DrinkerBiddle&Reath LLP

James H. Millar
212-248-3264 Direct
212-248-3141 Fax
james.millar@dbr.com

Law Offices
1177 Avenue of the Americas
41st Floor
New York, NY
10036-2714

(212) 248-3140
(212) 248-3141 fax
www.drinkerbiddle.com

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October 1, 2015

By ECF and Hand Delivery

The Honorable Shira A. Scheindlin
United States District Court Judge
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007

Re: ***MeehanCombs Global Credit Opportunities Master Fund, LP, et al. v. Caesars Entertainment Corp., et al.*, No. 1:14-cv-07091 (SAS)**

Dear Judge Scheindlin:

This firm represents plaintiffs in the above-referenced action ("Plaintiffs"). In accordance with Section IV.A of Your Honor's Individual Rules and Procedures, Plaintiffs respectfully ask for leave to file a motion for partial summary judgment against defendant Caesars Entertainment Corporation ("CEC"). Plaintiffs request a pre-motion conference to address the proposed motion, and suggest that such conference be held simultaneously with the compliance conference currently scheduled for October 7, 2015.

The facts material to Plaintiffs' motion are not in dispute. Plaintiffs are holders of 6.5% Senior Notes due 2016 (the "Notes"), issued by Caesars Entertainment Operating Company, Inc. ("CEOC"). The Notes were sold pursuant to a registered public offering in 2006 and are governed by an indenture (the "Indenture") qualified under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (the "TIA" or the "Act"). Under the terms of the Indenture, CEC (CEOC's parent) agreed to "irrevocably and unconditionally" guarantee the payment of all principal and interest due on the Notes (the "Guarantee"). Indenture, § 1501(1). Important here, the Guarantee is an "indenture security" as defined in Section 303(11) of the TIA,[1] and CEC is an "obligor" as defined in Section 303(12) (which was amended in 1987 expressly to confirm that guarantors were covered by the Act). *See* 15 U.S.C. § 77ccc(11) and (12). Moreover, the Indenture expressly incorporates the Guaranty into the definition of "Securities" and states that Plaintiffs' right to repayment on the Securities (including both CEOC's Notes and CEC's Guarantee) is "absolute and unconditional" and exists "[n]otwithstanding any other provision of t[he] Indenture . . . ." Indenture, §508; *see also id.* at Recitals and §101.

[1] TIA Section 303(11) adopts the definition of "security" set forth in Section 2 of the Securities Act of 1933, which states that "the term 'security' means any note, . . . bond, debenture, evidence of indebtedness" or "any . . . guarantee of . . . any of the foregoing." 15 U.S.C. § 77(b)(a)(1) (emphasis added).

In August 2014, Caesars paid a select group of holders owning 51% of the outstanding Notes one hundred cents on the dollar for certain of their Notes—plus interest, transaction fees, and costs—in exchange for the holders' consent to Indenture amendments that, among other things, purported to remove from the Indenture all sections pertaining to CEC's Guarantee (the "August Transaction"). CEC admits that Plaintiffs did not consent to these amendments, and that CEC never gave Plaintiffs the opportunity to participate in the August Transaction. *See* CEC's Resps. and Objections to Pls.' First Set of Reqs. For Admis., Aug. 28, 2015, at Nos. 44, 46, 48. CEOC filed for bankruptcy on January 15, 2015, an Event of Default under the Indenture that immediately triggered CEC's guarantee obligation. CEC has refused Plaintiffs' demand for payment on the Guarantee.

Under Section 316(b) of the TIA, a bondholder's right to receive payment from an obligor or institute suit for such payment under the terms of the indenture may not be impaired without such bondholder's consent. *See* 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." Op. and Order dated Aug. 27, 2015 [ECF No. 54], *BOKF, N.A. v. Caesars Entm't Corp.*, No. 15-cv-01561 (SAS) and [ECF No. 61], *UMB Bank, N.A., v. Caesars Entm't Corp.*, No. 15-cv-4634 (SAS) (the "Opinion"), at 17. "[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) . . . ."[2] Opinion at 26 (emphasis in the original).

As set forth above, the August Transaction undisputedly amended a "core term" of the Indenture (*i.e.*, the right to receive payment under the Guarantee) without the consent of Plaintiffs, thereby impairing the ability of Plaintiffs and other minority holders to recover on the Notes and Guarantee. Based on the foregoing, Plaintiffs seek this Court's permission to move for summary judgment on Counts Three, Four, and Six of the Amended Complaint [ECF No. 31]—alleging, respectively, breach of Section 316(b) of the TIA, breach of Section 508 of the Indenture (which parallels Section 316(b) of the TIA), and breach of the Indentures' guarantee provisions. Plaintiffs also seek to move for summary judgment on Count One of the Amended Complaint, seeking a declaration that the Guarantee remains in place. Finally, Plaintiffs seek to move on Count Nine of the Amended Complaint, seeking damages based on CEC's default on its payment obligation following CEOC's bankruptcy.

In opposing Plaintiffs' motion, CEC likely will argue that the Guarantee was released in May 2014, when CEC sold 5% of CEOC's stock to certain insider purchasers and CEOC distributed another 6% of its stock to certain Caesars employees (the "May Transactions"). According to CEC, the May Transactions released the Guarantee because CEOC was no longer a "wholly owned subsidiary" of CEC as defined in the Indenture (which expressly incorporates the

[2] *See also Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592 (S.D.N.Y. 2014); *Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99-cv-10517, 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999).

definition of such term in SEC Regulation S-X). *See* Indenture, § 1503(3). This argument fails for two separate and independent reasons.

First**,** and as noted above, CEC specifically agreed in the Indenture that the Guarantee constitutes a "Security" and that holders' right to repayment on the "Securities" (including both CEOC's Note and CEC's Guarantee) is "absolute and unconditional," and exists "[n]otwithstanding any other provision of t[he] Indenture . . . ." Indenture, §508; *see also id.* at Recitals and §101. The Second Circuit has specifically held that where an indenture provides for an "absolute and unconditional" right to repayment, "[n]otwithstanding any other provision in t[he] [i]ndenture," then the repayment term "overrides" conflicting terms purporting to limit those payment obligations. *See Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 917-18 (2d Cir. 2010); *see also Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 158 (2015) ("As an initial matter, 'under New York law, clauses similar to the phrase '[n]otwithstanding any other provision' trump conflicting contract terms.'") (quoting *First Millennium*, 607 F.3d at 917).[3] Here, the "plain terms, [] 'absolute and unconditional' right to repayment granted to the noteholders by the [I]ndenture[,] override[] the conflicting" provision upon which CEC relies in arguing the Guarantee was released. *First Millennium*, 607 F.3d at 917.

Second, as defined in Regulation S-X, "wholly owned subsidiary" means a subsidiary "substantially all of whose outstanding voting shares" are owned by parent entities. 17 C.F.R. § 210.1-02(aa). This is not a bare numeric test—at least not here, where ownership exceeds 80% and CEC has at all times maintained complete domination over CEOC.[4] Moreover, the circumstances involved in the May Transactions and the undisputed relationships and other shared interests between the transferees and CEC require that the transferees and CEC be treated as a single "collaborative group" under Regulation S-X that together owns 100% of CEOC's voting stock.[5] For all of these reasons, CEOC remains a "wholly owned subsidiary" under Regulation S-X and CEC's contractual defense fails on its own terms.

Plaintiffs are available at the Court's convenience to address any questions Your Honor may have on this or any other case-related topic.

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[3] The Indenture is governed by New York law. Indenture, § 112.

[4] In determining whether a company has become substantially wholly owned, under the guidance in effect at the time of the Indenture, the SEC staff has stated that push-down accounting would be required if 95 percent or more of the company has been acquired, permitted if 80% to 95% has been acquired, and prohibited if less than 80 percent of the company is acquired. *See* FASB Emerging Issues Task Force Topic No. D-97: Push-Down Accounting, Apr. 18-19, 2001, *available online* at http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220151245&acceptedDisclaimer=true. 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." *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 online* at https://www.sec.gov/rules/policy/33-8221.htm.

[5] *See* FASB EITF D-97.

Respectfully submitted,

James H. Millar

Cc: All counsel (by ECF and email)