UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEEHANCOMBS GLOBAL CREDIT OPPORTUNITIES MASTER FUND, LP, RELATIVE VALUE-LONG/SHORT DEBT, A SERIES OF UNDERLYING FUNDS TRUST, and TRILOGY PORTFOLIO COMPANY, LLC, Plaintiffs, v. CAESARS ENTERTAINMENT CORPORATION and CAESARS ENTERTAINMENT OPERATING COMPANY, INC., Defendants.	:	Case No. 14-CV-07091(SAS)

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

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Plaintiffs MeehanCombs Global Credit Opportunities Master Fund, LP, Relative Value-Long/Short Debt, A Series Of Underlying Funds Trust, and Trilogy Portfolio Company, LLC (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 56, for partial summary judgment on Counts One, Three, Four, Six, and Nine of their Amended Complaint [ECF No. 31], against Defendant Caesars Entertainment Corporation ("CEC").

PRELIMINARY STATEMENT

Based on the undisputed facts of this case, CEC has, as a matter of law, "impaired" Plaintiffs' recovery rights under both the Trust Indenture Act, 15 U.S.C. §§ 77aaa-77bbbb (the "TIA" or the "Act"), and the indenture governing Plaintiffs' bonds[1] (the "Indenture").

CEC admits that, in August 2014, it amended the Indenture to remove its guarantee obligation for Plaintiffs' Notes (the "Guarantee"). CEC further admits that it removed the Guarantee without the consent of Plaintiffs, and that the majority holders who consented to the removal of the Guarantee did so only after CEC agreed to repurchase certain of their Notes for one hundred cents on the dollar, plus interest and transaction fees (the "August Transaction"). CEC also admits that it never sought consent from Plaintiffs for the removal of the Guarantee, and never offered them an opportunity to participate in the August Transaction.

Under Section 316(b) of the TIA, a noteholder's right to payment of principal and interest on an "indenture security" may not be "impaired or affected" without such holder's consent. Critical for the Court's analysis here, the Guarantee itself constitutes an "indenture security" for the purposes of Section 316(b).[2] For this reason, when CEC amended the Indenture to remove

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[1] Plaintiffs hold 6.50% senior unsecured notes due 2016 (the "Notes") issued by CEC's operating subsidiary, Caesars Entertainment Operating Company ("CEOC").

[2] *See infra* p. 9.

Plaintiffs' legal right to collect principal and interest from CEC pursuant to the Guarantee, it necessarily violated Section 316(b)'s core protection—*i.e.*, that a bondholder's right to payment under an "indenture security" may not be impaired without the holder's consent. This is the case even under the restrictive reading of the TIA urged by CEC (*i.e.*, that Section 316(b) protects only "legal rights," not a holder's "practical ability" to recover).

CEC also clearly violated its obligations under the Indenture, which states that Plaintiffs' right to recover on the Guarantee is "absolute and unconditional." Moreover, any argument by CEC that the Guarantee was released prior to the August Transaction pursuant to the Indenture's Guarantee release provisions is belied by the specific terms of the Indenture, and by CEC's prior representations to this Court and the Second Circuit that the Guarantee "had yet to be released" as of August 2014. For all of these reasons, Plaintiffs are entitled to summary judgment.

STATEMENT OF FACTS

A. Caesars

CEC, through its various subsidiaries, is one of the largest gaming companies in the world. Statement of Undisputed Facts ("SUMF"), ¶ 86. CEC's principal operating subsidiary is CEOC. *Id.*, ¶ 7. In 2008, CEC was acquired in a $30 billion leveraged buyout transaction (the "2008 LBO") sponsored by Apollo Global Management ("Apollo") and TPG Capital, LP ("TPG"). *Id.*, ¶¶ 6, 87-88. In connection with that transaction, CEOC issued approximately $24 billion dollars in debt, the proceeds from which were used by Apollo and TPG to acquire CEC's publicly traded shares. *Id.*, ¶ 88. As of December 31, 2014 (prior to the transactions at issue in this case), CEC owed a total of approximately $12.6 billion in bond debt, governed by at least eight separate indenture agreements. *Id.*, ¶ 120.

B. The 2016 Notes Indenture

Plaintiffs are holders of the Notes. *Id.*, ¶¶ 1-3. The Notes were sold pursuant to a registered public offering in 2006 (prior to the 2008 LBO) and are governed by the Indenture, which is qualified under the TIA. *Id.*, ¶¶ 8-9.

In Section 1501 of the Indenture, CEC agreed to guarantee the payment of all principal and interest due on the Notes, and that its guarantee obligations would be "unconditional, irrespective of . . . any waiver or consent by any Holder . . . ." *Id.*, ¶ 24. In Section 508 of the Indenture, CEC further agreed that, "[n]otwithstanding any other provision of th[e] Indenture," each holder's right "to receive payment of the principal of and any premium and . . . interest on" any "Security" is "absolute and unconditional" and "shall not be impaired without the consent of such Holder." *Id.*, ¶ 19. Like the TIA, the Indenture expressly includes CEC's Guarantee in its definition of "Securities." *Id.*, ¶ 13. Similarly, Section 902 of the Indenture states that while supplemental indentures may be entered into with the consent of a majority of holders, "no such supplemental indenture shall, without the consent of the Holder of each Outstanding Security affected thereby," alter the "principal" or "interest" on any "Security." *Id.*, ¶ 23.

Section 1503 of the Indenture states that the Guarantee may be released under certain limited circumstances, including if CEOC is no longer a "wholly owned subsidiary" of CEC as "defined in Rule 1-02(z) of the Regulation S-X promulgated by the SEC." *Id.*, ¶ 25.[3] Notably, CEOC's post-LBO indentures do not incorporate Regulation S-X's definition of wholly owned subsidiary into their guarantee release provisions. *Id.*, ¶ 27. Nor do CEOC's post-LBO indentures provide that each holder's right to recover under the parent guarantee is "absolute and unconditional." *Id.*, ¶ 28.

[3] The definition of "wholly owned subsidiary" is currently located at Rule 1-02(aa) of Regulation S-X. *See* 17 C.F.R. § 210.1-02(aa).

C. The May Transactions

In May 2014, facing a mountain of debt and continuing losses at CEOC, CEC sought to protect its equity holders (*i.e.*, Apollo and TPG) by unilaterally releasing CEC's guarantee of CEOC's bonds through the sale of 5% of CEOC's stock (the "5% Stock Sale"). *Id.*, ¶¶ 47, 49, 50, 116-17. [redacted] *Id.*, ¶¶ 54-60. CEC admits that it affirmatively solicited each of these stock purchasers. *Id.*, ¶ 52. Immediately after the 5% Stock Sale, CEC issued a press release stating that, because CEOC was no longer a "wholly owned subsidiary" of CEC, CEC's guarantee obligations had been terminated under CEOC's bond indentures. *Id.*, ¶ 77. Notably, the press release did not address Regulation S-X's definition of "wholly owned subsidiary," which appears only in CEOC's pre-LBO indentures. *Id.*

Approximately three weeks after the 5% Stock Sale, CEOC allocated for distribution another 6% of its shares to certain select employees as part of a hastily adopted "performance incentive plan" (the "PIP"). *Id.*, ¶¶ 69-71. [redacted] CEOC paid each of the recipients additional funds necessary to cover resulting tax liabilities. *Id.*, ¶¶ 74, 76. Following the PIP, CEC again publicly stated that its guarantee obligations for CEOC's bonds had been terminated. *Id.*, ¶ 72. Like the release following the 5% Stock Sale, this statement did not address the definition of "wholly owned subsidiary" in Regulation S-X. *Id.*, ¶¶ 72, 77.

D. The August Transaction

On May 15, 2014, CEC received a letter sent by Sullivan & Cromwell on behalf of funds that together held a majority of CEOC's 2016 and 2017 outstanding unsecured notes. *Id.*, ¶ 78. In the letter, Sullivan & Cromwell asserted that, contrary to CEC's press release, the guarantee for the 2016 and 2017 Notes remained in place notwithstanding the effect the 5% Stock Sale may have had on CEOC's other indentures. *Id.*, ¶ 79.

After receiving the letter, CEC and the majority holders negotiated the August Transaction, pursuant to which CEOC and CEC together agreed to pay Sullivan & Cromwell's clients approximately $155 million for certain of their 2016 and 2017 notes. *Id.*, ¶¶ 81, 31-32. This purchase price covered all principal and interest due on the repurchased notes [redacted] *Id.*, ¶¶ 32, 36-37. In exchange for CEC and CEOC agreeing to repurchase their notes, the majority holders consented to amendments that removed CEC's guarantee from those agreements. *Id.*, ¶¶ 31, 39, 45, 46.

The parties memorialized their deal in a Note Purchase and Support Agreement (the "NPSA") dated August 12, 2014, and the transaction closed on August 22, 2014. *Id.*, ¶¶ 29, 42-43. On the day the transaction closed, CEC, CEOC, and the indenture trustee executed supplemental indentures that (as contemplated by the NPSA) purported to remove from the indentures all provisions relating to the Guarantee. *Id.*, ¶¶ 40, 45-46. Plaintiffs did not consent to the indenture amendments. *Id.*, ¶¶ 33, 35, 46. Nor were they ever offered an opportunity to participate in the August Transaction. *Id.*, ¶ 34.

E. CEOC's Bankruptcy

CEOC filed for bankruptcy on January 15, 2015, which constituted an "Event of Default" under the Indenture and immediately triggered CEC's Guarantee obligation. *Id.*, ¶¶ 119, 121.

CEC refused Plaintiffs' demand for payment on the Guarantee. CEOC, under the restructuring plan currently filed in its bankruptcy, proposes to pay Plaintiffs what would effectively be five cents on the dollar for their Notes unless they agree to release CEC and waive the claims asserted in this action (or, if Plaintiffs were to agree to a release, eighteen cents on the dollar). *Id.*, ¶ 122.

ARGUMENT

Summary judgment must be granted where, as here, the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Coollick v. Hughes*, 699 F.3d 211, 219 (2d Cir. 2012). To defeat a motion for summary judgment, the non-moving party may not rest upon unsupported denials, but must come forward with specific material facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I. THE AUGUST TRANSACTION UNDISPUTEDLY VIOLATED PLAINTIFFS' RIGHTS UNDER THE TIA AND THE INDENTURE

A. Both the TIA and the Indenture Prohibit the Impairment of a Holder's Right to Recover Principal and Interest Without Such Holder's Consent

The TIA was "designed to vindicate a federal policy of protecting investors." Op. and Order dated Aug. 27, 2015 [ECF No. 54], *BOKF, N.A. v. Caesars Entm't Corp.*, No. 15-cv-01561-SAS (S.D.N.Y.) and [ECF No. 61], *UMB Bank, N.A., v. Caesars Entm't Corp.*, No. 15-cv-4634-SAS (S.D.N.Y.) (the "Opinion"), at 10 (quotation marks omitted) (quoting *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 85 F.3d 970, 974 (2d Cir. 1996)). Congress enacted the TIA in response to a 1936 report from the Securities and Exchange Commission ("SEC") documenting abuses of minority bond holders by issuers and majority holders (the "1936 SEC Report"). *See id.* at 27 (citing Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Prospective and

Reorganization Committees, Part VI: Trustees Under Indentures 63-64, 150 (1936)); *see also* 15 U.S.C. § 77bbb(a) (citing SEC reports as a basis for the Act). The 1936 SEC Report found that majority control provisions in indentures, allowing majority amendment of indentures' security and payment obligations, "give rise to abuses and problems which must be faced if the interests of security holders are not to be made subordinate to the desires and conveniences of the dominant group." 1936 SEC Report at 150. Of particular concern was the possibility that, "[b]y buying up or otherwise controlling a majority of a distressed company's bonds[,] . . . equity owners could vote to suspend or reduce payments on the bonds, thus allowing value to move down the corporate chain to the equity holders." Lee C. Buccheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1328 (2002). Such outcome would be "an inversion of the normal priorities in a corporate bankruptcy by which a company's debt holders are paid off before the equity holders." *Id.*

Section 316(b) of the TIA provides in relevant part:

> (b) Prohibition of impairment of holder's right to payment
>
> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security 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 to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . . .

15 U.S.C. § 77ppp(b). "To prove an impairment under section 316(b), plaintiffs must prove either an amendment to a core term of the debt instrument, or an out-of-court debt reorganization. The alleged impairment . . . must be evaluated as of the date that payment becomes due, because it is only then that the bondholders' right to payment has been affected by certain actions and/or transactions undertaken by issuers or guarantors." Opinion at 17. This

Court and two others in this District have found that Section 316(b) protects both a bondholder's "legal right" to obtain payment when due and the holder's "practical ability" to recover payment. Opinion at 14-15 (citing *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, No. 1:14-cv-8584-KPF, Op. and Order, ECF No. 78, at 10 (S.D.N.Y. June 23, 2015)); *see also Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592, 613 (S.D.N.Y. 2014); *Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99-cv-10517-HB, 1999 WL 993648, at *7 (S.D.N.Y. Nov. 2, 1999).

Section 508 of the Indenture parallels TIA Section 316(b). That section provides as follows:

> Notwithstanding any other provision in this Indenture, the Holder of any Security shall have the right, which is absolute and unconditional, to receive payment of the principal and any premium and . . . interest on such Security on the respective Stated Maturities expressed in such Security . . . and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

SUMF, ¶ 19 (quoting Indenture, § 508 (emphasis added)). As noted above, the Indenture expressly includes CEC's Guarantee in the definition of "Securities." *Id.*, ¶ 13. Important here, in *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905 (2d Cir. 2010), the Second Circuit held that where an obligor agrees that a noteholder's right to recover on its investment is "absolute and unconditional," "notwithstanding any other provision in th[e] Indenture," the holder's recovery rights "override" provisions of the indenture purporting to limit such rights. *See id*. at 917. Under *First Millennium*, CEC's Guarantee cannot be released without Plaintiffs' consent.

B. CEC Violated the TIA and the Indenture by Amending the Indenture to Remove the Guarantee Without Plaintiffs' Consent

Because the August Transaction resulted in the removal of CEC's Guarantee obligations from the Indenture without the consent of Plaintiffs, it constitutes a "straightforward" violation of Section 316(b). *See* Opinion at 26 ("[R]enegotiating a debt obligation with a majority of noteholders to the detriment of a nonconsenting minority *under the same indenture* would be an impairment" and a "straightforward violation[] of section 316(b) . . . .") (emphasis in original).

Based on this Court's August 27, 2015 summary judgment decision in the *BOKF* litigation, CEC contends that the August Transaction did not violate the TIA because the Guarantee is not a "core" term of the Indenture. CEC's argument grossly distorts the Court's opinion. More importantly, however, CEC's argument ignores the fact that the Guarantee is, in and of itself, an "indenture security" under the TIA. The TIA defines an "indenture security" as "any security issued or issuable under the indenture to be qualified." *See* 15 U.S.C. § 77ccc(11). Although the TIA does not define "security," it instructs that "[a]ny term in section 2 of the Securities Act of 1933 [15 U.S.C. § 77b] and not otherwise defined in this section shall have the meaning assigned to such term in section 2 of the [Securities Act]." *See* 15 U.S.C. § 77ccc(1). Section 2 of the Securities Act defines the term "security" to "mean[] any note, . . . bond, debenture, evidence of indebtedness . . . or . . . guarantee of . . . any of the foregoing." 15 U.S.C. § 77b(a)(1) (emphasis added). Notably, the TIA also includes a guarantor in the definition of "obligor."[4]

[4] *See* 15 U.S.C. § 77ccc(12) ("The term 'obligor,' when used with respect to any indenture security, means every person (including a guarantor) who is liable thereon . . . ."). Section 303 of the TIA was amended in 1987 expressly to confirm that guarantors are covered by the Act. *See* S. Rep. No. 100-105 at 33 (1987).

Because the Guarantee is an "indenture security" under the TIA (and because CEC is an "obligor"), when CEC purported to remove the Guarantee from the Indenture via the August Transaction, it by definition impaired Plaintiffs' "legal right" to recover principal and interest on an "indenture security" (the Guarantee) in violation of Section 316(b). For this reason, Plaintiffs would be entitled to judgment even if the Court were to adopt the interpretation of the TIA advocated by CEC in this proceeding—*i.e.*, that the TIA only protects a holder's "legal right" to recovery, not its practical ability to recover.

The removal of the Guarantee also impaired Plaintiffs' "practical ability" to recover on the Notes. CEOC declared bankruptcy five months after the August Transaction (an Event of Default under the Indenture), as a result of which it was unable to pay principal and interest on the Notes. SUMF, ¶¶ 119, 121. Because CEC's Guarantee obligations were purportedly stripped from the Indenture by the August Transaction, Plaintiffs had no "practical ability" to recover against either CEOC (the issuer) or CEC (the guarantor) at the point when payment on the Notes was due. *See* Opinion at 17 ("The alleged impairment . . . must be evaluated as of the date that payment becomes due . . . ."); *see also Federated*, 1999 WL 993648, at *7.

Finally, the August Transaction clearly violated the terms of the Indenture. Section 508 expressly prohibited CEC from "impairing" Plaintiffs' right to principal and interest on any "Security," a term that includes the Guarantee. SUMF, ¶¶ 13, 19. Similarly, Section 902 of the Indenture barred CEC from amending the Indenture to remove Plaintiffs' rights to principal and interest on any "Security" without Plaintiffs' consent. *Id.*, ¶ 23. CEC breached both of these provisions when it removed the Guarantee without Plaintiffs' consent in connection with the August Transaction. Based on the foregoing, Plaintiffs are entitled to judgment as a matter of law.

II. CEC HAS NO DEFENSE TO LIABILITY BASED ON THE MAY TRANSACTIONS

Although CEC will argue that the May Transactions released the Guarantee (which, according to CEC, moots any violation that may have occurred in connection with the August Transaction), that argument is contrary to the express provisions of the Indenture and to representations CEC has made to the Second Circuit and to this Court in the related *BOKF* and *UMB* actions.

A. Under Section 508 of the Indenture, CEC Could Not Release its Obligation to Pay Principal and Interest under the Guarantee Without Plaintiffs' Consent

First, CEC's release argument fails under Section 508 of the Indenture, pursuant to which CEC agreed that, "[n]otwithstanding any other provision in this Indenture," Plaintiffs' "absolute and unconditional" right to principal and interest on a "Security" could not be "impaired" without Plaintiffs' consent. *Id.*, ¶ 19 (citing Indenture, § 508). As noted above, the Second Circuit specifically held in *Bank of New York v. First Millennium* that the language included in Section 508 "overrides" any conflicting provisions in the Indenture. 607 F.3d at 917.[5] In *First Millennium*, an interpleader defendant (Federal Deposit Insurance Corporation) argued that the recovery rights of its adversaries (the noteholders) were limited pursuant to an express nonrecourse provision included in the indenture. Relying on the exact same language included in Section 508 of the Indenture here (i.e., that each holder's right to payment of principal and interest was "absolute and unconditional"), the Second Circuit found that, under New York law, the noteholders' right to recover on their bonds trumped the conflicting nonrecourse provision.

[5] *See also Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18-19 (1993) ("notwithstanding" clause renders it "clear beyond peradventure that [the terms of that clause are controlling,] even if other provisions of the contract[] might seem to require [a different] result"); *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 438-39 (2d Cir. 1995) (stating that "[w]hatever tension otherwise would exist" among three seemingly contradictory contractual provisions is relieved because the clause "notwithstanding any other provision contained in this agreement" trumps otherwise inconsistent provisions).

See id. at 917-18. As a result, the noteholders were permitted to recover from all of the issuer's assets, not just those defined as "collateral" in the indenture. *See id.*

Applied here, *First Millennium* mandates that Plaintiffs' "absolute and unconditional" right to recover on the Guarantee trump any provisions relied upon by CEC to limit that right, including Section 1503's release language. For this reason, CEC cannot release its Guarantee of the Notes without Plaintiffs' consent.

B. CEOC Remains a Wholly Owned Subsidiary of CEC as Defined in SEC Regulation S-X

Second, CEC's release argument fails because, as a matter of law, CEOC remains a "wholly owned subsidiary" of CEC as defined in Regulation S-X. Under Regulation S-X, a subsidiary is "wholly owned" if "substantially all of [its] outstanding voting shares are owned by its parent and/or the parent's other wholly owned subsidiaries." 17 C.F.R. § 210.1-02(aa). Here, even if the 5% Stock Sale and the PIP are given effect, CEC admits that it still owns 89% of the outstanding voting stock of CEOC, a level of ownership that falls within the plain meaning of "substantially all." SUMF, ¶¶ 47, 70, 100. Moreover, the SEC Staff has advised that a voting interest of 80% or greater may satisfy the ownership standard of a wholly owned subsidiary within the meaning of Regulation S-X. *See* FASB Emerging Issues Task Force Topic No. D-97: Push-Down Accounting, Apr. 18-19, 2001 ("FASB EITF D-97").[6] For these reasons, CEC has no basis to dispute that it owns "substantially all" of CEOC's shares as that term is interpreted in connection with Regulation S-X.[7]

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[6] FASB EITF D-97 may be found online at: www.fasb.org/pdf/appd-97.pdf.

[7] The standards of the Financial Accounting Standards Board ("FASB") are deemed "authoritative" by the SEC, thus EITF D-97 is competent evidence of the SEC's approach to interpreting the term "wholly owned subsidiary" under Regulation S-X. *See* Securities and Exchange Commission Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Apr. 25, 2003, Release No. 33-8221, *available at* https://www.sec.gov/rules/policy/33-8221.htm.

The SEC Staff has also made clear that in applying the rule cited in the Indenture, the SEC distinguishes between a substantially wholly owned subsidiary where "the form of ownership is within the control of the parent," and a subsidiary with "a significant noncontrolling interest" (emphasis added) which "might impact the parent's ability to control the form of ownership." SEC Staff Accounting Bulletin No. 112, 74 Fed. Reg. 27427 (June 10, 2009). Relevant here, outside shareholders must hold a "significant noncontrolling interest" to cause a subsidiary not to be substantially wholly owned "as defined in Rule 1-02(aa) of Regulation S-X." *Id.* Here, CEC's 89% voting interest in CEOC has enabled CEC to dominate CEOC completely, dictating all aspects of CEOC's existence, including day-to-day operations as well as extraordinary actions such as asset sales, related-party transactions, and CEOC's bankruptcy filing. SUMF, ¶¶ 100-115. On these facts, CEOC's minority shareholders cannot under any circumstances be deemed a "significant . . . interest" that would cause CEOC not to be a wholly owned subsidiary of CEC within the meaning of Regulation S-X.

Finally, the SEC Staff has also advised that, for purposes of determining whether a company has become "wholly owned" within the meaning of Regulation S-X, "it is appropriate to aggregate the holdings of those investors who both 'mutually promote' [an] acquisition and 'collaborate' on the subsequent control of the investee company." *See* FASB EITF D-97. Based on factors identified by the SEC Staff for determining a collaborative group, *see id.*, the hedge funds that participated in the 5% Stock Sale and the employees who participated in the PIP clearly comprise a "collaborative group" with CEC. This is so because: [redacted] *see* SUMF, ¶¶ 52, 54-59, 70; (ii) [redacted] *see id.*, ¶¶ 58, 62-67, 74; and

(iii) [redacted] *see id.*, ¶ 52. Based on the foregoing undisputed facts, CEOC is a wholly owned subsidiary of CEC within the meaning of Regulation S-X because CEC and its collaborative group together own all the voting shares of CEOC. Thus, for this reason as well, CEC's Guarantee remains in full force and effect.

C. CEC's Defense is Barred by the Doctrines of Judicial Admission and Judicial Estoppel

Finally, CEC may not rely on its argument that the May Transactions released the Guarantee because CEC has taken a contrary position in the related BOKF and UMB litigations. Only a few weeks ago, CEC represented to the Second Circuit that:

> Pursuant to that transaction, undertaken in August 2014, CEC and CEOC agreed with holders of a majority of certain other CEOC notes (unsecured notes junior in priority to those at issue in the *BOKF* litigation) to release CEC's guarantee on those notes. . . . The last of these series of notes on which the parent guarantee had yet to be discharged were the unsecured notes that were part of the August 2014 transaction.[8]

Mot. for Leave to File Reply Br. in Supp. of Pet. for Permission to Appeal Pursuant to 28 § U.S.C. 1292(b) and Fed. R. App. P. 5 [ECF No. 13], *BOKF, N.A., v. Caesars Entm't Corp.*, Civ. A. No. 15-2827 (2d Cir.), Ex. A, p. 3 (emphasis added). This statement parallels those CEC made to this Court in opposing BOKF's and UMB's motions for summary judgment. For example, in its brief opposing BOKF's motion, CEC stated that:

> As a consequence of the August Unsecured Notes Transaction, the Guarantee was released under the last paragraph of Section 12.02(c) of the [Second Lien] Indenture. That is because the transaction provided an independent basis for the release of CEC's guarantee of the 2016 and 2017 Notes, which were the last outstanding "Existing Notes" defined in the indenture, as CEC's

[8] Following the October 7, 2015 pre-motion conference, CEC sought leave to "clarify" its representation to the Second Circuit. Regardless of whether that motion is granted, the fact remains that CEC represented to this Court in its papers opposing the BOKF and UMB summary judgment motions that the Guarantee on Plaintiffs' Notes had yet to be released as of August 2014. Having prevailed on those motions, CEC cannot take an inconsistent position here.

> guarantee of the other "Existing Notes" had already been discharged or released.

ECF No. 44, *BOKF, N.A. v. Caesars Entertainment Corp.*, Civ. A. No. 1:15-cv-01561-SAS (S.D.N.Y.), at 13 (emphasis added). David Sambur, an Apollo partner who serves on CEC's Board and testified as CEC's Rule 30(b)(6) witness in this action, made a nearly identical statement in a sworn declaration CEC submitted with its opposition papers. ECF No. 40, *BOKF, N.A. v. Caesars Entertainment Corp.*, Civ. A. No. 1:15-cv-01561-SAS (S.D.N.Y.), ¶ 20 ("The 2016 and 2017 Notes were the last outstanding 'Existing Notes' defined in the Indentures, as CEC's guarantee of the other 'Existing Notes' had already been discharged or released.") (emphasis added).

CEC's attempt to "play both sides" of the release issue is inappropriate and threatens the integrity of this Court's adjudication of the guarantee actions. CEC's statements to the Court that the Guarantee had yet to be released as of August 2014 should be treated as binding judicial admissions.[9] Likewise, under principles of judicial estoppel, CEC should not be permitted to take a position here contrary to the position it adopted in opposing the prior summary judgment motions.[10]

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[9] *See Setevage v. Dep't of Homeland Sec.*, 539 F. App'x 11, 13 (2d Cir. 2013); *accord Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) ("A court can [also] treat statements in briefs as binding judicial admissions of fact.").

[10] The Second Circuit grants judicial estoppel when "(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding; and (2) that position was adopted by the first tribunal in some manner, such as by render a favorable judgment." *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999) (internal citations omitted). There are no "inflexible prerequisites" or "an exhaustive formula for determining the applicability of judicial estoppel"; rather, the inquiry depends heavily on the "specific factual context[]." *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Nor does judicial estoppel require that a court expressly adopt the prior inconsistent position, only that it render a favorable judgment. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.4 (2d Cir. 2011).

CONCLUSION

For all of the foregoing reasons, the Court should grant summary judgment against CEC on Counts One, Three, Four, Six, and Nine of Plaintiffs' Amended Complaint.

Dated: October 23, 2015
New York, New York

Respectfully submitted,

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