No. 15-3259

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL.,
Debtors.

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL.,
Plaintiffs-Appellants,

v.

BOKF, N.A., WILMINGTON SAVINGS FUND SOCIETY, FSB, MEEHANCOMBS GLOBAL CREDIT OPPORTUNITIES MASTER FUND, LP, RELATIVE VALUE-LONG/SHORT DEBT PORTFOLIO, A SERIES OF UNDERLYING FUNDS TRUST, SB 4 CF LLC, CFIP ULTRA MASTER FUND, LTD., TRILOGY PORTFOLIO COMPANY, LLC, AND FREDRICK BARTON DANNER,
Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois (Gettleman, J.), No. 1:15-cv-06504

Originating from the United States Bankruptcy Court for the Northern District of Illinois (Goldgar, J.), Chapter 11 Case No. 15-01145
Adversary Proceeding No. 15-00149

MOTION FOR EXPEDITED ISSUANCE OF THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(b), Debtors-Appellants respectfully request that the Court issue the mandate in this case forthwith.

1. Following expedited briefing and argument (*see* Oct. 21, 2015 Order, Dkt. 24), this Court issued an opinion on December 23, 2015, vacating the denial of the injunction requested by the Debtors in the

above-captioned adversary proceeding and remanding the case to the Bankruptcy Court to determine whether to issue the injunction under the appropriate legal standard. *See CEOC v. BOKF, N.A.*, Case No. 15-3259 [Dkt. 46] ("Slip Op.") at 9 (Posner, J., joined by Manion, J. and Sykes, J.).[1] On December 28, 2015, the Court entered final judgment on appeal. [Dkt. 47].

2. Pursuant to the Federal Rules of Appellate Procedure, the mandate currently is scheduled to issue no sooner than January 19, 2016. *See* Fed. R. App. P. 41(b), 40(a)(1), & 35(c).

3. There is good cause to issue the mandate forthwith.

4. This Court concluded that the Bankruptcy Court and the District Court read Bankruptcy Code section 105(a) too narrowly in holding that only a lawsuit arising from the "same acts" of the non-debtor that gave rise to the disputes in the bankruptcy proceeding may be enjoined under the statute. Slip Op. at 4, 9. Instead, section 105(a) grants "broad" and "extensive equitable powers that bankruptcy courts need in order to be able to perform their statutory duties." *Id.* at 3, 4.

[1] A copy of the Slip Opinion is attached as Exhibit A for the Court's convenience.

Thus, the proper statutory inquiry under section 105(a) is whether the requested injunction is "likely to enhance the prospects for a successful resolution of the disputes" related to the bankruptcy and whether "its denial will thus endanger the success of the bankruptcy proceedings." *Id.* at 4. If the answer to these questions is yes, "the grant of the injunction would, in the language of section 105(a), be 'appropriate to carry out the provisions' of the Bankruptcy Code, since successful resolution of disputes arising in bankruptcy proceedings is one of the Code's central objectives." *Id.* at 4-5.

5. Although reserving factual questions for the Bankruptcy Court in the first instance, this Court recognized that the interests of the Debtors' creditors in the chapter 11 cases "would be furthered by a temporary injunction staying the lenders' lawsuits against CEC." *Id.* at 5. If guarantor liability were imposed on CEC, "CEC's ability to satisfy CEOC's fraudulent-conveyance claims against it—and thus pay other creditors—would be impaired." *Id.* at 8–9.

6. Given this Court's opinion, and the fact that CEC faces imminent potentially case-dispositive summary judgment rulings in the guaranty lawsuits, the Debtors respectfully request that the Court issue

the mandate forthwith so that the Bankruptcy Court may immediately rule on the Debtors' motion and enter the requested injunction. *See, e.g.*, *Kusay v. United States*, 62 F.3d 192, 193-94 (7th Cir. 1995) ("The way to expedite proceedings after an appellate decision is to seek early issuance of the mandate.").

7. As Debtors previously explained, and this Court recognized, a subset of CEOC's creditors has been aggressively seeking judgments against CEC in lawsuits outside of this bankruptcy case to recover $11 billion in alleged guaranty claims, including a lawsuit that the first lien trustee filed after trial seeking more than $6 billion. *See* Slip Op. at 2-3; A1046:17-1048:22; A1133:11-1134:2; *see also* Compl., *UMB Bank, N.A. v. Caesars Entm't Corp.*, No. 1:15-cv-04634-SAS (S.D.N.Y. 2015). These lawsuits threaten to render CEC insolvent and prevent the Debtors from recovering *any* assets from CEC. *See* Slip Op. 5. Indeed, both the Debtors' estate claims and these creditors' guaranty claims seek to recover from the same limited pool of assets from the same entity (CEC), and CEC lacks the ability to both satisfy the guaranty claims and make any meaningful contribution to the estate on account of the estate's claims. *See id.*; A1046:17–1048:22; A1133:11–1034:2.

8. Litigation that could eliminate the Debtors' ability to recover on one of their principal estate assets diminishes their ability to efficiently reorganize and maximize creditor recoveries. *See* Slip Op. 5. The Debtors' ability to formulate *any* plan of reorganization heavily depends on their ability to recover against CEC on account of estate claims. A1041:16-1042:3.

9. CEC has publicly disclosed that "were a court to find in favor of the claimants in any of these Noteholder Disputes, such determination could have a material adverse effect on our business, financial condition, results of operations, and cash flows. Accordingly, we have concluded that the material uncertainty related to certain of the Litigation proceeding against CEC raises substantial doubt about the Company's ability to continue as a going concern…." A950. This language is shorthand that CEC will file for bankruptcy itself if a court finds in favor of the guaranty claimants in any of their cases. Simply put, an adverse decision in the guaranty litigation would materially diminish CEC's ability to fund and otherwise support the Debtors' restructuring, rendering moot the Debtors' chapter 11 plan (predicated

on the RSA) currently on file and putting the Debtors back at square one in their efforts to reorganize.

10. The guaranty actions remain on a trajectory that continues to directly threaten the Debtors' reorganization. On November 20, 2015, Appellees BOKF and UMB filed motions for summary judgment in the guaranty litigation in the Southern District of New York. *See* Mem. in Suppt. of Mot. for Summ. J., Case No. 1:15-cv-04634-SAS [Dkt. 69] at 1, 3. The motion has been fully briefed since December 11 and Judge Scheindlin may rule any day. If CEC survives summary judgment, the case is set for a two-week jury trial beginning March 14, 2016. 11/10/15 Status Conference Tr. at 20. Appellees MeehanCombs and Danner likewise have moved for summary judgment on certain of their claims. These motions have been fully briefed since December 2.

11. Given the imminent rulings on the potentially case-dispositive summary judgment motions and upcoming trials in the CEC litigation, the first of the guaranty claims can be decided any day, and will be decided no later than late March 2016. Both CEC's and the Debtors' financial advisors testified at trial that, because the language of the guaranties is very similar (and in some cases identical), CEC likely will

file for bankruptcy if it suffers an adverse judgment in any of the guaranty actions. CEC lacks the financial wherewithal to post an appeal bond on a multi-billion dollar judgment, meaning that any such judgment entered against it—even with respect to a liability finding only—would be effectively final. A1046:17–1048:22; A1050:9–1053:22; A1095:12–1096:7; A1107:21–1108:11; A1134:3-21; A1135:10-23; A1189:2-1190:2; A941.

12. Given the foregoing, time is of the essence. Otherwise, a decision adverse to CEC in the guaranty litigation will cause the very harm that the requested injunction was intended to prevent. Should the guaranty litigation result in an adverse decision forcing CEC to file for chapter 11 before the mandate issues (or while the Bankruptcy Court is deciding the issues on remand from this Court), it will severely impair the Debtors' ability to reorganize in the near term.

13. Notwithstanding Fed. R. Civ. P. 62.1(a) and Fed. R. Bankr. P. 8008, the Bankruptcy Court has declined to take any further action until this Court's mandate issues and the matter is docketed in the Bankruptcy Court. *See* Dec. 28, 2015 Order [Bkr. N.D. Ill. Case 15-

00149, Dkt. 190].[2] Therefore, immediate issuance of the mandate is needed to enable prompt action on remand.

CONCLUSION

For the foregoing reasons, this Court should issue the mandate forthwith.

[2] Attached as Exhibit B.

December 28, 2015

/s/ John C. O'Quinn
James H.M. Sprayregen, P.C.
David R. Seligman, P.C.
David J. Zott, P.C.
Jeffrey J. Zeiger, P.C.
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Paul M. Basta, P.C.
Nicole L. Greenblatt
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

John C. O'Quinn
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel to Debtors / Appellant-Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Motion for Expedited Issuance of the Mandate through the CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

/s/ John C. O'Quinn
John C. O'Quinn

DATE: December 28, 2015

Exhibit A

In the

United States Court of Appeals

For the Seventh Circuit

No. 15-3259

IN RE CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,

Debtors.

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,

Plaintiffs-Appellants,

v.

BOKF, N.A., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15 C 6504 — **Robert W. Gettleman**, *Judge*.

ARGUED DECEMBER 10, 2015 — DECIDED DECEMBER 23, 2015

Before POSNER, MANION, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. This is an immense, and immensely complicated, bankruptcy proceeding, but the issue presented by the appeal is straightforward, enabling us to spare the reader a mountain of details. For both the bankruptcy

judge, and the district judge to whom the bankruptcy judge's ruling was unsuccessfully appealed, based their decisions on a question of statutory interpretation. We must decide simply whether their interpretation was correct.

Caesars Entertainment Operating Company, which the parties call CEOC, owns and operates a chain of casinos and is the leading debtor in a Chapter 11 bankruptcy proceeding. It is the only debtor we need discuss because the others are subsidiaries of CEOC. (In other words, to simplify our opinion we pretend that CEOC is the sole debtor.) CEOC used to be wholly owned by Caesars Entertainment Corp. (CEC), which remains its principal owner. Beginning in the mid-2000s and continuing in recent years, CEOC borrowed billions of dollars to finance its operations, issuing notes to the lenders that were guaranteed by CEC. As CEOC's financial position worsened, CEC tried to eliminate its guaranty obligations by selling assets of CEOC to other parties and terminating the guaranties that it had issued. Creditors of CEOC who had received the guaranties challenged CEC's repudiation of them by filing suits in state and federal courts against CEC. The suits sought damages *in toto* of approximately $12 billion. See, e.g., *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, 80 F. Supp. 3d 507, 509–11 (S.D.N.Y. 2015); *BOKF, N.A. v. Caesars Entertainment Corp.*, No. 15-CV-1561 (SAS), 2015 WL 5076785, at *2 (S.D.N.Y. Aug. 27, 2015); *Wilmington Savings Fund Society, FSB v. Caesars Entertainment Corp.*, No. CV 10004-VCG, 2015 WL 1306754, at *2–3 (Del. Ch. March 18, 2015). Further complicating the picture, CEOC in its bankruptcy proceeding has asserted claims against CEC alleging that CEC caused CEOC to transfer highly valuable assets to CEC at less than fair value, leaving CEOC saddled with billions of dollars of debt;

the transfers had therefore allegedly been fraudulent transfers—part of a scheme by CEC to snatch CEOC's most valuable assets while ensuring that the guaranty plaintiffs could not recover on their notes.

CEOC fears that those guaranty suits will "thwart[] [CEOC's] multi-billion-dollar restructuring effort, which depends on a substantial contribution from CEC in settlement of [CEOC's] claims against it," and thus will "let [the guaranty plaintiffs] jump the line in front of other creditors, including more senior ones," of the bankrupt estate. CEOC therefore asked the bankruptcy judge to enjoin the guaranty suits until 60 days after a bankruptcy examiner, appointed by the judge to make an independent assessment of the bankruptcy claims, completes his report. The hope was that the report might help the parties negotiate a reorganization of the bankrupt estate. The bankruptcy judge, seconded by the district judge, to whom CEOC appealed the first judge's ruling, refused to issue the injunction. The bankruptcy judge's exercise of jurisdiction over these other suits would have been constitutional, see *In re Quigley Co., Inc.*, 676 F.3d 45, 52–53 (2d Cir. 2012), but he thought he lacked statutory authority to enter an injunction under the relevant provision of the Bankruptcy Code, section 105(a), which provides, so far as relates to this case, that "the [bankruptcy] court may issue *any* order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). Despite this broad grant of power, the bankruptcy judge thought that for litigation against a non-debtor to be enjoinable it must arise out of the "same acts" of the non-debtor that gave rise to disputes in the bankruptcy proceeding. The disputes in CEOC's bankruptcy arise out of CEC's alleged fraudulent transfers, while

the claims being pressed against CEC in the lawsuits that CEOC is endeavoring to enjoin arise from CEC's alleged repudiation of the guaranties that it issued to the firms that lent money to CEOC. They are not the same claims. (The guaranty plaintiffs also have claims against CEOC, but those claims are automatically stayed pursuant to 11 U.S.C. § 362(a).)

But nothing in 11 U.S.C. § 105(a) authorizes the limitation on the powers of a bankruptcy judge that CEC's creditors (the guaranty plaintiffs) successfully urged on the judges below. (Notice too that 28 U.S.C. § 1334(b), provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11" (emphasis added).) Though section 105(a) does not give the bankruptcy court carte blanche—the court cannot, for example, take an action prohibited by another provision of the Bankruptcy Code, *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004)—it grants the extensive equitable powers that bankruptcy courts need in order to be able to perform their statutory duties.

The question that the bankruptcy judge and the district judge failed to address because of their cramped interpretation of section 105(a) is whether the injunction sought by CEOC is likely to enhance the prospects for a successful resolution of the disputes attending its bankruptcy. If it is, and its denial will thus endanger the success of the bankruptcy proceedings, the grant of the injunction would, in the language of section 105(a), be "appropriate to carry out the provisions" of the Bankruptcy Code, since successful resolution of disputes arising in bankruptcy proceedings is one of the

Code's central objectives. See *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162–63 (7th Cir. 1994). If before CEOC's bankruptcy is wound up CEC is drained of capital by the lenders' suits to enforce the guaranties that CEC had given them, there will be that much less money for CEOC's creditors to recover in the bankruptcy proceeding. CEOC seeks on behalf of the creditors to recover from CEC assets that CEC caused to be fraudulently transferred to it from CEOC, and to use the recovered assets to pay the creditors. The less capital CEC has for CEOC to recapture through prosecution or settlement of its fraudulent-transfer claims, the less money its creditors will receive in the bankruptcy proceeding. Those creditors, and CEOC as their debtor, thus have a direct and substantial interest in the litigation between CEC and the firms to which it has issued guaranties. That interest would be furthered by a temporary injunction staying the lenders' lawsuits against CEC.

One can envision a situation in which CEC, having both obligations on the guaranties it issued to CEOC's lenders, and obligations to CEOC arising from the latter's fraudulent-transfer claims, would lack the money to satisfy all its obligees, and would thus become the badminton birdie in a contest between the two groups of claimants. CEOC contends that if the guaranty litigation against CEC can be frozen for a time by an order issued by the bankruptcy judge, the bankruptcy examiner's report analyzing the disputed transactions will provide the parties with information they need to have a clear shot at negotiating an overall settlement of what amounts to a three-cornered battle among CEC, its direct creditors via CEC's guaranties to them, and CEOC's creditors, some of whom are also CEC's creditors by virtue of CEC's guaranteeing CEOC's debts.

If this analysis is correct, there is nothing in section 105(a) to bar the order sought by CEOC; for the statute, to repeat, authorizes "any order … that is … appropriate to carry out the provisions of" the Bankruptcy Code. Whether the temporary injunction sought by CEOC is such an "appropriate" order is a factual issue that remains to be determined.

Earlier we questioned the "same acts" limitation that the bankruptcy judge and the district judge placed on section 105(a). But the guaranty plaintiffs (CEC's creditors) argue that two decisions by this court have endorsed that limitation: *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir. 1998), and *In re Teknek, LLC*, 563 F.3d 639 (7th Cir. 2009). The issue in *Fisher* was "whether claims that the defrauded investors have against the accomplices [of the fraudster, whose corporation was in bankruptcy] and against the futures commission merchant through which they conducted much of their business may be stayed for the duration of the [corporation's] bankruptcy proceeding." 155 F.3d at 877. The bankruptcy court stayed (i.e., enjoined) the investors' suits under 11 U.S.C. § 105(a). *Id.* at 878. We approved, saying that

> while the [investor] Plaintiffs' claims are not "property of" the estate [and so were not subject to an automatic stay under 11 U.S.C. § 362], it is difficult to imagine how those claims could be more closely "related to" it [under 28 U.S.C. § 1334(b)]. They are claims to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy. We can think of no hypothetical change to this case which would bring it closer to a "property of" case without converting it into one.

Id. at 882. That was a more clear-cut case for relief under section 105(a) than this one, given that "both parties were pur-

suing the same dollars from the same defendants to redress the same harms." *Id.* at 879. But it doesn't follow that a less clear-cut case is necessarily beyond the reach of section 105(a). In both *Fisher* and the present case the issuance of a temporary injunction against a class of creditors could well facilitate a prompt and orderly wind-up of the bankruptcy.

Teknek approves *Fisher*, remarking that in that case "even though the investor-creditors' fraud claims were personal and distinct from claims that could be brought by other creditors, they were so related to the bankruptcy proceeding that, if not temporarily enjoined, they would have derailed those proceedings' efforts to recover for the class of creditors as a whole." 563 F.3d at 648. But *Teknek* in contrast was a case involving "separate acts, which caused separate injuries to two separate companies, only one of which is in bankruptcy." *Id.* at 649. The plaintiff had won a patent-infringement case against two companies—one of which later filed for bankruptcy—and subsequently obtained an enlargement of the judgment to reach shareholders (called "alter egos") of the defendants. The plaintiff claimed that the alter egos had looted the two companies by moving the companies' assets into a holding company in order to avoid having to pay the judgment. The bankruptcy trustee sought to enjoin the plaintiff from enforcing its judgment against the shareholders, arguing that they and the holding company had indeed looted the bankrupt entity; thus the trustee was seeking recovery from the same pool of money as the patent plaintiff. We ruled that the patent claims were not sufficiently related to the debtor's bankruptcy to allow such an injunction to be issued. *Id.* at 649–50. The patent holder's suit had been against both Teknek (the bankrupt company) and a firm called Electronics (the non-bankrupt company).

We noted that the "alter egos [had] looted both Teknek and Electronics[,] … [which were] separate acts, *which caused separate injuries to two separate companies, only one of which is in bankruptcy*." *Id.* at 649 (emphasis added). Because the entire judgment could be collected from the non-bankrupt entity, Electronics, there was no reason to allow Teknek to obtain an injunction that would prevent the patent holder from going after Electronics**.** In the present case, in contrast, the misconduct alleged in the third-party litigation (misconduct by CEC) directly harms the debtor, and concerns transactions that are closely related to, and sometimes overlapping with, those challenged in the bankruptcy.

Furthermore, the patent holder was Teknek's only major creditor, so allowing the third-party action of that creditor to proceed would not affect a larger group of creditors in the bankruptcy. *Id.* at 651. (Indeed we were puzzled why the case was even in bankruptcy, given what was effectively a creditor class consisting of only one creditor. *Id.* at 650. The usual purpose of bankruptcy is to allocate the distribution of the bankrupt's assets among creditors.) In our case the potential injuries to the numerous creditors in the bankruptcy (whose prospects depend on CEOC's assets), and to the guaranty plaintiffs (whose loans CEC has guaranteed), are not readily separable. Both injuries, according to CEOC, stem from CEC's broad scheme to transfer CEOC's assets to itself. Indeed, some of the same creditors have claims against both CEOC and CEC for repayment of the same loans, and so their ability to recover from CEC (the guarantor) may depend on the amount they can recover directly from CEOC, their borrower. And were guarantor liability to be imposed on CEC, CEC's ability to satisfy CEOC's fraudulent-

conveyance claims against it—and thus pay other creditors—would be impaired.

We don't say that the stay sought by CEOC must be granted—that's an issue for the bankruptcy judge to resolve in the first instance—but only that both he and the district judge erred in thinking that section 105(a) as interpreted in *Fisher* and *Teknek* foreclosed such a procedure. That was a misreading of the statute and our cases. The denial of the injunction sought by CEOC is therefore vacated and the case remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED

Exhibit B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable A. Benjamin Goldgar **Hearing Date** December 28, 2015

Bankruptcy Case No. 15 B 01145 **Adversary** No. 15 A 149

Brief Statement of Motion Caesars Entertainment Operating Co., Inc. v. BOKF, N.A.

Order denying without prejudice application to set hearing on emergency motion

Names and Addresses of moving counsel

Representing

ORDER

On December 23, 2015, the court of appeals issued an opinion vacating this court's order that denied the plaintiffs' motion for preliminary injunction and remanding for further proceedings. Now, only five days later, the plaintiffs ask to set an emergency hearing on their "notice of opinion . . . and motion for emergency request for ruling [*sic*]." No notice of the opinion is necessary, of course. As for the request for a ruling on remand, the court of appeals only entered judgment today and has not yet issued its mandate. *See* Fed. R. App. P. 41. The mandate is not due to issue until 7 days after the time to file a petition for rehearing expires, *id.*, and that time will not expire until 14 days after entry of judgment, Fed. R. App. P. 40(a) – in other words, on January 19, 2016, or later if a petition for rehearing is filed. Until the mandate issues and is docketed with the bankruptcy court, this court lacks jurisdiction to address the preliminary injunction motion on remand. *Kusay v. United States*, 62 F.3d 192, 193-94 (7th Cir. 1995). The application is therefore denied without prejudice.