IN THE UNITED STATES BANKRUPTCY COURT
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.*, Plaintiff, v. BOKF, N.A., WILMINGTON SAVINGS FUND SOCIETY, FSB, MEEEHANCOMBS 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 FREDERICK BARTON DANNER, Defendants.	Chapter 11 Adversary Case No. 15-00149

UNSECURED NOTES DEFENDANTS'[2] POST-TRIAL BRIEF

[1] A complete list of the Debtors and the last four digits of their federal tax identification numbers may be obtained at https://cases.primeclerk.com/CEOC.

[2] The Unsecured Notes Defendants are, collectively, 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. and Trilogy Portfolio Company, LLC ("MeehanCombs Defendants") and Frederick Barton Danner ("Danner").

The Unsecured Notes Defendants respectfully submit this post-trial brief following the evidentiary hearing on the Debtors' *Motion to Stay, or in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Pending Litigation Against Debtors' Directors and Non-Debtor Affiliates* [Dkt. No. 4] (the "Stay Motion").

INTRODUCTION

Unlike the vast majority of decisions where litigation against non-debtors has been stayed, *and in contrast to the claims asserted by BOKF and WSFS in their respective actions* (the "Second Lien Claims"), the Unsecured Notes Defendants' claims do not arise from conduct that would result in any claim against CEC by the Debtors. To the contrary, the Unsecured Notes Defendants' claims are premised entirely on guarantee obligations CEC contracted to provide at the time the Notes[3] were issued, and whether the elimination of CEC's guarantee obligation in August 2014 violated the Unsecured Notes Defendants' rights under the Trust Indenture Act, the Indentures (defined herein) and common law rights.

The SDNY Litigation[4] arises from a Note Purchase and Support Agreement (the "Agreement") by and between CEC, CEOC and certain holders of 2016 Notes and 2017 Notes (collectively, the "Notes"). Pursuant to the Agreement, CEC and CEOC contracted to purchase over $155 million of Notes from only certain Noteholders (the "Favored Noteholders") in exchange for votes to amend the indentures governing the Notes (the "Indentures") to strip the

[3] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the *Ad Hoc Group of 5.75% and 6.50% Notes' Preliminary Objection to Debtors' Motion to Stay, or in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Pending Litigation Against Debtors' Directors and Non-Debtor Affiliates* [Dkt. No. 7].

[4] *MeehanCombs Global Credit Opportunities Master Fund, LP, et al. v. Caesars Entertainment Corp., et al.*, No. 14-cv-07091 (SAS) and *Frederick Barton Danner, Individually and on Behalf of All Others Similarly Situated, v. Caesars Entertainment Corp., et al.*, No. 14-cv-07973 (SAS) (collectively, the "SDNY Litigation").

remaining Notes of certain fundamental provisions, including the Guarantees (the "August 2014 Transaction"). This transaction was consummated without the consent of the Unsecured Notes Defendants and other holders of the Notes, including individual investor noteholders (collectively, the "Disenfranchised Noteholders"). CEOC and the successor indenture trustee entered into two supplemental indentures—one for the 2016 Notes and one for the 2017 Notes—in an attempt to effectuate the amendments to the respective indentures that were contemplated in the Agreement.

CEOC and CEC each agreed to pay the Favored Noteholders $77.7 million in cash in the aggregate for the purchased Notes, for a total of $155.4 million. *See* MC1, Ex. A.[5] CEC further agreed to contribute notes it held, totaling no less than $393 million aggregate principal amount, to CEOC for cancellation. *See id.* As a result, the August 2014 Transaction reduced CEOC's indebtedness by approximately $582 million. MC19, p. 37. Critically, the August 2014 Transaction did not involve any transfers from the Debtors to CEC.

The MeehanCombs Defendants and Danner filed suit against CEOC and CEC on September 3 and October 2, 2014, respectively. Each suit sought declarations that the Supplemental Indentures were void under the Trust Indenture Act and that CEC's guarantee obligations remain in place. The suits were commenced prior to the Debtors' filing of voluntary petitions for relief in this Court. CEOC's bankruptcy filing accelerated the maturity date of the Notes, and gave rise to an additional claim for payment under the Guarantees, and the Unsecured Notes Defendants amended their respective complaints accordingly. P2, at ¶¶ 52-54, 75-76, 183-188; P3 at ¶¶ 31-32, 109-114.

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[5] Citations to exhibits from the MeehanCombs Defendants' exhibit list, Debtors' exhibit list, and Defendants' Joint List of Exhibits, each filed on May 26, 2015, are designated as "MC__," "P__," and "D__," respectively.

As discussed below, the Unsecured Notes Defendants' claims are based solely on the Indentures, the Guarantees and the August 2014 Transaction. While the Amended Complaints contain a recitation of certain other pre-petition transactions, those statements were included simply to show a pattern of self-dealing by CEC and CEOC. The Unsecured Notes Defendants have never asserted *any* claims arising from any transaction other than the August 2014 Transaction. Because the Unsecured Notes Defendants' claims are not based on any conduct that would give rise to a claim against CEC by the Debtors, under Seventh Circuit precedent this Court lacks jurisdiction to enjoin the prosecution of the SDNY Litigation.

ARGUMENT

A. The Standard for Issuing a Section 105 Injunction as Articulated in *Fisher* and *Teknek.*

The Seventh Circuit has held that "in limited circumstances the [debtor] may temporarily block adjudication of claims that are not property of the estate by petitioning the bankruptcy court to enjoin the other litigation" under section 105(a) of the Bankruptcy Code. *See Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998) ("*Fisher*"). This form of injunctive relief "is considered to be an *extraordinary* remedy to be granted only when a significant and direct impact on the reorganization proceeding is threatened." *In re United Model Distrib., Inc.*, No. 91-1120, 1992 WL 503595, at *3 (Bankr. N.D. Ill. May 1, 1992).

Further, the general rule is that suits against a debtor's guarantor should not be enjoined because they do not seek relief from the debtor. *See Levey v. Sys. Div., Inc. (In re TekNek, LLC)*, 563 F.3d 639, 649 (7th Cir. 2009) ("*Teknek*"). Indeed, in *Fisher* the Seventh Circuit described a lawsuit brought by a creditor of the debtor against a non-debtor guarantor as the "more common case," which will be allowed to proceed because the suit is "only nominally against the debtor because the only relief sought is against his insurer, guarantor, or other similarly situated party."

Fisher, 155 F.3d at 882-83. That is exactly the situation before the Court. The Unsecured Notes Defendants are suing the non-debtor guarantor, CEC, under the Guarantees, without regard to the Debtors' liability.

The Court has asked the parties to address whether the claims asserted in the SDNY Litigation may be enjoined under *Fisher* as clarified in *Teknek*. *Fisher* provides a two-prong analysis for determining whether a bankruptcy court can enjoin a suit between non-debtors from proceeding in another court.[6]

First, the Court must determine, on a claim-by-claim basis, whether the claims to be enjoined are general or personal. *See Fisher*, 155 F.3d at 879-80; *Teknek*, 563 F.3d at 645. General claims are claims that can be brought on behalf of all creditors. *See Fisher*, 155 F.3d at 879-80 (quoting *Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1348-49 (7th Cir. 1987)) ("[A]llegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim[.]"). Representative general claims include any cause of action a debtor corporation may have to "recover damages for fiduciary misconduct, mismanagement or neglect of duty." *Teknek*, 563 F.3d at 646 (quoting *Koch*, 831 F.2d at 1343-44). The trustee or debtor-in-possession has the "sole right and responsibility" to bring general claims. *Teknek*, 563 F.3d at 646. Personal claims, on the other hand, are claims in which the claimant has been harmed and "'no other

[6] At the Court's request, the Unsecured Notes Defendants have limited their discussion of jurisdiction in this brief to the issues raised by *Fisher* and *Teknek*. The Unsecured Notes Defendants are not abandoning or waiving any arguments made in the Unsecured Notes Defendants' *(I) Memorandum Objecting to Jurisdiction, (II) Pretrial Brief and (III) Joinder to the Pretrial Brief of Wilmington Savings Fund Society, FSB and BOKF, N.A.* [Dkt. No. 133], including the argument that the Court lacks constitutional authority to enjoin an Article III court from proceeding in a case involving non-debtors.

claimant or creditor has an interest in the cause.'" *Fisher*, 155 F.3d at 879 (quoting *Koch*, 831 F.2d at 1348). The trustee or debtor-in-possession has no standing to bring personal claims of creditors. *Teknek*, 563 F.3d at 646. In order to make a determination as to whether a cause of action accrues generally to the debtor corporation or personally to the claimant, a court must consider whether the alleged injury is "peculiar and personal to the claimant or general and common to the corporation and creditors." *Id.* at 647 (citing *Koch*, 831 F.2d at 1349).

Second, if the Court determines that a claim is personal to a creditor, then the Court must conduct the second prong of the analysis and may only temporarily enjoin the prosecution of that claim if it is sufficiently "related to" the bankruptcy proceeding. *Fisher*, 155 F.3d at 882. The Seventh Circuit takes a narrow view of "related to" jurisdiction. "Related to" jurisdiction under 28 U.S.C. § 1334(b) only exists where resolution of the claim "affect[s] the amount of property of the bankruptcy estate, or the allocation of property among creditors." *Fisher*, 155 F.3d at 882 (internal citations omitted). That a separate action may have some tenuous connection to the debtor or overlap with the debtor's affairs is insufficient to provide the bankruptcy court with a basis for jurisdiction. *See Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989). In this case, CEC is just one of any number of potential parties that may be willing to contribute capital to the Debtors for an equity stake in the reorganized CEOC capital structure. *See* 6/13/15 Tr. at 99:22-100:8. CEC's status as a potential contributor to the bankruptcy estates is insufficient to satisfy the narrow "related to" definition.

As this Court noted in *In re Mission Bay Ski & Bike, Inc.*, in light of the Seventh Circuit's restrictive definition of "related to" jurisdiction, "not surprisingly, one non-debtor's action for damages against another non-debtor is typically not a matter over which a bankruptcy court can exercise jurisdiction." 398 B.R. 250, 253 (Bankr. N.D. Ill. 2008) (internal citations omitted). In both *Fisher* and *Teknek*, the Seventh Circuit expressly "recogniz[ed] the freedom (at least in most cases) of creditors to bring suits that are 'only nominally against the debtor because the only relief sought is against his insurer,' ***guarantor***, or other similarly situated party." *Fisher*, 155 F.3d at 883 (quoting *In re Hendrix*, 986 F.2d 195, 197 (7th Cir. 1993)) (emphasis added); *Teknek*, 563 F.3d at 649.

B. The Unsecured Notes Defendants' Claims are Personal Claims that are not "related to" the Debtors' Bankruptcy Cases.[7]

1. The Unsecured Notes Defendants' claims are personal claims.

The Debtors have never asserted that the Unsecured Notes Defendants' claims are "general and common to the corporation and its creditors," as opposed to personal claims, *i.e.*, claims which seek to redress an injury that is "peculiar and personal to the claimant." *Koch*, 831 F.2d at 349. In the SDNY Litigation, the Unsecured Notes Defendants are seeking a declaration that the Guarantees of their Notes are still in full force and effect and ultimately to recover under those Guarantees. The purported removal of the Guarantees, and the attendant risk of not recovering their investment, is personal to the Unsecured Notes Defendants. Indeed, during the trial, the Debtors' witnesses conceded that the guarantee claims belong to the Unsecured Notes Defendants and that CEOC does not have any causes of action against CEC with respect to the Guarantees. *See* 6/3/15 Tr. at 75:1-6; 132:14-16.

2. The Unsecured Notes Defendants' claims are not related to the Debtors' bankruptcy cases.

The Unsecured Notes Defendants' claims are not "related to" the Debtors' bankruptcy proceedings. As discussed above, "related to" jurisdiction under 28 U.S.C. § 1334(b) only exists

[7] Pursuant to the Court's request, the chart attached hereto as Exhibit A lists each claim the Unsecured Notes Defendants are asserting in the SDNY Litigation and identifies why each claim is neither "personal" nor "related to" the Debtors' bankruptcy.

where resolution of the claim "affect[s] the amount of property of the bankruptcy estate, or the allocation of property among creditors." *Fisher*, 155 F.3d at 882. Neither is affected by the claims asserted in the SDNY Litigation.

a. The Unsecured Notes Defendants' claims will not affect the amount of property in the Debtors' bankruptcy estates.

The SDNY Litigation will not affect the amount of property in the Debtors' bankruptcy estates. If the Unsecured Notes Defendants prevail on their claims for declaratory relief with respect to the Guarantees, the principal amount of the judgment against CEC will not exceed $159 million.[8] The undisputed evidence at trial demonstrated that CEC, and certain of its subsidiaries and affiliates, excluding CEOC, has the capacity to both make payments on the Guarantees up to $159 million and still participate in the proposed plan as set forth in the RSA and Disclosure Statement. *See* 6/4/15 Tr. at 284:22-286:9. Moreover, as seen on the chart attached hereto as Exhibit A, damages sought by the MeehanCombs Defendants are limited to an amount equal to the principal of and accrued and unpaid interest on the notes held by the MeehanCombs Defendants, which is less than $23 million. For Danner, the damages sought pursuant to the Danner Amended Complaint are approximately $119 million. *See id.* at 163:23-164:1. At trial, Steven Zelin, a Senior Managing Director of the Blackstone Group, CEC's financial advisor and investment banker, testified that CEC has the financial wherewithal to pay $23 million and still make the contemplated contribution. *See* 6/4/15 Tr. at 101-102. Similarly,

[8] The principal value of the outstanding Notes totals $530 million. *See* 6/4/15 Transcript, 100:20-23. Of that amount, approximately $289 million is owned by Caesars Acquisition Company ("CAC"), an affiliate of CEC. *See id.* at 100:24–101:1. As part of CAC's potential or possible merger with and into CEC, the Notes held by CAC will be cancelled. *See* P19. The Favored Noteholders hold approximately $82 million of the Notes. *See* 6/4/15 Transcript, 101:2-5. As discussed above, the Favored Noteholders have consented to the release of the Guarantees pursuant to the Agreement. Accordingly, it is undisputed that the total amount of outstanding Notes that are neither owned by affiliates of CEC nor holders who have consented to the removal of the Guarantees does not exceed $159 million. *See id.* at 101:6-10.

Mr. Zelin also testified that CEC has the financial wherewithal to pay any judgment in the Danner Litigation and still make the contemplated contribution. *See* 6/4/15 Tr. at 98-100. Thus, CEC confirmed at trial that the SDNY Litigation will have no impact on its contribution to the Debtors' estates.

Further, as discussed above, there may be entities other than CEC who are willing to contribute to the reorganization in exchange for equity in the reorganized CEOC equity structure. Obviously, such contribution would not be impacted by the continuation of the SDNY Litigation in any way. And in fact, CEOC has recently engaged in a marketing process to determine the interest from such third parties. *See* 6/3/15 Tr. at 98:19-99:11.

During the trial, CEOC repeatedly advanced the argument that a judgment in any of the guarantee actions, including the SDNY Litigation, will result in a so-called "cascading effect" whereby CEC will be forced to pay out under all the guarantees if it is forced to make payment under one of them. 6/3/15 Tr. at 205-08; 6/4/15 Tr. at 99, 131. This argument is unavailing for two reasons.

First, the Debtors' own demonstrative illustrates the difference between the language regarding the definition of "wholly-owned subsidiary" in the first and second lien indentures (which is identical) and the language in the indenture governing the 2017 Notes. Indeed, James E. Millstein of Millstein & Co., the Debtors' investment banker, conceded that the definition of "wholly-owned subsidiary" in the Indentures materially differs from the definition of the same term in the indentures governing the first and second lien notes. *See* 6/3/15 Tr. at 120:7-13. Thus, any argument that a decision in the SDNY Litigation may have a preclusive effect in litigation in which the relevant indenture language is materially different is fundamentally flawed. *See Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995) (under New York law, collateral estoppel may only be applied to preclude a party from re-litigating an issue where "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding").

Second, the Debtors have not offered any evidence that there would be a "cascading effect" should the SDNY Litigation result in judgments in favor of the Unsecured Notes Defendants. The Debtors' witnesses' opinions on this topic offer nothing more than conjecture regarding potential litigation outcomes. By "cascading effect," the Debtors appear to mean that, unless an injunction is issued, the first lien noteholders will join the guarantee litigation and abandon the RSA. *See* 6/3/15 Tr. at 49:4-16. However, given that the RSA currently contemplates paying the first lien lenders no less than 93 cents on the dollar, the additional damages they might receive from a lawsuit are *de minimis*. Thus, in addition to being entirely unsubstantiated and unprecedented, any argument that the threat of a "cascading effect" supports enjoining the SDNY Litigation is legally meritless.

b. The Unsecured Notes Defendants' claims will not affect the distribution of property of the bankruptcy estates.

The Debtors failed to introduce any evidence showing that the SDNY Litigation will affect the allocation of property among the Debtors' creditors. Generally speaking, a guarantor acquires the right to recover from the principal all amounts the guarantor paid on the principal's behalf. In the case of a bankrupt principal, the guarantor is subrogated to the creditor's claim against the debtor. While the identity of creditors changes, the claims in the bankruptcy remain the same, so there is no effect on the distribution of estate property. *See Mission Bay*, 398 B.R. at 254. Here, the Guarantees expressly provide that "the Guarantor shall be subrogated to all rights of the Holders against [CEOC] in respect of any amounts paid by Guarantor pursuant to the provisions of this Guarantee or this Indenture[.]" *See* P40, at § 12.1.3; P41, at § 1501(3). Thus, in the event CEC made payment pursuant to the Guarantees, it would simply subrogate to the Unsecured Notes Defendants' claims in the bankruptcy case against CEOC, leaving both the allocation of property among the Debtors' creditors and the amount of claims against the Debtors' estates unchanged. The Debtors failed to show that this Court has "related to" jurisdiction over *any* of the Unsecured Notes Defendants' claims.

C. The Unsecured Notes Defendants' Claims Are Distinguishable from the Claims at Issue in *Fisher* and Comparable to the Claims at Issue in *Teknek*.

In order to best illustrate how the relief sought in the SDNY Litigation is distinguishable from the claims at issue in *Fisher* and better analogized to the litigation sought to be enjoined in *Teknek*, it is helpful to briefly compare the facts of those cases to the SDNY Litigation.

In *Fisher*, the Chapter 7 debtors perpetrated a fraudulent scam "similar to a Ponzi scheme." *Fisher*, 155 F.3d at 877-78. Following the commencement of an involuntary case, certain investors who were also estate creditors brought securities, commodities, and common law fraud actions in the federal district court against the debtors' accomplices and two of the debtors. *See id.* at 878. The trustee, who was pursuing claims against the accomplices arising from the same fraudulent scheme, sought to stay the lawsuits until he completed prosecution of the estate's claims. *Id.* at 878-79. The bankruptcy court entered an injunction under section 105(a), finding that both the trustee and the plaintiffs were "pursuing the same dollars from the same defendants to redress the same harms." *Id.* at 879.

The Seventh Circuit, in entering an injunction, reasoned that the plaintiffs' claims, while not property of the estate, were claims "related to" property of the debtors' estates because such claims were to "the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, [and] as part of the same conspiracy."

Id. at 882. As a result, the court found that the fraud claims might "affect the amount of property in the bankrupt estate, or the allocation of property among creditors," and were thus properly stayed. *Id.* at 882.

In *Teknek*, Systems Division, Inc. ("SDI") obtained a judgment for patent infringement against Teknek LLC ("Teknek") and Teknek Electronics ("Electronics") in federal district court. *Teknek*, 563 F.3d at 641. While the patent litigation was pending, the defendants' shareholders created a separate new entity, Teknek Holdings ("Holdings"), and proceeded to transfer the companies' assets into Holdings. *Id.* The district court subsequently held that the shareholders and Holdings were alter egos of Teknek and directly liable on the patent judgment.

In the interim, the now insolvent Teknek filed for bankruptcy. *Id.* at 642. The Chapter 7 trustee filed an adversary proceeding against the debtor's shareholders asserting claims for, *inter alia*, fraudulent transfers and breach of fiduciary duty in connection with their looting of the debtor. *Id.* at 642-43. At the trustee's request, the bankruptcy court held that SDI's claim against the shareholders for the amount of the judgment was property of the bankruptcy estate, and that SDI should be and was enjoined from seeking recovery of the judgment from the shareholders. *Id.*

On appeal, the Seventh Circuit distinguished SDI's claims from those at issue in *Fisher* as well as *Koch*, an earlier Seventh Circuit decision: "In both of those cases, the creditors' claims against the non-debtor fiduciaries depended on the non-debtor's misconduct *with respect to the corporate debtor*." *Teknek*, 563 F.3d at 649 (emphasis in original). In *Koch*, the plaintiff oil companies sought to hold the member-owners of the debtor liable for breach of their fiduciary duties to the debtor. *Koch*, 831 F.2d at 1340. In *Fisher*, as discussed above, the plaintiff investors asserted securities fraud claims in connection with the principal's looting of the debtor corporation. *Fisher*, 155 F.3d at 881. In *Teknek*, in contrast, SDI's claims did not arise from the non-debtors' misconduct with respect to the debtor. Rather, SDI suffered an independent injury from Teknek Electronics, a non-debtor, in the form of patent infringement. The trustee's claims for fraudulent transfers and breach of fiduciary duty did not arise from the patent infringement, but rather the shareholders' subsequent looting of Teknek. Unlike in *Fisher*, where the plaintiffs' and the bankruptcy estate's claims were "claims to the same limited pool of money, in possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy," in *Teknek*, "though SDI's claims involve the same pool of money as the trustee's claims, and that money is in the possession of the same defendants (the alter egos), *the claims are not based on the same acts*." *Teknek*, 563 F.3d at 649 (citing *Fisher*, 155 F.3d at 882) (internal citations omitted) (emphasis added). Accordingly, SDI's claim was not sufficiently "related to" Teknek's bankruptcy to afford the bankruptcy court with jurisdiction to enjoin SDI's collection action.

The Unsecured Notes Defendants' claims are comparable to the claims at issue in *Teknek* because there is no overlap between the acts giving rise to the Unsecured Notes Defendants' claims against CEC and any claims the Debtors may have against CEC. The Unsecured Notes Defendants' claims do not arise from "the non-debtor's misconduct *with respect to the corporate debtor*." *Teknek*, 563 F.3d at 649 (emphasis in original). The SDNY Litigation seeks to enforce CEC's contractual Guarantees, which CEC played a direct role in attempting to strip in violation of the Indentures, the Guarantees and the Trust Indenture Act. The Debtors have not identified any causes of action CEOC may have against CEC arising from the August 2014 Transaction. During the June 2015 trial, Mr. Millstein conceded that he has not evaluated any potential claims the Debtors may have against CEC, nor has the Special Governance Committee of the CEOC Board of Directors completed its investigation. *See* 6/3/15 Tr. at 81:12 – 83:21.

During the trial, the Debtors' witnesses vaguely alluded to claims the estates may have against CEC for "fraudulent conveyances" or "fraudulent transfers." *See, e.g.*, 6/3/15 Tr. at 50:15-17; 56:11-13; 58:10-59:6; 70:19-21; 71:4-8; 72:7; 82:3-8; 90:9-14; 102:4; 124:1-4. However, at no point did the Debtors present any evidence demonstrating that an estate cause of action exists against CEC based on the August 2014 Transaction. This is not surprising, as the August 2014 Transaction primarily involved transfers *from* CEC that inured to the benefit of CEOC in the form of debt reduction. MC19, p. 7 ("CEC contributed $426.6 million of Senior Unsecured Notes to CEOC for cancellation…")]. Moreover, the Special Governance Committee, formed in June 2014, a month *before* the August 2014 Transaction was approved and consummated, is "charged with, among other things, conducting an independent investigation into potential claims that the Debtors … have against CEC…" MC19, p. 8. It would be astonishing if the same Special Governance Committee who approved the August 2014 Transaction would now conclude that CEOC estate causes of action arise from the very transaction it approved.

As the Seventh Circuit noted in *Teknek*, "general claims and claims that are 'related to' the bankruptcy seemingly always involve transfers from the debtor to a non-debtor control person or entity." *Teknek*, 563 F.3d at 649. Here, the Unsecured Notes Defendants' claims do not involve any transfers from CEOC to CEC. To the contrary, in the August 2014 Transaction, CEC paid cash to purchase Notes from third parties. It also contributed $393 million of Notes it owned or controlled to CEOC for cancellation, allegedly resulting in an overall reduction of CEOC's indebtedness by approximately $582 million. MC19, p. 37.

It is immaterial that, were the Debtors to identify and then prosecute claims against CEC, the Debtors and the Unsecured Notes Defendants would be seeking to recover from the same source. Under *Teknek*, even if the debtor's and the to-be-enjoined plaintiffs' respective claims involve the same "pool of money" and that money is in the possession of the same defendant, the claims are not "related to" the bankruptcy if they are based on separate acts. 563 F.3d at 649.

The SDNY Litigation is the very lawsuit the Seventh Circuit described in both *Fisher* and *Teknek* as the "more common case"—a creditor's action against a non-debtor guarantor that will be allowed to proceed given the fact that the lawsuit is "only nominally against the debtor because the only relief sought is against his insurer, guarantor, or other similarly situated party." *Id.* (citing *Fisher*, 155 F.3d at 882-83) (internal quotations omitted). Because the Debtors failed to offer any evidence whatsoever demonstrating that the Debtors' estates own or control any claims against CEC arising from its conduct with respect to the August 2014 Transaction, the Unsecured Notes Defendants' claims are not "related to" the Debtors' bankruptcy and this Court lacks jurisdiction to enjoin their prosecution. *Id.*

D. This Court does not have Jurisdiction to Issue a Permanent Injunction.

There is no authority in the Seventh Circuit to support the issuance of a permanent injunction. All applicable case law establishes that any injunction enjoining the continued prosecution of an action by a third party against a nondebtor must be temporary in nature. *See, e.g.*, *Teknek*, 563 F.3d at 648 ("[I]n limited circumstances the Trustee may temporarily block claims that are not property of the estate[.]"); *Fisher*, 155 F.3d at 882 (same); *In re Gander Partners, LLC*, 432 B.R. 781, 788-89 (Bankr. N.D. Ill. 2010) (limiting injunction to 120 days); *R&G*, Hr'g Tr. at 124:18-125:5 (limiting injunction to 122 days). In each case, the plaintiffs retained the right to litigate after the injunction was lifted. *See, e.g. Fisher*, 155 F.3d at 883 (staying litigation "pending the outcome of the bankruptcy proceeding. At that point, … it will be possible for the district court to proceed with the action against the nondebtor defendants for whatever individualized damages may be proper."). Further, in *Gander* the debtors proposed to pay the enjoined plaintiff in full; the bankruptcy court found that a temporary stay "actually benefits [the plaintiff] as it would recover all monies owed it if the Debtors succeed in their effort to refinance the debt." 432 B.R. at 788.

Here, in contrast, the Debtors seek to stay the SDNY Litigation until sixty (60) days after the issuance of the Examiner's report. However, at trial the Debtors conceded that throughout the 60-day period they will be actively trying to confirm a plan that would give CEC a blanket non-consensual third-party release while the Unsecured Notes Defendants will receive a *de minimis* recovery on account of their claims against CEOC. *See* 6/3/15 Tr. 146:19 – 147:22, 148:22 – 151:19. Despite the Debtors' request for a temporary injunction, the facts of this case make clear that any injunction will have the same practical effect as a permanent injunction. Under Seventh Circuit precedent, this Court has no authority to permanently extinguish the Unsecured Notes Defendants' claims by way of a section 105 injunction.

E. The Unsecured Notes Defendants' Claims are Distinguishable from the Claims of the Second Lien Bondholders.

The Debtors would have this Court believe that there is no difference between the four defendants and their respective causes of action. That is simply untrue. There are four parties seeking to enforce guarantees against CEC: WSFS, BOKF, the MeehanCombs Defendants and Danner. While these four defendants have coordinated to a certain extent on many issues, their underlying guarantee claims and litigations are very different.

On one hand, WSFS and BOKF are both indenture trustees acting under indentures governing secured, second lien position bonds (the "Second Lien Bonds"). As established at trial, the indentures for the Second Lien Bonds are substantially identical to the indentures for the first lien bonds, and provide for the automatic release of the CEC guarantee if CEOC is no longer owned 100% by CEC.

Moreover, the Second Lien Claims challenge the *bona fides* of two May 2014 transactions pursuant to which the Debtors and CEC claim that the Second Lien Bonds' guarantees were automatically released. *See* P1, P4. In these May 2014 transactions, CEC sold 5% of CEOC common equity to certain institutional investors and gave away another 6% of CEOC common equity to CEOC employees to reward performance. Each of the WSFS and BOKF complaints attack the validity of these transactions as they are the purported basis for the alleged release of the guarantees on the Second Lien Bonds. While the Examiner is expected to opine on whether the May 2014 transactions (and the related B-7 Refinancing, as described on MC19, p. 7) give rise to estate fraudulent transfer claims, the plain fact is that WSFS and BOKF have disputed whether the May 2014 transactions were genuine transactions capable of releasing CEC's guarantee under the Second Lien Bond indentures (and the First Lien Bond indentures).

The Unsecured Notes Defendants, on the other hand, are the holders of unsecured Notes governed by Indentures that were executed by Harrah's, predating the involvement of CEC's equity sponsors (the "Sponsors") with the Debtors, and as such have very different guarantee release provisions than those contained in the Second Lien Bond indentures. Specifically, the Indentures do not provide for the automatic release of CEC's Guarantees upon CEC no longer owning 100% of CEOC. Rather, the Indentures provide that CEC "shall be released from all of its obligations under the Guarantee… if: … (3) [CEOC] ceases for any reason to be a "wholly-owned subsidiary" of [CEC] (as such term is defined in Rule 1-02(z) of the Regulation S-X promulgated by the SEC)." P41, § 1503(3); P40, § 12.3(c). The reference to Regulation S-X, and the definition of a "wholly-owned subsidiary" as "a subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parents, other wholly owned subsidiaries" (*see* 17 C.F.R. 210.1-02(aa)) distinguishes the Unsecured Notes Defendants' claims from WSFS and BOKF's claims.

The Unsecured Notes Defendants are not asserting any claims in the SDNY Litigation based on the May 2014 transactions. Indeed, this was the very reason CEC orchestrated the August 2014 Transaction. Given the difference in the language of the notes indentures, CEC was unable to release its Guarantees on the Notes pursuant to the May 2014 transactions. Thus, CEC and CEOC had to consummate the August 2014 transaction in an attempt to eliminate CEC's Guarantees of the Notes. The Unsecured Notes Defendants do not contend that the August 2014 Transaction was a fraudulent conveyance nor do their causes of action seek to unwind the economic terms of the August 2014 Transaction. Rather, the Amended Complaints simply allege that while the August 2014 Transaction may have released the Guarantees of Notes held by parties who consented to such treatment, *i.e.*, the Favored Noteholders, it could not strip the Guarantees held by parties who did not consent to the release of their guarantee.

F. The Debtors Failed to Prove that they are Entitled to a Section 105 Injunction.

Because this Court lacks "related to" jurisdiction over the Unsecured Notes Defendants' personal claims, it does not need to consider whether CEOC has met the additional requirements for a section 105 injunction temporarily staying litigation against non-debtors. However, even where a bankruptcy court has "related to" jurisdiction over claims sought to be enjoined, it may not enjoin prosecution of any claim unless all of the following requirements are met: (1) when prosecution of the claim would defeat or impair its jurisdiction over the bankruptcy case before it; (2) the moving party has established a likelihood of success on the merits; and (3) the balancing of the harms between the debtor and the creditors who would be restrained favors the injunction; and (4) the injunction would be in the public interest. *See Gander*, 432 B.R. at 788.

The Debtors bear the burden of proving each element by clear and convincing evidence. *See id.*; *see also In re Lancelot Investors Fund, L.P.*, Adv. No. 11-00646, 2011 WL 1465579, at *2 (Bankr. N.D. Ill. Apr. 15, 2011); *In re Paul R. Glenn Architects, Inc.*, Adv. No. 12-1266, 2013 WL 441602, at *3 (Bankr. N.D. Ill. Feb. 5, 2013). The evidence introduced at trial fell far short of this exacting standard.

1. There is no likelihood of a successful reorganization.

Success on the merits means, in the context of a section 105 injunction, that there is a "reasonable likelihood of a successful reorganization." *In re R&G Prop.*, No. 09-37463 (Goldgar, J.), Hr'g Tr. at 117: 19-21. At trial, the Debtors repeatedly asserted that they need the contribution from CEC contemplated by the RSA in order to successfully reorganize. *See, e.g.* 6/3/15 Tr. at 197:2-10. However, the RSA grants CEC blanket releases not only for its putative liability for prepetition misconduct with respect to the Debtors, but also for its liability with respect to the Guarantees. Further, the RSA also provides releases for CEC and CEOC's directors and officers, as well as the Sponsors. CEC's contribution to the estates is conditioned on the approval of the releases. *See* P20, Ex. B, p. 11. Thus, if the Court does not approve these releases of non-debtors, which CEOC contends are essential to the RSA, there is no likelihood of a successful reorganization as contemplated by the RSA.

In the Seventh Circuit, the bankruptcy court may approve the non-consensual release of a third party where the third party is making a substantial contribution to the reorganization and the release is "essential to the reorganization" of the Debtor. *See Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008). It is beyond comprehension why CEOC has hung its reorganization on a financial contribution by CEC in return for an impermissible, non-consensual third party release of CEC. The same can be said for this litigation, wherein the Debtors have abandoned nearly all of the allegations and arguments that initially formed the basis for their request for relief. As a result, the Debtors' entire case for an injunction is ultimately premised on their allegation that the continued prosecution of the SDNY Litigation will "threaten CEC's ability to make this contribution to the estate—or any substantial contribution at all." D45 at ¶ 22.

The Debtors cannot make this case. The RSA describes CEC's proposed contribution under a plan as follows: (1) a $406 million cash contribution to be used to fund payment of forbearance fees and to fund the operations of OpCo; (2) payment of $75 million to fund the operations of OpCo and PropCo; (3) purchase of up to $269 million of PropCo new equity equal to 14.8% of fully diluted equity; and (4) purchase of up to $700 million of OpCo new equity equal to 100% of fully diluted equity. P20. It is the Debtors' contention that these contributions represent a "substantial contribution" to the reorganization. D45 at ¶ 4. The testimony elicited at trial from Mr. Zelin severely undermines the veracity of this claim.

A significant portion of the contemplated contribution consists of a put option, pursuant to which, if exercised, CEC will be purchasing 100% of the equity of OpCo and 14.8% of the equity of PropCo. In each instance, CEC is paying cash to receive an asset—equity in the reorganized CEOC. During his cross-examination, Mr. Zelin conceded that CEC's purchase of OpCo equity allows it to retain majority control of CEOC, without which it would face a massive tax liability of $600 million or more. *See* 6/4/15 Tr. at 25-27. Mr. Zelin further acknowledged that, with respect to the $406 million cash contribution, approximately $200 million will be paid to the first lien Noteholders as "forbearance fees," with the $206 million balance going to fund the future operations of OpCo, an entity that CEC will own upon consummation of the proposed plan. 6/4/15 Tr. at 32-36. Similarly, the $75 million payment will also be used to fund the operations of OpCo, an entity CEC will own, and PropCo, an entity CEC will partially own, post-bankruptcy. *Id.* at 37-38.

In light of the foregoing, it is abundantly clear that the actual amount of money CEC will contribute under the RSA, as opposed to the amount of money CEC will pay to retain ownership of the reorganized CEOC capital structure and fund its operations, is far less than the $1.5 billion claimed by CEC and the Debtors. Indeed, when asked to identify which component of the contribution was in exchange for the release of CEC's liability on the Guarantees, Mr. Zelin was unable to quantify the amount of money CEC is paying for these releases. *See* 6/4/15 Tr. at 56:14-24. Further, it is undisputed that the Sponsors and directors and officers are not making any contribution whatsoever in exchange for their releases of estate causes of action. *See* 6/3/15 Tr. at 91:25-92:11. The Debtors failed to put forth any evidence that the blanket third-party releases would be approved. Accordingly, they have not proven that a successful reorganization is likely.

2. Continuation of the SDNY Litigation will not defeat or impair the Court's jurisdiction over the Debtors' bankruptcy cases.

Impairment of jurisdiction means "interference with accomplishing [the Debtors'] reorganization." *R&G* Hr'g Tr. at 117:23-24. The Debtors failed to prove by clear and convincing evidence that the continuation of the SDNY Litigation will interfere with the Debtors' reorganization. As discussed above, the undisputed evidence introduced at trial demonstrates that CEC has the ability and financial wherewithal to make payment on the claims asserted by the Unsecured Notes Defendants in the SDNY Litigation and still participate in the proposed plan as set forth in the RSA.

Further, proceeding with the SDNY Litigation will not interfere with the Debtors' estates' prosecution of any claims against CEC. As an initial matter, the Debtors have not identified any claims against CEC related to the August 2014 Transaction. That fact alone distinguishes this case from *Fisher* and *Teknek*, where the trustees sought to stay litigation against non-debtors because of the perceived impact of that litigation on claims they were actively prosecuting. *See Fisher*, 155 F.3d at 878; *Teknek*, 563 F.3d at 642-43. Furthermore, the evidence at trial demonstrated that the Debtors are in the early stages of pursuing a marketing plan. Thus, there is no evidence that a contribution from CEC is the only manner in which CEOC can reorganize.

Moreover, the Unsecured Notes Defendants' claims are based solely on the governing Indentures, the Guarantees and CEC's attempt to eviscerate the protections provided by those documents in the August 2014 Transaction. The Debtors have not submitted evidence of any estate fraudulent conveyance claims against CEC arising from the August 2014 Transaction, as the transaction involved CEC (and CEOC) paying funds to third parties—the Favored Noteholders. Even if the Debtors were able to identify claims against the Favored Noteholders for the August 2014 Transaction, which they have not done, that would not be sufficient to bestow this Court with jurisdiction to even consider a section 105 injunction because the recovery sought by the Unsecured Notes Defendants against CEC and the Debtors against the Favored Noteholders would not be "claims to the same limited pool of money, in possession of the same defendants[.]" *See Fisher*, 155 F.3d at 882.

3. The balance of harms and the consideration of the public interest weighs against the issuance of an injunction.

The evidence at trial demonstrates that the other relevant factors -- the balance of the relative harms and the public interest -- do not support enjoining the SDNY Litigation.

The Unsecured Notes Defendants will be disproportionately harmed by the issuance of an injunction, in that they will effectively be permanently denied the right to litigate their claims and seek enforcement of the Guarantees, while the Debtors' restructuring efforts will not be affected if the SDNY Litigation proceeds. The Debtors failed to introduce any evidence showing that CEC's contemplated contribution or the first lien noteholders' commitment to the RSA is contingent on the SDNY Litigation being stayed. The Debtors' claim that the consenting creditors / first lien noteholders will walk away from the RSA if the SDNY Litigation is not stayed is mere speculation and conjecture, as the Debtors did not present a single witness who could testify as to this. Moreover, the Debtors' claim that CEC can terminate the RSA is false and contrary to the terms of the RSA. P20, § 10. The Debtors were required to present clear and convincing evidence that their effort to reorganize would be harmed if an injunction is not issued. They failed to do so. Instead, the Debtors' case consisted solely of "what ifs" and invocations of worst case scenarios.

Public policy also disfavors an injunction. By way of the Stay Motion, CEC, via the Debtors, is attempting to obtain the benefits and protections of chapter 11 without assuming its burdens. If CEC wishes to have a single forum to deal with its creditors, it should file a chapter 11 petition of its own. Instead, CEC is hoping to buy a stay, and ultimately a release, without exposing itself, its directors and officers, and the Sponsors to claims of a CEC bankruptcy estate. Under the circumstances presented here, the public interest does not support an injunction. *See Costa and Head Land Co. v. Nat'l Bank of Commerce (In re Costa and Head Land Co.)*, 68 B.R. 296, 303 (N.D. Ala. 1986) (holding that the public interest did not support a stay where the non-debtors "have conspicuously not sought [the] protection [of the bankruptcy laws]").

The Debtors' request for relief is without precedent. If they are successful, any future plan sponsor, whether they are a DIP financing lender, equity holder, or asset purchaser, could require a debtor to ask the bankruptcy court for the same stay of any litigation pending against it. The mere claims that the non-debtor is considering contributing to the reorganization and that the third-party litigation threatens its willingness to make such a contribution would be sufficient, according to the Debtors, to justify the stay of that litigation. Section 105 is the ultimate vehicle for equitable relief—the Court should not countenance its manipulation to obtain what is a fundamentally inequitable result.

CONCLUSION

This Court does not have jurisdiction to provide the Debtors with the relief they are seeking in the Stay Motion and underlying adversary Complaint. Accordingly, the Court should (i) deny the Stay Motion as it pertains to the Unsecured Notes Defendants, and (ii) grant to the Unsecured Notes Defendants such other and further relief as this Court deems just and proper.

Dated: June 26, 2015

Respectfully submitted,

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EXHIBIT A[1]

Claim (Count Number)	**Injury Sought to be Redressed**	**Relief Sought**	**Claims Asserted In The Amended Complaints Are**	
			"Personal" To The Unsecured Notes Defendants	**Not "Related To" The Debtors' Bankruptcy Cases**
Declaratory judgment that (i) the Guarantees are in full force and effect, and (ii) the Supplemental Indentures are invalid and void *ab initio* (MeehanCombs I and II; Danner I)	Execution of the Supplemental Indentures and the purported release of CEC's Guarantees of the Notes in violation of the Indentures, the Guarantees and the TIA.	Declaration that the Guarantees are still in full force and effect and that the Supplemental Indentures are void *ab initio*. Such a declaration will reaffirm the Unsecured Notes Defendants' right to and ability to collect principal and interest from CEC under the Guarantees.	The injury which these claims seek to redress is unique to the Unsecured Notes Defendants and the Disenfranchised Noteholders. Neither the Debtors nor the Debtors' estates may pursue this cause of action.	Claims against a non-debtor guarantor represent the "more common case" that is allowed to proceed. It is undisputed that CEC could pay the total amount of claims on the Guarantees and still make the contemplated contribution to the Debtors' estates. Recovery against CEC on the Guarantees will have no impact of the distribution of estate property.
Violations of the Trust Indenture Act based on the Aug. 2014 Transaction (MeehanCombs III; Danner Count II (but Danner does not assert claims arising out of TIA §316(a)	Execution of the Supplemental Indentures without proper consent and the impairment of the Unsecured Notes Defendants' right to payment under the Notes and right to institute suit for payment.	Damages of at least the principal of and accrued and unpaid interest on the Notes, including pre- and post-judgment interest, reasonable costs and attorneys' fees.	Same as to MeehanCombs I and II; Danner Count I.	These claims will not affect "the amount of property of the bankruptcy estate" nor "the allocation of property among creditors." CEC has admitted that it can pay a judgment for the amounts sought in the Amended Complaints and still make the contemplated contribution. The *MeehanCombs* and *Danner* actions will not derail CEC's commitment to contribute to the Debtors' restructuring.

[1] Capitalized terms used herein shall have the meaning ascribed to them in the *Unsecured Notes Defendants' Post-Trial Brief*, to which this Exhibit A is attached. Even though the Amended Complaints assert claims against CEC and CEOC, claims against CEOC are stayed pursuant to 11 U.S.C. §362(a), and thus the only party against whom a claim is asserted is CEC.

Breach of contract for (1) failure to receive requisite consent to the Supplemental Indentures, and for impairing the right to payment and right to institute suit for payment, (2) violating the Indentures' redemption provisions, (3) violating CEC's Guarantees based on the releases of the Guarantees, (4) violating the Indentures by permitting the Favored Noteholders to impair the rights of other noteholders, each arising out of the Aug. 2014 Transaction. (MeehanCombs IV, V, VI, VII, IX; Danner III, IV, VI (but Danner does not assert claims for breach of §507 of the 2016 Notes Indenture))	Impairment of the Unsecured Notes Defendants' right to payment under the Notes and right to institute suit for payment. The improper effectuation of a constructive redemption in breach of the Notes, Indentures and Guarantees. The preferential treatment of the Favored Noteholders in exchange for the Favored Noteholders' consent to amendments to the Indentures.	Damages of at least an amount equal to the principal of and accrued and unpaid interest on the Notes, including pre- and post-judgment interest, reasonable costs and attorneys' fees.	Same as to MeehanCombs I and II; Danner Count I.	Same as to MeehanCombs III; Danner Count II.
Breach of Contract because of CEC's failure to pay on the guarantee obligations following an event of default. (MeehanCombs IX; Danner VI)	CEC's failure to pay the Unsecured Notes Defendants all amounts due under the Notes, Guarantees and Indentures following an Event of Default, automatically occurring upon CEOC's filing of a voluntary petition for relief under the Bankruptcy Code.	Damages in an amount not less than an amount equal to the principal of and accrued and unpaid interest on the Notes, including pre- and post-judgment interest, reasonable costs and attorneys' fees.	Same as to MeehanCombs I and II; Danner Count I.	Same as to MeehanCombs III; Danner Count II. Additionally, under *Mission Bay*, and pursuant to the subrogation provisions of the Indentures, recovery against CEC on the Guarantees will have no impact of the distribution of estate property.
Breach of the Duty of Good Faith and Fair Dealing arising from the Aug. 2014 Transaction (MeehanCombs VIII; Danner V)	CEC's course of dealing outside of the provisions and protections of the Indentures and actions taken in bad faith to strip Unsecured Notes Defendants and the Disenfranchised Noteholders of such protections.	Damages in an amount not less than an amount equal to the principal of and accrued and unpaid interest on the Notes, including pre- and post-judgment interest, reasonable costs and attorneys' fees.	Same as to MeehanCombs I and II; Danner Count I.	Same as to MeehanCombs III; Danner Count II.