SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CAESARS ENTERTAINMENT OPERATING COMPANY, INC. and CAESARS ENTERTAINMENT CORPORATION,

Index No.: 652392/2014

DECISION & ORDER

Plaintiffs,

-against-

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO FUND LTD., THOROUGHBRED FUND L.P., THOROUGHBRED MASTER LTD., AVENUE CREDIT STRATEGIES FUND, AVENUE INVESTMENTS, LP, AVENUE - COPPERS OPPORTUNITIES FUND, L.P., AVENUE INTERNATIONAL MASTER, LP, LYXOR/AVENUE OPPORTUNITIES FUND LIMITED, MANAGED ACCOUNTS MASTER FUND SERVICES - MAP10, AVENUE SS FUND VI (MASTER), LP, AVENUE SPECIAL OPPORTUNITIES FUND I, L.P., CANYON CAPITAL ADVISORS LLC, ON BEHALF OF ALL OF ITS PARTICIPATING FUNDS AND MANAGED ACCOUNTS THAT ARE BENEFICIAL HOLDERS OF THE NOTES, CASPIAN CAPITAL LP, CENTERBRIDGE CREDIT PARTNERS, L.P. CENTERBRIDGE CREDIT PARTNERS MASTER, L.P., CENTERBRIDGE SPECIAL CREDIT PARTNERS II, L.P., CONTRARIAN CAPITAL MANAGEMENT L.L.C. ON BEHALF OF ALL MANAGED ACCOUNTS AND AFFILIATED ENTITIES THAT ARE BENEFICIAL HOLDERS OF THE NOTES, ELLIOTT MANAGEMENT CORPORATION, OAKTREE VALUE OPPORTUNITIES FUND HOLDINGS, L.P., OCM OPPORTUNITIES FUND VII DELAWARE, L.P., OCM OPPORTUNITIES FUND VIIB DELAWARE, L.P., OAKTREE OPPORTUNITIES FUND VIII DELAWARE, L.P., OAKTREE OPPORTUNITIES FUND VIIIB DELAWARE, L.P., OAKTREE FF INVESTMENT FUND, L.P. – CLASS B, SPECIAL VALUE EXPANSION FUND, LLC, SPECIAL VALUE, OPPORTUNITIES FUND, LLC, TENNENBAUM OPPORTUNITIES PARTNERS V, LP, THIRD AVENUE FOCUSED CREDIT FUND, and WILMINGTON SAVINGS FUND SOCIETY, FSB, in its capacity as successor Indenture Trustee for the 10% Second Priority Senior Secured Notes due 2018,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

In this action concerning Caesars-affiliated properties, all that remains is the first cause of action in the amended complaint (the AC) by plaintiff Caesars Entertainment Corporation (CEC) against the Second Lien Holders.[1] Before the court is the Second Lien Holders' motion, as limited by the parties' stipulations,[2] for dismissal of the first cause of action with prejudice for failure to state a claim. For the reasons that follow, the motion is granted.

I. Background

CEC is a publicly traded Delaware corporation. Its subsidiary, former plaintiff Caesars Entertainment Operating Company, Inc. (CEOC), also is incorporated in Delaware. CEC and CEOC (collectively, Caesars), through various affiliates, own, operate, and manage casinos in the United States and have a principal place of business in Las Vegas, Nevada. Caesars is currently embroiled in multi-forum litigation with its creditors, most notably in the Court of Chancery of Delaware and the United States Bankruptcy Court for the Northern District of Illinois. *See Wilmington Savings Fund Society, FSB v Caesars Entm't Corp.*, 2015 WL 1306754 (Del Ch Mar. 18, 2015); *In re Caesars Entm't Operating Co.*, 526 BR 265 (Bankr ND Ill Mar. 9, 2015); *see also In re Caesars Entm't Operating* Co., 2015 WL 495259 (Bankr D Del Feb. 2, 2015) (determining that bankruptcy proceedings shall proceed in Illinois). Familiarity with these actions is presumed.

At issue in this action were controversies between Caesars and certain holders of its First Lien Notes (former defendant Elliott Management Corporation) and Second Lien Notes (the

[1] *See* Dkt. 158 at 2 n.1 (listing the Second Lien Note Holders).

[2] *See* Dkt. 132, 155, & 158.

Second Lien Holders).[3] Since the gravamen of the parties' disputes is no longer before this court, the facts recited here are limited to those pertinent to the remaining cause of action, tortious interference with prospective business relations, alleged against the Second Lien Holders. The complex structured finance issues at the heart of the parties' other lawsuits are neither legally relevant nor necessary for contextual purposes.

II. Procedural History

Caesars commenced the instant action on August 5, 2014 (s*ee* Dkt. 2 [original complaint]) and filed the AC on September 15, 2014. *See* Dkt. 54. The AC contained three causes of action for tortious interference with prospective business relations, declaratory judgment, and breach of contract. As a result of the parties' stipulations of discontinuance, what remains is the tortious interference claim as asserted by CEC against the Second Lien Holders.

On October 15, 2014, the Second Lien Holders moved to dismiss the AC. Prior to oral argument, Caesars offered to withdraw the first cause of action without prejudice, albeit with leave to possibly refile in one of the other pending actions.[4] The Second Lien Holders refused to consent to a without-prejudice dismissal, arguing the first cause of action should be dismissed on the merits and with prejudice. This motion followed. *See* Dkt. 159 (6/30/15 Tr.).

III. The Alleged Defamation

Since this is a motion to dismiss, the facts recited below are taken from the AC unless otherwise indicated.

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[3] The Indenture Trustee for the Second Lien Notes, Wilmington Savings Fund Society, FSB, was added as a defendant in the AC, but is no longer a party to this action.

[4] At oral argument, CEC's counsel stated that "we actually have no present intention of bringing the case even in Delaware." *See* Dkt. 159 (6/30/15 Tr. at 6).

CEC's tortious interference with business relations cause of action is predicated upon defamation claims. Those defamation claims are based on four categories of communications.

A. Letter to Caesars

The first communication occurred on March 21, 2014, when "the Second Lien Holders sent a threatening letter to [Caesars] and their respective counsel, alleging that CEC and CEOC had breached their fiduciary duties and that CEOC had decided to 'cede valuable assets of CEOC to affiliated entities for inadequate consideration.'" AC ¶ 95. While this letter was a private communication, CEC claims that "[a]s these defendants knew and intended, CEC was obligated to disclose their statements" in an SEC filing[5] and, therefore:

> [O]n March 26, 2014, CEC reported in an 8-K that it had received a letter from a law firm acting on behalf of clients who claimed to hold second-priority secured notes of CEOC, alleging, *inter alia*, that CEOC's owners improperly transferred or seek to transfer valuable assets of CEOC to affiliated entities" and that the letter "includes allegations that these transactions constitute or will constitute voidable fraudulent transfers and represent breaches of alleged fiduciary duties owed to CEOC creditors," and demands "that the transactions be rescinded or terminated."

AC ¶ 96. Two days later, on March 28, 2014, the press reported on this disclosure. ¶ 97; *see also* ¶ 100 (subsequent press reports in April, May, and July 2014).

B. LGCB Hearings

Next, Caesars alleges that:

> On April 24, 2014, the legal and financial advisors for the Second Lien Holders … appeared before the Louisiana Gaming Control Board (the "LGCB") and [] asserted that (a) the Four Properties Transaction[6] constituted a fraudulent transfer

[5] *See* Dkt. 75 at 32 (CEC's explanation for why disclosure was required by NASDAQ rules and federal securities laws).

[6] *See* AC ¶ 85 ("In the Four Properties Transaction, CEOC agreed to sell four casino properties (three in Las Vegas and one in New Orleans) and related assets to Growth for $2 billion.").

> because the assets being sold by CEOC to Growth were purportedly worth "between $1.1 and $2.2 billion more" than Growth would be paying for them – notwithstanding the Special Committee's independent evaluation and vigorous negotiation of that Transaction, with the advice of independent legal and financial advisors, and (b) there was "a fair likelihood" that their clients would "institute proceedings to unwind the transactions … under the applicable fraudulent transfer laws of this country, and rescind it so it becomes voidable." … Thereafter, counsel for the Second Lien Holders … met with officials with the Nevada Gaming Control Board and made similar statements to those they made to the LGCB.

AC ¶¶ 102-03.

The following month, "[o]n May 13, 2014, letters from counsel for the Second Lien Holders … accompanied by slide decks apparently prepared by their financial advisors, were submitted to the LGCB. Both sets of submissions alleged that the sale of Harrah's New Orleans was a fraudulent transfer and urged the LGCB not to approve it." ¶ 104. "On May 19, 2014, the Second Lien Holders … again appeared, through their legal and financial advisors, before the LGCB, and urged it not to approve the transfer of Harrah's New Orleans to Growth." ¶ 105. Caesars alleges that the Second Lien Holders "knew and intended that their false statements made at the LGCB hearings would be disseminated to the public through the press. The Wall Street Journal and Bloomberg obtained transcripts of the LGCB hearings and in articles dated May 28, 2014 and June 24, 2014, respectively, reported on the hearings and the false statements made by these defendants' representatives on their behalf, including their threats of litigation." ¶ 106.

C. IGB Hearings

Caesars alleges that the Second Lien Holders "also attempted to impede, delay, or prevent the closing of the CEOC Refinancing."[7] ¶ 107. A hearing on Caesars' application for approval of the CEOC Refinancing was originally scheduled to take place before the Illinois

[7] *See* AC ¶¶ 89-90 (details of the refinancing).

Gaming Board (the IGB) on June 26, 2014. *Id.* After a June 24, 2014 Bloomberg report noted that Second Lien Holders planned to testify at the hearing, the hearing was rescheduled for July 24, 2014. *Id.* Then:

> On July 24, 2014, counsel for the Second Lien Holders appeared at the IGB hearing and asserted to the IGB the same [allegedly] false assertions they previously made, including asserting that certain transactions entered into by CEOC were "significantly below their fair market value." The Second Lien Holders' representative urged the IGB to deny approval of the CEOC Refinancing, which he called "the endless shell game." Over the objections of these defendants, the IGB approved the CEOC Refinancing on July 24, 2014, and the transaction closed on July 25, 2014.

AC ¶ 108. Caesars further alleges that the Second Lien Holders "knew that their statements to the IGB would be quickly disseminated to the public through the press, which was eagerly reporting on the hearing." ¶ 108. "At 4:24 p.m. on July 24, 2014, Bloomberg reported on the hearing, quoting the Second Lien Holders' representative's description of the CEOC Refinancing as a 'shell game.'" *Id.*

D. Litigation Threats

Finally, Caesars alleges that the Second Lien Holders "have repeatedly and maliciously threatened litigation against CEOC and CEC." ¶ 111. These threats were reported in a May 7, 2014 article in the New York Post, which stated that "David Tepper [of defendant Appaloosa Management, a Second Lien Holder] … is preparing to sue Caesars Entertainment for allegedly trying to avoid paying its loans." *Id.* Additionally, a June 3, 2014 Debtwire article "reported that '[a] litigious group of second lien [CEOC] bondholders yesterday sent Caesars Entertainment executives a stinging legal brief that spells out the group's allegation that the company violated its bond indentures." ¶ 113. Caesars, however, claims that "no Second Lien Holder sent any such document." *Id.*

On June 5, 2014, the Second Lien Holders served CEOC with a notice of default under the indenture, dated April 15, 2009, which governs the Second Lien notes. ¶¶ 11, 114. The next day, on June 6, 2014:

> Bloomberg reported on the Notice, stating that "[t]he creditors said the company defaulted on its obligations by transferring assets, such as Bally's Las Vegas hotel, to an affiliate, and by removing the parent company's guarantee on the operating unit's debt." Bloomberg explained, "[t]he creditors' action puts Caesars on notice that, if their concerns aren't addressed, they could seek to exercise remedies under the loan documents …." Numerous news outlets, including Vegas Inc., Law360, The Wall Street Journal, Bloomberg, Jewish Business News, and The Street, also reported on the Notice.

AC ¶ 115. This action, and the other litigation cited earlier, followed.

IV. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further,

where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

V. Discussion

"To prevail on a claim for tortious interference with business relations in New York, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009). "Defamation is a predicate wrongful act for a tortious interference claim." *Id.*, citing *Stapleton Studios, LLC v City of New York*, 26 AD3d 236 (1st Dept 2006).

"Defamation is the making of a false statement about a person that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society.'" *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014), quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 (1977). "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) **published to a third party** (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [defamation per se]." *Stepanov v Dow Jones & Co.*, 120 AD3d 28, 41-42 (1st Dept 2014) (emphasis added), citing *Dillon v City of New York*,

261 AD2d 34, 38 (1st Dept 1999). "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct." *Frechtman*, 115 AD3d at 104, citing *Chiavarelli v Williams*, 256 AD2d 111, 113 (1st Dept 1998). "Of course, 'only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue.'" *Martin v Daily News L.P.*, 121 AD3d 90, 100 (1st Dept 2014), quoting *Thomas H. v Paul B.*, 18 NY3d 580, 584 (2012); *see Mann v Abel*, 10 NY3d 271, 276 (2008) ("Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation"); *see generally Gross v N.Y. Times Co.*, 82 NY2d 146 (1993). Additionally, CPLR 3016(a) provides that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." *See BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 (1st Dept 2009) (allegations "that 'plaintiff and/or their agents or attorneys'" made defamatory statements, without specifically identifying such statements, "and that as a result, plaintiff caused an article to be written repeating" the defamation, are insufficient to satisfy the particularity requirement of CPLR 3016(a)).

A. The LGCB and IGB Hearings

The Second Lien Holders argue that their statements made in connection with the hearings before the LGCB and the IGB (collectively, the Regulatory Hearings) are not actionable because defamation claims predicated on such statements are barred by New York's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute and the *Noerr-Pennington* doctrine. New York's anti-SLAPP rule, codified as Civil Rights Law § 76-a(2), provides:

> In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless

> disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

See generally Hariri v Amper, 51 AD3d 146, 148-50 (1st Dept 2008). § 76-a(1)(a) defines an "action involving public petition and participation" as:

> [A]n action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

"§ 76-a was passed to protect citizens facing litigation arising from their public petitioning and participation by deterring strategic lawsuits against public participation, termed SLAPP suits." *Southampton Day Camp Realty, LLC v Gormon*, 118 AD3d 976, 977 (2d Dept 2014) (citations omitted). "A finding that an action is a SLAPP suit entails serious consequences to the plaintiff: a heightened standard of proof is imposed upon the plaintiff to avoid dismissal of the action; where the action is one for defamation, an actual malice standard is imposed." *Guerrero v Carva*, 10 AD3d 105, 116 (1st Dept 2004) (citation omitted). Additionally, CPLR 3211(g) further provides that "[a] motion to dismiss under [CPLR 3211(a)(7)] in which the moving party has demonstrated that [a claim qualifies as] an action involving public petition and participation as defined in [§ 76-a], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."

The court need not reach the issue of whether the allegations regarding the Regulatory Hearings meet the heightened pleading standards of § 76-a.[8] The claims based on these allegations are dismissed on the merits, with prejudice, because they are barred by the *Noerr-*

[8] This motion seeks dismissal with prejudice, not dismissal for insufficient pleading.

Pennington doctrine,[9] pursuant to which "parties may not be subjected to liability for petitioning the government." *I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 (1st Dept 2005). "Under the *Noerr-Pennington* doctrine, civil actions are barred where the activity challenged under federal statute or state law consists of 'petitioning legislatures, **administrative bodies**, and the courts,' even if the defendant's actions had an 'anticompetitive or otherwise injurious purpose or effect.'" *Tuosto v Philip Morris USA Inc.*, 2007 WL 2398507, at *5 (SDNY 2007) (emphasis added), quoting *Hamilton v Accu-tek*, 935 FSupp 1307, 1316-17 (EDNY 1996) (Weinstein, J.); *see generally Mosdos Chofetz Chaim, Inc. v Village Of Wesley Hills*, 701 FSupp2d 568, 594-95 (SDNY 2010) (collecting cases). Both the First and Second Departments have expressly held that the *Noerr-Pennington* doctrine applies to common law tort claims. *See Concourse Nursing Home v Engelstein*, 278 AD2d 35 (1st Dept 2000) ("Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State law, including claims asserted pursuant to 42 USC § 1983 and common-law tortious interference with contractual relations."), quoting *Alfred Weissman Real Estate v Big V Supermarkets*, 268 AD2d 101, 107 (2d Dept 2000); *cf. LightSquared Inc. v Deere & Co.*, 2014 WL 345270, at *4 (SDNY 2014) (noting that "[t]he Second Circuit 'has yet to decide whether the *Noerr-Pennington* doctrine ... must be applied mechanically in cases outside the antitrust area.'"), quoting *Mosdos*, 701 FSupp2d at 594.

[9] "This doctrine arises from a pair of United States Supreme Court cases: *Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127 (1961) and *United Mine Workers of Am. v Pennington*, 381 US 657 (1965)." *Bridas Int'l S.A. v Repsol, S.A.*, 40 Misc3d 1229(A), at *7 (Sup Ct, NY County 2013).

The *Noerr-Pennington* doctrine applies here. *See Icahn v Raynor*, 32 Misc3d 1224(A), at *5 (Sup Ct, NY County 2011) ("A petition of a government agency is immune from liability for tortious interference with contract by the *Noerr-Pennington* doctrine."), *aff'd sub nom. Nineteen Eighty-Nine, LLC v Icahn Enter's L.P.*, 99 AD3d 546 (1st Dept 2012). Nonetheless, CEC argues that its tortious interference claim is still viable under the doctrine's "sham" exception. As explained by the Second Department:

> There is a "sham" exception to the *Noerr-Pennington* doctrine which applies in [s]ituations in which persons use the governmental *process*—as opposed to the ***outcome*** of that process—as an anticompetitive weapon. The "sham" exception to the *Noerr-Pennington* doctrine has an objective and subjective element. The objective element requires that the defendant's conduct must be objectively baseless with no reasonable expectation of success. The subjective element requires that the defendant act, not with the intent of influencing governmental action, but rather with the intent to interfere directly with the business relationships of a competitor. If the objective element is not satisfied, the court is precluded from examining the subjective motivation for the conduct, and the "sham" exception is not applicable.

Singh v Sukhram, 56 AD3d 187, 192 (2d Dept 2008) (emphasis in original; citations and quotation marks omitted); *see generally Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.*, 508 US 49, 55-63 (1993) (*PRE*) (establishing two prong test, requiring a showing of both objective and subjective baselessness); *see also Octane Fitness, LLC v ICON Health & Fitness, Inc.*, 134 SCt 1749, 1757 (2014) ("under a sham exception to [the *Noerr-Pennington*] doctrine, activity ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor. In *PRE*, we held that to qualify as a 'sham,' a

lawsuit must be objectively baseless and must concea[l] an attempt to interfere directly with the business relationships of a competitor." [citations and quotation marks omitted]).[10]

CEC's arguments focus primarily on the second, subjective element, by averring that the Second Lien Holders' participation in the Regulatory Hearings was made in bad faith and for the purpose of interfering with CEC's business by attempting to scuttle regulatory approval of its financial transfers and restructuring.[11] Even if there was merit to these contentions, CEC cannot satisfy the first, objective prong of the "sham" exception – namely, that the Second Lien Holders' conduct was objectively baseless and had no reasonable expectation of success. Under this standard, it is not enough for CEC to be in the right; the Second Lien Holders' claims must,

[10] In the antitrust context, the Supreme Court explained that "the plaintiff must have brought baseless claims in an attempt to **thwart competition** (i.e., in bad faith)." *Octane Fitness*, 134 SCt at 1757 (emphasis added). Though the *Noerr-Pennington* doctrine has been expanded to protect the petitioning of governments outside the antitrust context, it is somewhat unclear, based on *Octane Fitness*, if the "sham" exception may be applied absent a showing of anticompetitive harm. In *PRE*, moreover, the Court described sham actions as those that "attempt to interfere directly with the business relationships **of a competitor**." *Id.* at 60-61 (emphasis added). It should be noted, therefore, that the harm alleged by CEC is not anticompetitive because owning corporate credit default swaps (CDS) does not make you a competitor of the company, even if you would want to see the company default.

[11] The Second Lien Holders clearly have an economic interest in CEC. The parties' dispute concerns what acts a holder of a company's CDS may legally take to increase the likelihood of default. CDS, a well-established and valid means to hedge preexisting credit risk, especially in the face of looming bankruptcy, are securities that pay off if a company defaults on its debt. They are tantamount to corporate debt default insurance. The Second Lien Holders aver they participated in the Regulatory Hearings because they viewed CEC's restructuring to be legally impermissible and believed it would adversely impact their investment in CEC. Putting aside whether the Second Lien Holders' actions should be considered fair game for CDS holders (an issue, perhaps, best left to federal securities regulators and ISDA), even according to CEC, the Second Lien Holders were not acting out of malice or ill will towards CEC. They simply were motivated by their own financial interests due to their investments in CEC and were not attempting to gain a competitive edge in the marketplace. The questions surrounding the legitimacy of this type of behavior by CDS holders are difficult and belie the argument that the Second Lien Holders acted frivolously. *See, e.g.*, Matt Levine, BloombergView, RadioShack Is Running on Credit Derivatives, http://www.bloombergview. com/articles/2014-12-18/radioshack-is-running-on-credit-derivatives (Dec. 18, 2014). However, these issues are beyond the scope of this action.

essentially, be frivolous. The AC does not establish the frivolity of the Second Lien Holders' conduct in the Regulatory Hearings because the allegations of frivolity are pleaded in conclusory fashion. *See, e.g.*, AC ¶ 94 (claiming Second Lien Holders were "aware of the falsity of their factual assertions and the weakness of their legal claims").

This deficiency, moreover, is not merely a pleading issue that would warrant a without-prejudice dismissal. The Second Lien Holders took the position that the challenged transactions were fraudulent transfers and without adequate consideration. The test for whether the "sham" exception applies is not whether such allegations themselves are frivolous, but whether the assertion of such claims *within the Regulatory Hearings* had no reasonable chance of procuring a favorable regulatory ruling. After all, it is the regulatory bodies, not the courts, that decide whether to grant CEC's applications. CEC alleges nothing to suggest that the Second Lien Holders' conduct before the LGCB and the IGB had no chance whatsoever to influence the outcome. That CEC ultimately prevailed, over the Second Lien Holders' objections, is of no moment, because establishing frivolity requires more than pointing to a favorable outcome.

As for the parties' reliance on this court's decision in *Bridas Int'l S.A. v Repsol, S.A.*, *supra*, 40 Misc3d 1229(A), such reliance is misplaced. In *Bridas*, the plaintiffs sought broad declaratory judgements as to the legality of contested business dealings impacted by government expropriation in Argentina, which spawned international multi-forum litigation. *See id.* at *1-2, 5. Additionally, the plaintiffs asserted a tortious interference cause of action predicated on claims made in a prior pending litigation between the parties in Spain. *See id.* at *6-7. As here, the defendant raised a *Noerr-Pennington* defense. *See id.* at *7. Ruling in defendant's favor, this court refused to apply the "sham" exception because doing so would have required this court to

declare the Spanish action to be "objectively baseless" and "would be tantamount to calling the Spanish Action a 'sham.'" *See id.*

Here, in contrast, the subject tortious interference claim is not predicated on the validity of the parties' pending litigation in Delaware and Illinois. While the underlying merits of those lawsuits concern claims the Second Lien Holders made during the Regulatory Hearings, the applicability of the "sham" exception turns not on the likelihood that such claims will be found deficient within the Delaware and Illinois actions, but rather on whether such claims were frivolous *in the context of the Regulatory Hearings*. CEC does not plead any facts to suggest that the Second Lien Holders had no reasonable chance of successfully persuading the LGCB and the IGB to deny CEC's applications. Conclusory assertions are not sufficient to meet its burden.

B. Communications to Caesars

CEC's defamation claims predicated on communications made by the Second Lien Holders directly to CEC – the March 21, 2014 letter and subsequent litigation threats – are equally infirm. The letter cannot support a defamation claim because the Second Lien Holders did not disseminate it to a third party. Rather, the letter was made public when CEC made its contents known in an SEC filing. CEC's argument that the letter is actionable under a "compelled self-publication"[12] theory is unavailing because the First Department has rejected this theory.[13] *See Wieder v Chemical Bank*, 202 AD2d 168, 170 (1st Dept 1994), citing

[12] As indicated below, this theory is also referred to as "compelled self-defamation."

[13] That being said, it should be noted, as CEC observes, that some federal courts, applying New York law, have "recognized the merits of the doctrine of compelled self-defamation, predicting that 'the New York Court of Appeals would hold that an action for defamation would lie where a plaintiff has no realistic alternative but to submit the defamatory material.'" *Kiblitsky v Lutheran Med. Center*, 32 Misc3d 575, 580-81 (Sup Ct, Kings County 2011) (Demarest, J.) (collecting cases and noting "the numerous thoughtful opinions advocating for recognition of a claim for self-compelled defamation"), quoting *Van-Go Transp. Co. v New York City Bd. of Ed.*, 971

Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon, 172 AD2d 254, 255 (1st Dept 1991); *see also Phillip v Sterling Home Care, Inc.*, 103 AD3d 786, 787 (2d Dept 2013) ("New York does not recognize defamation via compelled self-publication."); *see also Naderi v N. Shore-Long Island Jewish Health Sys.*, 2014 WL 840417 (Sup Ct, NY County 2014) (Kern, J.) (same).

C. Litigation Threats

As for the Second Lien Holders' litigation threats, they too cannot give rise to a defamation claim because they are expressions of future intent, not facts. In fact, the Second Lien Holders followed through with the threats by commencing litigation against CEC.

D. Statements to the Press

The balance of the communications are statements made directly to the press. CEC cannot possibly know, without discovery, who spoke to the press on behalf of the Second Lien Holders. Nonetheless, even assuming the AC has the particularity required by CPLR 3016(a), a review of the statements in the press articles demonstrates that such statements are not actionable. For instance, in the May 7, 2014 New York Post Article (*see* Dkt. 93), the reporter

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FSupp 90, 94 (EDNY 1997); *see generally Van-Go*, 971 FSupp at 102-04 (explaining why it "seems reasonable to assume that the New York Court of Appeals would adopt the doctrine in a form that allowed for liability where … there was a high degree of compulsion that required the reporting of the defamatory matter."); *see also Aguirre v Best Care Agency, Inc.*, 961 FSupp2d 427, 455 n.16 (EDNY 2013) ("Some district courts have applied a foreseeability standard under which the originator of the defamatory statement is liable for the foreseeable republication of the statement" because "The New York Court of Appeals has not decided whether a defendant can be held liable for restatements if he participated in the original publication with 'knowledge or a reasonable expectation that republication was likely.'"), quoting *Karaduman v Newsday, Inc.*, 51 NY2d 531, 541 n.2 (1980); *but see Clemons v WellPoint Cos.*, 2013 WL 1092101, at *16 (NDNY 2013) ("It is this Court's view that New York will not adopt the [compelled self-publication] doctrine"); *see also Medcalf v Walsh*, 938 FSupp2d 478, 488 (SDNY 2013) ("it is unclear whether the narrow doctrine of 'compelled self-publication' … is recognized under New York law"). Nonetheless, *Wieder*'s rejection of a "compelled self-publication" claim precludes CEC's assertion of a defamation claim predicated on a letter the Second Lien Holders only provided to CEC.

reproduced comments that may have been made by a representative of the the Second Lien Holders. Such comments addressed the legitimacy of Caesars' restructuring, the very issues the parties are now litigating. The article stated that the "source" said that "[t]hese are similar antics" to those employed by another company who was found to have "transferred billions of dollars of assets illegally to newly created businesses to restructure its debts." *See* Dkt. 93 at 2-3. The source's comments, of course, are merely legal opinions. By alleging that such opinions may give rise to liability, CEC overlooks the fact that, in the very same article, its own spokesman commented that "[m]any [creditors] have positions, evidenced by $27 billion in outstanding credit default swaps, which motivate them to bet against its future success." Neither statement is actionable. They are expressions of opinion, not fact.

To distinguish between a fact and an opinion, courts must consider:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) **whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact**.

See Mann, 10 NY3d at 276 (emphasis added), quoting *Brian v Richardson*, 87 NY2d 46, 51 (1995), quoting *Gross*, 82 NY2d at 153.

No reasonable reader of the New York Post article, or any of the other press reports, could view the subject statements as anything other than the typical puffery and public relations comments made in the run up to contentious litigation. That is particularly the case when the adversaries are well known, savvy hedge funds managers. In this high profile case, the more sophisticated financial press, such as the Wall Street Journal, has, as expected, provided in depth coverage of the parties' litigation positions. Beyond the mainstream press, Caesars' financial

situation is significant enough to warrant in-depth scrutiny by myriad Wall Street analysts, whose conclusions are presumably drawn from substantive investigation, not rhetoric quoted in daily newspapers. *See, e.g.*, Dkt. 92 at 13 (Moody's analysis).[14] The parties' disputes should be resolved on the financial merits in court, not on the basis of defamation claims arising from the parties' pre-litigation rhetoric.

In conclusion, the tortious interference with business relations claim predicated on the defamation alleged in the AC is dismissed with prejudice. All other claims not predicated on the AC's allegations, and the claims originally asserted in this action by CEOC, are not impacted by this decision. Moreover, this dismissal is without prejudice to CEC's claims that were stipulated to be withdrawn prior to oral argument. The dismissal with prejudice only applies to the specific statements used by the AC as a predicate for CEC's defamation claims addressed herein. Accordingly, it is

ORDERED that the motion to dismiss by the Second Lien Holders' is granted to the extent that plaintiff Caesars Entertainment Corporation's first cause of action for tortious interference with business relations against the Second Lien Holders is dismissed with prejudice, and the Clerk is directed to enter judgment accordingly, and, as no other portion of this action remains, this action shall be marked disposed.

Dated: July 20, 2015 ENTER:

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J.S.C.

[14] The litigation that ensued was clearly foreseeable. *See* Dkt. 92 at 18 ("It is difficult to predict whether creditors will file lawsuits or to assess the merits of the claims, but the mounting liquidity issues, potential moves to strip the parent guaranty of CEOC's debt and negative reaction to the asset sales all increase the risk of a bankruptcy").