

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRILOGY PORTFOLIO COMPANY, LLC, *et al.*,

Plaintiffs,

v.

CAESARS ENTERTAINMENT
CORPORATION, *et al.*,

Defendants.

Case No. 1:14-cv-07091 (JSR)

FREDERICK BARTON DANNER, Individually
and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

CAESARS ENTERTAINMENT
CORPORATION, *et al.*,

Defendants.

Case No. 1:14-cv-07973 (JSR)

[Rel. Case No. 1:14-cv-07091 (JSR)]

**PLAINTIFFS’ JOINT (A) REPLY TO CAESARS ENTERTAINMENT
CORPORATION’S LOCAL CIVIL RULE 56.1 RESPONSE TO PLAINTIFFS’
STATEMENT OF MATERIAL FACTS AND COUNTER-STATEMENT OF MATERIAL
FACTS AND (B) OBJECTIONS TO PROFFERED EXPERT DECLARATIONS**

Plaintiffs Trilogy Portfolio Company, LLC (“Trilogy”) and Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds Trust (“Long/Short,” and with Trilogy, the “Trilogy Plaintiffs”), and Frederick Barton Danner (“Danner,” and with the Trilogy Plaintiffs, “Plaintiffs”), respectfully submit: (a) their reply to Defendant Caesar Entertainment Corporation’s (“CEC”) Local Civil Rule 56.1 Response to Plaintiffs’ Statement of Material Facts (“CEC Response”) and the specific numbered paragraphs of CEC’s Counter-Statement of

Material Facts (TRILOGY ECF 154; DANNER ECF 135)¹ (“CEC Counter-Statement”); and (b) their objections to the declaration of David B. Sambur (TRILOGY ECF 139; DANNER ECF 120) (the “Sambur Decl.”) and the proffered expert declarations of Jerry L. Arnold (TRILOGY ECF 158; DANNER ECF 139) (the “Arnold Decl.”) and James Gadsden (TRILOGY ECF 160; DANNER ECF 141) (the “Gadsden Decl.”), each filed in support of CEC’s opposition to Plaintiffs’ joint motion for partial summary judgment (TRILOGY ECF 141; DANNER ECF 122) (“Plaintiffs’ Summary Judgment Motion”). These responses are submitted solely for the purposes of Plaintiffs’ Summary Judgment Motion. Nothing herein shall be deemed an admission of the truth, materiality, relevance or admissibility of any CEC Counter-Statement or declaration at trial or for any other purpose.

A. Reply to the CEC Local Rule 56.1 Response and the Counter-Statement.

(i) General Objections. Local Civil Rule 56.1 requires a party moving for summary judgment to submit a “separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried,” and for the opposing party to submit “a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.” Local Civ. R. 56.1 (a)-(b). “If the opposing party then fails to controvert a fact set forth in the movant’s Rule 56.1

¹ Citations herein are formatted as follows:

- Documents in this Court’s ECF docket will be cited by ECF number with a short description in parentheses; *e.g.* TRILOGY ECF 31 or DANNER ECF 28 (First Am. Compl.) ¶ 1.
- An exhibit to an ECF document will be cited by docket and exhibit number, with a description of the exhibit; *e.g.* Exhibit A to DANNER ECF 28 would be cited as “ECF 28-1 (2016 Notes Indenture) § 1.01.”

statement, that fact will be deemed admitted pursuant to the local rule.” *Johnson v.*

IAC/Interactive Corp., 2 F.Supp.3d 504, 507 (S.D.N.Y. 2014). The purpose of Local Civil Rule 56.1 is to assist the Court by “narrowing the scope of the issues to be adjudicated and identifying the facts relevant and admissible to that determination.” *Baity v. Kralik*, 51 F.Supp.3d 414, 418 (S.D.N.Y. 2014) (citing *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001) (“The purpose of Local Rule 56.1 is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties.”)).

The CEC Response to Plaintiffs’ Statement of Undisputed Material Facts (TRILOGY ECF 143; DANNER ECF 124) (“Plaintiffs’ SUMF”) fails to comply with Local Civil Rule 56.1. In an effort to create the appearance of disputed material facts where none actually exists, CEC:

- Denies an identical or substantially similar statement it previously admitted in its Responses & Objections to Plaintiffs’ First Set of Requests for Admissions. *See, e.g.*, CEC Response No. 48 and CEC Admis. No. 39.
- Includes argument and/or immaterial facts in its purported denials and its admissions. *See, e.g.*, CEC Response Nos. 51, 100, 101, 123, 131, 142, 145; *see also Costello v. N.Y. State Nurses Ass’n*, 783 F.Supp.2d 656, 661 n. 5 (S.D.N.Y. 2011) (disregarding responses to a Rule 56.1 Statement that contained conclusory assertions or legal arguments).
- Fails to either admit or deny a particular fact, instead responding with equivocal statements such as “disputes the statement to the extent” CEC Response Nos. 101, 102, 123; *see also Buckman v. Calyon Sec.*, 817 F.Supp.2d 322, 328 n. 42 (S.D.N.Y. 2011) (noting that “56.1 statements not explicitly denied by plaintiff are deemed admitted”).
- Denies Plaintiffs’ asserted facts, but then proceeds to restate Plaintiffs’ same statement in a manner that does not actually controvert the fact(s) asserted. *See, e.g.*, CEC Response Nos. 161, 186.
- Objects to a number of Plaintiffs’ statements on the grounds that the statement “fails to comply with Local Civil Rule 56.1 because the cited evidence does not support the statement and, therefore, no response is required.” *See, e.g.*, CEC Response No. 129. The apparent basis for this objection is that Plaintiffs’ papers

did not attach all documents referenced in Plaintiffs' SUMF. CEC's objection is improper. While former Rule 56(e)(1) previously required that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith," this requirement was eliminated as part of the 2010 amendments to Rule 56. Here, most of the documents referenced in Plaintiffs' SUMF had already been submitted to the Court in summary judgment filings by CEC or the other guarantee plaintiffs. However, in order to avoid any further dispute on this issue, Plaintiffs attach to the Supplemental Declaration of Clay J. Pierce and the Supplemental Declaration of Gordon Z. Novod, each filed contemporaneously herewith, each document cited in paragraphs in Plaintiffs' SUMF to which CEC objected on the grounds discussed herein.²

(ii) Specific Responses to each CEC Counter-Statement. Plaintiffs specifically

respond to each CEC Counter-Statement as follows:

240. Admitted.

241. Admitted.

242. Admitted that Section 501(5) of the indenture agreement, dated June 9, 2006 (the "2006 Indenture") contains the language quoted in CEC Counter-Statement No. 242.

243. Admitted that Section 1007 of the 2006 Indenture, as described in the corresponding Officer's Certificate, contains the language quoted in CEC Counter-Statement No. 243.

² Certain of CEC's Local Civil Rule 56.1 objections relate to the Final Report of Bankruptcy Examiner Richard J. Davis, dated May 16, 2016 (initially filed March 15, 2016), filed in the bankruptcy case captioned *In re Caesars Entertainment Operating Company, Inc., et al.*, No. 15-01145 (ABG) (Bankr. N.D. Ill.). Specifically, CEC asserts that "the law is well-established that a report of an examiner appointed by a bankruptcy court is not competent, admissible evidence and is not properly considered on a motion for summary judgment." CEC Response No. 58. However, the case CEC cites in support of that proposition, *WM High Yield Fund v. O'Hanlon*, 964 F.Supp.2d 368 (E.D. Pa. 2013), is readily distinguishable. In *WM High Yield Fund*, there was a finding that there were serious flaws with that examiner's report, calling the veracity of that examiner's findings into question. *See id.* at 395 ("[D]iscovery in this litigation has proven the Examiner's factual findings as to [defendant's] conduct and state of mind to be inaccurate, if not plainly false."). Here, in contrast, there has been no judicial finding that the report of the examiner, who was requested by the debtors themselves, is untrustworthy or in any way inaccurate.

244. Admitted that Section 1008 of the 2006 Indenture, as described in the corresponding Officer's Certificate, contains the language quoted in CEC Counter-Statement No. 244.

245. Admitted that Section 904 of the 2006 Indenture contains the language quoted in CEC Counter-Statement No. 245.

246. Admitted.

247. Admitted that Section 1103 of the 2006 Indenture contains the language quoted in CEC Counter-Statement No. 247.

248. The first sentence of CEC Counter-Statement No. 248 is admitted. The second sentence of CEC Counter-Statement No. 248 is denied. Section 701 of the 2006 Indenture provides:

Preservation of Information: Communications to Holders.

The Trustee shall preserve, in as current a form as is reasonably practicable, the names and addresses of Holders contained in the most recent list of the names and addresses of Holders received by the Trustee in its capacity as Security Registrar.

The rights of Holders to communicate with other Holders with respect to their rights under this Indenture or under the Securities, and the corresponding rights and privileges of the Trustee, shall be as provided by the Trust Indenture Act.

Every Holder of Securities, by receiving and holding the same, agrees with the Corporation and the Trustee that neither the Corporation nor the Trustee nor any agent of either of them shall be held accountable by reason of any disclosure of information as to names and addresses of Holders made pursuant to the Trust Indenture Act.

(TRILOGY ECF 144; DANNER ECF 129 (Declaration of Clay J. Pierce in Support of Plaintiffs' Joint Motion for Summary Judgment ("Pierce Decl."), Ex. A (2006 Indenture) § 701)). It is admitted that Section 1004 of the 2006 Indenture contains the language quoted in the third sentence of CEC Counter-Statement No. 248.

249. Plaintiffs object to the first sentence of CEC Counter-Statement No. 249 for failure to comply with Local Rule 56.1 because CEC failed to provide any evidence to support the statement and, therefore, no response is required. To the extent a response is required, the first sentence is admitted. The second, third and fifth sentences of CEC Counter-Statement No. 249 are admitted. It is admitted that Section 4.04 of the 2006 Indenture contains the language quoted in the fourth sentence of CEC Counter-Statement No. 249.

250. Plaintiffs object to the first sentence of CEC Counter-Statement No. 250 for failure to comply with Local Rule 56.1 because CEC failed to provide any evidence to support the statement and, therefore, no response is required. To the extent a response is required, the first sentence is admitted. The second sentence of CEC Counter-Statement No. 250 is admitted.

251. Denied. [REDACTED]

[REDACTED]

(TRILOGY ECF 155; DANNER ECF 136 (Supplemental Declaration of Phillippe Adler in Opposition to Plaintiffs' Motions for Partial Summary Judgment ("Adler Supp. Dec.") Ex. 47).

[REDACTED]

252. Admitted.

253. The first sentence of the CEC Counter-Statement No. 253 is admitted. The second sentence of CEC Counter-Statement No. 253 is denied. The CEOC Governance Committee Charter provides, in part, that the Governance Committee may:

1. Exercise sole authority and responsibility for consideration, negotiation and approval of any Related Party Transaction (as defined in the Company's Related Party Transaction Policy and Procedures) or any other transaction or matter involving a material conflict of interest (as determined in the reasonable judgment of the Committee) affecting any of the Directors or any person or group beneficially owning, directly or indirectly, more than 5% of outstanding class of equity securities of the Company.

2. Consider and evaluate potential material debt, financial, or other restructuring transactions involving the Company or any of its assets, provided that any such transactions shall require approval by the Board.

3. Discharge its duties under the Company's Related Party Transaction Policy and Procedures.

4. Perform any other activities consistent with this Charter or as the Committee or the Board deems necessary or appropriate.

(TRILOGY ECF 155; DANNER ECF 136 (Adler Supp. Dec.) Ex. 42). The third sentence of CEC Counter-Statement No. 53 is admitted.

254. Admitted.

255. Plaintiffs object to the first sentence of CEC Counter-Statement No. 255 for failure to comply with Local Rule 56.1 because CEC failed to provide any evidence to support the statement and, therefore, no response is required. To the extent a response is required, the first sentence is denied. The second and third sentences of CEC Counter-Statement No. 255 are admitted.

256. Plaintiffs object to the first sentence of CEC Counter-Statement No. 256 for failure to comply with Local Rule 56.1 because CEC failed to provide with the CEC Counter-Statement evidence to support the statement and, therefore, no response is required. To the extent a response is required, the first sentence is admitted. The second, third, fourth and fifth sentences of CEC Counter-Statement No. 256 are admitted. The sixth and seventh sentences of CEC Counter-Statement No. 256 are denied. The CEOC common stock subject of the PIP³ and 6% Stock Transfer was valued, for tax purposes, based on the [REDACTED]. (TRILOGY ECF 144; DANNER ECF 129 (Pierce Decl.), Ex. J (September 2, 2015 Deposition Transcript of Michael McClellan) 134:20-135:5).

³ Capitalized terms used but not defined herein have the meanings set forth in Plaintiffs' SUMF.

257. The first and third sentences of CEC Counter-Statement No. 257 are admitted. For the reasons set forth below objecting to the admission of the Sambur Decl., the second sentence of CEC Counter-Statement No. 257 is not supported by citation to admissible evidence. To the extent any response is required, Plaintiffs deny the second sentence of CEC Counter-Statement No. 257.

258. Admitted.

259. Admitted.

260. The first sentence of CEC Statement No. 260 is admitted. The second sentence of CEC Statement No. 260 is denied. The “Closing Memorandum” states that multiple steps will occur on August 22, 2014, not that they occurred. (TRILOGY ECF 155; DANNER ECF 136 (Adler Supp. Dec.) Ex. 67 at 1).

261. Admitted.

B. Objections to Admission into Evidence of the Declaration of David Sambur and Expert Declarations of Jerry L. Arnold and James Gadsden.

As set forth most recently in Plaintiffs’ Joint Response to CEC’s Local Civil Rule 56.1 Statement of Undisputed Material Facts and Counter-Statement of Material Facts (TRILOGY ECF 149; DANNER ECF 131), as well as Plaintiffs’ prior Local Civil Rule 56.1 replies (TRILOGY ECF 84; DANNER ECF 75), the Sambur Decl. fails to include information necessary for Mr. Sambur’s testimony to be admissible, including facts necessary to establish his competence to testify on various subjects (as required by both Fed. R. Civ. P. 56(c) and Local Civil Rule 56.1(b)). Also, certain materials attached to the Sambur Decl. were not produced by CEC in this litigation. *See* Sambur Decl. Exs. E-H. For these reasons, Plaintiffs respectfully submit that the Court should disregard the Sambur Decl.

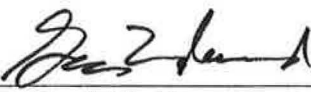
Plaintiffs also object to the Arnold Decl. and Gadsden Decl. as inadmissible under Rules 401, 702 and 703 of the Federal Rules of Evidence. Plaintiffs incorporate herein their objections and arguments to the admissibility of the Arnold Decl. and Gadsden Decl. stated in Section I.D.2 and I.B of Plaintiffs' Reply Brief.

Dated: New York, New York
June 14, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

DRINKER BIDDLE & REATH LLP

By: 
Daniel L. Berger
Gordon Z. Novod

By: _____
James H. Millar
Kristin K. Going
Clay J. Pierce

485 Lexington Avenue
29th Floor
New York, New York 10017
Telephone: (646) 722-8500

1177 Avenue of the Americas
41st Floor
New York, New York 10036
Telephone: (212) 248-3140

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Meagan Farmer
Tower 56
126 East 56th Street, 8th Floor
New York, New York 10022
Telephone: (212) 905-0509

*Attorneys for Plaintiffs Trilogy Portfolio
Company, LLC and Relative Value-Long/Short
Debt, A Series of Underlying Funds Trust*

*Attorneys for Plaintiff Frederick Barton Danner
and the Proposed Class*

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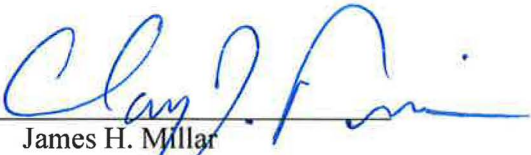
Dated: New York, New York
June 14, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

DRINKER BIDDLE & REATH LLP

By: _____
Daniel L. Berger
Gordon Z. Novod

By:  _____
James H. Millar
Kristin K. Going
Clay J. Pierce

485 Lexington Avenue
29th Floor
New York, New York 10017
Telephone: (646) 722-8500

1177 Avenue of the Americas
41st Floor
New York, New York 10036
Telephone: (212) 248-3140

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Meagan Farmer
Tower 56
126 East 56th Street, 8th Floor
New York, New York 10022
Telephone: (212) 905-0509

*Attorneys for Plaintiffs Trilogy Portfolio
Company, LLC and Relative Value-Long/Short
Debt, A Series of Underlying Funds Trust*

*Attorneys for Plaintiff Frederick Barton Danner
and the Proposed Class*