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)
Debtors.	(Jointly Administered)
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., et al., Movant, -against- STATUTORY UNSECURED CLAIMHOLDERS' COMMITTEE, Respondent.	

SUPPLEMENTAL 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 supplemental objection (the "Supplemental Objection")[2] to the *Debtors' Motion for an Order*

[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.

[2] On July 9, 2015, the UCC filed the *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* [ECF No. 1866] (the "Objection"). At the July 13, 2015 hearing, the Court requested the Debtors and the UCC file additional responses on this matter. Hr'g Tr. 13:25, 14:1–2, 15:19–24, July 13, 2015.

Expanding the Scope of the Examiner's Investigation, dated June 30, 2015 [ECF No. 1847] (the "Motion"), and sur-reply to the *Debtor's Reply in Support of Their Motion for Entry of an Order Expanding the Scope of the Examiners' Investigation*, dated July 20, 2015 [ECF No. 1933] (the "Reply"), and avers as follows:

Supplemental Objection[3]

1. The Debtors Do Not Deny the Primary Assertions in the UCC's Objection.

The Debtors fail to deny they are attempting to expand the Examiner's investigation solely to impede the UCC's investigation of certain liens by subjecting the UCC to the Witness Protocol with the Examiner. That would delay the UCC's ability to take any necessary Bankruptcy Rule 2004 exams and complete its investigation. In fact, the Debtors admitted that much by stating they do not want "the creditors committee [asserting] claims . . . the examiner never looked at" and thwart the Debtors' "efforts to get to a consensual plan through the examiner's analysis." Hr'g Tr. 13:4–14, July 13, 2015; *see also* Reply ¶ 4. Thus, the "urgency" motivating this Motion that puzzled the Court (Hr'g Tr. 14:4–6, July 13, 2015) derives from the Debtors' effort to shut down the UCC's investigation before it is completed and ensure that prepetition liens necessary to justify the RSA (which the UCC does not support) remain in place.

2. Notably, the UCC also hopes for a consensual plan. The difference, however, between the UCC and the Debtors is the UCC believes a consensual plan should be the product of an arm's-length negotiation among unsecured claimholders, secured claimholders, the Debtors, and the Debtors' owners, which can only occur if claims against the secured claimholders and the Debtors' owners are asserted and negotiated by unsecured claimholders.

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[3] Capitalized terms not otherwise defined shall have the same meaning as ascribed to them in the Objection.

Conversely, as shown by every position the Debtors have taken, the Debtors want to cram down on unsecured claimholders a purported settlement they negotiated with their owners while being controlled by their owners, which purported settlement is premised on the non-avoidability of the secured lenders' liens and on the liens encumbering virtually all estate assets, even when they do not. That is the basis on which the Debtors convinced some secured claimholders to agree to their proposed plan.

3. The Debtors also do not deny that the Examiner informed the UCC, before the Witness Protocol was negotiated, that he was not investigating the LBO, and neither the LBO nor the liens granted in additional financings over the next two years were ever on the Examiner's list of investigation topics that he circulated to the parties.[4] This was consistent with the motions of the Debtors and the Second Lienholders for the Examiner to investigate the "Challenged Transactions" and the "Insider Transactions" that affect the Debtors' sponsors, and not transactions—like the LBO—that merely impact the allocation of value among claimholders. It was also consistent with the Cash Collateral Order, under which the UCC was carved out as the entity to investigate liens (Cash Collateral Order ¶ 12), especially because the Debtors represented the First Lienholders' security interests and liens were all valid and unavoidable. Accordingly, the UCC immediately commenced an extensive investigation. It found, among other things, that many liens were granted by subsidiaries for no consideration and secured debt far greater than the subsidiaries' asset value. The UCC was also cognizant of the statute of limitations issues and has been investigating whether an actual creditor exists that could have

[4] Tellingly, the Examiner's counsel noted to this Court that the Examiner "felt that he shouldn't undertake such an additional expansion of what was clearly covered in terms of the listed transactions without first getting approval of the court to include this within the scope." Hr'g Tr. 4:17–21, July 13, 2015.

brought fraudulent transfer claims on the petition date. Clearly, the Debtors and secured claimholders would prefer the UCC investigation be slowed down in every possible way.

4. The Debtors further fail to deny that the Examiner's report is hearsay, and is inadmissible in evidence to prove or disprove the voidability of liens. Having the Examiner start investigating the LBO now, after the UCC already has been investigating it since the beginning of these cases, is sheer duplication and delay with no purpose served other than undermining the UCC's own investigation. The Debtors pretend the Examiner's opinion about the liens will somehow outweigh the opinion of the UCC because the Examiner "will look at all potential claims, defenses, and remedies." Reply ¶ 13. The Debtors, however, fail to explain how the UCC's investigation is not doing that. Contrary to the Debtors' belief, it does matter who ultimately will bring LBO-related claims, because the UCC has a much greater incentive to investigate these issues thoroughly. Indeed, the Debtors already represented in the Cash Collateral Order that the liens of the First Lienholders are valid and unavoidable (Cash Collateral Order ¶ E(iv)). Since the only party who realistically can bring LBO-related claims is the UCC, and since the Examiner's investigation of these issues would result in substantial duplicative cost and a material delay in producing the Examiner's report, the only logical conclusion is to have the UCC complete its investigation without additional hurdles.

5. <u>The Debtors Willingly Ignore the Unnecessary Duplication and Cost to the Estates</u>. What the Debtors do deny is the cost and delay the relief requested in their Motion will cause in these cases. Ironically, the Debtors believe that investigating the LBO pursuant to the Witness Protocol "will help reduce potentially duplicative examinations and reduce the burden on the estates," Reply ¶ 20, but nowhere do the Debtors factor in the months of duplicative work the Examiner would have to do just to get to where the UCC is now in its investigation. The

Debtors argue it is irrelevant who will bring claims on behalf of the estate, but the Debtors ignore that the Examiner's investigation of the LBO will create duplication and delay for no purpose. It is already clear the Examiner's report—without the addition of the LBO claims—will not be completed by October 15, as initially estimated. If the Debtors and secured claimholders have it their way, the Examiner may not even start investigating the LBO before he completes the investigation of the original topics—which may be months from now. And even then, it would first take the Examiner months to duplicate all the work the UCC has already done. The Court should not allow any such delay, and should especially reject any suggestion to delay the LBO investigation until after the report on the "Challenged Transactions" and "Insider Transactions" is completed[5] because the validity of liens and claims arising from the LBO will be critical to an assessment of treatment under any plan.

6. The Examiner Order Does Not Give the Examiner Authority to Investigate LBO-Related Claims. Contrary to the Debtors' assertions, the LBO claims do not fall within the scope of the "catch-all" provision of the Examiner Order regarding claims belonging to the estate, because the LBO claims do not belong to the estates.[6] The authority for that is firstly the

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[5] *See Response of the Ad Hoc Bank Lender Committee to (1) Debtors' Motion for Entry of an Order Expanding the Scope of the Examiner's Investigation and (2) Statutory Unsecured Claimholder's Committee's Objection Thereto*, dated July 9, 2015 [ECF No. 1869] (the "Lenders' Reply"), ¶ 5. The arguments set forth in the Lenders' Reply are largely covered in the Debtors' Reply and are, therefore, not separately addressed herein.

[6] The Debtors claim "there is simply no relevant distinction for purposes of this Court's Examiner Order between potential avoidance claims arising from the LBO and those arising from the Challenged Transactions." Reply ¶ 2. The Debtors point out that the B-7 Refinancing includes avoidance actions, which are included in the scope of the Examiner's investigation. *Id*. That is true and irrelevant, because the Examiner Order expressly directed the Examiner to investigate the "Challenged Transactions," and the B-7 Refinancing was one of them. By contrast, LBO-related claims clearly were not included in either the "Challenged Transactions" or the "Insider Transactions," and are also not claims belonging to the estate that could fall within the "catch-all" provision in the Examiner Order.

statute. Bankruptcy Code section 541(a) makes proceeds of avoidance actions property of the estate, but not the actions themselves. This was confirmed by the United States Court of Appeals for the Third Circuit in *Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 245 (3d Cir. 2000) ("[F]raudulent transfer claims, which state law provided to Cybergenics' creditors, were never assets of Cybergenics, and this conclusion is not altered by the fact that a debtor in possession is empowered to pursue those fraudulent transfer claims for the benefit of all creditors. The avoidance power itself . . . was likewise not an asset of Cybergenics . . . .").

7. Seventh Circuit law does not provide otherwise. The Debtors cite *Mellon Bank, N.A. v. Dick*, 351 F.3d 290, 291 (7th Cir. 2003) to suggest the Seventh Circuit would disagree with *Cybergenics* on whether avoidance actions are property of the estate, but the suggestions fails. In *Mellon*, the Seventh Circuit upheld the district court ruling that preference actions had not been sold to the purchaser of the debtor's assets. *Id.* at 292. Notably, this conclusion was based on the sale documents, as noted in the district court's decision,[7] and not on whether as a matter of law, the debtors owned the preference actions and could sell them as property of the estate. The Seventh Circuit held that nothing prevented the bankruptcy court from ordering that preference recoveries go to the banks who financed the postpetition operations. *Mellon Bank, N.A.*, 351 F.3d at 293. Therefore, *Mellon* is consistent with the UCC's position and the express terms of Bankruptcy Code section 541(a) that the proceeds—and not avoidance actions— become estate property.

8. The Debtors attempt to support their position with additional Seventh Circuit decisions, but to no avail, because not a single one of those decisions actually involved

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[7] *See Qualitech Steel Corp. Qualitech Steel Holdings v. GE Supply Co. (In re Qualitech Steel Corp. Qualitech Steel Holdings)*, 2003 U.S. Dist. LEXIS 9427, *31-43 (S.D. Ind. May 9, 2003).

the distinction between ownership of the actions and ownership of the proceeds, and none of the decisions expressly held that the actions belonged to the estate. *See In re Teknek, LLC*, 563 F.3d 639, 646 (7th Cir. 2009) (stating "the trustee has creditor status under 11 U.S.C. § 544 and is the only party that can sue to represent the interests of the creditors as a class" without discussing the ownership of avoidance actions); *Fisher v. Apostolou*, 155 F.3d 876, 879 (7th Cir. 1998) (recognizing the trustee has the authority to recover the "property of the estate" as defined in Bankruptcy Code section 541 without ever concluding avoidance actions belong to the estate); *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708–09 (7th Cir. 1994) (mentioning recovery on avoidance actions as property of the estate in passing without distinguishing between ownership of such actions and ownership of proceeds); *Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1343 (7th Cir. 1987) (discussing whether the estate or creditors control the alter ego claim and noting, in discussing the broad application of "property of the estate," that fraudulently transferred property—rather than an action to recover such property—is property of the estate under section 541); *Klingman v. Levinson*, 158 B.R. 109, 113 (N.D. Ill. 1993) (finding that fraudulently conveyed assets do not become property of the estate until recovered and noting the right of the trustee to pursue fraudulent transfers, but failing to discuss the ownership of such actions); *In re Integrated Agri, Inc*., 313 B.R. 419, 422 n. 2, 427 (Bankr. C.D. Ill. 2004) (in a chapter 7 case, noting the right of the trustee to pursue fraudulent transfers and stating "a trustee's avoidance actions, including those under Section 544(b), are not, technically, property of the estate"); *In re Cutty's-Gurnee, Inc.*, 133 B.R. 929, 932 (Bankr. N.D. Ill. 1991) (discussing the trustee/debtor in possession's power to prosecute avoidance actions, but not the ownership of such actions).

9. As emphasized in *Cybergenics,* "[t]he fact that section 544(b) authorizes a debtor in possession . . . to avoid a transfer using a creditor's fraudulent transfer action *does not mean that the fraudulent transfer action is actually an asset of the debtor in possession, nor should be confused with the separate authority of a trustee or debtor in possession to pursue the prepetition debtor's causes of action* that become property of the estate upon the filing of the bankruptcy petition. *See, e.g., Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996) (explaining the difference between these separate grants of authority)." *Cybergenics*, 226 F.3d at 243 (emphasis supplied). The Debtors incorrectly conflate these separate issues and erroneously conclude the LBO-related claims belong to the estate.

10. The LBO-Related Claims Were Never Included in the Examiner Order, So Why Is It Important to Add Them Now? If the Debtors wanted the LBO investigated for purposes other than undermining the UCC's investigation, they could have expressly included the LBO in the Examiner Order within the transactions to be investigated, just like the LBO claims expressly included in the orders that the Debtors cite for the proposition that courts often authorize examiners to investigate LBO-related claims. *See¸ e.g., Agreed Order Directing the Appointment of an Examiner*, ¶ 2, *In re Tribune Company, et al.*, Case No. 08-13141 (KJC) (Bankr. D. Del. Apr. 20, 2010), ECF No. 4120 ("The Examiner shall (i) evaluate whether there are potential claims and causes of action held by the Debtors' estates in connection with the leveraged buy-out of Tribune . . . ."); *In re Revco D.S., Inc.*, 118 B.R. 468, 470 (Bankr. N.D. Ohio 1990) ("The Order approving appointment of the Examiner provided: [t]he Examiner shall investigate potential causes of action and other remedies arising out of the leveraged buyout and the attendant benefits and detriments to the estates . . . ."). The omission here must have been intentional because it has been clear from the outset the Examiner was going to focus on

transactions impacting the Debtors and their owners, Apollo and TPG. That is the recurring theme throughout all the Examiner's investigation topics. The LBO, however, has nothing to do with that. Avoidance of LBO liens impacts the allocation of value among creditor groups. It does not impact how much Apollo and TPG entities owe to the Debtors' estates. As a literal and technical matter, avoidance actions relating to the LBO were not in the initial scope of the Examiner's investigation, and the Debtors are trying to include them now to ensure the UCC's investigation and any pursuit of such claims do not threaten the RSA. Moreover, because the RSA is premised on the Debtors' owners and affiliates receiving non-debtor discharges/releases of liability and the Court has now determined it should not enjoin the prosecution of various guarantee-related claims against non-debtors, there is no basis to protect the RSA.

11. Conclusion. When the Debtors recently asked the Examiner to investigate the LBO, the Examiner immediately recognized the Debtors were deploying a tactical move to slow down the UCC. The Debtors put the Examiner in a difficult position, because the Examiner certainly does not want to appear to refuse to carry out his duties. Accordingly, the Examiner wisely told the Debtors that absent a court order expressly providing his investigation should include the LBO, he would not take on an investigation of the LBO that was brought to his attention at the outset, and he did not include the LBO in his investigation topics. Both because that investigation is technically not in the scope of the investigation ordered by the Court, and because the Debtors are using it solely for tactical purposes despite its inherent duplication of expense and delay, the Debtors' Motion should be denied.

12. If, however, the Examiner, for whatever reason, adds the LBO to his list of investigation topics, the UCC and the Examiner plan to coordinate in a manner designed to

minimize any delay to the UCC and duplication of expense. The UCC and Examiner have already discussed methods of accomplishing those goals.

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 27, 2015
Chicago, Illinois

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