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March 15, 2016

By ECF and Hand Delivery

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

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

Dear Judge Scheindlin:

On behalf of the Plaintiffs in the above-referenced action, and in accordance with Rule IV.A of Your Honor's Individual Rules and Procedures, we write to oppose CEC's proposed motion for partial summary judgment.[1] As set forth below, CEC's motion should be denied both on the merits and on procedural grounds.

CEC is Not Entitled to Summary Judgment on Plaintiffs' Claim for Breach of the Duty of Good Faith and Fair Dealing

Although CEC suggests otherwise, New York law is clear that Plaintiffs may simultaneously plead claims for breach of contract and breach of the duty of good faith and fair dealing. *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, No. 08 Civ. 9116(PGG), 2009 WL 321222, at *5 (S.D.N.Y. Feb. 9, 2009). To do so, "a plaintiff must allege an implied duty that is consistent with the express contractual terms, but base its implied covenant theory on allegations that are distinct from the factual predicate for its contract claims." *Id*; *see also Bear, Stearns Funding, Inc. v. Interface Group – Nev., Inc.*, 361 F. Supp. 2d 283, 299-300 (S.D.N.Y. 2005) (allowing simultaneous breach of contract and good faith and fair dealing claims where the factual predicates of the claims were distinct). "[A] plaintiff adequately states an implied covenant claim by alleging conduct that subverts the contract's purpose without violating its express terms." *JPMorgan*, 2009 WL 321222, at *5.[2]

[1] Capitalized terms, to the extent not defined herein, have the meaning set forth in Plaintiffs' Amended Complaint [ECF No. 31].

[2] "'Whether particular conduct violates . . . the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact.'" *Janel World Trade, Ltd. v. World Logistics Servs., Inc.*, No. 08 Civ. 1327(RJS), 2009 WL 735072, at *13 (S.D.N.Y. Mar. 20, 2009) (quoting *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 98 (2d Cir. 2007).

Here, Plaintiffs' good faith and fair dealing claim is based on factual predicates that are distinct from those underlying Plaintiffs' breach of contract claims. Plaintiffs' contract claims focus on CEC's wrongful release of the Guarantee through a series of transactions consummated on August 22, 2014 (the "August Transaction"). Amended Compl. ¶¶ 144-46. In contrast, Plaintiffs' good faith claim with respect to the August Transaction alleges that CEC violated its duty to Plaintiffs by entering into a secret agreement with the Favored Noteholders to pay them a premium in exchange for their consent to amend the Indenture without giving all noteholders (including Plaintiffs) the opportunity to participate in the transaction. *Id.* at ¶¶ 177(a) and (c); 178(a).[3] In addition, Plaintiffs' good faith claim is premised on CEC's orchestration of two sham transactions in May 2014—the 5% Stock Sale and the PIP grant—the sole purpose of which was to trigger the Indenture's guarantee release provisions even though CEOC's equity at the time of the transactions was worthless. *Id.* at ¶ 177(b). CEC engaged in all of the foregoing conduct in an effort to subvert the Indenture, giving rise to an independent cause of action for breach of the duty of good faith and fair dealing. *See Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625, 631 (S.D.N.Y. 2010), *aff'd in relevant part*, 381 F. App'x. 117 (2d Cir. 2010) (enjoining transaction that, although technically permissible under the express terms of a contract, was an "end-run, if not a downright sham . . . [that did] away with the 'fruits' of the contract.") (quoting *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 292 (N.Y. 1995)). Because the foregoing allegations are distinct from those underlying Plaintiffs' contract claims, CEC's "redundancy" argument is without merit and Plaintiffs should be permitted to pursue their good faith and fair dealing claim as an alternative theory of liability. *JPMorgan*, 2009 WL 321222, at *5.

With respect to the so-called "Disputed Transactions," Plaintiffs do not intend to seek liability based on CEC's transfers of assets from CEOC to other CEC affiliates. Thus, CEC has no grounds to seek summary judgment based on allegations concerning the Disputed Transactions.

CEC is Not Entitled to Summary Judgment
on Plaintiffs' Affiliate Voting Claim

CEC's proposed motion on Plaintiffs' "affiliate voting" claim is also without merit. CEC does not dispute that Section 316(a) of the TIA requires that, when considering a direction to act from a majority of noteholders, an indenture trustee must disregard consents provided "by any person directly or indirectly controlling or controlled by or under direct or indirect common control" of the issuer (here, CEOC and

[3] Under New York law, such conduct is actionable as a violation of the duty of good faith and fair dealing. *See, e.g.*, *Whitebox Convertible Arbitrage Partners, L.P. v. World Airways, Inc.*, No. Civ.A. 1:04-CV-1350, 2006 WL 358270, at *3 (N.D. Ga. Feb. 15, 2006) (construing redemption provisions of an indenture under New York law).

CEC). In its letter, CEC argues that the August Transaction did not violate section 316(a) because the Favored Noteholders were not controlled by CEC at the time those holders signed the August 12, 2014 Note Purchase and Support Agreement (the "NPSA") pursuant to which those holders consented to the removal of CEC's Guarantee from the 2016 Indenture. But that is only part of the story. Indeed, and as set forth in Plaintiffs' Amended Complaint, under the terms of the NPSA, the Favored Noteholders' consents did not become effective until the "closing" of the August Transaction (on August 22, 2014), by which time the Favored Noteholders had been paid for their Notes and the Notes had been delivered to CEC and CEOC for cancellation. *See* Amended Compl. ¶¶ 97-113; CEC-NOTEHOLDER 00023934-941. For this reason, CEC and CEOC had actual ownership of the Notes at the time the consents became effective. Moreover, because the terms of the NPSA expressly prohibited the Favored Noteholders from disposing of or voting their Notes except as directed by CEOC and CEC, CEC and CEOC also had beneficial ownership of the Notes when the August Transaction closed. *See* Rule 13d-3 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-3(a) ("For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security."). Because CEOC and CEC had both actual and beneficial ownership of the Favored Noteholders' Notes at the time the consents became effective, the August Transaction violated Section 316(a).

The Proposed Motion is Untimely

CEC's delay in pursuing the proposed motion until the eve of trial threatens substantial prejudice to the Plaintiffs. Trial is set to commence on May 9, 2016, and the parties' numerous pre-trial deadlines began to run on March 4, 2016. Unlike CEC, Plaintiffs promptly sought to move for summary judgment at the close of discovery, in October 2015. There is no reason CEC could not have pursued its motion then. Moreover, CEC also failed to raise its motion when, over one month ago, CEC proposed to file a similar motion for summary judgment on the good faith and fair dealing claims alleged in the *BOKF* and *UMB* litigations. CEC offers no excuse for its delay. Based on the foregoing, the Court should deny CEC leave to file the motion on the grounds that it is untimely or, at minimum, require CEC to make its motion at the close of Plaintiffs' case at trial, when the motion can be converted to one for directed verdict.

* * *

We are available to discuss the foregoing matters at the Court's convenience.

Respectfully submitted,

Clay J. Pierce

cc: All counsel of record (via ECF)