IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*[1] *Debtors*.	Chapter 11 Case No. 15-1145 (ABG) (Jointly Administered)

NOTICE OF MOTION OF NOTEHOLDER COMMITTEE FOR ORDER GRANTING STANDING TO COMMENCE, PROSECUTE, AND SETTLE CLAIMS ON BEHALF OF THE DEBTORS' ESTATES

PLEASE TAKE NOTICE that on May 13, 2016, the Official Committee of Second Priority Noteholders (the "Noteholder Committee") appointed in the above-captioned cases filed the *Motion of Noteholder Committee For Order Granting Standing To Commence, Prosecute, And Settle Claims On Behalf Of The Debtors' Estates* (the "Motion").

PLEASE TAKE FURTHER NOTICE that on **June 22, 2016, at 1:30 p.m. (prevailing Central Time)** or as soon thereafter as counsel may be heard, the Noteholder Committee will appear before the Honorable A. Benjamin Goldgar, or any other judge who may be sitting in his stead, in Courtroom 2525 in the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and present the Motion.

PLEASE TAKE FURTHER NOTICE that any objection to the Motion must be filed with the Court by **June 15, 2016, at 4:00 p.m. (prevailing Central Time)** and served so as to be actually received by such time by: (a) counsel to the Noteholder Committee; (b) counsel to the Debtors; (c) the Office of the United States Trustee for the Northern District of Illinois; and (d) any party that has requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. A schedule of such parties may be found at https://cases.primeclerk.com/CEOC.

PLEASE TAKE FURTHER NOTICE that copies of the Motion as well as copies of all documents filed in these chapter 11 cases are available free of charge by visiting the case website maintained by Prime Clerk LLC, the claims and noticing agent for these chapter 11 cases, available at https://cases.primeclerk.com/CEOC or by calling (855) 842-4123 within the United States or Canada or, outside of the United States or Canada, by calling +1 (646) 795-6969. You

[1] Due to the large number of debtors in these jointly administered cases, a complete list of the debtors is not provided herein, but is available at https://cases.primeclerk.com/CEOC, the website of the debtors' claims and noticing agent.

may also obtain copies of any pleadings by visiting the Court's website at www.ilnb.uscourts.gov in accordance with the procedures and fees set forth therein.

Dated: May 13, 2016
Chicago, Illinois

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MOTION OF NOTEHOLDER COMMITTEE FOR ORDER GRANTING STANDING TO COMMENCE, PROSECUTE, AND SETTLE CLAIMS ON BEHALF OF THE DEBTORS' ESTATES

The Official Committee of Second Priority Noteholders (the "Noteholder Committee") moves for entry of an order granting it derivative standing to pursue the claims set forth in the draft Complaint attached as Exhibit A (the "Complaint") as well as any other claims arising out of the facts plead.[1] The Complaint includes claims to recover constructive and intentional fraudulent transfers as well as claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and other claims against Caesars Entertainment Corporation ("CEC"), the controlling shareholder of debtor Caesars Entertainment Operating Company, Inc. ("CEOC"), certain of CEC's and CEOC's directors and officers, the Sponsors, and others for knowingly participating in the wrongdoing alleged in the Complaint.[2]

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[1] The final form of the Noteholder Committee's Complaint will include additional information currently designated as confidential, including information contained in the Examiner's report that has, to date, been redacted in the public version of that report. A revised version of the Complaint that includes such information will be filed when the final form of the Examiner's report is available.

[2] The Noteholder Committee has discussed joint prosecution of these claims with the Statutory Unsecured Claimholders Committee (the "UCC" and, together with the Noteholder Committee, the "Committees"). The Noteholder Committee is willing to prosecute and settle the claims jointly with the UCC, on appropriate terms and conditions.

I. PRELIMINARY STATEMENT

1. The claims to be pursued by the Noteholder Committee arise from a series of self-dealing prepetition transactions between CEOC—which at all relevant times was an insolvent corporation—and entities owned and controlled by CEC or the Sponsors involving asset transfers made for grossly-inadequate consideration and financial transactions intended to benefit CEC and the Sponsors at CEOC's expense. The purpose and effect of those transactions was to enrich CEC and its affiliates and shareholders by moving billions of dollars of CEOC's assets beyond the reach of CEOC's creditors, and by protecting CEC and the Sponsors and other entities including those termed bankruptcy remote in CEOC's inevitable bankruptcy case.

2. In his exhaustive report (ECF No. 3401) ("Report" or "Rep."), the Examiner concluded that those insider transactions give rise to claims against CEC, the Sponsors, and numerous other defendants that will generate billions of dollars (in damages and the value of the property returned) for the Debtors and their estates. Among other things, the Examiner found that CEC and CEOC's directors and officers violated their fiduciary duties to CEOC and its creditors by approving the transfers, and that those repeated breaches of duty were aided and abetted by CEC's directors and Sponsors.

3. The Debtors, who remain under the control of many of the same individuals who have been identified by the Examiner as wrongdoers and potential defendants, have taken no action to pursue claims against any of those entities. To the contrary, CEOC repeatedly tried to ***extinguish*** claims against its insiders and affiliates, first by seeking a declaratory judgment that no viable claims exist and later by agreeing to release all insiders and potential defendants pursuant to various Restructuring Support Agreements (each an "RSA"). Every Plan version filed by the Debtors has provided for the same global releases and immunization of insiders.

4. The Debtors' two-person Special Governance Committee ("SGC"), which was hand-picked by directors that face liability,[3] lacks sufficient independence to bring or compromise claims against the incumbents who appointed them. This is evidenced not only by the SGC's abdication of responsibility to preserve the claims, but also by the unfavorable terms of the RSA "settlement" negotiated by the SGC even while discovery collected by the Examiner showed that the deal cut by the SGC was grossly inadequate (and later determined to be a fraction of the probable recoveries the Examiner identified). Making matters worse, the SGC's financial advisor—on whom the SGC relied in valuing the estate claims—was tainted all along, prompting the Court to conclude that the SGC's analysis and conclusions are "not useful."

5. In these circumstances, the Debtors cannot be faithful stewards of the estate causes of action, and the Noteholder Committee is the proper entity to preserve those critical assets. Unlike the Debtors, the Noteholder Committee will maximize the value of the claims, through vigorous prosecution or settlement, for the benefit of the estates and their creditors, free of the inherent conflicts of interest and constraints that taint the Debtors and the SGC. Moreover, if the claims are brought by the Noteholder Committee, as much as $280 million of insurance coverage will be available to the Debtors' estates; if the claims remain in the hands of the Debtors, that insurance vanishes. With the limitations period approaching, the time has come to authorize the Noteholder Committee to preserve, pursue and recover the claims.

[3] CEC and the Sponsors have previously appointed other special committees to review at least two of the challenged transactions. (Rep. at 38-39, 48-51.) Then, as now, CEC had a fiduciary duty to CEOC as its controlling shareholder and then, as now, it was the Sponsors that decided who would serve on those committees. As the Examiner found, those special committees did nothing to prevent—and, in fact, affirmatively aided and abetted—the very transactions that the Examiner concluded were intentionally fraudulent transfers and constituted breaches of fiduciary duty. The special committees were mere formalities whose members went through the motions of governance, while obvious fraudulent transfers occurred under their noses. CEOC received no protection from those earlier special committees, and it would be naive to conclude that this new special committee (the SGC), appointed by the same Sponsor-controlled board, will be any different than its predecessors.

II. BACKGROUND

6. Valuable Claims Exist With Respect To The Fraudulent Prepetition Transactions. Beginning in 2009 and continuing through the commencement of these bankruptcy cases, the Debtors' parent (CEC) and Sponsors (Apollo and TPG),[4] together with various insiders and affiliates, engaged in transactions that were detrimental to the interests of CEOC and its creditors. As summarized by the Examiner on the first page of his Report:

> The principal question being investigated was whether in structuring and implementing these transactions assets were removed from CEOC to the detriment of CEOC and its creditors.
>
> The simple answer to this question is "yes." As a result, claims of varying strength arise out of these transactions for constructive fraudulent transfers, actual fraudulent transfers (based on intent to hinder or delay creditors) and breaches of fiduciary duty by CEOC directors and officers and CEC. Aiding and abetting breach of fiduciary duty claims, again of varying strength, exist against the Sponsors and certain of CEC's directors. (Rep. at 1.)

7. The Examiner concluded that "[t]he potential damages from those claims considered reasonable or strong range from $3.6 billion to $5.1 billion." (Rep. at 1.) Those massive damages were attributed just to claims deemed likely to succeed; the Examiner defined "strong" claims as those "having a high likelihood of success" and "reasonable" claims as those "having a reasonable, or better than 50/50, chance of success." (Rep. at 1 n.3.) The Examiner did not quantify other claims characterized as "plausible" or "weak" but nevertheless viable, such as billions of dollars of claims for the value of Caesars Interactive Entertainment, Inc. (Rep. at 27-28) and challenges to any "good faith" defense asserted by Caesars Growth Partners and other defendants (Rep. at 78, 412-13, 651-52). The Examiner's quantification also excluded several categories of damages determined to be available on the strong and reasonable claims but not calculated in the Report, such as claims for lost profits (Rep. at 12-13, 20, 26, 423), the

[4] All capitalized terms not otherwise defined have the meaning used in the Report.

appreciation in the value of fraudulently-transferred properties (Rep., App. 5, at 93), the value impairment caused by the removal of Octavius Tower from Caesars Palace (Rep. at 47), the transfer to CES of control over the Total Rewards program (Rep. at 58), and prejudgment interest (Rep. at 412).

8. The Debtors And The SGC Abdicated Their Duty To Maximize The Value Of The Claims. In late June 2014, CEOC appointed Steven Winograd and Ronen Stauber (together, the "SGC Directors") to its board as the sole members of a "Special Governance Committee." The Examiner concluded that the SGC Directors are "independent" under Delaware law, but there are many reasons to question their appetite and ability to prosecute claims against CEC, the Sponsors, CEC's and CEOC's directors, and other potential defendants.[5] For example, in early July 2014, shortly after appointment of the SGC Directors, CEOC formed the SGC with a charter granting the SGC Directors "***sole authority and responsibility*** for, inter alia: (1) the consideration, negotiation and approval of any 'Related Party Transaction' or other transaction or ***matter involving a material conflict of interest*** (as determined in the reasonable judgment of the Committee) affecting any of the Directors or any person or group beneficially owning, directly or indirectly, more than 5% of outstanding class of equity securities of the Company." (Rep. at 926 (emphasis added).) Notwithstanding that grant of "sole authority and responsibility," the SGC Directors stood by passively when, just four days later, CEOC's interested directors authorized the filing of a lawsuit to seek a declaration that CEOC had no

[5] And the SGC Directors were oddly pliant. Both men were recruited as outside directors as early as February 2014, but – at the Sponsors' suggestion – they agreed to postpone joining the CEOC board until the B-7 Transaction and Four Properties Transaction transactions were completed in June. (Rep. at 540, 929) Those multi-billion dollar transactions, of course, were found by the Examiner to be fraudulent transfers and breaches of fiduciary duties. The SGC Directors' willingness to let the Sponsors decide when their fiduciary duties would kick in raises questions from the start about their independence.

viable claims, including claims against the same interested directors and their affiliates. Those, of course, were the very claims that the SGC was endowed with "sole authority and responsibility" to investigate. The SGC Directors remained silent even though they were not comfortable with the complaint (a lawsuit the Examiner described as "troubling") and refused to sign off on it. (Rep. at 110 n.180; Exhibit B.)

9. The SGC Directors also stayed quiet during the ensuing six-month period from July to December 2014, when the Debtors implemented the wholesale transfer of CEOC's workforce and enterprise services to CES. The Debtors now claim that those transfers make it difficult for the Debtors to pursue a "standalone plan" under which the claims could be prosecuted in a manner that would maximize their value. (ECF No. 3484, Ex. I.)

10. Thereafter, in December 2014, the SGC Directors blessed CEOC's execution of an RSA with CEC and certain holders of CEOC First Lien Notes. Under that RSA, CEC agreed to pay money directly to holders of First Lien Notes who signed the RSA. In exchange for that payment, those holders agreed, among other things, to vote in favor of a CEOC plan that would provide CEC and other insider defendants with broad releases of estate and third-party claims. That RSA would have required CEC to make only a small contribution worth a fraction of the value of the claims to be released, as illustrated by the chart attached as Exhibit C. Other potential defendants who obtained releases, including the CEOC directors and Sponsors who hand-picked the outside directors, would not have been required to contribute anything.

11. That settlement apparently was based on the SGC's conclusion, following an "investigation," that claims belonging to the Debtors had a relatively modest value,[6] dramatically

[6] This information was provided by the Debtors to the Noteholder Committee on March 17, 2015, but was designated by the Debtor as confidential. The Noteholder Committee will request the Debtor to redesignate the document containing this information, or otherwise will seek relief to file the underlying document under seal in support of the Motion.

below the range of damages identified in the Examiner's Report. The Debtors subsequently attempted to justify the SGC's endorsement of such a terrible deal by claiming that the RSA was made "[b]ased on the information available at the time," and that SGC Directors "did not have sufficient information to determine whether fraudulent transfer claims based on an actual intent to delay, hinder or defraud creditors were likely to succeed." (ECF No. 3484, Ex. 1, at 38.) That is no excuse. No responsible, unconflicted fiduciary would ever settle viable causes of action for pennies on the dollar when it was aware that it lacked sufficient information to make a reasonable assessment of the claims.

12. The SGC's abdication of duty did not stop there. After the petition date, the Debtors (with the apparent endorsement of the SGC) moved for appointment of an examiner but tried to inhibit the investigation of CEC and other insiders by proposing to: (1) limit the investigation to a set of hand-picked transactions the Debtors had identified; (2) cap the budget of the examiner and his professionals; (3) limit the duration of the investigation; (4) prohibit the examiner from accessing privileged information; and (5) enjoin any other party (including the Noteholder Committee) from conducting its own investigation during the period of the examiner's investigation. (ECF No. 363, at 9-10.) The Court, of course, declined to impose those constraints, which paved the way for the Examiner's comprehensive report detailing the multitude of viable claims available against CEC, the Sponsors, and other insiders.

13. The Debtors continued to pursue the discounted RSA settlements over the course of the year after the commencement of these cases. The SGC endorsed this course of action even though the RSA gave it the right to withhold final approval of the releases and even while substantial volumes of evidence were collected by the Examiner (to which the SGC had full access). Incredibly, the Debtors continued to push the RSA settlements even beyond early

December 2015, when the Examiner provided CEOC and the SGC with his preliminary views of the merits and value of the estate causes of action.

14. At that time, it was beyond question that the SGC should have understood that the RSA settlements were substantially deficient and well outside of any appropriate range of reasonableness. Nevertheless, the Debtors (operating through a Special Restructuring Committee, consisting of the two SGC Directors and an Apollo director (ECF No. 4, at 47)) sought to protect the RSAs and the settlement at nearly every turn by, among other things, filing a motion to approve the RSAs, filing multiple flawed unsigned plans and disclosure statements, and seeking to begin a cramdown of those plans before the Examiner had concluded his work.

15. It remains uncertain whether the Debtors and SGC will, under the Plan, adopt the outcome of the Examiner's investigation, or instead ignore, minimize or reject the Examiner's conclusions as to the existence of potential claims and the amount of damages that can be obtained. What remains evident under the latest version of the Plan filed by the Debtors (with the endorsement of the SGC), even in its current incomplete form, is that the Debtors are once again are proposing to cramdown a settlement that would immunize CEC, the Sponsors and insiders and affiliates. Any settlement must account not only for the damages included in the Examiner's range based upon his independent assessment, but also for available damages and value resulting from lost profits, prejudgment interest, the value of CIE, the challenge to any "good faith" defense asserted by Caesars Growth Partners, the appreciation in value of the transferred assets, the impairment to Caesars Palace from the transfer of Octavius Tower, and the degradation to the properties owned by CEOC as a result of the transfers of CEOC's "crown jewels." (*See id*. at 39-43, 45, 47.)

III. RELIEF REQUESTED

16. The Noteholder Committee seeks entry of an order that grants the Noteholder Committee standing to pursue claims as set forth in the attached draft Complaint and claims based upon or arising out of the facts alleged therein.

IV. ARGUMENT

A. The Court Has Authority To Grant Standing To The Noteholder Committee.

17. The Bankruptcy Code provides for the establishment of official committees to protect the rights of creditors. *See* 11 U.S.C. § 1102. Creditor committees may "perform such other services as are in the interests of those represented," *id.* § 1103(c)(5), and "may raise and may appear and be heard on any issue in a case under this chapter," *id.* § 1109(b). This right to be heard would be hollow if a committee did not have the right to assert claims on behalf of the estate. *E.g.*, *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003). Thus, bankruptcy courts are empowered to confer standing upon a committee in appropriate circumstances. *See Official Comm. of Unsecured Creditors of SGK Ventures, LLC v. NewKey Grp., LLC (In re SGK Ventures, LLC)*, 521 B.R. 842, 848 (Bankr. N.D. Ill. 2014) ("[T]he Seventh Circuit has repeatedly recognized the availability of derivative . . . standing.").

18. In *In re Perkins*, 902 F.2d 1254 (7th Cir. 1990), the Seventh Circuit described the three predicates for committee standing: "(a) the [debtor in possession] unjustifiably refuses a demand to pursue the action; (b) the creditor establishes a colorable claim or cause of action; and (c) the creditor seeks and obtains leave from the bankruptcy court to prosecute the action for and in the name of the [debtor.]" 902 F.2d at 1258; *accord Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000). As discussed in the following sections, each predicate exists here.

B. The Claims Are More Than "Colorable."

19. A showing of colorability "is a relatively easy one to make." *Adelphia Commc'ns Corp. v. Bank of Am., N.A. (In re Adelphia Commc'ns Corp.)*, 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005); *In re Midway Airlines, Inc.*, 167 B.R. 880, 884 (Bankr. N.D. Ill. 1994) ("A colorable claim (one seemingly valid and genuine) is not a difficult standard to meet."). Authorization to bring claims derivatively "should be denied only if the claims are 'facially defective.'" *Adelphia*, 330 B.R. at 376 (citation omitted).

20. Even without the benefit of the Examiner's Report, the claims set forth in the draft Complaint would easily meet this standard, given the detailed allegations that CEOC, insolvent and under the control of CEC, made transfers for less than adequate consideration with the intent to hinder or delay CEOC's creditors. "There is no basis for the principle . . . that the directors of an insolvent subsidiary can, with impunity, permit it to be plundered for the benefit of its parent corporation." *Claybrook v. Morris (In re Scott Acquisition Corp.)*, 344 B.R. 283, 288 (Bankr. D. Del. 2006) (citation omitted)). Nor can there be dispute that the directors of CEC, the Sponsors, and others directed or otherwise knowingly participated in the looting of CEOC and in so doing breached fiduciary duties owed to CEOC or aided and abetted breaches of fiduciary duties by CEC's and CEOC's directors. *See CDX Liquidating Trust v. Venrock Assocs.*, 640 F.3d 209, 219-20 (7th Cir. 2011) ("[T]o aid and abet a breach of fiduciary duty committed by corporate directors is actionable under Delaware law.").[7]

21. The claims are colorable, *a fortiori*, given the Examiner's conclusions. After a comprehensive, year-long investigation in which the Examiner and his advisors reviewed over 8.8 million pages of documents and conducted 92 interviews, the Examiner issued a detailed

[7] Notably, the Delaware Chancery Court, in an action raising many of the same claims against many of the same defendants, found the claims to be colorable. *See* Exhibits D-E.

Report finding that CEOC possesses claims "for constructive fraudulent transfers, actual fraudulent transfers (based on intent to hinder or delay creditors) and breaches of fiduciary duty by CEOC directors and officers and CEC." (Rep. at 1.) The Examiner also found that claims for aiding and abetting breaches of fiduciary duty "exist against the Sponsors and certain of CEC's directors." (Rep. at 1.) The Examiner valued just the damages he quantified, on account of claims found to be "strong" or "reasonable," in the range of $3.6 billion and $5.1 billion (Rep. at 80) and, as noted above, the Noteholder Committees believes that realistic recoveries are substantially greater than that.[8]

C. CEOC Has Not Litigated And Will Not Litigate The Claims.

22. Despite having long been on notice of the claims, CEOC has unjustifiably declined to prosecute the claims or allow others to do so. "A [debtor]'s decision to decline the pursuit of a colorable claim is only justified if there is a legal or practical impediment to prosecution." *Home Casual LLC*, 534 B.R. at 354. Here, no such impediment exists. The claims are worth far more than $5 billion (the Noteholder Committee estimates a range no less than $8.1 billion to $12.6 billion), the estate has the resources to pursue them, and the defendants have billions of dollars of assets from which recovery can be collected.

23. CEOC's creation of the SGC does not alter this conclusion. A purportedly "independent" committee or board cannot refuse to pursue claims without valid justification.

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[8] The conclusions of an examiner have been found to be admissible as the conclusions of an expert under the Federal Rules of Evidence or, in at least one instance, as a public record. *E.g., In re FiberMark, Inc.*, 339 B.R. 321, 327 (Bankr. D. Vt. 2006) (examiner's conclusions and opinions admissible under Federal Rule of Evidence 706); *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & ERISA Litig.)*, 623 F. Supp. 2d 798, 824 & n.21 (S.D. Tex. 2009) (same); Hr'g Tr. at 20, 27, *In re Latshaw Drilling Co.*, No. 09-13572-R (DLR) (Bankr. N.D. Okla, Sep. 9, 2010) (ECF No. 374) (examiner's report admissible under the public records exception to the hearsay rule, Federal Rule of Evidence 803(8), and examiner's conclusions admissible as an expert opinion).

Moreover, the prior actions and inactions of the SGC make clear that the SGC Directors are in no position to make an independent, conflict-free assessment of the causes of action.

24. To begin, both of the SGC Directors were appointed by persons and entities who surely knew at the time that they would be defendants on the claims to be investigated by the SGC. Without question, persons chosen by potential defendants are not those most likely to thoroughly and vigorously pursue recoveries against their benefactors. "Indeed, if the involved directors expected any result other than a [decision not to litigate claims] at least as to them, they would probably never establish the committee." *Joy v. North*, 692 F.2d 880, 888 (2d Cir. 1982).[9]

25. Moreover, not only were the SGC Directors appointed by the CEOC board, the Board can presumably remove them from the SGC at any time. This alone raises a reasonable doubt as to whether the SGC can act impartially. *See Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1023 n.25 (Del. 2015) ("A lack of independence . . . turns on, at the pleading stage, whether the plaintiffs have pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel . . . subject to the interested party's dominion . . . .").

26. The SGC's independence is further called into question by its conduct. For example, the SGC Directors abstained on the vote to authorize the filing by CEOC of a lawsuit that sought to wipe out the entirety of the estate claims for no consideration whatsoever. The SGC Directors then allowed the wholesale transfer of valuable employees and enterprise services to CEC affiliates in the Fall of 2014 which, according to the Debtors, now requires them to forgo any standalone plan involving litigation and instead to capitulate to the lousy deal offered by

[9] This is especially true where, as here, the directors who appointed the SGC used the challenged transactions in an effort to exert leverage against the very creditors that would benefit from pursuit of the claims. (*E.g.*, Rep. at 66 (Mr. Bonderman told the Examiner that a benefit of the B-7 refinancing, and the resulting purported release of CEC's parent guarantee of the Notes, "was that it increased the leverage on CEOC's creditors")).

CEC and the Sponsors. (ECF No. 3484, Ex. I.) The SGC did nothing to prevent those harmful acts despite its "sole authority and responsibility" to consider and approve matters involving material conflicts of interest. This abstention and passivity shows that the SGC is "incapable of making a decision with only the best interests of the corporation in mind." *Oracle Corp. Derivative Litig.*, 824 A.2d at 920 (citation omitted); *see Booth Family Trust*, 640 F.3d at 145 (court allowed derivative suit to proceed where special committee member recused himself from considering claims against director, given "the mere appearance of the special litigation committee's lack of independence"). Thereafter, the SGC allowed the Debtors to try to impede the Examiner by proposing severe constraints on the duration, cost, access (to privileged CEOC documents) and scope of the investigation, and to try to prevent the participation of the Committees in that investigation. (ECF No. 363, at 9-10; ECF No. 541, at 2.)

27. The SGC also did not engage independent counsel to represent it in its investigation of the conflicted insiders. "Both New York and Delaware law contemplate that a special litigation committee be represented by independent counsel." *In re Par Pharm., Inc. Derivative Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1190 (N.D. Cal. 1993) (where a special settlement committee acted without the benefit of independent counsel, the "decision to settle and dismiss the derivative action simply does not satisfy the independence and good faith requirements of [Delaware law]"). Here, the SGC's investigation was aided by CEOC's own counsel (Kirkland & Ellis)—the same CEOC controlled by conflicted directors and the same firm that represented CEOC generally. Even worse, the Court found that the SGC's financial consultant was tainted as a result of its failure to disclose the relationship between Mesirow's principal who led the investigation and counsel for CEC.

28. Given that lack of independence, the SGC's "investigation" of the estate claims is not reliable, and its decision not to pursue them is not credible. Although the SGC concluded that fraudulent transfer claims existed against CEC, the Debtors originally proposed to settle them for billions of dollars less than the Examiner's *low* (and, as recognized by the Examiner, incomplete) estimate of their value. And the SGC failed to recommend any claims against CEOC's and CEC's directors, and instead, under the RSA, sought to release claims for no contribution. Moreover, the SGC failed to change its position despite the Examiner's collection of substantial evidence and information that plainly suggested that the SGC's preliminary conclusions were well off the mark. The SGC's willingness to forgo prosecution of immensely valuable causes of action is evidence of an inherent conflict of interest.[10]

D. Noteholder Committee Standing Will Generate $280 Million For The Estate.

29. If granted standing, the Noteholder Committee will maximize the value of the estates in another way. As much as $280 million of insurance coverage is unavailable if the claims remain in the hands of the Debtors, but available if the Noteholder Committee is authorized to pursue them. The policies at issue cover CEC, CEOC, and both entities' directors and officers as "insureds." Section 4B.(5) of the primary policy contains an "entity versus

[10] Adding further to concerns about the SGC's independence are the longstanding affiliations that one of its two members (Steven Winograd) has with Apollo. *See* Rep. at 926-27 (describing ties between Winograd and Apollo); *Biondi v. Scrushy*, 820 A.2d 1148, 1156 (Del. Ch. 2003) ("If a special litigation committee is comprised of directors with compromising ties to the key officials who are suspected of malfeasance, . . . its ability to instill confidence is, at best, compromised . . . ."). Although the Examiner found that certain of these ties, standing alone, were insufficient to rebut the presumption of the SGC's independence "in negotiating and approving the RSAs," the Examiner "[took] no position on what entity under applicable law should pursue any claims against related parties." (Rep. at 78 & n.106.) Indeed, when combined with the other circumstances and actions described above, these ties add to the perception that the SGC is not sufficiently independent to pursue or settle these claims. *See Booth Family Tr.*, 640 F.3d at 143 ("[I]n a special litigation committee case, there is no presumption of independence and the special litigation committee bears the burden of establishing its own independence by a yardstick that must be like Caesar's wife—above reproach.") (internal quotation marks and citations omitted).

insured" exclusion, which would bar coverage for claims brought by CEOC against another insured—including CEC and directors and officers of CEOC and CEC. (ECF No. 3439, Ex. A, at 10.) That exclusion applies even in a bankruptcy case if "the Claim is brought, controlled or materially assisted by . . . the resulting debtor-in-possession . . . of the debtor Organization or . . . any Executive of the foregoing." (*Id.*) (emphasis omitted) By contrast, the exclusion does *not* apply to "any Claim brought by [a] . . . *creditors committee*, *bondholder committee*, *equity committee* or any other creditor or group of creditors" on behalf of the debtors' estates. (*Id.* at 99) (emphasis added.) *See Cirka v. Nat'l Union Fire Ins.*, No. 20250-NC, 2004 Del. Ch. LEXIS 118, at *35 (Del. Ch. Aug. 6, 2004) (finding that a creditors' committee, authorized by a bankruptcy court to sue derivatively, brings suit on behalf of the estate, not debtor in possession, and therefore does not trigger the Insured v. Insured Exclusion"). Thus, derivative standing will greatly increase the likelihood of a significant recovery by the estates.[11]

V. CONCLUSION

For all the reasons above, the Noteholder Committee respectfully requests that the Court enter an order granting leave, standing and authority to the Noteholder Committee to commence, prosecute, and settle the causes of action on behalf of the Debtors' estates.

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[11] The Debtors may cite to the Court's recent order to continue the UCC's prior standing motion respecting claims against First Lien Parties (ECF No. 3403) as grounds to continue or deny the relief sought here. Previously, the Court concluded that the Debtors were justified, at least temporarily, in not pursuing such litigation because the Debtors were seeking confirmation of a Plan that, if approved, would resolve the claims to be pursued. (*Id.* at 11.) There, however, the settlement at issue was between the Debtors and the First Lien Parties—it was not a settlement among insider affiliates, but rather was negotiated at arms' length. Here, for the same reason that the Debtors are incapable of prosecuting the claims against their insiders and affiliates, they are equally ill-equipped to negotiate and pursue settlement of those claims. Moreover, unlike before where the filing of the standing motion was sufficient to meet deadlines imposed by the Cash Collateral Orders (*id.* at 7), the claims set forth in the Complaint must be brought by no later than January 11, 2017 to ensure that they are properly preserved. 11 U.S.C. § 108(a).

Dated: May 13, 2016
Chicago, Illinois

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

ORDER GRANTING NOTEHOLDER COMMITTEE STANDING TO COMMENCE, PROSECUTE, AND SETTLE CLAIMS ON BEHALF OF THE DEBTORS' ESTATES

Upon the *Motion Of Noteholder Committee For Order Granting Standing To Commence, Prosecute, And Settle Claims On Behalf Of The Debtors' Estates* (the "Motion");[1] it is hereby **ORDERED** that:

1. The Motion is GRANTED as set forth herein.

2. The Noteholder Committee is granted exclusive standing and authority pursuant to Bankruptcy Code sections 1103 and 1009 to commence, prosecute, and settle all claims for relief based upon, arising out of, or related to the conduct, transactions, or occurrences described in the draft complaint submitted in support of the Motion, which is attached hereto as Exhibit A (the "Complaint"), with the full rights and privileges of, and in the stead of, the Debtors' estates.

3. The Noteholder Committee is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

4. The Noteholder Committee may amend or modify the Complaint prior to its filing without further Court approval if such amendment asserts a claim that is based upon, arising out of, or related to the conduct, transactions, or occurrences described in the Complaint.

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1 Terms not otherwise defined in this Order have the meanings given to them in the Motion.

5. Any settlement of the claims for relief raised in the Complaint will be subject to approval by the Court after notice and a hearing.

Dated: _____, 2016

_____
Honorable A. Benjamin Goldgar
United States Bankruptcy Judge