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 SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Caesars Entertainment Corporation respectfully submits this memorandum of law in support of its motion for summary judgment on all claims brought by Plaintiffs Trilogy Portfolio Company, LLC, *et al*. and Plaintiff Frederick Barton Danner. As noted in CEC's brief in support of its motion for summary judgment in *BOKF, N.A.* v. *Caesars Entertainment Corp.*, No. 15 Civ. 1561, and *UMB Bank, N.A.* v. *Caesars Entertainment Corp.*, No. 15 Civ. 4634, that brief addresses issues common to all of the Caesars cases before the Court, including the *Trilogy* and *Danner* actions. This brief addresses issues unique to *Trilogy* and *Danner*, and incorporates by reference the statement of facts and arguments on common issues from our *BOKF*/*UMB* brief. Capitalized terms not defined herein are used in accordance with the definitions in that brief.

PRELIMINARY STATEMENT

As in *BOKF* and *UMB*, the claims in these cases can be adjudicated in CEC's favor based on facts that are not in dispute. Plaintiffs hold 6.50% unsecured bonds due 2016 (the "2016 Notes"), issued by CEOC pursuant to an indenture dated June 9, 2006 (the "2006 Indenture"). The 2016 Notes were guaranteed by CEC when issued, but that guarantee was terminated no later than August 2014 as a result of the August 2014 Transaction (if not earlier by the May Transactions discussed in our *BOKF*/*UMB* brief). Plaintiffs assert claims arising out of the August transaction under the 2006 Indenture and Section 316(b) of the TIA.

In our *BOKF*/*UMB* brief, we showed that CEC is entitled to summary judgment on the claims asserted in those cases under Section 316(b) and the respective indentures arising from the May and August transactions. Among other things, we showed in that brief that the CEC guarantee of the secured CEOC notes at issue in those cases were released by virtue of the discharge of CEC's guarantee under the "Existing Notes" provision of the indentures there. As discussed in that brief, the 2016 Notes at issue in this case are among the Existing Notes in the *BOKF*/*UMB* indentures.

Plaintiffs' claims in this case, and the arguments in this brief, focus principally on the validity of the August 2014 Transaction. While CEC believes (and will show if necessary at trial) that CEC's Guarantee on the 2016 Notes was released independently as a result of the May Transactions, because the termination provisions of the 2006 Indenture differ from the parallel provisions of the indentures in BOKF and UMB, we do not seek summary judgment in these actions based upon those transactions. (To avoid any doubt, statements herein that the August 2014 Transaction terminated the Guarantee on the 2016 Notes should be interpreted to mean that it did so if the Guarantee was not already terminated by the May Transactions.)

For reasons given in our *BOKF*/*UMB* brief and other reasons discussed below, CEC is entitled to summary judgment on all of Plaintiffs' claims because the termination of the Guarantee on the 2016 Notes did not violate the TIA or the 2006 Indenture.

CEC Is Entitled to Summary Judgment on Plaintiffs' TIA Claims

First, the traditional interpretation of Section 316(b) prohibits only amendments to "core" payment terms of an indenture—*i.e.*, principal amount, interest rate, and payment dates—or those governing the noteholders' rights to sue for payment (as explained in CEC's motion in *BOKF* and *UMB*). Under that standard, termination of the Guarantee did not violate Section 316(b) because the Guarantee is not a "core term" of the Indenture—a term specifying the principal and interest payment amounts and due dates—and does not govern the noteholders' right to institute suit. The conclusion that the Guarantee was not a "core term" is supported by precedent under the TIA, and the market's settled understanding concerning what constitutes a "core" payment term. Even the cases that have adopted the more expansive interpretation of Section 316(b) have never concluded that a guarantee of debt is a "core term." That conclusion is also supported by the Indenture itself, which allows for non-unanimous amendments of provisions of the agreement, including the Guarantee provision, but not of payment terms.

Second, even under the broader interpretation of Section 316(b) previously adopted in these and the related actions before the Court, CEC is entitled to summary judgment because the August 2014 Transaction did not constitute an out-of-court debt "reorganization."

Third, contrary to arguments Plaintiffs previously made, the Guarantee is not a "security" under the TIA, such that termination of the Guarantee impaired their rights to payment in violation of Section 316(b). As the cases recognize, a guarantee is not a security where, as here, it is merely a contingent contractual right of noteholders, not a separate investment instrument that was independently sold, marketed, or available for purchase.

Finally, as in *BOKF* and *UMB*, CEC is also entitled to summary judgment on Plaintiffs' TIA claims because Plaintiffs have failed to demonstrate standing under the statute and, separately, have failed to demonstrate that they incurred any "actual damages" arising from the conduct they challenge.

CEC is Entitled to Summary Judgment on Plaintiffs' Claims Under the Indentures

The Court should also grant summary judgment to CEC on Plaintiffs' remaining claims.

First, 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 notes. While the 2006 Indenture precludes amending specifically identified payment terms without unanimous consent, nothing in that instrument prohibits an amendment by majority vote to eliminate the Guarantee. Plaintiffs have previously argued that Section 508 of the indenture—which provides that the right of Noteholders to receive payment is "absolute and unconditional"—overrides any provision of the agreement permitting release of the Guarantee, but as Judge Scheindlin previously held, Section 508 does not preclude

releasing the Guarantee. Finally, Plaintiffs' claim that the Guarantee is itself a "Security" under the 2006 Indenture that cannot be released is contrary to the relevant language.

Second, Plaintiffs' claims that the August 2014 transaction constituted an improper "redemption" under the 2006 Indenture and that the third party noteholders who participated in the transaction somehow became CEC or CEOC "affiliates," thereby rendering their consents to terminate the Guarantee invalid, are also without merit. The August 2014 Transaction was not a "redemption" under the 2006 Indenture, but a voluntary transaction with a limited set of third party noteholders, and the noteholders' consents to terminate the Guarantee were valid and consistent with the requirements of the 2006 Indenture. Judge Scheindlin previously dismissed the *Trilogy* Plaintiffs' claim that the participating noteholders were CEC or CEOC "affiliates." *See MeehanCombs Global Credit Opps. Master Fund, LP* v. *CEC* ("*MeehanCombs I*"), 80 F. Supp. 3d 507, 516–17 (S.D.N.Y. 2015) (noting that the complaint did "not allege that the Participating Noteholders were anything other than unaffiliated, independent third parties that entered into an arm's length transaction to provide their consents") (quotation marks omitted). And while the Court granted Plaintiffs leave to replead, their amended complaint adds no facts that change this conclusion.

Finally, as with BOKF and UMB, Plaintiffs assert claims for declaratory judgment and breach of the implied covenant of good faith and fair dealing. These claims are deficient for the same reasons explained as to BOKF and UMB's claims—namely, that the declaratory judgment claims are wrong on the merits and duplicative of affirmatively pled claims for relief, and that the implied covenant claims are duplicative of Plaintiffs' contract claims.

STATEMENT OF FACTS

The facts relevant to this motion are set forth in the accompanying Rule 56.1 Statement of Undisputed Material Facts (cited as "¶ __"). Certain documents cited herein are attached to the accompanying declaration of Philippe Adler ("Adler Decl.").

I. The 2006 Indenture and the Guarantee

As with the indentures governing the other CEOC notes at issue in these and the related actions before the Court, the 2006 Indenture sets forth in detail the rights and obligations of CEC, CEOC, the noteholders (including Plaintiffs), and the trustees for the noteholders. Article XV, in particular, governs the Parent Guarantee and provides among other things for automatic termination of that Guarantee if certain conditions are satisfied. (¶¶ 4–6.)

The specified bases for the automatic release and structure of the provision differ from those in the indentures governing the notes at issue in the *BOKF*, *UMB*, and *Wilmington Trust* actions in two principal respects. *First*, Section 1503 of the 2006 Indenture provides that "[CEC] shall be released from all of its obligations under the Guarantee with respect to Securities of any series and under this Indenture if" one of three conditions is satisfied, including if "[CEOC] ceases for any reason to be a 'wholly owned subsidiary' of [CEC] (as such term is defined in Rule 1-02(z) of the Regulation S-X promulgated by the SEC)." (¶ 5.) That Rule (now codified at 17 C.F.R. § 210.1-02(aa)) defines a "wholly owned subsidiary" as a subsidiary "substantially all" of whose voting stock is owned by a parent. (¶ 6.) This differs from the corresponding definition found in the indentures at issue in the *BOKF*, *UMB*, and *Wilmington Trust* actions, which specify that CEOC ceases to be CEC's "Wholly Owned Subsidiary" when it is no longer 100% owned by CEC. As noted above, CEC maintains that the Guarantee was released following one or both of two transactions in May 2014 through which CEC's ownership of CEOC's stock was reduced to 89%, but CEC does not seek summary judgment on this basis.

Second, the release conditions in Section 1503 of the 2006 Indenture are separated by the word "or" rather than "and," (¶ 5), and there is no dispute that if CEOC ceased to be CEC's "wholly owned subsidiary" pursuant to Regulation S-X, CEC's Guarantee on the 2016 Notes would be automatically released. Because CEC does not seek summary judgment here on the basis of Section 1503 of the 2006 Indenture, this distinction is immaterial to disposition of CEC's motion, but will be relevant if these actions proceed to trial.

The relevant provisions of the 2006 Indenture are summarized below.

A. Provisions Governing Amendments to the Indenture

The 2006 Indenture permits the Guarantee to be terminated by a majority vote of holders of the 2016 Notes. In particular, Section 902 provides that CEC, CEOC, and the trustee may supplement the 2006 Indenture—following agreement with holders of a majority of the notes—"for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture." (¶ 10.) Section 902(1) specifies limited exceptions to this amendment right, including prohibiting non-unanimous amendments to change the maturity of payments, reduce principal or interest, or "impair the right to institute suit for the enforcement" of payment after maturity. (¶ 11.) Section 902(1), however, does not refer to or prohibit an amendment to the Guarantee provisions. (*Id.*)

The 2006 Indenture separately specifies that, when calculating the "Outstanding" 2016 Notes for purposes of determining a majority vote to amend the instrument, any 2016 Notes owned by an "Affiliate" of CEC or CEOC shall be disregarded. (¶ 10.) An "Affiliate" is defined 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." (*Id.*) These provisions track Section 316(a) of the TIA, 15 U.S.C. § 77ppp(a).

Other provisions of the 2006 Indenture indicate that CEOC was to be the principal source of recovery for the noteholders—not CEC—and are thus consistent with the provisions permitting CEC's Guarantee to be terminated without the unanimous consent of all noteholders. For example, the indenture restricts CEOC's ability to issue stock, incur further debt, sell assets, grant liens, issue dividends, and to declare bankruptcy. (¶¶ 20–25.) Violation of any of these provisions could result in a default under the terms of the Indenture. (*Id.*) CEC is not similarly restricted, and the indenture does not prevent CEC from taking actions—for example, contributing all of its assets to an affiliate—that might hinder its ability to satisfy any Guarantee obligations. (*See id.*) Even a CEC bankruptcy is not a default under the indenture. (¶ 20.)

B. Section 508 and the Definition of a "Security" Under the Indenture

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." (¶ 13.) Like Section 902(1), Section 508 does not refer to the Guarantee provisions. (*See id.*)

The Indenture describes "Securities" as the "unsecured debentures, notes, or other evidences of indebtedness (*together with* the related guarantees provided by [CEC], the 'Securities')." (¶ 14 (emphasis added).) It further provides that the term "Securities" "more particularly means any securities authenticated and delivered under this Indenture." (*Id.*)

C. Provisions Governing "Redemptions" Under the Indenture

Article XI sets forth the process for undertaking a "redemption" of the 2016 Notes. (¶ 16.) To redeem the 2016 Notes, CEOC must provide an "election" that is "evidenced by a Board Resolution or in another manner specified," followed by notice to the indenture trustee, at least 45 days before the date of the redemption, stating the "principal amount of

Securities of such series to be redeemed and, if applicable, of the tenor of the Securities to be redeemed." (¶¶ 17–18.) In the event CEOC redeems less than all of the 2016 Notes, the 2006 Indenture provides that the trustee shall select a method that it "shall deem fair and appropriate and which may provide for the selection for redemption" of the particular 2016 Notes to be redeemed. (¶ 19.)

II. <u>Termination of the Guarantee in August 2014</u>

As explained in CEC's *BOKF*/*UMB* brief, CEC's Guarantee on the 2016 Notes was terminated in connection with the August 2014 Transaction (if, contrary to fact, it was not already terminated by the May 2014 transactions), when holders of a majority of the 2016 Notes agreed to a supplement to the 2006 Indenture removing the provisions relating to the guarantee. On August 12, 2014, the participating noteholders, CEOC, and CEC entered into a Note Purchase and Support Agreement, pursuant to which they authorized and delivered consents to amendments to the 2006 Indenture. (¶¶ 63, 69.) From that date through the closing of the deal on August 22, the steps that were taken were all contemplated by that Agreement. (¶¶ 66–69, 75–78.) These steps included providing additional evidence of consent through letters from Cede & Co., the holder of record, stating that, pursuant to consents received from beneficial holders of a majority of the notes, stating that "the holder of record of the [2016 Notes] hereby consents to the amendments to the Indenture." (¶ 75.) The 2016 Notes were not sold to CEC and CEOC until the closing, ten days after the consents were delivered. (¶¶ 63, 69, 78.) This process was consistent with Section 904 of the 2006 Indenture, which states that consents remain in place until closing: "Until an amendment or waiver becomes effective, a consent to it by a Holder of a Security . . . is a continuing consent by the Holder." (¶ 12.)

The undisputed facts show that the noteholders that participated in the August 2014 Transaction were independent entities represented by their own counsel who approached

CEC and CEOC about the transaction. (¶ 61–62.) The participating noteholders' counsel described the process leading to the transaction as a [redacted] (¶ 62.)

III. Plaintiffs' Claims

Based on the allegations in their complaints, Plaintiffs assert four categories of claims. *First*, Plaintiffs allege that the Release Transactions violated Section 316(b) of the TIA, (Trilogy Count Three; Danner Count Two). *Second*, Plaintiffs assert contract claims alleging breaches of the 2016 Notes Indenture for (a) CEC failing to honor its obligations under the Guarantee (Trilogy Count Nine; Danner Count Six); (b) amending the 2016 Notes Indenture to remove the Guarantee provisions (Trilogy Count Four; Danner Count Three); (c) an alleged improper redemption of the 2016 Notes (Trilogy Count Five; Danner Count Four); and (d) allegedly owning the 2016 Notes of the participating noteholders, or controlling them and their votes, before the August Transaction closed (Trilogy Counts Four, Six and Seven). *Third*, Plaintiffs ask the Court to enter declaratory judgments stating that the Guarantee remains in effect (Trilogy Counts One and Two; Danner Count One). *Finally*, Plaintiffs allege breach of the implied duty of good faith and fair dealing (Trilogy Count Eight; Danner Count Five).

ARGUMENT

CEC is entitled to summary judgment on all claims in these cases. *First*, CEC is entitled to summary judgment on Plaintiffs' claims under Section 316(b), whether the Court interprets that provision (as we respectfully submit it should) in accordance with how it has traditionally been interpreted or in accordance with the standard adopted by the Court in *BOKF N.A.* v. *Caesars Entm't Corp.* ("*BOKF I*"), Nos. 15 Civ. 1561, 15 Civ. 4634, 2015 WL 5076785 (S.D.N.Y. Aug. 27, 2015). *Second*, CEC is entitled to summary judgment on Plaintiffs' contract claims because the Guarantee in the 2006 Indenture was terminated no later than August 2014 by the August 2014 Transaction (if not earlier), in accordance with the provisions governing

amendments to the agreement. *Third*, as in the case of BOKF and UMB's declaratory judgment claims, the valid removal of the Guarantee from the 2006 Indenture compels entry of judgment in favor of CEC on Plaintiffs' declaratory judgment claims. *Finally*, Plaintiffs' implied covenant of good faith and fair dealing claims are duplicative of their contract claims and are therefore deficient as a matter of law.

I. CEC is Entitled to Summary Judgment on Plaintiffs' TIA Claims (Trilogy Count Three; Danner Count Two)

As explained in CEC's motion for summary judgment in *BOKF* and *UMB*, Section 316(b) of the TIA (as traditionally and properly understood) merely protects noteholders from changes without their consent to "core" payment terms that affect their legal rights to principal and interest, and their standing to bring suit to collect upon such claims. It does not prohibit actions that may affect noteholders' "practical ability" to receive payment, whether undertaken as part of an out-of-court debt "reorganization" or otherwise. Under this standard, CEC is entitled to summary judgment because the Guarantee was not a "core term" of the 2006 Indenture—*i.e.*, a term specifying the principal, interest, and payment dates—and because there is no dispute that Plaintiffs retain their right to bring suit to assert claims for payment on the notes. Even under the more expansive interpretation of the statute previously adopted in these actions, CEC is entitled to summary judgment because the August 2014 Transaction did not constitute an "out-of-court reorganization." And the contention that the *Trilogy* Plaintiffs have previously advanced—that the Guarantee could not be terminated because it is in and of itself a "security" under the TIA—is incorrect as a matter of law.

Finally, CEC is entitled to summary judgment because—as in *BOKF* and *UMB*—there is no evidence that the Plaintiffs have standing under the TIA or that they have incurred any "actual damages" as a result of any alleged conduct by CEC, as the statute requires.

A. The Amendment Removing the Guarantee from the Indenture Did Not Violate the TIA Because the Guarantee is Not a "Core Term"

As set forth in CEC's summary judgment brief in *BOKF* and *UMB*, the Court should follow the traditional interpretation of TIA Section 316(b), under which the statute prohibits non-consensual changes only to the core terms of an indenture or impairments of noteholders' rights to sue for payment. Based on the undisputed material facts, the Guarantee was not a "core term" of the 2006 Indenture and its removal did not violate Section 316(b).

The courts have consistently identified the "core terms" of an indenture as those that set forth the principal, the calculation of interest, and the dates on which payments are due. *See UPIC & Co.* v. *Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 452 (S.D.N.Y. 1992) (describing "core term" as "one affecting a securityholder's right to receive payment of the principal of or interest on the indenture security on the due dates for such payments"); *Bank of N.Y.* v. *First Millennium, Inc.*, 607 F.3d 905, 917 (2d Cir. 2010) (stating that Section 316(b) "prohibit[s] majority bondholders from collusively agreeing to modify the bond's payment terms"); *see also* Coffee & Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. Chi. L. Rev. 1207, 1224–25 & n.54 (1991) (defining "core" terms as "provisions relating to interest, principal, and maturity"); Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. Cal. L. Rev. 1035, 1054 (2011) (describing "core provisions" as those governing "maturity date, interest, [and] principal amount"); Gadsden, *Introduction to the Annotated Trust Indenture Act*, 67 Bus. Law. 979, 1146 (Aug. 2012) (Section 316(b) prohibits "an indenture from allowing 'majority actions' to modify core terms of the indenture such as the payment of principal or interest"); Shuster, *The Trust Indenture Act and International Debt Restructurings*, 14 Am. Bankr. Inst. L. Rev. 431, 434 (2006) ("The amount and timing of principal and interest due . . . may not be changed without

the consent of the individual bondholder, but virtually any other provision of an indenture may be changed by the vote of a group of bondholders (often a simple majority.)").

Thus, as discussed at greater length in our *BOKF/UMB* summary judgment brief, modifications to indenture provisions other than those setting forth these payment terms do not violate Section 316(b), even where the modifications could affect noteholders' ability to receive payment. *See YRC Worldwide Inc.* v. *Educ. Loan Trust IV*, No. 10 Civ. 2106, 2010 WL 2680336, at *7 (D. Kan. Jul. 1, 2010) (removal of provision prohibiting issuer from transferring substantially all of its assets); *Greylock Global Opp. Master Fund Ltd.* v. *Province of Mendoza*, No. 04 Civ. 7643, 2005 WL 289723, at *4 (S.D.N.Y. Feb. 8, 2005) (removal of protective covenants and sovereign immunity waiver); *Schallitz* v. *Starrett Corp.*, 82 N.Y.S.2d 89, 91 (N.Y. Sup. Ct. 1948) (removal of provisions requiring subsidiaries to remit profits to issuer).

Neither Judge Scheindlin's previous opinions nor the decisions upon which those opinions rely hold that a guarantee is a "core term" of an indenture. To the contrary, the Court in *Marblegate* held that a guarantee can be "bargained . . . away" without violating the TIA and recognized that "releases of guarantees through automatic or majority-vote provisions are commonplace in the bond market . . . ." *Marblegate Asset Mgmt.* v. *Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592, 612 n.14, 615–16 (S.D.N.Y. 2014). The *Marblegate* Court sought to avoid creating a standard that would require it "to condemn widespread market practice," *id*. at 612 n.14, by adopting a test under which the TIA could be violated where a transaction included "modifications [that] effect an involuntary debt restructuring." *Id*. at 614. But the court nowhere suggested that a guarantee by itself was a "core term" that could not be amended without the consent of all noteholders; on the contrary, it emphasized that there could be contexts in which the clauses in the indenture at issue allowing for the release of the parent guarantee "would be invoked without implicating Section 316(b)." *Id.* at 615; *see also Federated Strategic Income*

Fund v. *Mechala Group Jamaica Ltd.*, No. 99 Civ. 10517, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999) (holding that removal of guarantee violated the TIA when coupled with "simultaneous disposition of all meaningful assets").

The Court's denial of CEC's motion to dismiss in these actions also does not hold that a guarantee is a "core term." That decision held that the August 2014 Transaction, as alleged in the plaintiffs' complaints, was "an impermissible out-of-court debt restructuring achieved through collective action" and "exactly what TIA section 316(b) is designed to prevent." *MeehanCombs I*, 80 F. Supp. 3d at 516. But the Court reached its conclusion relying on the plaintiffs' allegations that the transaction was part of a supposed "plan" "to push CEOC into bankruptcy while protecting [CEC's private equity sponsors] from CEOC's creditors," *id.* at 511, not because a guarantee cannot be terminated by a majority vote of noteholders because it is a "core term."

This is consistent with current market practice and the market's understanding of these decisions, as well. As a White Paper recently issued by 28 leading law firms noted, the market has understood that "'non-core' terms include all terms *other than payment terms*" and that "an amendment to an indenture that releases guarantees" is permissible "when such amendment is allowed by the terms of the indenture with less than a unanimous vote of noteholders" (and now, given the decisions in *Marblegate* and *BOKF I*, when there has not been an out-of-court debt "restructuring"). Adler Decl. Ex. 71 at 2, 4 (emphasis added).

To hold that a guarantee is a "core term" would result in the very "condemn[ation] [of] widespread market practice" that *Marblegate* sought to avoid. Indeed, we know of no workable standard under which a guarantee could be recognized as a core term without subjecting a host of other indenture provisions—such as covenants restricting dividend payments or the incurrence of additional debt, or requiring certain levels of operating results or

net worth—to similar treatment, if they could affect a noteholder's practical ability to receive payment in the same way as amendments terminating guarantee provisions. An expansion of the definition of "core terms" would thus cast significant uncertainty on widely accepted practices of amending such provisions by non-unanimous noteholder vote. *See* Coffee & Klein, *supra*, at 1224–25 ("Although the Trust Indenture Act of 1939 provides that bondholders may not alter certain 'core' provisions of publicly issued debt obligations, bondholders can agree to eliminate other important protective covenants—for example, covenants prohibiting the firm from paying dividends, covenants requiring the firm to maintain a specified net worth, or covenants prohibiting the firm from incurring debt senior in any respect in right of payment to the debt for which the exchange offer is made.") (cited in *Marblegate*, 75 F. Supp. 3d at 615).

Finally, holding that guarantees are among an indenture's core terms would prevent the parties to an indenture from providing for guarantees that are terminable upon the majority vote of the bondholders, and would thus create a substantial disincentive to otherwise beneficial guarantees. This Court should not adopt a rule that would constrain noteholders' investment options in this way.

B. Even Under the More Expansive Interpretation of Section 316(b), the Termination of the Guarantee in the August 2014 Transaction Did Not Constitute an Out-of-Court Debt "Reorganization"

Even under Judge Scheindlin's rulings, the undisputed facts demonstrate that the amendment to the 2006 Indenture completed as part of the August 2014 Transaction does not constitute an out-of-court reorganization, based on the standards outlined in *BOKF I*. As discussed in the *BOKF*/*UMB* brief, the transaction did not result in the "restatement of [CEOC's] assets and liabilities" and did not constitute "talks with creditors in order to make arrangements for maintaining repayments," but, rather, involved negotiations between CEC and representatives acting on behalf of just the four participating noteholders in the August 2014 Transaction—not

negotiations with entities representing anything approximating the full spectrum of CEOC's debt structure. *BOKF/UMB* Br. 24–29. The August 2014 Transaction also did not constitute an "attempt to extend the life of a company facing bankruptcy through special arrangements and restructuring": the Note Purchase and Support Agreement executed as part of the August 2014 Transaction did not concern future creditor recoveries and, in fact, provided that the four participating noteholders would support a *future* "Qualified Solicitation," such as a restructuring proposal, if one was created. *Id*. For these reasons, as well, CEC is entitled to summary judgment on Plaintiffs' TIA claims.

C. The Guarantee is Not a "Security" Under the TIA

Plaintiffs may also contend, as the *Trilogy* Plaintiffs did in their previous motion for summary judgment, that their right to payment has been "impaired" under Section 316(b) because the Guarantee was "in and of itself" an "indenture security" under the statute that could not be removed as part of the August 2014 Transaction without their consent. Motion for Partial Summary Judgment at 9–10, *Trilogy*, ECF No. 70 (Oct. 23, 2015). In denying the *Trilogy* Plaintiffs' motion, the Court did not reach this issue. But the argument is inconsistent with the *Marblegate* opinion, because if the guarantee there had been considered a "security" under the TIA, there would have been no need to focus on whether there had been an out-of-court restructuring. And accepting Plaintiffs' argument would be both contrary and disruptive to widespread market practices for all of the reasons set forth above. Indeed, despite a full round of briefing on the issue, the *Trilogy* Plaintiffs failed to cite a single case in support of their novel theory, and the cases make clear that a guarantee of a "security" does not render the Guarantee a "security." Indeed, the argument is little more than a restatement of the incorrect assertion that the Guarantee was a "core term."

The TIA defines an "indenture security" as "any security issued or issuable under the indenture to be qualified," and "security" as having the same meaning as in the Securities Act of 1933, *see* 15 U.S.C. § 77ccc(1), (11). In examining whether an instrument is a "security" under this definition, "form should be disregarded for substance and the emphasis should be on economic reality." *United Hous. Found., Inc.* v. *Forman*, 421 U.S. 837, 848 (1975) (quotation marks omitted). In determining whether an instrument is a "security," courts "assess the motivations that would prompt a reasonable seller and buyer to enter into [the underlying transaction]"; "examine the plan of distribution of the instrument to determine whether . . . there is common trading for speculation or investment"; "examine the reasonable expectations of the investing public"; and "examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument." *Reves* v. *Ernst & Young*, 494 U.S. 56, 66-67 (1990) (citation and quotation marks omitted) (interpreting the meaning of "securities" under the Securities Exchange Act of 1934 and observing that the definition in the 1933 Act is "virtually identical") (quotation marks omitted). The label the parties assign to an instrument is not determinative. *United Hous. Found.*, 421 U.S. at 848 (rejecting the suggestion that a transaction "evidenced by the sale of shares called 'stock,' must be considered a security transaction simply because the statutory definition of a security includes the words 'any . . . stock'").

Applying the *Reves* principles, "[t]here is little doubt that 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.'" *See 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)). Other courts have held that guarantees of bonds are not independent "securities" where the guarantees "were neither sold, nor marketed, and could not

have been purchased apart from the bonds." *Haberman* v. *Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1048 (Wash. 1987), *amended*, 750 P.2d 254 (Wash. 1988) (affirming dismissal of claim under 1933 Act premised on theory that guarantees of debt otherwise exempt from the act were themselves "securities"); *see also Woods* v. *Homes & Structures of Pittsburg, Kansas, Inc.*, 489 F. Supp. 1270, 1294 (D. Kan. 1980) (same). The same applies here: the Guarantee was a contingent contractual right of holders of the notes, not a separate investment instrument that was independently sold, marketed, or available for purchase. (¶ 7.)

D. Plaintiffs Lack Standing to Sue And Have Failed to Demonstrate Damages Under the TIA

CEC is also independently entitled to summary judgment on Plaintiffs' TIA claims because, like the *BOKF* and *UMB* plaintiffs, Plaintiffs here lack standing to pursue them and have failed to demonstrate damages under the TIA.

Standing. To demonstrate standing under the TIA, Plaintiffs must prove that they (1) held the 2016 Notes when CEC's alleged TIA violation occurred or (2) received an express assignment of such claims from the prior holder. *See* cases cited in *BOKF/UMB* Br. at 29. The undisputed facts show that Plaintiffs lack standing as to some—and in certain cases all—of their TIA claims, irrespective of whether those claims are premised on the August 2014 Transaction or the release of the Guarantee in May 2014 as the result of either or both of the 5% Stock Sale and 6% Stock Transfer. *First*, Trilogy and Relative Value do not have standing to assert a claim based on the 5% Stock Sale, because [redacted]

(¶¶ 26–27.) *Second*, while Trilogy [redacted] it did not hold its entire [redacted] at the time of those events. (¶ 26.) *Third*, even assuming Danner's putative class is certified (and it should not be), that class is defined to include holders who first purchased their 2016 Notes as late as

January 15, 2015, as CEC explained in its opposition to Danner's motion for class certification. *Danner*, No. 14 Civ. 7973, ECF No. 86, at 2, and who therefore lack standing to assert claims based on earlier transactions. *Finally*, there is no evidence that Plaintiffs received an express assignment of TIA claims from prior holders. (¶ 87.) On these facts, CEC is entitled to summary judgment on the portions (or entirety) of Plaintiffs' claims for which they lack standing.

Damages. As explained in CEC's brief in support of its motion for summary judgment in *BOKF* and *UMB*, Plaintiffs must demonstrate "actual damages" under the TIA, meaning "out-of-pocket losses." *BOKF/UMB* Br. at 30. But Plaintiffs have failed to establish that CEC's alleged TIA violations caused them any out-of-pocket losses, nor have they provided a computation of such losses. Even assuming Plaintiffs could establish that CEC's alleged TIA violations (as opposed to CEOC's financial distress or other factors) caused a diminution in the value of their 2016 Notes, the extent of that diminution would be uncertain, particularly because the recovery for holders of the 2016 Notes in CEOC's bankruptcy has yet to be definitively determined. This uncertainty is heightened for the 2016 Notes held by members of Danner's putative class, who could have purchased at a range of prices between June 9, 2006 (the date of issuance) and January 15, 2015.

II. CEC is Entitled to Summary Judgment on Plaintiffs' Contract Claims

Based on the undisputed facts, CEC is also entitled to summary judgment on all of Plaintiffs' contract claims. *First*, the 2006 Indenture was effectively amended in accordance with Section 902 of the 2006 Indenture to remove the Guarantee provisions, thus eliminating any claim based on CEC's purported Guarantee obligations. *Second*, Section 508's provision of an "unconditional" right to payment does not override that power to amend the indenture. *Third*, there is no factual basis for Plaintiffs' unsupported allegations that CEOC's purchase of certain

2016 Notes in the August 2014 Transaction from consenting Noteholders constituted an "improper redemption" in violation of the indenture. *Finally*, the undisputed facts demonstrate that the holders of the 2016 Notes who voted to amend the indenture were not affiliates of CEOC, nor controlled by CEOC, thus entitling CEC to entry of judgment on the alleged improper affiliate voting claims.

A. CEC is Entitled to Summary Judgment on Contract Claims Related to the Guarantee Because that Provision, and CEC's Obligations Under it, Were Validly Terminated (Trilogy Count Nine; Danner Count Six)

As described above, in connection with the August 2014 Transaction, a majority of the holders of the 2016 Notes adopted a supplemental indenture providing that "Article XV of the Indenture is hereby deleted in its entirety. CEC shall have no further obligations under the Indenture and the Notes." (¶ 76.) This action was authorized by Section 902 of the Indenture, which provides that CEC, CEOC, and the relevant trustee may supplement the Indenture, following agreement with holders of a majority of the 2016 Notes, "for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture." (¶ 10.) Although Section 902(1) prohibits amendments of payment terms by majority consent, it does not prohibit amendments to the Guarantee provisions. (¶ 11.) CEC thus had no remaining Guarantee obligation it could breach, and is entitled to judgment on Plaintiffs' claims.

B. Section 508 of the Indenture Does Not Bar an Amendment to Remove the Guarantee (Trilogy Count Four; Danner Count Three)

Plaintiffs' allegations that CEC breached Section 508 of the Indenture by violating their purported "unconditional right to receive principal and interest payments" (*Trilogy* Am. Compl. ¶ 144) are without merit. Section 508 of the 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 principal and interest on the notes. (¶ 13.) Properly understood based on governing New York law, that provision does not bar an amendment to release the Parent Guarantee.

In denying Plaintiffs' earlier motions for summary judgment, Judge Scheindlin correctly concluded that the release of the Guarantee on the 2016 Notes through the sale and distribution of CEOC stock in accordance with the release provisions in Section 1503 did not constitute a breach of Section 508. *MeehanCombs Global Credit Opps. Master Fund, LP* v. *CEC* ("*MeehanCombs II*"), Nos. 14 Civ. 7091, 14 Civ. 7973, 2015 WL 9478240 (S.D.N.Y. Dec. 29, 2015). Plaintiffs sought partial summary judgment on the theory that the August 2014 Transaction violated the TIA and argued on that motion that the May 2014 transactions could not have separately released the Guarantee under Section 1503, because that provision was supposedly trumped by the language of Section 508. Motion for Partial Summary Judgment, *Trilogy*, ECF No. 70, at 11–12 (Oct. 23, 2015).

The Court disagreed, holding that Section 508 supersedes only "*conflicting* contract terms," *MeehanCombs II*, 2015 WL 9478240, at *5–6 (emphasis added; quotation marks omitted), and that because Section 1503 of the Indenture "explicitly permits the removal of the Guarantee," reading Section 508 to override the release provision would render it a nullity, in contravention of established New York law concerning contractual interpretation. *Id*. at *6; *see also LaSalle Bank Nat'l Ass'n* v. *Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) ("[I]nterpretation . . . that has the effect of rendering at least one clause superfluous or meaningless . . . will be avoided if possible.") (quotation marks omitted). The Court also rejected the contention that the reference in Section 508 to an "absolute and unconditional" right to payment precludes the release of the Guarantee—holding that "a guarantee release provision does not conflict with a guarantee providing an 'absolute and unconditional' right to payment,"

and that the "unconditional" nature of the Guarantee means only that, following an event of default, Plaintiffs could seek recovery directly from CEC rather than having to first exhaust their remedies against CEOC. *MeehanCombs II*, 2015 WL 9478240, at *6–7.

The rationale of that holding applies equally to the amendment of the 2006 Indenture in the August 2014 Transaction: The fact that the release was terminated by means of a vote allowed by the indenture, rather than by unilateral action by CEC pursuant to Section 1503, is irrelevant. As with Section 1503, there is no conflict between Section 902 and Section 508. Section 508 provides an unconditional right "to receive payment of the principal and any premium and . . . interest on such Security . . . and to institute suit for the enforcement of any such payment." (¶ 13.) Section 902(1), by its terms, expressly excludes from the majority's power the ability to amend corresponding terms:

> [to] change the Stated Maturity of the principal of, any installment of principal of or interest on, any Security, or reduce the principal amount thereof or the rate of interest thereon or any premium payable upon the redemption thereof, or reduce the amount of the principal of [a Security] which would be due and payable upon a declaration of acceleration of the Maturity thereof pursuant to Section 502 . . . , or impair the right to institute suit for the enforcement of any such payment on or after the Stated Maturity thereof (or, in the case of redemption, on or after the Redemption Date).

(¶ 11.) In other words, Section 902's authorization to amend the Indenture expressly carves out the very same rights protected by Section 508. CEC's Guarantee, however, is not mentioned in either Section 508 or Section 902. (¶¶ 10–11, 13.) CEC and the majority holders of the 2016 Notes were thus well within their rights to remove the Guarantee under the indenture.

The *Trilogy* Plaintiffs have also previously argued that the termination of the Guarantee violated Section 508 because the Guarantee is itself an independent "security" under the terms of the indenture, but that contention is wrong as a matter of the plain language of the

contract. For one, the 2006 Indenture describes "Securities" as the "unsecured debentures, notes, or other evidences of indebtedness (*together with* the related Guarantees provided by [CEC], the 'Securities')," (¶ 14) (emphasis added)—indicating that the Guarantee is merely a component of each "Security"—*i.e.*, each Note. *Cf. Gibson* v. *City of Kirkland*, 433 F. App'x 539, 541 (9th Cir. 2011) (where Washington statute permitted liquidated damages "together with" attorneys' fees, the "together with" language "implie[d] attorneys' fees must be awarded 'in union with' liquidated damages as a single remedy, and not by themselves"); *Hinshaw* v. *M-C-M Props., LLC*, 450 S.W.3d 823, 827 (Mo. Ct. App. 2014) ("The description of both easements in the same sentence connected by the phrase 'together with' indicates the intent to convey related, and not independent, easements."). Moreover, the 2006 Indenture elsewhere specifies that the term "securities" means "more particularly . . . any Securities authenticated and delivered under this Indenture." (¶ 14.) But as the indenture indicates, the Guarantee was not separately "authenticated and delivered"; instead, only the 2016 Notes were "authenticated and delivered," and they were endorsed to evidence the Guarantee. (¶ 9.)

C. The August 2014 Transaction Was Not an Improper Redemption (Trilogy Count Five; Danner Count Four)

Plaintiffs' claims that the August 2014 Transaction constituted an improper redemption is contravened by the plain language of the Indenture and the undisputed facts in the record. CEC is thus also entitled to summary judgment on that claim. (Judge Scheindlin previously denied CEC's motion to dismiss this claim, but she did so without any substantive discussion or analysis. *MeehanCombs I*, 80 F. Supp. 3d at 520. In light of the undisputed facts developed during discovery, the claim is now appropriate for resolution on summary judgment.)

Plaintiffs contend that the August 2014 Transaction violated Section 1103 of the Indenture, which requires that, if "less than all of the Securities of any series are to be

redeemed," the trustee should select the 2016 Notes for redemption by a method that it deems "fair and appropriate." (¶ 19.) But that provision imposes no *affirmative* obligation; it merely specifies the process for a partial redemption *if* one takes place.

"In ordinary corporate parlance," a "redemption" is defined as "a corporation's contractual right to *compel* holders of a certain class of securities . . . to return or exchange them for cash or property." *Heine* v. *The Signal Cos.*, No. 74 Civ. 3036, 1977 WL 436077 (S.D.N.Y. Mar. 4, 1977) (emphasis added); *see also Concord Real Estate CDO 2006-1* v. *Bank of Am. N.A.*, 996 A.2d 324, 334–36 (Del. Ch. 2010) (holding that under New York law payment for outstanding notes to willing sellers is not a redemption). Consistent with that definition, Article XI of the 2016 Indenture describes a process for *mandatory* redemption of the 2016 Notes at CEOC's election. (¶¶ 16–18.) As part of that process, Section 1103 specifies the means by which the securities to be redeemed are selected by the Trustee. Nothing in Section 1103 or elsewhere in Article XI precludes CEOC from undertaking a voluntary exchange or purchase of Notes with consenting noteholders, or requires that Section 1103 applies to such a voluntary transaction. Indeed, the 2006 Indenture contemplates such voluntary repurchases by methods *other* than an Article XI redemption. (*See* ¶ 15 (authorizing CEOC "at any time [to] deliver to the Trustee for cancellation any Securities previously authenticated and delivered hereunder which [CEOC] may have acquired *in any manner whatsoever*") (emphasis added).) Because no redemption occurred under Article XI, there was no obligation to follow the procedures specified in Section 1103.

D. CEC is Entitled to Summary Judgment on All Claims Related to Execution of the August Transaction (Trilogy Counts Four, Six, and Seven)

Several of Plaintiffs' claims depend upon (unsupported) allegations that the votes by the participating noteholders in the August 2014 Transaction were not effective because CEC

or CEOC either "had beneficial ownership" of the participating noteholders' 2016 Notes at the time of the vote or "effectively controlled" those noteholders. (*See, e.g.*, *Trilogy* Am. Compl. ¶ 167.) These contentions are incorrect, as shown by the undisputed facts, and the corresponding claims should be dismissed. The Court previously held that the plaintiffs' allegations in their original complaint were insufficient to demonstrate that CEC or CEOC either owned or controlled the participating holders' notes. *MeehanCombs I,* 80 F. Supp. 3d at 517. The amended complaint does not allege any new facts that should change the Court's analysis or call its conclusion into question.

First, as discussed above, the record shows that the participating noteholders owned their 2016 Notes at the time they voted to approve the supplemental indentures. *See supra* 8–9. Their consents to the amendment were authorized and delivered when the Note Purchase and Support Agreement was signed on August 12, 2014, and the Notes were not purchased until the closing ten days later. (¶¶ 63, 69, 78.)

Second, Plaintiffs' allegations that the participating noteholders were "controlled" by CEC or CEOC are unsupported by the evidence. The undisputed evidence shows that the noteholders' consents and their entry into the Note Purchase and Support Agreement followed several months of negotiations among the noteholders—represented by their own counsel—CEC, and CEOC. (¶¶ 61–62.) The participating noteholders' own counsel described the process as a [REDACTED] (¶ 62.) Plaintiffs' allegations that the participating noteholders were somehow "controlled" because they voluntarily agreed to the terms of the Note Purchase and Support Agreement makes no sense. Indeed, the undisputed facts are that those noteholders entered into their consents *at the same time* as that Agreement (¶ 69), and there is no evidence of any control by CEC or CEOC before execution of both that Agreement and the consents on August 12, 2014.

Finally, the sequence of the August 2014 Transaction—in particular, that the noteholders delivered their consents prior to and only effective upon closing—were appropriate and consistent with market practice. It is routine in tender offers or exchange offers for the owners of a security to deliver their consents in response to an invitation on one date, and for the acquirer to close the acquisition by purchasing the securities on a date shortly thereafter (once a requisite majority is reached.) *Federated Bond Fund* v. *ShopKo Stores, Inc.*, No. 05 Civ. 9923, 2006 WL 3378696, at *1 (S.D.N.Y. Nov. 17, 2006). This practice is sometimes referred to as using "exit consents." *Gradient Oc Master Ltd.* v. *NBC Universal Inc.*, 930 A.2d 104, 121–22 (Del. Ch. 2007); *see also* Section 9.4 of the ABA Revised Model Simplified Indenture, Adler Decl. Ex. 73, at cmt. 1 (consents "may be used . . . until a given date or when joined in by the holders of a given percentage of Securities"). And courts have long accepted such practices. *See, e.g.*, *Federated Bond Fund*, 2006 WL 3378696, at *1; *Gradient* 930 A.2d at 121–22; *Cantor Fitzgerald, L.P.* v. *Cantor*, No. CA 18101, 2001 WL 1456494, at *8-9 (Del. Ch. Nov. 5, 2001); *In re Marriott Hotel Props. Ltd. P'ship Unitholders Litig.*, No. CA 14961, 2000 WL 128875, at *19 (Del. Ch. Jan. 24, 2000); *Katz* v. *Oak Indus.*, 508 A.2d 873, 881 (Del. Ch. 1986).

III. CEC is Entitled to Summary Judgment on Plaintiffs' Claims for Declaratory Judgment (Trilogy Counts One and Two; Danner Count One)

CEC is also entitled to summary judgment on Plaintiffs' declaratory judgment claims. Plaintiffs seek declarations that: (1) the Guarantee remains in full force and effect and (2) the supplemental indentures are void *ab initio*. (*Trilogy* Am. Compl. ¶¶ 119, 129; *Danner* Compl. ¶ 76.) The substance of each of these requests is addressed above, *see supra* Sections I & II, and CEC is entitled to judgment on the declaratory judgment claims for those same reasons. Furthermore, these claims seek relief that is duplicative of the relief sought by Plaintiffs' affirmative claims, and under the law described in CEC's brief in support its motion for

summary judgment in *BOKF* and *UMB*, judgment should be entered on this basis as well. *BOKF/UMB* Br. at 36–37.

IV. CEC is Entitled to Judgment on the Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing (Trilogy Count Eight; Danner Count Five)

Plaintiffs' alleged claims for breach of good faith and fair dealing are duplicative of their contract claims, in both the alleged wrongful conduct and the relief sought by Plaintiffs. Summary judgment on these claims is therefore appropriate.

In order to "simultaneously plead breach of contract and implied covenant claims under New York law, a plaintiff must allege an implied duty that is consistent with the express contractual terms, but base its implied covenant theory on allegations that are distinct from the factual predicate for its contract claims." *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, 2009 WL 321222, at *5 (S.D.N.Y. Feb. 9, 2009). As the chart below demonstrates, Plaintiffs fail in this regard—basing their implied covenant claims on the same allegations at issue on their contract claims. (Plaintiffs previously represented to the Court that their implied covenant claims concerned only the 2014 transactions, *Trilogy*, ECF Nos. 111, 112; *Danner* ECF No. 106, and thus we address only the allegations relating to those transactions.)

The Trilogy Plaintiffs' Allegations in Support of Their Implied Covenant Claim	**Corresponding Allegations Pled in Support of Contract Claims**
The August Transaction was not made available to "numerous individual investor noteholders who possess no practical means of engaging in separate discussions or transactions on a one-off basis." (*Trilogy* Amended Compl. ¶¶ 177(a), 178(a).)	Trilogy Amended Compl. ¶ 147; *see also id.* ¶ 146.
The amendment of the indenture in which the Parent Guarantee was removed resulted from buying votes and "empty voting." (*Id.* ¶ 178(a)–(b).)	*Id.* ¶¶ 146–47.
The August Transaction was an effort "to avoid the Covenants Against Fundamental Changes" in the indenture. (*Id.* ¶ 177(c).)	*Id.* ¶ 149.

The August Transaction thwarted the requirement in the indenture that shares be selected for redemption using a "fair and appropriate" process. (*Id.* ¶ 177(d).)	*Id.* ¶¶ 154–55.
The August Transaction thwarted the "mandate that no one or more bondholder shall affect, disturb or prejudice the rights of any other bondholder, nor obtain a priority or preference over any other bondholder." (*Id.* ¶ 177(e).)	*Id.* ¶ 169.
In the August Transaction, Caesars improperly directed the voting, even though it would have been unable to vote itself under the indenture. (*Id.* ¶ 178(c).)	*Id.* ¶¶ 167–68.
The Danner's Allegations in Support of His Implied Covenant Claim	**Corresponding Allegations Pled in Support of Contract Claims**
The August Transaction thwarted the requirement in the Indenture that shares be selected for redemption using a "fair and appropriate" process. (*Danner* Amended Complaint ¶ 103(d).)	Danner Amended Compl. ¶¶ 94–95.
The August Transaction was not made available to all noteholders but instead was negotiated "in secret" with select noteholders. (*Id.* ¶ 106.)	*Id.* ¶¶ 95–96.
In connection with the August Transaction Caesars "disregarded Section 902 of the 2016 Notes Indenture" by presenting the offer to less than 100% of the noteholders. (*Id.* ¶ 104(a).)	*Id.* ¶¶ 87–89.

Courts routinely dismiss good faith claims where, as here, "the conduct alleged is exactly the same as the charge of the express breach of contract claim, not a different set of facts from those underlying a claim for breach of contract." *Fleisher* v. *Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 300 (S.D.N.Y. 2012) (quotation marks omitted).

Furthermore, the relief sought by Plaintiffs for these claims is indistinguishable from the relief sought by their contract claims. As relief for CEC's alleged breach of good faith and fair dealing, Plaintiffs seek declaratory relief and the "benefit of their bargain." (*Trilogy* Am. Compl. ¶¶ 179–80; *Danner* Compl. ¶¶ 107–08.) *The exact same relief* is sought by

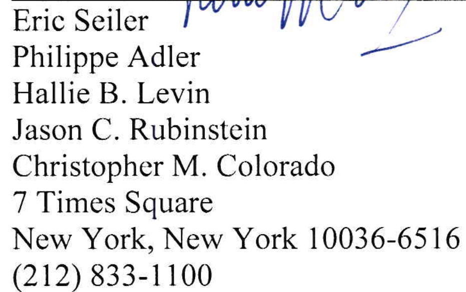
Plaintiffs' declaratory judgment and contract claims. (*Trilogy* Compl. ¶¶ 151, 157, 164, 174, 189; *Danner* Compl. ¶¶ 91, 98.) This provides an independent basis for summary judgment: "Under New York law, claims for breach of the implied covenant of good faith which seek to recover damages that are intrinsically tied to the damages allegedly resulting from the breach of contract must be dismissed as redundant." *ARI and Co., Inc.* v. *Regent Intern. Corp.*, 273 F. Supp. 2d 518, 523 (S.D.N.Y. 2003); *see Alter* v. *Bogoricin*, No. 97 Civ. 0662, 1997 WL 691332, at *8 (S.D.N.Y. Nov. 6, 1997) (dismissing implied covenant claim where "the relief sought by plaintiff is intrinsically tied to the damages allegedly resulting from the breach of contract") (quotation marks omitted).

CONCLUSION

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

Dated: New York, New York
May 10, 2016

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: 

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