IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILMINGTON TRUST COMPANY, as Indenture Trustee for Tropicana Entertainment, LLC and Tropicana Finance Corp. 9 5/8% Senior Subordinated Notes Due 2014, directly, and derivatively on behalf of TROPICANA ENTERTAINMENT, LLC,	:	
Plaintiff,	:	
v.	:	**C.A. No. 3502-VCN**
TROPICANA ENTERTAINMENT, LLC, TROPICANA FINANCE CORP., AZTAR CORPORATION, WILLIAM J. YUNG, III and DONNA MORE,	:	
Defendants.	:	

MEMORANDUM OPINION
Date Submitted: February 26, 2008
Date Decided: February 29, 2008

Carmella P. Keener, Esquire of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware; and Edward S. Weisfelner, Esquire, Sigmund S. Wissner-Gross, Esquire, Robert J. Stark, Esquire, and May Orenstein, Esquire of Brown Rudnick Berlack Israels LLP, New York, New York, Attorneys for Plaintiff.

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NOBLE, Vice Chancellor

Almost one billion dollars of unsecured debt was borrowed by the acquirer of a casino in Atlantic City, New Jersey. That acquirer and its casino-operating subsidiary have now lost their essential gaming licenses. Although the loss of the gaming licenses does not constitute an event of default under the controlling indenture, the question framed by cross-motions for summary judgment filed by the Indenture Trustee and the Issuers is whether the collateral consequences from the loss of the gaming licenses precipitated an Event of Default.

I. BACKGROUND

A. *The Commercial Parties*

By an Indenture,[1] dated December 28, 2006 (and supplemented on January 3, 2007 and October 10, 2007), Tropicana Entertainment, LLC ("Trop Entertainment") and Tropicana Finance Corp. ("Trop Finance") (sometimes collectively together with Aztar Corporation ("Aztar"), either "Tropicana" or the "Company") issued $960 million in principal amount of 9-5/8% Senior Subordinated Notes Due 2014 (the "Notes"). The borrowed funds were used in part to acquire the Tropicana Atlantic City Casino. The casino assets were held by Adamar of New Jersey, Inc. ("Adamar"), a wholly-owned subsidiary of Ramada New Jersey Holdings Corporation ("New Jersey Holdings"), which had been held by Aztar, before its acquisition by Trop Entertainment and related entities.

[1] Transmittal Affidavit of Richard P. Rollo, Esquire (Feb. 5, 2008) ("Rollo Aff.") Ex. C.

Wilmington Trust Company (the "Indenture Trustee") serves as the successor trustee under the Indenture and, on January 28, 2008, on behalf of a majority of the holders of the Notes (the "Note Holders") delivered a Declaration of Acceleration and Notice of Default because of alleged defaults under Section 5.01(c) and Section 4.06 of the Indenture.[2] This action followed, and Tropicana has moved for partial summary judgment, seeking a declaration that no default has occurred. The Indenture Trustee, by its motion for partial summary judgment, now seeks judicial determination that an Event of Default has occurred or will occur if the default is not cured within sixty days of notice.

B. *A Brief and Superficial Consideration of Pertinent Aspects of New Jersey's Gaming Laws*

Because this dispute arises at the intersection of New Jersey gaming law and the Indenture, a brief introduction to relevant provisions of the New Jersey gaming law may be helpful to gaining an understanding of how this controversy developed.

The basic corporate hierarchy for a large casino operation has a parent entity that must obtain a plenary casino license; the parent owns a holding company that has as its only asset the stock of the operating company, which owns the casino assets and also holds the gaming license.

[2] Rollo Aff. Ex. K. A second Declaration of Acceleration and Notice of Default was transmitted on February 20, 2008. Transmittal Affidavit of Carmella P. Keener, Esquire (Feb. 22, 2008) ("Keener Aff.") Ex. A.

A casino in Atlantic City is a highly regulated venture. When an entity seeks to acquire a casino, it must apply under the New Jersey Casino Control Act (the "Act")[3] for Interim Casino Authorization ("ICA")[4] from the New Jersey Casino Control Commission (the "Commission"). The applicant may close on its acquisition after it receives ICA approval, but it is not allowed to hold—although it may operate and profit from—the casino assets. Instead, a neutral trustee (the "ICA Trustee"), acceptable to the Commission, receives and holds in trust (the "ICA Trust") all of the applicant's present and future right, title and interest typically to either a holding company (which holds the operating entity) or to the operating entity itself. The ICA Trust, subject to Commission oversight, serves a limited function which allows the applicant to operate the casino while the permanent licensing process is ongoing. If the permanent gaming license is issued, the ICA Trust dissolves. If, however, the applicant is denied a permanent license, the ICA Trust becomes "operative," and the applicant loses all right to control, operate, or profit from the assets in the ICA Trust; in that event, the ICA Trustee manages the casino business and is obligated to sell the trust assets within 120 days or such longer period as the Commission may specify. It is through the ICA Trust provision that New Jersey exercises its police powers over new applicants in order to assure that they are qualified to operate a casino, and it also meets its economic

[3] N.J.S.A. § 5:12-1, *et seq.*
[4] *See generally* N.J.S.A. § 5:12-95.12 through -95.16.

development objectives by assuring the continued operation of the casino through the ICA Trustee in the interim until a replacement operator can be put in place.

Entities which hold gaming licenses must go through a license renewal process every five years. If, for example, a casino operator loses its gaming license, a conservator is appointed by the Commission.[5] By New Jersey law, "[u]pon his appointment, the conservator shall become vested with the title of all property of the former or suspended licensee relating to the casino and the approved hotel . . ."[6] The conservator also is charged with responsibility for operating the casino assets and arranging for their sale. The ICA Trustee, after the ICA Trust becomes operative, and the conservator serve similar purposes although their powers and how they interact with the applicant or licensee differ in significant ways.

C. *Trop Entertainment Acquires the Tropicana Atlantic City Casino and Encounters Problems*

By an agreement dated May 19, 2006, Trop Entertainment,[7] or its affiliates, agreed to acquire all of the equity of Aztar which was then the ultimate parent of Adamar, which was, in turn, the direct owner of the casino and held the gaming license that allowed for its operation. The Company filed an application for an

[5] *See generally* N.J.S.A. 5:12-130.1 through -130.11.
[6] NJSA § 5:12-130.2(a).
[7] Some of the entities were known by different names then. For convenience, current names are used in lieu of proper historical nomenclature

ICA with the Commission on June 6, 2006. As required by New Jersey law, it executed an ICA Trust Agreement on October 16, 2006.[8] The Commission issued to the Company an ICA permit and approved the ICA Trust Agreement on November 2, 2006.[9] The Indenture, dated December 28, 2006, authorized the issuance of the Notes which allowed the acquisition by Trop Entertainment to close on January 3, 2007. At that time, all shares of Adamar were to have been issued to the ICA Trustee, The Honorable Gary S. Stein ("Justice Stein"). For reasons that do not matter, the stock certificate for all shares of Adamar was not actually delivered to him until approximately two months later.[10]

Both the Company's application for plenary qualification as a holding company of the casino and Adamar's five-year license renewal came before the Commission in the fall of 2007.[11] On December 12, 2007, the Commission found the Company to be "unqualified" and denied its application.[12] As a result, the ICA Trust became "operative."[13] Furthermore, by the December 12 Order, the Commission denied Adamar's renewal application and recognized that it would be

[8] Rollo Aff. Ex. F.
[9] Rollo Aff. Ex. E.
[10] Affidavit of Hon. Gary S. Stein (Feb. 8, 2008) ("Stein Aff.") Ex. C.
[11] The Company (through Tropicana Casino and Resorts, Inc.) had applied for plenary qualification as a holding company for Adamar. Adamar had applied for renewal of its casino and casino alcoholic beverage licenses.
[12] Rollo Aff. Ex. G.
[13] Rollo Aff. Ex. H (the "December 12 Order").

necessary to appoint a conservator. By order dated December 19, 2007,[14] the Commission appointed Justice Stein, as conservator. Thus, Justice Stein serves as both ICA Trustee and conservator.

D. *The Indenture*

The rights which the Indenture Trustee seeks to enforce are established, of course, by the Indenture. The Indenture Trustee relies upon two substantive provisions for its claim that there has been a default. By Section 5.01(c), "the Company shall not permit any Notes Guarantor to . . . convey, transfer or lease, in one transaction or series of transactions, all or substantially all of its assets to any Person unless: [certain conditions that are not met in this matter are satisfied]."[15] Section 4.06 of the Indenture provides in part as follows: "Limitation on Sales of Assets and Subsidiary Stock. (a) Neither the Company nor any Affiliated Guarantor will, or will permit any of their respective Restricted Subsidiaries to, directly or indirectly, consummate any Asset Disposition unless [certain conditions that are not met in this matter are satisfied]." "Asset Disposition," as used in Section 4.06, has been defined by Article 2 of the Indenture to mean:

> "any sale, lease, transfer or other disposition (or series of related sales, leases, transfers or dispositions) by the Company or any Restricted

[14] Rollo Aff. Ex. I (the "December 19 Order").

[15] The heading for Article 5 reads: "Successor Company." That would suggest that Section 5.01(c) would have a purpose other than one framed by the actions of the Commission. However, by Section 13.13, "headings . . . have been inserted for convenience of reference only, and are not to be considered a part hereof and shall not modify or restrict any of the terms or provisions hereof."

> Party, including any disposition by means of a merger, consolidation or similar transaction (each referred to for the purposes of this definition as a "disposition"), of
>
> (1) any shares of Capital Stock of a Restricted Party (other than directors' qualifying shares or shares required by applicable law to be held by a Person other than the Company or a Restricted Party);
>
> (2) all or substantially all the assets of any division or line of business of the Company or any Restricted Party; or
>
> (3) any other assets of the Company or any Restricted Party outside of the ordinary course of business of the Company or such Restricted Party; . . .

An Event of Default, by Section 6.01, occurs if:

> (3) the Issuers or any Affiliated Guarantor fails to comply with Section 5.01, or the Issuers fail to comply with their obligations under the Escrow Agreement; [or]
>
> (4) the Issuers or any Notes Guarantor fails to comply with any of its other obligations under this Indenture (including the failure by any holders of Capital Stock of any Affiliated Guarantor to comply with the terms of Section 4.06) and such failure continues for 60 days after its receipt of the written notice specified below; . . . .
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> * * *
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> The foregoing will constitute Events of Default whatever the reason for any such Event of Default and whether it is voluntary or involuntary or is effected by operation of law or pursuant to any judgment, decree or order of any court of competent jurisdiction or any order, rule or regulation of any administrative or governmental body of competent jurisdiction.

Trop Entertainment and Trop Finance are "Issuers" and collectively constitute the "Company" under the Indenture. Adamar and New Jersey Holdings

are "Restricted Parties," "Subsidiary Guarantors," and "Notes Guarantors," but they are not "Affiliated Guarantors."

Finally, by Section 13.09, the Indenture is to be construed in accordance with the law of New York.

E. *The ICA Trust Agreement*

The ICA Trustee "hold[s] in trust for 'the Company' all of 'the Company's' present future right, title and interest, including all voting rights in securities, with respect to 'the Company's' acquisition of [Adamar]."[16] In order to appreciate the consequences of the Commission's denial of the Company's license application which resulted in the ICA Trust's becoming "operative," certain provisions of the ICA Trust Agreement are set forth:

> Section 1. Definitions:
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> b. "**ICA Event**". An ICA Event shall be deemed to have occurred on:
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> 1. A finding by the Commission, after interim casino authorization (ICA) has been granted to the Company, that pursuant to the provisions of N.J.S.A. 5:12-95.14b, reasonable cause exists to believe that the Company . . . may be found unqualified.
>
> c. "**Operative Date of the Trust**". After the occurrence of an "ICA Event", the date when the Commission orders that the Trust becomes *operative*. The term *operative* means that the Trustee shall exercise all rights incident to the ownership of the Trust property and shall be vested with all powers, authority and duties necessary to the unencumbered exercise of such rights as provided for in Section 16 of

[16] ICA Trust Agmt., Recital 10.

this Trust Agreement and N.J.S.A. 5:12-130.1 through N.J.S.A. 5:12-130.[11], except that the "Company" shall have no right to participate in the earnings of the casino hotel or receive any return on its investment or debt security holdings.

If the Trust becomes *operative*, it shall remain *operative* until the Commission finds "the Company" qualified, or the Commission finds the applicant unqualified and the property subject to the trust is disposed of in accordance with N.J.S.A. 5:13-95.14e.

d. "**Trust Property**" is defined as the Company's present and future right, title, and interest in any and all ANJ [Adamar] securities, including but not limited to the ANJ common stock, and any mortgage, pledge or guarantee that ANJ issues as collateral under the Wimar OpCo Credit Facility, the Senior Subordinated Notes due 2014, also known as the "Wimar Notes," or both.

By Section 4(b), the fiduciary duties of the ICA Trustee are reinforced:

b. if the Commission orders that the Trust becomes *operative*, the Trustee shall exercise the rights and powers as provided by N.J.S.A. 5:12-95.14c and use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

Section 16 and Section 19 address the conduct and authority of the ICA Trustee while the ICA Trust is operative. By Section 16:

Section 16. Trustee Control over the Trust Property. If the Commission orders that the trust becomes *operative*, as the term "*operative*" is defined in Section 1c of this Trust Agreement, and while the trust remains *operative* the Trustee shall exercise all rights incident to the ownership of the property subject to this Trust and shall be invested with all the powers, authority and duties necessary to the unencumbered exercise of such rights as provided for in N.J.S.A. 5:12-130.1 through N.J.S.A. 5:12-130.11,[17] except that "the Company" shall have no right to participate in the earnings of the

[17] These sections address conservatorships.

casino hotel or receive any return on its investment or debt security holdings during the time the trust is *operative*, and the Trustee shall act independently of "the Company" . Except as otherwise provided, once Trust becomes *operative* there shall be no communication between the Company and the Trustee, unless prior approval has been received from the Commission for such communications to take place.

. . .

If the Trust becomes *operative*, it shall remain *operative* until the Commission finds "the Company" qualified, or the Commission finds the applicant unqualified and the property subject to the trust is disposed of in accordance with N.J.S.A. 5:12-95.14e.

. . .

b. Voting Rights. The Trustee shall have the unencumbered right to vote any securities that are part of the Trust Property; and . . .

By Section 19:

Section 19. Trustee's Duties on Company's Disqualification. If the Commission denies qualification to "the Company", the Trustee shall endeavor and be authorized to sell, assign, convey or otherwise dispose of al property subject to the trust to such persons as shall be appropriately licensed or qualified or shall obtain interim casino authorization in accordance with N.J.S.A. 5:12-95.12 through N.J.S.A 5:12-95.16. The disposition of trust property by the trustee shall be completed within 120 days of the denial of qualification, or within such additional time as the commission may for good cause allow, and shall be conducted in accordance with the Act, specifically N.J.S.A. 5:12-130.1 through N.J.S.A. 5:12-130.11, except that the proceeds of such disposition shall be distributed to "the Company" only in an amount not to exceed the lower of the "actual cost", as the term is defined in Section 1a, of the assets to "the Company", or the value of such assets calculated as if the investment had been made on the date the trust becomes operative, and any excess remaining proceeds shall be paid to the casino revenue fund.

II. CONTENTIONS

The Indenture Trustee alleges that the Commission's orders that made the ICA Trust "operative" and that designated Justice Stein as the conservator effected a transfer proscribed by Section 5.01(c) and Section 4.06 of the Indenture. According to the Indenture Trustee, when the ICA Trust became operative, the rights of New Jersey Holdings, to which full ownership traces to Trop Entertainment as one works up the corporate structure, in Adamar were materially and adversely affected because Justice Stein, following the December 12 Order began to exercise full and exclusive (as to the Company) control of the gaming business. This material change, coupled with other substantial limitations, in the nature of New Jersey Holdings' rights to and expectations from Adamar is said to constitute a transfer. With the appointment of Justice Stein as the conservator, all assets of Adamar vested in him. The vesting, according to the Indenture Trustee, also worked a prohibited transfer.

The Company responds with several arguments. First, it points out that the Indenture does not list the loss of a gaming license (or the rejection of an application for a gaming license) among its Events of Default.[18] The risks of losing a gaming license were known to the casino industry and the failure to address such an unhappy, but readily foreseeable, event evidences the absence of

[18] The Credit Agreement supporting the secured debt (Rollo Aff. Ex. D at Section 7(n)) expressly includes such adverse regulatory occurrences as events of default.

any agreement that a loss of license would trigger an Event of Default. Second, Justice Stein held the Adamar stock before issuance of the December 12 Order; he held the Adamar stock after issuance of the December 12 Order; and he continues to hold the Adamar stock. Thus, the order could not have constituted or caused a transfer. Finally, Justice Stein's role as conservator was described by the Commission as "relatively limited."[19] All of the necessary powers to serve New Jersey's regulatory concerns can be exercised by him as the ICA Trustee. Thus, his appointment as a conservator changed nothing of substance; accordingly, notwithstanding the statutorily-mandated vesting of title following his appointment, the absence of any cognizable and independent consequences should preclude the Court from finding any transfer that would satisfy the default provisions of the Indenture.

The parties have cross-moved for summary judgment with respect to Counts III, VII, and X of the Complaint.[20] In Count III, the Indenture Trustee seeks a declaration that the December 12 Order caused a transfer of substantially all of the assets of New Jersey Holdings (the stock of Adamar) and of Adamar (the casino assets) in violation of Section 5.01(c) of the Indenture. In Count VII, the Indenture Trustee seeks a declaration that there was a disposition of assets of New

[19] Rollo Aff. Ex. I at 3.
[20] An amended complaint has been proposed. For convenience, the Court looks to the initial filing.

Jersey Holdings and Adamar that breached Section 4.06 of the Indenture and that following the passage of 60 days from the Company's receipt of notice of acceleration and default, the Trustee and holders of 25% of the principal amount of the Notes will be entitled to accelerate the Notes. Count X is a breach of contract claim tied to the Indenture Trustee's contention that the Company violated Section 5.01(c) by allowing New Jersey Holdings and Adamar to transfer "all or substantially all of [their] assets." The Company, in turn, seeks a declaration that none of Counts III, VII and X sets forth a valid cause of action for default. It also seeks a declaration that the Declaration of Acceleration and Notice of Default was improperly issued.[21]

III. ANALYSIS

A. *Summary Judgment Standard*

Summary judgment under Court of Chancery Rule 56 may be granted only if the material facts are not in dispute and the moving party is entitled to judgment as a matter of law. The Court must view the evidence in the light most favorable to

[21] The Company complains, with some cause, that the Indenture Trustee has changed its focus over the short duration of this litigation. The Complaint focused on the ICA Trust and its becoming operative as the principal basis for seeking remedies on default. The conservatorship was mentioned, but only briefly. Nevertheless, the arguments concerning the impact of the conservatorship were fully presented in the Indenture Trustee's Opening Brief in Support of its Motion for Partial Summary Judgment, and the Company fully replied to those arguments in its Reply Brief in Support of its Motion for Partial Summary Judgment. In addition, the potential consequences of the conservator's appointment were fully explored during oral argument. Thus, the issue has been fairly litigated and is properly before the Court, as least to the extent that it may inform the Court's views of Counts III, VII, and X of the Complaint.

the nonmoving party and draw those reasonable inferences that favor the nonmoving party.[22] In this instance, the parties have cross-moved for partial summary judgment without identifying any material facts in dispute; accordingly, the Court, as authorized by Court of Chancery Rule 56(h), may treat the motions as "the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." The questions before the Court are appropriate for summary judgment because they depend almost exclusively upon the Indenture, the ICA Trust Agreement, New Jersey gaming law and regulation, and the acts of the Commission as evidenced by its rulings.[23]

B. *Some Contract Construction Principles*

For purposes of construing and applying a trust indenture, it is, in many ways, just another contract. The rules of interpretation are drawn from basic contract law. The shared intent of the parties, as evidenced by their written words, is the target,[24] and, as with shorter and perhaps simpler agreements, the words and terms are generally given their plain and ordinary meaning.[25] Yet, there is a difference. The same "boilerplate" language appears over and over again through the years in many similar indentures, and it is important that language routinely

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[22] *See, e.g.*, *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007).
[23] *Compare Union Oil of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *10 (Del. Ch. Dec. 15, 2006) ("Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact.").
[24] *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1049 (2d Cir. 1982).
[25] *See, e.g.*, *Lopez v. Fernandito's Antique, Ltd.*, 760 N.Y.S.2d 140, 141 (N.Y. App. Div. 2003).

and broadly employed in a specific category of agreements be accorded a consistent and uniform construction.[26] Efforts to give trust indenture provisions expansive readings or some additional force by implication carry the ever present risk of not honoring the careful and sophisticated drafting which is said to go into the preparation of such agreements. It has been recognized that "the highly-negotiated provisions of notes and debentures that restrict the commercial freedom that issuers otherwise enjoy under default law are traditionally interpreted strictly, precisely because they involve specifically extracted limitations on ordinary economic liberties."[27] Even with due respect for the principle that indentures (and their "boilerplate" language in particular) should not be read as the source for some previously unrecognized "implied" rights, the drafters of such documents bear the risk that acts or conduct not contemplated may fall squarely within the reach of the express and unambiguous language appearing in the document. With these principles and objectives in mind, the Court turns to the specific contentions of the parties.

C. *Loss of Licensure is Not an Event of Default*

The Company starts with five uncontrovertible propositions: (1) the Indenture does not contain a specific licensure covenant that would include the

[26] *See, e.g.*, *Sharon Steel*, 691 F.2d at 1048; *Morgan Stanley & Co., Inc. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1542 (S.D.N.Y. 1983).
[27] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1033 (Del. Ch. 2006) (citing *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1515 (S.D.N.Y. 1989)).

revocation, nonrenewal, or denial of a gaming license as an Event of Default; (2) the Credit Agreement supporting the secured debt for the Company's acquisition of Aztar has an express licensure provision; (3) the Note Holders were (or should have been) fully aware of New Jersey's casino licensing requirements and the unhappy economic consequences that might result from an adverse regulatory action;[28] (4) a covenant dealing with gaming licensure could easily have been drafted; and (5) covenants addressing revocation, nonrenewal, and denial of licensure are commonly required of issuers in the gaming industry.

From this amalgamation of unremarkable observations, the Company argues that a licensure problem cannot be squeezed within the scope of the Indenture's default provisions by implication. When the parties omit a provision that seems obvious and could easily have been included, courts are loathe to impose such a provision by implication.[29] To this point, the Company's argument is sound. Nevertheless, the Company may be seeking to prove too much with it. Even though there is no license covenant and one easily could have been included, it does not necessarily follow that every consequence flowing from the loss or nonrenewal of a license is immunized from the reach of the Indenture's

[28] The Offering Circular for the Notes clearly described the risks. Rollo Aff. Ex. B at 32-35.

[29] *See, e.g.*, *Reiss v. Fin. Performance Corp.*, 764 N.E.2d 958, 961 (N.Y. 2001) (Under New York law, a court "will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms." (citations omitted)).

requirements. If a collateral consequence of a license nonrenewal or denial triggers a default provision, the issuer will not be protected merely because the initial precipitating cause was the nonrenewal or denial of the gaming license. Ultimately, the Company's argument here is little more than an additional—yet wholly appropriate—cautionary argument against cavalierly implying rights that the Indenture does not expressly provide.

D. *The ICA Trust Become Operative*

With the December 12 Order, the ICA Trust became "operative." Justice Stein took over running the business, in part, because of his control of the only trust asset—all of the shares of Adamar which, in turn, owned the casino assets. The Company lost all rights to be involved in the management of the business. Indeed, it needed special permission from the Commission even to talk to Justice Stein about its investment. Its assets went up for sale. A cap was established on what it could hope to obtain from the sale of its assets.[30] It lost its right to income from the casino assets. Even its debt service could be paid from casino revenues only through the good graces of the Commission. In short, the December 12 Order carried material and adverse consequences for the Company's economic wherewithal.

[30] Any proceeds above the cap—established in the December 19 Order by reference to the "lower of the actual cost of the assets to such unqualified applicant, or the value of such assets calculated as if the investment had been made on the date the ICA trust became operative"—would accrue to the benefit of the State of New Jersey. Rollo Aff. Ex. I at 3.

The Indenture Trustee invokes the property notion of a bundle of sticks. When one looks to the rights associated with "ownership" of the Adamar stock—even though in an ICA Trust—and then one looks to the various limitations on (or losses of) those rights as a result of the December 12 Order, the Indenture Trustee suggests that the economic reality and the beneficial rights were so materially changed that a transfer of assets occurred within the meaning of the Trust Indenture.[31] Put another way, the Indenture Trustee insists that with the vast changes in the powers and rights of the ICA Trustee with respect to Adamar stock by virtue of the December 12 Order, there was a "transfer" or a "conveyance" that came within both Section 5.01(c) and Section 4.06. Although the beneficial rights and economic expectations of the Company (and also the Note Holders) changed as a result of the December 12 Order, there was no transfer. The asset at issue, the shares of Adamar—which otherwise would have constituted substantially all the assets of New Jersey Holdings—were held by Justice Stein, as ICA Trustee, before December 12; they were held by him, as ICA Trustee, afterward. There was no transfer of trust property *to* anyone else. One may view this as a reading of the Indenture that is too closely tied to the concept of title. Where title does not change, as it did not change here, and the consequences were foreseeable within

[31] The adverse economic consequences were all foreseeable in the event of a loss of a license. These consequences are simply manifestations of the risks accepted by the Company as a participant in the regulated gaming industry.

the regulatory context, there is no reason to find by implication or by an expansive interpretation of the concept of "transfer to" any right by implication for the benefit of those persons represented here by the Indenture Trustee.[32]

E. *The Conservatorship*

With his appointment as conservator,[33] Justice Stein, by force of New Jersey statutory law, became "vested with the title of all the property of [Adamar] relating to the casino . . ."[34] Thus, before the conservatorship, title to the casino assets was held by Adamar; after December 19, title was held by Justice Stein, as conservator.[35] Accordingly, unlike the December 12 Order, which resulted in no transfer of assets, the December 19 Order resulted in a transfer of the casino assets

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[32] In addition, the Indenture Trustee's arguments under Section 4.06 are even weaker because the Asset Disposition definition specifically excludes the transfer of shares (here, the shares of Adamar, as the only assets of the ICA Trust) that are "required by applicable law to be held by a Person [*i.e.*, Justice Stein] other than the Company . . ." Thus, with respect to shares of stock, Section 4.06 has a specific provision addressing the consequences of "applicable law." As will be seen, no comparable language appears in Section 4.06 with respect to other kinds of assets.

[33] The December 12 Order referenced that a conservatorship would be established and that a conservator would be appointed. Whether the consequences of the appointment of a conservator occurred on December 12 or December 19 would appear to be of no moment. For convenience, and to distinguish the appointment of the conservator from the ICA Trust's becoming operative, the Court's discussion of the conservatorship will be premised upon the December 19 Order.

[34] N.J.S.A. § 5:12-130.2(a).

[35] Justice Stein holds the stock of Adamar as ICA Trustee, and he holds title to Adamar's former assets as conservator. In essence, he is able to exercise control over the casino through either of two routes: the first as the owner of all the stock and the second as the owner of the assets. Of course, ownership of stock, even all of the stock, does not equate with ownership of the assets.

It bears noting that the ICA Trust, approved by the Commission, recites powers that would be bestowed upon a conservator by statute. Thus, it may be that, under New Jersey law, his performance as an authorized ICA Trustee after the ICA Trust has become operative shares many of the characteristics of a conservator. Indeed, the Commission in the December 19 Order referred to "the relatively limited role of the conservator."

from Adamar to Justice Stein. Whether that transfer to Justice Stein conflicted with either Section 5.01(c) or Section 4.06 is the next question for the Court.

F. *Section 5.01(c) of the Indenture and Conservatorship*

When one reads Article 5 of the Indenture, even without the benefit of its title or headings, it is obvious that the purpose of that article is to address dealing with a successor company or obligor. Section 5.01(c) speaks of a conveyance or a transfer "in one transaction or series of transactions." Section 5.01(c) is generally viewed as a successor obligor clause found in trust indentures primarily to require the assumption of debt by a transferee so that the lenders would have a "degree of continuity of assets."[36]

The appointment of a conservator as a regulatory action does not fit neatly with the notion of a successor obligor described in Section 5.01(c).[37] That is because it is difficult to characterize the appointment of a conservator (with the consequences flowing from New Jersey law and the orders of the Commission) as a "transaction." A transaction in common parlance is "a business deal."[38] Defaults, by Section 6.01, may be the result of voluntary and involuntary acts and may be the result of governmental actions. Nonetheless, the language of Section 6.01 that the Indenture Trustee relies upon does not expand the meaning of

[36] *See Sharon Steel*, 691 F.2d at 1051.
[37] What happens when the casino assets are sold is, of course, not before this Court.
[38] WEBSTER'S THIRD NEW INT'L DICTIONARY (1993) 2426.

"transaction."[39] In short, because the transfer to Justice Stein as conservator was not a transaction within the meaning of Section 5.01(c) of the Indenture, there was no reach of that provision.

That leaves the question of whether the transfer caused by the appointment of Justice Stein as conservator ran afoul of Section 4.06.

G. *Section 4.06 of the Indenture and Conservatorship*

The Indenture, by Section 4.06, prohibits an Asset Disposition by a Restricted Subsidiary; Adamar is a Restricted Subsidiary. There are several safe harbors set forth in Section 4.06 that would allow for an Asset Disposition; none of the safe harbors, by its terms, is applicable.

It is, thus, necessary to work through the definition of Asset Disposition. The mechanism for an Asset Disposition is a "sale, lease, transfer or other disposition." The assets of Adamar, as a matter of New Jersey law, vested in Justice Stein on his appointment as conservator. Simply, the assets were Adamar's before the appointment of a conservator; after the appointment of the conservator, they had vested in Justice Stein. Thus, the assets were "transferred" from Adamar or "disposed of."[40] The "sale, lease, transfer or other disposition" language is followed by a clause that reads: "including any disposition by means of a merger,

[39] See *infra* note 41.

[40] By not operating Adamar in a manner consistent with New Jersey casino regulatory requirements (a finding, not by this Court, but by the Commission), the Company can be said to have "permitted" the foreseeable consequences of its conduct.

consolidation or similar transaction." Of course, the appointment of a conservator cannot be fairly analogized to a "merger, consolidation or similar transaction," but the words "transfer" and "disposition," in particular, are inherently broad terms generally understood to encompass changes in title or ownership. The clause with the list following "including" does not invoke the familiar "but not limited to" language, but it is difficult to read the "including" clause as eviscerating the broad reading that transfer and disposition would ordinarily receive.[41] Subparagraph (2) of the definition of Asset Disposition requires that it be or "all of substantially all of the assets" of the Restricted Party. The casino and related assets that vested in Justice Stein had constituted "all or substantially all" of Adamar's assets. Accordingly, the December 19 Order effected an Asset Disposition with respect to the casino assets of Adamar.[42]

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[41] The Indenture Trustee urges the Court to look to Section 6.01 and its Event of Default provision and points out that a breach of Section 4.06 will constitute an Event of Default regardless of whether the occurrence (here, a transfer or other disposition) was voluntary or involuntary (here, it was involuntary), effected by operation of law (which it was here), or "pursuant to any . . . order . . . of an administrative or governmental body of competent jurisdiction" (which it was here). These factors do not aid in determining whether there has been an Asset Disposition, but instead, they act to preclude the Issuer from contending that a transfer or other disposition cannot be an Asset Disposition because, for example, it was involuntary or occurred by operation of law. Nonetheless, these factors do suggest that the drafters understood that transfers or dispositions could occur without the voluntary and affirmative conduct of the Issuer or other parties subject to the Indenture's restrictions.

[42] Subparagraph (3) of the Asset Disposition definition also is likely implicated in that it is difficult to reconcile the consequences of the loss of a gaming license with the notion of "in the ordinary course of business."

Although there are exceptions from the scope of the definition of Asset Disposition, such as the disposition of surplus property in the ordinary course of business or the transfer of assets between the Company and a Restricted Party, none of the exceptions would apply in this

The Company points out that appointment of a conservator changed very little. The ICA Trustee assumed operation of Adamar's assets because of his control of all of its stock. Whether he exercised that authority because of his holding of the stock or his holding of the assets by virtue of his status as conservator, as a practical matter, should make no difference. The ICA Trust Agreement, at paragraphs 16 and 19, expressly incorporates statutory powers prescribed for conservators.[43] This argument is not without merit because, as a matter of policy, it reflects a reasonable accommodation of competing interests. Largely for the reasons argued earlier by the Company as to why the policy implications of the ICA Trust's becoming operative and the impact on Trop Entertainment's beneficial interest should not be considered in the context of the Indenture, the Court is reluctant to go beyond the plain and unambiguous language of the Indenture to embrace this policy argument. Title was transferred; the casino assets were disposed of; and the remaining elements of an Asset Disposition have been satisfied in accordance with the words of the Indenture.[44]

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instance.

[43] The Commission was confronted with the apparently novel confluence of a license application denial for the parent entity and a license nonrenewal for the operating entity, one triggering the ICA Trust and one requiring a conservator, but both with respect to the same casino operation. The December 19 Order reflected a reconciliation of the differing powers accorded the ICA Trustee and the conservator. Thus, Justice Stein's role, as currently defined, includes elements of both regimes. The principal considerations, such as who manages the casino assets and the need to sell those assets, are common to both processes.

[44] The Company also argues that the exercise of control by Justice Stein over Adamar's assets should not be viewed as a transfer or disposition. Instead, his control should be treated as a step

The Company posits another potentially troubling consequence of the Court's finding of a failure to comply with Section 4.06. The Act, as implemented by the Commission, prescribes a coherent methodology and strategy for divesting an unqualified casino operator from its assets in a way that is likely to assure ongoing and proper operation of the casino and effective sale of those assets. As it now stands, the Commission, through its supervision of Justice Stein, whether as ICA Trustee or as conservator, is in control of both the current operations and the process for finding a new operator who will purchase the casino assets. As noted, that serves a range of important public policy concerns of New Jersey. A default under the Indenture with the attendant acceleration of indebtedness may, if the processes of the bankruptcy laws are invoked, complicate the Commission's efforts and, perhaps, impair the ability of New Jersey to achieve its important public policy objectives. The Company may well be right, but any consequences of a potential bankruptcy, whatever they may be, are simply beyond the reach of a state court trial judge.

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in the process prescribed by New Jersey law that will lead to a sale of those assets. In other words, according to the Company, there has not yet been a disposition or transfer of the assets; that remains for the future. Again, as a matter of policy, this argument has a certain appeal, but it fails to address the fundamental problem that the Company has in this instance: by force of New Jersey law, Adamar's casino assets vested in Justice Stein. Although the Commission recognized that Justice Stein "need not . . . take possession" of those assets as conservator and that his role as conservator is "relatively minor" and even though functionally this may be viewed as just a stop along the road to a sale, these observations cannot be controlling in light of the unambiguous statutory language.

In short, under the Indenture, the vesting of Adamar's casino assets in Justice Stein as a consequence of the December 19 Order constituted an Asset Disposition within the meaning of the Indenture;[45] it follows that there has been a breach of Section 4.06 of the Indenture.

H. *Some of the Consequences*

A failure to comply with Section 5.01(c) of the Indenture would have immediately constituted an Event of Default under Section 6.01(3) of the Indenture. A failure to comply with Section 4.06, however, constitutes an Event of Default under Section 6.01(4) only if "such failure continues for 60 days after [the Issuer's or Notes Guarantor's] receipt of the written notice." The Indenture, also at Section 6.01, provides the following guidance:

> A Default under clause (4) is not an Event of Default until the Trustee or the Holders of at least 25% in principal amount of the outstanding Securities notified the Company of the Default and the applicable issuer or the applicable Affiliated Guarantor does not cure such Default within the time specified after receipt of such notice. Such notice must specify the Default, demand that it be remedied and state that such notice is a "Notice of Default".

[45] There is nothing strained or tortured about the Court's reading of the plain language of the Indenture. Substantially all of a Restricted Party's assets were transferred or disposed of. Nothing in the Indenture suggests that if the stock of that Restricted Party is held in ICA Trust for the benefit of the Issuers (and the Issuers do not, in fact, control the stock) that the restrictions of the Indenture on Asset Dispositions would no longer apply. It should come as no surprise that ownership of a company's stock and a company's ownership of its assets are legally distinct concepts and that the distinction does not routinely blur into meaninglessness—an outcome which the Company seems to sponsor.

The Indenture Trustee has served two notices of default. The Court has not been called upon to decide which one, if either, comports with the Indenture and, thus, it does not. For present purposes, even if the first notice sufficed, the cure period will not expire for approximately another month.[46]

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of the Defendants and against the Plaintiff on Counts III and X of the Complaint, which contain the Plaintiff's claims under Section 5.01(c) of the Indenture; summary judgment is granted in favor of the Plaintiff and against the Defendants on Count VII of the Complaint, which contains the Plaintiff's claim under Section 4.06 of the Indenture, to the extent that such count relates to the assets of Adamar. Summary judgment to the extent that Count VII of the Complaint relates to the stock of Adamar is granted in favor of the Defendants and against the Plaintiff.

Counsel are requested to confer and to submit an implementing form of order.

[46] This action has progressed in accordance with an expedited schedule. There are issues to which the parties have alluded, such as the Indenture Trustee's standing, a question that may be related to the sufficiency of the first notice of default, which have not been fairly addressed. Whether such issues need resolution or whether such issues have been waived are not questions resolved here. The careful reader, no doubt, will recognize some implicit assumptions on the part of the Court. The Court's purpose here, in light of time constraints, is to address the issues as understood by the Court to have been fairly presented for its resolution.