UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRILOGY PORTFOLIO COMPANY, LLC, *et al.*, Plaintiffs, v. CAESARS ENTERTAINMENT CORPORATION, *et al.*, Defendants.	Case No. 1:14-cv-07091 (JSR)
FREDERICK BARTON DANNER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, *et al.*, Defendants.	Case No. 1:14-cv-07973 (JSR) [Rel. Case No. 1:14-cv-07091 (JSR)]

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

GRANT & EISENHOFER P.A.
485 Lexington Avenue, 29th Floor
New York, New York 10017

-and-

GARDY & NOTIS, LLP
Tower 56
126 East 56th Street, 8th Floor
New York, New York 10022

Attorneys for Frederick Barton Danner and the Proposed Class

DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas, 41st Floor
New York, New York 10036

Attorneys for Trilogy Portfolio Company, LLC and Relative Value-Long/Short Debt, A Series of Underlying Funds Trust

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Plaintiffs Trilogy Portfolio Company, LLC and Relative Value-Long/Short Debt, A Series of Underlying Funds Trust (the "Trilogy Plaintiffs" or "Trilogy"), together with Plaintiff Frederick Barton Danner ("Danner," and with the Trilogy Plaintiffs, "Plaintiffs"), respectfully submit this memorandum of law in opposition to the motion for summary judgment of Defendant Caesars Entertainment Corporation ("CEC").

PRELIMINARY STATEMENT

CEC's motion for summary judgment is contrary to the plain language of the Trust Indenture Act, the governing Indenture,[1] the undisputed record, and even the cases that CEC cites in its own brief. The Court should deny CEC's motion and instead grant summary judgment for Plaintiffs.

First, on Plaintiffs' claims for violation of TIA Section 316(b), CEC continues to ignore the fact that the Trust Indenture Act of 1939 (15 U.S.C. §§ 77aaa to 77bbbb, the "TIA") and the Securities Act of 1933 (15 U.S.C. §77a et seq., the "Securities Act") together expressly define bond guarantees as "indenture securities," a fact which renders all of CEC's "core term" arguments dead on arrival. Section 316(b) prohibited CEC from "impair[ing] or affect[ing]" Plaintiffs' right to receive principal and interest on any "indenture security." Because CEC's parent guarantee (the "Guarantee") is an indenture security, CEC's removal of Plaintiffs' right to receive principal and interest under the Guarantee without Plaintiffs' consent necessarily violated TIA. Moreover, even if the Guarantee were not an indenture security, no court has stated or even suggested that a bond guarantee is not a "core term" of an indenture, or that "core terms" are restricted solely to those governing the amount and timing of payments owed by the issuer. Rather, courts have regarded indenture terms as "core" where they "affect[] a securityholder's

[1] Capitalized terms not defined herein have the same meaning as set forth in the Memorandum of Law in Support of Plaintiffs' Joint Motion for Partial Summary Judgment [*Trilogy* ECF No. 145; *Danner* ECF No. 123].

right to receive payment of the principal of or interest on the indenture security on the due dates for such payments . . . ."[2] Because CEC's removal of the Guarantee necessarily "affected" Plaintiffs' legal (and not merely practical) right to receive principal and interest, CEC's motion fails even under CEC's own interpretation of the statute.

CEC's argument that Plaintiffs have not demonstrated standing or the right to damages under the TIA is also meritless. CEC admits that [redacted]. As such, Plaintiffs are undisputedly entitled to seek declaratory relief regarding the removal of the Guarantee. Regarding damages, CEC ignores the fact that Plaintiffs are entitled to contractual damages from CEC (an obligor) under the Indenture and Guarantee. For this reason, it is irrelevant whether Plaintiffs' statutory right to damages is somehow limited by the TIA.

CEC's arguments regarding Plaintiffs' contract claims fare no better. When CEC removed its Guarantee without Plaintiffs' consent, it necessarily breached Section 508 of the Indenture (which tracks TIA Section 316(b)) and Section 902 of the Indenture (which requires unanimous approval for any change to Plaintiffs' right to receive principal and interest on any "Security," a term defined to include the Guarantee). CEC also violated Section 902 of the Indenture because the "majority" of Notes for which it purported to obtain consents were held by CEC and CEOC at the point when the Proposed Consents became effective under the governing contract (*i.e.*, the August 12, 2014 Note Purchase and Support Agreement (the "NPSA")). None of the authorities cited by CEC address this aspect of the August Transaction, which differed from standard industry practice for "exit consents."

[2] *UPIC & Co. v. Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 452 (S.D.N.Y. 1992).

Regarding Plaintiffs' claim for improper redemption, CEC admits that it failed to follow the Indenture's redemption provisions (which require that the Trustee select notes participating in any partial redemption in a "fair and appropriate" manner) but incorrectly asserts that its payment of all principal and interest to the Favored Noteholders did not constitute a redemption because the Favored Noteholders were not "compelled" to sell their Notes. CEC's argument finds no support in the Indenture, however, and the plain meaning of the term "redemption" requires only that CEC pay all that was due on the subject Notes. Because that is exactly what happened here, CEC's motion should be denied.

Finally, CEC's argument regarding Plaintiffs' good faith and fair dealing claims is also contrary to the applicable law. Although CEC argues otherwise, New York permits good faith and fair dealing claims to be pled in the alternative to contract claims. In addition, Plaintiffs' claims rest on conduct not at issue in Plaintiffs' contract claims—specifically, CEC's failure to give the minority holders an opportunity to participate in the August Transaction, and CEC's orchestration of two sham transactions in May 2014 (the 5% Stock Sale and the PIP), the sole purpose of which was to trigger the release of the Guarantee [redacted]. For these reasons, CEC's redundancy argument fails on its own terms.

STATEMENT OF FACTS

Plaintiffs hereby incorporate the statement of facts set forth in their papers in support of their own Joint Motion for Partial Summary Judgment [*Trilogy* ECF Nos. 143, 145; *Danner* ECF Nos. 123, 124]. Plaintiffs' responses to the facts cited by CEC in support of its motion are set forth in Plaintiffs' Response to Caesars Entertainment Corporation's Local Civil Rule 56.1 Statement of Undisputed Statement of Material Facts and Counter-Statement of Material Facts ("Pls.' Resp. and Counter-SUMF").

ARGUMENT

I. PLAINTIFFS, AND NOT CEC, ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' TRUST INDENTURE ACT CLAIMS[3]

A. CEC Violated TIA Section 316(b) When It Purported to Remove Its Guarantee From the Indenture Without Plaintiffs' Consent

In contrast to BOKF, UMB, and the noteholders in *Marblegate*,[4] Plaintiffs here base their TIA claims not on the release of a guarantee, but rather on CEC's wholesale removal of all provisions relating to the Guarantee from the Indenture governing Plaintiffs' Notes, without Plaintiffs' consent.[5] This is the exact fact pattern that led Congress to enact the TIA—*i.e.*, an issuer and a guarantor conspiring with majority noteholders to amend the Indenture and thereby prejudice the legal rights of the minority.[6] In its defense, CEC argues that its termination of

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[3] Although CEC suggests in its motion that it is moving for summary judgment on all of Plaintiffs' TIA claims, CEC's brief does not address Plaintiffs' claims under TIA Section 316(a), which prohibited CEC from amending the Indenture based on consents for Notes held by CEC affiliates or entities controlled by CEC. To the extent that CEC intended to move for summary judgment on those claims, the motion should be denied for the reasons set forth in the Memorandum of Law in Support of Plaintiffs' Joint Motion for Partial Summary Judgment [*Trilogy* ECF No. 145; *Danner* ECF No. 123].

[4] *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592 (S.D.N.Y. 2014).

[5] In addition to impairing Plaintiffs' legal rights, CEC's removal of the Guarantee also impaired Plaintiffs' "practical ability" to recover on the Notes when due. CEOC declared bankruptcy five months after the August Transaction (an Event of Default under the Indenture), as a result of which it was unable to pay principal and interest on the Notes when due on January 15, 2015. Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 in Supp. of Pls.' Joint Mot. for Partial Summ. J. ("Pls.' SUMF") ¶¶ 228-32. Because the Guarantee obligations were purportedly stripped from the Indenture by the August Transaction, Plaintiffs had no "practical ability" to recover against either CEOC (the issuer) or CEC (the guarantor) when payment on the Notes became due. *See BOKF, N.A. v. Caesars Entm't Corp.*, Nos. 15-cv-1561 (SAS), 15-cv-4634 (SAS), 2015 WL 5076785, at *5 (S.D.N.Y. Aug. 27, 2015) ("The alleged impairment . . . must be evaluated as of the date that payment becomes due . . . ."); *see also Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99 CIV 10517 HB, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999).

[6] Congress enacted the TIA in response to a 1936 report from the SEC documenting abuses of minority bond holders by issuers and majority holders. *BOKF, N.A.*, 2015 WL 5076785 at *9 (citing CEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Prospective and Reorganization Committees, Part VI: Trustees Under Indentures 63-64, 150 (1936) (the "1936 SEC Report")); *see also* 15 U.S.C. § 77bbb(a) (citing SEC reports

Plaintiffs' rights was permissible because the TIA protects solely against impairments of the Indenture's "core terms"—which CEC argues should include only provisions that govern the amount and timing of payments owed to noteholders. This argument fails for the reasons set forth in Plaintiffs' own joint motion for partial summary judgment: first, the Guarantee constitutes an "indenture security" under the express statutory language of the TIA, a fact which moots CEC's core term argument in its entirety; and second, even if the Guarantee were not an "indenture security," the Guarantee still clearly constitutes a "core term" of the Indenture under the statute and all of the relevant case law, as Plaintiffs show below.[7]

1. The Guarantee Is an "Indenture Security" Under the TIA

TIA Section 316(b) provides that a noteholder's right "to receive payment of the principal of and interest on" any "indenture security" may not be "impaired or affected" without the holder's consent. 15 U.S.C. § 77ppp(b) (emphasis added). The TIA defines an "indenture security" to be "any security issued or issuable under the indenture to be qualified,"[8] and adopts the definition of "security" included in Section 2 of the Securities Act. *See* Mem. of Law of Caesars Entm't Corp. in Supp. of its Mot. for Summ. J. [*Trilogy* ECF No. 138; *Danner* ECF No. 119] ("CEC Br.") at 16; 15 U.S.C. § 77ccc(11) (defining "indenture security"); 15 U.S.C. § 77ccc(1) (stating that "[a]ny term defined in section 2 of [the Securities Act] and not otherwise

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as a basis for the Act). The 1936 SEC Report found that majority control provisions in indentures, allowing majority amendment of indentures' security and payment obligations, "give rise to abuses and problems which must be faced if the interests of security holders are not to be made subordinate to the desires and conveniences of the dominant group." 1936 Report at 150.

[7] In response to CEC's motion for summary judgment on Plaintiffs' claim that the May and August Transactions constituted an impermissible out-of-court restructuring under the TIA, Plaintiffs hereby incorporate the arguments set forth in the Memorandum of Law submitted by BOKF and UMB in response to CEC's motion for summary judgment.

[8] The TIA defines an "indenture to be qualified" as an "indenture under which there has been or is to be issued a security in respect of which a particular registration statement has been filed" or an "indenture in respect of which a particular application has been filed." 15 U.S.C. § 77ccc(9). CEC does not dispute that the Indenture here is a qualified indenture.

defined in this section shall have the meaning assigned to such term in such section 2 [of the Securities Act]"); *see also Ret. Bd. of the Policeman's Annuity and Ben. Fund of the City of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 168 (2d Cir. 2014) (indicating that the TIA adopts the definition of "security" provided in the Securities Act). Section 2 of the Securities Act—which CEC conspicuously omits from its moving papers—defines the term "security" to "mean[] any note, . . . bond, debenture, evidence of indebtedness . . . or . . . guarantee of . . . any of the foregoing." 15 U.S.C. §77b(a)(1) (emphasis added). Because the Securities Act expressly provides that bond guarantees are securities, CEC's Guarantee constitutes an "indenture security" for the purposes of Section 316(b).

Several additional provisions of the securities laws and SEC regulations confirm that the Guarantee is an "indenture security." For example, TIA Section 304, which specifies those categories of securities to which the TIA does not apply, expressly includes bond guarantees within the TIA's scope. *See* 15 U.S.C. § 77ddd(a)(1) ("The provisions of [the TIA] shall not apply to any of the following securities: (1) any security other than (A) a note, bond, debenture, or evidence of indebtedness, whether or not secured. . . or (C) a temporary certificate for, or guarantee of, any such note, bond, debenture, evidence of indebtedness, or certificate . . . ." (emphasis added)). Similarly, in 1987, Congress specifically amended Section 303(12) of the TIA "to clarify that a guarantor is an obligor with respect to indenture securities under the [Trust Indenture] Act." S. Rep. No. 100-105 at 33 (1987). Congress enacted this amendment to "reflect[] current administrative practice" and "eliminat[e] the necessity to interpret the term 'obligor' to include a guarantor." *Id.* As amended, Section 303(12) reads as follows:

> The term "obligor", when used with respect to any such indenture security, means every person (including a guarantor) who is liable thereon . . . .

15 U.S.C. § 77ccc(12). Finally, SEC Final Rule 33-7878 explicitly states that "[g]uarantees of Securities are securities themselves for purposes of the Securities Act of 1933." Financial Statements and Periodic Reports for Related Issuers and Guarantors, SEC Release Nos. 33-7878, 34-43124 (effective Sept. 30, 2000), https://www.sec.gov/rules/final/33-7878.htm#P124_6773. CEC's argument that the Guarantee is not an indenture security is contrary to all of these provisions.

Where statutory language is clear on its face, the Court does not need to look to outside authorities to interpret its meaning. *See Cervantes-Ascencio v. U.S. Immigration and Naturalization Serv.*, 326 F.3d 83, 86 (2d Cir. 2003) ("When construing statutes, we look to the statutory language which, if clear on its face, ends our analysis.") (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 428, 438 (1998)). According to CEC, however, the Court should ignore the plain language of the TIA (as well as interpretive statements from the SEC), and instead rely on a series of cases that (according to CEC) have held guarantees are not "securities" under the federal securities laws. None of the decisions CEC cites supports this argument. Indeed, the two Supreme Court decisions CEC cites do not discuss bond guarantees at all. *See Reves v. Ernst & Young*, 494 U.S. 56, 58-59 (1990) (discussing demand notes issued by agricultural cooperative); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 840 (1975) (discussing "shares of stock" in cooperative housing project).[9] As for the few cases CEC cites that do discuss guarantees, they hold simply that a guarantee should not be deemed a "security" where the underlying obligation does not qualify as a "security" under the Securities Act or the Securities Exchange Act. *See*

[9] The *Reves* case—on which CEC places special emphasis—supports the treatment of an instrument as a "security" so long as the instrument at issue was issued for "investment" purposes. *Reves*, 494 U.S. at 61 (acknowledging that Congress "did not attempt precisely to cabin the scope of the Securities Acts. Rather, it enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be sold as an investment[,]" so as to best "achieve its goal of protecting investors").

Coan v. Bell Atl. Sys. Leasing Int'l, Inc., 813 F. Supp. 929, 935-40 (D. Conn. 1990) (underlying sale/leaseback arrangement with a single investor was not a security); *James v. Meinke*, 778 F.2d 200, 204-05 (5th Cir. 1985) (underlying commercial loan was not a security); *Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1048 (Wash. 1987), *amended*, 750 P.2d 254 (Wash. 1988) (underlying public bonds were exempted from relevant Securities Act provision, and no separate guarantee existed for "payment on the bonds directly"); *Woods v. Homes & Structures of Pittsburg, Kan., Inc.*, 489 F. Supp. 1270, 1293-94 (D. Kan. 1980) (underlying industrial development bonds were exempted from Securities Act's definition of security). Ironically, the *Woods* case specifically confirms that "a guarantee can be a security." *Woods*, 489 F. Supp. at 1294 (emphasis added) ("The statutory definition of 'security' at Section 2(1) of the 1933 Act states a laundry list of items constituting securities and then specifically includes 'any . . . guarantee of . . .' any of the items listed."). Not surprisingly, CEC's brief ignores this portion of *Woods*, along with other cases finding that a guarantee can be a security. *See, e.g.*, *Banco de La Republica de Colombia v. Bank of New York Mellon*, No. 10 Civ. 536(AKH), 2013 WL 3871419, at *6 (S.D.N.Y. July 26, 2013) (stating that a guarantee can be a security, "particularly if 'incorporated in securities distributed to investors'" (quoting H.R. Rep. No. 73-1838, at 39 (1934))).

CEC's insistence that the Guarantee is not an indenture security is also contrary to CEC's SEC's filings and related internal documents. Consistent with the SEC's rules, CEC registered its Guarantee with the SEC at the time the Notes were issued and specifically "identified the Guarantee as a 'class of securities'" in its SEC Registration Statement. Pls.' Resp. and Counter-SUMF, Counter-SUMF ¶ 3. Likewise, in an internal memorandum to CEC's accounting department discussing CEC and CEOC's reporting obligations following the May Transactions,

CEC confirmed its own understanding that "[u]nder the US Securities laws, a guarantee of a security is considered to be a security separate and apart from the security it guarantees." Pls.' SUMF ¶ 17. In light of the foregoing, CEC's suggestion that the Guarantee is not a security is simply not credible.

Finally, CEC is incorrect in arguing that finding the Guarantee to be an "indenture security" would be "inconsistent" with the *Marblegate* decision. *Marblegate* involved no amendment of the indenture governing the plaintiffs' unsecured notes. *See Marblegate Asset Mgmt.*, 75 F. Supp. 3d at 595. Rather, the plaintiffs challenged a transaction that would trigger the release of a parent guarantee pursuant to terms already included in the indenture (as opposed to an amendment of the indenture to strip the guarantee). Indeed, that is why Judge Failla was required to determine whether a TIA violation could result from an out-of-court restructuring. Because neither the parties nor the court had reason to address whether the removal of the guarantee from the indenture resulted in the impairment of the plaintiffs' legal right to the repayment of principal and interest under an "indenture security" (*i.e.*, the guarantee), *Marblegate* provides no support for CEC's argument.

For all of these reasons, the Court should find that, as a matter of law, the Guarantee qualifies as an "indenture security" under the TIA, and CEC's removal of the Guarantee from the Indenture without Plaintiffs' consent violated TIA Section 316(b).

2. The Guarantee Is a "Core Term" of the Indenture

Even if the Guarantee were not an "indenture security" under the TIA (and it is), it would still constitute a "core term" of the Indenture for purposes of the TIA. Although CEC argues that "core terms" of an Indenture include only those provisions setting forth the amount of principal

and interest owed to noteholders, and the dates on which such payments are due,[10] neither the statute nor any of the cases cited by CEC support such a narrow interpretation. To the contrary, the courts have found an indenture provision is a "core term" under the TIA when it "affect[s] a securityholder's right to receive payment of the principal of or interest on the indenture security on the due dates of such payments . . . ." *UPIC & Co.*, 793 F. Supp. at 452. Here, the elimination of the Guarantee directly and undisputedly "affected" the ability of Plaintiffs to receive payments of principal and interest when those amounts came due (*i.e.*, when CEOC filed for bankruptcy)—and also impaired Plaintiffs' ability to institute suit against CEC as guarantor. For that reason, the Guarantee plainly constitutes a "core term."

None of the decisions cited by CEC adopt the narrow interpretation of "core term" that CEC advocates here.[11] In *UPIC*, for example, the court found that the elimination of the issuer's repurchase obligation would impair the plaintiffs' rights in violation of Section 316(b), notwithstanding the fact that this provision was distinct from those governing the issuer's obligations to make principal and interest payments. *UPIC & Co.*, 793 F. Supp. at 455-56. Similarly, in *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas*, the court found that TIA Section 316(b) required holders' unanimous consent for the removal of a repurchase option from the indenture. No. 10-2106-JWL, 2010 WL 2680336, at *5-6 (D. Kan. July 1, 2010). Tellingly, CEC ignores this portion of *YRC*, instead citing to a different portion of the case

[10] *See* CEC Br. at 11.

[11] CEC cites *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 906, 917 (2d Cir. 2010) as an example of "courts . . . consistently identif[ying] 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." CEC Br. at 11. But *First Millennium* says nothing to this effect. The court in *First Millennium* described TIA Section 316(b) as "a statutory provision requiring that bond indentures protect minority bondholders by prohibiting majority bondholders from collusively agreeing to modify the bond's payment terms." 607 F.3d at 917. As the court was not evaluating a claim under TIA Section 316(b), the court conducted no analysis into what the phrase "payment terms" includes, let alone what constitutes a "core term."

finding that only majority approval was required for the deletion from the indenture of a provision barring the issuer form merging or transferring substantially all of its assets. CEC Br. at 12 (citing *YRC Worldwide Inc.*, 2010 WL 2680336, at *7). CEC neglects to mention that in reaching that decision, the court stated:

> [T]he Trustee has not shown that, under the amendments approved by a majority of holders, plaintiff [the issuer] is in fact divesting itself of all of its assets, thereby threatening the holders' ability to recover payment under the notes from plaintiff. Nor has the Trustee shown that holders would no longer have any recourse against the notes' guarantors. Thus, there is no basis to conclude in this case . . . that the amendments necessarily leave the holders with no practical ability to receive payments due under the notes. . . . [W]hatever its [e]ffect on the holders' ultimate ability to recover their investment, the deletion of section 5.01 does not affect the holder's *legal rights* to receive payments from plaintiff or the guarantors or to institute suit to enforce those payment obligations.

Id. at *7 (underlined emphasis added).[12]

CEC also argues that construing the Guarantee to be a "core term" of the Indenture would be contrary to the decisions in *Federated* and *Marblegate*. CEC Br. at 12-13. That is clearly incorrect. Indeed, the court in *Federated* specifically cited the removal of a subsidiary guarantee in finding that the proposed exchange offer violated the TIA. *Federated Strategic Income Fund*, 1999 WL 993648 at *7 ("By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover and will remove a holder's 'safety net' of a guarantor, which was obviously an investment consideration from the outset."). As for *Marblegate*, that case did not involve any

[12] The other decisions CEC cites also do not support its argument. *See Greylock Global Opportunity Master Fund Ltd. v. Province of Mendoza*, No. 04 Civ. 7643(HB), 2005 WL 289723, at *4-6 (S.D.N.Y. Feb. 8, 2005) (no impairment of bondholders' absolute and unconditional right to receive payment of principal and interest under the indenture where plaintiffs would not be blocked by the Foreign Sovereign Immunities Act from suing sovereign debt issuer despite removal of sovereign immunity limitation provisions from indenture); *Schallitz v. Starrett Corp.*, 82 N.Y.S.2d 89, 91 (N.Y. Sup. Ct. 1948) (no violation of TIA Section 316(b) where plaintiff's legal right to recover principal and interest remained following waiver of default in issuer's obligation to sweep cash from subsidiary).

amendment of the governing indenture to strip the guarantee. Rather, the case discussed when a violation of the TIA occurs where a guarantee is released in accordance with the terms of the indenture. *Marblegate*, 75 F. Supp. 3d at 614. That said, *Marblegate's* finding of a TIA violation was based in significant part on the fact that, after the release of the parent guarantee, the plaintiffs would have no recourse against any company capable of paying a judgment. *See id.* at 616-17. If the release of a guarantee in connection with an out-of-court restructuring can trigger a violation of the TIA, then the removal of the guarantee by amendment should have the same result.

Although CEC suggests otherwise, the Guarantee's impact on Plaintiffs' right to receive principal and interest is what drove the Court's opinion denying CEC's prior motion to dismiss these cases. *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 516 (S.D.N.Y. 2015) (holding that the allegation that "the August 2014 Transaction stripped plaintiffs of the valuable CEC Guarantees leaving them with an empty right to assert a payment default from an insolvent issuer" stated a claim for violation of the TIA). The same is true for the Court's finding in *BOKF*/*UMB* that the Guarantee "unambiguously" provided credit support for CEOC's Noteholders.[13] CEC's argument that the Guarantee is not a "core term" cannot be reconciled with these decisions.

Finally, CEC's arguments regarding market practice and "custom and usage" are also without merit. Where the language of the Indenture is clear and unambiguous, the court need not look to evidence of market practices. *See BOKF, N.A.*, 2015 WL 5076785, at *8. Also, the several law journal articles CEC cites on this point state only that TIA Section 316(b) protects the right to interest, principal, and maturity. *See* CEC Br. at 11, 14 (citing John C. Coffee, Jr. &

[13] *BOKF, N.A.*, 2015 WL 5076785, at *7-8.

William A. 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); Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. Cal. L. Rev. 1035, 1054 (2011); James Gadsden, *Introduction to the Annotated Trust Indenture* Act, 57 Bus. Law. 979, 1146 (Aug. 2012); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 Am. Bankr. Inst. L. Rev. 431, 434 (2006)). None of the articles address whether a guarantee is a core term and, as such, they offer no support for CEC's position. Accordingly, the Court should find that the Guarantee constitutes a "core term" under the Indenture, and that CEC's removal of the Guarantee from the Indenture without Plaintiffs' consent violated TIA Section 316(b).

B. Plaintiffs Have Standing and Are Entitled to Recover all Principal and Interest Owed Under the Guarantee on the 2016 Notes

CEC contends that Plaintiffs lack standing to pursue their TIA claims and, in addition, that Plaintiffs cannot demonstrate "actual damages" under the TIA. In making these arguments, CEC misconstrues the statute, the governing case law, and Plaintiffs' claims.

1. Plaintiffs Have Standing to Sue Under the TIA

According to CEC, Plaintiffs lack standing to assert any claims under the TIA unless they can show that they: (i) held their Notes at the specific time of CEC's TIA violation; or (ii) received an express assignment of the TIA claims from the prior holder. *See* CEC Br. at 17. In making its standing argument, CEC relies on two decisions—*Bluebird Partners. L.P. v. First Fidelity Bank, N.A.*, 85 F.3d 970, 974 (2d Cir. 1996) and *In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1490-91 (9th Cir. 1985))—neither of which involved a holder of indenture securities suing an obligor (here, a guarantor) on those securities. *See* CEC Br. at 17 (incorporating by reference cases cited in Mem. of Law of Caesars Entm't Corp. in Supp. of its Mot. for Summ. J.

[*BOKF* ECF No. 143] at 29). Rather, *Bluebird* and *Nucorp* each involved claims asserted against an indenture trustee or a trustee's agents by parties that purchased their notes subsequent to the alleged TIA violation. *See Bluebird*, 85 F.3d at 973; *Nucorp*, 772 F.2d at 1488. CEC cites no case holding that the standing requirements of *Bluebird* or *Nucorp* should apply to a holder's suit against a guarantor of notes (as opposed to a suit against a trustee). Nor does CEC offer any basis for why those cases should be given such an expansive application.[14]

Even if *Bluebird* and *Nucorp* were applied to this matter, CEC's standing argument would still fail. First, CEC admits that the Trilogy Plaintiffs all [redacted] *See* CEC's Local Civil Rule 56.1 Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment [*Trilogy* ECF No. 137; *Danner* ECF No. 118] ¶¶ 26-27; *see also* CEC Br. at 17. Similarly, CEC does not dispute that Danner held 2016 Notes in August 2014. Pl.'s Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 in Supp. of Mot. for Partial Summ. J. [*Danner* ECF No. 64] ¶ 1; Decl. of Gordon Z. Novod in Supp. of Pl.'s Mot. for Partial Summ. J. [*Danner* ECF No. 63], Ex. A; Caesars Entm't Corp.'s Resp. to Pl.'s Local Civil Rule 56.1 Statement of Material Facts and Counter-Statement of Material Facts [*Danner* ECF No. 72] ¶ 1. As such, Plaintiffs undisputedly have standing to assert TIA claims based on the August Transaction, including claims for declaratory relief regarding the ineffectiveness of CEC's attempt to remove its Guarantee from the Indenture.

[14] In finding that misrepresentation claims against an indenture trustee under the TIA were not automatically assigned to subsequent buyers of the notes, the court in *Nucorp* reasoned that an automatic assignment would potentially foreclose the rights of parties who actually suffered the harm caused by the misrepresentation—*e.g.*, holders who sold the notes at a reduced price after the misrepresentation was disclosed publicly. *Nucorp*, 772 F.2d at 1489-90. No such concerns are present here, since Plaintiffs are the only Holders of their Notes and thus are the only parties entitled to sue for the payment of principal and interest.

Although CEC is correct that one of the Trilogy Plaintiffs, Trilogy Portfolio Company, LLC, [redacted] that fact would matter only if Plaintiffs' request for monetary damages was premised solely on their TIA claims. But that is not the case. Rather, Plaintiffs all seek monetary damages pursuant to their claims for breach of contract, including their claims based on CEC's refusal to pay amounts it owes on its Guarantee obligations. *See, e.g.*, Am. Compl. for Declaratory Relief and Damages [*Trilogy* ECF No. 31] ("*Trilogy* Am. Compl."), Count Nine; First Am. Class Action Compl. [*Danner* ECF No. 28] ("*Danner* Am. Compl."), Count Six. Because Plaintiffs undisputedly have standing to seek declaratory relief under the TIA, and because they also have standing to pursue damages under their contract claims, Plaintiffs' purported inability to seek monetary damages on their TIA claims with respect to [redacted] is irrelevant.

CEC's argument that certain members of the potential class alleged by Danner may not have standing under the TIA fails for similar reasons. CEC does not dispute that Danner owned his 2016 Notes prior to and at the time of the August Transaction. Nor has any class been certified at this point, while the parties await a decision on the fully submitted class certification motion.[15] As such, Danner clearly has standing under the TIA.

CEC's only other argument is that the Trilogy Plaintiffs do not have standing to assert TIA claims concerning the 5% Stock Sale. CEC Br. at 17. Again, this argument is irrelevant. Even if the Trilogy Plaintiffs lacked standing on their TIA claims with respect to the May Transactions, Plaintiffs are still entitled to relief pursuant to their parallel contract claims, including their claims for breach of Section 508 of the Indenture, which barred CEC from "impair[ing] or affect[ing]" Plaintiffs right to the principal and interest on both the Notes and the

[15] Danner reserves the right to address the issues of standing and damages as it relates to the proposed class after certification.

Guarantee. Moreover, Plaintiffs are also entitled to challenge the May Transactions as a rebuttal to CEC's principal affirmative defense—*i.e.*, that the May Transactions released the Guarantee, thereby mooting any breach of the TIA in August. For these reasons as well, CEC's standing argument is without merit.

2. Plaintiffs Are Entitled Under the Guarantee to Recover the Principal and Interest Owed on the 2016 Notes

CEC argues that Section 323(b) of the TIA limits Plaintiffs' damages to out-of-pocket losses, *i.e.*, the difference between the price at which Plaintiffs purchased the 2016 Notes and what they will ultimately receive on account of the 2016 Notes. *See* CEC Br. at 18. CEC's argument ignores the specifics of Plaintiffs' claims. As discussed above, Plaintiffs' requests for damages are based not only on their TIA claims, but also on CEC's breach of its obligations under the Indenture, the 2016 Notes, and the Guarantee, under each of which Plaintiffs have a contractual right to principal and interest. Where (as here) a party sues on a note or other security purchased in the secondary markets, the price paid for the security is irrelevant to the substantive rights of a party seeking to enforce the terms of an instrument.[16] *See* N.Y. Gen. Oblig. Law § 13-107(1) ("[A] transfer of any bond shall vest in the transferee all claims or demands of the transferrer . . . for damages against any guarantor of the obligation of such obligor, trustee, or depositary."); *In re Nortel Networks, Inc.*, 532 B.R. 494, 560 (Bankr. D. Del. 2015). As stated by the court in *Nortel*:

> The pro rata proponents suggest the Courts should consider the identities of the Bondholder Group's members, their purchase history, and the prices they paid for the Bonds when evaluating allocation. The Court answers with a resounding "No." When and at what prices the members of the Bondholder Group acquired

[16] In addition to the foregoing, CEC's argument is contrary to TIA Section 316(b), which states that "[n]otwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security . . . shall not be impaired or affected without consent of such holder . . . ." 15 U.S.C. § 77ppp(b) (emphasis added).

> their Bonds is irrelevant to this litigation. The purchaser of a debt instrument on the secondary market is entitled to the exact same rights as the original purchaser of that instrument.

In re Nortel Networks, Inc., 532 B.R. at 560 (citing *In re 785 Partners*, 470 B.R. 126, 133 (Bankr. S.D.N.Y 2012) (an assignee stands in the shoes of the assignor and can assert the exact same rights)).

None of the authorities CEC cites support its argument. By its terms, TIA Section 323(b) imposes limitations on any "suit for damages under the provisions of [the TIA]." 15 U.S.C. § 77www(b). Again, Plaintiffs here seek contractual damages against an obligor (CEC) based on the terms of the relevant contracts (the Indenture and the Guarantee), not out-of-pocket losses they suffered due to an indenture trustee's misrepresentations. In *Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n*, 109 F. Supp. 3d 587, 600 (S.D.N.Y. 2015), the court applied Section 323(b) to limit damages in a suit against an indenture trustee under the TIA (not a contract claim). The other case CEC cites, *Oaktree Capital Mgmt., LLC v. Spectrasite Holdings, Inc.*, No. Civ.A 02-548 JJF, 2002 WL 32173072, at *7 (D. Del. June 25, 2002), did not even address TIA Section 323(b). Rather, the *Oaktree* court refused to grant preliminary injunctive relief because plaintiffs (who retained their rights to sue the issuer) were not likely to suffer irreparable harm. *See id.* at *6-7.

In sum, none of the authorities cited by CEC prohibit bondholders from recovering all principal and interest due on bonds they continue to hold. The Court should deny CEC's motion.

II. PLAINTIFFS, AND NOT CEC, ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CONTRACT CLAIMS

A. The August Transaction Violated Sections 508 and 902 of the Indenture

Section 508 of the Indenture provides as follows:

Unconditional Right of Holders to Receive Principal, Premium and Interest.

> Notwithstanding 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 and any premium and . . . interest on such Security on the respective Stated Maturities expressed in such Security . . . and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

Pls.' SUMF ¶ 24 (quoting Indenture, § 508 (emphasis in original)). As the Indenture acknowledges, Section 508 was included in the Indenture pursuant to Section 316(b) of the TIA. *Id.* ¶ 25.

Section 902 of the Indenture permits CEOC, CEC, and the Trustee to enter into a supplemental indenture:

> with the written consent of the Holders of at least a majority in principal amount of the Outstanding Securities, . . . provided, however, that no such supplemental indenture shall, without the consent of the Holder of each Outstanding Security affected thereby, . . . 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 an Original Issue Discount Security or any other Security which would be due and payable upon a declaration of acceleration of the Maturity thereof pursuant to Section 502 or change any place of payment where or the coin or currency in which any Security or any premium or interest thereon is payable, 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).

Id. ¶ 29 (quoting Indenture, § 902).

Section 508 expressly prohibited CEC from "impair[ing]" Plaintiffs' right to principal and interest on any "Security," or to institute suit for the enforcement of such payment, without their consent. *Id.* ¶ 24. Similarly, Section 902 of the Indenture barred CEC from amending the Indenture to remove Plaintiffs' rights to principal and interest on any "Security" without Plaintiffs' consent. *Id.* ¶ 29; *see also* CEC Br. at 21 (CEC acknowledging that "Section 902's authorization to amend the Indenture expressly carves out the very same rights protected by Section 508"). Because the Guarantee is a "Security" under the Indenture, CEC breached both

Sections 508 and 902 when it removed the Guarantee without Plaintiffs' consent pursuant to the August Transaction.

CEC's argument that the August Transaction did not violate Sections 508 or 902 is based on the assertion that the Guarantee is not a "Security" under the Indenture. That argument (like CEC's argument that the Guarantee is not an "indenture security" under the TIA) fails under the plain terms of the governing document. In the Recitals section, the Indenture states that CEOC and CEC "have duly authorized the execution and delivery of this Indenture to provide for the issuance from time to time of unsecured debentures, notes or other evidences of indebtedness (together with the related guarantees provided by the Guarantor, the "Securities"), to be issued in one or more series as provided for in this Indenture." Pls.' SUMF ¶ 15 (emphasis added). Similarly, in Section 101, the Indenture states that "'Securities' has the meaning stated in the first recital of this Indenture and more particularly means any Securities authenticated and delivered under this Indenture." *Id.* ¶ 16 (emphasis added).

CEC's argument that the Recitals definition's use of the phrase "together with" should be read as exclusionary rather than inclusionary is contrary to both the law and common sense. CEC Br. at 22. Under New York's rules of contract interpretation, "words and phrases should be given their plain meaning and the contract should be construed so as to give full meaning and effect to all of its provisions." *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) (internal quotation marks and citation omitted). Here, CEC fails to offer any explanation for why the Recitals definition include the word "Guarantee," if not to include the Guarantee in the Indenture's definition of "Security." Moreover, the decisions CEC cites on this point, *Gibson v. City of Kirkland*, 433 F. App'x 539, 541 (9th Cir. 2011); *Hinshaw v. M-C-M Props., LLC*, 450 S.W.3d 823, 827 (Mo. Ct. App. 2014), do not address contractual

definitions at all, and hold only that the use of "together with" shows that the connected terms are related rather than independent. Because there is no dispute that the Guarantee is "related" to the Notes, these cases are inapposite.

CEC's argument that the Guarantee is not a "Security" because it is not "authenticated" or "delivered" (as referenced in Section 101 of the Indenture) also is without merit. CEC Br. at 22. Section 1502 of the Indenture (entitled "Execution and Delivery of the Guarantee") specifically required a formal Notation of the Guarantee to be "endorsed" on each Note authenticated and delivered by the Trustee. *See* Decl. of Clay J. Pierce in Supp. of Pls.' Joint Mot. for Partial Summ. J. [*Trilogy* ECF No. 144; *Danner* ECF No. 129] ("Pierce Decl."), Ex. A § 1502. Thus, under the terms of the Indenture, the Guarantee was "authenticated" and "delivered" by the Trustee along with the Notes. Moreover, even if that were not the case, Section 101 of the Indenture still could not be read to exclude the Guarantee from the definition of "Security," since such an interpretation would negate Section 101's express incorporation of the definition of "Security" set forth in the "first recital of this Indenture." Pls.' SUMF ¶ 16. Based on the foregoing, Plaintiffs, not CEC, are entitled to summary judgment on this claim.

B. The August Transaction Was an Improper Partial Redemption, in Violation of Article XI of the Indenture

CEC does not dispute that, as part of the August Transaction, it repurchased the Favored Noteholders' Notes at 100 cents on the dollar, plus accrued interest and transaction fees, notwithstanding the fact that the Notes were trading on the open market at a discount at the time. Pls.' SUMF ¶ 58. CEC also does not dispute that, under the express terms of Section 1103 of the Indenture:

> If less than all the Securities of any series are to be redeemed (unless all the Securities of such series and of a specified tenor are to be redeemed or unless such redemption affects only a single Security), the particular Securities to be redeemed shall be selected not more than 60 days prior to the Redemption Date by the Trustee, from the Outstanding Securities of such series not previously called for redemption, by such method as the Trustee shall deem fair and appropriate.

Id. ¶ 31. The Trustee for the 2016 Notes did not employ any "fair and appropriate" method in determining which Noteholders would be included in the August Transaction. *Id.* ¶¶ 64-68. Instead, CEC and CEOC chose holders who, in exchange for all the value they were owed under the Notes, agreed to strip away rights of the minority holders.

In moving for summary judgment, CEC argues that Section 1103's provisions requiring the "fair and appropriate" selection of Notes do not apply because the August Transaction did not involve any "redemption." According to CEC, a redemption occurs only when noteholders are "compelled" to exchange their notes. CEC Br. at 23. The Indenture does not define the word "redemption" to require compulsion, however. Indeed, the Indenture does not define "redemption" at all, as a result of which the Court must interpret the term according to its ordinary and customary definition and usage. *See, e.g.*, *Fed. Ins. Co. v. Home Assurance Co.*, 639 F.3d 557, 568 (2d Cir. 2011). "Redemption" means the "repayment of a debt security or preferred stock issue, at or before maturity." *See Barron's Dictionary of Finance & Investment Terms* 587 (8th ed. 2010); *Merriam-Webster's Collegiate Dictionary* 1041 (11th ed. 2003) (defining "redeem" as "to remove the obligation of payment," or "to buy back" or "repurchase"). This definition is consistent with decisions from the Second Circuit. For example, in *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, 773 F.3d 110, 116 (2d Cir. 2014), the Second Circuit held that "'redemption' . . . refers to '[t]he reacquisition of a security by the issuer.'" (citation omitted). Similarly, in *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013), the Circuit held that, "[g]enerally, '[t]o redeem is defined as to

purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain, as mortgage property, by paying what is due; to receive back by paying the obligation.'" (citation omitted).

The only relevant authority CEC cites in support of its "compulsion" argument is an unpublished district court case from 1977, *Heine v. The Signal Companies, Inc.*, No. 74 -3036, 1977 WL 930, at *14 (S.D.N.Y. Mar. 4, 1977).[17] That decision, which has not been cited by any other court for several decades, is on its face inconsistent with both current law and the customary definition and usage of "redemption." Notably, in *Whitebox Convertible Arbitrage Partners, L.P. v. World Airways, Inc.*, the court (applying New York law) found that a private exchange offer constituted a partial redemption even though (like the August Transaction) it involved a voluntary, negotiated exchange. No. Civ. A. 1:04-CV-1350, 2006 WL 358270, at *3 (N.D. Ga. Feb. 15, 2006) (applying New York law). CEC's argument is contrary to both *Whitebox* and the above Second Circuit decisions.

CEC's reliance on provisions of the Indenture allowing the cancellation of securities "acquired in any manner whatsoever" also is unavailing. Indeed, when confronted with the same argument based on an identical indenture provision, *compare id.* at *3 *with* Ex. A to Pierce Decl. § 309, the *Whitebox* court rejected it, stating that "[t]his provision places a duty on the [t]rustee to cancel bonds; it does not provide a method whereby [defendant] might obtain bonds that would otherwise be prohibited by the [i]ndenture . . . ." 2006 WL 358270 at *3. Language in

[17] The second case cited by CEC, *Concord Real Estate CDO 2006-1 v. Bank of America, N.A.*, is wholly distinguishable from the August Transaction, as it addresses only the voluntary delivery of notes to the issuer for no consideration with the intent that the notes be cancelled so that the issuer would not fail a coverage test in the indenture. 996 A.2d 324, 326 (Del. Ch. 2010). The court in *Concord* addressed only the issue of whether the notes remained outstanding as that term was used in the coverage test. *See id.* *Concord* does not address a transaction where, by agreement, an incentive was offered only to certain favored noteholders in an effort to obtain their approval of a bond exchange while not made to other bondholders.

indentures should be given consistent, uniform interpretation. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982). This Court should similarly refuse to interpret Section 309 as authorizing CEC to engage in bond exchanges that are inconsistent with the terms of the Indenture.

In sum, the parties' contract clearly contemplates that, where Caesars elects to repay all principal and interest due on only a portion of the Notes then outstanding, the selection of those Notes should be conducted by a "fair and appropriate" method. Here, CEC did not repurchase bonds on the open market. Nor did it offer to repurchase the Notes at the discounted purchase price at which the Notes were then trading. Instead, CEC opted to pay all principal and interest owed on the Notes, which in substance constitutes a redemption under the plain meaning of that term, to noteholders it chose based on their willingness to impair the rights of minority holders. For all of these reasons, CEC's motion should be denied.

C. The Favored Noteholders' Consents to the Supplemental Indenture Were Ineffective and Resulted in a Violation of Section 902 of the Indenture[18]

Like the rest of its motion, CEC's argument regarding the Trilogy Plaintiffs' claim that the August Transaction violated the Indenture's Affiliate Voting provisions—Count Four of the Trilogy Plaintiffs' Amended Complaint—is contrary to both the undisputed facts and the governing provisions of the parties' contract.

Under Section 902 of the Indenture, CEC, CEOC, and the Indenture Trustee were required to obtain the "written consent of the Holders of at least a majority in principal amount of the Outstanding Securities" before they could put in place any Supplemental Indenture. Pls.' SUMF ¶ 29. In defining "Outstanding Securities," the Indenture specifically excludes: (i)

[18] Although the heading for Argument II.D. indicates that CEC is moving for summary judgment on Counts Four, Six, and Seven of Trilogy's Amended Complaint, no discussion of Counts Six and Seven appears in CEC's brief. In light of CEC's failure to address these counts, the Trilogy Plaintiffs likewise only discuss Count Four.

"Securities theretofore canceled by the Trustee or delivered to the Trustee for cancellation"; (ii) "Securities for whose payment or redemption the necessary amount of money or money's worth has been theretofore deposited with the Trustee or any Paying Agent . . . for the Holders of such Securities" on the date of determination; and (iii) Securities held by CEOC, CEC, or their "Affiliates." Ex. A to Pierce Decl. § 101. The Indenture defines "Affiliates" to include any "Persons directly or indirectly controlling or controlled by" CEC or CEC. *Id.* "Control" is defined to mean "the power to direct the management and policies of [another] Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise." *Id.*

Here, CEC breached Section 902 of the Indenture because the Notes repurchased from the Favored Noteholders were not "Outstanding Securities" at the time the Proposed Consents provided by the Favored Noteholders became "effective." In Section 5.1 of the NPSA, Caesars and the Favored Noteholders agreed that the "Proposed Consents"[19] provided by the Favored Noteholders "will not become effective until the consummation of the Closing." Ex. D to Pierce Decl. § 5.1. Section 2.2 of the NPSA provides that, at the Closing: (i) the Favored Noteholders would transfer their Notes to CEC and CEOC; (ii) CEC and CEOC would pay the Favored Noteholders for their Notes; (iii) CEOC would execute and deliver a Supplemental Indenture for the Notes; and (iv) [redacted]" *Id.* § 2.2. CEC does not deny any of the foregoing facts, which together show that, at the point when the Proposed Consents became effective, the Favored Noteholders had been paid, and the Notes had been transferred, first to CEOC and CEC, and then to the Trustee for cancellation. Thus, based on the express terms of the NPSA, the Notes were not "Outstanding" when the

[19] Consistent with Section 5.1, the NPSA expressly defines the Favored Noteholders' consents as "Proposed Consents." Ex. D to Pierce Decl. § 5.1.

Proposed Consents became effective, and should not have been counted when determining whether the Supplemental Indenture had the majority consents required by Section 902.

CEC for the most part ignores the foregoing. [20] *See, e.g.*, *Trilogy* Am. Compl. ¶ 121. Instead, CEC argues that the sequence of the August Transaction was consistent with "market practice" because the Favored Noteholders' Proposed Consents were delivered to CEC and CEOC prior to closing. CEC Br. at 25. In making this argument, CEC cites various authorities stating that exit consents are typically provided prior to a tender or exchange offer's closing. *See, e.g.*, *Federated Bond Fund v. Shopko Stores, Inc.*, No. 05 CV 9923(RO), 2006 WL 3378696, at *1 (S.D.N.Y. Nov. 17, 2006); *Gradient Oc Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 121-22 (Del. Ch. 2007). CEC is missing the point. Plaintiffs do not base their claim on the fact that the Supplemental Indenture was signed subsequent to the Favored Noteholders providing the Proposed Consents. Rather, Plaintiffs base their claim on the fact that, at the time the Proposed Consents became effective, the Notes had been transferred to and paid for by Caesars and transferred to the Trustee for cancellation, as a result of which the Notes could no longer be considered "Outstanding" as that term is defined in the Indenture. *See* Pls.' Br. at 25-28.[21]

Moreover, and contrary to CEC's suggestion, the structure of the August Transaction was *not* consistent with standard industry practice. As discussed in *A Practitioner's Guide To Exchange Offers And Consent Solicitations* (the "*Practitioner's Guide*"), the execution of a

[20] Although CEC does not address Plaintiffs' statutory affiliate voting claim (Trilogy Count Three) in its motion, CEC was also in violation of TIA § 316(a). *See* Mem. of Law in Supp. of Pls.' Joint Mot. for Partial Summ. J. [*Trilogy* ECF No. 145; *Danner* ECF No. 123] ("Pls.' Br.") at 25-28.

[21] Because none of CEC's authorities address consents that were ineffective when delivered and only became effective upon closing, they have no bearing on the essential issue here and should be disregarded. *See* CEC Br. at 25.

supplemental indenture should not occur after an issuer has acquired the bonds being voted, because bonds held by an issuer or its affiliate are not eligible to vote in favor of an amendment to an indenture. Nicholas P. Saggese, Gregg A. Noel, Michael E. Mohr, *A Practitioner's Guide To Exchange Offers And Consent Solicitations*, 24 Loy. L.A. L. Rev. 527, 590 (1991). Specifically, the *Practitioner's Guide* states that:

> Practitioners should be particularly careful in following the amendment procedures of an indenture governing Target Securities for which exit consents are being sought in a combined Exchange Offer/Consent Solicitation. All trust indentures following the Model Indenture and many private trust indentures provide that bonds held by the issuer or its affiliates will not be considered "outstanding" for purposes of voting in favor of any amendment to, or waiver of, the terms of the indenture. Consequently, a corporation typically would allow the consents it receives to be withdrawn prior to the execution of the supplemental indenture affecting the proposed amendments and would time such execution so that it does not occur after the corporation accepts any Target Securities pursuant to the concurrent Exchange Offer.

Id.

CEC did not follow the above advice. Instead, it structured the August Transaction so that the Supplemental Indenture would be executed and delivered to the Trustee simultaneously with the repurchase of the Notes by CEC and CEOC [redacted] Ex. D to Pierce Decl. § 2.2. CEC also made sure that the Proposed Consents could not be withdrawn prior to the execution of the Supplemental Indenture. *See id.* § 5.1 (requiring each Favored Noteholder to "take all commercially reasonable action relating to its Proposed Consents reasonably necessary to cause such Proposed consents to become effective upon consummation of the Closing," including "using commercially reasonable efforts to deliver all required documents and instructions reasonably requested by CEC or CEOC to cause DTC's nominee, as record holder . . . to take such actions relating to the Proposed Consents necessary to give effect to the Proposed Consents," and "not transferring any interest in the Notes (including any right to exercise voting power with respect thereto or delivering any proxy with respect to

such Notes or entering into any voting agreement relating to the Notes"). Because CEC effectively bound the Favored Noteholders from withdrawing their consents prior to the execution of the Supplemental Indenture, CEC cannot avoid liability based on any claim that the August Transaction was "consistent with market practice."[22] CEC Br. at 25.

III. PLAINTIFFS, AND NOT CEC, ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

New York law is clear that Plaintiffs may simultaneously plead claims for breach of contract and breach of the duty of good faith and fair dealing as long as they "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*, No. 08 Civ. 9116(PGG), 2009 WL 321222, at *5 (S.D.N.Y. Feb. 9, 2009); *see also Bear, Stearns Funding, Inc. v. Interface Grp. – Nev., Inc.*, 361 F. Supp. 2d 283, 299-300 (S.D.N.Y. 2005) (allowing simultaneous breach of contract and good faith and fair dealing claims where the factual predicates of the claims were distinct). "[A] plaintiff adequately states an implied covenant claim by alleging conduct that subverts the contract's purpose without violating its express terms." *JPMorgan Chase Bank, N.A.*, 2009 WL 321222, at *5. "On a summary judgment motion where the contract meaning is yet to be determined, a party can continue in both a claim for breach of contract and one for breach of the covenant of good faith and fair dealing." *Fantozzi v. Axsys Techs., Inc.*, No. 07 Civ. 02667(LMM), 2008 WL 4866054, at *7 (S.D.N.Y. Nov. 6, 2008) (citing *E*Trade Fin. Corp. v. Deutsche Bank AG*, No.

[22] Section 8.1 of the NPSA provides that the only way for the Favored Noteholders to terminate the NPSA (and thereby withdraw their Proposed Consents) is: (1) "by mutual written consent of CEOC, CEC, and each Holder;" (2) if there has been a material violation, breach or inaccuracy of any representation or warranty by CEC or CEOC; (3) if the Closing has not occurred; or (4) if any Governmental Authority issues a final order preventing or prohibiting the consummation of the Closing. Ex. D to Pierce Decl. § 8.1.

05 Civ. 0902, 2008 WL 2428225, at *26 (S.D.N.Y. June 13, 2008)). Further, summary judgment should ordinarily not be granted on a good faith claim because "'[w]hether particular conduct violates . . . the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact.'" *Janel World Trade, Ltd. v. World Logistics Servs., Inc.*, No. 08 Civ. 1327(RJS), 2009 WL 735072, at *13 (S.D.N.Y. Mar. 20, 2009) (quoting *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 98 (2d Cir. 2007)).

Although CEC suggests otherwise, Plaintiffs' good faith and fair dealing claims are based on factual predicates that are distinct from those underlying Plaintiffs' breach of contract claims, which focus on CEC's violation of: (i) Plaintiffs' unconditional right to receive principal and interest (Indenture § 508) and the rules governing noteholder votes (Indenture § 902) (Trilogy Count Four, Danner Count Three); (ii) the Indenture's redemption provisions (Indenture § 1103) (Trilogy Count Five, Danner Count Four); and (iii) CEC's failure to pay on its Guarantee (Trilogy Count Nine, Danner Count Six). *Trilogy* Am. Compl. ¶¶ 142-57; *Danner* Am. Compl. ¶¶ 84-98, 109-14. In contrast, Plaintiffs' good faith claims with respect to the August Transaction alleges that CEC violated its duty to Plaintiffs by entering into an agreement with the Favored Noteholders to pay them a premium in exchange for their consent to amend the Indenture without giving all noteholders (including Plaintiffs) the opportunity to participate in the transaction. *Trilogy* Am. Compl. ¶¶ 177(a) and (c), 178(a); *Danner* Am. Compl. ¶¶ 103(a), 104(a); Pls.'SUMF ¶¶ 51-52, 57-60, 65-69, 84-85.[23] Plaintiffs' good faith claims are also premised on CEC's orchestration of two sham transactions in May 2014—the 5% Stock Sale and

[23] Under New York law, such conduct is actionable as a violation of the duty of good faith and fair dealing. *See, e.g.*, *Whitebox* 2006 WL 358270 at *3 (construing redemption provisions of an indenture under New York law).

the PIP—the sole purpose of which was to trigger the Indenture's Guarantee release provisions [redacted]. *Trilogy* Am. Compl. ¶ 177(b); *Danner* Am. Compl. ¶ 103(b); Pls.' SUMF ¶¶ 97, 139-48, 158; Pls.' Resp. and Counter-SUMF, Counter-SUMF ¶ 6. CEC engaged in all of the foregoing conduct in an effort to subvert the Indenture giving rise to an independent cause of action for breach of the duty of good faith and fair dealing. *See Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625, 631-32 (S.D.N.Y. 2010), *aff'd in relevant part*, 381 F. App'x. 117 (2d Cir. 2010) (enjoining transaction that, although technically permissible under the express terms of a contract, was an "end-run, if not a downright sham . . . [that did] away with the 'fruits' of the contract.").

CEC relies heavily on the fact that some of the allegations in Plaintiffs' breach of contract and good faith claims overlap. However, overlap of allegations does not mean the claims are "conclusively duplicative" and does not mandate dismissal. *See, e.g.*, *Sandler v. Indep. Living Aids, LLC*, No. 652154/2013, 2016 WL 2625277, at *21-22 (N.Y. Sup. Ct. May 6, 2016); *Lehman Bros. Int'l (Europe) v. AG Fin. Prods., Inc.*, No. 653284/2011, 2013 WL 1092888, at *7-8 (N.Y. Sup. Ct. 2013) (refusing to dismiss the good faith claim even though "the allegations of the breach of contract and implied covenant causes of action overlap in significant respects").

CEC's argument that Plaintiffs' good faith claims should be dismissed for the independent reason that the relief sought by the good faith claims is the same as that sought by the contract claims is also unavailing. In both cases that CEC cites on this point, the good faith claims were found to be duplicative of the breach of contract claims. *See ARI & Co., Inc. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 523 (S.D.N.Y. 2003); *Alter v. Bogoricin*, No. 97 CIV.

0662(MBM), 1997 WL 691332, at *8 (S.D.N.Y. Nov. 6, 1997). Thus, duplicative relief was merely a symptom of the redundancy of the defective claims at issue.[24] CEC's overlapping relief argument is also contrary to New York decisions allowing plaintiffs to assert alternative claims for breach of contract and breach of good faith and fair dealing at the summary judgment stage "'where there is a bona fide dispute concerning . . . whether the contract covers the dispute in issue . . . .'" *Courtien Commc'ns, Ltd. v. Aetna Life Ins. Co.*, 193 F. Supp. 2d 563, 571 (E.D.N.Y. 2002) (denying summary judgment on both the breach of contract claims and good faith claims where the claims were pled in the alternative) (quoting *Randall v. Guido*, 238 A.D.2d 164, 164 (1st Dep't 1997)).

Here, CEC argues that the August Transaction comported with the express terms of the Indenture because the May Transactions released the Guarantee. Assuming for the sake of argument that this is true, then Plaintiffs may still seek relief based on CEC's failure to allow minority holders to participate in the August Transaction, and CEC's orchestration of sham transactions in May 2014 aimed at terminating Plaintiffs' Guarantee rights. *See Whitebox*, 2006 WL 358270 at *3 (finding that a private exchange offer with favored bondholders that frustrated a partial redemption effected under the terms of the indenture was what "the principles of good faith and fair dealing are designed to avoid").

CONCLUSION

For the reasons set forth above and in Plaintiffs' joint motion for partial summary judgment, CEC's motion should be denied and judgment should be entered for Plaintiffs.

[24] Because Plaintiffs' good faith claims are pled as an alternative theory of liability to their breach of contract claims, there is no possibility of double recovery. *See Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 808 F. Supp. 2d 552, 568 (S.D.N.Y. 2011).

Dated: New York, New York
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Respectfully submitted,

GRANT & EISENHOFER P.A.

By: _____
Daniel L. Berger
Gordon Z. Novod

485 Lexington Avenue
29th Floor
New York, New York 10017
Telephone: (646) 722-8500

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Meagan Farmer
Tower 56
126 East 56th Street, 8th Floor
New York, New York 10022
Telephone: (212) 905-0509

Attorneys for Plaintiff Frederick Barton Danner and the Proposed Class

DRINKER BIDDLE & REATH LLP

By: _____
James H. Millar
Kristin K. Going
Clay J. Pierce

1177 Avenue of the Americas
41st Floor
New York, New York 10036
Telephone: (212) 248-3140

Attorneys for Plaintiffs Trilogy Portfolio Company, LLC and Relative Value-Long/Short Debt, A Series of Underlying Funds Trust

Dated: New York, New York
May 31, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

By: _____
Daniel L. Berger
Gordon Z. Novod

485 Lexington Avenue
29th Floor
New York, New York 10017
Telephone: (646) 722-8500

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Meagan Farmer
Tower 56
126 East 56th Street, 8th Floor
New York, New York 10022
Telephone: (212) 905-0509

Attorneys for Plaintiff Frederick Barton Danner and the Proposed Class

DRINKER BIDDLE & REATH LLP

By: _____
James H. Millar
Kristin K. Going
Clay J. Pierce

1177 Avenue of the Americas
41st Floor
New York, New York 10036
Telephone: (212) 248-3140

Attorneys for Plaintiffs Trilogy Portfolio Company, LLC and Relative Value-Long/Short Debt, A Series of Underlying Funds Trust