UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,	)	Case No. 15-01145 (ABG)
	)	(Jointly Administered)
Debtors.	)	

FIRST LIEN NOTES PARTIES' JOINT OBJECTION TO UCC STANDING MOTION

The Ad Hoc Committee of First Lien Noteholders (the "1L Notes Committee")[1] and UMB Bank, N.A., solely in its capacity as successor indenture trustee for the First Lien Notes, (the "1L Notes Trustee," and together, the "First Lien Notes Parties") submit this Joint Objection to the motion (the "Motion") [Dkt. No. 2029] filed by the unsecured claimholders' committee (the "UCC") appointed in the bankruptcy cases of the above-captioned debtors (the "Debtors") seeking derivative standing to pursue certain causes of action on behalf of the Debtors' estates.

PRELIMINARY STATEMENT

1. The Motion should be denied without prejudice, because the UCC cannot satisfy the prerequisites for derivative standing and granting it at this time would not align with the interests of the estates. *First*, far from "unjustifiably refusing" to bring suit, the Debtors are prosecuting a chapter 11 plan that resolves all of the issues the UCC requests standing to litigate. The UCC may object to that resolution in connection with confirmation, but unless and until that objection is sustained, the accusation that the Debtors have shirked their duties by failing to litigate against their senior secured creditors has no merit. The Motion should be seen for what it is: an attempt by the UCC to scuttle the Debtors' plan process before it truly gets off the ground

[1] The 1L Notes Committee's membership is set forth in a Rule 2019 Statement at Dkt. No. 2609.

by wresting control of the very claims that the Debtors propose in their Plan to settle for valuable consideration.

2. *Second*, a number of the UCC's proposed claims seek not lien-avoidance, but rather declarations that liens on certain assets were never granted in the first place. Adjudication of such claims brings no new value into the estate and is necessary only if the Debtors propose to pay unsecured creditors less than that to which they are otherwise entitled; plainly, that is a confirmation issue. In the unlikely event that the Court were to determine that the Debtors' plan does not properly allocate value among classes, or if confirmation were otherwise to be denied, the UCC will have an opportunity to renew its request for derivative standing.

3. *Third*, the few actual avoidance claims alleged by the UCC (including purported claims concerning insurance policies and riverside casinos) are not colorable and would not survive a motion to dismiss.

4. *Finally*, even if the UCC were granted standing to pursue derivative claims, under no circumstances should the UCC be granted sole authority to settle such claims. To rule as the UCC requests not only would short-circuit the entire plan process, but also would improperly invade the Debtors' exclusive authority to propose the current plan or a modified plan and would needlessly engulf this case in premature and unnecessary litigation.

BACKGROUND

5. In the summer of 2014, the Debtors began negotiations with their senior secured creditors regarding the potential terms for a consensual restructuring. On December 19, 2014, after months of intensive bargaining, terms of a restructuring were agreed upon among the

Debtors, CEC[2] and certain holders of the First Lien Notes. Those terms were embodied in a restructuring support agreement (as amended from time to time, the "RSA") and plan term sheet, that over the following month, obtained the support of the holders of approximately 80% of the First Lien Notes.[3] A similar restructuring support agreement was subsequently signed by a majority of first lien bank lenders in August 2015.[4] The Debtors have since filed a chapter 11 plan (the "Plan") based on the Debtors' restructuring support agreements. *See* Notice of Filing of Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code [Dkt. No. 2402]. In addition, an Examiner has been appointed to examine potential estate causes of action, with a report expected in the coming months.[5] The Examiner's report will provide further information to the parties of potential relevance to the Debtors' proposed global settlement.

6. The Debtors' Plan reflects a proposed global settlement of the numerous issues presented in the Debtors' chapter 11 cases, including potential claims against CEC and alleged avoidance actions against first lien creditors. Under the terms of the Plan, among other things, the Debtors will reorganize into an operating company and a real estate investment trust, and reduce their debt load by approximately $10 billion and their annual interest expense by roughly $1.25 billion. To make this restructuring possible, the holders of the First Lien Notes agreed to significant concessions, including: (i) accepting a partial recovery on account of their claims (a

[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion.

[3] *See generally* Caesars Entertainment Corp. Form 8-K (Oct. 8, 2015) (describing the Fifth Amended restructuring support agreement with holders of the First Lien Notes, amending the agreement originally entered into in December of 2014).

[4] *See generally* Caesars Entertainment Corp. Form 8-K (Aug. 24, 2015) (describing restructuring support agreement with holders of bank debt).

[5] The Court has determined to defer consideration of the Debtors' disclosure statement pending release of the Examiner's report.

substantial portion of which will take the form of reorganized equity), (ii) waiving distributions on account of deficiency claims, (iii) waiving turnover rights under various intercreditor agreements, and (iv) consenting to the Debtors' uninterrupted use of first lien collateral in exchange for modest current adequate protection payments.

7. In addition to providing the backbone for a consensual reorganization, the concessions by the holders of the First Lien Notes allow for substantially improved distributions to second lien noteholders and unsecured creditors who will receive consideration under the Plan valued in excess of $1 billion – an amount far more than they reasonably could expect to receive even if they were somehow successful in each of the claims they seek to bring, or in the event of a liquidation of the Debtors. However, if the first lien secured claims were adversely affected through litigation brought by the UCC, the holders of the First Lien Notes would have the right to terminate their plan support obligations, these concessions would evaporate to the detriment of every junior class of creditors in these cases, and the holders of the First Lien Notes could insist on recovery on account of the full amount of their claims.[6]

8. The Final Cash Collateral Order set May 6, 2015 as the deadline for the UCC to object to the secured creditors' liens and claims. The first lien creditors agreed to extend that deadline on several occasions, and had offered to continue to do so when, on August 7, 2015, the UCC opted to file the Motion instead.

9. The Motion seeks derivative standing to commence, prosecute, and settle certain actions that the UCC alleges constitute estate claims, as set forth in a proposed complaint annexed to the Motion (the "**Complaint**").

[6] *See, e.g.*, Final Cash Collateral Order §§ 10(C) & 8(i).

OBJECTION

I. The UCC Cannot Satisfy The Standard For Derivative Standing

10. For the Motion to be granted, the UCC must (i) demonstrate that the Debtors have unjustifiably refused to pursue the identified claims, (ii) establish that such claims are colorable, *and* (iii) obtain leave from the bankruptcy court to prosecute those claims on the estates' behalf. *Matter of Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990); *Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000); *Access Lending Corp. v. Scott (In re Scott)*, Case No. 05-16227, 2006 WL 126757, at *4 (Bankr. N.D. Ill. Jan. 18, 2006). The burden of proving each of these elements lies solely with the UCC. *See, e.g.*, *Enodis Corp. v. Emp'rs Ins. of Wausau (In re Consol. Indus. Corp.)*, 360 F.3d 712, 716 (7th Cir. 2004) ("creditor must show" that elements of test are satisfied); *Larson v. Foster (In re Foster)*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014) (the "party seeking such derivate standing bears the burden of proof"). The UCC, however, has not even remotely carried that burden.

A. The Debtors Have Prudently Negotiated a Proposed Resolution of the Relevant Claims, not Unjustifiably Refused to Bring Them

11. A creditor or fiduciary seeking derivative standing must first establish that a debtor is "shirking [its] statutory responsibilities" by not actively litigating the identified claims. *Matter of Xonics Photochemical, Inc.*, 841 F.2d 198, 203 (7th Cir. 1988). "[A]t a minimum," the movant "must provide the bankruptcy court with *specific* reasons why it believes the trustee's refusal [to litigate] is unjustified." *PW Enters., Inc. v. N.D. Racing Comm'n (In re Racing Servs., Inc.)*, 540 F.3d 892, 900 (8th Cir. 2008).

12. Such a showing requires a cost-benefit analysis; otherwise the debtor's performance of its statutory duties cannot be evaluated. *See, e.g., In re Archdiocese of Milwaukee*, 483 B.R. 855, 869 (Bankr. E.D. Wis. 2012) ("the determination of whether the

trustee unjustifiably refuses to bring a creditor's proposed claims will require bankruptcy courts to perform a cost-benefit analysis.") (citation omitted); *Weyandt v. Fed. Home Loan Mortg. Corp. (In re Weyandt)*, 544 F. App'x 107, 110 (3d Cir. 2013) (affirming denial of derivative standing where claim "would bring no benefit to the estate"); 7 Collier on Bankruptcy ¶ 1109.05[2][c] (16th ed.) ("the claim, if successful, must be one that will benefit the estate"). In conducting this analysis, courts consider the probability of success in litigation, potential financial recovery, expenses which could be incurred and the delay in case administration. *In re Archdiocese of Milwaukee*, 483 B.R. at 869; *see also Official Comm. of Asbestos Claimants v. Bank of N.Y. (In re G-I Holdings, Inc.)*, No. 04-3423, 2006 U.S. Dist. LEXIS 45510, at *38-52 (D.N.J. June 21, 2006) (vacating grant of derivative standing in absence of "detailed factual findings" that estate would benefit).

13. Importantly, courts have also recognized that, as here, "when a debtor is settling the proposed litigation in its plan, the refusal to bring the litigation is not unjustified." Oral op. at 11:12-17, *In re Colt Holding Co., LLC*, Case No. 15-11296 (Bankr. D. Del. Oct. 7, 2015) (attached as Exhibit A hereto) (citing *Vill. of Overland Pointe, LLC v. Terra Bentley II, LLC (In re Terra Bentley II, LLC)*, Case No. 09-23107-11, 2011 WL 808190, at *6 (Bankr. D. Kan. Mar. 2, 2011)).

14. Here, although the UCC complains that the Debtors agreed not to pursue these claims in the Final Cash Collateral Order, it offers no reason why that decision was questionable, let alone a violation of a fiduciary duty. *See* Motion ¶¶ 69-70. To the contrary, before the petition date, intensive, arm's length negotiations occurred between the Debtors and their senior secured creditors regarding the consensual use of cash collateral and the terms of a chapter 11 reorganization. The parties eventually agreed to a global settlement, pursuant to which the

holders of the First Lien Notes agreed to a partial recovery on account of their claims, a substantial portion of which will take the form of equity interests in a real estate investment trust – a result that could not be imposed under section 1129(b) of the Bankruptcy Code. As part of that settlement, the holders of the First Lien Notes also agreed to waive deficiency claims and turnover rights under certain intercreditor agreements and to permit the Debtors to continue to use their collateral in exchange for below-market adequate protection payments. Those concessions will enable second lien noteholders and unsecured creditors to receive in excess of $1 billion under the proposed Plan, which is more than what such creditors could hope to obtain through the litigation alternative that the UCC seeks standing to pursue through its Motion. The Debtors (and the other parties to the Debtors' restructuring support agreements) should be afforded an opportunity to demonstrate to the Court in connection with confirmation that the settlements embodied in the restructuring support agreements and related Plan are in the best interests of the Debtors' estates.

15. In addition, the Motion does not allege – let alone prove – that the estates would obtain any particular benefits from the UCC's alleged claims or that such benefits would outweigh the associated costs. The UCC makes no attempt to demonstrate the value of the individual claims and the extent to which the estates might be augmented by pursuit of the claims. Indeed, as explained further below, many of the claims simply seek a declaration that a particular asset is unencumbered – by definition such a claim does not bring any value into the estates. Perhaps more importantly, the UCC provides no estimate regarding the *costs* of litigation – both direct (*e.g.*, fees) and indirect (*e.g.*, the loss of the concessions embodied in the RSA and related Plan, and the substantial costs associated with a restructuring process that lacks the consent of the Debtors' first lien creditors). *See, e.g.*, *In re Archdiocese of Milwaukee*, 483

B.R. at 869 ("The first element of a cost-benefit analysis is cost.").

16. Finally, the UCC ignores that proposing a plan that settles disputed claims, by definition, does not equate to "unjustifiable refusal" and cannot support derivative standing. *See Colt*, at 11:12-17 (attached as Exhibit A). Indeed, the UCC does not even allege, much less offer proof, that the proposed settlements provided for in the Debtors' Plan will provide unsecured creditors with inadequate consideration. Unless the settlement would result in inadequate consideration, litigation of these claims would not make sense. In any event, the adequacy of the settlement is plainly an issue more appropriately asserted in connection with plan confirmation.

17. As this Court has previously recognized, these cases are complex and contentious. *See* Oct. 21, 2015 Hr'g Tr. at 4-5. The Debtors' proposed Plan provides an opportunity to avoid significant litigation through pursuit of a global settlement. Before granting the UCC derivative standing to pursue the piecemeal litigation alternative, the Court should consider the propriety and viability of that settlement at confirmation. During the confirmation process, the UCC may argue that the Plan provides inadequate value to unsecured creditors. Given the pendency of the Plan process, there is no basis to authorize the UCC to prematurely litigate that very same issue now. The Motion should therefore be denied without prejudice to the UCC's ability to renew it if the global resolution of claims embodied in the Debtors' Plan is not confirmed by the Court.

B. The UCC Has Not Stated Colorable Claims

i. <u>The UCC Has No Intention of Pursuing Several Counts of Its Proposed Complaint</u>

18. As an initial matter, the UCC has acknowledged that it will not pursue challenges to the first lien creditors' liens on equity and membership interests held by the Debtors or on the Debtors' intellectual property (Complaint Counts VII and X). The UCC has also agreed to address the concerns raised in Counts XI and XV (concerning recourse and Section 1111(b) of

the Bankruptcy Code) in a separate contested matter initiated by claims objections. *See* Dkt. No. 2539. Two additional counts are only asserted against second lien lenders and their collateral agent (Complaint Counts II and III). Because the UCC is not seeking derivative standing to pursue these six counts against the first lien creditors, they need not be addressed in this objection.

ii. Five of the UCC's Remaining Claims Should Be Deferred

19. Of the remaining nine counts, five do not pose any possibility of bringing new value into the estates. They are instead requests for declarations regarding the scope of the first lien lenders' secured claims, which are intimately tied to the allocations set forth in the Debtors' Plan (which itself seeks to implement the global settlement). As such, this is a matter more properly considered at confirmation. Specifically:

- **Count I (Commercial Tort Claims)**: The UCC seeks to "avoid" liens on commercial tort claims that (i) constitute fraudulent transfer claims, (ii) arose after the grant of security interests on September 25, 2014, and (iii) are described in terms that are allegedly too general. Motion ¶¶ 38-46; Complaint ¶¶ 27-41. But it makes no sense to "avoid" liens that allegedly *did not attach* to certain assets in the first place.[7]

- **Counts V and VI (Regulatory Licenses)**: The UCC alleges that, under the Collateral Agreements, security interests were only granted on regulatory licenses "to the extent such grant would not violate applicable gaming laws," and that certain liens were not granted in accordance with those laws. Motion ¶ 50; Complaint ¶¶ 65, 67, 72, 74. As with Count I, these counts are not properly viewed as "avoidance" actions because the relevant assertion is that no liens attached in the first place.

- **Count IX (Real Property)**: The Complaint identifies several properties as to which it alleges the Collateral Agent's mortgage documents "are not duly recorded." Complaint ¶ 90. It is not clear from the allegations in this count whether the UCC is seeking a determination that mortgages were never granted, or that they were not properly recorded. In either event, this count, like the other claims identified in this section, is more properly addressed at confirmation, as explained below.

[7] Notably, the description in the security documents of the specific commercial tort claims on which the first lien creditors *do* have liens is entirely consistent with what is required under the Uniform Commercial Code to grant and perfect a security interest in a commercial tort claim. *See, e.g., Helms v. Certified Packaging Corp.*, 551 F.3d 675, 681 (7th Cir. 2008).

- **Count XIII (Subsidiary Pledgor Stipulation)**: The UCC alleges that certain Debtors were not parties to the First Lien Financing Documents and thus should not be considered "Subsidiary Pledgors" for purposes of the stipulations that bind the "Subsidiary Pledgors." Complaint ¶¶ 116-125. However, the Plan that is on file provides for payment *in full* (plus post-petition interest) of unsecured creditors of the "Non-Obligor Debtors" (as defined in the Plan). *See* Plan Art. III.B.9 [Dkt. No. 2402]. This underscores the notion that the UCC's issues should be considered as part of the plan confirmation process.

20. In each of the aforementioned counts, the UCC does *not* allege that security interests were granted but were unperfected on the petition date; instead, the UCC alleges that no security interests exist in these assets. As a result, and even if the UCC is correct, there is nothing to avoid, preserve, or otherwise regain for the benefit of the estates.[8] If anything, the UCC has outlined an objection to the allowance of a portion of an overall secured claim that is resolved in the global settlement. If the UCC indeed has an objection to the allowance or treatment of any secured claims under the Plan, it should raise those objections in connection with confirmation. Seeking derivative standing to litigate issues that are more appropriately litigated in connection with confirmation needlessly wastes the parties' and the Court's resources.[9]

iii. Four of the UCC's Remaining Counts Are Not Colorable

21. Only four of the UCC's counts arguably seek to actually avoid liens in a manner consistent with the corresponding allegations: Counts IV (Insurance Policies), VIII (Riverboats), XII (Lien Stipulation), and XIV (Fee and Charge Stipulation). But the UCC has not carried its burden of demonstrating that these claims are "colorable."

22. In deciding whether a claim is colorable, the court should undertake "the same

[8] Incongruously, avoidance and recovery are nevertheless the only relief sought in the UCC's complaint. Complaint ¶¶ 41, 69, 76, 73; *see also* Complaint at pp. 31-34 (Prayer for Relief).

[9] The First Lien Notes Parties therefore will not address the merits of these objections now, and reserve the right to do so at a more appropriate time.

analysis as when a defendant moves to dismiss a complaint for failure to state a claim." *Walnut Creek Mining Co. v. Cascade Inv., LLC (In re Optim Energy, LLC),* 527 B.R. 169, 173 (D. Del. 2015) (citation omitted). To survive a motion to dismiss, an avoidance claim must "set forth sufficient facts that, if true, would establish the unperfected status of the lien sought to be avoided." *In re D'Angelo*, 491 B.R. 395, 403 (E.D. Pa. 2013). To meet this pleading requirement, a claimant must, among other things, actually identify the assets to which the allegedly unperfected liens pertain. *See In re Archdiocese of Milwaukee*, 483 B.R. 693, 697 (Bankr. E.D. Wis. 2012) ("the Court is not bound to accept as true legal conclusions couched as factual allegations, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements will not suffice.") (citation and internal quotation marks omitted).

23. With respect to its two true avoidance actions, the UCC has failed to meet even this minimal pleading burden:

- **Count IV (Insurance Policies)**: The UCC observes that the first lien creditors were granted a lien on "general intangibles," which includes insurance policies. Motion ¶ 49; Complaint ¶ 59. The UCC alleges that insurance policies and claims are excluded from Article 9 of the UCC, and must be perfected under state insurance law, which the UCC says has not occurred. Motion ¶ 49; Complaint ¶¶ 60-61. The UCC admits, however, that insurance that constitutes "proceeds" of other Article 9 collateral (such as commercial tort claims) is not excluded from the scope of Article 9. Motion ¶ 49. But, the UCC fails to identify any *specific insurance policies* that (a) would not be considered proceeds of other collateral and (b) were not otherwise perfected under state insurance law. Without these basic facts, there can be no "colorable" claim; nor can the Court make an informed assessment of the claim's potential value.

- **Count VIII (Riverboats)**: The UCC observes that liens were granted on certain dockside casinos, and says it is investigating whether maritime or real property mortgages were filed. Motion ¶¶ 55-57. This claim is based on the premise that "[i]f the Riverboat Casinos constitute 'vessels' under federal law, perfection of security interests therein is accomplished by filing a ship mortgage." Motion ¶ 55. (citing 46 U.S.C. § 31321(a)(1)). But the UCC has misread federal law, which only requires a ship mortgage to be filed for "documented vessels" (or vessels "for which an

application for documentation is filed").[10] And setting aside whether these casinos are "vessels" (which the First Lien Notes Parties dispute), the UCC does not even allege any is "documented" (or that an application for documentation was filed). Therefore, the assertion that ship mortgages are required is not colorable.

24. The UCC's allegations with respect to its claims for declaratory relief are similarly flawed:

- **Count XII (Lien Stipulation)**: In Count XII, the UCC alleges that the stipulation that the liens granted to the first lien creditors are "valid, binding, enforceable, non-avoidable, and properly perfected" is inaccurate. Motion ¶ 63; Complaint ¶¶ 109-115. The allegations in this Count are based exclusively on the existence and alleged accuracy of Counts I and IV-X. Complaint ¶¶ 112-113. But as explained above, these Counts are not colorable, are not currently being pursued by the UCC, or should otherwise be deferred. As such, they cannot serve as the predicate for Count XII.

- **Count XIV (Fee and Charge Stipulation)**: In Count XIV, the UCC argues that the stipulations concerning the allowance of the first lien creditors' claims for certain fees, costs, and other charges owed under the credit documents are "inaccurate" given that section 506(b) of the Bankruptcy Code only permits *postpetition* fees, costs, and other charges to be treated as secured claims to the extent they are owed to an oversecured creditor. Motion ¶ 65. But the stipulations challenged by the UCC pertain solely to the Debtors' obligations *as of the petition date*. *See* Final Cash Collateral Order ¶¶ E(i)(d), (ii)(c), (iii)(c), (iv)(c). As such, section 506(b), which "governs the allowance of postpetition interest, fees, costs and charges as part of a secured claim," is irrelevant. 4 *Collier on Bankruptcy* ¶ 506.04 (16th ed.). In addition, the UCC has not articulated any factual allegations that would place these stipulations in doubt.

II. The UCC Should Not Be Granted Exclusive Authority to Settle

25. Even if the UCC's request for derivative standing were somehow to be granted, its additional request for the *exclusive* authority to settle must, in any event, be denied. Such relief is contrary to the express terms of the Bankruptcy Code and Rules, unsupported by precedent, and would inappropriately interfere with the plan confirmation process.

26. As an initial matter, the UCC's request for exclusive authority to settle is in

[10] 46 U.S.C. § 3132 (requirements for granting liens on documented vessels); 46 U.S.C. § 106 (defining "documented vessels," with reference to filing documentation with office of U.S. Coast Guard); 46 U.S.C. §§ 12101-12152 (criteria and procedures for certificates of documentation by the National Vessel Documentation Center within the U.S. Coast Guard).

tension with Bankruptcy Rule 9019, which authorizes a court to approve the compromise or settlement of estate claims or causes of action upon a motion "*by the trustee*." In construing the Bankruptcy Code, the Supreme Court has observed that powers expressly vested in "the trustee" or debtor-in-possession cannot be coopted by others. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) (construing section 506(c) of the Bankruptcy Code). Relying on *Hartford Underwriters*, courts have recognized that, in the usual case, parties-in-interest cannot utilize Bankruptcy Rule 9019 to "usurp the debtor-in-possession's role as legal representative of the estate." *Smart World Techs. LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 182 (2d Cir. 2005) (holding derivative standing for purposes of settlement was improper).

27. The UCC's request is also in tension with section 1123 of the Bankruptcy Code, which provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Settlements proposed under that section are tested by the same standard that is applied with respect to settlements under Bankruptcy Rule 9019. *In re Aleris Int'l, Inc.*, No. 09-10478, 2010 Bankr. LEXIS 2997, at *60 (Bankr. D. Del. May 3, 2010) ("When evaluating a settlement under section 1123(b)(3)(A), courts apply the same standard as applied under Bankruptcy Rule 9019."); *In re Lionel L.L.C.*, No. 04-17324, 2008 Bankr. LEXIS 1047, at *52 (Bankr. S.D.N.Y. Mar. 31, 2008) (approving settlement agreement "pursuant to section 1123(b)(3)(A) as satisfying the standards for approval under Bankruptcy Rule 9019(a)," on grounds including that the settlement represented "an exercise of sound business judgment by the Debtors.").

28. Courts have recognized that section 1123 of the Bankruptcy Code permits a debtor to compromise ongoing litigation of estate claims in a proposed plan, even *after* another

party has been granted derivative standing to prosecute those claims. *See, e.g.*, *In re Exide Techs.*, 303 B.R. 48, 67 (Bankr. D. Del. 2003) (rejecting argument that debtor lacked ability to settle, via plan, derivative claims brought by committee); Hr'g Tr. at 39:11-40:15, *In re Quicksilver Res. Inc.*, No. 15-10585 (LSS) (Bankr. D. Del. Nov. 3, 2015), ECF No. 864 (denying UCC's motion for exclusive authority to settle certain causes of auction notwithstanding the grant of a derivative standing in connection therewith); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 312 (Bankr. W.D. Pa. 1990) ("This court by confirming the debtor's plan and agreeing to this settlement binds the [equity committee that brought derivative action].").

29. A handful of decisions nevertheless suggest in dicta that a debtor might *theoretically* be stripped of its ownership of estate causes of action and the ability to settle, but even those courts emphasize that such a result would only arise in rare circumstances, and that misconduct or unjustifiable behavior by the debtor would be required. *See, e.g.*, *Smart World Techs.*, 423 F.3d at 177 ("We do not rule out that in certain, *rare* cases, *unjustifiable behavior* by the debtor-in-possession may warrant a settlement over the debtor's objection, but this is not such a case.") (emphases added); *Official Comm. of Equity Holders v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 371 B.R. 660 (S.D.N.Y. 2007) ("[A] debtor-in-possession may assert control over an adversary proceeding notwithstanding a committee's derivative standing, where that standing was granted for reasons other than debtor *misconduct*.") (emphasis added).[11]

[11] The UCC identified only three cases in which a debtor has actually been divested of its inherent authority to settle estate claims. Motion ¶ 72. In each case, the debtor either supported or did not contest the creditors' committee's motion for exclusive authority to settle. Hr'g Tr. at 43:4-13, *In re Evergreen Solar, Inc.*, No. 11-12590 (MFW) (Bankr. D. Del. Oct. 25, 2011), ECF No. 373-3 (debtor acknowledged that creditors' committee should "speak for the debtor" on issues in complaint); *In re Majestic Capital, Ltd.*, No. 11-36225 (CGM) (Bankr. S.D.N.Y. Dec. 12, 2011), ECF No. 211 at 2 ("the Debtors do not object to the Committee being granted the

30. The UCC has not alleged that the Debtors are guilty of any misconduct or unjustifiable behavior with respect to the first lien creditors' claims, nor could it credibly do so. The request to strip the Debtors' inherent powers under section 1123 and Bankruptcy Rule 9019 should be denied on this basis alone. Furthermore, the Debtors have already exercised their right to seek settlement of estate claims through their proposed Plan. Granting the UCC exclusive settlement authority at this stage would undercut the Plan and negate all confirmation efforts to date, without ever giving creditors a chance to vote. Such a result would turn the Bankruptcy Code on its head and effectively condition the Debtors' statutory right to propose a plan of reorganization upon the UCC's consent, or it would limit that right to plans premised on litigation with their secured creditors. This is not and cannot be the law, and the UCC offers no explanation, let alone precedent, for such a radical result.

WHEREFORE the First Lien Notes Parties respectfully request that the Motion be denied without prejudice.

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relief requested in the Motion"); Hr'g Tr. at 19:8-13, *In re Old CarCo LLC (F/K/A Chrysler LLC)*, No. 09-50002 (AJG) (Bankr. S.D.N.Y. Aug. 13, 2009), ECF No. 5307 ("Oldco rises in support of the motion."). The cases cited by the UCC thus stand in stark contrast to this case, where the Debtors not only oppose the UCC's motion for exclusive authority to settle, but have also already exercised their own inherent power to propose settlements in a chapter 11 plan.

Dated: November 20, 2015

/s/ Mark A. Berkoff
Mark A. Berkoff (ARDC #06194787)
Robert Radasevich (ARDC #06180383)
Nicholas M. Miller (ARDC #06295723)
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street, Suite 1700
Chicago, Illinois 60602-3801
Ph: (312) 269-8000

-and-

Kenneth H. Eckstein (admitted *pro hac vice*)
Douglas H. Mannal (admitted *pro hac vice*)
Daniel M. Eggermann (admitted *pro hac vice*)
David E. Blabey Jr. (admitted *pro hac vice*)

KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
Ph: (212) 715-9100

Counsel to 1L Notes Committee

/s/ Peter A. Siddiqui
Peter A. Siddiqui (ARDC # 6278445)
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661-3693
Ph: (312) 902-5200

-and-

Craig A. Barbarosh (admitted *pro hac vice*)
David A. Crichlow (admitted *pro hac vice*)
Karen B. Dine (admitted *pro hac vice*)
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022-2585
Ph: (212) 940-8800

Counsel to 1L Notes Trustee

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	.	Chapter 11
IN RE:	.	
	.	Case No. 15-11296 (LSS)
COLT HOLDING COMPANY, LLC,	.	
et al,	.	Courtroom No. 2
	.	824 Market Street
Debtors.	.	Wilmington, Delaware 19801
	.	
. . . . .	.	Wednesday, October 7, 2015

TRANSCRIPT OF COURT DECISION RE:
MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER GRANTING THE COMMITTEE:
(A) DERIVATIVE STANDING TO ASSERT, PROSECUTE, AND SETTLE CLAIMS ARISING OUT OF THE DEBTORS' LEASE OF THE WEST HARTFORD FACILITY WITH NPA HARTFORD, LLC;
AND (B) AUTHORIZATION TO HOLD, ASSERT, AND (IF NECESSARY) WAIVE PRIVILEGES ON BEHALF OF THE ESTATES
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Jason M. Madron, Esq. RICHARDS, LAYTON & FINGER, PA 920 North King Street Wilmington, Delaware 19801
	Gary Svirksy, Esq. O'MELVENY & MYERS, LLP Times Square Tower Seven Times Square New York, New York 10036
(Appearances Continued)	
Audio Operator:	Electronically Recorded by Ginger Mace, ECRO
Transcription Company:	Reliable 1007 N. Orange Street Wilmington, Delaware 19801 (302)654-8080 Email: gmatthews@reliable-co.com

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APPEARANCES: (Continued)

For Magpul Industries: Marc J. Phillips, Esq.
MANION, GAYNOR & MANNING, LLP
1007 North Orange Street
Wilmington, Delaware 19801

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(Proceedings commence at 10:03 a.m.)

(Call to the Order of the Court)

THE COURT: Please be seated.

MR. MADRON: Good morning, Your Honor.

THE COURT: Good morning.

MR. MADRON: For the record, Jason Madron, of Richards Layton & Finger, on behalf of Colt Holding Company LLC and its Chapter 11 debtor affiliates.

Your Honor, I'm joined today at counsel table by Gary Svirsky --

THE COURT: Yes.

MR. MADRON: -- of the O'Melveny & Meyers firm.

Your Honor, I'll turn to the agenda that we filed with respect to today's hearing. Our part, I think, today will be very brief.

Agenda Item Number 1, as I had made mention to Your Honor at last Friday's hearing is the debtors' motion for approval of a key employee incentive plan, and as I had referenced, that matter has been adjourned again and is now scheduled to take place at our October 20th, omnibus hearing in these cases.

Your Honor, Agenda Item 2 is the debtors' motion seeking an extension of its 365(d)(4) periods, with respect to unexpired non-real property leases, pardon me. We filed that motion last month, Your Honor. It was unopposed.

And as I, again, had referenced at last week's hearing, there were revisions to the order that were necessitated based on the agreed extension of the Hartford lease expiration date. We did prepare a revised form of order that was submitted under certification of counsel yesterday morning, and this morning, I was advised by Your Honor's chambers that Your Honor did have a chance to review that submission and that order has been signed.

THE COURT: Yes.

MR. MADRON: So we thank you for that.

With that, Your Honor, it then quickly brings us to the tail-end of the agenda, which as Your Honor had requested last week, we kept today's hearing on so we can hear from Your Honor on the committee's motion for derivative standing.

THE COURT: Yes, thank you.

MR. MADRON: Thank you.

THE COURT: And, as promised, I am prepared to give my ruling with respect to the committee's motion for derivative standing to assert, prosecute, and settle claims related to the debtors' lease of the West Hartford facility with NPA Hartford. For the reasons that I will go through, I will not grant the motion today, but the denial is without prejudice, to be raised again at a later date.

As the parties know, the pervasive issue in this case, which distinguishes it from most Chapter 11 proceedings is the

imminent expiration of the lease for the West Hartford facility, which houses the debtors' U.S. manufacturing facilities. While there are operations in Canada, the vast majority of production takes place in West Hartford.

Subject to arguments which the committee makes as of the petition date, which was June 14th, 2015, the lease was set to expire by its terms on October 25th, 2015. Extensions have been granted by the landlord, such that as of the commencement of the hearing on the standing motion, the expiration date of the lease was December 4th, 2015.

Mr. Maib, debtors' CRO, stated in his first-day declaration, in support of the filing of the petitions, that continuity of the West Hartford facility for a minimum of three years is critical to the ongoing viability of the debtor. He further stated that relocation of the debtors' facilities would take a minimum of two to three years and require tens of millions of dollars of incremental investment.

Further, the facility is specifically configured for gun production and any new facility would need zoning and regulatory approvals. It would be an understatement to say that the lease expiration has driven this case, but the further complicating factor is the presence of Sciens on the debtors' governing board and its management of the landlord.

Sciens, as the debtors' equity sponsor, appointed members to debtors' board, specifically, Mr. Standen, who is

chairman of the board, has been a Sciens partner since 2000, and Mr. Rigas, who was a manager of the debtors' board, is also the chairman and CEO of Sciens.

On the landlord's side, Mr. Standen and Mr. Rigas own and control the landlord's managing agent, NPA Management. The debtors have indicated that an independent committee has been formed to deal with certain issues involving the debtors' restructuring. And the landlord has stated that a member, other than NPA Management, namely, Volnak (phonetic), has sole and final decision-making authority, with respect to the renewal of the lease with Colt or the entry of a lease with a third party. Nonetheless, without the benefit of an evidentiary hearing, it is not clear to the Court how much influence, if any, Sciens continues to have over both, the debtors and the landlord.

The company came in with a 363 sale motion with Sciens as a stalking horse bidder. That sale motion has now given way to discussions, which have resulted in a draft and, as yet unsigned, plan termsheet, and restructuring support agreement. Assuming finalization of the current termsheet, the signatories to the restructure and support agreement will be Sciens, certain prepetition noteholders who became DIP lenders post-petition by acquiring prepetition secured debt, the landlord, and the debtors.

As of the hearing, Morgan Stanley, holder of secured

prepetition debt was not onboard with the termsheet and there had been no negotiations with the committee.

It is not clear to the Court whether the debtors are playing a leadership role in the current negotiations or a more passive role.

The committee filed its motion on August 28th. By the motion, the committee seeks to obtain derivative standing and related relief to that it may sue, on the debtors' behalf, Sciens, the landlord, Mr. Standen, Mr. Rigas, NPA Management, Volnak, and Mr. Smalden (phonetic).

The complaint sounds in six counts, namely, breach of fiduciary duties against Mr. Standen, Mr. Rigas, and Sciens; aiding and abetting breach of fiduciary duties against NPA Hartford, NPA Management, Volnak, and Mr. Smalden; avoidance of an amendment to the debtors' LLC agreement; tortious interference with an existing and prospective business relationships against Sciens, NPA Management, Volnak, Mr. Standen, Mr. Rigas, and Mr. Smalden; and two claims for injunctive relief against the landlord.

The claims for injunctive relief asks this Court to prevent the landlord from evicting the debtors at the expiration of the term of the lease under theories of equitable estoppel, and/or the implied covenant of good faith and fair dealing. The Court heard argument on October 2nd.

The Third Circuit in its Cybergenics v Chinery

decision recognized that the Court may authorize a creditors' committee to bring actions on behalf of the estate to recover property for the benefit of the estate. The action at issue in Cybergenics was a fraudulent conveyance action. Avoidance actions and beach of fiduciary duty actions are the types of claims that committees often seek derivative standing to pursue. In that regard, the first counts of the committee's draft complaint in this action are typical. The request for injunctive relief, with respect to the lease, is not typical. While the Cybergenics Court recognized derivative standing, it did not set out the particular criteria used to determine whether derivative standing should be conferred.

Courts in this circuit have variously expressed the standard as follows: Judge Carey, in his Centaur decision, expressed the standard as:

> "Entitlement to derivative standing requires, one, a colorable claim; two, that the trustee unjustifiably refused to pursue, and, three, permission of the bankruptcy court to initiate the action."

Judge Shannon's recitation of the standard in his decision in Optim is very much the same.

Judge Winfield, in her One2One Communications decision, listed criteria that Courts use as:

> "One, a demand on the statutorily authorized party to act; two, a refusal by that party; three, the

existence of a colorable claim that would benefit the estate on a cost-benefit analysis performed by the Court, and four, a determination that the refusal is not in keeping with the statutorily authorized parties' duties."

In this case, at this time, the gatekeeping issue is whether the debtors have unjustifiably refused to bring the causes of action that are delineated in the committee's draft complaint. The committee has aptly noted the connections between the debtors, Sciens, and the landlord, which would make the Court question the ability of the debtors to effectively sue Sciens or the landlord, and, clearly, the debtors are not bringing those actions.

Debtors also insist that certain of the causes of the action are not colorable, but debtors' primary argument now is that the best way to exit the case is through a plan of reorganization, which they have represented, will be filed sometime this week.

The committee, on the other hand, believes the best way to maximize recoveries is through the litigation, resulting in an injunction. The committee believes that obtaining the injunction would either result in a truly global settlement that includes the committee's constituency or bring other parties to the table willing to purchase the debtor or make further investment. The committee states that either of those

results would be better than the current draft termsheet, which it asserts, provides little, if any, real value to general unsecured creditors who will not or cannot make a further investment Colt.

While it is true that the debtors are not pursuing litigation against the landlord, Sciens, or the individual proposed defendants, the draft termsheet circulated to the parties and the Court settles the causes of action the committee wishes to bring. It also gives debtors optionality, with respect to the lease, a five-year lease two, two-year renewal options, or a purchase of the building.

In a somewhat similar posture, the Court, in Terra Bentley II, LLC, 2011 WL 808190, held that when a debtor is settling the proposed litigation in its plan, the refusal to bring the litigation is not unjustified. Indeed, the Terra Bentley Court questioned whether there was a refusal at all.

The Terra Bentley Court's conclusion is persuasive; although it is unclear to me how involved the debtors are in the actual negotiations of the termsheet, restructuring support agreement and plan, at the very least, debtors are supporting the negotiations of the resolution of these issues. And while the debtors are not bringing the causes of action and are affirmatively opposing the committee's request to do so, the causes of action, and in particular, the expiration of the lease are being addressed, thus, I find, that even assuming

there is a refusal to bring the causes of action at this time, such refusal is not unjustifiable.

Further, in the event that the draft termsheet does not result in a filed plan or any filed plan is not confirmed, there is time for the committee to renew its motion and for litigation to ensue. At the hearing, the landlord indicated its willingness to extend the term of the lease through January 31, 2016. While it was stated in more of a quid pro quo for denying the motion, I will view it as a goodwill gesture to give the consensual process, of which it is a part, time to play out. The extension through January 31, 2016, should be appropriately documented.

As I am denying the committee's motion on the grounds I've stated, I need not address the remaining requirements for standing or the other relief sought, similar to the way Judge Shannon handled the Optim matter.

That being said, it is evident that the committee needs to be brought into the process in order for there to be a global resolution of this case and to avoid costly litigation, which the debtors have represented to the Court they can ill afford. While the Court denied the committee's motion today, that should not be taken as an endorsement of the draft termsheet or an indication that the committee's draft complaint does not have merit.

The committee has raised issues with respect to the

involvement of Sciens in the process, the determination of the consideration its constituency will receive under the proposed termsheet in light of what it was offered only a few months ago, and the general confirmability of the plan, all of which portend significant plan-related discovery and litigation. The result of that litigation is uncertain.

It should be no surprise to anyone in this courtroom that I expect good faith negotiations with the committee regarding an appropriate resolution of this case. And that conclusion my ruling.

Are there any questions?

MR. MADRON: No, Your Honor.

MR. PHILLIPS: No, Your Honor.

THE COURT: Thank you.

We stand adjourned.

(Proceedings concluded at 10:18 a.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

/s/ William J. Garling October 7, 2015

William J. Garling

AAERT-Certified Court Transcriptionist

For Reliable

CERTIFICATE OF SERVICE

Mark A. Berkoff, an attorney, certifies that on November 20, 2015, he caused the ***First Lien Notes Parties' Joint Objection to UCC Standing Motion*** to be filed electronically using the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

The following is the list of parties who are currently on the list to receive email notice/service for this case:

- David A Agay dagay@mcdonaldhopkins.com, mbrady@mcdonaldhopkins.com, lburrell@mcdonaldhopkins.com, mgupta@mcdonaldhopkins.com, bkfilings@mcdonaldhopkins.com
- Charles G Albert calbert@awm-law.com
- Angela M Allen aallen@jenner.com
- R Scott Alsterda rsalsterda@nixonpeabody.com
- Jeffrey E Altshul jaltshul@carlsondash.com, kidstein@carlsondash.com
- Rick Amos amoslaw@cableone.net
- Margaret M Anderson panderson@fslc.com, cjelks@fslc.com, abouse@fslc.com, bkdocket@fslc.com
- George P Apostolides gpapostolides@arnstein.com, jbmedziak@arnstein.com
- Edmund Aronowitz earonowitz@gelaw.com, alebdjiri@gelaw.com
- Amy A Aronson amyaronson@comcast.net,
- Brian A Audette baudette@perkinscoie.com, nsaldinger@perkinscoie.com, docketchi@perkinscoie.com
- Jason Bach jbach@bachlawfirm.com, aloraditch@bachlawfirm.com, sandra.herbstreit@bachlawfirm.com
- Joseph A Baldi jabaldi@baldiberg.com, jmanola@baldiberg.com
- Ronald Barliant ronald.barliant@goldbergkohn.com, kristina.bunker@goldbergkohn.com
- William J. Barrett william.barrett@bfkn.com, mark.mackowiak@bfkn.com, gregory.demo@bfkn.com
- Leslie Allen Bayles leslie.bayles@bryancave.com
- Richard M Bendix rbendix@dykema.com
- Bruce Bennett bbennett@jonesday.com, kfloyd@jonesday.com, slevinson@jonesday.com, dciarlo@jonesday.com
- Michael T. Benz benz@chapman.com, eickmann@chapman.com
- Peter L Berk plberk@berklegal.com, hmilman@berklegal.com
- Mark A Berkoff mberkoff@ngelaw.com, cdennis@ngelaw.com, ecfdocket@ngelaw.com, mmirkovic@ngelaw.com
- Christopher M Cahill ccahill@lowis-gellen.com, abockman@lowis-gellen.com
- Andrew D Campbell acampbell@novackmacey.com
- John P Carlin jcarlin@changandcarlin.com, changcarlin@iamthewolf.com
- Kurt M Carlson kcarlson@carlsondash.com, knoonan@carlsondash.com
- Marc J Carmel marccarmel@paulhastings.com
- Timothy R Casey timothy.casey@dbr.com

- Steven B Chaiken schaiken@ag-ltd.com, lhope@ag-ltd.com
- Scott R Clar sclar@craneheyman.com, mjoberhausen@craneheyman.com, asimon@craneheyman.com
- Christopher Combest christopher.combest@quarles.com, Faye.Feinstein@quarles.com, Sarah.Baker@quarles.com
- Phillip Coover pcoover@satcltd.com
- Ryan Dahl ryan.dahl@kirkland.com, david.eaton@kirkland.com, michael.weitz@kirkland.com, joe.graham@kirkland.com
- Ryan A Danahey rad@doherty-progar.com
- Debra Dandeneau debra.dandeneau@weil.com, dana.kaufman@weil.com, david.griffiths@weil.com, lori.seavey@weil.com
- Aaron Davis aaron.davis@bryancave.com, CHDocketing@bryancave.com, kathryn.flaherty@bryancave.com, thomas.schell@bryancave.com
- Denise A Delaurent USTPRegion11.es.ecf@usdoj.gov, denise.delaurent@usdoj.gov, maria.r.kaplan@usdoj.gov
- Maria A Diakoumakis mdiakoumakis@dykema.com, DocketCH@dykema.com
- Chris L Dickerson chris.dickerson@dlapiper.com, jeremy.hall@dlapiper.com, jonathan.pfleeger@dlapiper.com
- Ira S Dizengoff idizengoff@akingump.com, srochester@akingump.com, jrubin@akingump.com, apreis@akingump.com, tyhong@akingump.com
- Kevin W Doherty kwd@doherty-progar.com
- David R Doyle ddoyle@shawfishman.com, kjanecki@shawflshman.com
- Devon J Eggert deggert@freeborn.com, bkdocketing@freeborn.com jhazdra@ecf.inforuptcy.com
- Robert E. Eggmann reggmann@demlawllc.com, whickey@demlawllc.com, cgant@demlawllc.com, reggmann@ecf.inforuptcy.com
- William J Factor wfactor@wfactorlaw.com, wfactorlaw@gmail.com, gsullivan@wfactorlaw.com, gsullivan@ecf.inforuptcy.com, wfactor@ecf.inforuptcy.com, nbouchard@wfactorlaw.com
- Thomas R. Fawkes tfawkes@freeborn.com, bkdocketing@freeborn.corn jhazdra@ecf.inforuptcy.com
- Daniel A Fliman courtnotices@kasowitz.com
- Joseph D Frank jfrank@fgllp.com, ccarpenter@fgllp.com, Jkleinman@fgllp.com
- Jamie S Franklin jsf@thefranklinlawfirm.com
- Jonathan P Friedland jfriedland@lplegal.com, jthompson@lplegal.com
- Richard Gallena rgallena@orrick.com
- Mary Anne Gerstner gerstlaw2@sbcglobal.net
- Gregory M Gartland ggartland@winston.com
- Mary Anne Gerstner gerstlaw2@sbcglobal.net
- Steven A Ginther ndilecf@dor.mo.gov
- Gabriel Glazer gglazer@pszjlaw.com
- David L Going dgoing@armstrongteasdale.com, crupp@armstrongteasdale.com
- David J Gold dgold@perkinscoie.com, jmatamoros@perkinscoie.com
- Joshua Greenblatt jgreenblatt@kasowitz.com, courtnotices@kasowitz.com
- Nicole Greenblatt nicole.greenblatt@kirkland.com, bfriedman@kirkland.com, patrick.evans@kirkland.com, melissa.koss@kirkland.com, Jessica.peet@kirkland.com, jenna.ward@kirkland.com, alex.cross@kirkland.com

- Lisa S Gretchko lgretchko@howardandhoward.com
- Steven B Gross sbg224@gmail.com
- Cameron M Gulden USTPRegion11.es.ecf@usdoj.gov
- Jonathan Guy jguy@orrick.com
- John W Guzzardo jguzzardo@shawfishman.com, jhampton@shawfishman.com
- Stephen C Hackney stephen.hackney@kirkland.com
- Oren B Haker obhaker@stoel.com
- Kristopher Hansen mmagzamen@stroock.com, ssiegel@stroock.com, dmohamed@stroock.com, jsiegel@stroock.com, jcanfield@stroock.com, fmerola@stroock.com, morozco@stroock.com
- Carrie Hardman chardman@winston.com, dcunsolo@winston.com
- Mark F Hebbeln mhebbeln@foley.com
- Bernard A Henry bhenry@rieckcrotty.com
- Daniel O Herrera dherrera@caffertyclobes.com
- David R Herzog drhlaw@mindspring.com, herzogschwartz@gmail.com
- Roger J Higgins rhiggins@rogerhigginslaw.com
- Timothy W Hoffmann thoffmann@jonesday.com
- Patrick L Huffstickler phuffstickler@coxsmith.com, aseifert@coxsmith.com, marycruz@coxsmith.com
- Paula K. Jacobi pjacobi@btlaw.com, jsantana@btlaw.com, jbennett@btlaw.com
- Steve Jakubowski sjakubowski@rsplaw.com, docketing@rsplaw.com
- Elizabeth L Janczak ejanczak@freeborn.com, bkdocketing@freeborn.com, jhazdra@ecf.inforuptcy.com
- Julie A. Johnston-Ahlen jjohnston-ahlen@novackandmacey.com, mbianchi@novackmacey.com
- Gary M. Kaplan gkaplan@fbm.com
- Harold L Kaplan hkaplan@foley.com
- Benjamin Kelly benkellysr@comcast.net
- John Klamo gillt222@gmail.com
- Jeremy C Kleinman jkleinman@fgllp.com, ccarpenter@fgllp.com
- Richard S Lauter rlauter@freeborn.com, bkdocketing@freebom.com jhazdra@ecf.inforuptcy.corn
- Ryan O. Lawlor Ryan.Lawlor@bryancave.com
- Patrick S Layng USTPRegion11.ES.ECF@usdoj.gov
- Vincent E. Lazar vlazar@jenner.com, docketing@jenner.com, thooker@ienner.com
- Steven H Leech s.leech@gozdel.com
- Mark E Leipold mleipold@gouldratner.com, srodriguez@gouldratner.com, lgray@gouldratner.com
- John P. Leon jleon@subranni.com, desk@subranni.com
- Brandon Levitan blevitan@proskauer.com, jdubuque@proskauer.com
- Michael Joseph Linneman linnemanm@jbltd.com
- Jordan M Litwin jordan@litwinlawfirm.com
- Sara E Lorber slorber@wfactorlaw.com, slorber@ecf.inforuptcy.com, nbouchard@wfactorlaw.com
- Samuel E. Lovett cfilburn@paulweiss.com, ysaferstein@paulweiss.com, lclayton@paulweiss.com, mtattnall@paulweiss.com, jjohn@paulweiss.com

- Jeff J Marwil jmarwil@proskauer.com, mzerjal@proskauer.com, ctheodoridis@proskauer.com, sma@proskauer.com
- Richard McCord rmccord@certilmanbalin.com
- Daniel J McGuire dmcguire@winston.com, ECF_Bank@winston.com
- Regina McIlvaine regina@lowenthalabrams.com, antoinette@lowenthalabrams.com
- Joshua M. Mester jmester@jonesday.com
- James H. Millar james.millar@dbr.com
- Nicholas M Miller nmiller@ngelaw.com, ecfdocket@ngelaw.com, cdennis@ngelaw.com, mmirkovic@ngelaw.com
- Bryan E Minier bminier@pedersenhoupt.com, skwon@pedersenhoupt.com
- James E Morgan jem@h2law.com, smckinney@howardandhoward.com
- Margreta Morgulas mmorgulas@okinhollander.com
- Kevin H Morse khmorse@arnstein.com
- Daniel R Murray dmurray@jenner.com
- Christopher J Nadeau cnadeau@traublieberman.com
- Roger J Naus rjnaus@wwmlaw.com
- David M Neff dneff@perkinscoie.com, nsaldinger@perkinscoie.com
- David Neier dneier@winston.com
- Michael V Ohlman mvohlman@ohlmanlaw.com
- Mark Page mpage@kelleydrye.com, KDWBankruptcyDepartment@kelleydrye.com, BankruptcyDepartment@Kelleydrye.com
- Aaron Paushter aaron.paushter@dlapiper.com
- Jeffrey Pawlitz jpawlitz@kirkland.com, benjamin.winger@kirkland.com
- Lars A Peterson lapeterson@foley.com, khall@foley.com
- Lanora Pettit lpettit@robbinsrussell.com
- Paul V Possinger ppossinger@proskauer.com, mthomas@proskauer.com, mbienenstock@proskauer.com, jliu@proskauer.com, vindelicato@proskauer.com, pabelson@proskauer.com, GRAICHT@proskauer.com
- Eric S Prezant eric.prezant@bryancave.com
- Scott A Pyle scottpy@uawlsp.com
- Robert Radasevich rradasevich@ngelaw.com, igarcia@ngelaw.com
- Amy Rapoport agibson@agdglaw.com, wserritella@agdglaw.com, jcole@agdglaw.com
- N. Neville Reid nreid@fslc.com, bkdocket@fslc.com, kgoin@fslc.com, abouse@fslc.com
- Richard Reinthaler rreinthaler@winston.com
- Schonfeld Richard rreyes@cslawoffice.net
- Zachary A Risk riskz1@michigan.gov
- Peter J Roberts proberts@shawfishman.com
- David Rosner drosner@kasowitz.com, courtnotices@kasowtiz.com
- Craig Rothenberg crothenberg@rrbslawnj.com
- Nathan Q Rugg nrugg@ag-ltd.com, lhope@ag-ltd.com
- Brandy A Sargent basargent@stoel.com, erheaston@stoel.com, docketclerk@stoel.com, obhaker@stoel.com, cejordan@stoel.com, eleliasen@stoel.com, jason.abrams@stoel.com
- Ryan T Schultz rschultz@fslc.com, bkdocket@fslc.com, abouse@fslc.com
- Samuel Schwartz ecf@schwartzlawyers.com, schwartzecf@gmail.com
- John Sciaccotta jsci@agdglaw.com

- Susan H Seabury sseabury@mesirowfinancial.com
- David R Seligman dseligman@kirkland.com, maureen.mccarthy@kirkland.com, j.michael.jones@kirkland.com, gregory.pesce@kirkland.com
- Brian L Shaw bshaw@shawfishman.com, jbunton@shawfishman.com
- Patrick Sibley psibley@pryorcashman.com, SLieberman@pryorcashman.com
- Peter A Siddiqui peter.siddiqui@kattenlaw.com
- Stephen J Siegel ssiegel@novackandmacey.com, bvincent@novackandmacey.com
- Andrew I. Silfen andrew.silfen@arentfox.com, Mark.Joachim@arentfox.com, Jackson.Toof@arentfox.com, Beth.Brownstein@arentfox.com, Manuel.Arreaza@arentfox.com, Lisa.Indelicato@arentfox.com
- Kevin C Smith ksmith@smithsersic.com, dgreen@smithsersic.com
- Jean Soh jsoh@polsinelli.com, chicagodocketing@polsinelli.com
- Michael T Sprengnether mts@doherty-progar.com
- Richard A Stieglitz rstieglitz@cahill.com
- Roman Sukley USTPRegion11.es.ecf@usdoj.gov, roman.l.sukley@usdoj.gov, cameron.g.gulden@usdoj.gov
- Mark K Thomas mthomas@proskauer.com
- Joseph M Tiller jtiller@jonesday.com
- L Judson Todhunter jtodhunter@howardandhoward.com
- Jennifer A Trofa jtrofa@subranni.com, desk@subranni.com
- John D VanDeventer jvandeventer@jenner.com
- Elizabeth B Vandesteeg evandesteeg@lplegal.com, nbailey@lplegal.com, ikropiewnicka@lplegal.com
- Michael D Warner mwarner@coleschotz.com
- Matthew Warren matthew.warren@lw.com, chefiling@lw.com, beth.arnold@lw.com
- Daniel I Waxman lexbankruptcy@wyattfirm.com
- Brian P Welch bwelch@craneheyman.com, gbalderas@craneheyman.com
- Sean P Williams seanw@restructuringshop.com
- Jolene M Wise wisej@sec.gov
- Samuel C. Wisotzkey swisotzkey@kmksc.com, kmksc@kmksc.com
- Barbara L Yong blyong@golanchristie.com, mperez@golanchristie.com, myproductionss@gmail.com
- Artur Zadrozny artur@bzlaw-firm.com
- David I Zalman dzalman@kelleydrye.com
- Scott M. Zauber szauber@subranni.com, desk@subranni.com
- Jeffrey Zeiger jzeiger@kirkland.com
- David J Zott dzott@kirkland.com

Additionally, the parties listed below were served via e-mail:

James HM Sprayregen Kirkland & Ellis LLP James.sprayregen@kirkland.com	Paul M. Basta Kirkland & Ellis LLP paul.basta@kirkland.com

Christopher Greco Kirkland & Ellis LLP christopher.greco@kirkland.com	Sara L. Brauner Akin Gump sbrauner@akingump.com
Prime Clerk LLC Claims and Noticing Agent ceocinfo@primeclerk.com	Randall S. Eisenberg AlixPartners reisenberg@alixpartners.com
Craig McDowell American Express, Global Merchant Services craig.b.mcdowell@aexp.com	Tobey M. Daluz Ballard Spahr LLP daluzt@ballardspahr.com
Leslie C. Heilman Ballard Spahr LLP heilmanl@ballardspahr.com	Kenneth T. Law Bialson, Bergen & Schwab klaw@bbslaw.com
Stephanie Wickouski Bryan Cave LLP stephanie.wickouski@bryancave.com	Michelle McMahon Bryan Cave LLP michelle.mcmahon@bryancave.com
Shawn M. Christianson Buchalter Nemer schristianson@buchalter.com	William Miller Cahill Gordon & Reindel LLP wmiller@cahill.com
Albert A. Ciardi, III Ciardi Ciardi & Astin aciardi@ciardilaw.com	Sean Portrait Credit Suisse AG, Cayman Islands Branch agency.loanops@credit-suisse.com
Sandra E. Horwitz Delaware Trust Company shorwitz@delawaretrust.com	Richard I. Nagle Environmental Protection Agency – Region 5 nagle.richard@epa.gov
James G. Aaron Ansell Grimm & Aaron, P.C. jga@ansellgrimm.com	Ronald L. Rowland Agent for EMC Corporation ronald.rowland@iqor.com
Michael Chaump City of Reno chaumpm@reno.gov	Mark C. Gardy Gardy & Notis LLP mgardy@gardylaw.com
James S. Notis Gardy & Notis LLP jnotis@gardylaw.com	Meagan Farmer Gardy & Nortis LLP mfarmer@gardylaw.com
David N. Crapo Gibbons P.C. dcrapo@gibbonslaw.com	Lawrence M. Jacobson Glickfeld, Fields & Jacobson LLP lmj@gfjlawfirm.com
Jay Eisenhofer Grant & Eisenhofer P.A. jeisenhofer@gelaw.com	Gordon Z. Novod Grant & Eisenhofer P.A. gnovod@gelaw.com
Charles B. Sklarsky Jenner & Block LLP csklarsky@jenner.com	Dawn M. Costa Jennings Sigmond, P.C. dcosta@jslex.com

Matthew Tokarsky Jennings Sigmond, P.C. mtokarsky@jslex.com	James O. Johnson Jones Day jjohnston@jonesday.com
Sidney P. Levinson Jones Day slevinson@jonesday.com	Monika S. Wiener Jones Day mwiener@jonesday.com
Philip Le B. Douglas Jones Day pldouglas@jonesday.com	Geoffrey S. Stewart Jones Day gstewart@jonesday.com
Todd R. Geremia Jones Day trgeremia@jonesday.com	Rajeev Muttreja Jones Day rmuttreja@jonesday.com
Alex P. McBride Jones Day apmcbride@jonesday.com	Craig A. Barbarosh Katten Muchin Rosenman LLP craig.barbarosh@kattenlaw.com
David A. Crichlow Katten Muchin Rosenman LLP david.crichlow@kattenlaw.com	Karen B. Dine Katten Muchin Rosenman LLP karen.dine@kattenlaw.com
James S. Carr Kelley Drye & Warren LLP kdwbankruptcydepartment@kelleydrye.com	Eric R. Wilson Kelley Drye & Warren LLP ewilson@kelleydrye.com
Kristin S. Elliott Kelley Drye & Warren LLP kelliott@kelleydrye.com	Kenneth H. Eckstein Kramer Levin Naftalis& Frankel LLP keckstein@kramerlevin.com
Gregory A. Horowitz Kramer Levin Naftalis& Frankel LLP ghorowitz@kramerlevin.com	Douglas H. Mannal Kramer Levin Naftalis& Frankel LLP dmannal@kramerlevin.com
Daniel M. Eggermann Kramer Levin Naftalis& Frankel LLP deggermann@kramerlevin.com	Darryl S. Laddin Arnall Golden Gregory LLP darryl.laddin@agg.com
James D. Heaney Law Debenture Trust Company of New York james.heaney@lawdeb.com	Alan Katz Locke Lord LLP akatz@lockelord.com
Kathy Jorrie Pillsbury Winthrop Shaw Pittman LLP kathy.jorrie@pillsburylaw.com	Eric N. Macey Novack and Macey LLP emacey@novackmacey.com
Jeffrey H. Davidson Pachulski Stang Ziehl & Jones LLP jdavidson@pszjlaw.com	Laura Davis Jones Pachulski Stang Ziehl & Jones LLP ljones@pszjlaw.com
John A. Morris Pachulski Stang Ziehl & Jones LLP jmorris@pszjlaw.com	Jeffrey D. Saferstein Paul, Weiss, Rifkind, Wharton & Garrison LLP jsaferstein@paulweiss.com

Lewis R. Clayton Paul, Weiss, Rifkind, Wharton & Garrison LLP lclayton@paulweiss.com	Jonathan Hurwitz Paul, Weiss, Rifkind, Wharton & Garrison LLP jhurwitz@paulweiss.com
Seth H. Lieberman Pryor Cashman LLP slieberman@pryorcashman.com	Thomas P. Yardley Robbins Salomon & Patt, Ltd. tyardley@rsplaw.com
Paul A. Rubin Rubin LLC prubin@rubinlawllc.com	Office of General Counsel Securities & Exchange Commission secbankruptcy@sec.gov
John R. Ashmead Seward & Kissel LLP ashmead@sewkis.com	Arlene R. Alves Seward & Kissel LLP alves@sewkis.com
Kalyan Das Seward & Kissel LLP das@sewkis.com	Ronald M. Tucker Simon Property Group, L.P. rtucker@simon.com
Bankruptcy Department State of Georgia Attorney General agolens@law.ga.gov	Bankruptcy Department State of Indiana Attorney General constituent@atg.in.gov
Bankruptcy Department State of Iowa Attorney General webteam@ag.state.ia.us	Bankruptcy Department State of Michigan Attorney General miag@michigan.gov
Bankruptcy Department State of Minnesota Attorney General attorney.general@ag.state.mn.us	Bankruptcy Department State of Missouri Attorney General attorney.general@ago.mo.gov
Bankruptcy Department State of Utah Attorney General uag@utah.gov	Sabrina L. Streusand Streusand, Landon & Ozburn LLP streusand@slollp.com
Jonathan D. Canfield Stroock & Stroock & Lavan LLP jcanfield@stroock.com	Kenneth Pasquale Stroock & Stroock & Lavan LLP kpasquale@stroock.com
Erez Gilad Stroock & Stroock & Lavan LLP egilad@stroock.com	Frank A. Merola Stroock & Stroock & Lavan LLP fmerola@stroock.com
Louis F. Solimine Thompson Hine LLP louis.solimine@thompsonhine.com	Deborah A. Ibrahim U.S. Bank Global Corporate Trust Services deborah.ibrahim@usbank.com
Regional Director U.S. Securities & Exchange Commission bankruptcynoticeschr@sec.gov	Regional Director U.S. Securities & Exchange Commission chicago@sec.gov
Peter J. Wozniak Gozdecki, Del Giudice, Americus, Farkas & Brocato LLP p.wozniak@gozdel.com	Bankruptcy Department Washington DC Attorney General oag@dc.gov

Debra A. Dandeneau Weil, Gotshal & Manges LLP debra.dandeneau@weil.com	David N. Griffiths Weil, Gotshal & Manges LLP david.griffiths@weil.com
Dana M. Kaufman Weil, Gotshal & Manges LLP dana.kaufman@weil.com	Thomas E. Lauria White & Case LLP tlauria@whitecase.com
J. Christopher Shore White & Case LLP cshore@whitecase.com	Harrison Denman White & Case LLP hdenman@whitecase.com
Robert S. Brady Young Conaway Stargatt & Taylor, LLP rbrady@ycst.com	Edmon L. Morton Young Conaway Stargatt & Taylor, LLP emorton@ycst.com
Robert F. Poppiti, Jr. Young Conaway Stargatt & Taylor, LLP rpoppiti@ycst.com	John H. Bae Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. jhbae@mintz.com
Kaitlin Walsh Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. krwalsh@mintz.com	William Kannel Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. bkannel@mintz.com
C.G. Gordon Martin The Law Offices of C.G. Gordon Martin cggordonmartin@earthlink.net	Earl E. Farkas Gozdecki, Del Giudice, Americus, Farkas & Brocato LLP e.farkas@gozdel.com
Edward P. Connell, Jr. Merkel & Cocke, P.A. tconnell@merkel-cocke.com	Donald C. Marro dmarro@crosslink.net
Carol A. Gllick Certilman Balin Adler & Hyman, LLP cgick@certilmanbalin.com	Frank Stepnowski The Stepnowski Law Offices frank@steppergroup.com
T. Lambert CEOC General Counsel tlambert@caesars.com	Linda Lorello Internal Revenue Service linda.lorello@irs.gov
Michael L. Testa Testa, Heck, Scrocca & Testa, P.A. mtesta@testalawyers.com	Kevin J. Mangan Womble Carlyle Sandridge & Rice, LLP kmangan@wcsr.com
Morgan L. Patterson Womble Carlyle Sandridge & Rice, LLP mpatterson@wcsr.com	Tennessee Department of Revenue c/o Tennessee Attorney General bill.mccormick@ag.tn.gov
John J. Marshall jmarshall@jmpartnersllc.com	Wesley J. Smith Christensen James & Martin wes@cjmlv.com

David M. Zensky Akin Gump Strauss Hauer & Feld LLP dzensky@akingump.com	John T. Dillman Harris, Montogomery & Fort Bend Counties – Texas Taxing Authorities houston_bankruptcy@lgbs.com
Joseph Graham Kirkland and Ellis LLP joe.graham@kirkland.com	Samuel S. Cavior Pillsbury Winthrop Shaw Pittman LLP samuel.cavior@pillsburylaw.com
Joseph Corrigan Iron Mountain Information Management, LLC bankruptcy2@ironmountain.com	Russell J. Reid Reid, McCarthy, Ballew & Leahy, L.L.P. rjr@rpmb.com
Joel H. Levitin Cahill Gordon & Reindel LLP jlevitin@cahill.com	Reed Heiligman FrankGecker LLP rheiligman@fgllp.com
Randall L. Klein Goldberg Kohn Ltd. randall.klein@goldbergkohn.com	David L. Eaton Kirkland & Ellis LLP david.eaton@kirkland.com
American Express Travel Related Services Co, Inc Becket and Lee LLP notices@becket-lee.com	Ariel N. Lavinbuk Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP alavinbuk@robbinsrussell.com

Additionally, the parties listed below were served via U.S. Mail delivery:

Arizona Department of Gaming Attn: Dan Bergin, Director 1110 W. Washington St., Suite 450 Phoenix, AZ 85007	Attorney General for the State of Illinois Attn: Bankruptcy Section 500 S. 2nd Street Springfield, IL 62701
Bureau of Gambling Control Attn: Kamala D. Harris, Attorney General 4949 Broadway, Suite E-231 Sacramento, CA 95820	California Gambling Control Commission Attn: Tina Littleton, Executive Director 2399 Gateway Oaks Dr., Suite 220 Sacramento, CA 95833
Illinois Department of Revenue Attn: Bankruptcy Section PO Box 64338 Chicago, IL 60664	Illinois Environmental Protection Agency Attn: Director or Chief Legal Counsel 1021 N. Grand Ave. E Springfield, IL 62702
Illinois Gaming Board (IGB) Attn: Emily Mattison – General Counsel 160 N. LaSalle, Suite 300 Chicago, IL 60601	Indiana Gaming Commission (IGC) Attn: Ernest E. Yelton, Executive Director East Tower, Suite 1600 101 W. Washington Street Indianapolis, IN 46204

Internal Revenue Service Attn: Territory Manager, Insolvency Territory 7 230 S. Dearborn St. Mail Stop 5000 CHI Room 3022 Chicago, IL 60604	Internal Revenue Service Attn: Centralized Insolvency Operation PO Box 7346 Philadelphia, PA 19101
Law Debenture Trust Company of New York Attn: Thomas Musarra 400 Madison Avenue, Suite 4D New York, NY 10017	Louisiana Gaming Control Board (LGCB) Attn: Ronnie Jones, Chairman 7901 Independence Boulevard, Bldg A Baton Rouge, LA 70806
Mississippi Gaming Commission Attn: Allen Godfrey, Executive Director 620 North Street, Suite 200 Jackson, MS 39202	Missouri Gaming Commission Attn: Roger Stottlemyre, Executive Director 3417 Knipp Drive PO Box 1847 Jefferson City, MO 65102
Nevada State Gaming Control Board & Gaming Commission Attn: Michael LaBadie, Marc Warren & David Staley 555 East Washington Ave., Suite 2600 Las Vegas, NV 89101	New Jersey Division of Gaming Enforcement Attn: David L. Rebuck, Director 1300 Atlantic Avenue Atlantic City, NJ 08401
North Carolina Department of Revenue Attn: Lyons Gray, Secretary of Revenue 501 N. Wilmington Street Raleigh, NC 27604	Ohio Casino Control Commission Attn: John Barron, Deputy Executive Director & General Counsel 10 W. Broad Street, 6th Floor Columbus, OH 43215
Pennsylvania Gaming Control Board Attn: Kevin F. O'Toole, Executive Director PO Box 69060 Harrisburg, PA 17106	State Lottery & Gaming Control Agency Attn: Stephen L. Martino, Director Montgomery Park Business Center 1800 Washington Blvd., Suite 330 Baltimore, MD 21230
State of Arizona Attorney General Attn: Bankruptcy Department 1275 W. Washington St. Phoenix, AZ 85007	State of California Attorney General Attn: Bankruptcy Department Consumer Law Section 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102
State of Connecticut Attorney General Attn: Bankruptcy Department 55 Elm St. Hartford, CT 06106	State of Kentucky Attorney General Attn: Bankruptcy Department 700 Capitol Avenue, Capitol Building, Ste. 118 Frankford, KY 40601
State of Louisiana Attorney General Attn: Charmaine Moore, Gaming Division PO Box 94095 Baton Rouge, LA 70804	State of Maryland Attorney General Attn: Bankruptcy Department 200 St. Paul Place Baltimore, MD 21202

State of Massachusetts Attorney General Attn: Bankruptcy Department 1 Ashburton Place Boston, MA 02108	State of Mississippi Attorney General Attn: Bankruptcy Department Department of Justice, Walter Sillers Building 550 High Street, Suite 1200 PO Box 220 Jackson, MS 39205
State of Nevada Attorney General Attn: Bankruptcy Department Old Supreme Ct. Building 100 N. Carson St. Carson City, NV 89701	State of New Jersey Attorney General Attn: Bankruptcy Department Richard J. Hughes Justice Complex 25 Market Street PO Box 080 Trenton, NJ 08625
State of New Jersey Casino Control Commission Attn: Matthew B. Levinson, CEO Arcade Building Tennessee Avenue & Boardwalk Atlantic City, NJ 08401	State of New York Attorney General Attn: Bankruptcy Department Department of Law – The Capitol, 2nd Floor Albany, NY 12224
State of North Carolina Attorney General Attn: Bankruptcy Department Department of Justice PO Box 629 Raleigh, NC 27602	State of Ohio Attorney General Attn: Bankruptcy Department State Office Tower – 14th Floor 30 E. Broad St. Columbus, OH 43266
State of Oregon Attorney General Attn: Bankruptcy Department Justice Building 116 2 Court St. NE Salem, OR 97301	State of Pennsylvania Attorney General Attn: Bankruptcy Department 1600 Strawberry Square, 16th Floor Harrisburg, PA 17120
State of Rhode Island Attorney General Attn: Bankruptcy Department 150 S. Main St. Providence, RI 02903	State of South Carolina Attorney General Attn: Bankruptcy Department Remert C. Dennis Office Building PO Box 11549 Columbia, SC 29211
State of Tennessee Attorney General Attn: Bankruptcy Department 425 5th Avenue North PO Box 20207 Nashville, TN 37243	State of Texas Attorney General Attn: Bankruptcy Department PO Box 12548 Austin, TX 78711
State of Virginia Attorney General Attn: Bankruptcy Department 900 East Main Street Richmond, VA 23219	State of Washington Attorney General Attn: Bankruptcy Department 1125 Washington St. SE Olympia, WA 98504

State of West Virginia Attorney General Attn: Bankruptcy Department State Capitol, Building 1, Room E 26 1900 Kanawha Blvd East Charleston, WV 25305	State of Wisconsin Attorney General Attn: Bankruptcy Department Wisconsin Department of Justice State Capitol, Room 114 East PO Box 7857 Madison, WI 53707
U.S. Bank National Association Attn: Raymond S. Haverstock, Corporate Trust Services 60 Livingston Avenue St. Paul, MN 55107	UMB Bank, National Association Attn: Gavin Wilkinson Corporate Trust and Escrow Services 120 South 6th Street, Suite 1400 Minneapolis, MN 55082
United States Attorney General for the Northern District of Illinois Attn: Bankruptcy Section 219 S. Dearborn St., 5th Floor Chicago, IL 60604	Wilmington Savings Fund Society, FSB Attn: Patrick J. Healy 500 Delaware Avenue Wilmington, DE 19801
Rosenthal & Rosenthal, Inc. Attn: Anthony DiTirro 1370 Broadway New York, NY 10018	Jeffrey M. Levine Mesirow Financial Holdings, Inc. 353 North Clark Street Chicago, IL 60654
Gerald F. Miksis Law Office of Gerald F. Miksis 1125 Atlantic Avenue, Suite 647 Atlantic City, NJ 08401	Alan J. Yacoubian Johnson, Yacoubian & Paysse 701 Poydras Street, Suite 4700 New Orleans, LA 70139
Michael Bazley AX6869 DVI P.O. Box 20 Tracy, CA 95378-0600	

/s/ Mark A. Berkoff
Mark A. Berkoff (ARDC #06194787)
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street, Suite 1700
Chicago, IL 60602-3801
(312) 269-8000