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)**

PLAINTIFF BOKF N.A.'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff BOKF, N.A., solely in its capacity as successor Indenture Trustee ("BOKF" or the "Trustee") for the 12.75% Second-Priority Senior Secured Notes due 2018 (the "Notes"), respectfully submits this memorandum of law in support of its Fed. R. Civ. P. Rule 56 Motion for Summary Judgment on Count V of its complaint, ECF 1 (the "Complaint"), against Defendant Caesars Entertainment Corporation ("CEC").

PRELIMINARY STATEMENT

The Trustee filed the above-captioned action on behalf of the holders of the Notes[1] (the "Noteholders") to challenge CEC's efforts to destroy those holders' right to recover on $750 million in Notes issued by CEC's subsidiary Caesars Entertainment Operating Company, Inc. ("CEOC") and guaranteed by CEC (the "Parent Guarantee" or "Guarantee"). CEOC has filed for bankruptcy, causing the entire principal and interest on the Notes to become immediately due and owing. CEOC has also proposed a reorganization plan that offers *no* cash payment and only a *de minimus* equity recovery to the Noteholders. CEC, which is not in bankruptcy, has asserted that its Guarantee has been terminated or released through one or more corporate and financial transactions.[2] If CEC is correct, the Noteholders would be denied their right to be paid.

The Trustee now moves for summary judgment on Count V of its Complaint, which seeks a declaration that the purported termination or release of the Parent Guarantee violates Section 316(b)[3] of the Trust Indenture Act of 1939 (the "TIA").[4] Count V raises legal issues of

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[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Trustee's Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 in Support of its Motion for Partial Summary Judgment (the "SMF") filed contemporaneously herewith and incorporated by reference.

[2] The Trustee disagrees that the Guarantee has been terminated, and it reserves, without waiver, all of its rights with respect thereto and to all other Counts in the Complaint and CEC's defenses.

[3] 15 U.S.C. § 77ppp(b). References to TIA Section 316(b) will be to "Section 316(b)."

[4] 15 U.S.C. §§ 77aaa to 77bbb.

statutory construction and implicates only a narrow subset of facts alleged in the Complaint, a subset that is not subject to a genuine dispute.

Section 316(b) prohibits impairment of an indenture security holder's right to receive payment of principal and interest on such security without the holder's consent. Whether an actionable impairment occurs depends on the practical *effect* of a transaction or transactions on the holders' substantive right to recover, rather than the specific mechanism through which the effect is accomplished. Here, the primary obligor, CEOC, is in bankruptcy and is protected by the imposition of the automatic stay under section 362 of title 11 U.S.C. 101 *et seq.* (the "Bankruptcy Code"); in addition, by its own admission, CEOC is unable to make *any* meaningful payment on the Notes, which matured upon the bankruptcy filing under the terms of the Indenture (as defined below). The Parent Guarantee is the Noteholders' sole practical recourse, and there is no genuine dispute that the effect of termination or release of the Guarantee would be to destroy any remaining prospect of meaningful recovery by the Noteholders. The undisputed facts further show that no Noteholder has consented, or even had the ability to consent, to the purported termination or release of the Guarantee. Accordingly, the release or termination of the Parent Guarantee would violate Section 316(b).

Part I below demonstrates that the undisputed facts and the plain meaning of the TIA entitle the Trustee to summary judgment on Count V because the Guarantee Transactions resulted in the nonconsensual impairment of the Noteholders' right to payment on the Notes. At least one court, however, has expressed concern about reading the TIA so broadly as to preclude all actions that might, as a practical matter, affect in some way the rights of indenture security holders. Accordingly, to avoid second-guessing ordinary business decisions that may have only a minor and indirect effect on holders' ability to recover, that court suggested that where the impairment is not substantial or direct, it must be the result of an out-of-court restructuring to constitute a Section 316(b) violation. Part II demonstrates that the concerns expressed in that case are inapplicable here because the removal of the Parent Guarantee is not the type of ordinary corporate action immune from judicial scrutiny. But in any event, any "restructuring" requirement is readily met here for at least two reasons. First, the removal of the Parent Guarantee would so fundamentally impair the Noteholders' right to payment that the Guarantee Transactions effectuating it necessarily amount to a restructuring as a matter of law. Second, even if an analysis of each transaction that removed or terminated the Parent Guarantee were required, that analysis would still compel the conclusion that each constitutes a restructuring.

STATEMENT OF FACTS[5]

BOKF is the successor Indenture Trustee under the Indenture dated as of April 16, 2010 (as supplemented or amended, the "Indenture"), pursuant to which CEOC issued the Notes. SMF ¶¶ 1, 3. CEC, the parent company of CEOC and a signatory to the Indenture as "Parent Guarantor," irrevocably and unconditionally guaranteed the obligations arising under the Indenture until payment in full of all of the guarantee obligations, whether at maturity, by acceleration, by redemption, or otherwise. *Id.* ¶¶ 1, 6-9. The Indenture is qualified under and governed by the TIA; it provides that "the right of any holder to receive payment of principal of and interest on the Notes held by such holder, on or after the respective due dates expressed or provided in the Notes . . . shall not be impaired or affected without the consent of such holder." *Id*. ¶¶ 9-11. To the extent any provision in the Indenture "limits, qualifies or conflicts with the duties imposed by, or with another provision . . . included in this Indenture by operation of, Sections 310 to 318 of the TIA, inclusive, such imposed duties or incorporated provision shall

[5] These facts are undisputed. The SMF, cited herein, is a more complete statement of all material undisputed facts.

control." SMF ¶ 11.

In January 2008, Apollo Global Management, LLC, TPG Global, LLC, and their respective affiliates and co-investors (collectively, the "Sponsors") acquired CEC in a leveraged buyout transaction for $30.7 billion, 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. SMF ¶¶ 17-18. At the time of the leveraged buyout transaction in 2008 and through the issuance of the Notes in April 2010, CEC operated through two primary groups of wholly owned subsidiaries: (i) CEOC and (ii) a group of six subsidiaries financed by commercial mortgage-backed securities. *Id.* ¶ 19.

By 2013, CEC acknowledged that CEOC's highly leveraged debt structure was unsustainable and expressly stated that "we do not expect cash flow from operations will be sufficient to pay CEOC's indebtedness in the long-term and we will ultimately have to seek a restructuring, amendment or refinancing of our debt, or if necessary pursue additional debt or equity offerings." *Id.* ¶ 22. Over the course of several years, Caesars – defined more fully in CEOC's First Day Memorandum in Support of CEOC's and its affiliated debtors' Chapter 11 Petitions (the "FDM") to expressly include CEOC and CEC – undertook numerous transactions, including over 45 asset sales and capital market transactions, to restructure and manage its debt. *Id.* ¶¶ 26-28.

As part of these transactions, Caesars moved certain CEOC assets – including casino and resort properties, online gaming assets and licenses to intellectual property such as the Total Rewards program – to Caesars affiliates formed in 2013 and in early 2014. *Id.* ¶¶ 31-40. For example, the transactions led to the creation of Caesars Growth Partners LLC ("CGP") in October 2013, an entity formed for the purpose of acquiring certain businesses and assets of

Caesars, and of Caesars Enterprise Services LLC ("CES") in April 2014, a new joint venture that received a non-exclusive, irrevocable worldwide royalty-free license related to CEOC's Total Rewards program. SMF ¶¶ 33-34, 36-37. Indeed, transaction documents implementing the transfer of assets to newly formed entities refer to the transaction as "effectuat[ing] a restructuring." *Id.* at ¶ 38.

In March 2014, CEC hired Blackstone Advisory Partners L.P. ("Blackstone"), the restructuring advisory business of the Blackstone Group L.P to provide advice on certain strategic alternatives. *Id*. ¶ 29. Through an engagement letter dated August 12, 2014, but made effective as of May 7, 2014, Blackstone agreed to provide financial advisory services to CEC and its affiliates in connection with a possible restructuring of certain liabilities and to assist in analyzing, structuring, negotiating, and effecting a restructuring. *Id*. ¶ 30.

On May 6, 2014, CEC announced that CEOC planned to issue $1.75 billion in new "B-7" term loans (the "B-7 Refinancing") under the first lien credit agreement (the "Credit Agreement") and to use the net proceeds to refinance existing indebtedness maturing in 2015 and existing term loans. *Id*. ¶¶ 42, 51-54. 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 certain institutional investors for $6.15 million (the "5% Stock Sale," and together with the B-7 Refinancing, the "May 2014 Transaction"). *Id*. ¶¶ 43-44. According to CEC, because CEOC was no longer a wholly owned subsidiary, the Parent Guarantee was automatically terminated under Section 12.02(c)(i) of the Indenture. *Id.* CEC contends that the B-7 Refinancing lenders required that CEC's Parent Guarantee of the Notes be eliminated and that such elimination provided enhanced credit support for the B-7 Refinancing. *Id.* ¶¶ 45-46. Also as part of the B-7 Refinancing, lenders under the

Credit Agreement provided their consent to certain amendments of the Credit Agreement, and in exchange, received a $50 million consent fee. SMF ¶¶ 49-50. One such amendment modified the Credit Agreement and required that CEC's guarantee of CEOC debt be limited to only debt held by those consenting lenders plus up to $2.9 billion. *Id*. ¶ 45. Ultimately, CEOC used the proceeds from the B-7 Refinancing to, among other things, purchase debt maturing in 2015, including the payment (at a premium) of approximately $451.9 million to affiliate CGP on account of certain notes it held. *Id*. ¶¶ 51-55.

In June 2014, CEC asserted, as an alternative basis for the elimination of its Parent Guarantee, that CEOC had elected to release the Parent Guarantee under a separate Indenture provision that purportedly permits such an election once CEC's guarantee of all of the "Existing Notes" (as defined in the Indenture) had been released. *Id.* ¶¶ 15-16, 59-60. On June 27, 2014, CEC also announced that on May 30, 2014, CEC authorized the CEOC Board to adopt a stock performance incentive plan which would enable CEOC to issue shares of CEOC stock to its directors and officers (the "<u>6% Stock Transfer</u>"). *Id*. ¶¶ 56-58. Following the 5% Stock Sale and the 6% Stock Transfer, CEC owns approximately 89% of CEOC stock. *Id*. ¶ 40.

On August 12, 2014, CEC announced a private refinancing transaction with certain holders of CEOC's 2016 and 2017 Notes whereby CEOC purchased the holders' notes and the holders 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 restricting disposition of "substantially all" of CEOC's assets to measure future asset sales based on CEOC's assets as of the date of the amendment (the "<u>August Unsecured Notes Transaction</u>"). *Id*. ¶¶ 62-63. On August 22, 2014, after the August Unsecured Notes Transaction closed, CEC asserted that CEOC had sent a notice to the Trustee's predecessor reaffirming its contention, first announced in June 2014, that CEC's Parent Guarantee had been released at CEOC's election. SMF ¶¶ 64-65.

Holders of the Notes did not consent, and were not afforded the opportunity to consent, to the May 2014 Transaction, the 6% Stock Transfer or the August Unsecured Notes Transaction (collectively, the "Guarantee Transactions"). *Id.* ¶ 66.

Despite the numerous out-of-court restructuring transactions, CEOC and 172 of its subsidiaries filed voluntary petitions under chapter 11 of Bankruptcy Code in January 2015. *Id.* ¶¶ 68, 71. CEOC's proposed reorganization plan and pre-petition Restructuring Support Agreement (the "RSA") reveals that the Noteholders would be unable to recover from CEOC the principal and interest due and owing to them. *Id.* ¶¶ 69, 79-80. Thus, holders of the Notes are expected to receive no cash payments and only a *de minimus* equity recovery. *Id.* ¶¶ 80.

The filing of CEOC's bankruptcy case was an immediate Event of Default under Section 6.01 of the Indenture and as a result, CEC and CEOC's obligations under the Notes became due and owing. *Id.* ¶¶ 12-13, 74-75. The Trustee served CEC with a demand for payment on account of its Guarantee Obligations on February 18, 2015. *Id.* ¶ 76. CEC continues to disaffirm its Parent Guarantee. *Id.* ¶ 77.

ARGUMENT

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). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Fletcher v. Atex, Inc.,* 68 F.3d 1451, 1456 (2d Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986) (emphasis in original)). If the moving party meets its initial burden of demonstrating the absence of any material fact dispute, the non-moving party may not rest upon unsupported denials, but must come forward with specific material facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Liberty Lobby*, 477 U.S. at 248; *see also Ling Nan Zheng v. Liberty Apparel Co.*, 556 F. Supp. 2d 284, 297 (S.D.N.Y. 2008).

Summary judgment is particularly appropriate to resolve issues of statutory construction. *See, e.g., Stissi v. Interstate & Ocean Transp. Co. of Philadelphia*, 765 F.2d 370, 374 (2d Cir. 1985). "The application of a statute's terms to undisputed facts is a question of law to be resolved by the court." *United States v. WB/Stellar IP Owner LLC*, 800 F. Supp. 2d 496, 508-09 (S.D.N.Y. 2011) *aff'd sub nom. United States v. Glenn Gardens Assoc., L.P.*, 534 F. App'x 17 (2d Cir. 2013) (internal citations and quotation marks omitted).

I. THE TRUSTEE IS ENTITLED TO SUMMARY JUDGMENT ON COUNT V OF THE COMPLAINT BECAUSE THE PLAIN LANGUAGE OF SECTION 316(b) PROHIBITS THE TERMINATION OR RELEASE OF THE PARENT GUARANTEE

The starting point for interpreting a statute is the language of the statute itself. *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.* ("Marblegate"), No. 14 Civ. 8584, 2014 WL 7399041 at *16 (S.D.N.Y. Dec. 30, 2014). Section 316(b) provides in relevant part:

> (b) Prohibition of impairment of holder's right to payment
>
> Notwithstanding 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, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . . .

15 U.S.C. § 77ppp(b). Thus, Section 316(b) is violated if there is: (i) impairment of an indenture security holder's right to receive payment of principal and interest *or* a holder's right to sue to enforce such payment; and (ii) the holder did not consent to such impairment. As shown below,

both statutory elements are indisputably met here.

A. Termination or Release of the Parent Guarantee Would "Impair" the Noteholders' Right "to Receive Payment of the Principal of and Interest on" the Notes

By its unambiguous terms, the statute focuses on the *effect* on the security holders and conspicuously omits any enumeration or description of specific, proscribed transactions or any requirement that the transactions be undertaken with the intent of harming the holders. *See* 15 U.S.C. §77ppp(b). The statute is not limited to prohibiting indenture amendments that modify legal obligations to pay. Rather, it proscribes impairment of a holder's right to receive payment, regardless of the precise mechanism by which it was accomplished or the intent behind it. *See, e.g., Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99 Civ. 10517, 1999 WL 993648 at *7 (S.D.N.Y. Nov. 2, 1999) (prohibition of Section 316(b) extends to transaction "that impairs or affects, *by its effect* and not necessarily by its terms, a holder's right to sue and recover payment") (emphasis added); *Marblegate Asset Mgmt. LLC, v. Educ. Mgmt. Corp.* ("*Marblegate II*"), 1:14-cv-08584-KPF, Opinion and Order, ECF No. 78, at 24 (S.D.N.Y. June 23, 2015) (TIA should be read broadly to protect holders' right to receive payment "even if the Act's authors did not anticipate precisely the mechanisms through which" the right may be impaired.).

Moreover, Section 316(b) does not preclude only impairment of a holders' bare *legal* right to sue; rather, it also precludes impairment of a holder's *practical* ability to recover. "[T]o interpret Section 316(b) as protecting merely the right to sue for payment, and not any substantive right to *receive* such payment, would be unfaithful to the text and the drafting history." *Marblegate II*, at 28 (emphasis in original); *accord id.* at 24-25. In addition, "[o]rdinary principles of statutory interpretation suggest that the first clause [of Section 316(b)] cannot be repetitive of the second, lest the disjunctive 'or' be disregarded." *Marblegate II* at 25, *citing Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). Accordingly, the statute distinguishes between "the right to receive payment" and the right to "institute suit for the enforcement," and prohibits the impairment of either.[6]

1. Termination or Release of the Parent Guarantee In the Context of an Insolvent Primary Obligor Constitutes Impairment

A number of decisions in this District, including three very recent opinions, confirm that Section 316(b) protects the substantive right to receive payment from the specific type of impairment threatened here: attempts to terminate guarantees supporting debts of issuers who are unable to pay those debts at maturity. These decisions conclude unanimously that the stripping of a guarantee in this context violates Section 316(b) because its *effect* is an impairment of the holders' *practical* ability to receive payment of principal and interest.

In *Federated Strategic Income Fund*, 1999 WL 993648, Judge Baer enjoined a transaction by which an issuer would divest itself of substantially all of its assets while simultaneously obtaining a release of its subsidiaries' guarantees of the issuer's payment obligations. *Id.* at *6. The court found that the resulting elimination of holders' practical ability to recover violates Section 316(b) even if the bondholders technically retain the "legal right" to pursue the issuer for payment of principal and interest. *Id.* at *7 (stripping of a guarantee "will remove a holder's 'safety net' of a guarantor"). Focusing on the *effect* of the proposed transaction, the court concluded that the removal of the guarantees in the context of the issuer lacking sufficient assets to pay debts as they matured impaired the right to payment:

> By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover . . . . Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the

[6] The legislative history confirms that this expansion of the TIA's protections "corresponds to" SEC and Congressional concerns about nonconsensual security holder impairment without judicial supervision. *Marblegate II* at 26; *accord id.* at 26-28.

> date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors.

Id. As the court elaborated, there can be no dispute that an impairment prohibited by the TIA occurs "when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt." *Id.*

In addition, *Marblegate* and *Marblegate II* both analyzed attempts to strip a guarantee in the context of an insolvent issuer. Both followed *Federated* and held that Section 316(b) protects the substantive right to payment and not merely the legal right to sue. The court found "unsatisfying the notion that Section 316(b) protects only against formal, explicit modification of the legal right to receive payment, and allows a sufficiently clever issuer to gut the Act's protections" through creatively structured transactions. *Marblegate*, 2014 WL 7399041 at *18. In its first decision, involving a motion for preliminary injunction, the court determined that "the release of the Parent Guarantee violates the Trust Indenture Act *in this context.*" *Id.* at *17 n.14 (emphasis added). The *effect* of the proposed transactions was integral to the court's finding that they impaired the holders' right to payment in violation of TIA, *id.* at *20, regardless of whether the mechanisms for removing the guarantee were expressly included in the indenture, *id.* at *15, and were otherwise "commonplace in the bond market." *Id.* at *15, *17 n.14. The court found that the stripping of the guarantee operated "to effect a complete impairment of dissenters' right to receive payment" when combined with the issuer's inability to pay. *Id.* at *20.

The *Marblegate II* decision was issued following a trial on the merits. The court there reaffirmed that 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* at 27 (emphasis added). Given that the removal of the guarantee would "sever the final avenue for [the holders'] recovery," it was "beyond peradventure that

Section 316(b) requires the satisfaction of [the holders'] claims in the factual circumstances of this case." *Id.* at 29-30.

Similarly, in *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, No. 14 Civ. 7091, 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015), this Court addressed the removal of CEC's guarantee of certain CEOC obligations as a result of the same August Unsecured Notes Transaction challenged here. In *MeehanCombs*, as here, the "crux of plaintiffs' allegations [was] that the release of the Guarantees . . . . affected plaintiffs' practical ability to recover payment in violation of section 316 of the TIA." *Id.* at *1. This Court agreed with plaintiffs and focused on the practical *effect* of the proposed guarantee stripping in the context of an "insolvent issuer," namely that the holders would be left "with an empty right to assert a payment default." *Id.* at *5.

The termination or release of the Parent Guarantee in this case would similarly leave the Noteholders with an empty right to assert a payment default. The Parent Guarantee here was in addition to the right to recover from CEOC, the issuer, and its subsidiary guarantors. SMF ¶¶ 3-8. In January 2015, however, CEOC and 172 of its affiliates, including all of its substantial subsidiary guarantors, filed voluntary cases under chapter 11. *Id.* ¶¶ 71-72. The bankruptcy filings accelerated the maturity of the Notes and the entire principal and interest became immediately due and owing under the terms of the Indenture. *Id.* ¶¶ 12-13, 74-75. That filing also barred any Noteholder collection efforts against CEOC and its subsidiary guarantors by virtue of the automatic stay of Bankruptcy Code section 362. 11 U.S.C. § 362. Moreover, CEOC filed a proposed plan of reorganization based upon the terms of the RSA that contemplates *no cash payment whatsoever* to the Noteholders; the Noteholders' recovery would be limited to a *de minimus* equity distribution. SMF ¶¶ 78-80.

In light of the Noteholders' inability to recover from CEOC and the subsidiary guarantors, the Parent Guarantee – which, under the terms of the Indenture, was "irrevocabl[e] and unconditional[]" and was to remain "in full force and effect until payment [of the Notes] in full" – became the Noteholders' sole practical recourse. SMF ¶¶ 5-8. In February 2015, the Trustee formally demanded that CEC satisfy its obligations under the Parent Guarantee. *Id.* ¶ 76. CEC, however, refused, taking the position that it is not subject to the Parent Guarantee as a result of the Guarantee Transactions. *Id.* ¶ 75; *see also id.* ¶¶ 44, 59, 64-65.

Because this purported termination and release of the Parent Guarantee would deny the Noteholders the last remaining avenue to recovery at or after the time of the Notes' accelerated maturity, as a matter of law, the Noteholders' right to receive payment under the Notes "on or after the respective due dates expressed in" the Indenture has been impaired in violation of Section 316(b).

2. Contrary to CEC'S Assertions, It Is Irrelevant Whether the Indenture Was Amended, Whether the Guarantee Was One of "Convenience," and Whether CEOC Was Insolvent at the Time the Guarantee Transactions Took Place

In an attempt to refute that the removal of the Parent Guarantee would unlawfully impair the Noteholders' right to payment, CEC asserts three arguments in its letter to the Court. None has merit.

First, CEC argues that the Parent Guarantee in this case "was terminated through a bargained-for right in the Indenture" itself, not through an amendment to an indenture as in *Federated* and *MeehanCombs*. *See* ECF 19 (CEC Letter to the Court) at 1. However, as detailed above, the *Marblegate* court *twice* sustained challenges to the termination of the guarantee that was expressly contemplated by the indenture and, as a result, required no amendment. As that court explained, CEC's argument proves too much:

> [I]f the Trust Indenture Act protects only those rights that are enshrined in an indenture, subject to whatever limitation contained therein, and nothing prevents an ex ante limitation on the right to receive payment (including through majority vote), then the Trust Indenture Act would fail to prohibit indentures allowing for majority modification of payment terms. *In effect, the statute would prohibit nothing more than violations of the indenture contract, rendering it superfluous.* The Trust Indenture Act, then, must protect *some* rights against at least *some* ex ante constraints.

Marblegate, 2014 WL 7399041 at *18 (emphasis added).[7] *See also Marblegate II* at 27 ("[R]eading the text and the purpose of the legislation fairly, there is no reason to think that the [TIA] was targeted only at a particular method of restructuring – straightforward amendment [of the indenture] – as opposed to an undesirable result" of allowing nonconsensual impairment.).

Second, CEC claims that unlike the guarantees involved in the cases discussed above, the Parent Guarantee is not protected by Section 316(b) because it is a "guarantee of convenience." ECF 19 (CEC Letter to the Court) at 2. There is nothing in the record to even suggest that the Parent Guarantee was a "guarantee of convenience." But even if the nature of the Guarantee were subject to genuine dispute – and it is not – such dispute would be immaterial. In *Marblegate*, unlike here, the Original Offering Circular expressly informed the holders that the guarantee was one of convenience and should not be relied upon by the holders for credit support. *Marblegate*, 2014 WL 7399041 at *4 (emphasis in original). Nevertheless, the court gave no weight to that fact, stating that "the Court does not believe that such cautionary language can undo the protections of the Trust Indenture Act." *Id.* at *20. "Plaintiffs may have been warned that modifications were possible, but they were not told that they could be forced to

[7] The plain language of Section 316(b) and the Indenture is equally dispositive of CEC's tortured argument. Section 316(b) prohibits impairment of holders' right to payment "[n]otwithstanding any other provision of the indenture." 15 U.S.C. § 77ppp(b). And the Indenture provides that to the extent its provisions limit or conflict with the provisions of the TIA, the provisions of the TIA control. *See* SMF ¶¶ 9, 11. Therefore, any transaction prohibited by the TIA, including the removal of the Parent Guarantee, cannot be rescued by reference to Indenture provisions.

accept a wholesale abandonment of their right to receive payment." *Id.* Thus, even *if* there were any indication that the Parent Guarantee was a "guarantee of convenience," its termination would still amount to prohibited impairment.

Third, CEC incorrectly contends that the Trustee cannot establish impairment unless it can show that CEOC was insolvent "at the time of *each* of the challenged transactions." ECF 19 at 3 (emphasis in original). Neither Section 316(b) nor the decisions applying it suggest that the termination of a guarantee impairs the right to payment only if the primary obligor is insolvent *at the time the termination occurs*.[8] Rather, the plain and unambiguous language of Section 316(b) prohibits impairment of the right to payment "*on or after the respective due dates* expressed in such indenture security." 15 U.S.C. § 77ppp(b) (emphasis added); *see generally* Part I.A. above. Therefore, impairment for the purposes of Section 316(b) is present whenever an act impairs the holder's practical ability to recover upon the debt's maturity, even if maturity will not occur for some time. *See Federated Strategic Income Fund*, 1999 WL 993648 at *7 (analyzing holders' ability to receive payment of principal and interest for the purposes of Section 316(b) as of the "date of maturity"); *see also MeehanCombs Global Credit Opportunities Funds, LP*, 2015 WL 221055 at *4 ("[I]t is possible for a right to receive payment to be impaired prior to the time payment is due."); *Marblegate*, 2014 WL 7399041 at *18 (Section 316(b) protects the substantive right to payment against *ex ante* impairment). Here, the payment was accelerated and became due upon CEOC's bankruptcy filing, and there can be no dispute that the Noteholders were impaired at least as of that time.

[8] Although CEOC's ability to pay at the time of the Guarantee Transactions is irrelevant to Count V, the Trustee maintains that CEOC was already insolvent at the time.

B. The Noteholders Did Not Consent to the Impairment of Their Rights to Receive Payment of Principal and Interest on the Notes

The second element of a Section 316(b) violation – the absence of the impaired holders' consent – is also readily met as a matter of law.

The plain language of Section 316(b) requires consent by each noteholder whose right to payment was impaired. 15 U.S.C. § 77ppp(b) ("[T]he right of *any holder* . . . to receive payment . . . shall not be impaired or affected *without the consent of such holder*.") (emphasis added); *MeehanCombs Global Credit Opportunities Funds, LP*, 2015 WL 221055 at *3 ("obligation to pay bonds" may not be altered outside of bankruptcy "without the consent of each bondholder"). As one commentator explained:

> Only two events should change a company's obligation to pay its bonds. Either *each affected bondholder would consent* to the alteration of the bond's terms, or a judge would value the company to determine that the firm was insolvent, eliminate the stockholders, and then reduce the express obligation to the bondholders. Congress and the SEC were aware that the holdout problem would frustrate some workouts, but the regulators wanted to impede workouts that took place outside of regulatory and judicial control.

Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 251 (1987) (emphasis added). There is no genuine dispute that none of the Noteholders consented to the removal or termination of the Parent Guarantee. CEC never obtained consent to the purported termination of the Parent Guarantee from *any* Noteholder. SMF ¶ 66. Indeed, CEC has admitted that it did not even seek such consent on the grounds that it was not required. *Id.* ¶ 67.

For the foregoing reasons, the Trustee is entitled to summary judgment on Count V.

II. THE COURT NEED NOT CONSIDER WHETHER THE GUARANTEE TRANSACTIONS ARE A RESTRUCTURING; NEVERTHELESS, THE UNDISPUTED FACTS ESTABLISH THAT ANY SUCH REQUIREMENT IS SATISFIED AS A MATTER OF LAW

As demonstrated in Part I above, Section 316(b) requires only two elements to establish a statutory violation: (i) an impairment of a security holder's right to receive payment (ii) without the holder's consent. Under the plain language of the statute, nothing more is needed.

The *Marblegate* court, however, was concerned that a purely textual interpretation of the TIA could permit disgruntled security holders to use Section 316(b) to attack any "ordinary business practices," *Marblegate*, 2014 WL 7399041 at *19, "based on a standardless 'ability to receive payment test.'" *Id.* at *18. This led the court to read into the statute the additional requirement, drawn from legislative history, that the impairment result from an out-of-court "restructuring." *Id.* at *19. Subpart A below demonstrates that this concern is not present here, and the Court thus need not engage in any effort to identify a "restructuring" giving rise to the Noteholder impairment. Nevertheless, as shown in subpart B below, there is ample undisputed evidence that the nonconsensual impairment here is the direct result of one or more out-of-court restructurings. Accordingly, the Trustee is entitled to summary judgment on Count V regardless of whether the implied "restructuring" limitation is relevant in this case.

A. The Rationale for Reading the "Restructuring" Limitation into Section 316(b) Is Inapplicable Here

In interpreting Section 316(b), the *Marblegate* court was concerned with opening the floodgates to TIA claims involving "ordinary" corporate actions that might have only minimal indirect effect on holders. *Marblegate*, 2014 WL 7399041 at *19. For example, the court did not "wish to find itself in the position of evaluating whether a proposed investment in a new widget factory is likely to erode an issuer's financial stability and thus negatively affect a bondholder's ability to receive payment." *Id.* at *18. That concern led the court in *Marblegate* and *Marblegate II* to examine the legislative history of Section 316(b), which showed that Section 316(b) was intended to avoid "[e]vasion of judicial scrutiny of the fairness of debt-readjustment plans." *Marblegate*, 2014 WL 7399041 at *18. That analysis provided the necessary limiting principle: unless explicit modifications of "core terms" of the legal obligation to pay are involved, transactions that nevertheless affect the right to payment of principal and interest as a purely practical matter do not violate Section 316(b) unless they "effect an involuntary debt *restructuring*." *Id.* at *19 (emphasis added). Limiting Section 316(b)'s application to out-of-court, involuntary restructurings avoids "the proffered specter of untrammeled judicial intrusion into ordinary business practice." *Id.*

That concern is wholly inapplicable here. The Guarantee Transactions are not ordinary corporate actions that may have only minimal or indirect effect on the Noteholders. To the contrary, CEC contends that the Guarantee Transactions, which themselves are part of a much larger series of transactions (*see* SMF ¶¶ 26-41), directly eliminate the Noteholders' recourse against CEC and their right to receive payment. And, unlike the questionable "widget factory" investment example cited in *Marblegate* that may have a merely indirect impairing effect through the general weakening of the issuer's financial stability, the termination of the Parent Guarantee would directly and completely eliminate an important and valuable legal right. Applying the plain language of Section 316(b) in this case does not risk unjustified judicial scrutiny, and there is no need to consider whether any out-of court restructuring (or restructurings) occurred.

B. Alternatively, Even If A Restructuring Is Required, The Guarantee Transactions and other Related Transactions Constitute Such a Restructuring

1. The Guaranty Transactions Collectively Constitute a Restructuring

Even if the "restructuring" requirement were applicable here, it is readily satisfied on the record before the Court. The overall effect of the Guarantee Transactions is far too harsh and oppressive for them to be anything but a prohibited restructuring. *See generally Lake v. Neal,* 585 F.3d 1059 (7th Cir. 2009) ("The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck.").

The TIA does not define the term "restructuring." However, courts applying Section 316(b) generally look at the context of a particular transaction to determine the extent of the modification of right to payment. *See, e.g., Marblegate*, 2014 WL 7399041 at *20. A transaction is "the type of debt reorganization that the Trust Indenture Act is designed to preclude" if it "operates, *in context*, to effect a complete impairment of dissenters' right to receive payment." *Id.* at *19-20 (emphasis added). It then follows that where claims under a guarantee are "the final avenue for [security holders'] recovery," the removal of the guarantee by *any* mechanism would improperly permit "*reorganizations* to take place . . . . without supervision of any court." *Marblegate II* at 29 (emphasis added); *see also MeehanCombs Global Credit Opportunities Funds, LP*, 2015 WL 221055 at *5 (removal of a guarantee that represents the holders' sole practical recourse is necessarily "an impermissible out-of-court debt restructuring.").

Thus, the *Marblegate* court refused to differentiate between two transactions where each resulted in the elimination of the guarantee. The *Marblegate* defendants relied primarily on section 10.06(a)(ii) of the indenture at issue, which provided for automatic release of the parent guarantee with the acquiescence of another class of creditors (who would have to agree to release the same guarantor's guarantee of their own debt) but without unanimous consent of the affected bondholders. *Marblegate*, 2014 WL 7399041 at *7. The defendants further relied on an indenture provision (section 9.02) that permitted release of the parent guarantee by a majority vote of the affected noteholders. *Id.* The court declined to distinguish between the two provisions and instead focused on the overall impairing *effect* of the transactions rather than their individual structure. It concluded that, given the "complete impairment" the transactions caused, both constituted impermissible restructuring:

> While Section 9.02 may run more squarely afoul of Trust Indenture Act § 316(b)'s minority-protective intent, Section 10.06 as deployed here allows one class of creditors, with company assistance, to force a debt reorganization onto another class of creditors. *Given the overall design of the Intercompany Sale, the Court does not find it material which of the two clauses is utilized to impair the rights of nonconsenting Noteholders*.

Id. at *21 n.17 (emphasis added).

In this case, as in *Marblegate*, CEC relies on multiple transactions and Indenture provisions to negate the Parent Guarantee. But regardless of the specific mechanism used, the practical effect of termination or release of the Parent Guarantee is the elimination, without the Noteholders' consent, of their right to receive payment under the Indenture. The Noteholders here, like those in *Marblegate* and *Federated*, "will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantor[]." *Federated Strategic Income Fund*, 1999 WL 993648 at *7. Accordingly, it is immaterial which clause of the Indenture or which transaction "is utilized to impair the rights of nonconsenting Noteholders." *Marblegate* at *21 n.17. This elimination of the Noteholders' rights – without their consent or bankruptcy court approval -- could only result from the kind of transaction that Section 316(b) was designed to prohibit.

2. Additionally or Alternatively, Each of the Guarantee Transactions Constitutes an Out-Of-Court Restructuring Due to Its Nature

Even if the effect of the Guarantee Transactions alone is not sufficient to establish a restructuring, the record in this case confirms that each of the Guarantee Transactions is a restructuring as a matter of law.

a. CEC, CEOC, and CEC Advisors Explicitly Call the Guarantee Transactions Restructurings

In determining whether transactions constitute restructuring, courts have examined how the issuer and its insiders described them. *See, e.g., Federated Strategic Income Fund*, 1999 WL

993648 at *4 (noting that the offering documents described the challenged transaction as being a part of "a corporate and financial restructuring of the [issuer] and its subsidiaries."); *Marblegate*, 2014 WL 7399041 at *7 (Offering Circular issued in connection with the transaction referred to it as the "Proposed Restructuring"). Similarly, the inclusion of restructuring services in the scope of the engagement of various advisors retained by the issuer supports the conclusion that each transaction amounted to a restructuring. *See Federated Strategic Income Fund*, 1999 WL 993648 at *1 (noting that the issuer retained an investment firm "to advise the company on how to restructure its debt").

Here, CEC and CEOC (who define themselves collectively as "Caesars," *see* SMF ¶ 26) have acknowledged that the Guarantee Transactions are all a part of a comprehensive restructuring of Caesars' debt obligations. *Id.* ¶¶ 26-28. The Sponsors acquired CEOC in a leveraged buyout that resulted in the issuance of approximately $24 *billion* in debt, approximately $19.7 billion of which was secured by liens on substantially all of CEOC's assets. *Id.* ¶¶ 17-18. Soon after CEOC issued the Notes in 2010, it became apparent that CEOC would not be able to maintain its overleveraged capital structure and satisfy its obligations in the long term. *Id.* ¶ 22. Accordingly, over the past several years, Caesars undertook numerous transactions, including more than 45 asset sales and capital market transactions, in an effort to restructure its debt. *Id.* ¶¶ 26-28. CEOC's FDM describes these transactions in a section entitled "Out-of-Court Transactions" and expressly states that "Caesars has executed" the transactions "in an effort to *restructure* and manage its debt." *Id.* (emphasis added). Each of the Guarantee Transactions that CEC asserts removed the Guarantee was among the transactions referenced and described in that specific section of the FDM. *Id.* Accordingly, Caesars expressly and candidly described the Guarantee Transactions as a restructuring because they *are* a restructuring, contrary to the position CEC now advocates.

Moreover, Caesars engaged in a broad practice of moving assets out of CEOC into newly formed CEC affiliates. SMF ¶¶ 31-39. Documents executed by Caesars to accomplish some of the asset transfers described them as "effectuat[ing] a *restructuring*." *Id.* ¶ 38 (emphasis added).

Like Caesars, its advisors also believed the Guarantee Transactions were a restructuring. In March 2014, two months prior to the first Guarantee Transaction, CEC engaged Blackstone, the restructuring advisory arm of Blackstone Group L.P. *Id.* ¶ 29. In August 2014, the same month the last Guarantee Transaction occurred, Blackstone and CEC entered into a second engagement agreement, which amended the scope of services *retroactively*, effective May 7, 2014. *Id.* ¶ 30. In that engagement agreement, Blackstone expressly and repeatedly referred to the services it had been providing as including work in connection with "*restructuring* of certain liabilities of" CEC and its subsidiaries. *Id.* (emphasis added). CEC countersigned the engagement letter in full agreement with the scope and description of Blackstone's services. *Id.*

b. The Nature of the Guarantee Transactions Confirms That Each Is a Restructuring

The August Unsecured Notes Transaction. This Court, in *MeehanCombs*, has already examined the August Unsecured Notes Transaction and concluded that "as alleged in the Complaint, *removal of the Guarantees through the August [Unsecured Notes] Transaction is an impermissible out-of-court debt restructuring achieved through collective action. This is exactly what TIA section 316(b) is designed to prevent*." *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entm't Corp.*, No. 14 Civ. 7091, 2015 WL 221055 at *5 (S.D.N.Y. Jan. 15, 2015) (emphasis added).[9] CEC may attempt to distinguish that decision on the ground that it

[9] As a part of the August Unsecured Notes Transaction, CEOC purported to obtain, among other things, a release of CEC's guarantee of certain senior notes, defined in the SMF as the 2016 Notes and 2017 Notes. SMF ¶¶ 62-63. The release was obtained by vote of a majority of

"involved the execution of a supplemental indenture on other CEOC notes – not the notes governed by the BOKF Indenture." *See* ECF 19 (CEC Letter to the Court) at 1. This distinction, however, is without legal significance because nothing in Section 316(b) requires that the impairment result from an amendment of the plaintiff's indenture. As demonstrated in Part I above, Section 316(b) prohibits *any* nonconsensual impairment, even when effectuated *without any* indenture amendments. *See Marblegate*, 2014 WL 7399041 at *20 n.17 (discussing an automatic release of the parent guarantee based on a release of the same guarantor's guarantee by another class of creditors); *Marblegate II* at 27 ("[T]there is no reason to think that the [TIA] was targeted only at . . . . straightforward amendment.").

<u>The May 2014 Transaction</u>. The May 2014 Transaction, including the 5% Stock Sale, similarly represents an out-of-court restructuring because it too "allow[ed] one class of creditors, with company assistance, to force a debt reorganization onto another class of creditors." *Marblegate* at *21. According to Caesars, as a part of the May 2014 Transaction, CEOC borrowed $1.75 billion through the B-7 Refinancing to, among other things, repurchase approximately $900 million of promissory notes, approximately *half* of which were held by a newly formed CEC affiliate, CGP. SMF ¶¶ 42, 52-55. Despite its financial instability, CEOC paid a premium, including to insider CGP, when it repurchased those notes. *Id.* ¶¶ 53-55. Also as part of the B-7 Refinancing, CEC, CEOC, the lenders, and the administrative agent amended the Credit Agreement to: (i) relax certain financial covenants; (ii) make CEC's guarantees of the Credit Agreement obligations a guarantee of collection rather than of payment; and (iii) limit that

noteholders. The dissenting minority objected to the stripping of CEC's guarantee, and some became plaintiffs in *MeehanCombs*. *MeehanCombs Global Credit Opportunities Funds, LP*, 2015 WL 221055 at *1-2. CEC then took the position that because its guarantee of the 2016 Notes and 2017 Notes was released, the Parent Guarantee was also released. SMF ¶¶ 64-65.

guarantee to debt held by consenting first lien lenders and approximately $2.9 billion of additional indebtedness. *Id.* ¶ 47. To entice consent to this amendment from the requisite lenders under the Credit Agreement, CEOC provided special financial incentives to them that were not offered to other creditors. Specifically, CEOC paid to the consenting lenders more than $50 million in consent fees and also repaid in full more than $794 million of debt held by those consenting lenders. *Id.* ¶¶ 50-51.

In addition, CEC claims that the lenders funding the B-7 Refinancing required CEC to remove its Parent Guarantee of the Notes (and of other existing CEOC debt) to enhance credit support of CEC's guarantee for the new loan. SMF ¶¶ 45-47. Accordingly, the Credit Agreement amendment provides that any CEC guarantee of CEOC debt is limited to the bank debt held by the consenting lenders, plus an additional $2.9 billion. *Id.*. To orchestrate this removal of CEC's guarantee of the Notes and other CEOC debt, CEC "sold" 5% of its CEOC stock and then took the position that the stock sale automatically terminated the Parent Guarantee under Indenture § 12.02(c)(i). *Id.* ¶¶ 14, 43-44.

<u>The 6% Stock Transfer</u>. The 6% Stock Transfer constitutes an impermissible restructuring for the same reason that the 5% Stock Sale is one. The 5% Stock Sale, made in May 2014, reduced CEC's ownership in CEOC by 5%. *Id.* ¶ 43. CEC contends that because CEOC ceased to be a wholly owned subsidiary of CEC, the 5% Stock Sale was sufficient to automatically terminate the Parent Guarantee pursuant to Indenture § 12.02(c)(i), without Noteholder consent. *Id.* ¶¶ 44, 65. Accordingly, the 6% Stock Transfer, which reduced further CEC's ownership of CEOC by an additional 6% later in May 2014, is indistinguishable from the 5% Stock Sale, both in its impairing effect and the mechanism by which that effect was accomplished.

Moreover, the 6% Stock Transfer involves "insider machinations" of the kind that led to the enactment of the TIA. *See* Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 234 (1987) (the SEC advocated for the TIA because it was "convinced that insider machinations would damage bondholders and that the only cure was a bankruptcy proceeding in which the judge scrutinized the recapitalization"). Indeed, nearly every party to the 6% Stock Transfer was an insider: CEC (a CEOC insider) authorized CEOC to issue and transfer 6% of CEOC stock to other CEOC insiders, including most notably CEOC officers and directors. SMF ¶¶ 56-57. This is exactly a kind of out-of-court transaction that Section 316(b) was intended to prevent – a deal among the issuer and its insiders, made without the holders' consent, that impaired the holders' right to obtain payment. *Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1324-25 (10th Cir. 2008) ("Congress passed the TIA to address the concerns of the Securities and Exchange Commission regarding corporate insiders taking advantage of individual investors.").

CONCLUSION

The undisputed facts establish that the purported termination or release of the Parent Guarantee amounts to non-consensual impairment of the Noteholders' right to payment and is, therefore, prohibited by Section 316(b) of the TIA. To the extent that the statute may require that the impairment be the result of a restructuring, that element is also met.

For the foregoing reasons, the Trustee respectfully requests that the Court grant is motion for summary judgment on Count V of the Complaint and award such other and further relief as the Court deems proper.

Respectfully submitted,

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/s/ Andrew I. Silfen

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