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 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTIONS TO DISMISS

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Defendants Caesars Entertainment Corporation ("CEC") and Caesars Entertainment Operating Company, Inc. ("CEOC," and together with CEC, "Caesars" or "Defendants") respectfully submit this memorandum of law in support of their motions, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaints filed by (i) MeehanCombs Global Credit Opportunities Master Fund, LP, Relative Value Long/Short Debt Portfolio, a Series of Underlying Funds Trust, SB 4 CF LLC, CFIP Ultra Master Fund, Ltd., and Trilogy Portfolio Company, LLC (collectively, "MeehanCombs"), and (ii) Frederick Barton Danner ("Danner," and with MeehanCombs, "Plaintiffs").

PRELIMINARY STATEMENT

Plaintiffs—alleged holders of two series of CEOC unsecured notes—seek by this action to rewrite the relevant note indentures and the governing federal statute to give themselves rights that they do not have and for which they never negotiated, all at the expense of CEOC, CEC, and CEOC's other creditors. Plaintiffs and all other holders of the notes have received every payment they are owed under the notes when due. Plaintiffs contend, however, that a recent transaction—undertaken by CEC and CEOC for the purpose of reducing CEOC's leverage and improving its business prospects—has nevertheless impaired their right to payment under the notes, and that the transaction thereby violated the indentures and the Trust Indenture Act of 1939 (the "TIA"). But Plaintiffs' reliance on the TIA—the only asserted basis for federal jurisdiction—is misplaced, because the TIA provisions they invoke do not apply to the transaction at issue. Plaintiffs' claims under the indentures are barred by the express terms of the indentures' no-action clauses, which preclude such actions by individual noteholders in the absence of a payment default. And, even apart from the no-action clauses, the challenged transaction is expressly permitted by the indentures' plain language. For these reasons, the Complaints should be dismissed.

CEC, together with CEOC and CEC's other operating subsidiaries, owns and operates a network of casinos, hotels, and other entertainment venues. Since 2008, as a result of the global financial crisis and the ensuing downturn in the gaming industry, CEC and CEOC have faced revenue and operational challenges that have put significant strain on their capital structure, particularly at the CEOC level. Accordingly, over the past several years, Defendants have embarked on sustained cost-cutting and streamlining at CEOC. In addition, to stabilize and de-lever CEOC and thereby maximize value for all stakeholders, Defendants also have pursued a strategy of generating liquidity, extending maturities, and amending or removing covenants in CEOC's credit agreements and note indentures.

The transaction Plaintiffs challenge was undertaken by CEOC and CEC as part of that strategy. Pursuant to that transaction, in August 2014, participating holders of the same series of unsecured notes that Plaintiffs hold—who collectively held a majority of the notes outstanding in each issuance—agreed to modify certain note covenants regarding dispositions of assets by CEOC, agreed to support certain further restructuring efforts of CEOC and agreed that CEC's guarantee obligations under the notes were terminated. In addition, as part of the transaction, Defendants purchased $155 million of notes held by the participating noteholders, and CEC contributed $426 million of its CEOC notes for cancellation. As a result of the transaction, CEOC reduced its outstanding debt by $582 million at a cost of only $78 million.

Plaintiffs' claims that the August transaction violated the TIA and the indentures, and Defendants' duty of good faith and fair dealing, should be dismissed.

First, Plaintiffs' claims under the TIA are a transparent ruse to create federal jurisdiction where none exists. Plaintiffs allege that the transaction violated two provisions of the statute, Sections 316(a) and (b). But neither provision applies. Section 316(a) (which only

MeehanCombs invokes) provides that securities held by the issuer or by persons under common control with the issuer shall not be considered in determining whether holders of a majority of notes have consented to certain specified actions. Here, that requirement was satisfied: the supplemental indentures that resulted from the August transaction were approved by holders of a majority of the notes, excluding those held by CEOC and its affiliates. Plaintiffs' contention that the independent noteholders who consented to the supplemental indentures were "controlled" by CEOC because they entered into an arm's-length agreement to sell it some of their notes is contrary to the plain language of the statute and unsupported by any relevant authority. In any event, Section 316(a) applies only to two specific circumstances—directions to the note trustee with respect to the exercise of its powers, and consents to waive past defaults—neither of which occurred here. Thus, Section 316(a) does not apply.

The Complaints likewise do not state a claim for violation of TIA Section 316(b). Under that provision, noteholders have the right to receive principal and interest when due, and to bring suit upon nonpayment. But, as noted, Plaintiffs do not and cannot allege any nonpayment. There is no violation of the statute merely because a noteholder claims to believe that the value of its investment or the probability of payment has declined. Because Plaintiffs' TIA claims fail—and Plaintiffs allege no other basis for federal jurisdiction—the remaining state-law claims do not belong in this Court.

Second, Plaintiffs' state-law claims are barred by the indentures' no-action clauses. These clauses preclude noteholders, including Plaintiffs, from instituting any legal proceeding with respect to the indentures unless, among other things, holders of not less than 25% of the outstanding securities of each series have requested the trustee to institute proceedings, and the trustee has failed to institute any such proceedings. Such clauses—routinely included in

indentures governing debt securities—are intended to protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors. Where, as here, Plaintiffs concededly have failed to satisfy the preconditions to suit under the no-action clauses, including a demand on the trustee, their claims must be dismissed.

Third, Plaintiffs' claims for breach of the indentures fail for the independent reason that the Complaints do not adequately allege either a breach of the indentures or any cognizable damages. The indentures' terms specifically authorized the amendments incorporated in the supplemental indentures and, as explained above, Plaintiffs' right to payment on the notes has not been impaired. Defendants also did not breach the indentures' redemption provisions, as Plaintiffs allege, because the transaction involved a negotiated purchase from participating noteholders, not a redemption. And MeehanCombs' claim that Defendants gave the participating noteholders improper preferential treatment fails because the indentures governing Plaintiffs' notes do not require the issuer to make offers to all noteholders when soliciting consents. And Plaintiffs' conclusory assertion that they have "suffered substantial actual and prospective damages" (MC Compl. ¶¶ 116, 122, 129, 137; Danner Compl. ¶¶ 68, 76, 83, 93)[1] is unsupported by any well-pleaded facts, and, because there has been no payment default, is insufficient as a matter of law.

Finally, Plaintiffs' claims for breach of the duty of good faith and fair dealing are untenable (as well as barred by the indentures' no-action clauses). There can be no breach where, as here, the indentures expressly permit the conduct being challenged. The law is also clear that

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[1] Citations to "MC Compl." and "Ex." (unless otherwise noted) are to the MeehanCombs Complaint and its exhibits; citations to "Danner Compl." are to the Danner Complaint.

the duty of good faith and fair dealing cannot be used to impose obligations inconsistent with the express terms of the governing contract.

Because all of Plaintiffs' claims are untenable under the plain terms of the TIA, the indentures and well-established law, the Court should dismiss the Complaints in their entirety.

SUMMARY OF PLAINTIFFS' ALLEGATIONS

The Parties

CEOC is a majority-owned subsidiary of CEC, which, through CEOC and other affiliates, owns and operates a broad network of casinos throughout the country. (MC Compl. ¶¶ 17-18.)

MeehanCombs is a group of sophisticated hedge funds that hold approximately $21 million of two series of senior unsecured CEOC notes due in 2016 and 2017 respectively (the "Notes"). (*See* MC Compl. ¶ 1.) Danner holds an undisclosed amount of 2016 Notes, and purports to sue on behalf of a putative class of all persons who beneficially held Notes of that series between August 11, 2014 and the present. (Danner Compl. ¶¶ 1, 16.)

The Notes and Indentures

CEOC issued the Notes in 2005 and 2006 in two offerings of $750 million each. Each series of Notes is governed by an indenture, a detailed contract specifying the respective rights and obligations of CEOC, CEC, Noteholders, and the Note Trustee. (Exs. D & E.) (We refer to the indentures respectively as the "2016 Indenture" and the "2017 Indenture," and together as the "Indentures." Unless noted otherwise, the relevant provisions of the Indentures are substantively identical.) The Indentures are governed by New York law. (Ex. D § 10.10; Ex. E § 112.) The Notes are still outstanding, and Plaintiffs do not and cannot allege that there has ever been a payment default.

When the Notes were issued, CEOC was a wholly owned subsidiary of CEC, and CEC guaranteed the Notes pursuant to the various conditions specified in the Indentures. (*See* Ex. D at Art. XII; Ex. E at Art. XV.) The Indentures further provided, however, that CEC's guarantee of the Notes is automatically terminated upon the occurrence of certain events, including that CEOC "ceases for any reason to be a 'wholly-owned subsidiary' of [CEC] . . . ." (Ex. D § 12.3; Ex. E § 1503; Danner Compl. ¶ 25.) CEC's guarantee was terminated in May 2014, when CEC sold a 5% stake in CEOC to a third party, and CEOC was thus no longer a wholly owned subsidiary. (Danner Compl. ¶ 41.)

With certain specifically identified exceptions, the Indentures may be amended (via supplemental indentures) by "the written consent of the Holders of at least a majority in principal amount of the outstanding Notes affected by such supplemental indenture." (Ex. D § 9.2; Ex. E § 902.) The Indentures broadly provide that holders of a majority of the Notes of each series may consent to amendments "adding any provisions to or changing in any manner or eliminating any of the provisions of th[e] Indenture[s] or of . . . modifying in any manner the rights of the Noteholders." (Ex. D § 9.2; Ex. E § 902.) The Indentures carve out from that general provision certain identified provisions that may not be amended without the consent of each Noteholder affected, including amendments to reduce the majority consent requirement, to waive payment defaults, to reduce the principal or interest rates of the Notes or change their maturity, and to make any changes to certain specifically identified provisions of the Indentures. (Ex. D § 9.3; Ex. E § 902.) This list of provisions not subject to amendment by majority vote does ***not*** include the provision governing the CEC guarantee of the Notes.

In determining whether holders of a majority of the Notes have approved an amendment, the Indentures provide that Notes owned by CEOC or an "Affiliate" of CEOC shall be

disregarded. (Ex. D § 2.9; Ex. E § 101.) Under the Indentures, an Affiliate of CEOC is any person "directly or indirectly controlling or controlled by or under direct or indirect common control," and "control" means "the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies" of the affiliated person. (Ex. D § 1.1; Ex. E § 101.)

The Indentures authorize the Note Trustee to pursue remedies for breach on behalf of all Noteholders, and correspondingly—in a broad "no-action" clause—restrict the ability of individual Noteholders to commence legal proceedings "with respect to" the Indentures. (Ex. D § 6.7; Ex. E § 507.) The no-action clauses provide that, unless certain preconditions are satisfied,

> [n]o Holder . . . shall have any right to institute *any* proceeding, judicial or otherwise, *with respect to this Indenture, . . . or for any other remedy hereunder* . . . .

(Ex. E § 507 (emphasis added); *see also* Ex. D § 6.7.) The preconditions for suit by an individual Noteholder include, among other things, that Holders of at least 25% of outstanding Notes of the respective series have made a written request to the Trustee to institute proceedings with respect to a continuing Event of Default, and have offered the Trustee reasonable indemnity of the costs of such a proceeding, and the Trustee has failed to institute such a proceeding within 60 days. (*Id.*) The sole exception to the no-action provision permits Noteholders "to institute suit for the enforcement of any … payment" of principal and interest due on the Notes "on the Stated Maturity." (Ex. D § 6.8; Ex. E § 508.) Plaintiffs do not and cannot allege that any of the conditions to suit have been satisfied here, or, as noted, that any payments have not been made as due.

The Challenged August 2014 Transaction

Plaintiffs' claims arise from a transaction that CEOC and CEC undertook in August 2014, pursuant to which $582 million of Notes were cancelled (including $426.6 million of Notes held by CEC), at a cost to CEOC of only $78 million. (Ex. F.)

Pursuant to the August transaction, holders of more than 51% of each series of Notes that are held by non-affiliates of CEOC (the "Participating Noteholders") consented to amend the Indentures by means of supplemental indentures in two respects: *first*, to acknowledge that the CEC guarantee under the Indentures had been terminated; and, *second,* to modify (but not eliminate) a Note covenant restricting the disposition of "substantially all" of CEOC's assets such that any such dispositions are measured based upon CEOC's asset sales as of the date of the amendment; and also agreed to support certain future restructuring efforts of CEOC. (*See id.*)

In connection with the August transaction, the Participating Noteholders also agreed to sell to CEOC and CEC approximately $89.4 million of the 2016 Notes and $66.0 million of the 2017 Notes, and CEC further contributed $426.6 million of additional Notes for cancellation for no cash consideration. The consideration paid to the Participating Noteholders for their various consents and for the repurchase of their Notes consisted of payment by CEOC and CEC of $78 million each, or a total of $156 million. The Participating Noteholders retained Notes with a face amount of approximately $82.4 million. (*Id.*)

Plaintiffs allege that the Participating Noteholders should be deemed "Affiliates" of CEOC, and that the Notes they held should therefore not be considered in determining whether holders of a majority of Notes of each series consented to the amendments. (MC Compl. ¶¶ 81, 87-88; Danner Compl. ¶ 60.) But Plaintiffs do not and cannot allege that the Participating Noteholders were anything other than independent third parties, or that the August transaction was negotiated and agreed to other than at arm's length.

Plaintiffs' Claims

Plaintiffs allege that the August transaction violated the Indentures and the TIA. Specifically, they purport to assert claims for: violations of Section 316(a) and 316(b) of the TIA (MC Compl. ¶¶ 96-106; Danner Compl. ¶¶ 62-68 (alleging only a Section 316(b) violation)); breaches of the Indentures, including that Defendants impaired their rights to payment of principal and interest and to bring suit for such payment; redeemed certain Notes without following the process applicable to redemptions; impermissibly released CEC's guarantee; and gave improper preferential treatment to the Participating Noteholders (MC Compl. ¶¶ 107-37; Danner Compl. ¶¶ 69-83); a declaratory judgment that the supplemental indentures are void, on the ground that the Participating Noteholders should be deemed Affiliates of CEOC and that the supplemental indentures were therefore not approved by holders of a majority of Notes of each series not held by Affiliates (MC Compl. ¶¶ 80-95; Danner Compl. ¶¶ 57-61); and breach of the duty of good faith and fair dealing (MC Compl. ¶ 144; Danner Compl. ¶¶ 84-93).

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). While the Court must accept "well-pleaded factual allegations" as true, *Hayden* v. *Paterson*, 594 F.3d 150, 161 (2d Cir. 2010), "that tenet . . . is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action," *Iqbal*, 556 U.S. at 678; *Harris* v. *Mills*, 572 F.3d 66, 72 (2d Cir. 2009). The Court may also "consider the full text of documents that are quoted in the complaint," *S. Cherry St. LLC* v. *Hennessee Grp. LLC (In re Bayou Hedge Fund Litig.)*, 534 F. Supp. 2d 405, 413 (S.D.N.Y. 2007) (citation omitted), as well as public records, including SEC filings, *see Kramer* v. *Time Warner Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991).

Under New York law (which, as noted, governs the Indentures), the "interpretation of indenture provisions is a matter of basic contract law." *Sharon Steel Corp.* v. *Chase Manhattan Bank*, 691 F.2d 1039, 1049 (2d Cir. 1982). When interpreting note indentures, courts have emphasized the important public policy of giving "commercial contracts that use standard language a consistent meaning." *Caspian Alpha Long Credit Fund, L.P.* v. *GS Mezzanine Partners 2006, L.P.*, 93 A.3d 1203, 1206 (Del. 2014) (applying New York law and citing *Sharon Steel*). Thus, "[t]he terms of the contractual relationship agreed to and not broad concepts such as fairness define the corporation's obligation to its bondholders." *Katz* v. *Oak Industries Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (under analogous Delaware law); *see also In re Solutia, Inc.*, No. 03-17949, 2007 WL 1302609, at *9 (Bankr. S.D.N.Y. May 1, 2007) (citing *Katz* in analyzing indenture governed by New York law and noting that "the relatively simple relationship between a corporation and the holders of its debt securities . . . is contractual in nature").

I.

THE COMPLAINTS FAIL TO STATE A CLAIM FOR VIOLATION OF THE TIA

Plaintiffs' only federal claims purport to arise under the TIA. The TIA regulates corporate debt securities offered for sale in interstate commerce, and requires such securities (unless specifically exempted) to be issued under an indenture that meets the requirements of the statute and is qualified with the SEC. 15 U.S.C. §§ 77aaa, 77hhh. To qualify under the TIA, the indenture must contain specified provisions intended to protect holders of securities issued under such indentures. *Id.* § 77ggg.

Plaintiffs assert two claims under the TIA. *First*, MeehanCombs alleges that the August 2014 transaction violated Section 316(a) of the statute, 15 U.S.C. § 77ppp(a), because, it contends, (i) CEOC "controlled" the Participating Noteholders; (ii) for that reason, the

Participating Noteholders' Notes should not be considered in determining whether holders of a majority of Notes of each series consented to amend the Indentures, and holders of a majority of all other Notes did not consent; and (iii) accordingly, the amendments are invalid. (MC Compl. ¶¶ 103-05.) *Second*, both Plaintiffs allege that the termination of the CEC guarantee and the amendment to the "substantially all" provision impaired their rights to payment under the Notes and thereby violated Section 316(b) of the statute, 15 U.S.C. § 77ppp(b). (MC Compl. ¶ 99; Danner Compl. ¶ 64.) As we show below, neither claim states a cause of action. And, because Plaintiffs' TIA claims are the sole asserted basis for federal jurisdiction (MC Compl. ¶ 19; Danner Compl. ¶ 13), their state-law claims should also be dismissed for lack of jurisdiction.

A. MeehanCombs Fails to State a Claim Under TIA Section 316(a)

MeehanCombs' claim under Section 316(a) fails because that section by its terms does not apply to the challenged transaction, and because, in any event, the Complaints do not allege facts showing that the Participating Noteholders were under CEOC's control.

Section 316(a), in relevant part, provides that holders of a majority of the principal amount of any series of notes governed by the statute may (i) direct "the time, method, and place of conducting any proceeding for any remedy available to" the trustee, or "exercising any trust or power conferred upon such trustee" under the indenture, and (ii) consent, on behalf of all holders, to "the waiver of any past default and its consequences." 15 U.S.C. § 77ppp(a). In terms similar to the parallel provision in the Indentures, the statute further provides that, in determining whether the holders of a majority of the securities at issue "have concurred in any such direction or consent," securities held by the issuer "or by any person directly or indirectly controlling or controlled by or under direct or indirect common control" of the issuer shall be disregarded. *Id.*

The MeehanCombs Complaint does not state a claim for violation of Section 316(a) for two reasons. *First*, neither of the two situations governed by the statute is alleged to have

occurred here. MeehanCombs does not and cannot allege that the challenged transaction involved either a direction to the trustee with respect to the exercise of its powers, or the waiver of any past default and its consequences. Instead, as discussed above, the transaction, as relevant here, affected only the CEC guarantee and the provision governing any future disposition of "substantially all" of CEOC's assets. By the unequivocal terms of the statute, therefore, Section 316(a) does not apply.

Second, the facts alleged in the Complaints do not show that the Participating Noteholders were under the control of CEOC or CEC. As noted, there is no allegation that the Participating Noteholders were anything other than unaffiliated third parties, that the transaction was not negotiated at arm's length, or that the agreement gave CEOC or CEC any authority over the Participating Noteholders' business or operations. Specifically, Plaintiffs do not allege that CEC or CEOC hold voting securities or any form of economic or legal interest in the Participating Noteholders; possess authority to appoint or influence the appointment of the Participating Noteholders' officers, directors or other members of management; or otherwise possess authority to direct any decisions or actions by the Participating Noteholders other than carrying out the terms of the transaction to which they had agreed. Absent such allegations, there are no facts from which the Court can even reasonably infer that Defendants "controlled" the Participating Noteholders. *See Waldman* v. *Riedinger*, 423 F.3d 145, 151-53 (2d Cir. 2005) (holding that trustee was not an "affiliate" where trust instrument did not grant trustee voting control over trust, as "he did not possess the power necessary to 'direct or cause the direction of the management and policies of a person'").

The mere fact that the Participating Noteholders accepted Defendants' offer for their Notes does not mean, as Plaintiffs allege, that the Participating Noteholders somehow came

under CEOC's or CEC's "control." Plaintiffs' theory, taken to its logical end, would mean that every transaction between an issuer and its noteholders would amount to an improper exercise of "control," because noteholders would obviously consent only to proposals that they find advisable, and no voting agreement between issuers and noteholders would ever be permitted. To avoid such absurd results, courts have construed similar references to control by agreement to encompass only "agency or other commercial contracts" that "allow one entity to wield significant power over another." *Telenor Mobile Commc'ns AS* v. *Storm LLC*, 587 F. Supp. 2d 594, 606 (S.D.N.Y. 2008); *see also Paracor Fin., Inc.* v. *General Electric Capital Corp.*, 96 F.3d 1151, 1162 (9th Cir. 1996) ("As the definition suggests, our inquiry must revolve around the 'management and policies' of the corporation, not around discrete transactions."). No such "control" has been or could be alleged here.

For these reasons, MeehanCombs' claim under Section 316(a) fails as a matter of law.

B. Plaintiffs Fail to State a Claim Under TIA Section 316(b)

Section 316(b) of the TIA provides that the right of a holder of securities governed by an indenture "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 [the right] to institute suit for the enforcement of any such payment *on or after such respective dates*" may not be impaired without the holder's consent. 15 U.S.C. § 77ppp(b) (emphasis added). Plaintiffs do not state a claim under Section 316(b), because they do not and cannot allege that their right to receive payment when due or their right to sue to enforce such payment on or after the due date has been impaired. (*See* MC Compl. ¶ 3 (alleging that "a looming restructuring *will* deprive [Plaintiffs] of their rights to receive principal and interest" (emphasis added)); Danner Compl. ¶ 7 ("no practical *prospect* of a meaningful recovery" (emphasis added)).)

Plaintiffs cannot state a claim under Section 316(b) merely by alleging that the issuer's actions have reduced its ability to make future payments when due. As the courts have repeatedly held, the statute does not guarantee that the issuer will be able to meet its obligations. Rather, it protects only a noteholder's *legal* right to receive payment when due. *See In re Northwestern Corp.*, 313 B.R. 595, 600 (Bankr. D. Del. 2004) ("[Section 316(b)] applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself." (emphasis in original)); *Ret. Bd. of the Policemen's Annuity and Benefit Fund of Chicago* v. *Bank of New York Mellon*, 914 F. Supp. 2d 422, 432 (S.D.N.Y. 2012) (citing *Northwestern* and dismissing Section 316(b) claim on ground that plaintiffs failed to respond to defendant's argument that Section 316(b) "only prevents non-consensual impairments to certificateholders' right to demand payment of interest and principal.").

The court's ruling in *YRC Worldwide Inc.* v. *Deutsche Bank Trust Co. Ams.*, No. 100-2106-JWL, 2010 WL 2680336 (D. Kan. July 1, 2010), is on point. In *YRC*, the court considered whether holders of a majority of the securities at issue could amend the indenture to eliminate a restriction on the issuer's ability to merge or transfer substantially all of its assets. The trustee argued that Section 316(b) and the indenture required unanimous consent because the proposed amendments "would impair the holders' right to payment on the notes and would impair their right to bring suit to enforce the payment obligation." *Id.* at *20. The court squarely rejected this argument. It held:

> The deletion of [the "substantially all" provision] does not affect the holder's *legal rights* to receive payments from plaintiff or the guarantors or to institute suit to enforce those payment obligations . . . . [T]he fact that the deletion of [this section] might make it more difficult for holders to receive payment directly from plaintiff does not mean that the deletion without unanimous consent violates TIA § 316(b) . . . .

Id. at *22-23.

The same is true here. Even if, as Plaintiffs allege, the August transaction deprived Noteholders of "critical credit support" and other protections (MC Compl. ¶ 61), the Complaints do not and cannot allege that Plaintiffs' legal rights to receive payment when due have been impaired. Thus, Section 316(b) does not apply.

Nor does that transaction impair Noteholders' rights to sue for payment on or after the payment date. As the court stated in *McMahan & Co.* v. *Wherehouse Entertainment*, 859 F. Supp. 743, 748 (S.D.N.Y. 1994), *aff'd in relevant part*, 65 F.3d 1044 (2d Cir. 1995):

> Section 316(b) pertains to events of payment default where a company has failed to pay out on an indenture security after its maturity date or after an explicit date on which it has come due— . . . when the right to payment becomes absolute and unconditional. . . . Plaintiffs do not seek to enforce payment on the Debentures on or after this date; therefore, § 316(b) is not applicable to the instant situation.

See also Brady v. *UBS Fin. Servs., Inc.* 538 F.3d 1319, 1325 (10th Cir. 2008) ("316(b) provides an unqualified, individual right to bring suit for the payment of principal and interest *after the due dates for those payments*" (emphasis added)).[2]

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[2] Plaintiffs asserted in their pre-motion letter that their speculative "impairment" theory states a claim under *Federated Strategic Income Fund* v. *Mechala Group Jam. Ltd.*, No. 99 Civ. 10515, 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999) and *Continental Cas. Co.* v. *New York Mortg. Agency*, No. 94 Civ. 8408 (KMW), 1998 U.S. Dist. LEXIS 12784 (S.D.N.Y. Aug. 5, 1998). But *Federated*—a case that no other court in this District has adopted in the fifteen years since it was decided—is neither persuasive nor controlling here. At most, *Federated* held in the context of a preliminary injunction motion that "a proposed amendment that impairs or affects, by its effect and not necessarily by its terms . . . *could in certain circumstances* constitute a violation" of Section 316(b). *Id.* at *10 (emphasis added). After acknowledging that there is no "caselaw that has addressed this precise issue," the Court found an impairment where the record had established that once the proposed amendments became effective, the issuer would voluntarily divest itself of nearly all of its assets and the planned reorganization, which depended on the passage of the amendments, would proceed. *Id.* at *9-10. But that extraordinary circumstance is not the situation here. And, as explained above, nearly all other courts have interpreted Section 316(b) in accordance with its plain terms—that there can be no impairment of payment until there is an actual default. (*See supra* at 14-15.) *Continental* does not change that analysis. As a recent New York decision

For these reasons, the Complaints fail to state a claim under TIA Section 316(b).

C. The State-Law Claims Should be Dismissed for Lack of Subject Matter Jurisdiction

Because Plaintiffs' TIA claims fail as a matter of law, the Court should decline to exercise supplemental jurisdiction over their remaining state-law claims. *In re Merrill Lynch Ltd. P'ships Litig*., 154 F.3d 56, 61 (2d Cir. 1998) ("[W]hen the federal claims are dismissed the state claims should be dismissed as well.") (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)); *Esposito* v. *New York*, No. 07 Civ. 11612 (SAS), 2012 WL 5499882, at *3 n.19 (S.D.N.Y. Nov. 13, 2012) (Scheindlin, J.) ("When a plaintiff has not alleged diversity jurisdiction and her federal claims fail as a matter of law, courts generally decline to exercise supplemental jurisdiction over remaining state law claims."); *Shetiwy* v. *Midland Credit Mgmt*., 980 F. Supp. 2d 461, 476 (S.D.N.Y. 2013) (Scheindlin, J.) ("Because I have dismissed all of plaintiffs' claims under federal law, I decline to exercise supplemental jurisdiction over plaintiffs' state law claims.").

II.

PLAINTIFFS' STATE-LAW CLAIMS ARE BARRED BY THE INDENTURES' NO-ACTION CLAUSES

No-action clauses are "bargained-for contractual provisions" that are routinely included in indentures to bar individual holders of notes and other debt instruments from bringing suit with respect to the indentures unless certain conditions are satisfied. *Feldbaum* v. *McCrory Corp.*, Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, at *5 (Del. Ch. June 1, 1992)

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explained, *Continental* "did not explain the basis for its interpretation" and the court's reading was "unpersuasive." *Emmet & Co., Inc.* v. *Catholic Health East*, 951 N.Y.S.2d 846, 851 (N.Y. Sup. Ct. 2012), *aff'd*, 114 A.D.3d 605 (N.Y. App. Div. 1st Dep't 2014). In accordance with the weight of other, well-reasoned decisions, *Emmet* reaffirmed that the right to bring suit "on or after" the "due date" of principal or interest payments was expressly limited to "suits for past due, accrued interest." *Id.* at 850-51.

(applying New York law); *SC Note Acquisitions, LLC* v. *Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 531 (E.D.N.Y. 2013). Their "primary purpose" is to "protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors." *SC Note*, 934 F. Supp. 2d at 531. They also "protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest." *Id.* (quotation omitted); *see also* American Bar Foundation, 1971 Commentaries on Model Indenture Provisions § 5.7 (attached as Hurwitz Decl. Ex. A) ("The major purpose of [no-action clauses] 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, [a significant percent] of the debentureholders would be willing to join in sponsoring it."); *Ellington Credit Fund, Ltd.* v. *Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 184 (S.D.N.Y. 2011) (no-action clauses are intended to bar "a small group of certificateholders" from imposing expense of litigation on other certificateholders who do not view litigation as in their "collective economic interest"); *RBC Capital Markets, LLC* v. *Educ. Loan Trust IV*, No. 6297-CS, 2011 WL 6152282, at *5 (Del. Ch. Dec. 6, 2011) (under New York law, the "essential purpose" of no-action clauses is "to strike the right balance between enabling the effective enforcement of noteholder rights and the avoidance of capital-taxing suits that do not have the support of most noteholders").

Accordingly, courts applying New York law "routinely enforce" no-action clauses to bar claims where, as here, the plaintiff noteholders have failed to comply with the requirements set forth in the clauses. *SC Note*, 934 F. Supp. 2d at 531 (collecting cases); *see also RJ Capital, S.A.* v. *Lexington Capital Funding III Ltd.*, No. 10 Civ. 25, 2011 WL 3251554, at *6 (S.D.N.Y. July

28, 2011) ("It is well established that 'no action' clauses bar claims by individual bondholders who fail to comply with the conditions precedent recited therein."); *Feldbaum*, 1992 WL 119095 at *7 ("[C]ourts systematically conclude that, in consenting to no-action clauses by purchasing bonds, plaintiffs waive their rights to bring claims that are common to all bondholders . . . unless they first comply with the procedures set forth in the clause."). That is because, "according to the courts of this state, a party cannot sue to assert its rights under an indenture while ignoring the indenture's restrictions on its ability to sue." *Emmet & Co., Inc.* v. *Catholic Health East*, 951 N.Y.S.2d 846, 850 (N.Y. Sup. Ct. 2012). *aff'd*, 114 A.D.3d 605 (N.Y. App. Div. 1st Dep't 2014).

All of Plaintiffs' state-law claims fall squarely within the Indentures' no-action clauses, which broadly encompass "*any proceeding*, judicial or otherwise, *with respect to this Indenture . . . or for any other remedy hereunder*." (Ex. E § 507 (emphasis added); *see also* Ex. D § 6.7.) As the New York Court of Appeals recently explained, such clauses bar any "indenture-based contract claims" and claims "arising from the indentures" if the noteholder has failed to comply with the requisite procedures. *Quadrant Structured Prods. Co., Ltd.* v. *Vertin*, 23 N.Y.3d 549, 564-69 (N.Y. 2014) (considering a no-action clause which similarly applied to actions "upon or under or with respect to" an indenture "or for any remedy [there]under").

Plaintiffs' claims for breach of contract are explicitly premised on Defendants' alleged breaches of the Indentures, and are therefore within the scope of the no-action clauses. Plaintiffs' claims for declaratory judgment similarly are "indenture-based," because Plaintiffs expressly seek "a declaration of [their] rights under the . . . Indentures" and the supplemental indentures and their claims rest on alleged breaches of the Indentures. (MC Compl. ¶¶ 82, 92-94; Danner Compl. ¶ 58.) *See House of Eur. Funding I, Ltd.* v. *Wells Fargo Bank, N.A.*, No. 13 Civ. 519, 2014 U.S. Dist. LEXIS 49894 (S.D.N.Y. Mar. 31, 2014) (dismissing declaratory judgment claim

based on substantially similar no-action provision). Finally, Plaintiffs' claim for breach of the duty of good faith and fair dealing, which rests on an alleged breach of an implied covenant of the Indentures, is necessarily "indenture-based." *See Feldbaum*, 1992 WL 119095 at *6 (holding under New York law that claims "predicated upon breaches of implied obligations of fair dealing" are subject to no-action clauses).

Thus, the no-action clauses in the Indentures apply to Plaintiffs' state-law claims, and Plaintiffs do not and cannot allege that they (much less holders of 25% of each series) made a demand on the trustee or satisfied any of the clauses' other conditions for bringing suit. Accordingly, the no-action clauses bar their claims.

Nor can Plaintiffs rely on the Indentures' exception to the no-action clause giving Noteholders "the right . . . to receive payment of the principal of and interest . . . on the Notes *on the Stated Maturity* . . . and to institute suit for the enforcement of any such payment . . . ." (Ex. D § 6.8; Ex. E § 508.) For the same reasons that apply to the TIA Section 316(b) claim (*supra* at 13-15), this narrow exception applies only to suits by Noteholders *after* a payment default, which has not occurred here. *See Cruden* v. *Bank of New York*, 957 F.2d 961 (2d Cir. 1992) (holding that a similar indenture provision confers a narrow "right to institute suit *after* nonpayment of principal or interest" (emphasis added)); *Emmet & Co., Inc.*, 951 N.Y.S.2d at 857-58 (bondholder's right to bring suit "on or after [the] due date" of payments was expressly limited to "suits for past due, accrued interest"; "allowing lawsuits for unaccrued payment obligations would essentially allow all claims relating to the value of the bond, and would let the payment exception swallow the no-action clauses"), *aff'd*, 114 A.D.3d 605 (N.Y. App. Div. 1st Dep't 2014); *McMahan & Co.*, 859 F. Supp. at 748 ("The No Action Clause is not made inapplicable to [plaintiffs' claims asserted prior to a default] by means of [TIA] § 316(b).").

For the foregoing reasons, the no-action clauses bar Plaintiffs' state-law claims.

III.

PLAINTIFFS FAIL TO STATE CLAIMS FOR BREACH OF CONTRACT AS A MATTER OF LAW

To state a claim for breach of contract under New York law, a plaintiff must allege (i) an agreement, (ii) plaintiff's adequate performance, (iii) defendant's breach, (iv) damages, and (v) causation. *See Eternity Global Master Fund Ltd.* v. *Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004). The Complaints fail to plead a breach of the Indentures and damages.

A. The Complaints Do Not Allege a Breach of the Indentures

1. Defendants Were Not Required to Seek Plaintiffs' Consent to the Agreement and Amendments (MeehanCombs Count Four; Danner Count Three)

Plaintiffs allege that Defendants breached § 508 of the 2016 Indenture and § 6.8 of the 2017 Indenture by impairing their right to payment of principal and interest and to file suit for nonpayment without their consent. Plaintiffs further allege that the Participating Noteholders should be deemed "Affiliates" of CEOC, and thus that their consent was improperly considered in determining that the supplemental indentures had achieved the required majority approval. (*See* MC Compl. ¶¶ 109-14; Danner Compl. ¶ 74.) As discussed above, however, there can be no breach here because Plaintiffs have received all payments under the Notes when due, and their legal right to payment has not been impaired. (*See supra* at 13-15.)

Likewise, for reasons also discussed above with respect to MeehanCombs' claim under Section 316(a) of the TIA (*supra* at 11-13), the Complaints do not allege any facts showing that the Participating Noteholders were CEOC's or CEC's Affiliates—*i.e.,* that they were "controlled by or under direct or indirect common control" with CEOC or CEC. (Ex. D § 1.1; Ex. E § 101.) The Indentures define "control" to mean "the possession, directly or indirectly, of the power to

direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities or by agreement or otherwise." (*Id.*) Plaintiffs do not plead any facts showing that CEOC or CEC controlled in any way the "management or policies" of any of the Participating Noteholders.

2. Defendants Did Not Violate the Redemption Process Because They Did Not Redeem the Notes (MeehanCombs Count Five; Danner Count Four)

Plaintiffs allege that Defendants breached Article IX of the 2016 Indenture and Article III of the 2017 Indenture when they purchased the Participating Noteholders' Notes because the transaction constituted a redemption or "constructive redemption," which is required to be performed pursuant to a "fair and appropriate" process. These claims also fail, as they rest on the false premise that a privately negotiated purchase transaction is a redemption.

Redemption is understood "[i]n ordinary corporate parlance" to refer "to a corporation's contractual right to *compel* holders of a certain class of securities . . . to return or exchange them for cash or property . . . ." *Heine* v. *The Signal Cos*., No. 74 Civ. 3036, 1977 U.S. Dist. LEXIS 17071, at *37-38 (S.D.N.Y. Mar. 4, 1977) (emphasis added). Here, by contrast, the Complaints make clear that the challenged transaction involved a voluntary, arm's-length agreement by the Participating Noteholders to convey some of their Notes. That voluntary exchange is not a compelled "redemption."

Indeed, the Indentures expressly contemplate that Defendants may engage in open market transactions pursuant to which they purchase and later cancel certain of the Notes. Drawing directly from the Model Indentures, the Indentures authorize Defendants "at any time [to] deliver to the Trustee for cancellation any Securities previously authenticated and delivered hereunder which [Defendants] may have *acquired in any manner whatsoever*." (Ex. E § 309 (emphasis added); Ex. D § 2.11 ("The Company at any time may deliver Notes to the Trustee for

cancellation."); *see* Commentaries § 3-9.) The Commentaries explain that this language "[t]ypically" includes notes "*acquired by purchase on the market* that the Company desires to render no longer outstanding" and contrasts such transactions to situations where notes are "surrendered for payment, conversion, or redemption." Commentaries § 3-9 (emphasis added).

Because the transaction involved a negotiated, consensual transaction for certain Notes and does not constitute a redemption, Plaintiffs cannot state any breach of the redemption process provisions. *See Heine*, 1977 U.S. Dist. LEXIS 17071, at *37-38 (rejecting stockholders' claim that issuer had "redeemed" shares by purchasing them from certain other holders as "substantially without merit"); *see also Concord Real Estate CDO 2006-1* v. *Bank of Am. N.A.*, 996 A.2d 324, 334-36 (Del. Ch. 2010) (under New York law, holding that payment for outstanding notes to willing sellers is not a redemption).

3. The Indentures Expressly Provide for the Release of CEC's Guarantee (MeehanCombs Count Six)

MeehanCombs alleges that Defendants breached Article XV of the 2016 Indentures and Article XII of the 2017 Indentures when they released CEC's guarantee of the Notes because "[t]here are no provisions in the Guarantees that provide for the release of the Guarantees pursuant to consent of a limited number of holders." (MC Compl. ¶ 126.) But the express terms of the Indentures flatly contradict this assertion. As discussed above, the Indentures unambiguously permit Defendants to amend the Indentures "with the written consent of the Holders of at least a majority in principal amount of the outstanding Notes affected by such supplemental indenture . . . ." (Ex. D § 9.2; Ex. E § 902.) And, as noted, the CEC guarantee provision is not among the terms of the Indentures specifically carved out of that broad amendment authority.

4. Defendants Did Not Give Improper Preferential Treatment to Any Noteholders (MeehanCombs Count Seven)

MeehanCombs' final breach of contract claim alleges that Defendants gave improper preferential treatment to the "Favored Noteholders" in exchange for their consent to the Amendments. (MC Compl. ¶¶ 134-35.) MeehanCombs cites § 507 of the 2016 Indenture and § 6.7 of the 2017 Indenture, but those provisions only apply to actions taken by holders of Notes in that capacity; here, by contrast, the challenged actions were taken by Defendants in their capacities as the issuer and its corporate parent. And in any event, nothing in the plain terms of the Indentures prohibits alleged "preferential treatment" of noteholders by the issuer.[3] MeehanCombs' effort to frame the alleged "preferential treatment" as a breach of contract is without merit.

B. Plaintiffs Do Not and Cannot Plead Any Non-Speculative Damages

Failure to plead damages is fatal to a breach of contract claim. *LNC Invs., Inc.* v. *First Fid. Bank, N.A. N.J.*, 173 F.3d 454, 465 (2d Cir. 1999). Under New York law, boilerplate allegations of damages are inadequate, and the pleadings must set forth facts showing the damages upon which the action is based. *Petitt* v. *Celebrity Cruises, Inc.*, 153 F. Supp. 2d 240, 263-64 (S.D.N.Y. 2001) (citing cases); *Gordon* v. *Dino De Laurentiis Corp.*, 529 N.Y.S.2d 777, 779 (N.Y. App. Div. 1st Dep't 1988). Here, Plaintiffs' only effort to plead damages is the conclusory allegation that that they have "suffered substantial actual and prospective damages" (MC Compl. ¶¶ 116, 122, 129, 137) or "suffered damages" (Danner Compl. ¶¶ 76, 83). This is

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[3] By contrast, indentures governing other outstanding CEOC notes explicitly provide that the issuer and its affiliates cannot "pay or cause to be paid any consideration . . . to any holder for or as an inducement to any consent, waiver or amendment of any [terms or provisions of the indenture or notes] unless such consideration is offered to be paid to all holders that so consent." Feb. 1, 2008 Indenture (10.75% Senior Notes due 2016, 10.75% / 11.5% Senior

insufficient. *See Cruden*, 957 F.2d at 968-69 (plaintiff debenture holders could not have sued before a default because "[d]amages could not have been ascertained" before a default occurred); *see also Bank Midwest, N.A.* v. *Hypo Real Estate Capital Corp.*, No. 10 Civ. 232, 2010 WL 4449366, at *3 (S.D.N.Y. Oct. 13, 2010) (because "any potential loss based on increased risk is contingent on future events that may not occur," "[a]bsent a default, [the lender]'s claim for damages based on the subordination of its security interest is an "undefined future harm [that] is too speculative to constitute a compensable injury" (citation omitted)); *Hahn Automotive Warehouse*, *Inc.* v. *American Zurich Ins. Co.*, 18 N.Y.3d 765, 770 (N.Y. 2012) ("A consistent line of Appellate Division precedent holds that where the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the [party making the claim] possesses a legal right to demand payment.").

IV.

PLAINTIFFS' CLAIMS FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING FAIL AS A MATTER OF LAW

Finally, Plaintiffs' claims for breach of the duty of good faith and fair dealing should be dismissed because such a claim is "not proper when a written agreement governs the subject matter of the claim." *RJ Capital*, 2011 WL 3251554 at *13 (citations omitted). For the same reason, "a court cannot imply a covenant inconsistent with terms expressly set forth in the contract." *Hartford Fire Ins. Co.* v. *Federated Dept. Stores, Inc.*, 723 F. Supp. 976, 991 (S.D.N.Y. 1989). New York courts routinely reject attempts to rewrite or interpret an agreement, particularly one "between two sophisticated commercial parties represented by counsel," to include a new term or implied obligation that the parties did not include. *D & L Holdings, LLC* v.

Toggle Notes due 2018) (filed as Ex. 10.1 to CEC Form 10-K (Feb. 4, 2008), *available at* https://www.sec.gov/Archives/edgar/data/858339/000119312508019185/dex101.htm.

RCG Goldman Co., LLC, 287 A.D.2d 65, 73 (N.Y. App. Div. 1st Dep't 2001). Plaintiffs thus cannot recast their non-viable contract claims by asking the Court to imply a covenant inconsistent with the terms of the Indentures. *See Nat'l Union Fire Ins. Co.* v. *Xerox Corp.,* 25 A.D.3d 309, 310 (N.Y. App. Div. 1st Dep't 2006) (affirming dismissal of claim for breach of duty of good faith and fair dealing because it was "merely a substitute for plaintiff's nonviable contract claims"); *Triton Partners LLC* v. *Prudential Sec. Inc.,* 301 A.D.2d 411, 411 (N.Y. App. Div. 1st Dep't 2003) (same). The Indentures are detailed, carefully drafted contracts, and Plaintiffs should be bound to their express terms.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaints with prejudice.

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Respectfully submitted,

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