UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRILOGY PORTFOLIO COMPANY, LLC and RELATIVE VALUE-LONG/SHORT DEBT PORTFOLIO, A SERIES OF UNDERLYING FUNDS TRUST, Plaintiffs, v. CAESARS ENTERTAINMENT CORP. and CAESARS ENTERTAINMENT OPERATING CO., INC., Defendants.	No. 1: 14-cv-07091-JSR Oral Argument Requested
FREDERICK BARTON DANNER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. CAESARS ENTERTAINMENT CORP. and CAESARS ENTERTAINMENT OPERATING CO., INC., Defendants.	No. 1: 14-cv-07973-JSR Oral Argument Requested

MEMORANDUM OF LAW OF CAESARS ENTERTAINMENT CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

On the relevant undisputed facts, as shown in CEC's papers in support of its motion for summary judgment in these cases ("CEC Br.") and in the related actions before the Court, CEC is entitled to summary judgment on all of Plaintiffs' claims, including their claims under Section 316(b) of the Trust Indenture Act ("TIA"), for alleged breach of the indenture (the "2006 Indenture"), and for breach of the duty of good faith and fair dealing. As we show in those papers, CEC's guarantee (the "Guarantee") of the 2016 notes at issue (the "2016 Notes") was properly terminated by each of three separate transactions in May and August 2014 in accordance with the TIA and the 2006 Indenture. For those reasons and other reasons, Plaintiffs' summary judgment motion should be denied.

First, Plaintiffs contend that they are entitled to summary judgment that the two May transactions—which reduced CEC's ownership of CEOC from 100% to approximately 89%—did not release the Guarantee pursuant to Section 1503 of the 2006 Indenture. That Section provides that the Guarantee is released automatically if "for any reason" CEOC is no longer a "wholly owned subsidiary" of CEC, and it defines "wholly owned subsidiary" by reference to an SEC regulation as a subsidiary "substantially all of whose outstanding voting shares are owned by its parent." Plaintiffs contend that CEC's 89% ownership stake following the May 2014 transactions still constituted "substantially all" of CEOC's stock as a matter of law, purportedly in reliance on the "plain meaning" of that term and on a standard in now-repealed SEC and FASB guidance relating to pushdown accounting..

But as a matter of both the plain meaning of "substantially all" and the pushdown accounting guidance, material factual disputes preclude summary judgment. Plaintiffs argue that a "substantially all" standard is satisfied so long as CEC owns a majority of CEOC's voting stock. But their argument ignores the dictionary definition of "substantially" as "essentially or really the same." Plaintiffs' argument also is at odds with repeated holdings that "substantially all" is a fact-specific standard not amenable to summary judgment.

Plaintiffs' reliance on the SEC's former pushdown accounting guidance likewise creates, at most, a factual dispute that cannot be resolved in their favor on summary judgment. That guidance is of dubious relevance here: it relates to the accounting treatment of assets acquired in a corporate acquisition, not, as here, a sale of stock. Moreover, the guidance was rescinded in 2014 by the FASB and the SEC after the FASB staff concluded that it was not "conceptually sound, effective, and operable." As shown in the accompanying expert declaration of Professor Jerry Arnold, the guidance provides that "substantially wholly owned" necessarily applies only to entities that are at least 95% owned, while ownership between 80% and 95%, the situation here, may or may not be treated as substantially wholly owned. Plaintiffs' additional argument that CEOC's minority shareholders—three independent investment funds and 377 Caesars employees—should be treated as a "collaborative group" with CEC under a 13-factor test in yet other accounting standards likewise does not support summary judgment for Plaintiffs. As discussed below, and in Professor Arnold's declaration, under those standards CEC's shareholders are *not* a "collaborative group," and at most the application of the factors creates disputed issues of fact.

As Judge Scheindlin concluded on Plaintiffs' previous attempt at summary judgment, because there is at least a disputed issue of fact whether the May 2014 transactions terminated the Guarantee, Plaintiffs cannot establish as a matter of law and undisputed fact that the Guarantee remains in place. Thus, irrespective of the impact of the separate August 2014 transaction, Plaintiffs are not entitled to summary judgment on any of their claims.

Second, Plaintiffs argue that the August 2014 transaction—in which holders of a majority of 2016 Notes consented, in accordance with Section 902 of the 2006 Indenture, to remove the Guarantee—violated the TIA, because the Guarantee is (they contend) itself an "indenture security" under the TIA, and their right to payment under the Guarantee, even in accordance with an amendment permitted by the 2006 Indenture, cannot be "impaired" without violating the Act. As discussed in our moving brief, Plaintiffs' contention that a guarantee is an independent indenture security is unsupported by any precedent, and is inconsistent with the very cases on which Plaintiffs rely—including *Marblegate Asset Management* v. *Education. Management Corp.*, 75 F. Supp. 3d 592 (S.D.N.Y. 2014). As courts have consistently held, "a guaranty, in and of itself, does not constitute a 'security' under the federal securities law" because it is merely "'an agreement to repay a loan to the lender should the borrower default.'" *Coan* v. *Bell Atl. Sys. Leasing Int'l, Inc.*, 813 F. Supp. 929, 935 (D. Conn. 1990) (quoting *James* v. *Meinke*, 778 F.2d 200, 204-05 (5th Cir. 1985)). And any factual dispute (such as whether the Guarantee was marketed and independently traded—it was not) precludes summary judgment.

Third, Plaintiffs' alternative argument that the Guarantee is a "core term" of the 2006 Indenture, and that its termination in accordance with the express terms of the 2006 Indenture violates the TIA is similarly without merit. No court—including this one—has ever held that a guarantee is a "core term," and such a holding would effectively "condemn widespread market practice" under which such guarantees can be removed by majority noteholder vote. *Marblegate*, 75 F. Supp. at 612 n.14. And any factual dispute about whether the Guarantee should be viewed as a core term of the 2006 Indenture in light of the other features of the indenture (including its other termination provisions) precludes summary judgment.

Fourth, Plaintiffs argue that the August 2014 transaction was ineffective in terminating the Guarantee because the consents provided by the majority noteholders to remove the Guarantee were invalid. This is so, they contend, because CEC allegedly "controlled" those noteholders or that CEC or CEOC was the "beneficial owner" of those holders' notes, and that accordingly under the 2006 Indenture the consents should be disregarded. But the undisputed facts demonstrate that the August 2014 Transaction was the product of "contentious" and arms'-length negotiations, executed in accordance with market practice, and the majority holders' consents were effective. As noted in our opening brief, the Court dismissed this same claim on a motion to dismiss, concluding that the plaintiffs there failed to allege facts showing that CEC either owned the noteholders' shares or controlled the noteholders at the time the consents were given. While the Court allowed the Trilogy plaintiffs to replead, the evidence they offer on this motion does not vary materially from the allegations the Court previously held to be insufficient. *MeehanCombs Global Credit Opps. Master Fund, LP* v. *Caesars Entm't Corp*., 80 F. Supp. 3d 507, 517 (S.D.N.Y. 2015) (Dkt. No. 28, at 18-19) ("*MeehanCombs I*").

Finally, Plaintiffs are not entitled to summary judgment on their claim for breach of the covenant of good faith and fair dealing in connection with the August 2014 transaction on the ground that CEC did not offer them an opportunity to participate in that transaction. As discussed in our moving brief and below—and as Plaintiffs themselves concede—nothing in the 2006 Indenture "expressly require[s] exit consents to be offered to all bondholders." (Pl. Br. at 29.) And the duty of good faith and fair dealing cannot be used to impose additional obligations on CEC not set forth in the parties' written agreement.

<u>COUNTERSTATEMENT OF FACTS</u>

The facts relevant to this motion and summarized below are set forth in the accompanying Local Rule 56.1 Response and Counter-Statement of Undisputed Material Facts (cited as "¶ _"), and the declarations and accompanying exhibits of Philippe Adler (Supplemental)[1], David B. Sambur, James Gadsden, David C. Smith, and Alan A. Nadel (respectively, "[Witness] Decl.").

I. <u>The 2006 Indenture and the Guarantee</u>

In June 2006, prior to CEC being taken private, CEOC issued the 2016 Notes. (¶¶ 8-9.) The rights and obligations of CEOC, CEC, the Trustee, and any holders of the notes are governed by the 2006 Indenture. (*Id.*) The Notes are junior to billions of dollars of senior secured CEOC debt. The Trilogy Plaintiffs purchased their notes at a substantial discount no earlier than May 10, 2014, after the Guarantee was released, and at a time that Plaintiffs claim CEOC was "facing a mountain of debt and continuing cash flow losses." (Pl. Br. at 5; *see also* ¶¶ 96, 159.)

A. Section 1503: "Release of Guarantor"

Although the 2006 Indenture characterizes the Guarantee as "unconditional," it also provides that the Guarantee may be released pursuant to Section 1503, which states that CEC may be "released from all of its obligations under the Guarantee" in certain circumstances not requiring noteholder approval including if, *inter alia*, CEOC "for any reason" ceases to be a "wholly owned subsidiary" of CEC, as defined in SEC Regulation S-X. (¶ 40.) Regulation S-X defines "wholly owned subsidiary" as "a subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parent's other wholly owned subsidiaries." (¶ 34.)

As these and other provisions of the Indenture and a Prospectus issued by CEOC make clear, the Guarantee was not an essential economic term of the 2016 Notes and CEOC, not

[1] "Adler Decl. I" refers to the Declaration of Philippe Adler, dated May 10, 2016, filed as *Trilogy* Dkt. No. 140 and *Danner* Dkt. No. 121. "Adler Supp. Decl." refers to the Declaration of Philippe Adler dated May 31, 2016, filed herewith.

CEC, was to be the principal source of recovery for the noteholders. The Guarantee could be released unilaterally by actions of CEC, and nothing in the 2006 Indenture restricted CEC's actions in order to ensure CEC's ability to repay the 2016 Notes, which an investor would expect if looking to CEC as a credit backstop: the Indenture did not restrict CEC's ability to incur additional debt, grant liens, sell assets, or even declare bankruptcy. (¶¶ 242-244.) The Prospectus for the 2016 Notes—which disclosed that the Guarantee could be released if CEOC ceased to be a wholly owned subsidiary of CEC—expressly cautioned investors that CEC "[did] not own any material assets other than [CEOC] stock" and was therefore "dependent on the receipt of dividends or other payments from [CEOC] to make payments on the guarantee." Adler Decl. I Ex. 19 at S-14.

B. Section 902: "Supplemental Indentures With Consent of Holders"

Section 902 of the 2006 Indenture permits CEC, CEOC, and the Trustee to amend the indenture in any manner, with specified exceptions, as long as the holders of a majority of the "Outstanding" Notes provide their "written consents." (¶ 29.) Section 902(1), however, describes several types of rights that may not be modified without unanimous noteholder consent (*e.g.*, date of repayment of principal, interest, or changes that "impair" the right of a noteholder to "institute suit" to enforce payment after it is due). (¶ 29.) Amendments to Section 1503 and the Guarantee are not prohibited by Section 902(1). (¶¶ 29, 32-33, 95.)

For the purpose of calculating whether the holders of a "majority" of 2016 Notes agree to an amendment, 2016 Notes held by "Affiliates" of CEC or CEOC are excluded. (¶ 52.) The indenture defines "Affiliate" as an entity "directly or indirectly controlling or controlled by or under direct or indirect common control," and "control," in turn, means "the power to direct the management and policies . . . directly or indirectly, whether through the ownership of voting securities, by contract or otherwise." (¶ 52.)

C. Section 508: "Unconditional Right of Holders to Receive Principal, Premium and Interest"

Section 508 of the 2006 Indenture provides that "[n]otwithstanding any other provision in this Indenture, the Holder of any Security shall have the right, which is absolute and unconditional, to receive payment of the principal of any premium and . . . interest on such Security . . . and to institute suit for the enforcement of any such payment." (¶ 24.) Like Section 902(1), Section 508 does not refer to Section 1503 or the Guarantee. (¶ 24.)

The 2006 Indenture describe "Securities" as "unsecured debentures, notes, or other evidence of indebtedness (*together with* the related Guarantees provided by the Guarantor, the 'Securities')." Adler Decl. I Ex. 7 at Recitals (emphasis added). The 2006 Indenture further states that "Securities" "more particularly means any securities authenticated and delivered under this Indenture." *Id.* at 5. In connection with the offering of the 2016 Notes, only the Notes, and not the Guarantee, were authenticated and delivered. (¶¶ 240-41.)

II. The May 2014 Transactions, the Reduction of CEC's Ownership Stake in CEOC, and Governance and Management Changes at CEOC

In the two May 2014 Transactions, CEC sold a portion of its equity stake in CEOC to three institutional investors (the "5% Stock Sale") and CEOC issued more than 86,000 shares of stock to 377 Caesars employees, officers, and directors (the "6% Stock Transfer"). The circumstances surrounding the May 2014 Transactions are described in CEC's opposition to the motion for summary judgment by UMB and BOKF ("CEC *UMB/BOKF* Opp. Br.") at 10-13. As a result of the Transactions, CEC's ownership interest in CEOC declined from 100% to approximately 89%.

In addition to reducing CEC's ownership stake in CEOC, the May 2014 Transactions prompted significant governance and management changes at CEOC, altering the relationship between CEC and CEOC. On June 27, 2014, CEOC expanded its Board of

Directors from two to seven members, including adding two independent directors. Contrary to Plaintiffs' baseless assertion that these directors were appointed due to some relationship with one of CEC's shareholders, the record makes clear that each was selected because of his experience as an executive and in the hospitality industry. (¶ 217.) CEOC's independent directors were vested with sole authority to retain legal and financial advisers, and other experts, on behalf of CEOC. (¶ 253.) Pursuant to this authority, they retained Kirkland & Ellis LLP as legal counsel and Perella Weinberg Partners as financial advisers. (¶¶ 250, 253, 255.) On July 30, 2014, CEOC's independent directors were appointed as the sole members of CEOC's newly formed Governance Committee, vested with the power to evaluate any material financial transactions involving CEOC or its assets that required Board approval and to exercise sole authority to consider and approve any matter involving a related party, including CEC. (¶ 253, 255.) Also during June and July 2014, CEOC hired its own Chief Executive Officer, Chief Financial Officer, and General Counsel. (¶ 252.)

III. <u>The August 2014 Transaction</u>

The August 2014 Transaction is also described in detail in CEC's opposition to the UMB/BOKF motion for summary judgment, CEC *UMB/BOKF* Opp. Br. at 13-14. Sullivan & Cromwell LLP ("S&C"), as legal counsel to holders (the "Participating Noteholders") of a majority of 2016 Notes and CEOC's 5.75% Senior Notes due 2017 ("2017 Notes"), approached CEC claiming that the Guarantee of the 2016 Notes and 2017 Notes remained in place following the 5% Stock Sale. (¶¶ 48-50.) [redacted] (¶¶ 49-50.) And, although CEC believed its guarantee of all CEOC's bonds had been released as a result of the May 2014 Transactions, CEC, CEOC, and [redacted] (¶ 258.)

On August 12, 2014, CEOC, CEC, and the Participating Noteholders entered into a Note Purchase and Support Agreement ("NPSA"). That day, each of the Participating Noteholders (collectively the holders of a majority in principal amount of the 2016 Notes) "deliver[ed] its consent" to the supplemental indenture removing from the 2006 Indenture any reference to the Guarantee. (¶ 60.) Pursuant to Section 904 of the 2006 Indenture, each written consent was "a continuing consent by the Holder" from the time it was delivered, on August 12, 2014, until the supplemental indenture and amendment became effective. (¶ 245.)

On August 22, 2014, the Participating Noteholders authorized the Trustee to transfer approximately $89.4 million aggregate face amount of the 2016 Notes and approximately $66 million aggregate face amount of the 2017 Notes, which were then cancelled by the Trustee. (¶ 59.) At the same time, CEC and CEOC authorized the payment of $155.4 million to the Participating Noteholders. (¶ 69.) The Trustee and CEOC also confirmed that their signatures were released as to the supplemental indentures. (¶ 260.) Pursuant to Section 7.5 of the NPSA, each of the consents to the amendment of the 2006 Indenture was to "become effective" "substantially concurrently with the consummation of the Closing." (¶ 82.)

Also in connection with the transaction, CEC transferred an additional $427 million principal amount of 2016 Notes and 2017 Notes to CEOC, which notes were also canceled. (¶¶ 62, 260.) CEOC's independent directors approved the August 2014 Transaction, which reduced CEOC's debt by $582 million at a cost to CEOC of only $78 million. (¶¶ 62, 69.)

ARGUMENT

I. Plaintiffs Fail to Demonstrate that the Guarantee Remained in Place Following the May Transactions

As Plaintiffs recognize (Pl. Br. at 15), if the Guarantee was properly released following the May 2014 Transactions, then Plaintiffs' arguments concerning any impact of the August 2014 Transactions on their rights under the Guarantee are irrelevant. No Guarantee would have been in place by then.

As noted above, under Section 1503, CEC's Guarantee is released if CEOC is no longer a "wholly owned subsidiary" of CEC "as such term is defined" in SEC Regulation S-X, which defines a "wholly owned subsidiary" as a "subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parent's other wholly owned subsidiaries." Plaintiffs offer two bases for their contention that CEC still owns "substantially all" of CEOC stock for the purposes of Section 1503, but each is incorrect. At minimum, disputed factual issues exist concerning whether the Guarantee was released in May 2014.

A. Plaintiffs Are Wrong About the Plain Meaning of "Substantially All"

Selectively quoting an Oxford English Dictionary definition of "substantially," Plaintiffs assert that CEC owns "substantially all" of CEOC if CEC owns CEOC "for the most part." Pl. Br. at 17. Plaintiffs' attempt to equate "substantially all" with "most" (anything more than half) ignores both the OED's full definition, as well as similar definitions of "substantially" (including in Blacks' Law Dictionary and Anderson's Dictionary of Law) stating that "substantially" means "essentially or really the same" or "without material qualification." *See* Supp. Adler Decl. Ex. 58; *id.* Ex. 59; *id.* Ex. 60. Consistent with these definitions, courts have held that "substantially" sets a high threshold. *See, e.g.*, *Pourchez* v. *Diatek, Inc.*, 265 F. Supp. 2d 192, 197-99 (S.D.N.Y. 2003) (construing "substantially parallel" in a patent to mean "the same as or very close to parallel"); *Loral Space & Commc'ns Holdings Corp.* v. *Rainbow DBS Holdings, Inc.*, 2007 WL 3236191, at *2 (N.Y. Sup. Ct. Mar. 30, 2007) ("sale of substantially all of the assets" of a company occurred where the assets that remained "could easily be viewed as [i]nsignificant, insubstantial, or even useless"); *Application of H. M. Vinard, Inc.*, 10 A.D.2d 145, 147 (N.Y. App. Div. 3d Dep't 1960) (under New York statute, "'substantially all' of the capital stock" was "determined on the basis of facts in each case but ordinarily the beneficial ownership or control of 95% or more of the issued and outstanding capital stock").

Here, 89% ownership is not "essentially or really the same" as 100% ownership. Divestiture of more than 10% of an entity, comprising more than 155,000 shares valued at greater than $14,000,000 (¶ 256), is more than a "material qualification" on ownership. Changes at CEOC stemming from CEC's sale of equity—materially impacting the relationship between CEC and CEOC—further confirm this. Following the May 2014 Transactions, CEOC assumed significant responsibility for its own governance and management. (¶¶ 250-55.) The newly-formed CEOC Board Governance Committee, consisting of two independent directors, was vested with sole power to represent CEOC's interests as to a broad scope of responsibilities, including retaining advisers, evaluating material transactions, and approving all related-party transactions, including with CEC. (¶¶ 253, 255.) CEOC also engaged a new senior management group (including CEO, CFO, and General Counsel) who had no roles at CEC. (¶ 252.) These changes, unacknowledged by Plaintiffs, confirm that CEC's ownership of CEOC after the May 2014 Transactions was not "really the same as" its ownership before those transactions.

Contrary to Plaintiffs' position, courts have repeatedly held that "substantially all" is a fact-specific standard not amenable to summary judgment. *See, e.g.*, *In re Nantucket Island Assoc. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 370 (Del. Ch. 2002) ("[D]iscretion to resolve whether particular sale involved 'substantially all of the assets' of an entity on a motion for summary judgment is necessary constrained."); *Winston* v. *Mandor*, 710 A.2d 835, 843 (Del. Ch. 1997) ("whether there is a sale of substantially all [of a company's] assets . . . depends upon . . . characteristics of the transaction . . . [and] is factual in nature."). Where, as here, the meaning of "substantially all" is not clearly ascertainable, the question of whether CEOC remains "wholly owned" by CEC is unsuitable for summary judgment. *See, e.g.*, *Union Ins. Soc. Of Canton Ltd.* v. *William Gluckin & Co., Inc.*, 353 F.2d 946, 952 (2d Cir. 1965) (reversing grant of summary judgment because relevant contract language was ambiguous even where "the parties may be able to adduce but little additional competent evidence before the fact-trier on the issue of intent" of the parties); *Caldor, Inc.* v. *Mattel, Inc.*, 817 F. Supp. 408, 411 (S.D.N.Y. 1993) (denying summary judgment in action concerning guarantee of former subsidiary's debts, where "wholly owned subsidiary" could have been a term of limitation or description and evidence of intent was "inconclusive"); *Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 88 F.R.D. 38, 43 (S.D.N.Y. 1980) (denying summary judgment on claims requiring interpretation of indenture term permitting assumption of a third party's obligations "by a corporation that purchases all or substantially all" of its property, where term was "not wholly unambiguous").

Plaintiffs cannot show, on undisputed facts, that CEC owns "substantially all" of CEOC (and that CEOC is thus "wholly owned" under Section 1503), and the Court should reject Plaintiffs' argument that, as a matter of law, the Guarantee survived the May 2014 Transactions.

B. The Defunct "Pushdown" Accounting Guidance Cited By Plaintiffs Establishes that CEOC is *Not* "Wholly Owned" By CEC

Plaintiffs argue that their proposed meaning of "substantially all" (*i.e.*, "most") is "reinforced" by guidance issued by FASB and the SEC concerning Regulation S-X. Pl. Br. at 17. This guidance—which is irrelevant and now defunct—does nothing to clarify the meaning of "substantially all" here. Even were the guidance applicable (and it is not), it only confirms, rather than resolves, the myriad factual disputes concerning the operation of CEOC.

First, the guidance relied on by Plaintiffs—a 1983 Staff Accounting Bulletin ("SAB 54") and a 2001 FASB Emerging Issues Topic ("EITF D-97")—concerns "pushdown accounting," which has no bearing on the termination of the Guarantee or operation of the 2006 Indenture. Instead, it concerns circumstances in which the SEC and FASB staffs previously recommended that an entity ***acquiring*** a second entity should restate the assets and liabilities of that second entity based on the acquisition price. But as Dr. Arnold, an Emeritus Professor in the Leventhal School of Accounting at the University of Southern California, explains in his declaration, "the circumstances under which pushdown accounting applies, namely acquisitions, are unrelated to the heart of the matter in this case—the release of a parent guarantee upon divestitures." Arnold Decl. ¶ 2.

Second, in 2014, both FASB and the SEC repealed the pushdown accounting guidance cited by Plaintiffs because it was not "conceptually-sound, effective, and operable." Supp. Adler Decl. Ex. 61 at 10 (FASB); *id.* Ex. 62 at 7-11; *see also id.* Ex. 63 at 2 (SEC). Plaintiffs contend that the guidance is still relevant because it was in place when the 2016 Notes were issued (Pl. Br. at 18 n.18), but the 2006 Indenture incorporated "wholly owned subsidiary" as defined in Regulation S-X, *not* any guidance then in existence that might refer to that term—let alone guidance that, as here, was subsequently deemed unintelligible and abandoned. Plaintiffs also suggest that the current guidance for pushdown accounting, whether a "change in control" has occurred, might apply here, Pl. Br. at 18 n.19, but that standard deletes any reference to "substantially wholly owned" and has nothing to do with the definition of "wholly owned" in Regulation S-X. Supp. Adler Decl. Ex. 62, at 11.

Third, even if the pushdown accounting guidance is relevant, it only underscores the factual disputes between the parties. To start, the core of the guidance is SAB 54, which explained that pushdown accounting was required when an entity becomes "substantially wholly owned" such that the "form of ownership" is controlled by the parent. But SAB 54 states that an entity is not "substantially wholly owned" if the entity has "outstanding public debt . . . that might impact the parent's ability to control the form of ownership." Supp. Adler Decl. Ex. 64 (SAB 54), at 2. Thus, SAB 54 makes clear that guidance is inapplicable to an entity, like CEOC, with significant outstanding debt governed by indentures that restrict changes to its corporate form. (¶ 248 (describing provision of 2006 Indenture that requires that CEOC remain a corporation); *see also* ¶¶ 169, 249.)

Fourth, Plaintiffs also incorrectly argue that the pushdown accounting guidance suggests that entities that become 80% to 95% acquired *may* be considered "substantially wholly owned." Pl. Br. at 18. In fact, the guidance provides that an entity becomes "substantially wholly owned" in an acquisition of *95%* or more of stock (thus requiring pushdown accounting), but where a company becomes *80% to 95%* owned, the entity is less than "substantially wholly owned" (and pushdown accounting is only "permitted" or "encouraged"). Supp. Adler Decl. Ex. 65 at 1-2; *see also* Arnold Decl. Ex. A at 13-15. For this additional reason, the pushdown accounting guidance does not reflect that CEC "wholly owned" CEOC after May 2014.

Fifth, Plaintiffs fail to show on the undisputed facts that CEC controlled the "form of ownership" of CEOC because (1) provisions in CEOC's Amended and Restated Articles of Incorporation ("CEOC's A&R COI") adversely impacted minority shareholder voting rights related to CEOC Board elections; and (2) CEOC's minority shareholders did not have "common" protections "to check CEC's control of CEOC." Pl. Br. at 19-20. CEOC's A&R COI was prompted by the requirement, as negotiated by the purchasers in the 5% Stock Sale, that CEC take steps to list CEOC on a national exchange. Sambur Decl. ¶ 20. Thus, CEOC's Certificate of Incorporation was expanded to include common provisions concerning CEOC's capital stock, gaming and regulatory and conflicts of interest issues, and shareholder rights, including related to Board elections and meetings. (¶¶ 184-86.) Each of those provisions is identical to corresponding provisions in the Certificate of Incorporation of *CEC*, a publicly traded company with hundreds of thousands of shares traded daily and an entity that could not be reasonably said to be "wholly owned" by any other entity. (¶¶ 185, 197-208.)

In addition, both under CEOC's A&R COI and as a matter of the factual record here, CEC did not have the ability to "control the form" of CEOC. Contrary to Plaintiffs' suggestion that no protections existed for CEOC's minority shareholders, CEOC's independent directors had the sole authority to consider material transactions and to approve related party transactions on behalf of CEOC, including with CEC, *supra* p. 7-8. CEOC's A&R COI did not vest CEC with sole power to control CEOC's Board but instead made clear that each CEOC shareholder had the power to vote its shares and that all Board members appointed to fill a vacancy served only until the next annual shareholder meeting, at which time the vacancy would be filled based on a "plurality of votes." (¶¶ 184, 214-15.) Plaintiffs' selective quotation, out of context, of CEOC's governance documents—all while ignoring the actual operation of CEOC—does not prove on undisputed facts that CEC "controlled [CEOC's] form."

Finally, Plaintiffs argue incorrectly that EITF D-97 suggests that CEC wholly owns CEOC because the three institutional investors in the 5% Sale and the 377 recipients of CEOC stock in the 6% Stock Transfer are part of a "collaborative group" with CEC. Pl. Br. at 22-25. EITF D-97 creates a "rebuttable presumption" that multiples entities should be considered a "collaborative group" whose interests are aggregated for the purposes of pushdown accounting only when those entities acquire a portion of a second entity "at the same time or in reasonable proximity" (Supp. Adler Decl. Ex. 65 at 3), but as Dr. Arnold notes, the rebuttable presumption is "not triggered" here because the minority shareholders acquired their interests in CEOC years after CEC. Arnold Decl. ¶ 6.

And any such presumption may be overcome by four groups of factors—"Independence," "Risk of Ownership," "Promotion," and "Subsequent Collaboration"—comprising *thirteen* fact-intensive considerations. As Dr. Arnold explains, application of these factors confirms that the guidance makes little sense here and, in any event, would only raise numerous fact questions inappropriate for summary judgment. Arnold Decl. ¶¶ 5-15. For example, Plaintiffs cannot demonstrate, on undisputed facts, that all purchasers or recipients in the May 2014 Transactions were not "Independent"—*i.e.*, that each investor or recipient had zero assets or investments other than the CEOC stock (to the contrary, each investor is a hedge fund managing hundreds of millions of dollars), that each investor or recipient knew and was affiliated with the others (and that those relationships were "material"), and that the purchase or receipt of stock by each was contingent on the same by others. *Id.* ¶¶ 8-9. As to "Risk of Ownership," and contrary to Plaintiffs' contention, each of the purchasers and recipients in the May 2014 Transactions incurred economic "risks" with their ownership of CEOC stock: the institutional purchasers each paid more than $1 million for CEOC stock (¶¶ 44, 107, 109), and as Dr. Arnold explains, employee stock recipients were poised to benefit from an increase in CEOC's equity value and incurred the risk of losing that opportunity by a decrease in value, (Arnold Decl. ¶ 10). Similarly, Plaintiffs fail to show that any purchaser or recipient promoted participation by any other or solicited CEC to sell stock or CEOC to issue it. *Id.* ¶ 11. Finally, the nearly 400 minority shareholders were not compelled to act together, or with CEC; rather, each received shareholder rights identical to those of any shareholder in *CEC*. *Id.* ¶¶ 12-14.

II. The Guarantee Is Neither a "Security" Nor a Core Term Under the TIA

Plaintiffs argue that the August 2014 amendment removing the Guarantee from the 2006 Indenture on consent of the majority noteholders was a *per se* violation of the TIA. *First*, Plaintiffs contend that the "Guarantee" is an "indenture security" under the TIA that cannot be removed absent noteholders' unanimous consent. *Second*, Plaintiffs argue that the "Guarantee," even if releasable, is a "core term" under the TIA that cannot be removed without noteholders' unanimous consent. Each argument fails as a matter of law, fact, and policy.

A. No Court Has Held that a Guarantee is a "Security" That May Not Be Released or Removed from an Indenture

The TIA defines an "indenture security" as "any security issued or issuable under the indenture to be qualified." *See* 15 U.S.C. § 77ccc(1). The Securities Act of 1933 (the "33 Act")—which is incorporated into the TIA—states that a "security" *can* include a "guarantee" of a "note." Pl. Br. at 11-12. Plaintiffs argue that because the '33 Act's broad definition of a security includes the word "guarantee," every guarantee related to an indenture under the TIA, including the Guarantee here, must be a security.

The Supreme Court, however, has long held that what constitutes a "security" cannot be settled by such literalism and that whether an instrument is a "security" requires a fact-specific analysis of its economic features. *See* CEC Br. at 16-17 (citing *Reves* v. *Ernst & Young*, 494 U.S. 56, 66-67 (1990); *United Hous. Found.* v. *Forman*, 421 U.S. 837, 848 (1975)). That assessment requires examination of, *inter alia*, the motivations of a reasonable seller and buyer entering into the transaction underlying the instrument; the distribution of the instrument and whether that reflects "common trading [of that instrument] for speculation or investment"; and "reasonable expectations of the investing public." *Id*. (citing *Reves*, 494 U.S. at 61 n.1, 66-67 (interpreting "security" under the Securities Exchange Act of 1934, but noting that the term is "virtually identical" under the '33 Act)).

Consistent with these factors, courts have held repeatedly that where—as here—guarantees are not marketed, bought, or sold independent of the notes to which they relate, those guarantees are not "securities" under the '33 Act. *See* CEC Br. at 16-17 (citing cases). This is consistent with the registration statement for the Notes filed with the SEC, which stated expressly that "no separate consideration [would] be received for the Guarantees," Adler Decl. Ex. 18, and belies that any investor would have believed that it was purchasing two separate securities when purchasing the 2016 Notes. *See Reves*, 494 U.S. at 66. While the registration statement identified the Guarantee as among "a class of securities to be registered," such a characterization is not binding on courts. *See Great Rivers Co-op. of Se. Iowa* v. *Farmland Indus., Inc.*, 198 F.3d 685, 699 (8th Cir. 1999) (capital credits "lack the essential characteristics of securities" even where defendant "registered these instruments as securities").

Plaintiffs do not attempt to address *Reves* and incorrectly read its progeny as inapplicable because "they hold simply that a guarantee is not a 'security' if the underlying obligation is not a 'security.'" Pl. Br. at 11 n.9. In all of the cases cited by CEC, the court reviewed the substantive nature of the guarantee and determined it was not a separate security, irrespective of the nature of the underlying obligation. *See, e.g.*, *Coan*, 813 F. Supp. at 935 (noting that a "guaranty is not an investment of money but rather 'an agreement to repay a loan[,]'" and, therefore, "does not constitute a 'security' under the federal securities laws"); *Haberman* v. *Wash. Public Power Supply Sys.*, 744 P.2d 1032, 1048 (Wash. 1987) (the "guaranties were neither sold, nor marketed, and could not have been purchased apart from the bonds"); *Woods* v. *Homes and Structures of Pittsburgh, Kansas, Inc.,* 489 F. Supp. 1270, 1294 (D. Kan. 1980) (same). In each case, the court rejected the proposition that the respective guarantees could be subject to Section 12 liability independently of the public bond itself because the guarantee did not meet the definition of a "security" under the '33 Act.

The sole case cited by Plaintiffs in support of their position—*Banco de la República de Colombia* v. *Bank of N.Y. Mellon*, 2013 WL 3871419 (S.D.N.Y. July 26, 2013—is factually inapposite. *Banco* concerned the meaning of the term "issuer" in a loan agreement to resolve a breach of contract claim, *id.* at *5-6, and says nothing about when a guarantee of notes issued under an indenture might be a "security" under securities laws or the TIA. Moreover, *Banco* noted only that a guarantee "*can* be" (not "is always") a "security," *id.* at *6 (emphasis added), which is simply a summary of the statutory definition of the term that underscores the Supreme Court's holding that what constitutes a "security" requires an assessment of the economic behavior of the instrument. The legislative history of the '33 Act discussed in *Banco* reflects that the inclusion of "guarantees" in the definition of securities was in fact unrelated to any principle relevant to the TIA and was intended merely to limit the disclosure obligations of guarantors, who had been defined as "issuers" and who would otherwise have been responsible for disclosures concerning every aspect of the security, not just the guarantee. *See* Supp. Adler Decl. Ex. 66 (H.R. Rep. No. 73-1838 (1934)), at 39.

Plaintiffs' positon that the Guarantee is a distinct security is also inconsistent with TIA precedent. As noted in *Marblegate*, "releases of guarantees through automatic or majority-vote provisions are commonplace," and a holding that guarantees cannot be released because they are "securities" would significantly disrupt the bond market. CEC Br. at 12, 15-17 (citing *Marblegate*, 75 F. Supp. 3d at 612 n.14). Likewise, the Court held in *BOKF I* that "the mere release of the Guarantee, standing alone, does not prove an impairment under section 316(b)." 2015 WL 5076785, at *8; *see also Meehancombs Global Credit Opps. Master Fund, LP* v. *Caesars Entm't Corp.* ("*MeehanCombs II*"), 2015 WL 9478240, at *7 (S.D.N.Y. Dec. 29, 2015) ("[R]emoval of the Guarantee under the terms of Section 1503(3)" does not automatically violate Plaintiffs' right to payment of principal and interest under the Indenture). And while *BOKF I* concerned indenture provisions allowing the automatic release of a guarantee, the rationale applies with equal force to a provision allowing amendment to an indenture to remove a guarantee.

Plaintiffs claim that CEC "has acknowledged [that the] Guarantee is an 'indenture security' under the plain language of the TIA and the [33 Act]." Pl. Br. at 11. But that assertion relies on a single sentence in a 5-page, undated "[d]raft for discussion purposes only"—apparently prepared by an unidentified member of Caesars' accounting department, and without any indication of any consultation with counsel. And the focus of the discussion draft is CEOC's and CEC's disclosure obligations after the Guarantee was terminated, not whether the Guarantee is an indenture security under the TIA or whether the termination complied with the TIA or was effective. Plaintiffs also cite to an SEC rule concerning an obligor's disclosure requirement, *see* Pl. Br. at 12 n. 10, but that is similarly irrelevant. In any event, the principle described in *Great Rivers*, 198 F.3d at 699, governs here: The economic nature of an instrument, not the label attached to it by an issuer (or by an issuer's accountant in a draft document) dictates whether it is a "security" under the '33 Act or TIA. Moreover, "innumerable" indentures filed with, reviewed by, and qualified under the TIA by the SEC have included releasable guarantees. *See* Ben H. Logan, *The Trust Indenture Act, Debt Restructuring & Reorganization Tourism (Part I)*, 36 Bank. L. Letter No. 3 (Mar. 2016) at 15. If termination of a guarantee pursuant to the express terms of an indenture were *per se* unlawful, then "the SEC should have issued stop orders whenever these indentures were filed with it." *Id*.

Finally, Plaintiffs' reliance on Section 508, which prohibits the "impairment" of Plaintiffs' right to principal and interest on any "Security," is misplaced. Plaintiffs argue that this provision encompasses the Guarantee and, therefore, the August Transaction violated the provision by removing it (Pls.' Br. 13), but for the reasons explained in CEC's moving brief, this is incorrect. As CEC has demonstrated, the plain language of 2006 Indenture makes clear that the Guarantee is merely a component of the "Security"—*i.e.*, the Note—not a "Security" in and of itself. CEC Br. at 19-22. And Plaintiffs' argument that the Guarantee is a "Security" the removal of which is precluded by Section 508 would eviscerate Sections 902 and 1503, which expressly permit the amendment of the 2006 Indenture (including to remove the Guarantee) and release of the Guarantee, respectively. *Id.* at 20-21 (citing cases). The Court concluded previously that Section 508 might supersede other contractual provisions only if the two conflicted, but that Sections 508 and 1503 may operate in harmony. *Id*. (citing *MeehanCombs II*, 2015 WL 9478240, at *7). As explained in CEC's moving brief, Section 902 is consistent with each of 508 and 1503. CEC Br. at 21.

B. Plaintiffs Fail to Demonstrate that the Guarantee Was a "Core Term" of the 2006 Indenture or That Its Removal Violated the TIA

Plaintiffs further argue that the Guarantee, though releasable, should be deemed a "core term" of the 2006 Indenture that cannot be amended or removed absent unanimous noteholder consent because it provides a "safety net" for noteholders' right to receive payment. Pls.' Br. 5, 13-15. Plaintiffs' attempt to expand the meaning of a "core term" to include parent (or, for that matter, subsidiary) guarantees is wrong as a matter of law and policy.

As explained in CEC's moving brief, CEC is aware of no court that has taken the extraordinary step of deeming a guarantee a "core term" of a debt instrument under the TIA such that the guarantee cannot be amended or removed without unanimous noteholder consent. *See* CEC Br. at 11-14. This is particularly true where, as here, none of CEC's guarantees of CEOC notes were designed to provide meaningful credit support and the 2016 Notes, in particular, were "unsecured." To the contrary, courts and bond market experts have consistently limited "core terms" of bond indentures to the principal owed to the noteholder, the calculation of interest to be paid, and the dates on which payments are due. *See id.* at 11-12.

Any other rule would undermine a widely accepted and common market practice by precluding parties negotiating bond indentures from agreeing to include a guarantee terminable by non-unanimous noteholder vote. *See id.* at 14 (citing Coffee & Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. Chi. L. Rev. 1207, 1224–25 (1991)). The implications of such a restriction are not merely theoretical. Entities frequently engage in sales or acquisitions—*e.g.*, of "lines of business organized as subsidiaries" that have issued, or which guarantee, debt—that require a mechanism for a guarantee of debt to be released to complete the transaction. *See* Logan, *supra* p. 20, at 14-15. To deem a terminable guarantee a "core term" non-removable absent unanimous noteholder consent would, in effect, give each holder of debt issued under an indenture the right to approve (or obstruct) such a transaction regardless of its merits. *Id.* ("[I]t is common for guarantors to come and go. . . . It would be strange indeed for TIA § 316(b) provided that such a transitory right could never be undone if it came into existence in the first place."). This would create significant and needless market uncertainty. *See* CEC Br. at 14 (citing Coffee & Klein, *supra*, at 1224-25).

The decisions on which Plaintiffs themselves principally rely—*Marblegate* and *Federated*—make clear that a guarantee is not a "core term." The *Marblegate* court did not hold that the TIA was violated because the guarantee was a "core term." *Marblegate I*, 75 F. Supp. 3d at 615-16 (emphasis added). Instead it expressly recognized "contexts" exist in which guarantee release clauses could "be invoked *without* implicating Section 316(b)." *Id.* (emphasis added). This includes where a majority of noteholders "bargained [the guarantee] away" after determining that its existence "impaired flexibility[.]" *Id.* Rather than premise its holding on the removal of the guarantee, the *Marblegate* court found that the TIA had been violated because the proposed transaction at issue was an out-of-court restructuring. *Id.* at 614. Put differently, had the guarantee in *Marblegate* been considered a "core term" (or, for that matter, an "indenture security"), the court would have had no need to consider whether a restructuring occurred.

Federated similarly does not state that a guarantee is a "core term" that cannot, in any circumstances, be modified without noteholders' unanimous consent. It held only that the removal of the guarantee in that case violated Section 316(b) when "[t]aken together" with "the simultaneous disposition of all meaningful assets" of the issuer. *Federated Strategic Income Fund* v. *Mechala Grp. Jamaica Ltd.*, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999).

Nor do the Court's decisions in *MeehanCombs* and *BOKF* treat the Guarantee as a "core term," as Plaintiffs suggest. *See* Pls.' Br. 14-15. As noted in CEC's moving brief, CEC Br. 13, the Court held in *MeehanCombs* only that Plaintiffs stated a claim under section 316(b) on the basis that the August Transaction, as alleged in the pleadings, was an "out-of-court debt restructuring," *not* that the Guarantee was a "core term." *Id.* (citing *MeehanCombs I*, 80 F. Supp. 3d at 516). Similarly, in *BOKF I*, the Court found "too broad[]" the proposition that "the release of the Guarantee without [Plaintiffs'] consent[,]" alone, is a violation of the TIA. 2015 WL

5076785, at *8. The Court then observed "that if CEOC had unilaterally adjusted the *amount of principal or interest* it would pay on a note, that would be an impairment under section 316(b)" and, "[s]imilarly, renegotiating a *debt obligation* with a majority of noteholders to the detriment of a nonconsenting minority under the same indenture would be an impairment." *Id.* at *9 (first emphasis added). The Court did not hold that modifying a guarantee is a *per se* violation of the TIA. Plaintiffs assert that CEC's position on the "core"/"non-core" distinction "cannot be reconciled" with the finding in *BOKF I* "that CEC's guarantee 'unambiguously' provided credit support for the CEOC's [*sic*] Noteholders" (Pl. Br. at 14-15), but the Court there recognized that a guarantee may be both "easily terminated" *and* provide credit support. 2015 WL 5076785, at *7.

Finally, while Plaintiffs assert here that the Guarantee was an important "investment consideration" and "safety net" for Noteholders—including because "the word 'Guarantee' appeared on the cover of the Prospectus" for the Notes, Pl. Br. at 14 & n.12—the expectations of investors as to the 2016 Notes are, at a minimum, disputed. The Prospectus disclosed that the Guarantee could be released in multiple circumstances, including where CEOC "ceases to be a wholly owned subsidiary of [CEC]," and that CEC did "not own any material assets other than the common stock of [CEOC]" and was therefore "dependent on the receipt of dividends or other payments from [CEOC] to make payments on the [G]uarantee[.]" Adler Decl. I Ex. 19 at S-14. In his declaration, James Gadsden explains that the provisions of the 2006 Indenture show that a reasonable investor would not have relied on the Guarantee as a "core term." Mr. Gadsden explains that this is so because (1) as noted, the Guarantee may be released unilaterally by CEC or CEOC; (2) the 2006 Indenture is devoid of any restrictions on CEC's ability to take actions that would diminish its ability to pay debt service; and (3) no material "cross-default" provisions restrict the actions of CEC, and thus even events like a bankruptcy filing by CEC do not give Noteholders the right to accelerate debt or pursue other remedies. Gadsden Decl. ¶¶ 53-56. These features, or the absence thereof, underscore that the Guarantee should not be deemed a "core term." *Id*. Finally, Plaintiffs present no evidence that they purchased their notes in reliance on the Guarantee.

III. The Undisputed Material Facts Demonstrate that the Participating Noteholders Validly Consented to Amend the 2006 Indenture

Plaintiffs argue that the mechanics by which the August 2014 Transaction was effectuated violated both the Indenture and the TIA. Pls.' Br. at 25-27. In short, Plaintiffs' argument is that the Participating Noteholders' consents to the supplemental indenture should be deemed to have come from CEC or CEOC (in which case they would not be counted under Section 902 of the 2006 Indenture) because CEC allegedly "controlled" the Participating Noteholders or was the "beneficial owner" of the notes when the consents became effective. *Id.* As demonstrated in CEC's moving brief, CEC Br. at 23-25, Plaintiffs' arguments rest on a misunderstanding of how the consents were voted, executed, and became effective, and is a rehash of arguments that the Court rejected when dismissing Plaintiffs' claim under Section 316(a) of the TIA in January 2015. *See MeehanCombs I*, 80 F. Supp. 3d at 516-17. They are also contradicted by the factual record.

To start, Section 7.5 of the NPSA states that the each of the consents to the amendment of the 2006 Indenture—delivered by the Participating Noteholders in writing on August 12, 2014—was to "become effective" "substantially concurrently with the consummation of the Closing." (¶ 260.) The mechanics of the "Closing," which occurred on August 22, 2014, are reflected in the "Closing Memo," which Plaintiffs conspicuously ignore. (*Id.*) To effect the Closing, multiple steps occurred contemporaneously: the Participating Noteholders authorized the transfer of their Notes to the Trustee for cancellation, CEC and CEOC authorized payment to the Participating Noteholders to purchase those notes, and CEOC and the Trustee released their signature making the supplemental indenture and amendment effective. (¶¶ 59-69.) The consents, which were "irrevocable," had been delivered ten days earlier. (¶¶ 51, 60.) Thus, the record supports only that the Participating Noteholders' consents became "effective" at the same time as the rest of the closing—not that they were provided by CEC or CEOC themselves.

Contrary to Plaintiffs' argument, CEC never "controlled" the Participating Noteholders at any time, including when the consents were provided or became effective. Plaintiffs argue, in essence, that because the Participating Noteholders negotiated and voluntarily entered into an agreement with CEC and CEOC to provide consents, then the mere fact of an agreement rendered the Participating Noteholders "controlled" by CEOC—but this makes no sense. To hold that such a transaction gives the issuer "control" over the noteholders would mean that *any* offer for the repurchase of notes accompanied by a solicitation for noteholder consent would violate the TIA and common indenture provisions. Yet, such consent solicitations and consents provided in connection with a note repurchase are both commonplace market practice and widely accepted by courts (*see* CEC Br. 25 (citing cases and model indenture)), and they do not reflect "control" by the purchasers over the sellers. Nor can Plaintiffs' "control" argument be squared with the ample factual record in this case demonstrating that the August 2014 Transaction was the product of months of "contentious" and arms'-length bargaining among CEC, CEOC, and the Participating Noteholders (¶¶ 48-54).

Similarly, Plaintiffs incorrectly argue that CEC or CEOC had "beneficial ownership" of the Notes when the Notes became effective such that the consents should be deemed invalid. *See* Pl. Br. at 26. As the Closing Memo states, CEC and CEOC paid for the

Notes and the Notes were transferred by the Participating Noteholder to the Trustee for cancellation contemporaneously with the consents becoming effective. Prior to that, only the Participating Noteholders "owned" their notes. (¶ 259.) Plaintiffs suggest that, in addition to actual ownership, "beneficial ownership" should be considered to determine if, and when, a consent should be counted for the purpose of an amendment under Section 902 (Pl. Br. at 26), but this finds no support in the 2006 Indenture. Moreover, the authority on which Plaintiffs rely for determining "beneficial ownership" is irrelevant SEC guidance concerning when an investor owns five percent or ten percent of an entity's stock such that it must disclose the level of ownership in a Schedule 13D or Schedule 13G filing. *Id.* at 26 (citing 17 C.F.R. § 240.13d-3(a) (setting forth considerations for determining beneficial ownership "[f]or the purposes of sections 13(d) and 13(g)")). It does not purport to address whether a noteholder has beneficial ownership of a note in connection with voting to amend an indenture.

In any event, even if that guidance were applicable (and it is not), it does not compel the conclusion that CEC or CEOC was the "beneficial owner" of the Participating Noteholders' notes simply because the consents became effective contemporaneous with the Closing. Plaintiffs argue that the NPSA somehow vested CEC and CEOC with "voting power" over the notes, as of August 12, 2014, and, therefore, CEC and CEOC should be deemed "beneficial owners" of the notes prior to the effectiveness of the consents (*see* Pl. Br. at 26), but the NPSA does no such thing. Section 5.1 of the NPSA states only that the Participating Noteholders, as sellers, agreed to take "commercially reasonable actions" to effect the closing of the transaction including by refraining from selling the Notes (or interests in the Notes, like voting rights) to some other entity, an act inconsistent with NPSA. (¶ 61.) This "commercial reasonableness" provision did not provide CEC or CEOC with voting power (and it certainly did not empower CEC or CEOC to vote the 2016 Notes related to the NPSA). Nor can Plaintiffs point to record evidence of what, if any, "commercially reasonable actions" the Participating Noteholders took pursuant to Section 5.1.

IV. CEC Did Not Breach Any Duty of Good Faith and Fair Dealing in Connection with the August 2014 Transaction

Finally, Plaintiffs claim that CEC, by engaging in conduct expressly contemplated by the Indenture (*i.e.*, obtaining consents to a supplemental indenture pursuant to Section 902), breached the covenant of good faith and fair dealing. Courts recognize that indentures require uniform interpretation and, therefore, are reluctant to imply obligations into them, even when the transaction might detrimentally impact the value of the bonds. *Hartford Fire Ins. Co.* v. *Federated Dep't Stores, Inc.*, 723 F. Supp. 976, 992 (S.D.N.Y. 1989) (no implied obligation, in part, because "weigh[ing] the virtues of such transactions on a case-by-case basis threatens to inject an impermissible degree of uncertainty into the bond market"); *In re Solutia, Inc.*, 2007 WL 1302609, at *10-13 (S.D.N.Y. Bankr. May 1, 2007) (no implied obligation to void a financing transaction structured to avoid triggering an "equal and ratable" clause).

Here, Plaintiffs must prove undisputed facts as to at least two issues: (1) that the covenant purportedly breached was not redundant of, or in tension with, any terms in the indenture, *Paraco Gas Corp.* v. *Travelers Cas. & Sur. Co. of Am.*, 51 F. Supp. 3d 379, 403 (S.D.N.Y. 2014); and (2) that the covenant purportedly breached was "so interwoven into the contract as to be necessary for effectuation of the purposes of the contract,'" *Fillmore E. BS Fin. Subsidiary LLC* v. *Capmark Bank*, 2013 WL 1294519, at *12 (S.D.N.Y. Mar. 30, 2013), *aff'd*, 552 F. App'x 13 (2d Cir. 2014) (citation omitted). *See also Canon Inc.* v. *Tesseron Ltd.*, 2015 WL 7308663, at *9 (S.D.N.Y. Nov. 19, 2015) (noting that the implied covenant "will be breached only in a narrow range of cases" and cannot "undermine a party's general right to act on its own interests in a way that may incidentally lessen the other party's expected benefit") (citations omitted). Plaintiffs cannot make either showing.

Plaintiffs' good faith claim is based on the August 2014 Transaction and that participation in that transaction was offered to some, but not all, Noteholders. Pl. Br. at 28-30. This, Plaintiffs claim, violated a purportedly implied obligation in the 2006 Indenture that CEOC, when "soliciting exit consents," must always "offer the transaction to *all* noteholders if those that reject the offer are to lose rights." *Id.* at 29. As CEC's moving brief explained, this good faith claim is premised on the same facts, seeks the same relief, and is duplicative of Plaintiffs' contract claim. *See* CEC Br. 26-28. New York courts routinely dismiss such duplicative good faith claims. *See id.* (citing cases).

Plaintiffs concede that nothing in the 2006 Indenture "expressly require[s] exit consents to be offered to all bondholders." Pl. Br. at 29. They argue that such an obligation was implied based on two provisions in the indenture that supposedly "contemplate[d] that holders will be treated equally (*id.*), but neither provision relates to exit consents, the Guarantee, or even the Indenture's voting requirements. The first, Section 507 (the "no action" clause), relates only to Noteholders' rights as to one another, not CEC. (¶ 246.) The second, Section 1103, addresses the rights and responsibilities of *the Trustee* (again, not CEC) in the event of a partial redemption. (¶ 247.) Neither provides a basis to conclude that an implied term required exit consents to be offered to all noteholders, much less that such an implied term was "so interwoven into the" 2006 Indenture "as to be necessary for effectuation of [its] purposes[.]" *See Capmark Bank*, 2013 WL 1294519, at *12. Moreover, Plaintiffs do not (and cannot) show that such an implied term could co-exist with the express provision of the 2006 Indenture providing for amendments to change and remove provisions (including to the Guarantee) with the support of a only a majority in principal of non-affiliated Notes. (¶ 29); *see Hartford Fire Ins.*, 723 F. Supp. at 991-92; *In re Solutia, Inc.*, 2007 WL 1302609, at *13.

Finally, Plaintiffs cite three cases for the proposition that, "to comply with the duty of good faith and fair dealing," an issuer must offer the terms of any exit consent "transaction to *all* noteholders" (Pl. Br. at 29), but none of these cases recognizes such an implied obligation. *Whitebox Convertible Arbitrage Partners, L.P.* v. *World Airways, Inc.*, 2006 WL 358270 (N.D. Ga. Feb. 15, 2006), involved allegations that a partial redemption violated an indenture's "equal treatment" covenant that expressly required pro-rata treatment in such a transaction. *Id.* at *2-3. In both *Kass* v. *Eastern Airlines, Inc.*, 1986 WL 13008, at *4-5 (Del. Ch. Nov. 14, 1986), and *Katz* v. *Oak Industries Inc.,* 508 A.2d 873, 881 (Del. Ch. 1986), the court *rejected* good faith claims aimed at enjoining exchange offers conditioned on exit consents.

CONCLUSION

For the reasons set forth above and in related briefs, the Court should deny Plaintiffs' motion for partial summary judgment and grant CEC summary judgment on all of Plaintiffs' claims.

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