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**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs' response does not refute the showing in our opening brief that (i) the Complaints fail to state a claim under the Trust Indenture Act (the "TIA")—the only asserted basis for federal jurisdiction; (ii) Plaintiffs' state law claims are barred by the no-action provisions of the governing Indentures; and (iii) the facts alleged show that the challenged transactions complied with the Indentures in all respects.

First, the Complaints do not state a claim under the TIA. MeehanCombs contends that the Participating Noteholders' Notes were "owned" or "controlled" by Defendants when they consented to the challenged Indenture amendments, and that therefore Section 316(a) of the statute required their consents not to be considered. But that is wrong. Defendants did not purchase the Notes until *after* the consents were given. Nor does the MeehanCombs Complaint allege any facts showing that Defendants "controlled" the Participating Noteholders. On the contrary, there is no dispute that the Participating Noteholders were independent third parties who agreed to give their consents and thereafter to sell their Notes at arm's length. MeehanCombs' argument, if accepted, would effectively prohibit this entirely routine means of obtaining consents to indenture amendments.

Plaintiffs' contention that the Complaints state a claim under Section 316(b) of the TIA (which prohibits any action to impair the "rights" of noteholders to receive interest and principal payments when due) rests entirely on the false premise that their "right" to payment on the Notes is impaired whenever the issuer takes action that allegedly increases the risk of default. The single decision on which Plaintiffs rely, *Federated Strategic Income Fund* v. *Mechala Group Jam. Ltd.*, No. 99 Civ. 10517, 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999)—in which the issuer stated that it did not intend to make any further payments under the notes, and sought to

transfer *all* of its assets to other entities—is not remotely analogous. In any event, the holding in *Federated* is contrary to the conclusions reached by every other court that has considered the issue, which have held that, to state a claim under Section 316(b), Plaintiffs must allege an impairment of their *legal* right to payment. No such impairment is alleged here.

Second, Plaintiffs' admitted failure to comply with the conditions to suit under the Indentures' no-action provisions bars their state law claims. Plaintiffs' reliance on a narrow exception permitting suit to enforce interest payments is misplaced, because, as the Appellate Division held only this year, that exception "only authorize[s] actions for *past due* principal and interest." *Emmet & Co., Inc*. v. *Catholic Health East*, 114 A.D.3d 605, 606 (N.Y. App. Div. 1st Dep't 2014) (emphasis added). And Plaintiffs' argument that their claims are not based on the Indentures but on the Notes and CEC's guarantee ignores both the language of the Notes and the guarantee—each of which expressly states that the parties' rights thereunder are governed by the Indentures—and the Complaints themselves.

Third, as discussed below, Plaintiffs' state law claims also fail because the Complaints do not adequately allege any breach of the Indentures or any cognizable damages. The Indentures expressly authorized each of the challenged aspects of the transaction at issue, and Plaintiffs effectively concede that they have suffered no damages.

For these reasons and those set forth in our opening brief, the Complaints should be dismissed.

ARGUMENT

I.

THE COMPLAINTS FAIL TO STATE A CLAIM UNDER THE TRUST INDENTURE ACT

We showed in our opening brief that Plaintiffs' claims under the TIA—in particular, MeehanCombs's claim under Section 316(a) and both Plaintiffs' claims under Section 316(b)—fail under the plain language of the statute. (Deft. Mem. at 10-16.) Plaintiffs' responses do not save these claims. And, as Plaintiffs do not dispute, because these claims are the only asserted basis for federal jurisdiction, once those claims are dismissed, their state law claims should be dismissed for lack of jurisdiction.

A. MeehanCombs's Section 316(a) Claim Fails Because That Provision Does Not Apply

We showed in our moving brief that the facts alleged by MeehanCombs do not state a claim under the plain language of Section 316(a) of the TIA because (i) the Participating Noteholders' Notes were not owned or controlled by Defendants, and thus under the statute were properly considered in determining whether holders of a majority of Notes consented to amend the Indentures; and (ii) in any event, the challenged transactions did not involve a direction to the Trustee by noteholders to "exercise[e] any trust or power conferred [by the Indentures] upon such trustee," as required to trigger the statute, 15 U.S.C. § 77ppp(a)(1)(a). (Deft. Mem. at 11-12.) MeehanCombs's response fails to refute either point.

MeehanCombs's argument that Defendants owned the Participating Noteholders' Notes at the time of the vote on the amendments (and thus under the statute should not have been counted in determining whether holders of a majority of Notes consented to the amendments) (MC Opp. at 7-8) rests on a misapprehension about the sequence of the relevant transactions. Under the Agreement, the Participating Noteholders first authorized and delivered their consents

on August 12, 2014, when the Agreement was executed, but did not sell their notes until August 22, 2014, when the transactions closed. (Ex. B.) Defendants' obligation to "consummate the transactions," including the purchase of the Notes at closing, was explicitly conditioned on (among other things) the Participating Noteholders' consents being effective. (*Id.* § 7.5.) Thus, under the clear language of the Agreement, the Participating Noteholders' consents were given *before* the Notes were sold to Defendants.

Similarly, there is no merit to MeehanCombs's argument that, because the Participating Noteholders contractually agreed to deliver their consents, Defendants thereby "controlled" the Participating Noteholders. (MC Opp. at 8-9.) The Complaint does not allege that the Participating Noteholders were anything other than unaffiliated, independent third parties that entered into an arm's length transaction to provide their consents. To hold that such an arm's length transaction gives the issuer "control" over the Notes, as MeehanCombs urges, would mean that *any* tender offer coupled with a consent solicitation violates the TIA. Indeed, as shown by the Indentures here and the ABA Model Indenture commentary, it is typical in such transactions for consents to be delivered and counted before closing, as was done here, in order to ensure that sufficient consents are obtained before closing. (Ex. D § 9.5; Ex. E § 904; ABA Revised Model Simplified Indenture, 55 Bus. Law 1115 (May 2000), Sec. 9.4 cmt. 1 (consents "may be used … until a given date or when joined in by the holders of a given percentage of Securities").) Plaintiffs cite no authority for the proposition that such routine transactions violate the TIA, and we know of none. (*See* Deft. Mem. at 12-13.)

Finally, MeehanCombs does not rebut our showing (Deft. Mem. at 11-12) that Section 316(a) does not apply because the challenged transactions did not involve a direction to the Trustee by holders of a majority of the Notes to exercise any "trust or power conferred" on

the Trustee by the Indentures. MeehanCombs argues that the transactions at issue are subject to Section 316(a) because the transactions resulted in the Trustee executing the Supplemental Indentures. (MC Opp. at 7.) But MeehanCombs cites no authority that the Trustee's ministerial act of executing the Supplemental Indentures is an exercise of a "power" under Section 316(a). And, in any event, the Agreement and Supplemental Indentures make clear that the relevant "direction" came from CEOC, the issuer, not from noteholders. (*Id.* (citing Ex. B § 2.2(c) ("CEOC will execute and deliver to the applicable trustees for the Notes a supplemental indenture . . ."); Ex. C at 6, 11, 16, 29 ("WHEREAS, the Company has requested that the Trustee execute and deliver this Supplemental Indenture.").) Thus, Section 316(a) does not apply.

B. Plaintiffs' Claim under TIA Section 316(b) Should Be Dismissed Because Their Rights to Payment Have Not Been Impaired

As shown in our opening brief, Plaintiffs' claims under Section 316(b) also fail because Plaintiffs do not and cannot allege that their legal right to payment under the Notes has been impaired. (Deft. Mem. at 13-15.) Plaintiffs do not contend that CEOC has failed to make any payment to Plaintiffs when due, or that Defendants have taken any action to interfere with their right to receive payments on the Notes when due.[1] Instead, they argue that an impairment of their rights under Section 316(b) can be established merely because they allege that the challenged transactions will make a default more likely. But that is not the law. As the court reasoned in *In re Northwestern Corp.*, 313 B.R. 595 (Bankr. D. Del. 2004), in rejecting an

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[1] CEOC's recent announcement that it has elected not to make interest payments on two series of second-lien notes in light of the ongoing discussions with respect to a potential restructuring has no bearing to these cases. Neither series of the second-lien notes is at issue here, and the indentures governing those notes provide for a 30-day grace period for interest payments before an event of default is deemed to have occurred. (CEOC Form 8-K, dated Dec. 15, 2014, *available at* http://www.sec.gov/Archives/edgar/data/858395/000119312514442780/d838081d8k.htm (accessed Dec. 18, 2014).)

argument that the issuing company's insolvency impaired the holders' rights to receive payment in violation of Section 316(b), "[Section 316(b)] applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself. Plaintiffs' legal rights were not impaired [by the issuer's insolvency]. Again, there is no guarantee against default." *Id.* at 600; *see also Brady* v. *UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1326 n.9 (10th Cir. 2008) (quoting the same language from *Northwestern* with approval); *YRC Worldwide Inc.* v. *Deutsche Bank Trust Co. Americas*, No. 100-2106-JWL, 2010 WL 2680336, at *7 (D. Kan. July 1, 2010) (same). And indeed, Danner concedes as much, acknowledging that "Section 316(b) 'does not provide a guarantee against the issuing company's default or its ability to meet its obligations.'" (Danner Opp. at 13.)

Plaintiffs' reliance on *Federated Strategic Income Fund* v. *Mechala Group Jam. Ltd.*, for the proposition that any action by the issuer that increases the risk of default still gives rise to a claim under Section 316(b) is misplaced. The facts in *Federated* are not remotely analogous, and the same judge narrowly construed *Federated* in two later decisions. And the only other courts that have addressed the issue have found the reasoning of *Federated* unpersuasive.

In *Federated*, noteholders sought to enjoin a tender offer and consent solicitation in which the issuer represented to its noteholders that it did "not intend to make the next interest payments" on its notes, 1999 WL 993648, at *1, and that the noteholders' consents would trigger a planned reorganization pursuant to which "all of [the issuer's] assets [would] be transferred to its subsidiaries," the issuer would become "a holding company with nominal assets," and a third party guarantee would be eliminated, *id.* at *6-7. The issuer also did not dispute that "non-tendering holders will not be able to recover the principal due under the notes at the time of the

maturity, due to [the issuer's] planned insolvency." *Id.* at *8. In these circumstances, the court reasoned that the challenged transaction could impair their rights to sue for payment. *Id.*

The facts here are not analogous. Plaintiffs do not allege that CEOC has disclaimed an intent to pay interest due on the Notes, that it has transferred or threatened to transfer all of its assets, or that CEOC has become or is about to become a holding company with only nominal assets. Indeed, as Danner acknowledges in its Complaint, CEOC continues to "own[] and operate[] casinos and other entertainment properties in Las Vegas and elsewhere in the United States and internationally" (¶ 18), and CEOC has generated billions of dollars in revenue for the first three quarters of 2014.[2] And, in contrast to the guarantee at issue in *Federated*, Plaintiffs were told at the time they purchased the Notes that CEC's guarantee would automatically be released upon the occurrence of certain events (including the transfer of part of CEC's interest in CEOC, such that CEOC was no longer a wholly owned CEC subsidiary). (Ex. D § 12.3; Ex. E § 1503.) Plaintiffs offer no reason why *Federated*'s narrow holding should be broadly extended to allow Section 316(b) claims whenever a noteholder alleges merely that the issuer's actions may affect its future ability to make payments when due.

Judge Baer, the author of *Federated*, has himself narrowly construed that decision. In *Greylock Global Opportunity Master Fund Ltd.* v. *Province of Mendoza*, No. 04 Civ. 7643, 2004 WL 2290900 (S.D.N.Y. Oct. 12, 2004) & 2005 WL 289723 (S.D.N.Y. Feb. 8, 2005), Judge Baer denied the plaintiffs' motion for a preliminary injunction enjoining an exchange offer, holding that *Federated* did not control because the plaintiffs in *Greylock*—like the noteholders here—retained the ability to enforce their rights under the indenture by suing the

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[2] CEC Form 8-K, dated Nov. 10, 2014, Ex. 99-1, *available at* http://www.sec.gov/Archives/edgar/data/858339/000085833914000095/ex991-2014q3cecearningsrel.htm (accessed Dec. 18, 2014).

issuer. *Greylock*, 2004 WL 2290900*,* at *3. MeehanCombs attempts to distinguish *Greylock* on the ground that the noteholders in that case also "retained their rights as against the guarantor" (MC Opp. at 11 n.7), but ignores the *Greylock* court's statement that the transaction at issue in *Federated* "would have permitted the [issuer] to divest itself of virtually all it[s] assets"—a fact that did not exist in *Greylock* and does not exist here. *Greylock*, 2004 WL 2290900*,* at *3.

II.

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

Plaintiffs do not dispute that they have not complied with the preconditions set forth in the Indentures' no-action clauses for bringing suit "with respect to [the] Indenture[s]." (Ex. E § 507; *see also* Ex. D § 6.7.) The justifications Plaintiffs offer to excuse that failure are insufficient, and their noncompliance with the no-action clauses bars their state law claims.

A. Because These Are Not Actions to Enforce a Missed Payment, Plaintiffs' Claims Are Subject to the No-Action Clauses

Plaintiffs are not entitled to take advantage of the no-action clauses' narrow exception allowing suits by individual noteholders for the "enforcement of any payment" of principal and interest on the Notes "on the Stated Maturity." (Ex. D §§ 1.1, 6.8; Ex. E §§ 101, 508.) As discussed above and in Defendants' opening brief, this exception only applies to suits brought by holders *after* a payment default, and no such default has occurred here. (*See supra* at 5-8; Deft. Mem. at 19 (collecting cases).)

Plaintiffs rely principally upon *Continental Cas. Co.* v. *New York Mortg. Agency*, No. 94 Civ. 8408, 1998 WL 513054 (S.D.N.Y. Aug. 18, 1998), for the proposition that the no-action clause permits an individual noteholder to bring suit before any payment default. But the reasoning and conclusion of *Continental* were expressly rejected as "unpersuasive" in *Emmet &*

Co., Inc. v. *Catholic Health E.*, 37 Misc. 3d 854, 859 (N.Y. Sup. Ct. 2012), *aff'd*, 114 A.D.3d 605 (N.Y. App. Div. 1st Dep't 2014). The indentures at issue in *Emmet* provided—in language substantially similar to the indenture in *Continental* and the Indentures here—that, notwithstanding the no-action clause, holders could bring suit to enforce payment "at the time and place expressed" in those indentures. *Id.* at 860. In rejecting *Continental*'s holding permitting suit under this provision before the interest due date, the *Emmet* court reasoned that allowing the bondholder to sue before the issuer's obligation had accrued would produce a "somewhat odd, asymmetrical result," and would "essentially allow all claims relating to the value of the bond, and would [thereby] let the payment exception swallow the no-action clause." *Id.* The court emphasized:

> Barriers to action by individual bondholders serve an important purpose by both preventing expensive lawsuits that do not have the support of a substantial portion of the creditors while also centralizing the prosecution of lawsuits whose benefits should properly accrue to all bondholders. As such, the interest exception must not be construed to render the no-action clause ineffective.

Id. at 860-61. The Appellate Division affirmed, holding that the plaintiffs were not "excused from compliance [with the no-action clause] by the indentures['] 'principal and interest' clauses, which only authorize actions for past due principal and interest." *Emmet & Co., Inc.*, 114 A.D.3d at 605.

Absent a controlling decision from the New York Court of Appeals or "persuasive evidence" that it "would reach a different conclusion," federal courts are "bound to apply the law as interpreted by" the Appellate Division. *Grand Light & Supply Co.* v. *Honeywell, Inc.*, 771 F.2d 672, 678 (2d Cir. 1985). The interest exception in the Indentures here, like those in *Emmet*, gives noteholders the right both to receive payment of principal and interest "on the Stated

Maturity" and "to institute suit for the enforcement of any such payment." (Ex. D § 6.8; Ex. E § 508.) As in *Emmet*, it would be anomalous to allow the holder to sue before payment is due, and to do so would allow the narrow interest exception to swallow the no-action provision. Plaintiffs' failure to comply with the no-action clause bars their state law claims.

B. All of Plaintiffs' Claims Are Subject to the No-Action Clauses

As MeehanCombs concedes and Danner does not dispute, the Indentures' no-action clauses expressly apply to "Plaintiffs' claims for breach of the Indentures" and claims that "arise from" the obligations set forth in the Indentures. (MC Opp. at 13.) *See Quadrant Structured Prods. Co., Ltd.* v. *Vertin*, 23 N.Y.3d 549, 564-69 (N.Y. 2014) (no-action clause governs all "indenture-based contract claims" and claims "arising from the indenture[s]").

MeehanCombs's argument that some of its claims (specifically, Counts One, Six, and Eight) arise under the Notes and the guarantees rather than the Indentures, and are therefore exempt from the no-action clause, is inconsistent with statements in both the Notes and the guarantees that the Indentures govern the parties' rights and obligations. Thus, the Notes refer to the Indentures "for a statement of the respective rights, limitations of rights, duties and immunities thereunder of the Company, the Trustee and the Holders of the Notes." (Ex. D at A-2; Ex. E § 203.) Likewise, the Notation of Guarantee provides that "[t]he obligations of the Guarantor to the Holders of Notes . . . pursuant to the Guarantee and Indenture are expressly set forth in Article 12 of the Indenture and reference is hereby made to the Indenture for the precise terms of the Guarantee." (Ex. D at B-1; Ex. E at 48.)

MeehanCombs' argument is also refuted by its own Complaint. For example, Count One of its Complaint expressly refers to "CEC's obligations under the guarantees and the provisions of the *Indenture governing them*" (MC Compl. ¶ 81(a) (emphasis added)), and Count

Six likewise cites both Indentures to explain the terms of the guarantee (*id.* ¶ 125). Similarly, MeehanCombs's Count Eight is expressly based on Defendants' alleged violation of an implied term of the Indentures. (*See, e.g.*, *id.* ¶ 144 (alleging that "Caesars's foregoing aggregate course of dealing outside of the provisions and protections of the Indentures . . . deprived Plaintiffs of the benefit of their bargain under the Indentures").) Plaintiffs' additional argument that their claims for declaratory judgment are exempt from the no-action clauses because (they contend) these claims purportedly seek relief that will "equally benefit all noteholders" (MC Opp. at 16; Danner Opp. at 16) is equally without merit. The no-action clauses in the Indentures provide no exception for declaratory judgment claims, and to allow such an exception would eviscerate the purpose of those clauses to "protect issuers from the expense [of] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors." *SC Note Acquisitions, LLC* v. *Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 531 (E.D.N.Y. 2013). Thus, courts in this District applying New York law have routinely enforced no-action clauses to bar declaratory judgment claims. *E.g.*, *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); *ZBD Constr., Inc.* v. *Billings Generation, Inc.*, No. 09 Civ. 6667, 2011 WL 1327144 (S.D.N.Y. March 25, 2011) (same), *aff'd*, 472 Fed. Appx. 83 (2d Cir. 2012) ("[T]he explicit terms of the contract unambiguously bar [plaintiff] from seeking even a declaratory injunction . . . ."). The decades-old trial court decisions Plaintiffs cite, *Kelley* v. *Prudence Co.*, 259 N.Y.S. 59, 62 (N.Y. Sup. Ct. 1932), and *Borg* v. *N.Y. Majestic Corp.*, 139 N.Y.S.2d 72 (N.Y. Sup. Ct. 1954), are inapplicable because both involved claims asserted against the Trustee that fell outside the no-action clauses. *See Borg*, 139 N.Y.S.2d at 78 ("[T]he action-barring clause here does not comprehend an action

against the trustee such as is here involved.”). Here, neither Plaintiff has asserted a claim against the Trustee.

C. Plaintiffs' Noncompliance with the No-Action Clauses Cannot Be Excused on Any Other Ground

Plaintiffs' other attempts to justify their admitted failure to satisfy the conditions to suit under the no-action clauses cannot save their claims. Thus, while Danner argues that Plaintiffs' failure to make a demand on the Trustee should be excused as “futile” because “no-action clauses do not apply to suits against indenture trustees” (Danner Opp. at 17), that argument is irrelevant, because Plaintiffs have not asserted any claims against the Trustee. Likewise, there is no merit to Danner's suggestion that it could not make a demand on the Trustee because the challenged transactions closed ten days after they were announced. (*See id.*) Plaintiffs brought these actions well after the transaction closed, and they and other noteholders could have made a demand on the Trustee to assert the very same claims.

MeehanCombs's contention that Defendants' purported breach of the Indentures excuses its failure to comply with the no-action clause would, if accepted, vitiate that provision. Plaintiffs cannot sue under the Indentures while “ignoring the [I]ndenture's restrictions on [their] ability to sue.” *Emmet & Co., Inc.*, 37 Misc. 3d at 858. The cases cited by MeehanCombs (MC Opp. at 17 (citing *Sunshine Steak, Salad & Seafood, Inc.* v. *W.I.M. Realty, Inc.*, 522 N.Y.S.2d 292 (N.Y. App. Div. 3d Dep't 1987) and *Special Situations Fund III, L.P.* v. *Versus Tech., Inc.*, 642 N.Y.S.2d 894 (N.Y. App. Div. 1st Dep't 1996))) are inapplicable, in that they do not involve no-action clauses and hold only that conditions to suit were excused when, because of the defendants' misconduct, satisfying the condition would have been futile. Here, by contrast,

Plaintiffs do not allege that Defendants' conduct rendered it futile for Plaintiffs to comply with the no-action clauses.

III.

THE COMPLAINTS FAIL TO STATE CLAIMS FOR BREACH OF CONTRACT

Plaintiffs' breach of contract claims should also be dismissed for the independent reason that Plaintiffs have failed to plead a breach of the Indentures or cognizable 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)

For the reasons given above (*supra* at 5-8) and in Defendants' opening brief (Deft. Mem. at 20), Plaintiffs have not shown that unanimous consent was required for the agreement and amendments at issue, which did not impair Plaintiffs' legal rights to payment under the Notes or to bring suit for nonpayment. Thus, the transactions did not breach § 508 of the 2016 Indenture or § 6.8 of the 2017 Indenture. Likewise, Plaintiffs have also failed to demonstrate that the Participating Noteholders were "controlled" by (and were therefore Affiliates of) CEOC or CEC, such that their consents were improperly considered towards majority approval of the agreement and amendments. Again, as explained above, Plaintiffs' expansive understanding of "control" likely would invalidate every consent solicitation, and is not the law. (*See supra* at 3-5.)

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

As shown in our opening brief, Plaintiffs' claims that Defendants violated the provisions of the Indentures governing redemptions should be dismissed because the negotiated

purchase of the Participating Noteholders' Notes is not a "redemption." (Deft. Mem. at 21-22 (citing *Heine* v. *The Signal Cos*., 1977 U.S. Dist. LEXIS 17071, at *37-38 (S.D.N.Y. 1977)).) As the court explained in *Heine*, "in ordinary corporate parlance, a 'redemption' refers to a corporation's contractual right to *compel* holders of a class of securities . . . to return or exchange them for cash or property." *Id*. (emphasis added). The Complaints do not allege any such compelled transaction.

Plaintiffs' assertion that *Chesapeake Energy Corp.* v. *Bank of N.Y. Mellon Trust Co., N.A.*, __ F.3d __, 13-1893-cv, 2014 WL 6650873, at *5 (2d Cir. Nov. 25, 2014) adopted a broader definition of "redemption" that encompasses any transaction involving a reacquisition by the issuer (MC Opp. at 19) misreads that decision. The court in *Chesapeake* had no occasion to provide an exhaustive definition of the term "redemption." Rather, it was undisputed in that case that the relevant transaction was a redemption, and the Court merely determined whether the "normal meaning" of "redemption" could reasonably be extended (as the plaintiff had argued) to "the giving of notice of a future redemption." *Id.* at *5. Thus, *Chesapeake* does not support plaintiffs' claims. And Plaintiffs cite no language in the Indenture or case law supporting their assertion that this provision only allows "market" transactions that are anonymously effected through a broker-dealer. (MC Opp. at 20.)

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

Defendants' opening brief showed that CEC's guarantee of the Notes was terminated in May 2014 pursuant to the Indentures' express terms, and that, in any event, the Indentures permit the guarantee provision to be amended with majority consent. (Deft. Mem. at 6, 22.) Plaintiffs' argument that CEC's guarantee was "irrevocable" and therefore could not be

amended ignores these express provisions authorizing a majority of holders to consent to amendments "eliminating *any* of the provisions of th[e] Indenture[s] or . . . modifying in any manner the rights of the Noteholders." (Ex. D § 9.2; Ex. E § 902 (emphasis added).)

Similarly, MeehanCombs's argument that CEC, as a guarantor, also had an "absolute and unconditional" payment obligation to the noteholders ignores the fact that such an obligation necessarily is effective only so long as the guarantee is not released, as well as the plain language of the Indentures setting forth the conditions for such a release. MeehanCombs's reliance on *Bank of N.Y.* v. *First Millennium, Inc.*, 607 F.3d 905 (2d Cir. 2010), is misplaced. (*See* MC Opp. at 22.) *First Millennium* held that a "prefatory provision" in an indenture limiting holders' recourse to certain assets could not overcome the statement that "[n]otwithstanding any other provision" in the indenture, each holder had an "unconditional and absolute" right to payments of principal and interest from the issuer when due. *Id.* at 915-16. Here, by contrast, the Indentures by their terms limited CEC's obligations under the guarantee (Ex. D § 12.3; Ex. E § 1503), and the guarantees expressly provided that CEC's obligations were only those "expressly set forth in Article 12 of the Indenture" (Ex. D at B-1; Ex. E at 48). Thus, the termination of the guarantee, and its recognition by Indenture amendments passed with majority consent, did not breach the Indentures.

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

As shown in Defendants' opening brief, the alleged "preferential treatment" of the Participating Noteholders does not state a claim for breach of contract because the relevant provision applies only to actions taken by holders of Notes in that capacity, and Defendants did not engage in any "preferential treatment" in their capacity as noteholders. (Deft. Mem. at 23.)

MeehanCombs's contentions that Defendants acted as noteholders and should be held liable for various other reasons (MC Opp. at 22-23) cannot salvage its claim. Thus, as discussed above, Plaintiffs' argument that Defendants acted as noteholders because they "had both actual and beneficial ownership" of the Participating Noteholders' Notes "at the time the consents became effective" (MC Opp. at 22-23), rests on the erroneous assumption that Defendants owned the notes when the consents were counted (*see supra* at 3-4).

B. Plaintiffs' Claims for Breach of the Duty of Good Faith And Fair Dealing Fail as a Matter of Law

Plaintiffs' claims for breach of the implied duty of good faith and fair dealing are an improper attempt to rewrite the Indentures and impose new terms and implied obligations that the parties did not include. (Deft. Mem. at 24-25.) Whether Plaintiffs regard the transaction at issue as part of an improper "scheme" (Danner Opp. at 25), or "at odds with custom and practice in the bond markets" is irrelevant (MC Opp. at 25), because each of the actions taken by CEC and CEOC were expressly authorized under the Indentures. New York courts consistently reject attempts, particularly by "sophisticated commercial parties," to add terms or imply covenants that would essentially rework the parties' contractual relationship. *D & L Holdings, LLC* v. *RCG Goldman Co., LLC*, 287 A.D.2d 65, 73 (N.Y. App. Div. 1st Dep't 2001).

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

Unable to point to any non-speculative allegations in the Complaints regarding their purported damages, Plaintiffs resort to arguing that the fact of "uncertain" or "nominal" damages does not warrant dismissal of their claims. (MC Opp. at 24; Danner Opp. at 22.) But "certainty" refers to "the fact of damage, not the amount," as made clear in Plaintiffs' own cited authorities. *E.g.*, *Acumen Re Management Corp.* v. *General Sec. Nat. Ins. Co.*, No. 09 CV 01796,

2012 WL 3890128, at *10 (S.D.N.Y. Sept. 7, 2012). Thus, even if there are only "nominal" damages at stake, "an allegation that [a claimant] 'suffered damages' without particular facts as to how she was damaged does not satisfy" the pleading standard. *IBM Corp.* v. *Dale*, No. 7:11-cv-951, 2011 WL 4012399, at *2 (S.D.N.Y. Sept. 9, 2011) (citing *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 444, 555 (2007); *Ashcroft* v. *Iqbal*, 556 U.S.662, 679 (2009).) Absent a payment default, Plaintiffs' allegations that Defendants may have caused other types of injuries are speculative and insufficient as a matter of law. (*See* Deft. Mem. at 24 (citing cases).)

CONCLUSION

For the foregoing reasons and those stated in Defendants' opening brief, the Court should dismiss the Complaints with prejudice.

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Respectfully submitted,

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