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ALERT MEMORANDUM

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Bankruptcy Court Defers to Caesars' Choice of Venue

On February 2, 2015, Judge Kevin Gross of the U.S. Bankruptcy Court for the District of Delaware (the "Delaware Court" or "Court") held that the venue choice of embattled debtor Caesars Entertainment Operating Company ("CEOC" or the "Debtor") was "*entitled to just enough deference*" to support a finding that, in the interest of justice, CEOC's voluntary case and an earlier-filed involuntary case should proceed in CEOC's chosen venue rather than the venue of the involuntary case. In re Caesars Entm't Operating Company, Inc., Case No. 15-10047 (KG) (Bankr. D. Del. Feb. 2, 2015).

The opinion addresses an issue of first impression as to how a bankruptcy court should evaluate competing venue claims in simultaneous cases against the same debtor.

Background

On January 12, 2015, certain CEOC second-lien noteholders (the "Petitioning Creditors") filed an involuntary bankruptcy proceeding against CEOC in the Delaware Court. On January 14, 2015, anticipating that CEOC and certain affiliates would shortly file a voluntary proceeding in the U.S. Bankruptcy Court for the Northern District of Illinois (the "Illinois Court"), the Petitioning Creditors filed a motion seeking a determination that all CEOC bankruptcy proceedings proceed before the Delaware Court.

On January 15, 2015, CEOC and 172 subsidiaries filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the Illinois Court, prompting the Petitioning Creditors to renew their venue motion before the Delaware Court. As one would expect, the Debtor objected. Purported holders of a substantial majority of the Debtor's total debt joined the Petitioning Creditors' motion to keep the cases in Delaware. First Lien Bondholders, who are bound by the terms of an RSA with the Debtor, joined the Debtor's objection.

The Delaware Court conducted a two-day evidentiary hearing, and, on January 28, 2015, issued a bench ruling consolidating venue in the Illinois Court.

Delaware Court Opinion

The Delaware Court's opinion (docket no. 227) (the "Opinion") begins with two undisputed propositions, namely, (a) that venue was appropriate in either court under the bankruptcy venue statute, 28 U.S.C. § 1408, but (b) that the two cases could not proceed in parallel in two separate courts. Faced with choosing between two appropriate forums, the Court turned to 28 U.S.C. § 1412, which states that a court "may transfer a case . . . in the interest of justice or for the convenience of the parties," and to Federal Rule of Bankruptcy Procedure 1014(b), which speaks specifically to the situation of two simultaneous cases involving the same debtors, and states that "the court in the district in which the first-filed petition is pending may

determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed." Based on this authority, the Delaware Court concluded that it should decide the venue question and that its decision would be "based [either] on (1) the interest of justice *or* (2) the convenience of the parties."

Because the Court found that both venues were equally convenient, it relied instead on an "interest of justice" analysis. The Court reasoned that such analysis "ultimately boil[ed] down to whether the Court [should] defer to the Debtor's or the Petitioning Creditors' judgment with respect to choice of venue." On the question of deference, the Delaware Court concluded that the traditional deference given to a debtor's choice of forum was less relevant in the case of an earlier-filed petition supported by a majority of creditors. However, the Court also rejected the Petitioning Creditors' assertion that their choice of venue was due deference under the "first-filed" rule, because, even assuming such a rule applied in bankruptcy proceedings, the Petitioning Creditors had clearly engaged in an "anticipatory filing" to thwart the debtor's venue choice. The Court "recognize[d] that rewarding the Petitioning Creditors' preemptive filing . . . would set a bad precedent . . . and limit the ability of future debtors to openly negotiate with creditors prior to filing a voluntary bankruptcy petition." Accordingly, the Court concluded "[i]t is contrary to the interest of justice to favor the Petitioning Creditors in such a scenario."

Although the Delaware Court was openly suspicious of the Debtor's conduct up to and including its voluntary filing in the Illinois Court, it concluded that the Debtor "provide[d] sufficient justification for its choice of forum." Specifically, the Court credited the Debtor's assertion that it had chosen the Illinois forum in large part based on its conviction that application of bankruptcy law in the Seventh Circuit, especially as regards assumption of executory contracts and third-party releases, offered a substantial benefit. As a result, the Court held that "the Debtor's choice of forum is entitled to *just enough deference* to support a finding that, in the interest of justice, the [cases] should proceed before the Illinois Court." (emphasis added).[1]

Significance of the Opinion

The Opinion is significant because it arose in the context of a classic race to the courthouse and proposes a framework for resolving venue disputes when two cases arise nearly simultaneously involving the same debtor. The Delaware Court's application of that framework, if followed, indicates creditors face an uphill battle to capture venue choice from a debtor through an "anticipatory filing" and that the debtor may be able to prevail on its venue choice so long as it can offer a reasonable explanation for such choice.

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[1] However, the court made clear that the decision was not intended to affect the substantive rights of the Petitioning Creditors with respect to the continued prosecution of their involuntary case, including with regard to the validity of the petition date, which, if valid, would make certain pre-petition transfers by the Debtor subject to preference attack.

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