BEFORE THE EXTERNAL REVIEW PANEL
OF THE DETERMINATIONS COMMITTEE OF THE
INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

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Reviewable Question: Has a Failure to Pay Credit Event occurred on December 18, 2014 in respect of the Reference Entity as a result of (a) a principal redemption amount (which included accrued interest due thereon) and an interest coupon payment in each case being scheduled as due on December 15, 2014, and (b) the Reference Entity depositing funds with the paying agent equal to such principal redemption amount and not depositing such interest coupon payment?

BRIEF IN FAVOR OF THE ANSWER "YES" TO THE REVIEWABLE QUESTION

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PRELIMINARY STATEMENT

We submit this brief in support of the answer "yes" to the Reviewable Question and urge the External Review Panel (the "Panel") to find that under the 2003 and 2014 ISDA Credit Derivatives Definitions ("2003 ISDA Definitions" and "2014 ISDA Definitions" (collectively, the "ISDA Definitions")), a Failure to Pay Credit Event occurred on December 18, 2014 in respect of the Reference Entity, Caesars Entertainment Operating Company ("CEOC" or the "Issuer").

As explained below, under the ISDA Definitions, to answer the Reviewable Question, it is necessary to determine whether payments were made "in accordance with the terms of [the] Obligations." (2003 ISDA Definitions § 4.5; 2014 ISDA Definitions § 4.5.) The terms of the "Obligations" are set forth in an indenture agreement dated December 24, 2008 (the "Indenture"). Accordingly, to determine whether a Failure to Pay Credit Event has occurred, it is necessary to look to the terms of the Indenture. The Indenture provides that an installment of principal or interest is not deemed paid unless "***all*** principal ***and*** interest then due" is paid. Both principal and interest were due on December 15, 2014, and the issuer indisputably failed to pay all the interest that was then due. As such, the principal payment due on December 15 was not deemed paid under the terms of the Indenture. Like most indentures, there is no grace period under the Indenture for a failure to pay principal. Accordingly, under the ISDA Definitions, a Failure to Pay Credit Event occurred.

To conclude that a Failure to Pay Credit Event did not occur, the Panel would need to determine that the words "all principal and interest then due" in the indenture do not mean what they plainly say. There is no basis for such a conclusion. *First*, the leading industry commentary published by the American Bar Association addresses the precise factual scenario at issue here and confirms that these words mean exactly what they say. The parties to the Indenture were

sophisticated and advised by experienced lawyers, and would no doubt have been aware of this commentary.

Second, the provision in the Indenture that principal is not deemed paid unless ***all*** principal and interest then due is paid in no way conflicts or is inconsistent with other provisions in the contract. To the contrary, the Indenture read as a whole reflects the clear intent of the parties that where interest and principal are due at the same time, the issuer is required to pay both, and that a failure to do so results in an immediate event of default.

Third, many similar indentures that pre-date the Indenture include specific language that expressly provides what the opposing side argues this indenture means. The parties to the Indenture would have been aware of these precedents, and deliberately chose not to follow them. This demonstrates that the parties specifically intended the language they used to have its express meaning.

As noted above, under the ISDA Definitions, the determination of whether a Failure to Pay Credit Event occurred must be made by reference to the terms of the Indenture. The Panel should reject any invitation to substitute its own belief or guess as to what the contracting parties might have meant, or what it thinks "should" happen, for the plain and unambiguous words on the page, which text is publicly available to all trading counterparties. To make determinations about credit events that are not based on the underlying contract risks depriving the derivatives markets of the certainty on which they depend.

STATEMENT OF FACTS

Pursuant to the Indenture, CEOC[1] issued its 10.00% Second-Priority Senior Secured Notes due 2015 and 10.00% Second-Priority Senior Secured Notes due 2018 (collectively, the "Notes") in the aggregate principal amount of $1,062,421,000. (Indenture § 2.01.) Under the Indenture, CEOC owes to the Noteholders a fixed 10% interest rate per year on the principal amount of the Notes. (Indenture at A-1-7, A-2-7, B-1-5, B-2-5.) These interest payments are due semiannually on June 15 and December 15 (the "Semiannual Payment Dates") for the duration of the Notes. (*Id*.)

Pursuant to the terms of the Indenture, beginning after the fifth anniversary of the Notes' issuance, CEOC became subject to a mandatory redemption provision, which required CEOC to redeem for cash a portion of the outstanding Notes necessary to prevent them from being treated as "applicable high yield discount obligations" ("AHYDOs") under United States tax laws (the "Mandatory Principal Payment").[2] (Indenture at A-1-9, A-2-9, B-1-7, B-2-7 (citing 26 U.S.C. § 163(i)(1).) The Mandatory Principal Payments thereafter were also due on the Semiannual Payment Dates. Thus, beginning on June 15, 2014, CEOC was required on each Semiannual Payment Date to make both the Mandatory Principal Payments and the semiannual interest coupon payments.

On December 15, 2014, CEOC was due to make a Mandatory Principal Payment and an interest coupon payment in the aggregate amounts of $17,631,000 and $41,271,000, respectively.

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[1] Harrah's Operating Company, Inc. is the Issuer named in the Indenture but changed its name to CEOC in November 2010. CEOC, Annual Report (Form 10-K) (Mar. 4, 2011).

[2] Such a provision is often contained in indentures with a tenor longer than five years that are issued with significant Original Issue Discount, and likely would not have been considered surprising to the bondholders.

On December 12, 2014, CEOC deposited with the Paying Agent a total of only $18,513,390 (equal to the price required to redeem the requisite portion of the Notes)—an amount more than $40,000,000 short of the $58,902,000 then due. The Paying Agent then sent the deposited funds to the Depository Trust Company ("DTC"), the registered holder of the Notes. CEOC, Current Report (Form 8-K) (Dec. 16, 2014).

CEOC reported in its public disclosures that it was "electing" not to pay the full amount of the principal and interest due on December 15, 2014 in light of ongoing restructuring discussions, and that it had instructed DTC—despite the Indenture's prohibition against such allocation, *see* n.4, *infra*—to apply its $18 million deposit to the Mandatory Principal Payment and the interest thereon. CEOC, Current Report (Form 8-K) (Dec. 15, 2014). To this day, CEOC still has not satisfied its obligation to pay the approximately $60 million due to the Noteholders on December 15, 2014.

ARGUMENT

I. Under the Plain Language of the Credit Derivatives Definitions and the Indenture, a Failure to Pay Credit Event Has Occurred.

Under the ISDA Definitions, a Failure to Pay Credit Event occurs if, "after the expiration of any applicable Grace Period," the Reference Entity fails to make "when and where due, any payments in an aggregate amount of not less than the Payment Requirement under one or more Obligations, in accordance with the terms of such Obligations at the time of such failure." (2003 ISDA Definitions § 4.5; 2014 ISDA Definitions § 4.5.) The Notes constitute CEOC's "Obligations" under the ISDA Definitions. (2003 ISDA Definitions §§ 2.14, 2.19; 2014 ISDA Definitions §§ 3.1, 3.13.) "Grace Period" is defined under the ISDA Definitions to mean "the applicable grace period with respects to payments under and in accordance with the terms of such Obligation," and if no grace period is applicable under the terms of such Obligation, a

Grace Period of three business days is "deemed to apply to such Obligation." (2003 ISDA Definitions § 1.12; 2014 ISDA Definitions § 1.46.)

As noted above, pursuant to the ISDA Definitions, to answer the Reviewable Question, it is necessary to determine whether CEOC made its payments "in accordance with the terms of [the] Obligations." (2003 ISDA Definitions § 4.5; 2014 ISDA Definitions § 4.5.) The terms of the "Obligations" are set forth in the Indenture. Accordingly, to determine whether a Failure to Pay Credit Event has occurred, it is necessary to look to the terms of the Indenture.

In interpreting that Indenture, which is governed by New York law (Indenture § 13.09), standard rules of contract interpretation apply. *Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1049 (2d Cir. 1982) ("Interpretation of indenture provisions is a matter of basic contract law."). Most fundamentally, "where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." *R/S Associates v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 771 N.E.2d 240, 242 (2002) (internal quotation marks omitted). In these circumstances, "the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Patsis v. Nicolia*, 120 A.D.3d 1326, 1327, 992 N.Y.S.2d 349, 350 (2nd Dep't 2014) (internal citations omitted). Thus, a clear and unambiguous contract "must be enforced according to the plain meaning of its terms." *Id.*

Here, the Indenture states that "[a]n installment of principal of or interest shall be ***considered paid*** on the date due ***if*** on such date the Trustee or the Paying Agent holds as of 12:00 p.m. Eastern time money ***sufficient to pay all principal and interest then due***." (Indenture § 4.01 (emphasis added).) As of 12 p.m. on December 15, 2014, CEOC had not deposited with the Paying Agent sufficient funds to pay "all principal and interest" due on that day.

Accordingly, under the plain and express terms of the Indenture, neither the Mandatory Principal Payment nor interest payment were considered paid on the date due. Unlike some of the other occurrences that trigger an Event of Default, the Indenture, similar to many other indentures, provides no grace period to cure a non-payment of principal. (*See* Indenture § 6.01.) Accordingly, on December 18, 2014, after the lapse of the three-day Grace Period under the ISDA Definitions, a Failure to Pay Credit Event occurred as a result of the Reference Entity (CEOC) failing to pay principal (the Mandatory Principal Payment) due on December 15, 2014.

To find that a Failure to Pay Credit Event did not arise from CEOC's failure to deposit with the Paying Agent funds sufficient to cover all of its principal and interest payments due on the Semiannual Payment Date requires interpreting Section 4.01 to mean something other than what it says. Specifically, the words "***all*** principal ***and*** interest then due" (Indenture § 4.01) would have to be interpreted to mean "***such installment of*** principal ***or*** interest then due." The plain words of a contract simply cannot be interpreted to mean something so contrary to what they say. *See Progressive Northeastern Ins. Co.* v. *State Farm Ins.*, 81 A.D. 3d 1376, 1378, 916 N.Y.S. 2d 454, 456-57 (4th Dep't 2011) (refusing to change the "conjunctive 'and' into a disjunctive 'or'" in interpreting a contract).

Indeed, that the words "all principal and interest" mean "all principal and interest" is confirmed by the American Bar Association ("ABA") Model Simplified Indenture issued in 1983 (the "1983 Model Indenture") and the American Bar Association Revised Model Simplified Indenture issued in 2000 (the "2000 Model Indenture") (collectively, the "Model Indentures")—which set out the common form for standard indenture provisions—and their commentaries, upon which courts (and practitioners) routinely rely to inform their interpretation of indenture agreements. *Quadrant Structured Prods. Co., Ltd.* v. *Vertin*, 23 N.Y.3d 549, 568,

992 N.Y.S.2d 687 (2014) (noting that "parties sophisticated and well versed in this area of the law . . . are well aware of these commentaries"); *see also In re K-V Discovery Solutions, Inc.*, 496 B.R. 330, 335-36 & n.3 (Bankr. S.D.N.Y. 2013). Section 4.01 of the Model Indentures contains in substance the same language as that contained in Section 4.01 of the Indenture:

> 1983 Model Indenture § 4.01: "Principal and interest shall be considered paid on the date due if the Paying Agent holds on that date money sufficient to pay ***all*** principal ***and*** interest then due." 38 Bus. Law 741, 755 (1983 ed.) (emphasis added).
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> 2000 Model Indenture § 4.01: "Principal and interest shall be considered paid on the date due if the Paying Agent holds in accordance with this Indenture on that date money sufficient to pay ***all*** Principal ***and*** interest then due . . . ." 55 Bus. Law 1115, 1133 (2000 ed.) (emphasis added).
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> Indenture § 4.01: "An installment of principal of or interest shall be considered paid on the date due if on such date the Trustee or the Paying Agent holds as of 12:00 p.m. Eastern time money sufficient to pay ***all*** principal ***and*** interest then due . . . ." (emphasis added).

The ABA commentaries to both of the Model Indentures state that "[t]his Section [§ 4.01] makes clear that the Company must deposit an amount sufficient to pay all principal and interest due on the particular date, not (for example) just enough to pay principal and interest on Securities called for redemption if other amounts are due on the same date." 38 Bus. Law at 789; 55 Bus. Law. at 1183-84.[3] Indeed, these ABA commentaries address the precise factual scenario here, where the Issuer sought to pay only principal and interest on securities called for redemption where other amounts were also due on the same date. The parties and their experienced counsel

[3] Moreover, the fact that the parties to the Indenture modified the language in Section 4.01 with the addition of the words "an installment of," "if on such date," "the Trustee," and "as of 12:00 p.m. Eastern time" makes clear that this section was not adopted boilerplate from the Model Indentures and instead was adapted to effectuate the parties' minor deviations from the Model Indenture.

would have been aware of these long-established interpretations of the Model Indenture language that they chose to use, and there is no basis to assume the parties intended a different result from use of the same language.

II. The Conclusion That a Failure to Pay Credit Event Occurred Is Consistent with the Indenture as a Whole.

A. Sections 4.01 and 6.01 Can and Must Be Read Together.

The opposing side's argument is, at its core, that Section 6.01(a) of the Indenture gives the Issuer the unconditional right to pay interest 30 days late and that this "right" trumps all other provisions of the Indenture. That argument fundamentally misapprehends Section 6.01(a). Section 6.01(a) does not, either expressly or impliedly, grant to the Issuer the unconditional right to pay interest 30 days late. It simply provides that a failure to pay interest does not *by itself* result in an event of default until 30 days have passed. That plainly does not mean that *no* event of default can occur until 30 days have passed from the failure to pay interest. For example, if the Issuer commences a voluntary case under the United States bankruptcy laws, there is an automatic event of default, and the fact that interest was also due obviously would not change the fact that there was an event of default. Likewise, here, CEOC failed to pay principal—as that obligation is defined in Section 4.01—and thus, an immediate event of default under Section 6.01 resulted, making the 30-day grace period for interest payments irrelevant under the circumstances.[4]

To view Section 6.01 as trumping Section 4.01 would also mean that Section 4.01's requirement that "all principal and interest then due" be paid would *never* have any effect. That

[4] The opposing side may argue that the Indenture permits a 60-day cure period for breaches of all covenants. However, Section 6.01(c) allows a 60-day cure period in connection with breaches of agreements "other" than the agreements to pay principal and interest. (*See* Indenture §§ 6.01(a)-(c).)

is, if interest could always be paid 30 days late, then there would *never* be a requirement to pay all principal and interest. Thus, to interpret Section 6.01 as always permitting interest to be paid 30 days late would deprive that clause of *any* meaning, as the exception would swallow the rule. That would violate the fundamental precept that "the entire contract must be considered and the court will favor an interpretation that gives effect to every part of the contract." *U.S. Trust Co. of New York v. Executive Life Ins. Co.*, 602 F. Supp. 930, 937 (S.D.N.Y. 1984), *aff'd*, 791 F.2d 10 (2d Cir. 1986); *see also Seabury Const. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63, 69 (2d Cir. 2002) ("General canons of contract construction require that 'where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.'"); *Glencore Ltd. v. Degussa Eng'r Carbons L.P.*, 848 F. Supp. 2d 410, 433 (S.D.N.Y. 2012) ("It is black letter law . . . that courts are to construe contract terms so as, where possible, to give rational meaning to all provisions in the document."). In *Bank of New York Trust Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 277-78 (2d Cir. 2013), the Second Circuit rejected one party's reading of an indenture that would effectively "supplant[]" one provision over another when the two provisions could be read "naturally as supplementing" one another.[5]

[5] The opposing side may also argue that absent an express contractual provision to the contrary, a borrower may allocate its payments in the manner that it chooses. However, in *360 Motor Parkway, LLC v. Mortgage Zone, Inc.*, 25 Misc. 3d 971, 976, 887 N.Y.S.2d 419, 423 (Sup. Ct. 2009), the court held that while a debtor may as a general matter dictate how funding should be applied to its debts, a clear and unambiguous contract that provided otherwise trumped that common law rule. *Id*. (citing *Beyer Bros. of Long Island Corp.* v. *Kowalevich*, 89 A.D.2d 1005, 1005, 454 N.Y.S.2d 444, 445 (2d Dep't 1982)). Thus, the argument that CEOC could designate its funds to pay only the Mandatory Principal Payment is erroneous, because here there is an express contractual provision to the contrary, in that Section 4.01 expressly provides that a payment has not been made unless all principal and interest then due is paid, and thus prohibits "allocation." Furthermore, under Section 6.10, after the automatic Event of Default on December 15, 2014 resulting from the Issuer's failure to make the principal payment due that day (or otherwise), the Trustee was required to apply the payment to the Noteholders "for principal, premium, if any, and interest ratably, without preference or priority of any kind."

(*footnote continued*)

To interpret the Events of Default section of the Indenture (*i.e.*, Section 6.01) as effectively supplanting or trumping the Covenants section of the Indenture (*i.e.*, Section 4.01), without doing so expressly, would be particularly egregious because the covenants are the linchpin of the Indenture, setting out the obligations of the issuer. Section 4.01 in particular sets out the most important obligation of the Issuer—the obligation to pay principal and interest when due. This promise by the borrower to pay the lender principal and interest when due is the core purpose of the Indenture. *See* American Bar Foundation, Commentaries on Model Debenture Indenture Provisions 111 (1971) ("The essence" of an indenture agreement is "the promise to pay a sum of money on a future date together with interest on such sum, payable semi-annually at a specified rate and at a specified place.").

On the other hand, Section 4.01 can be read according to its plain and unambiguous terms without conflicting with Section 6.01. Specifically, the plain meaning construction in no way nullifies the 30 day grace period for interest payments generally. So long as there is not a separate Event of Default, the grace period for failure to pay interest would operate. Indeed, for most of the life of the Indenture, only interest payments were due, and these were always subject to a 30-day grace period.[6] As set forth in the Notes, for the first five years following their issuance in December 2008, CEOC made interest-only payments semiannually. (Indenture at A-

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(*footnote continued*)
(Indenture § 6.10.) Any default rule under the common law which may permit a voluntary allocation of payments is thus inapplicable here where the contractual provisions prohibit an allocation to pay only the principal amount owed.

[6] Notably, on December 15, 2014, CEOC also failed to make a $184 million interest payment that was due on CEOC's 10% second-priority senior secured notes due 2018 issued under an indenture dated April 15, 2009 (the "April 2009 Indenture"). CEOC, Current Report (Form 8-K) (Dec. 15, 2014). CEOC was paying only interest on the notes issued under the April 2009 Indenture on that day, and thus, an Event of Default with respect to those notes could not occur until after a 30-day grace period had run.

1-7, A-2-7, B-1-5, B-2-5.) Failure to pay those 10 interest-only payments on time would have resulted in an Event of Default 30 days after the due date of those interest-only payments under Section 6.01 of the Indenture.

When, after the fifth year, in 2014, the Issuer began making the Mandatory Principal Payments, as required by the express terms of the Indenture, the Issuer was then obligated under the Indenture to pay in full both the principal and interest payments in order to avoid triggering an Event of Default as a result of non-payment of principal.[7] The higher burden on the Issuer to pay both interest and principal when principal payments are due makes sense. It protects the lender by ensuring that the borrower cannot divert interest to pay principal, thus reducing future principal at the lender's own expense. Ignoring Section 4.01 would impair the rights of the Noteholders and confer a benefit on the Issuer that was not intended by the Indenture.

B. The Plain Meaning of Section 4.01 Is Consistent with the Remainder of the Indenture.

The plain text of Sections 4.01 and 6.01 is also consistent with the remainder of the Indenture, including Sections 2.05, 2.09 and 3.07. Section 2.05, in particular, provides that whenever principal and interest are due, the Issuer is required to deposit with the Paying Agent "a sum sufficient to pay such principal and interest when so becoming due," consistent with Section 4.01. Read together, Sections 2.09 and 3.07 address the mechanics for redemption, and provide that "so long as the Issuer has deposited with the Paying Agent funds sufficient" to pay

[7] In order to avoid being subject to the tax burden arising out of the application of the AHYDO rules, CEOC structured the Notes so that it would be making principal payments five years after their issuance. (Indenture at A-1-9, A-2-9, B-1-7, B-2-7.) As a matter of fairness, CEOC cannot be permitted to benefit from the tax structure that it chose to implement while using the payments required under that tax structure to delay—and in this case, evade entirely—the interest payment due to the Noteholders. In other words, CEOC should not be able to obtain the benefit from the tax structure of the Notes at the expense of the Noteholders.

"all principal and interest payable on that date with respect to the Notes (or portions thereof) to be redeemed," and the Paying Agent is not "prohibited from paying such money to the holders on that date pursuant to the terms of the Indenture" then the Notes called for redemption "cease to be outstanding and interest on them ceases to accrue." (Indenture §§ 2.09, 3.07.) The commentary to the Model Indenture, however, makes clear that depositing "just enough to pay principal and interest on Securities called for redemption" does not satisfy the Issuer's obligation to make a payment under Section 4.01. 38 Bus. Law at 789; 55 Bus. Law. at 1183-84.[8]

III. A Comparison to Other Indenture Agreements Confirms the Plain Reading of Section 4.01.

Because the plain language of the contract is "clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" and there is no need to look beyond the text. *R/S Associates*, 98 N.Y.2d at 32, 771 N.E.2d at 242. However, a review of other indenture agreements that pre-date this Indenture, and thus would have been available to the drafters, confirms that the parties intended the plain meaning. Specifically, these other indentures show that where the parties' intent was for the contract to say what the opposing side argues, the parties modified the Model Indenture language accordingly.

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[8] Further, any reliance on the last sentence in Section 3.07 in support of the argument that the deposit of funds sufficient to pay only the principal and interest on the Notes to be redeemed is misplaced because Section 3.07 addresses only the Issuer's duty to deposit funds for redemption with the Paying Agent, not the Issuer's duty to satisfy its payment obligations. Section 3.07 provides that the Issuer's "deposit of [the] redemption price" must be made "prior to 10:00 a.m., New York City time, on the redemption date." (Indenture § 3.07.) In fact, the 10 a.m. deadline for the Issuer's deposit of the redemption amount differs from the deadline of 12 p.m. for determining whether the Issuer's payments are deemed paid. (*Compare* Indenture § 3.07 *to* Indenture § 4.01.) The ABA commentaries to Section 3.05 of the Model Indentures (comparable to Section 3.07 of the Indenture) confirm that this section serves a limited purpose and is only "intended to import a requirement that on the redemption date the Paying Agent be in possession of funds then available (i.e., funds cleared for its use) to pay for redemption and accrued interest." 38 Bus. Law at 788-89; 55 Bus. Law at 1183.

For example, in one 2001 indenture, instead of using the Model language:

> "[p]rincipal and interest shall be considered paid on the date due if the Paying Agent holds in accordance with this Indenture on that date money sufficient to pay ***all*** Principal ***and*** interest then due"

it provided that:

> "an installment of principal, premium, if any, or interest shall be considered paid on the applicable due date if on such date the Trustee or the Paying Agent holds, in accordance with this Indenture, money sufficient to pay ***all of such installment*** then due."[9]

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[9] (Metlife Indenture § 4.01, dated Nov. 9, 2001 (excerpt attached as Exhibit A).) Many indentures even gave the issuer the right to designate the application and use of the funds paid to the paying agent. For example, Section 10.01 of a November 14, 2003 indenture agreement entered into by Tsakos Energy Navigation LTD states that "[a]n installment of principal, premium, if any, or interest on the Securities shall be considered paid on the date it is due if the Trustee or Paying Agent (other than the Company or an Affiliate of the Company) holds for the benefit of the Holders, on that date, immediately available funds deposited and ***designated for*** and sufficient to pay the installment." (*See* Tsakos Energy Navigation LTD Indenture § 10.01, filed Nov. 14, 2003 (excerpt attached as Exhibit B) (emphasis added); *see also* Quality Distribution, LLC Indenture § 4.01, dated Oct. 15, 2009 (excerpt attached as Exhibit C); Interline Brands, Inc. Indenture § 4.01, dated Aug. 6, 2012 (excerpt attached as Exhibit D); American Apparel Inc. Indenture § 4.01, dated Apr. 4, 2013 (excerpt attached as Exhibit E); Skyterra Indenture § 4.01, dated Jan. 7, 2009 (excerpt attached as Exhibit F); Netscout Indenture § 4.01, dated Nov. 1, 2007 (excerpt attached as Exhibit G); Xinyuan Real Estate Co., Ltd. Indenture § 4.01, dated Dec. 6, 2013 (excerpt attached as Exhibit H); Lennar Corp. Indenture § 4.1, dated July 20, 2012 (excerpt attached as Exhibit I); Universal City Development Partners, Ltd. Indenture § 4.01, dated Nov. 6, 2009 (excerpt attached as Exhibit J); Retail Opportunity Investments Partnership Indenture LP § 4.01, dated Dec. 9, 2013 (excerpt attached as Exhibit K); Walt Energy, Inc. Indenture § 4.01, dated Mar. 27, 2014 (excerpt attached as Exhibit L); Clear Channel Communications, Inc. Indenture § 4.01, dated June 21, 2013 (excerpt attached as Exhibit M); Energy Future Intermediate Holding Company, LLC Indenture § 4.01, dated Dec. 5, 2012 (excerpt attached as Exhibit N); Transunion Holding Co., Inc. Indenture § 4.01, dated Mar. 21, 2012 (excerpt attached as Exhibit O); Revel AC, Inc. Indenture § 4.01, dated Feb. 17, 2011 (excerpt attached as Exhibit P); Suburban Propane Partners, L.P. Indenture § 9.01, dated Aug. 1, 2012 (excerpt attached as Exhibit Q); HD Supply, Inc. Indenture § 401, Apr. 12, 2012 (excerpt attached as Exhibit R); Hawker Beechcraft Indenture § 4.01, dated Mar. 26, 2007 (excerpt attached as Exhibit S); Fairpoint Communications Indenture § 4.01, dated Feb. 14, 2013 (excerpt attached as Exhibit T); Georgia Gulf Corp. Indenture § 4.01, dated Feb. 1, 2013 (excerpt attached as Exhibit U); Energy & Exploration Partners, Inc. Indenture § 4.01, dated July 22, 2014 (excerpt attached as Exhibit V).)

Similarly, that indenture also included a provision allowing the issuer the right to defer payments of interest pursuant to certain conditions, "notwithstanding the provisions of Section 4.01 or any provision herein to the contrary."[10] In other indenture agreements, the second sentence of Section 4.01 at issue here was removed entirely.[11]

The parties to the Indenture—who were sophisticated entities represented by experienced counsel—had these precedents (as well as the commentaries to the Model Indentures) available to them at the time that they drafted their indenture.[12] They thus plainly knew that there were ways to provide what the opposing side argues was the intent of the parties here. However, they did not use the language from those precedents, and where "parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission." *Quadrant*, 23 N.Y.3d at 567, 992 N.Y.S. 2d at 699. Here, the "inescapable conclusion" is that the parties intended Section 4.01 to have its plain and ordinary meaning.

CONCLUSION

The question before this Panel is whether the Reference Entity failed to make its payments under its Obligations "in accordance with the terms of such Obligations." The "terms of [CEOC's] Obligations" were set forth in the Indenture, which stated clearly that a principal payment was deemed paid if "all principal and interest then due" was paid. The Issuer did not

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[10] (Ex. A § 4.01(b).)

[11] (*See* Republic of Argentina Indenture § 3.1, filed Jan. 13, 2005 (excerpt attached as Exhibit W); R.R. Donnelly Indenture § 4.01, dated Jan. 3, 2007 (excerpt attached as Exhibit X); Kellwood Co. Indenture § 5.01, dated June 22, 2004 (excerpt attached as Exhibit Y).)

[12] In fact, many of these indenture agreements with the modified language in Section 4.01 were for bonds issued by portfolio companies owned by the sponsors of CEOC. (Ex. C § 4.01; Ex. F § 4.01; Ex. G § 4.01; Ex. H § 4.01; Ex. V § 4.01.)

pay principal in accordance with these terms. Because the terms of the contract are clear and unambiguous, the Panel is bound to find that a Failure to Pay Credit Event occurred. The Panel should therefore answer "yes" to the Reviewable Question.

Dated: New York, NY
February 2, 2015

Respectfully submitted,

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