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

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

**NOTICE OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL POST-TRIAL BRIEF**

**PLEASE TAKE NOTICE** that on the 22nd day of February, 2016, at 9:30 a.m. (prevailing Central Time) or as soon thereafter as counsel may be heard, Defendants Wilmington Savings Fund Society, FSB, and BOKF, N.A., shall appear before the Honorable A. Benjamin Goldgar or any other judge who may be sitting in his place and stead, in Courtroom 642 in the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and present the attached Motion For Leave To File Supplemental Post-Trial Brief (the "Motion").

**PLEASE TAKE FURTHER NOTICE** that copies of the Motion as well as copies of all documents filed in these chapter 11 cases are available free of charge by visiting https://cases.primeclerk.com/CEOC or by calling (855) 842-4123 within the United States or Canada or, outside of the United States or Canada, by calling +1 (646) 795-6969. You may also obtain copies of any pleadings by visiting the Court's website at www.ilnb.uscourts.gov in accordance with the procedures and fees set forth therein.

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

Dated: February 16, 2016

Respectfully submitted,

JONES DAY

By: /s/ Morgan R. Hirst
Morgan R. Hirst
77 West Wacker Drive
Chicago, IL 60601

Bruce Bennett
James O. Johnston
Sidney P. Levinson
Joshua M. Mester
555 South Flower Street
50th Floor
Los Angeles, CA 90071

Geoff Stewart
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

-and-

KELLEY DRYE & WARREN LLP
Eric R. Wilson
David I. Zalman
101 Park Avenue
New York, NY 10178

*Attorneys for Defendant,*
*Wilmington Savings Fund Society, FSB*

FOLEY & LARDNER LLP

By: /s/ Mark F. Hebbeln
Mark F. Hebbeln, Esq.
Harold L. Kaplan, Esq.
Lars A. Peterson, Esq.
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313

-and-

ARENT FOX LLP
Andrew I. Silfen, Esq.
Mark B. Joachim, Esq.
Michael S. Cryan, Esq.
1675 Broadway
New York, NY 10019

Jackson D. Toof, Esq.
1717 K Street, NW
Washington, DC 20006

*Attorneys for Defendant BOKF, N.A.*

**UNITED STATES BANKRUPTCY COURT**
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| In re:<br>CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,[2]<br>*Debtors*. | Chapter 11<br>Case No. 15-01145 (ABG)<br>(Jointly Administered) |
| CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,<br>*Plaintiffs*,<br>*v.*<br>BOKF, N.A., *et al*.<br>*Defendants.* | Chapter 11<br>Adversary Case No. 15-00149 |

**MOTION OF WSFS AND BOKF FOR LEAVE TO FILE SUPPLEMENTAL POST-TRIAL BRIEF**

Defendants Wilmington Savings Fund Society, FSB, and BOKF, N.A. (collectively, the "Trustees") hereby move for entry of an order, in the form attached hereto, authorizing the Trustees to file the proposed supplemental post-trial brief (the "Proposed Brief") attached to this Motion as Exhibit 1. In support, the Trustees state as follows:

1. At the status hearing on February 3, 2016, the Court set a ruling date of March 2, 2016 on the Debtors' motion for a temporary injunction (ECF 4).

2. The trial in this matter concluded on June 4, 2015, and post-trial briefing closed on June 26, 2015. Since that time, a number of material events relevant to the Debtors' motion have transpired.

3. As the Court recognized at the February 3 hearing: "I am aware that this situation is somewhat fluid, and that we'd had this hearing sometime back, despite the speed with which

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

all other courts moved. If there have been relevant changes in the facts, then I guess people can make some effort to apprise me of those." Tr. at 29.[3] The Court then stated that, in order to allow parties to address events that have taken place since the record closed, "what I will do is allow any motions in the adversary to be brought, not subject to the case management procedures." *Id.*

4. Accordingly, the Trustees seek to file the Proposed Brief to advise the Court of developments and facts occurring since the record and briefing closed last June, and to address the legal standard identified by the Seventh Circuit in its recent ruling in this case. Concurrently with this Motion, the Trustees also are filing a request for judicial notice of certain of those developments and facts.

WHEREFORE, the Trustees request the Court grant this Motion and enter an order, in substantially the form of the proposed order attached hereto, allowing the Proposed Brief to be filed immediately.

[3] "Tr." is the transcript from the status conference held on February 3, 2016.

Dated: February 16, 2016

Respectfully submitted,

JONES DAY

By: /s/ Morgan R. Hirst
Morgan R. Hirst
77 West Wacker Drive
Chicago, IL 60601

Bruce Bennett
James O. Johnston
Sidney P. Levinson
Joshua M. Mester
555 South Flower Street
50th Floor
Los Angeles, CA 90071

Geoff Stewart
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

-and-

KELLEY DRYE & WARREN LLP
Eric R. Wilson
David I. Zalman
101 Park Avenue
New York, NY 10178

*Attorneys for Defendant,*
*Wilmington Savings Fund Society, FSB*

FOLEY & LARDNER LLP

By: /s/ Mark F. Hebbeln
Mark F. Hebbeln, Esq.
Harold L. Kaplan, Esq.
Lars A. Peterson, Esq.
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313

-and-

ARENT FOX LLP
Andrew I. Silfen, Esq.
Mark B. Joachim, Esq.
Michael S. Cryan, Esq.
1675 Broadway
New York, NY 10019

Jackson D. Toof, Esq.
1717 K Street, NW
Washington, DC 20006

*Attorneys for Defendant BOKF, N.A.*

**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
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| In re:<br>CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,[1]<br>*Debtors*. | Chapter 11<br>Case No. 15-01145 (ABG)<br>(Jointly Administered) |
| CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,<br>*Plaintiffs*,<br>*v.*<br>BOKF, N.A., *et al*.<br>*Defendants.* | Chapter 11<br>Adversary Case No. 15-00149 |

**ORDER GRANTING MOTION OF WSFS AND BOKF FOR LEAVE TO FILE SUPPLEMENTAL POST-TRIAL BRIEF**

Upon the motion of Defendants, Wilmington Savings Fund Society, FSB, and BOKF, N.A. (collectively, the "Trustees"), for entry of an order granting them leave to file a supplemental post-trial brief (the "Motion"), and the Court being fully apprised,

IT IS HEREBY ORDERED:

1. The Motion is granted;

2. The Trustees are authorized to filed the Proposed Brief, attached as Exhibit 1 to the Motion.

Dated: _____, 2016
Chicago. Illinois

_____
Hon. A. Benjamin Goldgar
United States Bankruptcy Judge

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

# Exhibit 1

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

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

**SUPPLEMENTAL POST-TRIAL BRIEF OF WSFS AND BOKF**

Defendants Wilmington Savings Fund Society, FSB ("WSFS") and BOKF, N.A. ("BOKF" and, collectively, the "Trustees") submit this Supplemental Post-Trial Brief to address matters discussed at the status conference held on February 3, 2016.

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

## I. PRELIMINARY STATEMENT

1. Acting as if the issue already has been decided, the Debtors request the Court to issue an injunction on remand, based on a stale record and without consideration of material new facts and events occurring in the eight-plus months since trial. The Debtors, however, ignore both the evidence adduced at trial and subsequent developments making clear that no injunction is appropriate under the standard now established by the Seventh Circuit.

2. The Debtors ask for a "temporary" stay of the guarantee actions, but the thrust of their argument is that CEC cannot simultaneously contribute to a plan and also satisfy its guarantee obligations. An injunction that bars the Trustees from *collecting* against CEC, however, is a matter of final relief, not a provisional remedy like a stay. In order to justify a *temporary* stay under the Seventh Circuit's opinion, the Debtors need to demonstrate that a brief respite from the guarantee litigation (which seeks to determine CEC's liability) *per se* will "enhance the prospects for a successful resolution of the disputes attending [the] bankruptcy."

3. For the Debtors to make that showing, they must point to some tangible benefit of a temporary stay or, alternatively, something harmful that would occur if there were no stay. The Debtors have not done so, relying instead on vacuous claims of "cooling off" periods and "frameworks for negotiation." Having long ago abandoned their "distraction" argument, the Debtors have not asserted, much less proven, any link between a specific harm to this reorganization and prosecution of the guarantee cases to judgment.

4. The fact is that there is no conceivable danger to CEC and its resources unless and until a judgment on the guarantees is entered, made final, and enforced. Delaying adjudication of CEC's guarantee liability (as opposed to enforcement of any resulting judgment against CEC) would just impede negotiation and resolution. Consensus is not likely until parties know the results of the Examiner's investigation *and* the status of CEC's guarantees. The nature and

extent of CEC's liability must be determined before confirmation so that creditors and the Court can assess the fairness of the payment CEC would make in exchange for a total release of all liability, both to the bankruptcy estate and to the Trustees on their independent guarantees. Litigation of the guarantee actions to judgment thus will facilitate, not impair, the prospects for a successful and consensual reorganization.

5. In any event, the relief the Debtors seek is vague and ambiguous. Should the Court conclude that a temporary injunction is warranted notwithstanding the evidence summarized below, it should not enter the open-ended order proffered by the Debtors. Any injunctive relief must be narrowly-tailored, clear, and precise, and an injunction, if granted, should (a) restrain only the commencement of trial of the guarantee actions (and not ongoing pretrial proceedings); (b) not extend beyond May 8, 2016 (the day before trial in the *MeehanCombs* and *Danner* actions is to begin); and (c) limit CEC's ability to transfer and dissipate assets (and/or require a bond) to protect against the material third-party harm resulting from a stay of litigation the Trustees have been pursuing for a year or more.

## II. THE SEVENTH CIRCUIT DID NOT DECIDE THE ISSUE

6. The Debtors claim the Seventh Circuit effectively decided the issue by "recogniz[ing] that the interests of CEOC's creditors in the chapter 11 cases 'would be furthered by a temporary injunction staying the lenders' lawsuits against CEC.'" Mot. ¶ 3 (quoting Slip Op. at 5).[2] That is a gross distortion.

[2] "Mot." is the Debtors' "Motion For Emergency Request For Ruling," which was attached as Exhibit B to their "Application To Set Hearing On Emergency Motion" (Adv. Pro. ECF 189); "Slip Op." is the Seventh Circuit's opinion; "Op." is this Court's memorandum opinion (Adv. Pro. ECF 158); "Tr." is the transcript from the status conference held on February 3, 2016. Capitalized terms not otherwise defined have the meanings given in the Trustees' Post-Trial Brief ("Post-Trial Br.") (Adv. Pro. ECF 152) and Pretrial Brief ("Pretrial Br.") (Adv. Pro. ECF 132).

7. Although the Debtors asked it to do so, the Seventh Circuit did not direct the Court to issue an injunction. "We don't say that the stay sought by CEOC must be granted – that's an issue for the bankruptcy judge to resolve in the first instance – but only that both he and the district court erred in thinking that section 105(a) as interpreted in *Fisher* and *Teknek* foreclosed such a procedure." Slip Op. at 9. As the Court noted at the recent status conference, "they said that it was up to me, not surprisingly, to make the factual determination" of whether "the facts warrant" an injunction. Tr. 4:13-15.

8. The Seventh Circuit also did not "recognize" that an injunction would be beneficial or appropriate on the facts of the case. It merely held that "there is nothing in section 105(a) to bar the order sought by CEOC" *if* the Debtors are correct that a short stay "will provide the parties with information they need to have a clear shot at negotiating an overall settlement of what amounts to a three-cornered battle among CEC, its direct creditors via CEC's guarantees to them, and CEOC's creditors." *Id.* at 5. The Seventh Circuit observed that an injunction might advance the interests of creditors "*[i]f* before CEOC's bankruptcy is wound up CEC is drained of capital by the lenders' suits to enforce the guaranties that CEC had given them." *Id.* (emphasis added).

9. The Seventh Circuit remanded because the Court had not addressed "*whether* the injunction sought by CEOC is likely to enhance the prospects for a successful resolution of the disputes attending its bankruptcy" and *whether* "its denial will thus endanger the success of the bankruptcy proceedings." *Id.* at 4 (emphasis added). And those are just the threshold issues, not "the only questions remaining for the Court on remand," as the Debtors assert. Mot. ¶ 5. *Even if* the Court finds that an injunction would enhance the prospects for consensus and the success of the reorganization, it also must conclude that an injunction would serve the public interest and

that the equities weigh in favor of the Debtors before any injunctive relief may be ordered. Op. at 21 & n.13.

## III. NO INJUNCTION IS WARRANTED ON THE TRIAL EVIDENCE

10. The Seventh Circuit has now let the Debtors proceed past "the *Fisher-Teknek* starting gate." 7/22/15 Tr. at 23:10-11; Tr. 4:12-13 ("I have the power to grant the injunction, should I find that the facts warrant it."). The Debtors concede, per the Seventh Circuit's opinion, that "the proper statutory inquiry under section 105(a) is whether the requested injunction is 'likely to enhance the prospects for a successful resolution of the disputes' related to the bankruptcy and whether 'its denial will thus endanger the success of the bankruptcy proceedings.'" Mot. ¶ 2 (quoting Slip Op. at 4).

11. The Debtors assert that the answer to that inquiry is yes, "based on a mountain of undisputed evidence that the Debtors presented at trial," *id*. ¶ 65, and they claim that "[n]othing has changed since" the trial, *id.* ¶ 6; *see* Tr. 25:21-22 ("there's three key facts, and they haven't changed") (Zott). The Debtors are wrong on both accounts.

12. To start, the Debtors did not prove at trial that a temporary stay is likely to enhance the prospects for a successful resolution of the disputes attending this bankruptcy. The *only* "evidence" they cite for that proposition (Mot. ¶ 15) is the following passage from Mr. Millstein's testimony:

> I'm saying that the highlight of a bankruptcy proceeding is where the fruit of a plan of reorganization will be produced. And to allow – you know, to start spreading seeds outside the bankruptcy proceeding is – to let, you know, a thousand flowers bloom outside the bankruptcy case is basically going to make this case very difficult to resolve.

6/3/15 Tr. 73:2-8 (Millstein). Such empty platitude does not a "mountain of evidence" make.

13. Experience teaches that negotiations happen, and deals are made, as litigation takes its course. Mr. Millstein conceded that the "threat of [the guarantees] being re-established"

is even "more valuable" than a litigation victory due to the negotiation leverage it brings. 6/3/15 Tr. 104:14-16 (Millstein). Mr. Eisenberg agreed. 6/4/15 Tr. 218:23-24 ("I think you have leverage already knowing that this is out there.") (Eisenberg). Just days ago, the Debtors argued that, "[u]nless there are deadlines, it's hard to get people to agree." Tr. 11:12-13 (Zott).

14. That is the very premise of the Debtors' pending motions for mediation of plan-related disputes and an extension of plan exclusivity. *See, e.g.*, Main Case ECF 3272 ¶ 2 ("Settlements benefit from unknown contingencies, and many matters settle on the eve of trial for this very reason. Thus, mediation and settlement discussions must occur while significant litigation and confirmation issues remain ongoing – each with concrete dates and deadlines – because mediation will benefit from the legal and factual uncertainty surrounding the outcomes of those matters."); Main Case ECF 3195 ¶ 23 ("the timing and deadlines associated with a contested confirmation trial will be the impetus for the successful completion of a mediation process"); Main Case ECF 3197 ¶ 4 ("full consensus may not be achievable – if at all – until the parties are on the courthouse steps"). The suggestion that CEC will not negotiate (or that negotiations would be hindered) without an injunction is not credible. If the guarantee litigation continues, CEC will need a deal with creditors more than if the litigation is enjoined. This is a simple corollary of the reality (recognized by the Debtors) that litigation often settles on the "courthouse steps."

15. Moreover, there is no logical connection between the impending report by the Examiner and the guarantee actions (and thus no logical reason for a stay to be linked to issuance of the report). The Examiner's report will assess CEC's liability to the bankruptcy estate, while the guarantee actions will fix CEC's liability on the guarantees. Both will inform the negotiations with CEC about its contribution to a plan of reorganization.

16. More generally, there is no credible evidence that trial of the guarantee actions "endanger" a successful reorganization. *See* Post-Trial Br. ¶¶ 27-63. To the contrary, as District Judge Scheindlin recognized, "the possible entry of judgment of liability[] would not be detrimental to the bankruptcy case. One reason this is true is that permitting a litigant to proceed to a judgment of liability is not the same thing as permitting that litigant to collect on a judgment." Post-Trial Br., Ex. A at 4 n.4 (Order dated June 19, 2015).[3]

17. The Seventh Circuit explained that the Debtors might suffer harm if, *but only if*, "CEC is drained of capital by the lenders' suits to enforce the guarantees that CEC had given to them," resulting in "that much less money for CEOC's creditors in the bankruptcy proceeding." Slip Op. at 5. Even if judgment against CEC was entered immediately after trial, CEC would retain all of its assets and none of its capital would be drained in the near term. And if, as the Debtors assert, CEC is insolvent and "likely will file for bankruptcy if it suffers an adverse judgment in any of the guaranty actions," the automatic stay would prevent the guarantee plaintiffs from collecting on their judgments outside of the bankruptcy process or from rendering the judgments against CEC "effectively final," as the Debtors claim. Mot. ¶ 12.

18. As noted, a determination of whether CEC is *liable* on its guarantees (distinguished from CEC's satisfaction of such liability) is a critical component of the "information [parties] need to have a clear shot at negotiating an overall settlement of what amounts to a three-cornered battle among CEC, its direct creditors via CEC's guaranties to them, and CEOC's creditors." Slip Op. at 5. So long as CEC disclaims liability on the guaranties, the "overall settlement" that the Debtors say they want will remain out of reach. The Debtors'

[3] Of course, one outcome of the guarantee actions is that CEC could try the case to verdict and *win*, mooting the Debtors' request for an injunction. Unless and until CEC *loses* a trial on the merits, any injunction is premature.

unsupported assertion that "[t]he requested injunction would preserve, at least in the interim, CEC's ability to participate in the Debtors' restructuring and provide a path forward to a consensual resolution of these bankruptcy cases" (Mot. ¶ 15) is a *non-sequitur*.

## IV. POST-TRIAL DEVELOPMENTS ARE RELEVANT

19. Material events have transpired since the record closed in early June of last year. Those developments further demonstrate that the guarantee actions pose no threat to the bankruptcy proceeding and that a temporary stay would do nothing to enhance the prospect of a consensual resolution or serve the public interest. The Court has given notice that it intends to take judicial notice of certain of those facts. Adv. Pro. ECF 198 ("Ct. Notice"). Concurrently with this brief, the Trustees have requested that the Court take judicial notice of additional relevant new information ("Trustee Notice").

20. No CEC Bankruptcy (Ct. Notice ¶ 5). In their post-trial brief, the Debtors threatened that, without an injunction, "CEC will likely file for bankruptcy – perhaps even before any judgment – and any progress in this reorganization will come to a screeching halt." Adv. Pro. ECF 151 ¶ 30. The Debtors cited the testimony of CEC's investment banker, who claimed that CEC might file "as late as early August, and possibly even sooner" and that "the debate that [CEC] is having internally is whether [CEC] should even file before the ruling [on summary judgment] is issued by the judge." *Id.* (citing 6/3/15 Tr. 208:3-13 and 209:10-23 (Zelin), 6/4/15 Tr. 131:2-132:2 (Zelin)). The Debtors warned that "the guaranty actions are progressing at a pace that will increasingly destabilize the Debtors' reorganization" and that "CEC may well file for bankruptcy before any adverse judgment, and it would make economic sense to do so." *Id.*

¶¶ 32, 33; *id.* ¶ 40 ("CEC may file for bankruptcy *before* a judgment is entered") (emphasis in original).[4]

21. Those were empty threats. CEC has stayed out of bankruptcy despite facing no less than four motions for summary judgment since trial.[5] The prospect of an adverse judgment did not impel CEC into bankruptcy, and there never was any credible evidence that it would. The record is clear that CEC will try to avoid bankruptcy and maintain control of the Debtors at all costs so that the LBO sponsors (Apollo and TPG) can salvage their ill-fated investment while avoiding hundreds of millions of dollars of taxes. *See* Post-Trial Br. ¶ 37.

22. Negotiations With Creditors (Ct. Notice ¶¶ 1-3; Trustee Notice ¶ d-f). The Debtors previously urged that a stay was necessary because the guarantee actions have reduced "the incentives of parties to negotiate a consensual resolution in the bankruptcy." Adv. Pro. ECF 151 ¶ 41. They claimed that *last June* was "a pivotal moment in this chapter 11 case" and that, without an injunction at that time, chaos would reign. *Id.* ¶ 1. Here again, the passage of time has disproven those nonsensical allegations. Since then, in the Debtors' own words (from their pending exclusivity motion), "the Debtors have continued to engage with stakeholders at each level of their capital structure around the framework for a consensual restructuring," including "advanced negotiations with their non-first lien creditors" (*i.e.*, the guarantee plaintiffs and their constituents). Main Case ECF 3197 ¶¶ 16, 17. In fact, according to the Debtors "these discussions recently have *intensified* in anticipation of the Examiner's report." Main Case ECF ¶ 3 (emphasis added).

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[4] This gives the lie to the Debtors' recent assertion that "the concern was summary judgment" against CEC. Tr. 22:25-26:1 (Zott).

[5] *See* No. 15-cv-01561-SAS (S.D.N.Y.) (ECF 54, 76); No. 14-cv-07091-SAS (S.D.N.Y.) (ECF 88); No. 4-cv-07973-SAS (S.D.N.Y.) (ECF 84).

23. The guarantee actions obviously have not impeded negotiations. And, given that the Debtors now have been in bankruptcy for well over a year, any needed "cooling off" period occurred long ago. There simply is no credible evidence (or even an inference) that a temporary stay "is likely to enhance the prospects for a successful resolution of the disputes attending [this] bankruptcy." Delaying adjudication of the guarantee actions would only hinder resolution, as consensus is unlikely to be achieved until all parties know the results of the Examiner's investigation *and* the status of CEC's guarantee liabilities.

24. Moreover, the RSA that the Debtors held up as a beacon of hope is now a dead letter. On February 10, 2016, the first-lien bank lenders filed a response to the Debtors' latest exclusivity motion making this crystal clear:

> [O]n February 15, 2016, the Debtors will miss a milestone in the RSAs because they will not have obtained orders from this Court approving a disclosure statement and establishing solicitation procedures consistent with the terms of the RSAs. The Debtors' failure to satisfy that condition is a termination event under each of the RSAs. As a result, the Ad Hoc Bank Lender Committee is presently considering its options regarding the Bank RSA, but is *unlikely to agree to any extension of the milestone or any other covenants in the Bank RSA tied to the Plan calendar*.
>
> Second, certain of the financial components underlying the RSAs are now, as a result of current market conditions, subject to considerable doubt. Indeed, the credit markets, which are vital to the ability to consummate the financing that is the foundation of the Plan transactions, have degraded significantly over the last six months to a point where it is *highly unlikely that the credit markets will support financial transactions of the size and breadth proposed in the RSAs*.
>
> Although the Debtors appear hopeful that global consensus can be reached, the reality is that the parties yet to settle have been negotiating over the same issues since before the Petition Date and *there doesn't appear to be any catalyst in these cases that would bring the parties closer together*.

Main Case ECF 3223 ¶¶ 3-5 (emphasis added). A now-invalid agreement over a controversial proposed plan of reorganization that, among other things, would absolutely and completely

release CEC from all guarantee liability cannot possibly serve as the basis for an injunction of the pending guarantee actions. This is particularly the case given that CEC's purported contribution under the RSA is worth a fraction of what the Debtors claimed, Post-Trial Br. ¶¶ 60-63, and the Debtors' financial advisors apparently *still* have not valued it, *id.* ¶ 62.

25. Prejudice To The Trustees. The Trustees established at trial that, contrary to the Debtors' cavalier assertion that "there is little to lose" (Mot. ¶ 15), an injunction – even a temporary one – could result in severe prejudice. *See* Post-Trial Br. ¶ 67. The risk of prejudice has only increased since trial.

26. *Trial Preparation* (Ct. Notice ¶¶ 6-8; Trustee Notice ¶ c). For one thing, imminent trial dates have been established in three of the four guarantee actions. Those cases have been litigated actively for a year or more, with fact and expert discovery concluded, thousands of documents produced, eleven expert reports and rebuttal reports delivered, approximately two dozen depositions taken, four motions for summary judgment briefed and adjudicated, and ten motions *in limine* pending. BOKF is now devoting massive efforts to the final stages of trial preparation.

27. Even if only temporary, an injunction that stops the guarantee cases in their tracks would be a tremendous waste of party resources and an affront to the Southern District of New York and Judge Scheindlin, who has devoted immense time to the litigation.[6] In fact, an injunction at this stage would be unprecedented. The Debtors have cited nothing that authorizes an injunction of guarantee cases on the eve of a contested trial. All of the Debtors' scant

[6] Last week, referring to the pending injunction request, Judge Scheindlin remarked that "we will know on March 2nd whether we've been spending a lot of time unnecessarily." Transcript of hearing held on February 8, 2018, in the *BOKF* and *UMB* actions, attached as Ex. 3 to the Trustees' Request For Judicial Notice, at 41:12-14; *id.* at 51:12-14 ("So let's think about what is the right way to try this. And meantime, we all can sit here with bated breath waiting for March 2nd.").

authority relates to guarantee actions that were threatened but not yet commenced or were in the early stages of litigation.

28. *Trust Indenture Act* (Trustee Notice ¶ b). Since the trial in June, several attempts have been made to amend the Trust Indenture Act for the specific purpose of impairing (and potentially eliminating) the Trustees' guarantee claims against CEC. Matt Jarzemsky, "*Caesars Takes Aim At Law Aiding Creditors*," WALL STREET JOURNAL (Dec. 6, 2015) ("Caesars Entertainment Corp. is lobbying to roll back a Depression-era creditor-protection law that could complicate the casino giant's financial restructuring . . . . An amendment to the law could gut lawsuits against Caesars brought by bondholders of the company's bankrupt operating division."); Catherine Ho, "*Caesars Entertainment Lobbies For Harry Reid-Backed Measure To Help Casino*," WASHINGTON POST (Dec. 9, 2015) ("Caesars is trying to quietly slip language into the omnibus spending bill . . . . The language would invalidate recent court rulings regarding Caesars' debt restructuring that Caesars disagrees with.").

29. CEC has admitted that it orchestrated those efforts.[7] Although not successful to date, it is likely that CEC will continue efforts to evade the judicial system and gut the Trustees' claims via legislative maneuvers. The legislation advanced by CEC would apply retroactively to any case that had not reached final judgment, meaning that a stay of the Trustees' ability to proceed to judgment might result in a permanent loss of their TIA claims.

30. *Other CEC Liabilities* (Ct. Notice ¶¶ 9-11; Trustee Notice ¶ a, Ex. 1). CEC continues to be exposed to substantial other liabilities. Among other things, since the trial here,

[7] CEC has filed a motion *in limine* in BOKF's guarantee action seeking to "exclude evidence concerning efforts by CEC, its affiliates, and/or agents to amend Section 316(b) of the TIA." No. 15-cv-01561-SAS (S.D.N.Y.) (ECF 93 at 13); *id.* ("The fact that CEC, its affiliates, or its agents may have advocated for an amendment to the TIA after the filing of these actions is irrelevant to the question the jury must decide.") (Trustee Notice ¶ b, Ex. 2).

Wilmington Trust National Association filed suit in the Southern District of New York to enforce against CEC's guarantee of over $500 million of CEOC debt. No. 15-cv-08280-SAS (S.D.N.Y. Oct. 20, 2015). The Debtors have not requested an injunction of that case, which is proceeding.

31. Also since the trial, the Court denied the Debtors' request to stay an action brought by the National Retirement Fund against CEC, also pending in the Southern District of New York, which seeks more than $360 million in withdrawal liability. Main Case ECF 2567 at 5 (Memorandum Opinion dated November 12, 2015); Ct. Notice ¶ 10.

32. If the Debtors are correct that CEC's financial condition is precarious, it would be enormously prejudicial to the Trustees to enjoin the guarantee actions while those other cases (seeking almost a billion dollars in liability) proceed and potentially deplete CEC resources that could be used to satisfy its guarantee liabilities.

## V. ANY INJUNCTION MUST BE LIMITED, CLEAR, AND PRECISE

33. The relief requested by the Debtors has morphed and shifted over the course of the last eleven months. In its most recent iteration (the Motion filed in late December), the Debtors asked the Court to enter an open-ended order providing that the guarantee actions "are hereby enjoined in their entirety pursuant to section 105(a) of the Bankruptcy Code until further order of this Court." Mot, Ex. A. Yet, the Debtors simultaneously profess to want only to "freez[e] the guaranty litigation for 60 days following the issuance of the Examiner report." *Id.* ¶ 3; *id.* ¶ 15 ("The injunction would provide a brief – yet critical – 60-day window following the issuance of the Examiner report for the Debtors and other parties in interest to try to reach a consensual, value-maximizing plan."). Elsewhere, the Debtors say they want the injunction period to run from issuance of a "final report" by the Examiner. *Id.* ¶ 15.

34. This is much too imprecise. Given the pending privilege issues (not coincidentally caused by CEC, the beneficiary of the proposed injunction), it is not clear what a "final report" by the Examiner might be or when one might be issued. Any order must clearly delineate the duration of the injunction and specify that, if the Debtors seek to extend the injunction (as they surely will), the burden is on them to prove (in a procedurally appropriate manner) that further relief is warranted by existing facts under governing law.

35. Similarly, it is not clear what it means to enjoin the actions "in their entirety." Do the Debtors intend for a total abatement of pending *pretrial* deadlines and proceedings (as opposed to an injunction against the actual trial itself)? That would be highly inappropriate given the advanced stage of the guarantee cases, the numerous pending motions *in limine*, and the enormous time, money, and effort it has taken to get the litigation to the eve of trial.

36. As a result, the Trustees ask that, if the Court is inclined to issue an injunction at this time, it should provide for no more than the following:

a. Duration. The injunction should not extend beyond May 8, 2016, absent further order of the Court upon a demonstration of cause after notice and a hearing. This is one day before the trial in the *Danner* and *MeehanCombs* cases is scheduled to begin and thus, absent further relief, will permit those cases to proceed as scheduled, potentially also with the *BOKF* and *UMB* cases as well.

b. Nature. The injunction should preclude only the commencement of trial of the guarantee actions, and not ongoing pretrial proceedings and deadlines. As the Debtors admit, there are no dispositive motions pending in any of the guarantee actions, Tr. 16:15-16 (Zott), meaning that there are no "imminent rulings" as the Debtors once allegedly feared. Mot. ¶ 14. There is no reason to halt all activity in those cases given

that the Debtors have disclaimed "distraction" as a basis for their desired injunction, and the parties should be able to continue with pretrial proceedings so that they are able to begin trial when the temporary injunction is lifted. Any broader injunction would have the effect of halting the guarantee actions not only for the duration of the stay but also for the additional period in which pretrial proceedings would be postponed while an injunction is in place.

c. Protections. Any injunction must be conditioned on prohibitions on CEC's ability to transfer and dissipate assets or otherwise make payments and transfers outside of the ordinary course of business, and/or the posting of a bond to lessen the harm to the Trustees. *See, e.g.*, *In re Lyondell Chemical Co.*, 402 B.R. 571, 595 (Bankr. S.D.N.Y. 2009) (60-day injunction issued weeks after petition date conditioned on prohibition of (i) "the transfer or encumbrance" by the parent guarantor of specified assets, (ii) "the transfer, encumbrance, release, settlement, or compromise" of receivables in favor of the parent guarantor, and (iii) "payments outside of the ordinary course" by the parent guarantor).[8] This is particularly critical given the immense liabilities CEC now faces in the other, non-stayed litigation that is going forward against it.

## VI. CONCLUSION

37. The Trustees ask that the Court deny the Debtors' renewed request for an injunction. However, if the Court determines that a temporary stay can and should be issued at this time, the Trustees request that the stay not extend beyond May 8 absent further order of the Court upon a showing of cause by the Debtors, that it not prohibit pretrial proceedings and

[8] The Trustees asked for such protections both before and after trial. *See* Pretrial Br. ¶ 47, Post-Trial Br. ¶ 67 n.4.

deadlines in the guarantee actions, and that it be conditioned on a bond and/or restrictions on CEC's ability to transfer or dispose of its assets.

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Respectfully submitted,

JONES DAY

By: /s/ Morgan R. Hirst
Morgan R. Hirst
77 West Wacker Drive
Chicago, IL 60601

Bruce Bennett
James O. Johnston
Sidney P. Levinson
Joshua M. Mester
555 South Flower Street
50th Floor
Los Angeles, CA 90071

Geoff Stewart
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

-and-

KELLEY DRYE & WARREN LLP
Eric R. Wilson
David I. Zalman
101 Park Avenue
New York, NY 10178

*Attorneys for Defendant,*
*Wilmington Savings Fund Society, FSB*

FOLEY & LARDNER LLP

By: /s/ Mark F. Hebbeln
Mark F. Hebbeln, Esq.
Harold L. Kaplan, Esq.
Lars A. Peterson, Esq.
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313

-and-

ARENT FOX LLP
Andrew I. Silfen, Esq.
Mark B. Joachim, Esq.
Michael S. Cryan, Esq.
1675 Broadway
New York, NY 10019

Jackson D. Toof, Esq.
1717 K Street, NW
Washington, DC 20006

*Attorneys for Defendant BOKF, N.A.*