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**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF NEVADA**

In re:

STATION CASINOS, INC.

- ☐ Affects this Debtor
- ☒ Affects all Debtors
- ☐ Affects Northern NV Acquisitions, LLC
- ☐ Affects Reno Land Holdings, LLC
- ☐ Affects River Central, LLC
- ☐ Affects Tropicana Station, LLC
- ☐ Affects FCP Holding, Inc.
- ☐ Affects FCP Voteco, LLC
- ☐ Affects Fertitta Partners LLC
- ☐ Affects FCP MezzCo Parent, LLC
- ☐ Affects FCP MezzCo Parent Sub, LLC
- ☐ Affects FCP MezzCo Borrower VII, LLC
- ☐ Affects FCP MezzCo Borrower VI, LLC
- ☐ Affects FCP MezzCo Borrower V, LLC
- ☐ Affects FCP MezzCo Borrower IV, LLC
- ☐ Affects FCP MezzCo Borrower III, LLC
- ☐ Affects FCP MezzCo Borrower II, LLC
- ☐ Affects FCP MezzCo Borrower I, LLC
- ☐ Affects FCP PropCo, LLC

Chapter 11

Case No. BK-09-52477
Jointly Administered
BK 09-52470 through BK 09-52487

**DEBTORS' OPPOSITION TO AMENDED MOTION OF THE INDEPENDENT LENDERS TO STATION CASINOS, INC. FOR THE APPOINTMENT OF AN EXAMINER**

Status Hearing: September 30, 2009
Hearing Time: 10:00 a.m.
Place: 300 Booth Street
Reno, NV 89509

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Rules**



**Statutes**



**Other Authorities**

TO THE HONORABLE GREGG W. ZIVE, UNITED STATES BANKRUPTCY JUDGE, OFFICE OF THE UNITED STATES TRUSTEE AND ALL PARTIES IN INTEREST:

Station Casinos, Inc. ("SCI" or "OpCo") and its affiliated debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Cases"), hereby object, pursuant to sections 105(a) and 1104 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code"), to the "Amended Motion of the Independent Lenders to Station Casinos, Inc. for the Appointment of an Examiner," dated September 3, 2009 (Docket No. 272) (the "Motion").

## I. INTRODUCTION

The Motion was filed by ten (10) institutions that apparently are participants in the OpCo bank group (collectively, the "Minority Lenders"). Based upon representations made to this Court in connection with the first-day hearings that occurred shortly after the Cases were filed, the Debtors believe that the Minority Lenders hold less than 30% of the debt outstanding under the OpCo Loan Agreement.[1] The Motion neglects to disclose the actual debt holdings of the Minority Lenders, however, and to date the Minority Lenders have not filed the disclosures required under Bankruptcy Rule 2019(a) regarding their debt holdings. The Debtors hereby reserve all rights with respect to the failure of the Minority Lenders to comply with Bankruptcy Rule 2019(a).

The specific relief requested in the Motion is the appointment of an examiner, but the accusations contained in the Motion illuminate the Minority Lenders' true agendas: (a) to collaterally attack a variety of Court orders as to which the Minority Lenders failed to either timely or successfully object; (b) to circumvent the voting provisions in the OpCo credit agreement under which a super-majority of OpCo lenders (the "Majority Lenders") has the power to outvote the Minority Lenders[2]; and (c) to

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[1] "OpCo Loan Agreement" means the Credit Agreement, dated November 7, 2007, entered into by OpCo, as borrower, Deutsche Bank Trust Company Americas ("DBTCA,)" as Administrative Agent, and the "Lenders" party thereto.

[2] The Debtors are informed and believe that Majority Lenders comprised of at least seventeen (17) institutional lenders holding in excess of 70% of the debt outstanding under the OpCo Loan Agreement

complain about the workings of the very capital structure into which they themselves chose to invest – and in particular about the November 7, 2007 Master Lease Agreement (as amended, the "Master Lease") arrangements between OpCo and FCP PropCo, LLC ("PropCo"). The Minority Lenders also manage to launch several gratuitous – and wholly unsubstantiated – attacks at the Debtors.

Although the Minority Lenders take aim at many different "targets," they end up hitting none. The Motion simply reveals that the Minority Lenders are embroiled in intercreditor disputes, not the victims of any conflicts of interest allegedly residing with the Debtors.

In addition, the Motion is based on a series of fallacies that are easily disproved. For example:

- The Minority Lenders accuse OpCo of "inaction" and "indecision" regarding the Master Lease and of making "no apparent effort" to reject or renegotiate the Master Lease. Motion at ¶ 18. The Minority Lenders have no good faith basis for those reckless allegations. The Debtors' evidence will demonstrate that the Debtors and their advisors have devoted, and continue to devote, significant effort and resources to arriving at an appropriate restructuring of the Master Lease.[3]
- The Minority Lenders argue that an examiner is necessary because the Debtors have the ability to "shift value from one stack to the other." Motion at ¶ 12. In so arguing, the Minority Lenders forget that (1) expenditures of cash collateral by OpCo and PropCo presently are conditioned on the consent of their respective lender groups under the budgeting procedures contained in the applicable cash collateral orders, and (2) any "value-shifting" transactions outside the ordinary course of business can occur only with approval of this Court. Accordingly, this

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voted to consent to OpCo's use of cash collateral in accordance with an agreed-upon budget, notwithstanding the objection of the Minority Lenders. Under the OpCo Loan Agreement, that majority vote binds all lenders.

[3] The Debtors reserve all rights against the Minority Lenders and their counsel with respect to the lack of any good faith basis to substantiate the allegations contained in the Motion.

argument is entirely unfounded.

- The Minority Lenders apparently believe that there should be an immediate attack on the Master Lease, either via rejection or recharacterization. *See Id.* at ¶¶ 13-19. This argument naively ignores the significance and complexities of the Master Lease and related arrangements and the potential importance of those arrangements (or some negotiated settlement thereof) to any successful restructuring of the Debtors. The Minority Lenders likewise ignore the serious consequences that could flow from any precipitous action regarding the Master Lease. For example, rejection of the Master Lease, whether affirmatively or by failure to honor its terms pending assumption or rejection, could result in OpCo's immediate surrender of four very important properties.[4] Recharacterization of the Master Lease, meanwhile, would prevent OpCo from realizing the benefits of the limitation on rejection damages that the Debtors might otherwise be able to utilize under Bankruptcy Code section 502(b)(6). Thus, while the Minority Lenders trumpet the fact that OpCo has not yet rejected or recharacterized the Master Lease as "inaction" by management due to perceived conflicts of interest, in fact OpCo is approaching those issues with all of the due care and consideration that is warranted to best protect the interest of its estate.

As set forth in more detail below, the Motion contains several other equally short-sighted and ill-conceived assertions about what the Minority Lenders believe should occur in these Cases. The simple reality, however, is that the Minority Lenders are not fiduciaries for anyone, let alone the OpCo estate, and thus their views as to what OpCo should be doing are merely the self-interested views of one minority group of the OpCo lenders.

Moreover, everything that the Minority Lenders want the examiner to do – review and analysis of all options with respect to the Master Lease, review and analysis of

[4] Declaration of Richard J. Haskins in Support of Debtors' Opposition to Amended Motion of the Independent Lenders to Station Casinos, Inc. for the Appointment of an Examiner, filed concurrently herewith ("Haskins Decl.") at ¶ 9.

how the Debtors are deploying cash collateral, review and analysis of amount and propriety of professional fee payments – is already being done by the Debtors in the exercise of their fiduciary duties and under the watchful eyes of this Court, the OpCo and PropCo lender groups, the Official Committee of Unsecured Creditors (the "UCC"), and all of the other interested parties in these cases, including the Minority Lenders themselves. An examiner would simply not add any value to this already highly scrutinized situation.

## II. ARGUMENT

### A. THOUGH THE MINORITY LENDERS TRY TO PAINT A PICTURE OF CONFLICTS OF INTEREST, ALL THAT IS REALLY IN CONFLICT ARE COMPETING CREDITOR AGENDAS.

On the one hand, the Minority Lenders try to paint the Debtors as hopelessly conflicted and paralyzed by the purported "Sophie's Choice" presented by the Master Lease between OpCo and PropCo. Motion at ¶ 17. On the other hand, the Minority Lenders suggest a very different group of sly and opportunistic Debtors plotting to "shift value" away from disfavored creditors without detection by the Court or interested parties. *Id.* at ¶ 12.

Of course, neither of these scenarios depict reality, nor do the Minority Lenders advance any facts or evidence whatsoever to substantiate their fables. Quite to the contrary, the record in these Cases clearly demonstrates that the Debtors' conduct to date has been guided by one straightforward and overriding principle: to continue to operate their enterprise in such a manner as to preserve and protect value to the greatest extent possible, while at the same time negotiating aggressively and expeditiously with all constituents toward a comprehensive, and hopefully consensual, restructuring. The Debtors' pursuit of that objective is evident through, among other things:

- The Debtors' successful efforts to negotiate with the OpCo lenders a consensual cash collateral and DIP financing package to provide the Debtors with the necessary liquidity to meet their operating needs during the Cases,

along with a companion forbearance agreement that allowed OpCo to keep its operating subsidiaries out of bankruptcy;

- The Debtors' successful efforts to negotiate a consensual cash collateral arrangement with the secured lenders at PropCo to ensure the continued maintenance and preservation of the PropCo assets;
- The Debtors' efforts to consensually resolve a variety of concerns of the UCC regarding the cash collateral and DIP financing arrangements and certain other first day motions; and
- OpCo's proactive formation of a special board committee to investigate a wide variety of potential litigation claims that, if viable, would be assets of OpCo's estate, and OpCo's willingness to share the report regarding that investigation publicly for full vetting by all interested parties. Haskins Decl. at ¶ 21.

The Debtors' rightful intentions are demonstrated and verified by their conduct, in contrast to the improper and self-interested agenda of the Minority Lenders evident in the Motion. The Motion readily reveals that the dissatisfaction of the Minority Lenders is not the result of any actions of the Debtors, but rather a function of (a) the Minority Lenders' frustration at being unable to outvote the other members of the OpCo lender group, and (b) the Minority Lenders' desire to try to challenge the Master Lease in order to deprive the PropCo lenders of their rights regarding cash that flows from OpCo to PropCo as rent under the Master Lease.

For example, the Motion complains about payments being made by OpCo in accordance with the OpCo cash collateral order and budget. *See* Motion at ¶¶ 8-19. The Motion conveniently ignores, however, that the OpCo lenders, through their agent and with the consent of approximately 70% of those lenders, consented to the very payments about which the Minority Lenders complain. Moreover, the Court has already approved

those payments following an interim hearing at which the Minority Lenders' objections were heard and overruled.[5]

With respect to the PropCo lenders, the Motion describes potential attacks on the Master Lease and complains about the "cash trap" that prevents "flowback" of amounts from PropCo to OpCo. *See* Motion at ¶¶ 20-23. As discussed below, the Minority Lenders' arguments on these issues are flawed for a variety of reasons. But those arguments do illustrate the Minority Lenders' true issue with the Master Lease structure – which is not that it creates a conflict between OpCo and PropCo, but that it results in a rental stream that moves cash away from the OpCo lenders and towards the PropCo lenders. Thus, the Minority Lenders are in a tug-of-war with the PropCo lenders, not with the Debtors.

The "conflicts" about which the Minority Lenders complain are not conflicts of interest that are impairing common management of the Debtors, but rather are conflicts among the rights of the Debtors' various lenders. Absent a showing that the Debtors have some motivation for favoring one group of lenders over another (which the Minority Lenders have not even alleged, let alone shown), these "conflicts" are simply normal intercreditor disputes that do not warrant, *nor would they be resolved by*, the appointment of an examiner for the Debtors.

## B. THE MOTION IS BASED ON A SERIES OF FALLACIES THAT ARE EASILY DISPROVED.

The Minority Lenders base their request for an examiner on a foundation of allegations that range from being simply inaccurate speculation to assertions that are plainly false. Consequently, the Motion's foundation crumbles and the Motion fails to stand up.

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[5] Interim Order Pursuant To 11 U.S.C. Section 105, 361, 362, 363, 364 and 552 And FED. R. BANKR. P. Rule 4001(b), and (s) (I) Authorizing the Debtors to (A) Use Cash Collateral, (B) Obtain Unsecured, Subordinated Postpetition Financing; (C) Make Loans to Non-Debtor Subsidiaries; (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Granting Related Relief, and (IV) Scheduling Final Hearing, July 31, 2009 (Docket No. 26).

**(i) Fallacy #1: The Debtors Have Unfettered Ability To Inappropriately "Shift Value" Among Themselves.**

**Reality: Any Transactions Outside The Ordinary Course Of Business Require Court Approval, And Cash Collateral Expenditures Are Subject To Lender Approval Under The Existing Cash Collateral Orders.**

The Motion repeatedly argues that the Debtors' existing capital structure permits the Debtors to "shift value" between Debtor entities, resulting in the Minority Lenders' apparent fear that their borrower, OpCo, will "give away" value to other Debtors. *See Id.* at ¶¶ 9, 11-12, 34. This argument fails to recognize that: (a) any transactions that would "shift value" between Debtors require Court approval and, under the current cash collateral orders, budget approval by the respective lender groups; and (b) OpCo has no incentive to give away value to PropCo.

The Minority Lenders undoubtedly understand that, as debtors in possession, the Debtors can only enter into material transactions (other than ordinary course transactions) after obtaining Bankruptcy Court approval on notice to interested parties. In addition, OpCo and PropCo are both currently operating under cash collateral arrangements that require applicable lender consent to budgets for expenditure of cash collateral (with certain permissible variances) and also provide for weekly reporting of actual spending. Haskins Decl. at ¶ 22. These safeguards against any covert "value shifting" are more than sufficient to allay the Minority Lenders' alleged fears on this point.

In addition, the Minority Lenders fail to establish any reason *why* OpCo would be motivated to improperly divert value to PropCo. The Motion states that "today, OpCo's equity interest in PropCo is essentially worthless." Motion at ¶ 5. If that statement is true, then OpCo, as PropCo's ultimate equity holder, would not realize any benefit from "giving away" value to PropCo – which is precisely why OpCo is not doing so. Rather than "giving away" value, OpCo is satisfying its contractual (under the Master Lease) and statutory (under Bankruptcy Code section 365(d)(3)) obligations under the Master Lease, pending an ultimate decision to assume, reject, or take other action with

respect to the Master Lease. Though the day may come when OpCo decides that a comprehensive restructuring of the enterprise is not possible or preferable and that the rental payments under the Master Lease therefore should stop, that day has not arrived a mere two months into the Cases. In addition, as discussed immediately below, there are many good reasons why a consensual restructuring of the Master Lease would be preferable to rejection or an attempt to recharacterize.

**(ii) Fallacy #2: OpCo Has Refused/Failed To Take Action On The Master Lease Due To Conflicts Of Interest.**

**Reality: OpCo Has Devoted, And Continues To Devote, Substantial Resources To Solving The Master Lease Issues, But The Importance Of The Master Lease To Any Restructuring Warrants Careful And Considered Action, Not Knee-Jerk Litigation Posturing.**

The Minority Lenders argue that an examiner is required to investigate: "[w]hether the Master Lease between OpCo and PropCo should be rejected or renegotiated" and "[w]hether OpCo should seek to recharacterize the Master Lease as a secured transaction thereby rendering inapplicable the requirements of Bankruptcy Code section 365 (including 365(d)(3)-(4)), and enabling the Master Lease to be recharacterized as an undersecured claim that can be bifurcated into secured and unsecured portions, and treated accordingly under a plan." Motion at p. 2.

The alleged basis for this request is the Minority Lenders' repeated, but wholly unsubstantiated, allegations that: (a) the Debtors are "taking no action" to either reject or renegotiate the Master Lease; (b) management has made "no apparent effort" to reject or renegotiate the Master Lease; (c) management's "indecision" on the Master Lease is harming OpCo; and (d) OpCo "does nothing" regarding the Master Lease. *See Id.* at ¶¶ 14, 17-19.

The Minority Lenders have absolutely no good faith basis for these accusations – *because none of them are true*. To the contrary, both OpCo and PropCo have devoted significant amounts of time and energy analyzing the Master Lease and the various alternatives available to each party thereunder (and their respective lenders), as

well as the consequences associated with each alternative. Haskins Decl. at ¶ 11. The Master Lease and the related financing documents are complex documents, and the ultimate treatment of the Master Lease will have significant consequences to each of the estates. For that reason, the analysis of the Master Lease is ongoing. Among other things, the following steps are being taken:

- a valuation and market rent study of the four PropCo properties by an outside valuation service;
- an independent review of the valuation of the four PropCo properties and market rent study by FTI Consulting;
- legal review of potential lease rejection damage claims from the perspective of both OpCo and PropCo;
- legal and financial review of the impact on OpCo of PropCo lender foreclosure on the four PropCo properties following any termination of the Master Lease;
- legal and financial review of the alternatives for a renegotiation of the Master Lease or other modification of the Master Lease;
- legal and financial review of alternatives regarding the possible reinstatement of the mortgage loan; and
- negotiation of a restructured lease in the context of an overall settlement and consensual reorganization. *Id.* at ¶ 12.

**(iii) Fallacy #3: The Master Lease Should Be Rejected Or Recharacterized Immediately.**

**Reality: The Master Lease Likely Will Be Restructured, But A Consensual Restructuring Is Preferable To Either Rejection Or Recharacterization.**

The Minority Lenders argue that an examiner should be appointed to investigate whether the Master Lease should be rejected or recharacterized. *See* Motion at ¶ 56. There simply is no need for an examiner for these purposes. As discussed above, the Debtors and their advisors have already analyzed these issues in depth and continue to do so. The appointment of an examiner would be wholly redundant to the efforts of the

stakeholders that are already well underway, and in fact likely would serve to slow down, not expedite, resolution of the Master Lease issues.

More troubling is the Minority Lenders' apparent belief that rejection or recharacterization of the Master Lease will necessarily benefit OpCo's estate. While it is true that rejection or recharacterization of the Master Lease may have the short term benefit of stopping the substantial rental payments that presently flow from OpCo to PropCo, according to Debtors' current analysis, rejection or recharacterization would also create significant negative consequences for OpCo. The Minority Lenders' seemingly singular agenda of stopping the rental payments reflects a short-sighted lack of analysis by the Minority Lenders regarding the Master Lease and how rejection or recharacterization could impact these Cases.

The basic facts of the Master Lease are as follows: OpCo operates the following casinos as a tenant under the Master Lease: (i) Palace Station Hotel & Casino ("Palace Station"), (ii) Boulder Station Hotel & Casino ("Boulder Station"), (iii) Sunset Station Hotel & Casino ("Sunset Station"), and (iv) Red Rock Casino Resort Spa ("Red Rock" and together with Palace Station, Boulder Station and Sunset Station, the "Casinos"). Haskins Decl. at ¶ 6. PropCo owns the real property associated with Palace Station, Sunset Station and Red Rock, and partially owns and partially leases the real property associated with Boulder Station (collectively, the "Real Property"). *Id.*

PropCo leases the Real Property to OpCo pursuant to the Master Lease. *Id.* at ¶ 7. The Master Lease is a "triple net" lease under which rent, taxes, insurance, capital expenditures, and other expenses are borne by OpCo. *Id.* In addition, to secure its obligations under the Master Lease, OpCo has pledged its interest in its furniture, fixture and equipment at the Casinos (the "OpCo FF&E") to PropCo. PropCo's sole source of cash flow is the rent paid by OpCo. *Id.*

The Real Property is encumbered by a mortgage securing a loan to PropCo in the principal amount of $1.8 billion (the "PropCo Mortgage"). Haskins Decl. at ¶ 8. PropCo's interest in the Master Lease and its security interest in the OpCo FF&E are also

pledged as collateral to the mortgage lender to secure the same loan. *Id.* PropCo also has unsecured contingent debt obligations in connection with an interest rate swap agreement with Deutsche Bank, AG ("DB"). *Id.* The only creditors of PropCo are the holder of the PropCo Mortgage, DB as swap counterparty, and the landlord on the ground lease pursuant to which PropCo leases a portion of Boulder Station. *Id.*

a) Rejection of the Master Lease.

Rejection of the Master Lease, whether by affirmative motion or by failure to abide by the terms of the Master Lease as required under Bankruptcy Code section 365(d)(3), is not in the best interests of the estates at this time. *Id.* at ¶ 9. Absent a negotiated settlement or perhaps an alternative treatment under a plan, rejection of the Master Lease would require OpCo to surrender the Real Property to PropCo immediately. *Id.* PropCo could not operate the Casinos on its own because it does not have the operational resources and is not a licensed gaming operator at this time. *Id.* The surrender of the four Casinos could also be expected to have a negative impact on OpCo's remaining locations. *Id.* Similarly, PropCo's loss of rental income and concomitant inability to pay debt service would make PropCo vulnerable to losing the Real Property to its lenders. *Id.* Thus, rejection of the Master Lease could well force the cleaving of OpCo and PropCo and would cause both companies (and their respective estates) enormous economic injury. *Id.* While the Minority Lenders may be correct that the possibility of future rejection is a relevant topic for discussion and negotiation, reaching that conclusion certainly does not require an examiner.

b) Recharacterization of the Master Lease.

The Minority Lenders speculate, without evidentiary support or analysis of any sort, that recharacterization of the Master Lease will generate an economic benefit for the OpCo creditors. *See* Motion at ¶¶14-16. In essence, the Minority Lenders muse that the Master Lease could be challenged as a "disguised financing" rather than a true lease, and that is something an examiner should explore. *Id.* at ¶ 19. The Minority Lenders speculate that the lease obligations under the Master Lease could be converted into a debt

obligation derived from a financing. *See Id.* As a financing, the Minority Lenders opine, PropCo becomes a lender to OpCo rather than a landlord, rental payments stop, and the debt is converted from a partially secured lease claim into a secured loan, which the Minority Lenders posit, is actually undersecured. *See Id.* The Minority Lenders speculate further that OpCo could bifurcate PropCo's recharacterized secured loan claim into a secured portion and an unsecured deficiency claim. *See Id.*

It is unclear how much, if any, value OpCo would get from a recharacterization of the Master Lease into a secured loan claim, however. Without recharacterization, OpCo would have the option to reject the Master Lease. Doing so would create a damage claim in favor of PropCo in the approximate amount, for sake of discussion, of more than $4 billion (the remaining payments due under the Master Lease), but after deducting collateral value, mitigation, other offsets and, notably, application of the rejection damages cap under Bankruptcy Code section 502(b)(6), that claim could be reduced to an unsecured lease damage rejection claim of approximately $500 million. Haskins Decl. at ¶ 10.

On the other hand, if as the Minority Lenders advocate the Master Lease is recharacterized as a partially secured loan, then the total magnitude of the claim is not reduced, but OpCo will lose the benefit of Section 502(b)(6) and thus will not be able to reduce the claim through mitigation or application of the cap on rents due.

All of the foregoing negative ramifications to the Cases demonstrate that the Minority Lenders' insistence that recharacterization be investigated (and presumably pursued) demonstrates either a complete lack of understanding of the Master Lease and how it impacts the chapter 11 case or an alternative agenda that is not discernable. Any decision to reject or recharacterize the Master Lease must take into account all of the ramifications of doing so (including the possibility that such decision may preclude any attempt to reinstate the PropCo mortgage loan) and cannot and should not be based solely on the Minority Lenders' desire to have OpCo immediately stop making rent payments under the Master Lease.

There is no need for an examiner to investigate rejection or recharacterization options at this time. The Debtors and their professionals are aware of the effects of both rejection and recharacterization of the Master Lease and are fully capable of making sound business judgments on those issues. Simply put, Debtors are charged with the duty of preserving asset value for all creditor constituencies, not taking rash and short-sighted actions at the urging of the Minority Lenders that may ultimately result in considerable detriment of other creditors and the reorganization effort.

**(iv) Fallacy #4: The Debtors Have Improperly Continued To Make Master Lease Payments And "Allow" The "Cash Trap" To Prevent Any "Flowback" From PropCo to OpCo.**

**Reality: Bankruptcy Code Section 365(d)(3) Requires OpCo To Continue To Honor The Master Lease Pending Assumption Or Rejection, And OpCo Presently Has No Right To Invade The Cash Trap.**

The Motion is generally accurate in its description of the prepetition (and pre-default) financing structure whereby OpCo paid Master Lease rent to PropCo, PropCo in turn paid its debt service and operating expenses and then dividended "excess" cash up through the other CMBS debtors to pay their debt service, and OpCo, as the "ultimate" residual equity holder, received any remaining amounts of that "excess" cash. *See* Motion at ¶ 18. The cash that ultimately made its way back up to OpCo is what is referred to as the "Flowback."

The Motion also is generally accurate in its discussion of the fact that, post-default, cash that might otherwise have become Flowback has been "trapped" because the financing documents do not permit post-default Flowback payments to OpCo. *See Id.* at ¶ 21.

Where the Motion begins to veer from the truth is in its inferences that OpCo has a choice not to pay rent under the Master Lease pending assumption or rejection and that OpCo somehow has a right to PropCo cash that resides in the "cash trap." *See Id.* at ¶¶ 20-22. As to the former, Bankruptcy Code section 365(d)(3) clearly requires OpCo

to perform under the lease pending assumption or rejection – so the Master Lease rent payments are not "optional." Similarly, the "cash trap" is not optional either. Once rental payments are funded to PropCo, the flow of those funds becomes subject to the existing financing documents. Haskins Decl. at ¶ 15. For any of that money to pass from PropCo up to any of the other CMBS debtors and eventually up to OpCo, that money can only flow through the respective Debtors as upstream dividends on account of the existing equity interests. *Id.* Predictably, the filing by PropCo of its chapter 11 petition on July 28, 2009 terminated all ability of PropCo or any of the CMBS debtors to make the dividends that ultimately create the Flowback to OpCo. *Id.* Thus it is the very filing of these chapter 11 cases and the operation of the Bankruptcy Code, and not any decision or agreement by OpCo, that results in the cash trap and precludes Flowback to OpCo. *Id.*

**(v) Fallacy #5: The Debtors Are Impaired By Conflicts Of Interest.**

**Reality: The Debtors Have Implemented Sufficient Safeguards To Ensure Independence And Protect Against Potential Conflicts Of Interest.**

Notwithstanding the Minority Lenders' unsubstantiated and unfounded accusations to the contrary, OpCo's board of directors and PropCo's board of directors have consistently acted and will continue to act in the best interest of all stakeholders in the proper discharge of their fiduciary responsibility. *Id.* at ¶ 16. Both OpCo's Board of Directors and PropCo's Board of Directors have established substantial safeguards to assure that they discharge their fiduciary obligations to all stakeholders. With respect to OpCo, the following safeguards are in place:

- OpCo's board created a special litigation committee (the "OpCo Special Committee") headed by David Weekly. *Id.* at ¶ 18. The OpCo Special Committee, with the assistance of independent counsel and financial advisors, has been tasked with investigating the November 2007 transactions to determine if any remedial action is available to OpCo as a result of those transactions. Haskins Decl. *Id.*

- OpCo's independent board member, Dr. James E. Nave, DVM, has independent counsel, to assist him in the discharge of his duties as a director. *Id.* at ¶ 16.

- OpCo has formed a reorganization committee composed of two individuals appointed by the OpCo board of directors to analyze all reorganization related matters and to report their findings to the board of directors. *Id.*

In addition, PropCo has the following additional safeguards in place:

- Two of PropCo's three directors are independent, respected attorneys, Robert White and Robert Kors. The third director of PropCo is Richard Haskins, who is the general counsel of OpCo. *Id.*

- PropCo has at its own expense engaged special counsel and a separate financial advisor to give its directors independent advice in the discharge of their duties to all PropCo stakeholders. Among the specific issues for attention by such professionals are all intercompany arrangements with OpCo, including the ultimate disposition of the Master Lease. *Id.*

These safeguard arrangements were put in place long before OpCo and PropCo filed their chapter 11 cases, for the specific purpose of assuring that each of OpCo and PropCo's stakeholders would have the benefit of unbiased, uncompromised and independent leadership at OpCo and PropCo. OpCo's board of directors formed the OpCo Special Committee in late March, 2009. The PropCo independent directors, White and Kors, as well as their independent counsel and advisors, were engaged in April 2009.

**(vi) Fallacy #6: The Debtors Improperly Rebuffed Boyd's Interest In The OpCo Assets.**

**Reality: Due Consideration Was Given To Boyd And Will Be Given To Any Other Bona Fide Offers.**

The Minority Lenders' recitation of the facts relating to OpCo's discussions with, and rejection of, an unsolicited offer from Boyd Gaming Corporation ("Boyd") is wrong. The facts relating to Boyd's expression of interest in a possible transaction with OpCo are as follows:

- In early February, 2009, at Boyd's request, a member of OpCo's management met informally with members of Boyd management, at which time the Boyd representatives expressed their general interest in acquiring one or two of the Debtors' properties on a consensual basis. *Id.* at ¶ 19.

- Subsequent to the informal meeting, on February 23, 2009, Boyd sent OpCo an unsolicited preliminary, non-binding written indication of interest

in a possible transaction to acquire certain of OpCo's assets. *Id.*; *See* Exhibit "E" to the Motion.

- After discussions among OpCo's board and legal and financial advisors, as well as certain creditors, OpCo responded by letter dated March 3, 2009, noting, *inter alia*, that Boyd's indication of interest was "non-binding, non-specific and highly conditional" and highlighting the risks, potential harm and delay to OpCo and its stakeholders of pursuing a potential transaction with Boyd under the terms and conditions proposed by Boyd. Based on the considerations outlined in the letter, OpCo informed Boyd that the OpCo board "concluded that it is in the best interests of [OpCo] and our stakeholders to proceed with the current restructuring plan" and indicated that "[s]hould circumstances change, we will contact you." Haskins Decl. at ¶ 19; *see* Exhibit "F" to the Motion.

- OpCo believes that both before and after the exchange of letters between Boyd and OpCo, Boyd communicated directly with a number of OpCo's creditors about its interest in acquiring certain assets from OpCo. Haskins Decl. at ¶ 19.

- OpCo continues to believe that a comprehensive debt restructuring plan is in the best interests of the Debtors' estate, rather than pursuit of a distressed sale transaction under the present circumstances with a primary competitor such as Boyd. *Id.*

Thus, far from ignoring its duty to explore a potential transaction with Boyd, OpCo did what it was supposed to do as a publicly reporting company: it carefully assessed Boyd's non-binding, non-specific, highly conditional expression of interest, responded appropriately and filed its response with the Securities Exchange Commission as an exhibit to the Form 8-K report dated March 3, 2009. *Id.* at ¶ 20.

**C. THE MINORITY LENDERS' SUGGESTION THAT AN EXAMINER IS NECESSARY TO INVESTIGATE PAYMENTS TO BE MADE PURSUANT TO CASH COLLATERAL BUDGETING PROCEDURES OR TO ESTATE AND OTHER PROFESSIONALS IGNORES THE FACT THAT THOSE MATTERS HAVE ALL BEEN OR WILL BE THE SUBJECT OF NOTICED HEARINGS AND COURT APPROVAL.**

**(i) The Expenditures About Which The Minority Lenders Complain Have Already Been Consented To By The OpCo Lenders And Are The Subject Of An Already Pending Contested Matter.**

The Minority Lenders request that an examiner investigate whether OpCo should be making a variety of payments that presently are included in OpCo's cash collateral budget. As the Minority Lenders are well aware, a majority of the OpCo lenders have already consented to those payments pursuant to a cash collateral motion that the Court approved on an interim basis. A final hearing on this motion is set for September 30th.[6] Assuming final approval of the cash collateral stipulation is approved, OpCo should be allowed to make the subject expenditures in compliance with the budget and with the consent of the OpCo lenders. The Minority Lenders' request that the Court appoint an examiner to investigate the propriety of those payments should be denied both as moot and as a prohibited "end run" around both the OpCo Loan Agreement voting provisions and this Court's cash collateral order.

Furthermore, with regard to cash use, as outlined in the relevant stipulations and budget, the Minority Lenders are bound by the consent of the Majority Lenders and DBCTA – a fact they have already conceded in other pleadings.[7] Thus, their complaints

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[6] *See* Interim Order Pursuant To 11 U.S.C. Section 105, 361, 362, 363, 364 and 552 And FED. R. BANKR. P. Rule 4001(b), and (s) (I) Authorizing the Debtors to (A) Use Cash Collateral, (B) Obtain Unsecured, Subordinated Postpetition Financing; (C) Make Loans to Non-Debtor Subsidiaries; (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Granting Related Relief, and (IV) Scheduling Final Hearing, July 31, 2009 (Docket No. 26).

[7] *See* Supplemental Objection of the Independent Lenders to Station Casinos, Inc. to the Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to (A) Use Cash Collateral; (B) Obtain Post-Petition Financing; and (C) Make Loans to Non-Debtor Subsidiaries, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Granting Related Relief, Etc. at 2, August 21, 2009 (Docket No. 157). ("[T]he Independent Lenders recognize that, from the Court's perspective, consent to use cash collateral has been granted, and the Independent Lenders' issues with [DBCTA] are an 'intramural dispute.' . . . [W]hile the Independent Lenders continue to maintain that the cash collateral/DIP financing arrangement drains cash from the OpCo structure to improperly subsidize the insolvent PropCo and LandCo structure, they recognize

on these issues do not require investigation at the expense of the Debtors' estates. See Opinion Granting Debtors' Motion Seeking Authority to Sell, Pursuant to 11 U.S.C. § 363, Substantially All of the Debtors' Assets, *In re Chrysler LLC*, No. 09-B-50002 (AJG) (Bankr. S.D.N.Y. May 31, 2009), as corrected by the Errata Order, dated June 2, 2009 (the "Chrysler Opinion").[8]

In the Chrysler Opinion, Judge Gonzalez determined that "[r]estricting enforcement [of rights and remedies against collateral] to a single agent to engage in unified action for the interests of a group of lenders, based upon majority vote, avoids chaos and prevents a single lender from being preferred over others. . . . The fact that [an objecting minority of lenders] do not like the outcome is not a basis to ignore the governance provisions of the relevant agreements." Chrysler Opinion at 29, 30 (citing *In re Enron Corp.*, 302 B.R. 463, 475 (Bankr. S.D.N.Y. 2003), aff'd 2005 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 14, 2005)). Obviously, Minority Lenders refuse the clear guidance offered in the Chrysler Opinion applicable to their situation in this case.

**(ii) The Engagement And Payment Of Professionals For The Estates And Certain Other Constituents About Which The Minority Lenders Complain Has Already Been Approved By The Court, And Ongoing Payment Of Estate Professionals Will Be Subject To Review Under Court-Approved Fee Procedures.**

Similarly, the Minority Lenders request that an examiner be appointed to investigate whether OpCo should be permitted to pay the fees of a variety of professionals involved in these Cases. This is yet another request that (a) ignores the fact that the employment of estate professionals in these Cases and the payment of certain other professionals in these Cases have *already* been considered and approved by this Court, and (b) the future payment of fees of the estate professionals will be the subject of review under all applicable Bankruptcy Code and Bankruptcy Rule standards and procedures.[9]

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the Court's view that these expenditures have been consented to by [DBTCA], as the Agent under the OpCo loan.").

[8] A copy of the Chrysler Opinion is annexed hereto as Exhibit "A."

[9] *See* Order, Pursuant To 11 U.S.C. 327(a) and 328(a), and Fed. R. Bankr. P. 2014, Authorizing Employment and Retention of Lazard Freres & Co. LLC as Financial Advisor and Investment Banker For

Once again, this request should be denied as a prohibited collateral attack on this Court's prior orders approving employment and payment of professionals and as wholly redundant of the fee review procedures already established in these Cases.

**D. THE APPOINTMENT OF AN EXAMINER AT THIS TIME WOULD BE ENTIRELY PREMATURE.**

The Motion is a thinly veiled litigation tactic designed to provide the Minority Lenders with leverage in their negotiations with the Debtors and the other creditor constituencies. Courts routinely deny such tactics as an abuse of the Bankruptcy Code. *See, e.g., In re Bradlees Stores, Inc.*, 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997) (finding request for appointment of examiner to be "nothing more than a litigation/negotiation tactic."); *see also In re Gliatech, Inc.*, 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004) ("'[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings.'" (quoting *Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 285 B.R. 148, 156 (Bankr. D. Del. 2002))); *In re SA Telecomms., Inc.*, Nos. 97-2395 through 97-2401 (PJW) (Bankr. D. Del. Mar. 27, 1998) Tr. at 81, ("[T]he examiner's report would simply serve as perhaps a convenient and concise statement of what the parties will be litigating over and it's not going to solve anything.")[10]; *accord In re Webcraft Techs., Inc.*, No. 93-1210 (HSB) (Bankr. D. Del. Nov. 4, 1993) Tr. at 18, (movant's request for the appointment of an examiner was denied because the "sole purpose [was] to delay this proceeding and to

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The Debtors, Sept. 18, 2009 (Docket No. 326); Order, Pursuant To 11 U.S.C. 327(e), Fed. R. Bankr. P.2014 (a), 2016(b) and 6003, and Local Rule 2014, Authorizing Employment and Retention of Squire, Sanders, & Dempsey LLP as Special Counsel To The Special Litigation Committee Of The Board Of Directors of Station Casinos, Inc., Sept 18, 2009 (Docket No. 327); Order, Pursuant To 11 U.S.C. 327(e), Fed. R. Bankr. P.2014 (a), 2016(b) and 6003, and Local Rule 2014, Authorizing Employment and Retention of Odyssey Capital Group as Financial Advisor and Investment Banker to The Special Litigation Committee Of The Board Of Directors Of Station Casinos Inc., Sept. 18, 2009 (Docket No. 328); Order, Pursuant To 11 U.S.C. 327(a), Fed. R. Bankr. P. 2014(a), 2016(b) and 5002, and Local Rule 2014 Authorizing Employment and Retention of Milbank, Tweed, Hadley, & McCloy, LLP as Counsel For The Debtors, Sept. 18, 2009 (Docket No. 329); Order Authorizing Retention of FTI Consulting, Inc. as Financial Advisors For The Debtors and Debtors In Possession, Sept 18, 2009 (Docket No. 330); Order Authorizing Employment and Retention of FTI Consulting as Financial Advisors For Certain Of The Debtors (CMBS Debtors), Sept 18, 2009 (Docket No. 331).

[10] A copy of the operative portions of the relevant court transcript are annexed as Exhibit "B."

injure the company.").[11]

Courts routinely consider the timing of a request for an examiner in exercising discretion over requests made pursuant to sections 1104(a) and (c) of the Bankruptcy Code. Typically, the courts focus on the lateness of the request,[12] but the Debtors contend consideration of timeliness also includes consideration of prematurity. In *In re Schepps Food Stores, Inc.*, the bankruptcy court deferred consideration of a creditor's motion for the appointment of an examiner until after the confirmation hearing. On appeal, the district court agreed, stating that although the statute permits a court to appoint an examiner at any time before a plan is confirmed, a creditor cannot use the provision to insist upon a pre-confirmation examiner which would disrupt the reorganization proceedings. *In re Schepps Food Stores, Inc.*, 148 B.R. 27, 30 (S.D. Tex. 1992) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

The Cases are not quite two months old. The Motion was filed five weeks after the Petition Date and just two weeks after the UCC was formed and counsel selected. Many of the critical "first stage" obligations of the Debtors are still in process such as the filing of schedules and statements of financial affairs.[13] Moreover, several of the Debtors' critical statutory deadlines to act on the majority of issues the Minority Lenders want investigated have not expired.

The appointment of an examiner at this time would deny the Debtors the opportunity to exercise the duties of a debtor in possession, manage their business and exercise their judgment.[14] The Minority Lenders would have the Court launch a costly investigation that also interferes with decisions regarding tasks which have not yet been

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[11] A copy of the operative portions of the relevant court transcript are annexed as Exhibit "C."

[12] *See, e.g.* Collier on Bankruptcy ¶ 1104.03 (Alan N. Resnick ed., 15th ed. rev. 2007) (discussing doctrine of laches).

[13] On September 22, 2009, after notice and a hearing, the Court approved the Debtors' Motion to extended the deadline to file schedules and statements of financial affairs to October 22, 2009. The initial debtor interview and the continued 341(a) meeting of creditors, previously scheduled for October 1 and October 5, respectively, have not yet taken place and are anticipated to be continued to dates after the schedules and statements of financial affairs are filed.

[14] *See, e.g. Commodity Futures Trading Com'n v. Weintraub*, 471 US. 343, 355 (1985) (stating that the willingness to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.").

decided and where the applicable deadlines for these important decision have not even passed. Under such circumstances the appointment of an examiner now would be highly unusual and contrary to a fundamental tenet of the Bankruptcy Code – that the debtor should remain in control of its business and the reorganization process. *See Alan N. Resnick, Henry J. Sommer,* 7 *Collier on Bankruptcy* 1104.02[3][a] (there is a strong presumption of leaving a debtor's management in control of the bankruptcy process); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003) (management "is best positioned to rescue a debtor from bankruptcy.").

Finally, the Minority Group Lenders' "rush" to seek an examiner was made before their counsel complied (unless noncompliance was intentional) with the requirements of Rule 2019 of the Federal Rules of Bankruptcy Procedure. Specifically, their counsel failed to file the requisite written statement identifying the clients the firm represents. As a result, this Court has the authority under Rule 2019(b)(1) to refuse to permit the Minority Lenders to be heard in this Case and to dismiss the Motion. *See, e.g., Reid v. White Motor Corp*., 886 F.2d 1462, 1472 (6th Cir. 1989) (not abuse of discretion to deny proof of claim of putative class of former employees of White Motor Corporation for failure to file Rule 2019 disclosure statement).

## III. LEGAL STANDARD

### A. THE COURT HAS DISCRETION TO DENY THE RELIEF REQUESTED AND TO LIMIT THE SCOPE OF ANY INVESTIGATION.

Contrary to the Minority Lenders' assertions, the Court has discretion to deny the relief requested in the Motion. Numerous courts have held that the appointment of an examiner, as well as the scope of the investigative tasks assigned, is discretionary. *See, e.g., Morgenstern v. Revco D.S., Inc (In re Revco D.S., Inc. ),* 898 F.2d 498, 501 (6th Cir. 1990) (bankruptcy court "retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration"); *In re Bradlees Stores*, 209 B.R. at 39 (appointment of an examiner is not mandatory when requesting party waived right to

seek appointment); *In re Schepps Food Stores, Inc.*, 148 B.R. at 28 (equitable considerations prevented appointment of an examiner under 1104(c)(2)*; In re SA Telecomms., Inc.*, Nos. 97-2395 through 97-2401 (PJW) (Bankr. D. Del. Mar. 27, 1998) (embracing tenet of statutory construction that "shall" can be construed as "may"); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D.R.I. 1980).

The case law, as well as a plain reading of subsection 1104(c),[15] indicates that the Court is not a "rubber stamp" for examiner assignments, but rather is the arbiter of appropriateness and that the exercise of discretion is required. Absent discretion, the promulgated language of the phrase "as is appropriate" is rendered superfluous and contrary to statutory construction.

**B. THE INVESTIGATIONS REQUESTED BY THE MINORITY LENDERS WILL NOT BENEFIT THE ESTATE; TO THE CONTRARY, THE INVESTIGATIONS WILL WASTE ESTATE ASSETS AND CAUSE DELAY.**

As a general matter, examiners should not be appointed when there is no benefit to the estate. *See In re Gliatech, Inc.*, 305 B.R. at 836 ("An appointment under § 1104(c)(1) must . . . be in the interests of everyone with a stake in the case, including creditors, equity security holders, and other interests of the estate."); *see also In re Webcraft Techs., Inc.*, No. 93-1210 (HSB) (Bankr. D. Del. Nov. 4, 1993) Tr. at 44 (wherein Judge Balick refused to burden the estate with the appointment of an examiner whose purpose would have been to conduct an investigation for the benefit of an "out-of-the-money" creditor and equity holder)[16]; *In re SA Telecomms., Inc.*, Nos. 97-2395 through 97-2401 (PJW) (Bankr. D. Del. Mar. 27, 1998) Tr. at 79-82 (Judge Walsh denied the U.S. Trustee's motion for the appointment of an examiner, finding that such an appointment would not be "in the best interests of the creditors.").[17] Although the Bankruptcy Code does not define the term "as is appropriate," whether the appointment of an examiner is

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[15] *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (words in statutes must be given their ordinary, contemporary and common meaning).

[16] A copy of the operative portions of the relevant court transcript are annexed as Exhibit "C."

[17] A copy of the operative portions of the relevant court transcript are annexed as Exhibit "B."

appropriate must be determined by a review of the facts and circumstances of each case. *In re Shelter Res. Corp*., 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (determining that appointment of an examiner to investigate fairness of an unopposed settlement of a derivative action and where a committee was in place was inappropriate and not "in the spirit of economy of administration in the handling of bankruptcy estates.").

In light of the circumstances of these Cases and the protections already provided to all parties in interest, especially creditors, the bankruptcy court, in the exercise of its discretion, must analyze the costs of appointing an examiner to ensure that such costs are not "disproportionately high." *Notes of Committee on the Judiciary*, H.R. Rep. 95-595 (1977). The benefit to the estate and the attendant protections of an examiner's investigation must outweigh the expense. *In re Hamiel & Sons, Inc.*, 20 B.R. 830 (Bankr. S.D. Ohio 1982).

There is no debate that the investigations requested would be duplicative of the duties and investigations to be taken during the pendency of these Cases by the entities, professionals and advisors already charged with fiduciary duties to the creditors. Thus, an examiner's investigations would be duplicative and unnecessarily squander estate assets. *See In re Bradlees Stores, Inc*., 209 B.R. at 39 (finding that "[t]he appointment of an examiner to conduct a new investigation at this time would be duplicative, needless and wasteful."); *In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) (examiner not warranted where it appears official committee can appropriately perform investigation); *In re Royster Co.*, 145 B.R. 88, 91 (Bankr. M.D. Fla. 1992) (examiner not warranted because committee can ensure that appropriate investigation will be conducted).

Moreover, if an examiner merely duplicates the investigations of other parties such as the Special Committee or the Committee, there would be no basis to compensate the examiner for performing the very same tasks. *See In re Granite Partners, L.P.*, 213 B.R. 440, 446 (Bankr. S.D.N.Y. 1997) ("Services [performed by an examiner] that duplicate those rendered by the debtor or other court appointed officers, absent proof that they are unwilling or unable to act, are not compensable because they entail an

excessive and undue burden on the estate.").

## C. THE SCOPE OF ANY INVESTIGATION MUST BE LIMITED TO "NO DUTIES."

If the Court is not persuaded that it has some discretion to deny the Motion, or if for other reasons it determines that formality and custom require the appointment of an examiner upon request, under the circumstances here, the Court has discretion to limit the scope of any examination, including giving an examiner "no duties." Accordingly, if the Court does appoint an examiner, the scope of investigations should be extremely limited.[18] The Court has the discretion to restrict the examiner to "no current duties." *See, e.g.*, *In re Asarco LLC,* Case No. 05-21207 (Bankr. S.D. Tex., Mar. 4 2008) (order appointing examiner but directing that examiner has no current duties);[19] *In re Acands, Inc.,* Case No. 02-12687 (RJN) (Bankr. D. Del. Dec. 19, 2002) (appointing an examiner to "stand by" but not permitting "one penny of fees" to be spent by the examiner without further order of the court). [20] Certainly a "no duty" appointment is, at most, all that the Independent Lenders can obtain under governing law and under current circumstances.

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[18] *See Loral Stockholders Protective Comm. v. Loral Space & & Commc'ns, Ltd. (In re Loral Space & Commc'ns, Ltd.)*, No. 04 Civ. 8645 (RPP), 2004 WL 2979785, *5 (S.D.N.Y. Dec. 23, 2004) ("[I]t is [the] court's duty to fashion the role of an examiner to avoid substantial interference with the ongoing bankruptcy proceedings. To that end, the Bankruptcy Court may exercise its discretion to limit the scope of the examiner's investigation and the compensation and expenses available to the examiner."); *In re UAL Corp.*, 307 B.R. 80, 86 (Bankr. N.D. Ill. 2004) ("[T]he court presiding over a large bankruptcy should have the authority to limit examiner investigations to 'appropriate' subjects, methods, and duration")

[19] A copy of the order in *Asarco* is annexed hereto as Exhibit "D."

[20] A copy of the order, and operative portions of the relevant court transcript are annexed as Exhibit "E."

## IV.

## V. CONCLUSION

**WHEREFORE**, Debtors respectfully request that the Court deny the Motion in its entirety or, in the alternative, if the Court appoints an examiner, the Court should limit the role of such examiner and follow the examples set in the *Asarco* and *Acands* cases and direct that the examiner take no action absent further Court approval; together with such other and further relief as the Court deems just and proper under the circumstances.

Dated: September 25, 2009

Respectfully submitted,

By: /s Paul S. Aronzon

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