UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOKF, N.A., Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, Defendant.	No. 1:15-cv-01561-SAS Oral Argument Requested
UMB BANK, N.A., Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, Defendant.	No. 1:15-cv-04634-SAS Oral Argument Requested

MEMORANDUM OF LAW OF CAESARS ENTERTAINMENT CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs' argument that all three release conditions specified in the governing Indentures must be satisfied before CEC's parent guarantee is released is inconsistent with the language of the Indentures and with the settled principle that contracts should be construed to avoid commercially unreasonable results.

Plaintiffs focus myopically on the fact that the conditions are connected by the word "and." But the natural reading of the provision, which prefaces the list of conditions with the word "upon," is that the guarantee is released upon satisfaction of *any* of the three conditions. As William Miller, who participated in negotiating and drafting the Indentures as counsel for the financial institutions involved in structuring and marketing the Notes, testified, the "upon/and" construction means that "the parent guarantee would be released upon the events in [clause] 1. [It] would be released upon the events in [clause] 2, and [it] would be released upon the events in [clause] 3." (Miller Tr. at 68:6-10.)

The interpretation of the Indentures that plaintiffs urge also conflicts with the settled law in New York that contracts must be given a "fair and reasonable interpretation," *Farrell Lines, Inc.* v. *City of N.Y.*, 30 N.Y.2d 76, 83 (1972), and "should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties," *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003). Consistent with this principle—and contrary to plaintiffs' contention that the word "and" must invariably be construed conjunctively—courts in New York and elsewhere routinely construe "and" disjunctively when doing so is necessary to avoid unreasonable results or serves the business purpose of the agreement. Similarly, New York law directs that the terms "and" and "or" when used in statutes "may be construed as interchangeable when necessary to effectuate legislative intent." N.Y. STATUTES § 365 (McKinney's 1971 & Supp. 2015). Other provisions of the very Indentures at issue here illustrate disjunctive uses of the term "and."

In contrast to these principles, plaintiffs' interpretation of the Indentures would produce unjustifiable and commercially unreasonable results. Under plaintiffs' interpretation, even payment by CEOC of all principal and interest on the Notes and the consequent discharge of all of its obligations is not enough to release the CEC guarantee. Rather, plaintiffs argue, for the guarantee to be released, the Noteholders have to be fully repaid, *and, in addition*, (i) CEOC must sell substantially all of its assets to or merge with a third party that assumes its (now discharged) obligations under the Indentures; *and* (ii) CEOC must no longer be a wholly owned subsidiary of CEC. But this makes no sense: once the Notes are paid off, requiring the guarantee to remain in place unless the other two conditions are also satisfied neither protects the Noteholders nor serves any other purpose. Plaintiffs do not even try to offer any reason that the Indentures would have been written that way, and there is none. By contrast, a disjunctive interpretation, such that any of the three conditions is sufficient to release the guarantee, is consistent with the parties' reasonable expectations and the purposes of the guarantee.

The sensible reading of the guarantee release provisions we advance is further supported by the deposition testimony of Mr. Miller and other extrinsic evidence. Mr. Miller testified unequivocally that the Indentures were drafted to provide for the release of the CEC guarantee if any of the three release conditions was satisfied. He further testified that the guarantee is released "automatically" if CEOC is no longer a wholly owned CEC subsidiary. Bond analysts and other sophisticated market participants expressed a similar understanding.

Plaintiffs' motion for a declaration that the parent guarantee remains in place should be denied on the additional ground that the parent guarantee was independently released through the release, including by the August transaction, of CEC's guarantee of earlier-issued CEOC notes. Plaintiffs do not dispute on these motions that CEC released the Parent Guarantee using this independent method. They argue instead that, if the Court grants the pending motions for summary judgment in *MeehanCombs* and *Danner*, then the Court will necessarily have determined that the August transactions are void as to the Notes at issue here. For the reasons given in our papers in those cases, the Court should deny those motions. In any event, any determination as to the implications on this case of the Court's ruling there would be premature.

STATEMENT OF FACTS

The relevant background is set forth in our papers opposing plaintiffs' previous summary judgment motions. Among other things, we described in those papers three transactions in 2014, each of which was independently sufficient to release CEC's parent guarantee of the Notes at issue, including the sale of 5% of CEOC's stock; the contribution of an additional 6% to an employee compensation fund; and a transaction in August 2014 among CEOC, CEC, and holders of a majority of CEOC senior unsecured notes maturing in 2016 and 2017 (the "August Transaction"). We also discussed the substantial benefits those transactions conferred upon CEOC.[1] For purposes of the present motions, plaintiffs do not dispute these facts.

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[1] *See BOKF* v. *CEC*, Dkt. #40 (Declaration of David Sambur (July 24, 2015)) ("Sambur Decl. I"), Dkt. #41 (Local Rule 56.1 Response and Counter-Statement (July 24, 2015)), & Dkt. #42 (Declaration of James Gadsden (July 24, 2015)) ("Gadsden Decl. I"); *UMB* v. *CEC*, Dkt. #42 (Local Rule 56.1 Response and Counter-Statement (July 24, 2015)), Dkt. #43 (Declaration of David Sambur (July 24, 2015)), & Dkt. #44 (Declaration of James Gadsden (July 24, 2015)); *MeehanCombs Global Credit Opportunities Master Fund, L.P.* v. *CEC*, Dkt. #77 (Declaration of David Sambur (Nov. 13, 2015)), Dkt. # 78 (Declaration of James Gadsden (Nov. 13, 2015)), & Dkt. #79 (Local Rule 56.1 Response and Counter-Statement (Nov. 13, 2015)); *Danner v. CEC*, Dkt. #70 (Declaration of David Sambur (Nov. 13, 2015)), Dkt. #71 (Declaration of James Gadsden (Nov. 13, 2015)), & Dkt. #72 (Local Rule 56.1 Response and Counter-Statement (Nov. 13, 2015)). Additional facts relevant to these motions are set forth in the accompanying declarations of James Gadsden ("Gadsden Decl. II"), Eric Seiler ("Seiler Decl."), Jeremy Reifsnyder ("Reifsnyder Decl."), and David Sambur ("Sambur Decl. II").

The Parent Guarantee Release Provisions

As plaintiffs acknowledge, the Indentures "provide[] for the automatic termination" of the Parent Guarantee (Pl. Mem. at 2) upon the satisfaction of certain conditions. Section 12.02(c) of the *BOKF* Indenture provides:

> The Parent Guarantee shall terminate and be of no further force or effect and the Parent Guarantor shall be deemed to be released from all obligations under this Article XII upon:
>
> (i) [CEOC] ceasing to be a Wholly Owned Subsidiary of [CEC];
>
> (ii) [CEOC's] transfer of all or substantially all of its assets to, or merger with, an entity that is not a Wholly Owned Subsidiary of [CEC] in accordance with Section 5.01 and such transferee entity assumes [CEOC's] obligations under this Indenture; and
>
> (iii) [CEOC's] exercise of its legal defeasance option or covenant defeasance option under Article VIII or if [CEOC's] obligations under this Indenture are discharged in accordance with the terms of this Indenture.
>
> In addition, the Parent Guarantee will be automatically released upon the election of [CEOC] and Notice to the Trustee if the guarantee by [CEC] of . . . the [Existing] Notes . . . has been released or discharged.

(*See BOKF v. CEC*, Dkt. #1-2, 1-3 [BOKF Indenture] § 12.02(c).) The relevant provisions of the Indentures at issue in *UMB* are substantively identical. (*UMB v. CEC*, Dkt. Ex. #1-1 to 1-4 [UMB Indentures] § 12.02(c).)

Thus, Section 12.02(c)(i) through (c)(iii) identifies three distinct economic events that trigger the release of the Parent Guarantee:

1. CEOC ceasing to be a "Wholly Owned Subsidiary" of CEC (the "First Release Event"). The Indentures define "Wholly Owned Subsidiary" of a parent, in relevant part, as a subsidiary "100% of the outstanding Capital

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The cited testimony is found in exhibits to the Seiler Declaration: the testimony of William Miller ("Miller Tr.") (Ex. A), counsel to the dealer-managers in the Notes offerings; and the testimony of George Kubin ("Kubin Tr.") (Ex. C), BOKF's corporate designee.

Stock or other ownership interests of which . . . [with certain exclusions not relevant here] shall be owned by [the parent or its Wholly Owned Subsidiaries]." (Indenture § 1.01, at 45.);

2. CEOC's transfer, in accordance with Section 5.01 of the Indentures, of all or substantially all of its assets to, or merger with, an entity not 100% owned by CEC, and the transferee's assumption of CEOC's Indenture obligations (the "Second Release Event"). Under Section 5.01, a conforming asset transfer to or merger with a third party results in CEOC being "automatically . . . released and discharged from its obligations under this Indenture and the Notes." (*Id.* § 5.01(a).); and

3. The discharge of CEOC's obligations under the Indentures, or its exercise of its defeasance options (the "Third Release Event"; together, the "Release Events"). (*Id.* § 12.02(c)(i)-(iii); Miller Tr. at 58:13-68:20.) Under Section 8.01(a) of the Indentures, CEOC's obligations under the Indentures are discharged by the payment of all principal and interest obligations to the Trustee. Alternatively, CEOC may defease its obligations under the Indentures in certain specified circumstances by depositing sufficient cash or Treasury securities with the Trustee to ensure that all principal and interest payments under the Notes are made. (*Id.* §§ 8.01(b), 8.02.) As BOKF's corporate representative testified, defeasance means "[e]ssentially paying off the bonds." (Kubin Tr. at 144:12-145:2.)

In addition, the parent guarantee may also be released at CEOC's election and upon notice to the Trustee if its obligations under certain existing notes are discharged, or the parent guarantee on those notes is terminated (the "Existing Notes Clause"). (Sambur Decl. II ¶ 7.)

The Purpose of the Parent Guarantee

The Parent Guarantee was put in place to enable CEOC, in compliance with Rule 3-10 of SEC Regulation S-X, to rely for SEC filing purposes on the financial statements of its parent company, CEC, rather than to have to file its own separate audited financial statements.[2] Without a Parent Guarantee, audited financial statements from CEOC would have been required. (Miller Tr. at 80:13 – 81:5.) To avoid the time and expense of preparing stand-alone audited CEOC financials (which did not exist at the time of the initial notes offering), CEC used Rule 3-10, which permitted CEOC to rely on CEC's audited financials for offerings so long as CEC guaranteed CEOC's obligations under the Indenture and CEOC remained a wholly owned CEC subsidiary. (Sambur Decl. I ¶ 9; Gadsden Decl. I ¶¶ 12-16; Gadsden Decl. II ¶ 6; Miller Tr. at 74:5-78:12.) Consistent with this purpose, CEOC did not file separate audited financials until after May 2014, when it was no longer a wholly owned subsidiary of CEC and the parent

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[2] In denying plaintiffs' prior summary judgment motions, the Court held that extrinsic evidence about the purpose of the parent guarantee and the understanding of market participants was inadmissible to contradict what the Court concluded was unambiguous language in the Indentures "indicat[ing] that it provided credit support." *BOKF* v. *CEC*, Nos. 15-cv-1561, 15-cv-4634, 2015 WL 5076785, *7 (S.D.N.Y Aug. 27, 2015). As the Court noted, those motions did not present the issue whether the guarantee release provisions should be read conjunctively or disjunctively, and the Court accordingly did not decide that issue. *Id.* at *7 n.62. Indeed, the Court noted that "simply because a Guarantee may be easily terminated—assuming that CEC could terminate it by unilateral action and by causing any one of three conditions to occur—does *not* indicate that the Guarantee was something other than an "unconditional[ ] guarantee[][of] . . . full and punctual payment when due." *Id.* at *7 (emphasis and brackets in original). We respectfully submit that the evidence cited in the text may properly be considered on this motion, not to vary the unambiguous terms of the Indentures, but as further support for the meaning evident from its language and common sense.

guarantee was terminated. (Sambur Decl. I ¶¶ 9, 15.) The use of parent guarantees to facilitate financial reporting in this way is a common practice. (Gadsden Decl. I ¶¶ 8-11.)

Plaintiffs' Interpretation of the Release Provision

Plaintiffs assert that all three of the Release Events must occur for the Parent Guarantee to be released pursuant to § 12.02(c)(i) through (iii). But plaintiffs' interpretation would make certain Release Events superfluous, and create absurd, commercially unreasonable results, while a disjunctive interpretation, under which any of the Release Events results in terminating the guarantee, is consistent with a reasonable and common sense business purpose.

This is so for several reasons. *First*, if the Noteholders are fully repaid or the Notes are defeased, and CEOC's obligations are thereby discharged (the Third Release Event), CEOC would have no further obligations under the Indentures for CEC to guarantee. (BOKF conceded that in the event of a defeasance, "the bonds become null and void" and that "[t]here would be nothing to guarantee at that point." Kubin Tr. at 148:3-4, 21-22.) Likewise, once CEOC's obligations are discharged, CEOC has no obligations for a third party purchaser of its assets to "assume" under the Second Release Event.

Second, no rational business purpose would be served by requiring the parent guarantee to continue once CEOC's obligations are discharged. It would make no sense to require the guarantee to remain in effect once the Notes are repaid or defeased and the Noteholders' economic interests are fully satisfied, much less to condition a release of the guarantee on the sale of all of CEOC's assets to (or a merger with) a third party that assumes its nonexistent obligations *and* CEC's sale or transfer of any amount of CEOC stock.

Third, plaintiffs likewise offer no rational explanation—and we can imagine none—for conditioning the release of the parent guarantee on *both* CEOC's transfer of all or substantially all of its assets to, or merger with, a third party that assumes its obligations under the Notes (the Second Release Event), *and* CEOC's no longer being a wholly owned subsidiary of CEC (the First Release Event), in addition to the Third Release Event. Indeed, if, under the Second Release Event, CEOC merges with another entity that is not a wholly owned CEC subsidiary, then CEC would no longer hold any stock in CEOC, rendering the First Release Event superfluous. Nor, again, would any rational purpose be served by requiring both of these events to occur before the parent guarantee is terminated. The noteholders in one of the related cases have suggested that the continuation of the guarantee protects noteholders from the sale of CEOC's assets to a third party with an uncertain credit status. But plaintiffs do not and cannot explain why (i) CEC's guarantee obligations should remain in place even though, under Section 5.01, the obligations of CEOC would be discharged; or (ii) the continuation of CEC's guarantee should depend on whether or not CEOC remains a wholly owned CEC subsidiary at a time when CEOC has no obligations under the Indentures.

By contrast, a disjunctive reading—such that the guarantee is released upon the occurrence of *any* of the Release Events—is consistent with the language of the Indentures, furthers a reasonable commercial purpose, and creates no such absurdities, because each of the three Release Events provides an independent reason for releasing the Parent Guarantee. The Third Release Event (payment or defeasance of the Notes) discharges CEOC's obligations, and there is nothing left for CEC to guarantee. Likewise, if the Second Release Event occurs, CEOC will have no continuing interest in the business and will have been released from its obligations under the Indenture. In that event, either CEC likewise would have no continuing interest in the business (if transferred to a third party), or Rule 3-10 would be inapplicable because CEOC's successor would not be a Wholly Owned Subsidiary, and neither CEOC nor its successor could rely on CEC's financial statements under that Rule. Finally, the First Release Event likewise renders Rule 3-10 inapplicable.

While the Court need not consider extrinsic evidence to reach these common sense conclusions, they are further confirmed by the accompanying declarations of James Gadsden, Jeremy Reifsnyder, and David Sambur. Each of these witnesses affirms that interpreting the Indentures to require all three conditions to be satisfied for the guarantee to be released is commercially unreasonable and would lead to absurd results. (*See* Gadsden Decl. II ¶¶ 4-9; Reifsnyder Decl. ¶¶ 10, 12-23; Sambur Decl. II ¶¶ 4-6.)

That the Parent Guarantee can be released by a unilateral action of CEC or CEOC is consistent with other provisions of the Indentures. Nothing in the Indentures restricts CEC's right to take actions that could reduce or eliminate its ability to satisfy its guarantee obligations, including its right to incur additional debt, sell assets, grant liens, issue dividends, or even declare bankruptcy. (Indentures § 6.01 (defining certain "Events of Default"); *id.* Article IV (Covenants).) By contrast, CEOC is subject to all of these limitations. (*Id.*)

Extrinsic Evidence Concerning the Release Provision

While the Court need not consider extrinsic evidence to determine that, under the unambiguous language of the Indentures, the Parent Guarantee should be deemed released if any of the three Release Events—including the sale of any CEOC stock to a third party—occurs, that conclusion is further confirmed by the deposition testimony of William Miller. Mr. Miller represented the financial institutions that participated in structuring the Note offerings and negotiated the Indentures with counsel for CEC and CEOC. (Miller Tr. at 25:6-38:23.) Referring to the Release Events, he testified:

> Q. . . . [W]hat was your understanding of how using the words "upon" with a list and "and" affected how many of the things would have to happen for the parent guarantee to be released?

> A. It is my understanding that the parent guarantee would be released upon the events in 1. They would be released upon the events in 2, and they would be released upon the events in 3.
>
> Q. So just to be clear, the events in 1 and the events in 2, for example, would not both have to happen for the parent guarantee to be released?
>
> A. Correct.
>
> Q. And the same thing if I asked you 1 and 3?
>
> A. Correct.
>
> Q. Or 2 and 3?
>
> A. Correct.

(*Id.* at 67:25-68:20; *see also id.* at 66:20-67:14; *see generally id.* at 58:13-68:20.)

Mr. Miller further testified that the transfer of CEOC stock to an entity not 100% owned by CEC automatically releases the Parent Guarantee. (*Id.* at 63:19-65:12.) He testified:

> Q. . . . When you said that the guarantor would be released from its obligation under the guarantee once stock was sold, whether it was 5 percent or 1 percent, did anything else have to happen for the guarantee to be released?
>
> A. It's automatically released.

(*Id*. at 65:4-65:9; *see also id.* at 120:5-20 ("Q. Is it your testimony that the parent guarantee in Exhibit 6 [the *BOKF* Indenture] can be removed simply by transferring some CEOC stock from CEC to another holder? A. If the issuer ceased to be a wholly-owned subsidiary of Harrah's Entertainment under Exhibit 6, yes, the parent guarantee would be released.").)

Finally, analysts and other market participants understood that the Parent Guarantee could be released upon the sale by CEC of any CEOC stock. (Sambur Decl. I ¶ 10 and Exs. B-D (analyst reports); Seiler Decl. Ex. D (views of CEOC noteholders).) No reasonable investor would have understood the Parent Guarantee to provide a meaningful credit backstop, irrespective of its release provisions. (Gadsden Decl. II ¶¶ 12-16.)

ARGUMENT

Summary judgment may be granted "only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party's favor, there is 'no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.'" *Western Heritage Ins. Co.* v. *Century Sur. Co.*, 32 F. Supp. 3d 443, 448 (S.D.N.Y. 2014) (quoting *Rivera* v. *Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685, 693 (2d Cir. 2012)). In a contract dispute, summary judgment is only proper "'when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning.'" *Fishoff* v. *Coty Inc.*, 676 F. Supp. 2d 209, 215 (S.D.N.Y. 2009) (quoting *Topps Co., Inc.* v. *Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008)).

I.

UNDER THE TEXT, STRUCTURE, AND PURPOSE OF THE INDENTURES, THE PARENT GUARANTEE WAS RELEASED ONCE CEOC WAS NO LONGER A WHOLLY OWNED SUBSIDIARY OF CEC

Under any reasonable interpretation of the release provisions of the Indentures, the occurrence of any one of the three Release Events results in the release of the Parent Guarantee. Because CEOC is no longer a wholly owned subsidiary of CEC, the First Release Event has been triggered, and the Parent Guarantee is accordingly released. Plaintiffs' arguments to the contrary—resting almost entirely on the use of the word "and" in the release provisions—ignore the plain language of the Indentures and their purpose and structure, and generate illogical and potentially impossible results. In addition, while the Court need not consider extrinsic evidence to reach this conclusion, it is powerfully confirmed by the testimony of Mr. Miller and the contemporaneous views of analysts and other market participants.

A. Under The Plain Language of the Release Provision and Any Reasonable Interpretation, The Three Release Events Should Be Read Disjunctively

Under New York law, which applies to the Indentures (§ 13.09), courts interpret contracts to avoid results that are commercially unreasonable or that render nugatory other provisions of the contract. *See, e.g., Farrell*, 30 N.Y.2d at 83 ("[R]ules of construction of contracts require, whenever possible, that an agreement should be given a 'fair and reasonable interpretation'") (citations omitted); *Greenwich Capital Fin. Prods.* v. *Negrin*, 74 A.D.3d 413, 415 (1st Dep't 2010) (same); *Lipper*, 1 A.D.3d at 171 ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties") (citations omitted); *Elsky* v. *Hearst Corp.*, 232 A.D.2d 310, 310-11 (1st Dep't 1996) (same).

Thus, "[i]n construing a contract, a court should read the contract as a whole, and avoid any interpretation that would render a contractual provision without force and effect." *Luitpold Pharms., Inc.* v. *Ed. Geistlich Söhne A.G. für Chemische Industrie*, 784 F.3d 78, 87 (2d Cir. 2015) (citations omitted). The Court should consider "'[p]articular words . . . not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *Kass* v. *Kass*, 91 N.Y.2d 554, 566 (1998) (citations omitted). Likewise, "'[f]orm should not prevail over substance and a sensible meaning of words should be sought.'" *Id.*, *quoting Atwater Co.* v. *Panama R.R. Co.*, 246 N.Y. 519, 524 (1927). *See also Bailey* v. *Fish & Neave*, 8 N.Y.3d 523, 528 (2007) ("[A]greements should be read as a whole to ensure that undue emphasis is not placed upon particular words . . . .").

New York courts can and do determine whether a proffered interpretation of a contract is commercially unreasonable as a matter of common sense, and without need to consider extrinsic evidence. *See, e.g.*, *Farrell*, 30 N.Y.2d at 82-83 (interpreting a lease to arrive at a "'fair and reasonable'" interpretation, and rejecting a reading that would "render[] nugatory" the other party's contractual benefits) (citation omitted); *Greenwich,* 74 A.D.3d at 415 (construing a guarantee and loan agreement "to give it a fair and commercially reasonable meaning," and rejecting one party's conjunctive interpretation that "ignores common sense, and could lead to absurd results"); *Terex Corp.* v. *Bucyrus Int'l, Inc.*, 94 A.D.3d 548, 549-50 (1st Dep't 2012) (reading a stock purchase agreement "'as a harmonious and integrated whole'" to find the relevant provision unambiguous, and rejecting one party's "absurd and commercially unreasonable" interpretation) (citation omitted); *Smith* v. *Estate of LaTray*, 161 A.D.2d 1178, 1178 (4th Dep't 1990) (resolving contractual ambiguity by giving it a "fair and reasonable interpretation in accordance with the intention the parties as derived from the language used" without resorting to "extrinsic proof").

Here, the text of the release provisions makes clear that the Parent Guarantee is released if any of the three Release Events is satisfied. Under Section 12.02(c), the Parent Guarantee is released "*upon*" the First Release Event, the Second Release Event, "*and*" the Third Release Event. (Indentures § 12.02(c)(i)-(iii) (emphasis added).) As Mr. Miller explained, the use of "upon" shows that the three Release Events should be read disjunctively. The Parent Guarantee is released "*upon*" the occurrence of the First Release Event (CEOC stock is no longer 100% owned by CEC); "*upon*" the occurrence of the Second Release Event (CEOC transfers all or substantially all of its assets to an entity not 100% owned by CEC (or merges with such an entity), provided that the transferee assumes CEOC's obligations); "*and*" "*upon*" the occurrence of the Third Release Event (CEOC exercises its defeasance options, or CEOC's obligations under the Indentures are otherwise discharged).

The plain language of the release provisions—under which the Parent Guarantee is released if any of the three Release Events occurs—comports with common sense and has a clear and readily explainable rationale, while the conjunctive interpretation plaintiffs urge serves no evident purpose and generates absurd results. As discussed above (pp. 7-9), plaintiffs do not and cannot offer any reasonable commercial justification for requiring that all three Release Events occur, and, indeed, the occurrence of all three events may well be impossible.

Finally, a disjunctive interpretation of the release provision is consistent with the structure of the Indentures. As discussed above (p. 9), the Indentures impose stringent limitations on CEOC's ability to assume additional debt or take other actions that could restrict its ability to honor its obligations under the Notes, while imposing no comparable restrictions on CEC. A disjunctive interpretation of the release provisions is consistent with the limited restrictions the Indentures impose on CEC. By contrast, the conjunctive interpretation plaintiffs urge is at odds with those other provisions.

B. Plaintiffs' Argument that the Release Provisions Must Be Read Conjunctively On the Ground that "'And' Means And" is Misplaced

The use of "and" between the Second and Third Release Events does not override these principles. Contrary to plaintiffs' argument that the word "and" must invariably be construed conjunctively, courts have consistently rejected a conjunctive reading of clauses separated by "and" where that reading "depends on 'formalistic literalism,' ignores common sense, and would lead to absurd results that could leave [one of the clauses] without meaning." *Greenwich*, 74 A.D.3d at 415 (citation omitted); *see also, e.g.*, *Major Oldsmobile, Inc.* v. *Gen. Motors Corp.*, 1995 WL 326475, at *6 (S.D.N.Y. May 31, 1995) ("A judicial determination that a conjunctive phrase in a contract was intended to be disjunctive is hardly unprecedented. . . . '[T]he word "or" is frequently construed to mean "and" and vice versa, in order to carry out the evident intent of the parties.'") (collecting cases; citations omitted), *aff'd*, 101 F.3d 684 (2d Cir. 1996); *Murphy* v. *Long Island Oyster Farms, Inc.*, 112 A.D.2d 276, 277 (2d Dep't 1985) (lease allowing defendant to use underwater lands for "planting, growing and cultivating thereon and [recovering] therefrom . . . shellfish" permitted removal of "naturally grown" clams); *Lamborn* v. *Nat'l Park Bank of N.Y.*, 212 A.D. 25, 32 (1st Dep't) (letter of credit referencing deliveries in "August and September" was applicable to deliveries in August "and/or" September), *aff'd*, 240 N.Y. 520 (1925); *Osborn* v. *Wilson & Co., Inc.*, 118 Misc. 379, 380-81 (N.Y. Sup. Ct. Wayne County 1922) (contract provision requiring buyer to accept a *pro rata* delivery of goods "in the event of floods … preventing Seller from filling this contract in full, and in the event of supplying goods … occasioned by [government] requisition" should be interpreted disjunctively), *aff'd*, 206 A.D. 787 (4th Dep't 1923).

Courts in other states have likewise applied the term "and" disjunctively in light of a common sense reading of the contract. *See Trammell Crow Residential Co.* v. *Am. Protection Ins. Co.*, 574 F. App'x 513, 521-22 (5th Cir. 2014) (construing "and" disjunctively in insurance contract); *Noell* v. *Am. Design, Inc. Profit Sharing Plan*, 764 F.2d 827, 833-34 (11th Cir. 1985) (construing "and" disjunctively in employee benefit forfeiture clause); *Manson* v. *Dayton*, 153 F. 258, 269-70 (8th Cir. 1907) (construing "and" as disjunctive in services contract).

Likewise, courts frequently construe the term "and" disjunctively in interpreting statutes. Indeed, under New York law, "[g]enerally, the words 'or' and 'and' in a statute may be construed as interchangeable when necessary to effectuate legislative intent." N.Y. STATUTES § 365 (McKinney's 1971 & Supp. 2015) (Seiler Decl. Ex. B); *see also* Seiler Decl. Ex. E (Oral Argument at 46:46 – 51:52, *State of N.Y. v. Wells Fargo Bank*, No. 15-1152 (2d Cir. Nov. 20, 2015) (explanation by Judge Raggi that "there are areas of federal law where the use of the word and is understood to give a list of alternatives. It is not necessarily conjunctive.")); *see also* *Davis Constr. Corp.* v. *Cnty. of Suffolk*, 95 A.D.2d 819, 820 (2d Dep't 1983) (citing § 365 to substitute "or" for "and" in statute); *Beslity* v. *Manhattan Honda*, 120 Misc. 2d 848, 853 (1st Dep't App. Term 1983) (same); *Slodov* v. *United States*, 436 U.S. 238, 249-50 (1978) (construing "and" disjunctively in statute); *Comm'n on Hosps. & Health Care* v. *Lakoff*, 572 A.2d 316, 320-21 (Conn. 1990) (construing "'and' . . . to mean 'or'") (citation omitted); *State* v. *Keller*, 657 P.2d 1384, 1387-88 (Wash. 1983) ("'and', has been frequently interpreted by courts to mean 'or'"); *Thornburgh* v. *Lewis*, 470 A.2d 952, 958 (Pa. 1983) ("'[C]ourts are often compelled to construe "or" as meaning "and" and again "and" as meaning "or."'") (citation omitted). As the court noted in construing the term "and" disjunctively in *Peacock* v. *Lubbock Compress Co.*, 252 F.2d 892, 893-95 (5th Cir.), *cert. denied*, 356 U.S. 973 (1958), "'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." *Id.* at 894.

Indeed, other provisions in the Indentures themselves use the term "and" disjunctively. For example, Section 4.03(b) of the Indentures provides that the general prohibition on CEOC's incurrence of additional debt "shall not apply to" 24 specified categories of debt. Although these categories are joined by the word "and," the plain meaning is that debt within *any* of the 24 categories is permitted, not—as plaintiffs' mechanical interpretation of "and" implies—that additional debt is permitted only if it satisfies *all 24* exceptions. (Miller Tr. at 119:9-120:16.) *See also* Section 1.01 (defining "Acquired Indebtedness" as debt falling within two categories, separated by "and," although the plain meaning of the definition is that indebtedness satisfying *either* category falls within the definition); *id*. (same with respect to definitions of "Asset Sale," "Cash Equivalents," "Excluded Contributions," "Hedging

Obligations," "Investment Grade Securities," "Permitted Investments," "Permitted Liens," and "Unrestricted Subsidiary"; *compare* definitions of "Contingent Obligations" and "U.S. Government Obligations" (separating terms by "or")); Section 4.07(b) (listing permitted transactions with affiliates, separated by "and"). (Gadsden Decl. II ¶¶ 10-17.)

The handful of cases plaintiffs cite in support of the argument that the term "and" must invariably be interpreted conjunctively (Pl. Mem. at 8-10) are inapposite, because in each of those cases, unlike here, the conjunctive interpretation led to a reasonable result consistent with the rest of the parties' agreement, while the disjunctive reading was unreasonable. *See Sasson* v. *TLG Acquisition LLC*, 127 A.D.3d 480, 481 (1st Dep't 2015) (disjunctive reading of "Permitted Investors" in change-of-control provision would have rendered the plural phrasing of the term "Permitted Investors" meaningless); *Maxwell* v. *State Farm Mut. Auto. Ins. Co.*, 92 A.D.2d 1049, 1050 (3d Dep't 1983) (exclusion from coverage in auto insurance policy applied only if the driver was "intoxicated" and if his "ability [to drive] was impaired through the use of a drug"); *Coan* v. *State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 81, 86 (E.D.N.Y. 1996) (clauses in insurance contract interpreted conjunctively because reading "and" as disjunctive would lead to an "inconceivable" outcome that "could not have been intended by the parties"); *Progressive Ne. Ins. Co.* v. *State Farm Ins. Cos.*, 81 A.D.3d 1376, 1378 (4th Dep't 2011) (disjunctive reading of auto policy exclusions is "strained, unnatural and unreasonable" and would render other language in the exclusion "grammatically incorrect").

Plaintiffs' argument that "and" must be read conjunctively because the Indentures elsewhere provide that "'or' is not exclusive" (Pl. Mem. at 9, citing Indentures § 1.04(c)) is a non sequitur. To begin with, contrary to plaintiffs' unsupported assertion, whether or not "or" should be construed exclusively or inclusively is distinct from whether it is conjunctive or disjunctive.

In any event, the parties' decision to adopt a rule of construction with regard to one word ("or") says nothing about how a different word ("and") should be construed. Much less does it imply, as plaintiffs argue, that the word "and" must be construed in a way that is inconsistent with the structure of the Indentures or that leads to unreasonable and absurd results.

Finally, plaintiffs argue that if "and" between the Second and Third Release Events were meant to be disjunctive, "then Section 12.02(c) would have simply listed seven separate conditions," rather than three. (Pl. Mem. at 10.) But this argument refutes itself. The Second Release Event also includes an "and" ("and such transferee entity assumes [CEOC's] obligations under this Indenture"). If plaintiffs' rule governed, this would mean their own conjunctive reading was wrong, because there are three, not four subparagraphs in Section 12.02. But the point is not to count subparagraphs. The Court's focus should be on the fact that Section 12.02(c) only makes sense in the context of the Indentures when read disjunctively.

C. Even If Section 12.02(c) Were Ambiguous, Summary Judgment Should Be Denied In Light Of the Extrinsic Evidence In the Record

Any ambiguity in Section 12.02(c) cannot be resolved on summary judgment, and cannot be resolved in plaintiffs' favor, because the extrinsic evidence uniformly supports CEC's disjunctive reading, and nothing in the record supports a contrary interpretation. *See Luitpold*, 784 F.3d at 88, 94. The extrinsic evidence includes the following:

- Mr. Miller testified that the Release Events were disjunctive, so that the occurrence of any one could release the Parent Guarantee. (Miller Tr. at 66:20-68:20; 115:21-120:16.)
- Market participants, such as holders of CEOC notes, underwriters, and analysts, understood that CEC could readily release the Parent Guarantee, including by the transfer of any amount of CEOC stock. (Seiler Decl. Ex. D; Sambur Decl. I ¶ 10 and Exs. B-D.)

- The accompanying declarations further confirm that requiring all three events in clauses (i), (ii) and (iii) of Section 12.02(c) to occur for the Parent Guarantee to be released would be commercially unreasonable. (Gadsden Decl. II ¶¶ 4-9; Reifsnyder Decl. ¶¶ 12-23; Sambur Decl. II ¶¶ 4-6.)
- Buyers of Notes would not have looked to the Parent Guarantee or CEC as a reliable source of credit support. (Gadsden Decl. I ¶¶ 12-16.) Also underscoring this point is the absence of restrictions in the Indentures applicable to CEC.
- CEOC did not file its own audited financial statements until after the Parent Guarantee was released. Before then, CEC's audited financial statements provided condensed consolidated financial information for CEC and CEOC, as required under Rule 3-10. (Sambur Decl. I ¶¶ 9, 15; Gadsden Decl. I ¶ 15; Gadsden Decl. II ¶ 6.) This is contemporaneous evidence that the relevant parties knew the Parent Guarantee absolved CEOC of having to file with the SEC audited financials independent from CEC's financials, until the First Release Event occurred.

II.

SUMMARY JUDGMENT ALSO SHOULD BE DENIED BECAUSE THE PARENT GUARANTEE WAS INDEPENDENTLY RELEASED UNDER THE EXISTING NOTES CLAUSE

If the Court finds that the Release Events should be understood conjunctively as a matter of law (they should not), plaintiffs' motion should still be denied because the Parent Guarantee was separately released pursuant to the Existing Notes Clause. (Sambur Decl. II ¶¶ 7-10.) CEC's guarantee of each tranche of Existing Notes was released via the operation of time or through other transactions (including the 5% Stock Sale and the 6% Stock Transfer) by June 2, 2014, and in all events by no later than August 22, 2014. And resolving any dispute over the release of the Parent Guarantee through the Existing Notes Clause requires a fact-laden inquiry, precluding summary judgment. Finally, plaintiffs' argument (Pl. Mem. at 11) that, if the Court grants the pending motions for summary judgment in *MeehanCombs* and *Danner*, it will have determined that the August Transaction is invalid with respect to the Notes at issue here is, at best, premature. Even if the Court rules on the validity of the August Transaction, the implications of such a ruling in this case, involving different notes and different Indentures, should be addressed only after the ruling is issued.

CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' motions.

Dated: New York, New York
December 4, 2015

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