UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOKF, N.A., solely in its capacity as successor Indenture Trustee for the 12.75% Second-Priority Senior Secured Notes due 2018, **Plaintiff,** **v.** **CAESARS ENTERTAINMENT CORPORATION,** **Defendant.**	**Case No. 1:15-cv-01561 (SAS)**
UMB BANK, N.A. solely in its capacity as Indenture Trustee under those certain indentures, dated as of June 10, 2009, governing Caesars Entertainment Operating Company, Inc.'s 11.25% Notes due 2017; dated as of February 14, 2012, governing Caesars Entertainment Operating Company, Inc.'s 8.5% Senior Secured Notes due 2020; dated as of August 22, 2012, governing Caesars Entertainment Operating Company, Inc.'s 9% Senior Secured Notes due 2020; dated as of February 15, 2013, governing Caesars Entertainment Operating Company, Inc.'s 9% Senior Secured Notes due 2020, **Plaintiff,** **v.** **CAESARS ENTERTAINMENT CORPORATION,** **Defendant.**	**Case No. 1:15-cv-04634 (SAS)**

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs in the above-captioned Actions[1] respectfully submit this memorandum of law in support of their Fed. R. Civ. P. Rule 56 Motion for Partial Summary Judgment on Counts I through IV of the BOKF Complaint [*BOKF* ECF No. 1] and Counts I, III, IV, and V of the UMB Complaint [*UMB* ECF No. 1], for breach of contract; and on Count V of the BOKF Complaint and Count II of the UMB Complaint for violation of the Trust Indenture Act ("TIA")[2] against Defendant Caesars Entertainment Corporation ("CEC").

PRELIMINARY STATEMENT

The material facts in this case are not disputed: CEC admits that faced with a financially troubled CEOC, CEC devised and implemented a plan—which it called a "strategic plan to maximize value"—comprising a series of transactions designed to postpone CEOC defaults and bankruptcy by, among other things, restructuring and modifying various assets and liabilities and negotiating with creditors in hopes of "deleveraging" CEOC to the point where it could sustain its debt load. This plan involved not only restructuring the obligations of CEOC, but also shielding CEC from having to perform under its guarantee of CEOC's debt. There are only two issues the Court needs to resolve, and both are questions of law: whether CEC's "strategic plan to maximize value" is a "restructuring" within the meaning of the TIA, and whether the purported release of the guarantee was ineffective given the unambiguous language of the indentures governing the

[1] *BOKF, N.A. v. Caesars Entertainment Corporation*, Case No. 1:15-cv-01561-SAS (the "*BOKF* Action") and *UMB Bank, N.A. v. Caesars Entertainment Corporation,* Case No. 1:15-cv-04634-SAS (the "*UMB* Action"), are referred to collectively as the "Trustee Actions." For convenience, references to court filings will be to those made in the *BOKF* Action, cited as *BOKF* ECF No. ____.

[2] The "TIA" refers to the Trust Indenture Act, 15 U.S.C. §§77aaa-77bbbb (1939). References to TIA section 316(b) will be to "Section 316(b)." Count V of the BOKF Complaint and Count II of the UMB Complaint are referred to collectively as the "TIA Counts."

Notes (the "Indentures"). As demonstrated below, the answer to both is yes. Accordingly, the Trustees are entitled to summary judgment.

SUMMARY STATEMENT OF UNDISPUTED FACTS[3]

Plaintiffs are the trustees of the Indentures, pursuant to which CEOC issued approximately $7 billion in Notes. SMF ¶¶ 1, 3. CEC, the parent company of CEOC, "irrevocably and unconditionally" guaranteed the obligations arising under the Indentures until the Notes were paid in full, whether at maturity, by acceleration, by redemption or otherwise (the "Parent Guarantee" or "Guarantee"). *Id.* ¶¶ 5-8. The Parent Guarantee could be released upon meeting certain specified conditions: (i) CEOC ceased to be a wholly owned subsidiary of CEC; (ii) CEOC transferred all of its assets to, or merged with, another entity that assumed its obligations under the Indentures; ***and*** (iii) CEOC defeased or discharged its obligations under the Indentures. *Id.* ¶ 15. The Parent Guarantee also could be released by CEOC's election upon the release or discharge of CEC's guarantee of certain of CEOC's other notes, including the notes implicated in the Individual Actions, defined *infra*. *Id.* ¶ 16.

The Indentures are qualified under and governed by the TIA. *Id.* ¶ 11. To the extent any provision in the Indentures "limits, qualifies, or conflicts with the duties imposed by, or with another provision . . . included in the Indenture[s] by operation of Sections 310 to 318 of the TIA, inclusive, such imposed duties or incorporated provision shall control." *Id.* ¶ 12. Impairment prohibited by Section 316(b) constitutes an independent and express breach of § 6.07 of the Indentures. *Id.* ¶ 10. CEOC's commencement of bankruptcy proceedings is an immediate event

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[3] The Trustees' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 (the "SMF"), filed contemporaneously herewith and cited herein, is a more complete statement of all material undisputed facts. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the SMF.

of default under the Indentures that automatically accelerates all obligations thereunder. SMF ¶¶ 13, 14. CEC's denial or disaffirmance of the Parent Guarantee constitutes an independent breach of the Indentures and matures into an event of default unless cured within 10 days. *Id.* ¶ 14.

A. CEC Contemplates a Restructuring as CEOC Teeters on the Brink of Bankruptcy Due to Liquidity, Covenant, and Maturity Pressures.

In January 2008, Apollo Global Management, LLC ("Apollo"), TPG Capital, LP ("TPG"), and their respective affiliates and co-investors (collectively, the "Sponsors") acquired CEC in a $30.7 billion leveraged buyout transaction, funded through the issuance of approximately $24 billion in debt; approximately $19.7 billion of that debt was secured by liens on substantially all of CEOC's assets. *Id.* ¶¶ 18, 19. At the time the Notes were issued, CEC operated through two primary groups of wholly owned subsidiaries: (i) CEOC, which held all of the operating assets subject to the Noteholders' liens; and (ii) a group of six subsidiaries financed by commercial mortgage-backed securities. *Id.* ¶ 20. At all times relevant here, the Sponsors, through CEC, controlled CEOC's corporate actions. *Id.* ¶¶ 21-24.

By early 2014, CEOC was teetering on the brink of defaults and bankruptcy due to liquidity, maturity, and covenant pressures. *Id.* ¶ 30. By then, CEC had guaranteed almost $17.5 billion of CEOC's debt, and the possibility of having to satisfy claims under those guarantees was considered to be a threat to CEC's equity value. *Id.* ¶¶ 26, 42, 43.

Since the 2008 leveraged buyout, CEOC remained "highly leveraged." *Id.* ¶¶ 25, 27. Due to significant business challenges, including the recession and increased competition in the gaming industry, CEOC's revenues plummeted as its debt load increased, causing CEOC's leverage to reach 19.7, which was unanticipated at the time of the leveraged buyout. *Id.* ¶¶ 27, 28. CEOC's annual interest expense alone increased to nearly $2 billion, far in excess of its EBITDA. *Id.* ¶ 29, 33. As a result, CEOC began experiencing negative cash flow in excess of $1 billion per year. *Id.*

¶¶ 31-37. [redacted]. SMF ¶¶ 38-40.

By early 2014, CEC began contemplating a restructuring after concluding that CEOC would be unable to pay its long-term maturities as they became due and that urgent action was needed to avoid defaults. *Id.* ¶¶ 35, 36, 37, 41.

B. CEC Develops a "Strategic Plan to Maximize Value" that Comprises "Extending the Runway" for CEOC and then Reducing CEOC Debts Through Creditor Negotiations.

As early as late 2013, CEC management had begun discussing a "CEOC Plan" (the "Plan") to "proactively" address liquidity, maturity, and covenant pressures. *Id.* ¶¶ 42-44. CEC viewed addressing these pressures as "a first priority . . . needed . . . to continue to move forward" and referred to it as "extending the runway." *Id.* ¶¶ 45, 46. Thereafter, the Plan contemplated a reduction of total outstanding debt through debt-for-debt or debt-for-equity exchanges with creditors. *Id.* ¶ 47. CEC's management characterized the Plan as a "strategic plan to maximize value." *Id.* ¶ 47.

CEC described the Plan in its December 2013 Regulatory Discussion Materials as involving four steps: (1) asset sales to improve liquidity and ease covenant pressure; (2) the sale of up to 25% of CEOC equity to both remove CEC's Parent Guarantee of CEOC's debt, thereby "mitigat[ing] any threat to equity value at [CEC]," and to disperse CEOC stock to create equity currency that could be used for future debt-for-equity exchanges with creditors; (3) amendments to existing CEOC debt agreements to obtain covenant relief; and (4) debt exchanges and debt-for-equity transactions with creditors to reduce CEOC's debt load and leverage. *Id.* ¶¶ 48-55. Thus, as early as December 2013, CEC identified the removal of its guarantee of CEOC's debt as a part of its "CEOC Plan." SMF ¶ 55.

CEC completed the first step of the Plan—asset sales—by April 2014. *Id.* ¶ 83. The asset sales were designed to bolster liquidity and also provide covenant relief by accumulating cash on CEOC's balance sheet. *Id.* ¶¶ 56-60. The assets (which included valuable intellectual property) were sold to newly formed CEC affiliates that were controlled by the Sponsors, yet were outside of the reach of CEOC's creditors. *Id.* ¶¶ 61-76. This was done so that Caesars could continue to control the assets, "maintain upside," and even have the ability to call the assets back in the future, presumably once the restructuring was complete. *Id.* ¶ 58.

C. CEC Hires Blackstone's Restructuring Advisory Group And Outlines Next Steps of the Plan with Blackstone's Help; Stripping the Parent Guarantee is Key to the Plan.

In March 2014, CEC engaged the Restructuring Advisory Group of Blackstone Advisory Partners L.P. ("Blackstone"), headed by an experienced restructuring professional, Michael Genereux, who had been talking to Caesars' creditors about Caesars "for years." *Id.* ¶¶ 77-82. Consistent with its name, the Restructuring Advisory Group "focuses on restructurings" and works with companies that, like CEOC, need help with their balance sheets. *Id.* ¶ 77. While the scope of Blackstone's engagement was initially described as advice regarding "certain financial and strategic alternatives," the scope was amended as of May 7, 2014, to expressly include restructuring and reorganization services. *Id.* ¶ 82.

As of April 21, 2014, with the first step of the Plan (the asset sales) "complete," the "[n]ext steps" included selling CEOC equity "to increase flexibility and release the parent guarantee," amending CEOC's bank credit facility, and engaging in debt-for-debt or debt-for-equity exchanges with creditors. *Id.* ¶ 83. On that same date, Blackstone's Restructuring Advisory Group and CEC's counsel presented for CEC Board approval an "integrated series of transactions" that CEC would undertake to "help implement [an] overall strategic plan by providing additional runway for

CEOC." SMF ¶¶ 84-85. These transactions included: (1) the sale by CEC of some CEOC stock it held; (2) obtaining a new term loan to refinance certain CEOC obligations (the "B-7 Refinancing"); (3) the amendment of covenants in CEOC's bank credit agreement; and (4) the redemption of CEOC's obligations maturing in 2015 (the "2015 Maturities") using the proceeds of the B-7 Refinancing. *Id.* ¶ 86.

The April 21 Blackstone and counsel presentations highlighted a number of rationales for the first component of the Plan: the equity sale. *Id.* ¶¶ 87-97. First, the equity sale was designed to strip the Parent Guarantee under § 12.02(c) of the Indentures in order to: (a) improve CEC's equity value by preventing CEOC's creditors from recovering from CEC by virtue of the Guarantee; (b) enable the B-7 Refinancing by providing enhanced credit support for the lenders; and (c) improve Caesars' position for negotiations with creditors to be undertaken as the final part of its plan by impairing the creditors' ability to recover and depressing CEOC debt trading prices. *Id.* ¶¶ 87-96. In addition, CEC asserts that the equity sale was designed to create a potential trading market for CEOC stock, which could then be used as currency in the same creditor negotiations. *Id.* ¶ 97. To further advance these purported goals, an additional distribution of CEOC stock to management also was contemplated. *Id.*

However, given CEOC's dismal financial condition at the time, its stock was worthless. *Id.* ¶¶ 98-99, 143. Indeed, Blackstone could not arrive at a positive value for CEOC stock using any "traditional methodologies." *Id.* ¶ 100. To overcome this, Caesars planned to seek out potential buyers with ulterior motives to purchase the worthless stock, such as pre-existing holders of CEC stock who stood to gain from an increase in CEC stock value as a result of the removal of the Parent Guarantee. *Id.* ¶ 101. Although CEC had much to gain from releasing the Parent Guarantee and had contemplated the release for years, *id.* ¶¶ 87-90, CEC contended that the B-7

Refinancing lenders required the release of the Parent Guarantee. SMF ¶¶ 91-92. Through the B-7 Refinancing, CEOC would borrow $1.75 billion to refinance the 2015 Maturities, and seek consent of the B-7 Refinancing lenders to amend CEOC's credit agreements to, among other things, relax the covenants CEOC was at risk of breaching, convert CEC's guarantee of CEOC's bank debt from a guarantee of payment to a guarantee of collection, and cap the amount of CEOC debt subject to CEC's guarantee at $2.9 billion. *Id.* ¶¶ 102-103. CEC asserts that stripping the Parent Guarantee was indispensable to raising capital to pay off 2015 Maturities and amend the covenants as a part of the B-7 Refinancing, thereby extending CEOC's runway. *Id.* ¶¶ 115, 116.

D. The May 2014 Transaction.

On May 6, 2014, CEC announced CEOC's plan to issue B-7 Refinancing term loans under the first lien credit agreement (the "Credit Agreement") and to use the net proceeds to refinance the 2015 Maturities and existing term loans. *Id.* ¶ 105. CEC simultaneously asserted that on May 5, 2014, CEC's Parent Guarantee of the Notes (as well as other CEOC existing debt) had been automatically terminated after CEC sold 5% of CEOC common stock to three institutional investors[4] at a price of $90,306 per share (the "5% Stock Sale," and together with the B-7 Refinancing, the "May 2014 Transaction") because, it contended, CEOC was no longer a wholly owned subsidiary pursuant to § 12.02(c)(i) of the Indentures. *Id.* ¶¶ 117, 124. CEC has admitted that neither of the other conditions to the release of the Parent Guarantee—§§ 12.02(c)(ii) and (iii)—has occurred.[5] *Id.* ¶ 125.

Two of the three purchasers of CEOC stock (Paulson and Scoggin) in the 5% Stock Sale

[4] The three purchasers of CEOC stock as part of the 5% Stock Sale were: Paulson & Co., Inc. ("Paulson"), Scoggin Capital Management LLC ("Scoggin"), and Chatham Asset Management, LLC ("Chatham"). SMF ¶ 118.

[5] CEC's current position is that those conditions need not be met because the "and" joining the three conditions in § 12.02(c) means "or."

already held millions in CEC stock, as contemplated by the April 21, 2014 presentations. SMF ¶¶ 118-121. The third buyer (Chatham) held troubled CEOC debt, which CEOC repurchased from it at a premium using over $400 million from the proceeds of the B-7 Refinancing. *Id.* ¶ 122. Proceeds of the B-7 Refinancing also were used to pre-pay at a premium approximately $450 million of troubled CEOC debt held by CEC's newly formed affiliate CGP. *Id.* ¶ 110-111.

The B-7 Refinancing and the 5% Stock Sale were undertaken to extend CEOC's runway. *Id.* ¶¶ 115, 123. CEOC's interest expense and principal owed (taking into account CEOC's cash contribution to the transaction) both increased as a result of the B-7 Refinancing. *Id.* ¶ 113.

Shortly after CEC's announcement of the 5% Stock Sale and the purported termination of CEC's guarantee, a group of noteholders holding $237.8 million in aggregate principal and greater than 51% of each of CEOC's outstanding 2016 and 2017 notes (the "Preferred Noteholders") informed CEC that they believed the 5% Stock Sale had not released CEC's guarantee under those notes. *Id.* ¶ 126. Among other things, the Preferred Noteholders contended that the 5% Stock Sale was insufficient to release CEC's guarantees under their indentures, which incorporated the standards for "wholly owned subsidiary" from SEC Regulation S-X ("Reg. S-X"). *Id.* ¶¶ 127-129. Negotiations soon ensued between these holders and CEC to arrange a transaction that would provide an independent basis to release the guarantee. *Id.* ¶ 154.

E. The 6% Stock Transfer.

Meanwhile, shortly after the Preferred Noteholders' challenge to CEC's purported release of the guarantee, CEC attempted to cause a transfer of an additional 6% of CEOC stock to various Caesars employees through a stock performance incentive plan, adopted on May 30, 2014 (the "6% Stock Transfer"). *Id.* ¶¶ 130-132. The 6% Stock Transfer was the "potential management compensation component" of the equity sale contemplated in the Blackstone Presentation. *Id.*

¶ 133. It was undertaken to disperse ownership of CEOC stock, allegedly to create tradeable equity currency for CEOC to enable future transactions such as debt-for-equity exchanges. SMF ¶ 134.

The performance incentive plan contained several features designed to immediately transfer CEOC stock, even though these same features were detrimental to incentivizing employees. *Id.* ¶¶ 136-147. The performance incentive plan was the only such plan at Caesars that granted stock instead of stock options, used worthless and illiquid CEOC stock as currency, and vested immediately. *Id.* ¶¶ 136-139. The stock was valued for tax purposes based on the price per share used in the 5% Stock Sale to insiders, and immediate vesting of the shares at that inflated price resulted in an immediate taxable event for recipients. *Id.* ¶¶ 135, 142. In order to address the resulting employee discontent over having to pay taxes for "worthless" CEOC stock, a "gross up payment" was made to participants. *Id.* ¶¶ 143-144. A tax gross-up was not present in any other Caesars performance incentive plan. *Id.* ¶ 145. CEC's own incentive plan expert later testified that the immediate vesting and gross-up were both atypical of usual incentive compensation practices. *Id.* ¶¶ 141, 146.

The Sponsors wanted to distribute CEOC stock quickly, and they pushed participants to execute their plan documents right away. *Id.* ¶ 148. Even before all of the grant documents were executed and the stock grants were made, CEOC delivered to the Trustees and/or their predecessors CEOC Officer's Certificates contending that CEC's Parent Guarantee had been automatically terminated under § 12.02(c)(i) of the Indentures. *Id.* ¶¶ 149-152. And on June 27, 2014, CEC asserted once again that its Parent Guarantee of the 12.75% Second Priority Notes had been released because CEOC elected to release the Parent Guarantee of its own debt under § 12.02(c) of the Indentures for the additional reason that CEC's guarantee of the other "Existing Notes" as defined in the Indentures had been released. *Id.* ¶ 153.

F. The August Unsecured Notes Transaction.

By August 2014, the negotiations that began in May 2014 between CEC and the Preferred Noteholders to invent an independent basis to remove the guarantee bore fruit. SMF ¶¶ 154-156. On August 12, 2014, CEC announced that it had negotiated and entered into a private transaction with the Preferred Noteholders (the "August Unsecured Notes Transaction"). *Id.* ¶ 157. CEC entered into the August Unsecured Notes Transaction to facilitate restructuring. *Id.* ¶ 159.

Under the August Unsecured Notes Transaction, CEC and CEOC purchased certain of the Preferred Noteholders' notes at par plus accrued and unpaid interest. *Id.* ¶¶ 160-162. In exchange, the Preferred Noteholders agreed to amend the indentures governing the 2016 and 2017 notes to include (a) a consent to the removal, and acknowledgement of the termination, of the CEC guarantee within each indenture and (b) a modification of the covenant preventing the disposition of "substantially all" of CEOC's assets to measure future asset sales based on CEOC's assets on the date of the amendment. *Id.* ¶ 163.

Those Preferred Noteholders also agreed to a number of other provisions, including a consent to approve a future "restructuring" of their notes. *Id.* ¶ 164. From CEC's perspective, the August Unsecured Notes Transaction was executed to, *inter alia*, ensure that the Parent Guarantee of the Notes had been released. *Id.* ¶ 158. Indeed, after the August Unsecured Notes Transaction closed on August 22, 2014, CEOC again sent notice to the Trustees and/or their predecessors reaffirming its contention, first announced in June 2014, that CEC's Parent Guarantee had been released at CEOC's election. *Id.* ¶¶ 170.

Certain minority holders (the "Individual Noteholders") whose indentures were amended as a part of the August Unsecured Notes Transaction to remove CEC's guarantee commenced actions in this Court asserting claims similar to the Trustees' claims. *See Danner v. Caesars*

Entertainment Corporation et al., No. 14-cv-07973 (the "*Danner* Action") and *Trilogy Portfolio Company, LLC et al. v. Caesars Entertainment Corporation et al.*, No. 14-07091 (the "*Trilogy* Action," and collectively with the *Danner* Action, the "Individual Actions."). The Individual Holders have moved for summary judgment in the Individual Actions, to be briefed simultaneously with this Motion.[6]

G. Creditor Negotiations.

CEC and CEOC negotiated with CEOC creditors throughout 2014. SMF ¶ 174. As noted, the B-7 Refinancing, the 5% Stock Sale, and the August Unsecured Notes Transaction (collectively, the "Guarantee Transactions") involved creditor negotiations. *Id.* ¶ 175. In addition, negotiations with other creditor constituencies were undertaken to reduce CEOC debt through debt exchanges with creditors, as contemplated by the Plan. *Id.* ¶ 176. Negotiations with CEOC's first and second lien creditors had been ongoing since April 2014, and negotiations with the first-lien creditors, in particular, involved attempts to "*achieve a consensual out-of-court restructuring with support from all creditor groups*." *Id.* ¶¶ 177-185, 187-188 (emphasis added). [redacted]. *Id.* ¶ 186. The head of Blackstone's Restructuring Advisory Group who participated in these negotiations testified that this was typical under the circumstances. *Id.*

H. CEOC Bankruptcy.

Despite numerous out-of-court restructuring efforts designed to extend CEOC's runway, including the Guarantee Transactions, CEOC and 172 of its subsidiaries filed voluntary petitions under chapter 11 of the Bankruptcy Code in January 2015. *Id.* ¶¶ 190-192. CEOC's proposed

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[6] The Individual Holders' brief in support of their motion for summary judgment is referred to as the "Trilogy/Danner Brief").

reorganization plan treats the Trustees' claims as impaired. SMF ¶¶ 197, 198.

The filing of CEOC's bankruptcy case was an immediate Event of Default under § 6.01 of the Indentures and as a result, CEC and CEOC's obligations under the Notes became due and owing. *Id.* ¶¶ 193-194. The automatic stay of § 362 of the Bankruptcy Code has prevented the holders from pursuing their claims against CEOC.

As of the date of filing of this Motion, the outstanding principal on the First Lien Notes is 6,345,000,000.00, and the outstanding principal on the 12.75% Second Lien Notes is $750,000,000.00. *Id.* ¶¶ 199-200. None of these amounts has been paid despite due demand and such amounts being immediately due and owing. *Id.* ¶¶ 195, 202.[7]

LAW OF THE CASE

In June 2015, before the parties completed discovery, the Trustees filed motions for partial summary judgment seeking a declaration that CEC's purported termination of the Parent Guarantee violated Section 316(b) of the TIA. *See BOKF* ECF Nos. 30–33; *UMB* ECF Nos. 27–30. These motions were ultimately denied because the Court found that without full discovery, unresolved issues of fact remained. But in the process, Judge Scheindlin made a number of holdings establishing the applicable standard for proving a violation of Section 316(b). *See generally BOKF, N.A. v. Caesars Entertainment Corp.*, Nos. 15-cv-1561 (SAS), 15-cv-4634 (SAS), 2015 WL 5076785 (S.D.N.Y. Aug. 27, 2015) (the "TIA Opinion").

First, the TIA Opinion holds that Section 316(b) protects not only the noteholders' legal right to sue, but also their "practical ability" to recover payments when they become due. *TIA Opinion*, 2015 WL 5076785, at *4. Therefore, a formal indenture amendment is not necessary for the noteholders' rights to have been improperly "impaired" under the TIA. *See id.* at *4–5.

[7] In addition to principal and interest, there are unpaid charges, expenses, costs and indemnities which continue to accrue or be incurred.

Instead, noteholders must prove "*either* an amendment to a core term of the debt instrument, *or* an out-of-court debt reorganization" to establish violation of Section 316(b).[8] *Id.* at *5 (emphasis added).

Second, the TIA Opinion holds that impairment is measured as of the date payment is due on the indentures. *Id.* at *10. An action taken as a part of a restructuring that has the effect of impairing the practical ability to recover at a later maturity date violates Section 316(b) regardless of the issuer's financial condition at the time the action is taken. *Id.* at *10–11. "It is only at the time that payment was required —here CEOC's chapter 11 filing and its proposed reorganization plan—that plaintiffs' rights became impaired as a result of the stripping of the Guarantee." *Id*. at *11 (emphasis in original).

Third, the TIA Opinion recognizes that the restructuring requirement serves as an important limitation on the scope of statutory protection. *See id.* at *10. Section 316(b) was enacted to prohibit companies from forcing noteholders to accept lesser payment on their notes in the context of an out-of-court restructuring. *Id.* at *9–10. However, the Court expressed concern about inviting "untrammeled judicial intrusion into ordinary business" transactions. *Id.* at *8. Reading into Section 316(b) the restructuring requirement alleviates this concern as it insulates from judicial scrutiny those transactions that are purely ordinary course business dealings unrelated to any out-of-court restructuring. *Id.* at *10.

To that end, a holder invoking Section 316(b) need not show an impairment resulting from a restructuring of its own notes. An actionable impairment occurs when a company restructures debt "arising under *other* notes, in the context of an out-of-court reorganization." *Id.* The proper inquiry is whether the transactions, either individually or collectively, "were undertaken *as part of*

[8] The Court used the terms "reorganization" and "restructuring" interchangeably. *Id. passim*.

a plan to accomplish an out-of-court restructuring." *Id*. at *11 (emphasis added). Importantly, the proper focus of this test is not the *intent* of the transactions, but rather, their *effect*: "The transactions must be analyzed as a whole to determine if the overall effect was to achieve a debt restructuring that impaired plaintiffs' right to payment." *Id.*; *see also id.* at *11 n.86 ("[T]he Court is not importing an intent requirement into Section 316(b) where none exists. Rather, the evidence related to the transactions must be examined to determine what the overall *effect* of the transactions was—a debt restructuring or a series of routine corporate transactions.").

Fourth, the TIA Opinion holds that the stripping of the Parent Guarantee (if accomplished as a part of a restructuring) would violate Section 316(b). *See id.* at *11. This holding is based on the Court's determination that the Parent Guarantee, by its plain terms and as a matter of law, provided the noteholders with credit support and was not, as CEC contended, merely one of convenience. *Id.* at *7 (the Parent Guarantee is "a promise of full payment in the event that CEOC was unable to fulfill its payment obligations").

Fifth, the TIA Opinion described "reorganization" as a "***process*** designed to revive a financially troubled or bankrupt firm" and "*an attempt to extend the life of a company facing bankruptcy* through special arrangements and restructuring in order to minimize the possibility of past situations reoccurring." *Id.* at *5 n.53 (emphasis added) (quoting Reorganization Definition, Investopedia.com, www.investopedia.com/terms/r/reorganization.asp (last visited May 9, 2016)).

Applying this definition, the Court denied the Trustees' motions for partial summary judgment only because it found issues of material fact existed as to whether the transactions in dispute were undertaken in the context of an out-of-court debt reorganization. *Id.* at *11. Thus, whether the Guarantee Transactions and the stripping of the Parent Guarantee were a part of an out-of-court restructuring is the *sole* remaining issue to be decided to resolve the TIA Counts.[9]

With the benefit of complete discovery, it is clear that none of the material facts surrounding the Guarantee Transactions is in dispute. Whether CEC violated the TIA turns on one remaining question of law: whether the Guarantee Transactions and the purported stripping of the Parent Guarantee constitute an out-of-court restructuring.

THE STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). After the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to "the non-moving party to set forth specific facts raising a genuine issue of fact for trial." *United States ex rel. Romano v. N.Y. Presbyterian*, 426 F. Supp. 2d 174, 177 (S.D.N.Y. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). A fact is "material" only "if it 'might affect the outcome of the suit under the governing law.'" *Morocho v. New York City*, No. 13 CIV. 4585 KPF, 2015 WL 4619517, at *2 (S.D.N.Y. July 31, 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)).

The summary judgment standard "mirrors the standard for a directed verdict." *Anderson*, 477 U.S. at 250. There is no genuine issue for trial unless the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Johnson v. City of New York*, No. 08 CIV. 5277 (SHS), 2010 WL 2292209, at *3 (S.D.N.Y. June 7, 2010).

[9] These holdings were not dicta. The Court set the standard for proving a TIA violation, and under that standard, held that issues of fact regarding the hallmarks of an out-of-court restructuring precluded summary judgment. *Id.* at *8–11.

ARGUMENT

Summary judgment is warranted. Because all of the Guarantee Transactions violated the TIA, they could not lawfully terminate CEC's guarantee regardless of the terms of the applicable indentures.[10] *See* **Part I *infra***.

In addition, even if the Court found that one or more of the Guarantee Transactions complied with the TIA, they could not as a matter of law release CEC's guarantee under the applicable indentures.[11] ***See* Part II *infra*, *Trilogy/Danner* Br. Part I.D.**

Therefore, CEC has no defense to its obligations under the Indentures, and the Trustees are entitled to summary judgment on their claims for damages. ***See* Part III *supra*.**

I. THE TRUSTEES ARE ENTITLED TO SUMMARY JUDGMENT ON THE TIA COUNTS BECAUSE NO REASONABLE JURY COULD CONCLUDE THAT THE TRANSACTIONS UNDERTAKEN BY CEC WERE NOT A PART OF A "RESTRUCTURING."

CEC *admits* that it devised and implemented a "strategic plan to maximize value" the first step of which was to "extend the runway" for a financially troubled CEOC. This phase of the Plan was designed to resolve liquidity, maturity and covenant pressures that all threatened to push CEOC into bankruptcy. The arrangements through which this was to be accomplished included (i) relaxing debt covenants, completing asset transfers, refinancing upcoming maturities to alleviate liquidity and maturity pressures, all through creditor negotiations; (ii) stripping the Parent Guarantee to obtain debt refinancing and preserve CEC equity value; and (iii) generating leverage

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[10] As explained in **Part I *infra***, any transaction that is a part of an out-of-court restructuring violates the TIA as a matter of the law of this case. In addition, as explained in **Parts I.A-C of the Trilogy/Danner Brief**, the August Unsecured Notes Transaction would independently violate the TIA even if it were unrelated to a restructuring because it expressly amended the Individual Noteholders' indentures without the consent of all holders.

[11] The Trustees respectfully request that the Court resolve the parties' competing interpretations of § 12.02(c) even if it concludes that issues of fact preclude summary judgment on the remaining claims.

for future negotiations with creditors. Those creditor negotiations were expected to reduce CEOC's debt load and result in repayment arrangements CEOC could satisfy. All of this was designed to postpone and avoid CEOC defaults and bankruptcy. The Guarantee Transactions were an integral part of this "Plan."

CEC's "Plan" constitutes an out-of-court "reorganization" under the TIA as a matter of law, such that no reasonable jury could conclude otherwise. Accordingly, the Trustees are entitled to summary judgment on their TIA Counts.

A. The Guarantee Transactions Were Part of an Out-of-Court Restructuring.

The TIA Opinion describes an out-of-court reorganization as a "*process* designed to revive a financially troubled or bankrupt firm." *TIA Opinion*, 2015 WL 5076785, at *5 n.53 (emphasis added). Rather than establish a bright-line rule, the Court stressed that the transactions in question must be examined "as a whole," to determine if their "overall effect" was to achieve an out-of-court restructuring. *See id.* at *5 n.53, *11 & n.86. Consistent with this "totality of circumstances" approach, the Court identified a number of indicia that would be present in a restructuring. For example, a reorganization is a process that "extend[s] the life of a company facing bankruptcy through special arrangements and restructuring." *Id.* at *11. Another indication a reorganization has occurred is that "talks with creditors in order to make arrangements for maintaining repayment" took place. *Id.* Modification of assets and liabilities is another hallmark of a restructuring. *Id.* A transaction violates Section 316(b) whether it is undertaken as a part of "a plan to accomplish an out-of-court restructuring" or is itself a restructuring. *Id*.

The Guarantee Transactions satisfy both alternative tests. CEC's Plan bears heavily all of the hallmarks of an out-of-court restructuring identified in the TIA Opinion, and the Guarantee Transactions were all undertaken as an express part of that Plan. And even if the Court were to examine each transaction individually, each bears the same hallmarks.

Because the Guarantee Transactions were a restructuring or a part of a restructuring, their alleged effect of stripping the Parent Guarantee amounts to impairment prohibited by Section 316(b) as a matter of law. All obligations under the Notes were accelerated and became immediately due and owing upon CEOC's bankruptcy in January 2015. SMF ¶¶ 193-194. Yet, the automatic stay under the Bankruptcy Code has since prevented the holders from recovering from CEOC, leaving claims against CEC under the Parent Guarantee as their sole recourse. It is now law of the case that the stripping of the Parent Guarantee under those circumstances amounted to an immediate impairment. *TIA Opinion*, 2015 WL 5076785, at *11 ("plaintiffs' rights became impaired as a result of the stripping of the Guarantee" upon CEOC's chapter 11 filing). This is because Section 316(b) prohibits any impairment of a holder's right to receive payment on or after the due date, including any postponement of that right, regardless of the precise mechanism (including acceleration) "under which the principal shall become due and owing." *Upic & Co. v. Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 455 (S.D.N.Y. 1992) (failure to honor a repurchase option that accelerated the payment of principal amounts to impairment under Section 316(b)).

1. <u>CEC's "Strategic Plan to Maximize Value" Was an Out-of-Court Reorganization or Restructuring</u>.

Regardless of the label CEC now puts on its "strategic plan to maximize value," it was an out-of-court restructuring. CEC's own witnesses and documents establish that this "Plan" was undertaken to extend CEOC's runway and avoid bankruptcy, with the hope that productive negotiations with creditors would eventually take place. CEC hoped to "deleverage" CEOC (*i.e.* modify and/or reduce its debt load relative to its revenues) through these creditor negotiations.

First, there is no dispute that the Plan was designed to extend the life of CEOC, which was facing bankruptcy. By the time the first of the Guarantee Transactions was undertaken, CEOC was experiencing severe liquidity, covenant, and maturity pressures. SMF ¶¶ 25-41. Already heavily leveraged as a result of the leveraged buyout, CEOC was mortally wounded by the business challenges it experienced during the economic downturn. *Id.* ¶¶ 25-28. CEOC had an annual cash flow deficit of more than a billion dollars and was unable to bear its interest expense alone, let alone pay more than a billion in principal maturing in 2015. *Id.* ¶¶ 29, 31-37, 41. [redacted]. *Id.* ¶¶ 38-40. The Plan was designed to extend CEOC's life, or "runway" as CEC called it, by dealing with one or more of the pressures facing CEOC while maximizing the value of CEC's common equity. *Id.* ¶¶ 30, 42-46, 50-52.

Second, the Plan relied heavily on modification of assets and liabilities and other "special arrangements" in order to "extend the runway" and eventually "delever" CEOC. *Id.* ¶¶ 45-47, 76. The asset sales resulted in a restructuring of CEOC's balance sheet as well as Caesars' corporate structure by forming new affiliates controlled by CEC and transferring to those affiliates billions in assets (including intellectual property) previously owned by CEOC. *Id.* ¶¶ 56-57, 61-76. Those assets were effectively removed from CEOC's balance sheet and replaced with cash, which CEOC hoarded on its balance sheet to ease covenant and maturity pressures. *Id.* The B-7 Refinancing and the repayment of notes as a part of the August Unsecured Notes Transaction similarly modified CEOC's balance sheet. *Id.* ¶¶ 105-113, 157, 160-162. Additional creditor negotiations contemplated as the final step of the Plan were intended to reduce CEOC's debt through debt-for-debt and debt-for-equity exchanges, which, if successful, would affect its balance sheet liabilities. *Id.* ¶¶ 47, 50-51, 83, 97, 134, 174-188. Debt-for-equity exchanges that traded CEOC debt for CEOC equity would also affect the amount of CEOC stock CEC carried.

The purported removal of the Parent Guarantee, regardless of how it was achieved, was in and of itself integral to the Plan and allegedly a requirement of the B-7 Refinancing. *Id.* ¶¶ 91-92, 116. A successful termination of CEC's guarantee would have removed billions in liability from its balance sheet, while the 5% Stock Sale and 6% Stock Transfer removed from CEC's balance sheet up to 11% of CEOC stock. SMF ¶¶ 26, 117, 132, 151.

Third, creditor negotiations were an integral part of the Plan. The transactions undertaken pursuant to the Plan, including the 5% Stock Sale, the B-7 Refinancing, and the August Unsecured Notes Transaction, all necessarily involved negotiations with CEOC creditors and CEC stakeholders. *Id.* ¶ 175. In fact, CEC contends that the requirement that the Parent Guarantee be removed arose from the negotiations with the B-7 lenders. *Id.* ¶ 91. CEC's negotiations with the B-7 lenders also resulted in several concessions that were vital to CEOC's avoidance of default, including alteration to its SSLR covenant and removal of the "going concern opinion" event of default. *Id.* ¶¶ 106-108. In addition, the Plan expressly contemplated negotiations with CEOC creditors to reduce CEOC's debt through debt exchanges. *Id.* ¶¶ 47, 50-51, 83, 97. CEC and Blackstone engaged in such negotiations with several groups of CEOC creditors throughout the relevant time period. *Id*. ¶¶ 174-188. Negotiations with CEOC's first and second lien creditors commenced as early as April 2014, and continued thereafter. *Id*. Meetings were held with certain holders with a goal to "achieve a consensual *out-of-court restructuring* with support from all creditor groups." *Id*. ¶ 182 (emphasis added).

2. <u>The Guarantee Transactions Were Each a Part of the Restructuring</u>.

As shown above, CEC's "Strategic Plan to Maximize Value" was a restructuring as a matter of undisputed fact. Each of the Guarantee Transactions was admittedly undertaken as part of that out-of-court restructuring.

According to CEC's own witnesses and documents, the release of the Parent Guarantee through CEOC equity transfers was a part of CEC's Plan and its intended effect. SMF ¶¶ 87-90.

Release of the Guarantee was designed to protect CEC, enable the B-7 Refinancing, and generate leverage for creditor negotiations. *Id.* ¶¶ 87-96. In addition, the equity transfers themselves would purportedly create a liquid equity currency in the form of CEOC stock that could be later used in debt exchanges with creditors. SMF ¶ 97.

Both the 5% Stock Sale and the 6% Stock Transfer purportedly accomplished the equity transfer. Indeed, both the 5% Stock Sale and the 6% Stock Transfer were components of the Plan as presented to CEC's Board in April 2014. The April 21, 2014 presentations contemplated a sale of stock to existing CEC investors (*i.e.*, the 5% Stock Sale) as well as a "potential management compensation component" of the equity sale (*i.e.*, the 6% Stock Transfer). SMF ¶¶ 101, 97.

When it was not certain that the 5% Stock Sale and the 6% Stock Transfer stripped CEC's guarantee, CEC began negotiating the August Unsecured Notes Transaction, which was undertaken to "provide an independent contractual basis to release the guarantee." *Id.* ¶ 126-129, 154. CEC's witnesses admit as much. *Id.* ¶ 158. Moreover, the August Unsecured Notes Transaction furthered future creditor negotiations by purchasing creditor support for the restructuring. *Id.* ¶ 164.

3. <u>Additionally and Alternatively, Each Transaction is Individually a Restructuring</u>.

Each Guarantee Transaction also individually meets the definition of restructuring based on the undisputed record. Both the 5% Stock Sale and the 6% Stock Transfer constituted transfers by CEC of CEOC equity designed to extend CEOC's runway. *Id.* ¶¶ 50, 55, 83, 123. These transfers were expected to enable the B-7 Refinancing (which did not close until July 2014), create potential currency for debt exchanges, and remove the Parent Guarantee in order to generate leverage for future creditor negotiations (which were ongoing at the time of the transactions). *Id.* ¶¶ 87-97. Moreover, separate negotiations with buyers of CEOC stock as a part of the 5% Stock

Sale yielded the valuation used in both transactions. *Id.* ¶ 135.

The August Unsecured Notes Transaction also constitutes an impermissible out-of-court restructuring. In fact, this type of transaction—a transaction that destroys noteholder rights through a purchased majority vote outside of judicial supervision—was the core impetus for Section 316(b). *See, e.g.*, *TIA Opinion*, 2015 WL 5076785, at *10 (purpose of Section 316(b) is to "protect minority bondholders against debt reorganizations resulting from a majority vote outside of judicial supervision"); *see also MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 516 (S.D.N.Y. 2015) (the August Unsecured Notes Transaction is "exactly what TIA section 316(b) is designed to prevent"). The August Unsecured Notes Transaction was a "renegotiate[ion] [of] a debt obligation . . . to the detriment of a nonconsenting minority *under the same indenture*." *TIA Opinion*, 2015 WL 5076785, at *9. It involved the amendment of the 2016 Notes Indentures, thus reorganizing the debt obligations thereunder. It is of no moment that the Trustees' Indentures were not modified by that transaction, because impairment resulting from a restructuring of other creditors' debts is actionable under Section 316(b). *TIA Opinion*, 2015 WL 5076785, at *10 ("[A]n impairment may . . . occur where a company restructures debt arising under *other* notes, in the context of an out-of-court reorganization . . . .").

Moreover, the August Unsecured Notes Transaction was undertaken in part to ensure that the Parent Guarantee of the Notes was removed. SMF ¶ 158. It also was undertaken through negotiations with the Preferred Noteholders, who for repayment of millions of dollars of their notes in cash on favorable terms, agreed not only to destroy the guarantee for non-participating minority holders, but also to support future restructuring efforts by CEC and CEOC. *Id.* ¶¶ 157-164.

In sum, it is undisputed that CEC adopted and implemented a process designed to aid the financially strapped CEOC, dubbed the "strategic plan to maximize value." The Plan included "extend[ing] the runway" for CEOC, staving off CEOC's bankruptcy, removing the Parent Guarantee, modifying assets and liabilities, and creditor negotiations to reduce the amount of CEOC debt. On these undisputed facts, CEC's Plan amounts to a restructuring as a matter of law. Summary judgment is therefore warranted.

B. CEC Cannot Defeat Summary Judgment By Arguing that the Guarantee Transactions Also Were Undertaken for Legitimate Business Reasons.

CEC has asserted repeatedly that the Guarantee Transactions did not violate Section 316(b) because they also served ordinary-course business purposes. This argument fails as a matter of law and is belied by the undisputed facts.

1. <u>"Dual Purpose" Transactions Are Subject to TIA Scrutiny</u>.

CEC incorrectly assumes that a restructuring transaction becomes immune from scrutiny under Section 316(b) if the transaction *also* has an ordinary course business purpose. This argument fails as a matter of the law of this case. As described above, the test established previously by the Court asks not whether the transactions had an ordinary business purpose, but whether they were undertaken as part of a restructuring. *See TIA Opinion*, 2015 WL 5076785, at *11 (transactions must be analyzed to determine whether the "overall effect was to achieve a debt restructuring"). Only those "routine" transactions that are "unrelated to a reorganization" are immune from scrutiny. *Id*.

Judge Scheindlin made this precise point in response to CEC's argument that it would not incur liability under Section 316(b) if it could prove that the Guarantee Transactions were undertaken for routine business reasons:

> It could have been a dual purpose . . . . [The Trustees] don't have to show that [the transactions were not undertaken] for a good business purpose, so to speak, but that it was *at least in part* of [*sic*] a reorganization or restructuring. . . . I don't think they have to say it wasn't a legitimate business transaction.

Hearing Tr. 10:11–19 (Feb. 22, 2016) (Scheindlin, J.) (attached as Silfen Decl. Ex. 80) (emphasis added).

As the Court recognized, transactions may violate the TIA even if they serve a "dual purpose"—*i.e.*, if they were undertaken in the context of an out-of-court restructuring but *also* serve an independent ordinary business purposes. After all, the *intent* behind the transaction—legitimate or not—is completely irrelevant. *TIA Opinion*, 2015 WL 5076785, at *11 n.86. Nor should the Court "opine on the wisdom or fairness of [CEOC's Plan]." *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.* ("*Marblegate II*"), 111 F. Supp. 3d 542, 556 (S.D.N.Y. 2015); *see also Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.* ("*Marblegate I*"), 75 F. Supp. 3d 592, 617 (S.D.N.Y. 2014) ("[W]hatever the ultimate cost to EDMC, its creditors, its employees, and its students, the Trust Indenture Act simply does not allow the company to precipitate a debt reorganization outside the bankruptcy process to effectively eliminate the rights of nonconsenting bondholders.").

Finally, scrutinizing dual purpose transactions under Section 316(b) ensures that "a sufficiently clever issuer [cannot] gut the [TIA's] protections." *TIA Opinion*, 2015 WL 5076785, at *4. Section 316(b) prohibits the impairment of holders' substantive "right to 'receive' the bargained-for principal and interest . . . *whether carried out straightforwardly or circuitously*." *Marblegate II*, 111 F. Supp. 3d at 556 (emphasis added). Permitting a "clever issuer" to evade judicial scrutiny by carefully designing its out-of-court restructuring to also include features present in ordinary course transactions would severely limit protections afforded to noteholders by the TIA. Because Section 316(b) requires courts to examine whether the transactions had an impairing effect on holders' right to receive payment, and not whether the transactions achieved some other business objective, CEC's defense fails as a matter of law.

2. <u>No Reasonable Jury Could Conclude that the Guarantee Transactions Were "Ordinary</u>."

Even if "dual purpose" transactions were immune from Section 316(b) scrutiny, no reasonable jury could find that the Guarantee Transactions were ordinary.

The 5% Stock Sale, for example, was undertaken despite the inability to come up with a positive valuation. SMF ¶ 100. In fact, at the time of the 5% Stock Sale, CEOC's balance sheets reflected *negative* stockholder equity *in the billions* of dollars. *Id.* ¶ 99. In order to market shares that CEOC's own senior officers considered "worthless," CEC sought purchasers with ulterior motives. *Id.* ¶ 101. Two purchasers were preexisting holders of CEC stock and stood to gain from the purported removal of the Parent Guarantee. *Id.* ¶ 121. The third—Chatham—was bribed with the repurchase of hundreds of millions of dollars in troubled CEOC debt at a price higher than par. *Id.* ¶ 122. And rather than improving CEOC's financial position, the B-7 Refinancing (that CEC claims was enabled through the 5% Stock Sale) actually resulted in an increased interest expense and higher cash need and outstanding principal indebtedness for CEOC. *Id.* ¶ 113. One factor that contributed to the bad deal for CEOC was that in addition to paying Chatham, it was forced to repurchase at a premium hundreds of millions of its own debt from CGP. *Id.* ¶¶ 110-111. The 5% Stock Sale was, therefore, borne out of the necessity to extend the runway as a part of a restructuring process rather than ordinary business practice by a financially healthy entity.

The 6% Stock Transfer and related performance incentive plan was outright bizarre, or as CEC's own incentive compensation expert mildly put it, "not typical." *Id.* ¶¶ 141, 146. The transaction was driven by the goal to quickly disperse CEOC stock, and this goal undermined any legitimate benefit of the transaction to CEOC. *Id.* ¶¶ 136, 148. The 6% Stock Transfer was the only Caesars performance incentive plan that immediately vested an award of stock rather than stock options (and worthless illiquid CEOC stock at that). SMF ¶¶ 136, 137, 139. Because the immediate vesting at the inflated valuation based on the 5% Stock Sale resulted in immediate tax liability to the recipients, a multi-million dollar tax gross-up from a cash-strapped CEOC was required. *Id.* ¶¶ 142-144. No other Caesars incentive plan involved a tax gross-up. *Id.* ¶ 145. The performance incentive plan was rushed out to participants so that Caesars could take the position that the Guarantee has been removed. *Id.* ¶ 146.

Finally, the August Unsecured Notes Transaction was also far from "ordinary." This transaction was executed, among other things, to create an "independent basis" for the removal of the Parent Guarantee and to facilitate a "comprehensive [non-judicial] restructuring." *Id.* ¶¶ 154, 159. Further, the Preferred Noteholders' consent was bought by CEC when CEC and CEOC repurchased their notes at par, also paying accrued and unpaid interest. SMF ¶¶ 157, 160-161. CEC spent much-needed cash to redeem unsecured notes whose maturities were not coming due for two to three more years. *Id.* Thus, not only are CEC's claims of "ordinary course" legally incapable of immunizing it from liability under the TIA, the defense also fails as a matter of undisputed fact.

The foregoing entitles the Trustees to summary judgment on the TIA Counts, a declaration that the offending Guarantee Transactions are null and void, and that the Parent Guarantee has been reinstated. This was precisely the relief granted by the *Marblegate* court following a bench trial. *See Marblegate II*, 111 F. Supp. 3d at 556–57 ("Education Management Corporation shall guarantee any past and future payments of principal and interest to Marblegate on their respective due dates under the March 5, 2013 Indenture.").[12]

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[12] Even if the Court determines that a given Guarantee Transaction did not violate the TIA, the other offending transactions still should be ignored for purposes of determining whether CEC satisfied the terms of the Indentures.

II. IN ADDITION OR ALTERNATIVELY, THE TRUSTEES ARE ENTITLED TO SUMMARY JUDGMENT ON BOKF'S COUNT II AND UMB'S COUNT I DECLARING THAT CEC'S GUARANTEE HAS NOT BEEN TERMINATED OR RELEASED AND REMAINS VALID, BINDING AND ENFORCEABLE ON CEC UNDER THE INDENTURES.

CEC cannot establish that the Guarantee Transactions stripped the Parent Guarantee pursuant to § 12.02(c) of the Trustees' Indentures. First, the Parent Guarantee was not terminated under the last paragraph of § 12.02(c) because CEC has failed to release the guarantee of the Individual Noteholders' Notes, which fall within the definition of "Existing Notes." Second, satisfying § 12.02(c)(i) alone cannot strip the Parent Guarantee: all three conditions enumerated in § 12.02(c)(i)–(iii) must be met, and CEC has admitted that it has failed to comply with § 12.02(c)(ii) and § 12.02(c)(iii). Third, by declaring that the Parent Guarantee had been removed following the 5% Stock Sale, CEC defaulted on the Indenture as of May 16, 2014, and as the breaching party, could not subsequently avail itself of any guarantee release provisions.

A. The Parent Guarantee Was Not Terminated Pursuant to the Last Paragraph of Section 12.02(c).

The last paragraph of § 12.02(c) permits the termination of the Parent Guarantee only if "the guarantee of . . . [Existing] Notes . . . has been released or discharged." SMF ¶ 16. "Existing Notes" is defined to include the notes held by the Individual Noteholders. *Id.* ¶ 17. For the reasons set forth in the Individual Noteholders' motion for summary judgment, CEC's guarantee of their notes has not been "released or discharged." *See* **Trilogy/Danner Brief, Part I**. Therefore, CEC cannot rely on the last paragraph of § 12.02(c) to argue that the Parent Guarantee of the Trustees' Notes has been removed.

B. The Parent Guarantee Also Was Not Terminated Pursuant To Section 12.02(c)(i)-(iii) Because "And" Means "And" and All of the Conditions to the Termination of the Guarantee Must Be Met.

Because the guarantee of the Individual Noteholders' Notes remained in place, the sole remaining issue with respect to the Trustees' Contractual Release Counts is whether the three conditions necessary to release the Parent Guarantee under § 12.02(c)(i), (ii), and (iii), separated by the word "and," must *all* be met to release the Parent Guarantee.

CEC acknowledges that the language of § 12.02(c) is unambiguous.[13] Interpretation of unambiguous provisions involves only two steps. *First*, the court must read the provision by giving its words their "literal" meaning, *Jade Realty LLC v. Citigroup Commercial Mortg. Tr. 2005-EMG*, 980 N.E.2d 945, 947 (N.Y. 2012), without resort to considerations of "reasonableness" or other rules of construction, which are all inapplicable absent an ambiguity, *In re Wallace v. 600 Partners Co.*, 658 N.E.2d 715, 715 (N.Y. 1995).

Second, after determining the "literal" meaning, the court must consider whether that meaning results in an "absurdity." It is only upon a finding of outright absurdity that the court "may as a matter of interpretation carry out the intention of a contract" by departing from its literal meaning. *Wallace*, 658 N.E.2d at 717; *Jade Realty LLC*, 980 N.E.2d at 947–48.

The literal reading of § 12.02(c) is that the enumerated conditions for the release of the Guarantee must all be met. That reading controls because CEC cannot show that this reading leads to an absurd result. Because CEC admits, as it must, that the conditions in § 12.02(c)(ii) or (iii) have not been satisfied, the Guarantee has not been released under § 12.02(c)(i)–(iii).

1. <u>The Plain and Unambiguous Language of Section 12.02(c)(i), (ii), and (iii) of the Indentures Compels a Finding as a Matter of Law that "And" Used Therein Means "And."</u>

"A trust indenture is a contract, and under New York law '[i]nterpretation of indenture provisions is a matter of basic contract law.'" *Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d

[13] *See* Caesars Entertainment Corp.'s Opp. to Pls.' Mot. for Partial Summ. J., *BOKF* ECF No. 64, at 6 n.2, 9, 11, 18 (subheading C).

1165, 1172 (2014). As this Court observed:

> The court's function in interpreting a contract is to apply the meaning intended by the parties, as derived from the language of the contract in question. [T]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

TIA Opinion, 2015 WL 5076785, at *4 (internal footnotes and quotation marks omitted); *see also Maxwell v. State Farm Mut. Auto. Ins. Co.*, 461 N.Y.S.2d 541, 543–44 (App. Div. 1983) ("Written instruments are to be construed by the courts," and the courts "must determine 'what is the intention of the parties as derived from the language employed'") (quoting 4 Williston, Contracts [3d ed.], § 600, p. 280)).

"The question of whether a written contract is ambiguous is a question of law for the court." *TIA Opinion*, 2015 WL 5076785, at *4. "Contract language is unambiguous when it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.* (quoting *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000)); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989).

"If the terms of a contract are unambiguous, the obligations it imposes are to be determined without reference to extrinsic evidence . . . ." *Hunt Ltd.*, 889 F.2d at 1277; *TIA Opinion*, 2015 WL 5076785, at *4 ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."). Similarly, "[a] court may only consider evidence of custom and usage where 'parties have used contract terms which are in common use in a business or art and have a definite meaning understood by those who use them, but which convey no meaning to those who are not initiated into the mysteries of the craft.'" *TIA Opinion*, 2015 WL 5076785, at *8 (citing *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010)). Moreover, even if admissible, evidence of custom and usage may not be used to add to or vary the writing. *Id.*; *Hunt Ltd.*, 889 F.2d at 1277–78 ("[T]rade custom and usage is not admissible to contradict or qualify" provisions of an unambiguous contract.).

In the absence of ambiguity, "a long and well-established rule of construction provides that words are to be given their ordinary meaning." *Maxwell*, 461 N.Y.S.2d at 543. Indeed, in the face of unambiguous language, courts must "*look solely to the language used by the parties* to discern the contract's meaning." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) (emphasis added); *Wallace*, 658 N.E.2d at 717 ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed."). "[Courts] apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 948 N.Y.S.2d 292, 297 (App. Div. 2012).

Maxwell is particularly instructive. The court there adhered to the plain meaning of the word "and" even though the disjunctive interpretation was the *more reasonable one*, and the one the drafters apparently intended. The decision interpreted an insurance policy exclusion that was triggered when injuries resulted from driving while impaired by *alcohol and a drug* at the same time. *Maxwell*, 461 N.Y.S.2d at 543–44. The court observed that the drafters' use of the conjunctive was "inexplicable" and that "the defendant may have actually intended something different," since a statute permitted exclusion for *either* drunk driving *or* driving while impaired by a drug. *Id*. Still, bound by "[a] long and well-established rule of construction . . . that words are to be given their ordinary meaning," the court enforced the exclusion as written. *Id.*

Further, New York courts regularly interpret "and" conjunctively in this very context: a list of triggering conditions. These cases uniformly hold that the plain and unambiguous meaning of a provision that joins a number of triggering conditions separated by the word "and" is that *all* of the triggering conditions must be satisfied. *Id.* (finding "as totally devoid of merit" defendant's contention that only one of three conditions delimited by an "and" must be satisfied). *See also* *Coan v. State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 81. 85 (E.D.N.Y. 1996) (provisions "broken down into three subdivisions and stated in the conjunctive, as demonstrated by use of the word 'and' connecting the second and third subdivisions" must all be met); *Progressive Ne. Ins. Co. v. State Farm Ins. Cos.*, 916 N.Y.S.2d 454, 456–57 (App. Div. 2011) (for an accident to be covered by an insurance policy, each of two conditions, separated by "and," had to be met); *Sasson v. TLG Acquisition LLC*, 9 N.Y.S.3d 2, 3 (App. Div. 2015) (definition of "Permitted Investors" was "in the conjunctive, unambiguous, and not subject to any rule of construction in the relevant documents or to any special commercially reasonable interpretation. It plainly required all three of those investors to take over the entity's board for there to be no 'Change of Control.'"). Even the use of the word "upon" in the opening clause of the section supports a conjunctive reading. See *Duchow v. New York State Teamsters Conference Pension & Ret. Fund*, 691 F.2d 74, 76 (2d Cir. 1982) (holding conditions preceded by "upon" and separated by "and" are conjunctive).[14]

These well-settled rules of contract interpretation inescapably establish that "and," as used

[14] The grammatical structure of Section 12.02(c) further supports the conjunctive interpretation because the three conditions are contained within a single sentence. *Coan*, 911 F. Supp. at 85 (provision conjunctive where it was "contained in a single sentence broken down into three subdivisions"). Indeed, two of the three conditions separated by the word "and" themselves each include three separate clauses stated in the disjunctive. *See* Section 12.02(c)(ii) ("[CEOC's] transfer of all or substantially all of its assets to, or merger with, an entity that is not a Wholly Owned Subsidiary"); 12.02(c)(iii) ("[CEOC's] exercise of its legal defeasance option or covenant defeasance option . . . or if [CEOC's] obligations under this Indenture are discharged"). If the word "and" separating these conditions meant "or," then Section 12.02(c) would have simply listed seven separate conditions instead of grouping them into three arbitrary categories. The only interpretation that does not strain the grammar or structure is that all three conditions must be met, but two of the three conditions may each be met in three alternative ways.

at the end of § 12.02(c)(ii) of the Indentures, means the conjunctive "and," and that all three conditions listed in that section must be satisfied in order to remove the Parent Guarantee.

2. Because Section 12.02(c) is Unambiguous, Other Rules of Contract Construction Cannot be Applied to Vary Its Plain Meaning.

CEC freely admits that § 12.02(c) is *unambiguous*, *see, e.g.*, CEC Opp. to Pls.' Mot. for Summ. J., *BOKF* ECF No. 64, at 6 n.2, 9, 11, 18 (subheading C), and yet stubbornly insists that "and" means "or," *see, e.g.*, *id.* at 12–13. CEC contends, based on extrinsic evidence, that the Court should ignore the plain meaning of § 12.02(c) under the guise of interpreting it in a manner that CEC considers to be commercially reasonable. *See, e.g.*, *id.* at 1–2, 11–13, 14. CEC's position is contrary to well-settled law that neither considerations of reasonableness nor extrinsic evidence may be considered in the face of unambiguous language, let alone override its plain meaning:

> When a contract is unambiguous, the court must, . . . *unless the result would be an absurdity, give effect to the contract as written* . . . . In so doing, the court determines the contract's meaning *from the language alone without reference to extrinsic facts or aids and without resort to the rules of construction*.

11 Williston on Contracts § 30:6 (4th ed.) (emphasis added) (citing *Wallace*, 658 N.E.2d at 715 ("resort to judicial construction and extrinsic evidence is unnecessary" absent lack of ambiguity)); *see also TIA Opinion*, 2015 WL 5076785, at *8 ("evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible").

Thus, rules of judicial construction, including specifically the "commercial reasonableness" rule invoked by CEC, are inapplicable to unambiguous provisions. *Wallace*, 658 N.E.2d at 715 (enforcing unambiguous provision as written despite claims that it produced an unreasonable result). As a leading treatise explains, rules of construction can be divided into "primary" and "secondary" rules. 11 Williston on Contracts § 32:1 (4th ed.). Primary rules, such as the "the plain meaning rule," are used regardless of ambiguity. *Id.* In contrast, secondary rules, such as the "rule favoring a reasonable construction," *id.* § 32:11, "are only used to determine the meaning of" ambiguous language. *Id.* § 32:1. This is so because secondary rules indicate which alternative meaning of an ambiguous provision is "preferred"—a choice not presented by unambiguous language. *Id.*; *Breed v. Ins. Co. of N. Am.,* 385 N.E.2d 1280, 1282 (N.Y. 1978) ("[B]efore the rules governing the construction of ambiguous contracts are triggered, the court must first find ambiguity. . . .").

Moreover, even if a "reasonable construction" rule were applicable—and it is not—it cannot be used to modify the plain meaning of the language used by the parties "under the guise of interpreting the writing." *Vermont Teddy Bear Co.*, 807 N.E.2d at 879; *Jade Realty LLC*, 980 N.E.2d at 947 ("[I]t is not a court's function to imply a term to save a defendant from the consequences of an agreement that it drafted."). This is so even where the plain meaning leads to a result that is "novel or unconventional,"[15] contrary to what the party actually intended,[16] or even "bizarre."[17] "This [C]ourt may not make or vary the contract . . . to accomplish its notions of abstract justice or moral obligation . . . ." *Breed*, 385 N.E.2d at 1283.

In sum, absent a showing of "absurdity," § 12.02(c) must be construed according to its plain meaning. As demonstrated below, CEC cannot show that reading "and" conjunctively as written produces absurd results.

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[15] *See Wallace*, 658 N.E.2d 715 (lease provided for a retroactive appraisal of rent payments made over the course of 32 years); *Jade Realty LLC*, 980 N.E.2d 945 (note provided for lower prepayment penalty in the first six years than in the years seven through ten).

[16] *See Maxwell*, 461 N.Y.S.2d at 543–44 (giving "and" its plain meaning even if the drafters "intended something different" but used the conjunctive "[f]or some inexplicable reason.").

[17] *See Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 973 N.Y.S.2d 187, 190 (App. Div. 2013) (a provision of a stock warrant prevented another provision from ever having any effect).

3. The Plain Meaning of Section 12.02(c) Does Not Result in Absurdity and Must be Applied As Written.

"[T]he Court of Appeals has set a high bar for declaring a contract absurd." *Warberg Opportunistic Fund, L.P.*, 973 N.Y.S.2d at 192. Under New York law, absurdity is present only where the plain reading completely deprives a party of all benefits under the agreement. In *Jade Realty LLC*, the Court of Appeals rejected the argument that deprivation of *some*, albeit significant, contractual rights warranted a departure from the plain language of the agreement. *See* 980 N.E.2d at 948 (deprivation of prepayment premium did not amount to absurdity because the lender still received interest during the life of the loan "and it did not lose its principal"). The court contrasted this with one of the few examples of interpretations that deprived rights so completely as to amount to an "economic absurdity." In that example, *Reape v. New York News, Inc.*, 504 N.Y.S.2d 469 (App. Div. 1986), the Appellate Department rejected as absurd the literal interpretation that resulted in one party "assum[ing] a net loss for each copy" of newspaper it distributed. *Id.* at 470. *See also Meyer v. Stout*, 914 N.Y.S.2d 834, 837 (App. Div. 2010) (relying on *Wallace* to modify the plain meaning of the deed that would "create the absurd result that the easement would commence on property that plaintiff did not own and would continue onto property that he also did not own").[18]

Mere assertions of unreasonableness or departure from the usual commercial practice do not meet the high burden of establishing economic absurdity. *See Wallace*, 658 N.E.2d at 717 ("unconventional" retroactive adjustment in rent over the period of 32 years was not absurd despite

[18] Evidence of absurdity of unambiguous provisions must be found, if at all, within "the four corners of the [agreement]." *Wallace*, 658 N.E.2d at 717; *Marin v. Constitution Realty, LLC*, 11 N.Y.S.3d 550, 555 (App. Div. 2015) (to consider expert opinion that the plain reading would "produce an absurd result . . . . is to admit extrinsic evidence to an admittedly unambiguous contract which is prohibited by long-standing precedent").

"dramatic inconsistencies[,] anomalies," and "fiscal uncertainties"); *Jade Realty LLC*, 980 N.E.2d at 947 (lower prepayment penalty in the first six years than during the balance of the loan term was "novel" and "unconventional," but not absurd). A literal reading is not absurd even if it leads to a result unintended by one of the parties. *Jade Realty LLC*, 980 N.E.2d at 947; *In re Allegiance Telecom, Inc.*, 356 B.R. 93, 100 (Bankr. S.D.N.Y. 2006) ("The trouble with XO's position [that it would never have taken on unconditional risk of loss] is that this is not what [the agreement] say[s]."). And, it is insufficient that the literal interpretation is not as favorable to its opponent as an alternative one. *Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 96 CIV. 7874 (RWS), 2002 WL 31106406, at *7 (S.D.N.Y. Sept. 20, 2002) ("The fact that the 102[%] was not as beneficial to [the defendant] as a figure of 120[%] . . . does not by itself render the provision 'absurd' or 'unreasonable'"). Finally, absurdity does not arise even where the plain reading ensures that provisions of the agreement "never come into effect," "bizarre" as it may seem. *Warberg Opportunistic Fund, L.P.*, 973 N.Y.S.2d at 190.

CEC cannot show absurdity. Even if the Guarantee could not be released because the three conditions were mutually exclusive—not the case as shown below—the plain meaning interpretation would still not deprive Caesars of all the benefits of billions in financing raised through the Indentures. Maintaining the Parent Guarantee unless all provisions of § 12.02(c)(i)-(iii) are satisfied would not eradicate the enormous financial benefits conferred by the bond offerings.

Furthermore, the three conditions *can* all occur at the same time and together serve as an important protection for noteholders. The condition in § 12.02(c)(iii) is triggered upon either discharge *or defeasance*, and *defeasance does not* result in repayment of the Notes. Specifically, defeasance is accomplished by CEOC's "*deposit*[] in trust with the Trustee" of cash or "U.S.

Government Obligations," *i.e.*, obligations of the United States or its instrumentalities. Indentures §§ 8.02(a)(i), 1.01(y). The cash or U.S. bonds so deposited are not turned over to the holders immediately, but rather at maturity. *Id.* § 8.03. For example, absent acceleration, defeasance of the BOKF Notes shortly after their issuance in 2010 would not result in payment of principal to holders until maturity in 2018. The resulting residual risk to the holders is obvious: a lot can go wrong in eight years. The U.S. could experience a significant economic downturn resulting in a devaluation of the deposited securities, or the financial institution holding the deposit could suffer some unforeseen harm. However remote these risks may be, the holders need to be protected until the Notes are actually repaid.

The three conjunctive conditions collectively protect the holders from unfair release of the Guarantee. For example, under § 5.01(a), CEOC could merge with another entity, and if CEOC is the surviving entity, it would remain obligated under the Indentures. Under the conjunctive interpretation, however, the Guarantee would remain in place to support the new CEOC's credit unless the holders received two additional protections. First, § 12.02(c)(iii) would require defeasance as a condition to the release of the Guarantee. Second, § 12.02(c)(i) would require CEC to relinquish complete ownership of CEOC. With the Guarantee removed and CEOC's insolvency no longer exposing CEC to liability, CEC would have the incentive to siphon off CEOC's assets (which is precisely what CEC did here once it determined to strip the Guarantee). The existence of CEOC shareholders other than CEC would protect the noteholders by making this manipulation more difficult. CEC's interpretation would eliminate completely these additional protections.

Therefore, the protections for holders set forth in the plain language reading of § 12.02(c) do not as a matter of law meet the high standard of absurdity.

The plain language of § 12.02 entitles the Trustees to summary judgment on BOKF's Count II and UMB's Count I, and a declaration that CEC's Guarantee has not been terminated or released.

C. CEC Is Independently Barred by Its Prior Default Under the Indentures From Availing Itself of Any Guarantee Release Provision.

CEC's wrongful disavowal of its obligations under the Parent Guarantee in May 2014 prevents it from subsequently availing itself of any guarantee release provisions of § 12.02(c).

A party who materially breaches a contract forfeits the right to take advantage of other provisions in that contract, including contractual releases from liability. *See, e.g.*, *A. E. Ottaviano, Inc. v. State*, 277 N.Y.S.2d 538, 541 (Ct. Cl. 1967) ("having thus breached its contract, [defendant] cannot now, and for its own benefit, avail itself of an alleged waiver provision in the very same contract"), *modified*, 299 N.Y.S.2d 938 (App. Div. 1969). The same reasoning applies to contractual guarantee releases. *Meehancombs Glob. Credit Opportunities Master Fund, LP v. Caesars Entm't Operating Co.*, No. 14-CV-7091(SAS), 2015 WL 9478240, at *7 (S.D.N.Y. Dec. 29, 2015) (CEC could not rely on contractual release of guarantee of payment after a default has occurred).

CEC's wrongful May 6, 2014 disclaimer of the Parent Guarantee was not only a material breach of the Indentures, but an express Event of Default. Under § 6.01(h) of the Indentures, an Event of Default occurs when "the Parent Guarantor denies or disaffirms its obligations under the Indenture or its Parent Guarantee and such Default continues for 10 days." SMF ¶ 14. This is exactly what occurred on May 6, 2014, when CEC claimed in an SEC filing that the Parent Guarantee has been removed. *Id.* ¶ 124. Contrary to CEC's assertion, the 5% Stock Sale failed to release the Parent Guarantee under either the last Paragraph of § 12.02(c) (*see* Part II.A *supra*) or § 12.02(c)(i) (*see* Part II.B *supra*).

Not only did CEC fail to cure its breach within the 10-day cure period, but it has since continuously maintained that the Parent Guarantee has been removed. Once that May 6, 2014 breach matured into an "Event of Default" on May 16, 2014, it rendered ineffectual CEC's subsequent attempts to rid itself of the Parent Guarantee obligations. Thus, neither the subsequent 6% Stock Transfer, nor the August Unsecured Notes Transaction, can provide a basis to eliminate the Parent Guarantee.

III. THE TRUSTEES ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CONTRACT DAMAGES COUNTS.

As shown above, the Trustees are entitled to summary judgment and a declaration that CEC remains obligated under the Parent Guarantee either because the Guarantee Transactions all violated the TIA, or because the transactions that comply with the TIA, if any, nevertheless failed to release the Parent Guarantee under the applicable indentures. Because CEC asserts no other defense to its obligations under the Indentures, the Trustees are also entitled to judgment for actual damages in the amount of outstanding principal and interest.

To establish breach of contract, plaintiff must prove: (1) that a contract existed; (2) that the plaintiff adequately performed under the contract; (3) that defendant breached the contract; and (4) damages attributable to the breach. *See Sicom S.P.A. v. TRS Inc.*, No. 14-CV-02085 (BCM), 2016 WL 1319205, at *5 (S.D.N.Y. Mar. 10, 2016). To establish that it is entitled to recover under a guarantee, plaintiff must prove: (1) that it was owed a debt; (2) that the defendant made a guarantee of payment of the debt; and (3) that the debt has not been paid by either the primary obligor or the guarantor defendant. *Id.*; *see also Meehancombs Glob. Credit Opportunities Master Fund, LP*, 2015 WL 9478240, at *7 n.64 (S.D.N.Y. Dec. 29, 2015) (citing *Kensington House Co. v. Oram*, 739 N.Y.S.2d 572, 572 (App. Div. 2002) ("Where, as here, a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee.”)).

The Trustees have established all of the elements of their entitlement to damages under the Parent Guarantee and are, therefore, entitled to summary judgment on BOKF’s Counts I and III and UMB’s Counts III–V. CEOC owed a debt under the Indentures and the Notes, which was accelerated and became immediately due and owing upon CEOC’s bankruptcy filings. SMF ¶¶ 193-194. CEC guaranteed CEOC’s obligations under the Indentures, and its guarantee was one of payment. *Id.* ¶¶ 5-6. The accelerated debt has not been paid by either CEOC or CEC. *Id.* ¶¶ 195, 202. Damages resulting from the failure to pay are total principal of $750,000,000.00 plus applicable interest, costs and other amounts as stated in the 12.75% Second Lien Indenture and total principal of $6,345,000,000.00 plus applicable interest, costs and other amounts as stated in the First Lien Indentures. *Id.* ¶¶ 199-201.

In addition, BOKF is independently entitled to the same damages on Count IV of its complaint based on violation of § 6.07. That provision of the Indentures tracks the language of Section 316(b) and prohibits, among other things, the impairment of BOKF holders’ right to receive payment of principal and interest without their consent. *Id.* ¶¶ 10. CEC cannot dispute that it and CEOC are both bound by § 6.07, and CEC can point to no facts that suggest that the holders failed to “adequately perform.” A breach of § 6.07 occurred for the same reasons that underlie the TIA violations. *See* Part I *supra*. It is immaterial whether the breach was committed by CEC or CEOC, since CEC has guaranteed CEOC’s “full and punctual performance” under the Indentures. SMF ¶ 5. Because the breach of § 6.07 has deprived BOKF’s holders of payment of outstanding principal and interest, BOKF is entitled to a judgment in that amount for the benefit of its holders.

IV. THE TRUSTEES ARE ENTITLED TO RECOVER THEIR COSTS AND EXPENSES.

In addition to outstanding principal and interest, the Trustees are also entitled to recover their costs and expenses incurred in enforcing their holders' rights under the Indentures.[19] Section 12.01(j) of the Indentures provides that "[e]ach Guarantor also agrees to pay any and all costs and expenses (including reasonable attorneys' fees and expenses) incurred by the Trustee or any holder in enforcing any rights under this Section 12.01." Accordingly, summary judgment should include judgment that the Trustees are entitled to an award of their charges, expenses, costs and indemnities under the Indentures. Such charges, expenses, costs and indemnities continue to accrue or be incurred. The Trustees are prepared to establish such charges, expenses, costs and indemnities following entry of judgment in their favor.

CONCLUSION

For the foregoing reasons, the Trustees respectfully request that the Court grant their motion for partial summary judgment; award the Trustees damages in the amount of $6,345,000,000.00 for UMB and $750,000,000.00 for BOKF, representing the total principal outstanding under their respective Indentures, award all interest accrued under the Indentures, award such charges, expenses, costs and indemnities, including attorneys' fees, incurred in the enforcement of the Noteholders' contractual rights, and award such other and further relief as the Court deems proper.

[19] The Trustees' claims affiliated with this provision are UMB Count VII (Payment of Costs and Expenses) and BOKF Counts I, III, and IV.

Respectfully submitted,

Dated: New York, New York
May 10, 2016

/s/ Andrew I. Silfen
Andrew I. Silfen (AS-1264)
Michael S. Cryan (MC-4887)
Mark A. Angelov (MA-5291)
ARENT FOX LLP
1675 Broadway
New York, NY 10019-5820
Tel: (212) 484-3900
Fax: (212) 484-3990
Email: andrew.silfen@arentfox.com
michael.cryan@arentfox.com
mark.angelov@arentfox.com

-and-

Ralph A. Taylor, Jr. (*admitted pro hac vice)*
Jackson D. Toof (*admitted pro hac vice)*
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 857-6000
Fax: (202) 857-6395
Email: ralph.taylor@arentfox.com
jackson.toof@arentfox.com

Attorneys for BOKF, N.A., solely in its capacity as successor Indenture Trustee under the Indenture governing the 12.75% Second Lien Notes

/s/ David A. Crichlow
David A. Crichlow
Craig A. Barbarosh
Karen B. Dine
Rebecca Kinburn
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022-2585
Tel: (212) 940-8800
Fax: (212) 940-8776
Email: craig.barbarosh@kattenlaw.com

david.crichlow@kattenlaw.com
karen.dine@kattenlaw.com
rebecca.kinburn@kattenlaw.com

Attorneys for Plaintiff UMB Bank, N.A., solely in its capacity as successor Indenture Trustee under the Indentures governing the First Lien Notes