debtors believe would be minimal at best) to address these issues is already the subject of pending confirmation-related discovery. Other challenges raised by the Committee, such as the avoidance of liens on cage cash (the "**Cage Cash**"), largely involve questions of law and can be briefed in connection with the confirmation proceedings.

3. In addition, the Debtors respectfully submit that any order granting standing preserve the Debtors' ability to settle any claim or cause of action belonging to the estate pursuant to section 1123 of the Bankruptcy Code.

### **LEGAL STANDARD**

4. Pursuant to the seminal Third Circuit case of *Cybergenics II*, a creditors' committee may seek to bring derivative suits to recover property for the benefit of a debtor's estate under certain circumstances. *See Official Comm. Of Unsecured Creditors of Cybergenics Corp. ex. rel. Cybergenics Corp. v. Chinery (Cybergenics II)*, 330 F.3d 548, 567 (3d Cir. 2003). In order to be granted derivative standing to bring such actions, a creditors' committee must (1) establish that a colorable claim exists, (2) establish that the trustee unjustifiably refused to pursue the claim, and (3) obtain permission of the bankruptcy court. *See In re Centaur*, No. 10-10799 (KJC), 2010 WL 4624910, at \*4 (Bankr. D. Del. Nov. 5, 2010) (citing *In re Yes! Entm't Corp.*, 316 B.R. 141, 145 (D. Del. 2004)).

5. In deciding whether a colorable claim exists, courts undertake an analysis similar to the standard employed when evaluating a defendant's motion to dismiss a complaint for failure to state a claim. *See id.* (citations omitted).

6. In determining whether the debtor's refusal was justified, courts generally perform a "cost/benefit analysis" to determine whether, in light of the estimated costs of litigation, prosecution of the claims would ultimately yield net value to the estate. *See id.*, at \*5. Such a cost/benefit analysis generally includes a consideration of "the probability of success and the potential costs of the litigation, including attorneys' fees, and whether it is preferable to appoint a trustee to bring suit instead of the creditors' committee." *Official Comm. of Unsecured*

*Creditors v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 548 (W.D. Pa. 2005) (citing *In re America's Hobby Center, Inc.*, 223 B.R. 275, 282 (Bankr. S.D.N.Y. 1998)).

7. Courts require evidence to determine whether a creditors' committee can meet its burden of demonstrating any net benefit to the estate in pursuing derivative claims. *Centaur*, 2010 WL 4624910, at \*5-6; *In re MIG, Inc.*, No. 09-12118 (KG), 2009 WL 8662897 at \*2 (Bankr. D. Del. Dec. 18, 2009) (citing *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters., Inc.)*, 779 F.2d 901, 905 (2d Cir. 1985)). When disparate testimonies are inconclusive, at least one court has limited the committee's professional fees to "cash proceeds or other quantifiable value received by the estate" as a result of the committee's derivative actions. *Centaur*, 2010 WL 4624910, at \*7.

**A. The Committee has Failed to Demonstrate that the Costs Associated with Pursuing the Claims Substantially Outweigh the Benefits, If Any, That Would Accrete to General Unsecured Creditors**

8. As a threshold matter, no demand was ever made by the Committee upon the Debtors. Relying upon the stipulations set forth in the Final Cash Collateral Order, its characterization of the Plan and the assertion of the Debtors and the prepetition secured lenders (the "**First Lien Lenders**") of a common interest protection, the Committee suggests that such a demand would have been futile. *See* Motion at ¶¶ 44-45. However, and leaving the merits of the challenges aside, the Committee seems to have disregarded the threshold question of whether the commencement of such actions would yield a net benefit to general unsecured creditors. Indeed, the Committee has not offered any evidence at all, let alone a quantitative cost/benefit analysis, to justify the prosecution of the proposed Complaint.

9. All the Committee proffers in support of its motion is the assertion – unsupported without any evidence or analysis – that "[g]iven the large amounts at stake, even a relatively small chance of success weighs strongly in favor of the Committee's pursuit of these causes of

action” and that the Committee “does not anticipate that the additional costs and expenses to be incurred in connection with prosecuting the Claims will outweigh the potential recovery for the estates.” *See* Motion at ¶¶ 63, 65. Such statements are insufficient to carry the Committee’s burden.<sup>3</sup>

10. Specifically, with regards to Counts One, Two and Three (which seek a determination with respect to, or the avoidance of, the lenders’ liens on Cage Cash ), the Committee unartfully suggests that if successful in avoiding the First Lien Lenders’ lien on Cage Cash, general unsecured creditors would receive a recovery “12 times greater than proposed under the Plan.” Motion at ¶ 63. But this simply is not the case. By the Committee’s own admission, casino licensees in the State of New Jersey are required under N.J.A.C. § 13:69C-4.2 and N.J. Stat. § 5:12-84a(1) to “maintain adequate cash on hand to ‘assure the financial integrity of casino operations’ and to pay winning bets to casino patrons when due.” *See* Motion at ¶ 48. Thus, under applicable New Jersey law, the Debtors are required to keep the Cage Cash on the casino floor while the Debtors continue to operate. As such, the Cage Cash does not represent distributable value that could be made available to any creditors of the Debtors’ estates so long as the Debtors continue to operate. In any event, determining the extent of the lenders’ liens, if any, on Cage Cash is unlikely to involve disputed issues of fact, and would be ripe for adjudication as part of confirmation.

11. Count Four of the Complaint asserts that the First Lien Lenders’ secured claim is limited to the value of their collateral *on the Petition Date*, and thus should exclude any increase in value achieved in connection with the Debtors’ rejection of the collective bargaining agreement with UNITE HERE Local 54 under section 1113 of the Bankruptcy Code as well as

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<sup>3</sup> To the extent that the Committee attempts, at this late date, to submit any evidence or offer testimony in connection with a response to this Objection, the Debtors reserve the right to seek discovery from the Committee and to depose any witness proffered by the Committee in advance of the hearing on Motion.

net operating losses that the Plan seeks to preserve. *See* Motion at ¶ 55. Count Five similarly raises a legal determination as to the value of the First Lien Lenders' secured claim, which the Committee believes should be the liquidation value as of the Petition Date. Here too, the Committee fails to quantify the deductions to the First Lien Lenders' secured claim as of the Committee's reference date, what the value of the lenders' secured claim would be under the Committee's view, or the impact of the reduction in the value of the First Lien Lenders' secured claim upon recoveries to general unsecured creditors (other than the lender deficiency claims) relative to the current Plan. And like other challenges raised in the Complaint, these counts raise legal and factual issues that are already the subject of pending confirmation-related discovery and briefing. It would be highly inefficient to allow these challenges to proceed by way of separate adversary proceeding, separate and apart from the confirmation hearing.

12. Counts Six and Seven of the Complaint seek the avoidance of (as a fraudulent or preferential transfer) of the Fourth Amendment to the First Lien Credit Agreement pursuant to which Debtor-TER was changed from a joint and several guarantor of payment to an obligor under the First Lien Credit Agreement. The Committee fails to establish the net effect upon the estate of the amendment, or any tangible economic benefit (let alone net benefit after taking into account litigation costs and delay attendant with such proceedings) to the estate were the Fourth Amendment to be avoided. Indeed, the Debtors believe that even if successful, any litigation to avoid the Fourth Amendment would not create additional net value for the benefit of the Debtors' estates or general unsecured creditors. As a result, permitting the Committee to prosecute a fraudulent transfer and/or preference action with respect to the Fourth Amendment,

under any circumstances, would benefit no one and would, in all likelihood, impose additional and unnecessary legal costs on the Debtors' estates.<sup>4</sup>

**B. The Court Should Not Award the Committee the Exclusive Right to Resolve the Estates' Claims**

13. The Committee requests "sole authority to propose one or more settlements with respect to all or a portion of the Claims..." See Motion ¶ 36. The abdication of the Debtors' right to settle claims or causes of action would contravene section 1123(b)(3)(A) of the Bankruptcy Code and would thus be inappropriate. That section enables a debtor the opportunity, subject to bankruptcy court approval, to settle claims or causes of action on behalf of the Debtors' estates. See 11 U.S.C. § 1123(b)(3)(A); see also *In re Centaur, LLC*, Case No. 10-10799 (KJC) (Bankr. D. Del. Nov. 5, 2010) [Docket No. 914] ("A grant of derivative standing does not strip a debtor of ownership of the Claims and, accordingly, the Debtors continue to have the right, subject to Court approval, to settle the Claims."); *In re Exide Tech.*, 303 B.R. 48, 67 (Bankr. D. Del. 2003) (holding that a debtor may settle a cause of action against its prepetition lenders even if the causes of action were waived by the debtors in connection with a final debtor in possession financing order and are being prosecuted by the creditors' committee); *Official Comm. of Equity Sec. Holders v. Adelpia Commc'ns Corp. (In re Adelpia Commc'ns Corp.)*, 371 B.R. 660, 670 (S.D.N.Y. 2007) ("[The Bankruptcy Code] cannot be 'construed as giving creditors the unilateral right to take control of the estate's legal causes' . . . because such a construction runs contrary to 'numerous provisions of the Bankruptcy Code establishing the debtor's authority to manage the estate and its legal claims.'" (quoting *Smart*

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<sup>4</sup> The Debtors dispute the claims alleged by the Committee, and reserve any and all rights to address the merits of the claims alleged by the Committee in its Complaint. Additionally, to the extent the Committee seeks to add any additional claims or challenges to its Complaint, the Committee should be required to seek separate Court approval of the Committee's right to seek to bring any such additional claims or challenges. Nothing contained herein shall constitute a waiver of any of the rights or defenses available to the Debtors in connection with the foregoing.

*World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 174 (2d Cir. 2005)).

14. Simply put, the claims that are the subject of the proposed Complaint still belong to the Debtors' estates and it would be inappropriate to provide the Committee with unfettered discretion to settle or otherwise pursue all or a portion of such Claims. The Debtors have a fiduciary duty to maximize the value of their estates for the benefit of all of their stakeholders. Granting the Committee the exclusive right to settle all or a portion of the Claims would unjustifiably strip the Debtors of their ability to exercise their rights as debtors in possession and preclude the Debtors from meeting their obligations under the Bankruptcy Code. Indeed, the claims alleged in the Complaint are proposed to be resolved and released under the Plan (subject to approval of the Court); providing the Committee with unfettered discretion to settle those claims would, in essence, provide the Committee with a veto of the Plan, without the need to prosecute any objections to the substantive terms of the Plan.

15. Moreover, granting the Committee the exclusive right to settle the Claims would constitute an event of default under the Debtors' postpetition financing facility. *See* Final DIP Order, Exhibit A, at § 6.01.<sup>5</sup> Therefore, to the extent the Court determines that the Committee has derivative standing to prosecute the Claims, the Court should deny the Committee's request for sole authority to settle all or a portion of the Claims.

16. Furthermore, to the extent the Committee is conferred derivative standing to pursue claims belonging to the Debtors' estates, the Court should retain the right to withdraw that standing in the event the Court later determines that continuing to pursue such litigation

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<sup>5</sup> On January 30, 2015, the Court entered the *Final 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* [Docket No. 846] (the "**Final DIP Order**"). The form of the DIP Credit Agreement (as defined in the Final DIP Order) is attached as Exhibit A thereto.



would not be in the best interests of the Debtors' estate. *See e.g., Official Comm. of Equity Security Holders of Adelpia Commc'ns Corp. v. Official Comm. of Unsecured Creditors of Adelpia Commc'ns Corp. (In re Adelpia Commc'ns Corp.)*, 544 F.3d 420, 423 (2d Cir. 2008) (“[A] court may withdraw a committee’s derivative standing and transfer the management of its claims, even in the absence of the committee’s consent, if the court concludes that such a transfer is in the best interests of the bankruptcy estate.”); *see also Cybergenics II*, 330 F.3d at 567-68 (noting that courts grant derivative standing using their equitable powers and therefore retain the power to oversee a derivative suit).

17. Additionally, to the extent the Court is inclined to grant the Committee standing to prosecute one or more of the claims raised in the Complaint on behalf of the estates, the Debtors respectfully request that the Court direct the parties to enter into a mutually agreeable scheduling order that is reasonably designed to manage any litigation efficiently and prevent the litigation from imperiling the Debtors’ efforts to emerge from bankruptcy.

### **CONCLUSION**

18. Based on the foregoing, the Committee’s Motion should be denied. The allegations raised in the Complaint should more properly be addressed as part of the confirmation proceedings, subject to the Committee’s demonstration that these allegations, if successful, would in fact yield a net material benefit to holders of general unsecured claims (other than the deficiency claims held by the First Lien Lenders) relative to the terms of the Debtors’ proposed Plan. In addition, the Debtors respectfully submit that, should this Court grant the Motion in whole or in part, any order granting standing preserve the Debtors’ ability to settle any claim or cause of action belonging to the estate pursuant to section 1123 of the Bankruptcy Code.

WHEREFORE, the Debtors respectfully request that the Court enter an order denying the Motion and granting such other and further relief as the Court deems proper.

Dated: February 6, 2015  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.  
Matthew B. Lunn (No. 4119)  
Robert F. Poppiti, Jr. (No. 5052)  
Ian J. Bambrick (No. 5455)  
Ashley E. Markow (No. 5635)  
Rodney Square  
1000 N. King Street  
Wilmington, Delaware 19801  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

-and-

STROOCK & STROOCK & LAVAN LLP  
Kristopher M. Hansen  
Kenneth Pasquale  
Erez E. Gilad  
Gabriel E. Sasson  
180 Maiden Lane  
New York, New York 10038-4982  
Telephone: (212) 806-5400  
Facsimile: (212) 806-6006

*Counsel to the Debtors and Debtors-in-Possession*