

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)

**PRELIMINARY OBJECTION OF THE AD HOC GROUP OF 6.50%
NOTES TO THE DEBTORS' MOTION FOR ENTRY OF AN
ORDER APPLYING RULE 7068 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE TO CONTESTED MATTERS IN CONNECTION WITH
CONFIRMATION OF THE DEBTORS' PLAN OF REORGANIZATION**

Trilogy Capital Management, LLC (as investment advisor for certain funds, including Trilogy Portfolio Company, LLC) ("Trilogy") and Douglas Kidd (collectively, the "Ad Hoc Group of 6.50% Notes" or the "Ad Hoc Group"), each a noteholder of Caesars Entertainment Operating Company, Inc., *et al.* (the "Debtors"), respectfully submit this preliminary objection (the "Objection") pursuant to paragraph 19 of the Amended Case Management Procedures approved by this Court on April 15, 2015 [Dkt. No. 1165], to the Debtors' Motion for Entry of an Order Applying Rule 7068 of the Federal Rules of Bankruptcy Procedure ("Rule 7068") to Contested Matters in Connection with Confirmation of the Debtors' Plan of Reorganization [Dkt. No. 5201] (the "Motion"), and state as follows:

OBJECTION

Although they fail to cite a single decision supporting the relief they seek, the Debtors ask the Court for permission to "penalize" "non-settling" creditors seeking to go forward with objections to the Debtors' second amended chapter 11 plan of reorganization dated October 4,

¹ A complete list of the Debtors and the last four digits of their federal tax identification numbers may be obtained at <https://cases.primeclerk.com/CEOC>.

2016 (the “Amended Plan”). Motion at 2. The Court should deny the Motion because: (i) the Motion has literally no support in the law; (ii) application of Rule 7068 in the context of this case makes no sense as a practical matter and would not further any of the policy goals underlying Rule 68 of the Federal Rules of Civil Procedure (“Rule 68”); and (iii) last but not least, granting the Motion would have an obvious and extraordinarily adverse effect on the ability of small creditors to prosecute their legal rights in large bankruptcies such as this one.

First, the Debtors identify no decision in this or any other circuit in which a court has exercised its discretion to allow the application of Rule 7068 in a non-adversary proceeding context. The Debtors cite only one case that is even remotely on point—*In re Aerobox Composite Structures, LLC*, No. 11-07-10138 MA, 2008 WL 5157837, at *1 (Bankr. D.N.M. Aug. 29, 2008)—and the Court in that matter declined to apply Rule 7068 to two contested matters. The court denied the debtor’s motion in that case because the issues being litigated were “primarily questions of law,” the amount of the creditor’s claim had already been liquidated, and because “Rule 7068 ordinarily would not apply” to the contested matters. The same factors apply in this case. The opposition of the Ad Hoc Group of 6.50% Notes to the Amended Plan will turn on whether it violates bankruptcy confirmation standards, including unfair discrimination, and whether the non-consensual third party release being provided to CEC is permissible—i.e., issues that are purely legal in nature. Further, the Debtors have not and cannot dispute their liability under the 6.50% Notes, effectively rendering the Ad Hoc Group’s claims against the Debtors liquidated. Finally, like the contested matters in *Aerobox*, Rule 7068 ordinarily does not apply to the confirmation phase of a chapter 11 case.

Second, the application of Rule 68 in the context of this case would offer no practical benefit to the parties or the Court and, potentially, would lead to absurd results that are

inconsistent with the objectives underlying the rule. As they readily acknowledge in their moving papers, the Debtors seek to eliminate all opposition to the Amended Plan.² But the absence of opposition will not spare the Court or the parties the necessity of working through the confirmation process. Section 1129 of the Bankruptcy Code provides that “[t]he **Court** shall confirm a plan only if” section 1129’s requirements are met. 11 U.S.C. § 1129(a) (emphasis added). This means that “a bankruptcy court has an independent duty to ascertain that a plan complies with all the requirements of § 1129(a), including the good faith requirement.” *In re Unichem Corp.*, 72 B.R. 95, 98 (Bankr. N.D. Ill. 1987); *see also In re Sparks*, 190 B.R. 842, 844 (Bankr. N.D. Ill. 1996) (the court’s duty is independent of any objection by creditors); *In re Woodstock Assocs I, Inc.*, 120 B.R. 436, 453 (Bankr. N.D. Ill. 1990) (“Pursuant to 11 U.S.C. § 1128, the Court is required to conduct a hearing on confirmation, even absent objections.”). Consistent with the foregoing, even if all creditors consented to the Amended Plan, the Court still would be obliged to make its own independent determination regarding whether the Amended Plan complied with the applicable law. If a plan is patently unconfirmable—e.g., because its third-party release provision is too broad or because it violates the absolute priority rule—then the plan *cannot* be confirmed, regardless of the terms of any offer of judgment made by the Debtors.

Separate and apart from the foregoing, there is substantial reason to believe that a decision on plan confirmation in this matter would not trigger Rule 68’s cost-shifting provision. By its terms, Rule 68 requires the shifting of costs only where: (i) a plaintiff obtains a judgment;

² The Motion requests relief that is far from specific. Without informing the Court what “contested matters in connection with confirmation of the Amended Plan” Rule 7068 should apply to, it appears the Debtors would have this Court apply Rule 7068 to the plan confirmation process in its entirety. Even if Rule 7068 has any applicability during the plan confirmation phase of a chapter 11 case, the Motion is premature at best and at a minimum, a motion should be brought for each contested matter to which Debtors seek to apply Rule 7068 so the parties affected may properly respond to such request.

and (ii) the judgment is not more favorable than the unaccepted offer. Fed. R. Civ. P. 68. Critical here, where a defendant prevails on a legal issue and defeats liability, there is no cost shifting. *Park Manor, Ltd. v. HHS*, 495 F.3d 433, 437 (7th Cir. 2007) (Rule 68 “penalizes the greedy *winning* plaintiff but is inapplicable if the defendant wins.”) (citing *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981)) (emphasis added). In this matter, objections to plan confirmation will likely focus on legal issues—e.g., the legality of the third-party release or whether the plan violates the absolute priority rule—not disputes on recovery amounts. If the Debtors prevail on these issues, then the “defendants” would effectively have won the dispute and Rule 68 would not apply. Likewise, if the Debtors’ Amended Plan is denied confirmation, then the non-settling creditors or “plaintiffs” would have won the dispute, and Rule 68 also would not apply. Thus, in the context of plan confirmation, the application of Rule 68 likely would be inconsistent with the objectives of the rule.

Third, and finally, the application of Rule 7068 to a confirmation hearing would have an unprecedented and entirely unwarranted chilling effect on confirmation objections. This case illustrates just how inequitable such a scenario would be. Douglas Kidd holds approximately \$250,000 in claims against the Debtors. If the Debtors were permitted to serve Mr. Kidd with an offer of judgment in connection with Mr. Kidd’s objection to confirmation, Mr. Kidd could potentially find himself liable for a portion of the costs the Debtors will incur during confirmation in an \$18.5 billion dollar bankruptcy case. Although Trilogy’s claim in this matter is larger (\$9.4 million), the result would be the same, since the Debtors’ expenses in confirmation could potentially eclipse Trilogy’s recovery. Because no reasonable creditor would take these risks, the Motion will almost certainly force all non-settling creditors to buckle and abandon any objections, thereby leaving the Court as the only party capable of identifying

defects in the Amended Plan. Such a scenario would be entirely at odds with the law governing plan confirmation, which, *inter alia*, provides that the Debtors (as the plan proponents) have the burden of demonstrating, by a preponderance of the evidence, that the Amended Plan satisfies all of the requirements of section 1129(a)(1)–(13). *Woodstock Assocs I, Inc.*, 120 B.R. at 453. The Debtors would rather shift that burden to the Court, leaving it in a situation in which it would have to advocate for or against the Amended Plan without the aid of objections by interested parties.

In sum, the Court was entirely correct when it observed that the relief sought by the Debtors here is “really unusual.” September 28 Hearing Transcript, attached as Exhibit A, at 33:12–35:5. No court has ever granted such relief, and the Debtors have failed to offer any good faith rationale for why Rule 7068 should be applied to the plan confirmation phase of this case.

CONCLUSION

For the foregoing reasons as well as any to be included in any subsequent briefing, the Ad Hoc Group of 6.5% Notes requests that this Court deny the Motion, and grant such other and further relief as the Court deems just and proper.

Dated: October 12, 2016
Chicago, IL

Respectfully submitted,

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Counsel to the Ad Hoc Group of 6.50% Notes

EXHIBIT A

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

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CAESARS ENTERTAINMENT OPERATING)
COMPANY, INC., et al.,) No. 15 B 01145
) Chicago, Illinois
) 10:00 a.m.
Debtor.) September 28, 2016

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE A. BENJAMIN GOLDGAR

APPEARANCES:

For the Debtors: Mr. David Seligman;
For the U.S. Trustee: Ms. Denise DeLaurent;
For Trilogy, et al.: Mr. Timothy Casey;
For the Noteholder
Committee: Mr. Sidney Levinson;
For CEC: Mr. Thomas Kreller;

Court Reporter: Amy Doolin, CSR, RPR
U.S. Courthouse
219 South Dearborn
Room 661
Chicago, IL 60604.

1 THE COURT: Okay.

2 MR. SELIGMAN: If we need to -- if we
3 want to address issues before then, I'm sure we'll be
4 able to --

5 THE COURT: Okay. I will just leave
6 that, because we can simply all go home if we're not
7 going to go ahead and talk about that then. So
8 there's no reason to vacate that order.

9 All right. Well, that's all I --

10 MR. SELIGMAN: Your Honor --

11 THE COURT: -- needed to know today.

12 MR. SELIGMAN: One other housekeeping
13 matter, Your Honor, is I think in contemplation of
14 where we are -- and, again, I just want to ask if
15 it's okay, Your Honor, if we can file a motion on
16 this and put it for -- we could potentially even put
17 it up for the 5th when we already have a hearing
18 scheduled, is we would like to ask that Rule 7068,
19 the offer of judgment rule, be applied to --
20 obviously, it only applies to adversary proceedings.

21 I would like to -- we would like to
22 request that it apply to the confirmation hearing as
23 a contested matter. The reason, frankly, is, Your
24 Honor, we think -- we're trying to get a deal done
25 with the Trilogy folks and the like. We've made what

1 we think are offers there. And, obviously, there are
2 ramifications if they don't accept our offer, and
3 ultimately they can't do better otherwise. So all we
4 are asking for is I just wanted to be able to file
5 that motion next week. We'll deal with it. We'll
6 make our case.

7 THE COURT: You can file whatever you
8 want to file.

9 MR. SELIGMAN: Exactly.

10 THE COURT: And I guess I'll deal with
11 it when I see it. You would be making an offer of
12 judgment in the adversary proceeding, the Section 105
13 adversary?

14 MR. SELIGMAN: No, I think it would be
15 -- I think it would be more in the -- you know, in
16 the context of confirmation. As -- you know, how we
17 tried to settle with them. And so our concern was we
18 didn't want to trip that up and -- because that would
19 be a 9000 series issue.

20 THE COURT: Right.

21 MR. SELIGMAN: And Your Honor,
22 obviously, has authority under 9024 to have it apply.
23 It's just a quirk in the rules that it only applies
24 to adversary proceedings.

25 THE COURT: Is that one of the rules

1 that can be made applicable in contested matters?

2 MR. SELIGMAN: Yes.

3 THE COURT: Well, that would be really
4 unusual. I guess I'll address the request when you
5 make it.

6 MR. SELIGMAN: Absolutely.

7 Okay. Thank you, Your Honor.

8 THE COURT: All right. Thank you all.

9 MR. LEVINSON: Thank you, Your Honor.

10 THE COURT: We have another matter.

11 These people have waited patiently for more than half
12 an hour.

13 MR. SELIGMAN: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Which were all the proceedings had in
16 the above-entitled cause, September
17 28, 2016, 10:00 a.m.)

18 I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY
19 THAT THE FOREGOING IS A TRUE AND ACCURATE
20 TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-
21 ENTITLED CAUSE.
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