UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,[1]	)	Case No. 15-01145 (ABG)
	)	(Jointly Administered)
Debtors.	)	

AD HOC COMMITTEE OF FIRST LIEN BANK LENDERS' AND FIRST LIEN AGENT'S JOINT OBJECTION TO MOTION OF STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE SEEKING DERIVATIVE STANDING TO COMMENCE, PROSECUTE AND SETTLE CERTAIN CAUSES OF ACTION ON BEHALF OF DEBTORS' ESTATES

The ad hoc committee (the "Ad Hoc Bank Lender Committee") of beneficial holders, or the investment advisors or managers for certain beneficial holders, of first lien bank debt issued by the Debtors (the "First Lien Bank Lenders"), and Credit Suisse AG, Cayman Islands Branch, as administrative agent under that certain *Third Amended and Restated Credit Agreement*, dated July 25, 2014, and as collateral agent under that certain *Amended and Restated Collateral Agreement*, dated as of June 10, 2009 (the "First Lien Agent"), by and through their undersigned counsel, hereby file this joint objection (this "Objection") to the *Motion of Statutory Unsecured Claimholders' Committee for Order, Pursuant to Bankruptcy Code sections 1103 and 1109, Granting it Derivative Standing to Commence, Prosecute, and Settle Certain Causes of Action on*

[1] The last four digits of Caesars Entertainment Operating Company, Inc.'s ("CEOC") tax identification number are 1623. Due to the large number of debtors (the "Debtors") in these chapter 11 cases (these "Chapter 11 Cases"), a complete list of the debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://cases.primeclerk.com/CEOC.

Behalf of Debtors' estates, [Docket No. 2029] (the "Motion")[2] and in support hereof, respectfully state as follows:[3]

PRELIMINARY STATEMENT

1. The First Lien Bank Lenders and the First Lien Agent will demonstrate – at an appropriate time – that as a matter of substance, many of the Challenges alleged in the UCC's proposed complaint fail to state plausible claims. For now, however, the Seventh Circuit requires a creditor seeking derivative standing to establish that the debtor has unjustifiably declined to pursue meritorious claims, including demonstrating, by way of an evidentiary cost-benefit analysis, that prosecution of the creditor's challenges will yield a net benefit to the debtor's estate. Importantly, the UCC has failed to satisfy its burden of demonstrating that the prosecution of the purported Challenges (as defined below) were unjustifiably denied by the Debtors or would provide a significant net benefit to the Debtors' estates.

2. The UCC's pursuit of these Challenges at this critical point in time could disrupt the plan process at considerable expense to all creditors. The Debtors have finally been able to gain enough support to file a viable plan embodying a global settlement that delivers substantial distributions to unsecured creditors. Yet, the UCC fails to demonstrate that prosecution of its claims would yield a higher recovery to general unsecured creditors relative to the terms of the current proposed Plan (as defined below).

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[2] Each capitalized term that is not defined herein shall have the meaning ascribed to such term in the Motion.

[3] This Objection does not address the *Motion Of The 10.75% Notes Trustee For Entry Of An Order Granting Standing And Authority To Commence, Prosecute, And Settle Certain Causes Of Action*, filed August 7, 2015 [Docket No. 2027], as the challenges raised in that motion are being considered separately as claim objections with litigation proceeding pursuant to a consensual scheduling order entered by this Court on November 05, 2015. *See Agreed Scheduling Order*, [Docket No. 2539].

3. Even if the Court were persuaded to confer standing upon the UCC, the appropriate time to litigate the Challenges would be in the context of plan confirmation after the UCC has demonstrated that the allegations, if proven, would yield a material net benefit to unsecured creditors. However, in no circumstance should the Court bestow upon the UCC the exclusive right to settle all or a portion of the claims, since doing so would limit the Debtors' ability to pursue a consensual plan process and ultimately preclude the Debtors from satisfying their fiduciary obligations to all creditors.

4. Accordingly, for the reasons set forth above and herein, this Court should deny the Motion, without prejudice, and consider the Challenges (if at all) only in connection with confirmation of the Plan, subject to the UCC demonstrating that the allegations, if successful, would yield a material net benefit to the holders of general unsecured claims relative to the terms of the Plan.

BACKGROUND

5. The First Lien Secured Parties represent the largest creditor constituency in these Chapter 11 Cases. Together with the First Lien Noteholders, the First Lien Bank Lenders are owed, as of the petition date, approximately $11.7 billion, dwarfing every other creditor constituency in these cases. The Second Lien Noteholders hold claims of just over $5 billion. Other unsecured parties are comprised of approximately $50 million in trade claims, as well as several series of unsecured notes totaling approximately $1 billion. One such series includes approximately $500 million in 10.75% Notes, which are subject to subordination and turnover requirements under an intercreditor agreement dated January 28, 2008.

6. On March 25, 2015, this Court entered the *Final Order (I) Authorizing Use Of Cash Collateral, (II) Granting Adequate Protection, (III) Modifying The Automatic Stay To Permit Implementation, And (IV) Granting Related Relief*, [Docket No. 988] (the "Cash Collateral

Order"). The Cash Collateral Order, through which the Debtors were granted the consensual use of cash collateral, was the result of substantial negotiations among the Secured Parties, the Debtors, the UCC and the 10.75% Noteholders.

7. Under the terms of the Cash Collateral Order, the UCC and the 10.75% Noteholders were granted until May 6, 2015 to "seek to avoid liens, object to claim allowance, or otherwise [challenge] . . . the Debtors' Stipulations[.]" Cash Collateral Order at ¶ 12(b). Certain other potential challenges, however, such as challenges relating to liens on cash and bank accounts, were deferred until confirmation. *Id.* On several occasions the First Lien Bank Lenders consensually agreed with the UCC to extend the May 6 deadline. The First Lien Bank Lenders further agreed to extend until confirmation the deadline for each of the challenges identified in the UCC's Motion. However, the UCC declined that offer, and instead filed its Motion seeking derivative standing to challenge the First Lien Bank Lenders' liens in the following assets of the Debtors: (a) certain Commercial Tort Claims; (b) claims under insurance policies; (c) gaming and liquor licenses (and equity interests in entities that hold gaming licenses); (d) certain "riverboat" casinos; (e) certain parcels of real property; and (f) copyrights in respect of an alligator statue and a gambling handbook (the "Challenges").

8. Since the filing of the Motion, the Debtors have made substantial plan-related progress, and have entered into RSAs with both the First Lien Bank Lenders and the First Lien Noteholders.[4] Importantly, the RSAs provide for a distribution to all creditors of the Debtors, regardless of whether they are in the money. In so doing, the Plan provides for a global settlement

[4] The First Lien Bank Lenders continue to review the Plan to ensure compliance with the First Lien Bank Lenders' RSA.

of various claims and causes of action. If confirmed, the Plan would necessarily resolve all claims and obviate the costly litigation sought by the UCC.

9. More specifically, on October 7, 2015, the Debtors filed their First Amended Plan [Docket No. 2402] (the "Plan") reflecting the terms of the RSAs, including the global settlement. Currently, under the proposed Plan, if the classes of holders of Unsecured Claims (Class F), Subsidiary-Guaranteed Notes Claims (Class G) and Trade Claims (Class H) vote to accept the Plan, holders in such cases would be entitled to receive their pro rata share of the following:

a. 30.1% of PropCo Common Equity;

b. either 9.8% of PropCo Common Equity and/or a prescribed amount of cash (dependent upon certain conditions);

c. CEC Convertible Notes; and

d. the consideration that CAC would otherwise receive under the Plan on account of CAC's Senior Unsecured Notes Claims.[5]

10. In addition, a holder of a Trade Claim (Class H) may elect to receive cash for its claim (up to $5 million per claim) in lieu of the Plan consideration described above. *See* Plan, at 35.

LEGAL STANDARD

11. A creditor may obtain standing to pursue an action on behalf of the estate only in "narrow circumstances." *In re Scott*, 2006 WL 126757, at *4 (Bankr. N.D. Ill. Jan. 18, 2006) (J. Goldgar). A creditor may obtain such "derivative standing" only when (i) a debtor *unjustifiably* refuses to pursue an action, (ii) the creditor establishes a colorable claim, and (iii) the

[5] Each capitalized term that is not defined in this sentence shall have the meaning ascribed to such term in the Plan.

creditor obtains leave from the bankruptcy court to pursue the action. *See, e.g.*, *id.* (citing *Matter of Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990); *Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000)). Courts have found that the first prong of the *Perkins* test – unjustifiable refusal by the debtor – is most crucial. *See, e.g.*, *In re Racing Servs., Inc.,* 540 F.3d 892, 900 (8th Cir. 2008) ("to prevent derivative adversary proceedings from becoming the norm in bankruptcy, we agree with our sister circuits that the critical inquiry is whether the trustee (or debtor-in-possession) abused its discretion by *unjustifiably* refusing to pursue the creditor's proposed claims") (citing *Fogel*, 221 F.3d at 966).

12. In order to establish that a debtor unjustifiably refused to pursue an action, this Circuit has made clear that a creditor must demonstrate, through specific evidence, that pursuing the action would result in a net benefit to the estate in the first instance. Thus, for example, in *In re USA Baby, Inc.,* 424 F. App'x 558 (7th Cir. 2011), the Seventh Circuit denied standing because the creditor failed to demonstrate the trustee's unjust refusal to bring the claims and made no attempt "to quantify specific [recoverable] amounts" and "made no assess[ment] of the likelihood of recovery". *Id.* at 563. *See also In re Auto. Professionals, Inc.,* 389 B.R. 630, 634 (Bankr. N.D. Ill. 2008) (creditor standing appropriate only when it is in "best interests of the estate that the action be pursued"); *In re SRJ Enterps., Inc.*, 151 B.R. 189, 195-96 (Bankr. N.D. Ill. 1993).

13. If and when a creditor seeking standing can provide evidence indicating a net benefit to the estate, courts in this Circuit have then balanced the likelihood of success as well as the amount likely to be recovered on behalf of the estate against the costs and risks associated with pursuing the action to determine whether the action would in fact benefit the estate. *See, e.g., In re Archdiocese of Milwaukee*, 483 B.R. 855, 871 (Bankr. E.D. Wis. 2012) (denying creditor standing when factoring "the time, expense and drain on the Debtor's resources that would accompany this litigation" in light of the potential benefit).

14. Thus, consistent with the Seventh Circuit's decision in *In re USA Baby*, the court in *In re Archdiocese of Milwaukee* held that a creditor failed to satisfy the unjustifiable refusal prong because it failed to demonstrate that the cost of pursuing the litigation outweighed its potential benefit, the trial promised to be lengthy and costly, and it was not certain whether the plaintiff could collect even if successful. *In re Archdiocese of Milwaukee*, 483 B.R. at 870-71.

15. Courts in other circuits have engaged in similar comparative analyses when gauging a debtor's unjustified refusal to pursue an action. *See*, *e.g.*, *In re Racing Servs., Inc.,* 540 F.3d 892, 901 (8th Cir. 2008) ("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"); *In re STN Enterp.*, 779 F.2d 901, 905 (2d Cir. 1985) ("In order to decide whether the debtor unjustifiably failed to bring suit so as to give the creditors' committee standing" the court must examine, "whether an action asserting such claim(s) is likely to benefit the reorganization estate"); *In re Weyandt,* 544 F. App'x 107, 110 (3d Cir. 2013) ("Trustee did not violate any of her duties in failing to pursue an avoidance action" where creditor did not establish that avoidance action would provide net benefit to the estate); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery,* 330 F.3d 548, 575 (3d Cir. 2003) (noting that courts will only approve derivative standing if action would provide a net benefit to the estate); *In re Yes! Entm't Corp.,* 316 B.R. 141, 145 (D. Del. 2004) (holding that bankruptcy courts have the power to authorize a creditor's committee to sue derivatively "to recover property *for the benefit of the estate*.") (emphasis added).

16. Thus, in evaluating the net benefit test, courts typically consider evidence regarding the probability of success in litigation, potential financial recovery, the expenses that may be incurred and the delay in case administration. *See, e.g.*, *In re Racing Servs., Inc.,* 540 F.3d

at 901 (considering, among other factors, "the probability of legal success and financial recovery . . . [and] the anticipated delay and expense to the bankruptcy estate"); *In re STN Enterp.*, 779 F.2d at 905 (analyzing the "probabilities of legal success and financial recovery in event of success[.]"). Although courts need not conduct a mini-trial, the court is to be presented with evidence on which to assess the likelihood of success versus the "anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." *Id.*

17. This evidentiary burden is significant, and must be supported with specific facts. *See, e.g.*, *In re Racing Servs., Inc.,* 540 F.3d at 900 ("To satisfy its burden, the creditor, at a minimum, must provide the bankruptcy court with *specific* reasons why it believes the trustee's refusal is unjustified. . . . A creditor thus does not meet its burden with a naked assertion that 'the trustee's refusal is unjustified.") (emphasis in original); *Foster*, 516 B.R. 537 at 542 (establishing unjustifiable refusal "requires specific reasons, supported by competent evidence, that show that a trustee has unjustifiably refused to pursue the avoidance action").

18. Ultimately, the net benefit test serves to ensure that committees and individual creditors are prohibited from pursuing causes of action that "may provide them with private benefits but result in a net loss to the entire estate." *In re Copperfield Invs., LLC*, 421 B.R. 604, 609 (Bankr. E.D.N.Y. 2010) (citing *In re AppliedTheory Corp.,* 493 F.3d 82, 86 (2d. Cir. 2007). Thus, "[t]he cost-benefit analysis which the Court is required to make is of obvious significance." *In re Trump Entm't Resorts, Inc.*, 14-12103-KG, [Docket No. 943], at *4 (Bankr. D. Del. filed February 18, 2015). Indeed, the UCC acknowledges that derivative standing requires that pursuit of the claims benefit the estate. *See* Motion at ¶ 69 ("Derivative standing is generally granted where a debtor fails or unjustifiably or unreasonably refuses to pursue claims *that the bankruptcy court finds would benefit the estate*.") (emphasis added).

ARGUMENT

A. The Challenges That The UCC Seeks To Pursue Would Waste Estate Assets And Would Not Provide A Net Benefit To The Debtors' Estates

19. The UCC has failed to provide any evidence demonstrating that its pursuit of the Challenges, even if successful, would yield any benefit to the UCC's constituency. Indeed, the UCC has neglected to even *allege* that the prosecution of their Challenges would provide a net benefit to unsecured claimholders. For this reason alone, the Court should deny the Motion. *See, e.g.*, *In re USA Baby, Inc.,* 424 F. App'x at 563 (denying creditor standing where creditor failed to estimate dollar amount likely to be won or recovered); *In re Trump Entm't Resorts, Inc.*, 14-12103-KG, [Docket No. 943], at *3 (refusing to grant committee standing because "[c]ommittee did not provide any evidence on the cost-benefit test and, therefore, any finding on this issue would require the Court's impermissible speculation").

20. The UCC's failure to offer the requisite cost-benefit analysis is unsurprising. The Challenges, even if successful, would offer little, if any, benefit to the UCC's constituency. For example, the Challenges relating to the regulatory licenses would have no effect on the ultimate distribution scheme because the first lien debt is secured by the proceeds of the licenses and is valued on a going concern basis. Similarly, the UCC has failed to offer any evidence of the value of the Debtors' assets that are the subject of the Real Estate and Riverboat Challenges, or whether those Challenges, if successful, would yield distributable value to unsecured claimholders in excess of what is proposed in the Plan.

21. Additionally, the Challenges with respect to commercial tort claim assets and insurance policies evolve directly from issues currently being investigated by the Examiner. Thus, the potential benefit, if any, of these Challenges is speculative. Moreover, it would seem to

be a substantial waste of time, money and judicial resources to litigate those issues now, in advance of the delivery of the Examiner's report.

22. Notably, the UCC has recently indicated that it is prepared to withdraw certain Challenges, including the Challenges regarding the grants of equity pledges in entities holding gaming licenses, thereby demonstrating the UCC's limited due diligence with respect to the Challenges and the premature nature of its Motion. The UCC has already caused the estates unnecessary expense investigating claims it now admits are worthless (including its withdrawal of the copyright Challenge relating to a trivial alligator sculpture), and this Court should not allow the UCC to pursue claims that may similarly be lacking in factual support.

23. Beyond the costs associated with the UCC's premature pursuit of the Challenges, the cost of litigating the underlying issues would also likely continue to be significant because the claims involve a multiplicity of causes of action implicating numerous issues of state and federal law in over ten distinct jurisdictions.

24. Finally, the pursuit of the claims now could also disrupt the significant plan-related progress achieved to date, whereas deferring litigation would further preserve estate assets by providing additional runway within which to continue to build consensus. As of the date hereof, over 90% of the first lien bank debt and over 80% of the first lien note debt has signed up to the respective RSAs. However, a successful Challenge could trigger a default under the RSAs, which in turn could result in substantial delays in the administration of the cases. *See*, *e.g.*, *In re STN Enterp.*, 779 F.2d at 905-06 (weighing the anticipated delay in the administration of the bankruptcy estate when gauging a debtors' unjust refusal); *In re Racing Servs., Inc.,* 540 F.3d at 901 (same); *In re Foster*, 516 B.R. at 543 (same).

B. The UCC Fails To Demonstrate That Litigating The Challenges Would Yield A Recovery That Exceeds The Plan Distributions To Unsecured Creditors Provided Under The Current Proposed Plan

25. Not only must the UCC demonstrate that the Challenges would yield some benefit to the estates, the UCC must also demonstrate that the benefits of litigating the Challenges exceed the benefits associated with the Debtors' current proposed Plan. To do so, the UCC would have to show that its constituents would fare better in a probability-weighted litigation outcome as compared with the recovery levels currently contemplated under the Plan. *See In re Trump Entm't Resorts, Inc.*, 14-12103-KG, [Docket No. 943], at *4 ("The Court will have to measure any benefit arising from a successful prosecution of the Claims against the results if the Court confirms the proposed plan or reorganization.").

26. Here, under the terms of the proposed Plan, the Debtors have provided junior creditors with up to 30.1 percent of the PropCo Common Equity of Reorganized Caesars plus other consideration as part of a global settlement of various claims and causes of action. *See* Plan, at 35. The UCC offers no evidence that the Challenges, if successful, would improve the recoveries to general unsecured creditors relative to the Plan.

C. The Debtors Are Justified In Declining To Pursue The Challenges

27. As noted above, courts have found that the first prong of the *Perkins* test – unjustifiable refusal by the debtor – is most crucial. *See, e.g.*, *In re Racing Servs., Inc.,* 540 F.3d at 900. In the first instance, we understand formal demand on the Debtors was not made. Accordingly, the UCC attempts to get around this factor by arguing that demand on the Debtors would have proven futile. *See* Motion at ¶ 69. Specifically, the UCC alleges only that because it is "plain from the record that no action on the part of the debtor would have been forthcoming, any demand that the Debtors themselves assert such claims would be futile." Motion at ¶ 69. Such a threadbare and conclusory allegation is insufficient. Because the UCC has not yet shown that its

Challenges were unjustifiably denied by the Debtors and would otherwise result in a net benefit to its constituents, the Motion should be denied without prejudice.

28. The UCC is misguided in citing to *In re Nat'l Forge Co.,* 326 B.R. 532, 544 (W.D. Pa. 2005), *see* Motion at ¶ 69 (citing to "*Id.* at 544"). In that case, the bankruptcy court indeed excused demand as futile, but authorized standing only after engaging in a cost-benefit analysis and concluding that the contemplated actions *would* provide a substantial benefit to the bankruptcy estate. The case of *In re SGK Ventures, LLC*, 521 B.R. 842 (Bankr. N.D. Ill. 2014), is similarly inapposite. There, demand was excused because the debtors did not oppose the committee's litigation as the debtors agreed they could not bring the claims because of a conflict of interest between the debtors and the defendants. Furthermore, from the reported decision it appears no party objected to the committee's standing on the basis of a cost-benefit analysis. Here, however, the Debtors (as well as the First Lien Secured Parties) expressly object to the UCC being granted standing without first demonstrating that the Challenges would provide a net benefit to the estates.

29. If anything, the record before the Court demonstrates that any refusal by the Debtors is justified. The Debtors, in the exercise of their business judgment, have apparently determined that the Challenges were impractical and of dubious benefit (particularly in light of the global settlement contained in the current proposed Plan). The Debtors are also justifiably concerned about the risks and delay posed to the plan process. *See, e.g., In re USA Baby, Inc.*, 424 F. App'x at 563 (unjustified refusal to pursue claims governed by the business judgment standard); *see also In re Racing Servs., Inc.,* 540 F.3d at 900 ("a trustee certainly does not abuse his discretion by refusing to bring a claim that would yield insignificant benefits to the estate"); *Matter of Xonics Photochemical, Inc*., 841 F.2d 198, 203 (7th. Cir. 1988) (derivative standing allowed only where

"debtor was shirking his statutory responsibilities"). Furthermore, courts have held that a debtor's refusal to pursue a cause of action cannot be considered unjustified if the debtor provides for a settlement of that cause of action in a plan of reorganization. *See, e.g., In re Colt*, No. 15-11296-LSS, Oral Op. at 11:14-15 (Bankr. D. Del. October 7, 2015) (attached hereto as Exhibit A) ("when a debtor is settling the proposed litigation in its plan, the refusal to bring the litigation is not unjustified") (citing *In re Terra Bentley II*, *LLC*, 2011 WL 808190, at *6 (Bankr. D. Kan. 2011)).

30. Thus, the Court can look past the Debtors' cash collateral waiver and evaluate other bases the Debtors may have relied upon in refusing to prosecute the Challenges, including the dubious benefits, litigation costs and risks associated with the litigation. In fact, the willingness of the First Lien Bank Lenders and the Debtors to grant the UCC a further extension of the Challenge deadline suggests that the Debtors have justifiably acted in this regard.

D. Litigation Of The Challenges Is Premature And Should Be Deferred To Confirmation

31. Alternatively, to the extent this Court grants standing to the UCC, the litigation should be deferred to coincide with confirmation of the Plan for several reasons: *First*, an evaluation of any cost-benefit analysis associated with the Challenges necessarily implicates issues of valuation, subordination and intercreditor relationships – issues that will invariably play center stage at the confirmation hearing. Thus, even if this Court were to entertain standing, it would be more efficient (and far less costly) to consider all of the UCC's Challenges in connection with confirmation. *See, e.g., In re Trump Entm't Resorts, Inc.,* 14-12103-KG, [Docket No. 943], at *5 (deferring consideration of standing motion because the court "will be in a far better position to evaluate the Motion when it considers to confirm the Plan").

32. Moreover, the UCC has chosen to bifurcate its universe of potential challenges and has deferred prosecution of certain potential challenges regarding the subsidiary

pledges incurred in connection with the LBO, as well as its cash-related challenges, until after the delivery of the Examiner's report. There is a high likelihood of substantial overlap between the claims the UCC wishes to pursue now and the claims the UCC is preserving until after the Examiner's report is completed; accordingly, requiring the estate to bear the burden of litigating similar issues piecemeal would only add unnecessary costs.

33. In addition, deferral of the litigation would allow the Debtors to build on the current plan-related momentum with the hopes of achieving a fully consensual resolution to these Chapter 11 Cases.

E. <u>The Court Should Deny The UCC's Request For Sole Settlement Authority</u>

34. In any event, the Court should deny the UCC's request for the exclusive authority to settle any of its Challenges. By seeking to preclude the Debtors from even proposing a settlement, the UCC is essentially attempting to override both Bankruptcy Rule 9019(a) (which permits a debtor to propose a settlement of estate claims) as well as Bankruptcy Code section 1123(b) (which allows a plan proponent to settle estate claims through a chapter 11 plan). Also, granting the UCC the sole right to settle the Challenges would undermine both the Debtors' ability to manage their claims and their exclusive right to propose a plan. Thus, even if granted standing, the UCC should not be allowed the sole authority to settle such claims. *See, e.g., In re Centaur, LLC,* Case No. 10-10799 (KJC) [Docket No. 914] (Bankr. D. Del. Nov. 5, 2010) (holding that even when a creditor is granted derivative standing, the debtors continue to have the right to settle the claims); *In re Exide Tech.,* 303 B.R. 48, 67 (Bankr. D. Del. 2003) (holding that a debtor may settle a cause of action even when action is being prosecuted by creditors' committee).

35. Ultimately, the Debtors have a fiduciary duty to maximize the value of their estates for the benefit of all of their stakeholders. Granting the UCC the exclusive right to settle

all or a portion of the Claims would also unjustifiably strip the Debtors of their ability to exercise their rights as debtors in possession and preclude the Debtors from satisfying their fiduciary obligations to all creditors, including both secured and unsecured creditors. Indeed, the Challenges alleged in the Complaint are proposed to be resolved under the Plan; providing the UCC discretion to settle those claims would, in essence, allow the UCC to veto the Plan even before the plan process has taken its due course.

CONCLUSION

36. Since the beginning of these cases, the UCC has burdened the parties – and more importantly, the Court – with senseless pleadings and "sidetracking" issues unlikely to produce quantifiable value for any party in interest. The Motion is no exception and this Court should not allow the UCC to continue to waste valuable estate resources.

37. The Challenges would be more properly addressed, if at all, as part of confirmation proceedings, subject to the UCC demonstrating that the allegations, if successful, would yield a material net benefit to the holders of general unsecured claims relative to the benefits provided under the proposed Plan. Because the UCC has failed to meet its burden of establishing that its pursuit of the Challenges would result in a net benefit to the estates, the Motion should be denied.

WHEREFORE, for the reasons set forth above, the Ad Hoc Bank Lender Committee and the First Lien Agent respectfully request that the Court deny the Motion and grant such other relief as this Court may deem just, proper and equitable.

Dated: November 20, 2015
Chicago, Illinois

Respectfully submitted,

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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

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COURT DECISION ON MOTION FOR DERIVATIVE STANDING 5

1 (Proceedings commence at 10:03 a.m.)
2 (Call to the Order of the Court)
3 THE COURT: Please be seated.
4 MR. MADRON: Good morning, Your Honor.
5 THE COURT: Good morning.
6 MR. MADRON: For the record, Jason Madron, of Richards
7 Layton & Finger, on behalf of Colt Holding Company LLC and its
8 Chapter 11 debtor affiliates.
9 Your Honor, I'm joined today at counsel table by Gary
10 Svirsky --
11 THE COURT: Yes.
12 MR. MADRON: -- of the O'Melveny & Meyers firm.
13 Your Honor, I'll turn to the agenda that we filed with
14 respect to today's hearing. Our part, I think, today will be
15 very brief.
16 Agenda Item Number 1, as I had made mention to Your
17 Honor at last Friday's hearing is the debtors' motion for
18 approval of a key employee incentive plan, and as I had
19 referenced, that matter has been adjourned again and is now
20 scheduled to take place at our October 20th, omnibus hearing in
21 these cases.
22 Your Honor, Agenda Item 2 is the debtors' motion
23 seeking an extension of its 365(d)(4) periods, with respect to
24 unexpired non-real property leases, pardon me. We filed that
25 motion last month, Your Honor. It was unopposed.

1 And as I, again, had referenced at last week's
2 hearing, there were revisions to the order that were
3 necessitated based on the agreed extension of the Hartford
4 lease expiration date. We did prepare a revised form of order
5 that was submitted under certification of counsel yesterday
6 morning, and this morning, I was advised by Your Honor's
7 chambers that Your Honor did have a chance to review that
8 submission and that order has been signed.
9 THE COURT: Yes.
10 MR. MADRON: So we thank you for that.
11 With that, Your Honor, it then quickly brings us to
12 the tail-end of the agenda, which as Your Honor had requested
13 last week, we kept today's hearing on so we can hear from Your
14 Honor on the committee's motion for derivative standing.
15 THE COURT: Yes, thank you.
16 MR. MADRON: Thank you.
17 THE COURT: And, as promised, I am prepared to give my
18 ruling with respect to the committee's motion for derivative
19 standing to assert, prosecute, and settle claims related to the
20 debtors' lease of the West Hartford facility with NPA Hartford.
21 For the reasons that I will go through, I will not grant the
22 motion today, but the denial is without prejudice, to be raised
23 again at a later date.
24 As the parties know, the pervasive issue in this case,
25 which distinguishes it from most Chapter 11 proceedings is the

1 imminent expiration of the lease for the West Hartford
2 facility, which houses the debtors' U.S. manufacturing
3 facilities. While there are operations in Canada, the vast
4 majority of production takes place in West Hartford.
5 Subject to arguments which the committee makes as of
6 the petition date, which was June 14th, 2015, the lease was set
7 to expire by its terms on October 25th, 2015. Extensions have
8 been granted by the landlord, such that as of the commencement
9 of the hearing on the standing motion, the expiration date of
10 the lease was December 4th, 2015.
11 Mr. Maib, debtors' CRO, stated in his first-day
12 declaration, in support of the filing of the petitions, that
13 continuity of the West Hartford facility for a minimum of three
14 years is critical to the ongoing viability of the debtor. He
15 further stated that relocation of the debtors' facilities would
16 take a minimum of two to three years and require tens of
17 millions of dollars of incremental investment.
18 Further, the facility is specifically configured for
19 gun production and any new facility would need zoning and
20 regulatory approvals. It would be an understatement to say
21 that the lease expiration has driven this case, but the further
22 complicating factor is the presence of Sciens on the debtors'
23 governing board and its management of the landlord.
24 Sciens, as the debtors' equity sponsor, appointed
25 members to debtors' board, specifically, Mr. Standen, who is

1 chairman of the board, has been a Sciens partner since 2000,
2 and Mr. Rigas, who was a manager of the debtors' board, is also
3 the chairman and CEO of Sciens.
4 On the landlord's side, Mr. Standen and Mr. Rigas own
5 and control the landlord's managing agent, NPA Management. The
6 debtors have indicated that an independent committee has been
7 formed to deal with certain issues involving the debtors'
8 restructuring. And the landlord has stated that a member,
9 other than NPA Management, namely, Volnak (phonetic), has sole
10 and final decision-making authority, with respect to the
11 renewal of the lease with Colt or the entry of a lease with a
12 third party. Nonetheless, without the benefit of an
13 evidentiary hearing, it is not clear to the Court how much
14 influence, if any, Sciens continues to have over both, the
15 debtors and the landlord.
16 The company came in with a 363 sale motion with Sciens
17 as a stalking horse bidder. That sale motion has now given way
18 to discussions, which have resulted in a draft and, as yet
19 unsigned, plan termsheet, and restructuring support agreement.
20 Assuming finalization of the current termsheet, the signatories
21 to the restructure and support agreement will be Sciens,
22 certain prepetition noteholders who became DIP lenders
23 post-petition by acquiring prepetition secured debt, the
24 landlord, and the debtors.
25 As of the hearing, Morgan Stanley, holder of secured

1 prepetition debt was not onboard with the termsheet and there
2 had been no negotiations with the committee.
3 It is not clear to the Court whether the debtors are
4 playing a leadership role in the current negotiations or a more
5 passive role.
6 The committee filed its motion on August 28th. By the
7 motion, the committee seeks to obtain derivative standing and
8 related relief to that it may sue, on the debtors' behalf,
9 Sciens, the landlord, Mr. Standen, Mr. Rigas, NPA Management,
10 Volnak, and Mr. Smalden (phonetic).
11 The complaint sounds in six counts, namely, breach of
12 fiduciary duties against Mr. Standen, Mr. Rigas, and Sciens;
13 aiding and abetting breach of fiduciary duties against NPA
14 Hartford, NPA Management, Volnak, and Mr. Smalden; avoidance of
15 an amendment to the debtors' LLC agreement; tortious
16 interference with an existing and prospective business
17 relationships against Sciens, NPA Management, Volnak, Mr.
18 Standen, Mr. Rigas, and Mr. Smalden; and two claims for
19 injunctive relief against the landlord.
20 The claims for injunctive relief asks this Court to
21 prevent the landlord from evicting the debtors at the
22 expiration of the term of the lease under theories of equitable
23 estoppel, and/or the implied covenant of good faith and fair
24 dealing. The Court heard argument on October 2nd.
25 The Third Circuit in its Cybergenics v Chinery

1 decision recognized that the Court may authorize a creditors'
2 committee to bring actions on behalf of the estate to recover
3 property for the benefit of the estate. The action at issue in
4 Cybergenics was a fraudulent conveyance action. Avoidance
5 actions and beach of fiduciary duty actions are the types of
6 claims that committees often seek derivative standing to
7 pursue. In that regard, the first counts of the committee's
8 draft complaint in this action are typical. The request for
9 injunctive relief, with respect to the lease, is not typical.
10 While the Cybergenics Court recognized derivative standing, it
11 did not set out the particular criteria used to determine
12 whether derivative standing should be conferred.
13 Courts in this circuit have variously expressed the
14 standard as follows: Judge Carey, in his Centaur decision,
15 expressed the standard as:
16 "Entitlement to derivative standing requires, one, a
17 colorable claim; two, that the trustee unjustifiably
18 refused to pursue, and, three, permission of the
19 bankruptcy court to initiate the action."
20 Judge Shannon's recitation of the standard in his
21 decision in Optim is very much the same.
22 Judge Winfield, in her One2One Communications
23 decision, listed criteria that Courts use as:
24 "One, a demand on the statutorily authorized party to
25 act; two, a refusal by that party; three, the

1 existence of a colorable claim that would benefit the
2 estate on a cost-benefit analysis performed by the
3 Court, and four, a determination that the refusal is
4 not in keeping with the statutorily authorized
5 parties' duties."
6 In this case, at this time, the gatekeeping issue is
7 whether the debtors have unjustifiably refused to bring the
8 causes of action that are delineated in the committee's draft
9 complaint. The committee has aptly noted the connections
10 between the debtors, Sciens, and the landlord, which would make
11 the Court question the ability of the debtors to effectively
12 sue Sciens or the landlord, and, clearly, the debtors are not
13 bringing those actions.
14 Debtors also insist that certain of the causes of the
15 action are not colorable, but debtors' primary argument now is
16 that the best way to exit the case is through a plan of
17 reorganization, which they have represented, will be filed
18 sometime this week.
19 The committee, on the other hand, believes the best
20 way to maximize recoveries is through the litigation, resulting
21 in an injunction. The committee believes that obtaining the
22 injunction would either result in a truly global settlement
23 that includes the committee's constituency or bring other
24 parties to the table willing to purchase the debtor or make
25 further investment. The committee states that either of those

1 results would be better than the current draft termsheet, which
2 it asserts, provides little, if any, real value to general
3 unsecured creditors who will not or cannot make a further
4 investment Colt.
5 While it is true that the debtors are not pursuing
6 litigation against the landlord, Sciens, or the individual
7 proposed defendants, the draft termsheet circulated to the
8 parties and the Court settles the causes of action the
9 committee wishes to bring. It also gives debtors optionality,
10 with respect to the lease, a five-year lease two, two-year
11 renewal options, or a purchase of the building.
12 In a somewhat similar posture, the Court, in Terra
13 Bentley II, LLC, 2011 WL 808190, held that when a debtor is
14 settling the proposed litigation in its plan, the refusal to
15 bring the litigation is not unjustified. Indeed, the Terra
16 Bentley Court questioned whether there was a refusal at all.
17 The Terra Bentley Court's conclusion is persuasive;
18 although it is unclear to me how involved the debtors are in
19 the actual negotiations of the termsheet, restructuring support
20 agreement and plan, at the very least, debtors are supporting
21 the negotiations of the resolution of these issues. And while
22 the debtors are not bringing the causes of action and are
23 affirmatively opposing the committee's request to do so, the
24 causes of action, and in particular, the expiration of the
25 lease are being addressed, thus, I find, that even assuming

1 there is a refusal to bring the causes of action at this time,
2 such refusal is not unjustifiable.
3 Further, in the event that the draft termsheet does
4 not result in a filed plan or any filed plan is not confirmed,
5 there is time for the committee to renew its motion and for
6 litigation to ensue. At the hearing, the landlord indicated
7 its willingness to extend the term of the lease through January
8 31, 2016. While it was stated in more of a quid pro quo for
9 denying the motion, I will view it as a goodwill gesture to
10 give the consensual process, of which it is a part, time to
11 play out. The extension through January 31, 2016, should be
12 appropriately documented.
13 As I am denying the committee's motion on the grounds
14 I've stated, I need not address the remaining requirements for
15 standing or the other relief sought, similar to the way Judge
16 Shannon handled the Optim matter.
17 That being said, it is evident that the committee
18 needs to be brought into the process in order for there to be a
19 global resolution of this case and to avoid costly litigation,
20 which the debtors have represented to the Court they can ill
21 afford. While the Court denied the committee's motion today,
22 that should not be taken as an endorsement of the draft
23 termsheet or an indication that the committee's draft complaint
24 does not have merit.
25 The committee has raised issues with respect to the

1 involvement of Sciens in the process, the determination of the
2 consideration its constituency will receive under the proposed
3 termsheet in light of what it was offered only a few months
4 ago, and the general confirmability of the plan, all of which
5 portend significant plan-related discovery and litigation. The
6 result of that litigation is uncertain.
7 It should be no surprise to anyone in this courtroom
8 that I expect good faith negotiations with the committee
9 regarding an appropriate resolution of this case. And that
10 conclusion my ruling.
11 Are there any questions?
12 MR. MADRON: No, Your Honor.
13 MR. PHILLIPS: No, Your Honor.
14 THE COURT: Thank you.
15 We stand adjourned.
16 (Proceedings concluded at 10:18 a.m.)
17 *****

1 CERTIFICATION

2 I certify that the foregoing is a correct transcript

3 from the electronic sound recording of the proceedings in the

4 above-entitled matter to the best of my knowledge and ability.

5

6

7

8 /s/ William J. Garling October 7, 2015

9 William J. Garling

10 AAERT-Certified Court Transcriptionist

11 For Reliable