IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	) Chapter 11
	)
TROPICANA ENTERTAINMENT, LLC, et al.,[1]	) Case No. 08-10856 (KJC)
	)
	) Jointly Administered
Debtors.	)
	) **Hearing date: August 12, 2009, at 10:00 a.m. (Eastern)**
	)
	) **Objection deadline: August 5, 2009, at 4:00 p.m. (Eastern)**

MOTION OF TROPICANA LAS VEGAS, INC., AND HOTEL RAMADA OF NEVADA, LLC FOR AN ORDER (A) CONFIRMING THAT STATE COURT TRADEMARK ACTION IS NOT SUBJECT TO THE AUTOMATIC STAY; OR (B) ALTERNATIVELY, ANNULLING THE AUTOMATIC STAY WITH RESPECT TO SUCH ACTION

Tropicana Las Vegas, Inc., and reorganized debtor Hotel Ramada of Nevada, LLC (collectively, the "Tropicana Las Vegas Plaintiffs") hereby move for entry of an order, in substantially the form of the proposed order attached as *Exhibit A*:

(1) confirming that the action (the "Trademark Action") initiated by the Tropicana Las Vegas Plaintiffs through a Complaint for Declaratory Relief filed with the District Court of Clark County, Nevada, immediately prior to the filing of this Motion, a copy of which is attached as *Exhibit B* (the "Trademark Complaint"), is not subject to the automatic stay of section 362 of the Bankruptcy Code; and

(2) alternatively, annulling the automatic stay as to the Trademark Action, to the extent it applies, as of July 20, 2009.

In support of this Motion, the Tropicana Las Vegas Plaintiffs respectfully state as follows:

---

[1] The remaining Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Adamar Garage Corporation (1225); Argosy of Louisiana, Inc. (5121); Atlantic-Deauville Inc. (2629); Aztar Corporation (6534); Aztar Development Corporation (0834); Aztar Indiana Gaming Company, LLC (5060); Aztar Indiana Gaming Corporation (1802); Aztar Missouri Gaming Corporation (8819); Aztar Riverboat Holding Company, LLC (5055); Catfish Queen Partnership in Commendam (4791); Centroplex Centre Convention Hotel, L.L.C. (2613); Columbia Properties Laughlin, LLC (9651); Columbia Properties Tahoe, LLC (1611); Columbia Properties Vicksburg, LLC (0199); CP Baton Rouge Casino, L.L.C. (9608); CP Laughlin Realty, LLC (9621); Jazz Enterprises, Inc. (4771); JMBS Casino LLC (6282); Ramada New Jersey Holdings Corporation (4055); Ramada New Jersey, Inc. (5687); St. Louis Riverboat Entertainment, Inc. (3514); Tahoe Horizon, LLC (9418); Tropicana Enterprises (7924); Tropicana Entertainment Holdings, LLC (9131); Tropicana Entertainment Intermediate Holdings, LLC (9214); Tropicana Entertainment, LLC (9263); Tropicana Express, Inc. (0806); Tropicana Finance Corp. (4040).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

I. JURISDICTION

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334. Venue is proper in this District pursuant to 28 U.S.C. § 1409.

2. The statutory basis for the relief requested is section 362 of the Bankruptcy Code and 28 U.S.C. § 959.

II. INTRODUCTION

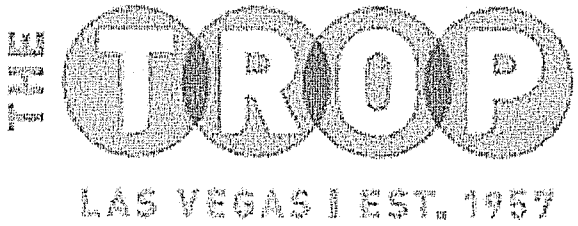
3. The LandCo Debtors' plan of reorganization was confirmed on May 5 and became effective on July 1, 2009. Hotel Ramada of Nevada is a reorganized debtor and Tropicana Las Vegas is the entity that acquired substantially all of the LandCo Debtors' assets pursuant to the LandCo plan, including the historic Tropicana Las Vegas Resort and Casino.

4. In the months before confirmation of the LandCo plan, the Debtors (purportedly acting on behalf of both the LandCo and OpCo estates) took the position that the LandCo Debtors had no rights to the use the name "Tropicana" in connection with the Las Vegas casino that has been known as the "Tropicana" since its inception in 1957. Notwithstanding that the LandCo Debtors and their predecessors had never before paid any royalty to use the name they originated on the property they developed, the Debtors asserted that the acquirer of the Tropicana Las Vegas casino under the LandCo plan would have to pay an exorbitant royalty or cease using the name after confirmation.

5. The lenders whose claims were secured by liens on the Tropicana Las Vegas casino – who had been promised that their collateral included all rights necessary to operate the business of the Tropicana Las Vegas as it was being conducted – took issue with the Debtors' assertions and sought to terminate plan exclusivity in order to pursue a plan that would not give away rights to the Tropicana name. Ultimately, a compromise was struck, with the LandCo and OpCo constituencies agreeing to postpone disputes over the trademark issues until the post-bankruptcy period. A full reservation of rights was added to both the LandCo and the OpCo plans.

6. Those plans were confirmed on May 5, 2009. The LandCo plan became effective on July 1, 2009, and the LandCo assets were transferred to newly-formed Tropicana Las Vegas, Inc., which is owned by newly-formed Tropicana Las Vegas Intermediate Holdings, Inc., and ultimately by newly-formed Tropicana Hotel and Casino, Inc., the shareholders of which are the former secured lenders to the LandCo Debtors. The OpCo plan is expected to go effective within a matter of weeks.

7. Last week, after taking possession of the assets, the new owners of the Tropicana Las Vegas discovered that, just two weeks before the LandCo plan effective date, OpCo Debtor Tropicana Entertainment Holdings, LLC had filed applications with the United States Patent and Trademark Office to register the following logo and the trademark "The Trop Las Vegas | Est. 1957" in favor of the OpCo Debtors:



See Exhibit C. The application is an "intent to use" application, requiring the OpCo Debtors to certify that they have a bona fide intent to use the mark in commerce.

8. This egregious action, taken before either plan effective date and notwithstanding the reservation of rights in the plans, compelled the Tropicana Las Vegas Plaintiffs to act. Tropicana Las Vegas, Inc., not the OpCo Debtors, now owns and operates the Tropicana Las Vegas Resort and Casino, the iconic casino at the corner of the Las Vegas Strip and Tropicana Avenue established in 1957. The OpCo Debtors do not have a casino in Las Vegas, much less one that was established in 1957. Their intent to use the mark "The Trop Las Vegas | Est. 1957" can only be taken as a sign that OpCo constituencies aggressively will attempt to prevent the actual Tropicana Resort and Casino, located in Las Vegas on Tropicana Avenue, from using the name Tropicana.

9. To prevent that absurdity, this morning the Tropicana Las Vegas Plaintiffs filed the Trademark Complaint against OpCo Debtors Aztar Corporation and Tropicana Entertainment LLC with the Clark County District Court. In it, the Tropicana Las Vegas Plaintiffs seek a declaration that Tropicana Las Vegas, Inc. may continue to operate the Tropicana Las Vegas casino under the name "Tropicana" without interference from the OpCo Debtors.

10. Significantly, the Tropicana Las Vegas Plaintiffs do not seek monetary damages or any property from the OpCo Debtor defendants. They seek only a declaration of rights respecting their entitlement to use the Tropicana name, notwithstanding the postpetition acts of the OpCo Debtors to the contrary. **The relief sought in the Trademark Action would not limit the OpCo Debtors' ability to use the Tropicana name and would not subject the OpCo Debtors to damages or any liability**. Moreover, the Trademark Action seeks relief that is substantially identical to that which would have been sought after the OpCo plan effective date several weeks hence.

11. The Trademark Action falls squarely within the scope of 28 U.S.C. § 959(a), which provides that debtors in possession may be sued in non-bankruptcy courts "with respect to any of their acts or transactions in carrying on business connected with" property of the estate. The Third Circuit, and countless other courts, have concluded that section 959(a) authorizes suit notwithstanding the automatic stay. *Haberern v. Lehigh and New England Ry.*, 554 F.2d 581, 585 (3d Cir. 1977) (section 959(a) "establishes a clear exception to blanket stays entered by a reorganization court"). Accordingly, by the Motion, the Tropicana Las Vegas Plaintiffs notify the Court of the filing of the Trademark Complaint and, anticipating that the OpCo Debtors will attempt to persuade the trial court that the Trademark Action somehow is stayed, request confirmation that the automatic stay does not apply.

12. Further, out of an abundance of caution, the Tropicana Las Vegas Plaintiffs also ask that the Court annul the automatic stay to the extent (if at all) it applies. The stay serves absolutely no purpose with respect to the Trademark Action. The OpCo Debtors are weeks away from the effective date of their plan. Both the Tropicana Las Vegas Plaintiffs and the OpCo

Debtors are headquartered in Las Vegas. The Tropicana Las Vegas casino is, of course, on the Las Vegas Strip. The Trademark Action involves issues of state law and remedies most appropriately considered by a Nevada court. And, given the complete reservation of rights in the OpCo plan, the litigation will have no impact whatsoever on the OpCo Debtors' reorganization.

III. BACKGROUND

A. History Of The Tropicana Las Vegas.

13. The Tropicana Las Vegas is the original "Tropicana". It was founded in the early days of Las Vegas' rise to prominence. Its contemporaries were legendary properties such as the Sands, the Desert Inn, the Dunes, and the Hacienda, all of which have been demolished, and the Tropicana thus stands as one of the last survivors of Las Vegas' Golden Age.

14. The Tropicana opened on April 4, 1957. Over the years, the Tropicana has been associated with many Las Vegas greats – the Tropicana's shows (such as the Folies Bergere, which ran for 50 years) and headliners (such as Sammy Davis Jr., to whose specifications the 1,150 seat Superstar Theatre was designed) were among Las Vegas' most famous and iconic, and the Tropicana's guests, bosses and customers were prominent and glittering characters in the story of the City's Golden Age. The Tropicana's famous roadside sign was a Las Vegas landmark, dominating the Strip and welcoming arriving visitors for a half-century.

15. The Tropicana has such a prominent place in Las Vegas history that Clark County has honored itself and the Tropicana by naming one its major boulevards – Tropicana Avenue – after the storied property.[2] The Tropicana name not only is an integral part of the hotel/casino itself, it is a name that is stamped indelibly on Las Vegas' very geography.

---

[2] Tropicana Avenue is the main local street into McCarran International Airport and the first major exit from I-15 to the Las Vegas Strip for traffic heading north from the Los Angeles and San Diego areas. The intersection of Tropicana Avenue and the Strip is reported to be one of the busiest in the nation.

B. Acquisitions.

16. Between its founding and 1979, the Tropicana Las Vegas was operated by a corporation known as Hotel Conquistador, Inc., which passed through a number of owners. In December 1979, the Ramada chain of hotels bought the Tropicana and changed the name of the operating entity from Hotel Conquistador, Inc. to Hotel Ramada of Nevada, Inc. Hotel Ramada of Nevada, the original corporate owner of the property, continued to directly own and operate it until July 1, 2009, when Tropicana Las Vegas, Inc. became the owner and operator pursuant to the LandCo plan.

17. In 1989, Ramada sold the Tropicana to a new group of investors, who created a corporate entity called Aztar Corporation to own the stock of Hotel Ramada of Nevada. In 2006, Aztar was acquired by another group of investors, with its stock being purchased by an entity that ultimately would be named Tropicana Entertainment LLC. Aztar and Tropicana Entertainment are now OpCo Debtors.

C. The Trademark.

18. For the first 30 years of its operation, the Tropicana Las Vegas never formally registered its name as a trademark and Hotel Ramada of Nevada continued to use that name for the business and to enjoy all rights associated with it. Hotel Ramada of Nevada apparently has never transferred any trademark rights to its name in derogation of its own rights and has never made any agreement pursuant to which it could be denied the right to use its own name.

19. On April 28, 1989, Ramada, Inc., filed an application to register the trademark "Tropicana" for use in casino gaming. On July 5, 1989, before having its registration application granted, Ramada, Inc. purported to assign its registration of the mark to Aztar Corporation. On September 13, 2007, Aztar purported to assign its registration of the mark to Tropicana Entertainment LLC.

20. Notwithstanding those various documents, from the day of its founding through several months ago (when the OpCo Debtors first claimed ownership and demanded a royalty), the Tropicana Las Vegas always has enjoyed the use of its own name, without any demand for

royalty or interference by any of the entities that purported to register the name Tropicana as their own.

D. The LandCo Credit Facility.

21. In January 2007, Hotel Ramada of Nevada and the other LandCo Debtors entered into a credit facility – known in the bankruptcy cases as the LandCo Credit Facility – which was arranged with the direct participation and express and implied consent of Tropicana Entertainment and other OpCo Debtors.

22. The assets comprising the Tropicana Las Vegas were pledged as collateral for the LandCo facility. The documents made clear that the LandCo lenders were looking to the Tropicana Las Vegas Resort and Casino as their collateral and were fully expecting, in the event of default, to be able to exercise their remedies against and obtain possession and use of an operating hotel and casino – one that would have the right to continue business under its existing trade name. The OpCo Debtors, as the ultimate owners of the Tropicana Las Vegas at the time, fully endorsed this understanding.

23. Thus, for example, the LandCo Guarantee and Collateral Agreement ("GCA") pledged a security interest in the LandCo Debtors' Intellectual Property, defined to include trademarks. To back up that pledge, the LandCo Debtors promised that they would preserve the trademarks, specifically agreeing that they would maintain "each Trademark material to the conduct of such Grantor's business." It goes without saying that the right to use the name "Tropicana" is and was "material to the conduct" of Tropicana Las Vegas' business.

24. To further back up those promises, the LandCo lenders were promised and assured – with the express and implied consent of the OpCo Debtors – that each of the LandCo Debtors had "all requisite power and authority to own its property and assets and to carry on its business as now conducted." Again, it goes without saying that the right to use the name "Tropicana" is and was integral to the ability of Tropicana Las Vegas "to carry on its business as now conducted."

25. Finally, the Credit Agreement promised and assured the LandCo lenders – with the express and implied consent of the OpCo Debtors – that each of the LandCo Debtors had "good and marketable fee simple title to . . . all its material properties and assets (including all Mortgaged Property), except for minor defects in title that do not interfere with its ability to conduct its business as currently conducted or to utilize such properties and assets for their intended purposes." The right to use the name "Tropicana" unquestionably was material to the LandCo Debtors' "ability to conduct their businesses as currently conducted."

26. As these and other provisions made clear, the LandCo lenders were repeatedly promised and assured that, in the event of a default, they would be able to look to their collateral (the Tropicana Las Vegas) and operate and/or sell it as a going concern – to "carry on the business as now conducted." All of those promises were made with the consent of the OpCo Debtors.

E. The Bankruptcy Case.

27. On May 5, 2008, the OpCo and LandCo Debtors commenced these cases.

28. During the plan negotiation process, after it became clear that the OpCo and LandCo estates would be split, the Debtors took the conflict-riddled position that the LandCo Debtors had no rights to use the name "Tropicana" due to the fact that the trademark had been registered in the name of an OpCo Debtor, notwithstanding the fact that the LandCo Debtors had created the concept and name, developed the original Tropicana Las Vegas casino, and used the name continuously, without interference and royalty-free for more than fifty years.

29. Faced with the fact that their estate fiduciaries (the LandCo Debtors and their professionals) apparently were abdicating their duties and ceding valuable rights to the OpCo Debtors, the LandCo lenders objected to an extension of plan exclusivity, proposing as a compromise "that inter-Debtor conflicts like the right to the trademark be left for resolution between the reorganized LandCo and OpCo entities (which will soon be separate companies with

separate boards of directors, separate management, and separate and unconflicted counsel), with each entity retaining whatever rights they currently have."[3]

30. Ultimately, that proposal was adopted through the following agreed language added to each of the LandCo and OpCo plans:

> Nothing in this Plan (including the duration of the Interim Period) shall impair, enlarge, or in any way alter the equitable and legal rights, obligations, and defenses of the OpCo Debtors (or any Entity created in accordance with the OpCo Plan) or the LandCo Debtors (or any Entity created in accordance with this Plan, including New LandCo) regarding the Intellectual Property Rights, and all Entities reserve their rights with respect thereto.
>
> Notwithstanding the foregoing, the action or inaction of any Entity with respect to the Intellectual Property Rights during the Interim Period shall not be used, invoked, or applied by any Entity in any proceeding to serve as the basis to enlarge, diminish, or in any way alter or affect the equitable and legal rights, obligations, and defenses of any Entity including, without limitation, through the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), naked license, unreasonable delay in asserting rights, adequate remedy at law, or laches, in any dispute regarding the Intellectual Property Rights.
>
> During the Interim Period, and without waiving any of the foregoing rights, obligations, and defenses, the OpCo Debtors (and any Entity created in accordance with the OpCo Plan) and the LandCo Debtors (and any Entity created in accordance with this Plan, including New LandCo) agree that they shall use (i) the trademarks and service marks included in the Intellectual Property Rights only in connection with those goods and services with which such trademarks and service marks have been used historically by such Entities, and (ii) the quality of such goods and services shall be consistent with or better than the quality of the goods and services on which such trademarks and service marks have been used historically.

See LandCo Plan § XIII.Q. The Plans define "Intellectual Property Rights" as "any intellectual property owned by the OpCo Debtors or the LandCo Debtors and any other rights or interests in

---

[3] Onex Corporation's Objection To Motion Of The Debtors For An Order Extending Section 1121(c)(3) Exclusive Period (With Respect To The LandCo Debtors), docket no. 1658, at 4 and Ex. B.

such intellectual property, whether legal or equitable, including, without limitation, with respect to the validity, registration, ownership, and right to use the name 'Tropicana', the internet domain name 'TropicanaLV.com', or any other trademark or trade name." *See* LandCo Plan § I.A.65. The Plans define "Interim Period" as "the period of time from and after March 18, 2009, through 60 days after the later of the Effective Date (as defined herein) or the Effective Date (as defined in the OpCo Plan)." *See* LandCo Plan § I.A.73.

31. The LandCo and OpCo plans were confirmed on May 5, 2009. The LandCo plan became effective on July 1, 2009, and the LandCo Assets (defined to include "all Intellectual Property Rights of the LandCo Debtors") were transferred to newly-formed Tropicana Las Vegas, Inc., the ultimate owners of which are the former LandCo lenders. The OpCo plan is expected to go effective within a matter of weeks.

F. The OpCo Debtors' Postpetition Trademark Filing.

32. Unbeknownst to the future owners of the Tropicana Las Vegas, on June 13, 2009, just two weeks before the LandCo effective date, OpCo Debtor Tropicana Entertainment Holdings, LLC filed applications with the United States Patent and Trademark Office to register the trademark "The Trop Las Vegas | Est. 1957" and the logo reproduced in the Introduction above. *See Exhibit C.* The application is an "intent to use" application, requiring certification of a bona fide intent to use the mark in commerce. The Debtors never notified the LandCo lenders – as the future owners of the Tropicana Las Vegas – or anyone actually employed by the Tropicana Las Vegas of their actions, which given the elaborate design work obviously had been in process for a substantial period of time.

33. The OpCo Debtors know full well that there is only one Tropicana Las Vegas, and it is now owned and operated by Tropicana Las Vegas, Inc. There is only one "Trop" that was established in 1957, and it is owned and operated by Tropicana Las Vegas, Inc. This egregious action,[4] taken before either plan effective date and notwithstanding the reservation of

[4] The Tropicana Las Vegas Plaintiffs reserve all rights with respect to this wrongful filing by the OpCo Debtors.

rights in the plans, compelled the Tropicana Las Vegas Plaintiffs to act by filing the Trademark Complaint shortly after discovery of the surreptitious trademark filings. The Trademark Complaint initiates the dispute that the parties always intended to be resolved outside of bankruptcy by the respective new stakeholders in the LandCo and OpCo enterprises. It was filed in the most convenient forum imaginable to both the Tropicana Las Vegas Plaintiffs and the OpCo Debtors, as both plaintiffs and defendants are headquartered in Clark County and located within seven miles of the courthouse.

IV. ARGUMENT

34. For the reasons set forth below, the Trademark Action initiated by the Trademark Complaint is within the scope of 28 U.S.C. § 959(a) and not subject to the automatic stay. Further, to the extent (if at all) the stay applies, it should be annulled to enable that action to proceed given the fact that the OpCo Debtors will emerge from bankruptcy in weeks and that the action will not have any impact on the OpCo plan or reorganization.

A. The Trademark Action Is Within The Scope Of 28 U.S.C. § 959(a).

35. Section 959(a) provides that "debtors in possession[] may be sued, without leave of the court . . . , with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. § 959(a).

36. As noted in the Introduction above, the Third Circuit has held that section 959(a) "establishes a clear exception" to the automatic stay. *Haberern*, 554 F.2d at 585. Under section 959(a), "a nondebtor party is **not** required to obtain leave of the bankruptcy court before filing suit against an operating trustee or a debtor in possession, provided that the lawsuit is based on an act or conduct . . . by the debtor in possession in carrying out business in connection with the debtor's property." *In re Telegroup, Inc.*, 237 B.R. 87, 94 (Bankr. D.N.J. 1999) (emphasis in original) (quoting 1 COLLIER ON BANKRUPTCY ¶ 10.01); *see, e.g.*, *In re St. Mary Hospital*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) (section 959(a) "gives parties aggrieved by a debtor's actions in violation of [applicable federal, state, or local law] the right to enforce that

law in any other court, free from the impact of the automatic stay"); *In re Baptist Medical Center of New York*, 80 B.R. 637, 643 (Bankr. E.D.N.Y. 1987) (same).

37. This is not a new concept. As recently explained by Judge Wedoff in the United Airlines case, the Supreme Court held nearly a century ago that "§ 959(a) offers a procedure distinct from bankruptcy adjudication, establishing an 'unconditional right to bring [an] action in the local courts, and to have the justice and amount of [the] demand determined by the verdict of a jury,' in the manner to which the claimant 'would be entitled . . . if the property or business were not being administered by the Federal court.'" *In re UAL Corp.*, 386 B.R. 701, 708-09 (Bankr. N.D. Ill. 2008) (quoting *Gableman v. Peoria, Decatur & Evansville Ry.*, 179 U.S. 335, 338 (1900)), *rev'd in part on other grounds*, 398 B.R. 243 (N.D. Ill. 2008).

38. By the Trademark Complaint, the Tropicana Las Vegas Plaintiffs seek redress for the OpCo Debtors' postpetition acts and conduct in carrying out their business, particularly their assertion of exclusive rights to use of name Tropicana and their attempt to apply to register the trademark "The Trop Las Vegas | Est. 1957." The Trademark Action therefore is squarely within the scope of section 959(a).

39. Many cases hold that actions against a debtor in possession for postpetition infringement of trademark, patent or other intellectual property rights are exempt from the automatic stay by virtue of section 959(a). *See, e.g.*, *Voice Systems and Services, Inc. v. VMX, Inc.*, No. 91-C-88-B, 1992 WL 510121, *10 (N.D. Okla. Nov. 5, 1992) ("The injunctive relief [regarding infringement] sought by VMX on this motion does not violate the automatic § 362 stay . . . ."); *In re Television Studio School of New York*, 77 B.R. 411, 412 (Bankr. S.D.N.Y. 1987) ("The post-petition infringement claim, by definition, is not protected by 11 U.S.C. § 362."); *see also Larami Limited v. Yes! Entertainment Corp.*, 244 B.R. 56, 58 (D.N.J. 2000) ("§ 362(a)(3) does not bar this Court from entertaining plaintiff's suit for damages [for postpetition infringement], nor would it prevent the Court from issuing an injunction which prevented Yes! [the debtor] from manufacturing and selling the infringing water guns"); *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F. Supp. 899, 917 (E.D.N.Y. 1988) ("The Bankruptcy

Act was intended to protect and rehabilitate debtors. It should not be used as a shield behind which a debtor may sustain the misappropriation of a trade name to which he is not rightfully entitled.") (quoting *Steak & Brew, Inc. v. Markis*, 177 U.S.P.Q. 412, 414 (D. Conn. 1973)).

40. The claims asserted in the Trademark Action are analogous. While the Tropicana Las Vegas Plaintiffs do not seek damages for the OpCo Debtors' infringement of the Tropicana mark, they do seek redress for the OpCo Debtors' attempted postpetition misappropriation of that mark for their exclusive use. In particular, the Tropicana Las Vegas Plaintiffs seek a declaration that Tropicana Las Vegas, Inc. may continue to operate the Tropicana Las Vegas casino under the name "Tropicana" without interference from the OpCo Debtors. Indeed, unlike in the infringement cases cited above, the Trademark Action would not limit the OpCo Debtors' ability to use the Tropicana name and would not subject the OpCo Debtors to damages or any liability.

41. The Trademark Action therefore is similar to the action at issue in *In re Newman Companies of Wisconsin, Inc.*, 45 B.R. 308 (Bankr. D. Wis. 1985). In *Newman*, a former employee of the debtor brought a postpetition action for a declaratory judgment that his prepetition non-compete agreement with the debtor was invalid. The debtor argued that the suit was subject to the automatic stay on the grounds that "the non-competition provisions of the employment agreement are part of the property of the estate." *Id.* at 309. The court, however, held that section 959(a) exempted the action from the stay:

> [T]his matter is governed instead by the provisions of 28 USC § 959(a). That statute permits debtors in possession to be sued, without leave of the court appointing them, with respect to acts or transactions in the carrying on of their business, and that is what Selvick's declaratory judgment action is about. **Although the case involves a pre-petition contract, the dispute itself is concerned with post-petition activity contemplated by Selvick**, that is, selling insurance in competition with the debtor corporation. Accordingly, by reason of 28 USC § 959(a), the stay of § 362(a) does not apply, and Selvick is free to bring his declaratory judgment action in state court.

Id. (emphasis added). Here, while the Trademark Action involves rights that originated prior to the petition date – the wrongful postpetition attempt to register "The Trop Las Vegas | Est.

1957" notwithstanding – there is no question that the relief sought "is concerned with postpetition activity contemplated by" the Tropicana Las Vegas Plaintiffs – namely, the operation of the Tropicana Las Vegas casino under the name it has used continually and royalty-free for the past half-century, including during the entire course of the LandCo Debtors' now-concluded bankruptcy proceedings.

42. The OpCo Debtors may argue that section 959(a) does not apply because the Trademark Action somehow seeks to limit their alleged bundle of rights with respect to the Tropicana name (by taking away their alleged rights to preclude Tropicana Las Vegas' use of the name). In addition to the authority cited above, *In re Kish*, 41 B.R. 620 (Bankr. E.D. Mich. 1984), conclusively refutes that argument.

43. In *Kish*, the debtor had obtained a license to open a new landfill, and a private group thereafter sued to enjoin operation of landfill on grounds that the license had been issued improperly. The operating trustee for the debtor argued that section 959(a) did not apply because the action would "interfere with the title, possession, control, liquidation or distribution of estate assets." *Id.* at 622. Accepting for the purpose of argument the (incorrect) assertion that section 959(a) does not apply to actions that attempt to obtain property of the estate, the court nevertheless rejected the trustee's argument:

> Although the trustee's position that a public license is included within the broad definition of "property of the estate" contained in 11 U.S.C. § 541 is correct . . . , it does not follow that a lawsuit seeking to destroy that property interest is an action to "obtain possession" of that property. Any action to compel compliance with state regulatory provisions could devalue the property of an estate, even to the extent of destroying the property interest entirely. Its effect, however, does not transform the action from what is basically an enforcement action into one to "obtain property of the estate". . . .
>
> Therefore, . . . the Court holds that Citizens was free to bring its suit in state court without first obtaining leave of this Court. It follows, then, that the act of filing the suit without such leave was in no way contumacious.

Id. at 623 (citations and footnote omitted). Here, the Tropicana Las Vegas Plaintiffs seek nothing more than a declaration that they have the right to use the Tropicana name for the Las Vegas casino. Under *Kish* (in which the litigants affirmatively sought to nullify the entire license held by the debtor), that requested relief clearly is not subject to the stay.

B. The Automatic Stay Should Be Annulled To The Extent (If At All) It Applies.

44. Out of an abundance of caution, the Tropicana Las Vegas Plaintiffs also ask that the Court annul the automatic stay to the extent (if at all) it applies. The grounds for this request are that the stay serves absolutely no purpose in the context of the Trademark Action. The OpCo Debtors are weeks away from the effective date of their plan. Both the Tropicana Las Vegas Plaintiffs and the OpCo Debtors are headquartered in Las Vegas. The property at issue in the Trademark Action – the Tropicana Las Vegas casino – is, of course, on the Las Vegas Strip. The Clark County District Court is well equipped to adjudicate the Trademark Action, which involves questions of state law and remedies. And, given the complete reservation of intellectual property rights in the OpCo plan and the fact that the Tropicana Las Vegas Plaintiffs do not seek any damages against or property from the OpCo Debtors, the litigation will have no impact whatsoever on OpCo's reorganization.

45. Rather, the Trademark Action simply puts into motion the course of events that the parties intended all along – a post-bankruptcy adjudication of rights to the Tropicana name by newly-reorganized entities free from the conflicts under which the LandCo Debtors and the OpCo Debtors labored during the bankruptcy proceedings.

1. The Automatic Stay May Be Annulled For Cause.

46. Section 362(d)(1) of the Bankruptcy Code provides that the Court shall grant relief from the automatic stay, including by terminating or annulling it, "for cause." 11 U.S.C. § 362(d)(1); *see, e.g.*, *In re Myers*, 491 F.3d 120, 127 (3d Cir. 2007) ("this Court and others have held that actions in violation of the stay, although void (as opposed to voidable), may be revitalized in appropriate circumstances by retroactive annulment of the stay").

47. Once the movant makes a prima facie showing of "cause" to lift the stay, as the Tropicana Las Vegas Plaintiffs have done here, the burden going forward shifts to the debtor to prove that stay relief is not appropriate. 11 U.S.C. § 362(g); *see, e.g.*, *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1285 (2d Cir. 1990); *In re RCM Global Long Term Capital Appreciation Fund*, 200 B.R. 514, 526 (Bankr. S.D.N.Y. 1996) ("the Debtor has the burden of proof that stay relief is not warranted"); *In re Rexene Prods. Co.*, 141 B.R. 574, 577 (Bankr. D. Del. 1992).

48. Courts in this District often employ the following three-part test to evaluate whether cause exists in a particular case: "Whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit; [w]hether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and [t]he probability of the creditor prevailing on the merits." *In re The SCO Group, Inc.*, 395 B.R. 852, 857 (Bankr. D. Del. 2007) (citing *Rexene Prods.*, 141 B.R. at 576)).

49. Courts in this District also consider, as applicable, the following dozen general policies underlying the automatic stay in making a decision with respect to relief from the stay:

> 1) whether relief would result in a partial or complete resolution of the issues; 2) lack of any connection with or interference with the bankruptcy case; 3) whether the other proceeding involves the debtor as a fiduciary; 4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; 5) whether the debtor's insurer has assumed full responsibility for defending it; 6) whether the action primarily involves third parties; 7) whether litigation in another forum would prejudice the interests of other creditors; 8) whether the judgment claim arising from the other action is subject to equitable subordination; 9) whether the moving party's success in the other proceeding would result in a judicial lien avoidable by the debtor; 10) the interests of judicial economy and the expeditious and economical resolution of litigation; 11) whether the parties are ready for trial in the other proceeding; and 12) impact of the stay on the parties and the balance of the harms.

SCO Group, 395 B.R. at 857 (citing *Sonnax*, 907 F.2d at 1287).

50. In applying these considerations, courts routinely hold that **cause for relief from the stay includes "the lack of any connection with or interference with the pending**

bankruptcy case." *Sonnax*, 907 F.2d at 1285 (quoting H.R. Rep. No. 95-595, at 343-44 (1977)) (emphasis added); *see, e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 838 n.8 (Bankr. S.D.N.Y. 1990) ("The 'cause' portion of § 362(d)(1) has also been utilized by bankruptcy courts to permit litigation in another forum . . . if that litigation lacks any connection or interference with the bankruptcy case.") (citations omitted).

2. Cause Exists To Annul The Stay With Respect To The Trademark Action.

51. All of the factors under the three-part test applied in *Rexene Products* and the applicable policies articulated in *Sonnax* mandate annulment of automatic stay (to the extent it applies) to allow the Trademark Action to proceed.

52. The first factor is "[w]hether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit." *Rexene Prods.*, 141 B.R. at 576. Here, neither the OpCo Debtors nor their bankruptcy estates will be prejudiced if the Trademark Action proceeds. As noted above, both OpCo and LandCo plans contemplated that disputes over trademark rights would go forward in the post-confirmation period, and the OpCo plan apparently is just weeks from becoming effective. By the time the Trademark Action gets under way in earnest, the real parties in interest will be the reorganized debtors and/or their successors in interest and, given the complete reservation of rights set forth in the respective plans, the matters at issue simply will have no "connection with [and will not] interfere[] with the pending bankruptcy case[s]." *Rexene Prod.*, 141 B.R. at 576; *see SCO Group*, 395 B.R. at 858 ("attention to the [state court action] will certainly not harm the estate"); *UAL*, 386 B.R. at 710 n.6 ("now that the reorganization has been completed with the confirmation of United's Chapter 11 Plan, interference [with the reorganization] would be unlikely"). This is particularly true in light of the fact that the Trademark Action does not seek damages against or the recovery of property from the OpCo Debtors and will not hinder or impair the OpCo Debtors' current operations.

53. In fact, it would make no sense for the Trademark Action to be litigated anywhere but Las Vegas. Both the Tropicana Las Vegas Plaintiffs and the OpCo Debtors are

headquartered in or near Las Vegas, less than three miles apart. The property at issue – the Tropicana Las Vegas casino – is on the Las Vegas Strip, just seven miles from the Clark County District Court (which is less than four miles from the OpCo Debtors' headquarters). And, as the OpCo Debtors' management continually has reminded the Court and parties in interest, these are challenging times for the casino gaming industry, meaning that the distraction of litigation in a distant forum would be prejudicial to all parties. Any suggestion that the matter should be litigated anywhere but Las Vegas could only be motivated by a desire to forum shop rather than by a desire to have the case resolved in the most appropriate, economical, and convenient forum.

54. The second *Rexene Products* factor "balances the hardship to [the Tropicana Las Vegas Plaintiffs] in continuing the stay with the hardship to the [OpCo Debtors] in lifting the stay." *Rexene Prods.*, 141 B.R. at 577. As noted above, there will be no hardship whatsoever to the OpCo Debtors from continuation of the Trademark Action.

55. In contrast, the Tropicana Las Vegas Plaintiffs risk very real prejudice if they are unable to proceed with the litigation. The OpCo Debtors' surreptitious pre-effective date application to register "The Trop Las Vegas | Est. 1957" can mean only one thing – that the OpCo Debtors are preparing an all out effort to strip Tropicana Las Vegas of the right to use the name Tropicana with respect to the Las Vegas casino and hotel that originated the name and operated under it for more than the last half century. The attempt to claim "Trop Las Vegas" and "Est. 1957" can mean nothing else.

56. Further, this important dispute must be resolved as quickly as possible. As the Court is aware, the LandCo plan included a rights offering for $75 million in preferred stock, the proceeds of which Tropicana Las Vegas intends to use to embark on a comprehensive refurbishment and renovation of the property (among other things to counteract years of neglect suffered under management by the OpCo Debtors and their predecessors). Some of the refurbishment and renovation may have to be put on hold if there are delays in establishing that the one and only Tropicana Las Vegas, established in 1957, can continue as the "Tropicana Las Vegas" and if the OpCo Debtors are permitted to publicly claim an entitlement to deprive the

Tropicana Las Vegas of its name. Such a delay will materially harm Tropicana Las Vegas and its stakeholders, who until very recently were the largest creditors of the LandCo Debtors.

57. The final *Rexene Products* factor analyzes "[t]he probability of the creditor prevailing on the merits." *Id.* "Even a slight probability of success on the merits may be sufficient to support a lifting of the automatic stay in an appropriate case." *SCO Group*, 395 B.R. at 859 (citation omitted). Here, given fifty-plus years of continuous, royalty-free, restriction-free use of the Tropicana name in connection with the Tropicana Las Vegas Resort and Casino, there is more than just a prospect that the Tropicana Las Vegas Plaintiffs will obtain a declaration that they are entitled to continue such use into the future, there is a substantial likelihood of success. This factor therefore weighs strongly in favor of an annulment of the stay.

58. The relevant *Sonnax* policies similarly support an annulment of the stay with respect to the Trademark Action.[5] For example, and for the reasons stated above:

- Policy #1 – annulment of the stay will result in complete resolution of the trademark issues in the most convenient and appropriate forum;
- Policy #2 – the Trademark Action has no connection to or interference with the OpCo Debtors' bankruptcy case;
- Policy #3 – the Trademark Action does not involve the OpCo Debtors in their capacity as fiduciaries to the OpCo bankruptcy estates;
- Policy #4 – the Clark County District Court is intimately familiar with the state law rights and remedies invoked by the Tropicana Las Vegas Plaintiffs in the Trademark Complaint;
- Policy #7 – the Trademark Action will not impact recoveries under the OpCo plan and will not prejudice the interests of other creditors;

[5] In applying the *Sonnax* policies, courts do not necessarily apply each and every factor. *In re Mazzeo*, 167 F.3d 139, 143 (2d Cir. 1999) ("Not all of these factors will be relevant in every case."). Moreover, the court need not assign equal weight to each listed policy. *See In re New York Med. Group, P.C.*, 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001).

- Policy #8 – any judgment arising in the Trademark Action will not be subject to equitable subordination or any adjustment in the OpCo bankruptcy cases;
- Policy #9 – the Tropicana Las Vegas Plaintiffs' success in the Trademark Action will not result in an avoidable judicial lien;
- Policy #10 – the interests of judicial economy and the expeditious and economical resolution of litigation are served through adjudication in Las Vegas, where the litigants, the property and all material documents and witnesses are located; and
- Policy #12 – annulment of the stay will have no impact on the OpCo Debtors, and the balance of the harms tips strongly in favor of the Tropicana Las Vegas Plaintiffs.

V. CONCLUSION

For all of the foregoing reasons, the Tropicana Las Vegas Plaintiffs respectfully request that the Court enter an order confirming that the automatic stay does not apply to the filing of the Trademark Complaint and the continuation of the Trademark Action, annulling the automatic stay, to the extent (if at all) it applies to the Trademark Complaint and Trademark Action, as of July 20, 2009, and granting such other and further relief as this Court may deem just and proper.

Dated: July 20, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Robert S. Brady (No. 2847)
The Brandywine Building – 17th Floor
1000 West Street
Post Office Box 391
Wilmington, Delaware 19899 0391
Telephone: (302) 571-6600
Telecopier: (302) 571-1253

- and -

HENNIGAN, BENNETT & DORMAN LLP

Bruce Bennett
James O. Johnston
Joshua D. Morse
865 S. Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Telecopier: (213) 694-1234

Counsel to Tropicana Las Vegas, Inc., and Hotel Ramada of Nevada, LLC