No. 1:15-cv-06504

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

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

v.

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

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

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INTRODUCTION

Appellees fundamentally fail to respond to Debtors' arguments about why the bankruptcy court's rigid "same acts" rule cannot be reconciled with the Seventh Circuit cases from which it was purportedly derived, much less any other precedent. Instead, Appellees repeat the bankruptcy court's flawed reasoning, while at the same time disclaiming the bankruptcy court's acknowledgment that its interpretation of *In re Teknek, LLC*, 563 F.3d 639 (7th Cir. 2009), and *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir. 1998), rendered the Seventh Circuit a national outlier—even though the "same acts" rule Appellees read into those decisions has not been articulated or applied by any other court. Yet, the bankruptcy court candidly observed that "courts have often issued section 105(a) injunctions to halt actions of the kind and under the circumstances the debtors describe," A55, while (erroneously) concluding that, "[i]n the Seventh Circuit, the section 105(a) injunction is a more limited remedy than in other courts," A47. Because the Seventh Circuit is not the outlier that the bankruptcy court believed it to be, the decision below must be reversed.

Even if there were some "same acts" test, it is clearly met here. It is undisputed that Appellees and the Debtors cannot both recover from CEC for their respective claims—claims that Appellees themselves pleaded arise out of the same disputed transactions. Indeed, Appellees continue to argue that "CEC loot[ed] the Debtors through the 'disputed transactions,'" shifting "billions of dollars of value away from the Debtors." Appellees Br. 5. Absent those transactions, Appellees imply that the Debtors would have had sufficient assets to avoid a bankruptcy, which means that Appellees' guaranty claims against CEC may not have been triggered. And Appellees are no strangers to this bankruptcy; they are creditors with second priority and unsecured claims against the Debtors. However, if Appellees are successful in the short-term, it will transfer value from CEC to Appellees—rather than the Debtors—allowing Appellees to leapfrog the Debtors' other creditors in contravention of the absolute priority rule. That is reason enough to grant the requested injunction.

Moreover, as the guaranty actions themselves demonstrate, this is not the typical guaranty situation. Appellees contend the actions of the Debtors (CEOC) and guarantor (CEC) are intertwined, further

demonstrating the need for an injunction. As the Southern District of New York recently observed, questions at the heart of Appellees' guaranty actions include whether the disputed transactions were "routine corporate transactions … undertaken in an effort to *improve* [Debtor] CEOC's financial condition or whether the transactions were undertaken as part of a plan to accomplish an out-of-court restructuring of all CEOC debt." *BOKF, N.A. v. Caesars Entm't Corp.*, 2015 WL 5076785, at *11 (S.D.N.Y. Aug. 27, 2015) (internal quotations omitted; emphasis in original). The factfinder in the guaranty actions, thus, will have to consider whether "CEOC h[e]ld talks with creditors in order to make arrangements for maintaining repayments." *Id.* Such questions about the Debtors should be litigated in the bankruptcy court, not in third-party actions. If §105(a) cannot be a basis to grant an injunction here, it is hard to see what role it has beyond § 362's automatic stay.

At bottom, Appellees' arguments make clear that their real motive in pursuing the guaranty actions and opposing a temporary injunction is to thwart confirmation of a plan of reorganization that they oppose. Appellees should be allowed to pursue these actions immediately, they say, because otherwise a plan might be confirmed by the bankruptcy

court that could release their claims against CEC. But the place for Appellees to litigate the terms of the Debtors' proposed plan is *in the bankruptcy court*, not through an end-run around the bankruptcy process. Appellees' goals having been laid bare, this Court should clarify the law and enter the requested injunction, so that no one set of creditors obtains an unfair advantage over the others as the Debtors attempt to reorganize for the benefit of *all* creditors.

That brings us to the issue of remedy. Recognizing the weakness of their position on the merits, Appellees spend much of their brief arguing that, if this Court finds the bankruptcy court applied the wrong test, it should merely remand rather than order entry of the requested injunction. Once again Appellees seek to run out the clock—hoping that, in the absence of temporary injunctive relief, they will win the race to judgment. But this Court should not countenance such highly prejudicial delay when the undisputed facts demonstrate that all of the relevant factors for a temporary injunction are satisfied. Indeed, Appellees' claims of disputed facts and purported prejudice from a temporary stay ring particularly hollow given that they called no fact witnesses at trial. Ultimately, the only "harm" that Appellees can even

identify from the grant of an injunction is the possibility that their claims against CEC could be released as part of a plan of reorganization. But whether such a release is part of a plan that the Debtors seek to confirm is a fight for another day before the bankruptcy court (and no such confirmation is scheduled), and is no basis for denying the Debtors' request to temporarily enjoin the guaranty actions.

ARGUMENT

I. Appellees' Arguments Supporting The Bankruptcy Court's Rigid "Same Acts" Requirement Are Unavailing

Appellees attempt to defend the bankruptcy court's refusal to enter an injunction here by asserting that (1) the bankruptcy court "applied the defining principle and followed *Fisher* and *Teknek* to the letter," Appellees Br. 24, (2) the "same acts" requirement does not conflict with decisions of any other court, and (3) § 105(a)'s general background principles justify that requirement. Appellees are wrong on all scores. Because the bankruptcy court's reliance on a legally erroneous rule is by definition an abuse of discretion, the decision below must be reversed. *See Kress v. CCA of Tenn., LLC*, 694 F.3d 890, 892

(7th Cir. 2012); *Christmas v. City of Chicago*, 682 F.3d 632, 638 (7th Cir. 2012).

A. *Fisher* And *Teknek* Do Not Mandate The "Same Acts" Requirement Appellees Advance

Appellees barely address whether *Fisher* and *Teknek* actually established a "same acts" requirement. Instead, Appellees largely *assume Fisher* and *Teknek* held that "an injunction is available only where the bankruptcy estate and a third party assert claims based upon the 'same acts,'" Appellees Br. 20, and then assert the bankruptcy court properly applied that standard. *See* Appellees Br. 24-29. That misses the point. The *central issue* in this appeal is whether *Fisher* and *Teknek* *actually* established a "same acts" requirement. To be sure, the Debtors asserted they should also prevail even under such a requirement, but that was only an alternative argument.

As the Debtors explained in their opening brief, *Fisher* and *Teknek* do not in fact restrict § 105(a) relief to situations where the debtor has a claim against the non-debtor defendant that arises from the "same acts" as the third-party action sought to be enjoined. To the contrary, both cases acknowledge the broad authority of bankruptcy courts to enjoin third-party actions that will "affect the amount of property in the

bankruptcy estate or the allocation of property among creditors." *Fisher*, 155 F.3d at 882; *Teknek*, 563 F.3d at 648.

That was not idle dicta or a "selective quotation" by the Debtors from a "passage" solely addressing "the reach of bankruptcy court jurisdiction." Appellees Br. 30. *Fisher* in the very next sentence holds that, "[t]o protect this jurisdiction" over actions that will affect the amount or distribution of property among creditors, "'the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,' including a stay." 155 F.3d at 882 (quoting 11 U.S.C. § 105(a)). That is emphatically a statement about the authority of bankruptcy courts. So is the statement elsewhere in *Fisher* "affirming the power and the *responsibility* of the bankruptcy court to preliminarily enjoin suits to which the debtor need not be a party but which may affect the amount of property in the bankrupt estate." *Id.* at 883 (emphasis added).

The "defining principle" of *Teknek* likewise is not that a court is powerless to enjoin a third-party action "unless the claims at issue are based on the same harm to the debtor." Appellees Br. 24. That assertion rises and falls with Appellees' contention that *Teknek* vacated

the injunction in that case *solely* because the estate and third-party claims were "not based on the same acts," *Teknek*, 563 F.3d at 649. But the Seventh Circuit held the third party's claims would have no effect on the amount of property in the bankruptcy estate or the allocation of property among creditors for two additional reasons: the third party there was Teknek's only major creditor, *id.* at 650, and the non-debtor had sufficient funds to pay both the estate and third-party claims, *id.* at 644. *Teknek*, as all courts have done, focused on the *effect* that the third party's claims would have on the bankruptcy process.

Appellees quickly dismiss the relevance of these unique facts, asserting in a single sentence that *Teknek* "reject[ed] the argument" that the absence of other creditors matters. Appellees Br. 27-28. But *Teknek* itself says otherwise. It held the absence of other creditors is a "relevant" consideration and a "distinguishing characteristic" that justified denying a § 105 injunction similar to the one *Fisher* granted. *Teknek*, 563 F.3d at 650. The Seventh Circuit's acknowledgement that it did "not put much weight on," *id.* at 644, or "make too much of this distinction," *id.* at 650, simply shows none of the Seventh Circuit's reasons for denying injunctive relief in *Teknek* were independently

dispositive. Each was a factor in a fact-specific inquiry. That is consistent with the well-established, flexible approach the Debtors ask this Court to apply, not the mandatory "same acts" requirement Appellees seek and the bankruptcy court erroneously adopted.

Finally, finding a "same acts" requirement hidden in *Fisher* and *Teknek* would require reading those decisions to overrule past Seventh Circuit precedent. Years before those decisions, the Seventh Circuit established that bankruptcy courts have broad authority to temporarily enjoin third-party actions against non-debtors that "would defeat or impair its jurisdiction," *In re L & S Indus.*, 989 F.2d 929, 932 (7th Cir. 1993), or otherwise "threaten the integrity of the bankrupt's estate," *In re Energy Co-Op, Inc.*, 886 F.2d 921, 929 (7th Cir. 1989). That inherently flexible standard—applicable across a variety of fact-patterns—is irreconcilable with the "same acts" requirement Appellees and the bankruptcy court read into *Fisher* and *Teknek*. Because one Seventh Circuit panel cannot overrule the decision of a prior panel, *see Iqbal v. Patel*, 780 F.3d 728, 729 (7th Cir. 2015), this only further demonstrates that Appellees are reading into *Fisher* and *Teknek* a legal

rule that does not exist. So does the fact that neither *Fisher* nor *Teknek* attempt to justify why a "same acts" requirement is necessary.

B. Appellees' Attempts To Reconcile Their Reading Of *Fisher* And *Teknek* With Mainstream Bankruptcy Jurisprudence Are Unpersuasive

1. Even A "Same Acts" Requirement That Applies Only In Limited Circumstances Would Conflict With Numerous Decisions

Appellees do not, and cannot, deny that no other court within the Seventh Circuit has read *Fisher* and *Teknek* to impose a "same acts" requirement and no other circuit has imposed such a requirement. And Appellees willfully ignore the bankruptcy court's candid acknowledgements that the same fact-pattern would warrant an injunction under the law of other circuits. A47, A49, A55-56. Rather, Appellees attempt to distinguish the numerous cases inconsistent with a "same acts" requirement away by asserting that requirement only applies in very narrow circumstances. *See* Appellees Br. 3 (asserting cases decided "on entirely different underlying factual premises" are irrelevant). The "same acts" requirement, in their view, applies "where the objective is to protect a non-debtor insider's assets from suit by an outside party" and nowhere else. Appellees Br. 14; *see also id.* at 1, 20. By retreating to this limited bright-line rule, Appellees effectively

concede the "same acts" requirement is inconsistent with numerous § 105 decisions from across the country. Indeed, such a limited rule has no basis in law or logic.

Section 105(a) grants courts the authority to "issue any order … that is necessary or appropriate" to protect its jurisdiction and "carry out the provisions of" the bankruptcy code. 11 U.S.C. § 105(a). This is a standard that calls for a "case by case decision[]" whether a particular action threatens the integrity of the bankrupt's estate and should be enjoined. *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 599 (10th Cir. 1991). Appellees recognize as much when it suits their needs, asserting when convenient that whether to grant a § 105(a) injunction is "a fact-intensive inquiry" that requires "case by case" analysis. Appellees Br. 43. It would make no sense to superimpose rigid rules unique to each factual circumstance on top of § 105(a)'s flexible standard. No decision has balkanized § 105(a) like that before—not *Fisher*, not *Teknek*, and not even the decision below—and Appellees offer no legal justification for this Court being the first to do so.

Indeed, Appellees' proposed rule requiring a heightened showing where the transfers involved insiders draws irrational distinctions.

Under their rule, if the debtor fraudulently transferred property to a non-insider, and both the debtor and a third party sought to recover from the transferee's assets, the third party claim could be enjoined even if it did not arise from the same acts. But if the transfer were to an insider, then no stay would be possible. There is simply no reason why a debtor's attempt to recover transfers made to an insider should be subject to a more restrictive injunction rule than to a non-insider. The point of a § 105 injunction is to protect the integrity of the estate, a debtor's ability to reorganize, and the allocation of property among creditors. It has nothing to do with the status of the transferee.

The bankruptcy court's novel rule, in any event, would still conflict with decisions from this district and across the country even if limited to § 105 injunctions that seek to protect a non-debtor insider's assets from suit by an "outside party." That is the "classic scenario" for a § 105 injunction against third-party actions. *In re Regency Realty Assocs.*, 179 B.R. 717, 719 (Bankr. M.D. Fla. 1995) (collecting cases); A55 (decision below calling this a "familiar" type of § 105 injunction that courts "often issue[]"). And courts in this district grant such injunctions even when the debtor has *no claim at all* against the non-

debtor. Each of these cases is irreconcilable even with Appellees' newly-minted version of the "same acts" requirement.

For example, *Gander Partners*—a decision that cites both *Fisher* and *Teknek*—enjoined a third-party action against "the principals[]" of the debtor because their assets were a "vital" "source of funds for the Debtors' reorganization efforts" that would "no longer be available" if the third-party litigation proceeded. *In re Gander Partners LLC*, 432 B.R. 781, 788 (Bankr. N.D. Ill. 2010) (never mentioning a "same acts" requirement). Another post-*Teknek* decision from this district, *Paul R. Glenn*, likewise temporarily blocked a third-party suit against the debtor's "principal[]" because his "time and *funds*" were "necessary for the Debtor's reorganization." *In re Paul R. Glenn Architects, Inc.*, 2013 WL 441602, *2 (Bankr. N.D. Ill. Feb. 5, 2013) (never mentioning a "same acts" requirement) (emphasis added). So too in *Kham & Nate's* where the bankruptcy court enjoined third-party actions because "assets of the Debtor's principals [are] crucial to the Debtor's ability to obtain additional financing" and successfully reorganize. *In re Kham & Nate's Shoes No. 2, Inc.*, 97 B.R. 420, 429 (Bankr. N.D. Ill. 1989) (never mentioning a "same acts" requirement). To claim as Appellees do that

these decisions did not issue § 105 injunctions to protect a non-debtor insider's assets requires willful ignorance of what the decisions actually say.

Courts outside this district have similarly blocked suits against insiders in order to protect their assets when necessary to protect the bankruptcy court's jurisdiction without requiring that the debtor even have a claim against the insider and without ever mentioning a "same acts" requirement. *See, e.g.*, *In re Lyondell Chem. Co.*, 402 B.R. 571, 581-83 (Bankr. S.D.N.Y. 2009); *In re St. Petersburg Hotel Assocs.*, 37 B.R. 380, 381 (Bankr. M.D. Fla. 1984); *In re Lanham Mfg. Co.*, 33 B.R. 681, 683 (Bankr. D.S.D. 1983); *In re Otero Mills, Inc.*, 21 B.R. 777, 778-79 (Bankr. D.N.M.), *aff'd*, 25 B.R. 1018 (D.N.M. 1982). Appellees attempt to distinguish all of these cases except *Lyondell* because they "involved a closely-held business" that hoped to reorganize using an insider's "personal assets." Appellees Br. 39. That is not a principled distinction. It is legally irrelevant whether a debtor is a small business seeking to fund its plan with a few thousand dollars from its founder or a large corporation, such as the Debtors, that is attempting to preserve a reorganization centered around a $1.5 billion contribution from its

corporate parent. In either case, third-party litigation against fragile pledged assets could "derail the bankruptcy proceedings," *Fisher*, 155 F.3d at 883.

Appellees' three attempts to distinguish *Lyondell* are equally unpersuasive. *First*, Appellees contend *Lyondell* is distinguishable because the debtor there sought an orderly period in which its corporate parent could file for bankruptcy rather than a stay to prevent unnecessarily throwing its corporate parent into bankruptcy. Appellees Br. 41. Once again, that is a legally irrelevant distinction; no court has held a § 105 injunction against third-party litigation is only available to facilitate an orderly bankruptcy filing by the non-debtor. *Second*, Appellees assert *Lyondell* is different because the Debtors here do not propose "any restraint or judicial supervision" of CEC during the stay period. Appellees Br. 41. That is an argument about the proper terms of an injunction, not whether the bankruptcy court has authority to issue one. *Third*, Appellees attempt to distinguish *Lyondell* because the Debtors may seek third-party releases for CEC in their plan of reorganization. Appellees Br. 41. This too has nothing to do with a court's authority under § 105(a).

But Appellees' objection to the potential for third-party releases in a plan does reveal the true reason they do not want the guaranty actions stayed. Appellees do not like the distribution of estate assets the Debtors propose or the releases necessary to secure CEC's $1.5 billion plan contribution, Appellees Br. 51. Rather than oppose confirmation at the proper time, however, Appellees seek to sidestep the bankruptcy process and claim the funds currently earmarked for equitable distribution to *all* creditors exclusively for themselves. This blatant attempt to "defeat or impair" the bankruptcy court's jurisdiction and the bankruptcy process is precisely when a court *should* exercise its § 105 authority. *L & S Indus.*, 989 F.2d at 932.

2. Appellees Cannot Distinguish Away Contrary Circuit Precedent

Appellees' attempts to dismiss the decisions of every other circuit to consider the issue fare no better. Tellingly, Appellees do not dispute the Debtors' characterization of the *legal rules* announced in those seven decisions, all of which recognize a bankruptcy court may broadly "use its injunctive authority [under §105(a)] to protect the integrity of a bankrupt's estate." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1003 (4th Cir. 1986); *see generally* Debtors Br. 28. Appellees' assertion that

adopting a "same acts" requirement would not cast the Seventh Circuit as a national outlier is thus mystifying. Even the bankruptcy court recognized a "same acts" requirement is unprecedented and required holding the Seventh Circuit uses a "different textbook" than everyone else. A56.

As for the factual differences between this case and decisions from other courts of appeals, those differences only confirm § 105 has no rigid bright-line rules. It is governed by a flexible test that empowers bankruptcy courts to enjoin every variety of third-party action that interferes with the court's duty to marshal estate assets for equitable distribution. Thus, for example, courts have not needed to invent or apply fact-specific rules to enjoin administrative claims in non-bankruptcy forums, *In re DeLorean Motor Co.*, 991 F.2d 1236, 1242 (6th Cir. 1993), suits that implicate estate indemnification obligations, *Western Real Estate*, 922 F.2d at 599, or suits that would simply distract from the reorganization process, *In re A.H. Robins Co.*, 828 F.2d 1023, 1026 (4th Cir. 1987). Each case is instead resolved through a case-specific application of the same "threatens the integrity of the estate" standard.

Appellees also misunderstand why *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990), and *In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991), are relevant. Merely citing *G.S.F. Corp.*, in their view, shows the Debtors "conflat[e]" a bankruptcy court's "jurisdiction" with its "power to issue [an] injunction." Appellees Br. 32. This is a criticism of the Seventh Circuit's cases, not the Debtor's position. The Seventh Circuit has already held *G.S.F. Corp.* establishes third-party actions can "be stayed by *authority* of section 105 of the Bankruptcy Code," *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-62 (7th Cir. 1994) (emphasis added), likely because *G.S.F.* says exactly that when quoting from the Seventh Circuit's decision in *Energy Co-Op*, 938 F.2d at 929. Put differently, there was no question that the *G.S.F.* bankruptcy court had *authority* to enter an injunction, the only question there was whether it was within the scope of that court's jurisdiction—which further demonstrates the breadth of § 105(a).

Zerand-Bernal, of course, is the very case both *Fisher* and *Teknek* rely upon to hold bankruptcy courts have broad *authority* to enjoin third-party actions that will "'affect the amount of property in the bankrupt estate." *Fisher*, 155 F.3d at 882 (quoting *Zerand-Bernal*, 23

F.3d at 161-62); *id.* at 883 (same); *Teknek*, 563 F.3d at 648 (same). If Appellees have to turn even on *Fisher* and *Teknek* to justify the indefensible "same acts" requirement, they truly have no allies left.

To be sure, *Lemco Gypsum* is a case about jurisdiction. But the Debtors never claimed otherwise, and only discussed it to establish *Zerand-Bernal*, and thus *Fisher* and *Teknek*, were not radical decisions that jettisoned mainstream bankruptcy jurisprudence. *See* Debtors Br. 32. As the Debtors explained in their opening brief, *Zerand-Bernal*'s reliance on both *G.S.F.* and *Lemco Gypsum* shows that decision is firmly grounded in well-established mainstream bankruptcy jurisprudence concerning both a court's jurisdiction and its authority to enjoin third-party actions. Thus, it would be very strange for *Fisher* and *Teknek* to rely so heavily on *Zerand-Bernal* while silently adopting the radical and unprecedented "same acts" requirement that Appellees and the bankruptcy court attempt to read into those decisions.

C. General Bankruptcy Principles Do Not Justify A Novel "Same Acts" Requirement

Appellees further err by claiming their invented "same acts" requirement is supported by general statements about the unusual nature of § 105 relief, limitations on a court's § 105 authority in

contexts other than injunctions to temporarily block third-party litigation, and the fact that courts often do not enjoin guaranty actions presenting very different facts than those at issue here.

As an initial matter, it is absurd to suggest a bankruptcy order restraining another court is "radical," "extreme," "extraordinary," or "drastic." Appellees Br. 1. The automatic stay is, of course, automatic and routinely stays both state and federal litigation. *See* 11 U.S.C. § 362. And the Debtors have cited more than a dozen cases—and could have cited many more—in which courts have enjoined state and federal litigation under § 105(a).

Appellees' reliance on *Village of Rosemont v. Jaffe*, 482 F.3d 926 (7th Cir. 2007), and *Disch v. Rasmussen*, 417 F.3d 769 (7th Cir. 2005), is equally baseless. Those cases rejected attempts to use § 105(a) to justify circumventing explicit requirements of the bankruptcy code. *See Jaffe*, 482 F.3d at 935 (holding courts cannot use § 105(a) to circumvent limitations of 11 U.S.C. § 1142(b)); *Disch*, 417 F.3d at 777 (holding courts cannot use § 105(a) to override the "strict limits on a court's authority to revoke a discharge" under 11 U.S.C. § 727(d)). Neither said a word about a court's authority to enjoin third-party actions. Thus,

those decisions would be relevant only if a § 105 injunction could be viewed as an end-run around the limitations of the automatic stay. Section 105, however, "complements the automatic stay provision," *Zerand-Bernal*, 23 F.3d at 162; *see also Fisher*, 155 F.3d at 882.

Appellees likewise misunderstand why courts often do not enjoin guaranty actions. It has nothing to do with a supposed "same acts" requirement. To the contrary, courts generally do not enjoin litigation against a debtor's guarantors because those actions rarely have any effect on the debtor's estate. A debtor generally does not have a claim against the guarantor that is a material asset of the estate, and even if it does, the guarantor is generally solvent enough to pay both the estate and the third-party claim in full. *See, e.g.*, *In re Phar-Mor, Inc. Securities Litig.*, 166 B.R. 57, 63 (W.D. Pa. 1994). Third-party guaranty actions, in other words, rarely "threaten[s] the integrity of the bankrupt's estate," *Energy Co-Op*, 886 F.2d at 929, or to "derail the bankruptcy proceedings," *Fisher*, 155 F.3d at 883.

Allowing the guaranty actions to proceed here, in contrast, would do exactly that. Without CEC's contribution, the restructuring support agreement (RSA), along with the plan of reorganization it facilitates,

will crumble. And the Debtors' ability to formulate *any* plan of reorganization heavily depends on the ability to obtain value on account of the estate claims against CEC. A1011:23-1015:3. An adverse ruling in the guaranty actions, however, would at a minimum delay and substantially impair CEC's ability to make any significant contribution to the Debtors' estate. A1026:23-1027:21; A1034:15-1037:8; A1078:4-1080:4. Courts are not powerless to stop this disruption to an orderly and equitable distribution to all creditors simply because the third-party action involves guarantors. *See Fisher*, 155 F.3d at 882-83.

II. Even Assuming There Is A Same Acts Requirement, The Court Below Improperly Denied An Injunction

Even if a "same acts" requirement did exist, Appellees' defense of the bankruptcy court's legally erroneous view of what constitutes the same acts is wholly unpersuasive. Tellingly, other than quoting the bankruptcy court's decision, the Appellees make no attempt to defend that court's holding that to establish two claims arise from the "same acts" requires a "count by count analysis" and comparison of the third-party and estate claims. With good reason. Adopting such a rule would call both *Fisher* and *Teknek* into doubt, as neither decision conducted a

count-by-count analysis nor even mentioned the underlying causes of action.

This is not the only reason the bankruptcy court's "same acts" test is indefensible. Its exceedingly narrow approach to "same acts" would effectively limit a court's authority to enjoin third-party actions to the facts of *Fisher* or situations already covered by the automatic stay—a prospect Appellees not only have no answer to but readily embrace. An injunction against third-party actions is only appropriate, according to Appellees, when "the two sets of claims seek redress for the *same harm to the debtor*." Appellees Br. 26-27 (emphasis in original). With remarkable candor, they admit this means a court's authority under § 105 to enjoin third-party actions is limited to those situations where a third party asserts "estate claims" that are "the 'exclusive property' of the bankruptcy estate." Appellees Br. at 35; *see also id.* at 2.

Accepting Appellees' view of the same-acts requirement would effectively "eliminate § 105 from" the bankruptcy code. *Fisher*, 155 F.3d at 882. The automatic stay already temporarily blocks "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a)(3). The bankruptcy code likewise already grants a debtor-in-possession "sole

responsibility" to bring actions to marshal estate assets or to represent the interests of creditors as a class. *Fisher*, 155 F.3d at 879. In addition, *Fisher* itself made clear the authority to enjoin third-party actions arising from the same acts as an estate claim is at the core of a bankruptcy court's § 105 authority, not its outer limits. *Id.* at 882.

That the bankruptcy court's entire analysis rests on a narrow approach to "same acts" that is legally erroneous is enough to reverse the decision below. But Appellees' assertion that their "claims have nothing to do with CEC's misconduct toward the Debtors" is also wrong. Both sets of claims arise from the same allegedly "broad[] scheme on CEC's part to transfer away CEOC assets," A54, and to "create a 'Good Caesars' … and a 'Bad Caesars,'" A37. It is the acquisition of former CEOC assets via those transactions that give rise to the estate's avoidable preference and fraudulent transfer claims. A1020; A1088; A470. And the alleged division into a "Good Caesars" held by CEC and a "Bad Caesars" held by CEOC would not have been complete without the termination of the disputed guarantees that give rise to Appellees' guaranty actions. *See* A37. Absent the termination of those

guarantees, that partitioning would have been ineffective because CEC would have remained liable for debts of "Bad Caesars" held by CEOC.

Moreover, Appellees' very right to recovery in the guaranty actions appears to turn on how the *Debtors*' conduct in the disputed transactions is viewed by the factfinder in those actions. If that does not satisfy a "same acts" requirement, it is hard to imagine what would. The Southern District of New York recently observed that questions at the heart of the guaranty actions include whether the disputed transactions were "routine corporate transactions … undertaken in an effort to *improve* [Debtor] CEOC's financial condition or whether the transactions were undertaken as part of a plan to accomplish an out-of-court restructuring of all CEOC debt." *Caesars*, 2015 WL 5076785, at *11 (internal quotations omitted; emphasis in original). The Court concluded that "the factfinder may examine all evidence related to these transactions," such as "did [Debtor] CEOC hold talks with creditors in order to make arrangements for maintaining repayments," to determine whether CEC remains liable. *Id.* In other words, CEC's liability depends on the factfinder's assessment of the Debtors' actions and motives in the disputed transactions.

Thus, it is simply not credible to assert that the claims of the Debtors and Appellees do not arise from "overlap[ping]" and "closely related" acts of misconduct by CEC against or involving the Debtors. *Fisher*, 155 F.3d at 883; *Teknek*, 563 F.3d at 649 (requiring "misconduct with respect to the corporate debtor" (emphasis omitted)). That is enough to satisfy any "same acts" requirement that could legitimately be gleaned from *Fisher* and *Teknek*, and there is no justification for the bankruptcy court treating the competing claims here as too attenuated to permit § 105 relief.

III. There Is No Basis For Further Delaying Injunctive Relief

Once the bankruptcy court's legal errors are corrected, the facts compel entry of an injunction. Appellees' arguments that (1) the guaranty actions do not threaten the integrity of the estate, (2) those actions do not threaten a successful reorganization, and (3) an injunction is not in the public interest all miss the mark. Indeed, the core facts that entitle the Debtors to an injunction are undisputed—Appellees did not even call a fact witness at trial to contest or raise issues with the Debtors' request. And there is no reason to delay granting injunctive relief, which would only give Appellees more time to

race towards judgment in the guaranty actions in an attempt to jump to the front of the creditor line.

A. None of Appellees' Arguments Against An Injunction Create A Material Factual Dispute

1. The Guaranty Actions Threaten The Integrity Of The Bankruptcy Estate

Many of the arguments Appellees advance regarding the integrity of the Debtors' estate are irrelevant. Appellees complain that "the Debtors seek to release all claims against [CEC-affiliated] parties for no consideration whatsoever," Appellees Br. 47, that "CEC's 'contribution' under the RSA is not valuable or designed to maximize 'creditor recoveries,'" *id.* at 48, and that "CEC seeks sole control over whether and how much it should pay to satisfy its liability to the Debtors," *id.* at 46. Those are objections to the Debtors' proposed plan that the bankruptcy court can address during plan confirmation proceedings. Dislike for the equitable distribution of assets or other terms of the Debtors' plan is not an excuse, however, for Appellees, through the guaranty actions, to divert the entire value of CEC's contributions to themselves.

Appellees' arguments also rely on half-truths and misrepresentations. Appellees do not dispute that the estate's claims

against CEC are one of its two primary assets or that, if the Appellees succeed in the guaranty actions, CEC will have no meaningful value to contribute to the estate for the benefit of all creditors. *See* A1006:14-1007:2; A1013:20-1015:3; A1019:17-1021:22; A1073:11-1074:2. Because CEC's subsidiaries also allegedly received fraudulent conveyances, however, Appellees assert "CEC is not the sole source of recovery for the estate claims." Appellees Br. 46. But CEC is a holding company with few assets other than its ownership interests in those subsidiaries, so CEC could only pay billions of dollars to Appellees by depleting the assets of its subsidiaries. (6/3/2015 Hr'g Tr. at 200:1-19). Thus, a dollar Appellees collect from CEC is a dollar that neither CEC nor its subsidiaries can contribute to the Debtors.

Nor are CEC's directors the litigation targets that Appellees suggest. The Debtors do not have fraudulent transfer claims against CEC's directors and the claims they may have are more attenuated than those against CEC. Appellee's unsupported assertion that the Debtors seek to release claims against CEC's subsidiaries "for no consideration" is likewise misleading. Appellees Br. 47. Because CEC is a holding company, the Debtors' expert testified without contradiction

that CEC's contribution is, as a practical matter, a contribution from those subsidiaries. (6/3/2015 Hr'g Tr. at 141:4-22).

That the Debtors and Appellees are seeking the same limited pool of funds likewise demonstrates Appellees are unquestionably attempting to jump to the front of the creditor line. Any contribution from CEC will be distributed by the Debtors in accordance with the bankruptcy code's statutory priority scheme. A438. But the guaranty actions seek to divert that contribution to Appellees, all of whom are unsecured creditors or second-lien noteholders, seeking to jump ahead of the distributions to the Debtors' senior creditors. To contend otherwise, Appellees must again ignore the undisputed evidence that CEC cannot satisfy any judgment in the guaranty actions and contribute to the Debtors' estate. A1021:4-22; (6/4/2015 Hr'g Tr. at 207:11–208:2).

Phar-Mor does not condone such attempts to circumvent the absolute priority rule. The non-debtor defending against both estate and third-party claims in that case was "a solvent partnership" with sufficient capital "to satisfy any and all judgments which may be rendered against it." 166 B.R. at 63. Thus, unlike here, any third-party

judgment against the non-debtor partnership did not imperil the equitable distribution of assets among creditors.

Appellees' contention that "the Debtors' own expert has not even valued CEC's 'contribution'" once again plays fast and loose with the truth. Although the Debtors' *current* financial advisor has not completed his valuation of CEC's contribution, their former one valued the contribution at $1.5 billion, (6/3/2015 Hr'g Tr. at 79:21-80:2, 97:5-8)—the figure the Debtors have consistently recited. The cash that CEC has agreed to contribute under the RSA framework alone exceeds $2 billion. A1065:4-7; A1068:2-10; (6/3/2015 Hr'g Tr. at 187:2-188:14). And no one has made a feasible proposal that would result in more value going to CEOC's creditors than under the RSA. A1058:13-18.

2. The Guaranty Actions Are An Immediate Threat To The Debtors' Ability To Reorganize

Appellees next argue a stay is unnecessary because the guaranty actions do not "threaten a successful reorganization." Appellees Br. 49. But establishing a third-party action threatens a successful reorganization is not a requirement for a § 105 injunction. To temporarily block proceedings in another court, a debtor need only show that (1) the proceedings threaten the integrity of the bankruptcy estate;

(2) the debtor has a reasonable likelihood of a successful reorganization; and (3) an injunction is in the public interest. *See Fisher*, 155 F.3d at 882.

In any event, the record is clear that an adverse ruling in the guaranty actions would substantially delay and potentially derail a successful reorganization by casting doubt over the current alternatives for a confirmable plan. Such a ruling will likely force CEC into bankruptcy, which would impair its ability to make a voluntary or court-ordered contribution to the Debtors' estate. A1026:23-1027:21; A1034:15-1037:8, A1078:4-1080:4. Yet the Debtors' ability to formulate *any* plan of reorganization heavily depends on the ability to obtain value on account of their estate claims against CEC. A1011:23-1015:3. And, while the Debtors' financial advisor testified that an injunction was not strictly necessary for the Debtors to successfully reorganize, there was no serious dispute that CEC will likely file for bankruptcy if it suffers an adverse judgment in any of the guaranty actions, A1019:17-1021:22; A1023:9-1026:22; A1048:12-1049:7; A1057:21-1058:11; A1074:3-13; A1075:10-23; A1084:2-1085:2—a bankruptcy that

would be highly value-destructive for all parties. A1026:23-1027:21; A1034:15-1037:8.

Moreover, having another court adjudicate questions about Debtor CEOC's "talks with creditors," and whether the disputed transactions were "undertaken in an effort to *improve* [Debtor] CEOC's financial condition or whether the transactions were undertaken as part of a plan to accomplish an out-of-court restructuring of all CEOC debt," *Caesars*, 2015 WL 5076785, at *11, prejudices the Debtors' own claims against CEC and their ability to reorganize.

3. Temporarily Enjoining Appellees From Pursuing The Guaranty Actions Would Not Unduly Harm Appellees, And The Public Interest Favors An Injunction

Shifting from one made-up requirement to another, Appellees claim "the balance of harms" disfavors an injunction. Appellees Br. 50. That is, once again, not a requirement for an injunction temporarily blocking a third-party action against a non-debtor. *See Fisher*, 155 F.3d at 882; *Gander Partners*, 432 B.R. at 788. Appellees' only legitimate claim of harm is easily dismissed anyway. According to Appellees, the Debtors' requested injunction is unfair because it does not prevent other creditors from collecting judgments against CEC or stop CEC from

paying its other debts. Appellees Br. 51. That is because none of CEC's other creditors are "similarly situated," *Lyondell*, 402 B.R. at 594, with billion-dollar demands that could single-handedly bankrupt CEC. *See* (6/4/2015 Hr'g Tr. at 167:19-168:6). Appellees' other asserted harms merely repeat their objections to the Debtors' proposed plan.

Appellees end their brief with the remarkable assertion that the public interest favors thrusting CEC into bankruptcy and derailing the Debtors' proposed restructuring. Appellees Br. 52. That argument makes no sense, and it certainly finds no support in *Lyondell*, 402 B.R. at 594, or any other case. *Lyondell* similarly does not support Appellees' argument that guarantees are sacrosanct and public policy requires their enforcement never be enjoined. Appellees Br. 52. In fact, that case *enjoined* guaranty actions against a non-debtor, holding it did "not believe the law does or should require that the enforcement of guaranties can *never* be blocked." *Id.* at 593-94.

This is a case, like *Lyondell*, where "the needs and concerns of other creditors simply trump" the interests of (alleged) guaranty holders. *Id.* at 594. "Promoting a successful reorganization is one of the most important public interests," *Gander Partners*, 432 B.R. at 789, and

allowing the guaranty actions to proceed here would make a successful reorganization significantly more difficult.

B. This Court Should Direct Entry Of An Injunction Without Further Delay

Because Appellees have identified no material factual disputes for the bankruptcy court to address on remand, this Court should direct the bankruptcy court to enter the Debtors' requested injunction. Appellees' request for a remand seeks delay for the sake of delay in the hope that they can drag out the bankruptcy process until the guaranty actions conclude, to the exclusion of all other creditors. That is not a reason to remand, and Appellees' makeweight arguments do not justifying further delaying injunctive relief.

As an initial matter, the bankruptcy court's views on whether a reversal should result in remand is beside the point. The bankruptcy court cannot dictate how this Court resolves a bankruptcy appeal. Nor would issuing an injunction "[c]ontradict[]" unspecified "promises" the Debtors made. Appellees Br. 42. The Debtors never promised in their certification motion or otherwise that they would not seek immediate entry of an injunction on appeal. And it would not delay Appellees' claims for all time, or even through confirmation. The Debtors seek a

stay only until 60 days after the examiner has issued his report so that, through the bankruptcy process, all of the relevant stakeholders can evaluate and respond to the examiner's assessment of the disputed transactions.

Appellees' assertion that "appellate courts *always* remand so that the trial court can engage in the requisite fact-finding and consideration" is simply not true. Appellees Br. 43. Appellate courts can and do "reverse and remand with instructions to enter a preliminary injunction." *Virgin Enters., Ltd. v. Nawab*, 335 F.3d 141, 142-43 (2d Cir. 2003); *see also League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) ("We remand to the district court with instructions for it to enter a preliminary injunction."). And this is a circumstance where doing so makes sense. Time is of the essence, the record is fully developed, and there are no relevant factual disputes.

Finally, there is no reason to remand so the bankruptcy court can consider the scope and terms of the Debtors' requested injunction. It is too late for Appellees to complain about the requested injunction's scope. Despite having every opportunity to raise those issues at the

trial and in the post-trial briefing, Appellees chose not to do so. Their new-found interest in the scope of the requested injunction is thus further proof the true reason Appellees seek a remand is to delay entry of the injunction to which the Debtors are legally entitled.

CONCLUSION

This Court should reverse and remand with instructions to enjoin the guaranty actions until 60 days after the court-appointed examiner issues his final report.

Dated: September 9, 2015
Chicago, Illinois

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. Bankr. P. 8015(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. Bankr. P. 8015(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. Bankr. P. 32(a)(7)(B)(iii), the brief contains 6,975 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook font. As permitted by Fed. R. Bankr. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: September 9, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2015, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all CM/ECF participants, resulting in service upon all counsel of record.

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