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., ET AL., *Defendants-Appellees*.

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

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Appellees make the following disclosures:

1. Appellee Wilmington Saving Fund Society, FSB ("WSFS"), states that its corporate parent is WSFS Financial Corporation, a publicly-held corporation. No other publicly-held corporation owns 10% or more of stock of WSFS. Jones Day and Kelley Drye & Warren LLP have appeared for WSFS in this case.

2. Appellee BOKF, N.A. ("BOKF"), states that its corporate parent is BOK Financial Corporation, a publicly-held corporation. No other publicly-held corporation owns 10% or more of stock of BOKF. Arent Fox LLP and Foley & Lardner LLP have appeared for BOKF in this case.

3. Appellee Frederick Barton Danner ("Danner") states that he is a natural person. Grant & Eisenhofer P.A. and Gardy & Notis, LLP have appeared for Danner in this case.

4. Appellee MeehanCombs Global Credit Opportunities Master Fund, LP ("MeehanCombs"), states that it has no corporate parent and no publicly-held corporation owns 10% or more of its stock. Drinker Biddle & Reath LLP has appeared for MeehanCombs in this case.

5. Appellee Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds Trust, states that it has no corporate parent and no publicly-held corporation owns 10% or more of its stock. Drinker Biddle & Reath LLP has appeared for Relative Value-Long/Short Portfolio in this case.

6. Appellee Trilogy Portfolio Company, LLC ("Trilogy" and, collectively with Danner, MeehanCombs, and Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds Trust, the "Unsecured Noteholders") states that it has no corporate parent and no publicly-held corporation owns 10% or more of its stock. Drinker Biddle & Reath LLP has appeared for Trilogy in this case.

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I. PRELIMINARY STATEMENT

The Bankruptcy and District Courts properly denied the Debtors' request to enjoin the Appellees' lawsuits against non-debtor Caesars Entertainment Corporation ("CEC"). Those actions, pending in the United States District Court for the Southern District of New York and the Delaware Chancery Court, involve independent claims for enforcement of $4.5 billion in contractual guarantees issued by CEC. They have nothing to do with the bankruptcy case from which this appeal arises and there is no basis to restrain them.

A bankruptcy court injunction against a federal or state court is a "radical" and "extreme" measure invoked only in "extraordinary" and "drastic" circumstances. Where (as here) a debtor attempts to shield a non-debtor (particularly a controlling insider like CEC) on the premise that the bankruptcy estate also has a claim against the defendant, this Court has restricted injunctive relief to cases involving "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." *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998). In those rare instances involving competing claims for the same harm to the debtor, an injunction properly protects bankruptcy court jurisdiction over recoveries to be marshaled for all creditors.

In contrast, no injunction may issue where (as here) a third-party claim against the non-debtor is not based on the "same acts" as a claim asserted by the bankruptcy estate – where the claim does not "depend[] on the non-debtor's misconduct *with respect to the corporate debtor*" and does not "involve transfers

from the debtor to a non-debtor control person or entity." *In re Teknek, LLC*, 563 F.3d 639, 649 (7th Cir. 2009) (emphasis in original). In those "more common case[s]," typically involving an insider guarantee, the estate has no priority to the non-debtor's resources. Consequently, the third-party claim is not sufficiently related to the bankruptcy case to justify an injunction.

The Bankruptcy and District Courts found that the Appellees' claims do not arise out of the "same acts" as any claim the Debtors might assert against CEC, their controlling corporate parent. (The Debtors have asserted no such claims to date.) This is indisputably correct. The Appellees' claims are unrelated to CEC's misconduct to the Debtors. The Appellees seek to enforce CEC's independent liability on contractual guarantees under bond indentures and CEC's related violations of the Trust Indenture Act of 1939 ("TIA") in disavowing those guarantees. Nothing more.

The Debtors argue that the Bankruptcy and District Courts "imposed a rigid legal rule" that precludes injunctive relief in all cases other than those involving claims for misconduct to the debtor. This, they claim, "ma[d]e this Circuit a national outlier." The Debtors, however, ignore a key distinction. The rule established in *Fisher* and *Teknek*, as applied below, relates to cases (like this one) where the basis for a requested injunction is competition for resources of the non-debtor defendant. In those cases, "something more" is required than an allegation that the third-party claim might deplete funds potentially available to the estate. If that were not true, injunctions could halt unrelated litigation anytime the debtor asserts that it also may have a claim

against the defendant. There are, of course, *other* permissible grounds for an injunction (e.g., where an action would threaten the debtor's insurance), but none are present here.

In advancing a contrary rule, the Debtors conflate the Bankruptcy Court's *jurisdiction* to entertain their request for an injunction (not disputed here) with the permissible *scope* of injunctive relief that may be ordered. The Debtors cite "well-established precedent" confirming that a bankruptcy court has subject-matter jurisdiction to issue a third-party injunction on appropriate facts. That authority does nothing to undermine the holding below that, notwithstanding jurisdiction, *Fisher* and *Teknek* prohibit relief on the facts of this case. The decisions on appeal are not a "seismic shift" or "radical" departure from established law.

Finally, and in any event, there is no basis for this Court to impose an injunction the Bankruptcy Court declined to issue. The Bankruptcy Court made a threshold determination that "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." It did not engage in the balancing of interests necessary for injunctive relief that otherwise might be authorized. If the Court concludes that the threshold decision was erroneous, a remand would be necessary for the Bankruptcy Court to weigh the facts and consider whether and how to exercise its discretion. There are no "undisputed facts" that would support an injunction without that fact-intensive balancing analysis. If anything, the facts established at trial compel *denial* of the requested relief even had the Bankruptcy Court been empowered to grant it.

II. STATEMENT OF JURISDICTION

The Debtors' statement of jurisdiction is complete and correct.

III. STATEMENT OF THE ISSUE

Did the Bankruptcy Court abuse its discretion in refusing an injunction where the Appellees' claims are not grounded in CEC's misconduct to the Debtors, do not involve transfers from the Debtors to CEC, and do not arise out of the "same acts" as any claim the Debtors might assert against CEC?

IV. STATEMENT OF THE CASE[1]

CEC is owned primarily by affiliates of two private equity firms, Apollo Global Management ("Apollo") and TPG Capital ("TPG"), which acquired CEC in "one of largest leveraged buyouts ["LBOs"] in history." [Br. at 7; A61] CEC controls Caesars Entertainment Operating Corporation ("CEOC") and the other Debtors. [Br. at i-xxi; A59; A1080 (6/3 Tr. 86:19-20) (Millstein)] At all relevant times, officers and partners of Apollo and TPG comprised a majority of the board of directors of CEOC. [A1081 (6/3 Tr. 87:19-22) (Millstein)]

The Appellees collectively hold or represent $4.5 billion of CEOC debt. WSFS is the successor indenture trustee for $3.68 billion in second-priority senior secured notes. [Br. at 13; A61-62] BOKF is the successor indenture trustee for $750 million in other second-priority senior secured notes. [*Id.*] The Unsecured Noteholders hold or serve as a proposed class representative for $119 million of senior unsecured notes (the "Senior Unsecured Notes"). [A60]

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[1] The Appendix is cited as "A"; the Debtors' Opening Brief is cited as "Br."; and transcripts from hearings before the Bankruptcy Court are cited as "Tr."

CEC irrevocably and unconditionally guaranteed CEOC's obligations under each of the Appellees' indentures. [A60-62][2]

A. CEC Loots The Debtors Through The "Disputed Transactions."

In the LBO, CEC saddled the Debtors with more than $24 billion of debt, most of which remains unpaid. [Br. at 7-8; A61] After the LBO, it became apparent that the Debtors could not satisfy the debt foisted on them by CEC.

Consequently, faced with CEOC's insolvency and the prospect that CEOC creditors would be entitled to all of the recoveries in a bankruptcy case, CEC caused the Debtors to engage in dozens of "capital market transactions" that, in the aggregate, shifted billions of dollars of assets away from the Debtors to CEC and affiliates. [Br. at 8-10; A62-63] Those transactions "create[d] a 'Good Caesars' (CEC and its affiliates, holding prime assets that once belonged to CEOC) and a 'Bad Caesars' (CEOC, left with barely profitable or unprofitable properties and burdened with debt remaining from the 2008 leveraged buyout)." [A63]

The Debtors euphemistically call them the "Disputed Transactions." [Br. at 8] They admit that "it would require a contribution of at least $1.5 billion from CEC to settle and release claims that the Debtors or their creditors could assert related to, among other things, the Disputed Transactions." [Br. at 10-11; A69-70]

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[2] The Debtors call these guarantees "of convenience" [Br. at 3] but cite nothing to support their claim that CEC's irrevocable and unconditional promise to pay CEOC debt is not enforceable in accordance with the plain language of the indentures.

B. CEC Disavows Its Guarantees Of CEOC Debt.

Having siphoned value away from the Debtors through the Disputed Transactions, CEC then engineered several pretexts for disavowal of its own liability under the guarantees of CEOC debt. [Br. at 9-10; A63-65] First, in May 2014, at the same time as a transaction known as the "B-7 Refinancing," CEC sold 5% of its CEOC common stock for a token $6.15 million and announced that the guarantees were "automatically released" as a result of the sale. [A64] In June 2014, CEC then allegedly transferred an additional 6% of its CEOC stock to an employee benefits plan and asserted that this also released the guarantees. [A64] Finally, in an August 2014 transaction known as the "Senior Unsecured Notes Transaction," CEOC amended indentures for the Senior Unsecured Notes to remove CEC's guarantee, and CEC claimed that this too discharged its guarantee of the WSFS and BOKF notes. [A64-65]

This "did not sit well" with the Appellees, who commenced four separate actions to establish and enforce CEC's liability on the disavowed guarantees. [A65] In August 2014, WSFS filed an action in Delaware Chancery Court asserting claims for breach of contract for denial of the guarantee and a declaration that the guarantee "has not been released and remains valid, binding and enforceable against CEC." [A195 (WSFS Compl.)][3] In September and October 2014, the Unsecured Noteholders filed actions against CEC in the

[3] WSFS also asserted derivative and similar claims against other defendants relating to the Disputed Transactions. Due to the bankruptcy case, those claims are stayed and not relevant to this appeal. [A65 ("Of the nine counts in Wilmington's complaint, two are relevant here.")]

Southern District of New York, asserting claims for breach of contract and violation of the TIA resulting from CEC's disavowal of the guarantees. [A704 (MeehanCombs Compl.), A757 (Danner Compl.)] Finally, in March 2015, BOKF filed suit against CEC in the Southern District of New York seeking similar relief. [A868 (BOKF Compl.)]

All four actions (the "Guarantee Actions") are pending. Federal District Judge Scheindlin has set trial dates in March 2016 for the BOKF action and May 2016 for the MeehanCombs and Danner actions. No trial date has been established in the WSFS action. Motions for partial summary judgment filed by MeehanCombs and Danner are pending at the time of this brief.

In an earlier ruling on a motion for partial summary judgment by BOKF, Judge Scheindlin rejected several of CEC's core defenses. Judge Scheindlin held that CEC's contention that its guarantee was "nothing more than a 'guarantee of convenience' to facilitate regulatory filings" and therefore terminable at will "fail[ed] under the most basic rule of contract construction," and that "[t]he plain language of [the TIA] does not support CEC's argument" that the Debtors must have been insolvent at the time of the guarantee-stripping transactions for the TIA to be implicated. *BOKF, N.A. v. Caesars Entm't Corp.*, No. 15-cv-1561, 2015 WL 5076785, *6-7, *10-11 (S.D.N.Y. Aug. 27, 2015).[4]

[4] Although it was the prevailing party (having defeated summary judgment), CEC petitioned the Second Circuit for leave to appeal that interlocutory order. That request is pending at the time of this brief.

C. CEC Dodges Bankruptcy.

Due in part to the Disputed Transactions, the Debtors are insolvent and unable to pay their debts, including the massive LBO obligations. [A62] As a consequence, CEC forced the Debtors into bankruptcy earlier this year. [A71-72] CEC, however, did not seek bankruptcy protection itself. [A59-60] By staying out of bankruptcy, CEC avoids the Bankruptcy Code's rule of absolute priority, which would wipe out equity obtained by the sponsors (Apollo and TPG) in the ill-fated LBO. *See* 11 U.S.C. § 1129(b)(2) (equity cancelled unless creditors paid in full). CEC also avoids hundreds of millions of dollars of taxes that would result if it lost control of the Debtors, as would happen in a CEC bankruptcy case. [A1159-60 (6/4 Tr. 25:10-26:5, 27:6-9, 27:21-23) (Zelin)]

Instead of filing for bankruptcy itself, CEC directed the Debtors to pursue a "restructuring" that, in exchange for a "contribution" purportedly worth "more than $1.5 billion" (but actually worth far less), would leave CEC with continuing ownership of the enterprise while releasing billions of dollars of *CEC's own debt*, including liability on contractual guarantees to the Appellees. [Br. at 11; A70-71] If implemented, CEC would have the functional equivalent of a bankruptcy discharge, with the LBO sponsors keeping their equity, CEC avoiding looming tax liability, and the Appellees left with pennies on the dollar for their claims against the Debtors *and* CEC.[5]

[5] The Appellees will establish to the Bankruptcy Court, if necessary and at the appropriate time, that a release of their claims against non-debtor CEC is not permitted. *See, e.g.*, *In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009) ("A nondebtor release should only be approved in rare cases . . . because it is a device that lends itself to abuse. This is especially true when

D. The Bankruptcy Court Declines To Enjoin Guarantee Claims Against CEC And The District Court Affirms.

Because CEC did not file for bankruptcy, it is not protected by the Bankruptcy Code's automatic stay of litigation against it. *See* 11 U.S.C. § 362(a); *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of the Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998) ("The stay . . . protects only the debtor."). In order to buy time to implement its self-serving restructuring scheme, CEC directed the Debtors to seek an injunction of the unstayed Guarantee Actions. [A72-73]

At CEC's behest, the Debtors claimed that, without an injunction, their "reorganization would be imperiled . . . because CEC would be unable to make the financial contribution on which the reorganization depends if the guarantees were reinstated." [A72][6] The Debtors warned that, if the Guarantee Actions "are allowed to proceed and are successful, the [Appellees] will take for themselves the assets that would otherwise fund the debtors' reorganization. CEC's contribution will disappear." [A79] At the same time, the Debtors contradictorily asserted that "an adverse ruling in the guarantee

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the release provides blanket immunity: In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.") (quotations omitted). The Appellees also will show that a plan providing for CEC to retain its equity cannot be confirmed. *See, e.g.*, *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 454 (1999) (new value plan "doomed" without opportunity "to compete for [the] equity or to propose a competing reorganization plan"); *In re Castleton Plaza, LP*, 707 F.3d 821, 821-22 (7th Cir. 2013) (same).

[6] The Debtors also argued that the Guarantee Actions "could deplete the insurance that CEOC shares with CEC." [A72] The Bankruptcy Court rejected that argument, [A83-87], and the Debtors abandoned it on appeal.

actions may force CEC to make its own bankruptcy filing," [Br. at 56], which would result in an automatic stay of any action to "take" CEC's assets.[7]

Following a two-day trial and extensive briefing, the Bankruptcy Court declined to issue an injunction. It concluded that, even if facts alleged in support of the injunction had been proven (they were not), "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." [A79] The Court explained:

> [T]he debtors have not shown . . . that the estate claims [against CEC] arise out of the 'same acts' as the claims in the Delaware and New York actions. The claims in those actions are based on either the B-7 Refinancing or the Senior Unsecured Notes Transaction. Not only have the debtors failed to show the estates have the same claims arising out of those transactions (and it is hard to see how the estates could), the debtors have failed to show how the estates have *any* claims against CEC arising out of them. Without competing estate claims based on the same acts – the breach of the indentures and notes and the release of CEC's guarantees – the debtors have no case for a section 105(a) injunction.

[A79-80 (emphasis in original) (footnote omitted)]

The Debtors appealed and requested certification of direct review by this Court. In denying certification, the Bankruptcy Court found that "[t]he debtors' appeal raises questions about whether *Fisher* and *Teknek* apply to the facts of this case . . . [, which] is a mixed question of law and fact, not a 'question of law' for purposes of the [certification] statute." [A1278 (7/29 Tr. 6:18-23)] The

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[7] A CEC witness claimed that CEC would file for bankruptcy in "*early August*, and possibly even sooner," if an injunction were denied, ostensibly in order to prevent a ruling on BOKF's motion for summary judgment. [A1135 (6/3 Tr. 209:23) (Zelin) (emphasis added)] That testimony from June 2015 – intended to frighten the Bankruptcy Court into issuing an injunction – has been discredited by the passage of time.

Court held that "a direct appeal will [not] materially advance anything" because, even if the Debtors prevailed, an appellate court could not grant the injunction they sought. Instead, "[i]f the order is reversed, the proceeding will be remanded to this court to determine whether the debtors satisfied the elements needed for injunctive relief." Hence, "a great deal of litigation lies ahead." [A1279-81 (7/29 Tr. 7:19-9:3)]

The District Court affirmed in all respects, holding that "the bankruptcy court's conclusion that the Debtors are not entitled to an injunction is not erroneous as a matter of law and is not an abuse of discretion." [A54] The Court observed that "[i]t is not difficult to understand why the bankruptcy court held as it did." [A49]

> [U]nder any reading of *Fisher* and *Teknek*, it is obvious that whether a third-party's claims against a non-debtor arise out of the same acts as the estate's claims is a key component of the determination of whether a § 105(a) injunction is permitted. Whether it is a requirement for injunctive relief, as the bankruptcy court held, or whether it is simply a key factor that may tip the scale when no other factors mandate an injunction, is an issue that need not be resolved here. In the instant case, as in *Teknek*, defendants' claims involve the same pool of money as Debtors' claims, and that money is in the possession of the same defendant. The claims are not, however, based on the same acts. No other factors compel, or even support the issuance of an injunction.

[A52][8]

[8] The Debtors quote snippets of remarks made at oral argument to suggest that the District Court was uncertain about its decision. [Br. at 21] These passages from the *written opinion* make clear that the Court harbored no doubt about the correctness of its ruling.

V. SUMMARY OF ARGUMENT

An injunction against a federal or state court is an "extraordinary and drastic remedy" warranted "only in unusual circumstances," not to be employed "as a panacea for all ills confronted in the bankruptcy case" or because it might "be a boon to the reorganization process."

The Bankruptcy Court Did Not Abuse Its Discretion In Denying The Injunction. This case involves no such extreme circumstances. The Debtors merely asked for an injunction to protect the assets of CEC, their non-debtor parent, so that the Debtors might someday try to recover those assets for the bankruptcy estate. In *Fisher* and *Teknek* this Court held that, when faced with such a request, a bankruptcy court may issue injunctive relief only when the bankruptcy estate and the third-party litigant have claims based on the "same acts" of misconduct by the non-debtor defendant to the debtor. Only in those unusual cases is there sufficient risk to the bankruptcy court's jurisdiction over estate assets to justify an injunction against a fellow court.

The Bankruptcy and District Courts correctly concluded that an injunction was not warranted here because the Appellees' claims for enforcement of CEC's disavowed guarantees arise from entirely different acts than the bankruptcy estate's potential avoidance claims relating to the Disputed Transactions. Unlike the Debtors' claims, the Appellees' claims have nothing to do with CEC's abuse of the Debtors. Accordingly, under *Fisher* and *Teknek*, there is no basis for the Debtors' requested injunction.

The Debtors Cite No Relevant Conflicting Authority. In arguing to the contrary, the Debtors confuse the Bankruptcy Court's *jurisdiction* with its *power* to enter an injunction on the facts presented. They rely on decisions from this Court that address bankruptcy court jurisdiction generally, while avoiding controlling authority (*Fisher* and *Teknek*) that limits the bounds of injunctive relief that may be ordered by a court with jurisdiction.

The out-of-circuit and bankruptcy court decisions cited by the Debtors do not conflict with *Fisher* and *Teknek* or render the Court a "national outlier." Those cases involve circumstances not present here (preservation of insurance, "distraction" of a closely-held debtor's principal, enforcement of previously-entered judgments, etc.). None authorized an injunction solely because a claim against a non-debtor might imperil a source of recovery for the bankruptcy estate's own claims, based on different acts, against the defendant.

Remand Is Necessary If The Court Finds Error. The Bankruptcy Court made a threshold determination that *Fisher* and *Teknek* prohibit an injunction on the facts alleged by the Debtors. It neither considered nor weighed the evidence that otherwise would determine whether injunctive relief should be ordered. In the event of reversal, remand would be required so that the Bankruptcy Court could engage in the fact-intensive balancing analysis necessary for discretionary injunctive relief.

In any event, there are no undisputed facts that support, much less compel, an injunction here. Given CEC's domination of the Debtors, it would be profoundly inequitable to enjoin the Appellees so that the Debtors can try to

discharge CEC's liabilities without adjudication of the guarantee claims. The Appellees have independent rights against CEC and are not "jumping the line." The Guarantee Actions do not threaten the bankruptcy estate, which has multiple sources of recovery other than CEC, and they do not risk any value-maximizing settlement because CEC's "contribution" is neither valuable nor designed to enhance creditor recoveries.

The Debtors in fact concede that the Guarantee Actions do not threaten a successful reorganization at all, merely that they might "derail" the sweetheart deal they "negotiated" with their controlling corporate parent and "temporarily" delay their exit from bankruptcy. That would not justify an injunction in any court, particularly given the strong public interest in enforcement of commercial guarantees and the prejudice the Appellees would suffer from an injunction as requested.

VI. STANDARD OF REVIEW

"[D]enial of a preliminary injunction is reviewed for abuse of discretion." *Goodman, D.C. v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005). "Under this standard, we reverse only where no reasonable person could take the view adopted by the [trial] court." *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005) (alteration in original) (quotation omitted). "[I]t is not enough that we think we would have acted differently in the [trial] judge's shoes; we must have a strong conviction that he exceeded the permissible bounds of judgment." *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 595 (7th Cir. 1986).

VII. ARGUMENT

"[S]uits against a debtor's guarantor . . . are allowed to proceed" absent extreme circumstances. *In re Gander Partners LLC*, 432 B.R. 781, 784-85 (Bankr. N.D. Ill. 2010); *see also Teknek*, 563 F.3d at 649 (noting "more common case" in which a claimant may sue the debtor's guarantor); *Fisher*, 155 F.3d at 882 (same); *In re Hendrix*, 986 F.2d 195, 197 (7th Cir. 1993) ("suit against a guarantor of the bankrupt's debt" not discharged); *In re Lyondell Chem. Co.*, 402 B.R. 571, 593 (Bankr. S.D.N.Y. 2009) ("guaranties should be respected and honored wherever possible, and . . . courts should be wary of placing limits on the enforcement of commercial guaranties").

The Debtors nevertheless tried to restrain the Guarantee Actions by invoking section 105(a) of the Bankruptcy Code, which provides that "[t]he court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). On appeal, they argue that section 105(a) authorizes injunctive relief in virtually unlimited circumstances. [Br. at 29]

Wrong. "Although expansively phrased, section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes a roving commission to do equity. Instead, the equitable discretion conferred upon the bankruptcy court by section 105(a) is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code." *Vill. of Rosemont v. Jaffe*, 482 F.3d 926, 935 (7th Cir. 2007) (citation omitted); *see also Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir.

2005) ("Despite the open-ended language of § 105(a), courts have carefully limited the circumstances in which it should be used. Otherwise, there is a real risk that more particular restrictions found throughout the Code would amount to nothing, because the court could always use the residual equitable authority of § 105(a)."); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004) ("the power conferred by § 105(a) is one to implement rather than override").

Simply put, "the power granted to the bankruptcy courts under section 105 is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case." 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (16th ed. 2015). Most pertinent here, courts tread very carefully when considering an injunction to protect a non-debtor like CEC from litigation by its own creditors. "[F]or one court to meddle with proceedings in another court, especially the court of a different sovereign, is no small matter." [A82] *See, e.g.*, *In re Phar-Mor, Inc. Sec. Litig.*, 166 B.R. 57, 62 (W.D. Pa. 1994) ("We have little doubt that granting a stay of the Creditor Actions would be a boon to the Debtors' reorganization process, but we will not, in furtherance of that goal, trample the rights of the Creditor-Defendants to assert their independent and distinct claims against a non-bankrupt third party.").

This is because an injunction in favor of a non-debtor not only goes beyond, and can conflict with, the limited statutory stay, 11 U.S.C. § 362(a), but also nullifies "the general principle that to enjoy the benefits of bankruptcy a recipient needs to suffer the burdens." *In re Saxby's Coffee Worldwide, LLC*, 440 B.R. 369, 378 (Bankr. E.D. Pa. 2009) (quotation omitted); *see, e.g.*, *In re*

Saleh, 427 B.R. 415, 421 (Bankr. N.D. Ohio 2010) (injunction "not only deprives [claimant] of the benefits of its bargain, but also permits the nondebtor party to receive a major benefit of the bankruptcy process without having to be subject to any of its burdens and safeguards") (quotation omitted).

Accordingly, an injunction against a third-party action "is considered an 'extraordinary and drastic remedy' to be used only in 'unusual circumstances.'" [A82 (quoting *In re Third Eighty-Ninth Assocs.*, 138 B.R. 144, 146 (S.D.N.Y. 1992), and *Saxby's Coffee*, 440 B.R. at 379)]; *see, e.g.*, *In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991) ("extraordinary exercise of discretion"); *Saleh*, 427 B.R. at 420-21 ("radical" and "extreme").

A. The Bankruptcy Court Did Not Abuse Its Discretion.

Ignoring these basic principles, the Debtors assert that a bankruptcy court has blanket authority "to enjoin third-party actions that threaten the bankruptcy estate." [Br. at 4] Wrong again.

As shown below, the *scope* of relief available to a debtor who seeks to protect a non-debtor from third-party litigation is narrow. A bankruptcy court cannot enjoin any action that may "threaten" the bankruptcy estate. An injunction is available only if the bankruptcy estate and a third party have claims based on the "same acts" involving the defendant's misconduct to the debtor ("seemingly always" involving transfers from the debtor to an insider).

Here, the Appellees' guarantee claims do not depend on CEC's misconduct to the Debtors. Consequently, the Bankruptcy Court did not abuse its discretion in denying the requested injunction.

1. Under *Fisher* And *Teknek*, An Injunction May Not Shield A Non-Debtor Unless The Bankruptcy Estate And Third-Party Litigant Have Claims Based On The "Same Acts" Of Misconduct To The Debtor.

The Bankruptcy Court began with the observation that, before a court may engage in a balancing of the equities for issuance of an injunction, "the case must be one in which relief under section 105(a) is possible." [A75]; *see, e.g.*, *Phar-Mor*, 166 B.R. at 61 ("before we may consider the enumerated factors for the issuance of an injunction, we must determine whether the relief requested is contemplated within the Code, or whether such relief would create rights in the Debtors which were heretofore non-existent"). To determine whether the injunction requested by the Debtors was one it was authorized to issue, the Bankruptcy Court examined this Court's controlling decisions in *Fisher* and *Teknek*.

Fisher. In *Fisher*, investors filed fraud claims against accomplices of the debtor. 155 F.3d at 878. The bankruptcy trustee filed similar claims against the same defendants and sought to enjoin the investors' case. The bankruptcy court held that the investor claims were property of the estate (thus subject to the automatic stay) and also issued a prophylactic injunction. *Id.* at 878-79.

This Court ultimately affirmed, explaining that "a bankruptcy court can enjoin proceedings in other courts when it is satisfied that such proceedings would defeat or impair its jurisdiction over the case before it." *Id.* at 882 (citation omitted). On the facts presented, an injunction was authorized because the investors' claims were a mirror image of those brought by the bankruptcy trustee: "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." *Id.*

The critical issue was whether "the claims of the [trustee] and the claims of the creditors . . . are so closely related that allowing the creditors to convert the bankruptcy proceeding into a race to the courthouse would derail the bankruptcy proceedings." *Id.* at 883. Because it was "difficult to imagine how [the investor] claims could be more closely 'related to'" the trustee's claims, the investor claims were found to "defeat or impair" the bankruptcy court's jurisdiction over estate resources (claims for misconduct against the debtor) for the benefit of creditors generally. *Id.* at 882.

Teknek. Decided eleven years later, *Teknek* involved an attempt by a creditor (SDI) to enforce a judgment against individuals who were "alter egos" of the debtor (Teknek) and a non-debtor affiliate (Electronics). 563 F.3d at 642. The bankruptcy trustee asserted "identical" claims on the judgment against the alter egos. *Id.* at 642-43. Like the Debtors here, the trustee argued that SDI's pursuit of the claim would harm the bankruptcy estate by eliminating assets the trustee might recover from the defendants. *Id.* at 643, 645. The bankruptcy court enjoined the action, *id.* at 642-43; the district court reversed, *id.* at 643-44; and this Court affirmed the district court.

The Court held that SDI's claim could not be enjoined, even though it would diminish funds otherwise available to the estate, *because SDI did not seek recovery for harm to the debtor*. *Id.* at 649 (SDI's claim did "not depend on the alter egos' misconduct with respect to the debtor"). The Court

distinguished its earlier decisions in *Fisher* and *Koch Refining v. Farmers Union Central Exchange*, 831 F.2d 1339 (7th Cir. 1987), explaining that:

> In both of those cases, the creditors' claims against the non-debtor fiduciaries depended on the non-debtor's misconduct *with respect to the corporate debtor*. . . . In this regard, general claims and claims that are "related to" the bankruptcy seemingly always involve transfers *from the debtor* to a non-debtor control person or entity.

Id. at 649 (emphasis in original).

That is the defining principle. A bankruptcy court cannot issue an "extraordinary" injunction against another court unless there are competing claims dependent on the same harm to the debtor – where the claims depend on the defendant's "misconduct with respect to the debtor," "seemingly always" in the context of transfers made from the debtor to an insider. Only then might the litigation "defeat or impair" the bankruptcy court's jurisdiction.

Thus, *Teknek* vacated the injunction even "though SDI's claims involve the same pool of money as the trustee's claims, and that money is in the possession of the same defendants." *Id.* Why? Because *"the claims are not based on the same acts."* *Id.* (emphasis added). SDI's claims did not imperil bankruptcy court jurisdiction over estate assets and no injunction was authorized.

2. <u>The Courts Below Properly Applied *Fisher* And *Teknek*</u>.

The Bankruptcy and District Courts followed *Fisher* and *Teknek* to the letter. The Bankruptcy Court concluded that,

> Under *Fisher* and *Teknek*, . . . a bankruptcy court can employ section 105(a) to enjoin third-party claims against a non-debtor in another court in favor of the bankruptcy estate's claims only if the

> third party's claims are sufficiently related to the bankruptcy case. That will be true only if both sets of claims are claims to the same assets in possession of the same defendants, and both sets of claims arise out of the same acts.

[A78] The District Court agreed, holding that "under any reading of *Fisher* and *Teknek*, it is obvious that whether a third-party's claims against a non-debtor arise out of the same acts as the estate's claims is a key component of the determination of whether a § 105(a) injunction is permitted." [A52]

After comparing the Appellees' claims (for enforcement of CEC's disavowed guarantees) to the bankruptcy estate's unasserted avoidance claims (relating to the Disputed Transactions), the Bankruptcy Court concluded that "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." [A79] It observed that the Appellees' claims are, at the core, claims for breach of contract relating to CEC's disavowal of the guarantees in 2014. [A79-81] In contrast, the estate claims arising from the Disputed Transactions – which occurred over a period of more than five years – sound in "avoidable preferences and fraudulent transfers." [A69-70]

The Bankruptcy Court ultimately found that:

> Not only have the debtors failed to show the estates have the same claims arising out of those transactions (and it is hard to see how the estates could), the debtors have failed to show the estates have *any* claims against CEC arising out of them. Without competing estate claims based on the same acts – the breach of the indentures and notes and the release of CEC's guarantees – the debtors have no case for a section 105(a) injunction.

[A80 (emphasis in original)] The Court noted that the Debtors never articulated any relationship between the two sets of claims, concluding that "[i]t is fair to

infer that the debtors have not explained how the estates' claims and the defendants' claims arise out of the same acts because they do not." [A81]

The District Court agreed that the Appellees' "claims against CEC do not in any way depend on CEC's misconduct with respect to CEOC. [The] claims arise out of CEC's failure to honor guarantee agreements entered by CEC well before any of the alleged Disputed Transactions." [A51]

a. Fisher *And* Teknek *Require More Than "Overlapping And Closely Related Acts."*

The Debtors misinterpret *Fisher* and *Teknek* to require only "overlapping and closely related acts of misconduct by a non-debtor inflicted against or involving the debtor." [Br. at 45 (quotation omitted)] This misreads the cases. If "closely related acts of misconduct" were sufficient, *Teknek* would have affirmed the injunction. The misconduct grounding the bankruptcy trustee's claims in *Teknek* was closely related to the misconduct that grounded SDI's claim – misappropriation of assets from the debtor and its affiliate. 563 F.3d at 642-43. This Court required more – specifically, that the claims involve the *same harm to the debtor*. Because SDI had claims that did not involve misconduct to the debtor, the injunction could not stand.

Similarly, in *Fisher* an injunction was appropriate only because the investors stood "in exactly the same position as the rest of the aggrieved investors, pursuing identical resources for redress of identical, if individual harms." 155 F.3d at 881. In that circumstance, it was appropriate for the investors to "wait their turn behind the trustee, who has the responsibility to recover assets for the estate on behalf of the creditors as a whole." *Id.*

Here, the Appellees have independent claims against CEC for enforcement of the guarantees. *Those claims have nothing to do with CEC's misconduct to the Debtors*. Indeed, CEC's attempt to strip the guarantees did not harm the Debtors in any way and, as the courts below noted, the Debtors concede that they have no claims with respect to the guarantee-stripping transactions. [A52 ("Debtors have admitted that they have no claim against CEC based on either the B7 Refinancing or the Senior Unsecured Notes Transaction"); A80 ("James Millstein, financial advisor and investment banker to the debtors, testified that CEOC has no such claims."); A1071 and A1104 (6/3 Tr. 75:1-6 and 132:14-16) (Millstein)] The only stated basis for injunctive relief is the alleged threat to CEC's resources. Under *Teknek*, a threat to resources based on "overlapping" or "closely related" facts is not enough.

Implicitly acknowledging that *Teknek* is fatal to their case, the Debtors attempt to distinguish it.[9] They claim that *Teknek* did not address the bankruptcy court's injunction, only its determination regarding the automatic stay. [Br. at 40-41] The District Court correctly rejected that assertion. [A53 ("Debtors' reading of *Teknek* is incorrect")] "*Teknek* squarely addresses the propriety of an injunction under § 105, and demonstrates that something more than the claims simply involving the same pool of assets (even if very large) is

[9] The Debtors even describe *Teknek* as "affirm[ing] a decision finding that neither § 362 nor § 105 supported an injunction." [Br. at 42] As the Debtors note elsewhere, in a bankruptcy appeal "[t]his Court looks through the district court's opinion and directly reviews the bankruptcy court's decision." [Br. at 27] *Teknek* properly is described as *reversing* the injunction, not merely affirming a "finding" of the district court.

needed to authorize the injunction. It is that something more that is missing in the instant case." [A53]

The Debtors also argue that *Teknek* is distinguishable because SDI was the debtor's only major creditor and the defendants might have been able to satisfy both SDI and the bankruptcy estate. [Br. at 43-44] The Debtors posit that "[t]here would have been no need to address either of these issues if, as the bankruptcy court held here, *Teknek* adopted a 'same acts' requirement." [Br. at 44] But the Court in *Teknek* actually *rejected* that very argument: "[W]e do not put much weight on the fact that SDI is the sole creditor in the bankruptcy case." 563 F.3d at 644; *id.* at 650 ("We do not make too much of this distinction."). *Teknek*'s holding was not based on facts on which the Court "did not put much weight" and alleged distinctions about which the Court did "not make too much."

b. *The Guarantee Claims Are Not Based On CEC's Scheme To Loot The Debtors.*

In any event, it is not true that the Appellees' claims "arise from the same allegedly broad scheme on CEC's part to transfer away CEOC assets, including the Disputed Transactions." [Br. at 47 (quotation omitted)] The claims are based on CEC's breach of its contractual guarantees and related violations of the TIA. As the Bankruptcy Court noted, "it is hard to see" how the bankruptcy estate could have *any* claim arising out of CEC's breach of the guarantees, which did not harm the Debtors in any way. The Debtors did not point to one below and they do not attempt to do so on appeal. They merely

confuse the issue by pointing to snippets of the Appellees' complaints that reference the Disputed Transactions. [Br. at 15-16][10]

As the Bankruptcy Court noted, those allegations "add flavor to [the] contract claims, nothing more." [A81] They "are not essential" to the contract claims. [A80] For enforcement of the guarantees, "[t]here is no need to plead or prove that [CEC's] breach was part of some larger scheme." [A81] As a consequence, "[t]he debtors cannot satisfy the 'same acts' requirement of *Fisher* and *Teknek* through the general air of conspiracy the [Appellees] cultivate" in their complaints. [A81]

The same is true for the Debtors' repeated quotation of District Judge Scheindlin's decision denying summary judgment on BOKF's TIA claim. [Br. at 4, 19, 26, 50] The fact that CEC's liability under the TIA might involve consideration of a larger "out-of-court restructuring" is irrelevant. As the District Court observed, "it is the defendants' claims that must relate to the debtors' potential claims, not just the issues or defenses involved in the litigation." [A51-52] The Debtors cite nothing to support their naked assertion that an injunction can issue when a non-bankruptcy court might "make specific factual findings about [a debtor's] conduct." [Br. at 51]

Similarly, the Debtors' statement that the guarantee claims "are currently being reviewed by the bankruptcy-court appointed examiner" is both

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[10] The Debtors misleadingly quote a portion of the WSFS Complaint relating to *derivative claims* asserted on behalf of the bankruptcy estate. [Br. at 17] The derivative claims are unrelated to WSFS's independent claims for enforcement of CEC's guarantee and are not at issue here. *Supra* note 3.

unsupported and false. [Br. at 19] The examiner is investigating "potential claims belonging to the estates," [A938], which were not harmed and have no cause of action for CEC's attempt to remove guarantees in favor the Appellees.

While focusing on the TIA claims, the Debtors simply ignore the Appellees' *contract* claims under their respective indentures. Those claims are "run-of-the-mill enforcement of a guaranty," [Br. at 3], precisely the "more common case" allowed to proceed per *Teknek*, 563 F.3d at 649, and *Fisher*, 155 F.3d at 882-83. The contract claims do not hinge on proof that the Disputed Transactions were "part of a plan to accomplish an out-of-court restructuring" nor "turn[] on the conduct of *the Debtors* and CEC in executing the Disputed Transactions." [Br. at 26 (quotations omitted) and 50 (emphasis in original)]

Consequently, the TIA and other non-contract claims raised in the Guarantee Actions are irrelevant: "It is unnecessary to go through the same analysis for the other guaranty claims: the declaratory judgment claims, TIA claims, claims for breach of the duty of good faith and fair dealing, and Danner's intentional interference with contract claim. *Unless all of the defendants' guaranty claims can be enjoined, there is no point in enjoining any of them.*" [A81 (emphasis added)]

B. The Debtors Cite No Relevant Conflicting Authority.

Unable to establish that the Guarantee Actions are based on the same acts as the bankruptcy estate's potential avoidance claims against CEC, or even that the claims are closely related to each other, the Debtors try to discredit the Bankruptcy and District Courts. They argue that the

interpretation of *Fisher* and *Teknek* below ignores Seventh Circuit precedent, "makes the Seventh Circuit a national outlier" with a "radical" and "novel legal rule that breaks from the uniform consensus across the circuits," and conflicts with various bankruptcy court decisions. [Br. at 2, 24, 34, 39 n.2] Wrong yet again.

1. The Debtors Confuse The Bankruptcy Court's Subject Matter Jurisdiction With Its Power To Issue An Injunction On The Facts Of This Case.

The Debtors cite *Fisher* for the proposition that:

> Bankruptcy courts have broad authority to enjoin third-party actions that will "affect the amount of property in the bankrupt estate" or "the allocation of property among creditors." *Fisher*, 155 F.3d at 882 (quoting *Zerand-Bernal v. Cox*, 23 F.3d 159, 161-62 (7th Cir. 1994) and *In re Memorial Estates, Inc.*, 950 F.2d 1364, 1368 (7th Cir. 1992)).

[Br. at 37] But that is selective quotation. What *Fisher* actually says is that:

> The *jurisdiction* of the bankruptcy court to stay actions in other courts extends beyond claims by and against the debtor, to include "suits to which the debtor need not be a party but which may affect the amount of property in the bankrupt estate" or "the allocation of property among creditors."

Fisher, 155 F.3d at 882 (emphasis added) (citations omitted) (first quoting *Zerand-Bernal*, 23 F.3d at 162, and then *Memorial Estates*, 950 F.2d at 1368).

The cases cited in *Fisher* addressed the reach of bankruptcy court *jurisdiction*. In *Zerand-Bernal*, for example, the Court *rejected* the contention, similar to that made here, "that any proceeding . . . that protects and enhances the value of the assets purchased at the bankruptcy sale invokes federal bankruptcy jurisdiction." 23 F.3d at 163-64. It thus held that the bankruptcy court had no jurisdiction over a request to enjoin third-party litigation against

the asset purchaser. *Id.* And *Memorial Estates* did not involve injunctive relief at all. In that case, the Court held that the bankruptcy court had *jurisdiction* to hear a foreclosure action respecting property of the estate because the dispute "affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors." 950 F.2d at 1368 (alteration in original) (citation omitted).

As the Bankruptcy Court recognized, the existence of *jurisdiction* over a particular controversy does not equate to *power* to grant the requested relief. [A74-75; A79 ("That a claim fails on the merits does not mean that the court lacked jurisdiction to hear the claim in the first place.")]

> Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act. Subject matter jurisdiction is the court's authority to entertain an action between the parties before it. Power under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction.

In re Am. Hardwoods, Inc., 885 F.2d 621, 624 (9th Cir. 1989); *see, e.g.*, *In re Otero Mills, Inc.*, 25 B.R. 1018, 1021 (D.N.M. 1982) ("[W]hat is at issue is a jurisdictional standard, not the test for whether the injunction should issue on the facts of the case. Appellant confuses these two issues.").

The Debtors conflate the Bankruptcy Court's jurisdiction with its power, in the appropriate case, to issue an injunction under the parameters established by *Fisher* and *Teknek*. [Br. at 37-38] For example, as "grounding" for *Fisher* and *Teknek*, they cite two out-of-circuit cases: *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990), for the proposition that an injunction may issue where "the outcome of the proceeding could *conceivably have an effect* on

the estate," and *G.S.F.*, for the proposition that an injunction is appropriate when the proceeding "threatens the integrity of the bankruptcy estate." [Br. at 38 (emphasis in original)]

Both cases are inapposite. *Lemco* is not an injunction case at all. In it, the Eleventh Circuit reversed an order of civil contempt, concluding that the bankruptcy court had no *jurisdiction* to enter it. 910 F.2d at 787-89. *G.S.F.* involved a question of *jurisdiction* to issue an injunction, but the First Circuit held that the "justification for the injunction here is not effect on the debtor (although the presence of such an effect certainly strengthens the case for the injunction), but protection of a federal judgment." 938 F.2d at 1475. Neither case supports the sweeping proposition advanced by the Debtors.

Jurisdiction does not equal authorization to issue an "extraordinary" injunction. As the Ninth Circuit has explained, the Debtors' argument to the contrary leads to absurdity:

> [T]he bankruptcy court stated that a preliminary injunction is proper whenever an action in another forum "could conceivably have any effect on the administration of the bankruptcy estate." That is actually the standard for determining whether the bankruptcy court has *subject matter jurisdiction* over a motion for a preliminary injunction. Whether the bankruptcy court has subject matter jurisdiction is a distinct question from whether an injunction should issue. The two inquiries cannot be identical; otherwise a bankruptcy court would be required to grant every preliminary injunction motion over which it has jurisdiction.

In re Excel Innovations, Inc., 502 F.3d 1086, 1096 (9th Cir. 2007) (emphasis in original).

The Debtors also misconstrue the other decisions of this Court that they claim conflict with *Fisher* and *Teknek*. *In re L&S Industries*, 989 F.2d 929 (7th

Cir. 1993) [cited at Br. at 29, 36], for example, affirmed *denial* of an injunction restraining the debtor's shareholder from raising counterclaims against another shareholder in state court litigation. 989 F.2d at 931-32. It had nothing to do with preservation of a defendant's assets for the estate and is not relevant here.

In re Energy Cooperative, 886 F.2d 921 (7th Cir. 1989) [cited at Br. at 29, 36], also offers no support to the Debtors. There, the debtor requested an injunction to prohibit third parties from suing a set of "Member-Owners" on claims it had settled with them. The Court held that the bankruptcy court had "the power to issue an injunction enjoining third parties from pursuing actions which are the exclusive property of the debtor estate and are dismissed pursuant to a settlement agreement." 886 F.2d at 929. The Court, however, concluded that the bankruptcy court's injunction was impermissibly broad because it could "be construed to bar not only the causes of action against the Member-Owners which are the exclusive property of the [bankruptcy] estate, but also all other claims which can be asserted against the Member-Owners in connection with their dealings with" the debtor. *Id.* at 930. The Court directed the bankruptcy court to limit the injunction to "only those claims which are the exclusive property of the [bankruptcy] estate." *Id.*

Under *Energy Cooperative*, the Bankruptcy Court has the power to enjoin third parties from suing CEC for the avoidance claims the Debtors may someday assert (but have not yet). Conversely, under *Energy Cooperative* no injunction may restrain the Appellees' guarantee claims because they are not

premised on CEC's misconduct to the Debtors and could not be asserted by the bankruptcy estate for the benefit of creditors generally. Far from establishing error, *Energy Cooperative* demonstrates the correctness of the decisions below.

2. The Bankruptcy And District Courts Did Not "Render The Seventh Circuit A National Outlier."

The Debtors are similarly misguided in asserting that the decisions below "make this Circuit a national outlier" and that "[c]ourts across the country have . . . temporarily blocked third-party actions in similar circumstances." [Br. at 32, 34] The Debtors cite seven decisions from other circuits that they claim are contrary to "the lower courts' interpretation of *Fisher* and *Teknek*," [Br. at 34], but not a single one is supportive of that claim. None sustained an injunction on the ground that a third-party claim might imperil a source of recovery on the bankruptcy estate's claims against a non-debtor defendant arising from different acts. Specifically –

- *Excel* and *Johns-Manville reversed* injunctions issued to protect the debtor's prospect of reorganization. *Excel Innovations*, 502 F.3d at 1096-99 (reversing injunction restraining arbitration involving debtor's principal); *In re Johns-Manville Corp.*, 801 F.2d 60, 63-69 (2d Cir. 1986) (reversing injunction against shareholder meeting).

- *Piccinin* and *Davis* approved injunctions issued to preserve insurance that was property of the bankruptcy estate, *In re A.H. Robins Co. (Piccinin)*, 788 F.2d 994, 1008 (4th Cir. 1986); *In re Davis*, 730 F.2d 176, 184-85 (5th Cir. 1984), an argument the Debtors have abandoned.

- *Oberg* authorized an injunction due to "the burden placed on [the debtor's] officers, directors, and employees," *In re A.H. Robins Co. (Oberg)*, 828 F.2d 1023, 1026 (4th Cir. 1987), an argument the Debtors also have abandoned. [A73]

- *DeLorean* involved an injunction of a suit against a bankruptcy trustee as an officer of the court. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1238-39, 1242 (6th Cir. 1993).

- *Western Real Estate reversed* a permanent injunction of an action against a defendant that had settled with the debtor because it, "in essence, discharged [the defendant]'s liability" to the third party. *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 598-602 (10th Cir. 1990), *modified sub nom. Abel v. W.*, 932 F.2d 898 (10th Cir. 1991).

The Debtors similarly misconstrue various lower court cases cited for the proposition that injunctions have issued "in similar circumstances." [Br. at 32] Most of the cited cases involved closely-held small businesses in which injunctions of very short duration were issued to temporarily shield a debtor's principal so that it could focus on the reorganization. *In re Paul R. Glenn Architects, Inc.*, No. 12-031208, 2013 WL 441602, at *2, *4 (Bankr. N.D. Ill. Feb. 5, 2013) (120-day injunction where litigation "divert[ed] [the] principal's time and funds which are necessary for the Debtor's reorganization"); *Gander*, 432 B.R. at 786, 789 (120-day injunction where principal unable "to attend to the Debtors' affairs and finance the Debtors' reorganization efforts"); *In re Kasual Kreation, Inc.*, 54 B.R. 915, 917 (Bankr. S.D. Fla. 1985) (41-day

injunction where two principals would "spend a substantial amount of time and money defending this action at a time when their full attention, time and efforts are required in the reorganization").

As noted, the Debtors disclaimed "distraction" as a basis for their injunction. Moreover, the bankruptcy cases have now been pending for more than ten months, far longer than any short-term injunction issued to enable a debtor's principal to focus on reorganization.[11]

Other decisions cited by the Debtors predate *Fisher* and *Teknek* and are in the same vein, involving closely-held small businesses that needed to use the personal assets of their principals to finance the reorganization. *In re Kham & Nate's Shoes No. 2, Inc.*, 97 B.R. 420, 429 (Bankr. N.D. Ill. 1989); *In re St. Petersburg Hotel Assocs.*, 37 B.R. 380, 381-82 (Bankr. M.D. Fla. 1984); *In re Lahman Mfg. Co.*, 33 B.R. 681, 683 (Bankr. D.S.D. 1983); *Otero*, 25 B.R. at 1021-22; *cf. In re Regency Realty Assocs.*, 179 B.R. 717, 719-20 (Bankr. M.D. Fla. 1995) (no injunction even where principals "intend to contribute to the settlement of the debts of the Debtor" and "their assets will be depleted" if litigation allowed to proceed).[12]

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[11] The Debtors repeatedly describe their requested injunction as "temporary," asserting that the "Appellees will still have their claims" even if an injunction is issued. [Br. at 5, 22, 23, 24, 26, 49, 58, 59] That is deceptive. The Debtors sought an injunction that would give them time to implement their plan to discharge the guarantee claims. [A1201-02 and 1208 (6/4 Tr. 203:10-204:14, 220:8-14) (Eisenberg)] If the Debtors got what they wanted, the Appellees would *never* have the ability to litigate their claims or establish CEC's liability to them.

[12] It is notable that these cases involved small, closely-held businesses because, in each, the principal effectively was the debtor. Without the

The Debtors identify just a single case – *Lyondell* – involving a large corporate enterprise in which an injunction was issued to protect a non-debtor guarantor from suit by third parties. *Lyondell*, however, fully supports the decisions below. In *Lyondell*, as here, the debtors sought to "enjoin[] creditors . . . , until confirmation, from pursuing remedies . . . against the Debtor's nondebtor parent . . . arising from guaranties of debt incurred by various of the Debtors in their dealings with those creditors." 402 B.R. at 575. The court concluded that some relief was appropriate because "irreparable injury would plainly result if an involuntary [bankruptcy] proceeding were commenced against [the debtor's parent] or its subsidiaries." *Id.* at 591.

The court, however, held that "injunctions of the breadth and duration that the Debtors request raise material public interest concerns, potentially prejudicing some creditors vis-à-vis other creditors and impairing the value of guaranties in major commercial transactions." *Id.* at 576. In particular, an injunction of the requested scope would be abusive because, "[w]here entities are insolvent, it probably is better that they enter into either an out-of-court workout, or a reorganization or restructuring under court supervision, to the end that similarly situated creditors are treated fairly." *Id.* at 594.

Accordingly, the court limited the injunction to a period of "only *60 days* – a duration that I regard as sufficient to permit the filing of the . . . insolvency proceeding [for the debtors' parent] that probably needs to be brought

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principal's time and resources, there would be no business to reorganize. In contrast, the Debtors will have "a strong operating business" and "iconic presence" even if CEC vanishes. [Br. at 57-58]

somewhere, either in the U.S. or abroad." *Id.* at 594 (emphasis added). Also, in order to "protect the value of its assets while the defendants in this adversary proceeding are restrained," the court prohibited the parent guarantor from disposing of material property or making payments outside of the ordinary course. *Id.* at 595.

Here, in contrast to *Lyondell*, the Debtors asked for an injunction to shield CEC from its creditors and keep it out of bankruptcy, not to give it an orderly period in which to file for bankruptcy (CEC has had more than *ten months* to do that). In contrast to *Lyondell*, the Debtors asked for an injunction to give them sufficient time to implement a plan to release the Appellees' claims without CEC ever having to file a bankruptcy case. And, in contrast to *Lyondell*, the Debtors proposed to let CEC dispose of its assets without restraint or judicial supervision. *Lyondell* supports, not undermines, the conclusion below that no injunction could issue here.

3. The Debtors Misunderstand *Fisher* And *Teknek*.

The Debtors accuse the courts below of "wooden formalism" and "an inappropriately rigid and narrow interpretation of 11 U.S.C. § 105(a)" with "no basis in principle or precedent." [Br. at 4, 22, 31; *id.* at 28 ("rigid legal rule"), 35 ("artificial line-drawing"), 38 ("novel, rigid rule"), 44 and 60 ("formalistic")] They claim that "[l]egions of cases . . . grant 105(a) relief in circumstances that do not even involve third-party litigation, or that do not involve claims by the debtor, . . . [and] it makes no sense to have different rules under § 105(a)." [Br. at 44-45; *id.* at 24-25]

This betrays a fundamental misunderstanding of *Fisher*, *Teknek*, and the decisions below. There are no "different rules under § 105(a)." There are different sets of *facts*, only some of which justify the extraordinary measure of enjoining litigation in other courts.

The rule of *Fisher* and *Teknek* is rooted in the core power of the bankruptcy court to protect its jurisdiction to administer property of the estate, and is limited to circumstances where that jurisdiction is threatened, as happens when a litigant pursues claims for harm to the debtor. Only then may the bankruptcy court balance the equities to determine whether injunctive relief is warranted. As the Bankruptcy Court observed, "because the purpose of a section 105(a) injunction is to protect the bankruptcy court's jurisdiction, the Seventh Circuit defined [the parameters for injunctive relief] in jurisdictional terms, permitting the bankruptcy court to enjoin third-party litigation against a non-debtor only if that litigation 'is sufficiently related to' the case before the court." [A75-76 (quoting *Fisher*, 155 F.3d at 882)]

In cases (like this one) where the basis for an injunction is a competition between the estate and a third party for resources of the defendant, more is required. Otherwise, injunctions could issue to stop litigation anytime a debtor also asserted a claim against the defendant. A threat to a defendant's resources – standing alone – simply does not threaten the bankruptcy court's jurisdiction. That is not a "rigid" rule. It is a reflection of basic principles of bankruptcy law.

There are, of course, other permissible grounds for an injunction in cases where a debtor has no claim against a defendant that is subject to suit by a third party (e.g., actions that threaten the debtor's insurance). But the premise of injunctive relief remains the same. In every instance, the litigation must sufficiently threaten the bankruptcy court's jurisdiction to justify the injunction. As the District Court held, that relationship "is missing in the instant case." [A53]

C. A Remand Is Necessary If The Court Concludes That The Bankruptcy Court Erred.

Contradicting assertions made when they sought certification of a direct appeal, [A1272 (Cert. Mot. at 5)], the Debtors now argue that this Court not only should reverse but also "direct the bankruptcy court on remand to immediately enter the Debtors' requested injunction." [Br. at 27; *id.* at 5, 52-61] The Debtors ignore the Bankruptcy Court's finding that this appeal presents "a mixed question of law and fact, not a 'question of law.'" [A1278 (7/29 Tr. 6:22-23)] They also ignore the conclusion that, "[i]f the order is reversed, the proceeding will be remanded to this court to determine whether the debtors satisfied the elements needed for injunctive relief." [A1279 (7/29 Tr. 7:23-25)]

The Bankruptcy Court was right. The issuance of an injunction depends on a fact-intensive exercise left to the discretion of the trial court in the first instance. There are no "undisputed facts" [Br. at 60] that would support, much less compel, issuance of an injunction here. If anything, "the facts found

by the bankruptcy court" [*id.*] demonstrate that an injunction is not warranted and would have been an abuse of discretion if entered.

1. A Remand Would Be Required In The Event Of Reversal.

Because it concluded that the requested injunction fell outside the bounds of *Fisher* and *Teknek*, the Bankruptcy Court did not weigh "the traditional elements for injunctive relief." [A75] It observed that, "because a Section 105(a) injunction isn't a possibility here, I've had no occasion to consider those elements. The motion simply never made it out of the *Fisher-Teknek* starting gate." [Tr. 7/22 at 23:7-11][13]

The "traditional elements" entail a fact-intensive balancing analysis performed on a "case by case" basis and subject to abuse of discretion review. *W. Real Estate*, 922 F.2d at 599 (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.02 (15th ed. 1990)). Accordingly, if a trial court denies injunctive relief on an erroneous threshold basis without engaging in the balancing inquiry, the appellate court must remand for fact-finding and consideration. *E.g.*, *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1254-55 (3d Cir. 1983).

Even when the trial court does balance the equities, an appellate court that reverses denial of an injunction almost always will remand for reconsideration. *See, e.g.*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 432-33 (6th Cir. 2014) (remanding for "district court to examine . . . the legal, factual, and equitable considerations now in place"); *Reliant Energy*

[13] This transcript was not included as part of the appellate record. It is available on the Bankruptcy Court's docket at ECF 1982.

Servs. v. Enron Canada Corp., 349 F.3d 816, 826 (5th Cir. 2003) (remanding so that "district court may determine whether [the appellant] has established the necessary elements to entitle it to a preliminary injunction"); *Hughes Network Sys. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 695 (4th Cir. 1994) ("While we might try to evaluate the relevant . . . factors ourselves, we believe the district court is in much the better position to do so.").

Further, an appellate court will not just "direct the bankruptcy court" to enter the requested injunction in the rare case in which undisputed facts demonstrate that injunctive relief should be ordered. [Br. at 27] This is because the bankruptcy court has "broad powers to shape the injunction so as to minimize the harm to the creditor." 2 COLLIER, *supra*, ¶ 105.03[1][c]. The need for a carefully-tailored injunction is particularly acute in the context of a non-debtor guarantor like CEC:

> The creditor's argument . . . is quite potent. It has a bargained-for nonbankruptcy right to pursue the guarantor independent of the debtor's bankruptcy case. Courts have rightly required a substantial harm to the estate to outweigh any tampering with this right. Of course, as courts of equity bankruptcy courts can fashion the decree to minimize this harm. Conditions such as restrictions on transfers of the guarantor's assets, limited time periods, and satisfactory progress towards reorganization can all be used to minimize harm.

Id. ¶ 105.04[1][a][ii]; *see, e.g.*, *Lyondell*, 402 B.R. at 595 (prohibiting guarantor from transferring assets and executing transactions outside of the ordinary course); *Lahman*, 33 B.R. at 684 (same). The Debtors' authority confirms this. *See League of Wilderness Def. v. Connaughton*, 752 F.3d 755, 767 (9th Cir.

2014) (remanding for district court to "tail[or] [the] remedy to the specific harm alleged") (citation omitted).[14]

2. The Facts Do Not Warrant An Injunction Even If The Bankruptcy Court Had Power To Grant Relief.

In any event, the facts established at trial do not support injunctive relief. As an overarching matter, an injunction to protect CEC would be profoundly inequitable. The Debtors attempt to cultivate the impression that CEC is a bitter adversary – an entity that "siphoned off assets from them" – from whom they extracted a hard-fought settlement of estate claims relating to CEC's abuse resulting in "substantial" value for the estate. [Br. at 3, 10-11, 15-16, 53-56]

In reality, CEC controls and directs the Debtors, who are governed by a board dominated by officers and partners of CEC. Before bankruptcy, CEC even caused the Debtors to file a lawsuit seeking a declaration that "Caesars [and] its directors have not breached their fiduciary duties, engaged in any fraudulent transfer, or otherwise engaged in any violation of law" in connection with the Disputed Transactions. *Wilmington Sav. Fund Soc'y v. Caesars Entm't Corp.*, No. 10004, 2015 WL 1306754, *3 (Del. Ch. Mar. 18, 2015). Such relief would have eliminated the estate claims the Debtors now say they have

[14] The Debtors argued below that "[i]t is too late for Appellees to complain about the requested injunction's scope [because,] [d]espite having every opportunity to raise those issues at the trial and in the post-trial briefing, Appellees chose not to do so." [D.Ct. ECF 37 at 35-36 (Reply)] False. Before and after trial, the Appellees argued that, "if the Court concludes that an injunction should be issued, it must be accompanied by a bond and strict prohibitions on CEC's ability to transfer and dissipate assets." [B.Ct. ECF 152 at ¶ 67 n.4 (post-trial brief); *see* A1026 (pretrial brief at ¶ 47)]

"settled" with CEC. And even now, CEC has control over how much it should pay to satisfy its liability for those very same claims, via a "settlement" that it negotiated with itself. There is nothing equitable about that.

Moreover, the Debtors' thesis for an injunction is unsupported and unsupportable.

a. *The Guarantee Actions Do Not Threaten The Integrity Of The Bankruptcy Estate.*

The Debtors assert that the "guaranty lawsuits threaten the integrity of the bankruptcy estate" in three ways. [Br. at 53] First, they argue that an injunction is appropriate because the estate has "two primary assets" – its operating business and "claims against CEC arising from the Disputed Transactions" – and "[t]he estate's claims and Appellees' claims both seek to recover from the same limited pool of assets from the same entity (CEC)." [Br. at 53-54]

This is contradictory. On one hand, the Debtors claim that the guarantee litigation "threatens to render CEC insolvent and deprive the Debtors of the ability to recover their assets from CEC" by allowing the Appellees to "raid" CEC's assets for themselves. [Br. at 14-15, 22] At the same time, however, they assert that the Guarantee Actions "may force CEC to make its own bankruptcy filing." [Br. at 56] If CEC is going to file for bankruptcy in the face of an adverse judgment, the Appellees cannot be accused of "racing to the courthouse" to scoop up assets that the Debtors also want. The automatic stay in a CEC bankruptcy case would stop them.

CEC also is not the sole source of recovery for the estate claims. Other liable parties include CEC affiliates that received fraudulent conveyances and several of the wealthiest individuals in the nation (including David Bonderman, Marc Rowan and David Sambur). [A1076-83, 1089-90, 1113-14 (Tr. 6/3 82:3-89:2, 95:13-96:21, 144:8-145:24) (Millstein)]; *Wilmington*, 2015 WL 1306754, at *3 ("the Plaintiff alleges [various defendants] were involved in wrongfully hiding CEOC's assets from its creditors, including Apollo, TPG, CEC, Growth Partners, Resort Properties, and various directors, officers, and partners at CEC, CEOC, Apollo, and TPG."). Yet, at CEC's direction the Debtors would release all claims against the others for no consideration at all. The evidence does not support the argument that the bankruptcy estate and the Appellees are "competing" for a pool of limited resources.

The Debtors similarly assert that recovery in the Guarantee Actions would "come directly from the very same assets that the Debtors allege were fraudulently transferred to CEC; otherwise CEC would have nothing from which Appellees could recover." [Br. at 3; *id.* at 10, 16, 26, 47-48] That is both false and irrelevant. CEC issued equity and has assets that are not subject to avoidance claims premised on the Disputed Transactions. It would have at least some funds to satisfy the guarantee claims even if the Debtors recovered assets they fraudulently transferred away. Moreover, the origin of CEC's assets is irrelevant to the question of whether an injunction may restrain the Guarantee Actions. In *Teknek*, the defendants "transferred assets from" the debtor and its affiliate to themselves, and both the bankruptcy trustee and a

third-party claimant sought to recover those same assets in their respective lawsuits. 563 F.3d at 642-43. Those facts – similar to what the Debtors assert here – did not warrant an injunction.

A judicial determination that CEC is liable on its contractual guarantees also would not "derail" the reorganization. As District Judge Scheindlin recognized, "the possible entry of judgment of liability[] would not be detrimental to the bankruptcy case. One reason this is true is that permitting a litigant to proceed to a judgment of liability is not the same thing as permitting that litigant to collect on a judgment." Order at 4 n.4, *BOKF, N.A. v. Caesars Entm't Corp.*, No. 15-cv-1561 (S.D.N.Y. June 19, 2015), ECF No. 27. CEC's liability on its guarantees must be determined before the Bankruptcy Court can consider a plan that attempts to release CEC over the objection of the Appellees. An injunction would just postpone the day of reckoning and delay the bankruptcy case.

Second, the Debtors argue that "the guaranty actions will affect the allocation of property among the Debtors' creditors" because "the very purpose of the guaranty actions is to jump to the front of the creditor line, in turn depriving the estate of a substantial contribution from CEC for distribution to all of its creditors." [Br. at 54-55] This is just the "competition" argument in different words.

The Appellees are not "jumping the line" by seeking recovery directly from non-debtor CEC. The Appellees bargained for independent rights against

CEC, and their claims are not subordinated or junior to other CEC creditors. The Debtors' feared "race to the courthouse" misses the point:

> The Debtors' concern that the continued prosecution of the Creditor Actions could result in a "race to the courthouse" is of no moment to the instant issue. The Code is designed to eliminate a "race to the courthouse" by creditors seeking to file claims against a *debtor*. Here, any "race" . . . would be for the purpose of lodging claims against a non-debtor, which is not a bankruptcy concern. Moreover, the fact that the Creditor Actions may result in disproportionate recoveries by certain creditors is also irrelevant. The Code is concerned only with a disproportionate *distribution* of the debtor's estate. The fact that a creditor may gain additional relief from sources other than the property of the estate does not contravene the Code's provisions or policies.

Phar-Mor, 166 B.R. at 62 (emphasis in original).

Third, the Debtors claim that "the guaranty actions could derail the bankruptcy proceedings" by "put[ting] CEC's contribution at risk" and thus "crumbl[ing]" the plan lockup agreement (obliquely called the Restructuring Support Agreement or "RSA") and "the consensual reorganization it entails." [Br. at 55-56 (quotation omitted)] This is a third variation of the "competition" argument, and it is based on two false premises.

For one thing, CEC's "contribution" under the RSA is neither valuable nor designed to maximize "creditor recoveries." [Br. at 55] Because CEC controls the Debtors, the RSA was "negotiated" by CEC with itself, and it does not maximize the value of the bankruptcy estate and distributions to creditors. The vast majority of CEC's "contribution" is payment for assets that CEC would keep for itself and contingent commitments that would benefit entities to be wholly or partially owned by CEC. [A1220-22 (WSFS and BOKF Post-Trial Brief at 21-23) (summarizing evidence); A1153-54, 1159, 1166-68, 1169-79, 1181-

86 (6/4 Tr. 19:24-20:19, 25:8-31:5, 32:9-34:25, 35:3-42:3, 48:1-50:16, 52:21-57:9) (Zelin)] Tellingly, the Debtors' own expert did not even try to value CEC's "contribution" despite their oft-repeated representation that CEC would pay more than $1.5 billion under the RSA. [A1037, 1073-74 (6/3 Tr. 40:15-24, 79:21-80:5) (Millstein)]

The RSA also does not "entail" a "consensual restructuring." It is opposed by the Appellees (who hold or represent more than $4.5 billion in claims against CEOC) and other material creditors, including both official committees of creditors. The RSA has proven to be a recipe for litigation and discord, not consensus, in the bankruptcy case.

b. *The Guarantee Actions Do Not Threaten A Successful Reorganization.*

The Debtors also argue that the Guarantee Actions threaten a successful reorganization, even setting aside the RSA. [Br. at 57-58] But the Debtors concede that they have a "strong operating business" and "substantial earnings," [Br. at 58], and their expert agreed that an injunction against the Guarantee Actions was *not* necessary to a successful reorganization. [A1072 (6/3 Tr. 78:12-23) (Millstein)] In the face of that testimony, the Debtors can only claim that the Guarantee Actions "potentially" might derail the bankruptcy case. [Br. at 57; *id.* at 57 ("could derail the bankruptcy proceedings") (quotation omitted)]

That speculative, ephemeral harm is not enough to warrant an injunction, certainly not in the absence of factual findings below. *See, e.g.*, *In re GAC Storage El Monte, LLC*, 489 B.R. 747, 770 (Bankr. N.D. Ill. 2013)

(injunction denied where "there has been no showing of danger of imminent, irreparable harm to the Debtor's ability to reorganize"). Moreover, the Debtors admit that, "[t]o this day, [they] continue to actively engage in discussions with creditors" in an effort to "achieve consensus on restructuring." [Br. at 11, 24] There is nothing about the ongoing Guarantee Actions that hinders those discussions or precludes the normal back-and-forth of successful bankruptcy reorganizations.

c. *An Injunction Would Be Inequitable And Against The Public Interest.*

Finally, the Debtors have not shown that the balance of harms or the public interest favors injunctive relief. [Br. at 58-60] The Debtors blithely assert that the Appellees will not suffer "any legally cognizable harm." [Br. at 59]. But they ignore the fact that, if CEC is insolvent as they claim, an injunction would prejudice the Appellees vis-à-vis CEC's many other creditors. CEC is subject to other litigation and is paying debts outside the ordinary course of business, [A956-58 and 992-94 (CEC 10-Q); A1144 (6/4 Tr. 10:19-22) (Zelin); A1196 6/4 Tr. 166:18-21) (Eisenberg)], exposing the Appellees to risk that CEC's financial condition will worsen during the period in which they are enjoined from pursuing the guarantee claims. At the same time, CEC remains free to invest, transfer or otherwise dissipate its assets, an apparently ongoing process. [A1147 (6/4 Tr. 13:22-24) (Zelin)]

The Debtors did not request that the Bankruptcy Court enjoin or restrict CEC's payment of claims or use of property. The requested injunction would enable other creditors to collect judgments from CEC, and permit CEC to pay

debts and transfer assets, while the Appellees were enjoined from action. That weighs heavily against an injunction. *See, e.g.*, *Lyondell*, 402 B.R. at 594 ("Another public interest concern arises from the potential for the unequal treatment of creditors similarly situated – as, for example, might result if the defendants here were enjoined, but other unpaid . . . creditors [of the parent guarantor] were free to pursue remedies.").[15]

The Debtors attempt to place a black hat on the Appellees, arguing that the "true reason they do not want the guaranty action stayed" is "fear a plan might be confirmed by the bankruptcy court that could release their claims against CEC." [Br. at 59-60] Without question, the Appellees oppose the illegal release of their claims against CEC and will object to confirmation at the appropriate time. *Supra* note 5. But that is not the motive of the Guarantee Actions. Efforts to enforce CEC's guarantee began more than fifteen months ago, well before the Debtors filed for bankruptcy. The Guarantee Actions do not have anything to do with a plan of reorganization filed in a bankruptcy case that did not even exist when the litigation began.

Finally, public policy strongly disfavors an injunction. It is in the public interest that allegedly-insolvent entities like CEC invoke bankruptcy law rather than the shelter of an injunction issued in a controlled-subsidiary's bankruptcy case. *See Lyondell*, 402 B.R. at 593-94. Moreover, "guaranties are an important device in commercial transactions, and . . . as a matter of public

[15] This is why any injunction would need to be accompanied by a bond and prohibitions on CEC's ability to transfer assets.

policy their enforcement should not be limited." *Id.* at 593. "[A]ny regular practice permitting the enforcement of guaranties to be blocked or impaired when the primary obligor went into bankruptcy would frustrate the very purpose for which the guaranties were secured in the first place." *Id.* Those strong public policies weigh against issuance of an injunction here.

VIII. CONCLUSION

The District Court correctly held that the Bankruptcy Court did not abuse its discretion in denying the injunctive relief requested by the Debtors. The Order below should be affirmed in all respects.

[*signatures on following pages*]

Respectfully submitted,

November 18, 2015

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TYPE-VOLUME CERTIFICATION

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, as follows:

(1) Exclusive of the portions exempted by Rule 32(a)(7)(iii) of the Federal Rules of Appellate Procedure, the brief contains 12,882 words, according to the count of Microsoft Word.

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November 18, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 18, 2015

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