**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

**REPLY MEMORANDUM OF LAW OF CAESARS ENTERTAINMENT CORPORATION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Caesars Entertainment Corporation ("CEC") submits this memorandum of law in further support of its motion for summary judgment. CEC incorporates by reference its moving and reply memoranda in support of its motions for summary judgment in *BOKF, N.A.* v. *Caesars Entertainment Corp.*, No. 15 Civ. 1561 (S.D.N.Y.), *UMB Bank, N.A.* v. *Caesars Entertainment Corp.*, No. 15 Civ. 4634 (S.D.N.Y.), and *Wilmington Trust N.A.* v. *Caesars Entm't Corp.*, No. 15 Civ. 8280 (S.D.N.Y.). Capitalized terms used herein have the same meaning as in CEC's motion for summary judgment ("CEC Br.") and in its opposition to Plaintiffs' motions for summary judgment ("CEC Opp.").

## PRELIMINARY STATEMENT

CEC showed in its moving brief that the Guarantee was validly terminated no later than August 2014 in accordance with the 2006 Indenture, which expressly permits amendments to the Indenture by vote of holders of a majority of the 2016 Notes, and in compliance with the TIA. In particular, CEC showed that, contrary to the allegations in Plaintiffs' complaints, (1) the Guarantee is not an "Indenture Security" under the TIA, and thus the termination of the Guarantee did not violate the statute; (2) likewise, the Guarantee is not a "core term" of the Indenture; (3) Plaintiffs have not proffered evidence of standing or damages under the TIA; and (4) the August 2014 Transaction was undertaken in compliance with the Indenture, and the consents obtained from holders of a majority of 2016 Notes not held by CEOC or its affiliates were sufficient to amend the Indenture to terminate the Guarantee. Plaintiffs' opposition shows no disputed issues of fact that preclude summary judgment for CEC.

## ARGUMENT

### I. CEC Is Entitled to Summary Judgment on Plaintiffs' TIA Claims

CEC showed in its moving papers that it is entitled to summary judgment on Plaintiffs' claims under the TIA (*Trilogy* Count Three and *Danner* Count Two) because (i) under the traditional (and, CEC submits, correct) interpretation of the TIA Section 316(b), the statute prohibits only non-consensual changes to the "core terms" of an indenture or impairment of a noteholder's right to sue for payment, and, based on the undisputed facts, the Guarantee was not a "core term" and its removal did not violate the statute; (ii) contrary to Plaintiffs' assertions, the Guarantee is not itself an "indenture security" under the TIA such that its removal is prohibited by the statute; and (iii) Plaintiffs have failed to establish either standing or compensable damages under the statute. (CEC Br. at 10–18.) Plaintiffs' opposition does not defeat this showing.

CEC also showed in its moving papers that it is entitled to summary judgment on Plaintiffs' TIA claims because there was no out-of-court "reorganization" under the standard previously adopted by this Court. Plaintiffs' response (Pl. Opp. at 5 n.7), merely incorporates the arguments that the plaintiffs in *BOKF* and *UMB* proffered on this point. CEC responded to those arguments in its reply brief in those cases. (*See BOKF/UMB* Reply at 2–13.)

### A. The Guarantee Is Not an "Indenture Security" Under the TIA

Plaintiffs argue that the Guarantee is itself an "indenture security" under the TIA, and that consequently the Guarantee may not be terminated even if such termination is permitted by the Indenture. (Pl. Opp. at 5–9.) Plaintiffs cite no case holding that a guarantee is an indenture security under the TIA or a security under the securities laws, and their argument is contrary to the case law, including the Supreme Court's authoritative analysis of the meaning of "security" in *Reves* v. *Ernst & Young*, 494 U.S. 56, 66-67 (1990), and the district court's decision construing the TIA in *Marblegate Asset Management LLC* v. *Education Management Corp.* ("*Marblegate I*"), 75 F. Supp. 3d 592 (S.D.N.Y. 2014). (CEC Br. at 15-17; CEC Opp. at 17-21.)

As discussed in CEC's opening brief, the Supreme Court has held that determining whether an instrument is a "security" under the Securities Act of 1933 (adopted by reference in the TIA, *see* 15 U.S.C. § 77ccc(1)) and the Securities Exchange Act of 1934 requires a fact-specific analysis focusing on the instrument's "economic reality." *United Hous. Found., Inc*. v. *Forman*, 421 U.S. 837, 848 (1975); *see also Reves*, 494 U.S. at 66–67. Under that analysis, the Guarantee—which was not bought, sold, or marketed independent of the underlying 2016 Notes, and for which no independent consideration was sought or received (Plaintiffs' Responses to CEC's 56.1 Statement of Material Facts ("Pl. 56.1 R") ¶ 7)—is not a separate and independent security or investment instrument, but merely a contingent contractual right of holders of the 2016 Notes.

Plaintiffs make no effort to apply the *Reves* standards to the Guarantee. Instead, Plaintiffs attempt to avoid *Reves* on the ground that it did not involve bond guarantees (Pl. Opp. at 7), but they do not and cannot dispute that *Reves* is binding precedent on what constitutes a "security" under the securities laws—the issue in controversy here. Plaintiffs also assert that *Reves* "supports the treatment of an instrument as a 'security' so long as the instrument at issue was issued for 'investment' purposes." (*Id*. at 7 n.9.) But Plaintiffs cite no evidence that the Guarantee was an independent "instrument" or that CEC issued the Guarantee for "investment purposes." On the contrary, the Guarantee could not be bought or sold apart from the 2016 Notes of which it was a term, as Plaintiffs concede (Pl. 56.1 R ¶ 7), and was no more a separate investment instrument than any other provision of the 2006 Indenture.

Plaintiffs attempt to distinguish the cases cited in CEC's opening brief that have held that guarantees are not independent securities (CEC Br. at 16–17; *see also* CEC Opp. at 18) on the ground that those cases "hold simply that a guarantee should not be deemed a 'security' where the underlying obligation does not qualify as a 'security'" under the securities laws. (Pl. Opp. at 7–8.) But that is not the reasoning of those cases. Rather, the courts concluded that the guarantees at issue were not securities after reviewing their economic nature, including in particular that the guarantees—like the Guarantee here—were "not an investment," *Coan* v. *Bell*

*Atl. Sys. Leasing Int'l, Inc.*, 813 F. Supp. 929, 935 (D. Conn. 1990), and "were neither sold, nor marketed, and could not have been purchased apart from the bonds," *Haberman* v. *Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1048 (Wash. 1987). It is immaterial whether, as Plaintiffs contend (Pl. Opp. at 8), a guarantee can in other circumstances be a security, because the Guarantee here does not carry the indicia of a security under *Reves*. Plaintiffs' reliance on dicta in *Banco de la República de Colombia* v. *Bank of N.Y. Mellon*, No. 10 Civ. 536 (AKH), 2013 WL 3871419, at *6 (S.D.N.Y. July 26, 2013), that a guarantee "can be" a security (Pl. Opp. at 8) is similarly inapposite, because that case did not analyze the application of the *Reves* factors to a particular guarantee, much less a guarantee analogous to the one here. (*See* CEC Opp. at 19.)

Plaintiffs' assertion that *Reves* and the other cases cited in CEC's opening brief can be disregarded because the "statutory language is clear on its face" (Pl. Opp. at 7), proves too much and is inconsistent with *Reves* itself. The statutory language Plaintiffs cite, Section 2 of the Securities Act of 1933 (which the TIA incorporates by reference), broadly defines the term "security" as "any note, stock, treasury stock, security future, security-based swap, bond, debenture, [or] evidence of indebtedness . . . or . . . guarantee of . . . any of the foregoing." 15 U.S.C. § 77b(a)(1). Yet, as *Reves* makes clear, not every instrument that is labelled a "note," "stock," or "bond" or that represents "evidence of indebtedness" is a "security" under the securities laws. *Reves*, 494 U.S. at 65–66 (citing examples where a "note" is not a "security"). Rather, under *Reves* and its progeny, it is the economic nature of an instrument, not its label, which determines whether it is a "security." Here, as discussed above, as an economic matter the Guarantee was a component of the 2016 Notes, not itself an investable or tradeable "security." Plaintiffs' reliance both on a provision of the TIA defining "obligor" to include a guarantor and on an SEC rule concerning a guarantor's disclosure obligations (Pl. Opp. at 6–7), is misplaced for the same reasons.

Finally, Plaintiffs attempt to distinguish *Marblegate I* on the purported ground that that case "involved no amendment of the indenture governing the plaintiffs' unsecured notes," but involved only "the release of a parent guarantee pursuant to terms already included in the indenture (as opposed to an amendment of the indenture to strip the guarantee)." (Pl. Opp. at 9.) These assertions misread *Marblegate*. The defendants there purported to eliminate the parent guarantee by two independent means, one of which involved the removal of the guarantee by a vote of the majority (but not all) of the noteholders under Section 9.02 of the governing indenture. *Marblegate I*, 75 F. Supp.3d at 597, 601 n.6, 610. The court expressly stated that the guarantee might properly be terminated by non-unanimous noteholder consent in accordance with Section 9.02 without implicating TIA Section 316(b), including "where the Noteholders determined that it impaired flexibility and bargained it away . . . ." *Id*. at 615. The court found not that termination of a guarantee by non-unanimous noteholder consent per se violates Section 316(b), but that the plaintiffs demonstrated a likelihood of success on the merits in that case because the guarantee was terminated as part of a broader restructuring of the issuer's debt pursuant to a Restructuring Support Agreement with certain of its creditors, including the simultaneous transfer, for no consideration flowing to the nonconsenting noteholders, of all of the issuer's assets. *Id*. at 601, 615–16; *see also MeehanCombs Global Credit Opportunities Funds, LP* v. *Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 516 (S.D.N.Y. 2015) (removal of guarantee by non-unanimous noteholder vote could violate TIA when part of an alleged "plan" to "push CEOC into bankruptcy"); *Federated Strategic Income Fund* v. *Mechala Grp. Jam. Ltd.*, No. 99 Civ. 10517, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999) (removal of guarantees by non-unanimous noteholder consent violated the TIA when coupled with the "simultaneous disposition of all meaningful assets" of the issuer).

### B. The Guarantee is Not a "Core Term"

For similar reasons, Plaintiffs' argument that the Guarantee is a "core term" of the 2006 Indenture, such that its termination would be a per se violation of the TIA (Pl. Opp. at 9–13), is wrong as a matter of law. (*See also* CEC Br. at 11–14; CEC Opp. at 21–25.)

Plaintiffs cite no case in which a court has deemed a guarantee a "core term" that cannot be terminated even if the termination is permitted by the governing indenture. Plaintiffs contend that *UPIC & Co*. v. *Kinder-Care Learning Centers, Inc*., 793 F. Supp. 448 (S.D.N.Y. 1992), and *YRC Worldwide Inc*. v. *Deutsche Bank Tr. Co. Americas*, No. 10 Civ. 2106, 2010 WL 2680336 (D. Kan. July. 1, 2010) (cited in CEC's moving brief (CEC Br. at 11–12)), support their position because the courts held in those cases that the TIA was violated by provisions that were distinct from those pertaining to the payment of principal and interest when due. (Pl. Opp. at 10–11.) But neither court addressed guarantees of repayment by parties other than the issuer, and Plaintiffs' argument does not accurately describe those cases. In *UPIC*, the court held that the elimination of the noteholders' rights to require the issuer to repurchase their notes following an interest reset violated the TIA. *UPIC*, 793 F. Supp. at 459–60. Contrary to Plaintiffs' assertion that the challenged provision "was distinct from those governing the issuer's obligations to make principal and interest payments" (Pl. Opp. at 10), the court held that the statute was violated precisely because the payment of principal pursuant to the repurchase option was, "for purposes of classifying the repurchase obligation, no different than payment of principal 'when due'" under the TIA. *UPIC*, 793 F. Supp. at 456. Plaintiffs' reliance on the *UPIC* court's statement that a "core term" of the indenture is "one affecting a securityholder's right to receive payment" of principal or interest when due, (Pl. Opp. at 10 (citing *UPIC*, 793 F. Supp. at 452)) is misplaced because termination of the Guarantee here did not affect any noteholder's "right" to receive payment on the 2016 Notes. (*See BOKF/UMB* Br. at 23–24.)

Likewise, in *YRC*, the court, in reliance on *UPIC*, held that the statute prohibited deletion of a provision of the indenture requiring the issuer to repurchase notes at the election of noteholders on specified "Purchase Dates" because "those dates represent 'due dates' on which the holders have the right to receive payment of the principal, such that TIA § 316(b) applies to require unanimous consent to the removal of that right." *YRC*, 2010 WL 2680336 at *5. The mention in *dicta* that a separate challenged amendment of the indenture did not affect the noteholders' rights against guarantors was merely one in a list of facts to which the court pointed in distinguishing that case from *Federated*, and does not suggest that the court would have reached a different result if the guarantee in that case had been terminated in accordance with the indenture. *Id*. at *7.

Plaintiffs' reliance on *Marblegate*, *Federated*, and the prior decisions of the Court in these matters is misplaced for similar reasons. As shown in CEC's moving brief, there would have been no need for each court to grapple with whether the issuer in each case was undergoing a debt reorganization or debt restructuring if, as plaintiffs contend, the guarantees were "core terms" of the indentures such that terminating them was a per se violation of the TIA. (CEC Br. at 11–14.) In each case, the court held that the TIA was violated (or might have been), not by termination of the guarantee alone, but by termination of the guarantee coupled with transactions that allegedly rendered the issuer incapable of repaying the notes at issue. *See supra* at 5.

Finally, Plaintiffs' argument that market usage should be disregarded because, they contend, "the language of the Indenture is clear and unambiguous" (Pl. Opp. at 12–13) is misguided. Irrespective of the language of the 2006 Indenture, the undisputed evidence shows that the market has long understood "core terms" under the *TIA* to mean those governing maturity date, interest, and principal amount, not guarantees. (CEC Br. at 13–14.) Plaintiffs offer no contrary evidence. Evidence of how market practitioners have long understood the TIA is directly relevant to how the statute should be construed. And, as discussed in CEC's opening brief, the statute should not be construed to disrupt these settled understandings by "condemn[ing] widespread market practice." *Marblegate I*, 75 F. Supp. 3d at 612 n.14.

**C. Plaintiffs Fail to Show Standing or Damages Under the TIA**

CEC showed that Plaintiffs lack standing under the TIA as to at least some of their claims, because Plaintiffs purchased some of their 2016 Notes after the alleged violations occurred. (*See* CEC Br. at 17–18; *see BOKF/UMB* Br. at 29, citing, among other cases, *Bluebird Partners L.P.* v. *First Fidelity Bank, N.A. New Jersey*, 85 F.3d 970, 974 (2d Cir. 1996).)

Plaintiffs seek to distinguish this authority on the ground that those cases involved claims asserted against an indenture trustee or its agents "by parties that purchased their notes subsequent to the alleged TIA violation." (Pl. Opp. at 14.) But Plaintiffs concede that at least some of their purchases (or those of members of the putative *Danner* class) were made after the alleged violations. (*Id*. at 15.) And there is nothing in the Second Circuit's decision in *Bluebird* to support the narrow reading Plaintiffs urge. On the contrary, the court in that case held that the plaintiff lacked standing because it purchased the bonds at issue after the acts of which it complained took place, and that, as a matter of federal law, "a claim arising under the [TIA] is not automatically assigned to a subsequent purchaser." *Bluebird*, 85 F.3d at 973. The court concluded that such a rule of automatic assignment would be contrary to holdings "that federal securities law claims are not automatically assigned to a subsequent purchaser upon the sale of the underlying security." *Id*. at 974. And it reasoned that

> the policy underlying the [TIA] is contrary to a rule of automatic assignment. The [TIA] creates a uniform scheme of federal regulation to protect those who are injured, . . . including those who have sold their securities at a reduced price after the Act has been violated, not those who subsequently purchase securities at the reduced price.

*Id*. Nothing in the opinion suggests that the Court's broad and unambiguous holding applies only to TIA claims against trustees and not to suits against guarantors.

Plaintiffs' other arguments are irrelevant. Plaintiffs concede that the *Trilogy* plaintiffs purchased all of their 2016 Notes after the 5% Sale in May 2014, and that one of the *Trilogy* plaintiffs and at least some members of the putative *Danner* class purchased 2016 Notes after the August 2014 Transaction. (Pl. Opp. at 14–16.) Their argument that they have standing to sue under the TIA on the 2016 Notes that they purchased before the challenged transactions does not defeat CEC's motion, which is addressed to the claims based on purchases made *after* the transactions. Likewise, their argument that they have standing to sue under the 2006 Indenture (*id*. at 15–16), is irrelevant to whether they have standing to sue under the TIA.

Similarly irrelevant is Plaintiffs' response to CEC's showing that they have not proffered evidence showing any out-of-pocket damages, and that they therefore cannot show damages under the TIA. (CEC Br. at 18.) Plaintiffs respond that they are also seeking damages under the Indenture, but that has no bearing on whether they can seek damages under the statute. Plaintiffs' effort to distinguish *Royal Park Investments SA/NV* v. *HSBC Bank USA, NA*, 109 F. Supp. 3d 587, 600 (S.D.N.Y. 2015), in which the court held that TIA Section 323(b) limits damages under the statute to actual damages (Pl. Opp. at 17), is unpersuasive. Plaintiffs appear to contend that Section 323(b) and *Royal Park* apply only to damages claims against an indenture trustee, but nothing in either the statute or the case is so limited. On the contrary, the language of Section 323(b) on which the court in *Royal Park* relied broadly limits Plaintiffs to recovery of "actual damages" in any "suit for damages under the provisions of this subchapter [*i.e.*, the TIA]." 15 U.S.C. § 77www(b). Plaintiffs have not offered any evidence of such actual damages here, and point only to letters to the trustees for the 2016 Notes stating the amount of 2016 Notes held by certain Plaintiffs in October 2014. (*See* Pl. 56.1 R ¶ 87.)

## II. <u>CEC is Entitled to Summary Judgment on Plaintiffs' Contract Claims</u>

CEC showed in its motion that it is entitled to summary judgment on Plaintiffs' claims under the 2006 Indenture on the grounds that (i) the August 2014 Transaction effectively terminated the Guarantee in accordance with Section 902 of the 2006 Indenture; (ii) Plaintiffs' allegation that the transaction violated their alleged "unconditional right to receive principal and interest payments" under Indenture Section 508 is without merit because that provision did not bar an amendment to terminate the Guarantee; (iii) contrary to Plaintiffs' assertions, the August 2014 Transaction was not an improper "redemption"; and (iv) the consents to the amendment given by the participating noteholders in the August 2014 Transaction were effective under Section 902 of the 2006 Indenture because, contrary to Plaintiffs' allegations, CEC neither had beneficial ownership of their 2016 Notes at the time the consents were given nor "effectively controlled" the participating noteholders. (CEC Br. 18–25.) Plaintiffs' response does not show either a disputed issue of fact or undermine the legal basis for CEC's motion.

### A. The Guarantee Is Not a "Security" Under the Indenture

Similar to their argument that the Guarantee was an "indenture security" under the TIA, *see supra* at 2–5, Plaintiffs contend that the Guarantee is a "Security" under the 2006 Indenture and that the termination of the Guarantee wrongfully "impaired" their rights under that "Security." (Pl. Opp. at 17 –20.) As shown in CEC's motion, however, the 2006 Indenture provides that the Guarantee is merely a component of each Note, and not a separate "Security" that cannot be terminated without all noteholders' consent. (CEC Br. at 21–22.) The 2006 Indenture describes "Securities" in the Recitals as the "unsecured debentures, notes, or other evidences of indebtedness (together with the related Guarantees provided by [CEC], the 'Securities')" (Pl. 56.1 R ¶ 14), and further defines "Securities" as "any Securities authenticated and delivered under this Indenture." (*Id.*)

Plaintiffs' contention that the use of the term "together with" in the Recitals means that the Guarantees are themselves "Securities" (Pl. Opp. at 19–20) is contrary to the plain language of the 2006 Indenture. The term "together with," as a matter of plain English, means that the Guarantees are not independent "Securities," but rather that they are a part of the debentures, notes, and other instruments that are issued with them. Plaintiffs' position also would vitiate Sections 902 and 1503 of the 2006 Indenture, which—as Plaintiffs admit—expressly permit the amendment of the 2006 Indenture (Pl. 56.1 R ¶ 10), with no limitation on removing the Guarantee, and the termination of the Guarantee by CEC or CEOC (*see id*. ¶ 5). Plaintiffs' proffered interpretation is thus contrary to New York law that a contract should be interpreted to give effect to each of its provisions. *See LaSalle Bank Nat'l Ass'n* v. *Nomura Asset Capital Corp*., 424 F.3d 195, 206 (2d Cir. 2005) (holding that a "contract should be construed so as to give full meaning and effect to all of its provisions") (citation omitted).

Plaintiffs' argument that the Guarantee is a Security that was "authenticated and delivered" under the 2006 Indenture because it was "endorsed" on the 2016 Notes in accordance with Section 1502 of the 2006 Indenture is equally misplaced. (Pl. Opp. at 20.) Section 1502 provides in relevant part:

> To evidence the Guarantee set forth in Section 1501, the Corporation and the Guarantor hereby agree that a notation of such Guarantee shall be endorsed on each Security authenticated and delivered by the Trustee . . . . The delivery of any Security by the Trustee, after the authentication thereof hereunder, shall constitute due delivery of the Guarantee set forth in this Indenture on behalf of the Guarantor.

Declaration of Philippe Adler (May 10, 2016), ECF Nos. 140, 121, Ex. 7, at 12112. This provision by its terms expressly distinguishes between a "Security" that is "authenticated and delivered" under the 2006 Indenture, and the Guarantee, which is not itself a "Security" but merely a term of the 2006 Indenture a notation of which is endorsed upon the Securities. *Id*.

Were the Guarantee itself deemed a "Security" under the 2006 Indenture, no purpose would be served by Section 1502; rather, the provisions elsewhere in the 2006 Indenture for execution, authentication, and delivery of the "Securities" would be sufficient. *Id*. at 12083–84. *See LaSalle*, 424 F.3d at 206 (noting that "[a]n interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible") (citation omitted).

**B. The August Transaction Was Not an Improper Partial Redemption**

As shown in CEC's moving brief, Plaintiffs' allegation that the August 2014 Transaction constituted an improper redemption in violation of Section 1103 of the 2006 Indenture is contravened by the plain language of the 2006 Indenture and the undisputed facts in the record. (*See* CEC Br. 22–23). As CEC showed there, while Section 1103 and other provisions in Article XI of the 2006 Indenture set forth the means by which 2016 Notes may be redeemed—*i.e*., repurchased before maturity on a mandatory basis at CEOC's election—nothing in that Article or elsewhere in the 2006 Indenture prohibits voluntary transactions between CEC, CEOC, and holders of less than all of the 2016 Notes as occurred here.

Plaintiffs contend that the contractual term "redemption" applies to voluntary transactions as well as mandatory repurchases, but nothing in the 2006 Indenture so specifies, and the authorities on which they rely (*See* Pl. Opp. at 21–22), are inapposite. The court in *In re Quebecor World (USA) Inc*., 719 F.3d 94, 99 (2d Cir. 2013), held only that a "redemption" means the repurchase of a company's own securities, not, as the defendant argued, the purchase of securities of another company. Likewise, *Chesapeake Energy Corp.* v. *Bank of New York Mellon Trust Co., N.A.*, 773 F.3d 110, 116 (2d Cir. 2014), addressed only the timing of a redemption, holding that it occurred when a security is repurchased by the issuer rather than when notice of repurchase is given. Neither case addressed whether the term "redemption" refers only to mandatory repurchases or also to voluntary transactions between an issuer and a group of its noteholders.

As shown in CEC's opening brief, Plaintiffs' argument is inconsistent with Section 309 of the 2006 Indenture, which contemplates voluntary repurchases of 2016 Notes by methods other than a redemption under Article XI. (CEC Br. at 23.) Plaintiffs rely in response on an unpublished opinion from the Northern District of Georgia, *Whitebox Convertible Arbitrage Partners, L.P.* v. *World Airways, Inc.,* No. 04 Civ. 1350, 2006 WL 358270, at *3 (N.D. Ga. Feb. 15, 2006) (cited in Pl. Opp. at 22–23), but that case involved a very different set of facts. There, the issuer engaged in two transactions that together were designed to allow it to reacquire all of the outstanding notes of the same issuance: a private agreement with a select group of bondholders to exchange their bonds for new bonds with improved terms (and some cash), and a simultaneous redemption of the remaining bonds for cash in accordance with the terms of the governing indenture. *Id*. at *1–2. The court held that these simultaneous transactions violated the issuer's duty of good faith and fair dealing by providing different consideration to different groups of noteholders whose bonds were repurchased. *Id*. at *2–3. Here, by contrast, there was no comprehensive redemption of the 2016 Notes. Noteholders that did not participate in the August Transaction did not surrender their 2016 Notes, and retained the same rights as they did before the transaction. *Whitebox* has no bearing here. Finally, to the extent that there is any ambiguity in the meaning of the term "redemption," that ambiguity precludes summary judgment for either party.

### C. The August Transaction Did Not Violate Section 902 of the 2006 Indenture

Plaintiffs allege that the votes of participating noteholders in the August transaction were not effective because CEC or CEOC either beneficially owned the participating noteholders' 2016 Notes at the time of the transaction or "effectively controlled" those noteholders. Consequently, they contend, the August Transactions violated Section 902 of the 2006 Indenture (and the parallel provision in Section 316(a) of the TIA) because the participating noteholders' consents were allegedly invalid. (*Trilogy* Am. Compl. ¶ 134.)

CEC showed in its opening brief, and in its opposition to Plaintiffs' summary judgment motion, that on the undisputed facts CEC is entitled to summary judgment on these claims because (i) the participating noteholders' consents to the August 2014 amendment that terminated the Guarantee were given irrevocably on August 12, 2014, and the purchase of the 2016 Notes did not occur until the closing ten days later; (ii) the consents became effective at the closing, in accordance with standard market practice that has been approved by the courts, and the simultaneous effectiveness of the consents and purchase of the 2016 Notes means that neither CEC nor CEOC owned or controlled the 2016 Notes before the consents became effective; and (iii) the undisputed evidence shows that the participating noteholders, far from being "controlled" by CEC or CEOC, were, on the undisputed facts, independent third parties who engaged in "contentious" negotiations over the transactions. (CEC Br. at 8–9, 2 –25; CEC Opp. 25–28.) (Plaintiffs' response failed to address the third point.)

Plaintiffs' response rests principally on their repeated assertion that "at the point when the Proposed Consents became effective, the Favored Noteholders had been paid, and the Notes had been transferred, first to CEOC and CEC, and then to the Trustee for cancellation." (Pl. Opp. at 24; *see also id.* at 25 ("Plaintiffs base their claim on the fact that, at the time the Proposed Consents became *effective*, the Notes had been transferred to and paid for by Caesars . . . .") (emphasis in original).) But Plaintiffs' assertion does not make it so. The undisputed evidence, including the governing Note Purchase and Support Agreement and Closing Memo, shows that the participating noteholders had *not* been paid, and their 2016 Notes had *not* been transferred, when the consents became effective. (*See* CEC Opp. at 25–28.) Rather, those events happened simultaneously. (*Id.*) Thus, contrary to Plaintiffs' assertion, the exchange had *not* yet occurred when the consents became effective. Moreover, as Plaintiffs concede (Pl. Opp. at 26–27), the consents were delivered "irrevocably" some ten days before the Closing.

Plaintiffs do not address the evidence CEC cited (CEC Br. at 25), showing that this sequence of events is consistent with market practice and has been approved by the courts, and their contention that it is inconsistent with market practice is belied by the evidence that they themselves cite. Plaintiffs rely on a 25-year-old article entitled *A Practitioner's Guide to Exchange Offers and Consent Solicitations*, 24 Loy. L.A. L. Rev. 527, 590 (1991), but that article states, in the paragraph Plaintiffs quote, that a corporation "typically" would time the execution of any supplemental indenture requiring noteholder consents "so that it does not occur after the corporation accepts any Target Securities pursuant to the concurrent Exchange Offer." (Pl. Opp. at 26.) Here, CEC did just that: the supplemental indenture was not executed "after" CEC or CEOC purchased the participating noteholders' 2016 Notes, but simultaneously with that purchase. (*See* CEC Opp. at 25–28.) Plaintiffs also cite provisions of the documents showing, they contend, that the consents could not be withdrawn before the supplemental indenture was executed (Pl. Opp. at 26), but those provisions show only that the consents were given irrevocably well before the closing, and have no bearing on when the consents became effective.

Finally, while, as Plaintiffs note, CEC's opening brief did not include a separate section on Plaintiffs' claims under Section 316(a) of the TIA, that language, as CEC noted (CEC Br. at 6–7), tracks the provisions in the 2006 Indenture requiring that securities held by any "affiliate" of the issuer should be disregarded. Thus, for the same reasons, CEC is entitled to summary judgment on Plaintiffs' claim under Section 316(a).

## III. CEC Remains Entitled to Judgment on the Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing

CEC demonstrated that Plaintiffs impermissibly base their claims for breach of the implied covenant of good faith and fair dealing on the same facts as their contract claims, and seek identical relief. (CEC Br. at 26–28.) Even Plaintiffs concede that "some of the allegations" in those claims "overlap." (Pl. Opp. at 29.) Because Plaintiffs' good faith claims merely duplicate their contract claims, summary judgment is appropriate. (CEC Br. at 26–28.)

Plaintiffs argue that their good faith claims differ from their contract claims because the good faith claims are premised on the theory that all of the 2016 Noteholders should have been offered an "opportunity to participate" in the August 2014 Transaction, but were not. (Pl. Opp. at 28.) But Plaintiffs had no contractual right to participate, *see infra* at 16–17, and by seeking to imply such an unbargained-for right into the 2006 Indenture, their claims impermissibly seek to "frustrate the operation of" unambiguous indenture terms. *Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc.*, 723 F. Supp. 976, 991-92 (S.D.N.Y. 1989) (recognizing that courts disfavor implying duties into bond indentures because of the importance of interpreting them uniformly); *see also Compania Embotelladora Del Pacifico, S.A.* v. *Pepsi Cola Co.*, 650 F. Supp. 2d 314, 324-25 (S.D.N.Y. 2009) (Rakoff, J.) (good faith claims cannot be used to imply "unbargained-for obligations").

Section 902 of the 2006 Indenture provides that the holders of only a *majority* of outstanding 2016 Notes (exclusive of notes held by CEC, CEOC, or their affiliates) are necessary to consent to most 2006 Indenture amendments. (Pl. 56.1 R ¶ 10.) Section 902(1) separately details exceptions to the requirement that holders of *all* "affected" noteholders must consent to an amendment, (*id.* ¶ 11), but none of those specific exceptions apply here. Thus, Sections 902 and 902(1) cannot be read to suggest that all noteholders must be offered an "opportunity" to consent to CEOC's repurchase of any amount of 2016 Notes or to an indenture amendment, like the amendment at issue here, that already has requisite noteholder support. Because Plaintiffs' good faith claim would graft new rights and unbargained-for obligations onto Section 902, it is not permitted under New York law. (*See* CEC Br. at 26–28.)

Plaintiffs also argue that their good faith claims differ from their contract claims because the good faith claims focus on the May 2014 Transactions which, Plaintiffs argue, were "sham transactions" effected solely to release the Guarantee. (Pl. Opp. at 28–29.) Here again, their theory would have the Court override express Indenture language. Plaintiffs argue that an evaluation of whether CEOC became less than "wholly owned" requires an examination of the process by CEOC stock was sold or transferred. (*See id.*) But, as Plaintiffs admit, Section 1503 of the Indenture provides that the Guarantee is released if CEOC "ceases *for any reason* to be a 'wholly owned subsidiary' of" CEC. (Pl. 56.1 R ¶ 5 (emphasis added).) Plaintiffs may not use the implied covenant of good faith to override the phrase "for any reason" in order to challenge the manner in which CEOC became less than "wholly owned." Plaintiffs cite no authority for the assertion that the May 2014 Transactions were "shams" because, they contend, their purpose was to trigger the release of the Guarantee, where, as here, those transactions had significant economic substance. (*BOKF/UMB* Br. at 9–11.)

Finally, Plaintiffs argue that, although their contract and good faith claims seek identical relief, they are not duplicative. Rather, plaintiffs assert that they pleaded those claims as alternative theories of liability. (Pl. Opp. at 30 n.24.) This, too, is wrong. As demonstrated above, Plaintiffs' good faith claims rise and fall on the same allegations and the same Indenture provisions as their contract claims.

**CONCLUSION**

For the reasons set forth above, the Court should grant CEC summary judgment on all of Plaintiffs' claims.

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