UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Chapter 11
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,[1]	Case No. 15-01145 (ABG)
Debtors.	(Jointly Administered)
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al., Movants, -against- STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE, Respondent.	

OBJECTION OF STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE OF CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *ET AL.* TO DEBTORS' MOTION FOR FINAL ORDER AUTHORIZING USE OF CASH COLLATERAL

To the Honorable A. Benjamin Goldgar, United States Bankruptcy Judge:

The statutory unsecured claimholders' committee (the "UCC") of Caesars Entertainment Operating Company, Inc., *et al.* (the "Debtors") respectfully submits this objection (the "Objection") to the *Debtors' Motion for Entry of Interim and Final Orders (i) Authorizing Use of Cash Collateral, (ii) Granting Adequate Protection, (iii) Modifying the Automatic Stay to Permit Implementation, (iv) Scheduling a Final Hearing, and (v) Granting Related Relief*, dated January 15, 2015 [ECF No. 22] (the "Cash Collateral Motion"), as follows:

[1] Due to the large number of Debtors in these jointly-administered chapter 11 cases, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained at https://cases.primeclerk.com/CEOC.

Procedural History

1. On January 12, 2015, certain second lien noteholders filed an involuntary chapter 11 petition against Caesars Entertainment Operating Company, Inc. ("CEOC") with the United States Bankruptcy Court for the District of Delaware. The Debtors commenced these chapter 11 cases on January 15, 2015. The involuntary petition is now pending in this Court.

2. The United States Trustee appointed the UCC and the statutory second priority noteholders' committee (the "Second Priority Committee") on February 5, 2015.

3. On January 15, 2015 the Debtors filed their Cash Collateral Motion, and on the same day, the Court issued the interim cash collateral order (the "Interim Order"), all conditioned on the Court's ultimate determinations in respect of a final cash collateral order.

Objection[2]

I. The Cash Collateral Only Exists Because the Debtors Refuse to Consent to the Involuntary Filing

4. The cash should not be collateral in the first place. There would be no cash collateral entitled to adequate protection if the Debtors carry out their statutory duties to their estates to consent to the involuntary chapter 11 petition and to avoid the lien they granted against cash less than 90 days before the involuntary petition. CEOC granted a lien to the First Lien Credit Parties on assets previously available to unsecured claimholders when the secured parties signed an agreement providing for the releases of the shareholders and their officers and directors under the plan embedded in the RSA.[3] In furtherance of this deal, CEOC expressly agreed not to commence a voluntary case until after the expiration of the preference period—which runs afoul of the fiduciary duties it owes to its estate. CEOC's failure to consent, and

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[2] Capitalized terms used but not otherwise defined in the Objection are defined below or have the same meanings ascribed to them in the Cash Collateral Motion.

[3] *See* Restructuring Term Sheet at 12 ("Releases" section).

thereby forfeit approximately $468[4] million of unencumbered cash, may well constitute gross mismanagement of its estate after the commencement of its voluntary chapter 11 case, within the meaning of Bankruptcy Code section 1104(a)(1). CEOC's power to consent to the involuntary petition is property of its estate, and cannot be released without Court approval.[5] CEOC's refusal, without court approval, to avoid the lien is also tantamount to its abandonment of non-burdensome estate property—its avoidance action—in violation of Bankruptcy Code section 554(a).[6]

II. The Prepetition Secured Claimholders Are Already Adequately Protected and Are Not Entitled to Additional Adequate Protection

5. Secured claimholders are not entitled to additional adequate protection when foreclosure would provide a lower recovery than a chapter 11 plan and they do not request leave to foreclose. By its plain terms, Bankruptcy Code section 361 provides adequate protection to compensate holders of secured claims against any diminution in value of their collateral arising from the stay of foreclosure and the debtor's use, sale, or lease of property.[7]

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[4] The amounts used herein are based on the statements made by the Debtors and may not be accurate.

[5] In *In re Commercial Mortgage and Finance Co*., 414 B.R. 389 (Bankr. N.D. Ill. 2009) (citing *In re Garofalo's Finer Foods, Inc*., 186 B.R, 414 (N.D. Ill. 1995)), the court acknowledged that "ordinary course" is largely a function of creditors' reasonable expectations based on similar prepetition activity, but limited and restricted the debtor and its subsidiaries in making loans which was their business in an effort to protect unsecured claimholders. *Commercial Mortgage* is consistent with other courts looking to whether creditors would expect the debtor to use its property as the debtor proposes to do. *Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384-85 (2d Cir. 1997); *Alfs v. Wirum (In re Straightline Investments, Inc.)*, 525 F.3d 870, 881 (9th Cir. 2008); *Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 704 (9th Cir. 1988). Here, there is no question that unsecured claimholders would not expect CEOC to forfeit its ability to avoid a lien against approximately $500 million.

[6] The UCC understands the Debtors now claim the lenders may be able to show some of the cash was their collateral without the lien granted within 90 days of the involuntary petition. Suffice it to say, the granting of the lien and the Debtors' strident opposition to consenting to the involuntary petition only make sense if a material amount of the cash was not already encumbered.

[7] *See* 11 U.S.C. §§ 361, 363; *see also In re Batista-Sanechez*, 493 B.R. 521, 528 (Bankr. N.D. Ill. 2013) ("A creditor is entitled to adequate protection in the chapter 11 only if the creditor's interest in the debtor's property is declining in value." (*citing United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 370 (1988))); *In re Olde Prairie Block Owner, LLC*, 2010 Bankr. LEXIS 3929, at *7 (Bankr. N.D. Ill. Oct. 29, 2010) ("A creditor is entitled to adequate protection in Chapter 11 only if the creditor's interest in the debtor's property is declining in value." (*citing Timbers*, 484 U.S. at 371)).

Here, the Prepetition Secured Creditors (i) have not requested stay relief, (ii) have contracted with CEOC to procure confirmation of a chapter 11 plan, (iii) require the debtors to operate, and (iv) do not want to foreclose.[8]

6. The Prepetition Secured Creditors are adequately protected by the Debtors' profits and expenses incurred to preserve and maintain the collateral. The necessity for adequate protection must be based on facts or projections "grounded on a firm evidentiary basis."[9] But neither the Debtors nor the Prepetition Secured Creditors have alleged that the collateral will decline in value during the pendency of these cases. In fact, the Declaration of Samuel E. Star, attached hereto as Exhibit A, shows the Prepetition Secured Creditors' collateral position will not be diminished because, among other things, the Debtors are building higher profits and cash[10] after the continued payment of maintenance, insurance, taxes, and capital investment. Put differently, if the Debtors request the Court to approve their use of cash collateral at a contested hearing, there is an overwhelming case to demonstrate the Court should not require the extra liens, waivers, drastic remedies, and payments the Debtors propose to give the Prepetition Secured Creditors. And, in the Debtors' own words, "[c]ourts have held that a secured party's interest in collateral may be adequately protected when a debtor's continued use of such collateral in its operations generates a net positive return."[11]

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8 RSA § 5(a)(i)(E).

9 *In re Windsor Hotel, L.L.C.*, 295 B.R. 307, 314 (Bankr. C.D. Ill. 2003) (internal citations omitted).

10 The Debtors' Chief Restructuring Officer admits the Debtors have sufficient cash on hand to operate their businesses throughout these chapter 11 cases. *Declaration of Randall S. Eisenberg in Support of Cash Collateral Motion* ¶ 4, ECF No. 22-2 ("The Debtors have sufficient cash on hand to operate their business throughout the course of these chapter 11 cases."); *see also* Debtors' *Memorandum in Support of Chapter 11 Petitions*, ECF No. 4 ("Memorandum in Support") at 4 ("The Debtors have positive cash flow before debt service . . . .").

11 Cash Collateral Motion ¶ 39. *See Nat'l Mortg. Ass'n v. Dacon Bolingbrook Assocs. LP*, 153 B.R. 204, 214 (N.D. Ill. 1993); *In re Las Vegas Monorail Co*., 429 B.R. 317, 341 (Bankr. D. Nev. 2010).

7. The carveout does not entitle the Prepetition Secured Creditors to adequate protection payments. Pursuant to Bankruptcy Code section 1129(a)(9), all administrative claims must be paid in full to confirm a chapter 11 plan, regardless of whether there is a carveout. So there is no basis to reward the Prepetition Secured Creditors for "agreeing to" a mandatory confirmation requirement. Unless Prepetition Secured Creditors wish to resort to time-consuming and expensive state-court foreclosures in multiple states to take back their collateral, they are constrained to allow the use of cash collateral to ensure a chapter 11 plan is confirmed for their own benefit—without any extra compensation.

III. The Adequate Protection Deal is Inappropriate and Provides an Unnecessary Gift to the Prepetition Secured Creditors at the Expense of Unsecured Claimholders

8. The Debtors are handing out extra adequate protection for improper ulterior motives. Based on the foregoing, there is no meritorious basis to grant the Prepetition Secured Creditors extra adequate protection. Indeed, the cash collateral package in the Cash Collateral Order provides everything on a secured lender's wish list, including: (i) permission to foreclose if a plan satisfactory to them is not timely filed or becomes effective;[12] (ii) milestones tied to the progress of the proposed chapter 11 plan; (iii) liens against the estates' avoidance actions; (iv) liens against otherwise unencumbered postpetition revenue, including gaming revenues, which ***are not*** rents, profits, or proceeds of the Prepetition Secured Creditors' collateral;[13] (v) 1.5% interest, a sweep of available cash, and past and future professionals' fees

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[12] Interim Order § 7(a), (d) (Events of Default include the failure to file a plan reasonably satisfactory to the Required Lenders and the Debtors within 90 days of the petition date and the failure of effectuating such plan within 365 days of the petition date); *id.* § 9(b) (allowing the First Lien Credit Parties (i) to terminate the Debtors' ability to use (and even to apply to use) cash collateral and (ii) to exercise all their remedies upon an Event of Default).

[13] The Debtors cite Dawn M. Cica and Laury Macauley, *When Gaming Goes Heads Up with the Bankruptcy Code: Unique Restructuring Issues for Gaming Businesses in Difficult Economic Times*, 3 UNLV Gaming L.J. 23 (2012), which notes, among other things, that a security interest in gaming tables and slot machines does not automatically grant a security interest in cash generated by the use of such equipment because it is questionable if such cash constitutes "proceeds." If it does not, then cash generated postpetition is unencumbered. *See, e.g.*,

to circumvent Bankruptcy Code section 506(b) when the Debtors and the Prepetition Secured Creditors contend they are undersecured;[14] (vi) waiving the "equities of the case" exception in Bankruptcy Code section 552(b) and estate surcharge rights in Bankruptcy Code section 506(c); and (vii) imposing a $75,000 limit and an unreasonable timeframe on the UCC's investigation of liens securing over $11.7 billion of debt, on top of other impediments. This package also includes *carte blanche* to set certain covenants[15]—how can the Debtors request approval of a cash collateral deal not even finished? As shown below, this "extra" adequate protection is designed to help the Debtors' owners get the "settlement" they want by compensating the Prepetition Secured Creditors who supported their RSA.

9. The Debtors' proposed cash collateral agreement straight-jackets the Court by imposing defaults having nothing to do with adequate protection. This is no exaggeration. The Cash Collateral Order[16] is laced with traps. For instance, an Event of Default occurs if the Debtors fail to effectuate a chapter 11 plan (and not just any chapter 11 plan, but one that is reasonably satisfactory to the First Lien Credit Parties) within a year of the petition date; or if

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1st Source Bank v. Wilson Bank & Trust, 735 F.3d 500 (6th Cir. 2013) (the "accounts" owed by the debtor's customers to the debtor (debtor sold delivery services) were not "proceeds" of the equipment (tractors and trailers) used to provide those services); *In re Gamma Ctr., Inc.*, 489 B.R. 688, 696 (Bankr. N.D. Ohio 2013) ("[T]he court is not persuaded that accounts receivable or funds collected thereon as the result of using equipment collateral constitute proceeds under the UCC."); *In re Wright Grp., Inc*., 443 B.R. 795 (Bankr. N.D. Ind. 2011) (fees paid for use of miniature golf course not "proceeds" of pencils used to keep score); *In re Las Vegas Monorail Co*., 429 B.R. 317, 333-35 (Bankr. D. Nev. 2010) (holding that the term "proceeds" does not include business income generated from customer fares as the fares are not "collected on, or distributed on account of" the franchise agreement, nor do they "aris[e] out of the collateral"); *In re Value-Added Commc'ns*, 139 F.3d 543 (5th Cir. 1998) (fees for use of pay phones not 'proceeds' of phones); *In re S & J Holding Corp*., 42 B.R. 249, 250 (Bankr. S.D. Fla. 1984) (cash revenues generated by video game machines and vending machines do not constitute "proceeds").

[14] The Debtors' proposed chapter 11 plan outlined in their RSA shows the bank debt (approximately $5.35 billion) secured by a first lien obtains 100% of its claim amount and the note debt (approximately $6.35 billion) secured by a first lien obtains 92% of its claim amount, thereby showing the total debt secured by the first lien, according to the Debtors' own numbers, is undersecured.

[15] Interim Order § 4(g)(6).

[16] "Cash Collateral Order" means the final order approving the Cash Collateral Motion. While the proposed final order has not been filed or shared with the UCC yet, the UCC assumes it will mirror the provisions of the Interim Order.

exclusivity terminates.[17] If either event occurs, the Required Lenders may exercise their remedies, and the Debtors are prohibited, without any notice or a hearing, to use—or ***even ask the Court for permission to use***—cash collateral.[18] Thus, if the Court grants the Cash Collateral Motion, the chapter 11 cases can only conclude in one of two ways: confirmation of a plan satisfactory to the First Lien Credit Parties, or the seizure of all encumbered assets by the First Lien Credit Parties.

10. The adequate protection package contains impermissible postpetition interest and/or fee payments disguised as adequate protection. The Prepetition First Lien Credit Parties and the First Lien Noteholder Parties share the same collateral in the same priority. Basic arithmetic shows that based on expected recoveries stated by the Debtors (100% for Prepetition First Lien Credit Parties and 92% for First Lien Noteholder Parties),[19] the average collateral coverage is approximately 96% (*i.e.*, the midpoint between 92% and 100%). The Debtors' numbers demonstrate that both the Prepetition First Lien Credit Parties and the First Lien Noteholder Parties are undersecured and thus not entitled to postpetition interest.[20] If Prepetition First Lien Credit Parties are paid in full, their 4% recovery exceeding the average collateral coverage must be comprised of impermissible postpetition interest and/or fees. Therefore, any adequate protection payments (which are not required in the first place) should be applied solely to principal, as already provided for in the Cash Collateral Order for some payments but not

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[17] *See* Interim Order § 7(a), (d), (q).

[18] *See* Interim Order §§ 7(a), (d), (q), 9(b).

[19] Memorandum in Support at 10.

[20] *See Timbers*, 484 U.S. at 372-73 ("Since [Bankruptcy Code section 506(b)] permits post-petition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing post-petition interest.").

others,[21] and not interest, unless and until the Prepetition First Lien Creditors become oversecured.

11. Avoidance actions are for unsecured claimholders only. The Debtors propose to grant the Prepetition Secured Creditors liens against all chapter 5 avoidance actions.[22] Under the Bankruptcy Code, avoidance actions can only be brought for the benefit of unsecured claimholders, and, thus, should not inure to the benefit of the Prepetition Secured Creditors,[23] unless the secured creditors fund losses in exchange for the avoidance actions.[24]

12. Waivers of the section 552(b) "equities of the case" exception and the section 506(c) surcharge are material and impermissible transfers from unsecured claimholders to secured claimholders. The critical fact here is that the Debtors' gaming revenues and other income were not encumbered because they are not rents, profits, or proceeds of collateral.[25] Therefore, when the Debtors spend hundreds of millions of unencumbered profits to improve the Prepetition Secured Creditors' collateral, they are entitled to be reimbursed under Bankruptcy

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[21] Interim Order § 20. The Cash Collateral Order grants the Prepetition First Lien Creditors, for instance, a waiver of the section 506(c) surcharge, but does not apply its amount as a reduction of principal.

[22] But, the Cash Collateral Motion does not mention that the Debtors have agreed in the RSA to release (*i.e.*, destroy and discard) those actions as part of its chapter 11 plan that, as explained below, pays subzero to settle the actions. *See* Restructuring Term Sheet at 12 ("Releases" section).

[23] *See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000) ("When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors . . . ."); *Official Comm. of Unsecured Creditors v. Gould Elecs. Corp.*, 1993 U.S. Dist. LEXIS 14318, at *12 (N.D. Ill. Sept. 20, 1993) ("The financing order is invalid to the extent that the order assigns to the bank a security interest in the debtor's preference actions."); *Mellon Bank v. Glick (In re Integrated Testing Prods. Corp.)*, 69 B.R. 901, 904 (D.N.J. 1987) ("It is well settled that generally it is the trustee alone, acting on behalf of all the creditors, that has a right to recover payments made as preferences. And this right cannot be assigned.").

[24] *Mellon Bank v. Dick Corp.*, 351 F.3d 290 (7th Cir. 2003) (court affirmed grant of avoidance action proceeds to secured lenders who funded debtor burning $10 million cash per month while sale was organized for estate's and unsecured claimholders' benefits). Here, the Debtors are very profitable and the secured lenders want them to operate for their own benefit.

[25] *See supra* note 13.

Code section 506(c).[26] Similarly, if the ultimate chapter 11 plan provides the Prepetition Secured Creditors benefits in excess of the value they can achieve by multiple state court foreclosures, the Court should have the opportunity to assess the unsecured claimholders' entitlement to share in the excess value, but will not if the section 552(b) "equities of the case" exception is waived.[27] Significantly, while the Debtors boast that their payments to secured claimants will be recharacterized as principal payments if they are undersecured, the Debtors gloss over the fact that the waivers of their section 506(c) and 552(b) entitlements are not treated as principal repayments and neither is the cash sweep.

13. The provisions relating to the challenge period and UCC investigation are gratuitously restrictive. At present, the Cash Collateral Order provides for a budget of $75,000 and 60 days after the formation of the UCC to investigate and challenge the liens and claims of the Prepetition Secured Creditors. As the Debtors and the Prepetition Secured Creditors undoubtedly realize, these provisions are far too restrictive. To properly discharge its duties, the UCC should be allowed: (i) 150 days after all pertinent documents are delivered to the UCC to perform its investigation; (ii) to assert any challenge without first seeking standing; (iii) to perform an investigation without budgetary restrictions; and (iv) access to the items available to certain lenders pursuant to sections 4(g) and 4(h) of the Cash Collateral Order.

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[26] *See In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) ("The underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs."); *accord In re Evanston Beauty Supply, Inc.*, 136 B.R. 171, 175 (Bankr. N.D. Ill. 1992) (citing *In re Codesco*, 16 B.R. at 230). Indeed, courts routinely reject the waiver of surcharge rights under section 506(c). *See In re The Colad Group, Inc.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (denying approval of DIP facility and finding no basis to allow a secured creditor to ignore the application of section 506(c) because such waiver "would either deny the means to pay such charges, or would impose such costs on funds available for distribution to unsecured creditors"); *In re Brown Bros., Inc.*, 136 B.R. 470, 474 (W.D. Mich. 1991) ("[The waiver of section 506(c) rights] is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal.").

[27] *See In re Metaldyne Corp*., No. 09-13412, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) (declining to waive equities of the case exception in connection with approval of debtor's use of cash collateral).

IV. The Cash Collateral Agreement Imposes Drastic Remedies Unrelated to Adequate Protection to Help the Owners Obtain Confirmation of the Plan in the RSA [28]

14. The owners' bad investment led to the controversial transactions. In January 2008, Apollo Global Management, LLC and its affiliated investment funds and portfolio companies (collectively, "Apollo"), and TPG Capital L.P. and certain of its affiliates (collectively, "TPG") purchased the Debtors for approximately $30.7 billion.[29] The high price they paid and excessive LBO debt, exacerbated by the succeeding Great Recession, quickly made the investment problematic, to say the least. Rather than accept their losses, Apollo and TPG orchestrated a series of what the Debtors label as "controversial" transactions (the "Controversial Transactions") over the past three years, with the common theme being that some of the Debtors' most valuable assets (the best asset left with the Debtors is the original Caesars Palace that a first lien covenant prevents transferring) were transferred out of the Debtors and into other entities largely owned and controlled by Apollo and TPG. While the Debtors repeatedly emphasize the deleveraging benefit of the Controversial Transactions, they implicitly acknowledge the injuries imposed on creditors by their unilateral proffering of a "settlement."

15. Apollo and TPG formulated their "settlement" by not negotiating with the affected creditors. Apollo and TPG knew all along the Debtors' creditors would want to avoid the Controversial Transactions as fraudulent transfers. Apollo and TPG coaxed their Prepetition First Lien Noteholder Parties to agree to an adequate protection package and proposed chapter 11 plan to be crammed down on all other creditors. They bundled both into the RSA. The Debtors' proposed chapter 11 plan pays unsecured claimholders approximately 4.9 cents on the dollar in

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[28] Most of the facts here are taken from admissions in the Memorandum in Support and the Debtors' Motion for Entry of an Order (A) Authorizing the Debtors to Assume Restructuring Support Agreement (the "RSA") and (B) Granting Related Relief, ECF No. 260 ("Motion to Assume the RSA").

[29] Memorandum in Support at 4.

the form of stock if they reject the plan, and approximately 8.5 cents if they accept.[30] Being sophisticated investors with chapter 11 experience, and having experienced advisors, Apollo and TPG incorporated into the proposed chapter 11 plan the cramdown of their "settlement" which releases the Debtors and non-debtors, including all Apollo and TPG entities, affiliates, officers, and directors, from all avoidance actions and breach of fiduciary duty actions.

16. The Debtors want a settlement hearing and not an arms-length negotiation. The essence of their approach is that instead of having to prove in fraudulent transfer actions that their entities paid reasonably equivalent value for the Debtors' assets, Apollo and TPG would only have to prove the settlement should be approved under the bankruptcy principle that a settlement need only be inside the zone of reasonableness. That is the linchpin of the Debtors' strategy and the crux of the differences between the parties: the Debtors want to cram down their "settlement" on all unsecured claimholders through the use of a settlement hearing by pretending their self-created "settlement" is a real settlement. Instead, the UCC wants to prosecute the fraudulent transfer actions and negotiate a real and legitimate settlement at arms-length.

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[30] These returns are computed by taking the Debtors' "plan value" of the stock in the Restructuring Term Sheet at 11 ("CEC or an affiliated entity shall, pursuant to the Put Options, purchase up to (a) $269 million of PropCo New LP Interests or REIT New Common Stock at a price implying a total value of $269 million for 14.8% of the PropCo on a fully diluted basis . . . ."); *see also* Memorandum in Support at 10 ("A baseline recovery to non-First Lien Creditors of 17.5% of PropCo equity, valued at approximately **$**319 million, with the opportunity, if the class votes in favor of the Plan, to receive 30.1% of PropCo equity, valued at approximately $549 million plus equity buy in rights for up to an additional 65% of PropCo equity at plan value"). The "plan value" of the stock implies the value of 100% of PropCo stock is approximately $1.82 billion. The estimated recoveries were divided by the approximate amount of non-first lien debt, $6.458 billion (includes approximately $209 million of trade debt based on the top 50 claimholder list filed with the Debtors' voluntary petition). *See* Memorandum in Support at 4 (describing the Debtors' outstanding debt). To the extent, if any, the second lien debt of approximately $5.24 billion is partially secured, the aggregate amount of the unsecured claims will decrease.

17. The "settlement" is zero or less. The Debtors boast that the transferees of the Controversial Transactions are providing approximately $1.45 billion in cash.[31] But then, the Debtors admit that nearly $1 billion of that amount is the money Apollo and TPG are paying to repurchase stock of the reorganized Debtors from the Prepetition First Lien Creditors who obtain ownership under the proposed plan.[32] That is not "settlement" money. It is the amount of new value Apollo and TPG want to pay Prepetition Secured Creditors to retain ownership of the reorganized Debtors. Next, the RSA shows that if the unsecured claimholders reject the plan, they will obtain approximately $319 million in the form of stock in a property company, and if they accept, they will receive approximately $549 million of stock.[33] Thus, it looks like the "settlement" of the fraudulent transfer claims and all other claims against officers and directors are being settled for $319 to $549 million. Less than 90 days before the involuntary chapter 11 petition was filed against CEOC, however, CEOC granted the Prepetition First Lien Creditors a first lien against approximately $468 million of cash, and CEOC is seeking to provide them its unencumbered cash for a total of $864 million on January 15, 2015.[34] And, CEOC wants to defend against the involuntary petition so the lien cannot be avoided because the RSA is premised on it not being avoided. Accordingly, if the unsecured claimholders reject the plan, they get $319 million of stock and lose $864 million of unencumbered cash for a net loss of $545 million, while if they accept the plan they get $549 million of stock and lose $864 million for a

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[31] *See* Memorandum in Support at 43–44.

[32] *Id.* at 9, 43–44 (near term contributions from CEC include "backstopping, with no associated fees, up to $969 million of equity put options to support the REIT structure and provide cash out opportunities to CEOC's creditors receiving equity in PropCo and OpCo under the proposed chapter 11 plan."). Significantly, for the RSA to have become effective among the parties, the Prepetition First Lien Creditors had to agree to sell the reorganized debtors back to Apollo and TPG.

[33] *Id.* at 10. The valuation of the stock is based on the Debtors' alleged value of the stock on page 11 of the Restructuring Term Sheet ("CEC or an affiliated entity shall, pursuant to the Put Options, purchase up to (a) $269 million of PropCo New LP Interests or REIT New Common Stock at a price implying a total value of $269 million for 14.8% of the PropCo on a fully diluted basis . . . . ").

[34] "As of the Petition Date, the Debtors have approximately $864 million of cash." Cash Collateral Motion ¶ 1.

net "settlement" of negative $315 million. As aforesaid, this "settlement" cannot be approved under any circumstances. The "settlement" is actually even worse than already described because it deprives the unsecured claimholders of the value of many unencumbered assets such as casino licenses and unencumbered operating profits during the chapter 11 cases. And even if some of the original cash was collateral, the unsecured claimholders still lose far more than they get.

18. The settlement was between Apollo and TPG on the one side and their beholden professionals on the other side. To counteract the problem that the settlement of the avoidance actions for the benefit of unsecured claimholders was never negotiated with unsecured claimholders, the Debtors repeatedly emphasize that the "settlement" was scrupulously formulated by an independent special governance committee of the board of directors of CEOC (the "Special Governance Committee"), represented by independent counsel and independent financial advisors.[35] But the Special Governance Committee was not independent. Its so-called independent counsel was Kirkland & Ellis ("K&E"), attorneys for at least three chapter 11 debtors in possession owned by Apollo and/or TPG: CEOC, Energy Future Holdings, and

[35] *See* Motion to Assume the RSA ¶ 5 ("**The Debtors' restructuring counsel** and Mesirow . . . have assisted the Special Governance Committee with [the] investigation over the past 6 months . . . The Special Governance Committee has determined that, subject to completion of their investigation (which the RSA is expressly conditioned upon), **the value contributed by CEC reflects a fair and reasonable settlement** of these claims and causes of action.") (emphasis supplied); Memorandum in Support at 8 ("[T]o establish an independent decision-making process at CEOC, **two independent directors were appointed** to the CEOC Board of Directors in June 2014 and CEOC **retained independent counsel and financial advisors**. The two independent directors then formed a Special Governance Committee of the CEOC Board of Directors . . . were charged with, among other things, conducting an **independent investigation** into potential claims that the Debtors and/or their creditors may have against CEC or its affiliates, including claims that would eventually form the basis of filed creditor complaints.") (emphasis supplied); *Debtors' Motion for Entry of an Order (i) Appointing an Examiner and (ii) Granting Related Relief* ¶ 1, ECF No. 363 ("[T]he Debtors themselves launched an extensive, **independent** internal investigation into [the] transactions in parallel with their negotiations of, and ultimate entry into, the RSA . . . .") (emphasis supplied); *id.* ¶ 9 ("[T]wo **independent directors** were appointed to the CEOC Board of Directors in June 2014 and **independent counsel and financial advisors** were hired shortly thereafter. The two **independent directors** formed a Special Governance Committee of the CEOC Board of Directors . . . and were charged with . . . **conducting an independent investigation** . . . into potential claims that the Debtors and/or their creditors may have against CEC or its affiliates.") (emphasis supplied).

Innkeepers. K&E has been and is currently billing and earning approximately $6 million per month from its representation of Energy Future Holdings, co-owned by TPG.[36] It earned over $22 million representing Innkeepers in 2011, a company owned by Apollo.[37] And here, K&E stands to earn millions of dollars per month representing CEOC and its subsidiaries, owned by Apollo and TPG. As former Chief Delaware Supreme Court Judge Veasey puts it, one must ask: independent from whom, and independent for what purpose.[38] Are we to understand that while K&E was and is beholden to Apollo and TPG for allowing K&E to earn millions of dollars of fees per month, it was independent of them and supposed to tell the Special Governance Committee to make Apollo and TPG pay more than they wanted to pay to settle the actions arising out of the Controversial Transactions?[39] Delaware law is clear that special committees only function validly when they replicate the outcome of an arms-length negotiation.[40] Based on the false premise that the Special Governance Committee is independent and the "settlement" is a real settlement, the Debtors are attempting to barrel forward towards confirmation of their

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[36] *See Order Awarding Interim Allowance of Compensation for Services Rendered and for Reimbursement of Expenses, In re Energy Future Holdings Corp., et al.*, Case No. 14-10979 (Bankr. D. Del. Jan. 26, 2015) [ECF No. 3365], available at: http://www.efhcaseinfo.com (awarding K&E $24,511,927.32 in fees for the period of four months between 4/29/14 and 8/3/14). K&E seeks compensation in the amount of $25,084,064.00 for the period from September 1, 2014 through and including December 31, 2014. *See Second Interim Application of Kirkland & Ellis LLP and Kirkland & Ellis International LLP, Attorneys or the Debtors and Debtors in Possession, for the Period from September 1, 2014 Through and Including December 31, 2014, In re Energy Future Holdings Corp., et al.*, Case No. 14-10979 (Bankr. D. Del. Feb. 17, 2015), ECF No. 3569, *available at* http://www.efhcaseinfo.com.

[37] *See Order Granting Application for Allowance of Fourth Interim and Final Compensation and Reimbursement of Expenses, In re Innkeepers USA Trust, et al*., Case No. 10-13800 (Bankr. S.D.N.Y. Dec. 16, 2011) [ECF No. 2252], available at: www.omnimgt.com/innkeepers.

[38] E. Norman Veasey, *What Happened in Delaware Corporate Law and Governance from 1992–2004?* A Retrospective on Some Key Developments, 153 U. PA. L. REV. 1399, 1425 (2005).

[39] This is not the first time Apollo has attempted this type of partially pre-arranged bankruptcy deal. Its last attempt was rejected. *See In re Innkeepers USA Trust*, 442 B.R. 227, 231, 234–35 (Bankr. S.D.N.Y. 2010) (denying motion to assume plan support agreement because Apollo's debtor had not complied with its fiduciary duties in pursuing plan, and ruling the bankruptcy court "could not conclude that the debtors exercised due care in electing to move forward with the current plan term sheet and the proposed valuation implied therein.").

[40] *In re Loral Space & Commc'ns Inc. Consol. Litig.*, 2008 Del. Ch. *LEXIS* 136, at *76 (Del Ch. 2008) (then Chancellor Strine); *reargument denied*, 2008 Del. Ch. LEXIS 220 (2008).

proposed plan, hoping the Court will not allow real unsecured claimholder representatives, such as the UCC, to prosecute and negotiate the actions arising out of the Controversial Transactions.[41]

RESERVATION OF RIGHTS

19. The UCC reserves the right to raise further and other objections or responses to the Cash Collateral Motion and the Cash Collateral Order and any other form of order presented by the Debtors prior to or at the final hearing to approve the Cash Collateral Motion. All rights and remedies are hereby expressly reserved.

CONCLUSION

WHEREFORE the UCC respectfully requests the Court to (a) deny final approval of the Cash Collateral Motion, (b) grant the Debtors approval to use cash collateral based on the declarations attached hereto and all testimony of the declarants showing the Debtors' positive cash flow after payment of all maintenance, capital improvements, taxes, and insurance provides adequate protection, and (c) grant the UCC such other and further relief as is just.

Dated: February 25, 2015
Chicago, Illinois

By: /s/ *Paul V. Possinger*
One of its attorneys

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-and-

[41] *See* Debtors' Examiner Motion ¶ 15 ("All other parties in interest will refrain from seeking discovery or otherwise commencing or conducting a concurrent investigation into matters substantially similar and/or duplicative of the scope of the examiner's investigation.").

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Proposed Attorneys for the Statutory Unsecured Claimholders' Committee of Caesars Entertainment Operating Company, Inc., et al.

Exhibit A

Declaration of Samuel E. Star

[MOTION FOR AUTHORITY TO FILE UNDER SEAL PENDING]