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

**DC ISSUES: 2014121901 and 2014122202**

---

**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 SUBMITTED BY AN ISDA MEMBER IN FAVOR OF THE "YES" ANSWER TO THE REVIEWABLE QUESTION


STROOCK & STROOCK & LAVAN, LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

*Attorneys for an ISDA Member in favor of a "Yes" Answer to the Reviewable Question*

*Of Counsel:*

Daniel A. Ross
Jayme T. Goldstein
Sayan Bhattacharyya

# TABLE OF CONTENTS

**Page**

INTRODUCTION ........................................................................ 1

THE INDENTURE AND THE ISDA DEFINITIONS ........................................ 2

POINT I
NEW YORK LAW DOES NOT PERMIT THE REPLACEMENT
OF CLEAR WORDS IN AN AGREEMENT WITH WORDS
MEANING THE OPPOSITE ............................................................ 8

POINT II
THE MODEL INDENTURE FURTHER SUPPORTS THE
INTERPRETATION OF THE INDENTURE AS REQUIRING A
FULL PAYMENT OF PRINCIPAL AND INTEREST ...................................... 17

CONCLUSION ........................................................................ 18

## INTRODUCTION

A Failure to Pay Credit Event occurred on December 18, 2014 with respect to Caesars Entertainment Operating Company, Inc. (the "Reference Entity"; hereinafter, "CEOC"). CEOC is the issuer of 10% Second-Priority Senior Secured Notes due 2018 (the "2018 Notes") and 10% Second-Priority Senior Secured Notes due 2015 (the "2015 Notes"; collectively, with the 2018 Notes, the "Notes"). The Failure to Pay Credit Event resulted from CEOC's failure to deposit sufficient funds with the paying agent for the Notes to satisfy in full both the principal redemption amount and the interest coupon due on the Notes on December 15, 2014, as required by the express terms of the Indenture dated December 24, 2008 governing the Notes (the "Indenture").

On December 15, 2014, a total of $58,902,000 was due and payable on the Notes, comprising: (1) an interest coupon payment totaling $41,271,000; and (2) a mandatory principal payment in the amount of $17,631,000.

Rather than pay such full amount of interest and principal due on December 15, 2014, on December 12, 2014, CEOC transmitted only $18.5 million to the Trustee and Paying Agent (hereafter, the "Trustee") and attempted to direct the Trustee (without having any authority under the Indenture to do so) to pay only the principal amount then due. However, §4.01 of the Indenture clearly provides that in order for an installment of either principal or interest to be considered paid on the date due, the Trustee or the Paying Agent must hold, as of 12:00 p.m. Eastern Time, money sufficient to pay all principal and interest then due. Accordingly, under the clear and unambiguous terms of the Indenture, the installment of principal due and payable on the Notes on December 15, 2014 was not considered paid on the due date.

Further, §6.01(b) of the Indenture provides that an "Event of Default" as to principal occurs as soon as there is a default in the payment of principal "upon required repurchase", with no provision for any cure period beyond the due date of such principal payment. While §6.01(a) of the Indenture provides CEOC with a 30 day cure period after a default in paying interest when due, that Section could not be used by CEOC to excuse its failure under §4.01 to pay both the full amount of principal and interest due on December 15, 2014, as clearly required by §4.01.

As a result of CEOC's failure to pay the full amount of interest and principal due on the Notes on December 15, 2014, a Failure to Pay Credit Event, as defined in §4.5 of the 2003 Credit Derivatives Definitions (hereinafter, "Def.__"), occurred with respect to CEOC by no later than December 18, 2014, three days after the failure to pay occurred, without any cure pursuant to the three day deemed period provided by Def. 1.12(iii).

## THE INDENTURE AND THE ISDA DEFINITIONS

The Indenture is governed by New York law (Indenture, §13.09). Under Rule 4.6(e) of the Credit Derivatives Determinations Committee Rules (September 16, 2014 Version), the "External Reviewers will interpret the Reviewable Question in accordance with the relevant governing law", which in this case is also New York law.

The full text of §4.01 of the Indenture reads as follows:

> Section 4.01. Payment of Notes. The Issuer shall promptly pay the principal of and interest on the Notes on the dates and in the manner provided in the Notes and in this Indenture. 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 and the Trustee or the Paying Agent, as the case may be, is not prohibited from paying such money to the holders on that date pursuant to the terms of this Indenture. (Emphasis added).

The applicable provision of the form of Note provides that "the Issuer shall pay interest semiannually on June 15 and December 15 of each year" (Section 1 of the Notes) and:

> If the 2018 Notes would otherwise constitute 'applicable high yield discount obligations' within the meaning of 163(i)(1) of the [Internal Revenue Code], at the end of each accrual period ending after the fifth anniversary of the 2018 Notes' issuance (each, any 'AHYDO redemption date'), the Issuer will be required to redeem for cash a portion of each 2018 Note then outstanding equal to the 'Mandatory Principal Redemption Amount' (such redemption a 'Mandatory Principal Redemption'). (Section 6(b) of the Notes). [1]

Both the 2018 and the 2015 Notes would have constituted "applicable high yield discount obligations" but for the redemption of a portion of the principal as provided for in the Notes. Accordingly, on each semi-annual interest payment date beginning on June 15, 2014 (the first coupon date after the fifth anniversary of the Notes' issuance), CEOC was required to both (a) pay the semi-annual coupon payment due on that date and (b) redeem a portion of the principal (plus accrued interest thereon) as a "Mandatory Principal Redemption" in accordance with the Notes. Prior to June 15, 2014, CEOC was only required to pay interest (on a semi-annual basis), but not principal.

Section 4.01 does not provide for a partial payment allocable to either principal or interest at the discretion of the issuer, where both principal and interest are due on the same date.[2] Rather, principal (like interest) "is considered paid" only when the Trustee or the Paying Agent holds money sufficient to pay "all principal and interest then due."

---

[1] Sections 1 and 6(b) of each of the Notes are the same.

[2] Nor does §4.01 distinguish between "types" of interest paid so as to permit CEOC to only pay the interest due on the principal amount due to be redeemed on a semi-annual payment date. Rather, "interest" means all interest due on that date, including the semi-annual coupon payment.

Notwithstanding the above clear and unambiguous language, on December 12, 2014 CEOC deposited funds with the Trustee (which was also the Paying Agent) which were insufficient, by a wide margin, to pay "all principal and interest then due."[3] At the same time, CEOC attempted to instruct the Trustee to pay only the principal amount then due, even though there is no provision in the Indenture which provides for any such instruction.

As a result, under §4.01, CEOC failed to pay an installment of principal then due when it failed to deposit funds sufficient to pay all principal and interest due on December 15, 2014.

With that background in mind, ISDA Def. 4.5 reads:

> **Section 4.5. Failure to Pay.** "Failure to Pay" means, after the expiration of any applicable Grace Period (after the satisfaction of any conditions precedent to the commencement of such Grace Period), the failure by a Reference Entity 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.

Under this definition, CEOC's failure to transmit to the Trustee the amount necessary to pay all of the principal and interest then due by noon on December 15, 2014 was a "Failure to Pay" under Def. 4.5 because CEOC, as the Reference Entity, failed to make, when and where due, a payment in an aggregate amount of not less than the "Payment Requirement under one or more Obligations."[4]

---

[3] The amount transmitted by CEOC was well over $1,000,000 less than the total amount due on December 15, 2014.

[4] "Payment Requirement" is defined as "the amount specified as such in the related Confirmation . . . or, if the Payment Requirement is not so specified, USD $1,000,000" under one or more Obligations). An "Obligation" is "any obligation of a Reference Entity [CEOC]." Def. 2.14(a). There is no dispute that the Notes are Obligations for the purposes of the Reviewable Question. Moreover, once a "Failure to Pay" has occurred pursuant to the terms of the Obligation, any

A "Failure to Pay" occurs "after the expiration of any applicable Grace period". As relevant here, under §1.12(i) of the ISDA definitions, a "Grace Period" means " . . . the applicable grace period with respect to payments under the terms of such Obligation . . ."

As noted earlier, there is no such period for payment of principal under the Indenture. Rather, §6.01 of the Indenture provides that an "Event of Default" occurs with respect to a series of Notes, when, among other things, any of the following occurs:

> (a) 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, [or]
>
> (b) there is a default in the payment of principal or premium, if any, of any Note of such series when due at its Stated Maturity, upon optional redemption, upon required repurchase, upon declaration or otherwise, [or]
>
> (c) the failure by the Issuer or any Restricted Subsidiary to comply for 60 days after notice with its other agreements contained in the Notes of such series or this Indenture, [or] ...

To the extent that §6.01 is considered to be a provision which provides for various "Grace Period[s]" under the ISDA definition, §6.01(b) clearly provides that there is no "Grace Period" at all for principal payments, such that the "deemed" Grace Period of three days under Def. 1.12(iii) would apply, giving CEOC until December 18, 2014 to cure, which it failed to do.[5]

---

argument that the clear terms of §4.01 are somehow "unenforceable" or "impossible" has no effect on whether a "Credit Event" has occurred. <u>See</u> Def. 4.1(b).

[5] Section 6.01(c) of the Indenture creates a cure period of 60 days after notice for a failure to "comply . . . with its other agreements contained in the Notes of such series or this Indenture". The "other agreements" mean agreements (<u>e.g.</u>, covenants concerning limitations on asset sales under §4.06(a)) other than those in §6.01(a) or (b), which specifically relate to payments due. The specific cure period for payments of interest under §6.01(a) and the specific provision for no cure period at all under §6.01(b) are clearly meant to govern payment defaults and are not

Section 6.01 of the Indenture, which determines when an "Event of Default" occurs, does not modify the provisions of §4.01, which sets forth the conditions whereby an installment of principal or interest to be considered to be paid when due. Rather, §6.01(a) simply provides that an Event of Default occurs only when "there is a default in any payment of interest . . . when the same becomes due and payable, and such default continues for a period of 30 days." (emphasis added). The "default" under §4.01 begins when the payment is not made on the due date. All that §6.01 does is to delay, for payments of interest, but not for principal, the ability of the Trustee or the Noteholders to exercise certain remedies upon an "Event of Default", such as an acceleration of the payments due under the Note pursuant to §6.02, or a collection action commenced by the Trustee pursuant to §6.08.[6]

Although §4.01 does not provide any authority for CEOC to direct the application of amounts advanced solely to the payment of either principal or interest due on such date, CEOC essentially ignored §4.01, or treated it as somehow unenforceable, when it deposited an amount sufficient to pay principal only.

---

effectively written out of the Indenture by §6.01(c), which only applies to "other agreements contained in the Notes or Indenture".

[6] The difference between a default and a grace period is well understood under New York law. See Hand v. Equitable Life Assur. Soc. of the United States, 251 A.D. 321 (1st Dep't 1937), where the court, in the context of an insurance contract, explained that "[i]t is settled that a default occurs when a premium is not paid on the due date and that the default is not postponed for the period of grace. The latter merely constitutes a waiver of default." Id. at 322. While the Indenture is not an insurance contract, the use of the word "default" in §6.01 of the Indenture as separate and distinct from an "Event of Default" is consistent with the general rule that a grace or cure period does not change the date on which a default occurs.

While CEOC thus seemingly took the position that the 30 day cure period in §6.01(a) somehow takes priority over §4.01, the two sections are not inconsistent with each other, and §4.01 does not read, literally or practically, §6.01(a) out of the Indenture, or vice versa.

Both §§4.01 and 6.01(a) and (b) of the Indenture are provisions of general application which may be applied to different notes with different payment terms. In the great majority of notes governed by indentures for publicly traded debt, payment dates for principal and interest will rarely overlap. For example, as is often the case (and is overwhelmingly the case with respect to high yield notes), a note governed by the Indenture may provide for the scheduled payment of interest only, with principal not due until maturity. Alternatively, a note could provide for scheduled payments of principal or interest on different dates.

Here, the Notes provide that no Mandatory Principal Redemption payments will be due until after the fifth anniversary of the Notes (here, June 15, 2014) – giving CEOC the full practical benefit of the 30 day period set forth in §6.01(a) for more than half the term of either the 2015 Note or the 2018 Note, both of which were issued on or about December 24, 2008.

It would only be in those relatively rare instances where both principal and interest payments were due on the same date for all scheduled payments that the issuer might be considered to lose the full practical benefit of the cure period provided by §6.01(a). If CEOC desired to avoid that result, the solution was not to ignore the plain terms of §4.01 after the fact, or to attempt exercise self-help by directing the Trustee to pay principal only, but to have drafted §4.01 differently to begin with (for example, by changing the "and" to an "or"). However, under New York law, which governs here, CEOC could not change or ignore clear contractual language as written and neither the Determination Committee nor the External Panel should attempt to alter or add to that language now.

## POINT I

## NEW YORK LAW DOES NOT PERMIT THE REPLACEMENT OF CLEAR WORDS IN AN AGREEMENT WITH WORDS MEANING THE OPPOSITE

New York law requires that a contract, such as the Indenture, be interpreted according to the plain meaning of the words used in the contract.[7] Here, §4.01 clearly provides that an installment of principal can only be considered paid if the Trustee holds "money sufficient to pay all principal and interest then due" (emphasis added). Simply put, one cannot change "and" into "or."

Except in rare circumstances, not present here, New York law prohibits the substitution of words in a contract with words meaning something else. To state the obvious, not only does "and" not mean "or", but it is essentially the opposite of "or".[8] The terms of the Indenture do not change the meaning of "and" or "or". To the contrary, while the Rules of Construction in §1.04(c) of the Indenture clarify that "'or' is not exclusive", there is no further explanation of the

[7] New York's general rules of contract construction apply to the interpretation of indentures governed by New York law. Law Debenture Trust Co. v. Maverick Tube Corp., 595 F.3d 458 (2d Cir. 2010).

[8] Webster's Third New International Dictionary (1993) defines "and" as, inter alia, "along with or together with", and "or" as, inter alia, a "choice between alternative things, states or courses." See also Maxwell v. State Farm Mutual Co., 92 A.D.2d 1049, 1050 (3d Dep't 1983), discussed on pp. 12-13, infra, for an explanation of the difference between the conjunctive "and" and the disjunctive "or". While custom and usage may sometimes be employed to determine a meaning of language having a specialized trade usage (Law Debenture, 595 F.3d at 466), "and" and "or" have no specialized meaning in the bond market. Moreover, while custom and usage may inform the interpretation of certain ISDA contract provisions, at issue here are words of common import in the Indenture.

meaning of "and"; which means that for the purposes of the Indenture, "and" means the common understanding of "and", and not something different.[9]

New York law requires that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to their terms." W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990); see also Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995). Moreover, New York law does not permit the altering of, or the addition to, contractual language simply to obtain what may appear to be a more commercially satisfactory result for one party to the contract. See Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005 – EMG, 20 N.Y.3d 881 (2012). Rather, the only time that a court is permitted to alter, add to, or delete language in a contract is to avoid an "absurdity" or where the language makes the contract unenforceable in whole or in part. Id. at 884. As explained below, under New York law, interpreting §4.01 of the Indenture to mean what it says fall far short of creating an absurdity, or rendering the contract unenforceable.

The clear and unambiguous language of §4.01 provides that CEOC had to fund the full amount of principal and interest when due in order for either the principal or interest to be considered paid when due, when payments of principal and interest are due on the same date. As discussed earlier in this brief (p. 7, supra), the effect of this reading may function to limit, but only after the first five years of the Notes (during which no Mandatory Principal Payments were due), the practical ability of CEOC to take advantage of the 30 day cure period for defaulted

---

[9] Similarly, under New York law, the phrase "principal and interest then due" in §4.01 cannot be rewritten or reinterpreted to insert the words "on such principal" or similar language after "interest" so as to change the meaning of "interest" to mean only the interest due on the amount of the principal due on a given due date. (See p. 3, n. 2, supra).

interest payments. However, that result is insufficient to justify changing the plain language of §4.01 as written.

In Jade, a promissory note permitted the borrower to voluntarily prepay the note upon paying a "yield maintenance amount", which is essentially a prepayment penalty. For the first six years of the note, the "yield maintenance amount" was calculated "by taking the positive difference (*if any*) between the Note Rates . . .minus the current yield, *on the actual date of default under the loan* . . .of U.S. Treasury Securities having the closest longer maturity to the remaining total term of this Note." (Id. at 882, italics in original). The borrower sought to voluntarily prepay the note within the first six years, without paying the yield maintenance amount, arguing that a voluntary payment was not a "default" under the note, and, as a result, that, for the first six years of the note, there was no way to actually calculate a "yield maintenance amount" on a voluntary prepayment since there would be no "date of default" on which to identify the U.S. Treasury Security necessary to calculate the yield maintenance amount. The prepayment penalty for the later years of the note used a different formula, so that under the literal language of the note, the borrower could voluntarily prepay without penalty for the first six years of the note, but would have had to pay a prepayment penalty in the later years of the note.

The trial court found this to be an absurd and unintended result, and effectively modified the note by adding the words "prepayment or" before the term "default" so as to have the yield maintenance amount apply to both voluntary prepayments and defaults.[10]

The First Department reversed, and the Court of Appeals upheld the reversal, holding:

[10] The description of the trial court's decision is found in the First Department decision, 83 A.D.3d 567, 568 (1st Dep't. 2012).

> Application of the note's literal language relative to voluntary prepayment and the yield maintenance amount does not result in either absurdity or an unenforceable agreement. To be sure, Jade's interpretation of the note results in a potentially lower prepayment premium in the first six years instead of the potentially lower prepayment premiums in the seventh through tenth years. While these terms might be 'novel or unconventional,' that, by itself, does not render the result here absurd. [The lender] received 5.48% interest for the time it held the loan and it did not lose its principal, so it could hardly be said that there is economic absurdity, as the [lender] defendants charge. . . . The note, as written, is enforceable according to its terms. A reasonable interpretation of the note is that, there having been no default on Jade's part and acceleration of the maturity date by [the lender], there could be no 'positive difference (if any)' between the Note Rate and the relevant 'current yield,' such that Jade owed no yield maintenance under the note.

Jade, 20 N.Y.3d at 884. (citations omitted).

As explained in Jade, an "absurd" result is something more than the loss of the practical benefit of some, but not all, of the contract's provisions. Thus, while the lender in Jade did not have the benefit of receiving a prepayment penalty upon a voluntary prepayment in the early years of the note, it retained the right to (i) a prepayment penalty in the latter years of the note, (ii) a right to a penalty upon default throughout the term of the note; and (iii) the right, upon prepayment, to recover the full amount of principal and accrued interest due on the note.

In Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995), a ground lease for a term of 33 years had options to renew for two additional 33-year terms. The tenant had built a 26 story office building on the property, and, near the end of the first 33 year term, sought to exercise the renewal option. The lease provided that, absent an agreement of the parties, the rent would be fixed by an appraisal to be calculated at 6% of the "then value" of the land. Unfortunately for the tenant, the appraisal provision only allowed a party seeking the appraisal to give notice of

such intention no earlier than "twelve (12) months prior to the *expiration* of any such renewal term." (Id. at 546, italics in original).

If read literally, the clause postponed the appraisal fixing the ultimate rent due for 32 years after the term of the lease began, such that the appraisal would take place in 2025, rather than 1993. As a result, the tenant would be obligated to pay the yearly rental as it existed at the beginning of the renewed 33 year term, with a lump sum payment due in 2025, comprising the difference between the rent actually paid and the amount found owed pursuant to the 2025 appraisal. Although being forced to renew the lease without knowing for certain what the total rent would be until 32 years later obviously presented difficulties for the tenant, the Court of Appeals held that "'a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed'" and that the "[language] as written is not unenforceable and does not create an absurd result." (Id. at 548).

The Court of Appeals further held that, while a retrospective appraisal mechanism may be "novel or unconventional, this does not warrant an excursion beyond the four corners of the document." (Id.).

In Maxwell v. State Farm Mutual Co., supra, the plaintiff sought coverage under an insurance policy which had a statutorily permitted exclusion for coverage of a driver who operated the vehicle while intoxicated or while the driver's ability to operate the vehicle was impaired by the use of a drug. The driver in question was found to have been intoxicated at the time of the accident, and the insurance company sought to exclude coverage. Unfortunately for the insurance company, "[f]or some inexplicable reason," the policy actually provided for an exclusion for any injury sustained by "'any person . . . while in an intoxicated condition *and* while his ability to operate such vehicle is impaired by the use of a drug.'" (92 A.D.2d at 1050,

emphasis in the original). While there was evidence of the driver's intoxication due to alcohol, there was no evidence that he had also been using drugs. In ruling against the insurance company, the court ruled:

> A long and well-established rule of construction provides that words are to be given their ordinary meaning. The exclusionary language herein is clearly plain and unambiguous and, in the exercise of reason, susceptible to but one interpretation. By its use of the conjunctive 'and' in place of the disjunctive 'or', defendant's exclusion does not come into play unless the driver is both intoxicated and impaired by the use of a drug. That defendant may have actually intended something different is of no consequence, for the court must determine 'what is the intention of the parties as derived from the language employed'. (Id., citations omitted).

Thus, the Maxwell court ruled that "and" means "and", even if it appeared that the insurance company meant to write "or".

In Chesapeake Energy Corp. v. Bank of New York, 773 F.3d 110 (2d Cir. 2014), the Second Circuit, applying New York law, reaffirmed the principle that words should be given their ordinary and common meaning, and their meaning cannot be changed to achieve what appears to be a more commercially satisfactory result (for the issuer, at least). Chesapeake had issued publicly traded notes with a redemption provision which allowed it to redeem the notes at par, without paying a make-whole premium, if the redemption could be accomplished within a short window of time approximately one year after the issuance. Chesapeake read the provision as allowing it to take advantage of the at par redemption so long as it noticed the redemption within that window; BNY Mellon, as trustee under the notes, read the provision as requiring Chesapeake to both notice and complete the redemption within the window.

Two sentences within the same redemption provision seemed at odds with each other. The first sentence stated that the Chesapeake could "redeem" at par at "any time from and including November 15, 2012 to and including March 15, 2013," a period of four months. The second sentence of the provision stated that Chesapeake could redeem the notes at par "so long as it [gave] notice between November 15, 2012 up to and including March 15, 2012." The problem for Chesapeake was that, elsewhere in the Indenture, there was a requirement that any redemption be preceded by no less than 30 days' notice and no more than 60 days' notice, so that a notice of redemption given less than 30 days prior to March 15, 2013 could not result in an actual redemption by that date.

Chesapeake waited until February 22, 2013 to send a notice of redemption. Chesapeake argued that sending the notice before March 15, 2013 was enough to allow it to redeem at par even if the actual redemption would necessarily occur after that date; BNY Mellon argued that Chesapeake had missed the opportunity to redeem at par.

The district court sided with Chesapeake, and held that any notice within the four month window (November 15 – March 15) allowed Chesapeake to redeem at par, even if the actual redemption took place after the four month window. Recognizing that "redeem" normally means the act of paying money to the noteholders when retiring the notes, the district court adopted a special meaning for "redeem" in the first sentence as meaning, for that sentence alone, "may commence the redemption process [by giving notice]". Chesapeake, 773 F.3d at 114.

The Second Circuit rejected this approach, holding that "redeem" means "redeem" (i.e., when the money is paid and the notes are retired), and the redemption provision required that both the notice of redemption and the redemption itself had to occur within the same four month period. While acknowledging that the effect of requiring both the 30 days' notice and the

redemption to occur within the same four month period effectively reduced the four month window to a three month window, the Second Circuit held that this did not render the redemption clause "structurally incoherent." (Id., fn. 2)

In Jade, Wallace, Maxwell, and Chesapeake, the plain meaning of the clauses in question all had the effect of somewhat reducing, but not eliminating, the benefits otherwise available to one party to the contract. Yet in all four cases, the courts held that it was not permissible to rewrite the agreements so as fully restore those benefits where the meaning of the words could not be altered short of replacing them, or adding new words to the agreement which were simply not there.

In Jade, the absence of the words "voluntary prepayment" effectively eliminated the prepayment penalty for a voluntary prepayment for over half the loan's term, but still maintained the prepayment penalty for defaults and for prepayments during the latter part of the loan's term, as well as the borrower's obligation to repay the loan in full. In Wallace, the use of the word "expiration" did not eliminate the right to renew a lease, but made it much more commercially risky to do so. In Maxwell, the use of the word "and" had the effect of greatly reducing the ability of the insurance company to qualify for the statutorily permitted exclusion of coverage for injury resulting from impairment, but did not completely eliminate it, since certain drivers could be both intoxicated by alcohol and impaired by drugs at the same time. Finally, in Chesapeake, the common understanding of "redeem", coupled with a clear notice requirement, effectively reduced, but did not eliminate, the time period in which the issuer could redeem at par. In all of these cases, the courts insisted that the plain meaning of the words of the contracts had to be honored.

The fact that §4.01 requires that the full amount of principal and interest must be paid whenever both payments are due on the same date does not render the contract "absurd" so as to justify either ignoring §4.01, or changing the applicable "and" into "or". See Warburg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d 78, 84 (1st Dep't 2013) ("[T]he [New York] Court of Appeals has set a high bar for declaring a contract 'absurd'.").[11] At best, the effect of §4.01 is to limit, but only when payments of principal became due on a semi-annual basis, the ability of CEOC to forestall an Event of Default for 30 days before depositing the full amount of the interest due. This practical limitation falls short of rendering the contract absurd or unworkable (particularly where, as here, CEOC clearly planned to file for bankruptcy shortly after the December 15, 2014 semi-annual payment was due rather than using the cure period to actually cure the default), and is a far less dramatic consequence than those tolerated in Jade, Wallace or Maxwell. Finally, the potential tension between §4.01 and §6.01 (in only limited circumstances for a limited time period), does not create an ambiguity, where the language of §4.01 is clear and the two clauses are structurally coherent.

Reading §4.01 as meaning "and" when it says "and" does not create a structural incoherence within the Indenture, as the two Sections address different concepts, and, practically speaking, §4.01 would only rarely deprive the issuer of the practical benefit of the cure period in §6.01. The alternative — changing "and" into "or" — which is impermissible under the governing New York law of contract construction.

[11] An example of a rare instance of a court permitting the change of wording in a contract to avoid an "absurd" result may be found in Reape v. New York News, Inc., 122 A.D.2d 29 (2d Dep't 1986), where the contract provided for a price to be paid for deliveries of newspapers on a daily, rather than an intended weekly, basis. The result was that the contract, as written, would on its face cause one party to the contract to lose money on every sale, which would "defeat and contravene the purpose of the agreement". (Id. at 30).

## POINT II

## THE MODEL INDENTURE FURTHER SUPPORTS THE INTERPRETATION OF THE INDENTURE AS REQUIRING A FULL PAYMENT OF PRINCIPAL AND INTEREST

Although given the plain meaning of "and", it is unnecessary to go beyond the four corners of the Indenture to interpret §4.01, that Section appears to derive directly or indirectly from Section 4.01 of the May, 2000 Revised Model Simplified Indenture (the "Model Indenture"), which reads:

> The Company shall pay the Principal of and interest on the Securities on the dates and in the manner provided in the Securities and this Indenture. 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 and the Paying Agent is not prohibited from paying such money to the Holders on such date pursuant to the terms of this Indenture. (emphasis added)

Interestingly, the drafters of §4.01 of the Indenture revised the Model Indenture by changing the second sentence of §4.01 as follows:

> An installment of principal of **or** [rather than "and"] 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 drafters changed "and" to "or" in the first part of the sentence (possibly in recognition of the fact that, for the first five years of the Notes, only interest was due) but left untouched the second, and crucial, "and". While there is no need to go beyond the words of the Indenture itself, this variation from the Model Indenture makes clear that the choice of substituting "or" for "and" in one place, while not substituting "or" for "and" in another, shows that the use of "and" was understood and intentional.

Further, the Commentary to Section 4.01 of the Model Indenture clarifies that the intent of the section was that, when a redemption of principal is due at the same time as other payments, the issuer must deposit funds sufficient to fund both the redemption and the other payments due. The Commentary reads:

> This Section 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.

(Commentary, Section 4.01, note 2).

Thus, it is clear that in the Model Indenture, which serves as the basis for §4.01 of the Indenture, "and" means "and", and that a default in the payment of principal was the intended result where, as in this case, an issuer fails to pay other amounts due on the same date that principal is due.[12]

## CONCLUSION

For the reasons stated, the External Panel should answer "Yes" to the Reviewable Question, "Has a Failure to Pay Credit Event occurred on December 18, 2014 in respect of the

---

[12] Because the language at issue here is clear, it is unnecessary to examine the facts, even if undisputed, surrounding CEOC's choice to transmit to the Trustee less than the full amount necessary to pay both the principal and interest then due on December 15, 2014. However, CEOC made its choice with its eyes wide open. CEOC knew by December 12, 2013 that the Trustee would allocate any funds received between principal and interest pursuant to §6.10 of the Indenture (such that only a transmittal of the full amount due for principal and interest would result in the noteholders receiving a full payment of principal) because one or more noteholders had declared that an Event of Default had occurred. While CEOC may have disputed the existence of an Event of Default (and resolution of the Question Presented does not require a determination of whether an Event of Default actually occurred), the dispute should have drawn its attention to the requirements of §4.01 of the Indenture, and whether out of arrogance, a gross misreading of the language, simple neglect, or a recognition that it never intended to pay the interest due anyway, it failed to adhere to those requirements, thus creating a Failure to Pay under the ISDA Definitions.

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?"

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP

By: /s/ Daniel A. Ross

Daniel A. Ross
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5400

*Attorneys for an ISDA Member in favor of a "Yes" Answer to the Reviewable Question*

*Of Counsel*:

Daniel A. Ross
Jayme T. Goldstein
Sayan Bhattacharyya