

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MEEHANCOMBS GLOBAL CREDIT  
OPPORTUNITIES MASTER FUND, LP, *et al.*,

v.

CAESARS ENTERTAINMENT CORP. and CAESARS  
ENTERTAINMENT OPERATING CO., INC.,

Case No. 1:14-cv-07091-SAS

FREDERICK BARTON DANNER, individually  
and on behalf of all others similarly situated,

v.

CAESARS ENTERTAINMENT CORP. and CAESARS  
ENTERTAINMENT OPERATING CO., INC.,

Case No. 1:14-cv-07973-SAS

**DECLARATION OF JONATHAN H. HURWITZ IN  
SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

JONATHAN H. HURWITZ, a member of the Bar of the State of New York,  
declares as follows pursuant to 28 U.S.C. § 1746:

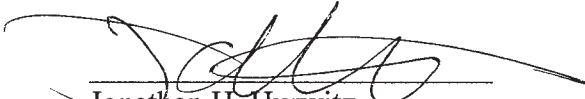
1. I am counsel with the law firm of Paul, Weiss, Rifkind, Wharton &  
Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019, counsel for defendant  
Caesars Entertainment Corporation ("CEC") in the above-captioned actions.

2. I respectfully submit this declaration to transmit to the Court a document  
referenced in the Memorandum of Law in Support of Defendants' Motion to Dismiss. A true  
and correct copy of the document listed below is attached as an exhibit to this declaration.

3. Exhibit A contains excerpts of the American Bar Foundation's 1971  
Commentaries on Model Indenture Provisions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 11, 2014.



Jonathan H. Hurwitz

**EXHIBIT A**

AMERICAN BAR FOUNDATION  
Corporate Debt Financing Project

Commentaries

ON

MODEL DEBENTURE INDENTURE PROVISIONS  
1965

MODEL DEBENTURE INDENTURE PROVISIONS  
ALL REGISTERED ISSUES  
1967

AND

CERTAIN NEGOTIABLE PROVISIONS  
which may be included in a particular  
INCORPORATING INDENTURE

1971

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COMMENTARIES ON INDENTURES”

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*The American Bar Foundation reserves no copyright with respect to the Sample Incorporating Indentures, the Model Debenture Indenture Provisions, or the samples of covenants, clauses, definitions and other negotiable provisions appearing in the Commentaries contained in this volume. The Foundation consents to their use in the preparation of indentures.*

§ 3-9, Cancellation

whether or not the Debenture to which it appertains be registered, as the absolute owner of such Debenture or coupon for the purpose of receiving payment thereof or on account thereof and for all other purposes, whether or not such Debenture or coupon be overdue, and neither the Company, the Trustee nor any such agent shall be affected by notice to the contrary. The Company, the Trustee and any agent of the Company may treat the Person in whose name any Registered Debenture is registered as the owner of such Debenture for the purpose of receiving payment of principal of, and if such Debenture be a Fully Registered Debenture, interest on, such Debenture and for all other purposes whatsoever (except the payment of coupons appertaining to any Registered Coupon Debenture and the payment of interest payable on presentation of any temporary Debenture) whether or not such Debenture be overdue, and neither the Company, the Trustee nor any agent of the Company shall be affected by notice to the contrary.

The major purpose of this section is to protect the Company and the Trustee against conflicting claims of ownership or rights to payment. The reference in the first line to “any agent of the Company” is intended to include registrars, paying agents, exchange agents, conversion agents, subscription agents and anyone else exercising similar functions. The attempt to exclude the effectiveness of any notice contrary to the information contained on the debenture register, while customary, may be broader than permitted by statutory law. For example, under Sections 8-403 and 8-404 of the Uniform Commercial Code the Company could be liable to a registered owner suffering loss from the improper registration or transfer of his registered debenture to another person if the Company had previously received proper notice of the registered owner’s claim. Suppose R, the registered holder of a debenture, sells it to A, but then wrongfully delivers it to the Company for transfer of registration to the name of B. The Company has a duty under UCC Section 8-403 to inquire into A’s claim if the Company receives notice of A’s claim at a time and in a manner affording the Company a reasonable opportunity to act prior to the registration of the debenture in B’s name. If the Company fails to make an inquiry into A’s claim, it may incur liability to A under UCC Section 8-404.

§ 3-9 [Section 309]. Cancellation and Cremation.<sup>49</sup>

All Debentures and coupons surrendered for payment, conversion or redemption shall, if surrendered to the Company or any agent of the Company, be delivered to the Trustee and, if not already cancelled, shall be

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<sup>49</sup> The words “and Cremation” are not used in the 1967 All Registered Version of the Model Provisions.

**§ 3-9, Cancellation**

**promptly cancelled by it. The Company may at any time deliver to the Trustee for cancellation any Debentures previously authenticated and delivered hereunder, together with all unpaid coupons appertaining thereto, which the Company may have acquired in any manner whatsoever, and all Debentures so delivered shall be promptly cancelled by the Trustee. No Debentures shall be authenticated in lieu of or in exchange for any Debentures cancelled as provided in this Section, except as expressly permitted by this Indenture. All cancelled Debentures and coupons held by the Trustee shall be disposed of as directed by a Company Order.**

In some indentures the general directions contained in Section 309 as to the disposition of debentures surrendered for payment, conversion or redemption are included among the general provisions of the indenture similar to those in Article 100 of the Model Provisions. Section 305 (sixth paragraph) directs the cancellation of debentures and coupons surrendered upon any exchange or transfer. Section 309 requires the delivery to the Trustee of debentures and coupons surrendered to the Company or any paying agent for payment, conversion or redemption. Together, these sections account for all debentures other than those outstanding. The reference to the possibility that such debentures may have already been cancelled by the paying agents is desirable because as a matter of practice, the Trustee may authorize reliable paying agents to cancel debentures received by them prior to transshipment to the Trustee. It is considered undesirable for the indenture to authorize anyone other than the Trustee to cancel debentures authenticated by the Trustee, but as a practical matter the Trustee may authorize paying agents to cancel paid debentures, particularly when they are in bearer form and require shipment to the Trustee.

The second sentence of Section 309 specifically authorizes the Company to deliver to the Trustee for cancellation, debentures acquired by the Company. Typically, these would be treasury debentures acquired by purchase on the market that the Company desires to render no longer outstanding. One might think that the Company's right to effect such cancellation would be implicit, but instances are known where the propriety of such cancellation, in the absence of an express provision, was questioned.

In practice, cancelled debentures will usually be cremated by the Trustee, pursuant to company order.

**§ 5-7, Limitation on Suits**

the proceeds of fire insurance, the proceeds from the sale of released properties and the proceeds from pledged collateral.

**§ 5-7 [Section 507]. Limitation on Suits.**

**No Holder of any Debenture or coupon shall have any right to institute any proceeding, judicial or otherwise, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless**

**(1) such Holder has previously given written notice to the Trustee of a continuing Event of Default;**

**(2) the Holders of not less than 25% in principal amount of the Outstanding Debentures shall have made written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder;**

**(3) such Holder or Holders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;**

**(4) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity has failed to institute any such proceeding; and**

**(5) no direction inconsistent with such written request has been given to the Trustee during such 60 day period by the Holders of a majority in principal amount of the Outstanding Debentures;**

**it being understood and intended that no one or more Holders of Debentures or coupons shall have any right in any manner whatever by virtue of, or by availing of, any provision of this Indenture to affect, disturb or prejudice the rights of any other Holders of Debentures or coupons, or to obtain or seek to obtain priority or preference over any other Holders or to enforce any right under this Indenture, except in the manner herein provided and for the equal and ratable benefit of all the Holders of Debentures and coupons.**

The major purpose of this Section is to deter individual debentureholders from bringing independent law suits for unworthy or unjustifiable reasons, causing expense to the Company and diminishing its assets. The theory is that if the suit is worthwhile, 25% of the debentureholders would be willing to join in sponsoring it. The 25% figure is standard. An additional purpose is the expression of the principle of law that would otherwise be implied that all rights and remedies of the indenture are for the equal and ratable benefit of all the holders.



## § 5-7, Limitation on Suits

Note that this limitation is only on suits under the indenture—the right of a debentureholder to sue on his debenture for payment when due is absolute and unconditional, as provided in Section 508.

Limitations similar to those contained in Section 507 have been generally upheld by the courts.<sup>22</sup>

Statutory recognition of the prevalence and practicality of these limitations is contained, for example, in the Ohio Turnpike Commission Act which specifically provides that the trust agreement securing the issuance of Ohio Turnpike Commission bonds “may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders as is customary in trust agreements or trust indentures securing bonds or debentures of corporations”.<sup>23</sup>

As a practical matter, if an event of default has occurred, the Trustee is obliged to exercise such of the rights and powers vested in it as would a prudent man under the circumstances (Section 601(b)). It is unlikely that the Trustee would refuse to take any action for more than two months after a request to do so by 25% of the debentureholders when an event of default (i.e., a ripened default) has occurred and is continuing.

<sup>22</sup> A case to that effect is *Lichter v. Land Title Guarantee & Trust Co.*, 77 Ohio L. Abs. 342, 150 N. E. 2d 70 (Ct. App. 1957). In *Relmar Holding Co. v. Paramount Publix Corp.*, 147 Misc. 824, 263 N. Y. S. 776 (Sup. Ct. 1932), it was held that a provision similar to Section 507(2) was not contrary to public policy. In *Greene v. New York United Hotels, Inc.*, 236 App. Div. 647, 260 N. Y. S. 405 (1st Dep't 1932); *aff'd*, 261 N.Y. 698, 185 N.E. 798 (1933), provisions in an indenture similar to clauses (2) and (4) of Section 507 were held to be valid and binding on the debentureholders. A curious case is *Bartol v. Gottlieb-Bauernschmidt-Straus Brewing Co.*, 129 Md. 32, 98 A. 286 (1916), which held that a holder of coupons for overdue interest on mortgage bonds issued under an indenture containing provisions similar to Section 507 could not maintain a suit on such coupons, because: “To permit the appellant to recover judgment on his overdue coupons in this case would necessarily affect, disturb or prejudice the lien or security of the deed of trust”. The reported decision does not indicate whether or not the deed of trust contained a provision similar to Section 508. In *First Nat'l Bank of Dallas v. Brown*, 34 S. W. 2d 412 (Tex. Civ. App. 1930) *appeal dismissed*, 122 Tex. 168, 53 S. W. 2d 604 (1932), it was held that a provision of a trust agreement giving the trustee *exclusive* right to enforce the security was void as against public policy. The trust agreement in that case contained the unusual provision that:

“The security hereby created and held by said trustee under this indenture shall be enforced *only by and through said trustee* but any holder whose bond is due and unpaid may sue said company thereon and obtain a personal judgment against it.” (italics added).

In *Reinhardt v. Interstate Telephone Co.*, 63 A. 1097 (N.J. 1906), it was held that a similar provision did not preclude a bondholder from prosecuting, as a creditor, a suit to have the mortgagor corporation declared insolvent and to have a statutory receiver appointed. Limitations similar to Section 507 were held not to bar a suit for a declaratory judgment construing certain of the provisions of the indenture, there being no default thereunder, in *Kelley v. Prudence Co.*, 144 Misc. 651, 259 N. Y. S. 59 (Sup. Ct. 1932).

<sup>23</sup> Ohio Revised Code § 5537.12.