15-2124-cv(L)

15-2141-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARBLEGATE ASSET MANAGEMENT, LLC,
MARBLEGATE SPECIAL OPPORTUNITIES MASTER FUND, L.P.,

Plaintiffs-Counter-Defendants-Appellees,

v.

EDUCATION MANAGEMENT FINANCE CORP., EDUCATION MANAGEMENT, LLC,

Defendants-Appellants,

(Caption Continued on the Reverse)

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICUS CURIAE* CAESARS ENTERTAINMENT CORPORATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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EDUCATION MANAGEMENT CORPORATION,

Defendant-Counter-Claimant-Appellant,

STEERING COMMITTEE FOR THE AD HOC COMMITTEE OF
TERM LOAN LENDERS OF EDUCATION MANAGEMENT, LLC,

Intervenor-Appellant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states as follows: Caesars Entertainment Corporation has no parent corporation, nor is there any publicly held corporation that owns 10% or more of its stock.

Dated: September 16, 2015

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Caesars Entertainment Corporation ("CEC") respectfully submits this brief as *amicus curiae*, pursuant to Federal Rule of Appellate Procedure 29, in support of Defendants-Appellants (the "Education Management Defendants") in *Marblegate Asset Management, LLC, et al.* v. *Education Management Corp., et al.*, and in support of reversal of the District Court's June 23, 2015 Opinion and Order.[1] This brief is submitted with the consent of all parties to the appeal.

INTEREST OF AMICUS CURIAE

CEC is a party to five litigations (the "CEC litigations") pending in the Southern District of New York and in Delaware Chancery Court that raise many of the questions under the Trust Indenture Act ("TIA") at issue in this appeal. A decision in the CEC litigations that relied heavily on the opinion on appeal here was certified for interlocutory appeal to this Court under 28 U.S.C. § 1292(b) *sua sponte* by District Judge Scheindlin, who recommended that the CEC case be consolidated with this appeal. CEC submits this amicus brief because we believe that decisions issued in the CEC litigations illustrate the market confusion and inequity – as well as the chilling effect on ordinary capital markets transactions and discussions with creditors engaged in by financially

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[1] Pursuant to Fed. R. App. P. 29(c)(5), CEC certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than CEC contributed money intended to fund the preparation or submission of the brief.

troubled companies attempting to avoid bankruptcy – engendered by the District Court's opinion in this case.

CEC is a publicly traded company that, through subsidiaries, owns, operates or manages approximately 50 casinos with over 60,000 employees. One of its subsidiaries, Caesars Entertainment Operating Company, Inc. ("CEOC"), is the issuer of approximately $12 billion of publicly traded debt. Solely for the purpose of allowing CEC's financials to be used in SEC filings, that debt was, at the time of issuance, guaranteed by CEC, CEOC's corporate parent. In 2014, CEC and CEOC consummated three separate transactions each of which, under the explicit terms of the governing debt indentures, terminated the CEC guarantee. Termination of the guarantee was required by bank lenders who provided $1.75 billion in new funds that were essential for CEOC to repay substantial near-term maturities. These transactions did not contemplate a restructuring or bankruptcy filing – to the contrary, they provided billions of dollars in liquidity and were designed to *avoid* restructuring or a bankruptcy filing.[2] Months later, under pressure from creditors, CEOC was forced to file for bankruptcy protection under Chapter 11 in January 2015.

[2] The facts in this brief concerning the CEC litigations are taken from the Declaration of David B. Sambur filed in opposition to motions for summary judgment made in *BOKF, N.A.* v. *Caesars Entertainment Corporation*, 1:15-cv-01561 (SAS) (Dkt. No. 40) and *UMB Bank* v. *Caesars Entertainment Corporation*, No. 15-cv-0634 (SAS) (Dkt. No. 43).

In the CEC litigations, holders and representatives of holders of approximately $11 billion of CEOC debt allege that CEC violated Section 316(b) of the TIA by terminating its guarantee, even if it was permitted to do so by the express terms of the indentures under which the holders chose to invest, because the termination of the guarantee allegedly constituted a "restructuring."[3] Relying on a decision in the present case, the CEC Court denied CEC's motion to dismiss two of those cases, ruling that termination of CEC's guarantee violated the statute if it amounted to an "out-of-court debt restructuring achieved through collective action." *MeehanCombs Global Credit Opportunities Funds, LP* v. *Caesars Entm't Corp.*, 80 F. Supp. 3d 507, 516 (S.D.N.Y. 2015). In an August 27, 2015 decision, relying on the ruling on appeal here, the CEC Court held that "in order to prove an impairment under section 316(b), plaintiffs must prove either an amendment to a core term of the debt instrument, or an out-of-court debt reorganization." *BOKF, N.A.* v. *Caesars Entm't Corp.*, No. 15-CV-1561 SAS, 2015 WL 5076785, at *17 (S.D.N.Y. Aug. 27, 2015).

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[3] The cases are *BOKF, N.A.* v. *Caesars Entertainment Corporation*, 1:15-cv-01561 (SAS) (S.D.N.Y.); *UMB Bank* v. *Caesars Entertainment Corporation*, No. 15-cv-0634 (SAS) (S.D.N.Y.); *MeehanCombs Global Credit Opportunities Master Fund, LP* v. *Caesars Entertainment Corporation*, 1:14-cv-07091 (SAS) (S.D.N.Y.); *Danner* v. *Caesars Entertainment Corporation*, 1:14-cv-07973 (SAS) (S.D.N.Y.); and *Wilmington Savings Fund Society, FSB* v. *Caesars Entertainment Corporation*, C.A. No. 1004-VCG (Del. Ch.).

Attempting to define "out-of-court debt reorganization" – a phrase that appears nowhere in the TIA – the CEC Court adopted an extremely broad and vague description taken from *Investopedia*, a personal investment web site. *Id.* at *5 n.53.[4] And it held that "impairment" under the statute "must be evaluated as of the date that payment comes due" rather than as of the time of the challenged transaction. *Id.* at *5.

Recognizing the "brewing circuit split and the range of views expressed by district and bankruptcy courts . . . on the correct interpretation of section 316(b)" and the "serious implications for corporate entities" of its ruling, the CEC Court, acting *sua sponte*, certified its summary judgment order under 28 U.S.C. § 1292(b) and suggested that the interlocutory appeal be consolidated with this case. *Id.* at *12-*13. On September 8, 2015, CEC filed an application under Section 1292(b) seeking this Court's authorization to appeal that ruling. *See BOKF, N.A.* v. *Caesars Entm't Corp.*, No. 15-2827 (2d Cir. filed September

[4] As quoted by the CEC Court: "The term 'reorganization' has been defined as follows: 'A process designed to revive a financially troubled or bankrupt firm. A reorganization involves the restatements of assets and liabilities, as well as holding talks with creditors in order to make arrangements for maintaining repayments. Reorganization is an attempt to extend the life of a company facing bankruptcy through special arrangements and restructuring in order to minimize the possibility of past situations reoccurring.' Reorganization Definition, Investopedia.com, www.investopedia.com/terms/r/reorganization.asp (last visited Aug. 26, 2015)." (*Id.* at *5 n.53)

8, 2015). (Additional facts concerning the CEC litigation are described in our application.)

We submit that the "serious implications for corporate entities" noted by the CEC Court will cause grave difficulty for issuers, creditors and investors who participate in or rely upon the trillion dollar market in publicly traded debt, as well as employees and other stakeholders of issuers of debt. In the wake of the dramatic downturn in the gaming industry that accompanied the financial crisis, CEC and CEOC undertook long and diligent efforts to address CEOC's highly levered balance sheet and maintain CEOC's viability. CEC and CEOC undertook over 45 separate capital market transactions – asset sales, exchange and tender offers, debt repurchases and loan refinancings – with the goal of raising cash, deleveraging and extending debt maturities to position CEOC for an improved business environment and avoid the value destruction inevitable in a bankruptcy. As a consequence of certain of these transactions, as contemplated under the express provisions of the governing bond indentures – provisions that are common in debt instruments – CEC's guarantee of CEOC's publicly traded debt was terminated.

In undertaking the transactions now under challenge, CEC and CEOC relied on the language of the indentures and on the marketplace's settled understanding of the TIA, an understanding that has now been upended by the ruling on appeal and those in the CEC litigations. Once it chose to follow the flawed path of the trial court in this case, the CEC Court was placed in the impossible position of needing to create out of whole cloth a test that could provide workable guidance about the reach of the TIA. The test it chose manifestly fails to do so. Issuers, creditors, investors and traders considering routine financing agreements or transactions necessary to alleviate a company's financial difficulties – transactions that might nevertheless be alleged to "impair" the rights of some holdout creditors – cannot reliably value the risk of a claim under the TIA, a claim that may be asserted months or years after the transactions at issue.

We recognize that this is not the time or place to argue the merits of the CEC litigations. But it is undisputed that, absent intervention from this Court, in those litigations, the corporate parent of an issuer that believes it took good faith action to pay off debt and maintain its operations, consistent with the provisions of its indentures and with the goal of avoiding the crushing expense of bankruptcy, now finds itself facing a trial over whether a debt refinancing was a forbidden "reorganization." And that issue will be decided based on a definition derived from *Investopedia* that apparently deems "holding talks with creditors" as evidence of a TIA violation. Imposition of such a standard inevitably will create roadblocks for efforts to deal with the balance sheets of troubled companies that until now were considered routine and inhibit constructive talks with creditors, while rewarding holdouts willing to threaten issuers with bankruptcy.

The surest way to deal with these issues – a path that has the significant virtue of being faithful to the words and intent of the TIA – is to limit Section 316(b) to a prohibition against the amendment of the core economic terms of an indenture governing the amount, maturity and interest rate of the debt, which is how the statute has been understood and applied for decades.

If the Court declines to do so, we submit that it should make clear that Section 316(b) can apply only when a challenged transaction is shown to be an inextricable part of a *comprehensive* restructuring of the material terms of all of an issuer's debt, including the debt held by the plaintiffs, and that the restructuring directly and immediately impairs a plaintiff's right to repayment. Only by announcing such a clear standard for application of Section 316(b) can the Court provide guidance to the market and prevent holdouts from using the TIA as a barrier to transactions necessary to serve the legitimate interests of issuers and creditors alike.

SUMMARY OF ARGUMENT`

Despite plain language in the bond indenture permitting the actions taken by Appellants, and contrary to the market's long-settled understanding of the scope of the TIA, the District Court here ruled that Appellants' removal of a parent guarantee of certain of its subsidiary's debt violated the TIA rights of holdout noteholders. The District Court's drastic expansion of the TIA threatens to create widespread disruption in capital markets. Its reasoning calls into question many billions of dollars of transactions, inappropriately gives any individual noteholder effective veto power over much that companies do and rights beyond those for which they bargained, undermines a core policy of the Bankruptcy Code encouraging out-of-court restructurings and effectively preempts an area already regulated by state contract, fraudulent conveyance and fiduciary duty law. The expansive interpretation of the statute the District Court adopted will lead to unnecessary litigation and challenges to routine transactions that would previously have been unquestioned and that are economically beneficial. The decision should be reversed for the following reasons, in addition to the reasons set forth by Appellants and Intervenors in their opening briefs.

First, the ruling allows courts to rewrite explicit and carefully drafted indentures, undermining market certainty and settled expectations of issuers and other market participants. The indentures at issue here (as in the litigation involving CEC) expressly provided that the parent guarantees could be removed under certain defined circumstances, and neither here nor in the CEC litigation did the Court hold that the challenged termination of the parent guarantee violated the indentures. The District Court's ruling that the termination at issue nevertheless violated the TIA – and its holding that the statute prohibits many transactions that, while consistent with the governing indentures, may nevertheless be deemed to impair the issuers' practical ability to repay its debts – upsets the market's ability to rely on the terms of indentures. It thus creates broad uncertainty about the rights of issuers contemplating actions permitted by their debt agreements that may nevertheless later be alleged to reduce the issuer's practical ability to repay its debts.

Second, as illustrated by the decisions in the CEC litigation, the uncertainty engendered by the District Court's expansion of Section 316(b) is exacerbated by the lack of any workable limiting principle. Neither the court here nor the court in the CEC litigation has provided a meaningful definition of the terms "restructuring" or "reorganization" that are central to their holdings.

Third, the District Court's decision is at odds with a central policy of the Bankruptcy Code: encouraging out-of-court settlements and avoiding the expense and value destruction of bankruptcy proceedings. By potentially requiring unanimous creditor consent for many otherwise routine corporate activities – such as financings or new investments – the District Court's interpretation of the TIA will invite holdouts and interfere with the ability of issuers to manage their financial and business affairs. In turn, the ruling will force financially challenged entities into avoidable bankruptcies, injuring creditors, investors, and employees who depend upon the financial health of issuers of public debt. Similarly, the District Court's decision effectively overrides the terms of state laws governing the construction of indentures and other contracts and fraudulent conveyances, and principles of fiduciary duty that apply to insolvent corporations. Congress never intended to legislate preemptively in these areas and there is no good reason to federalize these areas of state law.

Fourth, should the Court conclude that Section 316(b) can apply to circumstances other than modifications of the core terms of an indenture (and it should not, for the reasons given herein), the statute should be narrowly limited by a bright line test prohibiting only transactions that constitute a *comprehensive* restructuring of the issuer's debt, including the debt held by the plaintiffs, and that directly and immediately impair a plaintiff's right to repayment. That approach minimizes restrictions on issuers' flexibility to undertake ordinary financing transactions and reduces market uncertainty, while preventing the impairment of noteholders' rights through out-of-court restructurings that are akin to the bankruptcy process. Without such a test, routine corporate transactions will be vulnerable to hindsight review under a vague and unworkable standard.

ARGUMENT

I. The District Court's Decision Improperly Undermines The Ability of Issuers And The Market To Rely on Governing Debt Instruments

Courts have repeatedly noted the importance of construing statutes to protect settled expectations and enhance certainty. *See, e.g., Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 81 (1982) (§ 703(b) of Title VII); *A-T-O, Inc.* v. *Pension Ben. Guaranty Corp.*, 634 F.2d 1013, 1020 (6th Cir. 1980) (ERISA); *In re Caldor, Inc. NY*, 193 B.R. 182, 186 (Bankr. S.D.N.Y. 1996) (Section 363(b) of the Bankruptcy Code); *cf. Wachovia Bank, Nat. Ass'n* v. *Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171 (2d Cir. 2011).

This court has particularly emphasized the need for clarity and predictability in the markets for debts and other securities. For example, in *Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982), the court rejected a rule that, in its view, would create uncertainty in the interpretation of common provisions in debt indentures, noting that such uncertainty "would vastly increase the risks, and therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice." *Id*. at 1048. *See generally Scientific Holding Co.* v. *Plessey Inc.*, 510 F.2d 15, 22 (2d Cir. 1974) (the "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract" (quoting

Restatement (Second) of Conflicts, § 187(1) & cmt c)). With respect to the indenture at issue here, the contracting parties' expectation was simple: that those instruments would be interpreted as they were written. The indenture straightforwardly informed noteholders that the parent guarantees could be removed, and spelled out precisely how that could be accomplished. (*See* Appellants' Br. at 9-12.)

As an expert declaration submitted in this case explained, there are good reasons that noteholders would agree to the provisions contained in the indenture. (A1709-1710 ¶ 3). Provisions authorizing the release of guarantees without unanimous consent "enforce the basic commercial arrangement between secured and unsecured creditors with respect to the priority of secured over unsecured debt." (*Id.*) Holders of lower priority instruments are rewarded with higher interest rates or other consideration. (A1716 at ¶ 22.) Indeed, the indenture at issue is consistent with broad market practice; indentures governed by the TIA "may and frequently do provide for the release of guarantees without the consent of 100% of the holders of the indenture securities." (A1709 at ¶ 2). The District Court's decision unfairly prevents both issuers and noteholders from relying on the terms of carefully negotiated contracts and creates broad uncertainty about their rights under debt contracts.

As the courts have held, contrary to the ruling below, Section 316(b) of the TIA plays a limited role in policing the debt market. The provision "applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself." *See In re Nw. Corp.,* 313 B.R. 595, 600 (Bankr. D. Del. 2004) (emphasis in original); *YRC Worldwide Inc.* v. *Deutsche Bank Trust Co. Ams.*, No. 10-2106-JWL, 2010 WL 2680336 (D. Kan. July 1, 2010).[5] As the Appellants' brief shows, this interpretation is a commonsensical reading of the statute that follows from principles of statutory interpretation. (*See* Appellants' Br. at 18-38.)

The District Court's expansion of Section 316(b) is not necessary to protect the legitimate interests of bondholders. Indentures are drafted by sophisticated parties, including "lawyers representing the investment banks that act as initial purchasers of the notes" and that are therefore charged with protecting the purchasers' interests. (A1716 at ¶ 21.) And, where the issuer is

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5 The District Court cited *Federated Strategic Income Fund* v. *Mechala Group Jamaica Ltd.*, which held that "defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets," when "taken together," "could materially impair or affect a holder's right to sue." No. 99 CIV 10517 HB, 1999 WL 993648, *7 (S.D.N.Y. Nov. 2, 1999) (Baer, J.). But, in contrast to the indentures at issue here and in the CEC litigation, the indenture in *Federated* did not contemplate that the parent guarantee at issue there might be removed. *See id.* at n.5. Thus, *Federated* does not preclude the termination of a parent guarantee in a manner expressly permitted by the governing indentures.

insolvent, bondholders have further protection under the state law of fiduciary duty. *See*, *e.g*., *Geyer* v. *Ingersoll Publications Co*., 621 A.2d 784, 790-91 (Del. Ch. 1992).

Independent commentary about the ruling on appeal reflects how far it diverges from the market's understanding. One commentator wrote that "[t]he TIA has been in effect for more than 75 years, and we are not aware of any precedent for reading Section 316(b) of the TIA to bar issuers from implementing actions permitted by the indenture that reduce the likelihood of payment of the notes without unanimous creditor consent." (*See* Davis Polk & Wardwell LLP, *SDNY Issues Novel Opinion Holding That Out-of-Court Restructurings May Violate Noteholder Rights Under the Trust Indenture Act* (February 3, 2015), *available at* https://blogs.law.harvard.edu/bankruptcyroundtable/2015/02/03/ sdny-issues- novel-opinion-holding-that-out-of-court-restructurings-may-violate-noteholder-rights-under-the-trust-indenture-act/.) Another commentator explained that "[t]he case is a departure from prior decisions that interpreted TIA section 316(b) as requiring a payment default or change in payment terms before that section would come into play." (*See* Hollace Topol Cohen, *The Trust Indenture Act's New Relevance to Out-of-Court Restructurings* (February 27, 2015), *available at* http://www.troutmansanders.com/the-trust-indenture-acts-new-relevance-to-out-of-court-restructurings-02-27-2015/.)

II. *Marblegate*'s Reasoning Lacks a Workable Limiting Principle and Discourages Consensual Efforts to Address the Finances of Troubled Issuers

The uncertainty created by the District Court's ruling is underscored by the absence of any meaningful or workable principle defining its holding. To avoid "untrammeled judicial intrusion into ordinary business practice," *Marblegate Asset Mgmt.* v. *Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592, 614 (S.D.N.Y. 2014), the District Court adopted a purported "limiting principle" that, absent a change to a core term of the indenture, the TIA is violated only where the challenged transaction constitutes "a nonconsensual majoritarian debt restructuring" outside of bankruptcy. *Marblegate Asset Mgmt.* v. *Educ. Mgmt. Corp.*, No. 14 Civ. 8584(KPF), 2015 WL 3867643, *11 (S.D.N.Y. June 23, 2015). But the supposed limiting principle – a malleable concept based on a term, "restructuring," that does not appear in the statute and that the District Court does not define – is not workable.

The need for some limiting principle is obvious, because various corporate initiatives can be said, after the fact, to affect the "practical ability" of the company's creditors to obtain repayment. Thus, the District Court's conclusion that the TIA precludes transactions that impair creditors' practical ability to recover could call into question such routine transactions as taking on senior debt; selling assets; paying dividends; undertaking an acquisition;

embarking on a new business venture; or refinancing debt senior to the holders' debt on more onerous terms. As the District Court seemingly acknowledged, any of these activities could be deemed, particularly in hindsight, to result in "impairing" or "affecting" a creditor's ability to obtain repayment, because they arguably lessen or even eliminate an issuer's ability to repay existing debt.

The CEC litigations illustrate the absence of a workable limit on the potential impact of Section 316(b) once the statute is extended to preclude actions that do not change the core economic terms of the indenture governing plaintiffs' debt. In its opinion on summary judgment, the CEC Court held, citing the opinion on appeal here, that the TIA could be violated absent any changes in the terms of the governing indentures by any transactions deemed to be "part of a plan" that collectively constitutes an "out-of-court debt reorganization." *BOKF, N.A.*, 2015 WL 5076785, at *11. The court expressly rejected CEC's argument that plaintiffs must establish "a restructuring of their particular debt." *Id.* at 10.

The CEC Court did not provide any meaningful definition of the critical term "reorganization." Instead, as noted above, citing a portion of the definition of that term drawn from the personal finance web site *Investopedia, id.* at *5 n.53, the court held that the factfinder could examine "all evidence" relating to the challenged transactions to determine whether a reorganization occurred, including whether "the transactions involve the restatement of assets and liabilities, [whether] CEOC [held] talks with creditors in order to make arrangements for maintaining repayments, and [whether] the transactions attempt[ed] to extend the life of a company facing bankruptcy through special arrangements and restructuring." *Id.* at *11. The court did not explain how those factors could be divined from the words of the statute, how the factfinder was to weigh those facts, or, except for the *Investopedia* citation of the non-statutory term "reorganization," why they should bear upon whether a bondholder's rights under the TIA have been impaired.

Under this definition, no issuer, creditor or trader could reliably predict whether a proposed or completed transaction would later be held to violate the TIA.

Significantly, the CEC Court's ruling, like the ruling of the court here, penalizes wholly appropriate and frequently necessary actions by an issuer or guarantor to address an issuer's financial condition. By bringing into play factors such as discussions with creditors, the CEC Court's definition will discourage negotiations with creditors that are beneficial – and sometimes vital – for issuers in financial difficulty who wish to avoid the disruption, cost and value destruction of a bankruptcy.

The CEC Court further held that a transaction can be deemed to violate Section 316(b) even if, at the time of the transaction, the issuer is solvent and fully able to repay its debts. Rather, the court held, whether or not the transaction violates the statute must be evaluated in hindsight "as of the date that payment becomes due," *id.* at *5, even if that date is months or years after the challenged transaction is concluded. Therefore, many standard corporate transactions will be at risk for years to come, if the issuer later runs into financial difficulty. The market cannot appraise these risks and, because the TIA has been construed to override explicit terms of an indenture, cannot assign them by contract.

These rulings illustrate the nebulous nature of the purported limiting principle adopted by the court in this case and the sweeping impact the court's holding, if affirmed, would have on a wide variety of debt issuers. Using these rulings, holdouts predictably will argue that routine transactions entered into to alleviate financial stress and allow an issuer to continue operation were part of a series of transactions that collectively constitute a forbidden debt reorganization. The definition would retroactively expose countless transactions to potential claims under the TIA. And given the absence of any meaningful definition of the terms "restructuring" or "reorganization," issuers and their affiliates would have no way of reliably predicting whether transactions might be subject to challenge.

For these reasons, Section 316(b) of the TIA should apply only when the "core terms" of an indenture are modified, to avoid myriad problems for issuers, creditors and the marketplace as a whole. Given the ability of sophisticated creditors to protect themselves through contract terms and the availability of state law remedies, no more is necessary.

III. The District Court's Decision Is at Odds with A Core Policy of The Bankruptcy Code of Encouraging Out-of-Court Restructuring

In addition to undermining the expectations of both the contracting parties and the marketplace, the District Court's interpretation of the TIA also undercuts an important purpose of the Bankruptcy Code by rewarding holdouts and thereby impeding out-of-court restructurings. The District Court itself "recognize[d] the potentially troubling implications of the Trust Indenture Act in rewarding holdouts; its arguable obsolescence given the expense and complexity of modern bankruptcy; and the unforeseen interplay between Section 316(b) and Title IV's funding requirements." *See Marblegate*, 2015 WL 3867643, at *13 (internal citation omitted).

As many courts have noted, a key purpose of the Bankruptcy Code is to encourage out-of-court restructurings. *See In re Pengo Indus, Inc.,* 962 F.2d 543, 549 (5th Cir. 1992) ("The Bankruptcy Code promotes out-of-court workouts in the first instance, with refuge in bankruptcy as a last resort.") (citation and internal quotation marks omitted); *In re Club Tower L.P.*, 138 B.R. 307, 312 (N.D. Ga. Bankr. 1991) ("The Bankruptcy Code also recognizes that the filing of a bankruptcy petition might not always be the most efficient means of restructuring the relations of a debtor and its creditors."); Hon. Conrad B. Duberstein, *Out-of-Court Workouts*, 1 Am. Bankr. Inst. L. Rev. 347, 348 (1993) ("The Code encourages out-of-court restructuring"); s*ee also Menchise* v. *Akerman Senterfitt*, 532 F.3d 1146, 1151 (11th Cir. 2008) (state statute that aimed "to encourage settlement and to conserve judicial resources" was not inconsistent with the Bankruptcy Code). In fact, many provisions of the Bankruptcy Code were enacted precisely to ensure that litigants and the court system do not have to face the expense and disruption that are hallmarks of bankruptcy. *See, e.g., In re Timbers of Inwood Forest Assoc., Ltd.*, 793 F.2d 1380, 1405-1406 (5th Cir. 1986) (listing provisions of the Bankruptcy Code of 1978 that "encourage speedy out-of-court workouts").

By effectively foreclosing the possibility of many out-of-court reorganizations, the District Court's decision undermines this purpose of the Bankruptcy Code. If actions by an issuer seeking to avoid bankruptcy require unanimous consent, it will frequently be in the interest of individual noteholders (such as the plaintiff here and the noteholders in the cases faced by CEC) to withhold consent or to demand additional compensation for providing it. *See, e.g.*, Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. Rev. 1040, 1055-56 (2002) (describing the "holdout" problems that arise when "a company in financial distress seeks concessions from its bondholders[.]") Such holdouts may have an incentive not to participate in any negotiations with distressed bond issuers even "if consummating the restructuring benefits bondholders as a whole." *See id.* at 1056.

There are strong reasons that the Bankruptcy Code was designed to promote out-of-court restructurings and avoid bankruptcy proceedings. It is widely recognized that out-of-court restructurings are frequently superior to bankruptcy proceedings for creditors, debtors and other constituents. *See* Karen M. Gebbia-Pinetti, *First Report of the Select Advisory Committee on Business Reorganization,* 57 Bus. Law. 163, 179 (2001); Duberstein, 1 Am. Bankr. Inst. L. Rev. at 365 (noting that out-of-court workouts, when successful, are typically more beneficial to all parties than when a company utilizes the bankruptcy courts); Stuart C. Gilson, Kose John & Larry H.P. Lang, *Troubled Debt Restructurings: An Empirical Study of Private Reorganizations of Firms in Default*, 27 J. Fin. Econ. 315, 319 (1990). Commentators have noted that "[o]ut-of-court workouts, even if they mean accepting pennies on the dollar, are usually quicker and cheaper than any bankruptcy, and therefore likely to return more to creditors." Randolph J. Haines, *Bankrupting the Opposition*, 21 Litig. 38, 40 (1995); *see also* Bettina M. Whyte & Patricia D. Tilton, *Turnarounds: Pursuing a Dual Path*, 14 Am. Bankr. Inst. J. 28 (1995) ("Generally speaking . . . an out-of-court workout is preferable to reorganizing under the Code due to the cost, image, drain or resources, impact on morale, etc. of a bankruptcy.”).

That is because, among other things, out-of-court restructurings avoid the large expense and value destruction that commonly accompany bankruptcies. *See* Gebbia-Pinetti, 57 Bus. Law. at 183-84. Altogether, “[a]verage bankruptcy costs are more than twice as large as costs of nonbankruptcy bond defaults, 28.8% versus 12.8%.” *See* Sergei Davydenko et al., *A Market-Based Study of the Costs of Default,* 25 Rev. of Fin. Studies 2959 (2012). For these reasons, too, the TIA should not be construed, as the District Court did here, to encourage unnecessary bankruptcy filings.

IV. If Section 316(b) Is Not Limited To Amendments to “Core Terms,” It Should Apply Only to Comprehensive Restructurings that Directly and Immediately Impair Noteholders’ Rights to Payment

If the Court nevertheless concludes that Section 316(b) should apply in circumstances other than a non-consensual amendment to the “core terms” of the indentures under which the plaintiffs purchased debt, the statute should be narrowly limited to prohibit only transactions that constitute a *comprehensive* restructuring of the issuer’s debt, including the debt held by the plaintiffs, and that directly and immediately impair a plaintiff’s right to repayment.

This approach reduces restrictions on issuers’ flexibility to undertake ordinary financing or other transactions, such as incurring additional senior debt, agreeing to asset sales, terminating or modifying guarantees or making potentially risky new investments. It provides issuers with flexibility to address financial stress, including by engaging in discussions with creditors (which, as noted, the District Court's decision in the CEC litigations discourages). It reduces the possibility that the TIA will provoke unnecessary bankruptcy filings. And, by limiting and more carefully defining the circumstances in which Section 316(b) can be read to override the terms of indentures, it enhances predictability, to the benefit of issuers, investors, and the broader market.

CONCLUSION

For the reasons set forth above, and those set forth in the Appellants' briefs, CEC respectfully submits that the judgment of the District Court should be reversed.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Lewis R. Clayton________
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