**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,[1] *Debtors*.	Chapter 11 Case No. 15-01145 (ABG) (Jointly Administered)
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*, *Plaintiffs*, *v.* BOKF, N.A., *et al*. *Defendants.*	Chapter 11 Adversary Case No. 15-00149

NOTICE OF FILING

To: Service List:

PLEASE TAKE NOTICE that on February 16, 2016, we caused to be filed the *WSFS And BOKF Request For Judicial Notice*, a copy of which is hereby served upon you.

[1] A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

Dated: February 16, 2016

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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WSFS AND BOKF REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201, Defendants Wilmington Savings Fund Society, FSB, and BOKF, N.A. (collectively, the "Trustees") request that the Court take judicial notice of the following facts and documents, each of which occurred after the trial in this matter, in addition to the facts and documents included in the Court's "*Notice Of Intent To Take Judicial Notice Of Certain Facts*" (ECF 198) (the "Notice"):

a. Subordinated Notes Guarantee Action. (i) The "*Complaint For Declaratory Relief And Damages*," filed on October 20, 2015, by Wilmington Trust National Association (the "Subordinated Notes Trustee") against Caesars Entertainment Corporation ("CEC"), *Wilmington Trust, N.A. v. Caesars Entertainment Corporation*, No. 15-cv-08280-SAS (S.D.N.Y. Oct. 20, 2015) (ECF 1) (copy, without exhibits, attached as Exhibit 1), in which the Subordinated Notes Trustee seeks to enforce CEC's

[2] A complete list of the Debtors may be obtained at https://cases.primeclerk.com/CEOC.

guarantee of over $500 million of debt of Caesars Entertainment Operating Company; and (ii) the Debtors have not requested an injunction or stay of that action.

b. CEC Motion In Limine Regarding Proposed TIA Amendment. The "*Memorandum Of Law Of Caesars Entertainment Corporation In Support Of Its Motion In Limine*," dated February 5, 2016, and filed in *BOKF, N.A. v. Caesars Entertainment Corporation*, 15-cv-01561-SAS (S.D.N.Y.) ("*BOKF*") (ECF 93) (copy attached as Exhibit 2), in which CEC seeks to "exclude evidence concerning efforts by CEC, its affiliates, and/or agents to amend Section 316(b) of the" Trust Indenture Act. *Id.* at 13.

c. Status Conference In *BOKF* Action. The transcript of the hearing held on February 8, 2016, before District Judge Scheindlin in the *BOKF* action, a copy of which is attached as Exhibit 3.

d. Mediation Motion. The "*Debtors' Motion For The Entry Of An Order Approving Appointment Of A Mediator To Mediate Issues Related To A Chapter 11 Plan Of Reorganization*," dated February 3, 2016 (Main Case ECF 3195).

e. Exclusivity Motion. The "*Debtors' Motion To Further Extend Their Exclusive Periods To File A Chapter 11 Plan And Solicit Acceptances Thereof*," dated February 3, 2016 (Main Case ECF 3197).

f. First-Lien Bank Response To Exclusivity Motion. The "*Preliminary Response Of Ad Hoc Committee Of First Lien Bank Lenders To Debtors' Motion To Further Extend Their Exclusive Periods To File A Chapter 11 Plan And Solicit Acceptances Thereof*" (Main Case ECF 3223).

g. Examiner Report. The Examiner's Report (when filed).

Argument

1. The Court may take judicial notice of facts "not subject to reasonable dispute" because they are either: "(1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." *Id.* R. 201(c).

2. Documents in the public record are among facts of which the Court may take judicial notice. *See, e.g.*, *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper.").

3. The Court frequently has recognized its power to take judicial notice of both proceedings in this case and related proceedings in other courts. *See* June 4, 2015 Tr. 255:7-9 ("I certainly can take judicial notice of documents in my own cases, and, for that matter, in related cases."). To that end, on February 9, 2016, the Court filed the Notice, by which the Court announced its intention to take judicial notice of a number of facts arising from documents filed in the main bankruptcy case, in other adversary proceedings pending before the Court, and in the guarantee actions pending before the United States District Court for the Southern District of New York. (ECF 198).

4. The additional facts for which the Trustees request judicial notice are easily ascertainable from public filings, the accuracy of which cannot reasonably be questioned, and are of the same or similar nature as the facts covered by the Court's Notice. The Trustees therefore submit that judicial notice of such additional facts is appropriate.

WHEREFORE, the Trustees hereby request this Court take judicial notice of the facts set forth above.

Dated: February 16, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILMINGTON TRUST, NATIONAL ASSOCIATION, solely in its capacity as successor Indenture Trustee for the 10.75% Notes due 2016, Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, Defendant.	CIVIL ACTION NO.:_______ COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES DEMAND FOR TRIAL BY JURY

Wilmington Trust, National Association ("Wilmington Trust"), as Successor Indenture Trustee (the "10.75% Notes Trustee" or "Plaintiff") for the 10.75% Senior Unsecured Notes due 2016 (the "10.75% Notes") issued by Caesars Entertainment Operating Company, Inc. ("CEOC"), and guaranteed by certain wholly-owned domestic subsidiaries of CEOC (the "Subsidiary Guarantors"), under that certain indenture dated February 1, 2008 (the "Indenture"), by and through its undersigned counsel, hereby brings this complaint (the "Complaint") against Caesars Entertainment Corporation ("Defendant" or "CEC" and, together with its direct and indirect subsidiaries, "Caesars") to enforce CEC's guarantee of CEOC's debt obligations with respect to the 10.75% Notes (the "Parent Guarantee"), and in support thereof respectfully alleges as follows:

NATURE OF THE ACTION

1. This action concerns CEC's reported attempts to avoid its written guarantee of the repayment of over $51 million of unpaid interest in respect of the 10.75% Notes. Plaintiff, for the benefit of holders of the 10.75% Notes (the "10.75% Noteholders"), seeks various forms of relief to recover that unpaid interest. Primarily, Plaintiff seeks to establish that CEC's actions in

purporting to release itself from any obligations under its Parent Guarantee are void for violations of both the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa to 77bbbb (the "TIA") and the Indenture. Plaintiff further seeks a money judgment against CEC in an amount equal to the $51,447,565.00 of outstanding interest that is due and payable but remains unpaid as of the date hereof under the Indenture (the "Missed Interest Payments").

2. Defendant CEC is the parent holding company of CEOC, the issuer of the 10.75% Notes. As of the date hereof, the 10.75% Notes remain outstanding in the principal amount of approximately $479 million plus interest, fees, and other charges due under the Indenture. Under that Indenture, and as a material payment term thereof, CEC unconditionally and irrevocably guaranteed payment of all principal and interest owing on the 10.75% Notes as and when due. See Indenture § 11.01(a) (Exhibit 1).

3. As discussed in greater detail herein, during the past several years, CEC used its position as CEOC's controlling shareholder to cause CEOC to transfer many of its most valuable assets to affiliated entities controlled by CEC and its shareholder sponsors (the "Distressed Transfers"). Upon information and belief, those Distressed Transfers have rendered CEOC insolvent and unable to pay principal and interest in respect of the 10.75% Notes as and when due. From an economic standpoint, because the Indenture remained valid and in effect, the 10.75% Notes Trustee had direct claims for principal and interest against both CEOC, as issuer transferor, and CEC, as guarantor transferee. The 10.75% Noteholders, therefore, were not disadvantaged by the Distressed Transfers between co-obligors on the debt under the Indenture.

4. Directly following the closing of the last of the Distressed Transfers, however, CEC purported to release its guarantee of CEOC's funded debt obligations, including its Parent

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Guarantee of the 10.75% Notes. That purported release had the effect of leaving the 10.75% Noteholders without recourse to payment from CEC, the transferee, then in control of CEOC's former assets. Indeed, in other litigation against CEC pending in this Court, CEC has continued to assert that all of its guarantees of CEOC's funded debt obligations have been released and that it has no obligation to pay any of CEOC's debts at this time. See, e.g., BOKF Action (as defined below), *Memorandum of Law of Caesars Entertainment Corporation In Opposition To BOKF, N.A.'s Motion for Partial Summary Judgment* (July 24, 2015) [Dkt. No. 44], at 8-11. Specifically, with respect to its Parent Guarantee of the 10.75% Notes, CEC has asserted that the Parent Guarantee was released in conjunction with CEC's sale of 68.1 shares of CEOC equity in May 2014 (or 5% of all CEOC's shares). Relying on this sale, on May 6, 2014, CEC first publicly announced its view that none of its obligations under the Parent Guarantee were in effect. At all times since, CEC has not withdrawn its disavowal and has thus been in material breach of the Indenture.

5. CEC's breach of the Indenture now has a direct monetary impact on the 10.75% Notes Trustee. The reverse form of note attached to the Indenture makes clear that the Missed Interest Payments were due and payable on February 1 and August 1, 2015. See Form Of Reverse Side Of Initial Cash Pay Note for the 10.75% Senior Cash Pay Notes Due 2016 (Exhibit 2). Those amounts have not been paid by either CEOC or CEC. As a guarantor of payment, not collection, CEC is directly obligated to make the Missed Interest Payments to the 10.75% Notes Trustee. See Indenture §§ 11.01(a), 11.01(d).

6. Together, the Distressed Transfers and the purported release of the Parent Guarantee constitute an out-of-court restructuring or reorganization of CEC's and CEOC's debt

obligations with the overall effect of impairing the right of the 10.75% Notes Trustee to receive payment of principal and interest on the 10.75% Notes as and when due.

7. Neither the 10.75% Notes Trustee, nor any 10.75% Noteholder in its capacity as such, has ever consented to any out-of-court restructuring of principal or interest due under the Indenture (including the Parent Guarantee therein) or the proposed reorganization scheme. As a result, the out-of-court restructuring or reorganization scheme and its purported release of the Parent Guarantee constitute a violation of the TIA, rendering the purported Parent Guarantee strip null and void.

8. Independent of the TIA–related claims, and as alleged in greater detail herein, the terms of the Indenture did not, in fact, permit CEC's release of the Parent Guarantee pursuant to the Five Percent Sale (as defined below). As set forth below, CEC's purported bases for releasing itself had no business rationale, served only as a pretense to support CEC's disavowal of the Parent Guarantee, and were not sufficient to release the Parent Guarantee under the express terms of the Indenture. Having failed to disclaim that ineffective release and disavowal within the ten business days provided for in the Indenture, CEC materially breached the Indenture. Regardless of any supervening event, including any subsequent purported releases of the Parent Guarantee, CEC has remained in material breach of the Indenture since May 16, 2014.

THE PARTIES

9. Plaintiff is a national banking association with a principal place of business at Rodney Square North, 1100 North Market Street Wilmington, Delaware 19890. Plaintiff is the successor indenture trustee under the Indenture dated as of February 1, 2008 among CEOC, as issuer, CEC as guarantor, and U.S. Bank National Association, as trustee. On January 23, 2015, Plaintiff was appointed successor trustee to U.S. Bank National Association pursuant to the

terms of the Indenture. Plaintiff currently serves as the 10.75% Notes Trustee under the Indenture.

10. Defendant CEC (formerly known as Harrah's Entertainment, Inc.) is a Delaware corporation with its principal place of business at One Caesars Palace Drive, Las Vegas, Nevada 89109. CEC and CEOC, together with their affiliates, provide casino entertainment services, operating primarily under the Caesars, Harrah's, and Horseshoe brand names. CEC is publicly traded and is the world's most geographically diversified casino-entertainment provider. CEC, through its economic interests in CEOC, Caesars Entertainment Resort Properties, LLC ("CERP"), and Caesars Growth Partners, LLC ("CGP"), owns, operates, or manages 50 gaming and resort properties in 14 states and five countries, covering 3 million square feet of gaming space, 39,000 hotel rooms, 45 million customer loyalty program participants, and 68,000 employees.

JURISDICTION & VENUE

11. This Court has subject matter jurisdiction pursuant to Section 322(b) of the TIA, 15 U.S.C. § 77vvv(b), Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), and 28 U.S.C. §§ 1331, 1367, and 2201. This controversy arises under federal law, involves claims herein so related to the 10.75% Notes Trustee's federal claims that they form part of the same case or controversy, and the 10.75% Notes Trustee seeks a declaration of the rights and other legal relations of the 10.75% Notes Trustee and the 10.75% Noteholders, whether or not further relief is or could be sought.

12. This Court has personal jurisdiction over CEC under New York's long arm jurisdiction statute, N.Y.C.P.L.R. § 302(a), because it has, at least, minimum contacts with the State of New York. Among other things, CEC transacts business within the State, regularly does or solicits business, or engages in other persistent courses of conduct in the State, expects or

should reasonably expect its acts to have consequences in the State, and/or derives substantial revenue from interstate or international commerce.

13. Venue is proper in this District pursuant to Section 322(b) of the TIA, 15 U.S.C. § 77vvv(b), Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), and 28 U.S.C. §§ 1391(b) and (c). Among other things, CEC is found or transacts business in this District, the offer or sale of debt at issue took place at least in part in this District, and/or a substantial part of the events giving rise to the violations of law complained of herein occurred at least in part in this District.

14. Section 13.09 of the Indenture provides that the provisions of the Indenture and securities "shall be governed by, and construed in accordance with, the laws of the State of New York . . . ." Indenture § 13.09.

15. CEC is a party to several actions pending in this District, which cases are related to this Complaint and raise similar issues regarding CEC's conduct, including: (i) the MeehanCombs Action; (ii) the BOKF Action; and (iii) the UMB Action (each as defined below).

FACTUAL ALLEGATIONS

Background on CEC and CEOC Obligations

16. On January 28, 2008, CEC was acquired by affiliates of Apollo Global Management, LLC ("Apollo") and TPG Capital, LP ("TPG" and, together with Apollo, the "Sponsors") in an all-cash transaction (the "LBO"), valued at approximately $30.7 billion. As a result of this transaction, the issued and outstanding shares of non-voting common stock and non-voting preferred stock of CEC became owned by entities affiliated with the Sponsors and certain co-investors and members of management, and the issued and outstanding shares of voting common stock of CEC became owned by Hamlet Holdings LLC, which is itself owned by certain individuals affiliated with the Sponsors. See CEC Current Report (Form 10-K) (filed

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Mar. 9, 2010), at 3. The Sponsors and other investors contributed approximately $6.1 billion, and the remainder was funded through the issuance of approximately $24 billion in debt. See In re Caesars Entm't Operating Co., Inc., No. 15-01145 (ABG) (Bankr. N.D. Ill.), *Memorandum in Support of Chapter 11 Petitions* (Jan. 15, 2015) [Dkt. No. 4] (the "Mem. in Support"), at 4.

17. Currently, CEOC has the following outstanding funded debt obligations, totaling approximately $18.4 billion in principal amount:

- four tranches of first lien bank debt totaling approximately $5.35 billion (the "First Lien Bank Debt");
- three series of outstanding first lien notes totaling approximately $6.35 billion (the "First Lien Notes");
- three series of outstanding second lien notes totaling approximately $5.24 billion (the "Second Lien Notes" and, together with the First Lien Notes, the "Secured Notes");
- the 10.75% Notes, totaling approximately $479 million; and
- two series of senior unsecured notes totaling approximately $530 million (the "Legacy Notes").

The 10.75% Notes

18. In connection with the LBO, on February 1, 2008, CEOC issued $4,932,417,000 aggregate principal amount of 10.75% Notes and $1,402,583,000 aggregate principal amount of 10.75%/11.5% senior toggle notes, which mature on February 1, 2016 and February 1, 2018, respectively, pursuant to the Indenture, between CEOC, the Subsidiary Guarantors party thereto, and U.S. Bank National Association, as original trustee. The 10.75% Notes are guaranteed by CEC and each Subsidiary Guarantor.

19. Pursuant to Section 11.01(a) of the Indenture, CEC "jointly and severally, irrevocably and unconditionally" guaranteed CEOC's obligations under the Indenture. Indenture § 11.01(a). Further, Section 11.01(g) of the Indenture provides that the Parent Guarantee "shall

remain in full force and effect until payment in full of all the Guaranteed Obligations." Id. § 11.01(g).

Relevant Provisions From Indenture

20. The Indenture provides certain essential protections to the 10.75% Noteholders. One such provision—mandated by Section 316(b) of the TIA, 15 U.S.C. § 77ppp(b)—is the unconditional right of noteholders to receive payment of principal and interest. Section 316(b) of the TIA states:

> 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) (emphasis added). The protections of Section 316(b) of the TIA are incorporated into Section 6.07 of the Indenture:

> Notwithstanding any other provision of this Indenture, *the right of any holder to receive payment of principal of and interest on the Notes held by such holder*, on or after the respective due dates expressed or provided for in the Notes, *or to bring 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.*

Indenture § 6.07 (emphasis added).

21. Section 6.07 of the Indenture, therefore, provides an unconditional right to receive principal and interest on the 10.75% Notes, which right shall not be impaired without the consent of each holder.

22. To the extent the Indenture and the TIA conflict, the Indenture provides that the relevant provisions of the TIA, including Section 316, control:

> If and to the extent that any provision of this Indenture limits, qualifies or conflicts with the duties imposed by, or with another provision (an 'incorporated

> provision') included in this Indenture by operation of, Sections 310 to 318 of the TIA, inclusive, such imposed duties or incorporated provision shall control.

Id. § 13.01.

23. Together, Sections 6.07 and 13.01 of the Indenture ensure that "a company cannot – outside of bankruptcy – alter its obligation to pay bonds without the consent of each bondholder." MeehanCombs Action, *Opinion and Order* (Jan. 15, 2015) [Dkt. No. 28], at 10-11 (Scheindlin, J.). Rather, "if, in taking actions allowed under the release provision of the Indenture, CEC violated noteholders' rights to payment under section 316(b), then the release was invalid as a matter of law." BOKF Action, *Opinion and Order* (Aug. 27, 2015) [Dkt. No. 54] (the "TIA Decision"), at 22 (Scheindlin, J.).

24. The Indenture provides that CEC is a primary obligor that has "jointly and severally, irrevocably and unconditionally" guaranteed the payment of interest under the Indenture when due and payable:

> Each Note Guarantor hereby jointly and severally, irrevocably and unconditionally guarantees on a unsecured senior basis, as a primary obligor and not merely as a surety . . . the full and punctual payment when due, whether at Stated Maturity, by acceleration, by redemption or otherwise, of all obligations of the Issuer under this Indenture (including obligations to the Trustee) and the Notes, whether for payment of principal of, premium, if any, or interest on in respect of the Notes. . . .

Indenture § 11.01(a).

25. Section 11.01(h) of the Indenture contemplates that "each Note Guarantor hereby promises to and shall . . . forthwith pay . . . an amount equal to the sum of (i) the unpaid principal amount of such Guaranteed Obligations, (ii) accrued and unpaid interest on such Guaranteed Obligations . . . and (iii) all other monetary obligations of the Issuer to the holders and the Trustee." Id. § 11.01(h).

26. The Indenture clarifies that this guarantee is a guarantee of payment, not collection, meaning that, as set forth in 11.01(d), payment is owing when due:

> Each Note Guarantor further agrees that its Note Guarantee herein constitutes a guarantee of payment, performance and compliance when due (and not a guarantee of collection) and waives any right to require that any resort be had by any holder or the Trustee to any security held for payment of the Guaranteed Obligations.

Id. § 11.01(d).

27. The Indenture establishes that it is an Event of Default if CEC denies or disaffirms the Parent Guarantee, and this remains uncured for 10 days:

> An 'Event of Default' occurs with respect to a series of Notes if: . . . [T]he Parent Note Guarantor . . . denies or disaffirms its obligations under this Indenture or any Note Guarantee with respect to such series of Notes and such Default continues for 10 days.

Id. § 6.01(h). As discussed herein, CEC denied and disaffirmed the Parent Guarantee pursuant to the May Announcement (as defined below). Accordingly, CEC has violated Section 6.01(h) of the Indenture.

28. Further, the Indenture provides that it is an Event of Default if there is a default in any payment of interest when the same becomes due and payable and this remains uncured for 30 days:

> An 'Event of Default' occurs with respect to a series of Notes if: . . . [T]here is a default in any payment of interest (including any additional interest) on any Note of such series when the same becomes due and payable, and such default continues for a period of 30 days.

Id. § 6.01(a). Interest payments were due and payable on February 1 and August 1, 2015 and, to date, those interest payments have not been made. See Form Of Reverse Side Of Initial Cash Pay Note for the 10.75% Senior Cash Pay Notes Due 2016.

29. The Indenture does not require the 10.75% Notes Trustee to issue a demand to CEC for payment prior to bringing this action, given that CEC expressly waived any right to assert that its payment obligations under the Indenture were subject to various pre-conditions:

> (b) Each Note Guarantor waives presentation to, demand of payment from and protest to the Issuer of any of the Guaranteed Obligations and also waives notice of protest for nonpayment. Each Note Guarantor waives notice of any default under the Notes or the Guaranteed Obligations. The obligations of each Note Guarantor hereunder shall not be affected by (i) ***the failure of any holder or the Trustee to assert any claim or demand or to enforce any right or remedy against the Issuer or any other Person under this Indenture, the Notes or any other agreement or otherwise***; (ii) any extension or renewal of this Indenture, the Notes or any other agreement; (iii) any rescission, waiver, amendment or modification of any of the terms or provisions of this Indenture, the Notes or any other agreement; (iv) the release of any security held by any holder or the Trustee for the Guaranteed Obligations or any Note Guarantor; (v) the failure of any holder or Trustee to exercise any right or remedy against any other guarantor of the Guaranteed Obligations; or (vi) any change in the ownership of such Note Guarantor, except as provided in Section 11.02(b).
>
> (c) Each Note Guarantor hereby waives any right to which it may be entitled to have its obligations hereunder divided among the Note Guarantors, such that such Note Guarantor's obligations would be less than the full amount claimed. Each Note Guarantor hereby waives any right to which it may be entitled to have the assets of the Issuer first be used and depleted as payment of the Issuer's or such Note Guarantor's obligations hereunder prior to any amounts being claimed from or paid by such Note Guarantor hereunder. Each Note Guarantor hereby waives any right to which it may be entitled to require that the Issuer be sued prior to an action being initiated against such Note Guarantor.

Indenture §§ 11.01(b)-(c) (emphasis added).[1]

[1] In any event, demand for payment from CEC would be futile, as CEC already has repeatedly disavowed the guarantee and opted to litigate the question of its liability before this Court. See, e.g., MeehanCombs Action; BOKF Action; UMB Action. For this reason, CEC, in responding to UMB Bank N.A.'s ("UMB") summary judgment motion, failed to raise and did not contest UMB's failure to seek demand prior to commencement of its complaint. See UMB Action, *Complaint* (June 15, 2015) [Dkt. No. 1], at 20 ("[S]uch demand would clearly be futile in this case, as CEC has repeatedly disclaimed its Guarantee liability in its publicly disclosed securities filings."); UMB Action, *Memorandum of Law of Caesars Entertainment Corporation in Opposition to UMB Bank, N.A.'s Motion for Partial Summary Judgment* (July 24, 2015) [Dkt. No. 46].

<u>**Caesars' Restructuring and/or Reorganization Scheme**</u>

30. Immediately following the LBO, CEOC was the main operating subsidiary of CEC and owned and operated five casino resorts on the Las Vegas strip, five casinos in Atlantic City, and 17 regional casinos across the United States. CEOC also managed 20 other casino properties and owned an online gaming business, the rights to the World Series of Poker, and all of the intellectual property and data comprising Caesars' revolutionary customer loyalty program, the Total Rewards Program. The LBO, which saddled CEOC with substantial new debt obligations, occurred at the precipice of the financial crisis that began in 2008. This left CEOC over-levered and facing substantial challenges, including significant declines in revenue (particularly from CEOC's regional casinos).

31. As a result, beginning at least as early as March 2014, CEOC was likely insolvent. At that time, CEC publicly acknowledged that CEOC's cash flow from operations would be insufficient to repay CEOC's indebtedness in the long term. <u>See</u> CEC Current Report (Form 10-K) (filed Mar. 17, 2014), at 46 ("We do not expect that cash flow from operations will be sufficient to repay CEOC's indebtedness in the long-term and we will have to ultimately seek a restructuring, amendment or refinancing of our debt, or if necessary, pursue additional debt or equity offerings.").

32. Upon information and belief, to preserve the value of its equity investment in CEOC (which appeared hopelessly burdened with LBO debt), CEC, through its control of CEOC, caused CEOC to undertake a systematic process of diverting value away from CEOC's LBO creditors. This process was accomplished in two steps: (i) certain of CEOC's most valuable assets were extracted from CEOC and funneled into other CEC subsidiaries not burdened by LBO debt (<u>i.e.</u>, the Distressed Transfers) and (ii) the Parent Guarantee CEC

provided in favor of CEOC's debt was stripped. This two-step strategy, if effective, could ensure that CEC and the Sponsors would retain their equity in CEOC's most valuable assets (because they would be safely harbored at other CEC subsidiaries free of the Parent Guarantee), while at the same time insulate CEC from judicial scrutiny of its out-of-court restructuring or reorganization.

33. The Distressed Transfers included the following transfers of material assets from CEOC and its subsidiaries to CEC subsidiaries:

- <u>CIE Transaction</u>. CEOC transferred its interest in certain intellectual property to Caesars Interactive Entertainment ("<u>CIE</u>") in exchange for equity in CIE. Subsequently, CEC forced CEOC to transfer its interest in CIE to CEC which ultimately transferred the interest to CGP.

- <u>CERP Transaction</u>. The Octavius Tower at Caesars Palace ("<u>Octavius</u>") and Project LINQ were transferred from CEOC subsidiaries to CERP for less than reasonably equivalent value.

- <u>CGP Transaction</u>. Planet Hollywood Resort and Casino ("<u>Planet Hollywood</u>"), the Horseshoe Casino Baltimore ("<u>Horseshoe Baltimore</u>"), and 50% of the management fee stream for these properties were transferred from CEOC subsidiaries to CGP for less than reasonably equivalent value.

- <u>Four Properties Transactions</u>. The Linq Hotel & Casino (formerly known as The Quad Resort & Casino) (the "<u>Linq Hotel</u>"), The Cromwell, Bally's Las Vegas Hotel and Casino ("<u>Bally's Las Vegas</u>"), and Harrah's New Orleans Hotel and Casino ("<u>Harrah's New Orleans</u>") were transferred from CEOC subsidiaries to CGP for less than reasonably equivalent value.

- <u>CES Transaction</u>. CEOC granted to Caesars Entertainment Services ("<u>CES</u>") (an entity owned jointly among CEC, CEOC, and Caesars Growth Properties Holdings, LLC) an exclusive and irrevocable license in highly valuable intellectual property, including the Total Rewards Program.

CIE Transaction

34. CIE was formed in May 2009 as an indirect subsidiary of CEOC with the purpose of developing certain Caesars brands, including its online gaming platform and the World Series of Poker brand. CEOC transferred to CIE the World Series of Poker rights and related

intellectual property in exchange for equity interests valued at $15 million, though CEOC retained the right to use the intellectual property pursuant to a perpetual, royalty-free license. See Mem. in Support, at 6.

35. In 2011 (i) CIE purchased from CEOC the exclusive right to host World Series of Poker tournaments for $20.5 million in cash and (ii) CEC subsequently caused CEOC to transfer to CEC the subsidiary holding the CIE equity interests. Finally, in October 2013, CEC transferred the subsidiary holding the CIE equity interests to CGP as part of the CGP Transaction (described below). See id. CIE's stated value in October 2013 was $750 million.

CERP Transaction

36. In August 2013, CEC and the Sponsors formed CERP. On October 11, 2013, the equity interests in Octavius and Project LINQ, marquee properties of the Caesars enterprise, were transferred from CEOC to CERP. Octavius is the newest of the six hotel towers that comprise Caesars Palace. Octavius is a 23-story high-end luxury complex that features 662 guest rooms, 60 suites, and six luxury villas. CEOC spent approximately $860 million to construct Octavius and intended it to appeal to Caesars Palace VIP customers and other high net worth guests. See CEC Current Report (Form 10-K) (filed Mar. 15, 2012), at 33. Project LINQ is "a $550 million outdoor retail, dining and entertainment district on the east side of the Las Vegas Strip between the Flamingo Las Vegas and The Quad Resort and Casino" and includes the world's largest observation wheel, "The High Roller." CEC Current Report (Form 10-K) (filed Mar. 17, 2014), at 37. Project LINQ is across the street from Caesars Palace and is positioned in the midst of other Caesars properties formerly owned by CEOC. The first phase of Project LINQ opened in December 2013. See id.

37. In exchange for the ownership interests in Octavius and Project LINQ, CERP provided to CEOC $80.7 million in cash and $53 million in CEOC notes for retirement and assumed $450 million in debt. This provided a total value of less than $600 million for both properties. See Mem. in Support, at 32-33.

CGP Transaction

38. CGP was formed on October 21, 2013 as a joint venture between subsidiaries of CEC and Caesars Acquisition Company ("CAC") to acquire assets from CEOC and CEC. As stated by CEC, "CAC was formed to directly own 100% of the voting membership units in CGP LLC. CGP LLC was formed for the purpose of acquiring certain businesses and assets of Caesars Entertainment." CEC Current Report (Form 10-K) (filed Mar. 17, 2014), at 7. All of the non-voting units of CGP are owned by CEC or its subsidiaries.

39. The CGP joint venture was formed through several transactions including: (i) a rights offering of CAC common stock; (ii) the exercise of subscription rights by the Sponsors to purchase $457.8 million of CAC common stock; (iii) the use of proceeds from the rights offering by CAC to purchase 100% of the voting units of CGP; (iv) CGP's use of proceeds received from CAC to purchase from CEOC the Planet Hollywood casino property, the Baltimore Horseshoe casino property, and a 50% interest in the management fee revenues of the entities that manage those two properties; and (v) the contribution of CIE common stock from a subsidiary of CEC, along with certain notes held by the subsidiary, in exchange for all of CGP's non-voting units. Id. at 7-8.

40. Additionally, as part of CEOC's transfer of 50% of its management fees, CEOC, CGP, and CAC entered into a management services agreement (the "2013 Management Services Agreement") intended to "allow[] CAC, [CGP] and their subsidiaries to leverage Caesars'

infrastructure." CEC Current Report (Form 8-K) (filed Oct. 22, 2013), at 5. In practice, however, the 2013 Management Services Agreement operated to give CGP and CAC access to, and benefit from, the Total Rewards Program while requiring CEOC to perform certain services on behalf of CGP and CAC. In exchange, CEOC receives a "service fee." See 2013 Management Services Agreement § 5.01 (Exhibit 3).

41. Among other features, the 2013 Management Services Agreement provides that (i) CEOC has no ability to terminate the agreement (absent an event of default); (ii) CGP and CAC can unilaterally terminate the agreement on 180 days' notice; (iii) the agreement otherwise remains in effect until CGP is liquidated; and (iv) if the agreement is terminated, CEOC must provide "transition assistance" upon termination. See 2013 Management Services Agreement §§ 3.04(b), 10.01, 10.03. Upon information and belief, and in light of its one-sided nature, the 2013 Management Services Agreement was not negotiated on an arms' length basis or in good faith.

Four Properties Transactions

42. On March 1, 2014, CEC caused CEOC to enter into a transaction agreement that required CEOC's subsidiaries to sell four of its most valuable properties to CGP (the "2014 Transaction Agreement"). See Mem. in Support, at 34. The properties included the Linq Hotel, The Cromwell, Bally's Las Vegas, and Harrah's New Orleans, as well as 50% of the management fees CEOC would earn from managing each of these properties. See id. The Linq Hotel, The Cromwell, and Bally's Las Vegas are among Caesars' most valuable and newly renovated properties in Las Vegas. In fact, The Cromwell was extensively renovated, redeveloped, and only reopened in May 2014. The Linq Hotel recently underwent substantial renovation that was completed in July 2015. Bally's Las Vegas had a new tower open in the

fourth quarter of 2013. Additionally, Harrah's New Orleans is the largest casino in Louisiana and enjoys a significant share of the New Orleans gaming market.

43. The Linq Hotel, for example, is so valuable that CGP has openly acknowledged that its construction (along with Project LINQ) caused a material decline in Caesars' revenue in 2013. See CEC Current Report (Form 8-K) (filed Apr. 10, 2014), at 26. Similarly, according to CAC, CGP's increase in room revenues for the third quarter in 2014 was driven by the renovated tower at Bally's Las Vegas and the opening of The Cromwell. See CAC Quarterly Report (Form 10-Q) (filed Nov. 14, 2014), at 41.

44. CEOC received roughly $2 billion ($1.8 billion of cash and CGP's assumption of a $185 million credit facility used to renovate The Cromwell) in exchange for transferring these four properties to CGP. See Mem. in Support, at 34. This amount, however, is likely understated because (i) CEOC agreed to pay cost overruns for renovations on the Linq Hotel and certain other expenses; (ii) funds required to pay the remaining costs for The Cromwell renovation were transferred by CEOC to CGP; and (iii) the consideration does not take into account the value of these properties to the Caesars enterprise as a whole. See 2014 Transaction Agreement § 11.2(g) (Exhibit 4).

45. For example, Caesars consistently emphasizes the value that the Total Rewards Program generates by funneling customers from its regional properties to its marquee properties, such as those in Las Vegas and New Orleans. According to CEC, Total Rewards allows it to generate almost one-third more revenue than its competitors. Pursuant to the Distressed Transfers, however, many of Caesars' marquee properties were transferred from CEOC and its subsidiaries to CEC subsidiaries. As a result, while CEOC and its subsidiaries (who now own mostly regional properties) generate customers for the marquee properties, they do not share in

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revenue generated by customers at the marquee locations. Thus, as a result of the Distressed Transfers, CEOC and its subsidiaries—and their substantial creditors, including the 10.75% Notes Trustee—were not only provided with insignificant value for the properties that were transferred, but were also robbed of the increased revenue generated at those properties by operation of the Total Rewards Program.

CES Transaction

46. The 2014 Transaction Agreement also established a joint services venture, CES, that assumed control over certain of CEOC's intellectual property, including the Total Rewards Program. CES is owned, in part, by CEOC, CERP, and CGP. Moreover, CES may have been created to move the Total Rewards Program out of the reach of CEOC creditors. Upon information and belief, a CAC management call on March 27, 2014 described CES as being "bankruptcy remote" and intended to protect assets from a bankruptcy filing by one of its owners. Additionally, at a regulatory hearing in Louisiana on April 24, 2014, CAC's general counsel admitted that CES was formed at the request of CAC's special committee based on "a fear o[f] the Caesars Acquisition Company that parties might take away the Total Rewards Program from Caesars Acquisition Company, and these CEOC lenders, who -- we don't know what their intentions are." Louisiana Gaming Control Board Directors' Meeting Transcript, at 136:19-136:24 (Apr. 24, 2014) (Exhibit 5).

47. On May 20, 2014, CEOC, CERP, and CGP entered into the Omnibus License and Enterprise Services Agreement (as amended and restated, the "License Agreement"). The License Agreement provides for CEOC's grant to CES of a non-exclusive, irrevocable, world-wide, royalty free license for all intellectual property, including the Total Rewards Program. See

CAC Current Report (Form 8-K) (filed May 21, 2014), at 3. Additionally, the agreement transitions certain "enterprise-wide" corporate services to CES.

48. This arrangement gave disproportionate control over key functions to CES. This control is compounded by the fact that CES is meant to serve the interests of CERP and CGP prior to serving the interests of CEOC. See CEC Current Report (Form 8-K) (filed May 6, 2014), at Risk Factors ("In the event that our interests do not align with those of [CGP] or CERP, the interests of [CGP] or CERP may be met before ours."). Though CEOC received a 69% stake in CES for the grant of its intellectual property and other consideration, this interest cannot be sold or assigned to third parties. See License Agreement § 16.4. CEOC is also responsible for 70% of the costs attributed to CES (compared to 24.6% for CERP and 5.4% for CGP). Accordingly, this all served to move Caesars' arguably most valuable asset, the Total Rewards Program, to an entity controlled by CERP and CGP, while shifting costs onto CEOC and depriving CEOC of value to service its obligations under the Indenture.

The Purported Parent Guarantee Strip

49. On May 6, 2014, CEC announced that the Parent Guarantee was released as to CEOC's secured and unsecured debt as a result of certain transactions consisting of (i) a $1.75 billion "refinancing" of CEOC's credit facility (the "B-7 Financing") and (ii) CEC's sale of 68.1 shares, or just five percent (5%), of CEOC's common stock for the nominal sum of $6.15 million (the "Five Percent Sale"). See CEC Current Report (Form 8-K) (filed May 6, 2014), at 5-6. Subsequently, on May 30, 2014, CEC transferred another six percent (6%) of CEOC's common stock to an employee benefits plan (the "Six Percent Transfer" and, together with the B-7 Financing and the Five Percent Sale, the "May Transactions").

50. Following the Five Percent Sale (and prior to the Six Percent Transfer), CEC and CEOC publicly disclaimed the Parent Guarantee by each filing a Form 8-K (together, the "May Announcement") stating that, pursuant to the Five Percent Sale, the Parent Guarantee was automatically released as to all of CEOC's outstanding secured and unsecured notes (including the 10.75% Notes). See CEC Current Report (Form 8-K) (filed May 6, 2014), at 6 ("Upon the completion of the [Five Percent Sale], [CEC]'s guarantee of CEOC's outstanding secured and unsecured notes was automatically released."); CEOC Current Report (Form 8-K) (filed May 6, 2014) (same). CEC and CEOC provided no further indication as to why the Five Percent Sale was undertaken or how the transaction provided any value to CEC or CEOC.

51. Upon information and belief, the Five Percent Sale was an attempt to avoid payments by CEC of principal and interest under CEOC's secured and unsecured notes, including the 10.75% Notes, rather than a *bona fide* sale transaction. The investors that purchased CEOC's equity in the Five Percent Sale were reportedly holders of other debt or equity in the Caesars capital structure, including First Lien Bank Debt and/or CEC equity. Upon information and belief, the purchasing parties benefitted from termination of the Parent Guarantee because (i) holders of First Lien Bank Debt would not have to share any value to be received from CEC with the holders of CEOC's secured or unsecured notes and (ii) removal of the Parent Guarantee would create equity value for CEC shareholders.

52. Pursuant to the Indenture, the Five Percent Sale was insufficient to terminate the Parent Guarantee. The Indenture unambiguously provides that CEOC ceasing to be a wholly owned subsidiary of CEC is one of three total conditions that all must be met in order for the Parent Guarantee to be automatically released:

> (c) A Note Guarantee as to any Parent Note Guarantor shall terminate and be of no further force or effect and such Note Guarantor shall be deemed to be released from all obligations under this Article 11 upon:
>
> (i) the Issuer ceasing to be a Wholly Owned Subsidiary of Harrah's Entertainment;
>
> (ii) the Issuer's transfer of all or substantially all of its assets to, or merger with, an entity that is not a Wholly Owned Subsidiary of Harrah's Entertainment in accordance with Section 5.01 and such transferee entity assumes the Issuer's obligations under this Indenture; *and*
>
> (iii) the Issuer's exercise of its legal defeasance option or covenant defeasance option under Article 8 or if the Issuer's obligations under this Indenture are discharged in accordance with the terms of this Indenture.

Indenture § 11.02(c) (emphasis added). These conditions are conjunctive (as the conditions are connected by the word "and") and each condition, therefore, must be met in order for the Parent Guarantee to be released. All of the conditions in Section 11.02(c) were not satisfied at the time of the disavowal of the Parent Guarantee (and CEC and CEOC have not claimed otherwise). Accordingly, the Parent Guarantee could not have been released from the 10.75% Notes pursuant to this section as a result of the Five Percent Sale. Because the Parent Guarantee was not released pursuant to the Five Percent Sale, CEC's disavowal of the Parent Guarantee in the May Announcement on May 6, 2014 constituted a material default that became an Event of Default on May 16, 2014 when it remained continuing and uncured. See Indenture § 6.01(h).

53. CEOC and CEC have implicitly recognized that default. Several weeks after the Five Percent Sale, CEOC undertook the Six Percent Transfer, which transferred six percent of CEOC's common stock to an employee benefits program. As a result of this transaction, CEC reduced its holdings to 89% of CEOC's equity. Again, CEC and CEOC provided no indication that this was a *bona fide* sale transaction and, upon information and belief, the transaction was undertaken for the sole purpose of justifying CEC's prior material breach of the Indenture.

54. Following the May Transactions, on June 2, 2014, CEOC sent a notice to the 10.75% Notes Trustee (the "10.75% Subsequent Notice") and separate notices (the "Secured June Notices" and, together with the 10.75% Subsequent Notice, the "June Notices") to the indenture trustees for the Secured Notes purporting to release the Parent Guarantee in accordance with a separate Indenture provision. The June Notices also reiterated that the May Transactions caused the automatic release of the Parent Guarantee from the 10.75% Notes and the Secured Notes. In any event, both the Six Percent Transfer and the June Notices, undertaken at a time when CEC was in material breach of the Indenture, are of no force or effect.

55. CEC's scheme to remove valuable assets from CEOC and to remove the Parent Guarantee from CEOC's debt, including the 10.75% Notes, is subject to several lawsuits currently pending, including:

- Actions filed by certain holders of the Legacy Notes in the Southern District of New York, MeehanCombs Glob. Credit Opportunities Master Fund, LP v. Caesars Entm't Corp., No. 14-cv-07091 (SAS) (S.D.N.Y. 2014) and Danner v. Caesars Entm't Corp., No. 14-cv-07093 (SAS) (S.D.N.Y. 2014) (together, the "MeehanCombs Action");

- An action filed by CEC and CEOC in the Supreme Court of New York, New York County against certain holders of First Lien Notes and Second Lien Notes, Caesars Entm't Operating Co., Inc. v. Appaloosa Inv. Ltd. P'ship I, et al., Index No. 652392/2014 (N.Y. Sup. Ct. 2014);

- An action filed by the indenture trustee for the 10% Second Lien Notes in the Delaware Chancery Court, Wilmington Sav. Fund Society, FSB v. Caesars Entm't Corp., No. 10004-VCG (Del. Ch. 2014) (the "WSFS Action");

- An action filed by the trustee for the First Lien Notes in the Delaware Chancery Court, UMB Bank v. Caesars Entm't Corp., No. 10393-VCG (Del. Ch. 2014);

- An action filed by the trustee for the 12.75% Second Lien Notes in the Southern District of New York, BOKF, N.A. v. Caesars Entm't Corp., No. 1:15-cv-01561 (SAS) (S.D.N.Y. 2015) (the "BOKF Action"); and

- An action filed by the trustee for the First Lien Notes in the Southern District of New York, UMB Bank, N.A. v. Caesars Entm't Corp., No. 1:15-cv-04634 (SAS) (S.D.N.Y. 2015) (the "UMB Action").

56. The actions filed in the Southern District of New York are consolidated before Judge Shira A. Scheindlin and are proceeding with discovery. On August 27, 2015, Judge Scheindlin issued the TIA Decision, denying the plaintiffs' motion for summary judgment in the BOKF Action and UMB Action but holding that CEC's release of the Parent Guarantee would constitute a violation of the TIA to the extent it was part of an out-of-court restructuring or reorganization. See TIA Decision, at 31-32 (denying summary judgment but recognizing the need to "examin[e] the transactions as a whole to determine whether they *collectively* constitute an impermissible out-of-court reorganization in violation of the noteholders' rights under section 316(b) . . .") (emphasis in original).

COUNT I

BREACH OF INDENTURE
(Indenture § 6.01(h) – Disavowal of Parent Guarantee Pursuant to the May Announcement)

57. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 56 above, as if fully set forth herein.

58. The terms of the Indenture were at all relevant times valid and enforceable contract obligations of CEC and CEOC to the 10.75% Notes Trustee and the 10.75% Noteholders.

59. CEC provided the Parent Guarantee as a material term of the Indenture regarding the repayment of principal and interest.

60. Section 6.01(h) of the Indenture provides that an Event of Default occurs if the "Parent Note Guarantor . . . denies or disaffirms its obligations under this Indenture or any Note Guarantee with respect to such series of Notes and such Default continues for 10 days." Indenture § 6.01(h).

61. The May Announcement by CEC that the Parent Guarantee had been "automatically released" constitutes a denial or disaffirmance of obligations under the Indenture to pay principal and interest when due and such default continued for more than 10 days. An Event of Default under the Indenture has, therefore, occurred and is continuing.

62. This breach of the Indenture harmed the 10.75% Notes Trustee and the 10.75% Noteholders.

COUNT II

VIOLATIONS OF TRUST INDENTURE ACT – FIVE PERCENT SALE
(15 U.S.C. §§ 77aaa, *et seq.*)

63. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 62 above, as if fully set forth herein.

64. The terms of the Indenture were at all relevant times valid and enforceable contract obligations of CEC and CEOC to the 10.75% Notes Trustee and the 10.75% Noteholders. The Indenture specifically provides that CEC has a direct obligation to pay principal and interest when due under the Indenture.

65. Upon information and belief, at the time of the Missed Interest Payments, CEOC, as issuer of the 10.75% Notes, was insolvent.

66. The TIA governs corporate debt securities offered for sale that have been qualified by the Securities and Exchange Commission, including the 10.75% Notes. In order to qualify under the TIA, the relevant indenture must contain specific provisions designed to protect the bondholder. See 15 U.S.C. § 77ggg.

67. Section 316(b) of the TIA requires that the 10.75% Notes Trustee and the 10.75% Noteholders have an absolute right to receive payment of the principal of and interest under the Indenture and further provides that the 10.75% Notes Trustee's and the 10.75% Noteholders'

right to institute suit for the enforcement of any such payment shall not be impaired or affected without their consent. See id. § 77ppp(b).

68. Contrary to this statutory mandate, CEC has impaired and affected the 10.75% Noteholders' right to receive payment of principal and interest when due without the consent of each 10.75% Noteholder. CEC's attempt to terminate or release the Parent Guarantee pursuant to the Five Percent Sale was part of a broader restructuring or reorganization scheme to protect CEC and its affiliates' interests at the expense of the 10.75% Notes Trustee and the 10.75% Noteholders, as well as other CEOC creditors. This out-of-court restructuring or reorganization, which impaired the 10.75% Noteholders' rights to obtain payment of interest on the 10.75% Notes without the consent of each 10.75% Noteholder, directly violated the provisions of the TIA.

69. The purported elimination of the Parent Guarantee prospectively impairs the rights of the 10.75% Notes Trustee and the 10.75% Noteholders to receive payment of principal and interest on and when due.

70. Accordingly, the 10.75% Notes Trustee seeks a declaration that the Five Percent Sale did not effectuate a release of the Parent Guarantee as such action violated the TIA.

71. As a result of CEC's violations of the TIA, the 10.75% Notes Trustee and the 10.75% Noteholders have suffered actual and prospective damages in an amount to be determined at trial.

COUNT III

VIOLATIONS OF TRUST INDENTURE ACT – 10.75% SUBSEQUENT NOTICE
(15 U.S.C. §§ 77aaa, *et seq.*)

72. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 71 above, as if fully set forth herein.

73. The terms of the Indenture were at all relevant times valid and enforceable contract obligations of CEC and CEOC to the 10.75% Notes Trustee and the 10.75% Noteholders. The Indenture specifically provides that CEC has a direct obligation to pay principal and interest when due under the Indenture.

74. Upon information and belief, at the time of the Missed Interest Payments, CEOC, as issuer of the 10.75% Notes, was insolvent.

75. The TIA governs corporate debt securities offered for sale that have been qualified by the Securities and Exchange Commission, including the 10.75% Notes. In order to qualify under the TIA, the relevant indenture must contain specific provisions designed to protect the bondholder. See 15 U.S.C. § 77ggg.

76. Section 316(b) of the TIA requires that the 10.75% Notes Trustee and the 10.75% Noteholders have an absolute right to receive payment of the principal of and interest under the Indenture and further provides that the 10.75% Notes Trustee's and the 10.75% Noteholders' right to institute suit for the enforcement of any such payment shall not be impaired or affected without their consent. See id. § 77ppp(b).

77. Contrary to this statutory mandate, CEC has impaired and affected the 10.75% Noteholders' right to receive payment of principal and interest when due without the consent of each 10.75% Noteholder. CEC's attempt to terminate or release the Parent Guarantee pursuant to the June Notices, including the 10.75% Subsequent Notice, was part of a broader restructuring or reorganization scheme to protect CEC and its affiliates' interests at the expense of the 10.75% Notes Trustee and the 10.75% Noteholders, as well as other CEOC creditors. This out-of-court restructuring or reorganization, which impaired the 10.75% Noteholders' rights to obtain

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payment of interest on the 10.75% Notes pursuant to the Parent Guarantee without the consent of each 10.75% Noteholder, directly violated the provisions of the TIA.

78. The purported elimination of the Parent Guarantee prospectively impairs the rights of the 10.75% Notes Trustee and the 10.75% Noteholders to receive payment of principal and interest on and when due.

79. Accordingly, the 10.75% Notes Trustee seeks a declaration that the 10.75% Subsequent Notice did not effectuate a release of the Parent Guarantee as such action violated the TIA.

80. As a result of CEC's violations of the TIA, the 10.75% Notes Trustee and the 10.75% Noteholders have suffered actual and prospective damages in an amount to be determined at trial.

COUNT IV

DECLARATORY JUDGMENT
(Affirming Parent Guarantee)

81. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 80 above, as if fully set forth herein.

82. An actual controversy exists between the 10.75% Notes Trustee and CEC regarding the validity and enforceability of the Parent Guarantee of the 10.75% Notes under the Indenture.

83. The Parent Guarantee remains valid and binding on CEC because:

- The 10.75% Notes Trustee's and the 10.75% Noteholders' right to receive payment of principal and interest from CEC cannot be impaired pursuant to an out-of-court restructuring or reorganization without the consent of each 10.75% Noteholder, regardless of whether purportedly permitted by the Indenture;

- CEOC still constitutes a wholly owned subsidiary of CEC notwithstanding the Five Percent Sale and the Six Percent Transfer and, therefore, the Parent

Guarantee has not been released pursuant to Sections 11.02(c)(i)-(iii) of the Indenture;

- Even if CEOC were no longer a wholly owned subsidiary of CEC, the other conditions in Sections 11.02(c)(ii) and (c)(iii) of the Indenture have not been met as required to release the Parent Guarantee;

- Even if CEOC were no longer a wholly owned subsidiary of CEC, the Five Percent Sale and Six Percent Transfer were part of an out-of-court restructuring or reorganization scheme to release the Parent Guarantee to the detriment of the 10.75% Notes Trustee and the 10.75% Noteholders; and

- The 10.75% Subsequent Notice failed to affect CEC's earlier material, uncured breach of the Indenture as a result of its disavowal of the Parent Guarantee.

84. CEC's attempts to restructure its liability on the Parent Guarantee violate Section 316(b) of the TIA, because the right to receive payment of principal and interest under the Indenture cannot be impaired without the consent of each 10.75% Noteholder. To the extent the TIA conflicts with any provision in the Indenture (such as the provisions governing the release of the Parent Guarantee), pursuant to Section 13.01 of the Indenture, the TIA controls. For this reason, the release of the Parent Guarantee under Section 11.02 of the Indenture—to the extent valid, which it is not—would conflict with Section 316(b) of the TIA. Section 11.02 of the Indenture is, therefore, void and unenforceable in this context.

85. Accordingly, the 10.75% Notes Trustee is entitled to a declaration that the Parent Guarantee under the Indenture has not been terminated or released and remains valid, binding, and enforceable against CEC pursuant to the express provisions of the Indenture.

COUNT V

BREACH OF INDENTURE
(Indenture § 6.07 – Deprivation of Unconditional Right to Receive Principal and Interest Payments Without Consent of Each Affected Noteholder)

86. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 85 above, as if fully set forth herein.

87. The terms of the Indenture were at all relevant times valid and enforceable contract obligations of CEC and CEOC to the 10.75% Notes Trustee and the 10.75% Noteholders.

88. Under Section 6.07 of the Indenture (mandated by Section 316(b) of the TIA), the 10.75% Notes Trustee and the 10.75% Noteholders are entitled to the unconditional right to receive principal and interest payments from CEOC and CEC. Such right shall not be impaired without the consent of each individual holder of the 10.75% Notes.

89. CEC has impaired the rights of the 10.75% Notes Trustee and the 10.75% Noteholders to the payment of principal and interest, including the Missed Interest Payments, under the 10.75% Notes, without securing the consent of each 10.75% Noteholder.

90. Accordingly, the 10.75% Notes Trustee is entitled to the declaratory relief pleaded in Count IV above.

91. In addition, as a result of CEC's breach, the 10.75% Notes Trustee and the 10.75% Noteholders have suffered substantial actual and prospective damages in an amount to be determined at trial, including, but not limited to, all outstanding accrued, unpaid, and capitalized interest on the 10.75% Notes and all other amounts and obligations due and owing under the Indenture.

92. Pursuant to Section 11.01(j) of the Indenture, this Court should additionally award attorneys' fees and expenses incurred by the 10.75% Notes Trustee and any 10.75% Noteholder in enforcing the Parent Guarantee.

COUNT VI

BREACH OF INDENTURE
(Indenture § 6.01(a) – Failure to Pay Interest When Due)

93. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 92 above, as if fully set forth herein.

94. The terms of the Indenture were at all relevant times valid and enforceable contract obligations of CEC and CEOC to the 10.75% Notes Trustee and the 10.75% Noteholders.

95. CEC provided the Parent Guarantee under the Indenture.

96. Section 6.01(a) of the Indenture provides that an Event of Default occurs if "there is a default in any payment of interest (including any additional interest) on any Note of such series when the same becomes due and payable, and such default continues for a period of 30 days." Indenture § 6.01(a).

97. Section 11.01(a) of the Indenture provides that CEC is a primary obligor that has "jointly and severally, irrevocably and unconditionally" guaranteed the payment of interest under the Indenture when due and payable. Id. § 11.01(a).

98. Interest payments in the aggregate amount of $51,447,565.00 were due and payable under the Indenture on February 1 and August 1, 2015. See Form Of Reverse Side Of Initial Cash Pay Note for the 10.75% Senior Cash Pay Notes Due 2016. CEC has failed to pay the outstanding interest that was due and payable on February 1 and August 1, 2015. An Event of Default under Section 6.01(a) of the Indenture has, therefore, occurred and is continuing and CEC has not fulfilled its obligations under the Indenture.

99. Section 6.08 of the Indenture provides that if an Event of Default specified in Section 6.01(a) occurs and is continuing, the 10.75% Notes Trustee may recover a judgment in

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its own name and as trustee of an express trust against the Issuer or any other obligor on the 10.75% Notes for the whole amount then due and owing (together with interest on overdue principal and any unpaid interest at the rate provided for in the Notes) and amounts owed under the compensation and indemnity provisions of Section 7.07 of the Indenture.

100. This breach of the Indenture harmed the 10.75% Notes Trustee and the 10.75% Noteholders.

COUNT VII

BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

101. The 10.75% Notes Trustee restates and realleges the allegations contained in paragraphs 1 through 100 above, as if fully set forth herein.

102. New York law implies in every contract a covenant requiring each party to deal fairly and in good faith with the other and to refrain from taking any actions that would deprive the other party of the benefit of their respective bargain.

103. The Indenture is a contract governed by New York law.

104. CEC has breached its implied duty of good faith and fair dealing by engaging in the transactions as a means to avoid the Parent Guarantee. CEC's actions have deprived the 10.75% Notes Trustee and the 10.75% Noteholders of their reasonable expectations of receiving the benefits to which they are entitled under the Indenture.

105. Additionally, CEC breached the covenant of good faith and fair dealing by engaging in a course of conduct outside of performance of the contract, including entry into agreements and amendments that sought to accomplish certain outcomes CEC would never have been able to achieve had it followed the terms of the 10.75% Notes, the Indenture, and the provisions of the TIA.

106. This breach of the Indenture harmed the 10.75% Notes Trustee and the 10.75% Noteholders.

PRAYER FOR RELIEF

WHEREFORE, by reason of the foregoing, Plaintiff requests that the Court enter an order:

a) Awarding Plaintiff damages in an amount to be determined at trial;

b) Declaring that the Parent Guarantee is in full force and effect;

c) Awarding pre- and post-judgment interest calculated pursuant to the terms of the 10.75% Notes, the Indenture, and the Parent Guarantee;

d) Awarding Plaintiff its attorneys' fees, costs, and expenses incurred in bringing this action; and

e) Awarding such other and further relief as the Court may deem proper.

Plaintiff hereby demands a trial by jury.

Dated: October 20, 2015
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOKF, N.A., Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, Defendant.	No. 1:15-cv-01561-SAS
UMB BANK, N.A., Plaintiff, v. CAESARS ENTERTAINMENT CORPORATION, Defendant.	No. 1:15-cv-04634-SAS Oral Argument Requested

MEMORANDUM OF LAW OF CAESARS ENTERTAINMENT CORPORATION IN SUPPORT OF ITS MOTION *IN LIMINE*

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Defendant Caesars Entertainment Corporation ("CEC") respectfully submits this memorandum of law in support of its motion *in limine*.

PRELIMINARY STATEMENT

While the facts of this case are complex, the parties' dispute focuses on a single, relatively narrow question: whether, as CEC contends, three transactions in May and August 2014 resulted in the termination of its guarantee of certain notes issued by its subsidiary Caesars Entertainment Operating Company ("CEOC"). Plaintiffs, the trustees representing holders of the Notes, allege that the transactions did not terminate the guarantees under the governing note Indentures, and that the transactions were part of a reorganization of CEOC and therefore, under this Court's prior rulings, impaired the noteholders' rights in violation of Section 316(b) of the Trust Indenture Act (the "TIA"). Plaintiffs also assert claims for breach of the duty of good faith and fair dealing and tortious interference with contract arising from the same 2014 transactions. CEC contends that the three 2014 transactions terminated the guarantees under provisions of the Indentures that expressly permit the guarantees to be terminated in specified circumstances—including those that occurred here—and that, far from being a reorganization under the TIA, the transactions, which involved only a fraction of CEOC's outstanding debt, were designed to *avoid* a reorganization and served other purposes entirely unrelated to a reorganization.

Thus, the issues to be resolved by the jury focus on the correct interpretation of the governing Indentures, the legal effect under the Indentures of the May and August 2014 transactions, and whether or not those 2014 transactions were part of a reorganization of CEOC. Evidence related to other transactions referred to in the Complaints or other matters described further below is irrelevant to the issues in dispute, and should be excluded under Rule 402 of the Federal Rules of Evidence. And any marginal relevance is far outweighed by the potential for prejudice, confusion, and waste of time, and such evidence should also be excluded under Rule

403. In contrast, evidence concerning the understanding of the parties to the Indentures and the broader market about the guarantee release provisions of the Indentures is directly relevant and admissible. For these and other reasons discussed below, CEC's motion *in limine* should be granted.

First, the Court should exclude evidence concerning the 2008 leveraged buyout of CEC and other transactions referenced in the Complaints involving CEC or CEOC unrelated to the challenged 2014 transactions (we refer to the 2014 transactions at issue as the "Challenged Transactions"). The transactions in question are defined and described more fully below as the "Property Transactions." Those other transactions have no bearing on the meaning of the Indentures or whether the Guarantee was properly and validly released. While the Complaints include allegations relating to these transactions and contend that those transactions were unfair to CEOC and its creditors, even plaintiffs' purported expert witness on reorganizations does not cite or rely on them. And permitting plaintiffs to introduce evidence on these transactions—which will require CEC to demonstrate that those transactions were fair to CEOC and its creditors and were negotiated and approved through scrupulous and fair processes—creates the potential for prejudice, confusion, and waste of the jury's and the Court's time.

Second, the Court should exclude evidence about the finances and operations of CEC's private equity sponsors, Apollo Global Management, LLC ("Apollo") and TPG Capital, LP ("TPG"), and their affiliates, unless that evidence directly concerns the operation of CEC or CEOC. Courts routinely exclude evidence because it can be used to create unfair prejudice by suggesting that the wealth and financial condition of a defendant should be relevant to their determination. That principle should apply with even more force to the shareholders of a defendant.

Third, the Court should exclude evidence concerning any purported reliance on the Guarantee by holders of the Notes. It would be fundamentally unfair to allow the plaintiffs to present evidence about purported reliance by noteholders on the Guarantee when CEC was prevented from obtaining discovery from noteholders on the very same issue.

Fourth, the Court should exclude evidence concerning efforts to persuade Congress to enact legislation amending Section 316(b) of the TIA. Recent press reports have indicated that CEC was involved in efforts in late 2015, so far unsuccessful, to enact legislation clarifying the scope of Section 316(b). But evidence of such efforts is wholly irrelevant to the issues in dispute, and allowing such evidence to be presented to the jury would be grossly prejudicial. Courts have repeatedly excluded evidence of a party's lobbying efforts on the ground that allowing such evidence to be considered would improperly chill the exercise of the First Amendment right to petition the government.

Finally, CEC asks the Court to permit the introduction of evidence concerning the intent of the Guarantee and the market's understanding of its purpose and operation, including whether it could be unilaterally released by CEC. CEC recognizes that the Court previously held that the language of the Guarantee was unambiguous and that evidence on this subject was inadmissible. Since then, however, in its most recent ruling denying plaintiffs' motions for summary judgment, the Court has stated that a key interpretive dispute among the parties concerning the language in the Indentures (the so-called "and/or" issue) may require resort to extrinsic evidence. Evidence of the drafters' intent and the market's understanding would directly inform that inquiry. The parties'—including CEC's—intent and the market's understanding of the Guarantee should also be admissible so that CEC can properly defend against the plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and intentional interference with contractual relations—each of which requires assessing CEC's own understanding of its obligations.

LEGAL STANDARD

Evidence is admissible only if (among other things) it is relevant to the parties' claims and defenses. Fed. R. Evid. 402. Relevant evidence is that which has a "tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Conversely, "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402.

Moreover, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "'Unfair prejudice' . . . means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 Advisory Committee's Note. The Court has "broad discretion" to balance the probative value of evidence against unfair prejudice. *United States* v. *Robinson*, 560 F.2d 507, 514 (2d Cir. 1977).

ARGUMENT

I. Evidence Relating to the "Property Transactions" Should Be Excluded

In these actions, plaintiffs raise various claims relating entirely to the release of CEC's Guarantee on the Notes. Specifically, plaintiffs challenge three transactions involving CEC or CEOC that each independently released CEC's Guarantee on the Notes—the May 2014 sale of 5% of CEOC's stock to three unaffiliated investors; the May 2014 grant of 6% of CEOC's stock to various employees through an employee benefit plan; and the August 2014 transaction in which holders of certain other CEOC notes consented to the removal of CEC's guarantee on those notes.

In their Complaints, however, plaintiffs address numerous transactions involving CEC and/or CEOC other than the Challenged Transactions. These transactions (collectively, the "Property Transactions") include:

- the January 2008 leveraged buyout transaction in which CEC was acquired by affiliates of Apollo, TPG, and certain co-investors (the "LBO");
- the Fall 2013 transaction in which CEOC sold its interests in two properties, Octavius Tower and Project Linq, to Caesars Entertainment Resort Properties (the "CERP Transaction");
- the Fall 2013 transaction in which CEOC sold its interests in two other properties, the Planet Hollywood Resort & Casino in Las Vegas and the Horseshoe Baltimore, as well as 50% of the management fees for those properties, to Caesars Growth Partners, LLC (the "Growth Transaction");
- transactions involving Caesars Interactive Entertainment ("CIE"), such as the May 2009 transaction in which CEOC sold to CIE certain interests in intellectual property rights related to the World Series of Poker; the September 2011 transaction in which CEOC sold to CIE its separate rights to host World Series of Poker tournaments; and the Fall 2013 contribution of CEC's ownership interests in CIE to CGP, completed as part of the Growth Transaction (collectively, "the CIE Transactions");
- the Spring 2014 transaction in which CEOC sold its interests in four properties—the Cromwell in Las Vegas, the Quad in Las Vegas, Bally's Las Vegas, and Harrah's New Orleans—as well as 50% of the management fees from those properties, to CGP (the "Four Properties Transaction"); and
- the Spring 2014 joint venture, Caesars Enterprise Services, LLC ("CES"), that would provide back office, procurement, payroll, and similar services across the Caesars enterprise and that would maintain ownership of certain intellectual property contributed by CEOC (the "CES Transaction").

As to the LBO, UMB in particular alleges that it was "orchestrated" by Apollo and TPG and "structured to saddle CEOC . . . with the majority of the debt" resulting from the acquisition. (*UMB* Compl. ¶ 2.) With respect to the remainder of the transactions, plaintiffs contend that they were undertaken as part of an alleged scheme on the part of CEC to transfer assets away from CEOC and out of the reach of creditors, including through sales in which CEOC purportedly did not receive fair value for the assets sold. BOKF alleges, for instance, that

CEC "systematically stripped valuable assets from CEOC" through these transactions because CEC failed to ensure that CEOC received "fair value" for the asset transfers or otherwise "precluded" CEOC and its creditors from recognizing any value from the relevant transactions. (*See BOKF* Compl. ¶¶ 66, 78, 85, 90, 103, 112.) UMB likewise alleges that these transactions constituted a "scheme" on the part of CEC "to deprive CEOC of nearly all of its most profitable and attractive assets," and improperly "dissipate[d] CEOC's intellectual property assets" to the detriment of its creditors. (*UMB* Compl. ¶ 4.) These allegations are wrong, but in any event, evidence concerning these transactions is irrelevant to plaintiffs' claims and likely to confuse the issues at trial, and therefore should be excluded.

To start, evidence concerning the Property Transactions does not relate to any fact of consequence for any claim in these actions. Under this Court's prior rulings, the claims alleging a violation of Section 316(b) of the TIA, for example, turn on whether the Challenged Transactions constitute an "out-of-court debt reorganization," which depends on facts such as whether "the [Challenged Transactions] involve[d] the restatement of assets and liabilities," whether "CEOC h[e]ld talks with creditors in order to make arrangements for maintaining repayments," and whether the Challenged Transactions were "attempt[s] to extend the life of a company facing bankruptcy through special arrangements and restructuring." *BOKF, N.A.* v. *Caesars Entm't Corp.*, Nos. 15-cv-1561 (SAS), 15-cv-4634 (SAS) ("*BOKF I*"), 2015 WL 5076785, at *11 (S.D.N.Y. Aug. 27, 2015). The issues underlying plaintiffs' contract claims, meanwhile, include whether the Challenged Transactions effected a release of the Guarantee under the indentures governing the Notes (and other notes included within those Indentures' definition of "Existing Notes"); whether such a release impaired noteholders' rights under the governing Indentures to receive payment of principal and interest; and whether CEC disaffirmed any obligations under the Indentures or the Guarantee. To prevail on their common law claims for breach of the implied duty of good faith and fair dealing, plaintiffs would need to prove that CEC's alleged attempts to "disclaim" and "disavow" the Guarantee had "the effect of destroying or injuring the right of [the noteholders] to receive the fruits of the [indentures]." *Dalton* v. *Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (N.Y. 1995) (internal quotation marks and citation omitted). Finally, BOKF's claim for intentional interference with contractual relations requires BOKF to show that CEC procured a breach of its indenture by CEOC "without justification." *See Gianelli* v. *St. Vincent's Hosp. & Med. Ctr.*, 553 N.Y.S.2d 677, 681 (1st Dep't 1990). Plaintiffs can offer no plausible account of how evidence concerning the Property Transactions could logically impact the determination of any of these issues, and such evidence should therefore be excluded as irrelevant.

This evidence would have to be excluded, in fact, even if it did have some marginal relevance, because any probative value would be outweighed by a danger of confusing the issues at trial. *See* Fed. R. Evid. 403. As set forth above, the claims in these actions require determining whether the Challenged Transactions properly released the Guarantee. Evidence concerning the Property Transactions, however, could confuse the jury as to which transactions may have released the Guarantee, cause it to take into consideration the financial and operational merits of the Property Transactions in evaluating the merits of the parties' positions, and lead to a verdict based on the Property Transactions' effects on the value of the noteholders' investments rather than one based on the Challenged Transactions' effects on their statutory and common law rights.

Allowing plaintiffs to address the Property Transactions at trial and to argue, as they do in their Complaints, that these transactions were not completed on terms that were fair to

CEOC and its creditors would also require CEC to present extensive evidence to rebut those allegations in order to avoid any risk of unfair prejudice. For example, were plaintiffs to argue at trial that the Four Properties Transaction was not equitable to CEOC and its creditors, CEC would be entitled to introduce evidence showing CEOC's financial situation at the time of the transaction as well as evidence showing that the transaction was appropriate in light of those financial circumstances. CEC would additionally be entitled to put on evidence concerning the process that was implemented to ensure that the prices paid for the properties in this transaction and other asset sales were fair, including evidence relating to the appointment of committees of independent directors, the retention of independent financial and legal advisors to assist these committees, and, in the case of the financial advisors, to provide written fairness opinions, and extensive due diligence and arm's length negotiations.

Bringing these kinds of complex matters into the trial would confuse the issues even further and cause considerable delay, and would in no way assist the jury in determining whether the noteholders' rights to receive principal and interest on the Notes had been impaired, either under the TIA or the governing Indentures. Plaintiffs' own purported expert on the subject of debt reorganizations, Martha Kopacz, in fact, does not factor the Property Transactions at all into her analysis of whether CEOC was engaged in a reorganization when the Guarantee was terminated, such that there could have been an impairment of noteholders' rights to payment. Exposure to evidence pertaining to the Property Transactions could impact the jury's determination only by causing it to render a decision on an "improper basis," and, under Federal Rule of Evidence 403, such evidence must be excluded. *See United States* v. *Paredes*, 176 F. Supp. 2d 179, 182 (S.D.N.Y. 2001) (internal quotation marks and citations omitted).

II. **The Court Should Exclude Evidence Concerning Apollo and TPG's Finances and Operations Unless Directly Relevant to CEC or CEOC**

The Court should exclude all evidence regarding the financial condition of Apollo and TPG as well as all evidence concerning Apollo and TPG in transactions not involving CEOC, CEC, or related entities. This evidence is irrelevant to plaintiffs' claims, which (as noted above) focus on contract interpretation and a limited set of transactions in 2014, all of which involve CEC and CEOC. Such evidence would also be prejudicial to CEC and would waste the jury's time and so should be barred under Rule 403.

First, this evidence is not relevant to plaintiffs' contract claims, which involve the interpretation of contract language regarding CEC's Guarantee. To the extent that parol evidence is admissible to determine the interpretation of these terms, Apollo and TPG are not parties to the contract, and transactions that do not involve CEC and CEOC would not be probative. Such evidence is also irrelevant to plaintiffs' TIA claims, which, under this Court's prior rulings, turn on whether the Challenged Transactions constituted an out-of-court reorganization of CEOC's debt. Transactions that did not involve CEOC or CEC are irrelevant to this issue. Likewise, Apollo and TPG's financial condition are irrelevant to CEOC's financial condition in 2014. *See, e.g.*, *Bank Brussels Lambert* v. *Credit Lyonnais (Suisse) S.A.*, No. 93 CIV. 6876 (LMM), 2001 WL 99516, at *1 (S.D.N.Y. Feb. 6, 2001) (granting motion *in limine* to preclude evidence of defendant's net worth or financial condition based on lack of relevance); *see also Weiss* v. *La Suisse, Societe D'Assurances Sur La Vie*, 293 F. Supp. 2d 397, 414 (S.D.N.Y. 2003) (granting motion *in limine* to exclude evidence about defendant's corporate parent except to the extent necessary to understand certain reinsurance agreements); *Kidder, Peabody & Co.* v. *IAG Int'l Acceptance Grp., N.V.*, No. 94 CIV. 4725 (CSH), 1999 WL 11553, at *6 (S.D.N.Y. Jan. 13, 1999) (noting that defendant's evidentiary objections are well founded because "many of the[] documents deal with transactions other than those in suit, occurring at times outside the pertinent period referred to").

Second, this evidence should be excluded because any probative value would be substantially outweighed by the danger of unfair prejudice. Evidence concerning the business practices of Apollo and TPG should be excluded because of the danger of unfair prejudice that might result from plaintiffs attempting to tar them based on unrelated transactions. *See, e.g.*, *Union Carbide Corp.* v. *Montell N.V.*, 28 F. Supp. 2d 833, 839 (S.D.N.Y. 1998) (excluding evidence where the real purpose appeared to be accusing the other party of "shady business practices and bad motives"); *De Beers LV Trademark Ltd.* v. *DeBeers Diamond Syndicate, Inc.*, 440 F. Supp. 2d 249, 271 (S.D.N.Y. 2006) (noting that a prior ruling granted a motion *in limine* to exclude evidence of party's controversial business practices).

Evidence regarding the financial condition of Apollo and TPG should also be excluded because of "the danger of unfair prejudice that might result from jurors basing their conclusion on the relative wealth of the parties." *Loussier* v. *Universal Music Grp., Inc.*, No. 02 CIV. 2447(KMW), 2005 WL 5644421, at *2 (S.D.N.Y. July 14, 2005) (granting motion *in limine* to exclude evidence of corporate defendants' wealth, financial condition, unrelated revenues, and size during the liability phase of the trial); *see also Velez* v. *Novartis Pharm. Corp.*, No. 04 CIV. 9194 (CM), 2010 WL 11043081, at *6 (S.D.N.Y. Feb. 25, 2010) (excluding evidence of defendant's financial condition or size until after a decision by the Court regarding whether to submit the issue of punitive damages to the jury); *Campbell* v. *Consol. Rail Corp.*, No. 1:05-CV-1501 (GTS/GJD), 2008 WL 7087159, at *1 (N.D.N.Y. Dec. 30, 2008) (granting defendants' motion *in limine* to exclude any reference to the relative financial condition of defendant or plaintiff). Indeed, courts have held that the introduction of such evidence to the jury would constitute grounds for a new trial. *See Koufakis* v. *Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) ("Remarks such as these, which can be taken as suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial"). That is particularly so where, as here, such evidence could misleadingly be used to suggest that the noteholders represented by the plaintiff trustees are ordinary individuals rather than hedge funds and other investment professionals.

Finally, evidence regarding unrelated transactions and the financial condition of parties other than the defendants would be confusing and waste the jury's time. Allowing plaintiffs to introduce evidence of unrelated transactions would unnecessarily expand the scope of an already complex trial, distracting the jury from the transactions that CEC contends released the Guarantee. *See, e.g., Fed. Hous. Fin. Agency* v. *Nomura Holding Am., Inc.*, No. 11 cv 6201 (DLC), 2015 WL 685153, at *1, *6-*7 (S.D.N.Y. Feb. 18, 2015) (granting motion *in limine* to exclude evidence that related solely to unrelated business activities because the "probative value [wa]s so minimal as to be substantially outweighed by the undue burden and waste of time that would accompany its admission"); *Park W. Radiology* v. *CareCore Nat. LLC*, 675 F. Supp. 2d 314, 325 (S.D.N.Y. 2009) (granting motion *in limine* to preclude evidence related to conduct by certain non-parties because "any probative value of this evidence is substantially outweighed by the possible confusion of the issues").

III. The Court Should Exclude Evidence Purporting to Show that Holders of the Notes Relied on the Guarantee

Any evidence that the plaintiffs may seek to introduce to the effect that any of the holders of the Notes actually relied on the Guarantee in purchasing and holding the Notes should be excluded because CEC was prevented from acquiring discovery that would have permitted it to test any such contention.

As the Court is aware, CEC issued subpoenas seeking documents and depositions from various holders of the Notes on topics relating to the Guarantee, including as to whether the holders believed the Guarantee provided meaningful credit support for the Notes. (*See* Decl. of Philippe Adler, *BOKF* Dkt. No. 43.) Following pre-motion letters on a motion to quash those subpoenas filed by five holders, CEC submitted a truncated document subpoena that maintained a request for documents on this subject (Subpoena at 8, *UMB* Dkt. No. 41-1); the Court subsequently directed the holders to collect responsive documents but to await producing them until the Court ruled on the plaintiffs' then-pending motions for partial summary judgment on their TIA claims (Order, *UMB* Dkt. No. 54). In opposing those summary judgment motions, CEC argued that they should be denied because (among other reasons) CEC had been prevented from obtaining discovery on whether the holders believed the Guarantee provided genuine credit support. (*See* CEC Opp. to BOKF Mot. for Summ. J. at 34, *BOKF* Dkt. No. 44.) In its opinion denying those motions, the Court denied CEC's request for discovery regarding whether the holders believed the Guarantee provided genuine credit support, stating that "the parties' subjective intent or understanding of the Guarantee is irrelevant and inadmissible." *BOKF I*, 2015 WL 5076785, at *12.

It is well-established that a party that was denied the opportunity to conduct discovery on an issue would be unfairly prejudiced if the opposing party were permitted to present relevant evidence on that issue at trial. *See, e.g.*, *Design Strategy, Inc.* v. *Davis*, 469 F.3d 284, 295, 296-97 (2d Cir. 2006) (affirming exclusion of evidence regarding lost profits theory of damages that was first introduced shortly before trial because "prejudice to the defendants in having to prepare for this evidence would have been severe, as discovery would have had to be reopened to determine whether [plaintiff's] calculations were proper"); *Faulkner* v. *Arista*

Records LLC, 46 F. Supp. 3d 365, 379 (S.D.N.Y. 2014) ("The introduction of additional expert testimony, after the close of expert discovery would unduly prejudice Defendants who have not been awarded the opportunity to prepare a rebuttal report or depose [the expert] regarding her opinions."); *24/7 Records, Inc.* v. *Sony Music Entm't, Inc.*, 566 F. Supp. 2d 305, 318 (S.D.N.Y. 2008) (excluding reliance on damages theory asserted after discovery because defendants were "depriv[ed] ... of a meaningful opportunity to conduct discovery as to this damages theory"). The same principles of fairness should be applied here.

IV. The Court Should Exclude Evidence Concerning <u>Potential Revisions to Section 316(b) of the TIA</u>

The Court should exclude evidence concerning efforts by CEC, its affiliates, and/or its agents to amend Section 316(b) of the TIA to clarify that impairment of the right to payment requires a reduction in principal or interest rate or extension of maturity for three independent reasons: (1) this evidence is irrelevant to the mid-2014 conduct at issue in these cases, and the introduction of this evidence would serve only to elicit a misleading, distracting, and emotional response by the jury; (2) permitting the introduction of evidence on this subject would chill CEC's First Amendment right to petition the government; and (3) the evidence should be excluded under Rule 407 because the bar against evidence on "subsequent remedial measures" prohibits plaintiffs from asking the jury to draw the inference that CEC *must* have violated the TIA because it may have taken subsequent steps that might have made any TIA liability it faced less likely to occur.

A. The Introduction of this Evidence is Irrelevant and Unfairly Prejudicial

The fact that CEC, its affiliates, or its agents may have advocated for an amendment to the TIA after the filing of these actions is irrelevant to the question the jury must decide: whether one or more of the Challenged Transactions properly released the Guarantee.

Any advocacy would have taken place long *after* the events which form the basis of plaintiffs' claim. They are therefore irrelevant—any efforts to clarify the law, by definition, are of no consequence in determining the outcome of this suit. *See Arlio* v. *Lively*, 474 F.3d 46, 52 (2d Cir. 2007) (if evidence "does not tend to prove a *material* fact, it is irrelevant") (emphasis added).

Further, evidence of any efforts to clarify Section 316(b) is, under Rule 403, far more prejudicial than probative, because it invites the jury to draw the misleading inference that CEC's conduct with respect to releasing the Guarantee was improper, or worse, that CEC must have violated the TIA. Such an inference could distract and confuse the jury, and elicit an emotional response, causing them to base their decision on something other than the material evidence in the case. *See Weit* v. *Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 641 F.2d 457, 467 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (affirming exclusion of evidence of defendants' lobbying activities where such evidence "poses a serious problem of confusion of issues" and "the threat of prejudice . . . is considerable"); *Egbert* v. *Nissan N. Am.*, No. 2:04-CV-00551 (PGC), 2006 WL 6503320, at *11 (D. Utah Mar. 1, 2006) ("The court will preclude the plaintiffs from referring to any lobbying of NHTSA—under Rule 403, such evidence is confusing, a waste of time, and prejudicial.").

B. The *Noerr-Pennington* Doctrine and Rule 403 Preclude the Introduction of Evidence Concerning Protected Legislative Activity

"Lobbying for proposed legislation is quintessential First Amendment-protected activity, and this protection extends to corporations." *In re Johns-Manville Corp.*, 32 B.R. 728, 733 n.7 (S.D.N.Y. 1983); *Hamilton* v. *Accu-tek*, 935 F. Supp. 1307, 1321 (E.D.N.Y. 1996) (same). The *Noerr-Pennington* doctrine is founded on this connection between one's right to petition his or her government and the First Amendment's free speech guarantee. *Hamilton*, 935

F. Supp. at 1316-17 ("The [*Noerr-Pennington*] doctrine developed in large part to protect the First Amendment right to petition government.").

Under the *Noerr-Pennington* doctrine, genuine attempts to influence the passage or enforcement of laws are immunized from antitrust liability, regardless of any anticompetitive purpose or effect. *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965). Although its roots are in antitrust law, the doctrine has since been "extended by analogy to protect petitioning activity challenged under other federal statutes," *Hamilton*, 935 F. Supp. at 1317, and is today understood "as an application of the first amendment's speech and petitioning clauses," *New W., L.P.* v. *Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (citations omitted).

The doctrine has also been given evidentiary force through Rule 403. *See United Mine Workers*, 381 U.S. at 670 n.3 (noting that it is "within the province of the trial judge to admit" evidence of efforts to influence public officials, "if he deemed it *probative and not unduly prejudicial*") (emphasis added). In the context of Rule 403, "evidence which by its very nature chills the exercise of First Amendment Rights is properly viewed as presumptively prejudicial[,]" and should therefore be excluded. *United States Football League* v. *National Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986) (internal citation omitted); *see also Feminist Women's Health Ctr.* v. *Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) ("Admissibility . . . should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights.").

Accordingly, courts have found that the *Noerr-Pennington* doctrine and Rule 403 warrant the exclusion of evidence of a party's efforts to petition governmental entities for legislative purposes. *See, e.g.*, *Feminist Women's Health Ctr.*, 586 F.2d at 543 n.7 (declining to admit evidence of advocacy efforts where any "evidentiary value to the plaintiff is far outweighed by the defendants' first amendment interests"); *United States Football League*, 634 F. Supp. at 1181 (excluding evidence of conduct "clearly embraced by *Noerr-Pennington* should be the rule rather than the exception"); *see also NAACP* v. *A.A. Arms Inc.*, Nos. 99 CV 3999, 99 CV 7037 (JBW), 2003 WL 2003767, at *1 (E.D.N.Y. Apr. 9, 2003) (on motion *in limine*, excluding evidence of "lobbying by defendants"). Exclusion on these grounds is warranted here.

C. Evidence of Any Efforts to Clarify Section 316(b) of the TIA is Also Inadmissible Pursuant to Rule 407

The Court should also exclude this evidence under Rule 407, which generally prohibits the admission of "subsequent remedial measure" evidence to prove "culpable conduct." Fed. R. Evid. 407. Although frequently encountered in the context of negligence or personal injury actions, the Rule has been applied in other circumstances where, as here, a party may seek to introduce evidence of subsequent steps that, if taken, would have made the alleged harm "less likely to occur." *See, e.g., Malone* v. *Microdyne Corp.*, 26 F.3d 471, 480 (4th Cir. 1994) (affirming Rule 407 exclusion of statements in company's SEC filings concerning return and credit rights where "jurors likely would view its disclosure of rights of return as proof of culpable conduct, akin to a landlord's fixing a stairway after being sued by an injured tenant"); *Ford* v. *Schmidt*, 577 F.2d 408, 410-11 (7th Cir. 1978) (in Section 1983 action, proof of new prison mail regulation promulgated subsequent to the delay of inmate's mail was properly excluded under Rule 407); *see also Mobileye, Inc.* v. *Picitup Corp.*, 928 F. Supp. 2d 759, 776 n.15 (S.D.N.Y. 2013) (in false advertising case, declining, under Rule 407, to consider evidence that defendants had "removed . . . challenged statements from its website" as a "tacit admission" that the statements were false).

Here, evidence that, subsequent to its efforts to release the Guarantee, CEC, its affiliates, or its agents may have urged Congress to amend the TIA is inadmissible pursuant to Rule 407. The only purpose such evidence could conceivably serve is to invite the jury to infer, impermissibly, that CEC is culpable—*i.e.*, that it undertook those steps *because* it violated the very provision of the TIA that it sought to amend. That, however, is precisely what Rule 407 was designed to prevent. *See Holick* v. *Cellular Sales of New York, LLC,* 2014 WL 4771719, at *3 (N.D.N.Y. Sept. 24, 2014) ("Rule 407 embraces the universal practice by American courts of excluding evidence of subsequent remedial measure as an admission of fault."). Consequently, even if relevant and not precluded by the *Noerr-Pennington* doctrine and Rule 403, any purported evidence of efforts by CEC to amend Section 316(b) should be excluded pursuant to Rule 407.

V. The Court Should Permit the Introduction of Evidence Concerning the Purpose of the Guarantee and the Mechanisms by which the Guarantee Could be Released

CEC also seeks to introduce evidence at trial concerning the understanding of the parties, noteholders, and the market regarding the purpose of the Guarantee and that it could be unilaterally released at any time by CEC and/or CEOC. That evidence would include, among other things, testimony on behalf of CEC concerning the reason why the Guarantee was included in the Indentures, third-party analyst reports whose work indicates that the market understood that the Guarantee could be released at any time, and expert testimony concerning the use of guarantees in other debt offerings for the same purpose as CEC's Guarantee—to facilitate financial reporting on the part of the issuer. For the reasons below, this evidence is directly relevant to CEC's defense against plaintiffs' claims.

A. The Evidence is Admissible to Clarify Any Ambiguity Concerning Whether Section 12.02(c)(i)-(iii) of the Indentures Should be Read Disjunctively

As the Court is aware, the parties dispute whether the release provisions in Section 12.02(c)(i)-(iii) of the Indentures should be read conjunctively or disjunctively. As CEC explained in opposing the plaintiffs' motions for summary judgment on this issue, the provisions are unambiguously disjunctive: That reading is the only natural one—and one that is required by New York law requiring contracts to be read fairly and reasonably, and in a manner that does not lead to a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties. (*See* CEC Opp. to Pls. Mot. for Summ. J. at 11-18, *BOKF* Dkt. No. 64.) Nevertheless, in denying the plaintiffs' motions (because they could not prevail on their contract claims even if this issue had been resolved in their favor), the Court recognized that "whether 'and' is a conjunctive or disjunctive term—and similarly whether 'or' is conjunctive or disjunctive—may well depend on the context and usage in a particular contract." *BOKF, N.A.* v. *Caesars Entm't Corp.* ("*BOKF II*"), Nos. 15-cv-1561 (SAS), 15-cv-4634 (SAS), 2016 WL 67728, at *2 n.5 (S.D.N.Y. Jan. 5, 2016).

The "context and usage" of "and" in the Indentures is directly borne out by evidence that would show that the Guarantee was included in the Indentures to comply with the financial reporting requirements of Rule 3-10 of Regulation S-X (which permitted CEOC to avoid having to file separate audited financial statements so long as the Guarantee was in place) and that the market understood that the Guarantee could be unilaterally released by CEC, including through the sale of CEOC stock. CEC should be permitted to introduce this evidence to demonstrate to the jury that the only reasonable construction of Section 12.02(c)(i)-(iii) that is consistent with the parties' reasonable expectations is disjunctive—in particular, that the Guarantee was released in May 2014 pursuant to Section 12.02(c)(i) of the Indentures once

CEOC's stock was no longer 100% owned by CEC because a release under those circumstances was consistent with CEC's reliance on Regulation S-X and the market's understanding. *See, e.g.*, *JA Apparel Corp.* v. *Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) (where "contract language creates ambiguity, extrinsic evidence as to the parties' intent may properly be considered"); *SR Int'l Bus. Ins. Co.* v. *World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006) (even "a party's uncommunicated subjective intent" may be admissible, among other things, to "shed light on the state of [contract] negotiations and . . . that party's objective actions").

B. The Evidence Is Relevant to Plaintiffs' Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing and BOKF's Claim for Intentional Interference with Contractual Relations

The evidence is also relevant to CEC's defense against the plaintiffs' claims for breach of the implied duty of good faith and fair dealing, which assert (among other things) that CEC improperly "disclaim[ed]" or "disavow[ed]" the Guarantee by participating in transactions that resulted in its release. (*BOKF* Compl. ¶¶ 216-224; *UMB* Compl. ¶¶ 77-79.) UMB, for instance, alleges that the "Guarantee was essential to the consideration received by the First Lien Noteholders in agreeing to extend credit under the First Lien Indentures" (*UMB* Compl. ¶ 47), and that CEC's release of that Guarantee has "effectively rob[bed] the Noteholders of the benefit of their bargain" (*id.* ¶ 10), while BOKF alleged that the Guarantee was "a critical element of the debt issuance and an important consideration from the outset" (*BOKF* Compl. ¶ 1).

The evidence that CEC seeks to introduce will show that, contrary to the contentions of BOKF and UMB, CEC believed and the market understood that the Guarantee could be released through the unilateral action of CEC—and, at a minimum, that CEC was not acting in bad faith. Courts adjudicating claims for breach of the implied duty of good faith and fair dealing look to the reasonable expectations of the contracting parties. *See Cross & Cross Props., Ltd.* v. *Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir. 1989) ("The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract."). Thus, such evidence—in particular, an understanding that CEC could act unilaterally to release the Guarantee—should be admitted to allow CEC to show that it did not breach an implied duty of good faith and fair dealing by participating in transactions that had the effect of releasing the Guarantee. *See id.* (considering testimony to shed light on the "context within which that contract was formed"); *Riddell Sports, Inc.* v. *Brooks*, No. 92 Civ. 7851 (JGK), 1997 WL 148818, at *2 (S.D.N.Y. Mar. 27, 1997) (looking to parties' expectations at time of contract formation and holding that a reasonable jury could find defendant violated the implied covenant of good faith where his actions were "inconsistent with the intent of the parties") (citations omitted); *Carvel Corp.* v. *Baker*, 79 F. Supp. 2d 53, 62 (D. Conn. 1997) (applying New York law) (relying on extrinsic evidence to ascertain parties' expectations and finding an issue of material fact as to whether there was a breach of the implied covenant of good faith and fair dealing).

For similar reasons, the evidence is relevant to CEC's defense against BOKF's claim that CEC intentionally interfered with the contract between the original trustee, the BOKF noteholders, and CEOC—alleging, in particular, that "CEC knowingly and deliberately caused CEOC to breach its obligations to the" noteholders and that "CEC acted with malice and bad faith." (*BOKF* Compl. ¶ 214.) Evidence concerning the purpose of the Guarantee and the unilateral mechanisms through which it could be released is directly relevant to addressing whatever evidence BOKF intends to offer that would purport to show—as BOKF must—that CEC acted with "malice" or in a manner that was "fraudulent or illegal." *MDC Corp., Inc.* v. *John J. Harland Co.*, 228 F. Supp. 2d 387, 397 (S.D.N.Y. 2002).

C. The Evidence is Relevant to Plaintiffs' TIA Claims

In adjudicating the first set of motions for summary judgment brought by BOKF and UMB—concerning their TIA claims—the Court concluded that "the parties' subjective intent or understanding of the Guarantee is irrelevant and inadmissible in the face of unambiguous contractual language." *BOKF I*, 2015 WL 5076785, at *12. Because this ruling was made on the basis of submissions concerning only the plaintiffs' TIA claims, we respectfully submit that it should not preclude admission of the evidence for the reasons discussed above.

We also respectfully ask the Court to reconsider its conclusion in the context of the TIA claims as well: Because the purpose of the Guarantee was to facilitate financial reporting, the Guarantee was not intended to, and did not, create an inviolate, unalterable right for noteholders to receive payment under the Indentures. It was designed to be releasable. Accordingly, the holders' right to receive payment could not have been "impaired" where, as here, the Guarantee was released or terminated in a manner fully consistent with the market's expectations and the terms of the governing Indentures. (*See* CEC Opp. to BOKF Mot. for Summ. J. at 28-29, *BOKF* Dkt. No. 44.)

Finally, there is no inconsistency between precluding the plaintiffs from introducing any evidence concerning purported reliance on the Guarantee (*see supra* Point III) while permitting CEC to introduce evidence concerning the understanding of the parties, noteholders, and the market on the purpose of the Guarantee and the mechanisms by which it could be released. CEC was prevented from obtaining discovery concerning the noteholders' reliance on the Guarantee, but nothing prevented the plaintiffs from pursuing in discovery why the Guarantee was included in the Indentures and whether it could be easily terminated without the consent of any of the holders—indeed, CEC's witnesses were questioned extensively in depositions on precisely that subject, the plaintiffs have provided an expert report that purports to address the matter, and the plaintiffs will in no way be hampered in attempting to test and/or respond to CEC's position at trial.

CONCLUSION

For the reasons set forth above, the Court should grant CEC's motion *in limine*.

Dated: New York, New York
February 5, 2016

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In The Matter Of:

BOKF, N.A., et al., v.

Caesars Entertainment

February 8, 2016

Southern District Court Reporters

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Min-U-Script® with Word Index

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

BOKF, N.A., et al.,

Plaintiffs,

v.

14 Cv. 7091 (SAS)
15 Cv. 1561 (SAS)
15 Cv. 4634 (SAS)

Caesars Entertainment Corporation,

Defendants.

------------------------------x

New York, N.Y.
February 8, 2016
2:00 a.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

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THE COURT: I've received a fair number of letters in the last week or two on two issues that I'm here to address today. One is CEC's motion to strike two rebuttal expert reports. There's a January 27th letter from Mr. Adler, a January 29th response from Mr. Crichlow, and a February 3rd reply from Mr. Adler.

The second topic is CEC's proposed motion for partial summary judgment. The moving preconference letter is February 2nd from Mr. Adler, February 5th from Mr. Silfen in response, which is a joint letter from BOKF and UMB, as I should have said so was Mr. Crichlow's, and a February 7th reply letter from Mr. Seiler of the same firm as Mr. Adler. Those are the two subjects that we're here to discuss.

I think it's always helpful for me to describe my initial reactions to the letters first so we know whether you've got an uphill, even, or downhill battle on the two topics. I'll take the rebuttal expert issue first.

It's hard for me to see what they're rebutting, frankly, if the defendants' experts did not opine on the subject they claim to be rebutting. While I haven't reviewed the report cover to cover, you did submit certain excerpts.

My initial reaction is that these are not rebuttal reports, these are, in essence, affirmative expert reports that take on a new topic, and if that is an accurate perception, I cannot allow it at this late date.

If they're new opinions, then defendant would say, well, okay, if you're going to allow the plaintiff to put in opinions on that, we will have experts who will have a different opinion on that, and for all I know, the plaintiff will then say we want a rebuttal to what defendant just put in, and we start a late and additional round of expert reports.

In addition, I do not think an expert should tell the Court what a statute means. That's my job. I've never let an expert tell me what the law is. Not that I'm so good at it, but it's my job, and I do my job as best I can. I don't rely on other people outside the Court to tell me what a statute means. So that's another problem with these rebuttal experts.

Of course, these are very knowledgable and prominent people, one of whom I know, respect greatly, but that isn't the point. I don't see it as rebuttal, and I don't see it as an appropriate subject.

That said, one of the defendants' experts, just by the by, worries me. That is expert Gadsden who is prepared to testify that it wouldn't be commercially reasonable to require the satisfaction of all of the three clauses of Section 12.02(c)(1) through (3), and that the release of the Guarantee should not be understood as an apparent right and assured payment on the notes.

The problem with that expert testimony is I think I've already ruled on this issue on August 27th of 2015 when I said

that, "The language of the Guarantee is clear, unequivocal, and unambiguous and, therefore, must be enforced according to its terms." And I went on to say, and I'm quoting from the opinion at star 7, "The indenture states that CEC irrevocably and unconditionally guarantees the full and punctual payment when due. Nothing in the remaining language of Section 12.01(a) casts any ambiguity upon the clear language indicating that the Guarantee is indeed one that provides a promise of full payment in the event that CEOC was unable to fulfill its payment obligations. Further, there is no indication from any other section of the indenture that the Guarantee was put in place merely to facilitate regulatory filings. Thus, the plain language of the Guarantee section indicates that it provided credit support," and I went on to state at the next page, star 8, that, "Extrinsic evidence on this topic would be improper."

So although it's not the immediate subject of the motion in limine, while we're talking about experts, I don't think I'm going to let Gadsden tell me the purpose of putting in the Guarantee, which is extrinsic evidence. That's the first one.

Now turning to the second topic, which is CEC's proposed motion for partial summary judgment.

On this one, I think the plaintiffs have the better of the argument, meaning this motion is very late. Fact discovery closed four months ago. And while one could technically argue that it complies with Rule 56, which says, "Within 30 days of the close of discovery, that because expert discovery is ongoing, you're still timely," I don't believe it for a minute. The fact is fact, discovery closed four months ago, and nothing the experts say has anything to do with the argument that a good faith claim or the interference claim should be dismissed.

You knew all about that from the time of the pleadings last, whatever it was, March and June. You've known about that for a long time. You could have moved for summary judgment at any time.

You say, "The pleadings themselves show that it's all based on the Guarantee language and not on some broader scheme," but you chose to wait until, what is it, five weeks before trial. It takes more than five weeks to brief a motion, and it takes time to decide a motion. It's improper now. It's late.

If you argue when your turn comes you have an absolute right under the rule to make this motion, I'll listen to you, probably let you make it, but I'm going to reserve decision. I'm going to reserve it right through the close of the plaintiffs' case when you're going to make a motion anyway to dismiss those two claims. I'll put the two motions together and I'll give you a ruling then. But there's no way this is going to be decided pretrial. The sooner we know that the better.

I also want to respond briefly to the letter which came yesterday, I think Sunday, which went on a bit about statements made in the bankruptcy court and that they are somehow binding judicial admissions.

That's inaccurate because they weren't made in this proceeding. If you look at the case law in judicial admissions, it has to be in the same proceeding, and they're made for a different purpose in a different context. So I don't think there's either judicial estoppel or judicial admissions at play here.

I have looked at the pleadings carefully, and I see the language in the pleadings. And while technically it is true that the claim is based on the same pleading language, throughout the complaint there is reference to "a broader scheme".

So my instinct, prior to hearing you further today, if you wish to be heard, is to, in the first instance, not even allow the motion, but in the second instance, if allowed, I can tell you now it will not be decided prior to trial.

All right. You have my preliminary thoughts on both motions. Should we talk about experts first where the plaintiffs have the uphill, or summary judgment first where the defendants have the uphill? I don't care, but let's do it.

MR. CRICHLOW: Your Honor, David Crichlow on behalf of UMB.

I think I would like to address the expert issue first, since you've identified that the plaintiffs have the uphill. And if you'll give me an opportunity, I'll try to dissuade you of your initial impression.

THE COURT: I'm here.

MR. CRICHLOW: Do you mind if I speak from the table?

THE COURT: I don't mind at all.

MR. CRICHLOW: Your Honor, the first thing I want to mention is just sort of where we are procedurally as a result of the letter. And I think you're aware of this, but I just want do make it clear for the record, that what CEC was asking for was not for a decision on a motion -- and there's no motion in limine pending -- and we're asking for this Court's approval to file that motion.

THE COURT: I realize that.

MR. CRICHLOW: Okay.

THE COURT: I'm a practical person, and I often use premotion conferences to decide the motion. I think I've got it. I've got the picture from the letters. I'll often say to counsel, "Stand up and make your motion. You can argue against it. I'm prepared to rule." There's no nothing I know that says you're entitled to brief it in 25 pages back and forth. It's a simple motion. I'm sure Mr. Adler or Mr. Seiler, or for that matter Ms. Levin, are all capable of making a motion orally. Go ahead.

MR. CRICHLOW: I'm glad to get that direction. That's where I was headed. I'm happy to address it now.

Your Honor, we actually disagree with both CEC's proposition, and I will respectfully disagree with your Honor's initial finding. I understand your position that if you read the report and where Reg S-X and the issues --

THE COURT: I'm sorry. And where what?

MR. CRICHLOW: -- where Regulation S-X, the issue involving the definition of wholly owned subsidiary under the regulation --

THE COURT: Right.

MR. CRICHLOW: -- and where it is mentioned in the report, that the reaction may be, upon an initial reading, well, what is there to rebut? Because there doesn't seem to be much there.

THE COURT: Point me to the opinion that the defense expert gives as to the meaning of Regulation S-X.

MR. CRICHLOW: Well, I think it's a little bit more nuance than that because, your Honor, I'm going to get there to the opinion in a second. It's at paragraph 43 of the Gadsden report.

THE COURT: Do I have that in the excerpts that were given to me? Paragraph 43 of the Gadsden report?

MR. CRICHLOW: I believe you do, your Honor.

THE COURT: All right. I have the expert report. 43.

MR. CRICHLOW: Right.
THE COURT: That's the one, I seem to be missing the page. I have page 20, but not 21, for whatever reason.
MR. CRICHLOW: I apologize, your Honor.
THE COURT: That may be our printing error.
MR. CRICHLOW: It may be.
THE COURT: I have page 20, but not 21.
MR. CRICHLOW: We may have a copy, and if your Honor would give me permission, I'd be happy to walk it up to you. We're just waiting to see if we have a copy.
THE COURT: Okay. I have page 20, or the beginning of paragraph 43. "It is my opinion that the trustee cases indentures and the individual cases indentures included, and would have been understood by reasonable investors to include, a guarantee by CEC for the purpose of facilitating CEOC's financial reporting, not for the purpose of providing credit support, given the events that could terminate CEC's liability. This is borne out by the three features I focused on in Section 4A as allowing an investor to distinguish," and then I don't have the rest.
MR. CRICHLOW: That's fine, your Honor. That's fine, because that's very helpful. I'm going to take you to the end of the last sentence of paragraph 42 so that you can put 43 in context.
THE COURT: I'd rather do it because I read slower

than lawyers do for the record.
"As to Section 1503 of the individual cases indenture, those circumstances include, one, CEC or CEOC's transfer of all or substantially all of its assets to or merger into another entity, provided that the transferee assumes the obligations under the Guarantee; two, CEC's liquidation, provided that if any other entities acquire all or substantially all of CEC's assets, they assume the obligations under the Guarantee; or three, CEOC ceasing for any reason to be a wholly owned subsidiary of CEC as defined in SEC Regulation S-X."
MR. CRICHLOW: Right. Now, your Honor, I think our issue is simply this. When you read that and then it's defined by the footnote --
THE COURT: Oh, okay. "This definition is, "A subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parent's other wholly owned subsidiaries," and that's from the CFR.
MR. CRICHLOW: Right. Now, if I can take a step back. I think, when you read the two provisions together and the subsequent opinions that follow from Mr. Gadsden, he is using that definition to form his opinion that what was happening here was that the wholly owned subsidiary regulations and Regulation S-X were being applied merely to allow a certain form of financial reporting, which he opines on, and that that is the basis for determining that Reg S-X applies, and that the

CEOC was no longer a wholly owned subsidiary under the regulation.
THE COURT: The problem with your argument is I don't think you can attribute your interpretation of his opinion into his opinion. I mean, either he stated it or he didn't. It seems to me you are embellishing or adding to the words in his opinion.
When I have experts testify on the stand, if the other side says, "I object. That's not found in the report," I always say to the expert, "Show me where that says that in your report." And if they can't, I strike it. So your interpretation is not the expressed opinion.
MR. CRICHLOW: What is expressed is the definition.
THE COURT: Yes. From the CFR, not his.
MR. CRICHLOW: Well, no. And that is an issue right now. Because exactly what you said is the point I'm about to make.
THE COURT: Okay.
MR. CRICHLOW: Your assumption and conclusion is that that definition, as you stated, is from the CFR, that must be it, end of full stop.
THE COURT: Wait a minute. I didn't check 17 CFR 210.1-02(A8), but are you saying he misquoted it?
MR. CRICHLOW: No.
THE COURT: Then what does that say?

MR. CRICHLOW: What I'm saying is that "wholly owned subsidiary" under the regulation is defined different ways in different parts of the regulation. It requires a more substantial analysis that has been given here.
And particularly, in a case where we have a jury trial, I trust your Honor to get it right. With due respect, and I think you could hear argument from us that it's more than this definition in this section of the CFR, it's more than what has been put forth here to support the opinions herein.
Where I are get concerned, particularly if it is unchecked without a rebuttal position, without a more thorough analysis of what Reg S-X really means, and what particularly the definition of wholly owned subsidiary under the equivocal regulations mean, and how they can be interpreted in different parts of different sections, and how it would apply to this case, it runs the risk of being entered into evidence with the imprimatur that it's coming from an expert, and the jury will believe that, okay, that's a definition of a wholly owned subsidiary.
THE COURT: The jury is not going to be asked to make a factual finding as to what Regulation S-X means, it'll be in the charge. It's a legal question. I will tell them what it means. Period. Full stop. It's not for them to make a fact finding on what a statute means.
MR. CRICHLOW: I'm happy to hear that, which is

something good that may come of this. We still believe that, as offered in the report, that there was certainly nothing wrong with rebutting it.

The Reg S-X issue and the issue about the interpretation of wholly owned subsidiary and what that means from a practical perspective in this case under this set of facts is an issue that was not raised by the plaintiffs, but it's an affirmative defense that had been raised from the outset by the defendants. So they cannot argue that they're hurt by some new area of opinion that is coming in from an expert.

That puts aside your observation about whether some of the expert testimony is effectively a legal conclusion to which we don't need an expert. I'm not here to argue that today. I think that can be dealt with in a Daubert process, or, if your Honor wants to make a ruling now, that's fine.

THE COURT: The only ruling I'm making now is that legal questions are reserved for the Court. I don't take expert testimony from anybody in any case that I can remember in 21 years that tells me what a statute says. That's my job.

MR. CRICHLOW: And that's fine, your Honor. But what I would like to encourage your Honor to at least consider is, in a situation where the party, as a defense, their guarantee action is arguing release. They're arguing release based on a technical definition of wholly owned subsidiary. We rebut the

way they have defined and used it with their affirmative experts.

They are the ones carrying the burden on this affirmative defense. They've chosen to present their definition and their use --

THE COURT: You're talking about this one single footnote that says, "Define the definition of the CFR?" That's the whole crux of it?

MR. CRICHLOW: Well, it formulates the basis for the opinions on the next couple pages. And Reg S-X is mentioned again on the following page in paragraph 44. It's not one scant reference, it's the underlying back-of-the-hand notion that this is what wholly owned subsidiary means.

My concern, your Honor, is, quite frankly, wholly owned subsidiary, if I was sitting here as a layperson thinking about it, I would think I know what that means. Wholly owned subsidiary is something that laypeople might think is clear and easy to discern, but in this circumstance, it is simply not.

THE COURT: It's been a long time since I thought of myself as a layperson when it comes to the law. Maybe I'm no better than a layperson, but I don't think it's fair to say "layperson". I told you, I'm going to define it. It's going to be in the charge. It's not for the jury to decide. It's note a fact issue.

MR. CRICHLOW: Then we would probably then be urging

some sort of an instruction that they're not allowed to get this testimony in.

THE COURT: I don't need an instruction telling them that, I'll be telling them myself. They're not going to get it. It's not a fact issue.

MR. CRICHLOW: Your Honor, then back to the original point about burdens and whether we should be able to do it. I have a fundamental issue. I think this issue has been raised. We think that this was a proper rebuttal because it was relied upon.

If your Honor disagrees and even if you thought it was untimely under the sanction provisions of Rule 16 that incorporate Rule 37, the normal analysis is simply whether the party would be prejudiced --

THE COURT: I just told you where the prejudice was. I just said it's five weeks before trial. If this is a new opinion, let's say for the sake of argument it is, then the defense would want to respond to that with his experts, then you'd probably want to reply, and everybody gets deposed, and that just adds a layer of complexity. And since the jury isn't getting this issue anyway, it's sort of beginning to sound like a motion in limine that the Court should say in advance what it means.

MR. CRICHLOW: That may be one solution. But the last point I want to make is, where the parties carry the burden of

proof, and we would be happy to brief this, if it's an issue that's already been identified, if it's not an issue that is a surprise to them, because the Regulation S-X issue and the wholly owned subsidiary issue is one raised by the defendants --

THE COURT: Absolutely.

MR. CRICHLOW: -- they are obligated in a staggered process -- and there's case law that supports this -- to put that issue up in their first expert report. The fact of the matter is --

THE COURT: So you saying they have. You just said they did.

MR. CRICHLOW: That is my opinion. You disagree with me. So I'm addressing it from the position that your Honor comes from. And what I would like to say is, I don't think there can be any harm, even if your Honor were to think that this is a new report, that it is not rebuttal, it is not a new report addressing an issue that they could not have anticipated that would be brought --

THE COURT: No. But there was a date for submitting affirmative expert reports. It's not that they didn't know the issue was there, but they don't think their expert opined on it, and I'll hear from them shortly, and they don't think your expert should opine on it for the first time and call it rebuttal.

MR. CRICHLOW: Then what I would like to suggest to your Honor, and I know you said you don't want briefing where it's unnecessary, I think there is juris prudence that would suggest otherwise. It would suggest that even if your Honor were to find that this is an initial report, because of the way the burden shifting rules work, and there's no question this is an affirmative defense brought, that we ought to be permitted to have that expert report considered, even if your Honor were to find that your view is is that it's a new, initial report, but on an issue that was identified from the defendant.

THE COURT: But then that gets to my fallback problem, which is, why would I let an expert tell me what a statute means?

MR. CRICHLOW: I think there's more than that in the expert report, your Honor.

THE COURT: In your two expert reports that you're proffering now?

MR. CRICHLOW: Yes. I believe there is more than that. I'm not going to quarrel with you about whether there are areas there -- because a lawyer has considered that, as well -- that may cross the line and get more into what the judge should or should not do. We, as litigants, are trying our best to figure out what we think may provide best guidance for the trier of fact, and what is clearly a question of law. And when you look at our motions in limine, you will see that

we think that there are a couple of issues that we don't need expert opinion on.

As far as how the regulations work and the fact that what Mr. Gadsden's report does is count a lot of this in interpreting it as to why certain levels of financial reporting are required, what the accounting standards are, and the like, as a result of this regulation. That is an area that normally is not one for the trier of fact, whether it be judge or jury, and is an area where we think it is technical enough that jurors can get confused or misled if they're not seeing a balance.

That's what's troubling us about not having the opportunity to rebut this opinion, because they use the definition to support a view on financial reporting, accounting, whether pushdown accounting was required, what that means, and the like.

Sitting here today, I would tell you that there is a lot in both of those expert reports that disagrees with Gadsden's approach here. I wouldn't be able to figure that out, and I think the trier of fact would not be able to figure that out, and those are factual issues that aren't related to legal issues.

THE COURT: Maybe you should resubmit the Carmel and -- who is the other one?

MR. VELOCCI: Phillips, your Honor.

THE COURT: -- with Phillips report in a slimmed-down version that avoids the legal interpretations of the regulation or statute, and addresses solely those issue that are fact issues for the jury and that clearly rebut something in the Gadsden report. And if you do resubmit the report, you can put in parens, "See Gadsden paragraph 43 or 44," or whatever you want to refer to, so I can quickly look back and forth and say, "Well, yes, that is rebuttal to something in the Gadsden report, and yes, that's an issue going to the jury."

If you want to take the time to resubmit both reports, it won't take you that long because you're just going to cut out whatever I don't think should be there based on today's conversation. I will look at it one more time with that in mind. So it's a more limited and pointed rebuttal to something you can point to in the Gadsden report and something that the jury actually has to be concerned about.

Some of the arguments you were making here sounded like, yeah, maybe the jury will have to decide that, but that wasn't what I was focusing on.

MR. CRICHLOW: I thank you for that observation, your Honor. We would like to take you up on that opportunity.

THE COURT: Do it fast.

MR. CRICHLOW: Okay. Thank you, your Honor.

THE COURT: Let me talk to defense. Anybody want to respond? Because he's now focused very specifically on

paragraph 43 and footnote 18.

MR. ADLER: Your Honor, thank you. Philippe Adler.

THE COURT: I'm sorry. You looked down and I didn't hear.

MR. ADLER: Sorry. Philippe Adler from Friedman Kaplan Seiler & Adler for CEC.

Your Honor, what Mr. Gadsden does in the passage that Mr. Crichlow references is simply lay out, here is the Guarantee release provision in the unsecured notes indenture. 1, 2, 3. And since 3 references Regulation S-X, he quotes in the footnote. That's it.

There no loss, there's no opinion, and there's nothing else going on further in this expert report about it.

THE COURT: Let me make sure I understand. Are you saying the quote in footnote 18 is Regulation S-X?

MR. ADLER: It is Rule 102(z)(z) of Regulation S-X. That's all it is. And because that is interpolated into the character IT release provision of the unsecured notes indenture, he's describing what the release provisions are. And he says, "The release provisions reference Regulation S-X." So here, I'm just quoting it. There's nothing further about it. Okay?

He says that this is the basis for Mr. Gadsden's opinions? The basis for Mr. Gadsden's opinions is actually stated by Mr. Gadsden. The basis for his opinion is Rule 310 and the permission to use consolidated financials. The basis for it is the nature of the covenants in the indenture. There is nothing in Mr. Gadsden's report that is based upon this quote in a footnote of this language in Regulation S-X, so I simply do not understand what Mr. Crichlow is saying.

I also don't want to take up a lot of time.

THE COURT: Okay. Because I want to turn to the other issue, because I have to leave at 3:00.

MR. ADLER: Okay. Just one more point, because I understand, as your Honor said, that's it's an uphill --

THE COURT: It's not what from them?

MR. ADLER: I said, I understand from your Honor that it was an uphill battle for them, so I want to quit while I'm ahead.

The other point I would make is this point about the burden. As I understand it, in a breach of contract claim, you've got to show there's a contract. So here, they've got to show that there is a contractual obligation, and particularly the Guarantee. So that means they've got to show the Guarantee hasn't been terminated.

THE COURT: That's not so. It's clear as a bell that there's a Guarantee in the language of the contract. You want to defend by saying, well, there may be a Guarantee, but there isn't one any longer and here's why. That's fine. That's a defense.

MR. ADLER: Okay. Your Honor, I think we can come back to that, but I think the point here is, we would be prejudiced if we now have to rebut a report that is, in essence, an affirmative report. I don't know what could be cut out of the Carmel --

THE COURT: That, we'll see. I do make that offer because if they can really say, here are the sections of these prominent people that actually rebut Gadsden and can point to a paragraph, I would hear it. They're entitled to rebuttal. If they can really rebut something in the Gadsden report that is something that the jury will have to consider, I would allow it.

MR. ADLER: They would have to literally rewrite these reports.

THE COURT: You know it better than I do.

MR. ADLER: What I'm ask, is your Honor allowing them to rewrite the reports?

THE COURT: No, I didn't say that. I said redacted. I am not as familiar with this report by any means as every lawyer in this room.

MR. ADLER: They're short reports.

THE COURT: Thanks for pointing that out. I had a few other things to do these past couple weeks.

MR. ADLER: I appreciate that. But again, there's virtually no mention of Mr. Gadsden anyplace --

THE COURT: Fine. Fine. We will see.

MR. ADLER: Thank you, your Honor.

THE COURT: While I'm not allowing them to rewrite the report, I am allowing them to annotate the report to point out what section of Gadsden they say it rebuts so that I can look at it side-by-side and have some help.

If I don't agree, I don't agree, but at least I have their assistance relieving me of some work to look side-by-side and say, ah, they reference paragraph 40 whatever. I look at it.

MR. ADLER: So your Honor, a practical issue is that I am set to depose Ms. Carmel and Mr. Phillips on Thursday and Friday of this week. So should we proceed with those while your Honor reviews the redacted documents?

THE COURT: I don't know. How fast is this redacted report going to come in? I'm asking Mr. Crichlow.

MR. CRICHLOW: Your Honor, we could redact the report in the next 24 to 48 hours.

THE COURT: Well, 48 would take us until Wednesday at 2:30, and the deposition is scheduled for Thursday? Is that what you said?

MR. ADLER: Yes.

THE COURT: I think they have to be rescheduled by a week. They have to be rescheduled by a week so I have time to do it.

MR. ADLER: Your Honor, that may bump us into the expert discovery cutoff, so can we --

THE COURT: That's okay. I want to reschedule those two for a week because they may never need to be deposed. That may save you money.

MR. ADLER: Yes.

MR. CRICHLOW: Your Honor, one thing that I was remiss, and my apologies, because I pointed you to 43, and it appears that there's just one reference in passing. That's actually incorrect, and I don't know whether you have this excerpt. But in the report itself, it's paragraph 9.

THE COURT: Hold on. I have 9, I think. Let me look, but I think I do. I have 9.

MR. CRICHLOW: In the Background Relevant Principles and Market Convention section, there is an extensive discussion of Reg S-X and what he believes it means and how it is going to apply. So it has always been our position that his purported definition, how he is using Reg S-X is permeating the opinions that are set forth therein. It's not just a passing reference in just that one footnote.

But I appreciate that you are going to give us the opportunity to carve out anything that is legal conclusion and get to the facts that I discussed.

THE COURT: Good. Do that in the next 48 hours.

MR. ADLER: One moment. There are two entirely distinct Reg S-X issues in this case. The definition of wholly owned subsidiary in this footnote 18 is simply not part of the Gadsden report. That has nothing to do with the other aspects of Reg S-X, which is Rule 310 which tells you when --

THE COURT: Fine, but --

MR. ADLER: -- a subsidiary --

THE COURT: -- do Carmel and Phillips try to rebut that portion?

MR. ADLER: No. So it's all -- pointing to stuff about Rule 310 and Reg S-X is a complete --

THE COURT: I told you you are more familiar with the report than I am.

MR. ADLER: All right. Thank you, your Honor.

THE COURT: Let's go on to summary judgment. Uphill battle, Mr. Seiler.

MR. SEILER: I think every time I've spoken in this court in every case I've had the uphill battle. Back to Greg Joseph and Wells Fargo. I usually don't get over the hill.

THE COURT: All wrong so far.

MR. SEILER: Maybe I've gotten over the hill once or twice.

First, if I could just take a minute, I want to tell you why we did this. We were getting ready to do the pretrial order. And we were thinking, well, here are these, what I call, peripheral claims. The main claim is the Guarantee, so

the breach of good faith and fair dealing, what's it mean. The tortious interference. We're thinking, well, we're going to argue at the end of the case that they don't state a claim on these. They can't because of the arguments I've put in my three-page letter.

I said, well -- and this was -- one of these arguments was in the motion to dismiss, and it didn't get -- it was denied, but we didn't address it. Fine.

I'm thinking, well, the judge might be mad at us for having had a whole presentation at a trial --

THE COURT: I could never be mad at you, Mr. Seiler.

MR. SEILER: You might think we should have told you why we didn't state a cause of action earlier, and that's why we wrote the letter.

Whether you treat my letter as the summary judgment motion, let me brief it and hold it in abeyance until the trial and it becomes the directed verdict motion, too, fine, at least I've told you my view, and you'll rule on it how you want to; fine.

But what bothered me a lot is the expansion of what the subject matter is. I think that's important, and I want to be really clear why I think that's a big problem.

Mr. Crichlow stood up here in court, and you asked, "How long is the trial going to be?" And he said, "I think it's two weeks." And he said, "I think we have one or two

witnesses. Maybe one or two more. Our case is little. The defense is going to take most of the time."

Well, in the last few days they've been asking us, "Can you make this witness available? That witness available?" We're up to 18 witnesses they've asked us about, either to bring -- assuming that they have one trustee each for each of them, that's two, 16 more. Now, one of them is about to have a baby and maternity leave, so we'll be down from 18 to 17, and there's one they might back off from. So there's 16 witnesses.

So that made me think, well, that sounds like a different trial, but I couldn't figure out why. And then I get this letter, and they say they want to talk about the disputed transactions because they relate to the good faith and fair dealing and tortious interference claim.

I'm thinking, well, I know how long that will take. It took me two weeks to learn the facts about the disputed transactions. And if they're going to call my witnesses, which is who they've asked for, and the idea is to talk about those transactions, even if they do it in a cursory way, suggesting that it was part of a scheme, I'm going to have to ask them questions to prove, in front of this jury, it wasn't part of a scheme.

Well, that trial is a two-month or three-month trial, not a two-week trial. I promise you. And 18 witnesses isn't a two-week trial if we didn't put on a case. But those the

people at either Caesars or Apollo, if they have to go through those disputed transactions, of which there are many, and talk all about them, that is a giant trial at which overwhelms the Guarantee.

THE COURT: When you say there are many, are you referring to the May, June, and August, of which there are three?

MR. SEILER: No. The disputed transactions that are not -- their whole thesis, to answer my summary judgment motion, is, well, wait a minute, if it's about the transactions that stripped the Guarantee, we see your point that it's really the contract is the same thing. It's about all of these transactions that preceded and postdated May, May, and August. It's about selling four properties in May.

THE COURT: I hadn't planned to get into all those. Wait a minute. You say May, May, August, I say May, June, and August.

MR. SEILER: May. Well, there was one that was the very last day of May.

THE COURT: Yes, I know. I say may just to keep myself clear.

MR. SEILER: We'll go with June.

THE COURT: Yeah. Because otherwise I get confused with May being there twice. I thought we were talking about May, June, and August.

MR. SEILER: Those transactions, as they relate to the Guarantee -- by the way, that's more than a two-week trial, but it's not crazy more than that if they called -- all the witnesses they identified could talk about those things. But the rest of the, what they call, the defined term, the disputed transactions, that's two years of things that happened coming into May.

THE COURT: Did the plaintiffs really think they were going to talk about all these other transactions besides May, June, and August? Because Mr. Seiler certainly knew how to scare a judge. I had not planned for that. I had not planned on a two to three-month trial. I don't have two to three months for this case. I was always told two weeks. I figured, worst case, two becomes three, but okay.

What is this about? You are again mister?

MR. CRYAN: My name is Cryan, and I will be addressing the partial motion for summary judgment.

THE COURT: Well, maybe you should just address this one point for a minute.

MR. CRYAN: This one point. Yes. There's no reason to delve into week-long testimony about these transactions, but they do pertain to CEC's course of conduct with its subsidiary, as your Honor, will --

THE COURT: Is your answer, "Yes, I do plan to put on evidence about many, many, many other transactions?"

MR. CRYAN: These transactions are part and parcel of the fact pattern here, your Honor.

THE COURT: How can we do that in the amount of time that I was told to set aside for this trial?

MR. CRYAN: We are prepared to do so.

THE COURT: What does that mean, you're prepared? If you're going to put on 16 witnesses, I was trying keep to 23 hours a day. I think we're trying it maybe six and a half.

MR. CRYAN: Because the reference to 16 witnesses includes all witnesses that we may need. Oftentimes, when you call --

THE COURT: No, it didn't. Actually, it was minus the two trustee witnesses, right? It was 16 more than that.

MR. CRYAN: Your Honor, some of those witnesses, once we get testimony from the first witness, another one may be excused and not even called. So it's not the case that we were planning to call each and every one of those witnesses necessarily. There are largely not disputed issues of fact about these transactions. And we're reviewing the fact that the transactions occurred as part --

THE COURT: How many transactions are we talking about? This is sort of new to me. As I said, I was pretty well up to speed on May, June, and August, but that was about the extent of my knowledge.

MR. CRYAN: Yes, your Honor. The disputed

transactions, which are reviewed in the complaint --

THE COURT: I'm sure they're there.

MR. CRYAN: -- from page 22 to page 35 --

THE COURT: I'm sure they're there.

MR. CRYAN: -- there are a large number of them, but they --

THE COURT: How are we going to go through a large number of transactions unless you think the defense is planning to roll over and not defend. Every transaction you described, they're going to have a different version of it, actually.

MR. CRYAN: What's at issue is their involvement with their subsidiary, CEOC. And at the end of the day, your Honor, there's really not dispute.

CEOC had tremendous assets, and it subsequently filed for bankruptcy. There were huge transfers out of assets, and that's really the basis of the conduct here on their breach of the covenant of good faith and fair dealing and the interference claim.

But it's not a matter of delving into with the corporate matter each and every transaction --

THE COURT: As I said, you may be able to do it in a conclusionary way, but unless you think they're not going to defend themselves, they may feel that they need to explain every detail of every transaction, if for no other reason than to make it as complex as possible, but they have the right to

try.

MR. CRYAN: Well, if your Honor is thinking that they would greatly multiply the days of trial --

THE COURT: They have a right to defend each and every transaction you've put in issue.

MR. CRYAN: That is true. Your Honor is absolutely right.

THE COURT: So this could change the picture of this trial.

MR. CRYAN: There's no need to change the picture of the trial based on plaintiffs' claims and the claims that plaintiffs --

THE COURT: Is it not true that you originally told the Court that there would be two primary witnesses and maybe an expert or two, and then suddenly it's become 16 more? Isn't that late-breaking news.

MR. CRYAN: No.

THE COURT: When did I first learn that there were 16 additional witnesses? I think we have transcripts that will show way back when the trial was scheduled that you did predict it was two weeks. That you did say you had a couple of major witnesses and a few experts and that was it.

MR. CRYAN: Your Honor is absolutely right about that.

THE COURT: When did you decide there were 16 more?

MR. CRYAN: These were people who were deposed in the case leading up to. Defendants have had full knowledge of all these witnesses. We are prepared to make very brief showings with these points. These are not -- I can imagine your Honor thinking there's a mini trial on each transaction.

THE COURT: That's what I'm thinking now.

MR. CRYAN: That is not at all what we're intending to get into it.

THE COURT: It may be not what you're intending. It's a question about what Mr. Seiler is intending when he defends those transactions. He may think it's worth a mini trial on each one to show the jury that the intent was not a scheme or an asset stripping or anything else but legitimate, good corporate business. And he has a right to defend this case.

MR. CRYAN: Yes. But your Honor, that would constitute late-breaking news because these --

THE COURT: Defending against transactions that you're going say are asset stripping and a scheme?

MR. CRYAN: Yes. Because your Honor noted, these are throughout the complaint.

THE COURT: But you're confusing me. He certainly has a right to defend against them. That's not late-breaking news that you have very highly sophisticated lawyers on the defense side who apparently are going to sit through the trial and defend.

MR. CRYAN: Your Honor, absolutely.

THE COURT: That's not news that they were going to do it -- they're going to drill down and do it to the nth degree. That's their job.

MR. CRYAN: But these allegations are part and parcel of the complaint.

THE COURT: What's your point? I know they're part of the complaint. He has a right to defend them. He didn't think you were trying that case, that's all he was saying. Because you stood up and said, "We have two witnesses, possibly an expert or two and we can be done in a week, and the defense a week, and it's a two-week trial." That's what he's saying is late breaking. He didn't anticipate that you were going to be putting in evidence of 15 other, or whatever the number is, other transactions to prove some large scheme to defraud. That's all.

MR. CRYAN: We are proving a restructuring scheme, your Honor. A broader scheme. One that your Honor noted was throughout the complaint.

THE COURT: I did note that. All I'm saying is, I don't understand your presentation of what you expected this trial to be about. You want me to find the transcript where you said two witnesses, one week? I can do it.

MR. CRYAN: Your Honor.

THE COURT: Oh, I don't have to do it. Mr. Seiler brought it to court.

MR. SEILER: In all fairness, it was Mr. Crichlow.

MR. CRICHLOW: If I could just, to take this off of Michael Cryan's plate, it was me. I said we probably, from the plaintiff's point of view, had the trustees and a few experts to present our case in chief, and I said I expected that the defendants would have significantly more, but if you were asking the plaintiff, maybe two weeks.

All that has changed -- and then I'll let Mr. Cryan get back up -- is that, collectively, as a strategy session, we didn't add witnesses, we decided to call some of their witnesses in our case in chief.

THE COURT: Well, please. I mean, you're a great lawyer. You really are. But that's a lawyer's argument. You added witnesses from 2 to 16.

We've got to finish up. Back to you, Mr. Seiler.

MR. SEILER: If your Honor wants to see what the transactions are --

THE COURT: I've read the complaint.

MR. SEILER: -- so you have them. So the ones that I think aren't -- if you look at the letter I sent you yesterday, the February 7th letter.

THE COURT: Give me a minute to do that.

MR. SEILER: And turn to Exhibit 4.

THE COURT: Give me a minute. I'm up to 6.

MR. SEILER: Go back to 4.

THE COURT: I am. Hold on. I'm in 4.

MR. SEILER: You look at the second page of the exhibit, but it's page 9. We gave you an excerpt.

It says, "Answers to disputed transactions. Paragraph 14." And then it describes -- see all those transactions?

THE COURT: Yes.

MR. SEILER: Those are the disputed transactions. If you read them, they're all really complicated. And if their theory is --

THE COURT: Well, the B7 is May and June; we expected that.

So the last two bullet points, the B7 and the senior unsecured notes were in this case every minute.

MR. SEILER: Correct. It's the five before that.

THE COURT: It's the five bullet points before that.

MR. SEILER: Right. And the thesis, which maybe they'll try to do in a breezy way, is those transactions stripped assets. And my response is, no, they were for legitimate business purposes.

THE COURT: No. All they're saying is they can put in the five bullet points very quickly.

MR. SEILER: I actually don't think so.

THE COURT: They say they can. They say the length will come in defending the transactions, which is probably right.

MR. SEILER: It might be right. But I know these transactions. I know the witnesses. If you asked me how long would that trial take? Two months is the better estimate than two weeks.

And I'm telling you now, look, I like to try a case fast. And I know this Court does. These are just hard, complicated things.

Why I say they weren't part of this case is, yes, they describe the -- actually, the BOKF plaintiffs in some degree described them early, but when you read these two that are now becoming the non-Guarantee causes of action, they actually said it was good faith and fair dealing with respect to the Guarantee. The one that's clearest, if you look at Exhibit 3, which is the -- let me make sure I get the right one.

Exhibit 2, UMB.

THE COURT: Please, wait a minute. Go ahead. What paragraph?

MR. SEILER: Paragraph 78, count 6. Good faith and fair dealings. "CEC has breached its implied duty of good faith and fair dealings by engaging in the improper disavowal of its Guarantee described above in an attempt to avoid its obligations pursuant to the Guarantee."

Doesn't tell me anything about any of the earlier transactions.

THE COURT: Well, not exactly. "Plaintiff

incorporates by reference each of the prior paragraphs of the claim." I assume in those prior paragraphs they describe what they call this asset stripping scheme.

MR. SEILER: Except that they never say in the prior paragraphs that they were a part of what was the good faith and fair dealing claim. I don't dispute --

THE COURT: It's right in count 6, paragraph 77 says, "We incorporate all that right here."

MR. SEILER: I don't dispute that they talk about it, but I do tell you that the complexity of those transactions individually is equal to the ones that we all thought were the core of the case. Each one of them.

Let me just say this. The reason I sent you the things that were said in the bankruptcy court is not to suggest that it's estoppel against them from trying to do it here, but it was to suggest what they told another federal judge this case was about. And over and over again, including documents signed by the Arent Fox firm in Chicago.

So the easiest one to look at, since we don't have a lot of time, look at Exhibit 6, the last one, and look at paragraphs 11 and 12. The Arent Fox firm is one of the two signatories telling the bankruptcy court in Chicago, for a reason that is important to the bankruptcy court, maybe not for this Court, but they say, end of paragraph 11, "BOKF seeks only to enforce CEC's Guarantee obligations under the BOKF

indenture." And then in paragraph 12 it ends by saying, "The good faith and fair dealings due to CEC's disavow of the Guarantee."

Why that -- I read it. It's cap 6 and 7. Those are the ones we're talking about. The very last sentence of paragraph 12. 6 and 7, "Assert claims under the BOKF indenture for intentional interference with contractual relations and breaches of duty of good faith and fair dealing due to CEC's disavow of the Guarantee."

The reason they were saying that is the other party that joined in that was -- what's now being called the Delaware action, the Jones Day action -- they brought claims about all of those transactions. And when the whole 105 issue percolated up in Chicago, they told the judge in Chicago, "Don't worry about those transactions, because we really think those are claims that CEC ripped off CEOC, and they belong, in the first instance, to CEOC, so we will not push them. We're only pushing, for now, the Guarantee claims." And they have a Guarantee claim in Delaware, the same way there are Guarantee claims here.

BOKF was saying the same thing. "In New York, we are just doing the Guarantee claims."

It's not my question, it's not this Court's question, but there they question whether pursuing the other disputed transactions to collect money for good faith and fair dealing

is taking something that should first be done by CEOC in the bankruptcy. I'm not going to make that argument. It's CEOC's argument to make if they choose to make it in the bankruptcy.

THE COURT: Who?

MR. SEILER: CEOC, the subsidiary. The bankrupt entity. They're represented by Kirkland & Ellis. They'll read the transcript and read these things and maybe they'll say something to the bankruptcy court.

THE COURT: Anybody know why the bankruptcy judge isn't scheduling the hearing until March 7th?

MR. SEILER: The bankruptcy judge, as I understand it, he had a whole hearing. And when he decided that he couldn't do the 105 injunction because he didn't have the power, he had all the evidence, but he said, "I don't have the power under the law to enjoin it," the district court affirmed --

THE COURT: I know all that. My question was, why is he putting that off until March 7th?

MR. SEILER: It's March 2nd.

THE COURT: Well, March 2nd. Close enough.

MR. SEILER: It's the day he's announcing his decision. I don't think he's holding a hearing, it's the day he was going to issue his opinion.

THE COURT: Is that everybody's understanding? He said, "That's the day I intend to rule?"

MR. CRICHLOW: That's correct, your Honor.

MR. SEILER: Or earlier, he said, actually.
THE COURT: I misunderstood.
MR. SEILER: It can't be that much earlier since we're getting close. So he intends to rule. But that's on the 105 issue he thinks he has, which is whether the Guarantee cases should go forward or whether they should be enjoined.
This is an issue he didn't even think --
THE COURT: But if he enjoins it, he enjoins this action from going forward, period.
MR. SEILER: Correct. But this action is bigger, the way they've planned to do it, than they told the Court it was.
THE COURT: I hear you. All I'm saying is, we will know on March 2nd whether we've been spending a lot of time unnecessarily.
MR. SEILER: I think there's truth about that. I'm running out of your time.
I think they've told a different story. I think they've changed their story in this Court. Maybe I should have been smart enough to realize when you incorporate your allegations, that means this giant case is really the case even when everything else that's happened looks like we have a small case. Fine.
I still think, by the way, my summary judgment motion on good faith and fair dealing applies to their giant case on that claim, because the law, which they don't dispute, is the

following. If your contract covers the ground of the issue, and the good faith and fair dealing is designed to enhance it or contradict it, you can't bring the claim. So on the Guarantee, it's pretty clear the contract has rules, here's the Guarantee, here's how you can terminate it.
THE COURT: I understand, but it was limited to the Guarantee, but they say there is this scheme that involves asset stripping, and eventual bankruptcy, and then you don't have a guarantee, and you do have a bankrupt primary person, it's a scheme.
MR. SEILER: But here's the thing. If I thought this wasn't the case, I would admit it. The contract has an elaborate section of indenture called 406, called asset sales, which has five pages of very complex rules about when you can sell an asset, when you can't, what you have to get for it, how you have to go about it, and I would make the same argument, I'll make it at directed verdict time in the case, but I'll say, look, that's all expressly covered by the contract. You cannot add gloss to it under good faith and fair dealing.
Indeed, in Delaware, they sued us for violating 406, for fraudulent transfer, for breach of fiduciary duty. They didn't even sue us in Delaware for good faith and fair dealing, I think they thought that it was redundant to or contradictory with this claim.
THE COURT: Well, they had brought other common law

claims. You just described them. That's the same thing, in my opinion. It goes beyond the Guarantee and describes the alleged scheme.
MR. SEILER: Yes. But for the fact that everyone thought that those claims in the first instance belonged to CEOC, and the bankruptcy comes first, we'd be litigating those claims.
The reason I tell you all this is I think that we've had these separate lanes, and we had a question whether the bankruptcy should have the right to, and now the question, should it enjoin this proceeding.
But it was a separate lane. Now the lanes are overlapping because they want to put on evidence about the very same transactions that would be the core of that lawsuit, whether it's in the bankruptcy court or somewhere else.
I'll say again, I'm probably wrong. I'm wrong that two months is probably too short. If they really tried to prove it, and we really tried to defend it, just with those witnesses and a few more -- it took me two weeks to learn the transactions, your Honor, when people who had done them tried to explain them to me.
THE COURT: All right.
MR. SEILER: So I don't want you to walk away and wonder at the trial why I didn't warn you.
THE COURT: I know. I get you.

MR. SEILER: But I'm happy to make the motion now. I'm happy to have the summary judgment motion on the papers that I wrote. I'm happy to have you hold it in abeyance until the trial. I wasn't trying to add work to the Court, but I don't think those claims should be ultimately going to the jury. I thought it would simplify the trial, and now I'm concerned that the trial is going to --
THE COURT: Without a pretrial ruling, it's not going to simplify the trial. My answer of holding it in abeyance until the close of the plaintiff's case because it's so late in the game isn't going to do much if we have to sit through weeks of testimony.
MR. SEILER: That's why I felt -- I'll go back to the very first --
THE COURT: Because I suspect your defense case is primarily cross examination of your own witnesses. So it doesn't even have to wait until you. In other words, he calls a witness, you're going cross examine for days.
MR. SEILER: I actually was going to ask you a question, I don't know if today is the right day, whether you allow cross outside the scope or I'm going to need to call the witness.
THE COURT: No. I usually allow it outside the scope, but that's your two to three months.
MR. SEILER: Yes. That's why I was so shocked by --

and that's why we wrote you a letter on Superbowl Sunday. Because when I wrote this letter I was shocked, because it was a totally -- whether they are entitled to do it --
THE COURT: What were you shocked by again?
MR. SEILER: That they expanded the trial.
THE COURT: When did you learn it?
MR. SEILER: I got a letter from them on February 5th.
THE COURT: I'm sorry. Which letter?
MR. SEILER: The letter from Arent Fox on February 5th --
THE COURT: February 5th.
MR. SEILER: -- to the court. It's their response.
THE COURT: In response to your motion.
MR. SEILER: Right. But I wasn't surprised that they responded to my motion and said we should make it. We're wrong. But when I read the second page of the letter, the page that starts with paragraph --
THE COURT: Wait, wait. You speak so fast.
MR. SEILER: I'm sorry, your Honor. I was trying to get done by 3:00.
THE COURT: I appreciate that. I do appreciate that. But I want to find the right letter.
MR. SEILER: Sure.
THE COURT: Okay.
MR. SEILER: February 5th, page 2.

THE COURT: Okay.
MR. SEILER: Paragraph 2 and 3. Start in the middle of paragraph 2.
THE COURT: Okay.
MR. SEILER: "Good faith claims and the corresponding facts asserted by plaintiffs are separate and distinct from plaintiffs" --
THE COURT: Of course. That's in response to your motion. Nothing is surprising about that.
MR. SEILER: No. That's what told me we were having the two or three-month trial and not the two-week trial, because I know what those claims will take to try.
THE COURT: But you knew that before. When did they tell you about the 16 new witnesses?
MR. SEILER: A couple days before that.
THE COURT: That's when you knew. You could have watched the Superbowl, and I'm sure you did.
MR. SEILER: Your Honor. I knew all those witnesses could talk about the Guarantee, and I thought that trial --
THE COURT: All those? You needed 16 of them to talk about --
MR. SEILER: I thought what they said was true, that they gave me a list of 16, would end up being 12 because of some redundancy. I agree with that. But I thought that talking about -- by talking about two transactions, it'll take

two or three weeks. If I'm talking about all the transactions, it's going to take two or three months. So I had an inkling that something was changing, and then when I got this letter, I knew what it was. I wanted to come here and tell you.
THE COURT: But it was in the complaint from day one. I don't understand.
MR. SEILER: Your Honor, there were an awful lot of times in this Court and in Chicago that everyone said this case is about the Guarantee. And so it's now not about the Guarantee, it's about everything, and that's a long trial.
If your Honor allows that, which it sounds like you will, because it's in the complaint, then that's a long trial. And I don't know who will spend more time with the witnesses, but -- and I still think --
THE COURT: Clearly, you will. I mean, he's saying we can put this on in a cursory fashion. We can put this on in a summary conclusory fashion.
MR. SEILER: Okay. I guess he says that, but we'll see when he starts to cross examine my witnesses whether he can --
THE COURT: No, he has them on direct.
MR. SEILER: When he calls them as adverse witnesses. They didn't take any discovery in this case about any of those issues. About the non-Guarantee issues there was no discovery. None.

THE COURT: Well, plaintiffs better think long and hard about how they want to present this case because I've allotted two weeks, maybe three, not two months, maybe three months. That's just not allotted.
I am confused about this March 2nd opinion coming out. I mean, that could make the next two or three weeks of work useless.
MR. SEILER: I agree. I'm not in that case, so I couldn't -- I don't have any influence over that, and the judge announced what he was going to do.
THE COURT: I didn't understand that. Okay. All right.
It is 3:00. I'd like to stop, but I know you haven't had a chance to respond to much of what Mr. Seiler said. Could you maybe spend just three minutes, five minutes at most? Because I do have to go.
MR. CRYAN: Well, your Honor pointed out that there were quite a few allegations in the complaint --
THE COURT: Right.
MR. CRYAN: -- about this more broad restructuring scheme. And I took the complaint and highlighted many of those allegations, and even brought an extra for counsel, as well. I don't know if it would assist the Court.
THE COURT: No. I know they're in the complaint. I'm just saying that's just not the case you talked about when you

predicted what the trial would look like, when you talked about the your original number of witnesses, when you made certain representations to the bankruptcy court. I'm not talking about judicial estoppel or admissions, but just the focus of the case.

What he's really saying is they're two different cases. And if you want to bifurcate to get the Guarantee case tried first, you can. If you want to try the Guarantee case clean and simple, two weeks, if the bankruptcy judge lets it happen, maybe that's wise. If you want to try the remaining good faith and fair dealing claims which involve five other transactions and will be the bulk of these two months, that's fine, too. But you need to think about it. Because what Mr. Seiler is pointing out, if you're trying all of it in one big trial, you misled the Court as to the length of this trial.

MR. CRYAN: No.

THE COURT: Well, you did. Your colleague took the weight on that, but it's true. It's just not what we were told at the beginning.

MR. CRYAN: Let me highlight three portions of the complaint.

THE COURT: But I don't doubt that it's in there. You don't need to do that because I'm not debating you. It's of course in there. Reading it into the record won't make a difference to me. I know it's in the complaint. Mr. Seiler

knows it's in the complaint. But he said that wasn't the focus of what you said you would try here.

MR. CRYAN: Yes, your Honor.

THE COURT: There was no discovery about it, your original witness list was two, plus maybe two. That's all he's saying. You've changed the focus. He's not denying that you're going to read, it's there word for word. I understand that. That's not going to help me with the remaining one or two minutes.

MR. CRYAN: He did say that it was not linked to the covenant of good faith and fair dealing.

THE COURT: But then I pointed out that you incorporated the allegations. I understand that it's in the count.

MR. CRYAN: And it was literally linked, as well. So I think your Honor has a clear picture of it.

THE COURT: What I don't have a clear picture of is the length of the trial, the number of witnesses, the number of issues and difficulty of issues to be tried, and maybe you better consider my suggestion and just try the contract case first. That would do a lot of good.

MR. CRYAN: Well, we do appreciate your suggestion.

THE COURT: I think you should think about all this after this conference on both issues. We can reconvene shortly. We may have to anyway after I get the resubmitted

expert reports. But this is a shock to me. The first I hear about a potential two to three-month trial.

MR. CRYAN: I think your Honor's been scared by that three-month trial.

THE COURT: I have. I have.

MR. CRYAN: I don't think it would materialize, but we understand.

THE COURT: I'm not sure of that. Five more complex transactions that Mr. Seiler says even he took two weeks to understand, that means it would take me two years to understand. So it took him two weeks, I'm in for two years.

So let's think about what is the right way to try this. And meantime, we all can sit here with bated breath waiting for March 2nd.

I think that's the best we can do today. I've reached no ruling. So Mr. Seiler, you may say what do I do with my motions? I think you should start briefing them. I'm not saying I'm going to decide them, but you can put them in your brief as fast as you can write it. When do you expect that might be?

MR. SEILER: This week. We will file our brief this week.

THE COURT: You will file your brief this week.

MR. SEILER: Yes. My colleague said tomorrow, but this week. We'll file it this week.

THE COURT: So they'll be in no later than the 12th. I know you're busy with many things in terms of trial preparation, and that's the real problem, but how long would you like to respond?

MR. TOOF: From Arent Fox, I think four weeks to respond. There's a lot going on between now and trial, which is 35 days away.

THE COURT: Right, which may well be stayed.

MR. TOOF: Yes, your Honor.

THE COURT: That's all right. I know that falls virtually on the eve of the trial, which is March 11th, but so be it. Best I can do. It's a late motion. Could have been made a year ago. I don't know why it wasn't made a year ago, either. I should say that. About a year. Not quite a year. Months ago.

MR. SEILER: We're not always as smart as we wish we were.

THE COURT: Yes, you are. It must have been a tactical reason. I don't want to know more.

MR. SEILER: Did not think about the motion until --

THE COURT: It was in the complaint.

MR. TOOF: As a matter of housekeeping, we submitted an stipulation for a Daubert motion schedule, because there's no Daubert motion schedule contemplated right now.

THE COURT: When was that submitted? I thought I rewrote it.

MR. TOOF: It was submitted on the 4th of February.

THE COURT: Maybe I didn't see it. We'll have to look into it in chambers. I remember hearing about it. I was out that day, but I thought I put it back by a week, so we'll look around.

MR. TOOF: Thank you, your Honor.

THE COURT: Thank you.

(Adjourned)