NCBJ 2015 Annual Conference

I. Retention and Compensation Issues in Chapter 11: K&E Retention in In re Caesars Entertainment Operating Company, et al. Chapter 11 Cases

A. Situation Background.

1. Caesars Entertainment Operating Company, Inc. ("CEOC"), together with its Debtor and non-Debtor subsidiaries, provides casino entertainment services and owns, operates, or manages 38 gaming and resort properties in 14 states and five countries, operating primarily under the Caesars®, Harrahs®, and Horseshoe® brand names. The Debtors represent the largest, majority owned operating subsidiary of Caesars Entertainment Corporation.

2. The majority owner of CEOC is Caesars Entertainment Corporation (or "CEC").

   a. The majority owners of CEC (with a combined 64% share) are four limited liability companies: TPG Hamlet Holdings, LLC, TPG Hamlet Holdings B, LLC, Apollo Hamlet Holdings, LLC, and Apollo Hamlet Holdings B, LLC (collectively, the "Hamlet entities").

   b. The TPG Hamlet entities, in turn, are indirectly owned or controlled by TPG Capital LP.

   c. The Apollo Hamlet entities are indirectly owned or controlled by Apollo Global Management, LLC.

   d. Apollo and TPG are private equity funds that have interests in a variety of other enterprises that are unrelated to Caesars and that are commonly referred to as "portfolio companies."

3. CEOC's board has seven members. Of those, two are affiliated with Apollo, two are affiliated with TPG, two are independent and one is CEOC's former CEO. CEOC's board has a two member Governance Committee comprised of the two independent directors.

4. On or around July 3, 2014, the Governance Committee elected to hire Kirkland & Ellis LLP ("K&E") as restructuring counsel for CEOC.

5. On January 12, 2015, three second lien creditors filed an involuntary bankruptcy petition against CEOC in the United States Bankruptcy Court for the District of Delaware.

6. On January 15, 2015, CEOC and 172 of its affiliates commenced voluntary chapter 11 cases in the United States Bankruptcy Court for the Northern District of Illinois, and CEOC's involuntary proceeding was subsequently transferred from Delaware to Chicago.

7. On February 18, 2015, the Debtors filed an application to retain K&E as their restructuring counsel.

8. On February 25, 2015, the Official Committee of Second Priority Noteholders objected to the Debtors' proposed retention of K&E.

9. Between April 23–24, 2015, the bankruptcy court conducted a two-day evidentiary hearing regarding the Debtors' application to retain K&E. K&E partner James H.M. Sprayregen testified at the hearing for a full day, and more than 75 exhibits were brought into evidence.

10. On May 27, 2015, Judge Goldgar read a summary of his ruling into the record approving the Debtors' retention of K&E.

11. On May 28, 2015, the Court entered its *Order Granting the Debtors Application to Retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Counsel* and accompanying opinion.

B. **Summary of Opinion Approving Retention of K&E as CEOC Counsel.**

1. The bankruptcy court addressed three primary bases for objections to K&E's proposed retention raised by the Official Committee of Second Priority Noteholders:

   a. K&E's representation of entities with connections to Apollo Global Management, LLC and TPG Capital LP in matters unrelated to CEOC, created an impermissible bias or appearance of bias to the detriment of the Debtors and their estates;

   b. K&E held an interest adverse to CEOC's estate because, notwithstanding the operative language of its engagement letter, K&E held a "security retainer" and therefore violated the automatic stay when K&E allegedly applied $7.2 million of invoices to that security retainer during the three day "gap period" prior to CEOC's voluntary bankruptcy petition on January 15, 2015; and

   c. K&E had a separate, undisclosed representation of CEOC's special governance committee—although this argument was largely abandoned at trial.

2. The bankruptcy court found that K&E's representation of, and connections to, entities connected to TPG and Apollo in unrelated matters was no basis for disqualification.

   a. Corporate separateness would be respected: K&E's representation of "affiliated" but separate companies could not be equated with representing CEOC's parent company or the indirect sponsors of CEOC's parent company.

   b. Similarly, representations of entities connected to CEC's financial sponsors, unrelated to CEOC, were no basis for disqualification absent a showing that such representations would create bias that was nowhere in the record.

   c. Rather, the bankruptcy court found that K&E had advised on an investigation and negotiation process with respect to certain challenged transactions and had also moved for the appointment of an independent examiner to further review those same transactions.

   d. Additionally, concerns regarding CEOC's "willingness to pursue claims belonging to the bankruptcy estates," could be addressed through remedies such as derivative standing or conflicts counsel, rather than "depriving CEOC of its choice of counsel."

3. Court further determined that so-called "gap period payments" were no basis to infer that K&E had received a putatively avoidable transfer

   a. K&E's engagement letter demonstrated intent that the agreement did not create a security retainer as between K&E and the Debtors.

   b. Rather, any retainer held by K&E vested when paid, and therefore no "draws" occurred during the gap period in violation of the automatic stay.

4. Finally, the Court determined the alleged "separate representation" of CEOC's special governance committee did not exist

   a. As a procedural matter, the objecting parties' failure to prosecute the objection constituted a waiver of the argument.

   b. As an evidentiary matter, the evidence confirmed that K&E advised CEOC's special governance committee "just as the firm advises CEOC's board and other board committees, in connection with the firm's representation of CEOC."

II. Methods of Payment of Ad Hoc Committees

A. Statutory Background

1. 11 U.S.C. §§ 361, 364

2. 11 U.S.C. § 503(b), (b)(1), (b)(4), (b)(5), (c)

3. 11 U.S.C. § 506(b)

4. 11 U.S.C. § 1123(b)(3), (6)

5. 11 U.S.C. §§ 1129(a)(4)

B. Certain relevant caselaw

1. In re Adelphia Commc'ns Corp., 441 B.R. 6 (Bankr. S.D.N.Y. 2010)

   a. Authorizing plan-based provision for payment of ad hoc committee fees, subject to disclosure and "reasonableness" standard per 1129(a)(4) where such payments are in the best interest of the estate

      i. Rejected argument that showing of "substantial contribution" was required for such payment per 503(b)(3)

      ii. Similarly rejected argument that plan-based payments of ad hoc committee fees were limited to specific categories of administrative expense claims identified by 503(b): "[T]he language of section 1129(a)(4) at least permits the possibility that section 503(b) isn't the only source of authority to pay legal fees under a plan."

   b. Adelphia further determined that categories of administrative expense claims set forth by section 503(b) reflected the categories of claims required to be paid from the estate (as opposed to claims paid voluntarily from the estate)

   c. Additionally, Adelphia noted that concerns arising from "overworking a matter or running up excessive disbursements" (called "Economy Concerns" by the Adelphia court) or from rewarding or encouraging "scorched earth" litigation (called "Behavior Concerns" by the Adelphia court) could be addressed by disclosure and review

2. In re AMR Corp., 497 B.R. 690 (Bankr. S.D.N.Y. 2013)

   a. Approved plan provision authorizing reimbursement of fees incurred by Creditors' Committee members

b. Rejected statutory argument that specific categories set forth by 503(b) incorporated the total set of claims payable from the estate: "Despite outright prohibitions of certain types of payments in other places in the Bankruptcy Code, Section 503(b) does not contain any such prohibition or restrictive language."

3. In re Lehman Bros., 508 B.R. 283 (S.D.N.Y. 2014)

a. Departed from Adelphia and AMR, finding that plan provision authorizing payment of fees incurred by Official Committee members as "plan payments" was impermissible as a matter of law.

b. Lehman district court ruled that:

i. Administrative expenses were limited to categories of claims set forth by sections 503(b)(1)–(9)

ii. Fees incurred by official committee members were specifically excluded from the substantial contribution provisions of section 503(b)(4) and, therefore, could not be an administrative expense

iii. Plan-based provision authorizing payment of such committee members' fees would therefore violate 1123(b)(6)'s requirement that plan provisions not be "inconsistent" with the Bankruptcy Code

iv. "[T]he Individual Members' professional fee expenses are either administrative expenses or not, and if the latter, they cannot be paid under a plan."

c. Additionally, the Lehman court:

i. addressed section 503(b)'s use of "including" as a lead-in phrase by finding to be "illustrative" (rather than "non-limiting" as provided by section 101(2)(3)) and, therefore purported administrative claims would still need to fall within 503(b)'s enumerated categories; and

ii. relied on legislative history to section 503(b)(4) to infer Congressional intent to exclude professional expenses incurred by official committee members from "administrative claims" payable under the Bankruptcy Code

III. Professional Fees after Baker Botts L.L.P. v. Asarco LLC (2015)

A. Background Facts.

1. In 2005, ASARCO LLC, a copper mining, smelting, and refining company filed for chapter 11 and retained Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. to represent it as restructuring co-counsel under section 327(a) of the Bankruptcy Code, which permits a debtor to "employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under" the Bankruptcy Code.

2. ASARCO's restructuring counsel ultimately obtained a \$7-\$10 billion judgment against the debtor's parent company on a fraudulent transfer claim that allowed ASARCO to successfully reorganize its business and pay its creditors in full, ultimately emerging from bankruptcy with approximately \$1.4 billion in cash on hand, little debt, and no environmental liabilities.

3. ASARCO's counsel applied for compensation under section 330(a)(1) of the Bankruptcy Code, which allows bankruptcy courts to award "reasonably compensation for actual, necessary services rendered by" professionals hired under section 327(a) of the Bankruptcy Code.

   a. ASARCO's lead bankruptcy and litigation counsel, Baker Botts LLP, filed its fee application requesting final approval of \$135,870,714.58 in fees and \$6,046,135.06 in expenses.

   b. Included in the requested fees was a 20-percent premium (approximately \$22.6 million) over the hourly rates that Baker Botts had charged during the bankruptcy.

   c. Baker Botts also sought to recover approximately \$8.5 million of fees and expenses that it had incurred in defending its fee application, including approximately \$5.2 million allocated to the defense of its core fees and expenses.

   d. Reorganized ASARCO, by then again under the control of the parent, vigorously contested Baker Botts' core fees (objecting to more than \$20 million of its fees) and the fee enhancement requested by Baker Botts.

   e. This challenge included a discovery request covering every document that Baker Botts produced during the 52-month bankruptcy, resulting in the production of 2,350 boxes of hard copy documents and 189 GB of electronic data.

f. Following a six-day trial, the bankruptcy court held that Reorganized ASARCO's objections to Baker Botts' core fees and expenses were meritless. See In re ASARCO LLC, No. 05-21207 (Bankr. S.D. Tex. July 20, 2011).

i. As to Baker Botts' requested fee enhancement, the bankruptcy court limited the 20-percent fee enhancement to services rendered in litigation against ASARCO's parent. Fee enhancements, the bankruptcy court observed, "should reward rare and exceptional work and should be tied to both the effort and the outcome."

ii. As to fees and expenses incurred in defending the fee applications, the bankruptcy court concluded that it had the power to award such fees under section 330(a) of the Bankruptcy Code and that it should apply the lodestar analysis with the section 330(a) factors to determine their reasonableness. The bankruptcy court ultimately found, with minimal explanation, that only $5 million of the $8 million of the defense fees was reasonable.

iii. Thereafter, reorganized ASARCO LLC appealed the bankruptcy court's order approving ASARCO LLC's fee applications.

B. **Proceedings Before the District Court and Fifth Circuit.**

1. On appeal to the District Court, Reorganized ASARCO abandoned its objections to Baker Botts' core fees but continued to dispute the fee enhancements and fees for defending the fee applications. The district court affirmed in most respects, except for the bankruptcy court's failure to provide findings supporting the $5 million award of defense fees to Baker Botts. See In re ASARCO LLC (ASARCO LLC v. Baker Botts LLP and Jordan, Hyden, Womble, Culbreth & Holzer, P.C.), No. 2:11-CV-290 (S.D. Tex. Aug. 8, 2012).

2. In Reorganized ASARCO's subsequent Fifth Circuit appeal, it continued to challenge the bankruptcy court's rulings awarding premiums to the law firms and authorizing the law firms under section 330(a) to recover fees for the defense of their fee applications. See 751 F.3d 291 (5th Cir. 2014).

a. As to the fee application defense costs, the Fifth Circuit held that section 330(a) of the Bankruptcy Code does not authorize compensation for the fees and expenses professionals incur in defending their fee applications.

b. The Fifth Circuit focused almost exclusively on whether the services that a professional provides in defending its fee application are services that are likely to benefit a debtor's estate. The panel answered in the negative and observed that "the primary beneficiary of a professional fee application, of course, is the professional."

c. The court found further support in section 330(a)(6) of the Bankruptcy Code, which provides that "any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application."

d. According to the Fifth Circuit, "the specification of an award for 'preparation of a fee application'" implies that Congress was excluding fees for defending a fee application by the omission of such language. The panel further reasoned that section 330(a)(6)'s reference to the "level and skill reasonably required to prepare the application" was only necessary if Congress believed that preparation of a fee application could not otherwise satisfy the "reasonable and necessary" requirement of section 330(a)(1)(A) of the Bankruptcy Code.

C. **The Supreme Court's Decision.**

1. Baker Botts subsequently appealed the Fifth Circuit's decision to the U.S. Supreme Court, which, in an opinion written by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito and, in part, Justice Sotomayor, affirmed the Fifth Circuit's decision and ***held that section 330(a)(1) of the Bankruptcy Code does not permit bankruptcy courts to award fees to "327(a)" professionals for defending fee applications.***

a. The Court's analysis was straight-forward: under American jurisprudence, each side in a litigated dispute bears its own attorneys' fees, unless there is an applicable statute or agreement that provides otherwise.

b. Here, section 330(a)(1) of the Bankruptcy Code provides that a court may "award to . . . a professional person . . . reasonable compensation for actual, necessary ***services*** rendered" to the bankruptcy estate.

c. In the Court's view, the plain text of the statute does not support a deviation from the "American Rule" regarding attorneys' fees.

d. More specifically, the Court reasoned that the word "services" ordinarily refers to labor performed for another. On this basis, the Supreme Court concluded that time spend litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as labor performed for another, let alone a disinterested service.

2. Justice Breyer, joined by Justices Ginsburg and Kagan, dissented from the Court's opinion on the basis that, while a professional's defense of a fee application is not a "service" within the meaning of the Bankruptcy Code, section 330(a)'s "reasonable compensation" language affords bankruptcy courts discretion to consider and award fees for defending fee applications. Justice Breyer also focused on certain policies considerations, including the concern that the majority's decision may prevent high-quality attorneys and other professionals from representing debtors in bankruptcy proceedings.

United States Bankruptcy Court, Northern District of Illinois

Name of Assigned Judge	A. Benjamin Goldgar	**CASE NO.**	15 B 1145
DATE	May 28, 2015	**ADVERSARY NO.**	
CASE TITLE	Caesars Entertainment Operating Co., Inc.		
TITLE OF ORDER	Order granting the debtors' application to retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP as counsel		

DOCKET ENTRY TEXT

The debtors' application to retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP as their counsel in these bankruptcy cases is granted, effective January 15, 2015. The debtors are authorized to retain Kirkland in accordance with the terms and conditions set forth in the application and the engagement letter. Kirkland may apply for compensation for services rendered and reimbursement of expenses in accordance with sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of the court, and the compensation procedures adopted in these cases.

[For further details see text below.]

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This matter is before the court for ruling after a two-day evidentiary hearing on the debtors' application to retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP ("Kirkland" or "the firm") as their counsel. The Official Committee of Second Priority Noteholders (the "Noteholders Committee" or the "Committee") has objected to the application. These are the court's findings of fact and conclusions of law under Rule 52(a)(1) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 52 (made applicable by Fed. R. Bankr. P. 7052 and 9014(c)). For the reasons that follow, the application will be granted.

1. Background

The facts are drawn mostly from the evidence adduced at the hearing and from the court's docket. The few facts not brought out at the hearing involve background matters well known to the parties and not subject to dispute.

The debtors in these jointly administered bankruptcy cases call themselves the primary operating units of the "Caesars gaming enterprise." The debtor named in the caption of the lead

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case is Caesars Entertainment Operating Company, Inc. ("CEOC"). The debtors in the other cases are subsidiaries of CEOC.

The majority owner of CEOC is Caesars Entertainment Corporation (or "CEC"). The majority owners of CEC (with a combined 64% share) are four limited liability companies: TPG Hamlet Holdings, LLC, TPG Hamlet Holdings B, LLC, Apollo Hamlet Holdings, LLC, and Apollo Hamlet Holdings B, LLC (the "Hamlet entities"). The TPG Hamlet entities, in turn, are wholly owned by TPG Capital LP. The Apollo Hamlet entities are wholly owned by Apollo Global Management, LLC. Apollo and TPG are private equity funds that have interests in a variety of other enterprises, enterprises unrelated to Caesars, that the parties refer to as "portfolio companies."

CEOC's board has seven members. Of those, two are affiliated with Apollo, two are affiliated with TPG, and two are independent. (The seventh was not identified.) The CEOC board has a three-member executive committee. One member is affiliated with Apollo, another with TPG. Six of the nine CEC board members are also associated with Apollo or TPG.

Apollo and TPG acquired their interests in CEC in 2008. Things have not gone well since the acquisition. From 2011 through 2013, CEC and its affiliates had net losses of approximately $5.2 billion. In 2013 and 2014, CEOC and its affiliates therefore engaged in approximately 50 transactions of various kinds described in the record as "capital markets transactions." Depending on one's point of view, these transactions were intended either to increase liquidity and provide CEOC with badly needed capital or to loot CEOC of valuable assets, transferring them to CEC and related companies.

As James Sprayregen, Kirkland's only witness at the hearing, observed, creditors have not been at all shy about initiating lawsuits over the transactions (which the parties term the "challenged" or "disputed" transactions). The transactions are the subject of several lawsuits pending in New York and Delaware. CEOC's bondholders in particular have criticized the transactions. The unhappy bondholders include the constituents of the Noteholders Committee objecting to Kirkland's application.

At some point, at least in 2014 but possibly earlier, CEOC began to consider restructuring. CEOC also considered retaining counsel in connection with any restructuring effort. One of the law firms under consideration was Kirkland. One of the independent CEOC directors, Ronen Stauber, knew a Kirkland partner, Edward Sassower. Stauber telephoned Sassower, said that he and another man had been appointed independent directors, and said the independent directors were going to interview counsel for a possible restructuring. Stauber wanted to interview Kirkland.

In late June or early July 2014, the Kirkland lawyers made what they call a "pitch" for

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the CEOC business in a meeting in New York. The pitch was made to the two independent CEOC directors. In connection with the pitch, on June 26 and 27 Kirkland quickly prepared a "pitch book" that was provided to the two independent directors. Because the Noteholders Committee finds the pitch book significant, it is worth summarizing its contents briefly.

The pitch book began with a "situation overview" that described the structure and recent financial performance of the broader Caesars enterprise and also described in general terms the challenged transactions.

The pitch book then set out possible "next steps/action items" for the CEOC board. These included addressing "financial and operational challenges," "establishing an appropriate corporate governance process," and developing a "strategic action plan for likely bondholder challenges." In the first category, Kirkland said (among other things) that it would "work closely with the Board, management, and financial and other advisors to jointly develop cutting edge solutions with creditors to reach a consensual solution." In the second category, Kirkland noted that it was "important to establish and maintain appropriate corporate governance and decision making processes, to facilitate decisions in the restructuring context, and to protect those decisions and the decision makers from challenges . . . ." In the third category, Kirkland offered to assist CEOC and its advisors "to develop an appropriate plan for responding to and defending against the bondholder challenges" to the disputed transactions.

The pitch book's next section was entitled "why hire Kirkland." The firm described itself as "problem solvers" and "deal doers" who focus on "maximizing enterprise value and minimizing costs and disruptions associated with restructuring situations." Kirkland, the pitch book said, was "deal-oriented." But, Kirkland added, it was "prepared to litigate if necessary." At the hearing, Sprayregen confirmed this firm philosophy, stating that "the most value-maximizing solution for most Chapter 11 situations is a holistic, fully consensual deal," but "[a]n important element of reaching consensual resolution has always been the ability and willingness to litigate."

This description of the pitch book covers pages 1 through 17. The remaining 94 pages of the 111-page book (the bulk of the piece, in other words) were devoted to a description of the firm's experience and the credentials of its personnel, complete with rankings of specific Kirkland practice areas from publications like "The American Lawyer" and "U.S. News & World Report." Fifty-four of the remaining 94 pages (nearly half the pitch book, in other words) consisted of the curricula vitae of assorted Kirkland lawyers.

On or around July 3, 2014, the independent directors apparently decided to hire Kirkland. The decision is embodied in an undated resolution of the CEOC board.

About a week later, Kirkland provided CEOC's general counsel, Tim Donovan, with a

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draft engagement letter. On July 15, CEOC's deputy general counsel, Scott Wiegand, responded that "we're looking at this letter and will provide comments shortly." There was apparently a discussion of the letter on August 4 involving Donovan, because on August 5 Donovan sent David Seligman at Kirkland an email asking whether there would be a "new, revised engagement letter" in light of "the retainer conversation yesterday." On August 6, Seligman sent Donovan a new engagement letter noting a change in the retainer amount. Around this time, Tim Lambert replaced Donovan as CEOC's general counsel, and in mid-August Lambert and Donovan exchanged detailed e-mails negotiating further changes to the engagement letter.

Kirkland and CEOC at last came to an agreement on the terms of the engagement, and on September 2, 2014, Kirkland and CEOC executed a finalized engagement letter. Sprayregen signed for Kirkland, and Mary Higgins, CEOC's chief financial officer, signed for CEOC.

Two features of the letter are relevant to the retention question. First, the letter acknowledged that Kirkland had been asked to represent "Caesars Entertainment Operating Company, Inc. and its subsidiaries in connection with a potential restructuring." Those entities were defined parenthetically as the "Company." The letter then added: "Please note, the Firm's representation is only of the Company; the Firm does not and will not represent any shareholder, director, officer, partner or joint venturer of the Company." Sprayregen testified without contradiction that Kirkland had never before represented CEOC or its subsidiaries; that Kirkland had never represented and does not currently represent CEC; that Kirkland had never represented and does not currently represent either the Apollo or the TPG Hamlet entities; that Kirkland had never represented and does not currently represent Apollo; and that Kirkland had never represented and does not currently represent TPG.

Sprayregen conceded that Kirkland had represented and still represents several portfolio companies of Apollo and TPG, but he made clear (and again his testimony was uncontradicted) that the representations were and are unrelated to this case. Sprayregen also conceded that Kirkland had represented David Bonderman, a member of the CEOC and CEC boards and a founder of TPG, in an unrelated action involving General Motors. The Kirkland lawyers in this case believed the representation of Bonderman had ended prepetition, but it had not. When the continued representation came to light, Kirkland withdrew from the action and Bonderman secured other counsel. Sprayregen conceded as well that Kirkland had advised on one of the challenged transactions, possibly two, but stressed there had been no involvement in the rest, the vast majority of which had occurred before the firm was even retained.

Second, the engagement letter spelled out (as most engagement letters do) the terms on which Kirkland would be paid. Paragraphs 4 through 6 explained that Kirkland would bill "the Company" (again as defined) for fees based on the firm's regularly hourly rates as well as for certain expenses. Paragraph 7 then declared that statements for fees and expenses "are typically rendered monthly and, unless other arrangements are made, payment in full is due upon receipt."

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Despite these provisions providing for monthly billing, paragraph 8 of the letter was entitled "Retainer" and provided in part:

> The Company will provide to the Firm, a "classic retainer" in the amount of $3,000,000 as defined in *In re Production Associates, Ltd.*, 264 B.R. 180, 184-85 (Bankr. N.D. Ill. 2001), and *In re McDonald Bros, Construction, Inc.*, 114 B.R. 989, 997-99 (Bankr. N.D. Ill. 1990). As such, the classic retainer was earned by the Firm upon receipt. The initial amount of the classic retainer was set to approximate our estimate of fees and expenses expected to be accrued and unpaid by the Company between payment cycles. The Firm's estimate of expected fees and expenses may change based upon actual or expected fees and expenses incurred or expected to be incurred, as applicable. Further, the Company agrees to replenish the classic retainer upon receiving invoices from the Firm so that the classic retainer amount remains at or above the Firm's estimated fees and expenses expected to be accrued and unpaid by the Company between payment cycles. The Firm may request an additional classic retainer depending on the scope of work and estimate of fees and expenses.

Paragraph 9 under the same heading underscored the previous statement that the retainer was earned "upon receipt," declaring that the retainer will be placed in the firm's "general cash account, " the retainer "will not be held in a separate account on your behalf," and "[y]ou have no interest in the classic retainer."

Sprayregen explained the nature of the fee arrangement under the engagement letter, an arrangement that Kirkland has used since 1990 when *McDonald Bros*. was decided. The arrangement's overriding purpose, Sprayregen said, is to ensure that as of the petition date in a bankruptcy case Kirkland is not a creditor of the debtor it seeks to represent and so is not adverse to the estate. This purpose is achieved through the retainer provision, which applies only until the petition date. Post-petition, the provisions concerning fees, expenses, and monthly statements payable on receipt take effect.

Sprayregen added that the retainer scheme described in the engagement letter is designed to avoid a debtor-creditor relationship by keying the amount of the retainer to the value of the services rendered. He testified: "We keep track of our rates-times-hourly fee and compare that against the classic retainer, and we keep the client informed. And then when the rates times hours is approximately getting close to that, we get another classic retainer." To obtain another retainer, Sprayregen said, Kirkland issues an invoice to CEOC. But the invoice creates no receivable for the firm, he added. The invoices "[aren't] bills." Sprayregen's testimony on this

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point was consistent with the engagement letter's provision that "the Company agrees to replenish the classic retainer upon receiving invoices from the Firm so that the classic retainer amount remains at or above the Firm's estimated fees and expenses expected to be accrued and unpaid . . . ."

In accordance with the engagement letter, CEOC paid Kirkland a $500,000 retainer on July 30, 2014, and an additional $2.5 million retainer on September 4, 2014. Between September 18 and December 22, Kirkland sent CEOC five invoices. In response, CEOC wired funds to Kirkland in the amounts of the invoices. As a result, on December 22, 2014, Kirkland was still "ahead," to use Sprayregen's term, to the tune of $3 million, the amount of the retainer as of September 4.

As soon as Kirkland was retained in early July, a special governance committee (the "SGC") of the CEOC board consisting of the two independent directors began an investigation of the 50 or so challenged transactions mentioned earlier. Kirkland led the investigation, hiring Mesirow Financial to assist in the effort. (Consistent with the engagement letter, however, Kirkland did not represent the SGC itself any more than Kirkland represented the CEOC board.) The investigation, which is continuing, has involved the review of hundreds of thousands of pages of documents and the examination of 15 to 20 witnesses.

As a result of its efforts, the SGC formed interim conclusions that a number of the transactions were problematic. Specifically, the SGC concluded that CEOC had received insufficient consideration – the transfers, in other words, were constructively fraudulent – and CEOC had grounds to bring an action against CEC. Kirkland shared its conclusions and concerns with CEC. Armed with those conclusions, the SGC (and Kirkland, apparently) negotiated a restructuring support agreement (the "RSA") to which CEOC, CEC, and CEOC's first lien bondholders were parties. Under the RSA, CEC would make contributions to CEOC in an amount the SGC was satisfied met its concerns. (An exact dollar figure was not mentioned, but Sprayregen described the contribution as "substantial.") In return, CEC and its affiliates would be released from liability in connection with the transactions.

The RSA nevertheless contains what Sprayregen described as "two major outs." First, CEOC has the absolute right not to go forward with the RSA if the SGC is not satisfied at the conclusion of the investigation that not all relevant information has been provided. Second, CEOC has the right not to go forward if the SGC in the exercise of its fiduciary duties decides that there is "an alternative" that is "better than the deal with the RSA."

Despite the SGC's investigation, and despite the interim conclusions that the SGC would later draw about the challenged transactions, CEOC and CEC together brought an action in New York state court on August 5, 2014, seeking as relief, among other things, a declaration that neither company had breached any fiduciary duties or engaged in any fraudulent transfers. An