**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

**MEMORANDUM OF LAW**
**IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

Plaintiff BOKF, NA ("BOKF")[1] in the first above-captioned action (the "*BOKF* Action"), and plaintiff UMB Bank, N.A. ("UMB,"[2] and together with BOKF, the "Trustees") in the second above-captioned action (the "*UMB* Action," and together with the *BOKF* Action, the "Actions") respectfully submit this Memorandum of Law in support of their joint Fed. R. Civ. P. Rule 56 Motion for Partial Summary Judgment under Count II of BOKF's Complaint and Count I of UMB's Complaint (the "Motion"). More specifically, the Trustees seek summary judgment declaring that the Stock Transfers, as that term is defined below, have not resulted in the termination or release of CEC's guarantee (the "Parent Guarantee" or "Guarantee") of the Notes (defined in note 2 below) under the express terms of the indentures governing the Notes (the "Indentures").

## PRELIMINARY STATEMENT

The Motion presents a straightforward issue of contractual interpretation – whether "and" as used to delineate subsections 12.02(c)(i), (ii), and (iii) of the Indentures means "and"; if it does, then CEC cannot rely on those subparts as a basis for the alleged automatic termination of the Parent Guarantee unless all three subparts are satisfied.

The language of Section 12.02(c) is unambiguous and susceptible of only one reasonable reading: "and" means "and" as a matter of law, such that all three conditions listed in the romanette subparts of that Section must occur in order to for the Parent Guarantee to be

[1] BOKF appears solely in its capacity as successor Indenture Trustee for the 12.75% Second-Priority Senior Secured Notes due 2018 (the "Second Lien Notes").

[2] UMB appears solely in its capacity as Indenture Trustee under those certain indentures as amended and supplemented, dated as of June 10, 2009, governing Caesars Entertainment Operating Company, Inc.'s ("CEOC's") 11.25% Senior Secured Notes due 2017; dated as of February 14, 2012, governing CEOC's 8.5% Senior Secured Notes due 2020; dated August 22, 2012, governing CEOC's 9% Senior Secured Notes due 2020; and dated February 15, 2013, governing CEOC's 9% Senior Secured Notes due 2020 (the "First Lien Notes," and together with the Second Lien Notes, the "Notes").

automatically terminated or released. This unambiguous language cannot be contradicted or "explained" by reference to extrinsic evidence of any sort, including evidence of custom and usage.

CEC contends that the Stock Transfers triggered the termination of the Parent Guarantee under subpart 12.02(c)(i), but admits that the two other enumerated subparts have not been satisfied. Accordingly, and for the reasons set forth in greater detail below, the Trustees are entitled to partial summary judgment and a declaration that the Parent Guarantee has not been terminated pursuant to the Stock Transfers. In combination with summary judgment motions currently being briefed in two related actions, this Motion has the potential to dispose of the Actions.

## STATEMENT OF FACTS[3]

The Actions seek to enforce CEC's obligations under the Parent Guarantee of the Notes issued by its subsidiary, CEOC. Pursuant to identical language included in each of the Indentures, CEC "*irrevocably and unconditionally* guarantees . . . the full and punctual payment when due . . . . under this Indenture (including obligations to the Trustee) and the Notes." SMF ¶ 4.[4] Under the terms of the Indentures, CEC's Guarantee "*shall remain in full force and effect until payment in full* of all Guaranteed Obligations." SMF ¶ 5.

Each of the Indentures also contains an identical Section 12.02(c) that provides for the automatic termination of CEC's obligation under its Parent Guarantee in certain circumstances:

[3] These facts are undisputed. The accompanying Statement of Material Facts contains a more complete statement of all undisputed facts material to this motion for summary judgment. Further factual background is set forth in the BOKF and UMB Memoranda of Law in Support of their respective Motions for Partial Summary Judgment under the Trust Indenture Act, *BOKF* ECF No. 31 and *UMB* ECF No. 30.

[4] Unless otherwise stated, all citations to "SMF" in this Memorandum are to the Trustees' Statement Of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 that accompanies this Motion.

> (c) The Parent Guarantee shall terminate and be of no further force or effect and [CEC] 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] obligations under this Indenture are discharged in accordance with the terms of this Indenture.

SMF ¶ 6 (emphasis added).

Until 2014, CEC owned 100% of CEOC equity. SMF ¶ 10. However, in late Spring 2014, CEC and CEOC engaged in two transactions as a result of which parties other than CEC received CEOC stock, such that CEC no longer owned 100% of CEOC equity. SMF ¶¶ 11, 12. First, on May 6, 2014, CEC announced that it had transferred 5% of CEOC common stock to certain institutional investors (the "5% Stock Sale"). SMF ¶ 11. Second, on June 27, 2014, CEC announced that it had granted approximately 6% of its common stock to certain individuals, including directors and officers of CEOC, as part of a performance incentive plan (the "6% Stock Transfer," and together with the 5% Stock Transfer, the "Stock Transfers"). SMF ¶ 12.

CEC contends that the Parent Guarantee was terminated pursuant to the terms of Section 12.02(c)(i) of the Indentures as a result of either of the Stock Transfers and CEC no longer holding 100% of CEOC's stock. SMF ¶ 13; CEC maintains that the Parent Guarantee has been released under Section 12.02(c)(i) even though it admits that the requirements of 12.02(c)(ii) and 12.02(c)(iii) have not been met. SMF ¶ 14.

In January 2015, CEOC and 172 of its subsidiaries filed voluntary petitions under chapter 11 of Bankruptcy Code. SMF ¶ 15. The filing of CEOC's bankruptcy case was an immediate Event of Default under the Indentures and as a result, CEC and CEOC's obligations under the

Notes became due and owing. SMF ¶ 16. Despite demands for payment under the Parent Guarantee, CEC has refused and maintains that it is not subject to the Guarantee. SMF ¶ 17.

**PROCEDURAL HISTORY AND RELATED CASES**

BOKF and UMB filed motions for partial summary judgment on June 25 and June 26, 2015, respectively. *See BOKF* ECF Nos. 30-33; *UMB* ECF Nos. 27-30.[5] Those motions sought a declaration that CEC's purported termination of the Parent Guarantee violates Section 316(b) of the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa to 77bbb. *See BOKF* ECF No. 31 at 1; *UMB* ECF No. 30 at 2. Among other assertions, CEC contended in opposition that the Parent Guarantee was terminated as a result of any one of the Stock Transfers or as a result of an additional transaction CEC and CEOC undertook in August 2014 (the "August Transaction"). *See BOKF* ECF No. 44 at 11; *UMB* ECF No. 46 at 4. As part of the August Transaction, the Indentures governing certain notes issued by CEOC and guaranteed by CEC (the "Amended Notes") were amended with the consent of the majority of their holders to remove CEC's guarantee of those Amended Notes. BOKF TIA SMF ¶¶ 62-63; UMB TIA SMF ¶¶ 61-62. As relevant to the Actions, CEC took the position that its Parent Guarantee of the Notes was terminated under a separate provision of Section 12.02 of the Indentures, which provides that CEOC can elect, but is not required, to release the Parent Guarantee once CEC's guarantee of the Existing Notes (which includes the Amended Notes) has been released or discharged. *BOKF* ECF No. 33 ¶ 15, 64-65; *UMB* ECF No. 29 ¶ 63.

In the Fall of 2014, the dissenting holders of the Amended Notes commenced separate suits against CEC challenging the purported termination of CEC's guarantee of those securities under the August Transaction. *See Danner v. Caesars Entertainment Corporation et al.*, Case

[5] All citations to "*BOKF* ECF No." and "*UMB* ECF No." are to the filings in the *BOKF* Action and the *UMB* Action, respectively.

No. 14-cv-07973 (the "*Danner* Action"); *Meehancombs Global Credit Opportunities Master Fund, L.P. et al. v. Caesars Entertainment Corporation et al.*, Case No. 14-cv-07091 (the "*MeehanCombs* Action"). In October 2015, the plaintiffs in both suits moved for summary judgment on the issue of whether the removal of CEC's guarantee of the Amended Notes through their express modification violated the TIA. *See Danner* Action, ECF Nos. 60-64; *Meehancombs* Action, ECF Nos. 67-70 (the "August Motions"). The August Motions and this Motion are being briefed on very similar schedules. *See* Hr'g tr. 32-33, Oct. 7, 2015 (briefing in the August Motions to be completed December 2, 2015); Hr'g tr. 15-16, Nov. 10, 2015 (briefing in the instant motion to completed December 11, 2015).

Together, the grant of the August Motions and a grant of this Motion would be case-dispositive for the Trustees.[6] If the Court determines on this Motion that Section 12.02(c)(i), (ii), and (iii) must be read in the conjunctive, then CEC cannot rely on these romanette numbered provisions to effectuate the termination of its Parent Guarantee because it is undisputed that the requirements of 12.02(c)(ii) and 12.02(c)(iii) have not been met. As a result, CEC's only basis for releasing its Parent Guarantee of the Notes would be the alleged release of CEC's guarantee of all of the Existing Notes under the last paragraph of 12.02. However, a grant of the August Motions would mean that CEC did not effectively release its guarantee of at least two of the Existing Notes (the Amended Notes) and that the conditions of the last paragraph of Section 12.02 were not satisfied, leaving CEC with no remaining bases to avoid its continuing obligations pursuant to the Parent Guarantee.

[6] Indeed, in the August 27, 2015 Opinion and Order, this Court observed that "[i]t may be that the contract interpretation issue related to the release provision [*i.e.* Section 12.02(c)] will be dispositive." *BOKF, N.A. v. Caesars Entm't Corp.*, No. 15-CV-1561 SAS, 2015 WL 5076785, at *13 (S.D.N.Y. Aug. 27, 2015). Even if not dispositive, the partial summary judgment sought herein would streamline the issues for trial.

## ARGUMENT

### I. THE STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is appropriate 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." *BOKF, N.A.*, 2015 WL 5076785, at *3. "The proper interpretation of an unambiguous contract is a question of law for the court, and a dispute on such an issue may properly be resolved by summary judgment." *Omni Quartz, Ltd. v. CVS Corp.*, 287 F.3d 61, 64 (2d Cir. 2002). This is because where the contract is unambiguous, the "question of [the parties'] intention is . . . appropriately decided . . . on a motion for summary judgment.'" *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989) (collecting cases); *Hanson v. McCaw Cellular Commc'ns, Inc.*, 77 F.3d 663, 667 (2d Cir. 1996) ("[S]ummary judgment is proper where the language of the contract is unambiguous, lending itself to only one reasonable interpretation.").

### II. SUMMARY JUDGMENT IS WARRANTED BECAUSE THE INDENTURES UNAMBIGUOUSLY REQUIRE THREE CONDITIONS TO OCCUR BEFORE THE GUARANTEE IS TERMINATED, AND TWO OF THE CONDITIONS HAVE NOT OCCURRED AS A MATTER OF UNDISPUTED FACT

Section 12.02(c) unambiguously requires the occurrence of three separate conditions enumerated in subsections 12.02(c)(i), (ii), and (iii) before the Parent Guarantee can be automatically terminated or released. The plain language of the Indentures and direct precedent both mandate this conclusion because the three conditions are joined with the conjunctive "and." Because CEC admits – as it must – that two of these three required conditions have not occurred, summary judgment for the Trustees is warranted.

### A. The Plain and Unambiguous Language of Indenture Section 12.02(c)(i), (ii), and (iii) Compels a Finding as a Matter of Law that "And" Used Therein Means "And"

"A trust indenture is a contract, and under New York law '[i]nterpretation of indenture provisions is a matter of basic contract law.'" *Quadrant Structured Prods. Co., v Vertin*, 23 N.Y.3d 549, 559, 16 N.E.3d 1165 (2014). As this Court observed:

> The court's function in interpreting a contract is to apply the meaning intended by the parties, as derived from the language of the contract in question. [T]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

*BOKF, N.A.*, 2015 WL 5076785, at *4; *see also Maxwell v. State Farm Mut. Auto. Ins. Co.*, 92 A.D.2d 1049, 1050, 461 N.Y.S.2d 541 (3d Dept. 1983) ("Written instruments are to be construed by the courts," and the courts "must determine 'what is the intention of the parties as derived from the language employed'") (*citing* 4 Williston, Contracts [3d ed.], § 600, p. 280)).

"The question of whether a written contract is ambiguous is a question of law for the court." *BOKF, N.A.*, 2015 WL 5076785, at *4. "Contract language is unambiguous when it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.* (*citing Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000)); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989).

"If the terms of a contract are unambiguous, the obligations it imposes are to be determined without reference to extrinsic evidence." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d at 1277; *BOKF, N.A.*, 2015 WL 5076785, at *4 ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."). Similarly, "[a] court may only consider evidence of custom and usage where 'parties have used contract terms which are in common use in a business or art and

have a definite meaning understood by those who use them, but which convey no meaning to those who are not initiated into the mysteries of the craft.'" *BOKF, N.A.*, 2015 WL 5076785, at *8 (*citing Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010)). Moreover, even if admissible, evidence of custom and usage may not be used to add to or vary the writing. *Id.*; *Hunt Ltd.*, 889 F.2d at 1277-78 ("[T]rade custom and usage is not admissible to contradict or qualify" provisions of an unambiguous contract.).

In the absence of ambiguity, "a long and well-established rule of construction provides that words are to be given their ordinary meaning." *Maxwell*, 92 A.D.2d at 1050. The ordinary meaning of "and" is conjunctive. *Id.*; *Coan v. State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 81, 85 (E.D.N.Y. 1996); *Sasson v. TLG Acquisition LLC*, 127 A.D.3d 480, 481, 9 N.Y.S.3d 2 (1st Dept. 2015).

Thus, as a matter of law, the plain and unambiguous meaning of a provision that joins a number of conditions with the word "and" is that the provision is not triggered unless *all* conditions are satisfied.[7] *Maxwell*, 92 A.D.2d at 1050 (finding defendant's contention that only one of three conditions delimited by an "and" must be satisfied to be "totally devoid of merit."). *See also Coan*, 911 F. Supp. at 85 (provisions "broken down into three subdivisions and stated in the conjunctive, as demonstrated by use of the word 'and' connecting the second and third subdivisions" must all be met); *Sasson*, 127 A.D.3d at 481 (definition of "Permitted Investors" was "in the conjunctive, unambiguous, and not subject to any rule of construction in the relevant documents or to any special commercially reasonable interpretation. It plainly required all three of those investors to take over the entity's board for there to be no 'Change of Control.'").

[7] The conjunctive "and" must be given its plain meaning even if the drafters "intended something different" but used the conjunctive "[f]or some inexplicable reason." *Maxwell*, 92 A.D.2d at 1050.

These well-settled rules of contract interpretation inescapably establish that "and," as used at the end of Section 12.02(c)(ii) of the Indentures, means the conjunctive "and," and that all three conditions listed in that section must be satisfied in order to terminate or release the Parent Guarantee. Like the conditions separated by "and" in *Maxwell*, *Coan*, and *Sasson*, the use of the conjunctive to delineate the conditions in Section 12.02(c)(i), (ii), and (iii) is only susceptible of one reasonable interpretation and is, therefore, unambiguous. The word "and" chosen by the drafters of the Indentures to state their intent should be given its plain and ordinary meaning. Extrinsic evidence cannot be used to vary this unambiguous meaning, regardless of what the drafters may have intended. Evidence of custom and usage is likewise inadmissible. On its face, Section 12.02(c) contains no terms of art or other specialized terms that would permit its introduction.

### B. Other Well Established Principles of Contract Interpretation Independently Mandate That the Court Give the Word "And" Its Plain Meaning

Two additional principles provide guidance for the Court. First, "[w]hen considering the meaning of a contract term in the larger context of an entire agreement, a court may presume that the same word used in different parts of a writing have the same meaning." *Eastman Kodak Co. v. Altek Corp.*, 936 F. Supp. 2d 342, 351 (S.D.N.Y. 2013), *reconsideration denied*, No. 12 CIV. 0246 DLC, 2013 WL 1759577 (S.D.N.Y. Apr. 24, 2013). Here, Section 1.04(c) of the Indentures, which defines "or" to mean either "or" or "and," independently confirms that the plain meaning of the word "and" governs Section 12.02(c). The drafters of the Indentures chose to supply a rule of construction for the word "or" and make clear that " 'or' is not exclusive," *i.e.* can also mean "and." SMF ¶ 9. However, any suggestion that "and" could mean "or" is conspicuously absent. The fact that the drafters knew how to – and did – define "or" to mean "and" but chose not to define "and" to include the disjunctive "or" independently weighs against

adopting CEC's interpretation. *See, e.g. U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty., N.Y.*, 712 F.3d 761, 770 (2d Cir. 2013) ("Elsewhere in the consent decree, the parties . . . clearly knew how to establish a temporal obligation if one was intended and to provide mechanisms for the County to apply for the extension of such deadlines, lending further support to interpreting the provisions that lack such deadlines as imposing continuing obligations upon the County.").

Second, CEC's proposed construction of Section 12.02(c) strains the grammatical structure of the entire provision. *Progressive NE Ins. Co. v. State Farm Ins. Companies*, 81 A.D.3d 1376, 1378, 916 N.Y.S.2d 454 (4th Dept. 2011) (declining to interpret "and" as "or" because "structure of the sentence does not support that interpretation."). Indeed, two of the three conditions separated by the word "and" themselves each include three separate clauses stated in the disjunctive. *See* Section 12.02(c)(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"); 12.02(c)(iii) ("[CEOC's] exercise of its legal defeasance option *or* covenant defeasance option . . . *or* if [CEOC's] obligations under this Indenture are discharged."). If the word "and" separating these conditions meant "or," then Section 12.02(c) would have simply listed seven separate conditions instead of grouping them into three arbitrary categories. The only reasonable interpretation that does not strain the grammar or structure is that all three conditions must be met, but two of the three conditions may each be met in three alternative ways.

Accordingly, the only proper interpretation of the Indentures is that, as a matter of law, each of the three conditions listed in Section 12.02(c)(i), (ii), and (iii) must be met in order for the Parent Guarantee to be terminated or released. Combined with CEC's formal admission that none of the conditions listed in Section 12.02(c)(ii) and (iii) have occurred, this interpretation

requires that the Trustees' Motion be granted.

## CONCLUSION

For the foregoing reasons, the Trustees respectfully request that the Court grant their Motion for Partial Summary Judgment, declare that neither of the Stock Transfers has resulted in the termination or release of the Parent Guarantee of the Notes under the express terms of the Indentures, and award such other and further relief as the Court deems proper. To the extent the Court also grants the August Motions, the result would be case dispositive and the Trustees, therefore, would further respectfully request that the Court declare the Parent Guarantee under the Indentures to be in full force and effect and that CEC has materially breached the Indentures as a matter of law.

Respectfully submitted,

Dated: New York, New York
November 20, 2015

*/s/ Andrew I. Silfen*

Andrew I. Silfen, Esq. (AS-1264)
Mark B. Joachim, Esq. (MJ-5324)
Michael S. Cryan, Esq. (MC-4887)
ARENT FOX LLP
1675 Broadway
New York, NY 10019-5820
Tel: (212) 484-3900
Fax: (212) 484-3990
Email: andrew.silfen@arentfox.com
mark.joachim@arentfox.com
michael.cryan@arentfox.com

-and-

Ralph A. Taylor, Jr., Esq. (*admitted pro hac vice*)
Jackson D. Toof, Esq. (*admitted pro hac vice*)
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 857-6000
Fax: (202) 857-6395

Email: ralph.taylor@arentfox.com
jackson.toof@arentfox.com

*Attorneys for BOKF, N.A., solely in its capacity as successor Indenture Trustee under the Indenture*

*/s/ David A. Crichlow*
David A. Crichlow
Craig A. Barbarosh
Karen B. Dine
Rebecca Kinburn

KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022-2585
Tel: (212) 940-8800
Fax: (212) 940-8776
Email: craig.barbarosh@kattenlaw.com
david.crichlow@kattenlaw.com
karen.dine@kattenlaw.com
rebecca.kinburn@kattenlaw.com

*Attorneys for Plaintiff UMB Bank, N.A. solely in its capacity as successor Indenture Trustee*