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February 10, 2016

By ECF and Hand Delivery

The Honorable Shira A. Scheindlin
United States District Court Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007

Re: ***MeehanCombs Global Credit Opportunities Master Fund, LP, et al. v. Caesars Entm't Corp., et al.*****, Civ. No. 14-7091-SAS;**

BOKF, N.A. v. Caesars Entm't Corp.**, No. 15-cv-1561-SAS**

UMB BANK, N.A. v. Caesars Entm't Corp.**, No. 15-cv-4634-SAS**

Dear Judge Scheindlin:

On behalf of Plaintiffs in each of the above-referenced actions, and pursuant to the Court's direction at the February 8, 2016 status conference (the "February 8 Conference"), enclosed please find the Annotations to the Expert Rebuttal Report of Roberta S. Karmel (the "Karmel Rebuttal Report") and the Expert Report of Michael W. Phillips in Rebuttal of Expert Report of James Gadsden (the "Phillips Rebuttal Report").[1]

As explained at the February 8 Conference, the Karmel and Phillips Rebuttal Reports (both the unannotated and annotated versions) properly rebut the Expert Report of James Gadsden (the "Gadsden Report"). The Gadsden Report clearly addresses, among other things, Caesars Entertainment Corporation's ("CEC") guarantee (the "Guarantee") of the 2016 Notes and its alleged release. Gadsden, however, fails to properly focus on the import of Section 1503(3) of the 2016 Notes Indenture. This specific release provision is the focus of the Karmel Rebuttal Report. Additionally, the Phillips Rebuttal Report rebuts the Gadsden Report by explaining from an accounting perspective, based on guidance issued by the SEC, the SEC staff, and under GAAP, the correct understanding of the term "Wholly Owned Subsidiary," as defined in Regulation S-X and as defined in the guarantee release provision of the specific Indentures at issue in the Actions.

[1] The Karmel Rebuttal Report and the Phillips Rebuttal Report will not be filed on the docket with this letter. Each report will be delivered to the Court by "Hand Delivery" and by electronic mail to all counsel of record.

Therefore, both the Karmel Rebuttal Report and the Phillips Rebuttal Report are necessary to highlight the shortcomings of the Gadsden Report and its assertion that CEC purportedly released the Guarantee through multiple transactions (the "May Transactions") contrived to reduce CEC's ownership of Caesars Entertainment Operating Company to less than 100%. For example, the Phillips Rebuttal Report makes plain that the Guarantee is not merely for financial reporting. But Regulation S-X shows that it is possible for CEC to be both unable to file consolidated reports and still liable under its guarantees. As the Phillips Rebuttal Report shows, Rule 3-10 of Regulation S-X provides that 100% ownership is required for consolidated reporting. Under 17 C.F.R. 210.1-02(aa), however, an entity is considered "wholly owned" even if the subsidiary is less than 100% owned. Thus, if CEC sold 5% of its equity and remained a 95% owner of CEOC, it would no longer be able to file consolidated reports, yet it would remain liable on its guarantees. This analysis and conclusion directly contradicts the Gadsden Report. *See* Gadsden Report at ¶10 (guarantees are "merely for financial reporting").

Moreover, should the Court ultimately determine that CEC's affirmative reports did not address the Section 1503(3) release provision and, thus, are not ripe for rebuttal, this does not foreclose Plaintiffs' ability to offer rebuttal expert reports. Given that CEC bears the burden of proof on the issue of whether the Guarantee was effectively released as part of the May Transactions, *see* Tr. of February 8 Conference at 21, Plaintiffs are permitted to submit an expert report for "rebuttal" on an issue that its adversary bears the burden of proof. *See, e.g., FLOE Int'l Inc. v. Newmans' Mfg. Inc.*, No. 04-cv-5120, 2006 WL 5159513, at *7 (D. Minn. Feb. 23, 2006) ("To hold otherwise would prevent a party from presenting an expert to respond to any argument—not necessarily one that is predicated on expert opinion—which the party that bears the burden of proof should make. While the party carrying the burden on an issue may not want to present expert opinion evidence on that issue, the opposing party should not be denied the opportunity to present expert opinion evidence on the same issue, simply because the party carrying the burden chose not to."); *see also Straus v. DVW Worldwide, Inc.*, 484 F. Supp. 2d 620 (S.D. Tex. 2007) (denying motion to exclude defendants' damages expert, who was not designated until deadline for rebuttal expert designations, because defendants did not have the burden to make a showing on the issue until after plaintiff presented evidence on it); Fed. R. Civ. P. 26 advisory committee's notes to the 1993 Amendment ("[I]n most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.").

If the Court should find that the Karmel and Phillips Rebuttal Reports fall outside of the scope of proper rebuttal, and instead constitute untimely disclosed affirmative expert reports, "[p]reclusion . . .is not automatic or mandatory." *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 290 F.R.D. 11, 17 (D. Mass. 2013) (finding that an expert report fell outside of the scope of proper rebuttal, but declining to exclude the report because, among other factors, the "case is complex" and plaintiff "demonstrate[d] a need

for [the expert's] report and testimony"); *see also Withrow v. Spears*, 967 F. Supp. 2d 982, 1003-08 (D. Del. 2013) (finding that an expert report was not a proper reply report and thus constituted an untimely affirmative expert report, but refusing to "grant[] the 'extreme sanction' called for by the [m]otion to [s]trike," particularly when, among other factors, plaintiff (the moving party) "had a good understanding as to what [d]efendants' position was on these topics," and the report "simply further flushed out those views.").

Moreover, ordering the "exclusion of expert testimony is a drastic remedy," and "[p]recluding testimony of an expert, even when there has not been strict compliance with Rule 26, may at times tend to frustrate the Federal Rules' overarching objective of doing substantial justice to litigants." *Rmed Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94-cv-5587, 2002 WL 31780188, at *3 (S.D.N.Y. Dec. 11, 2002). Factors a court may consider when determining whether to exclude expert testimony include: "(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willingness in failing to comply with the district court's scheduling order." *Id.* (internal quotation marks and citation omitted).

Here, CEC has not shown how it will be prejudiced or surprised by the Karmel and Phillips Rebuttal Reports, nor can it make such a showing, as the Section 1503(3) release provision and the meaning of the term "wholly owned subsidiary" have been addressed by the parties throughout the Actions. Further, "any prejudice is easily cured by allowing plaintiff to depose [the disclosed expert] if they so desire." *Rmed Int'l, Inc.*, 2002 WL 31780188 at *4 (citation omitted); *see also Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, No. 01-cv-11295, 2003 WL 22471909, at *2 (S.D.N.Y. Oct. 31, 2003) (same). At the February 8 Conference, the Court postponed by a week the time period for CEC to depose Karmel and Phillips. There is ample time prior to trial for the parties to schedule these depositions and also for CEC to submit any additional report it deems necessary. Admission of the Karmel and Phillips Rebuttal Reports will not disrupt either the *BOKF/UMB* trial or the *MeehanCombs/Danner* trial, which are set to begin on March 14 and May 9, 2016, respectively. *See, e.g., Rmed Int'l, Inc.*, 2002 WL 31780188 at *4 ("Allowing service of a new report . . . will not disrupt the trial, which is set to begin almost a month from now.").

To the contrary, Plaintiffs would suffer grave prejudice if the Court excludes the Karmel and Phillips Rebuttal Reports, which opine on highly technical accounting and securities issues that are outside the knowledge of an average juror. Accordingly, the severe sanction of preclusion of the Karmel and Phillips Rebuttal Reports based on untimely disclosure is unwarranted. *See, e.g., Grdinich v. Bradlees*, 187 F.R.D. 77, 79 (S.D.N.Y. 1999) ("Courts have held that imposition of Rule 37 sanctions is a 'drastic remedy' that should only be applied 'in those rare cases where a party's conduct

represents *flagrant bad faith* and *callous disregard* of the Federal Rules of Civil Procedure. (emphasis in original) (citation omitted)).

Plaintiffs request the opportunity to brief the matters set forth in this letter should the Court determine it requires additional authority and in light of the fact that these are critical issues. We are available at the Court's convenience to answer any questions.

[*Signature Page Immediately Follows*]

Respectfully submitted,

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