IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
	)	Case No. 15-01145 (ABG)
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al.,[1]	)	(Jointly Administered)
	)	
	)	Hon. A. Benjamin Goldgar
Debtors.	)	
	)	**Hearing Date: March 4, 2015**
	)	**Hearing Time: 1:30 p.m.**

OBJECTION OF 10.75% NOTES TRUSTEE 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

Wilmington Trust, National Association, as Successor Indenture Trustee (the "10.75% Notes Trustee") for the 10.75% Senior Unsecured Notes (the "10.75% Notes") issued by Caesars Entertainment Operating Company, Inc. ("CEOC," and, together with the other chapter 11 debtors, the "Debtors," and, together with their non-Debtor affiliates, the "Caesars Entities"), and guaranteed by certain wholly-owned domestic subsidiaries of CEOC (the "Subsidiary Guarantors"), under that certain indenture dated February 1, 2008, by and through its undersigned counsel, hereby files this objection (the "Objection") to 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

[1] The last four digits of Caesars Entertainment Operating Company, Inc.'s tax identification number are 1623. Due to the large number of Debtors in these chapter 11 cases, for which the Debtors have requested joint administration, 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 on the website of the Debtors' proposed claims and noticing agent at https://cases.primeclerk.com/CEOC.

Final Hearing, and (V) Granting Related Relief [Dkt. No. 22] (the "Motion").[2] In support thereof, the 10.75% Notes Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The 10.75% Notes Trustee is the successor indenture trustee for the 10.75% Notes and the co-chair of the Official Committee of Unsecured Creditors (the "Unsecured Creditors Committee"). It hereby joins in and adopts the arguments in the Unsecured Creditors Committee's objection to the Motion, which largely focuses on the request by CEOC, the Debtors' ultimate parent, for authority to use certain of its cash collateral. The 10.75% Notes Trustee submits this supplemental Objection in connection with issues of unique importance to the 10.75% Notes Trustee and to the 172 Debtors other than CEOC (the "Subsidiary Debtors"), the substantial majority of which are guarantors of the 10.75% Notes.

2. By the Motion, each of the Subsidiary Debtors seeks to provide CEOC's Prepetition Secured Creditors with multiple forms of adequate protection in exchange for the use of an unidentified amount of their alleged cash collateral. No Subsidiary Debtor, however, was a prepetition borrower from the Prepetition Secured Creditors. Nor was any Subsidiary Debtor a guarantor of any of the Prepetition Secured Obligations. Rather, the Prepetition Secured Creditors only have security interests in certain specified assets of the Subsidiary Debtors pursuant to prepetition non-recourse asset pledge agreements. In these pledge agreements, the Prepetition Secured Creditors expressly waived their right to assert any deficiency claim against

[2] On January 15, 2015, the Court entered the *Cash Collateral Order (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* [Dkt. No. 47] (the "Cash Collateral Order"). Capitalized terms used but not defined herein shall have the meanings set forth in the Motion or the Cash Collateral Order. The 10.75% Notes Trustee hereby reserves the right to supplement this Objection upon the completion of discovery in connection with the Motion.

any of the Subsidiary Debtors "under any law."[3] Given these unique facts, the 10.75% Notes are structurally senior to the Prepetition Secured Creditors with respect to all assets at the Subsidiary Guarantors that were not specifically pledged in the Collateral Agreements, including substantial cash and gaming assets. And, while diligence is ongoing, it appears that the Subsidiary Debtors may have sufficient unencumbered assets to pay all of their unsecured creditors in full.

3. The holders of the 10.75% Notes are thus uniquely motivated to advocate on behalf of the Subsidiary Debtors' estates and to protect those estates' unencumbered assets from any overreaching by the Prepetition Secured Creditors. As set forth below, the relief requested in the Motion, if granted, would unnecessarily prejudice the Subsidiary Guarantors and could have the effect of preventing them from being able to pay their unsecured creditors in full. The Court should therefore deny the final relief sought in the Motion.

OBJECTION

4. The Motion, as framed, has four principal flaws. First, the Subsidiary Debtors have made no showing as to the amount of, proposed uses of, or any risk of diminution of value in the Prepetition Secured Creditors' cash collateral at any particular Subsidiary Debtor. Second, the Subsidiary Debtors' cash as of the Petition Date was not collateral of the Prepetition Secured Creditors and thus should not be subjected to the Cash Collateral Order. Third, adequate protection should not apply to Subsidiary Debtors' cash generated postpetition unless such cash is the verified and segregated proceeds of prepetition pledged assets. Fourth, the Debtors have

[3] See Caesars Entertainment Corporation, Form 8-K (Jun. 15, 2009) at Ex. 10.3 (Amended and Restated Collateral Agreement, dated as of January 28, 2009, among Harrah's Operating Company, Inc., its subsidiaries identified therein and Bank of America, N.A., as Collateral Agent (as amended, the "First Lien Collateral Agreement")) § 7.18 ("Notwithstanding anything to the contrary in this Agreement, no recourse shall be had, whether by levy or execution, or under any law . . . ."); Caesars Entertainment Corporation, Form S-4/A (Dec. 24, 2008), at Ex. 4.40 (Collateral Agreement, dated as of December 24, 2008, among Harrah's Operating Company, Inc. and its subsidiaries identified therein and U.S. Bank National Association, as Collateral Agent (the "Second Lien Collateral Agreement" and, together with the First Lien Collateral Agreement, the "Collateral Agreements")) § 7.17 (same).

not made the requisite evidentiary showings to obtain certain extraordinary aspects of the relief requested in the Motion.

I. The Debtors Have Made No Showing Of Any Risk Of Diminution In Value Of The Prepetition Secured Creditors' Collateral At Any Particular Subsidiary Debtor

5. In support of the broad adequate protection package requested in the Motion, the Debtors offer the seven page declaration of CRO Randall S. Eisenberg [Dkt. No. 22, Ex. B] (the "Eisenberg Declaration"), which makes certain assertions about "the Debtors'" use of cash collateral. The Eisenberg Declaration does not, however, identify the amount of any existing cash at a Subsidiary Debtor, what portion, if any, of that cash is the collateral of the Prepetition Secured Creditors, what the proposed uses are for any cash collateral held by any particular Subsidiary Debtor or whether there is any anticipated diminution in cash collateral balances at any of the Subsidiary Debtors. Nor does the declaration explain how the proposed "global" adequate protection package is intended to apply to any particular Subsidiary Debtor. Instead, Mr. Eisenberg declares, in a conclusory fashion, that the requested relief is "more than sufficient" to protect the Subsidiary Debtors' estates. Eisenberg Decl. ¶ 14.

6. As a matter of law, adequate protection must be grounded in legitimate expectations of a potential diminution in value of collateral. "The purpose of adequate protection 'is to insure that the creditor receives the value for which he bargained prebankruptcy.'" In re Am. Consol. Transp. Cos., No. 09-B-26062, 2010 WL 3655485, at *4 (Bankr. N.D. Ill. Sept. 10, 2010) (citing In re O'Connor, 808 F.2d 1393, 1396 (10th Cir. 1987)). "The secured creditor 'must, therefore, prove this decline in value-or the threat of a decline-in order to establish a *prima facie* case.'" In re Gunnison Ctr. Apartments, LP, 320 B.R. 391, 396 (Bankr. D. Colo. 2005) (quoting In re Elmira Litho, Inc., 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994)). "If a creditor's interest in the debtor's property is not declining in value, the creditor is

not entitled to adequate protection." Am. Consol. Transp. Cos., 2010 WL 3655485 at *4 (citing United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Fed. Nat'l Mortg. Ass'n v. Dacon Bolingbrook Assocs. Ltd. P'ship, 153 B.R. 204, 209 (N.D. Ill. 1993)).

7. To obtain adequate protection for the use of cash collateral, one must therefore (a) establish the existence, extent and value of the secured creditor's interest, (b) identify the risks to the secured creditor's collateral resulting from the debtor's request for use of cash, and (c) determine whether the adequate protection proposal protects value as narrowly as possible. In re Martin, 761 F.2d 472, 476-77 (8th Cir. 1985). A debtor's agreement with a secured creditor to provide adequate protection must "contain facts sufficient to establish the amount, extent and priority of the secured creditor's claim as well as representations or a stipulation as to the diminution of the value of such collateral during the course of the reorganization . . . to justify the adequate protection proposed." In re Megan-Racine Assocs. Inc., 202 B.R. 660, 663 (Bankr. N.D.N.Y. 1996) (citation omitted).

8. Here, none of the Subsidiary Debtors have provided the Court with any of the requisite predicate facts to support the relief requested in the Motion. Indeed, none have provided a cash flow statement or budget for their particular operations, have identified what of their cash is collateral or attempted to tie the adequate protection package to any perceived risks. In the absence of any evidence that any Subsidiary Debtor will be cash flow negative (and there is none proffered), the Court should conclude that the Prepetition Secured Lenders are adequately protected by the Subsidiary Debtors' uninterrupted operations. See, e.g., RL BB Fin. LLC v. 207 Redwood St. LLC (In re 207 Redwood St. LLC), No. 10-27968-NVA, 2011 WL 3799767, at *6 (Bankr. D. Md. Aug. 26, 2011) (holding that a secured creditor was adequately protected "based on the expectation that the value of the Property will continue to grow"); In re

495 Cent. Park, 136 B.R. 626, 626-631 (Bankr. S.D.N.Y. 1992) (holding that a secured creditor was adequately protected where the value of the projected property improvements would increase the value of the collateral).

II. The Subsidiary Debtors' Cash As Of The Petition Date Is Not Collateral Of The Prepetition Secured Creditors

9. As noted by the Unsecured Creditors Committee in its objection to the Motion, it is unclear whether and to what extent any cash owned by CEOC on the Petition Date is encumbered by the liens of the Prepetition Secured Creditors. That question may only be resolved upon a determination by this Court, after presentation of evidence by appropriate creditor fiduciaries, as to whether the deposit account control agreements at CEOC are valid or avoidable. Consequently, the 10.75% Notes Trustee takes no position at this time with respect to cash owned by CEOC on the Petition Date, except to note that much of that cash was presumably transferred in the 90 days prior to the Petition Date from unencumbered accounts of the Subsidiary Debtors into pledged concentration accounts at CEOC as part of what may later be viewed as avoidable preferential transfers.

10. This Objection focuses primarily on the cash owned by the Subsidiary Debtors on the Petition Date as well as that generated by them after the Petition Date. As to that cash, the adequate protection requested is unnecessary because the Prepetition Secured Creditors do not even assert, much less offer proof, that they have enforceable liens on the Subsidiary Debtors' cash. As of the Petition Date, the Subsidiary Debtors owned substantial cash at their various subsidiary debtor level operating bank accounts. None of that cash was subject to control agreements, even though under Article 9 of the Uniform Commercial Code, control agreements over the relevant Subsidiary Debtor deposit accounts are the *sine qua non* of any perfected lien

on cash. N.Y. U.C.C. Law § 9-104(a) (stating that a secured party has control of a deposit account if the debtor, secured party and bank have entered into a deposit control agreement).[4]

11. Likewise, the Subsidiary Debtors on the Petition Date appear to have held substantial amounts of unliened "cage cash." See First Lien Noteholders' Discussion Materials, at 5 (Sept. 18, 2014).[5] That cash was never pledged to the Prepetition Secured Creditors; instead, it was encompassed by the excluded assets provision in the Collateral Agreements.[6] Given the existence of significant unencumbered Petition Date cash at the Subsidiary Debtors, it is unclear whether any of the Subsidiary Debtors need access to cash collateral at all, and any order approving cash collateral usage should clearly exclude unencumbered cash from its ambit.

III. Adequate Protection Should Not Apply To Subsidiary Debtors' Cash Generated Postpetition Other Than Verified And Segregated Proceeds of Article 9 Collateral

12. In addition to Petition Date cash, the Subsidiary Debtors' gaming assets, including gaming licenses, cage cash and slot machines, are carved out of the Prepetition Secured Creditors' liens.[7] Any cash generated postpetition by the Subsidiary Debtors from the operation of unpledged assets would not be proceeds of collateral and that too would be

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[4] The Collateral Agreements are both governed by New York law. See First Lien Collateral Agreement § 7.08; Second Lien Collateral Agreement § 7.08.

[5] Available at http://www.businesswire.com/news/home/20141211006615/en/Lien-Bondholder-Counsel-Kramer-Levin-Discloses-Information#.VMK9NlJ0z5o.

[6] See First Lien Collateral Agreement, at § 4.01(a) ("Notwithstanding anything to the contrary in this Agreement, this Agreement shall not constitute a grant of a security interest in (and the Article 9 Collateral shall not include) . . . any assets owned on or acquired after the Closing Date, to the extent that, and for so long as, taking such actions would violate any applicable law or regulation (including any Gaming Law or regulation) or an enforceable contractual obligation . . . ."); Second Lien Collateral Agreement, at § 4.01(a) ("Notwithstanding anything to the contrary in this Agreement, this Agreement shall not constitute a grant of a security interest in (and the Article 9 Collateral shall not include) . . . assets owned or acquired after the Issue Date, to the extent that, and for so long as, taking such actions would violate any applicable law or regulation (including any Gaming Law or regulation) or an enforceable contractual obligation . . . ."). As an example of one such "Gaming Law," Indiana law prohibits pledging a security interest in a gambling game license, providing that "[a] license to conduct gambling games: (1) is a revocable privilege granted by the state; and (2) is not a property right," Ind. Code § 4-35-5-2.8, and that "[a] person may not: (1) lease; (2) hypothecate; or (3) borrow or loan money against; a gambling game license." Id. § 4-35-5-7(c).

[7] Id.

unencumbered by the liens of the Prepetition Secured Creditors. See 11 U.S.C. § 552. Accordingly, the Prepetition Secured Creditors are not entitled to adequate protection for the use of cash generated by the operations of the Subsidiary Debtors' businesses. See In re Applied Theory Corp., Nos. 02-11868 – 02-11874, 2008 WL 1869770, at *9 (Bankr. S.D.N.Y. Apr. 24, 2008) (holding that a lender's lien cannot extend to proceeds of otherwise excluded collateral); McDaniel v. 162 Columbia Heights Housing Corps., 863 N.Y.S.2d 346, 351 (N.Y. Sup. Ct. 2008) ("[S]ince plaintiff does not possess a security interest . . . the fact that a security interest . . . continues in proceeds upon the disposition of collateral pursuant to UCC-9-315 is of no moment").

13. A more difficult issue may arise with respect to any postpetition proceeds of collateral dispositions (as opposed to postpetition profits of the Subsidiary Debtors' businesses). The Prepetition Secured Creditors do have prepetition liens on the Subsidiary Debtors' "Article 9 Collateral." As such, they could assert that the sale proceeds of any of that collateral would be subject to their liens under section 552(b) of the Bankruptcy Code. However, under the cash management system that the Debtors seek to maintain pursuant to their *Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue Using Their Cash Management System, (B) Maintain Their Existing Bank Accounts and Business Forms, and (C) Continue Intercompany Transactions, and (II) Granting Related Relief* [Dkt. No. 8] (the "Cash Management Motion"), cash at the Subsidiary Debtors, including unliened cash and collateral disposition proceeds, will be swept into concentration accounts at CEOC. Assuming the relief sought in the Cash Management Motion with respect to such sweeps is granted (as to which the 10.75% Notes Trustee has filed a Limited Objection), any sweep of cash from the Subsidiary Debtors' accounts into commingled concentration accounts could render the Prepetition Secured

Creditors' security interest in those cash proceeds unperfected. See N.Y. U.C.C. § 9-315(b)(2) ("Proceeds that are commingled with other property are identifiable proceeds . . . to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.").

14. Notably, the Prepetition Secured Creditors would have the burden of tracing cash proceeds of collateral dispositions swept into a concentration account. See Barkley Clark & Barbara Clark, The Law of Secured Transactions Under the Uniform Commercial Code, § 10.03[2] at 10-13 (3d ed. 2012) ("The secured creditor has the burden of tracing, according to the lowest-intermediate-balance rule. When this burden is not met, by an expert witness or otherwise, the security interest in the original collateral will not extend to a deposit account containing commingled proceeds."). Thus, unless the Prepetition Secured Creditors can trace the proceeds of "Article 9 Collateral" with respect to cash swept from the Subsidiary Debtors to CEOC postpetition, their security interests in postpetition proceeds generated by the Subsidiary Debtors would be rendered unperfected and thus not subject to adequate protection.[8]

IV. The Subsidiary Debtors Have Not Made The Requisite Showing To Obtain Extraordinary Relief

15. To the extent that any of the Subsidiary Debtors could demonstrate, on a debtor-by-debtor basis, (a) the amount of any cash collateral held by it; (b) a specified need to use that cash collateral postpetition; (c) a budgeted use for cash collateral during a specified period; and (d) an identifiable risk to the repayment of cash collateral at the expiration of that budget period,

[8] As set forth in the *Limited Objection of 10.75% Notes Trustee to the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue Using Their Cash Management System, (B) Maintain Their Existing Bank Accounts and Business Forms, and (C) Continue Intercompany Transactions, and (II) Granting Related Relief*, filed concurrently herewith, superpriority claims granted to the Prepetition Secured Creditors under the Cash Collateral Order must be junior to superpriority claims granted to the Subsidiary Debtors against CEOC on account of upstreamed cash so as to preserve the holders of 10.75% Notes' priority with respect to unencumbered cash proceeds at the Subsidiary Debtors.

the Debtors and the Prepetition Secured Creditors have nonetheless failed to comply with the guidelines set forth in the Local Rules of United States Bankruptcy Court for the Northern District of Illinois with respect to the extraordinary adequate protection relief they seek.

- The Subsidiary Debtors have not sufficiently justified the need for waivers of section 362 of the Bankruptcy Code as required by Local Rule 4001-2(A)(2)(i). See also In re Clouse, 446 B.R. 690, 697 (Bankr. E.D. Pa. 2010) (stating that the court must carefully supervise requests to waive section 362 protections because the automatic stay is intended to prevent one creditor from gaining a preference over other creditors). In particular, the proposed stay relief would permit the First Lien Credit Parties to exercise remedies with respect to cash collateral after the occurrence of a First Lien Credit Parties' Event of Default that remains uncured for seven business days, regardless of which Debtor defaults. Cash Collateral Order ¶ 9(b). Thus, for example, a Subsidiary Debtor's assets could be seized for reasons having nothing to do with that Debtor's operations. All relief from the stay for any default under a cash collateral order should be subject to further Court order on notice and motion.

- The Subsidiary Debtors have not sufficiently justified the need for waivers of section 552 of the Bankruptcy Code as required by Local Rule 4001-2(A)(2)(e). See also In re Metaldyne Corp., No. 09-13412 MG, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) (declining to waive the "equities of the case" exception in section 552(b) of the Bankruptcy Code prospectively). Section 552 waivers are inappropriate where, as here, there could be substantial legal and factual issues as to what cash of a particular Subsidiary Debtor might constitute proceeds of pledged collateral versus proceeds of unencumbered gaming assets.

- The Subsidiary Debtors have not sufficiently justified the need for waivers of section 506 of the Bankruptcy Code as required by Local Rule 4001-2(A)(2)(c). See also

Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 150 F.3d 868, 872 (8th Cir. 1998) (holding that 506(c) waiver would operate as a windfall to the secured creditor at the expense of administrative claimants and was thus unenforceable). A section 506(c) waiver is particularly prejudicial here because, without a debtor-by-debtor budget in place, substantial unencumbered cash could be used for the maintenance or improvement of collateral without any benefit to unsecured creditors of the Subsidiary Debtors.[9]

- The Subsidiary Debtors have failed to prove the need for the proposed cash payments as adequate protection. It appears these payments are intended to comprise postpetition interest, not any realistic assessment of potential diminution in value of cash collateral. See Caesars Entertainment Operating Company, Inc., Form 8-K (Jan. 30, 2015) Ex. 99.1, at 2 (RSA negotiations focused on adequate protection payments as a substitute for postpetition interest); see also United Sav. Ass'n of Tex., 484 U.S. at 372-73 ("Since [§ 506(b)] permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest"); Baybank-Middlesex v. Ralar Distribs., Inc., 69 F.3d 1200, 1203 (1st Cir. 1995) ("We need not determine whether there was a failure of adequate protection because . . . Baybank, as an undersecured creditor, is not entitled to postpetition interest and fees under § 506(b) . . . ."). The Subsidiary Debtors are not obligors under the Prepetition Secured Documents, and thus there is no basis for their making any payment to the Prepetition Secured Creditors.

- The Debtors have not sufficiently justified the need to grant adequate protection liens on Avoidance Actions as required by Local Rule 4001-2(A)(2)(d). See also Official Comm. of Unsecured Creditors v. Goold Elecs. Corp., No. 93-C-4196, 1993 WL 408366, at *3-4

[9] For example, were a Subsidiary Debtor to use unencumbered cash for capital improvements of its liened assets, that use might provide no benefit to unsecured creditors in the event that the Prepetition Secured Creditors took possession of their collateral. That is the type of prejudice that section 506(c) is designed to prevent.

(N.D. Ill. Sept. 22, 1993) (vacating DIP financing order to the extent that the order granted the lender a security interest in the debtors' preference actions); In re Cybergenics Corp., 226 F.3d 237, 243-44 (3d Cir. 2000) (avoidance actions are not property of the estate and are not transferred to the debtor-in-possession, but are rights held by the estate for the benefit of all creditors); In re First Fin. Assocs., Inc., 371 B.R. 877, 919 (Bankr. N.D. Ind. 2007) ("The purpose of avoidance of a preferential transfer is to return property to the debtor's estate in order to equalize distribution among creditors."); In re Integrated Testing Prods. Corp., 69 B.R. 901, 905 (D.N.J. 1987) (holding that prepetition secured creditor was not entitled to proceeds of sale of collateral recovered as preference because this "would frustrate the policy of equal treatment of creditors under the Code . . ."). Liens on Avoidance Actions would be particularly inappropriate here, as none of the Prepetition Secured Creditors were prepetition creditors of the Subsidiary Debtors with state law rights to recover on avoidance actions. The unidentified need to use alleged cash collateral should not be used as a means to provide the Prepetition Secured Creditors with postpetition rights that they bargained away prepetition.

16. In sum, the Court should refuse to grant any of the extraordinary relief sought in the Motion.

RESERVATION OF RIGHTS

17. The 10.75% Notes Trustee expressly reserves its right to supplement and amend this Objection following the completion of discovery.

CONCLUSION

Based on the foregoing, the 10.75% Notes Trustee respectfully requests that the Court deny the Motion and grant such other and further relief as the Court deems just and proper.

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