

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re :  
: Chapter 11  
TRUMP ENTERTAINMENT :  
RESORTS, INC., *et al.*, : Case No. 14-12103(KG)  
: (Jointly Administered)  
Debtors. :  
: **Re: Dkt No. 826**

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**MEMORANDUM ORDER RE 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<sup>1</sup>**

The Official Committee of Unsecured Creditors (the "Committee") has moved the Court to grant it standing and authority to prosecute claims on behalf of Debtors' estates (the "Motion") (D.I. 826). The Debtors and the Secured Parties<sup>2</sup> oppose the Motion. The Committee has filed a proposed seven count Complaint, containing the following claims (the "Claims"):

- Count One: The Secured Parties do not have a lien on cage cash.
- Count Two: The alleged lien on cage cash is unperfected and avoidable pursuant to 11 U.S.C. §§ 544(a) and 551.
- Count Three: The alleged lien on cage cash received within 90 days before the Petition Date is avoidable pursuant to 11 U.S.C. §§ 547 and 551.

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<sup>1</sup> This Memorandum Order is for the benefit of the parties, and, therefore, the Court is not including a discussion of the background or the facts.

<sup>2</sup> The "Secured Parties" are Icahn Agency Services, LLC, as Agent; and Icahn Partners LP, Icahn Partners Master Fund LP, and IEH Investments I LLC, as Lenders.

- Count Four: The Secured Parties' liens do not extend to property acquired, or an increase in value of the collateral, after the Petition Date pursuant to 11 U.S.C. § 552(a).
- Count Five: The value of the Secured Parties' collateral is limited to the value as of the Petition Date pursuant to 11 U.S.C. §§ 502 and 506(a).
- Count Six: The Fourth Amendment to the First Lien Credit Agreement is an avoidable preference.
- Count Seven: The Fourth Amendment to the First Lien Credit Agreement constitutes a constructive fraudulent transfer pursuant to 11 U.S.C. §§ 548(a)(1)(B) and 550.

The rights of and limitations on a creditors committee to obtain derivative standing is now settled law in this Circuit. *Official Comm. of Unsecured Creditors of Cybergenics Corp., ex rel. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (*en banc*). A creditors committee can obtain standing to bring an action belonging to a debtors' estate but must first meet its burden and prove by a preponderance of the evidence that: (1) the claims it seeks to bring are colorable, (2) the benefit of bringing the claim will outweigh the costs and (3) the Debtors have unjustifiably refused to pursue the claims. *Id.*; *In re Yes! Entertainment Corp.*, 316 B.R. 141, 145 (D. Del. 2004).

The hearing on the Motion revealed the complexity of the Committee's claims and the reasons Debtors and the Secured Parties oppose the Motion. The Debtors and the Secured Parties also contend that even if the claims are colorable, there would be little if any benefit to the estate and the cost would exceed the gain.

These cases have been difficult and contentious. Debtors' casino businesses have suffered greatly from a multitude of contributing factors. Although one casino has closed (Trump Plaza), Debtors have managed, through the use of cash collateral, to continue to operate the Trump Taj Mahal Hotel and Casino and, more recently, by obtaining financing from the Secured Parties.

The requirement of a "colorable claim" is a low hurdle to satisfy. A claim is "colorable" if it is "not wholly insubstantial or frivolous," and if it is not "mere bald-faced allegations." *Pasha v Attorney General of the United States*, 425 Fed. Appx. 139, 142 (3d. Cir. 2011), quoting *United States v. Voight*, 89 F.3d 1050, 1067 (3d. Cir. 1996); and *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992). "Colorable" does not mean "meritorious". *United States v. Voight*, 89 F.3d at 1067.

Applying the minimal threshold for establishing a "colorable" claim or claims, the Court is satisfied that the Complaint states colorable claims. The Court's finding does not mean that the claims have merit or would necessarily survive a motion to dismiss. Indeed, Debtors and the Secured Parties have raised weighty defenses to the Claims but the merits of the Claims are not before the Court. The Claims are not frivolous or wholly insubstantial. Thus, the Claims are colorable.

The Court's inquiry continues with the second prong of the standing analysis. The second prong is whether the benefit of bringing the claim (here the Claims) will outweigh the costs. The Committee did not provide any evidence on the cost-benefit test and, therefore, any finding on this issue would require the Court's impermissible speculation.

The cost-benefit analysis which the Court is required to make is of obvious significance. Were the Court to grant standing to the Committee to prosecute the Claims, there would be substantial delay and cost. Would there be substantial benefit? The Court will have to measure any benefit arising from a successful prosecution of the Claims against the results if the Court confirms the proposed plan of reorganization (the "Plan") (D.I. 840-1) and the Secured Parties' investment in these cases. The Secured Parties have provided \$20 million in debtor-in-possession financing, have committed \$13.5 million in exit financing, are permitting their collateral to be used to pay administrative expenses and cure claims and are making funds available for a distribution of \$1 million to unsecured creditors. The Secured Parties are also waiving their deficiency claim in excess of \$100 million and are waiving their super priority administrative expense claims for diminution in the value of their collateral. A confirmed Plan will also allow the operations of the Trump Taj Mahal Hotel and Casino to continue and protect the jobs of 3,000 employees.<sup>3</sup> At the same time, the Court remains mindful that unsecured creditors are receiving a mere \$1 million through the Plan which amounts to approximately \$.005/\$1.00, and that the Secured

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<sup>3</sup> Thus far, the attorneys for the Debtors and the Secured Parties have represented to the Court that the Trump Taj Mahal Hotel and Casino will not close after their hoped-for confirmation of the Plan. The Court expects to hear testimony at the upcoming confirmation hearing from the Secured Parties that the hotel and casino will in fact remain open and how it will financially manage to do so. Also, earlier in the case Debtors' investment banker, William "Tuck" Hardie, testified that, *inter alia*, the hotel and casino would remain open only if Debtors received substantial tax concessions from Atlantic City and New Jersey, and \$100 million in exit financing. The Court expects Mr. Hardie to testify why these two conditions are no longer critical to the operational success of the hotel and casino.

Parties will attempt to benefit from very substantial net operating losses. In addition, the apparent, “generosity” of the Secured Parties will largely inure to the benefit of the Secured Parties who are swapping debt for equity, and are also seeking releases. It is no wonder that the Committee, acting on behalf of unsecured creditors, argues that the benefits from prosecuting the Claims outweigh the costs. Unsecured Creditors are at little risk in prosecuting the Claims, and the Secured Parties have shown no willingness to negotiate with the Committee to date.

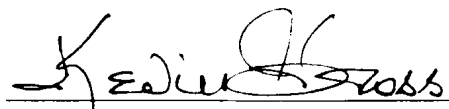
The Court is deferring rather than deciding the Motion, since it will be in a far better position to evaluate the Motion when it considers whether to confirm the Plan. The Plan incorporates a settlement of any and all claims which Debtors’ estate may have against the Secured Parties. In considering the settlement, the Court will have the evidence it needs to evaluate both the costs and the benefits of bringing the Claims, especially in the light of the negligible recovery to unsecured creditors weighed against the benefits to the Secured Parties. The Committee will also have had the benefit of discovery by the time the Court conducts the confirmation hearing.<sup>4</sup>

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<sup>4</sup> The Court is concerned over the Committee’s statements that the Secured Parties have not been forthcoming with discovery the Committee has requested. The Court is likewise concerned that delay and parsimony in meeting discovery demands could result in an adjournment of the confirmation hearing.

Accordingly, the Court is deferring a decision on the Motion pending the hearing on the confirmation of the Plan.

Dated: February 18, 2015

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

Kevin Gross, U.S.B.J.