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MEMORANDUM

To ISDA Credit Derivatives Determinations Committee (Americas)

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Subject ***iHeartCommunications, Inc. Failure to Pay Credit Event***

This memorandum is submitted in connection with the general interest question posted to the ISDA Credit Derivatives Determinations Committee (the "**ISDA DC**") on whether a Failure to Pay Credit Event occurred with respect to iHeartCommunications, Inc. ("**iHeart**").[1] As evidenced by the Publicly Available Information submitted in connection with the general interest question, and as described in more detail below, a Failure to Pay Credit Event has occurred with respect to iHeart on December 20, 2016.

I. EXECUTIVE SUMMARY

iHeart is the issuer of certain 5.50% Senior Notes due 2016 (the "**Notes**") that became due and payable on December 15, 2016.[2] Upon maturity, iHeart paid $192.9 million of principal to noteholders but did not repay $57.1 million of those Notes held by its wholly-owned subsidiary, Clear Channel Holdings, Inc. ("**CCH**"). At its core, the issue presented here is straightforward. iHeart failed to make a $57.1 million debt payment on its scheduled due date and thus triggered a Failure to Pay Credit Event under the 2014 Definitions.

iHeart is struggling under a debt load exceeding $20 billion and long has been engaged in ongoing efforts to proactively manage its highly leveraged capital structure and stave off default. As explained in contemporaneous SEC filings by iHeart and its parent iHeartMedia Inc., and as further detailed in a filing for a declaratory judgement in the District Court of Bexar County, Texas, iHeart failed to pay the Notes held by CCH in order to keep these Notes outstanding and thereby avoid an obligation to grant a "springing lien" to certain of its creditors. CCH, for its part,

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[1] For purposes of this memorandum, we assume the terms set out in the Credit Derivatives Physical Settlement Matrix with respect to Standard North American Corporate Transaction Types to apply ("**Standard NA Terms**"). Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the 2014 ISDA Credit Derivatives Definitions (the "**2014 Definitions**").

[2] The Notes are governed by the Senior Indenture dated October 1, 1997 (the "**Base Indenture**") between iHeart and The Bank of New York, as trustee, and the Nineteenth Supplemental Indenture thereunder dated December 16, 2004 (the "**Supplemental Indenture**," and together with the Base Indenture, the "**Notes Indentures**").

informed iHeart that it reserves its rights under the Notes Indentures but currently agrees to forbear from exercising remedies to collect the principal amount due under the Notes.

The facts at hand present a picture that is consistent with those in a line of ISDA DC determinations where defaulting Reference Entities were able to obtain forbearance agreements from their creditors. In these prior cases, the ISDA DC consistently and unanimously found that a Failure to Pay Credit Event had occurred, since forbearance from the exercise of remedies does not undo the actual failure to pay.

These decisions reflect the underlying purpose of the ISDA Definitions—to promote certainty and clarity within the CDS market. It would be contrary to these goals and established practice if Failure to Pay Credit Events turned on subjective considerations such as a creditor's "current intent" or a borrower's "liquidity situation" to enable it to pay or its reasons for withholding payment.

The determination that a Failure to Pay Credit Event has occurred as a result of iHeart's failure to make the $57.1 million principal payment at maturity of the Notes is consistent with the purposes and prior interpretation of those definitions as well as the market perception and expectations.

II. Statement of Facts

iHeart is struggling financially. In a press release dated December 15, 2016, S&P Global Ratings ("**S&P**") concluded that the company's "capital structure is unsustainable," noting that its "leverage is extremely high at 9x."[3] In addition, certain of iHeart's debt obligations have been trading below 50% of par value, and it has engaged in discussions with creditors to restructure its debt.[4] It also was reported that iHeart has an annual interest expense around $1.8 billion, resulting in a net loss of over $700 million for 2015, and is expected to have $8.3 billion of senior debt fall due by 2019.[5]

Against this backdrop, on December 15, 2016, iHeart did not make a payment on $57.1 million principal amount of the Notes that matured on that date. The market reaction was swift and unambiguous: S&P lowered the corporate credit rating of iHeartMedia Inc. from '*CCC*' to '*SD*' (selective default) and the Notes' issue-level rating from '*CC*' to '*D*.' S&P explained its decision, stating that it "view[s] the nonpayment as a default."[6]

Two days earlier, on December 13, 2016, iHeart had filed a Form 8-K with the U.S. Securities and Exchange Commission announcing its intent to make no payments on the Notes held by its wholly-owned subsidiary, CCH.[7] iHeart explained that CCH had informed it that while it

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[3] *See* S&PGR Press Release: "*S&PGR Downgrades iHeartMedia To 'SD' On Missed Debt Repayment*, December 15, 2016 (hereafter, "**S&PGR Press Release 2016-12-15**").

[4] *See* iHeartCommunications, Inc.'s Current Report on Form 8-K filed on June 28, 2016.

[5] *See* iHeartCommunications, Inc.'s Form 10-K filed on February 25, 2016.

[6] *See* S&PGR Press Release 2016-12-15.

[7] *See* iHeartCommunications, Inc.'s Current Report on Form 8-K filed on December 13, 2016 (hereafter, "**iHeart 12/13 8-K**").

"does not currently intend" to "seek to collect principal amounts due" or to "request enforcement of any remedy with respect to the nonpayment," it nonetheless "retains its right to exercise remedies under the indenture governing the [Notes] in the future."

In conjunction with its nonpayment, iHeart on December 12, 2016, filed a Petition for Declaratory Judgment with the District Court of Bexar County, Texas.[8] In the Petition, iHeart explained its decision not to repay the CCH-held Notes at maturity in order to avoid triggering a "springing lien" under which certain of its debtholders would obtain additional collateral to secure their loans.[9] In filing the Petition, iHeart seeks a declaration that the Notes "are outstanding and will remain outstanding until they are cancelled or repaid" and that it is "not obligated to grant the Springing Lien."[10] iHeart has, in its own words, found itself "between the proverbial rock and a hard place."[11] While there is no indication how long it will take the court to issue a ruling in the lawsuit, it signals the deep financial trouble in which iHeart finds itself.

At least one unidentified counterparty has made a submission to the ISDA DC through Linklaters LLP (the "**Linklaters Memorandum**") contending that no Failure to Pay Credit Event has occurred. As explained in the following pages, a Failure to Pay Credit Event has in fact occurred, contrary to the position taken in the Linklaters Memorandum.

III. ANALYSIS

A. iHeart's Non-payment on December 15, 2016, Constitutes a Failure to Pay Credit Event Under a Plain Reading of the 2014 Definitions

Under Section 4.5 of the 2014 Definitions, a Failure to Pay Credit Event 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 iHeart 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*."

Each element of this definition is considered below in turn.

1. The Notes Constitute "Obligations"

Under the 2014 Definitions, as supplemented by the Standard NA Terms, the term "Obligations" includes

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[8] Petition for Declaratory Judgment filed in *iHeartCommunications Inc. et al. v. The Bank of New York N/K/A The Bank of New York Mellon Corporation*, No. 2016-CI-21289 (District Court of Bexar County, TX, Dec. 12, 2016) (hereafter, "**Petition**").

[9] Petition at 1. If the amount of all "Legacy Notes," which includes the Notes, were to drop below $500 million, then the "springing lien" would trigger. *Id.*

[10] Petition at 19.

[11] Petition at 1.

"*any obligation (excluding an obligation under a revolving credit arrangement for which there are no outstanding, unpaid drawings in respect of principal) for the payment or repayment of borrowed money (which term shall include, without limitation, deposits and reimbursement obligations arising from drawings pursuant to letters of credit).*"[12]

The Notes represent obligations of iHeart for the repayment of borrowed money to the noteholders, and we agree with the Linklaters Memorandum that the Notes constitute "Obligations" of iHeart for purposes of determining whether a Failure to Pay Credit Event occurred.

2. iHeart Failed to Make a $57.1 Million Principal Payment Under the Notes When Due in Accordance With the Terms of the Notes Indentures

The Notes Indentures state that "[t]he Notes shall mature and the principal thereof shall be due and payable, together with all accrued and unpaid interest thereon on December 15, 2016."[13] Accordingly, the principal was due, and iHeart was obligated to repay the principal amount of the Notes on December 15, 2016. In recognition of such fact, iHeart repaid $192.9 million of the Notes held by third-party noteholders at maturity. However, as of December 20, 2016, iHeart has left $57.1 million in Notes held by CCH past due. Thus, iHeart failed to make a payment "when due" in accordance with the express terms of the Notes Indentures.

Statements contained in iHeart's Form 8-K underscore the common sense conclusion that payment was due on December 15, 2016, as the Notes Indentures provide in simple, objective terms. According to iHeart's Form 8-K, CCH does not intend to "seek to collect principal amounts ***due***" (emphasis added)—a clear acknowledgement of the December 15, 2016 due date. Furthermore, CCH reserved its right to exercise remedies under the terms of the Notes—remedies that are only available if the Notes are indeed past due as a result of not having been repaid on December 15, 2016. Put another way, it would not be necessary for CCH to forbear from the immediate assertion of its rights if the amount were not presently due.

The Notes are due on the stated maturity date unless iHeart and CCH actually change the maturity date of the Notes by amending the Notes Indentures. They did not do this. In order to change the maturity of the principal of any Note, the Notes Indentures require a supplemental indenture with the consent of the affected noteholder.[14] There is no evidence that any such a supplemental indenture was delivered to iHeart or the trustee. To be clear, iHeart and CCH *could* have modified the terms of the Notes Indentures to change the date on which repayment was due. But there is no indication they did. The Linklaters Memorandum does not and could not argue that the mere agreement by CCH to temporarily refrain from enforcing remedies constitutes an amendment of the Notes Indentures to extend the maturity date of the Notes. Indeed, iHeart's public statements and explanation in the Petition filed with the Texas Court make plain that iHeart is carefully *avoiding* an amendment of the Notes because such an amendment would seriously jeopardize iHeart's entire strategy—it would call into question the continuing characterization of the $57.1 million as "Legacy Notes" and thus risk triggering the springing lien. It is to prevent this outcome that CCH has *not* waived its right to receive payments and has not agreed upon a new

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[12] 2014 Definitions, Section 3.13.

[13] *See* Section 1.01(a) [*sic*] of the Supplemental Indenture.

[14] *See* Section 902 of the Base Indenture.

definite due date for the principal repayment. Instead all that CCH has done is to agree to forbear temporarily from exercising remedies "to collect principal amounts due" (while clarifying that "it retains its right to exercise remedies under the [Notes Indentures] in the future").[15] This is a quintessential forbearance agreement where one party refrains from enforcing a right, obligation or debt it is otherwise legally entitled to exercise.[16] Forbearance does not alter the due nature of an outstanding obligation or preclude a finding of a Failure to Pay Credit Event.

It is irrelevant to the analysis of a Failure to Pay Credit Event whether a creditor seeks to enforce its remedies under the relevant Obligation. In fact, the ISDA DC has consistently found Failure to Pay Credit Events to have occurred despite creditors agreeing with the companies to forbear from the exercise of remedies upon such payment failures, as CCH has done here.[17]

For example, in April 2015, Sabine Oil & Gas Corporation ("**Sabine Oil**") failed to make an interest payment to its creditors pursuant to the terms of its credit agreement dated December 14, 2012.[18] During the 30-day grace period applicable under the credit agreement, Sabine Oil entered into a forbearance agreement whereby the creditors and the administrative agent agreed to "forbear from the exercise of their rights and remedies" as a result of the anticipated event of default. Notwithstanding the entry into this forbearance agreement, members of the ISDA DC unanimously resolved that a Failure to Pay Credit Event occurred on the date the grace period expired under the terms of the credit agreement.

Similarly, in March of this year, the ISDA DC again reached the same conclusion in determining that a Failure to Pay Credit Event occurred in respect of Pacific Exploration & Production Corporation ("**Pacific**") as a result of Pacific missing an interest payment to its noteholders.[19] As in the Sabine Oil determination, the ISDA DC unanimously resolved that a Failure to Pay Credit Event occurred notwithstanding the noteholders and Pacific having entered into an agreement prior to the date of default wherein the noteholders agreed not to exercise their default remedies against Pacific until a later date.

Although the ISDA DC is not required to (and has not) elaborated on the rationale behind its unanimous determinations that a Failure to Pay Credit Event occurred with respect to Sabine Oil and Pacific, it is clear that an individual's or group of creditors' forbearance from exercising remedies upon a default does not affect the determination of a Failure to Pay because such forbearance does not distract from the objective fact that a payment failure under an Obligation actually occurred.[20] Based on all publicly available information, iHeart's current

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15 *See* iHeart 12/13 8-K.

16 "Forbearance," Black's Law Dictionary (10th ed. 2014).

17 *See, e.g.,* Credit Event 2015052801 re *Sabine Oil & Gas Corporation* available at: http://dc.isda.org/cds/sabine-oil-gas-corporation/; Credit Event 2016030701 re *Pacific Exploration & Production Corporation* available at: http://dc.isda.org/cds/pacific-exploration-production-corporation/; *see* also Credit Event 2009051801 re *Georgia Gulf Corporation* available at: http://dc.isda.org/cds/georgia-gulf-corporation/ for an equivalent fact pattern and outcome.

18 *See* Credit Event 2015052801 re Sabine Oil & Gas Corporation.

19 *See* Credit Event 2016030701 re Pacific Exploration & Production Corporation.

20 We are aware of the ISDA DC (EMEA)'s determination of a Restructuring Credit Event with respect to Thomson SA in August of 2009 ("**Thomson**"). *See* Credit Event 2009081001 re *Thomson SA* available

arrangement with CCH is of the same nature as the forbearance agreements in Sabine Oil and Pacific. As such, the ISDA DC should remain consistent in not allowing such forbearance to distract from the finding that iHeart failed to pay the $57.1 million principal amount when due.

Significantly, the Linklaters Memorandum ignores those prior determinations and instead relies on inapposite New York cases. The assertion therein that a default does not "come[] into existence" under New York law where a debt holder grants a "waiver" prior to the date that payments were due, is misplaced. The case on which Linklaters relies for this proposition, *Lasalle Bank National Ass'n v. Citicorp Real Estate, Inc.*,[21] is not applicable to the facts at hand and does not stand for a general proposition of law. Rather, *Lasalle* is a breach of contract action that turned on the interpretation of particular language in the parties' contract of sale of a loan—specifically, whether or not a defendant lender, at the time of sale of a loan, had under the particular terms of the contract waived any "existing breach or default" as opposed to "one that might occur in the future."[22] The *Lasalle* court did not examine the impact of a waiver on the occurrence of a default in general.

In any event, CCH's decision to refrain from exercising its remedies while maintaining its right to those remedies cannot be properly characterized as a waiver to receive the principal amount due to it on December 15, 2016. As the New York Court of Appeals explains, waiver occurs when a party to a contract "relinquish[es] . . . a known right."[23] And "once this occurs, the waiving party can no longer insist on strict performance of the relevant contractual duties."[24] CCH has done the opposite of "relinquishing" its rights—it has expressly reserved those rights, according to iHeart, and has held open the possibility that it might insist on enforcing those rights in the future. Rather, CCH's statement should be properly understood as a temporary forbearance from exercising its default remedies.

Moreover, it would be improper to assign CCH's presumed "waiver" the weight of a bona fide agreement between two parties to extend the due date on the Notes given the relationship between iHeart and CCH—CCH is a wholly-owned subsidiary of iHeart that apparently has sought no security or other consideration for its consent—and the fact that there is no mention of an intended amendment in the Petition or any other public filing of iHeart. As such, it is a stretch to

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at: http://dc.isda.org/cds/thomson-sa/. However, Thomson involved a factual situation that is different from the situation in iHeart in all relevant respects. Thomson and all of its third-party noteholders entered into an explicit "waiver agreement" and contractually altered the scheduled maturity date on the notes to a later certain date. The waiver agreement expressly changed the maturity date on the notes and was binding on all noteholders, which where comprised of several and unaffiliated holders. In contrast to Thomson, the ISDA DC (EMEA) more recently resolved in Codere Finance (Luxembourg) SA ("**Codere**") that a Failure to Pay Credit Event had occurred when Codere missed a scheduled interest payment despite the fact that a majority of noteholders had agreed to forebear from exercising remedies to accelerate their respective notes. *See* Credit Event 2013091601 re *Codere Finance (Luxembourg) SA* available at: http://dc.isda.org/cds/codere-finance-luxembourg-sa/.

[21] *See Lasalle Bank National Ass'n v. Citicorp Real Estate, Inc.*, No. 01-cv-4389 (AGS), 2002 WL 181703, *6 (S.D.N.Y. Feb. 5, 2002).

[22] *Id.*

[23] *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 968 (1988).

[24] *Deutsche Bank AG v. AMBAC Credit Prod.*, LLC, No. 04 CIV. 5594 (DLC), 2006 WL 1867497, at *14 (S.D.N.Y. July 6, 2006).

characterize the "agreement" between iHeart and CCH as much more than a unilateral decision by iHeart to withhold payment on a payment obligation that is due.

3. The Payment Requirement Is Exceeded

Under Section 4.9(d) of the 2014 Definitions, if a Payment Requirement is not specified, as is the case under the Standard NA Terms, the Payment Requirement will be $1 million. iHeart failed to pay $57.1 million, far exceeding the Payment Requirement. We agree with the Linklaters Memorandum in this regard.

4. The Deemed Grace Period Has Lapsed

The terms of the Notes Indentures do not provide any grace period for a failure to pay principal.[25] As such, for purposes of determining when a Failure to Pay Credit Event occurred, Section 1.46(c) of the 2014 Definitions applies a deemed grace period of three Grace Period Business Days where Grace Period Extension does not apply (which is the case under the Standard NA Terms). The deemed grace period expires on December 20, 2016. The $57.1 million principal payment remains outstanding as of December 20, 2016, and, absent a cure by iHeart, a Failure to Pay Credit Event will have occurred on the final day of the relevant Grace Period, i.e., on December 20, 2016.[26]

In sum, under a straightforward and objective application of the 2014 Definitions, iHeart's failure to repay $57.1 million in principal amount of its Notes constitutes a Failure to Pay Credit Event occurring on December 20, 2016.

B. Market Expectation and Practice

A finding that a Failure to Pay Credit Event has occurred by virtue of the non-payment of $57.1 million of the Notes is consistent with market expectations and would preserve the intended effect of Credit Default Swaps as a market standard hedging instrument.

When iHeart publicly announced its intention and strategy not to repay the $57.1 million principal amount of the CCH-held Notes upon their maturity, market participants, news coverage and rating agencies widely viewed the non-payment as a default under the terms of the Notes Indentures. S&P lowered its corporate rating of iHeart to "*SD*" (selective default) from "*CCC*" and its issue-level rating of the Notes to "*D*" from "*CC*" in light of its view that "the missed maturity payment [constitutes] a default."[27] Contemporaneous market commentary has uniformly understood iHeart to be executing a calculated strategy to delay the effectiveness of the obligation to grant additional security interests under the "springing lien" provisions in some of its other indebtedness while accepting a limited default that would not cross-default other outstanding debt.[28]

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25 *See* Base Indenture Section 501(2).

26 *See* Section 1.50 of the 2014 Definitions. We agree with the Linklaters Memorandum in this regard as well.

27 *See* S&PGR Press Release 2016-12-15.

28 *See, e.g.,* Kyle Younker, Andrew Berlin and Alex Plough, DEBTWIRE, 16 Dec 2016, 14:02 GMT-5.

Credit Default Swaps provide protection against clearly circumscribed credit events. Increased contract standardization and the objective application of publicly available facts to the relevant provision of the 2014 Definitions are intended to provide market participants with transparency and certainty. Here, iHeart failed to make a payment of $57.1 million on its outstanding indebtedness on the scheduled due date. The evaluation of such event for purposes of the 2014 Definitions should not depend on a subjective determination of a Reference Entity's "liquidity position" or require an investigation into which subjective motivation iHeart may have had for not making the payment. Contrary to the view offered in the Linklaters Memorandum, this is precisely the kind of situation marked by a deterioration of creditworthiness and general market impact that can trigger a Credit Event. iHeart's resort to aggressive management of its highly leveraged capital structure is a reflection of its deteriorating financial condition. S&P views the nonpayment as a default and downgraded iHeart on the same day they missed the payment. iHeart itself concedes that many of its third-party creditors are harmed by the failure to pay the $57.1 million of Notes, but, while its ulterior goal was to avoid triggering the springing lien, accepted the clear default under the Notes as a necessary means to an end.[29] One of the most fundamental "commercial purposes" of Credit Default Swaps is to provide market participants with a transparent and efficient tool to hedge against risks arising from a deterioration of the Reference Entity's credit and financial condition. Such market participants would be unfairly penalized if the ISDA DC were to deviate from a straightforward application of the 2014 Definitions to somehow characterize iHeart's failure to pay $57.1 million of its Obligations on the due date as anything other than a Failure to Pay Credit Event.

IV. CONCLUSION

iHeart's failure to pay $57.1 million of principal amount on its Notes pursuant to the terms of the Notes Indentures constitutes a Failure to Pay Credit Event under the 2014 Definitions. The circumstances presented by this general interest question are not unique or new to the ISDA—on several previous occasions, the ISDA DC has unanimously found that a Failure to Pay Credit Event occurs even where a creditor forebears from enforcement of remedies, as CCH is effectively doing here. A finding that a Failure to Pay Credit Event occurred will be consistent with market expectations. And by encouraging objectivity and transparency in the market, such a finding will preserve the intended effect of Credit Default Swaps as a market standard hedging instrument.

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We confirm that a copy of this memorandum may be provided for information purposes only to the members of any Credit Derivatives Determinations Committee convened under the DC Rules in connection with the iHeartCommunications, Inc. General Interest Question to consider the issues discussed herein, and that it may be made publicly available on the ISDA Credit Derivatives Determinations Committee website. We accept no responsibility or legal liability in relation to its contents.

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[29] Although the ISDA DC does not need to decide this point, it is clear that the implementation of iHeart's strategy through a nonpayment of the Notes has had a significant market impact. In excess of $13 billion of iHeart's term loan, priority guaranteed notes and legacy notes holders are adversely affected by not obtaining security for their debt positions through the springing lien, thereby exposing them to material future losses. The only conceivable way in which iHeart could potentially avoid triggering the springing lien was by failing to pay the full principal amount of the Notes coming due on December 15, 2016. Credit Default Swaps are a natural instrument to hedge against that very risk.