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)
	:	
	:	**Obj. Deadline: March 9, 2015 at noon**[1]
Debtors	:	**Hearing Date: March 12, 2015 at 9:00 a.m.**

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF DEBTORS' THIRD AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, AS MODIFIED

In support of his Objection to Confirmation of the Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified (the "Objection"), Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to this Objection.

[1] The objection deadline was extended by agreement of the parties.

BACKGROUND

4. On September 9, 2014, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

5. On September 23, 2014, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee").

6. On February 25, 2015, the Debtors filed the Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified (the "Plan").

PRELIMINARY STATEMENT

7. A chapter 11 plan may not be confirmed unless the Court can find that the plan complies with the provisions of 11 U.S.C. § 1129 (a). A plan proponent bears the burden of proof with respect to each and every element of 11 U.S.C. § 1129 (a). *See In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001). As discussed below, the Plan is not confirmable because it contains third party release and exculpation provisions that are contrary to applicable law in this District.[2]

GROUNDS/BASIS FOR RELIEF

Release Provision

8. Section 12.7(b) of the Plan, Releases by Certain Holders of Claims, states in pertinent part that:

[2] The U.S. Trustee notes that Section 10.4(b) of the Plan provides for the assumption of the pre-petition Executive Severance Plan on the Effective Date. Depending on the circumstances, the assumption of a severance plan could implicate 11 U.S.C. § 503(c)(2), which prohibits severance from being allowed or paid to an "insider" of the Debtors unless certain criteria are met. If the Debtors contemplate that one or more of the covered executives will be terminated shortly after the Effective Date, then the Debtors must comply with 11 U.S.C. § 503(c)(2). *See e.g., In re AMR Corp.*, 497 B.R. 690, 697-698 (Bankr. S.D.N.Y. 2013)(in denying approval of executive severance payment that did not comply with section 503(c)(2), the payment of which was a condition precedent to the plan going effective, the Court noted that "attempts to bypass the requirements of section 503(c) given the history and intent of the section" are disfavored). On the other hand, if it is not contemplated that any of the executives will be terminated shortly after the Effective Date, then the assumption of the Executive Severance Plan appears to act simply as an agreement as to how the executives will be treated if they are terminated at some unknown point post-Effective Date, which may not require compliance with section 503(c)(2).

(b) Releases by Certain Holders of Claims. Except as otherwise provided in this Plan or the Confirmation Order, as of and subject to the occurrence of the Effective Date: (i) each of the Released Parties; (ii) **each holder of an Allowed General Unsecured Claim entitled to vote on this Plan that did not validly exercise the Opt-Out Election in a timely submitted Ballot;** and (iii) each holder of a Claim deemed hereunder to have accepted this Plan, in consideration for the obligations of the Debtors, the Reorganized Debtors and the Distribution Trust under this Plan, the New Common Stock, and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to conclusively, absolutely, unconditionally, irrevocably and forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities against the Released Parties[3] (and each such Released Party shall be deemed forever released, waived and discharged by such holder), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing as of the Effective Date or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, their affiliates and former affiliates, the Reorganized Debtors, the Chapter 11 Cases, the subject matter of, or the transactions or events giving rise to, any claim or equity interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of

[3/] Released Parties is defined in Article I. A. of the Plan as "collectively, (a) each of the following: (i) the DIP Agent, (ii) the DIP Lenders, (iii) the New Term Loan Agent, (iv) the New Term Loan Lenders, (v) the First Lien Agent, (vi) the First Lien Lenders, and (vii) with respect to each of the foregoing entities in clauses (a)(i), (a)(ii), (a)(iii), (a)(iv), (a)(v), and (a)(vi), such entity's current and former shareholders, affiliates, partners, subsidiaries, members, officers, directors, principals, employees, agents, managed funds, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, together with their respective predecessors, successors, and assigns; and (b) each of the following solely in their capacity as such: (i) the Creditors' Committee, (ii) the Debtors and the Reorganized Debtors, and (iii) with respect to each of the foregoing entities in clauses (b)(i) and (b)(ii), such entity's current and former shareholders, affiliates, partners, subsidiaries, members, officers, directors, principals, employees, agents, managed funds, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, solely in their respective capacities as such, together with their respective predecessors, successors, and assigns; provided, however, that the following persons and/or entities are not Released Parties: (i) Donald J. Trump; (ii) Ivanka Trump; (iii) Trump AC Casino Marks LLC; and (iv) any employee of the Debtors' found by the Debtors to have engaged in the conduct described in the *Debtors' Motion, Pursuant to Sections 105 and 362 of the Bankruptcy Code, For Entry of an Order (I) Enforcing the Automatic Stay Against UNITE HERE Local 54, (II) Requiring UNITE HERE Local 54 to Issue a Letter Informing All Parties that Received Union Communications Regarding the Chapter 11 Cases that Such Communications were Misleading and in Violation of the Automatic Stay, (III) Requiring UNITE HERE Local 54 to Provide the Debtors with a List of All Parties it Previously Distributed the Misleading Communications to, and (IV) Awarding the Debtors Attorneys' Fees and Expenses for UNITE HERE Local 54's Willful Violation of the Automatic Stay* [Docket No. 251]."

> claims and equity interests prior to or in the Chapter 11 Cases, the negotiation, formulation, or preparation of this Plan, the Disclosure Statement, the Plan Documents, the DIP Credit Agreement, the DIP Commitment Letter or related agreements, instruments, or other documents;

(emphasis added)

9. The language at issue in section 12.7(b) of the Plan contemplates release by all holders of Allowed General Unsecured Claims entitled to vote on the Plan, unless such parties opt out of the release. As currently drafted, the release does not appear to be voluntary. To the extent such parties do not return a ballot, they have not consented to a release, and cannot be compelled to involuntarily grant a release. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011)(where Bankruptcy Court stated that "failing to return a ballot is not a sufficient manifestation of consent to a third party release," even in the presence of an opt out provision).

10. In *In re Zenith Electronics Corp.*, 241 B.R. 92 (Bankr. D. Del. 1999), this Court considered the permissibility of non-consensual non-debtor releases in a plan. This Court considered the proposed release of the creditors' claims against the plan funder where a creditor voted to accept the plan, or was in a class that voted to accept the plan, or where the creditor was to receive a distribution under the plan. With respect to the latter two instances, this Court concluded that the release was inappropriate. This Court held that such release may only be obtained consensually with the affirmative agreement of the affected creditor. *Id.* *See also In re Washington Mutual, Inc.*, 442 B.R. 314 at 355.

11. In *In re Continental Airlines*, 203 F.3d 203 (2d Cir. 2000), the Third Circuit noted that a permanent injunction in favor of non-debtors is a "rare thing" that should not be considered

absent a showing of exceptional circumstances in which certain key factors are present. The Third Circuit determined that fairness requires a showing that sufficient consideration was given to creditors whose claims were to be released and that such consideration renders the plan feasible. *Id*. at 213-214. The Third Circuit noted that the success of the plan must be based on the releases, and that there be an identity of interest between the debtor and the non-debtor so that the debtor would likely bear the cost of the litigation against the non-debtor. *Id* at 216.

12. In *In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001), this Court examined the release of a secured creditor by the unsecured creditors of the estate. To establish the necessity of such releases, the court declared that the debtors were required to demonstrate that the success of its reorganization was related to such non-consensual releases and the releases provided a "critical financial contribution" that was necessary to render the plan feasible. *Id.* at 607.

13. The court noted that unlike the approval of releases in cases such as *A.H. Robins*, in which the 'the entire reorganization' of a massive and complex chapter 11 case 'hinged,' the 'necessity' of the release of the lenders in *Genesis* was more marginal. *Id*. at 607-608.

14. Absent a proper and appropriate factual scenario or basis sustained by credible evidence, the involuntary release provision may not be implemented or applied as to certain parties, under the circumstances of this case.

15. There is an insufficient showing that the releases sought to be conferred upon several of the Released Parties complies with applicable law, and as such the requisite relief appears to run afoul of the ruling set forth in *In re Washington Mutual, Inc.*, 442 B.R. 314, 349-350 (Bankr. D. Del. 2011) (where the Bankruptcy Court held, *inter alia*, that under applicable law,

there was no basis for the debtors to grant releases to the debtors' directors and officers or any professionals, current or former, because no evidence was presented with respect to, among other things, a "substantial contribution" having been made to the case by the parties seeking such releases).

16. In the instant case, the non-debtor release provision is overbroad and is impermissible under *Washington Mutual, Zenith, Continental* and *Genesis*. The vast majority of parties sought to be released have not provided a 'critical financial contribution' necessary to render the plan feasible. To the extent holders of General Unsecured Claims do not affirmatively indicate their consent to the non-debtor releases, they should not be approved.

Exculpation Provision

17. The exculpation provision contained in section 12.8 of the Plan is overbroad and thus impermissible. It provides exculpation to the Released Parties. The list of parties receiving exculpation should be limited to those parties who served in the capacity of estate fiduciaries, *i.e.*, the creditors' committee, its members, estate professionals and the Debtors' directors and officers. *See In re Indianapolis Downs, LLC,* 486 B.R. 286 (Bankr. D. Del. 2013); *In re Tribune Co.,* 464 B.R. 126, 189 (Bankr. D. Del. 2011)*; In re PTL Holdings, LLC,* 2011 WL 5509031 *12 (Bankr. D. Del. Nov. 10, 2011); *In re Washington Mutual Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011). The exculpation provision also provides that, "each Released Party will be entitled to rely upon the advice of counsel concerning its duties pursuant to, or in connection with, the above referenced documents, actions or inactions." This provision should be removed as it appears to be an attempt to give each Released Party a complete defense to any claim or cause of action merely by invoking reliance on counsel.

18. In *PWS Holding Corp*, 228 F.3d 224 (3d Cir. 2000), the United States Court of Appeals for the Third Circuit examined the question of whether limited exculpation for official committee members and professionals retained by the debtors was appropriate. The Third Circuit ruled that the exculpation was appropriate because the provision at issue correctly stated the standard of liability for fiduciaries including official committee members and debtor professionals. *See also In re Coram Healthcare Corp*., 315 B.R. 321, 337 (Bankr. D. Del. 2004) (stating that "[third party release provisions against Trustee, Equity Committee and their respective agents and professionals] are not permissible except to the extent they are limited to post-petition activity which does not constitute gross negligence or willful misconduct."

19. In *PWS*, the United States Court of Appeals for the Third Circuit examined the question of whether limited exculpation for official committee members and professionals retained by the debtors was appropriate. The Third Circuit ruled that the exculpation was appropriate because the provision at issue correctly stated the standard of liability for fiduciaries including official committee members and debtor professionals. *See also In re Coram Healthcare Corp*., 315 B.R. 321, 337 (Bankr. D. Del. 2004) (stating that "[third party release provisions against Trustee, Equity Committee and their respective agents and professionals] are not permissible except to the extent they are limited to post-petition activity which does not constitute gross negligence or willful misconduct.")

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying confirmation of the Plan as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

By: */s/ Jane M. Leamy*

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Dated: March 9, 2015

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Debtors.	:	

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on March 9, 2015, the United States Trustee's Objection to Confirmation of the Debtors' Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified was caused to be served via electronic mail to the following persons:

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/s/ Jane Leamy
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Trial Attorney