UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARYJUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

The plaintiff Trustees[1] respectfully submit this Reply Memorandum of Law in further support of their joint Fed. R. Civ. P. Rule 56 Motion for Partial Summary Judgment.

PRELIMINARY STATEMENT

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

11 Williston on Contracts § 30:6 (4th ed.) (emphasis added), *citing Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 545 (1995) ("resort to judicial construction and extrinsic evidence is unnecessary" absent lack of ambiguity).

CEC properly admits that § 12.02(c) of the Indentures is unambiguous. *See, e.g.,* CEC Opposition ("Opp.") at 9, 6 n.2; *see also id.* at 11, 18 (subheading C). Accordingly, interpretation of an unambiguous § 12.02(c) involves only two steps. First, the court must read the provision by giving its words their "literal" meaning, *Jade Realty LLC v. Citigroup Commercial Mortgage Trust 2005-EMG*, 20 N.Y.3d 881, 884 (2012), without resort to the rules of construction, including reasonableness, *Wallace*, 86 N.Y.2d at 548.

Second, after determining the "literal" meaning, the court must consider whether that meaning results in an "absurdity." It is only upon a finding of outright absurdity that the court "may as a matter of interpretation carry out the intention of a contract" by departing from its literal meaning. *Wallace*, 86 N.Y.2d at 547-548; *Jade Realty LLC*, 20 N.Y.3d at 883-84. The burden of establishing absurdity is high. An interpretation is not "absurd" even if unusual or commercially unreasonable. Rather, the literal meaning is absurd only if it completely deprives a party of all of its benefits under the agreement. CEC cannot meet this burden.

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[1] All definitions from the Trustees' Moving Brief ("Br.") are incorporated herein.

Therefore, the Motion should be granted.

ARGUMENT

I. SECTION 12.02(C) SHOULD BE ENFORCED AS WRITTEN

A. The Word "And" as Used to Delimit Conditions Precedent in § 12.02(c) Must Be Given Its Plain Conjunctive Meaning

CEC faults the Trustees for "resting [their argument] almost entirely on the use of the word 'and' in [§ 12.02(c)]." Opp. at 11. But because § 12.02(c) is unambiguous, this Court must "*look solely to the language used by the parties* to discern the contract's meaning." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475-476 (2004) (emphasis added); *Wallace*, 86 N.Y.2d at 548 ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed."). "[Courts] apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 7, 948 N.Y.S.2d 292 (1st Dep't 2012).

The Trustees' opening brief shows that the use of the word "and" to delimit a list of conditions precedent is regularly held to require that all conditions occur in order for the provision to be triggered. *See* Br. at 8. Contrary to CEC's assertion, Opp. at 17, the cases cited by the Trustees adopted the conjunctive interpretation based on plain language employed, not on reasonableness. *Maxwell v. State Farm Mut. Auto. Ins. Co.*, 92 A.D.2d 1049, 1050, 461 N.Y.S.2d 541 (3d Dep't 1983) ("A long and well-established rule of construction provides that words are to be given their ordinary meaning."); *Sasson v. TLG Acquisition LLC*, 127 A.D.3d 480, 481 (1st Dep't 2015) ("The definition was in the conjunctive, unambiguous, and not subject to any rule of construction . . . ."); *Coan v. State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 81, 86 (E.D.N.Y. 1996) (adopting interpretation based on "[t]he clearly expressed language in the

provision"); *Progressive Ne. Ins. Co. v. State Farm Ins. Companies*, 81 A.D.3d 1376, 1378, 916 N.Y.S.2d 454 (4th Dep't 2011) (adopting the interpretation supported by "the plain language of the contract"). These judicial interpretations of provisions identical in structure to § 12.02(c) are not distinguishable simply because the plain reading of the contract also produced a reasonable result.

Maxwell is particularly instructive. The court there adhered to the plain meaning of the word "and" even though the disjunctive interpretation *was* the more reasonable one, and the one the drafters apparently intended. The decision interpreted an insurance policy exclusion for injuries resulting from driving while impaired by alcohol *and* a drug. *Maxwell*, 92 A.D.2d at 1050. The court observed that the drafters' use of the conjunctive was "inexplicable" and that "the defendant may have actually intended something different," since a statute permitted exclusion for either drunk driving *or* driving while impaired by a drug. *Id.* Still, bound by "[a] long and well-established rule of construction . . . that words are to be given their ordinary meaning," the court enforced the exclusion as written. *Id.*

Finally, none of the cases CEC cites contradicts the conjunctive reading of § 12.02(c).[2] *See* Opp. at 14-16. To the extent the decisions applied New York law, they interpreted the word "and" in contexts vastly different from a list of conditions precedent. Most cases interpreted lists of permitted activities or of monetary obligations, where it was natural to conclude that if A and

[2] CEC's support for disjunctive reading is heavily based on the bald assertion by a purported drafter of the Indentures, Mr. Miller, that the combination of the words "upon" and "and" compels a disjunctive reading. *See* Br. at 1, 9-10. As noted above, extrinsic evidence cannot be used to interpret admittedly unambiguous provisions, and nothing about the plain meaning of the word "upon" suggests that the list it precedes must be read in the disjunctive. *See, e.g. Duchow v. New York State Teamsters Conference Pension & Ret. Fund*, 691 F.2d 74, 76 (2d Cir. 1982) (interpreting in the conjunctive conditions preceded by "upon" and separated by "and").

B are both permitted/included in the obligation, then each is individually permitted/included.[3] One involved the interpretation of the phrase "[f]ailure of Dealer to conduct customary sales *and* service."[4] The provision was triggered by the "failure to," *i.e.* "not conducting," "sales and service," such that the negation properly turned "and" into an "or." In the last case CEC cites, the agreement was ambiguous and the conjunctive interpretation would excuse the fruit packer's nonperformance only if his crop failed *and* the missing portion of the crop that never came into being was subsequently seized by the government.[5]

Accordingly, § 12.02(c) should be given its plain conjunctive meaning.

B. Rules of Construction on Which CEC Relies Cannot Be Applied to Unambiguous Language and Cannot Be Used to Vary Its Plain Meaning

CEC urges the Court to disregard the provision's plain language for the sake of achieving what CEC views to be a "commercially reasonable" interpretation. Opp. at 12-13. CEC even maintains that the plain language employed by the parties "does not override these principles." Opp. at 14. CEC's position is directly contrary to well-settled law that neither considerations of

[3] *See Greenwich Capital Fin. Products, Inc. v. Negrin*, 74 A.D.3d 413, 415, 903 N.Y.S.2d 346 (1st Dep't 2010) ("Guaranteed Obligations" were defined as "(i) . . . . Borrower's Recourse Liabilities and (ii) . . . . all the Debt"); *Murphy v. Long Island Oyster Farms, Inc.*, 112 A.D.2d 276, 277, 491 N.Y.S.2d 721 (2d Dep't 1985) (interpreting the right to use the leased property for "planting, growing, and cultivating thereon and recovery therefrom oysters and other shellfish"); *Lamborn v. Nat'l Park Bank of New York*, 212 A.D. 25, 27, 208 N.Y.S. 428 (1st Dep't 1925), *aff'd*, 240 N.Y. 520 (1925) (letter of credit permitted "shipments to be made during August and September 1920").

[4] *Major Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 93 CIV. 2189 (SWK), 1995 WL 326475, at *3 (S.D.N.Y. May 31, 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996).

[5] *Osborn v. Wilson & Co.*, 118 Misc. 379, 381, 193 N.Y.S. 241 (Sup. Ct. 1922), *aff'd sub nom. Osborn v. Wilson & Co.*, 206 A.D. 787, 200 N.Y.S. 938 (1923).

reasonableness nor extrinsic evidence[6] may be considered in the face of unambiguous language, let alone override its plain meaning.

Rules of judicial construction, including specifically the "commercial reasonableness" rule invoked by CEC, are inapplicable to unambiguous provisions. *Wallace*, 86 N.Y.2d at 545 (enforcing unambiguous provision as written despite claims that it produced an unreasonable result). As a leading treatise explains, rules of construction can be divided into "primary" and "secondary" rules. 11 Williston on Contracts § 32:1 (4th ed.). Primary rules, such as the "the plain meaning rule," are used regardless of ambiguity. *Id.* In contrast, secondary rules, such as the "rule favoring a reasonable construction," *id.* § 32:11, "are only used to determine the meaning of" ambiguous language. *Id.* § 32:1. This is so because secondary rules indicate which alternative meaning of an ambiguous provision is "preferred" – a choice not presented by unambiguous language. *Id.*; *Breed v. Ins. Co. of N. Am.,* 46 N.Y.2d 351, 355, 385 N.E.2d 1280 (1978) ("[B]efore the rules governing the construction of ambiguous contracts are triggered, the court must first find ambiguity. . . .").

Moreover, even if a "reasonable construction" rule were applicable – and it is not – it cannot be used to modify the plain meaning of the language used by the parties "under the guise of interpreting the writing." *Vermont Teddy Bear Co.*, 1 N.Y.3d at 475; *Jade Realty LLC*, 20 N.Y.3d at 883 ("[I]t is not a court's function to imply a term to save a defendant from the consequences of an agreement that it drafted."). This is so even where the plain meaning leads

[6] Extrinsic evidence outside of the four corners of the contract is inadmissible to vary unambiguous provisions. *BOKF, N.A. v. Caesars Entm't Corp.,* No. 15-CV-1561 SAS, 2015 WL 5076785, at *6 (S.D.N.Y. Aug. 27, 2015); *see generally* Br. at 7-8.

to a result that is "novel or unconventional,"[7] contrary to what the party actually intended,[8] or outright "bizarre."[9] "This [C]ourt may not make or vary the contract . . . to accomplish its notions of abstract justice or moral obligation." *Breed*, 46 N.Y.2d at 355.

The decisions CEC cites, Opp. at 12-13, do not support its attempt to vary the plain meaning of an unambiguous provision. Some of the decisions involve ambiguous agreements that required a resort to secondary rules of construction inapplicable here.[10] In the vast majority, however, the literal interpretation was also the more reasonable interpretation; none relied on a rule of construction to alter the agreement as CEC urges here.[11] Such departure is not permissible, and the termination provision must be given its plain, conjunctive meaning.

II. THE PLAIN MEANING OF § 12.02(C) DOES NOT RESULT IN ABSURDITY AND MUST BE APPLIED AS WRITTEN

"[T]he Court of Appeals has set a high bar for declaring a contract absurd." *Warberg Opportunistic Fund, L.P.*, 112 A.D.3d at 84. Under New York law, absurdity is present only

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[7] *See Wallace*, 86 N.Y.2d 543 (lease provided for a retroactive appraisal of rent payments made over the course of 32 years); *Jade Realty LLC*, 20 N.Y.3d 881 (note provided for lower prepayment penalty in the first six years than in the years seven through ten).

[8] *See Maxwell*, 92 A.D.2d at 1050 (giving "and" its plain meaning even if the drafters "intended something different" but used the conjunctive "[f]or some inexplicable reason.").

[9] *See Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 81, 973 N.Y.S.2d 18 (1st Dep't 2013) (a provision of a stock warrant prevented another provision from ever having any effect).

[10] *See Greenwich Capital Financial Products, Inc. v. Negrin,* 24 Misc. 3d 1245(A), 901 N.Y.S.2d 899 (Sup. Ct. 2009), *aff'd in part, modified in part*, 74 A.D.3d 413, 903 N.Y.S.2d 346 (1st Dep't 2010); *William C. Atwater & Co. v. Panama R. Co*., 246 N.Y. 519 (1927); *Smith v. Estate of La Tray*, 161 A.D.2d 1178, 555 N.Y.S.2d 968 (4th Dep't 1990).

[11] *See Farrell Lines, Inc. v. City of New York,* 63 Misc. 2d 542, 312 N.Y.S.2d 260 (Sup. Ct. 1970), *aff'd*, 35 A.D.2d 788, 315 N.Y.S.2d 794 (1st Dep't 1970), *aff'd*, 30 N.Y.2d 76 281 N.E.2d 1962 (1972); *In re Lipper Holdings, LLC*, Case No. 603653/02, 2003 WL 25668716 (Sup. Ct. 2003), *aff'd, In re Lipper Holdings*, 1 A.D.3d 170, 766 N.Y.S.2d 561 (1st Dep't 2003); *Elsky v. Hearst Corp.*, 232 A.D.2d 310, 648 N.Y.S.2d 592 (1st Dep't 1996); *Luitpold Pharma., Inc. v. Ed. Geistlich, et al.*, 784 F.3d 78 (2d Cir. 2015); *Terex Corp. v. Bucyrus Intern., Inc.,* 94 A.D.3d 548, 943 N.Y.S.2d 18 (1st Dep't 2012).

where the plain reading completely deprives a party of all benefits under the agreement. In *Jade Realty LLC*, the Court of Appeals rejected the argument that deprivation of *some*, albeit significant, contractual rights warranted a departure from the plain language of the agreement. *See Jade Realty LLC*, 20 N.Y.3d 884 (deprivation of prepayment premium did not amount to absurdity because the lender still received interest during the life of the loan "and it did not lose its principal"). The court contrasted this with one of the few examples of interpretations that deprived rights so completely as to amount to an "economic absurdity." In that example, *Reape v. New York News, Inc.*, 122 A.D.2d 29, 504 N.Y.S.2d 469 (2d Dep't 1986), the Appellate Department rejected as absurd the literal interpretation that resulted in one party "assum[ing] a net loss for each copy" of newspaper it distributed. *Id.* at 30. *See also Meyer v. Stout*, 79 A.D.3d 1666, 1668, 914 N.Y.S.2d 834 (4th Dep't 2010) (relying on *Wallace* to modify the plain meaning of the deed that would "create the absurd result that the easement would commence on property that plaintiff did not own and would continue onto property that he also did not own").

Mere assertions of unreasonableness or departure from the usual commercial practice do not meet the high burden of establishing absurdity. *See Wallace*, 86 N.Y.2d at 547-548 ("unconventional" retroactive adjustment in rent over the period of 32 years was not absurd despite "dramatic inconsistencies[,] anomalies," and "fiscal uncertainties"); *Jade Realty LLC*, 20 N.Y.3d at 884 (lower prepayment penalty in the first six years than during the balance of the loan term was "novel" and "unconventional," but not absurd). A literal reading is not absurd even if it leads to a result unintended by one of the parties. *Jade Realty LLC*, 20 N.Y.3d at 884; *In re Allegiance Telecom, Inc.*, 356 B.R. 93, 100 (Bankr. S.D.N.Y. 2006) ("the trouble with XO's position [that it would never have taken on unconditional risk of loss] is that this is not what [the agreement] say[s]."). And, it is insufficient that the literal interpretation is not as favorable to its

opponent as an alternative one. *Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 96 CIV. 7874 (RWS), 2002 WL 31106406, at *7 (S.D.N.Y. Sept. 20, 2002) ("The fact that the 102[%] was not as beneficial to [the defendant] as a figure of 120[%] . . . does not by itself render the provision absurd or unreasonable") (internal quotation marks omitted).[12] Finally, absurdity does not arise even where the plain reading ensures that provisions of the agreement "never come into effect," "bizarre" as it may seem. *Warberg Opportunistic Fund, L.P.*, 112 A.D.3d at 81.

Moreover, where the agreement is unambiguous, courts may not look to extrinsic evidence to support a finding of absurdity. Evidence of absurdity must be found, if at all, within "the four corners of the [agreement]." *Wallace*, 86 N.Y.2d at 548; *Marin v. Constitution Realty, LLC*, 128 A.D.3d 505, 509, 11 N.Y.S.3d 550 (1st Dep't 2015) (to consider expert opinion that the plain reading would "produce an absurd result . . . . is to admit extrinsic evidence to an admittedly unambiguous contract which is prohibited by long-standing precedent").

CEC cannot show absurdity. Even if the Guarantee could not be released because the three conditions were mutually exclusive – not the case here for reasons detailed below – the plain meaning interpretation would still not deprive CEOC of all benefits of the Indenture.[13] The Indentures were the means by which CEC's operating subsidiary CEOC raised billions of dollars for its business. Maintaining the Parent Guarantee unless all provisions of §12.02(c)(i)-(iii) are satisfied would not eradicate the enormous financial benefits conferred by the bond offerings.

Furthermore, the three conditions *can* all occur at the same time and together serve as an

[12] Accordingly, CEC's self-serving position, Opp. at 2, that the conjunctive interpretation is unreasonable because it is more favorable to the noteholders falls far short of "absurdity" required to deviate from the plain meaning of § 12.02(c).

[13] Nor would it be absurd if certain prongs of § 12.02(c) did not "come into effect." Redundancy in the form of "belts and suspenders" provisions is common in commercial contracts and is particularly justified with respect to the release of a guarantee of billions of dollars.

important protection for noteholders. CEC's argument to the contrary is based on a central fallacy – supported solely by extrinsic evidence – that the "[n]oteholders' economic interests are fully satisfied" upon the occurrence of the condition in § 12.02(c)(iii). Opp. at 7.

The condition in § 12.02(c)(iii) is triggered upon either discharge *or defeasance*, and *defeasance does not* result in repayment of the Notes. Specifically, defeasance is accomplished by CEOC's "*deposit*[] in trust with the Trustee" of cash or "U.S. Government Obligations," *i.e.* obligations of the United States or its instrumentalities. Indenture §§ 8.02(a)(i), 1.01(y). The cash or U.S. bonds so deposited are not turned over to the holders immediately, but rather at maturity. *Id.* § 8.03. For example, absent acceleration, defeasance of the BOKF Notes shortly after their issuance in 2010 would not result in payment of principal to holders until maturity in 2018. The resulting residual risk to the holders is obvious: a lot can go wrong in eight years. The U.S. could experience a significant economic downturn resulting in a devaluation of the deposited securities, or the financial institution holding the deposit could suffer some unforeseen harm. However remote these risks may be, the holders need to be protected until the Notes are actually repaid.

Indeed, the Indentures secure against this risk. ***Unlike the subsidiary guarantees that are released upon defeasance, the Parent Guarantee is not***. *Id.* § 8.01(b). This feature belies any claim that it is absurd to maintain the protection of the Parent Guarantee after defeasance, and it is irreconcilable with CEC's position that defeasance alone terminates the Guarantee.[14]

The three conjunctive conditions collectively protect the holders from unfair release of the Guarantee. For example, under § 5.01(a), CEOC could merge with another entity, and if

[14] CEC's argument is also refuted by § 8.06, which reinstates CEOC's obligations in the event the defeasance fails because cash or U.S. securities deposited with the Trustee cannot be turned over to the holders. Under CEC's view, the Parent Guarantee would be terminated upon defeasance, yet it would not be reinstated if the defeasance fails.

CEOC is the surviving entity, it would remain obligated under the Indentures. CEC acknowledges that the merger could present a risk to the holders if CEOC merged with an entity that has inferior credit. Opp. at 8. Under CEC's view, the Guarantee would nevertheless be released upon merger pursuant to § 12.02(c)(ii), leaving the holders with a less stable issuer and without the Guarantee.

Under the conjunctive interpretation, however, the Guarantee would remain in place to support the new CEOC's credit unless the holders received two additional protections. First, § 12.02(c)(iii) would require defeasance as a condition to the release of the Guarantee. Second, § 12.02(c)(i) would require CEC to relinquish complete ownership of CEOC. With the Guarantee removed and CEOC's insolvency no longer exposing CEC to liability, CEC would have the incentive to syphon CEOC's assets (and it has done so here once it determined to strip the Guarantee). The existence of CEOC shareholders other than CEC would protect the noteholders by making this raiding more difficult. CEC's interpretation would eliminate completely these additional protections. [15]

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

CONCLUSION

For the foregoing reasons, the Trustees respectfully request that the Court grant their Motion for Partial Summary Judgment and grant the relief identified in their opening brief.

[15] CEC also asserts incorrectly that "[n]othing in the Indentures restricts CEC's right to take actions that could reduce . . . . its ability to satisfy its guarantee obligations, including its right to . . . . sell assets." Opp. at 9. Yet, § 5.01(b) prohibits CEC from merging, or transferring substantially all assets unless it puts in place a "Successor Parent Guarantor . . . . reasonably satisfactory to the Trustee."

Dated: New York, New York
December 11, 2015

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