

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

CAESARS ENTERTAINMENT
OPERATING COMPANY, INC., *et al.*¹

Debtors.

Chapter 11

Case No. 15-01145 (ABG)

(Jointly Administered)

**SUPPLEMENTAL OBJECTION OF NOTEHOLDER COMMITTEE
TO DEBTORS' MOTION TO EXTEND THEIR PLAN EXCLUSIVITY PERIODS**

1. In seeking a six-month extension of plan exclusivity, the Debtors rely solely on the record of this case. The accompanying *Stipulation Of Facts Between Debtors And Objectors To Debtors' Exclusivity Motion* ("Stip."), which comprises the evidentiary record on which the Motion is to be decided, documents nothing the Court does not already know. That record does not support a finding of cause for any extension of exclusivity, much less the half-year extension sought by the Debtors.

2. As shown below, the Noteholder Committee objects to exclusivity on two elemental grounds. *First*, as a matter of law, the Debtors' avowed intention to pursue a "new value" plan by which their controlling shareholder – nondebtor Caesars Entertainment Corporation ("CEC") – would retain substantial ownership of reorganized CEOC is cause to terminate exclusivity, not extend it, whether or not the Debtors ultimately "market test" the plan as they now belatedly say they might.

¹ The last four digits of the tax identification number for debtor Caesars Entertainment Operating Company, Inc., are 1623. A complete list of the Debtors may be obtained at <https://cases.primeclerk.com/CEOC>. Undefined capitalized have the meanings set forth in the Motion and Stipulation.

3. *Second*, contrary to the Debtors' unsupported allegations, the record on which the Debtors rely does not demonstrate the requisite progress and good faith necessary for an extension of exclusivity. The Debtors' inappropriate prepetition transactions and reckless pursuit of a new value plan over the objection of a vast majority of the capital structure have produced the most-litigious imaginable start to a major chapter 11 case, a point the Debtors effectively concede. Mot. ¶ 18 (“[A]s demonstrated repeatedly over the last three months, these cases are highly litigious.”). There will be no true “progress” here until exclusivity is lifted, thereby neutering CEC’s effort to obtain additional inappropriate benefits from its insolvent subsidiary and creating a level bargaining table over which all stakeholders can negotiate for fair and even-handed treatment.

I. THE RSA AND ITS NEW VALUE PLAN ARE CAUSE TO *TERMINATE* EXCLUSIVITY, NOT EXTEND IT

4. On March 2, 2015, the Debtors filed an unsigned draft plan of reorganization (ECF 555), Stip. ¶ 30, apparently in an effort to comply with a “milestone” established by the RSA plan lockup agreement that CEC (for itself and putatively on behalf of the Debtors) negotiated with a select minority of the Debtors’ creditors prior to bankruptcy. Stip. ¶ 15, Ex. A.

5. No one disputes that the RSA plan is a “new value” plan. It provides for CEC – the entity that directly or indirectly controls all of the Debtors – to receive up to 100% equity ownership of reorganized CEOC, together with equity in a newly-formed property company, control of CEOC through appointment of a majority of the board of directors, the right to manage various properties (including Caesars Palace Las Vegas), and full releases and absolute exculpation of any and all claims that might be asserted by the bankruptcy estates and all creditors against CEC, its officers, directors, shareholders and a host of affiliates.

A. LaSalle Mandates Termination Of Exclusivity Upon Filing Of A New Value Plan.

6. Section 1129(b)(2)(B) of the Bankruptcy Code prohibits confirmation of a plan over the objection of an impaired class unless claims within the class are paid in full or “the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.” 11 U.S.C.

§ 1129(b)(2)(B).

7. To date, the Supreme Court has declined to consider whether there is a “new value” exception to this rule of “absolute priority.” *Bank of America National Trust & Savings Ass’n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 454 (1999) (issue “is not to be decided here”).² However, as explained in the Noteholder Committee’s Preliminary Objection, the Supreme Court unconditionally has held that a new value plan like the RSA plan cannot be confirmed over the objection of a dissenting class (is “doomed”) if the dissenting creditors have no opportunity “to compete for [the] equity or to propose a competing reorganization plan.” *Id.* Specifically, confirmation must be denied where a debtor “has taken advantage of [plan exclusivity] by proposing a plan under which the benefit of equity may be obtained by no one but old equity partners.” *Id.*; *see id.* at 455 (“before the Debtor’s plan was accepted no one else could propose an alternative one, and after its acceptance no one else could obtain equity in the reorganized entity”).

8. Ultimately, the Court concluded that, if a “new value” exception exists, it is viable only through a “market test.” “Under a plan granting an exclusive right, making no provision for competing bids or competing plans, any determination that the price was top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value is

² The Noteholder Committee does not concede that a “new value” exception exists.

exposure to a market.” *Id.* at 457; *e.g.*, *In re Castleton Plaza, LP*, 707 F.3d 821, 821 (7th Cir. 2013) (under *LaSalle*, “competition is the way to tell whether a new investment makes the senior creditors (and the estate as a whole) better off”).

9. Significantly, the Court observed that termination of exclusivity is one way – and possibly the only way – to satisfy that market test. *LaSalle*, 526 U.S. at 458 (“Whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity, is a question we do not decide here.”). Accordingly, since *LaSalle* courts have not hesitated to terminate (or refuse to extend) exclusivity upon the filing of a “new value” plan.

10. In *Situation Management*, for example, the court directly considered “whether a ‘new value’ provision in a reorganization plan constitutes cause for terminating the exclusivity period” and concluded that it did. *In re Situation Mgmt. Sys., Inc.*, 252 B.R. 859, 863 (Bankr. D. Mass. 2000). The court held that, under *LaSalle*, a “new value” plan “exposes the Debtor’s equity interests to competitive bidding.” *Id.* at 865. Thus, when a “new value” plan has been proffered, “the Debtor’s exclusive right to propose and gain acceptance of a plan effectively has been forfeited because any party can bid on the Debtor’s equity interest and assume control of the Debtor if the bidder is successful.” *Id.* (emphasis added).

11. Similarly, in *Davis*, the court denied the debtor’s motion to extend exclusivity because a “new value” plan had been filed, concluding that termination of exclusivity would provide others “the opportunity to propose a competing plan and/or to object to confirmation of the Debtors’ plan should they choose to propose a modified plan which continues to vest in themselves the exclusive right to provide new value.” *In re Davis*, 262 B.R. 791, 799 (Bankr. D. Ariz. 2001). In *Euro-American*, the court appointed a chapter 11 trustee in part because “[t]he

appointment of a trustee will terminate exclusivity and allow any other party in interest to file a plan. Thus, it will open up the process to competition.” *In re Euro-American Lodging Corp.*, 365 B.R. 421, 432 (Bankr. S.D.N.Y. 2007) (citation omitted). And in *Bosque Power*, the court concluded that termination of exclusivity due to the filing of a new value plan was necessary to “promote the maximum recovery to creditors.” *In re Bosque Power Co.*, Case No. 10-60348-rbk, 2010 Bankr. LEXIS 6064, *75 (Bankr. W.D. Tex. Sept. 1, 2010) (“This Chapter 11 case involves the ‘bankruptcy nuances’ of the new value exception and credit bidding by secured creditors. Because this is an unusually large case, and in order to give creditors the best chance of being paid in whole or in part, cause exists under section 1121(d) of the Bankruptcy Code to reduce the time for acceptances of the Debtors’ proposed plan so that other parties in interest may file a proposed plan. This could allow creditors a choice between competing plans and would promote the maximum recovery to creditors.”) (disclosure statement quoting court ruling) (emphasis added).

12. Commentators likewise agree that exclusivity is forfeited and should be terminated when a debtor files a new value plan:

The text of the Code and judicial precedent both support categorizing the filing of a new value plan as sufficient “cause” to terminate exclusivity. If the debtor proposes a new value plan, then by definition it has admitted its insolvency because it is proposing to pay its creditors less than the full amount of their claims. It is also stepping back from consensual readjustment of its capital structure; owners seek confirmation of a new value plan over the dissent of an unpaid class. In such circumstances, allowing owners to perpetuate their control of the debtor by excluding creditor action violates *Boyd’s* holding that the absolute priority rule protects incidents of ownership such as control. The filing of a new value plan and its concomitant admission of insolvency thus provides ample “cause” to terminate exclusivity.

Markell, Bruce, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 118-19 (1991) (emphasis added).

13. Accordingly, as a matter of law, the Debtors forfeited their statutory right to plan exclusivity when they chose to follow the directive of their controlling out-of-the-money shareholder by pursuing a crammed-down new value plan over the objection of creditors holding billions of dollars of claims. The Motion can and should be denied on that basis alone.

B. The Belated “Market Test” Is Not Cause To Extend Exclusivity.

14. The Debtors tacitly recognize this. In the Motion, they state that they now “have determined that it is appropriate to commence a process – overseen by the [allegedly] independent Governance Committee – to market test the Plan.” Mot. ¶ 5. A “market test” is now claimed to be required by “the Debtors’ fiduciary obligations to maximize the value of their estates and applicable law.” *Id.*

15. Notably, the Debtors never previously recognized any obligation to conduct such a market test. Neither the RSA, the locked-up RSA plan, nor the proposed disclosure statement makes any mention of a market test. None of the admittedly “controversial” prepetition transactions that siphoned billions of dollars away from the Debtors to CEC and entities it controlled was accompanied by any market test. And the Debtors have not actually done anything to implement the market test they now say is required. They just conveniently now suggest for the very first time – when they are asking for an extension of exclusivity – that they might create a “process” in the future. Stip. ¶¶ 31-33. The Debtors have not even begun to “design” that process, much less put it in place. Mot. ¶ 5 (“it will take months to design, implement, and complete this process”).

16. This empty, desperate promise does not, and cannot, resurrect cause for an extension of exclusivity. For one thing, the Debtors are controlled by CEC, the very entity that seeks to obtain new equity and other rights through the new value plan. CEC obviously suffers from debilitating conflicts and cannot possibly run a fair “process” for the assets that it will keep

for itself under that plan. The “oversight” of the allegedly “independent Governance Committee” – the same one that rubberstamped one or more of the “controversial” prepetition transactions – is no salve, as CEC retains ultimate control. Potential bidders will not regard any sale process run by CEC and parties to the RSA as a serious effort to sell anything. Instead, it will be seen as an effort to validate the transaction CEC sponsored and the RSA parties endorsed.

17. Moreover, there can be no truly fair “market test” – one that maximizes value – under the rubric of “soliciting Plan overbids,” which is all that the Debtors suggest they may do. Mot. ¶ 5. The RSA plan firmly and unfairly tilts the scale in favor of CEC through the various ancillary benefits afforded to it, including control of reorganized CEOC (regardless of CEC’s ultimate equity ownership), the right to manage Caesars Palace Las Vegas and other valuable properties, rights of first refusal on transactions involving the new Caesars property company and, most critically, broad global releases that would be extremely valuable to CEC and its insiders and affiliates but worthless to independent third parties who might want to bid on ownership or assets of the Debtors. For true, fair and open competitive bidding over equity in the reorganized debtors to occur, all of those other valuable rights – available only to CEC – would have to be stripped from the plan. Neither the Debtors, CEC, nor their insiders has indicated any willingness to do so.

18. In any event, termination of exclusivity “is a preferable procedural mechanism to auction” because, among other things, “the competing plan approach provides for a more informed process for creditors and interested bidders than an auction of equity interests in the context of a Debtor’s plan.” *Situation Mgmt.*, 252 B.R. at 865-66. The Debtors’ RSA plan – with or without the nascent “market test” – is “doomed” unless exclusivity is terminated to enable others to propose a competing plan free of the taint of CEC control and domination.

C. The Debtors' Purported Desire To "Build Consensus" Around An Unconfirmable Plan Is Not Cause To Extend Exclusivity.

19. It is no answer to suggest – as the Debtors do – that the Court should “wait and see” how confirmation of their new value plan plays out. For one thing, there is woefully inadequate creditor support for the RSA plan. Creditors throughout the Debtors' capital structure affirmatively oppose it. The First Lien Bank Lenders, representing over \$ 5.35 billion in first lien debt, are on record as opposing the RSA and have “ceased discussions” with CEC (and, hence, the Debtors) regarding it. Stip. ¶ 18, Ex. C. The UCC, the fiduciary representative of all unsecured creditors, is similarly critical of the RSA and the plan and settlement contemplated by it. (ECF 452 at ¶¶ 14-18).

20. The Debtors have not conducted any negotiations with the Noteholder Committee – representing over \$5.2 billion in second lien debt – regarding the RSA or the terms of a plan. Stip. ¶ 20. Like the First Lien Bank Lenders and the UCC, the Noteholder Committee and its constituency oppose the RSA and proposed plan.

21. As the First Lien Bank Lenders trenchantly observed, “there has been no progress made towards a restructuring in the more than ninety days since the Debtors filed for Chapter 11 relief. Indeed, the Debtors appear further from a consensual restructuring now than they were on the Petition Date.” (ECF 1273 ¶ 1) The Debtors effectively concede this. They state that they need more exclusivity so that they can begin to attempt to “build consensus.” Mot. ¶ 4 (with exclusivity, the Debtors would “continue to negotiate with their first lien bank group” and, if a deal were achieved, “would then be able to turn their attention in earnest toward their junior creditors”) (emphasis added); *see id.* ¶ 2 (exclusivity allegedly needed “for the Debtors to negotiate and build additional consensus”); ¶ 6 (exclusivity allegedly needed “to allow the Debtors to engage with their junior stakeholders to try to build consensus”).

22. This is not a state of affairs that constitutes cause for an extension of exclusivity. The widespread opposition to the RSA plan requires termination, not extension, of exclusivity. *See, e.g., In re Deming Hospitality, LLC*, Case No. 11-12-13377 TA, 2013 Bankr. LEXIS 1428, *25 (Bankr. D.N.M. April 5, 2013) (“Debtor argues that it is too soon to consider *LaSalle*’s requirements because Debtor may still be able to convince SBA to vote in favor of the Plan, in which case no such auction would be required. That is theoretically true, but SBA’s opposition is strong enough, and Debtor’s treatment of SBA’s claim is harsh enough, for the Court to conclude that the Plan must comply with *LaSalle*’s market/competition requirement, whatever they may be, to proceed.”) (footnote omitted).

23. Indeed, a “wait and see” approach would be a prescription for delay, expense, and chaos, as there is no question that the RSA plan is in fact “doomed” under *LaSalle*. *See, e.g., In re RAMZ Real Estate Co.*, 510 B.R. 712, 719 (Bankr. S.D.N.Y. 2014) (“Based on the Supreme Court’s mandate in *LaSalle*, there is no possibility but to deny confirmation of the Plan in this case. Debtor has not provided for a competing plan nor is there evidence that any other party was given an opportunity to bid on the interest sought by new equity.”); *In re Ralph Roberts Realty, LLC*, 487 B.R. 480, 484 (Bankr. E.D. Mich. 2012) (“Like the plan in *North LaSalle*, the Debtors’ Third Amended Plan in this case is ‘doomed.’ The Plan, which Debtors proposed at a time when only they could file a plan, under 11 U.S.C. § 1121(b), gives an exclusive opportunity to the old equity owner Ralph Roberts to obtain 100% of the new equity in the reorganized Realty LLC, by contributing ‘new value.’ The Plan does not give anyone else such an opportunity; it does not allow anyone else to compete for the ownership of the reorganized Realty LLC. Under *North LaSalle*, the Third Amended Plan clearly violates the absolute priority rule – *i.e.*, it fails to satisfy § 1129(b)(2)(B)(ii). For this reason alone, confirmation of this plan

must be denied.”); *In re 4C Solutions, Inc.*, 302 B.R. 592, 600 (Bankr. C.D. Ill. 2003) (“Kartham’s acquisition of the new shares without market exposure or an opportunity for any other interested party to outbid him is the Plan’s fatal flaw.”); *In re Global Ocean Carriers, Ltd.*, 251 B.R. 31, 49 (Bankr. D. Del. 2000) (“[W]e conclude that the Debtors’ Modified Plan violates the absolute priority rule by allowing the existing shareholder to determine, without the benefit of a public auction or competing plans, who will own the equity of Global Ocean and how much they will pay for the privilege. To avoid this result the Debtors must subject the ‘exclusive opportunity’ to determine who will own Global Ocean to the market place test.”).

24. It would be counterproductive, and value destructive, to waste months and millions of dollars litigating over a “doomed” plan and a tainted “market test” process. Termination of exclusivity now would start the process of exposing equity in the reorganized Caesars to the market and better ensure that value for creditors is maximized and avoiding a time-consuming and wasteful litigation morass. It also would enable creditors to generate a plan that (a) is not a new value plan and (b) does not contain releases of insiders and affiliates. Such a plan would not have to await resolution of claims against CEC and its affiliates and insiders and could be confirmed immediately, to the benefit of all stakeholders.

II. THE DEBTORS LACK ADEQUATE “PROGRESS” TO JUSTIFY AN EXTENSION OF EXCLUSIVITY

25. The Debtors argue that they “have made significant progress in negotiating with their stakeholders and administering these cases, which further warrants an extension of the Exclusivity Periods.” Mot. ¶ 20. False. As explained above, negotiations with the First Lien Bank Lenders have ceased, and the Debtors have not even begun to engage the Noteholder Committee or the UCC. The Debtors have made no effort to “establish a constructive and active dialogue with their prominent creditor constituencies – including the Official Committees.”

Mot. ¶ 21. Moreover, the Debtors already have failed to satisfy at least one “milestone” under their RSA with the First Lien Bond Lenders, entitling even those minority creditors to abandon their commitment to the RSA plan. Stip. ¶ 17.

26. That is not “progress,” much less “significant progress. Indeed, there has been so little true “progress” in this case that the Debtors attempt to take credit for the constructive actions of other parties. For example, the Debtors boast that they “moved for and secured the appointment of an independent examiner to ensure that all parties in interest have the benefit of an impartial perspective with respect to certain prepetition transactions.” Mot. ¶ 20(f). The Debtors conveniently ignore the fact that the Petitioning Creditors had moved for an examiner more than a month earlier. Stip. ¶ 10. The Debtors only decided to join the request once they realized that the appointment of an examiner to investigate their admittedly “controversial” prepetition transactions was a *fait accompli*. Even then, the transparent purpose of the Debtors’ motion was to limit the scope, duration, expense and, ultimately, effectiveness of the examiner’s investigation. That effort was rejected by the Court, and the investigation ultimately ordered was far broader than the constrained investigation sought by the Debtors. *See* Stip. ¶ 24, Ex. F.

27. Similarly, the Debtors claim that they “successfully secured key stakeholder support for an agreed final cash collateral order.” Mot. ¶ 20(d). To the contrary, it was the UCC that negotiated a favorable resolution of its objection to cash collateral with the relevant secured lenders. The Debtors were perfectly content to live with the cash collateral agreement they had “negotiated” prior to the bankruptcy case.

28. If anything, the Debtors have impeded “progress” here. For example, after unsuccessfully lobbying the U.S. Trustee to not appoint any second priority noteholders to an official committee, the Debtors moved to disband the Noteholder Committee, Stip. ¶ 13, relief

that the Court was without power to order. This unproductive action served no purpose other than to increase administrative expenses and delay the Noteholder Committee's ongoing consideration of the restructuring alternatives available to the estate – not progress in any sense of the word.

29. In sum, there simply is no cause for an extension of plan exclusivity here – real “progress” will only be achieved if creditors and estate fiduciaries are free to explore all options, free from heavy hand and control of CEC.

* * *

For all of these reasons, the Noteholder Committee requests that the Court deny the Motion in order to create a truly level playing field amongst all stakeholders and to put this case on a feasible track toward resolution and reorganization.

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Chicago, Illinois

Respectfully submitted,

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