UNITED STATES BANKRUPTCY COURT
IN THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION – DETROIT

IN RE:
GREEKTOWN HOLDINGS, L.L.C., *et al*[1]

Debtors.
____/

Case No. 08-53104
Chapter 11 Proceeding
Jointly Administered
Hon. Walter Shapero

OBJECTION OF THE STATE OF MICHIGAN GAMING CONTROL BOARD TO THE DEBTORS' SECOND MOTION TO EXTEND THE EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN AND DISCLOSURE STATEMENT

NOW COMES the State of Michigan Gaming Control Board ("Board"), by and through its attorneys Lambert, Leser, Isackson, Cook & Giunta, P.C. and for its Objection to Debtors' Second Motion to Extend the Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement ("Second Motion") states as follows.

I. INTRODUCTION

Debtors filed this motion on October 31, 2008 requesting that their exclusive time within which to file a Chapter 11 plan be extended to February 15, 2009 and the solicitation period extended to April 14, 2009 ("Second Motion"). (Docket No. 578.) The Board does not believe that Debtors are entitled to a further extension under the provisions of 11 U.S.C. §§ 1121 since it is clear that the Debtors have not and cannot establish good cause for such extension as required therein. Further, the Board believes that such an extension should not be permitted where Debtors continue to be in violation of the Michigan Gaming Control and Revenue Act, M.C.L. §§ 432.210 *et seq.* ("Gaming Act"), and the orders of the Board. Although the Board has heretofore participated in the Debtors' bankruptcy proceeding as a parallel alternative to the involuntary sale of Debtors' casino

[1] The Debtors in these jointly administered cases include Greektown Holdings, L.L.C., Case No. 08-53104; Greektown Casino, L.L.C., Case No. 08-53106; Kewadin Greektown Casino, L.L.C., Case No. 08-53105; Monroe Partners, L.L.C., Case No. 08-53107; Greektown Holdings, II, Inc., Case No. 08-53108; Contract Builders Corporation, Case No. 08-53110; Realty Equity Company Inc., Case No. 08-53112; and Trappers GC Partner, LLC, Case No. 08-53111.

under the Gaming Act, if further delay in this case is permitted, the Board may be compelled to exercise its regulatory powers to protect the integrity of the casino license, including its right to invoke the sale process which has arisen due to the continuing defaults of the Debtors under the orders of the Board.

II. FACTUAL BACKGROUND

A. Regulatory History

The Board's relevant regulatory challenges with the Debtors began in November of 2005 when the Board issued an Order Approving Debt Transaction ("2005 Order"). (2005 Order, Ex. A.) This Order provided that the Debtors could enter into credit agreements with Merrill Lynch Capital Corporation and Merrill Lynch Pierce Fenner and Smith Inc. (collectively "Merrill Lynch") to refinance a 2003 credit agreement, refinance letter of credit obligations to the City of Detroit, fund operations, and expand the casino ("Debt Transaction"). In order to ensure the continued viability and vitality of the Debtors' casino operations, the 2005 Order required, as a condition of approval of the Debt Transaction, that the Debtors meet and maintain financial benchmarks, including net debt to EBITDA ratios and fixed charge coverage ratios as provided below ("Financial Benchmarks"):

> (i) Greektown Holdings must maintain a net debt to EBITDA ratio that does not exceed (a) 6.25:1 for the fiscal year ending December 31, 2007; (b) 4.50:1 for the fiscal year ending December 31, 2008; (c) 4.50:1 for the fiscal year ending December 31 2009; (d) 3.50:1 for the fiscal year ending December 31, 2010; and (e) 2.75:1 for the fiscal year ending December 31, 2011 and for each subsequent year of indebtedness under either the Secured Credit Facility or the Senior Notes.
>
> (ii) Greektown Holdings must maintain a fixed charge coverage ratio that exceeds (a) 1.00:1 for the fiscal year ending December 31, 2006; (b) 1.00:1 for the fiscal year ending December 31, 2007; (c) 1.20:1 for the fiscal year ending December 31, 2008; (d) 1.20:1 for the fiscal year ending December 31, 2009; (e) 1.50:1 for the fiscal year ending December 31, 2010; and 1.75:1 for the fiscal year ending December 31, 2011 and for each subsequent year of indebtedness under either the Secured Credit Facility or the Senior Notes.

(Ex. at 7.)

These Financial Benchmarks are completely consistent with the provisions of the Gaming Act, which require that a licensee shall have sufficient liquidity to responsibly maintain the casino operation in order to assure the integrity of the system. The Board's approval of the Debt

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Transaction in the 2005 Order was also conditioned upon the Board's right to initiate a sale process if the Financial Benchmarks were not met. If, in the judgment of the Executive Director of the Board, any Financial Benchmark is not satisfied by the date that the certified audit for a particular fiscal year is due, the Board may notify Debtors in writing that the process for sale of the Debtors' casino operations ("Sale Transaction") will take effect**.** Within 180 days of that notification, Debtors must enter a contract to transfer all interests in the casino and the transferee(s) must file a transfer of interest application. If the Sale Transaction process obligations are not satisfied or if the Board finds a transferee ineligible, unsuitable, or unqualified, the conservatorship provisions of M.C.L. § 432.224 (discussed in detail below) take effect.

In the fall of 2006, less than one year after the 2005 Order, the Debtors requested that the Board amend the covenants to allow an additional year for them to come into compliance with the 2008 Financial Benchmarks and each successive benchmark. The Board denied this request for modification in an order dated December 12, 2006. (2006 Order, Ex. B.) In fact, the Debtors violated the December 31, 2007 net debt to EBITDA ratios. Therefore, under the 2005 Order, the Sale Transaction could have been invoked approximately eight months ago. Debtors have remained continuously in default of these regulatory requirements and will be in default for the year ending December 31, 2008 and project that they will be in default through 2011.

In March of 2008, Debtors again requested a waiver of the Financial Benchmark requirements of the 2005 Order and further requested that the required initiation of the Sale Transaction be waived. The Board denied Debtors' request. (May 13, 2008 Order Denying Request to Waive Sale Transaction Provisions, Ex. C.) This order found that the Debtors had failed to meet one of the Financial Benchmarks for the fiscal year ending December 31, 2007 and the matter was set for a June 10, 2008 show cause hearing as to why the Board should not continue with the Sale Transaction. During the interim period between the May 13, 2008 Order and the show cause hearing, which was scheduled on June 10, 2008, the Debtors filed petitions under Chapter 11 of Title 11, United States Code ("Chapter 11"). At that hearing, in deference to the Bankruptcy Court and the process, the Board took the decision on whether to continue with the Sale Transaction under advisement. (Order Reserving the Board's Right to Invoke the Sale Transaction Process, Ex. D.)

The interim financials make it clear that the Debtors will be in default under the Financial Benchmarks through December 31, 2008. Charles Moore, of Conway, MacKenzie & Dunleavy, the Debtors' financial consultants ("CMD"), has testified that the Debtors' will be in violation of the Financial Benchmarks through December 31, 2008, and could not project 2009. (Testimony of Charles Moore, Ex. F.) However, the Debtors' financial projections entitled "Greektown Integrated Model" dated July 20, 2008 (the "Greektown Financial Model") delivered to the Board staff projects that the Debtors will be in violation of the EBITDA covenant through 2011. (Ex. F.) It is important to note that, since July, the Debtors have consistently underperformed relative to that projection.

B. Debtors' Bankruptcy Proceedings, a Second Bite at the Apple

Again, shortly after the show cause hearing with respect to the sale process was set by the Board, on May 29, 2008, Debtors filed their voluntary bankruptcy petitions ("Petition Date"). As part of their first day motions, Debtors filed a Motion to Use Cash Collateral, Acquire Post-Petition Secured Financing, and Provide Adequate Protection. (Docket No. 29.) The order on this matter was entered on June 26, 2008 ("Final DIP Order"). The Board consented to the terms of the Final DIP Order but all parties explicitly agreed to the ongoing regulatory powers of the Board and the following language:

> Nothing in this Order shall constitute or be construed as a determination regarding the impact of the filing or continuation of these Cases on the ongoing regulatory powers of the MGCB, and all rights of the MGCB with respect to its ongoing regulatory powers, and the rights of any other party in interest to oppose any interpretation, or the applicability or extent of any ongoing regulatory powers, are expressly preserved. The Debtors' authorization to incur any Post-petition Obligation above the amount authorized in the Interim Order is subject to the Debtors first obtaining MGCB approval, including the approval required by R 432.1508 and R 432.1509, and the Debtors' compliance with the provisions of the Gaming Control and Revenue Act, M.C.L.A. 432.201 et seq., and the MGCB's administrative rules, resolutions, and orders that apply to the debt transaction at issue in this Order.

The Final DIP Agreement also contained a covenant regarding monthly EBITDAR requirements which the Debtors had to meet. The Debtors have violated the monthly EBITDAR covenant and cumulative EBITDAR covenant for August, September and October. This requirement is an indication of the cash available to operate the casino. If restructuring costs are subtracted from this amount, it leaves very little cash cushion prospectively. The attached schedule shows the continued financial deterioration of the casino operations. (Greektown Casino Revenue and Earnings, Ex. G.)

On July 30, 2008, pursuant to the Gaming Act, the Debtors' audited statement for the second quarter of 2008 was due. The Debtors did not request an extension until September 19, 2008, almost two months after the due date. The audit report was received four days later, on September 23, 2008. The audit expressed considerable doubt regarding the Debtors as a going concern, including their need to improve profitability, to pay debts as they come due, and their ability to get additional financing to meet future obligations. In August of 2008, the Debtors' gaming license was up for renewal. The Board has taken no administrative action with respect to their violation or the license renewal.

Pursuant to 11 U.S.C. § 1121(b) the exclusivity period for Debtors to file a Chapter 11 plan would have expired on September 26, 2008. However, on July 29, 2008 Debtors filed their first Motion for an Order Under Bankruptcy Code Section 1121(d) Extending Exclusive Periods During Which Debtors May File and Solicit Acceptances of a Plan of Reorganization ("First Motion"). (Docket No. 243.) In the First Motion, Debtors requested an extension of the exclusivity period through June 1, 2009. The reasons given were that the time allotted under Section 1129 was insufficient, that Debtors were making good-faith progress towards reorganization, that Debtors had reasonable prospects for filing a viable plan, that Debtors had been timely in paying their bills, and that Debtors were making progress in negotiating with their creditors.

The Board believed that the requested extension was too long, given the Debtors' continued default under the Financial Benchmarks and filed an objection. (Docket No. 274.) The Board was willing to agree to a shorter extension, until December 15, 2008. This would have allowed the Debtors almost eight months, since the Board had the right to invoke the sale transaction due to the regulatory breach of the Financial Benchmarks and more than seven months under the protection of the Bankruptcy court to fashion a reorganization plan. This extension would also allow for further discovery with respect to the likelihood of the Debtors' meeting the Financial Benchmarks and the likelihood of the Debtors obtaining capital, in the form of either debt or equity, sufficient to fund a plan of reorganization ("Plan Financing"). Plan Financing will require loans or new equity sufficient to both satisfy the Debtor in Possession Financing ("DIP Financing"), and provide sufficient operating capital to transition to compete with the other casinos in the southeastern Michigan gaming market.

In the end, after a number of other objections to the First Motion were filed, a stipulated Order was entered on August 27, 2008 extending the exclusivity period through December 15, 2008 ("Exclusivity Extension Order"). (Docket No. 327.) As a condition of this order, Debtors were required to engage an investment banker by October 8, 2008. The investment banker was to populate a data room and complete and begin circulation of an offering memorandum by November 17, 2008. Indications of interest are to be accepted beginning December 15, 2008 with a deadline of January 15, 2009. The Exclusivity Extension Order also states that it is "entered without prejudice to the rights of the MGCB and the Debtors' rights with respect thereto". The investment banker has been retained through the Court's grant of Debtors' application to employ Moelis & Company, LLC on October 15, 2008. (Docket No. 514.)

Finally, on October 31, 2008, Debtors filed the instant Second Motion. (Docket No. 578.) Debtors spend a good deal of time addressing what has been taking place since the Exclusivity Extension Order was entered, but they give few reasons that further extension is necessary. The ones that they do submit are that certain renovations to the casino will be completed by January 2009, that the Debtors' are making changes to their board of directors and CEO, and that the local and national economic climate has changed since the petition date. Specifically, Debtors state that 1) they need sufficient time to negotiate a plan of reorganization and prepare adequate information, 2) they are making good faith progress toward reorganization, and 3) they have demonstrated reasonable prospects for filing a viable plan of organization. As discussed below, this is exactly the way the Debtors described the situation when they requested the first extension in August. In the interim, the Debtors' financial condition has deteriorated substantially. The Debtors failed to meet their financial projections and the EBITDAR covenants required by both the Board and the Final DIP Order. This has created a significant cash problem for the Debtors. Based upon the information submitted to the Board, it appears that there will be insufficient cash without additional lending or equity, to both continue operations, including paying regulatory fees of both the State and the City, and complete the hotel as more fully discussed below in III (d) of the Objection. This deterioration of the Debtors is in the context of an environment where the credit markets have collapsed, the gaming industry in Southeastern Michigan is contracting for the first time and the gaming industry in other areas of the country is experiencing difficulty. A number of other casinos have filed for bankruptcy and/or have been placed for sale on the market in the last calendar year. The combination of these factors, together with the Debtors financial deterioration creates a substantial risk that the integrity of the Debtors' gaming license will be impaired.

III. LAW AND ARGUMENT

The Debtor is granted a period of exclusivity under 11 U.S.C. § 1121(b). However, the grant is not absolute. Pursuant to Section 1121(d)(1) "on request of a party in interest made within the respective periods under subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period". The issue then is to determine what constitutes sufficient "cause" under Section 1121(d)(1) to justify an extension.

In addition, the legislative history of 1121(d) shows that Congress was seeking to give a debtor a fair opportunity to file a plan on its own terms, but at the same time not unduly prejudice creditors where the debtor is either unwilling or unable to file a viable plan.

> Proposed chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy. At the same time, the bill recognizes the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company. The bill gives the debtor an exclusive right to propose a plan for 120 days. In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors.

In re Ravenna Industries, Inc., 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982) *citing H.R. Rep. No.* 595, 95th Cong., 1st Sess. 231-32 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191.

The ability provided by the Code for the filing of competing plans, thereby allowing creditors to cast ballots for multiple plans, also encourages the Chapter 11 policy of "creditor democracy". *In re Mother Hubbard, Inc.*, 152 B.R. 189, 195-96 (Bankr. W.D. Mich. 1993). "Unless there exists some countervailing Code provision or bankruptcy policy which mandates to the contrary, creditors should be allowed to propose and vote on a competing chapter 11 plan." Id. at 196. For more on this concept, the *Mother Hubbard* case looks to the treatise of Professor Jackson.

> Creditors have the right to be heard and deference should be given to their views especially in a case involving an insolvent chapter 11 debtor. The group of creditors that should have the most decision-making authority will often be the class of

> unsecured creditors. "Once it becomes clear that there will not be enough to pay the creditors in full, continuing the decision-making authority in the hands of shareholders and their agents effectively separates the decision maker from the group that stands to gain or lose as a consequence of the decision." In instances when a debtor in possession controls the corporate affairs, the shareholders, represented by the management of the debtor, should not have the sole decision-making power. This judge believes that authorizing a creditor to file a competing plan to be voted on by other creditors is consistent with this bankruptcy goal.

Id. citing T. Jackson, The Logic and Limits of Bankruptcy Law 167-68 (1986) (internal citations omitted).

Along these lines, it is extremely important to note that the current equity holders, as the lowest class of creditors, are probably out of the money, and that the other constituents in this case are eager and willing to either consider alternative plans or submit their own. The bondholder parties have already made it clear to the Court that they intend to submit their own plan within days of the current exclusivity termination date of December 15, 2008. As equity holders are essentially the lowest class of creditors in a proceeding such as this, it is important to ensure that the creditors with superior priority are allowed due participation as soon as possible. One extension has already been given to the Debtors during which they failed in their assurances that a plan would be forthcoming. Further extension would only serve to delay that balance which Congress clearly intended for creditors to possess. The Debtors argue that they are proposing an independent board to guide the Debtors to operate and propose a plan in the best interests of all of the constituents, however, this board will still serve at the behest of the equity holders. Further, the constituents are in the best position to fashion their own solutions. Finally, a new independent board does not bring new capital to these Debtors who appear to be running out of cash.

In moving for an extension of exclusivity, "the party requesting an extension of the [period] has the burden of establishing good cause" including "a showing of some promise of probable success [in reorganizing]." *In Re Hoffinger Industries, Inc.*, 292 B.R. 639, 643 (8th Cir. 2003). Mere allegations are insufficient and the moving party is required to present actual evidence. *In re Ravenna Industries, Inc.*, 20 B.R. 886, 889 (N.D. Ohio 1982) Extensions of exclusivity are "not to be granted either routinely or cavalierly." *In Re McLean Industries, Inc.*, 87 B.R. 830, 834 (S.D. N.Y. 1987).

Extensions are privileges, not rights, much as the gaming license upon which this Debtors must base their reorganization is a privilege and not a right. (M.C.L. § 438.208c.)

In evaluating a request to extend the exclusivity period, courts in this District consider the following list of eight non-exclusive factors:

1. The size and complexity of the case;
2. The necessity of sufficient time to permit the Debtor to negotiate a plan of reorganization and prepare adequate information;
3. Good faith progress toward reorganization;
4. The fact that the Debtor pays its bills as they come due;
5. Whether the Debtor made progress in negotiation with its creditors;
6. Whether the Debtor is seeking an extension of the Exclusive Periods in order to pressure creditors to submit to Debtor's reorganization demands;
7. Whether an unresolved contingency exists; and
8. Whether the Debtor demonstrated reasonable prospects for filing a viable plan of organization;

See In re Dow Corning, 208 B.R. 661, 664-65 (Bankr. E.D. Mich. 1997), *citing In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996). The Board has deferred to the Bankruptcy Court while it appeared that regulatory interests are being served by the bankruptcy process. However, as will be discussed in this section, the Board now believes, and the Second Motion proves, that the Debtors' operations are deteriorating and Board action may be necessary to protect the integrity of the gaming license.

A. Size and Complexity of the Case

This case is not one that is uniquely large or complex such that an additional extension of the requisite time period is warranted. In deciding on 120 days as a reasonable time period for a debtor, Congress believed that in most cases this amount of time was sufficient for a debtor to negotiate a settlement with its creditors, unless a company was *unusually large*. *Ravenna Industries, Inc.*, 20 B.R. at 889. In this case, the Debtors have already received an extension of eighty days. Further, consider that the Debtors have been in regulatory breach, entitling the Board to invoke a sale process, for almost eight months and have recognized that they would be in default for two years with no progress toward cure and with no projected end in sight.

B. Necessity of Sufficient Time to Negotiate a Plan

The Debtors will have had 200 days to negotiate a plan by the time the current extended exclusivity period expires on December 15, 2008. The Board believes that the Debtors have not even begun negotiations with any of their constituents. During the Debtors' delay in filing and executing a chapter 11 plan the estate has continued to deteriorate and the market in which it seeks refinancing or sale is crumbling as well.

Debtors also state that a further extension will serve to help them develop a track record for lenders to look at. It is difficult to believe that a lender or purchaser would base its decision upon sixty days of operations. The more likely scenario is that the assets will be sold to a purchaser who will operate the casino under its own business model and with more capital, enabling it to compete in the market. Further, as Debtors' financial status continues to deteriorate, the track record that Debtors are seeking to develop may well end up being a negative one. Pursuant to the Court's order an investment banker has been retained and this process should move towards a sale of the Debtors' operations as soon as practicable.

C. Progress Toward Reorganization

The Board is unaware of any substantial steps the Debtors have made in this regard with the exception of the appointment of an investment banker.

D. Whether Debtor Pays Its Bills as They Come Due

The Debtors are required to pay an annual fee to the Board to defray the prospective regulatory expenses of the Board pursuant to M.C.L. § 432.212a(3). The fee for this upcoming year is $10,003,259 ("Regulatory Fee") and was due November 10, 2008. The Debtors had requested that the Board agree to receive this fee in monthly installments. However, the statute makes this impossible. Failure to make such payment could impair the Board's ability to provide oversight and execute its regulatory powers. The Debtors have now paid this fee; however, the payment was not timely and the impact of payment on Debtors cash flow will be significant. Exhibit G shows the Board's projection of the cash problem that the casino will encounter over the next four months. The casino must generate $22,317,525 in order to complete construction after payment of the regulatory fee. This would mean that the casino must generate at least $5,500,000 in EBITDA, not EBITDAR, in order to cover the requirements as outlined in this projection. In addition, the Debtors must soon pay a municipal service fee in the amount of $4,000,000 (the "Municipal Fee"), prior to the time the hotel construction is complete. This will add an additional burden to the Debtors' cash flow. The Board has received notice that the Debtors have had to draw down all of the operating Tranche B, $15,000,000, to pay the Regulatory Fee, the Municipal Fee, and operational costs. This will be problematic since Charles Moore of CMD has testified that part of the cost overruns related to the hotel construction would have to come from Tranche B. (Ex. E., P. 129.) That Tranche is now exhausted.

E. Progress Made in Negotiation with Creditors

The Board is unaware of any substantial steps the Debtors have made in this regard with the exception of the appointment of an investment banker. Most of the constituents with whom the Board has communicated have indicated that the Debtors have had no meaningful discussions with respect to reorganization.

F. Whether the Request is a Means of Pressuring Creditors

The Board does not believe that Debtors are seeking to pressure creditors by the filing of the Second Motion, since they have evidenced no plan for which they would be applying pressure.

G. Whether an Unresolved Contingency Exists

The unresolved contingencies alleged by the Debtors are the completion of the casino assets and a sixty-day track record. No reasonable person can believe that this sixty-day period will markedly change the Debtors' refinancing or sale prospects except to diminish them due to continued deterioration of its operations and the credit markets. A meaningful financial track record may be six months to a year and the Debtors may not survive to create such a record.

Further, there are certain unresolved contingencies in this case that may not be resolved by the Debtors and which weigh against a further extension. Some of these arise because of the Debtors' defaults under the Development Agreement which may not be curable. Those defaults may result in two problems for the Debtors which may make reorganization impossible. First, until the defaults are corrected, there is an additional wagering tax in the amount of 6% which is imposed until the Debtors are in compliance under the Development Agreement ("Tax Rollback"). Unless there is a Tax Rollback, the Debtors' ability to generate cash flow will be significantly impaired and will further impair the ability of the Debtors to compete in the Southeastern Michigan gaming market. Further, the failure to cure the defaults in the Development Agreement may cause the City to terminate the Executory Development Agreement. In the event that that occurs, the City has the right to trigger a request to the Board for a mandatory revocation of the gaming license pursuant to M.C.L. § 432.208(c)(2). Under this provision, if the City terminates the Development Agreement and requests license revocation, the Gaming Board must terminate the license. These contingencies have not been addressed by the Debtors ("Development Agreement Contingencies").

H. Reasonable Prospects for Filing a Viable Plan of Reorganization

The Board submits that among all of the other *Dow Corning* factors this is the most relevant to the case at bar. The Board believes that Debtors simply will not be able to file a plan of reorganization that is viable. Specifically, the Board notes that the financial position of Debtors is deteriorating at an alarming rate. This deterioration will increase the likelihood that the Board will decide it must resume the Sale Transaction, revoke Debtors' gaming license or deny renewal in order to meet its statutory mandate. Further, the Development Agreement Contingencies may make reorganization of the Debtors', other than through sale, impossible. Finally, neither the Sale Transaction, the license renewal process nor the revocation of Debtors' license are actions that are stayed by the automatic stay.

<u>1. The Debtors' Financial Position is Deteriorating and Will Only Worsen If a Further Extension is Granted</u>

The Debtors have repeatedly missed their projections of revenue, EBITDA, and EBITDAR. Their projections through 2011, even if they meet them, do not provide that the Debtors will meet the Financial Benchmarks. (Ex. F.) Debtors had always represented that they could cover all of their costs of construction and operations. However, Exhibit F calls this seriously into question and calls into question the financial survival of the casino.

The Board believes there is little or no likelihood that Debtors will be able to refinance their DIP obligations and get sufficient working capital to solve the cash flow issues identified above. In recent weeks the credit markets have deteriorated precipitously with the DIP lender market suffering extraordinary tightening. "'DIP' Loans Are Scarce, Complicating Bankruptcies", Wall Street Journal, October 17, 2008. Debtors have provided this Court with no evidence to the contrary. In fact, in their own testimony they admit that their projections out to 2011 do not show them coming into

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compliance with the Financial Benchmarks established by the Board. What then? The Debtors may obtain confirmation, while still in default of the Financial Benchmarks, and the Board may invoke the sale transaction. This is nonsensical.

2. Under the Gaming Act and Its Prior Orders, the Board Possesses the Authority to Revoke the Debtors' Casino License, Order Its Casino Assets Sold or Deny Renewal of Debtors' Casino License

As already discussed above, the terms of the 2005 Order allow that when a Financial Benchmark is not met, the Board may invoke the Sale Transaction. (Ex. A.) The basis for this power is the broad swath of authority the Board has been granted under the Gaming Act. As a general statement of its powers, Section 4 of that Act states that "[t]he board shall have the powers and duties specified in this act and all other powers necessary and proper to fully and effectively execute and administer this act for the purpose of licensing, regulating, and enforcing the system of casino gambling established under this act. " M.C.L. § 432.204(1).

Pursuant to the Gaming Act,

> [t]he board shall have jurisdiction over and shall supervise all gambling operations governed by this act. The board shall have all powers necessary and proper to fully and effectively execute this act, including, but not limited to, the authority to do all of the following:
>
> o) In addition to the authority provided under subdivision (m), revoke or suspend a casino license or impose any other disciplinary action for any of the following reasons:
>
> . . .
>
> (*ii*) At any time the licensee no longer meets the eligibility requirements or suitability determination by the board for a casino license under this act.
>
> (*iii*) The failure to revoke or suspend the license would undermine the public's confidence in the Michigan gaming industry.
>
> . . .
>
> (v) Take any other action as may be reasonable or appropriate to enforce this act and rules promulgated by the board.

M.C.L. 432.204a(1).

It is clear that there are now serious questions with respect to the Debtors' suitability. Any failure of a licensee would certainly undermine the public's confidence in the Michigan gaming integrity. Where these questions arise, the Board must act to insure the public's confidence. In this regard, among the most important of the Board's powers is the power to appoint a conservator and direct the sale of the property if a casino license is not renewed, revoked or suspended. M.C.L. §

432.224 provides that:

> (1) Notwithstanding any other provision of this act, when the board revokes a casino license, or suspends a casino license for a period in excess of 120 days, or refuses to renew a casino license, whether or not an appeal is pending, the board, with notice to the mayor of the city in which the casino is located, shall appoint a conservator to, among other things, take into his or her possession and control all the property and business of the licensee relating to the casino.
> . . .
> (7) Except as otherwise provided in subsection (8), the conservator shall sell, assign, or otherwise transfer ownership of all of the property, in bulk, of a former licensee that was part of the casino or an approved hotel to a person who meets all of the requirements of this act and rules promulgated under this act to receive a casino license under this act

There is no question that the operation of a casino in the state of Michigan is a revocable privilege and not a property right. M.C.L. § 432.208(1) clearly states that "[g]ranting a license under this act does not create or vest any right, title, franchise, or other property interest." The Gaming Board must act to insure that this privilege resides with an entity that is financially capable of insuring the integrity of the gaming operation which is the beneficiary of the license.

3. The Automatic Stay Does Not Prevent Exercise of the Board's Powers

The Board submits that while 11 U.S.C § 362 does generally impose a stay on proceedings against a debtor, this prohibition is specifically inapplicable to the powers that the Board would be exercising if it decided to suspend or revoke Debtors' gaming license or to continue the Sale Transaction or simply not renew the license. Such actions by the Board would be aimed at promoting the public purposes of protecting consumers, protecting the integrity of the gaming license, and ensuring and promoting confidence in the gaming industry in Michigan. Accordingly, the Board's actions in this regard would be regulatory in nature and, pursuant to Section 362(b)(4) of the Code, exempt from the automatic stay.

Section 362(b)(4) of the Bankruptcy Code provides that the filing of a petition does not affect a stay:

> under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's ... police and regulatory power

11 U.S.C. § 362(b)(4). The Sixth Circuit observed that "Congress clearly intended for the police power exception to allow governmental agencies to remain unfettered by the bankruptcy code in the exercise of their regulatory powers." *Word v. Commerce Oil Co. (In re Commerce Oil Co.)*, 847 F.2d 291, 295 (6th Cir. 1988).

Historically there had been a split of authority as to whether governmental regulatory action was exempt from the stay when such action involved the government exercising some authority over property of the estate. *See* 3-362 Collier on Bankruptcy-15th Edition Rev. P 362.05. Prior to the amendment in 1998 that would subsequently answer the question definitively, the Sixth Circuit had already concluded that some regulatory actions that exercised authority over property of the estate were exempt from the automatic stay by virtue of their regulatory character*. In re Javens*, 107 F.3d 359 (6th Cir. 1997).

A 1998 amendment to this section broadened its scope to include subsections (a)(3) and (a)(6) of Section 362. Subsection (a)(3) is the stay against acts to obtain possession or exercise control over estate property, and (a)(6) is the stay of any act to collect a claim against the debtor that arose prior to commencement of the case. For both, the plain language of the current Section 362(b)(4) makes it clear that when a governmental entity is enforcing its police and regulatory powers, the automatic stay is inapplicable. These amendments "expanded the exception to allow states to pursue regulatory actions even if they conflict with the bankruptcy court's control of property of the estate." *In re Auto Professionals, Inc.*, 370 B.R. 161, 184 (Bankr. N.D. Ill. 2007).

The case of *Emerald Casino, Inc. v. Illinois Gaming Board*, 482 F.3d 926 (7th Cir. 2007) is particularly on point in this instance. There, while the casino was in a Chapter 11 proceeding, it sought to enjoin the Illinois Gaming Board from revoking its gaming license. Affirming the lower courts' decisions that such regulatory actions were exempt from the stay pursuant to Section 362(b)(4), the Seventh Circuit stated that "the Code forbids the bankruptcy court from interfering with the government's police and regulatory powers. *Id.* at 938.

Although not a gaming case, *Javens* is the Sixth Circuit's most recent look at that issue and confirms the logic of *Emerald Casino*. In that case, even though the government had ordered the demolition of the debtors' real estate, the action was not found to be a violation of the automatic stay as the government had no pecuniary interest in the demolition and further that the demolition advanced public policy. *Id.* It is also important to note that *Javens* was decided even before the 1998 amendments to Section 362(b)(4) which make it patently clear that government regulation is not stayed even if it affects the property of the estate.

Taken together, *Emerald Casino* and *Javens* present a clear picture of the deference afforded state regulatory agencies in the exercise of their duties, even in light of the automatic stay in bankruptcy. Based on this analysis, the Board firmly believes that Section 362 does not prevent the exercise of its regulatory authority to either continue with the Sale Transaction, revoke or deny the renewal of Debtors' gaming license. On this point and pursuant to the Board's direction, its counsel will shortly be filing a motion for a declaratory order that the Board's regulatory powers are not stayed by Section 362. The Board may take no regulatory action which would impair the Chapter 11 process if the process moves quickly and does not further enhance the risk to the integrity of the license and the gaming industry. However, it must have clarity with respect to its power to act, where, in its discretion, circumstances and its legislative mandate so require.

<u>4. Based on the Foregoing, the Debtors Are Not Capable of Submitting a Viable Plan of Reorganization</u>

The Board has shown great deference to the forum of the Bankruptcy Court. To the extent that the process could move expeditiously to maximize the return to the various constituents without threatening the continued viability of the casino assets and beneficial attributes of the license, the Board has not attempted to exercise its regulatory powers in contradiction to or contravention of the Bankruptcy process. However, the Board mandate is not to protect all of the constituents, but to protect the integrity of the license and viability and vitality of the casino assets. The Debtors are under a statutory duty to prove by clear and convincing evidence that they meet the criteria for continuation of a casino license. M.C.L. § 432.206(5). These criteria include that they be well capitalized and that they responsibly maintain casino operations and assets. Given the continued financial deterioration of the Debtors, the refusal of the City of Detroit to waive defaults under the Development Agreement, and the projections of the Debtor, which provide that the Financial Benchmark defaults extend through 2011, the continued viability of the licensee must now be called into question.

All this leads the Board to conclude that Debtors cannot submit a viable plan of reorganization. First, they do not possess the requisite financial feasibility given their current deteriorating operations and the low probability of securing adequate lending in a crumbling market. Second as the City of Detroit has declined to waive Debtors' defaults under the Development Agreements, the strong possibility exists that they could notify the Board and trigger a mandatory revocation of Debtors' license. Further, as the bankruptcy process drags on, under these substantial risks, the Board may be required to intervene to protect the integrity of the casino license. Third, the longer the bankruptcy process is dragged out by Debtors the more the Board may feel it needs to intervene to protect the integrity of the casino license. Finally, it is important to note that the sale and license revocation powers of the City and the Board would remain even if Debtors were somehow able to confirm a plan. The Board will also retain its power to deny license renewal. This leads to the possibility that extensive proceedings in the bankruptcy court could be rendered superfluous if Debtors continue to fail to meet their Financial Benchmarks. A similar situation was presented in Emerald Casino, which elicited the following colloquy in the Bankruptcy Court:

> The Court: Is there anything that would prevent the resumption of the revocation proceeding and the revocation of the license here, despite confirmation of the plan that's presently before the Court, other than a majority vote of the Illinois Gaming Board?
>
> [Counsel for Emerald]: No.
>
> The Court: So that if the membership of the gaming board changed, or if members of the gaming board changed their mind, there would still be a potential for revocation?
>
> [Counsel for Emerald]: Well, Your Honor, there's all sorts of things that could happen.

Emerald Casino, 482 F.3d at 931-32.

Indeed, what Debtors have presented to the Court in this case is a situation diametrically opposite to those types of situations in which courts have found good cause for extension. The case of *Bunch v. Hoffinger Indus. (In re Hoffinger Indus.)*, 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003) is illustrative on this point. In that case, the court did find that good cause had been shown where there was testimony that early reports on the debtors' fiscal year were encouraging, sales were at an all time high, the debtor had hired necessary experts. There was also testimony that Debtor was paying its post petition expenses as they become due and adequate cash and lines of credit were in place to pay administrative claims in the future. If *Hoffinger* is a model for the type of debtor that is entitled to be granted an extension, the Debtors in this case are the model for the opposite result.

IV. CONCLUSION AND RELIEF REQUESTED

This case needs to be moved out of the starting gate and the proposal contained in this Second Motion only serves to delay the cold, hard facts of the economic situation that the Debtors face. Based on the arguments presented above, the Board believes that Debtors have made insufficient progress in moving towards either reorganization or sale and that they will not be able to present a viable plan. As it appears that Debtors are either unwilling or unable to progress this case at the speed required, the Board may be required to exercise its regulatory authority in the near future if further delays occur in the bankruptcy proceeding.

THEREFORE, for the reasons stated herein, the Board respectfully requests that this Honorable Court deny Debtors the relief they have requested and maintain the current exclusivity termination date of December 15, 2008. The Board also requests any other relief the Court believes available and appropriate under the circumstances.

LAMBERT, LESER, ISACKSON,
COOK & GIUNTA, P.C.

/s/ Susan M. Cook

DATED: November 14, 2008 BY: ________________________________

SUSAN M. COOK (P31514)
Special Assistant Attorney General to
State of Michigan, Gaming Control Board
309 Davidson Building, P.O. Box 835
Bay City, Michigan 48707-0835
Telephone: (989) 893-3518
scook@lambertleser.com