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Hon. Shira A. Scheindlin
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *BOKF, N.A. v. Caesars Entertainment Corporation*, 15-CV-1561
MeehanCombs Global Credit Opportunities Master Fund, LP v. Caesars Entertainment Corporation, 14-CV-7091
UMB Bank, N.A. v. Caesars Entertainment Corporation, 15-CV-4634

Dear Judge Scheindlin:

We represent defendant Caesars Entertainment Corporation ("CEC"). CEC stands by its application, made on January 27, that the Court preclude trial testimony from plaintiffs' experts Roberta S. Karmel and Michael W. Phillips, and strike their reports. CEC made this application because plaintiffs disregarded Rule 26 and the Court's scheduling order in serving affirmative reports on a topic no CEC expert had opined on, and in falsely characterizing them as "rebuttal" reports – thereby enjoying the unfair advantages of 35 extra days to serve them, and depriving Caesars of the ability to rebut these new opinions. CEC stands by its application because, for a second time, plaintiffs have ignored the Court's order. At the February 8 conference, the Court directed that if plaintiffs wished to present Ms. Karmel and Mr. Phillips, they serve redacted reports which excluded legal opinions, and added parenthetical citations, in those places where the reports claimed to rebut the report of CEC's expert James Gadsden, to identify the paragraphs of Mr. Gadsden's report being rebutted. Plaintiffs instead filed improper supplements to their improper "rebuttal" reports, which still respond to no opinion expressed by Mr. Gadsden. CEC asks the Court to (a) preclude Ms. Karmel and Mr. Phillips, or (b) allow CEC to find experts and obtain reports rebutting Ms. Karmel and Mr. Phillips, and depose Ms. Karmel and Mr. Phillips, and move to exclude them, before trial.

On February 8, the Court's initial reaction was "that these are not rebuttal reports" (Tr. 2:22-23), and they were not on "an appropriate subject" (*id.* 3:15-16) because they purported to "tell the Court what a statute means" (*id.* 3:7-8), in particular, what the SEC meant in Rule 1-02(z) of Regulation S-X by the words "substantially all" in its definition of "wholly owned subsidiary."[1]

The Court permitted plaintiffs to resubmit these reports "in a slimmed-down version that avoids the legal interpretations of the regulation or statute, and addresses solely those issues that

[1] The definition of "wholly owned subsidiary" in Regulation S-X begins, "a subsidiary *substantially all* of whose outstanding voting shares are owned by its parent…" (emphasis added). The indentures governing CEOC's 6.50% senior unsecured notes due 2016 and 5.75% senior unsecured notes due 2017 (together, the "Unsecured Notes Indentures") provide at section 1503 that CEC's guarantee of CEOC's obligations is released if CEOC "ceases for any reason to be a 'wholly owned subsidiary' of [CEC] (as such term is defined in Rule 1-02(z) of the Regulation S-X promulgated by the SEC)."

are fact issues for the for the jury and that clearly rebut something in the Gadsden report" (*id.* 19:1-5). The Court suggested modest annotations in any resubmitted report – "you can put in parens, 'See Gadsden paragraph 43 or 44,' or whatever you want to refer to, so I can quickly look back and forth" (*id.* 19:5-7). The Court gave plaintiffs a short time to resubmit the reports "because you're just going to cut out whatever I don't think should be there based on today's conversation .... So it's a more limited and pointed rebuttal to something you can point to in the Gadsden report" (19:11-12, 14-15).

When CEC noted that with the Court's limitations, there would be nothing left to Ms. Karmel and Mr. Phillips' reports, the Court reiterated, "if they can really say, here are the sections ... that actually rebut Gadsden and can point to a paragraph, I would hear it" (*id.* 22:7-9). CEC asked if the Court was "allowing them to rewrite the reports?" and the Court responded, "No, I didn't say that. I said redacted" (*id.* 22:16-18). It concluded: "While I'm not allowing them to rewrite the report, I am allowing them to annotate the report to point out what section of Gadsden they say it rebuts so that I can look at it side-by-side ... and say, ah, they reference paragraph 40 whatever" (*id.* 23:3-6, 9).

Plaintiffs' resubmissions yesterday were not "slimmed-down"; nothing was "cut out" or "redacted"; the reports were in no way "more limited and pointed"; they did not "avoid[] the legal interpretation of the regulation"; and in no way did they "clearly rebut something in the Gadsden report." Mr. Phillips' 12-page report is now accompanied by seven, full, single-spaced pages of "Annotations." These are not annotations in the accepted sense the Court used the word ("'See Gadsden paragraph 43 or 44,' ... so I can quickly look back and forth"). Every long paragraph of the "Annotations" states that the report "explain[s] ... the correct understanding of the term 'Wholly Owned Subsidiary,' as defined in Regulation S-X." Plaintiffs filed these "Annotations" even though (a) the Court had stated, with particular reference to Regulation S-X, that the reports should not "tell the Court what a statute means," and (b) Mr. Gadsden has never offered an opinion on the meaning of "wholly owned subsidiary," whether in Regulation S-X or in the Unsecured Notes Indentures.[2]

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[2] Mr. Gadsden's report refers just once to "wholly owned subsidiary" as used in section 1503 of the Unsecured Notes Indentures. He states (Report ¶ 38) that he will not express an opinion about the nature of the guarantee in the Unsecured Notes Indentures because the definition of "wholly owned subsidiary" there differs from the definition found in the indentures governing CEOC's secured notes.

Mr. Gadsden's report refers just once to "wholly owned subsidiary" as defined in Regulation S-X. He recites (*id.* ¶ 42) the provisions in the Unsecured Notes Indentures releasing the guarantee, including "CEOC ceasing 'for any reason' to be a 'wholly owned subsidiary' of CEC, as defined in SEC Regulation S-X." Below that (*id.* n.18), he quotes – without any opinion or commentary – Rule 1-02(z) of Regulation S-X.

Should there be any doubt on the score, when Mr. Gadsden was deposed yesterday, he confirmed that he had no opinions in this regard (Depo. Tr. 93:7-24 [colloquy omitted]):

> "In the [Unsecured Notes Indentures], one of the release provisions is when CEOC is no longer a wholly owned subsidiary, as defined under – let me turn to it – Rule 1-02(z) of the Regulation S-X. Is that right?
>
> MR. GADSDEN: "I see that, yes.
>
> "And do you understand what the definition of 'wholly owned subsidiary' under that rule is?
>
> MR. GADSDEN: "I haven't offered an opinion as to what 'wholly owned subsidiary' means for purposes of that rule.

As to Ms. Karmel, her 21-paragraph report is now accompanied by an 11-paragraph, signed document that, while captioned as an "Annotation," is hardly that – it is a narrative, argumentative discussion of section 1503 of the Unsecured Notes Indentures. It begins ("Annotation" ¶ 3) by critiquing Mr. Gadsden because "his report fails to analyze the provision under which CEC purports to have released the Guarantee, Section 1503(3) …." Ms. Karmel admits, "This release provision is the main focus of my rebuttal report" (*id.*). CEC agrees with this characterization, as to both "rebuttal" reports. They purport to rebut Mr. Gadsden, but (as Ms. Karmel admits) he gave no opinion on the topic of the rebuttals. (Mr. Phillips' report makes a similar admission (page 2): "The Gadsden Report does not address the application of the term Wholly Owned Subsidiary under the guidance promulgated by the United States Securities and Exchange Commission …." Mr. Phillips goes on to address at length the "application" of this "term" under the referenced "guidance.")

In their letter accompanying yesterday's supplements, plaintiffs urge the Court to allow Ms. Karmel and Mr. Phillips' reports because they demonstrate how Mr. Gadsden's analysis of the guarantee release provisions is incomplete. Specifically, Mr. Gadsden does not address the possibility that CEC could sell a tiny amount of CEOC stock, meaning CEC would lose the right to consolidate CEOC's financial statements with CEC's, yet CEC would still be bound by the guarantee in the Unsecured Notes Indentures insofar as the tiny sale would not end CEOC's status as CEC's "wholly owned subsidiary," as defined in Regulation S-X (Ltr. at 2). Since Mr. Gadsden does not opine on "wholly owned subsidiary" as used in Regulation S-X or the Unsecured Notes Indenture, it is unsurprising that his report does not discuss this possibility. In any event, at deposition, Mr. Gadsden acknowledged the existence of this possibility (Depo. Tr. 97-100), so that is not a basis on which the Court needs to allow Ms. Karmel and Mr. Phillips' reports. It is certainly not a basis on which the Court should allow Ms. Karmel and Mr. Phillips to offer new opinions, on "rebuttal," about the meaning of "wholly owned subsidiary" in Regulation S-X, which is the real thrust of their reports. The other focus of Ms. Karmel and Ms. Phillips' reports, particularly as "annotated," is to mischaracterize Mr. Gadsden as opining that "the Guarantee is not for credit support," period (Karmel "Annotation" ¶ 2; *see* Phillips "Annotation" ¶ A (same)). This kind of argument would also not be a proper basis for the Court should to allow these reports, even if the characterization was accurate. It is not accurate. *See* Gadsden Depo. Tr. at 103:5-8, 17-20 ("I have not given an opinion that the guarantee prior to the time of the guarantee release events did not provide financial recourse for the noteholders …. It's my opinion that so long as the guarantee was in place, the noteholders had the recourse that was – that is available under the guarantee").

Finally, while the legal arguments in plaintiffs' letter were not called for by the Court. CEC briefly responds to plaintiffs' assertions (Ltr. at 2) about who bears the burden of proving the guarantee was released. Even if CEC agreed with plaintiffs (it does not), this would not be pertinent to the current dispute. The Court did not order that expert opinions be served in a sequence determined by burdens of proof, instead, it was based on Rule 26's straightforward rubric of affirmative and rebuttal reports. The Court certainly did not authorize parties to serve rebuttal reports (which Rule 26 limits to opinions that "contradict or rebut") on new topics, including on topics for

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"Is that something that you happen to know in the course of your practice?

MR. GADSDEN: "No."

Id. at 94:19-22 (same). Mr. Gadsden also testified that he offered no opinion about "wholly owned subsidiary" as used in the Unsecured Notes Indentures. *Id.* at 96:23-25 ("I'm not offering an opinion as to what 'wholly owned subsidiary' means for the purpose of 15.03").

which the adversary bore the burden of proof and did not present an expert. Plaintiffs even served an affirmative expert report from Martha Kopacz, on the due date of December 18, which discussed the release of the guarantee at length (Kopacz Report ¶¶ 68-81). This confirms that plaintiffs' decision to delay serving Ms. Karmel and Mr. Phillips' reports on the release of the guarantee until the rebuttal report due date of January 22 was tactical, and that their justification based upon burdens of proof is an afterthought. Moreover, by plaintiffs' logic, a party with the burden of proof on an issue could never rebut its adversary's expert – such a rule would be manifestly unfair.

The prejudice to CEC resulting from plaintiffs' strategy is obvious – if CEC took the same amount of time plaintiffs did to find Ms. Karmel and Mr. Phillips and serve their reports (*i.e.*, 35 days, starting from yesterday, when they supplemented their reports), then CEC would not rebut Ms. Karmel and Mr. Phillips' affirmative opinions until March 16 – two days after trial begins. While Ms. Karmel and Mr. Phillips are not likely to be called (if at all) until late in the trial, a schedule like this which would be equitable to CEC is unfeasible. CEC respectfully requests that the Court preclude trial testimony from Ms. Karmel and Mr. Phillips and strike their reports, and if not, that the Court (i) allow CEC to depose them during the week of February 22, (ii) give CEC five business days after the completion of these depositions to make *Daubert* motions against them, and (iii) give CEC until March 1 (*i.e.*, 20 days from yesterday) to serve reports rebutting their opinions.

Respectfully,

Philippe Adler /EH

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