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

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,[1] *Debtors*.	Chapter 11 Case No. 15-01145 (ABG) (Jointly Administered)
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*, *Plaintiffs*, *v.* BOKF, N.A., *et al*. *Defendants.*	Chapter 11 Adversary Case No. 15-00149

JOINT PRETRIAL BRIEF OF WSFS AND BOKF[2]

1. Under the control and direction of their corporate parent, non-debtor Caesars Entertainment Corp. ("CEC"), the Debtors seek to enjoin direct claims for enforcement of CEC's contractual guarantee of nearly $5.5 billion in notes held or represented by the Defendants, now pending in three cases before the Southern District of New York and one before the Delaware Chancery Court (the "Guarantee Actions"). Those claims are asserted only against CEC (not the Debtors) and are not property of the bankruptcy estate. The automatic stay does not apply to them and, absent an injunction, the Defendants will pursue the claims in their chosen *fora*.

2. The Debtors' request for an injunction in favor of their non-debtor parent is extraordinary. Just yesterday, Judge Scheindlin of the Southern District of New York emphatically rejected CEC's request to postpone consideration of BOKF's proposed motion for summary judgment, noting:

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[1] A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

[2] This brief is filed by Defendants Wilmington Saving Fund Society, FSB ("WSFS") and BOKF, N.A. ("BOKF").

> [T]here is no reason to require BOKF to wait to make its motion. CEC is not a debtor and, as a matter of common sense, there does not appear to be any connection between its ability to contribute to a putative chapter 11 plan and the continuation of this case or even, should it be warranted, the entry of a judgment of liability. Moreover, this case raises significant issues under a federal statute which necessarily impact the relationship between issuers and noteholders outside of the bankruptcy context. I will not limit BOKF from attempting to vindicate noteholders' rights under non-bankruptcy law, including under the TIA, against a non-debtor. This is particularly true when enjoining actions against non-debtors occurs only rarely, in unusual or extraordinary circumstances, and after consideration of both equitable and non-equitable factors.

Order, No. 15-cv-1561(SAS) (S.D.N.Y. May 28, 2015) at 3 (emphasis in original) (Exhibit A).

3. The Debtors' request for an injunction is an obvious attempt to shield CEC, not only from liability but indeed from any judicial determination regarding its contractual guarantees. If CEC and its captive Debtors have their way, the Defendants will never have the opportunity to adjudicate, much less enforce, their claims against non-debtor CEC. Those claims will be enjoined until effectiveness of the Debtors' proposed plan, which in turn would discharge CEC (and a host of CEC sponsors, affiliates, and insiders) from all liability to the Defendants.

4. As such, this proceeding is just the latest step in CEC's ongoing scheme. First, CEC orchestrated a series of transfers of the Debtors' strategic assets to itself and entities it controlled, for inadequate consideration and in violation of the most basic tenets of corporate governance. Then, CEC initiated a result-oriented "investigation" by a hastily-constituted "Governance Committee," followed by the deeply-flawed prepetition plan lockup agreement ("RSA"). Now comes the requested injunction and plan, which would enable CEC to retain ownership of the reorganized Debtors while freeing CEC shareholders (including sponsors of the ill-fated LBO) from billions of dollars of CEC's independent liabilities. At the core, CEC seeks the benefits of bankruptcy relief (a stay and discharge) while evading jurisdiction of the Court and circumventing elemental rules of bankruptcy priority.

5. There is no basis for the injunction that underlies CEC's scheme. To the contrary, the Debtors have retreated from virtually every initial premise of their case and now resort to equally flimsy arguments that do not justify the extraordinary and unusual relief they seek:

6. No distraction. For example, the Debtors alleged that they would be "distracted" by discovery in the Guarantee Actions. Compl. ¶¶ 5, 30. When ordered to produce documents to support that allegation, however, the Debtors abandoned it, pivoting to a claim (not alleged in the Complaint) that the mere fact of the Guarantee Actions somehow might "distract" from their ability to negotiate a consensual plan. But no court has ever issued an injunction on the ground that litigation against a non-debtor third party would "distract" from a debtor's ability to negotiate with creditors. It is not a legitimate basis for the requested injunction.

7. In any event, the Debtors' new premise makes no sense. The Debtors, CEC, the Defendants and other stakeholders are large, sophisticated entities capable of negotiating and litigating at the same time. The prospect of a decision in the Guarantee Actions will pressure all sides to come to the bargaining table, not abandon it. In contrast, an injunction that indefinitely puts off the day of reckoning regarding CEC's liability on its contractual guarantees will only retard, not facilitate, settlement discussions and consensus.

8. No indemnification. The Debtors also have abandoned their allegation that the Guarantee Actions would "create indemnification obligations for the Debtors." Compl. ¶¶ 5, 29. They now concede that the actions will not "result in additional claims against the estate."

9. No impact on insurance. The Debtors do still claim that the Guarantee Actions will deplete insurance proceeds. Compl. ¶¶ 5, 28. However, there is no more than $170 million in insurance – a *de minimis* amount in the context of this $18 billion reorganization – and it is unlikely that there is any coverage of the Defendants' claims. In any event, the Guarantee

Actions cannot deprive the Debtors of proceeds because the relevant policy provides for payment on claims that might be asserted by the estate (*e.g.*, against directors and officers) ahead of payment on claims like those asserted by the Defendants. The estate gets paid first.

10. No jeopardy to the reorganization. After repeatedly alleging that the tainted RSA was the centerpiece of their restructuring, Compl. ¶¶ 4, 20-21, 27, 48, the Debtors failed to comply with a required "milestone" and ceased negotiations with their first-lien bank lenders. The Debtors thus have been forced to backpedal, now claiming that the RSA is only "one example of a way we can reorganize." Tr. 5/6/15 at 49:13-14 (Zeiger). Although the Debtors have not proposed any reorganization alternative, they claim that the Guarantee Actions imperil CEC's ability to make a "contribution" to any restructuring.

11. As Judge Scheindlin noted, this is nonsense. If it were critical to a CEC contribution, the Debtors would have conditioned the RSA on an injunction of the Guarantee Actions. They did not, meaning that CEC remains liable under the RSA (to the extent it is enforceable) even if the Guarantee Actions proceed. More fundamentally, any contribution from CEC to the bankruptcy estate would be as payment for liability on multi-billion dollar fraudulent conveyance claims arising from "controversial" prepetition transactions in which CEC siphoned value away from the Debtors, or for ownership in the reorganized Debtors (the alleged "new value"). There is no authority anywhere that justifies an injunction (preliminary or permanent) for the purpose of preserving an out-of-the-money shareholder's ability to buy equity in the reorganized debtor or to pay for a settlement of (or judgment on) fraudulent conveyance claims relating to assets the shareholder fraudulently transferred away before bankruptcy.

12. The Debtors simply cannot prove that the Guarantee Actions imperil these cases or otherwise establish any legitimate basis for the extraordinary relief they seek.

I. BACKGROUND[3]

13. In 2005 and 2006, a captive subsidiary of CEC – the debtor Caesars Entertainment Operating Company ("CEOC") – issued approximately $755 million in senior unsecured notes, of which approximately $241 million remains outstanding and held by entities unaffiliated with the Debtors. In 2009 and 2010, CEOC issued approximately $5.2 billion in four series of second priority notes, all of which remain outstanding.

14. CEC guaranteed all obligations of CEOC in respect of those notes. Last year, however, CEC repudiated its guarantees as CEOC was on the verge of defaulting.

A. The Guarantee Actions Seek To Enforce CEC's Contractual Guarantees.

15. The Defendants initiated the Guarantee Actions to enforce CEC's repudiated guarantees. Three of the four Guarantee Actions were filed before the petition date.[4]

16. Due to CEOC's bankruptcy petition and the automatic stay, the Defendants are only prosecuting direct claims on the guarantees against nondebtor CEC. By definition, those claims are not property of the bankruptcy estate and are not subject to the automatic stay. Rather, as Judge Scheindlin observed, they "attempt[] to vindicate noteholders' rights under non-bankruptcy law, including under the TIA, against a non-debtor."

B. The Debtors Seek A Permanent Injunction Of The Guarantee Actions.

17. The Debtors ask the Court to enter an order "granting an injunction pursuant to Bankruptcy Code Section 105(a) enjoining and prohibiting the continuation of the [Guarantee] Actions against the Non-Debtor Affiliates [*i.e.*, CEC] until the effective date of a restructuring plan or further order of this Court." Compl. ¶ 50.

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[3] Facts referenced here will be set forth in a Stipulation Of Undisputed Facts to be filed before trial or will be established at trial.

[4] For more information on the Guarantee Actions, see the preliminary objections to the Debtors' injunction motion. (Adv. Pro. ECF 7, 18, 21, 22, 24, 25).

18. Although the Debtors previously argued that the Defendants "will have the full opportunity to investigate and litigate their claims [against CEC] in these bankruptcy cases," Mot. ¶ 32, they actually seek a permanent injunction that would forever extinguish the claims at issue in the Guarantee Actions. The Debtors do not propose that the Guarantee Actions against CEC be transferred to (or reinitiated in) this Court and then litigated here. Indeed, the Debtors made no attempt to remove the WSFS Action now pending before the Delaware Chancery Court by the May 15 deadline established by the Court (ECF 1022), revealing that they never had any intention to have the merits of CEC's guarantee liability adjudicated by the Court.

19. Instead, the Debtors seek an injunction through the effective date of a plan. The Debtors' plan, in turn, provides for the complete release and discharge of, and an injunction against, all claims against CEC (and many other insiders), including the Defendants' claims to enforce their contractual guarantees. In discovery, the Debtors affirmed that, if their desired injunction is issued, the only opportunity the Defendants will have to "litigate" their claims would be "in the context of litigation and a hearing on the Plan." Debtors' First Supp. Resp. to WSFS Interrogatory No. 3. In other words, if the Debtors and CEC have their way, the substantive merits of the Guarantee Actions will never be adjudicated by any court at any time.

II. THE DEBTORS CANNOT ESTABLISH ANY BASIS FOR AN INJUNCTION

20. The general rule is that "suits against a debtor's guarantor . . . are allowed to proceed because they do not seek relief from the debtor." *In re Gander Partners LLC*, 432 B.R. 781, 784 (Bankr. N.D. Ill. 2010) (citing *In re Teknek, LLC*, 563 F.3d 639, 649 (7th Cir. 2009)); *e.g.*, *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998) (noting the "common case in which a creditor of a bankrupt files a claim against an insurer or guarantor of the bankrupt and is allowed to proceed"); *In re Hendrix*, 986 F.2d 195, 197 (7th Cir. 1993) ("a suit against a guarantor of the bankrupt's debt" not discharged).

21. An injunction of proceedings pending before a federal District Court or a state trial court is an extraordinary act. In cases involving a non-debtor guarantor, a bankruptcy court may grant such an injunction only in very "limited circumstances" and only "temporarily," when it is "satisfied that such proceedings would defeat or impair its jurisdiction over the case before it." *Fisher*, 155 F.3d at 882. The Debtors cannot make that showing here.

A. The Court Has No Authority To Issue A Permanent Injunction.

22. To start, there is no authority to support the Debtors' request for what is, in effect, a permanent injunction. All applicable case law establishes that an injunction halting continued prosecution of an action against a non-debtor must be temporary. *See, e.g.*, *Teknek*, 563 F.3d at 648 ("the trustee may temporarily block claims that are not property of the estate"); *Fisher*, 155 F.3d at 882 (same); *Gander*, 432 B.R. at 788-89 (limiting injunction to 120 days); *In re IFC Credit Corp.*, 422 B.R. 659, 664-65 (Bankr. N.D. Ill. 2010) (limiting injunction to 90 days).

23. In relevant cases enjoining litigation against a non-debtor, the plaintiffs did not permanently lose the right to pursue their claims. Rather, they retained the right to litigate after the injunction was lifted. *See, e.g.*, *Fisher*, 155 F.3d at 883 (It is appropriate to "stay the proceedings pending the outcome of the bankruptcy proceeding. At that point, . . . it will be possible for the district court to proceed with this action against the nondebtor defendants for whatever individualized damages may be proper."); *Gander*, 432 B.R. at 788 (noting "[t]he relatively limited harm to [the plaintiff] of delaying, not terminating, the state court lawsuits" given that "[t]he reorganization objective is to pay [the plaintiff] in full"); *In re marchFIRST, Inc.*, 288 B.R. 526, 533 (Bankr. N.D. Ill. 2002) ("it should be pointed out that the Defendants are enjoined only preliminarily and that as soon as the Trustee has completed his action, the Defendants may proceed with the District Court Action"), *aff'd* 293 B.R. 443 (N.D. Ill. 2003).

24. In contrast, the Debtors want to halt the Guarantee Actions until effectiveness of a plan that would eliminate the claims entirely. There is no authority for such a permanent injunction. *See In re Lyondell Chem. Co.*, 402 B.R. 571, 576 (Bankr. S.D.N.Y. 2009) (limiting injunction to sixty days; refusing injunction through plan confirmation because "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 . . . to interfere with creditors' rights against nondebtor parties").

B. There Is No Ground For An Injunction Of Any Length.

25. Perhaps recognizing that there is no authority for a permanent injunction, the Debtors have retreated from their initial request and now claim to want only a "temporary" injunction through a date that is sixty days after the Examiner issues his report.

26. That pared-back request is not found anywhere in the Debtors' Complaint or Motion. It is also illusory, because even a "temporary" injunction of the sort desired by the Debtors would have the same impact on the Defendants as the original request for a permanent injunction. The Debtors have vowed that they will move to confirmation as quickly as possible after issuance of the Examiner's report. With the desired injunction, the Debtors would rush to discharge the Defendants' claims before the Guarantee Actions could be litigated and enforced.

27. In any event, the Debtors cannot establish a basis for an injunction of any length. To do so, they must prove by clear and convincing evidence that (a) the Guarantee Actions would interfere with "a reasonable likelihood of a successful reorganization"; (b) "the relative harm as between the debtor and the [Defendants]" favors an injunction; and (c) an injunction is consistent with "a balancing of the public interest in successful bankruptcy reorganizations with

other competing societal interests." *In re GAC Storage El Monte, LLC*, 489 B.R. 747, 769-70 (Bankr. N.D. Ill. 2013) (quoting *Gander*, 432 B.R. at 788). The Debtors cannot do so.

1. The Guarantee Actions Do Not Threaten A Reorganization.

28. When they initiated this case, the Debtors alleged that the Guarantee Actions "threaten[] to imperil the Debtors' ability to reorganize." Compl. ¶ 4; Mot. ¶ 25. They argued that the Guarantee Actions would (a) "endanger CEC's ability to fund any contribution to the Debtors' estate"; (b) "deplete an insurance policy and coverage that the Debtors share with" CEC; (c) "create indemnification obligations for the Debtors"; and (d) impose "significant discovery burdens that will distract personnel key to their restructuring." Compl. ¶¶ 4-5, 27-30; Mot. ¶¶ 5-8, 25-30. When forced to substantiate those allegations with actual evidence, however, the Debtors immediately abandoned half of them. The Debtors, for example, conceded that the Guarantee Actions will not "result in additional claims against the estate on account of the [D]ebtors' indemnification obligations." Def. Ex. 58. Similarly, the Debtors stipulated that the Guarantee Actions will not "result in burdensome and distracting discovery on any of the Debtors' directors and executives." (Adv. Pro. ECF 114 ¶ 3)

29. Belatedly realizing that this effectively guts their case, however, the Debtors have reversed course again and now vaguely contend that the Guarantee Actions might "distract from and interfere with" their "ability to negotiate and garner support for a consensual plan." Millstein Rep. at 3. That unprovable assertion (found nowhere in the Complaint) does not support any injunction here. In fact, no court has ever issued an injunction on the ground that non-debtor litigation might "distract" from a debtor's ability to negotiate with creditors. This new "distraction" theory is not a cognizable ground for an injunction.

30. Moreover, the factual premise of the Debtors' new argument is deeply flawed. By the Guarantee Actions, the Defendants seek to determine CEC's liability on its guarantee

obligations. That determination is a necessary prerequisite to confirmation of any plan of reorganization (including the Debtors' proposed plan) that contains involuntary releases of the guarantee claims. The Guarantee Actions will assist the reorganization, not distract from it. The pendency of the Guarantee Actions also will enhance negotiation and consensus, not stifle it. With the prospect of a decision in the Guarantee Actions, all parties will face the pressure of a potential adverse determination. That pressure inevitably will lead to discussion. Without it, CEC will luxuriate in a pressure-free environment and be unlikely to engage. There is a reason why "settlement on the courthouse steps" is firmly entrenched in the lexicon.

31. The Examiner's report – on which the Debtors now rely – is no substitute. The Examiner is not tasked with investigating or reporting on the Defendants' guarantee claims. An injunction through issuance of the report will do nothing to facilitate consensus – it will only delay a necessary resolution of the Defendants' claims.

32. Finally, regarding insurance, the applicable policies provide only $170 million in potential coverage, an amount that cannot jeopardize the Debtors' restructuring of $18 billion in debt. The Debtors share that insurance with CEC and various non-debtor "Subsidiaries" but notably are not seeking to enjoin other pending lawsuits that may impact the insurance coverage. Moreover, the insurers have not agreed to cover the Guarantee Actions, and it is unlikely that any coverage will be available for claims seeking to enforce CEC's guarantee liability. Most importantly, the Guarantee Actions cannot possibly impact the Debtors because the estate's right to collect on the policy for relevant claims is superior to CEC's right (if any) to collect on claims relating to its guarantee liability. Def. Ex. 3 (AIG Policy § 3.B, Endorsement 25).

33. In any event, the cases cited by the Debtors involve competing actions on the same policy against the same defendants for the same misconduct. *IFC Credit*, 422 B.R. at 663

("plaintiffs have not alleged anything that is peculiar and personal to them and not shared by the Debtor's other creditors"); *marchFIRST*, 288 B.R. at 531-32 ("All of the parties herein seek damages arising from the same or similar transactions and acts allegedly committed by the directors and officers, albeit under different legal theories."). That is not this case. The Guarantee Actions enforce independent claims that belong to the Defendants and cannot be asserted by the bankruptcy estate. The Debtors cite no authority for the proposition that depletion of insurance is a basis to enjoin a creditor's personal claim not available to the estate.

2. CEC's Putative "Contribution" Does Not Justify An Injunction.

34. In light of the foregoing, the Debtors' entire case for an injunction ultimately is premised on their allegation that continued prosecution of the Guarantee Actions will "endanger CEC's ability to fund any contribution to the Debtors' estate and thus imperil their reorganization efforts." Mot. ¶ 26. At the threshold, this confirms what the Defendants have maintained all along; namely, that the Debtors and CEC are working hand-in-hand to generate an environment where there can be no meaningful competitor to CEC in the reorganization, so that CEC can both acquire new equity cheaply and be excused from its years of misconduct. That scheme, years in the making, would upend the Bankruptcy Code's fundamental rules of priority and leave the Defendants without a forum to adjudicate, much less enforce, their rights.

35. The Complaint and Motion point to CEC's contribution pursuant to the RSA. Compl. ¶¶ 4, 20-21, 27, 48; Mot. ¶¶ 5, 18-19. But nothing in the RSA makes CEC's contribution contingent on an injunction of the Guarantee Actions. If the contribution actually were threatened by continued pursuit of the Defendants' claims, CEC surely would have ensured that it could withdraw from the RSA in the event the Debtors failed to obtain an injunction. It did not do so. In fact, the RSA does not even obligate the Debtors to seek an injunction, much less obtain one. Instead, the Debtors waited more than two months after the petition date – during

which time CEC's (ultimately unsuccessful) motion to dismiss the WSFS Action was pending before the Delaware Chancery Court – before filing their Complaint. This is classic forum shopping, not a legitimate effort to enhance the prospects of a successful reorganization.

36. In any event, the RSA is imperiled but not due to the Guarantee Actions. Rather, the Debtors breached the RSA by failing to achieve a required "milestone." They also ceased restructuring negotiations with their first-lien bank lenders. The RSA – which was supported by a minority of the Debtors' creditors even in the best of times and is vigorously opposed by creditors holding more than $11 billion in claims – cannot possibly serve as the foundation for a finding that the Guarantee Actions threaten a "successful reorganization."

37. Tacitly conceding this, the Debtors again have changed position. They now claim that a contribution from CEC will be necessary even absent the RSA, whether through settlement or litigation recoveries. The Defendants agree that CEC is liable to the bankruptcy estate for the billions of dollars of fraudulent conveyances it orchestrated through "controversial" prepetition transactions now under investigation by the Examiner. But CEC's putative liability for its prepetition misconduct – no matter how large – provides no grounds for an injunction against the Defendants' independent claims on causes of action that are not available to the estate and that have nothing do to with CEC's liability to creditors generally.

38. For one thing, the Debtors can and should reorganize without a voluntary "contribution" from CEC if, as is the case in the RSA, CEC's price includes new equity and blanket releases in favor of CEC, its shareholders, and its affiliates (including the LBO sponsors), all of whom are liable for billions of dollars of damages to the estate.

39. More fundamentally, the Debtors have not cited any authority for the proposition that an injunction can be issued to protect an out-of-the-money shareholder for the purpose of

ensuring that the shareholder can satisfy its own liability to the debtors. To the contrary, the Seventh Circuit has noted that an injunction against third-party litigation may be appropriate only in cases where claims against non-debtor parties "depended on the non-debtor's misconduct with respect to the corporate debtor," typically in situations that "involve transfers from the debtor to a non-debtor control person or entity." *Teknek*, 563 F.3d at 649 (emphasis in original). In other words, an injunction may be appropriate where the bankruptcy estate pursues the same claims that a third-party litigant is pursuing. While CEC certainly is liable and should be held accountable for "misconduct with respect to the corporate debtor," the Guarantee Actions do not seek recompense for that liability. Rather, the Guarantee Actions seek to enforce CEC's individual liability on causes of action not available to the bankruptcy estate.

40. The two guarantor cases cited by the Debtors are not to the contrary. They involved small partnerships whose principals were so distracted by litigation on their personal guarantees that a temporary injunction was warranted. *Gander*, 432 B.R. at 786-87; *In re Northlake Bldg. Partners*, 41 B.R. 231, 233 (Bankr. N.D. Ill. 1984). As noted, the Debtors have stipulated away that position. Where, as here, a guarantor will not be prevented from devoting "time and energy" to the reorganization, no injunction may issue. *See, e.g.*, *GAC Storage*, 489 B.R. at 770 ("restraining the Bank is not justified because the Guarantors' time and energy are not directed toward the Debtor's reorganization").

41. If, as the Debtors allege (but have not proven), CEC is unable to satisfy all of its liabilities, the proper course of action is for CEC to file its own bankruptcy case. If CEC desires a discharge of its contractual liability to the Defendants, it must do so. It is wholly improper for CEC to seek an automatic stay and discharge in the absence of bankruptcy relief.

3. The Balance Of Harms And Public Interest Disfavor An Injunction.

42. As noted, there is no cognizable harm to the Debtors from continuation of the Guarantee Actions. To the contrary, because the Defendants' rights vis-à-vis CEC need to be adjudicated before any purported "settlement" of CEC's liability can be approved in this case, the Guarantee Actions will help facilitate a true, consensual reorganization.

43. On the other hand, the Defendants face significant harm from an injunction. If CEC is insolvent (as the Debtors assert), an injunction would disadvantage the Defendants vis-à-vis CEC's many other creditors. CEC currently faces numerous lawsuits, alleging hundreds of millions of dollars in damages and liability, and is paying debts outside the ordinary course of business. The Debtors, however, have not requested that the Court also enjoin those other actions or prohibit payment of such claims.

44. This disproves the Debtors' allegation that CEC's financial wherewithal is critical to their reorganization. It also exposes the Defendants to substantial prejudice. The Debtors' requested injunction would enable other creditors to collect judgments from CEC, and permit CEC to pay debts and transfer assets, while the Defendants 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.").

45. 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. *Id.* 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.*

III. THE DEBTORS' REQUEST FOR AN INJUNCTION IS PREMATURE

46. To the extent the Court believes that it ever would be appropriate to enjoin the Guarantee Actions in order to preserve CEC assets for the estate, now is not the time. The Guarantee Actions are in their initial stages. CEC's ability to "contribute" to this reorganization is not in jeopardy now or in the near future. If the Defendants succeed in establishing CEC's liability, the Debtors may return to the Court to seek an injunction. At that time, far more will be known about the Debtors' prospects for a successful reorganization, likely including the Examiner's conclusions regarding CEC's liability for the "controversial" prepetition transactions. There is no basis for a preemptive injunction now.

IV. ANY INJUNCTION SHOULD BE CONDITIONED ON A BOND AND PROHIBITION OF CEC ASSET TRANSFERS AND PAYMENTS

47. Finally, if the Court believes that an injunction may issue now, it should protect the Defendants from potential harm in two ways. First, it should order a bond for "costs and damages sustained by [the Defendants if they are] found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). Second, it should condition any injunction on CEC's agreement to refrain from payments or transfers outside the ordinary course of business. *See Lyondell*, 402 B.R. at 595 (granting sixty-day stay on condition that guarantor not make payments, encumbrances, or compromises outside the ordinary course).

V. CONCLUSION

48. There is no basis for an injunction of any length against the Guarantee Actions. The Defendants request that the Court deny the Motion and dismiss this case.

Dated: May 29, 2015

Respectfully submitted,

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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.

ORDER

15-cv-1561(SAS)

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

BOKF, N.A. ("BOKF"), as successor Indenture Trustee, brings this action to enforce Caesars Entertainment Corporation's ("CEC") guarantee of roughly $750 million in notes issued by Caesars Entertainment Operating Company ("CEOC"). BOKF asserts that CEC's guarantee 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 guarantee.

On May 26, 2015, I held a pre-motion conference on BOKF's request to move for partial summary judgment, on Counts II and V of its Complaint.

According to BOKF, it is entitled to a declaratory judgment that CEC's purported elimination of the guarantee violates section 316(b) of the Trust Indenture Act of 1939, because it was part of an out-of-court debt restructuring that materially impaired the noteholders' rights — without their consent — to receive payment of principal and interest on the notes. BOKF seeks this relief even though it has not taken discovery and the close of discovery is three months away.

CEC argues that there are genuine disputes of material fact that preclude summary judgment, and notes that plaintiffs in two related cases pending before this Court have opted to wait until the close of discovery before making a dispositive motion.[1] CEC also asks this Court to defer consideration of BOKF's application based on an adversary proceeding in the Bankruptcy Court seeking to enjoin, under section 105(a) of the Bankruptcy Code, all actions against CEC.

It may well be that genuine issues of material fact preclude the relief BOKF seeks or that it would be better served by waiting until the conclusion of fact discovery to make its motion. The Court will be in a better position to make that determination after reviewing the parties' submissions. To be sure, BOKF cannot move on these claims both now and after the conclusion of discovery.

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[1] *See MeehanCombs Global Credit Opportunities Master Fund, LP et al. v. Caesars Entertainment Corporation*, No. 14-cv-07091 and *Danner v. Caesars Entertainment Corporation*, No. 14-cv-07973.

However, there is no reason to require BOKF to wait to make its motion. CEC is not a debtor and, as a matter of common sense, there does not appear to be any connection between its ability to contribute to a putative chapter 11 plan and the continuation of this case or even, should it be warranted, the entry of a judgment of liability. Moreover, this case raises significant issues under a federal statute which necessarily impact the relationship between issuers and noteholders *outside of* the bankruptcy context. I will not limit BOKF from attempting to vindicate noteholders' rights under non-bankruptcy law, including under the TIA, against a non-debtor. This is particularly true when enjoining actions against non-debtors occurs only rarely, in unusual or extraordinary circumstances, and after consideration of both equitable and non-equitable factors.

Accordingly, if BOKF wishes to move for partial summary judgment before the close of discovery, it may do so by June 19, 2015. CEC's response is due three weeks from the date of filing, and BOKF's reply is due two weeks later.

SO ORDERED:

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

Dated: New York, New York
May 28, 2015

- Appearances -

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