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

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC. *et al.*, 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'[1]
(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.

[1] 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 brief in opposition to the Debtors'[2] *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").

PRELIMINARY STATEMENT

As discussed in the Joint Pretrial Brief of Wilmington Savings Fund Society, FSB ("WSFS") and BOKF, N.A. ("BOKF"), the Debtors are asking this Court for extraordinary relief that no court has ever granted. Critical here, the Debtors do not rely upon factors that this and other courts have found to warrant a Section 105 injunction. Instead, the Debtors rely entirely on one argument that lacks any support in the case law: that their parent, CEC, a publicly traded entity with a market capitalization of approximately $1.4 billion, should be excused from litigating with its creditors and effectively discharged from any corresponding liability, so that it may use some of its wealth to fund a new value plan to buy back its insolvent subsidiary for the benefit of its equity sponsors. All while the holders of the unsecured 5.75% Notes and 6.5% Notes get less than ten cents on the dollar and lose all right to seek relief from CEC. For the reasons laid out by WSFS and BOKF, this argument is without any merit.

The Unsecured Notes Defendants submit this brief to address two issues not discussed in the WSFS and BOKF Pretrial Brief that further warrant denial of the Stay Motion.

As a threshold matter, this Court should not prevent an Article III Court from hearing a federal securities action between two non-debtors. The relief sought by the Debtors is no different than the "rogue TRO" condemned by Judge Easterbrook in *In Matter of Mahurkar*

[2] 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].

Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969 (N.D. Ill. 1992). "For one federal court to issue an injunction forbidding litigation in another is extraordinary, given principles of comity among coordinate tribunals. For a bankruptcy judge to issue an injunction with the effect of preempting resolution of a pending motion in a district court is unheard of." *Id* at 974.

In any event, and putting all else aside, the Court should deny the Stay Motion with respect to the Unsecured Notes Defendants because the litigation filed by both the MeehanCombs Defendants and Danner asserting causes of action under the Trust Indenture Act and pending in the Southern District of New York District Court[3] (the "SDNY Unsecured Noteholders Litigation") will never have any conceivable impact on CEC's ability to fund or otherwise participate in any restructuring plan. The Debtors have admitted—and the MeehanCombs Defendants' financial expert has independently verified—that CEC has the financial wherewithal to perform under the RSA and pay any judgment awarded in the SDNY Unsecured Noteholders Litigation. In determining the Stay Motion, the Court is required to consider each action individually. Thus the fact that CEC can indisputably satisfy a potential judgment in the SDNY Unsecured Noteholders Litigation while still funding the Debtors' reorganization requires, as a matter of both law and fact, denial of the Stay Motion as to the Unsecured Notes Defendants.

In sum, there is no way whatsoever that the Debtors can show by clear and convincing evidence that the SDNY Unsecured Noteholders Litigation will threaten or imperil the RSA or any other restructuring of the Debtors. For that reason, the Court should deny the Stay Motion.

[3] *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).

ARGUMENT

I. The Bankruptcy Court Lacks Constitutional Authority and Jurisdiction to Issue the Section 105 Injunction.

A bankruptcy court must have both constitutional and statutory authority to adjudicate the claim before it. *Stern v. Marshall*, __ U.S.__, 131 S. Ct. 2594, 2604, 2620 (2011). Both are lacking here.

A. The Bankruptcy Court Lacks Constitutional Authority To Enjoin An Article III Court From Proceeding In A Case Involving Non-Debtors.

A bankruptcy court, as an Article I Court, has limited jurisdiction. *In re John Richards Homes Bldg. Co., L.L.C.*, 552 Fed.App'x. 401, 415 (6th Cir. 2013); *In re Conseco, Inc.*, 305 B.R. 281, 283 (Bankr. N.D. Ill. 2004). A bankruptcy court has jurisdiction over the restructuring of debtor-creditor relations, but it generally does not have jurisdiction over third-party causes of action, nor does it have the authority to render decisions on behalf of a separate and distinct federal district court. *In re Shirley Duke Assocs.*, 611 F.2d 15, 18 (2d Cir. 1979); *In re Crystal Mfg. & Packaging, Inc.*, 60 B.R. 816, 818 (N.D. Ill. 1986). As Chief Justice Roberts recently explained in *Wellness Int'l Network Ltd., et al. v. Sharif*:

> Our precedents have also recognized an exception to the requirements of Article III for certain bankruptcy proceedings. When the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy 'commissioners' to collect a debtor's property, resolve claims by creditors, order the distribution of assets in the estate, and ultimately discharge the debts. This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, **confirms that Congress may assign to non-Article III courts adjudications involving 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power.'**

– S.Ct. –, 2015 WL 2456619, at *15 (May 26, 2015) (Roberts, C.J., dissenting), quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (internal citations omitted) (emphasis added).

The constitutional authority for a bankruptcy court's injunction of an Article III Court has never been confronted and established by the appellate courts. *See* 1 *Collier on Bankruptcy*, ¶ 3.09[1] (Alan N. Resnick & Henry J. Sommer, 16th ed.) ("Whether a non-Article III court will be held by Article III courts to have the power to enjoin Article III courts is another matter altogether [than whether it may enjoin a state court]."). While the Supreme Court has determined that a party cannot collaterally attack a bankruptcy court's injunction of an Article III Court, it has at the same time expressed concerns over the ability of a bankruptcy court to enjoin an Article III Court. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 317 (1995) (Stevens, J., dissenting) ("[T]he constraints on the jurisdiction and authority of the Bankruptcy Judge compel the conclusion that the Bankruptcy Judge lacked jurisdiction to issue the challenged injunction, and that the injunction has only a 'frivolous pretense to validity.'").

Federal district courts have, in several instances, rejected any attempt by a bankruptcy court to enjoin or otherwise stay their proceedings. *See, e.g., Mahurkar*, 140 B.R. at 974 (internal citations omitted) ("For one federal court to issue an injunction forbidding litigation in another is extraordinary, given principles of comity among coordinate tribunals. For a bankruptcy judge to issue an injunction with the effect of preempting resolution of a pending motion in a district court is unheard of."); *In re Receivership Estate of Indian Motorcycle Mfg., Inc.*, 2002 WL 507543 at *2 (D. Colo. Feb. 28, 2002) ("[A bankruptcy judge] lacks authority to interfere with the relationship between the Receiver and this Court, to interfere with this Court's jurisdiction over the receivership, or to declare any rulings of this Court void."); *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., Inc.*, 84 B.R. 638, 644 (D.S.D. 1988) ("While the bankruptcy court has the authority in some circumstances to enjoin parties from proceeding with actions in state court, section 105 does not authorize a bankruptcy court to

enjoin parties from proceeding in a federal district court.").

The constitutional limitation on a bankruptcy court's authority is founded on the "separation of powers" doctrine. "[The Constitution] commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Northern Pipeline*, 458 U.S. at 60; *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989); *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *Miller v. French*, 530 U.S. 327, 341-42 (2000) ("The Constitution enumerates and separates the powers of the three branches of government in Articles I, II, and III, and it is this very structure of the Constitution that exemplifies the concept of separation of powers . . . [T]he Constitution prohibits one branch from encroaching on the central prerogatives of another.") (internal citations omitted).

Bankruptcy Courts are a creation of Article I of the Constitution, which provides for the establishment of the legislative branch of the United States government, *i.e.*, Congress. U.S. CONST. art. I, § 1. This legal distinction is fundamental to the Constitution's separation of powers; while Congress can prospectively limit the jurisdiction of federal courts, it may not interfere with the resolution of individual actions. *U.S. v. State of Michigan*, 989 F. Supp. 853, 859 (W.D. Mich. 1996) ("While Congress maintains authority to determine jurisdiction of the courts it has established, and to establish rules regarding the practice and procedure in the federal courts, the interpretation and application of the laws and the ultimate resolution of cases and controversies are solely within the province of the Judiciary.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Thus, because the Bankruptcy Court's powers derive from those of Congress, and Congress lacks the power to enjoin Article III Courts, Bankruptcy Courts do not possess the legal authority to enjoin proceedings in an Article III Court, insofar as such an injunction is beyond the scope of the automatic stay. *See, e.g., Clinton v. Jones*, 520 U.S. 681,

701 (1997) ("We have recognized that '[e]ven when a branch does not arrogate power to itself … the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'") (citing *Loving v. United States*, 517 U.S. 748, 757 (1996)).

Even if one were to set aside the constitutional deficiencies (which, as a matter of law, cannot be done), the Debtors' requested relief is all the more extraordinary because, as Judge Scheindlin recently recognized, the SDNY Unsecured Noteholders Litigation seeks adjudication of "issues under a federal statute which necessarily impact the relationship between issuers and noteholders *outside of* the bankruptcy context." *BOKF, N.A. v. Caesars Entertainment Corp.*, Case No. 1:15-cv-01561-SAS (S.D.N.Y.) (May 28, 2015), Dkt. No. 20, at pg. 3 (Order permitting BOKF to move forward with partial summary judgment on or before June 19, 2015). Indeed, the Trust Indenture Act requires that claims under the act must be brought in either federal district court or any appropriate state court. Nonetheless, in the underlying Complaint and the Stay Motion, the Debtors repeatedly intimate that this Court should adjudicate the Unsecured Notes Defendants' claims, which is something this Court cannot do for the reasons set forth below. *See, e.g.*, Stay Motion ¶ 3 (the Unsecured Notes Defendants' claims "should be litigated in a coordinated fashion in this forum where the interests of all relevant parties can be heard, rather than in multiple lawsuits in different courts, involving some but not all interested parties"). The Unsecured Notes Defendants do not consent to the adjudication of their claims in this Court, and respectfully request that their involuntary participation in this matter not be inferred as an implication to the contrary.

B. The Court Lacks Statutory Jurisdiction.

1. The Court Lacks "Related To" Jurisdiction to Issue the Requested Relief.

Section 105 "does not provide an independent source of federal subject matter

jurisdiction." *In re Green Scene, Inc.*, No. 10-B-72521, 2010 WL 2465399, at *2 (Bankr. N.D. Ill. June 16, 2010) (quoting *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225 (3d Cir. 2004)). To the contrary, in order to assert jurisdiction to issue a Section 105 injunction, this Court must have "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b). *See Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998). "Related to" jurisdiction under 13 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." *Id.* "[C]ommon sense cautions against an open-ended interpretation of the 'related to' statutory language in a universe where everything is related to everything else." *In re Fedpak Systems, Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (internal quotations omitted). "[N]ot 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." *In re Mission Bay Ski & Bike, Inc.*, 398 B.R. 250, 253 (Bankr. N.D. Ill. 2008) (internal citations omitted).

The SDNY Unsecured Noteholders Litigation will not affect the allocation of property among the Debtors' creditors. Generally speaking, when a guarantor pays its principal's obligation, the guarantor acquires rights against the principal to be reimbursed for the amounts the guarantor paid on the principal's behalf. In the case of a bankrupt principal, the guarantor is subrogated to the plaintiff's claim in the bankruptcy case against the debtor. *See* 11 U.S.C. § 509. 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 255. Here, the guarantees for the 5.75% Notes and the 6.5% Notes (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*

5.75% Notes Indenture, Section 12.1.3; 6.50% Notes Indenture, Section 1501(3). Thus, in the event CEC made payment pursuant to the Guarantees, it would step into the shoes of the Unsecured Notes Defendants' claims in the bankruptcy case, leaving the allocation of property among the Debtors' creditors unchanged. Accordingly, the SDNY Unsecured Noteholders Litigation will have no impact on the allocation of property among CEOC's creditors.

For the reasons set forth herein and in the WSFS and BOKF Pretrial Brief, continuation of the SDNY Unsecured Noteholders Litigation will in no way impact the amount of property in the Debtors' bankruptcy estates or the allocation of property among creditors. Accordingly, this Court lacks "related to" jurisdiction.

II. The Unsecured Notes Defendants Could Be Paid and CEC Could Still Make a Substantial Contribution to the Debtors.

It is hornbook law that determination of a request for an injunction under Section 105 requires "case by case decisions as to whether any ***particular action*** excepted from the automatic stay will result in sufficient harm or interference with the bankruptcy case to warrant the issuance of a specific injunction." *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 599 (10th Cir. 1990) (quoting 2 Collier on Bankruptcy ¶ 105.02 at 105-7 - 9 (15th ed. 1990)) (emphasis added); *see also In re CCDC Fin. Corp.*, 135 B.R. 423, 425 (Bankr. D. Kan. 1992) (same). The legislative history of Section 105 confirms this requirement: "[T]he court will have to determine whether a particular action which may be harming the estate should be stayed." S. Rep. No. 989, 95th Cong., 2d Sess. 51 (1978). One example of the type of case-by-case analysis the Court must conduct can be found in *In re Third Eighty-Ninth Assoc.*, 138 B.R. 144 (Bankr. S.D.N.Y. 1992) (when deciding whether to issue a temporary stay against multiple actions pending against different guarantors, the court analyzed the guarantors' respective involvement in the debtors' business).

Critical for the Court's analysis here, the Debtors cannot reasonably contend that the continuation of the SDNY Unsecured Noteholders Litigation will in any way impair this Court's jurisdiction over the Debtors' bankruptcy case. Impairment of jurisdiction means "interference with accomplishing [the Debtors'] reorganization." *In re R&G Props.*, No. 09-37463 (Goldgar, J.), Hr'g Tr. at 117:23-24, Feb. 3, 2010. CEC has admitted that it has the ability and the financial wherewithal to make payment on the claims asserted by the Unsecured Notes Defendants in the SDNY Unsecured Noteholders Litigation and still participate in the proposed plan as set forth in the RSA and Disclosure Statement.[4] *See* MC Ex. 10 at 2[5]; DJX Ex. 98. Grant Lyon, Managing Director, KRyS Global, the MeehanCombs Defendants' financial expert, has independently determined that CEC, and certain of its subsidiaries and affiliates, excluding CEOC, have the capacity to both make payments on the Guarantees, in all relevant amounts, as well as provide the funding necessary to execute the proposed Plan.

CEC's potential liability in the SDNY Unsecured Noteholders Litigation is limited to $159 million, which represents the amount of outstanding 6.5% notes due in 2016 and 5.75% notes due in 2017 that contained guarantees from CEC prior to the August 2014 Note Support Agreement being effectuated, but subtracts the $289 million in notes held by CEOC's affiliates (which will be retired without payment pursuant to the terms of the RSA) as well as the $82 million in notes that individually consented to the removal of their CEC guarantee. CEC, together with its subsidiaries and affiliates, excluding CEOC, holds approximately $1.56 billion

[4] Additionally, CEOC has publicly stated, with respect to the SDNY Unsecured Noteholders Litigation, that "[g]iven the size of the claims at issue and our strong defenses, we do not expect the ruling to impact the planned reorganization." *See* Defendants' Joint List of Exhibits, filed May 26, 2015, DJX Exs. 53, 54, 118, 122 and 124. Citations to the Defendants' Joint List of Exhibits are designated as "DJX Ex. __".

[5] Citations to exhibits from the MeehanCombs Defendants' exhibit list filed May 26, 2015 are designated as "MC Ex. __".

in cash. CEC is a public company, its shares trade on the NASDAQ, and, as of May 12, 2015, it has a market cap of approximately $1.4 billion. Thus, CEC's potential liability represents a fraction of its available cash and its market cap. In light of the foregoing, the Debtors cannot possibly demonstrate that a judgment in the SDNY Unsecured Noteholders Litigation, let alone its mere continuance, would threaten CEC's contemplated contribution.

Because the Debtors cannot show that the continuation of the SDNY Unsecured Noteholders Litigation will impair this Court's jurisdiction by interfering with the reorganization, the Stay Motion must be denied.

CONCLUSION

This Court does not have jurisdiction to provide the Debtors with the relief they are seeking in the Stay Motion and underlying Complaint. Further, the evidence at trial will confirm that CEOC is not entitled to injunctive relief enjoining the prosecution of the SDNY Unsecured Noteholders Litigation. Accordingly, the Court should (i) deny the Stay Motion, and (ii) grant to the Unsecured Notes Defendants such other and further relief as this Court deems just and proper.

Dated: May 29, 2015

Respectfully submitted,

Frederick Barton Danner

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

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