

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

**OBJECTION OF STATUTORY UNSECURED
CLAIMHOLDERS' COMMITTEE OF CAESARS ENTERTAINMENT
OPERATING COMPANY, INC., ET AL. TO DEBTORS' MOTION
FOR ORDER EXPANDING SCOPE OF EXAMINER'S INVESTIGATION**

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

The statutory unsecured claimholders' committee (the "UCC") of Caesars Entertainment Operating Company, Inc., *et al.* (the "Debtors") respectfully submits this objection (the "Objection") to the *Debtors' Motion for an Order Expanding the Scope of the Examiner's Investigation*, dated June 30, 2015 [ECF No. 1847] (the "Motion"), and avers as follows:

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

Summary of Argument²

The Debtors' Motion would expand the Examiner's investigation into Lien Challenges that solely impact intercreditor disputes and do not enhance the Debtors' estates. It should be denied because (a) the relief requested is designed to impede the UCC from carrying out its rights and duties to prosecute Lien Challenges under the Cash Collateral Order, (b) contrary to the Examiner Order, the expanded scope does not incorporate any causes of action of the Debtors' estates, and solely impacts intercreditor disputes the Debtors cannot pursue, and (c) contrary to the Debtors' allegations, the relief they request will create needless delay and duplication, and neither make the chapter 11 cases more efficient, nor assist parties' negotiations.

Background

1. Examiner Appointment. On March 12, 2015, the Court entered, pursuant to Bankruptcy Code section 1104(c), the *Order Granting in Part and Denying in Part Motions to Appoint Examiner* [ECF No. 675] (the "Examiner Order"). On March 25, 2015, the Court entered an order appointing Richard J. Davis as the examiner [ECF No. 992] (the "Examiner").

2. Scope of Examiner's Investigation. Pursuant to Paragraph 3 of the Examiner Order, the Examiner has been directed to investigate: (a) the transactions described as the "Challenged Transactions" in the *Debtors' Motion for Entry of an Order (I) Appointing an Examiner and (II) Granting Related Relief* [ECF No. 363]; (b) the transactions described as the "Insider Transactions" in the proposed order accompanying the *Motion of Official Committee of Second Priority Noteholders for Appointment of Examiner with Access to and Authority to Disclose Privileged Materials* [ECF No. 367]; (c) any other transactions involving the Debtors, to the extent those transactions suggest potential claims belonging to the estates, including causes

² Capitalized terms not otherwise defined are defined in subsequent sections of the Objection.

of action against any current officers or directors of the Debtors, any former officers or directors of the Debtors, or any affiliates of the Debtors; and (d) any apparent self-dealing or conflicts of interest involving the Debtors or their affiliates.

3. Examiner Protocols. Based on concerns about the inefficiencies of different entities' contemporaneous investigations into the Challenged Transactions and Insider Transactions, the Court instructed the parties to form a discovery plan. Hr'g Tr. 74:10–13, Mar. 25, 2015. After extended negotiations among the Examiner, the United States Trustee, the Debtors, the statutory committees, and the *ad hoc* committees, the parties agreed on two separate protocols designed to streamline and coordinate the parties' discovery. On May 18, 2015, the Court entered the *Order (i) Approving Protocol and Procedures Governing Examiner Discovery, (ii) Approving Establishment of a Document Depository, and (iii) Granting Related Relief* [ECF No. 1576] (the "Discovery Protocol"). On June 26, 2015, the Court entered the *Agreed Order on Interviews and Depositions by the Examiner* [ECF No. 1831] (the "Witness Protocol," and together with the Discovery Protocol, the "Examiner Protocols").

4. Impact of Witness Protocol. Notably, the Witness Protocol does not prevent the UCC from taking oral discovery in any contested matter or adversary proceeding, but does prevent (until the earlier of the filing of the Examiner's report and October 15, 2015) the UCC from taking examinations pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") of witnesses on topics the Examiner desires to examine. Witness Protocol ¶ 6.

5. UCC Lien Challenge. Pursuant to paragraph 12(b) of 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*, entered on March

25, 2015 [ECF No. 988] (the “Cash Collateral Order”), subject to obtaining derivative standing if and when necessary, the UCC has the right to “seek to avoid liens, object to claim allowance, or otherwise challenge the Debtors’ Stipulations or to challenge, initiate any proceeding, or assert any claim or cause of action with respect to (i) the validity, enforceability, extent, priority, or perfection of the First Lien Documents or any of the mortgages, security interests, and liens (including the Prepetition First Priority Liens) of any Prepetition Secured Agent or Prepetition Secured Creditor; (ii) the validity, allowability, priority, secured status or amount of the Prepetition First Lien Obligations, or (iii) the Prepetition First Lien Creditors arising under or in connection with the First Lien documents or the Prepetition First Lien Obligations,” (collectively, the “Lien Challenges”).³

6. The UCC is the Only Eligible Party in Interest to Prosecute Lien Challenges. In paragraph E(iv) of the Cash Collateral Order, the Debtors stipulate to, among other things, the validity, perfection, and non-avoidability of the Prepetition First Priority Liens (as defined in the Cash Collateral Order ¶ E(ii)(b)). Accordingly, the Debtors cannot challenge the Prepetition First Priority Liens. The holders of Prepetition First Priority Liens (the “First Lienholders”) cannot challenge their own liens. And, the holders (the “Second Lienholders”) of liens (the “Prepetition Second Priority Liens,” and together with the Prepetition First Priority Liens, the “Prepetition Liens”) securing the Prepetition Second Priority Notes (as defined in the Cash Collateral Order ¶ E(iii)(b)) are barred by their intercreditor agreement from challenging

³ The Cash Collateral Order established May 6, 2015 as the deadline by which the UCC must bring such challenge, and to the extent derivative standing is required, the UCC’s May 6, 2015 deadline could be tolled by filing a standing motion. The challenge deadline has since been extended to August 7, 2015. See *Third Stipulation Pursuant to Final Cash Collateral Order Extending Challenge Period* [ECF No. 1862]. The UCC intends to conduct any necessary Rule 2004 depositions and to file Lien Challenges as expeditiously as possible.

the Prepetition First Priority Liens. Accordingly, the UCC is the only party in interest eligible to challenge the Prepetition First Priority Liens. Additionally, the First Lienholders have no pecuniary interest in challenging the Prepetition Second Priority Liens, and the Second Lienholders cannot challenge their own liens. Accordingly, the only statutory party in interest having a pecuniary interest in challenging the Prepetition Second Priority Liens is the UCC.

7. Liens Granted in the LBO. The Debtors define the LBO as the January 28, 2008 transaction under which Apollo and TPG acquired the public shares of Caesars Entertainment Corporation (“CEC”). Motion ¶ 2. Around that time, Prepetition First Priority Liens were granted to secure the obligations (the “First Lien Bank Debt”) under the First Lien Credit Agreement (as defined in the Cash Collateral Order ¶ E(i)(a)).

8. Liens Granted After the LBO. The Prepetition Second Priority Liens were not granted until the issuances of Prepetition Second Priority Notes on December 24, 2008, April 15, 2009, and April 10, 2010, well after the LBO. *See* Cash Collateral Order ¶ E(iii)(a). Likewise, although the First Lien Bank Debt was secured in the LBO transaction, the notes secured by the Prepetition First Priority Liens were not issued until June 10, 2009, nearly a year and a half after the LBO. *See* Cash Collateral Order ¶ E(ii)(a).

9. Potential Lien Challenges. Pursuant to the Cash Collateral Order, the UCC has been investigating the validity and potential avoidability of the Prepetition Liens. While the UCC’s investigation is ongoing, the UCC already has identified several grounds to challenge certain of the Prepetition Liens. One such ground is that the Prepetition Liens were granted by subsidiaries for no value while they may have been insolvent or under-capitalized. The UCC’s raising of this potential challenge, which would have started (but not ended) with the LBO, spurred the Debtors to file the Motion.

10. The Examiner Advised the Parties He Would Not Investigate the LBO.

On April 14, 2015, the Examiner distributed a list of his intended investigation topics and it did not include the LBO. This was consistent with the Examiner's prior advice to the UCC that he would not investigate the LBO and was consistent with the Examiner Order, which only referred to actions that would add value to the Debtors' estates.

11. The UCC Negotiated the Witness Protocol Based on the Examiner's Representations That He Was Not Investigating the LBO. The Witness Protocol was not supposed to impede the UCC's ability to carry out its rights and duties under the Cash Collateral Order, including taking Bankruptcy Rule 2004 examinations to determine which Lien Challenges were plausible.

Objection

12. The Debtors Requested the Examiner to Investigate the LBO Because That Would Impede the UCC's Prosecution of Lien Challenges. The Examiner advised the Debtors that he would not investigate the LBO without an order requiring him to do so, and he understood the Debtors' motives.

13. The LBO Investigation Does Not Involve Estate Causes of Action and Therefore is Not a Clarification of the Examiner Order. Bankruptcy Code section 541(a) is clear that avoidance actions are not property of the estate. *Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 245 (3d Cir. 2000). Only their proceeds become estate property. 11 U.S.C. § 541(a)(3).

14. Extending the Deadline for the UCC to Commence Lien Challenges Does Not Avoid Prejudice to the UCC. The Debtors claim that by extending the UCC's deadline to bring Lien Challenges, the UCC will not be prejudiced by expanding the Examiner's scope of

investigation. Motion ¶ 7 n.2. As the Debtors are aware, if the UCC lacks time to obtain standing when necessary, and to begin prosecuting a Lien Challenge prior to a confirmation hearing, the plan proponent may succeed in settling Lien Challenges as part of the plan. The Debtors clearly are motivated to prevent the UCC from eliminating a Prepetition Lien necessary to justify the proposed chapter 11 plan in their restructuring support agreement (the “RSA”). Additionally, the less the UCC knows about the strength of the potential Lien Challenges, the less effectively it can negotiate a chapter 11 plan.

15. Expanding the Scope of the Examiner’s Investigation to Include the LBO is Neither Efficient Nor Helpful. The Examiner’s ultimate report constitutes his opinion on law and facts. As such, it is both hearsay and an opinion on the law, inadmissible in evidence. Bankruptcy Rule 9031 prohibits the application of Rule 53 of the Federal Rules of Civil Procedure to appoint a master in any bankruptcy case. Accordingly, the Examiner’s report cannot be used by the Court as a master’s report. Moreover, because the Examiner is not obligated to turn over his discovery and notes, the parties cannot reliably assign weight to his conclusions. As the UCC has previously asserted, the benefit of an examiner is to find assets for the estate that creditors do not already know about. The Examiner’s investigation of the LBO provides no benefit, especially where the Examiner would first have to duplicate much of what the UCC has already done, and then undertake more work that the UCC would then have to duplicate in substantial part before it could bring its Lien Challenges. The sole impact of the Examiner would be to impede the UCC’s investigation of Lien Challenges at the Debtors’ request.

16. Conclusion. The Motion is simply the Debtors’ tactical maneuver designed to frustrate the UCC’s efforts to bring Lien Challenges to benefit its constituency,

which challenges could show that the Debtors' proposed plan in the RSA is premised on voidable liens.

WHEREFORE the UCC respectfully requests the Court to (a) deny the Motion, and (b) grant the UCC such other and further relief as is just.

Dated: July 9, 2015
Chicago, Illinois

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

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