

EXHIBIT P

Not Reported in F.Supp.2d, 2003 WL 21518555 (D.Conn.), 91 A.F.T.R.2d 2003-2604
(Cite as: **2003 WL 21518555 (D.Conn.)**)

H

United States District Court,
D. Connecticut.
LONG TERM CAPITAL HOLDINGS, et al., Petitioners
v.
UNITED STATES OF AMERICA, Respondent.
No. 3:01 CV 1290(JBA).

May 15, 2003.

[Charles W. Pieterse](#), [Maciej A. Piatkowski](#), [Michael F. Cavolo](#), Whitman, Breed, Abbott & Morgan, Greenwich, CT, [Christopher P. La Puma](#), [David J. Curtin](#), [John A. Galotto](#), [William F. Nelson](#), McKee & Nelson, Washington, DC, for Petitioners.

Charles P. Hurley, Jennifer G. Cohen, [Kevin P. Jenkins](#), [Nicole Bielawski](#), Stacey Hallett, US Dept. of Justice, Washington, DC, [John B. Hughes](#), U.S. Attorney's Office, New Haven, CT, for Respondent.

All Cases [FNI](#)

[FNI](#). On November 20, 2001, United States District Judge Janet Bond Arterton filed an Order of Consolidation, consolidating 3:01 CV 1291, 3:01 CV 1292, and 3:01 CV 1714 with this lead case 3:01 CV 1290. (Dkt.# 28). On May 8, 2002, 3:01 CV 1713 and 3:01 CV 1711 were also consolidated with this case for all purposes. (Dkt.# 64).

[MARGOLIS](#), Magistrate J.

RULING ON RESPONDENT'S MOTION TO COMPEL

*1 On July 9, 2001, Long-Term Capital Holdings, L.P., Long-Term Capital Portfolio, L.P. and Long-Term Capital Management, L.P. ["LTCM"], [collectively "Petitioners"], as the tax matters partners of Long-Term Capital Partners, L.P., filed a Petition for Readjustment pursuant to [26 U.S.C. § 6226\(a\)\(2\)](#) (Dkt.# 1). On August 19, 2002, this case was referred to this Magistrate Judge for discovery purposes (Dkt.# 84) by United States District Judge Janet Bond Arterton. Familiarity with the legal and procedural his-

tory of this litigation is presumed.

On March 26, 2003, Respondent filed its Motion to Compel and brief in support (Dkts. 123-124), [FN2](#) as to which Petitioners filed their brief in opposition on April 16, 2003. (Dkt.# 125). [FN3](#)

[FN2](#). Attached to Respondent's brief in support are seven exhibits: affidavit of Attorney Charles P. Hurley, dated March 25, 2003 (Exh. A); copy of NACOMEX Rebuttal to Respondent's Expert, dated March 3, 2003 (Exh. B); copy of NACOMEX residual value forecasting (Exh. C); copy of report, *How Good Are The Guides? A Comparative Analysis of the Major Computer Price Guides*, copyright 1997 (Exh. D.); excerpts from deposition of Peter Daley, taken on February 19, 2003 (Exh. E); copy of article, *Forecasting Residual Value of Computer Hardware*, copyright 2000 (Exh. F); and copy of report, *Fair Market Value of Computer Assets in Fairfax County* submitted in *The Mitre Corporation v. Fairfax County Board of Supervisors et al.*, Law No. 151652 (Exh. G).

[FN3](#). Attached is a copy of affidavit of Robert J. Zises, dated April 10, 2003 (Exh. A) and another copy of NACOMEX Rebuttal to Respondent's Expert, dated March 3, 2003, Zises' curriculum vitae, list of reference materials, and another copy of report, *How Good Are The Guides? A Comparative Analysis of the Major Computer Price Guides*, copyright 1997 (Exh. A.1).

For the reasons stated below, Respondent's Motion to Compel (Dkt.# 123) is *denied*.

I. FACTUAL BACKGROUND

On February 3, 2003, Respondent served Petitioners with the expert report of Peter Daley ["Daley"]. (Dkt. # 125, at 1). Daley has valued the used computer equipment that was the purported subject of the alleged leasing transactions at issue using the price

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guides for used computers that he and others have published. (Dkt. # 124, at 1; Dkt. # 125, at 2 n. 1). Petitioners engaged Robert J. Zises ["Zises"], President of NACOMEX USA ["NACOMEX"] a major computer appraisal, consulting, and brokerage firm, to evaluate Daley's expert report. (Dkt.# 125, Exh. A). Zises thereafter published his results in his rebuttal report, dated March 3, 2003, which Petitioners produced to Respondent. (*Id.*; see Dkt. # 125, Exh. A. 1; Dkt. # 124, at 1 & Exh. B).

II. DISCUSSION

Respondent seeks to compel Petitioners to produce the NACOMEX database maintained by Zises, which purportedly reflects information concerning actual sales of used computers and which Respondent contends Zises has relied upon in forming the opinions contained in his report. (Dkt.# 123). Petitioners object to Respondent's request for production on grounds that the request is outside the scope of expert discovery, and if provided, could cause irreparable harm to Zises and NACOMEX because of the proprietary nature of the database. (Dkt. # 125, at 1-3).

Zises' rebuttal report provides:

Respondent's expert uses fundamentally flawed and erroneous value evidence to arrive at value conclusions.... The use of computer price guides as source data is unlikely to provide reliable and credible value conclusions.... Computer price guides gather data from the wrong market level ... to measure values at the end-user market level. Appraisal literature states that the best evidence of value are observations of actual sales transactions gathered from the correct market level for items identical to the subject assets....

(Dkt. # 124, Exh. B, at 3; Dkt. # 15, Exh. A. 1, at 3). In his expert report, Daley assigned a value to the used computer equipment at issue using the price guides for used computers that he and others have published for the last sixteen years and which are widely distributed. (Dkt. # 124, at 1). Respondent contends that Zises' opinions were not formed for the purpose of this case; rather, they have been held by him for some time and are evidenced in an expert report which he submitted in an unrelated case. (Dkt. # 124, at 2 & Exh. G; see Dkt. # 125, at 2). In that earlier expert report, Zises explained that his fair market appraisal was derived in

part from the NACOMEX database which "consists of over 500,000 sales observations covering primarily the years 1985 through 1997." (Dkt. # 124, Exh. G, at 6). In 1997 NACOMEX issued a report advising its audience that "the methodology used by the [price] guides is flawed" and "the [price] guides are unreliable as sources for historical appraisals." (Dkt. # 124, Exh. D, at 34). In this report, NACOMEX referred specifically to Daley's price guide, stating that with Daley's price guide "[t]here is no way to know if the transaction was or will be closed at that price.... At one time in the publication's history Daley tried to go back to sources and verify that sales had happened, but when this proved unfeasible it was abandoned." (Dkt. # 124, Exh. D, at 10)(parenthesis omitted). Based on Zises' and NACOMEX's history in this business, as evidenced by the foregoing references, Respondent contends Zises relied on the database to form the opinions articulated in his rebuttal report. (*See* Dkt. # 124, at 3).

*2 The report of an expert witness "shall contain a complete statement of all opinions to be expressed and the basis therefor; [and] the data or other information considered by the witness in forming the opinions...." [FED. R. CIV. P. 26\(a\)\(2\)\(B\)](#).^{FN4} According to Zises, "[t]he NACOMEX Database was not accessed in either preparing the Rebuttal Report or in conducting the Price Guide Study" and "[t]he existence of the NACOMEX Database is irrelevant to the statements and opinions expressed in the Rebuttal Report and the Price Guide Study." (Dkt. # 125, Exh. A, at ¶¶ 6-7). Although Respondent concedes that Zises did not "use his database to provide values that are inconsistent with that of ... Daley," Respondent contends that Zises' database "clearly informs his opinion on the alleged unreliability of ... Daley's figures." (Dkt. # 124, at 3).

[FN4. FED. R. CIV. P. 26\(a\)\(2\)\(B\)](#) provides in pertinent part that:

[the disclosure of expert testimony] shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a *complete statement of all opinions to be*

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expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; ... and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(Emphasis added).

An expert rebuttal report does exactly what it says: it rebuts, in the form of a complete statement of all of the opinions expressed by the author, the report of the opposing party's expert. In this case, Zises reviewed Respondent's expert's report and offered his opinions and conclusions in his rebuttal report. (See Dkt. # 124, Exh. B; Dkt. # 125, Exh. A. 1). His conclusions evidence his opinion on the use of computer price guides, in part because it is his business, and has been his business for the past sixteen years, to observe transactions involving the appraisal and valuation of computer assets and, in part because Respondent's expert relies on computer price guides to reach his conclusion. The fact that Zises has knowledge of Daley's or anyone else's computer price guides does not, in itself, translate to a violation of [Rule 26\(a\)\(2\)\(B\)](#). The conclusions which Zises articulates in his rebuttal report respond to the conclusions made by Daley and are based on the application of the Uniform Standards of Professional Appraisal Practice and on various appraisal literature, references to which are made in the report and are cited to in the reference section. (Dkt. # 125, Exh. A. 1, at 3-6 & Section III).

Respondent contends that it cannot test the reasonableness of Zises' statement without access to NACOMEX's database. (Dkt. # 124, at 3). Moreover, Respondent contends that it is entitled to examine the database to determine whether the prices are significantly different from those in the price guides, and, if the prices are different from those in the guides, whether the purported actual sales prices are higher or lower than the price guides, whether the sales prices include services or benefits in addition to the cost of the computer, and whether there are any limitations on the data available in the database. (*Id.* at 3-4). Petitioners respond that the information which Respondent seeks is proprietary; NACOMEX gathered the information in its database over a period of time and at great expense and Daley is a competitor to NACOMEX in the computer valuation market. (Dkt. #

125, at 3 & Exh. A, at ¶ 5; see Dkt. # 124, at 2, n. 1).

*3 Respondent has acknowledged that Zises' report contains a complete statement of his opinions and the basis and reasons therefor, and contains the data or other information which Zises considered in forming the opinions articulated in his report. Thus, because the content of Zises' rebuttal report complies with [Rule 26\(a\)\(2\)\(B\)](#), further disclosure is not warranted and Respondent's remaining assertions are moot.

III. CONCLUSION

Respondent's Motion to Compel (Dkt.# 123) is *denied*.

This is not a Recommended Ruling but a Ruling on discovery, the standard of review of which is specified in [28 U.S.C. § 636](#); [FED. R. CIV. P. 6\(a\), 6\(e\) & 72](#); and Rule 2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the District Judge upon timely made objection.

See [28 U.S.C. § 636\(b\)](#) (written objections to ruling must be filed within ten days after service of same); [FED. R. CIV. P. 6\(a\), 6\(e\) & 72](#); Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; [Small v. Secretary, H & HS, 892 F.2d 15, 16 \(2d Cir.1989\)](#) (failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).

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