CASE NO. 1:15-cv-06504

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL., *Debtors.*

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL., *Appellants*,
v.
BOKF, N.A., ET AL., *Appellees*.

Appeal from the United States Bankruptcy Court for the
Northern District of Illinois, Case No. 15-01145, Adv. Pro. No. 15-00149

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, 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.

2. Appellee BOKF, N.A. ("BOKF"), states that its corporate parent is BOK Financial Corporation, a publicly-held corporation.

3. Appellee Frederick Barton Danner ("Danner") states that he is a natural person.

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.

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.

6. Appellee Trilogy Portfolio Company, LLC (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.

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I. PRELIMINARY STATEMENT

The Bankruptcy Court properly denied the Debtors' request for an injunction to immunize their non-debtor parent, Caesars Entertainment Corporation ("CEC"), from the Appellees' pending actions to enforce CEC's disavowed contractual guarantee of $4.5 billion of debt.

A bankruptcy court order restraining a federal district or state trial court is a "radical" and "extreme" measure invoked only in "extraordinary" and "drastic" circumstances. In particular, where (as here) a debtor seeks to protect an insider's assets from suit by third parties, the Seventh Circuit limits injunctive relief to situations in which the bankruptcy estate and the third-party claimant compete over "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 situations, the estate and claimant effectively seek redress for the *same harm* to the debtor and, as a consequence, the claimant threatens funds that should be available to *all* of the debtor's creditors as recompense for that harm.

In contrast, no injunction may issue where (as here) the third-party's claim does not arise out of the "same acts" as a claim asserted by the bankruptcy estate – where the third-party's rights do not "depend[] on the non-debtor's misconduct *with respect to the corporate debtor*" and do 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 cases," typically involving an insider guarantee, the debtor's creditors have no legitimate priority to the insider's resources, as they are not property of the bankruptcy estate.

The Bankruptcy Court found that the Appellees' claims do not arise out of the "same acts" as any claim the Debtors might assert against CEC. This is indisputably correct, and the Debtors do not seriously suggest otherwise. The Appellees' claims are not premised upon CEC's misconduct with respect to the Debtors and do not involve transfers from the Debtors to CEC or other insiders. Rather, the Appellees seek to enforce CEC's independent liability for breach of its contractual guarantees under the relevant indentures and CEC's violation of the Trust Indenture Act of 1939 ("TIA").

In seeking to discredit the decision below, the Debtors conflate the Bankruptcy Court's *jurisdiction* to entertain a request for an injunction protecting a non-debtor insider (not argued here) with the permissible *scope* of injunctive relief.[1] The Debtors purport to cite "well-established precedent" holding that a bankruptcy court has subject-matter jurisdiction to enjoin a third party in appropriate circumstances. But that authority does nothing to undermine the

[1] The Unsecured Noteholders are not abandoning or waiving any arguments made below, including the argument that the Bankruptcy Court lacks constitutional authority to enjoin an Article III court from proceeding in a case involving non-debtors.

Bankruptcy Court's conclusion that, notwithstanding its jurisdiction to consider the Debtors' motion, *Fisher* and *Teknek* prohibit the injunction the Debtors seek on the facts established at trial.

The Debtors further confuse the issue by citing cases that authorize an injunction on entirely different underlying factual premises – for example, where a suit would distract management of a closely-held debtor from facilitating a reorganization, or deplete insurance that was property of the bankruptcy estate, or conflict with a previously-entered order. The Debtors do not assert any of those grounds here, and the cases they cite have nothing to do with protecting an insider's assets from suit by a third-party claimant.

Finally, and in any event, there is no basis for this Court to impose the very injunction the Bankruptcy Court declined to issue. The Bankruptcy Court made only the threshold determination that "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." The Bankruptcy Court did not engage in the balancing of interests necessary for any determination that an injunction, if authorized under *Fisher* and *Teknek*, would be appropriate on the facts of the case.

Thus, if this Court concludes that the Bankruptcy Court's threshold determination was erroneous, a remand would be necessary (as the Bankruptcy Court itself observed) so that the Bankruptcy Court could weigh the facts and determine whether to exercise its discretion to issue an injunction. There are no "undisputed facts" that could warrant injunctive relief without the requisite fact-intensive balancing analysis. If anything, the facts established at trial prove that *denial* of the injunction would have been well within the Bankruptcy Court's discretion even if *Fisher* and *Teknek* authorized the requested relief.

II. STATEMENT OF THE ISSUE

Did the Bankruptcy Court abuse its discretion in declining to issue an injunction where the Appellees' claims are not premised upon CEC's misconduct with respect to the Debtors, do not involve transfers from the Debtors to CEC or other insiders, do not arise out of the "same acts" as any claim the Debtors might assert against CEC, and do not seek redress for harm against the Debtors?

III. STANDARD OF REVIEW

"[D]enial of a preliminary injunction is reviewed for abuse of discretion." *Goodman, D.C. v. Illinois Dep't of Fin. and 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, M.D. v. Northwestern Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005) (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." *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 595 (7th Cir. 1986).

IV. STATEMENT OF THE CASE[2]

CEC is owned primarily by affiliates of two private equity firms, Apollo Global Management ("Apollo") and TPG Capital ("TPG"), who acquired CEC in "one of largest leveraged buyouts in history." [Br. at 6-7; A35; A435]

CEC owns and controls the Debtors. [Br. at i-xxi (CEC owns 89% of Debtor Caesars Entertainment Operating Corporation ("CEOC"), which owns all of the other Debtors); A33; SA18 (6/3 Tr. 86:19-20) (Millstein)] A majority of the board of directors of CEOC consists of officers or partners of Apollo and TPG. [SA19 (6/3 Tr. 87:19-22) (Millstein)] As part of the LBO, Apollo and TPG caused CEC to saddle the Debtors with more than $24 billion of debt, most of which remains unpaid. [Br. at 7; A35; A435]

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

Shortly after the LBO, it became apparent that the Debtors could never satisfy the debt foisted upon them by CEC. Consequently, CEC caused the Debtors to engage in dozens of "capital market transactions" that, in the aggregate, shifted billions of dollars of value away from the Debtors and to CEC and its

2 The Debtors' Appendix is cited as "A"; the Appellees' Supplemental Appendix is cited as "SA"; the Debtors' Opening Brief is cited as "Br."; and transcripts from hearings before the Bankruptcy Court are cited as "Tr."

affiliates. [Br. at 7-9; A36-37] The purpose and effect of those transactions "was to create 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)." [A37]

The Debtors now euphemistically call these the "Disputed Transactions." [Br. at 7] Although they are still under CEC's control, the Debtors admit that the bankruptcy estate has valuable claims against CEC arising from the Disputed Transactions and 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." [*Id.* at 9; A43-44]

B. CEC Disavows Its Guarantees Via The May And August Transactions.

The Appellees hold or represent $4.5 billion of CEOC debt. WSFS is the successor trustee for an issue of $3.68 billion in second-priority senior secured notes issued by CEOC. [A35; Br. at 11] BOKF is the successor trustee for an issue of $750 million in second-priority senior secured notes issued by CEOC. [A35; Br. at 12] The Unsecured Noteholders hold or serve as a proposed class representative for more than $119 million of senior unsecured notes issued by CEOC. [A34]

CEC irrevocably and unconditionally guaranteed CEOC's obligations under each of the Appellees' indentures. [A34-36] In mid-2014, following the "Disputed Transactions" described above, CEC engineered two additional transactions to create a pretext to disavow those guarantees. [A36-39; Br. at 8-9] First, in May 2014, at the same time that CEOC consummated a transaction known as the "B-7 Refinancing," CEC sold 5% of CEOC common stock to unidentified investors for $6.15 million. [A38] CEC then announced that the guarantees were "automatically released" as a result of that sale. [A38; A221 (WSFS Compl. ¶ 110)] Then, in an August 2014 transaction known as the "Senior Unsecured Notes Transaction," CEOC amended the indentures governing the unsecured notes held by the Unsecured Noteholders to remove CEC's guarantee of those notes, which in turn purportedly resulted in "the automatic release of CEC's guarantee" of the WSFS and BOKF second priority notes. [A38-39; A890-91 (BOKF Compl. ¶ 146)]

As the Bankruptcy Court later observed, this "did not sit well" with the Appellees, who commenced four separate actions to establish and enforce CEC's liability on the disavowed guarantees. [A39] In August 2014, WSFS filed an action in Delaware Chancery Court asserting two relevant claims: one for breach of contract for denial of the guarantee, and one for a declaration that the guarantee "has not been released and remains valid, binding and enforceable against CEC."

[A230-36 (WSFS Compl. ¶¶ 134-54)] In September and October 2014, the Unsecured Noteholders filed actions against CEC in the Southern District of New York, each of which asserted claims under the TIA and sought to establish and enforce CEC's liability on the disavowed guarantees of their debt obligations. [A40; A678 (MeehanCombs Compl.), A731 (Danner Compl.)] Finally, in March 2015, BOKF filed suit against CEC in the Southern District of New York seeking similar relief. [A41, A842 (BOKF Compl.)][3]

All four actions are pending, with fact discovery to be completed by September 30, 2015. On August 27, 2015, District Judge Scheindlin denied summary judgment in favor of BOKF on its claim under the TIA, concluding that a disputed issue of material fact exists with respect to whether the May and August guarantee transactions effected a prohibited nonconsensual out-of-court reorganization. In that opinion, a copy of which is attached to this Brief, Judge Scheindlin narrowed the issues for trial by rejecting a number of CEC's core defenses, including its argument that the guarantee "was intended to be nothing more than a 'guarantee of convenience' to facilitate regulatory filings" and therefore was terminable at will (op. at 20), and its argument the Debtors had to be

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[3] WSFS also asserted derivative and similar claims against other defendants relating to the Disputed Transactions. [A36-37] Due to the bankruptcy case, those claims are stayed. They are not relevant to this appeal. [A39 ("Of the nine counts in Wilmington's complaint, two are relevant here.")]

insolvent at the time of the May and August transactions for the TIA to be implicated (op. at 32).

C. CEC Dodges Bankruptcy.

Due in part to the Disputed Transactions, the Debtors are now insolvent and unable to pay their debts, including the massive obligations incurred in the LBO. [A36] As a consequence, CEC caused the Debtors to file for bankruptcy earlier this year. [A45-46] Despite enormous debts of its own, however, CEC did not seek bankruptcy protection itself. [A33-34]

By staying out of bankruptcy, CEC avoids the Bankruptcy Code's rule of absolute priority, which would wipe out equity that the LBO sponsors (Apollo and TPG) obtained 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. [SA46-48 (6/4 Tr. 25:10-26:5, 27:6-9, 27:21-23) (Zelin)]

Instead of seeking bankruptcy protection for itself, CEC directed the Debtors to pursue a "restructuring" that, in exchange for a CEC "contribution" purportedly worth "more than $1.5 billion" (but actually worth far less), would leave CEC in control of the enterprise while providing for a release of billions of dollars of *CEC's own debt*, including its liability to the Debtors and on more than $12 billion in independent contractual guarantees (including those in favor of the Appellees). [Br. at 10; A44-45]

If implemented, that proposed restructuring would provide CEC with the functional equivalent of a bankruptcy discharge without CEC actually having filed a bankruptcy case, enabling the LBO sponsors to keep their equity, allowing CEC to avoid its looming tax liability, and forcing the Appellees to accept just pennies on the dollar of their claims against the Debtors while barring them from pursuing their independent claims against CEC.[4]

D. The Bankruptcy Court Declines To Protect CEC From Suit.

Because CEC did not file for bankruptcy, it is not protected by the Bankruptcy Code's automatic stay of litigation and claims against it, including the Appellees' actions to enforce their respective contractual guarantees and recover damages under the TIA. *E.g.*, *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.").

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[4] The Appellees will establish to the Bankruptcy Court at the appropriate time that a non-consensual release of their claims against 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 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). That issue is not now before the Court.

In order to buy time to implement the proposed restructuring (which, as noted above, would include a nonconsensual release of the Appellees' claims against CEC), the Debtors (still under CEC's control) sought an injunction under section 105(a) of the Bankruptcy Code to halt the Appellees' pending cases against non-debtor CEC. [A46-47] That injunction, if granted, effectively would have provided CEC with the automatic stay otherwise unavailable to it unless CEC had filed its own bankruptcy case. The Debtors argued that, without an injunction, "[t]he reorganization would be imperiled . . . because CEC would be unable to make the financial contribution on which the reorganization depends *if* the guarantees were reinstated." [A46 (emphasis added)][5] And CEC (through the Debtors) threatened that, "[i]f the Delaware and New York actions against CEC 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." [A53 (emphasis added)]

Following a two-day trial and extensive pre- and post-trial briefing, the Bankruptcy Court declined to issue an injunction. It concluded that, even if the Debtors had proven the facts they alleged to support their request for an injunction

[5] The Debtors also argued that "[t]he estates would be harmed because the actions could deplete the insurance that CEOC shares with CEC." [A46] The Bankruptcy Court rejected that argument, [A57-60], and the Debtors have abandoned it on appeal.

(which they did not), "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." [A53] Specifically –

> [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.

[A53-54 (emphasis in original) (footnote omitted)]

The Debtors appealed and requested that the Bankruptcy Court certify direct review by the Seventh Circuit. In their certification motion, the Debtors identified one issue on appeal: whether the Bankruptcy Court erred in holding that an injunction was not warranted under *Fisher* and *Teknek* because the Appellees' claims against CEC do not arise out of the same acts as the bankruptcy estate's potential claims against CEC. [SA6-7 (Cert. Mot. ¶ 8)] The Debtors argued that certification was appropriate because, among other things, "this appeal presents a pure question of law requiring resolution of conflicting decisions." [SA7 (Cert. Mot. at 5)] The Debtors did not claim that, in deciding their "pure question of law," an appellate court could issue an injunction without further proceedings before the Bankruptcy Court.

The Bankruptcy Court denied certification. It found that "[t]he debtors' appeal raises questions about whether *Fisher* and *Teknek* apply to the facts of this case. But questions about whether particular court of appeals decisions apply to particular facts is a mixed question of law and fact, not a 'question of law' for purposes of the [certification] statute." [SA91 (7/29 Tr. 6:18-23)]

The Bankruptcy Court also found that "a direct appeal will [not] materially advance anything" because, even if the Debtors prevailed on appeal, the appellate court could not grant the injunction they seek. 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." [SA92-94 (7/29 Tr. 7:19-9:3)]

V. SUMMARY OF ARGUMENT

An injunction of proceedings before a federal district or state trial court is an "extraordinary and drastic remedy" warranted "only in unusual circumstances." Injunctions of a pending action between non-debtor parties may not be employed by the bankruptcy court "as a panacea for all ills confronted in the bankruptcy case" or where it might "be a boon to the reorganization process." Rather, a bankruptcy court may order such injunctive relief only in the rare instance in which a non-bankruptcy action would defeat or impair its jurisdiction.

A. The Bankruptcy Court Did Not Abuse Its Discretion In Denying The Injunction. The Seventh Circuit's decisions in *Fisher* and *Teknek* hold that, where the objective is to protect a non-debtor insider's assets from suit by an outside party, a bankruptcy court may issue an injunction only when the bankruptcy estate and the third party assert claims that arise out of the "same acts" grounded in the insider's misconduct with respect to the debtor. Only in those cases might the third-party's lawsuit threaten to defeat or impair the jurisdiction of the bankruptcy court to marshal assets (estate claims based upon misconduct to the debtor) for equitable distribution to the debtor's creditors.

The Bankruptcy Court correctly concluded that an injunction was not warranted because the Appellees' claims for enforcement of CEC's disavowed guarantees and breach of the TIA arise from different acts than the bankruptcy estate's potential claims against CEC relating to the Disputed Transactions. Most importantly, unlike the Debtors' putative claims against CEC, the Appellees' claims are not based on CEC's misconduct with respect to the Debtors. Under *Fisher* and *Teknek*, on those facts, the Bankruptcy Court could not issue the injunction the Debtors requested.

B. The Debtors Cite No Relevant Conflicting Authority. The Debtors confuse the Bankruptcy Court's *jurisdiction* to consider their request for an injunction with the Bankruptcy Court's *authorization* to enter an injunction on the facts presented in this case. They rely upon Seventh Circuit cases that address bankruptcy court jurisdiction generally, and avoid controlling authority (*Fisher* and *Teknek*) that limits the authorized bounds of relief that may be ordered by a court with proper jurisdiction. The cases cited by the Debtors do not conflict with *Fisher* and *Teknek*, which prohibit an injunction to protect a non-debtor insider from suit based upon acts different from those on which the bankruptcy estate's claims against the insider are premised.

The out-of-circuit and bankruptcy court decisions cited by the Debtors also do not conflict with *Fisher* and *Teknek*. Those cases involve vastly-different circumstances not present here (preservation of insurance, "distraction" of a closely-held debtor's principal, protection of officers of the court, enforcement of previously-entered judgments, etc.). None authorized an injunction on the premise advanced by the Debtors – *i.e.*, that a third-party's claim against a non-debtor insider should be enjoined because it might imperil a source of recovery for the bankruptcy estate's own claims (based on different acts) against the insider.

C. If The Court Concludes That The Bankruptcy Court Erred, A Remand Is Necessary For The Bankruptcy Court To Determine Whether The Facts Warrant An Injunction. The Bankruptcy Court made a threshold determination that *Fisher* and *Teknek* prohibit the issuance of an injunction on the facts established at trial. In making that threshold determination, the Bankruptcy

Court neither considered nor weighed the elements that otherwise would determine whether injunctive relief might be ordered. Because those elements require a fact-intensive balancing analysis that rests considerable discretion in the trial court, a remand would be required if this Court concludes that the Bankruptcy Court erred in making its threshold determination.

In any event, there are no undisputed facts that might compel issuance of the injunction requested by the Debtors. For one thing, given CEC's domination and control of the Debtors, an injunction intended to protect CEC and enable the Debtors to implement a restructuring that would discharge CEC's independent liabilities to the Appellees would be profoundly inequitable.

Moreover, the Appellees' non-bankruptcy actions to enforce CEC's guarantees do not threaten the integrity of the bankruptcy estate, which has multiple sources of recovery other than CEC. Those actions do not enable the Appellees to "jump the line" because the Appellees have rights against CEC that are distinct from their claims against the Debtors. And there is no risk to a consensual restructuring that might maximize the value of the bankruptcy estate because CEC's "contribution" under the so-called "RSA" is neither valuable nor designed to enhance creditor recoveries.

In fact, the Debtors concede that the Appellees' guarantee actions do not even threaten a successful reorganization, merely that they theoretically might "derail" the sweetheart deal they "negotiated" with their controlling corporate parent and thus "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 severe prejudice the Appellees would incur from the injunction the Debtors requested.

VI. ARGUMENT

Under section 105(a) of the Bankruptcy Code, "[t]he 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).

"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." *Village of Rosemont v. Jaffe*, 482 F.3d 926, 935 (7th Cir. 2007). "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). . . . [A] judge does not have free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be." *Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005) (quotation omitted).

Thus, "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). In context of an injunction that would protect a non-debtor from its own creditors, courts tread carefully. *See, e.g. In re Phar-Mor, Inc. Secs. 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 expansive use of the injunctive power in favor of non-debtors would eviscerate the carefully-circumscribed statutory automatic stay, 11 U.S.C. § 362, and nullify "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 against third-party claim "not only deprives [the 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, as the Bankruptcy Court recognized, "a section 105 injunction is considered an 'extraordinary and drastic remedy' to be used only in 'unusual circumstances.'" [A56 (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) ("it is an extraordinary exercise of discretion to use that power to stay a third party action not involving the debtor"); *Saleh*, 427 B.R. at 420-21 (injunction against a third-party action "is a radical measure" and "an extreme remedy"). This is consistent with "notions of comity – a recognition that for one court to meddle with proceedings in another court, especially the court of a different sovereign, is no small matter." [A56]

Pertinent to this case, "suits against a debtor's guarantor . . . are allowed to proceed" absent extreme circumstances. *In re Gander Partners LLC*, 432 B.R. 781, 784 (Bankr. N.D. Ill. 2010); *e.g.*, *Teknek*, 563 F.3d at 649 (noting the "more common case" in which a claimant may sue the debtor's guarantor); *Fisher*, 155 F.3d at 883 ("recognizing the freedom (at least in most cases) of creditors to bring suits that are only nominally against the debtor because the only relief sought is against his insurer, guarantor, or other similarly situated party") (quotation omitted); *In re Hendrix*, 986 F.2d 195, 197 (7th Cir. 1993) ("a suit against a guarantor of the bankrupt's debt" not discharged); *see generally 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 except in cases of the most pressing need").

A. The Bankruptcy Court Did Not Abuse Its Discretion.

Despite these axiomatic principles, the Debtors assert that "a bankruptcy court has authority to enjoin *any* third-party actions that threaten the bankruptcy estate." [Br. at 2-3 (emphasis added)] They are wrong.

The Seventh Circuit (among many other courts) has limited the *scope* of injunctive relief available to a debtor who seeks to protect a non-debtor insider's assets from suit by third parties. In such a circumstance, a bankruptcy court is not free to enjoin "any" action that may "threaten" the bankruptcy estate. To the contrary, an injunction is available only where the bankruptcy estate and a third party assert claims based upon the "same acts" that are grounded in the insider's misconduct with respect to the debtor ("seemingly always" in cases involving transfers from the debtor to the insider).

Because the Appellees' guarantee claims against CEC have nothing to do with CEC's misconduct with respect to the Debtors, the Bankruptcy Court properly denied the requested injunction. There was no abuse of discretion here.

1. Under *Fisher* And *Teknek*, An Injunction May Not Shield An Insider's Assets Unless The Bankruptcy Estate And Third Party Assert Claims Based Upon The "Same Acts" Grounded In Misconduct Toward The Debtor.

The Bankruptcy Court's analysis began with the observation that, before a court may engage in the standard balancing test for injunctive relief, "the case must be one in which relief under section 105(a) is possible." [A49]; *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"). The Court thus turned to *Fisher* and *Teknek*, the controlling Seventh Circuit authority on the subject, to determine whether it was authorized to grant the relief the Debtors requested.

Fisher. In *Fisher*, a group of investors filed "securities, commodities and common law fraud" claims against various accomplices of the debtor. 155 F.3d at 878. The bankruptcy trustee filed claims against the same defendants and sought an injunction to halt the investors' case. *Id.* at 879. The bankruptcy court concluded that the investors' claims were property of the estate and subject to the automatic stay, and also entered a prophylactic injunction halting the litigation. On appeal, the district court reversed, holding that the claims were not property of the estate, that no stay applied, and that no injunction was warranted.

On further appeal, the Seventh Circuit reversed again and reinstated the injunction. *Id.* at 881. It held 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 warranted 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 issue in *Fisher* 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, *id.* at 882, the investor claims were found to "defeat or impair" the jurisdiction of the bankruptcy court to marshal estate resources (claims for misconduct with respect to the debtor) for creditors generally.

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 against the alter egos. *Id.* at 642-43.

Like the Debtors here, the trustee argued that SDI's pursuit of its claim would harm the bankruptcy estate by eliminating assets the trustee might recover from the alter egos. *Id.* at 643, 645. The bankruptcy court enjoined the action, *id.* at 642-43; the district court reversed, *id.* at 643-44; and the Seventh Circuit affirmed the district court.

The Circuit held that SDI's claim could not be enjoined, even though it would diminish resources otherwise available to the estate, *because SDI did not seek redress for harms against the debtor*. *Id.* at 649 (SDI's claim did "not depend on the alter egos' misconduct with respect to the debtor"). In reaching that conclusion, the Circuit distinguished its earlier decisions in *Fisher* and *Koch Refining v. Farmers Union Central Exchange*, 831 F.2d 1339 (7th Cir. 1987), each of which involved competing claims regarding the same harm to the debtor:

> The case *sub judice* . . . is distinct from both *Koch* and *Fisher*. 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 *Koch*, the oil companies sought to hold the member-owners liable based on their alleged breach of fiduciary duties to the debtor, and in *Fisher*, the creditor-investors' fraud claims were based on the accomplices' looting of the debtor corporation in which the plaintiffs had invested. 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. . . . [In contrast,] SDI's claim against the alter egos does not depend on the alter egos' misconduct with respect to the debtor.

Id. at 649 (emphasis in original) (citations omitted).

That is the defining principle. A court cannot take the extraordinary step of enjoining litigation pending before another federal or state court unless the claims at issue are based on the same harm to the debtor – unless they 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 third-party's claim threaten to "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*. The alter egos looted both Teknek and Electronics. Those are separate acts, which caused separate injuries to two separate companies, only one of which is in bankruptcy." *Id*. (emphasis added). Accordingly, continued prosecution of SDI's claims did not "defeat or impair" the bankruptcy court's jurisdiction.

2. The Bankruptcy Court Properly Interpreted And Applied *Fisher* And *Teknek*.

The Bankruptcy Court applied the defining principle and followed *Fisher* and *Teknek* to the letter. It concluded that, "[u]nder *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." [A52]

The Bankruptcy Court then compared the claims asserted by the Appellees (for enforcement of CEC's disavowed guarantees) to the bankruptcy estate's potential claims against CEC (relating to the Disputed Transactions), and concluded that "[t]he circumstances the debtors describe do not warrant relief under *Fisher* and *Teknek*." [A53] It observed that the Appellees' claims are, at the core, claims for breach of contract relating to the May and August 2014 transactions. [A53-55] In contrast, the estate's claims sound in "avoidable preferences and fraudulent transfers." [A43-44]

The Court ultimately found that, "[n]ot 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." [A54] The Court pointedly noted that the Debtors had failed to analyze the specific claims asserted by the Appellees despite a specific request that they do so: "Rather than provide that count-by-count analysis, the debtors have chosen to paint with a far broader brush. It 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." [A55]

On appeal, the Debtors *still* do not attempt to argue that the Appellees' contract-based guarantee claims are premised upon the "same acts" as the estate's potential avoidance and other claims. Instead, they argue that (a) under *Fisher* and *Teknek*, all that is required is a set of "overlapping and closely related acts of misconduct by a non-debtor inflicted against or involving the debtor," [Br. at 46-47 (quotation omitted)]; and (b) here, "both sets of claims arise from the same allegedly broad scheme on CEC's part to transfer away CEOC assets via a series of forty-five capital market transactions, including the Disputed Transactions," [*Id.* at 47 (quotation omitted)]. The Debtors are wrong on both accounts.

First, the Debtors' reading contravenes *Fisher* and *Teknek*. Under those cases, more is required than "closely related acts of misconduct" that "involve" the debtor. More is required than a threat to the resources of a defendant who might provide "needed funds" to the bankruptcy estate.

If that was sufficient, *Teknek* would have endorsed the bankruptcy court's injunction. In *Teknek*, the misconduct that served as the basis for the bankruptcy trustee's claims was closely related to the misconduct that served as the basis for SDI's claim – the very same misappropriation of assets from the debtor and its affiliate. The Seventh Circuit, however, required more – specifically, that the two sets of claims seek redress for the *same harm to the debtor*. Only then might there be a legitimate argument that the bankruptcy trustee should have priority to the alter egos' assets. And only then might the bankruptcy court consider the extraordinary act of enjoining a federal district or state trial court. Because SDI had independent claims for misconduct unrelated to the debtor, the injunction could not stand.

Here, the Appellees have independent, contract-based claims against CEC for enforcement of the guarantees. *Those claims have nothing to do with CEC's misconduct toward the Debtors*. Indeed, the Debtors conceded that they do not have any causes of action against CEC with respect to the guarantees. [SA9 and 29 (6/3 Tr. 75:1-6 and 132:14-16) (Millstein)] There is no conceivable basis for an injunction absent the alleged threat to CEC's resources and, under *Teknek*, a threat to resources is not enough.

The Debtors argue that *Teknek* is distinguishable because the Seventh Circuit observed that SDI was the debtor's only major creditor and that the alter egos might be able to satisfy their liability to SDI and the bankruptcy estate. [Br. at 36] 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 mandatory 'same acts' requirement." [*Id.*] The Seventh Circuit, however, noted those facts in the course of *rejecting* the argument made by the Debtors. "We do not put much weight on the fact that SDI is the sole creditor in the bankruptcy case." *Teknek*, 563 F.3d at 644; *id.* at 650 ("We do not make too much of this distinction.").

Second, it is not true that the Appellees' claims arise from CEC's scheme to loot the Debtors. The Appellees' claims arise from CEC's disavowal and refusal to honor its contractual guarantees and its violation of the TIA. As the Bankruptcy Court noted, "it is hard to see" how the bankruptcy estate could have *any* claim arising out of such disavowal. 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][6]

As the Bankruptcy Court noted, those allegations "add flavor to their contract claims, nothing more." [A55] They "are not essential" to the contract claims. [A54] For enforcement of the guarantees, "[t]here is no need to plead or prove that [CEC's] breach was part of some larger scheme." [A55] 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. [A55]

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6 The Debtors misleadingly quote a portion of the WSFS Complaint relating to *derivative claims* asserted on behalf of the bankruptcy estate. [Br. at 15] As noted above, the derivative claims are unrelated to WSFS's independent claims for enforcement of CEC's guarantee and are not at issue here.

The Bankruptcy Court did *not* hold "that two claims arise from the same acts only if the elements of the respective causes of action require identical proof," as the Debtors claim. [Br. at 2, 22, 48] The Court simply applied the plain language of *Fisher* and *Teknek* and concluded that the Appellees' claims for enforcement of CEC's guarantees have nothing to do with the bankruptcy estate's potential claims against CEC for avoidable preferences and fraudulent conveyances. That was not an abuse of discretion.

B. The Debtors Cite No Relevant Conflicting Authority.

Having failed to establish that the Appellees' guarantee claims are based on the same acts as the bankruptcy estate's potential claims against CEC, or even that the two sets of claims are closely related to each other, the Debtors attempt to discredit the Bankruptcy Court's legal analysis. They argue that the Court's interpretation of *Fisher* and *Teknek* ignores prior Seventh Circuit precedent, "makes the Seventh Circuit a national outlier," and conflicts with various bankruptcy court decisions. [Br. at 25] This is nonsense.

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

The Debtors claim that "[t]he bankruptcy court's order is flawed first and foremost because it ignores the Seventh Circuit's well-established precedent that bankruptcy courts have broad authority to temporarily enjoin third-party actions that would defeat or impair the court's jurisdiction or otherwise threaten the integrity of the bankruptcy estate." [Br. at 20] That is a baffling allegation in light of the Bankruptcy Court's ten-page analysis of *Fisher* and *Teknek*. The Debtors may disagree with that analysis, but their assertion that the Bankruptcy Court "ignored" the Circuit's governing precedent is incredible.

In any event, the Debtors' construction of applicable Seventh Circuit authority is badly misguided. For example, 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 31]

That selective quotation is highly misleading. What *Fisher* actually says is that "[t]he *jurisdiction* of the bankruptcy court to stay claims 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 (quoting *Zerand-Bernal* and *Memorial Estates*) (emphasis added).

The cases cited in that passage addressed the reach of bankruptcy court *jurisdiction*. In *Zerand-Bernal*, for example, the Seventh Circuit *rejected* the contention, similar to that made here, "that any proceeding . . . that protects and enhances the value of assets of purchased at the bankruptcy sale invokes federal bankruptcy jurisdiction." 23 F.3d at 163-64. Thus, it held that the bankruptcy court had no jurisdiction over the request of an asset purchaser to enjoin third-party products liability claims against it. *Id. Memorial Estates* did not involve injunctive relief at all. Rather, the Seventh Circuit 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 (citation omitted).

As the Bankruptcy Court recognized, the existence of *jurisdiction* over a particular controversy does not equate to *power* or *authorization* to grant the requested relief. [A48-49; A53 ("That a claim fails on the merits does not mean that the court lacked jurisdiction to hear the claim in the first place.")] To the contrary –

> 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 American Hardwoods, Inc., 885 F.2d 621, 624 (9th Cir. 1989); *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 Bankruptcy Court's order does not state that an injunction should necessarily issue whenever a state court proceeding will affect the bankruptcy estate and adversely influence the debtor. It provides only that the threshold jurisdictional requirements are met where these conditions exist."); *Lyondell*, 402 B.R. at 586 ("While the *propriety* of exercising my jurisdiction here might legitimately be debated, subject matter jurisdiction . . . cannot be.") (emphasis in original).

The Debtors neglect this basic point, conflating the Bankruptcy Court's jurisdiction over their request for an injunction with the Court's power to issue the injunction under the parameters established by *Fisher* and *Teknek* and on the facts of this case. [Br. at 32-33] For example, they cite *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 where the proceeding "threatens the integrity of the bankruptcy estate." [Br. at 32 (emphasis in original)]

Lemco, however, is not an injunction case at all. Rather, 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. Similarly, *G.S.F.* involved the question of whether the bankruptcy court had *jurisdiction* to issue an injunction to protect a previously-entered judgment. 938 F.2d at 1475 ("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.") (emphasis added).

As noted in one of the cases cited by the Debtors, this sort of muddled reasoning leads to nonsensical results:

> [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 similarly misconstrue other allegedly-contrary decisions of the Seventh Circuit. For example, they cite *In re L&S Industries*, 989 F.2d 929 (7th Cir. 1993), for the proposition that "bankruptcy courts have the power to temporarily enjoin third-party actions against non-debtors that 'would defeat or impair its jurisdiction.'" [Br. at 24 (quoting *L&S Indus.*, 989 F.2d at 932)] In that case, a former shareholder of the debtor moved to enjoin another former shareholder from raising counterclaims in pending state court litigation, on the theory that doing so would violate a prior order of the bankruptcy court. 989 F.2d at 931-32. The Seventh Circuit *denied* an injunction, concluding that the bankruptcy court's prior order – and hence its jurisdiction over the bankruptcy case – was not threatened by the state court action. *L&S Industries* is not relevant here.

In the same vein, the Debtors cite *In re Energy Cooperative, Inc.*, 886 F.2d 921 (7th Cir. 1989), for the proposition that an injunction may issue in respect of any third-party action that "otherwise 'threaten[s] the integrity of the bankrupt's estate.'" [Br. at 24 (quoting 886 F.2d at 929)] That case is instructive, but not supportive of the Debtors in any way. There, the debtor settled claims it had against a set of "Member-Owners" and requested an injunction to prohibit third parties from suing the Member-Owners on the settled claims. The Seventh Circuit 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 (emphasis added).

The Seventh Circuit, however, concluded that the bankruptcy court's injunction was impermissible 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. Accordingly, the Circuit directed the bankruptcy court to limit the injunction to "only those claims which are the exclusive property of the [bankruptcy] estate." *Id*.

Thus, under *Energy Cooperative*, the Bankruptcy Court would have the power to enjoin third parties from suing CEC for the estate claims that the Debtors may someday assert. Conversely, because the Appellees' guarantee claims against CEC are not the "exclusive property" of the bankruptcy estate, the Bankruptcy Court correctly concluded that it had no power to enjoin those independent claims. Far from establishing error, *Energy Cooperative* demonstrates the correctness of the Bankruptcy Court's decision.

Finally, the Debtors argue that "the bankruptcy case is supposed to be the main event with exclusive jurisdiction over estate assets which are marshaled for equitable distribution." [Br. at 37 (quotations omitted)] In support they quote *Xonics* for the proposition that "[a]djusting competing claims . . . is the central function of bankruptcy law." [*Id.* (quoting *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987) (ellipses added by Debtors)] In fact, however, *Xonics* holds that "[a]djusting competing claims of creditors *to the property of a bankrupt* is the central function of bankruptcy law." *Xonics*, 813 F.2d at 131 (emphasis added).

The Debtors misleadingly excise the critical portion of the quote – a bankruptcy court is to adjust competing claims *against the debtor*. That is the "main event." In contrast, the Debtors seek to have the Bankruptcy Court adjust competing claims against *CEC*, a non-debtor insider that has chosen to avoid bankruptcy oversight and jurisdiction. That is the critical difference here.

2. The Bankruptcy Court Did Not **<u>"Cast The Seventh Circuit As A National Outlier."</u>**

The Debtors are similarly misguided in asserting that the Bankruptcy Court's opinion somehow makes the Seventh Circuit "unique[] among all other circuit courts" and "calls into question other § 105(a) decisions in this district." [Br. at 2, 21]

The Debtors cite seven decisions from other circuits that they claim to be contrary to "the bankruptcy court's interpretation of *Fisher* and *Teknek*." [Br. at 28] Not a single one of those decisions is supportive of the Debtors' assertion, as each case involved circumstances far different than those present here.

For example, two of the cases (from the Second and Ninth Circuits) *reversed* injunctions purportedly 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 prohibiting shareholders from holding a shareholders' meeting).

Two other cases (from the Fourth and Fifth Circuits) authorized an injunction in order 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 (5th Cir. 1984) (same). As noted, the Debtors have abandoned their argument premised on insurance, and the Appellees' guarantee claims against CEC are not property of the bankruptcy estate at all.

Two other cases (from the Sixth and Tenth Circuits) involve facts even further afield. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1242 (6th Cir. 1993) (injunction to halt suit against bankruptcy trustee relating to administration of the bankruptcy estate); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 598-602 (10th Cir. 1990) (temporary injunction to halt third-party suit against defendant that had settled with the debtor; reversing permanent injunction because it, "in essence, discharged [the settling non-debtor]'s liability" to the third party).

Finally, the Debtors cite *In re A.H. Robins Co. (Oberg)*, 828 F.2d 1023 (4th Cir. 1987), as their marquee authority, claiming that the case "illustrates how significantly the bankruptcy court's 'same acts' requirement deviates from the understanding on other courts." [Br. at 29] That case, however, authorized an injunction due to "the burden placed on the [debtor's] officers, directors, and employees, which would exhaust their energies and thus interfere with the debtor's reorganization." 828 F.2d at 1026. The Fourth Circuit's reasoning had nothing to do with protecting the assets of a non-debtor insider like CEC. Here, the Debtors expressly "elected to abandon their 'distraction' theory," in which they had argued that "burdensome discovery in the actions would distract critical CEOC employees from their restructuring obligations." [A47] Thus, *A.H. Robins Co. (Oberg)* cannot support the Debtors' arguments for reversal of the Bankruptcy Court.

The Debtors in fact do not cite a single circuit-level decision sustaining an injunction on the premise advanced here – *i.e.*, that a third-party's claim against a non-debtor possibly might imperil a source of recovery for the bankruptcy estate's own claims against the defendant arising from different acts. And, while the Debtors cite various bankruptcy cases for the proposition that "[c]ourts across the country have likewise temporarily blocked third-party actions in similar circumstances," [Br. at 26], they similarly misconstrue that authority.

For example, *Glenn, Gander*, and *Kasual Kreation* involved closely-held small businesses in which injunctions of very short duration were issued to temporarily shield the debtors' principals against suit so that they could focus on the reorganization. *In re Paul R. Glenn Architects, Inc.*, No. 12-031208, 2013 WL 441602, at *2 (Bankr. N.D. Ill. Feb. 5, 2013) (120-day injunction where third-party action "divert[ed] the principal's time and funds which are necessary for the debtor's reorganization"); *Gander*, 432 B.R. at 786 (120-day injunction where debtor's principal "would not then be able to attend to the Debtors' affairs and finance the Debtors' reorganization efforts" and where the debtor proposed to pay the enjoined creditor in full); *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 of" the debtor). In any event, as noted above, the Debtors expressly disavowed "distraction" as a basis for the injunction they sought.

Kham & Nate's, *St. Petersburg*, *Lahman*, and *Otero* – sixteen to thirty-three year old decisions that predate *Fisher* and *Teknek* – are in the same vein. Each involved a closely-held small business in which an injunction was issued to allow the debtor's principal to use personal assets to finance the reorganization. *In re Kham & Nate's Shoes No. 2, Inc.*, 97 B.R. 420, 429 (Bankr. N.D. Ill. 1989) ("assets of the Debtor's principals is [sic] crucial to the Debtor's ability to obtain additional financing"); *In re St. Petersburg Hotel Assocs.*, 37 B.R. 380, 381 (Bankr. M.D. Fla. 1984) (principal "will be effectively prevented from obtaining additional investment from the limited partners and he will not be able to refinance some of his holdings"); *In re Lahman Mfg. Co.*, 33 B.R. 681, 683 (Bankr. D.S.D. 1983) ("the only available source of financing capital was a substantial amount of unencumbered farm real estate owned by" the principal); *Otero*, 25 B.R. at 1022 (third-party suit might "pressure" the debtor's principal).

The Debtors identify just a single case – *Lyondell* – involving a large corporate enterprise in which an injunction was issued to protect a non-debtor affiliate from suit by third parties. *Lyondell*, however, is consistent with and fully supports denial of the injunction requested below.

In *Lyondell*, the debtors asked the court to "enjoin[] creditors of the Debtors in this case, 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 this creditors." *Lyondell*, 402 B.R. at 575. The court concluded that injunctive relief was appropriate because "irreparable injury would plainly result if an involuntary [bankruptcy] proceeding were commenced against [the debtor's parent] or its subsidiaries – to the Debtors' ability to reorganize and, in addition, to the Debtors themselves." *Id.* at 591.

The court, however, concluded 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 – with the result that an injunction of the breadth and duration requested here would represent an excessive exercise of the power that I undoubtedly have to interfere with creditors' rights against nondebtor parties." *Id.* at 576. Among other things, the court observed that, "[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.

As a result, 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 somewhere, either in the U.S. or abroad." *Id.* at 594. Also, in order to "protect the value of [the assets of the debtors' parent] while the defendants in this adversary proceeding are restrained," the court prohibited the debtors' parent from transferring or disposing of certain assets or making payments outside of the ordinary course. *Id.* at 595.

Here, in contrast to *Lyondell*, the Debtors ask for an injunction to keep CEC out of bankruptcy, not to give it an orderly period in which to file for bankruptcy (CEC has had more than eight months to do that). In contrast to *Lyondell*, the Debtors ask for an injunction to give them sufficient time to implement a plan that would release and discharge all of the Appellees' claims against CEC without a bankruptcy case ever being filed by CEC, thus treating similarly-situated creditors of CEC unfairly and inequitably. And, in contrast to *Lyondell*, the Debtors propose to let CEC freely use and dispose of its assets without any restraint or judicial supervision. *Lyondell* supports, not undermines, the Bankruptcy Court's conclusion that no injunction could issue here.

C. If The Court Concludes That The Bankruptcy Court Erred, A Remand Is Necessary For The Bankruptcy Court To Determine Whether The Facts Warrant An Injunction.

Contradicting promises made when they sought certification of a direct appeal, [SA7 (Cert. Mot. at 5)], the Debtors now argue that this Court not only should reverse the Bankruptcy Court's threshold determination that it lacked power to grant relief under the facts of this case but also "should direct the bankruptcy court to immediately enter the Debtors' requested injunction." [Br. at 23; *id.* at 4, 38-46]

The Debtors ignore the Bankruptcy Court's finding that this appeal presents "a mixed question of law and fact, not a 'question of law.'" [SA91 (7/29 Tr. 6:22-23)] They also ignore the Bankruptcy Court's determination 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." [SA92-94 (7/29 Tr. 7:23-9:1)]

And they are simply wrong. The issuance of an injunction of the sort they request is a fact-intensive exercise left to the discretion of the trial court in the first instance. There also are no "undisputed facts" [Br. at 45] that would compel issuance of an injunction here. If anything, "the facts found by the bankruptcy court" [*id.*] conclusively demonstrate that an injunction is not warranted and would be an abuse of discretion.

1. <u>A Remand Would Be Required In The Event Of Reversal</u>.

The Bankruptcy Court did not consider or weigh "the traditional elements for injunctive relief." [A49] Rather, it concluded that the requested injunction fell outside the bounds established by *Fisher* and *Teknek*. [*Id.*]

Those "traditional elements" require a fact-intensive balancing analysis that is performed on a "case by case" basis. *Western Real Estate*, 922 F.2d at 599 (quoting 2 COLLIER, *supra*, ¶ 105.02). That is why a decision on a preliminary injunction is reviewed for abuse of discretion. And that is why, in cases where a trial court denies injunctive relief on an erroneous threshold legal basis, appellate courts always remand so that the trial court can engage in the requisite fact-finding and consideration. *E.g.*, *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983) ("Since we believe that the district court's decision on the preliminary injunction was, to a large part, influenced by an erroneous view of the availability of copyright for operating systems programs . . . , we reverse the denial of the preliminary injunction and remand for reconsideration.").

In fact, even where the trial court engages in the balancing analysis, appellate courts that reverse the denial of a preliminary injunction almost always remand for reconsideration, rather than directing issuance of an injunction that was denied. *E.g.*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 432-33 (6th Cir. 2014) ("The prudent course of action requires the district court to examine, with the assistance of fuller briefing and a more developed record, the legal, factual, and equitable considerations now in place."); *Reliant Energy Servs. v. Enron Canada Corp.*, 349 F.3d 816, 826 (5th Cir. 2003) (remanding so that "the 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 better position to do so.").

Moreover, even if undisputed facts unequivocally dictate that an injunction should issue, the appellate court will not simply "direct the bankruptcy court to enter . . . the requested injunction" as the Debtors assert. [Br. at 50] This is because the bankruptcy court has the duty and "broad powers to shape the injunction so as to minimize the harm to the creditor." 2 COLLIER, *supra*, ¶ 105.03[1][c]. Of particular importance here, "[i]n cases in which an injunction is sought against an insider collection action, the court can require the insider to submit to transfer restriction[s] on his or her assets." *Id.* As COLLIER notes, the need for a carefully-tailored injunction is particularly acute in the context of a requested injunction to protect a non-debtor guarantor:

> 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 or executing transactions out of the ordinary course as a condition to injunction); *Lahman*, 33 B.R. at 684 (same).

The Debtors' own authority supports this result. *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) ("We have explained that injunctive relief must be tailed to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion. . . . As we hold only that the . . . plaintiffs have adequately established their entitlement to the issuance of a preliminary injunction, . . . we express no opinion on the appropriate scope for such an injunction. Rather, we reverse and remand for further proceedings consistent with this opinion.") (quotation omitted).

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 warrant injunctive relief under any circumstance. 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 from whom they extracted a "valuable" settlement of estate claims relating to CEC's abuse and looting of the Debtors. [Br. at 1, 14] In reality, CEC controls and directs the Debtors, who are governed by a board dominated by officers and partners of CEC. Through the requested injunction, CEC seeks sole control over whether and how much it should pay to satisfy its liability to the Debtors. There is nothing equitable about that.

Moreover, as shown at trial and summarized below, the facts simply do not support the Debtors' thesis for an injunction.

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. [*Id*. at 39] First, they argue that an injunction is appropriate because the bankruptcy estate has "two primary assets" – its operating business and "its claims against CEC arising from the Disputed Transactions" – and because "[t]he estate's claims and Appellees' claims both seek to recover from the same limited pool of assets from the same entity (CEC)." [*Id*. at 39-40]

The Debtors ignore the fact that CEC is not the sole source of recovery for the estate claims. Other liable parties include CEC affiliates that received fraudulent conveyances (including Caesars Growth Partners, LLC, Caesars Acquisition Company, Caesars Entertainment Resort Properties, LLC, Caesars Enterprise Services, LLC) and some of the wealthiest individuals in the nation (including David Bonderman, Marc Rowan and David Sambur). [A1062-63 (Tr. 6/3 144:8-145:24) (Millstein); SA14-21 and 27-28 (Tr. 6/3 82:3-89:2, 95:13-96:21)

(Millstein)] Yet, at CEC's direction, the Debtors seek to release all claims against those other parties for no consideration whatsoever. The evidence does not support the argument that the bankruptcy estate and the Appellees are "competing" for a pool of limited resources.

Next, 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 40] This is just the "competition" argument in different words.

Moreover, 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 Appellees are not moving ahead of anybody by enforcing their contractual rights. 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" that may occur 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).

Finally, 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 41 (quotation omitted)] This too is just another variation of the "competition" argument, and it is based on two demonstrably-false premises.

For one thing, CEC's "contribution" under the RSA is not valuable or designed to maximize "creditor recoveries." [*Id.*] Because CEC controls the Debtors, the RSA largely was "negotiated" by CEC with itself and does not come close to maximizing the value of the bankruptcy estate and distributions to the Debtors' creditors. To the contrary, the evidence shows that the RSA is a device for moving money from one of CEC's pockets to another, as the vast majority of CEC's purported "contribution" is payment for assets that CEC is buying for itself and contingent commitments that may never be called upon in favor of entities CEC will wholly or partially own. [SA3 (WSFS and BOKF Post-Trial Brief at 22) (summarizing evidence); SA40-41, 46-66, and 68-73 (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)]

Astoundingly, the Debtors' own expert has not even valued CEC's "contribution" despite the Debtors' oft-repeated (but unsupported) representation that CEC is contributing more than $1.5 billion under the RSA. [A1010 (6/3 Tr. 40:15-24) (Millstein); SA11-12 (6/3 Tr. 79:21-80:5) (Millstein)] Meanwhile, through the RSA the Debtors left billions on the table by agreeing to forgo their claims against many other solvent potential defendants.

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 CEC) and other material creditors. The RSA is a recipe for litigation and discord, not consensus. And, because the Appellees' rights vis-à-vis CEC need to be adjudicated before any purported "settlement" of CEC's liability possibly could be approved in the bankruptcy case, the guarantee actions will help *facilitate* a true, consensual reorganization, not threaten it.

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

The Debtors fare no better in arguing that the Appellees' guarantee cases threaten a successful reorganization. [Br. at 43-44] Indeed, they concede that they have a "strong operating business" and "substantial earnings." [*Id.*] At trial, their expert agreed that an injunction against the guarantee litigation was *not* necessary to a successful reorganization. [SA10 (6/3 Tr. 78:12-23) (Millstein)] On appeal, they can only muster the half-hearted assertion that the guarantee cases might "*temporarily* derail this bankruptcy case." [Br. at 19 (emphasis added); *id.* at 41 ("*could* derail the bankruptcy proceedings") (emphasis added) (quotation omitted)]

Such speculative, ephemeral harm is not enough to warrant an injunction, certainly not in the absence of factual findings by the Bankruptcy Court. *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").

c. *An Injunction Is Not In The Public Interest.*

Finally, the Debtors have not shown that the balance of harms and public interest favors injunctive relief. [Br. at 44-45] For example, the Debtors ignore the significant harm the Appellees face from an injunction. If CEC is insolvent (as the Debtors assert), an injunction would disadvantage 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, [SA31 (6/4 Tr. 10:19-22) (Zelin); SA74 6/4 Tr. 166:18-21) (Eisenberg)], exposing the Appellees to the risk that CEC's allegedly-compromised financial condition will worsen during the period in which they are enjoined from pursuing their guarantee claims. At the same time, CEC remains unfettered and free to invest, transfer or otherwise dissipate its assets. [SA34 (6/4 Tr. 13:22-24) (Zelin)]

The Debtors, however, did not request the Bankruptcy Court to enjoin those other actions or restrict CEC's payment of claims or use of property. This disproves the Debtors' allegation that CEC's financial wherewithal is critical to their reorganization. It also exposes the Appellees to substantial prejudice. 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 guarantor] were free to pursue remedies.").[7]

The Debtors argue that the Appellees would suffer no "harm" because the Debtors "only seek a temporary – not permanent – injunction" and that "if no deal is reached, Appellees will be able to pursue their claims." [Br. at 45] That is deceptive. The Debtors' entire objective is to enjoin the guarantee litigation through the date of confirmation of their proposed plan, by which they hope to release and discharge all of the Appellees' claims against CEC. [SA77-78 and 85 (6/4 Tr. 203:10-204:14, 220:8-14) (Eisenberg)] If the Debtors get what they want, the Appellees will never have the ability to litigate their guarantee claims.

[7] This is why, as noted above, any injunction would have to be accompanied by a bond and strict prohibitions on CEC's ability to transfer and dissipate its assets.

Public policy also disfavors an injunction. It is in the public interest that allegedly-insolvent entities like CEC invoke the bankruptcy laws instead of seeking shelter through an injunction issued in a subsidiary's bankruptcy case. *Lyondell*, 402 B.R. at 594. Moreover, "guaranties are an important device in commercial transactions, and . . . as a matter of public 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.* The Debtors have shown nothing that overcomes those strong public policies that all weigh against issuance of an injunction here.

VII. CONCLUSION

The Bankruptcy Court did not abuse its discretion in denying the injunctive relief requested by the Debtors, and its Order should be affirmed.

[*signatures on following pages*]

Respectfully submitted,

September 2, 2015

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TYPE-VOLUME CERTIFICATION

Pursuant to Rule 8015(a)(7)(C) of the Federal Rules of Bankruptcy Procedure, this brief complies with the type-volume limitations of Rule 8015(a)(7)(B) of the Federal Rules of Bankruptcy Procedure, as follows:

(1) Exclusive of the portions exempted by Rule 8015(a)(7)(B)(iii) of the Federal Rules of Bankruptcy Procedure, the brief contains 12,405 words, according to the count of Microsoft Word.

(2) The brief was prepared using Microsoft Word in 14-point Times New Roman, a proportionally-spaced font.

September 2, 2015

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Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOKF, N.A., solely in its capacity as successor Indenture Trustee for the 12.75% Second-Priority Senior Secured Notes due 2018,

Plaintiff,

-against-

CAESARS ENTERTAINMENT CORPORATION,

Defendant.

OPINION AND ORDER

15-cv-1561 (SAS)

UMB BANK, N.A., solely in its capacity as Indenture Trustee under those certain indentures, dated as of June 10, 2009, governing Caesars Entertainment Operating Company, Inc.'s 11.25% Notes due 2017; dated as of February 14, 2012, governing Caesars Entertainment Operating Company, Inc.'s 8.5% Senior Secured Notes due 2020; dated August 22, 2012, governing Caesars Entertainment Operating Company, Inc.'s 9% Senior Secured Notes due 2020; dated February 15, 2013, governing Caesars Entertainment Operating Company, Inc.'s 9% Senior Secured Notes due 2020,

Plaintiff,

-against-

CAESARS ENTERTAINMENT CORPORATION,

Defendant.

15-cv-4634 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

BOKF, N.A. ("BOKF"), as successor Indenture Trustee, and UMB Bank, N.A. ("UMB"), as Indenture Trustee, bring these actions to enforce Caesars Entertainment Corporation's ("CEC") guarantees of roughly $7 billion in notes issued by Caesars Entertainment Operating Company ("CEOC"). Plaintiffs assert that CEC's guarantees became due and payable upon CEOC's filing of a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Northern District of Illinois Bankruptcy Court on January 15, 2015. CEC, however, claims that certain transactions entered into in May and August 2014 released its obligations under the guarantees. Plaintiffs now move for partial summary judgment, seeking a declaration that the purported release of CEC's guarantees violates section 316(b)[1] of the Trust Indenture Act of 1939 (the "TIA").[2] For the following reasons, plaintiffs' motions are DENIED.

II. BACKGROUND

A. The Indentures

BOKF is the successor Indenture Trustee under the Indenture dated

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[1] *See* 15 U.S.C. §§ 77ppp(b) ("section 316(b)").

[2] *See id.* §§ 77aaa to 77bbbb.

April 16, 2010 (the "Indenture"), under which CEOC issued the 12.75% Second-Priority Senior Secured Notes due 2018.[3] UMB is the Indenture Trustee under four First Lien Indentures — dated June 10, 2009 (due 2017), February 14, 2012, August 22, 2012 and February 15, 2013 (all three due in 2020) (together with the BOKF Indenture, the "Indentures") — that comprise approximately $6,345,000,000 of CEOC's recourse first lien bond debt (together with the 12.75% Second Priority Senior Secured Notes, the "Notes").[4] CEC, the parent company of CEOC and a signatory to the Indentures as "Parent Guarantor," irrevocably and unconditionally guaranteed the obligations arising under the Indentures until payment in full of all of the guarantee obligations (the "Guarantee").[5] The Indentures contain a release provision, providing that the Guarantee will terminate

3 *See* Plaintiff BOKF N.A.'s Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 in Support of Its Motion for Partial Summary Judgment ("BOKF 56.1") ¶¶ 1, 3.

4 *See* Plaintiff UMB Bank, N.A.'s Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 in Support of Its Motion for Partial Summary Judgment ("UMB 56.1") ¶ 1. The provisions of all indentures at issue are identical in all material respects. I will therefore reference the indentures for both plaintiffs as simply the "Indentures." Additionally, most facts are identical in both plaintiffs' motions. I will therefore cite only to BOKF's 56.1 statement unless otherwise necessary.

5 *See* BOKF 56.1 ¶¶ 1, 6–9.

upon the occurrence of certain events.[6] The Indentures are qualified under and governed by the TIA, and the Indentures state that if any provision of the Indentures conflict with the TIA, the TIA controls.[7]

B. CEC and CEOC

In January 2008, Apollo Global Management, LLC, TPG Global, LLC, and their respective affiliates and co-investors acquired CEC in a leveraged buyout transaction for $30.7 billion, funded through the issuance of approximately $24 billion in debt; approximately $19.7 billion of which was secured by liens on substantially all of CEOC's assets.[8]

In its 2013 Annual Report, issued on March 17, 2014, CEC stated that "[w]e do not expect that cash flow from operations will be sufficient to repay CEOC's indebtedness in the long-term and we will have to ultimately seek a restructuring, amendment or refinancing of our debt, or if necessary, pursue additional debt or equity offerings."[9] Over the past several years, CEOC and CEC have undertaken numerous transactions, including over forty-five asset sales and

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6 *See id.* ¶ 14 (citing section 12.02(c) of the Indenture, reproduced in full at page 19).

7 *See id.* ¶¶ 9–11 (citing sections 6.07 and 13.01 of the Indenture).

8 *See id.* ¶¶ 17–18.

9 *Id.* ¶ 22.

capital market transactions, in order to manage their debt.[10] These transactions included moving certain CEOC assets to new affiliates formed in 2013 and early 2014.[11]

In March 2014, CEC hired Blackstone Advisory Partners L.P. to provide advice regarding certain financial and strategic alternatives for the company.[12] In an engagement letter dated August 12, 2014, but made effective as of May 7, 2014, Blackstone agreed to provide financial advisory services to CEC and its affiliates in connection with a possible restructuring of certain liabilities and to assist in analyzing, structuring, negotiating, and effecting a restructuring.[13]

C. The Guarantee Transactions

On May 6, 2014, CEC announced that CEOC planned to issue $1.75 billion in new "B-7" term loans (the "B-7 Transaction") under the first lien credit agreement and to use the net proceeds to refinance existing indebtedness maturing in 2015 and existing term loans.[14] Also on May 6, 2014, CEC announced that in connection with the B-7 Transaction, CEC sold five percent of CEOC's common

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10 *See id.* ¶ 26.

11 *See id.* ¶¶ 31–40.

12 *See id.* ¶ 29.

13 *See id.* ¶ 30.

14 *See id.* ¶¶ 42, 51–54.

stock to certain institutional investors (the "5% Stock Sale" and together with the B-7 Transaction, the "May 2014 Transaction"). According to CEC, because CEOC was no longer a wholly owned subsidiary, the Guarantee was automatically terminated under section 12.02(c)(i) of the Indentures.[15] CEC stated that the B-7 Transaction lenders required the elimination of the Guarantee, and that the elimination provided enhanced credit support for the B-7 Transaction.[16]

On May 30, 2014, CEC authorized the CEOC Board to adopt a 2014 stock performance incentive plan, which enabled CEOC to grant shares of CEOC stock to its directors and officers (the "6% Stock Transfer"), which was announced on June 27, 2014.[17] Also on June 27, CEC asserted that its Guarantee of the Notes had been released because CEOC elected to release the Guarantee under a separate Indenture provision that permits such an election once CEC's guarantee of all the "Existing Notes," as defined in the Indenture, had been released.[18]

On August 12, 2014, CEC announced a private refinancing transaction with certain holders of CEOC's 2016 and 2017 Notes, whereby CEOC

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15 *See id.* ¶ 44.

16 *See id.* ¶¶ 45–46.

17 *See id.* ¶¶ 56–58.

18 *See id.* ¶¶ 15–16, 59–60.

purchased the holders' notes and the holders agreed to amend the indentures governing the 2016 and 2017 Notes to include (a) a consent to the removal, and acknowledgment of the termination, of the CEC guarantee within each indenture and (b) a modification of the covenant restricting disposition of "substantially all" of CEOC's assets to measure future asset sales based on CEOC's assets as of the date of the amendment (the "August Unsecured Notes Transaction").[19] After the August Unsecured Notes Transaction closed, CEC announced that CEOC had provided notice to the Indenture Trustees, as well as other trustees for other secured notes, reaffirming its contention that CEC's Guarantee had been released at CEOC's election, first announced in June 2014.[20]

None of the noteholders represented by plaintiffs consented, or were afforded the opportunity to consent, to the May 2014 Transaction, the 6% Stock Transfer, or the August Unsecured Notes Transaction (collectively, the "Guarantee Transactions").[21]

In January 2015, CEOC and 172 of its subsidiaries filed voluntary

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19 *See id.* ¶¶ 62–63.

20 *See id.* ¶¶ 64–65.

21 *See id.* ¶ 66; UMB 56.1 ¶ 64.

petitions under chapter 11 of the Bankruptcy Code.[22] Under the terms of CEOC's proposed reorganization plan, the noteholders cannot recover the principal and interest due under the Indentures.[23] The bankruptcy filing was an immediate Event of Default under the Indentures, and as a result, CEOC's and CEC's obligations under the Notes became due and owing.[24] BOKF served CEC with a demand for payment on February 18, 2015, and CEC responded that it was not subject to the Guarantee.[25]

III. LEGAL STANDARD

Summary judgment is appropriate "only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party's favor, there is 'no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.'"[26] "A fact is material if it might affect the outcome of the suit under the governing law, and an

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[22] *See* BOKF 56.1 ¶ 70.

[23] *See id.* ¶¶ 79–80; UMB 56.1 ¶ 74.

[24] *See* BOKF 56.1 ¶¶ 74–75; UMB 56.1 ¶¶ 70–71. CEC disputes that it has any obligations under these Notes, as it asserts that the Guarantees have been terminated.

[25] *See* BOKF 56.1 ¶¶ 76–77.

[26] *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 19 (2d Cir. 2014) (quoting Fed. R. Civ. P. 56(c)) (some quotation marks omitted).

issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[27]

"[T]he moving party has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle [it] to judgment as a matter of law."[28] To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts,"[29] and "may not rely on conclusory allegations or unsubstantiated speculation."[30]

In deciding a motion for summary judgment, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried."[31] "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those

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27 *Windsor v. United States*, 699 F.3d 169, 192 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (quotations and alterations omitted).

28 *Coollick v. Hughes*, 699 F.3d 211, 219 (2d Cir. 2012) (citations omitted).

29 *Brown v. Eli Lilly & Co.,* 654 F.3d 347, 358 (2d Cir. 2011) (quotation marks and citations omitted).

30 *Id.* (quotation marks and citations omitted).

31 *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 119 (2d Cir. 2012).

of a judge.'"[32]

IV. APPLICABLE LAW

A. The Trust Indenture Act

The TIA provides that instruments to which it applies must be issued under an indenture that has been qualified by the Securities and Exchange Commission ("SEC").[33] The requirements of such indentures are "designed to vindicate a federal policy of protecting investors."[34]

Section 316 of the TIA relates to collective action clauses. For example, it is permissible for a majority of noteholders to direct the trustee to exercise its powers under the indenture or for not less than seventy-five percent of noteholders "to consent on behalf of the holders of all such indenture securities to

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[32] *Barrows v. Seneca Foods Corp.*, 512 Fed. App'x 115, 117 (2d Cir. 2013) (quoting *Redd v. New York Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012)).

[33] *See generally* 15 U.S.C. §§ 77eee-77ggg. "A 'trust indenture' is a contract entered into between a corporation issuing bonds or debentures and a trustee for the holders of the bonds or debentures, which, in general, delineates the rights of the holders and the issuer." *Upic & Co. v. Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 450 (S.D.N.Y. 1992).

[34] *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 85 F.3d 970, 974 (2d Cir. 1996) (explaining that the law was "enacted because previous abuses by indenture trustees had adversely affected 'the national public interest and the interest of investors in notes, bonds[, and] debentures . . . .'") (quoting 15 U.S.C. § 77bbb(a)).

the postponement of any interest payment for a period not exceeding three years from its due date."[35] Section 316(a)'s terms are permissive — meaning an indenture can expressly exclude such majority action.

However, section 316(b) is mandatory. It states that:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a) of this section, and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.[36]

Thus, section 316(b) acts to protect a bondholder's right to receive payment of both principal and interest.

Section 316(b) addressed earlier practices whereby majority bondholders — often controlled by insiders — used collective or majority action clauses to change the terms of an indenture, to the detriment of minority

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35 15 U.S.C. § 77ppp(a).

36 *Id.* § 77ppp(b).

bondholders.[37] As a result of section 316(b), an issuer cannot — outside of bankruptcy[38] — alter its obligation to pay bonds without the consent of each bondholder.[39] In this way, section "316(b) was designed to provide judicial scrutiny of debt readjustment plans to ensure their equity."[40]

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[37] *See MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.* ("*MeehanCombs*"), Nos. 14 Civ. 7091, 14 Civ. 7937, 2015 WL 221055, at *3 n.31 (S.D.N.Y. Jan. 15 2015) (collecting cases).

[38] *See, e.g.*, *In re Board of Directors of Telecom Argentina, S.A.*, 528 F.3d 162, 172 (2d Cir. 2008) ("'[I]t is self-evident that Section 316(b) could not have been intended to impair the capacity of a debtor and its creditors to restructure debt in the context of bankruptcy,' and '[t]he cases have uniformly recognized that reorganization proceedings in Chapter 11 are not within the purview of TIA Section 316(b).'") (quoting *In re Delta Air Lines, Inc.*, 370 B.R. 537, 550 (Bankr. S.D.N.Y. 2007), *aff'd*, 374 B.R. 516 (S.D.N.Y. 2007)).

[39] *See In re Board of Directors of Multicanal S.A.*, 307 B.R. 384, 388-89 (Bankr. S.D.N.Y. 2004); Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 251 (1987) ("Only two events should change a company's obligation to pay its bonds. Either *each* affected bondholder would consent to the alteration of the bond's terms, or a judge would value the company to determine that the firm was insolvent, eliminate the stockholders, and then reduce the express obligation to the bondholders.") (emphasis in original).

[40] *Brady v. UBS Financial Services, Inc.*, 538 F.3d 1319, 1325 (10th Cir. 2008) (citing S. Rep. No. 76-248, at 26 (1939)); *see also id.* ("In practice, the provision tends to force recapitalizations into bankruptcy court because of the difficulty of completing a consensual workout."); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 Am. Bankr. Inst. L. Rev. 431, 433-37 (2006) ("Section 316(b) was adopted with a specific purpose in mind — to prevent out-of-court debt restructurings from being forced upon minority bondholders."); Roe, *The Voting Prohibition*, 97 Yale L.J. at 251 ("Congress and the SEC were aware that the holdout problem would frustrate some workouts, but the regulators wanted to impede workouts that took place outside of

B. Contract Interpretation

Under New York law, "[t]he court's function in interpreting a contract is to apply the meaning intended by the parties, as derived from the language of the contract in question."[41] "[T]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."[42]

"The question of whether a written contract is ambiguous is a question of law for the court."[43] "Contract language is unambiguous when it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion."[44] However, contract language is ambiguous if "the terms of the contract could suggest more than one meaning when viewed objectively by a

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regulatory and judicial control. The SEC *wanted* trust indenture legislation that would bring contractual recapitalizations under the jurisdiction of the federal bankruptcy court.") (emphasis in original).

41 *Marin v. Constitution Realty, LLC*, 11 N.Y.S.3d 550, 558–59 (1st Dep't 2015) (internal citations, quotations, and alterations omitted).

42 *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) (internal citations and quotations omitted).

43 *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009).

44 *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000).

reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[45] "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing; evidence as to custom and usage is considered, as needed, to show what the parties' specialized language is fairly presumed to have meant."[46]

V. DISCUSSION

A. Impairment Under the TIA

In *MeehanCombs*, I rejected CEC's arguments that section 316(b) protected only a noteholder's *legal* right to receive payment when due. Rather, I agreed with two other courts in this district that "when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, . . . such action . . . constitute[s] an 'impairment' . . . ."[47] I continue to adhere to the view that section 316(b) protects a

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45 *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010).

46 *Id.* at 466–67.

47 *Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99 Civ. 10517, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999).

noteholder's practical ability, as well as the legal right, to receive payment when due.[48] Specifically, I concluded, following the reasoning of two decisions from this District, that section 316(b) protects more than simply "formal, explicit modification of the legal right to receive payment" which would allow "a sufficiently clever issuer to gut the Act's protections."[49] As explained in *Federated Strategic Income Fund*:

> By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover and will remove a holder's "safety net" of a guarantor, which was obviously an investment consideration from the outset. Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors. It is beyond peradventure that when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action . . . constitute[s] an "impairment" . . . [of] the right to sue for payment.[50]

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[48] *Accord Marblegate Asset Mgmt., LLC v. Education Mgmt. Corp.* ("*Marblegate II*"), No. 14 Civ. 8584, 2015 WL 3867643 (S.D.N.Y. June 23, 2015) (reviewing legislative history to conclude that section 316(b) protects against nonconsensual debt restructuring to protect a noteholder's right to receive payment).

[49] *Marblegate Asset Mgmt. v. Education Mgmt. Corp.* ("*Marblegate I*"), 75 F. Supp. 3d 592, 613 (S.D.N.Y. 2014)

[50] *Federated Strategic Income Fund*, 1999 WL 993648, at *7.

In *MeehanCombs*, I stated that "the Complaint's plausible allegations that the August 2014 Transaction stripped plaintiffs of the valuable CEC Guarantees leaving them with an empty right to assert a payment default from an insolvent issuer are sufficient to state a claim under section 316(b)."[51] Here, however, I must decide several questions left open by *MeehanCombs.* Namely, what must plaintiffs prove to demonstrate an impairment that violates section 316(b)? Plaintiffs contend that there are only two elements: "(i) an impairment of a security holder's right to receive payment (ii) without the holder's consent."[52] Thus, they assert that because the Guarantees were purportedly stripped without their consent, CEC's actions violated section 316(b).

CEC responds with several arguments. *First*, CEC contends that, in order to violate section 316(b), the alleged impairment must be either: (1) an amendment of a core term of the debt instrument or (2) a restructuring of the noteholders' debt. *Second*, CEC asserts that the impairment should be evaluated as of the time of each transaction — that is, plaintiffs must prove that CEOC was insolvent at the time the Guarantees were terminated, leaving the noteholders with no ability to recover as of the time of the transaction. Related to this argument,

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[51] *MeehanCombs*, 2015 WL 221055, at *5.

[52] Plaintiff BOKF N.A.'s Memorandum of Law in Support of Its Motion for Partial Summary Judgment ("BOKF Mem.") at 16–17.

CEC asserts that the Guarantees were never intended to provide credit support, and therefore the release of a Guarantee that provided no real value to noteholders cannot be an impairment. *Finally*, CEC argues that there are genuine disputes of material fact as to whether the challenged transactions were, either individually or collectively, a restructuring of the noteholders' debt, and that CEC has been prevented from pursuing discovery essential to its opposition.

As described more fully below, I conclude that in order to prove an impairment under section 316(b), plaintiffs must prove either an amendment to a core term of the debt instrument, or an out-of-court debt reorganization.[53] The alleged impairment, however, must be evaluated as of the date that payment becomes due, because it is only then that the bondholders' right to payment has been affected by certain actions and/or transactions undertaken by issuers or guarantors.

1. The Nature of the Guarantee

I begin by addressing the nature of the Guarantee. CEC asserts that

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[53] The term "reorganization" has been defined as follows: "A process designed to revive a financially troubled or bankrupt firm. A reorganization involves the restatements of assets and liabilities, as well as holding talks with creditors in order to make arrangements for maintaining repayments. Reorganization is an attempt to extend the life of a company facing bankruptcy through special arrangements and restructuring in order to minimize the possibility of past situations reoccurring." Reorganization Definition, Investopedia.com, www.investopedia.com/terms/r/reorganization.asp (last visited Aug. 26, 2015).

the noteholders cannot have been practically impaired by the release of the Guarantee because the Guarantee was never intended to provide credit support for the Notes. Rather, CEC contends that the Guarantee was included in the Indenture only as a regulatory device to comply with Rule 3-10 of SEC Regulation S-X. This regulation would allow CEOC to rely on CEC's audited financials rather than preparing and filing its own audited financial statements.[54] Plaintiffs respond that the Guarantee language in the Indenture is unambiguous: it provides for an unequivocal guarantee by CEC. Thus, any extrinsic evidence regarding the purported intent of the Guarantee is inadmissable under New York law.

Section 12.01(a) of the Indenture spells out the terms of the Guarantee:

> Each Guarantor hereby jointly and severably, *irrevocably and unconditionally guarantees . . . the full and punctual payment when due*, whether at Stated Maturity, by acceleration, by redemption or otherwise, of all obligations of the Issuer under this Indenture (including obligations to the Trustee) and the Notes, whether for payment of principal of, premium, if any, or interest on in respect of the Notes and all other monetary obligations of the Issuer under this Indenture and the Notes . . . .[55]

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[54] *See* Memorandum of Law of Caesars Entertainment Corporation in Opposition to BOKF, N.A.'s Motion for Partial Summary Judgment ("Opp. Mem.") at 9–10 (citing 17 C.F.R. Part 210.3-10).

[55] BOKF 56.1 ¶ 6 (emphasis added). The language in the UMB Indenture is substantively identical. *See* UMB 56.1 ¶ 8.

Additionally, section 12.01(g) provides that "[e]ach Guarantor agrees that its Note Guarantee shall remain in full force and effect until payment in full of all the Guaranteed Obligations."[56] The release of the Guarantee is governed by section 12.02(c) of the Indenture, which provides that CEC

> shall be deemed to be released from all obligations . . . upon:
>
> (i) the Issuer ceasing to be a Wholly Owned Subsidiary of Harrah's Entertainment;
>
> (ii) the Issuer's transfer of all or substantially all of its assets to, or merger with, an entity that is not a Wholly Owned Subsidiary of Harrah's Entertainment in accordance with Section 5.01 and such transferee entity assumes the Issuer's obligations under this Indenture; and
>
> (iii) the Issuer's exercise of its legal defeasance option or covenant defeasance option under Article VIII or if the Issuer's obligations under this Indenture are discharged in accordance with the terms of this Indenture.[57]

Finally, the Indenture provides that the TIA governs the Indenture and controls in the event of an inconsistency between the TIA and the Indenture: "If and to the extent that any provision of this Indenture limits, qualifies or conflicts with the duties imposed by . . . Sections 310 to 318 of the TIA, inclusive, such imposed duties . . . shall control."[58]

CEC contends that several provisions of the Indenture indicate that the

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[56] BOKF 56.1 ¶ 6; UMB 56.1 ¶ 10.

[57] BOKF 56.1 ¶ 14; UMB 56.1 ¶ 15.

[58] *See* BOKF 56.1 ¶ 11 (quoting section 13.01 of the Indenture).

Guarantee was not intended to provide credit support. *First*, it asserts that the Guarantee could be released under any one of the three conditions listed above — that is, CEC reads the release provisions disjunctively, rather than conjunctively, as the "and" would suggest. As such, the Guarantee could be easily terminated by unilateral action on CEC's part. Relying on the release provisions of the Indenture — as well as extrinsic evidence of third-party analyses of the release provisions — CEC contends that the Guarantee was intended to be nothing more than a "guarantee of convenience" to facilitate regulatory filings. *Second*, CEC argues that it has been prevented from obtaining discovery as to, *inter alia*, whether the noteholders believed the Guarantee provided genuine credit support. Thus, CEC argues that there is a genuine dispute of material fact as to whether the release of the Guarantee impaired the noteholders' right to payment.

These arguments fail under the most basic rule of contract construction — where the language of an agreement is unambiguous, courts must enforce the agreement according to the agreement's plain language: "'[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.'"[59] Here, the language of the Guarantee is "clear, unequivocal and unambiguous" and

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[59] *Law Debenture Trust Co.*, 595 F.3d at 468 (quoting *Greenfield*, 98 N.Y.2d at 569–70).

therefore must be "enforced according to its terms."[60] The Indenture states that CEC "irrevocably and unconditionally guarantees . . . the full and punctual payment when due."[61] Nothing in the remaining language of section 12.01(a) casts any ambiguity upon the clear language indicating that the Guarantee is indeed one that provides a promise of full payment in the event that CEOC was unable to fulfill its payment obligations. Further, there is no indication from any other section of the Indenture that the Guarantee was put in place merely to facilitate regulatory filings. Thus, the plain language of the Guarantee section indicates that it provided credit support.

Additionally, nothing in the release provisions creates an ambiguity. Whether or not the release provisions are read conjunctively or disjunctively,[62] the mere fact that CEC could be released from the Guarantee under certain circumstances says little about the nature of the Guarantee itself. That is, simply because a Guarantee may be easily terminated — assuming that CEC could terminate it by unilateral action and by causing any one of three conditions to occur — does *not* indicate that the Guarantee was something other than an

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[60] *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007).

[61] BOKF 56.1 ¶ 6; UMB 56.1 ¶ 8.

[62] The parties have not briefed this issue, and I need not decide the issue here.

"unconditional[] guarantee[] [of] . . . full and punctual payment when due."[63]

Finally, the Indenture also included a provision stating that any obligations that arise under the TIA control in the event that any provision conflicts with the TIA. Though I do not today decide this issue, there is no dispute that, whatever the release provision allowed, it cannot provide CEC with a path to impair noteholders' rights under section 316(b). In other words, if, in taking actions allowed under the release provision of the Indenture, CEC violated noteholders' rights to payment under section 316(b), then the release was invalid as a matter of law. Moreover, the fact that plaintiffs consented to the provision by agreeing to the Indenture is of no moment. Though all parties to the Indenture are sophisticated — and no doubt were represented by sophisticated attorneys — signatories to a contract cannot consent to violate the law.[64] That is, it is undisputed that plaintiffs consented to *a* release provision, which is not, in and of itself, a violation of the TIA. But plaintiffs could not have known, *ex ante*, the transactions that would occur or whether those transactions would, in fact, violate the TIA. If the transactions that triggered the release of the Guarantee — even

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63 *Id.*

64 *See, e.g.*, *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843 (2d Cir. 1952) ("[I]t is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable.").

assuming that they did not violate the terms of the Indenture — violate the TIA, then plaintiffs' consent to the release provision cannot be a consent to the Guarantee Transactions.

CEC supports its argument with third-party analyst reports and expert declarations that understand the Guarantee to merely facilitate financial reporting obligations, and not to provide credit support. But in the face of an unambiguous contract, this evidence is inadmissible. A court may only consider evidence of custom and usage where "parties have used contract terms which are in common use in a business or art and have a definite meaning understood by those who use them, but which convey no meaning to those who are not initiated into the mysteries of the craft . . . . Proof of custom and usage does not mean proof of the parties' subjective intent . . . ."[65] But there are no specialized terms used in the Guarantee provision that would necessitate looking to extrinsic evidence of custom and usage. Rather, CEC appears to argue that, while the language of the Indenture unambiguously spells out a guarantee of credit support, the parties all understood that the Guarantee was essentially meaningless. This is exactly the type of extrinsic evidence of subjective intent that is inadmissible under New York law: "'[e]vidence outside the four corners of the document as to what was really

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[65] *Law Debenture Trust Co.*, 595 F.3d at 466 (internal quotations omitted).

intended but unstated or misstated is generally inadmissible to add to or vary the writing.'"[66]

Finally, further discovery would not lead to admissible evidence that could create a genuine issue of material fact. CEC seeks discovery relating to the noteholders' understanding of the Guarantee. As discussed above, such evidence is inadmissable where the language of the contract is unambiguous.

2. Plaintiffs Must Prove Either an Amendment of a Core Term of the Debt Instrument or an Out-of-Court Debt Reorganization

Although I conclude that the Guarantee unambiguously provided credit support, the mere release of the Guarantee, standing alone, does not prove an impairment under section 316(b). Plaintiffs argue that the release of the Guarantee without their consent is "the kind of transaction that Section 316(b) was designed to prohibit."[67] But this proposition sweeps too broadly. The case on which plaintiffs rely for this proposition recognizes that a guarantee release clause could, in some contexts, be invoked without violating section 316(b).[68] Although the plain language of the TIA prohibits any impairment to a noteholder's right to

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66 *Id.* (quoting *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)).

67 BOKF Mem. at 20.

68 *See Marblegate I*, 75 F. Supp. 3d at 615–16.

payment, plaintiffs' broad reading of the statute would allow "untrammeled judicial intrusion into ordinary business practice."[69] Thus the question remains as to what plaintiffs must prove to establish an impairment.

The issue before Judge Failla in *Marblegate II* was whether a debt restructuring violated section 316(b) when it did not modify any indenture term explicitly governing the right to receive interest or principal on a certain date, yet left bondholders no choice but to accept a modification of the terms of their bonds.[70] That is, if bondholders did not accept a modification, there would be no formal alteration of the dissenting noteholders' right to payment; however, the transaction at issue was "unequivocally designed to ensure that they would receive no payment if they dissented from the debt restructuring."[71] Judge Failla exhaustively reviewed the legislative history of section 316(b) to conclude that it was designed to prevent a "nonconsensual majoritarian debt restructuring."[72] Notably, Judge Failla did not need to go beyond that conclusion, because the facts

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[69] *Id.* at 614.

[70] *See Marblegate II*, 2015 WL 3867643, at *3.

[71] *Id.* at *2. Importantly, the transaction effected a restructuring of only the debt of *consenting* noteholders. Dissenting noteholders retained their *right* to payment under their indentures, but were left with no practical ability to receive payment.

[72] *Id.* at *11.

of that case left "little question that [the transaction at issue was] precisely the type of debt reorganization that the Trust Indenture Act is designed to preclude."[73]

Here, all parties agree that no term of the Indenture was amended. It is indisputable that if CEOC had unilaterally adjusted the amount of principal or interest it would pay on a note, that would be an impairment under section 316(b). Similarly, renegotiating a debt obligation with a majority of noteholders to the detriment of a nonconsenting minority *under the same indenture* would be an impairment. Here, however, neither of those straightforward violations of section 316(b) have occurred. Rather, plaintiffs argue that by allegedly exercising its rights under the release provisions contained in the Indenture, CEC impaired plaintiffs' rights as prohibited by the TIA because it affected their practical ability to receive payment on the Notes. By contrast, CEC argues that its actions were permitted by the Indenture and did not violate the TIA, even if plaintiffs' ability to receive payment was indirectly affected. Therefore, this Court must interpret section 316(b) to determine what actions, beyond the detrimental amendment of core terms of an indenture, constitute an impairment under the TIA.

I begin with the plain language of section 316(b), which states that "the right of any holder of any indenture security to receive payment of the

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[73] *Id.* at *12.

principal of and interest on such indenture security, on or after the respective due dates . . . , *or* to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . . ."[74] The use of the disjunctive "or" lends support to the conclusion that section 316(b) protects *both* the right to sue for payment as well as the substantive right to receive such payment.[75]

The legislative history of the section confirms this reading, and also illuminates the broader purpose of section 316(b). A 1936 SEC report provided the impetus for the TIA.[76] This report discussed the problems minority bondholders faced, including reorganizations conducted outside the supervision of a judicial or administrative process.[77] The TIA went through several iterations,

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[74] 15 U.S.C.§ 77ppp(b) (emphasis added).

[75] *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("To read the next clause, following the word 'or,' as somehow repeating that requirement, even while using different words, is to disregard what 'or' customarily means. As we have recognized, that term's ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.") (internal quotations omitted).

[76] *See* 15 U.S.C. § 77bbb(a).

[77] *See* Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VI: Trustees Under Indentures 63–64, 150 (1936).

accompanied by testimony and debate in the Senate and House. This testimony indicated a concern with protecting minority bondholders' rights against a majority forcing a non-assenting minority into a debt-readjustment plan. The Senate's report in 1938, which largely reiterated the testimony of then-SEC Chairman William O. Douglas, stated that the predecessor provision to section 316(b) would

> prohibit provisions authorizing . . . a majority to force a non-assenting security holder to accept a reduction or postponement of his claim for principal . . . . Evasion of judicial scrutiny of the fairness of debt-readjustment plans is prevented by this prohibition . . . . This prohibition does not prevent the majority from binding dissenters by other changes in the indenture or by a waiver of other defaults, and the majority may of course consent to alterations of its own rights.[78]

The final version of the text of section 316(b) was significantly revised from previous versions. The significant differences were (1) instead of providing discretion to the SEC, the TIA set out mandatory indenture provisions; and (2) the addition of the language providing for a right to receive payment in addition to the right to institute suit.[79] However, the understanding of section 316(b) remained the same: "Evasion of judicial scrutiny of the fairness of debt-readjustment plans is prevented by this prohibition."[80]

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78 S. Rep. No. 75-1619, at 19 (1938).

79 *See Marblegate II*, 2015 WL 3867643, at *9.

80 *Id.* (quoting 1939 House Hearings at 31).

Thus, the legislative history makes clear the purpose of the right enunciated in section 316(b): to protect minority bondholders against debt reorganizations resulting from a majority vote, outside of judicial supervision. This reading tracks the plain language of the statute, giving effect to both clauses — the right to institute suit, as well as the right to receive payment. It also provides an important limitation on the right. Broadly understood, as plaintiffs urge, the right enumerated in section 316(b) would prevent *any* corporate action that had any effect on a noteholder's ability to receive payment. An interpretation of section 316(b) that requires plaintiffs to prove either an amendment to a core term of the debt instrument or an out-of-court debt reorganization — in keeping with the purpose underlying the provision — allows for corporate flexibility while protecting minority bondholders against being "forced to relinquish claims outside the formal mechanisms of debt restructuring."[81]

Taking this purpose into account, as well as the plain language of the statute, I reject CEC's contention that plaintiffs must establish a restructuring of their particular debt. There is no question that, had CEC attempted to restructure the plaintiffs' debt by amending a core term of the Indenture without their consent, that action would violate the TIA. But, as in *Marblegate*, an impairment may also

81 *See id.* at 12.

occur where a company restructures debt arising under *other* notes, in the context of an out-of-court reorganization, leaving some noteholders with an unaltered formal right to payment, but no practical ability to receive payment. For example, it might be that taking on new debt, where the new investors require as a condition of their investment that the rights of existing bondholders be altered — in other words, the terms of the B-7 Transaction — constitutes an out-of-court reorganization that impairs bondholders' rights under the TIA.

3. There Is a Genuine Dispute of Material Fact as to Whether the Guarantee Transactions Were an Out-of-Court Reorganization

The remaining question is whether the Guarantee transactions were an out-of-court reorganization. CEC asserts that plaintiffs must establish CEOC's insolvency at the time of each challenged transaction — that is, the transaction must involve a termination of the Guarantee in the context of an insolvent issuer, which would have the effect of a complete impairment of the noteholders' right to receive payment *at the time of the transaction*. The plain language of section 316(b) does not support CEC's argument: "the right of any holder . . . to receive payment . . . *on or after the respective due dates* . . . shall not be impaired . . . ." Thus the statute measures impairment as of the date payment is due — the language necessarily requires a court to examine whether, as of the due date, a noteholder's right to payment has been impaired.[82] Further, using CEC's narrow reading, a company could too easily skirt the requirements of section 316(b) by stripping a guarantee in one transaction and then, in separate but related transactions, effect a company-wide debt restructuring, leaving noteholders with "an empty right to assert a payment default from an insolvent issuer."[83]

CEC notes that without a requirement that an issuer be insolvent at the time of the transaction, ordinary corporate activities would potentially violate the TIA. That is, if an issuer became insolvent at *any* point, earlier corporate activities could support a claim under section 316(b) so long as the plaintiff alleges that those earlier activities impaired the noteholders' rights to receive payment. This would expose "countless routine transactions that companies undertake without the unanimous consent of their creditors — such as raising senior debt or other new funds; exchange offers for existing debt; ordinary sales of assets; or new investments — as potential violations of the TIA . . . ."[84] But examining the transactions as a whole to determine whether they *collectively* constitute an

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[82] Of course, nothing would prevent a plaintiff seeking prospective, declaratory relief from bringing an action and proving an impairment as of the time of the transaction.

[83] *MeehanCombs*, 2015 WL 221055, at *5.

[84] Opp. Mem. at 26.

impermissible out-of-court reorganization in violation of the noteholders' rights under section 316(b) allows the Court to avoid defendants' parade of horribles. A routine transaction that, after examination with a full record, is unrelated to a a reorganization but nevertheless resulted in a noteholder receiving a reduced payment would not violate section 316(b).

To make the point crystal clear, I explain this reasoning in the context of the instant lawsuits. At the time that CEC was released from the Guarantee — and for the purposes of this motion only plaintiffs concede that the Guarantee has been stripped – CEOC (the issuer) was not yet insolvent and was not yet unable to pay on notes which (by the way) were not yet due to be paid. At that moment, it cannot be said the plaintiffs rights were impaired because they could not know whether CEOC would be in a stronger position to ultimately meet its obligations under the Indentures as a result of the Guarantee Transactions than it would have been otherwise. It is only at the time *that payment was required* — here CEOC's chapter 11 filing and its proposed reorganization plan — that plaintiffs' rights became impaired as a result of the stripping of the Guarantee. Thus, it is only as of that moment in time that a court can evaluate whether the Guarantee stripping violated the TIA because the action was taken as part of an out-of-court reorganization without the consent of the plaintiff bondholders.

Nonetheless, under this standard, plaintiffs have not met their burden of demonstrating that there is no genuine dispute of material fact as to whether the Guarantee Transactions effected a nonconsensual debt restructuring. As discussed above, the purported termination of the Guarantees must be in the context of a debt reorganization. Thus, the transactions must be analyzed as a whole to determine if the overall effect was to achieve a debt restructuring that impaired plaintiffs' right to payment.

In light of this, summary judgment is inappropriate at this stage where, as here, there is a genuine dispute as to whether the challenged transactions, either individually or collectively, were an out-of-court reorganization and the record has not yet been fully developed. CEC raises questions as to whether the transactions were "routine corporate transaction[s] . . . undertaken in an effort to *improve* CEOC's financial condition"[85] or whether the transactions were undertaken as part of a plan to accomplish an out-of-court restructuring of all CEOC debt.[86] With the benefit of full discovery, the factfinder may examine all evidence related to these transactions to determine whether a restructuring occurred

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[85] *Id.* at 22.

[86] To be clear, the Court is not importing an intent requirement into section 316(b) where none exists. Rather, the evidence related to the transactions must be examined to determine what the overall *effect* of the transactions was — a debt restructuring or a series of routine corporate transactions.

— *i.e.*, did the transactions involve the restatement of assets and liabilities, did CEOC hold talks with creditors in order to make arrangements for maintaining repayments, and did the transactions attempt to extend the life of a company facing bankruptcy through special arrangements and resturucturing?

Nevertheless, only *limited* discovery is permitted to allow the parties to develop the record with regard to these transactions. Defendants have requested discovery related to (1) whether the challenged transactions were a restructuring; (2) whether the noteholders' prospects for recovery were adversely affected by the challenged transactions; and (3) "whether the [noteholders] believed the Guarantee provided genuine credit support."[87] Defendants may pursue only the first and second avenues of the requested discovery. As discussed above, the parties' subjective intent or understanding of the Guarantee is irrelevant and inadmissible in the face of unambiguous contractual language.

B. Certification Under 28 U.S.C. § 1292(b)

I am keenly aware that this Order addresses several questions of unresolved law, and may have serious implications for corporate entities. I therefore *sua sponte* certify this Order for an interlocutory appeal pursuant to 28

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[87] *Id.* at 34. I have reworded the requests articulated by CEC in their Memorandum of Law because those requests are broader than the discovery I am permitting, as stated above.

U.S.C. § 1292(b).[88] The Second Circuit has yet to address three threshold issues that would be decisive for this litigation: *First*, what rights does section 316(b) of the TIA protect? Does it protect noteholders' *practical* rights to principal and interest, as this Court and several others have held, or only their *legal* rights, as other courts have concluded? *Second*, assuming that section 316(b) protects more than a bare legal right, what is the appropriate standard to assess impairment? Must plaintiffs show that a nonconsensual out-of-court restructuring occurred? If so, must there be an amendment to the debt instrument itself? *Third*, as of when (and how) should the impairment be evaluated? Must a court evaluate each transaction separately at the time it was undertaken? Or is the impairment to be evaluated as of the date for demand of payment? May a court consider multiple transactions collectively?

It is a "basic tenet of federal law to delay appellate review until a final judgment has been entered."[89] However, a court, in its discretion, may certify an interlocutory order for appeal if the order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that

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88 *See Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44 (2d Cir. 1996) (accepting interlocutory appeal certified by district court *sua sponte*); *Wisdom v. Intrepid Sea-Air Space Museum*, 993 F.2d 5, 6–7 (2d Cir. 1993) (same).

89 *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996).

an immediate appeal from the order may materially advance the ultimate termination of the litigation."[90] Interlocutory appeals are presumptively disfavored, and are only warranted in "extraordinary cases where appellate review might avoid protracted and expensive litigation . . . ."[91]

This is the unusual case in which certification is appropriate. An interlocutory appeal is in the interests of all parties, and will ensure judicial economy. There are billions of dollars riding on this decision — BOKF and UMB together seek more than $7 billion, which is "far in excess of CEC's market capitalization."[92] CEOC has already filed for bankruptcy, and — given the amount at stake — a decision in plaintiffs' favor would likely open the door to a bankruptcy filing by CEC.

The question of the correct interpretation of section 316(b) is a controlling issue of law. It is a "'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record."[93] A

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[90] 28 U.S.C. § 1292(b).

[91] *Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007).

[92] Opp. Mem. at 6.

[93] *In re Worldcom, Inc.*, No. M-47, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003).

controlling issue of law for the purposes of section 1292(b) includes not only those issues that will resolve the action in its entirety, but those that are dispositive in other respects, such as whether a claim exists as a matter of law.[94] The correct construction of section 316(b) is dispositive in this respect, and is therefore a controlling issue of law. Moreover, it will materially advance the ultimate termination of the litigation. Understanding whether plaintiffs may assert a claim under section 316(b) — and if so, what the correct standard for assessing an impairment is — will enable the parties either to avoid a protracted and most likely exorbitantly expensive trial entirely, or to avoid trying the same claim twice under different standards.

Finally, the brewing circuit split and the range of views expressed by district and bankruptcy courts indicate that there is substantial ground for difference of opinion on the correct interpretation of section 316(b). As noted above, three courts in this district have concluded that section 316(b) protects noteholders' practical right to payment.[95] Another court in this district, as well as

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[94] *See* 19 Moore's Federal Practice § 203.31 (Matthew Bender 3d ed. 2013) (collecting Second Circuit cases).

[95] *See MeehanCombs*, 2015 WL 221055, at *4–5; *Marblegate I*, 75 F. Supp. 3d at 611–15; *Federated Strategic Income Fund*, 1999 WL 993648, at *7. A notice of appeal has been filed in *Marblegate II*. As that case involves some of the same legal issues, an appellate court may wish to consolidate the appeals. *See* Notice of Appeal, Dkt. No. 80 in *Marblegate Asset Management, LLC v.*

courts elsewhere, have concluded that section 316(b) protects only noteholders' legal rights.[96] Further, whether an impairment requires a nonconsenual out-of-court restructuring, and the standard under which to evaluate the challenged transaction, are questions that only this Court and Judge Failla have addressed. These issues are almost certain to arise again, and without guidance from an appellate court, the divide in the correct interpretation of section 316(b) will likely only deepen. These issues are therefore appropriate for certification.

Nevertheless, I do *not* certify this Order for appeal as an alternative to proceeding. The parties are expected to remain on schedule, and the Court is ready to proceed, at the conclusion of discovery on September 30, with full summary judgment or a bench trial. It may be that the contract interpretation issue related to the release provision — which the parties have not briefed for this motion — will be dispositive.

Education Mgmt. Corp., No. 14 Civ. 8584.

[96] *See In re Northwestern Corp.*, 313 B.R. 595, 600 (Bankr. D. Del. 2004) ("[Section 316(b)] applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself.") (emphasis in original); *Brady v. UBS Financial Services, Inc.*, 538 F.3d 1319, 1326 n.9 (10th Cir. 2008) (quoting *Northwestern*); *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas*, No. 10 Civ. 2106, 2010 WL 2680336, at *7 (D. Kan. July 1, 2010) (following *Northwestern*). *See also UPIC & Co.*, 793 F. Supp. at 456 (noting that while section 316(b) guarantees a "procedural" right to commence an action for nonpayment, it does not "[a]ffect or alter the substance of a noteholder's right to payment").

VI. CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment is DENIED. I hereby certify an interlocutory appeal from this Order pursuant to 28 U.S.C. § 1292(b). The Clerk of Court is directed to close these motions (Docket Nos. 30, 35 in 15-cv-1561; Docket Nos. 27, 35, 37 in 15-cv-4634). A conference is scheduled for October 7, 2015 at 3:30 p.m.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
August 27, 2015

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