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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 07-11448-mg (lead case)

Case No. 07-03069-mg (adversary proceeding)

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GERARD MCHALE, In His Capacity as Chapter 11 Trustee of
The 1031 Tax Group,

Plaintiff,

-against-

CORDELL FUNDING LLLP, ET AL.,

Defendants.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 26, 2007

3:06 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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HEARING re Motion for Order Temporarily Restraining and Staying
Defendants who are Lenders in the Okun Entities from Taking
Action to Enforce Obligations Under Loans Made to Okun Entities

Transcribed by: Lisa Bar-Leib

1
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BY: DOUGLAS B. ROSNER, ESQ.

(TELEPHONICALLY)

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BY: JEFFREY D. PROL, ESQ.

(TELEPHONICALLY)

P R O C E E D I N G S

1
2 THE COURT: Please be seated. We're here in
3 connection with adversary proceeding number 07-03069, Gerard
4 McHale in his capacity as the Chapter 11 trustee of the 1031
5 Tax Group versus Cordell Funding LLLP, et al. I won't list all
6 of the other defendants. Counsel, please make their
7 appearances.

8 MR. EISEMAN: David Eiseman, Golenbock Eiseman on
9 behalf of the trustee.

10 THE COURT: Thank you, Mr. Eiseman.

11 MR. FLAXER: Jonathan Flaxer of Golenbock Eiseman.

12 MS. CYGANOWSKI: Melanie Cyganowski, Greenberg
13 Traurig on behalf of the committee and with me, Your Honor, is
14 my colleagues Allen Kadish as well as Gregory Ostfeld. We
15 filed Mr. Ostfeld's application for pro hac vice this
16 afternoon.

17 THE COURT: Thank you very much.

18 MR. SPELFOGEL: Good afternoon, Your Honor. Douglas
19 Spelfogel of Baker & Hostetler on behalf of Cordell Funding. I
20 apologize for my attire today.

21 THE COURT: I already said you don't need to
22 apologize for that. All right. And on the phone?

23 MR. PROL (TELEPHONICALLY): Good afternoon, Your
24 Honor. Jeffrey Prol, Lowenstein Sandler for Valley National
25 Bank.

1 MR. ROSNER (TELEPHONICALLY): Good afternoon, Your
2 Honor. Douglas Rosner for Bolder Holdings IX and Bolder
3 Holdings VI. Your Honor, just as a -- I guess a formality,
4 I've asked someone in our office to prepare pro hac papers for
5 me to represent Bolder.

6 THE COURT: Yes.

7 MR. ROSNER (TELEPHONICALLY): Those filed if not
8 today, on Monday.

9 THE COURT: That's fine. I'm assuming you're a
10 member in good standing of some state bar and you will join a
11 cast --

12 MR. ROSNER (TELEPHONICALLY): Yes. In Massachusetts
13 I am, Your Honor.

14 THE COURT: Yeah. But you'll join a cast -- a very
15 large cast of characters who've been admitted pro hac who are
16 glad to have your participation, Mr. Rosner. All right. Mr.
17 Eiseman, you're going to argue?

18 MR. EISEMAN: Your Honor, I'd first like to just
19 bring the Court up to date on the status of discussions that
20 took place during the break between this morning and this
21 afternoon. And I believe that the situation falls into three
22 different categories with respect to the defendants. And I
23 will identify the particular defendants that belong to each
24 category and advise the Court of what the status is.

25 The first category includes Cordell who's represented

1 by Mr. Spelfogel who's here; the Bolder entities represented by
2 Mr. Rosner who's on the phone; and Valley National Bank
3 represented by Mr. Prol who's on the phone.

4 We've had conversations with each of these gentlemen
5 and the proposal that's on the table and I believe subject to
6 Mr. Spelfogel confirming that he's okayed it with his client is
7 to enter into a forbearance agreement that would prevent their
8 clients and any entities associated or affiliated with their
9 clients from taking any action whatsoever to prosecute or
10 enforce any rights they may have arising out of their loan
11 agreements or arrangements with any of the Okun entities. That
12 would -- that agreement would go until November 12th, a date on
13 which we would ask the Court to schedule a preliminary
14 injunction hearing. And hopefully, during the time between now
15 and November 12th, the parties would engage in further
16 discussions to see if we might be able to avoid a preliminary
17 injunction hearing entirely. And I don't want to overspeak
18 because Mr. Spelfogel had not confirmed those dates.

19 THE COURT: Yes.

20 MR. EISEMAN: That's the first category. The second
21 category of defendants are defendants who indicated that for
22 one reason or another they had no objection to having a TRO
23 entered because they didn't think it would impact them one way
24 or the other and that's Kluger, Peretz and Ninety-Eight
25 Aviation.

1 The third category are defendants --

2 THE COURT: I guess, let me just -- with respect to
3 Kluger in Ninety-Eight Aviation, I mean, the issue -- you say
4 they have no objection to the TRO. The difficulty then becomes
5 that the TRO can only be ten days unless the parties stipulate
6 to a longer period. I really would not like to have multiple
7 preliminary injunction hearings.

8 MR. EISEMAN: What I would do, Your Honor, is contact
9 each of them. Assuming that the Court enters a TRO against
10 them, I would contact each of them and see if they would be
11 agreeable to voluntarily extending the TRO until November 15th.
12 Since they didn't object to the entry of the TRO, I doubt they
13 would object to that.

14 THE COURT: Okay. But you understand my problem.
15 I --

16 MR. EISEMAN: Yes, yes.

17 THE COURT: Okay.

18 MR. EISEMAN: The third category, Your Honor, are
19 defendants who have neither appeared by telephone or in person
20 and who we have not been able to contact directly and who do
21 have these outstanding loan -- either loan enforcement actions
22 or threatened loan enforcement actions or defaulted loans for
23 situations that cause us grave concern about what they might be
24 doing and simply -- just simply have not heard from them. And
25 we are going to ask that the Court enter the TRO as drafted as

1 against those defendants. And they are Greenwich Capital,
2 Wachovia, Westheimer Mall and JPS Capital. And I understand,
3 Your Honor, that the same issue arises --

4 THE COURT: Yes.

5 MR. EISEMAN: -- with respect to those defendants and
6 we'll have to think about how to deal with that.

7 THE COURT: Okay.

8 MR. EISEMAN: So, we're asking based on the argument
9 made this morning --

10 THE COURT: Yeah. I've reviewed -- during -- since
11 we recessed, I reviewed the briefs that were filed. So let me
12 allow Mr. Spelfogel to go ahead and argue. Although I'm not
13 sure -- I guess if the agreement as proposed is acceptable, I'm
14 not sure what we're arguing about right now.

15 MR. SPELFOGEL: Yeah. A few issues and concerns with
16 it. The language was a bit broader than at least I had
17 understood. What Cordell is prepared to do is to adjourn the
18 state court action that's pending and returnable on Wednesday
19 provided that the trustee -- and we'll consent to that and the
20 continuation of the TRO in that case. I believe the trustee,
21 by virtue of Your Honor's approval of the settlement today,
22 would stand in the shoes of the corporate defendants in that
23 action but I'm not sure about Mr. Okun.

24 THE COURT: This is the order that Justice Lowe
25 entered?

1 MR. SPELFOGEL: Yes, yes. The -- similarly to what
2 Your Honor just indicated, the restraining order on that case
3 would continue for only the ten days unless there's consent.
4 So in order to adjourn that to facilitate time for the parties
5 to meet in this case, we would simply need them to consent to
6 adjourn that out for other.

7 The second item, Cordell is prepared to adjourn the
8 sales that originally were noticed for Monday. They were
9 originally prepared to adjourn it to November 5th and they are
10 prepared as of coming here today to let the hearing go forward
11 on November 5th so in other words, put them off for a date
12 after that, after November 5th. The fifth -- I don't have
13 authority to go to the 15th -- I'm sorry, the 12th. I'm
14 prepared to make a call to the client on that.

15 The two concerns that we have, immediate concerns,
16 there is cash flow on various properties that Cordell is joint
17 lender on. We don't believe that that's protected. We don't
18 believe there's a mechanism in place. Assuming one even could
19 be put in place -- in this Court we don't believe that that's
20 in place to provide for protection against the collateral so
21 there is money coming in from tenants of shopping centers in
22 Louisiana and other places. We are looking to try to protect
23 that. So that's a concern about going out much further than
24 the 5th.

25 So our request to the trustee was to have a meeting

1 on Monday or Tuesday to see if we could iron out the
2 differences, to see if we could come to an agreement on the
3 appointment of a mutually acceptable person, process or entity
4 to take control over some of these other rent streams and
5 monies that might not be directly under Your Honor's
6 jurisdiction or would need to be at least subject to further
7 proceedings.

8 THE COURT: Yes.

9 MR. SPELFOGEL: So that hasn't all happened. So at
10 present, we're prepared to enter into a briefing schedule and
11 provide responses to the motion.

12 THE COURT: Well, if we're going ahead with the
13 hearing on November 5th, if I grant the TRO, you will have a
14 briefing schedule. It may not make anybody happy but you will
15 have a briefing schedule.

16 MR. SPELFOGEL: I am prepared -- I told the trustee
17 to call the client and see if they are agreeable to a little
18 bit of extra time keeping in mind that that is a concern that's
19 out there.

20 THE COURT: Right.

21 MR. SPELFOGEL: I don't know if Your Honor has any
22 questions.

23 THE COURT: I don't. Let me hear from Mr. Rosner and
24 Mr. Prol.

25 MR. ROSNER (TELEPHONICALLY): This is Douglas Rosner

1 for Bolder. The trustee, I think, correctly characterized our
2 understanding, especially one point. And that is, Bolder has
3 liened a first mortgage on the property commonly known as
4 Jewella, J-E-O-W -- J-E-W-E-L-L-A in Shreveport, Louisiana.
5 And we had sent a demand letter to the sole tenant of that
6 property demanding that they start paying rent to our client as
7 opposed to the mortgagee and the assignee of the
8 (indiscernible). And we have not received a response to that
9 letter. And we -- I believe we agreed with the trustee that
10 that letter is to remain out there. We wouldn't take any
11 further enforcement action with respect to the letter but if
12 for some reason they did not comply, that if the state did
13 comply and paid up, let's say, November rent or October rent --
14 and we don't even know whether rent is being paid, then we
15 would receive those rents and all for the trustee's rates would
16 be preserved with respect to that. And of course
17 (indiscernible) everybody's right is preserved with respect to
18 the issues before the Court.

19 Is that -- David or Jonathan, is that --

20 MR. EISEMAN: Yes, Your Honor. Our position is that
21 what's done is done and what we're talking about is not talking
22 about is not taking any actions to enforce any of these things
23 on a going forward basis. So if the rent is paid, it should
24 just be clear that the trustee is not waiving any of its rights
25 with respect to those payments.

1 THE COURT: Okay. Who else wants to be heard?

2 MR. PROL (TELEPHONICALLY): Your Honor, this is Jeff
3 Prol. In deference to the fact that the trustee was only
4 appointed two days ago and has a fairly large learning curve
5 given the size of this case, my client has agreed to a
6 standstill through the 12th. We had set a proposed claim to be
7 filed last night. We anticipated that would be filed today and
8 that that would remain unfiled. We did not serve it or take
9 any further action with regard to it. And it's our hope that
10 between now and the 12th, we would be able to sit down with the
11 trustee to work through the issues. Our concern is that we are
12 a relatively small fish in a large pond where it would be about
13 five and a half a million dollars. And we think it's clear
14 from the document and record in this case that this property is
15 undersecured, that there is no value here for the estate and
16 every day that passes we fall farther behind and further and
17 further under the water. So there's certainly in our interest
18 and everyone's interest, we believe, to get this resolved as
19 quickly as possible.

20 MR. ROSNER (TELEPHONICALLY): Your Honor, Douglas
21 Rosner again. I hope -- I just looked at my calendar and
22 realized that November 12th is at least on my calendar is
23 Asbestos Day. I don't know --

24 THE COURT: Well, here's what we're going to do. I
25 really do appreciate your efforts to try and reach an agreement

1 but it's Friday afternoon at 3:20 which makes it very hard to
2 reach clients and all of that. And so, what I'm going to do is
3 I'm going to render decision with respect to the temporary
4 restraining order because despite, Mr. Spelfogel, your clients'
5 willingness doesn't exactly coincide with the agreement, you
6 don't have approval as to the dates. And I encourage you come
7 Monday to work on getting stipulations together and see if you
8 can get this sorted out. Okay. If you want to be heard on the
9 TRO itself, you have a chance to do that.

10 MR. SPELFOGEL: Judge, I understand completely. With
11 respect to the TRO, the substantial part of our argument I
12 think we will reserve for the preliminary injunction hearing.

13 THE COURT: Okay.

14 MR. SPELFOGEL: The only couple things I'd just like
15 to point out to Your Honor, we don't believe there's an
16 appropriate analysis as to the creditors to the parties
17 involved. There's really simply nothing to provide for any
18 type of adequate protection if it was a bankruptcy case or some
19 other protection to the secured lenders. We also don't believe
20 there's any detailed analysis on success on the merits in
21 particular, whether the property is under or oversecured and
22 whether there would even be an equity piece that would come
23 back to this case. But we -- given that we got the papers only
24 a few hours ago, we would reserve to brief that fully --

25 THE COURT: Absolutely.

1 MR. SPELFOGEL: -- in front of Your Honor.

2 THE COURT: Absolutely.

3 MR. SPELFOGEL: And we -- thank you, Judge.

4 THE COURT: No. I thank you, Mr. Spelfogel. Mr.
5 Prol or Mr. Rosner, do you want to be heard further?

6 MR. ROSNER (TELEPHONICALLY): Your Honor, I believe -

7 -

8 THE COURT: You need to identify yourself when you
9 speak.

10 MR. ROSNER (TELEPHONICALLY): I'm sorry. Douglas
11 Rosner for Bolder. We would join all of the arguments raised
12 by counsel for Cordell. In addition, we would also argue that
13 we have not seen any evidence that's before this Court that
14 would trace funds from the debtors to the property which we
15 hold and in fact which are first mortgaged on Jewella property
16 in Shreveport and a first lien on the equity we have in the
17 entity that owns the lien on Central Mall. Both of those
18 properties were purchased through loan financing with only a
19 very small piece that came from ownership. Both of those
20 properties and all of our collateral is held by a single
21 purchased entity separate and apart from these debtors and
22 there's no evidence that the Court, whether it be subject to
23 consolidation or piercing the corporate veil or any type of
24 finding that the separateness of these entities should be
25 disregarded. And we would also add that we believe that entry

1 of a TRO or a preliminary injunction is not appropriate because
2 there's no irreparable harm with respect to the collateral on
3 the (indiscernible) because we have not initiated foreclosure
4 proceeding and there are no foreclosure proceedings or
5 foreclosure sales that are imminent. So we don't really
6 understand what the irreparable harm is and if you did not
7 enter any order today nothing would change. And if we were to
8 take any action, the trustee would have plenty of time to
9 respond or seek whatever protection he feels he needs. But I
10 don't even think the issue is ripe.

11 I also would object to this Court's subject matter
12 jurisdiction over the separate and distinct entities and their
13 assets, none of which are property of the estate. Nor has
14 there been any evidence of tracing or anything that would give
15 rise to an argument of some equitable interest.

16 Lastly, I would say that given that a TRO or
17 preliminary injunction is within the equitable powers are
18 obvious indications to those equitable powers and, again, it
19 should be really a last resort. And if the trustee has other
20 remedies that the trustee could employ, including if the
21 trustee now holds the majority equity or controlling equity
22 interest of the ultimate parent of these various entities, then
23 the trustee could seek bankruptcy protections or cause these
24 entities to seek bankruptcy protection. And then at least, in
25 that regard, we would have the protection as a secured creditor

1 of the Bankruptcy Code to adequately protect our collateral and
2 security -- our security interest. And by issuing a TRO which
3 is sort of an end run around that, it does strip us of what I
4 believe are statutory and constitutional rights with respect to
5 our property interests that we otherwise would and should have
6 if the trustee was to employ the tools and instruments that
7 federal law and state laws allow the trustee to employ. And it
8 does not need to look to this Court for some type of equitable
9 remedy. And those would be our arguments, Your Honor.

10 THE COURT: Thank you very much, Mr. Rosner. Mr.
11 Prol?

12 MR. PROL (TELEPHONICALLY): Yes, Your Honor. We
13 would join in the arguments raised by both counsel before me
14 and just point out to Your Honor that indeed with regards to
15 the Valley National Bank situation, there is no irreparable
16 harm to the debtor here either. As indicated, we will file our
17 complaint today. Foreclosure process in New Jersey can take up
18 to a year to complete so that we believe that relief is pretty
19 sure at this time. In addition, we think that the balance
20 (indiscernible) against the trustee here in that we are
21 undersecured at the present time. We will continue to fall in
22 the hole here. We see no offer of adequate protection or offer
23 to pay interest, real estate taxes or even insurance on the
24 bill which we understand has its (indiscernible). So that our
25 client is being prejudiced by the relief that is requested when

1 there is no harm in fact in sight for the trustee or the
2 estate.

3 THE COURT: Thank you, Mr. Prol. The Court is
4 prepared to rule and I will read a bench decision granting the
5 temporary restraining order.

6 Gerard McHale, the trustee, in his capacity as
7 Chapter 11 trustee, filed this adversary proceeding against
8 numerous defendants who are alleged to be lenders to the Okun
9 entities, using that term as defined in the complaint and in
10 the moving papers. The adversary complaint seeks declaratory
11 and injunctive relief against the defendant seeking to enjoin
12 the defendants from commencing or prosecuting loan enforcement
13 actions, again a defined term.

14 The defendants allegedly hold loans secured by the
15 assets of the Okun entities. The debtors have equitable
16 interest in the assets that are alleged to be property of the
17 estates pursuant to Bankruptcy Code Section 541. Earlier
18 today, the Court approved the asset transfer agreement
19 authorizing the trustee to receive the transfer of all of
20 Okun's nondebtor property including, specifically, the Okun
21 entities with the exception of four specifically identified
22 properties that are not the subject of the current TRO
23 application.

24 For the reasons I shall now explain, the Court grants
25 the motion for a temporary restraining order. A separate order

1 will be entered setting forth the terms of the TRO and
2 scheduling the preliminary injunction hearing.

3 Some abbreviated background is helpful in
4 understanding the current issues. As explained in prior
5 decisions of this Court, The 1031 Tax Group and its affiliates,
6 debtors in these Chapter 11 cases, acted as qualified
7 intermediaries, which I will refer to as a QI. In connection
8 with like-kind property exchanges intended to permit investors
9 to defer capital gains taxes on the sales of investment
10 properties, exchange participants contracted with one of the
11 debtors to act as a QI. Upon the sale of the exchange
12 participants' initial investment property, sale proceeds were
13 turned over to the QI extensively to be used to fund the
14 exchange participants' purchase of a replacement investment
15 property within 180 days after the sale of the initial
16 investment property. At the time of the debtors' Chapter 11
17 cases -- at the time of their case filings, the debtors had
18 approximately 300 open exchange transactions where they had
19 received funds totaling approximately 150 million dollars from
20 the sale of exchange participants' initial investment
21 properties. Unfortunately, the exchange participants' funds
22 were diverted by Okun for use by Okun and the Okun entities in
23 acquiring or maintaining nondebtor investments represented by
24 the assets that are subject to the agreement that I approved
25 this morning. Thus, the debtors are left with little money to

1 distribute to creditors. The largest asset the debtors have is
2 a guaranty signed by Okun shortly before the debtors' Chapter
3 11 petitions were filed which, with accrued interest, obligates
4 Okun to repay approximately 150 million dollars with interest
5 continuing to accrue. Okun's ability to repay this amount
6 appears completely dependent on the debtors gaining immediate
7 control of the nondebtor assets. The debtors also have claims
8 to the nondebtor assets themselves to the extent that the
9 debtors' funds, essentially the diverted exchanger funds, were
10 used to acquire or maintain the nondebtor assets Okun acquired
11 through the Okun entities.

12 As explained below, the Court concludes that during
13 the course of the Chapter 11 proceedings to date, the debtors
14 have established a reasonable probability that they will
15 prevail in establishing equitable rights to the nondebtor
16 assets. When combined with the debtor showing of likelihood of
17 irreparable injury if immediate relief is not granted by the
18 Court, the Court concludes that the trustee is entitled to a
19 TRO. The debtors' equitable rights in the nondebtor assets are
20 property of the estate within the meaning of Bankruptcy Code
21 Section 541. Because the Court concludes that it is reasonably
22 probable that the debtors will establish that the nondebtor
23 assets are property of the estate, Bankruptcy Code Sections
24 363(a)(3) and 105(a) can properly be invoked to prevent
25 interference with or dissipation of the assets pending further

1 proceedings in this matter.

2 It is clear that the debtors face an imminent and
3 substantial risk of loss of the assets if relief is not
4 granted. Many of the nondebtor assets involve real estate
5 interests, some held in quite convoluted structures with, in
6 some instances, multiple layers of secured debt that is in
7 default. Several of the properties for which Cordell is the
8 lender are subject to potential nonjudicial foreclosure, three
9 of which are scheduled for nonjudicial foreclosure sales on
10 Monday, October 29, 2007.

11 As already said earlier today, I approved the asset
12 transfer agreement that will enable the trustee to gain control
13 of the assets. While the defendants here may well have
14 perfected security interests in the assets and cannot be
15 restrained for long from exercising their state law rights to
16 foreclose on collateral, under the circumstances presented
17 here, the trustee is entitled to the opportunity to show at the
18 preliminary injunction hearing why the defendants should be
19 restrained and enjoined from proceeding with the loan
20 enforcement actions and foreclosing on the assets. Absent a
21 TRO, the trustee risks the loss of this very substantial
22 potential source of recovery for the creditors.

23 Jurisdiction and Venue. First, it is clear that this
24 Court has subject matter jurisdiction over this matter pursuant
25 to 28 U.S.C. Section 1334. This is a core proceeding within

1 the meaning of 28 U.S.C. Section 157(b). Venue of this
2 adversary proceeding in this motion is proper pursuant to 28
3 U.S.C. Sections 1408 and 1409. Sections 362(a) and 105(a) of
4 the Bankruptcy Code authorize the relief sought in the joint
5 motion. The motion is properly brought pursuant to Bankruptcy
6 Rule 7001(7) and 7065 and Local Rule 9077-1.

7 The legal grounds for relief. Both Sections
8 363(2)(a)(3) and 105(a) support granting relief in this case.
9 Courts within the circuit have extended the automatic stay of
10 Bankruptcy Code Section 362 to cover nondebtors when a claim
11 against the nondebtor would have an immediate adverse effect
12 upon the debtors' estate. See *Queenie, Ltd. versus Nygard*
13 *International*, 321 F.3d 282, 287 (2nd Cir. 2003). ("The
14 automatic stay can apply to nondebtors but normally does so
15 only when a claim against the nondebtor will have an immediate
16 adverse consequence for the debtors' estate.") In re *Gucci*,
17 126 F.3d 380, 392 (2nd Cir. 1997). ("An action taken against a
18 nondebtor which would inevitably have an adverse impact upon
19 the property of the estate must be barred by the automatic stay
20 provision.") See also *Gray versus Hirsch*, 230 B.R. 239, 243
21 (S.D.N.Y. 1999). ("Recognizing that the Court can extend the
22 automatic stay to nondebtors with a failure to issue the stay
23 would pose a serious threat to the debtors' reorganization
24 efforts.") In re *United Health Care Org.*, 210 B.R. 228, 234
25 (S.D.N.Y. 1997). ("Extending the automatic stay to nondebtor

1 third party with a failure to do so would directly interfere
2 with the debtors' funding necessary for Chapter 11
3 liquidation.") In re Third Eighty-Ninth Assocs., 138 B.R. 144,
4 147-48 (S.D.N.Y. 1992) ("For instance, Courts have stayed
5 creditor actions against nondebtor third parties where the only
6 source of adequate financing for the reorganization was the
7 personal real estate of the principal/guarantors against which
8 the creditors sought to foreclose and where it was uncontested
9 that an officer/guarantor intends to sell the property upon
10 which the creditor would foreclose and contribute the proceeds
11 to the debtor to pay corporate debts.") Internal citations
12 omitted.

13 Here, as in Thirty Eighty-Ninth Assocs., the
14 nondebtor assets will be transferred to the trustee for the
15 benefit of all the creditors. Substantially of all of Okun's
16 assets, assets to which the debtors already have an equitable
17 interest, will then be dedicated exclusively for the benefit of
18 the debtors' estates. Without securing these assets for the
19 benefit of the creditors in this case, the debtors face
20 increased risk in having little value to distribute to their
21 creditors. Additionally, there is already a proliferation of
22 law suits and proceedings in different courts around the
23 country with threats of imminent foreclosure with respect to
24 some of the properties. The extension of the automatic stay
25 under Section 362(a)(3) and an injunction under Section 105(a)

1 will require that any litigation regarding rights to these
2 assets be centralized to the fullest extent possible before a
3 single Court that can sort out competing claims to the limited
4 pot of assets.

5 The criteria for issuing a TRO are satisfied. The
6 criteria for issuing a TRO in this case are satisfied. First,
7 there is a danger of imminent irreparable harm to the estate or
8 the debtors' ability to reorganize if a TRO is not issued.
9 Second, the debtors have demonstrated a reasonable likelihood
10 of a successful reorganization, in this case, through a
11 liquidation plan. Third, balancing the relative harm as
12 between the debtors and the defendants, that balance clearly
13 favors the debtors at least until such time as the Court can
14 hear and decide the preliminary injunction motion. Fourth, the
15 Court must consider the public interest which requires a
16 balancing of the public interest and successful reorganization
17 with competing societal interest. See *United Health Care*, 210
18 B.R. 233, *Accord University Medical Center*, the *American*
19 *Sterilizer Co.* (In re *University Medical Center*, 82 B.R. 754,
20 757 (Bankr. E.D.P.A. 1988).

21 These criteria are satisfied here. First,
22 irreparable harm. Numerous Courts have stayed creditor law
23 suits against nondebtors where they have found that the
24 bankrupt estate "would be adversely affected because the
25 creditors' action would prevent the nondebtor from contributing

1 funds to the reorganization." See United Health Care
2 Organization, 210 B.R. at 232, Accord, In re Third Eighty-Ninth
3 Assocs., 138 B.R. at 147 ("Pursuant to their authority under
4 Section 105, Courts have stayed creditor actions against
5 nondebtor third parties where...the action will impede the
6 nondebtor third party from injecting funds into the
7 reorganization.")

8 Frustrating the ability of the debtors to accept the
9 transferred assets constitutes irreparable harm for purposes of
10 Section 105(a) relief, particularly where some of those assets
11 are exposed to imminent nonjudicial foreclosure. In United
12 Health Care, for example, the Court enjoined actions against
13 principals of the debtors who had agreed to contribute their
14 personal funds to support the debtors' plan of reorganization.
15 There, the principals intended to obtain the necessary funds by
16 mortgaging certain of their assets upon which a creditor had
17 "placed pre-judgment liens or attachments", *id.* at 233-34. No
18 financing was possible while such liens or attachments remained
19 in effect.

20 The criteria for granting a temporary restraining
21 order pursuant to Bankruptcy Rule 7065 and Rule 65 of the
22 Federal Rules of Civil Procedure are likewise satisfied here.
23 A party seeking a temporary restraining order pursuant to
24 Federal Rule 65 generally must demonstrate irreparable harm and
25 a likelihood of success on the merits.

1 These are the same standards that apply for entry of
2 a preliminary injunction and are essentially the same as the
3 first two factors analyzed in connection with a 105(a)
4 injunction. See *United Health Care*, 210 B.R. at 233
5 ("Practical effect of creditors' pre-judgment liens or
6 attachments therefore is to prevent the nondebtors from
7 obtaining the funds necessary to bring about the settlement of
8 the bankruptcy case.") *Id.* at 234. In enjoining the actions,
9 the *United Health Care* Court found that interfering with a
10 nondebtors' plan funding constituted imminent irreparable harm
11 to the debtors' ability to reorganize. Similarly, in
12 *Lazarus-Berman Associates, LB, the National Westminster Bank*
13 *U.S.A., (In re Lazarus-Berman Associates LB)*, 161 B.R. 891, 899
14 (*Bankr. E.D.N.Y. 1993*). The Court enjoined actions against the
15 nondebtor principal of the debtor-partnership because the
16 principals were the only persons who could effectively
17 formulate fund and carry out the debtors' plans of
18 reorganization. The Court noted that "the contribution of
19 funding to the debtors' reorganization alone could provide the
20 basis for the issuance of an injunction." 161 B.R. at 899.
21 Thus, the Court stayed actions against nondebtor principals
22 where such actions could, among other things, affect the
23 ability of the nondebtors to infuse capital into the debtor as
24 part of a reorganization plan. See also *Lehman, which is L-E-*
25 *H-M-A-N, Manufacturing Co. v. First National Bank, (In re*

1 Lehman Manufacturing Co.), 33 B.R. 681, 683 (Bankr. Dist. S.D.
2 1983). ("The evidence is undisputed that culmination of the
3 state court action would effectively eliminate the only
4 available source of financing for the debtors'
5 reorganization...Therefore, the Court finds that absent the
6 requested injunction, the debtor will be irreparably harmed.")
7 In re Otero, O-T-E-R-O, Mills, Inc., 21 B.R. 777, 779 (Bankr.
8 Dist. of NM 1982). ("Staying litigation against nondebtor
9 based on the debtors' argument that 'irreparable harm will
10 occur if foreclosure is allowed because the property...is
11 property which' -- I'll insert the words, the nondebtor -- and
12 then picking up the quote -- 'intends to sell so that the
13 proceeds may be contributed to the debtor for payment of
14 corporate debts'"). And that was affirmed at 25 B.R. 1018
15 (Dist. NM 1982).

16 Here, extending the automatic stay or otherwise
17 enjoining the loan enforcement actions is necessary to prevent
18 irreparable harm to the debtors.

19 The factor of successful reorganization. Success on
20 the merits in a bankruptcy case is generally defined as the
21 probability of a successful plan of reorganization. Otero
22 Mills, 21 B.R. at 779, Accord, Calpine Corp. v. Nevada Power
23 Corp. (In re Calpine Corp.), 354 B.R. 45, 50 (Bankr. S.D.N.Y.
24 2006).

25 In United Health Care, the Court concluded that the

1 parties' announcement of the settlement would fund the
2 reorganization itself demonstrated the likelihood of a
3 successful reorganization to funding of a Chapter 11
4 liquidation plan. 210 B.R. at 234.

5 Transferring the assets here pursuant to the
6 agreement brings substantial value -- or potentially brings
7 substantial value to the debtors' estates for the benefit of
8 all creditors and will establish a substantial likelihood that
9 the case will be successfully concluded with a Chapter 11
10 liquidation plan.

11 Balance of the equities. If the loan enforcement
12 actions are permitted to proceed at this time, it will, beyond
13 any doubt, substantially derail the debtors' reorganization
14 efforts. If the assets are lost to the trustee through
15 threatened foreclosures, for example, it would be difficult or
16 impossible ever to recover this property for the benefit of the
17 creditors. Therefore, the balance of equities clearly favors
18 granting relief. To be sure, the perfected rights of secured
19 lenders must be protected by the Court and may well override
20 the trustee's interest in realizing value from the assets.
21 Absent some culpable conduct by the lenders, the trustee's
22 rights cannot be greater with what were previously nondebtor
23 assets than if the lenders were seeking to lift the automatic
24 stay to foreclose on debtor property. But such stay relief in
25 a bankruptcy case takes time to accomplish and the lenders here

1 will suffer no greater harm through delay than they would in
2 the normal course in a bankruptcy case.

3 Therefore, on consideration of this application for a
4 TRO, the Court concludes that the balance of hardships tips
5 clearly in favor of granting the requested relief.

6 The public interest factor. "In the context of a
7 bankruptcy proceeding, the public interest element means the
8 promoting of a successful reorganization." See *In re American*
9 *Film Tech, Inc.*, 175 B.R. 847, 849 (Bankr. Dist. DE 1994).
10 Successful reorganization here in the form of a liquidation
11 plan requires the debtors' recovery of these assets. The
12 orderly liquidation of the nondebtor assets for the benefit of
13 creditors advances "the public interest in promoting out of
14 court settlements in conserving judicial resources." *United*
15 *Health Care*, 210 B.R. at 234.

16 The conclusion. For the foregoing reasons, the Court
17 concludes that the debtors are entitled to have a temporary
18 restraining order issue and have this matter set down for a
19 preliminary injunction hearing. That's the Court's bench
20 decision.

21 Now, with respect to the order setting it down for
22 preliminary injunction, Mr. Eiseman, do you have a disk?
23 Because the order you submitted this morning needs to be
24 revised. It talked about the pending motion for approval of
25 the agreement which is now approved. Let me give you schedule.

1 The subject -- and let me make this clear. And I encourage
2 counsel -- and I would prefer not to rule on the motion this
3 afternoon. Mr. Spelfogel, I appreciate your clients' -- you
4 know, your efforts to try and work out a schedule. Just with
5 things hanging in the air on a Friday afternoon, I saw no
6 alternative but to go ahead. And certainly there are people
7 who have not appeared. But the operative points -- the
8 defendants are required to respond to the complaint and the
9 motion for preliminary injunction within three business days of
10 service. Hearing on the motion for preliminary injunction is
11 scheduled for Monday, November 5, which is ten days from today,
12 at 10 a.m. before me in Courtroom 610. That's Judge Drain's
13 courtroom. Service by facsimile, by overnight mail or by hand
14 of this order, the complaint and the motion upon the Office of
15 the United States Trustee, the defendants or counsel for the
16 defendants on or before 5 p.m. Monday, October 29th shall be
17 deemed good and sufficient service for purposes of the hearing
18 on the motion for preliminary injunction.

19 And responsive papers, if any, must be in writing
20 served by facsimile or overnight mail or by hand on Mr.
21 Flaxer's firm together with a proof of service not later than 5
22 p.m. November 1 and reply papers, if any, with a courtesy hard
23 copy to chambers no later than November 2 at 5 p.m.

24 It's now 3:47 -- well, let me read the operative part
25 of the injunction because I got to get this order revised. But

1 I want to read what the order provides and certainly for those
2 counsel who are present they have notice of it. "Defendants
3 and their respective attorneys, agents, servants, employees and
4 attorneys-in-fact and those persons in active concert or
5 participation with any of them and each of them hereby or
6 temporarily enjoin from commencing or prosecuting any loan
7 enforcement actions as those terms you defined in the moving
8 papers." That's the operative portion. So as soon as
9 somebody -- and it is now 3:49 p.m. on Friday, October 26th and
10 certainly as to those parties who are present by counsel, you
11 have notice of the injunction even before the actual physical
12 order is entered on ECF.

13 Anything else, Mr. Eiseman?

14 MR. EISEMAN: The only other thing, Your Honor, when
15 I was going through the list of defendants, I left out one
16 which was Marquette Transportation Finance and it's our
17 intention to voluntarily dismiss them from the action. That's
18 why. Thank you, Your Honor.

19 THE COURT: Any of the defendants' counsel wish to be
20 heard further at this point?

21 MR. ROSNER (TELEPHONICALLY): Your Honor, Douglas
22 Rosner for Bolder. I guess one -- I have a question because in
23 your bench order you said that the assets may be or will be
24 transferred to the trustee exclusively for the benefit of the
25 estate.

1 THE COURT: Well, obviously subject to your client --
2 I should make clear, it's obviously subject to whatever
3 perfected rights the defendants have in the property.

4 MR. ROSNER (TELEPHONICALLY): Okay. Thank you. You
5 scared me.

6 THE COURT: No, I -- you know, I didn't have a lot of
7 time here.

8 MR. ROSNER (TELEPHONICALLY): I was really impressed.
9 That was my only --

10 THE COURT: Yeah. Everybody -- for all of the
11 defendants, whatever perfected rights they have in their
12 security is, you know, is carried forward, I mean, is not
13 affected by the order. Anything else anyone else has?

14 MR. SPELFOGEL: Your Honor, is there going to be any
15 direction with respect to a bond or that's going to wait for
16 the next hearing?

17 THE COURT: Well, that's -- you know, the bankruptcy
18 trustee is not required to post a bond. He's exempted from --
19 that's one of the things about bankruptcy court. Bond
20 requirement doesn't apply.

21 MR. EISEMAN: Will we be able to just e-mail the
22 short version of that order around?

23 THE COURT: Yes. And maybe if you could get somebody
24 to do that right away --

25 MR. EISEMAN: Yes. If we could just get our hands on

1 it.

2 THE COURT: Okay. My law clerk -- one of my law
3 clerks will give you an e-mail address and, you know, if your
4 office -- the -- it seemed to me on page 2 of the draft order
5 that was -- obviously the case number needs to go in and will
6 be done. But in the draft order, in the second paragraph, what
7 the Court finds -- where it says "On October 16, 2007, the
8 debtors and the committee filed a motion seeking approval of
9 the terms of the agreement in a hearing on which occurred on
10 October 23, 2007 and October 26, 2007, the agreement was
11 approved on October 26, 2007." And then in the paragraph just
12 above, "Accordingly, it is hereby ordered that", I changed
13 it -- struck the first long clause and so the relief requested
14 is herein -- begins "The relief requested herein is necessary
15 and appropriate" et cetera. And then, as I say, I provided you
16 with the dates. Hopefully, you got those down.

17 You know, I encourage the parties to keep talking
18 and, you know, clearly, as reflected in my bench decision, I
19 recognize that the parties who are secured lenders with
20 perfected rights should be no worse off on this injunction
21 proceeding than they would be in this point that was made by
22 counsel. So you got a short window to try and get this worked
23 out. And I know there's an issue of whether the trustee will
24 abandon any of the property in which case, you know, to the
25 extent any of the property -- you make a decision to abandon

1 the property work out with the lenders and submit a revised --
2 submit a form of order that lifts the restraining order with
3 respect to those properties. Clearly, no secured lender should
4 be impaired beyond what's absolutely necessary to move forward
5 with this proceeding. So, Mr. McHale, you're here and if you
6 decide that you're going to abandon any of the property that's
7 covered by the order, I'm sure you'll promptly through counsel
8 work to have the order modified to do that. Okay?

9 MR. EISEMAN: Thank you, Your Honor.

10 THE COURT: Have a good weekend, everybody.

11 MR. SPELFOGEL: Thank you, Your Honor.

12 THE COURT: We're adjourned.

13 (Whereas these proceedings were concluded at 3:58
14 p.m.)

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I N D E X

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

October 29, 2007

Signature of Transcriber

Date

Lisa Bar-Leib

typed or printed name