



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 27, 2017

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

Case No.: 08-17814-MKN (Lead)
Chapter 11

LAKE AT LAS VEGAS JOINT
VENTURE, LLC,
Debtor.

Jointly Administered Under
Case No.: 08-17815-MKN

LLV-1, LLC,
Debtor.

Case No.: 08-17817-MKN

LLV HOLDCO, LLC,
Debtor.

Case No.: 08-17820-MKN

LAKE LAS VEGAS PROPERTIES, L.L.C.,
Debtor.

Case No.: 08-17822-MKN

LLV FOUR CORNERS, LLC,
Debtor.

Case No.: 08-17825-MKN

NORTHSHORE GOLF CLUB, L.L.C.,
Debtor.

Case No.: 08-17827-MKN

P-3 AT MONTELAGO VILLAGE, LLC,
Debtor.

Case No.: 08-17830-MKN

THE GOLF CLUB AT LAKE LAS
VEGAS, LLC,
Debtor.

Case No.: 08-17832-MKN

MARINA INVESTORS, L.L.C.,
Debtor.

Case No.: 08-17835-MKN

THE VINEYARD AT LAKE LAS VEGAS,
L.L.C.,
Debtor.

Case No.: 08-17837-MKN

LLV VHI, L.L.C.,
Debtor.

Case No.: 08-17841-MKN

Case No.: 08-17842-MKN

Case No.: 08-17844-MKN

Case No.: 08-17845-MKN

Date: June 16 and 18, 2015
Time: 9:30 a.m.

1 TCH DEVELOPMENT, L.L.C.,)
 Debtor.)
 2 _____)
 3 TC TECHNOLOGIES, L.L.C.,)
 Debtor.)
 4 _____)
 5 SOUTHSORE GOLF CLUB, L.L.C.,)
 Debtor.)
 6 _____)
 7 NEVA HOLDINGS, L.L.C.,)
 Debtor.)
 8 _____)
 9 AFFECTS ALL DEBTORS.)
 10 _____)

9 **MEMORANDUM DECISION ON MOTION OF CREDIT SUISSE AG,
 CAYMAN ISLANDS BRANCH TO ENFORCE CREDITOR TRUST AGREEMENT
 AND FOR REPAYMENT IN FULL OF PUMP STATION LOAN¹**

10 An evidentiary hearing was conducted on the Pump Station Dispute² in the above-
 11 referenced proceeding on June 16 and 18, 2015.³ The appearances of counsel were noted on the
 12 record. After closing arguments were presented, the matter was taken under submission.

13 **BACKGROUND**

14 On July 17, 2008, Lake at Las Vegas Joint Venture, LLC filed a voluntary Chapter 11
 15 petition. (ECF No. 1). Separate Chapter 11 petitions were filed by fourteen affiliated entities.
 16 On July 28, 2008, an order was entered for joint administration of the fifteen proceedings, with
 17 the Lake at Las Vegas Joint Venture, LLC proceeding serving as the lead case. (ECF No. 121).
 18 (Collectively, the entities will be referred to as the “Debtors”).
 19

20 _____
 21 ¹ In this Memorandum Decision, all references to “ECF No.” are to the numbers assigned
 22 to the documents filed in the above-captioned lead bankruptcy case or the minute entries by the
 23 clerk as they appear on the docket maintained by the Clerk of the Court. All references to
 24 “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless
 otherwise indicated. All references to “FRBP” are to the Federal Rules of Bankruptcy
 Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure.

25 ² The Pump Station Dispute is a contested matter in the above-captioned proceeding
 26 encompassed by the Motion of Credit Suisse AG, Cayman Islands Branch to Enforce Creditor
 Trust Agreement and for Repayment in Full of Pump Station Loan (“Pump Station Motion”).
 27 (ECF No. 3276).

28 ³ All references to “Ex. No.” are to the documents admitted into evidence during the
 evidentiary hearing, some of which also appear on the court docket.

1 On July 30, 2008, notice was filed of the appointment of members of an Official
2 Committee of Unsecured Creditors (“UCC”). (ECF No. 150).

3 On September 4, 2009, Debtors, along with the UCC, filed a proposed joint Chapter 11
4 Plan of Reorganization. (ECF No. 1510).

5 On January 11, 2010, Debtors, along with the UCC, filed a joint First Amended Chapter
6 11 Plan of Reorganization (“FAP”). (ECF No. 1946; Ex. No. 7). On the same date, a First
7 Amended Disclosure Statement (“FAD”) describing the FAP also was filed. (ECF No. 1947; Ex.
8 No. 8). A hearing on approval of the FAD was noticed for February 16, 2010. (ECF No. 1949).

9 On February 1, 2010, Debtors, along with the UCC, filed a Notice of Submission of
10 Exhibits to the FAP, attaching copies of Exhibits “A” through “R” to the FAP. (ECF No. 1978).

11 On February 8, 2010, an objection to the FAD was filed by Carmel Land & Cattle
12 Company (ECF No. 1985), IOTA Emerald LLC, IOTA Sixteen, LLC, and IOTA Twenty One,
13 LLC (ECF No. 1989), Transcontinental Corporation, Inc. and Transcontinental Properties, Inc.
14 (ECF No. 1992), and the City of Henderson (ECF No. 1993). Creditor Gamma 4c filed a joinder
15 in the objection filed by Carmel Land & Cattle Company (ECF No. 1990), as well as a separate
16 joinder in the objection filed by the IOTA entities (ECF No. 1991).

17 On February 16, 2010, the hearing on disclosure statement approval was continued to
18 March 19, 2010. Notice of the continued hearing was served on all parties in interest. (ECF No.
19 2023).

20 On March 16, 2010, Debtors, along with the UCC, filed a joint Second Amended Plan of
21 Reorganization (“SAP”). (ECF No. 2061). On March 17, 2010, a Second Amended Disclosure
22 Statement (“SAD”) describing the SAP was filed. (ECF No. 2062).

23 On March 19, 2010, the hearing on disclosure statement approval was conducted.
24 Subject to revisions to appear in a further amendment that also would reflect amendments to the
25 proposed plan, the court approved the disclosure statement as containing sufficient information
26 under Section 1125(a).

27 On March 26, 2010, Debtors, along with the UCC, filed a joint Third Amended Plan of
28 Reorganization (“TAP”). (ECF No. 2097). On the same date, a Third Amended Disclosure

1 Statement (“TAD”) describing the TAP was filed. (ECF No. 2098; Ex. No. 26).

2 On March 30, 2010, an order was entered approving the TAD. (ECF No. 2116). On the
3 same date, an order was entered approving a notice setting a hearing on confirmation of the TAP
4 for June 21, 2010, and also approving various procedures, including solicitation of ballots, for
5 plan confirmation. (ECF No. 2118).

6 On April 2, 2010, fully executed copies were filed of the TAP (ECF No. 2138) and the
7 TAD (ECF No. 2139). On the same date, the Debtors, along with the UCC, filed a “Notice of
8 Submission of Redlined Changes” to the TAP and TAD. (ECF No. 2141).

9 On May 3, 2010, an order was entered authorizing the employment of McKool Smith,
10 P.C., as special litigation counsel to the estate. (ECF No. 2274).

11 On May 3, 2010, Debtors, along with the UCC, also filed a motion to establish
12 procedures for certain modifications to the proposed TAP as well as supplemental information
13 for the TAD (“Supplement Motion”). (ECF No. 2283).

14 On May 12, 2010, objections to confirmation of the TAP were filed by Carmel Land &
15 Cattle Company (ECF No. 2326), Transcontinental Corporation and Transcontinental Properties,
16 Inc. (ECF No. 2330), and LID Acquisition, LLC (ECF No. 2331).

17 On May 13, 2010, Debtors, along with the UCC, filed a supplement to the TAD. (ECF
18 No. 2332).

19 On May 18, 2010, an order was entered granting the Supplement Motion. (ECF No.
20 2343).

21 On May 25, 2010, an order was entered authorizing the employment of A•S•K Financial
22 as special litigation counsel to the estate. (ECF No. 2384).

23 On June 17, 2010, the TAP, including the modifications requested by the Supplement
24 Motion, was filed. (ECF No. 2461). On the same date, a notice redlining the modifications to
25 the TAP also was filed. (ECF No. 2462).

26 On June 21, 2010, the plan confirmation hearing was conducted at which the court
27 confirmed the TAP, including additional modifications, and directed counsel to submit proposed
28 findings of fact and conclusions of law, along with a proposed order.

1 On June 25, 2010, the TAP, as modified at the confirmation hearing, was filed with the
2 court (ECF No. 2475; Ex. No. 31), as well as a further notice redlining the additional
3 modifications approved at the confirmation hearing. (ECF No. 2491). Under the TAP, the LLV
4 Creditor Trust (“Creditor Trust”) was created pursuant to a Creditor Trust Agreement (“CTA”),
5 eventually dated July 15, 2010 (Ex. No. 35), attached as Exhibit “E” to the TAP, with Larry
6 Lattig (“Lattig”) being appointed as the trustee of the Creditor Trust. The signatories to the CTA
7 are the Debtors and Lattig. The beneficiaries of the Creditor Trust are the creditors whose
8 claims are treated under Classes 1, 7, 8, and 9 of the TAP. Under the CTA, Credit Suisse AG,
9 Cayman Islands Branch f/k/a Credit Suisse, Cayman Islands Branch was appointed as the
10 disbursing agent for payment of claims held by certain “Pre-Petition Lenders” defined under the
11 confirmed plan. The Creditor Trust would administer certain “Creditor Trust Assets,” which the
12 TAP defined to mean the avoidance actions that the bankruptcy estate could pursue against
13 various parties, including insiders, as well as monetary contributions from the reorganized
14 debtors that would be distributed to general unsecured creditors.

15 On July 1, 2010, findings of fact and conclusions of law (“Plan Confirmation Findings”)
16 (ECF No. 2501; Ex. No. 33), along with an order confirming the TAP, as modified (“Plan
17 Confirmation Order”) (ECF No. 2502; Ex. No. 34), were entered. (As there were no subsequent
18 modifications or amendments to the TAP, the confirmed version is hereafter referred to as the
19 “Plan.”)⁴

20 On July 16, 2010, Lattig commenced Adversary Proceeding No. 10-01284-LBR
21 (“Adversary Proceeding”) against various insiders of the Debtors to avoid certain fraudulent
22 transfers and to obtain other relief. Reference of the Adversary Proceeding to the bankruptcy
23 court was withdrawn to the district court and reassigned Case No. 2:11-cv-01346-GMN-PAL.
24 Under the Plan, any cash recoveries from the Adversary Proceeding, less attorney’s fees, costs,
25 and any loans to the Creditor Trust to finance prosecution of the Adversary Proceeding, are

26
27 ⁴ Section IV, A., of the Plan provides for the assets, claims and affairs of the various
28 debtor entities’ bankruptcy estates to be substantively consolidated as of the effective date. See
TAP at 49.

1 known as “Net Litigation Proceeds.”

2 On or about May 30, 2014, a settlement of the Adversary Proceeding was reached as a
3 result of a mediation before Magistrate Judge Leen. On or about October 13, 2014, a settlement
4 agreement (“Settlement Agreement”) was signed. On October 15, 2014, the settlement funds
5 (“Settlement Proceeds”) were wired to Lattig and were held in Lattig’s trust account.

6 On November 21, 2014, a Stipulation for Interim Distribution of Settlement Proceeds
7 was submitted by Lattig, as trustee of the Creditor Trust, and Credit Suisse First Boston, Credit
8 Suisse Cayman Islands Branch, and Credit Suisse Securities (USA) LLC (collectively “Credit
9 Suisse”). (ECF No. 3236). The stipulation recited that the Creditor Trust and Credit Suisse had
10 reached an impasse on the amount Credit Suisse was to be paid on the Pump Station Loan from
11 the Net Litigation Proceeds. Credit Suisse asserted that it was entitled to \$6,321,785, while the
12 Creditor Trust maintained that \$2,905,582 was sufficient. The stipulation also recited that Credit
13 Suisse believes it is entitled to an indemnification payment in the amount of \$7,929,000 pursuant
14 to the confirmed Plan and terms of a loan agreement dated May 4, 2005. The Creditor Trust
15 maintains that no indemnification payment is required at all.

16 On December 2, 2014, a Revised Stipulation for Interim Distribution of Settlement
17 Proceeds (“Distribution Stipulation”) was filed. (ECF No. 3244; Ex. No. 44). Under that
18 stipulation, Lattig, as trustee of the Creditor Trust, agreed with Credit Suisse, that certain
19 portions of the recoveries from the Adversary Proceeding would be withheld from distribution
20 under the confirmed Plan. In particular, the amount of \$3,416,203 would be withheld pending
21 the determination by the court of the instant Pump Station Dispute, while another \$7,929,000
22 would be withheld pending the determination of a separate “Indemnification Dispute.”⁵ Those
23 disputes were between the Creditor Trust on one hand, and Credit Suisse on the other hand. The
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26
27 ⁵ The disputed Pump Station funds are reserved in escrow by Lattig pending further order
28 of this court, while the disputed Indemnification funds are held in an interest-bearing account by
the accounting firm of Verdolino & Lowery, P.C. (“V&L”), as escrow agent, pending further
order of this court.

1 parties agreed that all other proceeds of the litigation would be disbursed to other claimants⁶
2 under the confirmed Plan.⁷

3 On December 3, 2014, an order was entered approving the Distribution Stipulation.
4 (ECF No. 3252; Ex. No. 45).

5 On January 7, 2015, the jointly administered cases were reassigned to Chief Bankruptcy
6 Judge Bruce Beesley after the retirement of Bankruptcy Judge Linda Riegler. (ECF No. 3265).

7 On January 21, 2015, the Pump Station Motion was filed by Credit Suisse which seeks to
8 enforce certain provisions of the CTA. The motion was accompanied by a request for judicial
9 notice (ECF No. 3277), as well as separate declarations of Elizabeth W. Walker (“First Walker
10 Declaration”) (ECF No. 3278)⁸ and Didier Siffer (“First Siffer Declaration”) (ECF No. 3279).

11 On February 5, 2015, a motion was filed to extend the term of the CTA for a three-year
12 period ending August 15, 2018. (ECF No. 3289).

13 On February 17, 2015, the jointly administered cases were again reassigned to the current
14 bankruptcy judge. (ECF No. 3299).

15 On February 19, 2015, opposition to the Pump Station Motion was filed by the Creditor
16 Trust (“Opposition”). (ECF No. 3302). That opposition was accompanied by a separate request
17 for judicial notice (ECF No. 3303), as well as the declarations of Thomas E. Patterson
18 (“Patterson”) (ECF No. 3304), David M. Guess (“Guess”) (ECF No. 3305), and Gary Cruciani
19 (“Cruciani”) (ECF No. 3306). In addition, the opposition was accompanied by an objection to
20 the First Siffer Declaration. (ECF No. 3307).

21 On March 13, 2015, Credit Suisse filed its Motion for Order Directing Distribution of
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23 ⁶ Attached as Exhibit “A” to the Distribution Stipulation was a list identifying the Pre-
24 Petition Lenders under Class 1 of the confirmed Plan and the amounts that they would receive
25 from the Net Litigation Proceeds, net of any indemnity claims.

26 ⁷ Because Lattig did not dispute that Credit Suisse was entitled to be paid \$2,905,582
27 from the Net Litigation Proceeds, that undisputed amount was paid to Credit Suisse under the
Distribution Stipulation.

28 ⁸ On January 23, 2015, an order was entered granting an ex parte motion to seal Exhibit
“F” to the First Walker Declaration. (ECF No. 3284).

1 Pre-Petition Lender Net Litigation Proceeds for Application to Indemnification Obligations, etc.
2 (“Indemnification Motion”). (ECF No. 3324). The motion was accompanied by a separate
3 request for judicial notice (ECF No. 3325), as well as separate declarations from Elizabeth W.
4 Walker (ECF No. 3326) and T. Ray Guy (ECF No. 3327).

5 On March 16, 2015, a status hearing was conducted with respect to both the Pump
6 Station Dispute and the Indemnification Dispute.⁹

7 On March 18, 2015, as a result of the status hearing, a notice was filed continuing the
8 hearing on the Pump Station Motion to April 1, 2015. (ECF No. 3335).¹⁰

9 On March 25, 2015, a scheduling order was entered scheduling a hearing date, discovery
10 deadlines, and a briefing schedule for the Indemnification Motion. (ECF No. 3341).

11 On March 25, 2015, Credit Suisse filed a reply in support of the Pump Station Motion
12 (“Credit Suisse Reply”) (ECF No. 3347), that was accompanied by declarations and
13 supplemental declarations from Jeremy E. Rosenthal (“Rosenthal Declaration”) (ECF No. 3348),
14 Didier Siffer (“Second Siffer Declaration”) (ECF No. 3349), Elizabeth Walker (“Second Walker
15 Declaration”) (ECF No. 3350). In addition, Credit Suisse filed a response to the Creditor Trust’s
16 objection to the First Siffer Declaration. (ECF No. 3351).

17 On March 26, 2015, Credit Suisse also filed objections to the declarations filed by the
18 Creditor Trust from Cruciani (ECF No. 3352), Guess (ECF No. 3353), and Patterson (ECF No.
19 3354). On the same date, Credit Suisse filed a separate “errata” to the Rosenthal Declaration
20 (ECF No. 3358) as well as to the Second Siffer Declaration (ECF No. 3359).

21 On April 1, 2015, an evidentiary hearing on the Pump Station Motion was scheduled for
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24 ⁹ On March 10, 2015, counsel filed a stipulation agreeing to a deadline of March 13,
25 2015, for Credit Suisse to file its motion to resolve the Indemnification Dispute. (ECF No.
26 3320). A deadline of March 9, 2015, had been agreed when the cases were assigned to Chief
27 Judge Beesley. On March 16, 2015, orders were entered approving that stipulation. (ECF Nos.
28 3329 and 3330). On this same date, an Order Vacating Order Entered in Error regarding ECF
No. 3330 was entered. (ECF No. 3332).

¹⁰ On March 30, 2015, an order was entered reflecting the results of the status hearing.
(ECF No. 3363).

1 May 13, 2015. (ECF No. 3365).¹¹

2 On April 6, 2015, the Creditor Trust filed objections to the Rosenthal Declaration and
3 Second Siffer Declaration. (ECF No. 3366). Additionally, the Creditor Trust filed responses to
4 the objections by Credit Suisse to the declarations from Cruciani, Guess, and Patterson. (ECF
5 No. 3367).

6 On April 10, 2015, Credit Suisse filed responses to the objection by the Creditor Trust to
7 the Rosenthal Declaration and Second Siffer Declaration. (ECF No. 3372).

8 On May 11, 2015, a stipulation was filed to continue the evidentiary hearing to June 16,
9 2015. (ECF No. 3388). On May 12, 2015, an order was entered approving that stipulation (ECF
10 No. 3389) and on May 13, 2015, an amended notice was filed scheduling the hearing for June
11 16, 2015. (ECF No. 3392).

12 On June 14, 2015, a joint exhibit list was filed by counsel. (ECF No. 3409).

13 On June 15, 2015, orders were entered on the Creditor Trust's objections to the Rosenthal
14 Declaration and Second Siffer Declaration (ECF No. 3412), and to the First Siffer Declaration
15 (ECF No. 3413). On the same date, orders were entered on Credit Suisse's objections to the
16 declarations of Guess (ECF No. 3414), Cruciani (ECF No. 3415), and Patterson (ECF No. 3416).

17 On June 16, 2015, and June 18, 2015, the evidentiary hearing on the Pump Station
18 Motion was held by the court.¹²

19 **THE FOCUS OF THE PUMP STATION DISPUTE¹³**

20 As previously mentioned, the confirmed Plan provided for the implementation of the
21 CTA, with Lattig appointed as the trustee of the Creditor Trust, and Credit Suisse appointed as
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23 ¹¹ On April 9, 2015, an amended notice was filed rescheduling the hearing on the Pump
24 Station Motion to May 13, 2015. (ECF No. 3370).

25 ¹² On June 19, 2015, the Creditor Trust filed a supplemental exhibit list setting forth the
26 additional exhibits that had been admitted into evidence at the evidentiary hearing. (ECF No.
27 3428).

28 ¹³ Separate proceedings were held in connection with the Indemnification Dispute. An
evidentiary hearing in that matter was conducted on October 8, 2015. That dispute is the subject
of a separate memorandum decision.

1 the disbursing agent. The Creditor Trust was responsible for administering the Creditor Trust
2 Assets, including pursuit of the Adversary Proceeding. Successful pursuit of the Adversary
3 Proceeding would generate Net Litigation Proceeds to be distributed by the Creditor Trust.

4 The confirmed Plan also provided for Credit Suisse to loan up to \$5 million to the Falls
5 Improvement Trust (“Falls Trust”) for the construction of a pump station on certain real property
6 owned by the Debtor (“Pump Station Loan”). That loan was made pursuant to a Pump Station
7 Credit Agreement between Credit Suisse and the Falls Trust, dated July 15, 2010. Under both
8 the CTA and the confirmed Plan, the Net Litigation Proceeds would be a source of repayment of
9 the Pump Station Loan.¹⁴

10 As previously mentioned, a settlement of the Adversary Proceeding was reached in 2014,
11 and the Settlement Proceeds were delivered to Lattig. These funds are Net Litigation Proceeds
12 within the meaning of the Plan. As previously mentioned, portions of the Net Litigation
13 Proceeds were distributed to various creditors, with specific sums withheld pending resolution of
14 the instant Pump Station Dispute as well as the Indemnification Dispute.

15 Credit Suisse and Lattig currently differ in how the reserved Net Litigation Proceeds are
16 to be applied to the balance owed on the Pump Station Loan. Credit Suisse maintains that it is
17 entitled to all of those reserved funds while Lattig argues that those funds are to be distributed to
18 the holders of claims in Class 7 of the Plan. Their primary focus is on various provisions of the
19 Plan and the provisions of the CTA.

20 **1. The Plan.**

21 The Plan addresses how the Creditor Trust is to disburse the Net Litigation Proceeds. In
22 the section entitled “Distribution of Litigation Proceeds,” the Plan provides that “The Net
23 Litigation Proceeds shall be distributed as follows:

- 24 a. The Pre-Petition Lender Net Litigation Proceeds Share (80% of the Net Litigation
25 Proceeds) shall be distributed first to the Pre-Petition Agent for application to the
26 indemnification obligations under the Pre-Petition Credit Facility and the DIP
Facility, and second to the Pre-Petition Lenders on account of their Pre-Petition

27 ¹⁴ There is no dispute that the Falls Trust does not have any resources to satisfy the Pump
28 Station Loan and that the source of repayment was always contemplated to be the Creditor Trust
under the Plan.

1 Lender Claims.

2 b. The Unsecured Beneficiaries Net Litigation Proceeds Share (20% of the Net
3 Litigation Proceeds)¹⁵ shall be distributed as follows: (x) 50% Pro Rata to holders
4 of Allowed Class 7 Claims, (y) 25% Pro Rata to holders of Allowed Class 8
5 Claims, and (z) 25% Pro Rata to holders of Allowed Class 9 Claims; provided,
6 however, that if the Pump Station Loan is outstanding or the T-16 Improvement
7 MAC Payments have been made, then pursuant to the Phase II Landowner
8 Settlement Agreement and T-16 Improvement Vendor Settlement Agreement, (a)
9 10% of the Class 8 creditors' share and 10% of the Class 9 creditors' share of the
10 first \$3 million of the Unsecured Beneficiaries Net Litigation Proceeds Share, and
11 (b) 50% of the Class 8 creditors' share and 50% of the Class 9 creditors' share of
12 the Unsecured Beneficiaries Net Litigation Proceeds Share over the first \$3
13 million of the Unsecured Beneficiaries Net Litigation Proceeds Share will be
14 collaterally assigned to the lender under the Pump Station Loan, until the Pump
15 Station Loan is repaid. The aggregate distributions to holders of Class 7 Claims,
16 Class 8 Claims and Class 9 Claims are referred to as, respectively, the "Class 7
17 Net Litigation Proceeds Share," the "Class 8 Net Litigation Proceeds Share," and
18 the "Class 9 Net Litigation Proceeds Share".¹⁶

11 Plan, Section IV, D., 5., at 53:14 to 54:3.¹⁷

13 ¹⁵ Although this provision of the Plan parenthetically defines “Unsecured Beneficiaries
14 Net Litigation Proceeds Share” as being 20% of the Net Litigation Proceeds, the same definition
15 already appears in the Plan at Section I, A., at 28:1-2.

16 ¹⁶ Under the Plan, Class 7 consists of allowed general unsecured claims, and specifically
17 excludes Phase II Landowner claims as well as T-16 Improvement Vendor claims. See Plan,
18 Section II, C., 7., at 41:12 to 42:24. Class 8 consists of the claims of electing Phase II
19 Landowners, see id. at Section II, C., 8., at 42:25 to 43:7, who are specifically identified to
20 possibly include: Carmel Land & Cattle Company, Coleman-Toll Limited Partnership, CW
21 Capital Fund One, LLC, Pleasant Valley Investments LLC, Strategic Capital LLV LLC, and
22 Woodside Provence, LLC. See id. at Section I, A., at 14:6-8. Class 9 consists of the claims of
23 electing T-16 Improvement Vendors, see id. at Section II, C., 9., at 43:8 to 44:14, who are
24 specifically listed in Ex. No. 9 to the TAD. See id. at Section I, A., at 25:22-26. That list
25 includes Advantage Civil Design Group, Brown & Caldwell, Contri Construction Company,
26 Cummins Rocky Mountain, LLC, Engineered Fluid, Inc., Las Vegas Paving Corp., Lochsa
27 Surveying, Post Buckley Shuch & Jernigan, Inc., Stanley Consultants, Inc., Las Vegas Electric,
28 Inc., Lockton Insurance, and Peridian International, Inc.

24 ¹⁷ The identical language appeared in the TAD:

25 The Net Litigation Proceeds shall be distributed as follows:

26 a. The Pre-Petition Lender Net Litigation Proceeds Share (80% of the Net Litigation
27 Proceeds) shall be distributed first to the Pre-Petition Agent for application to the
28 indemnification obligations under the Pre-Petition Credit Facility and the DIP Facility, and
second to the Pre-Petition Lenders on account of their Pre-Petition Lender Claims.

b. The Unsecured Beneficiaries Net Litigation Proceeds Share (20% of the Net
Litigation Proceeds) shall be distributed as follows: (x) 50% Pro Rata to holders of Allowed

1 The Plan also refers to provisions of the CTA as follows:

2 In addition to the provisions of the Plan with respect to the Creditor Trust, the
3 Creditor Trust Agreement will provide for, among other things, other actions to
4 be taken by the Creditor Trust and the Creditor Trustee, the removal of the
5 Creditor Trustee or appointment of a successor Creditor Trustee, the
6 circumstances under which the Creditor Trustee, in its capacity as such, will be
7 liable for a (sic) action or inaction, the effect of actions by the Creditor Trustee,
8 and the indemnification of the Creditor Trustee. The Creditor Trust Agreement
shall also contain language consistent with IRS Revenue Procedure 94-95
establishing that the Creditor Trust is a liquidating trust. To the extent not set
forth in the Plan, the functions and procedures applicable to the Creditor Trust,
the powers and duties of the Creditor Trustee, and the rights of holders of
beneficial interests in the Creditor Trust shall be governed by the provisions of
the Creditor Trust Agreement.

9 Plan, Section IV, D., 7., at 54:14-23.

10 **2. The CTA.**

11 Recital "C" to the CTA provides that the "Plan provides for, among other things and in
12 accordance with the terms thereof, the distribution of (i) the Net Litigation Proceeds of the
13 Creditor Trust Assets to Class 1 (the Prepetition Lender Beneficiaries), Class 7 (holders of
14 Allowed General Unsecured Claims), Class 8 (Phase II Landowners who execute the Phase II
15 Landowner Settlement Agreement) and Class 9 (T-16 Improvement Vendors who make the T-16
16 Improvement Vendor Claims Election) (collectively, the "Beneficiaries") and (ii) One Million
17 Dollars (\$1,000,000) to Class 7 (the "Class 7 Payment")." CTA at 1.

18 Recital "G" to the CTA provides that "except as otherwise expressly stated herein, if any
19 of the terms and/or provisions of this Agreement conflict with the terms and/or provisions of the
20

21 Class 7 Claims, (y) 25% Pro Rata to holders of Allowed Class 8 Claims, and (z) 25% Pro Rata to
22 holders of Allowed Class 9 Claims; provided, however, that if the Pump Station Loan is
23 outstanding or the T-16 Improvement MAC Payments have been made, then pursuant to the
24 Phase II Landowner Settlement Agreement and T-16 Improvement Vendor Settlement
25 Agreement, (a) 10% of the Class 8 creditors' share and 10% of the Class 9 creditors' share of the
26 first \$3 million of the Unsecured Beneficiaries Net Litigation Proceeds Share, and (b) 50% of the
27 Class 8 creditors' share and 50% of the Class 9 creditors' share of the Unsecured Beneficiaries
28 Net Litigation Proceeds Share over the first \$3 million of the Unsecured Beneficiaries Net
Litigation Proceeds Share will be collaterally assigned to the lender under the Pump Station
Loan, until the Pump Station Loan is repaid. The aggregate distributions to holders of Class 7
Claims, Class 8 Claims, and Class 9 Claims are referred to as, respectively, the "Class 7 Net
Litigation Proceeds Share," the "Class 8 Net Litigation Proceeds Share," and the "Class 9 Net
Litigation Proceeds Share." TAD at Section X, D., 4., at 130:13 to 131:9 (footnote 22 omitted).

1 Plan, then the Plan shall govern.” CTA at 2. Section 18.11 of the CTA contains the identical
2 language. Id. at 27.

3 Section IV of the CTA also addresses how the Creditor Trust is to disburse the Net
4 Litigation Proceeds. Section 4.1 is entitled “Priority and Method of Distributions” and states as
5 follows:

- 6 (a) Generally. The Creditor Trustee, on behalf of the Creditor Trust, will
7 make all distributions of the Net Litigation Proceeds of the Creditor Trust
8 Assets, as set forth herein and in the Plan. Unless the entity or person
9 receiving a payment agrees otherwise, the Creditor Trustee will make any
10 payment in cash to be made by the Creditor Trust by check drawn on a
11 domestic bank or by wire transfer from a domestic bank.
- 12 (b) Distribution of Net Litigation Proceeds of the Creditor Trust Assets. After
13 the payment in full of all Creditor Trust Loans and the payment, or the
14 establishment of a reserve for such payment, of the expenses, fees and
15 other obligations of the Creditor Trust, including, without limitation, with
16 respect to the counsel that pursued any action on behalf of the Creditor
17 Trust, then all Net Litigation Proceeds of the Creditor Trust Assets shall
18 be distributed by the Creditor Trustee as follows:
- 19 (i) The Pre-Petition Lender Net Litigation Proceeds Share (80% of the
20 Net Litigation Proceeds) shall be distributed first, to Credit Suisse
21 in its capacities as DIP Agent and Pre-Petition Agent for
22 application to the indemnification obligations under the Pre-
23 Petition Lender Credit Documents and the DIP Facility, and
24 second, to the Pre-Petition Lender Beneficiaries in accordance
25 with their respective percentage interests of the Allowed Class 1
26 Claims.
- 27 (ii) The Unsecured Beneficiaries Net Litigation Proceeds Share (20%
28 of the Net Litigation Proceeds) shall be distributed as follows:
- (A) if any obligations under the Pump Station Loan are
outstanding, for any Unsecured Beneficiaries Net Litigation
Proceeds Share between \$0 and \$3 million, (i) the lesser of
(x) 10% of the Unsecured Beneficiaries Net Litigation
Proceed Share and (y) the amount necessary to repay the
obligations under the Pump Station Loan in full, shall be
paid to the lender under the Pump Station Loan; and (ii) the
remainder shall be paid as follows: (x) 50% to holders of
Allowed Class 7 Claims, (y) 25% to the holders of Allowed
Class 8 Claims, and (z) 25% to holders of Class 9 Claims.
- (B) if any obligations under the Pump Station Loan are
outstanding, then for any Unsecured Beneficiaries Net
Litigation Proceeds Share in excess of \$3 million and until
the obligations under the Pump Station Loan are repaid in
full, (i) 25% to holders of Allowed Class 7 Claims, (ii) 12
½% to holders of Allowed Class 8 Claims, (iii) 12 ½% to
holders of Class 9 Claims, and (iv) 50% to repay the

1 obligations under the Pump Station Loan; and

2 (C) once the obligations under the Pump Station Loan are
3 repaid in full, 50% to holders of Allowed Class 7 Claims,
4 25% to holders of Allowed Class 8 Claims, and 25% to
5 holders of Class 9 Claims (the aggregate distributions to
6 holders of each of Class 7 Claims, Class 8 Claims and
7 Class 9 Claims are referred to as, respectively, the “Class 7
8 Net Litigation Proceeds Share,” the “Class 8 Net Litigation
9 Proceeds Share,” and the “Class 9 Net Litigation Proceeds
10 Share”).

11 CTA at 10-11.

12 Section 4.3 is entitled “Collateral Assignment” and states as follows:

13 As additional security for the Pump Station Loan, the Phase II Landowners
14 making the Phase II Landowner Claims Election and the T-16 Improvement
15 Vendors making the T-16 Improvement Vendor Claims Election (collectively, the
16 “Pump Beneficiaries”) shall collaterally assign to the lender for the Pump Station
17 Loan (a) 10% of the Pump Beneficiaries’ share of the first \$3 million of the
18 Unsecured Beneficiaries Net Litigation Proceeds Share and (b) 50% of the Pump
19 Beneficiaries’ Unsecured Beneficiaries Net Litigation Proceeds Share over \$3
20 million until the Pump Station Loan is repaid, as such amounts are allocated
21 under the Plan. The Pump Beneficiaries’ Unsecured Beneficiaries Net Litigation
22 Proceeds Share shall be distributed by the Creditor Trust to a controlled account
23 in favor of the lender for the Pump Station Loan as proceeds of its security
24 interest in the Pump Beneficiaries’ interests in the Unsecured Beneficiaries Net
25 Litigation Proceeds Share described above.

26 CTA at 12.

27 **3. The Mathematical Significance.**

28 As previously discussed, the instant dispute arose when Credit Suisse asserted that it was
entitled to \$6,321,785 from the Net Litigation Proceeds to satisfy the Pump Station Loan,¹⁸ while
the Creditor Trust maintained that \$2,905,582 was sufficient. These positions are based on
whether the distribution method set forth under Section IV, D, 5, b. of the Plan is applied, or the
method under Section 4.1(b)(ii) of the CTA is applied. Application of the respective

¹⁸ There is no apparent dispute that the \$6,321,785 figure represents the balance owed on the Pump Station Loan as of November 10, 2014.

1 methodologies is illustrated by Ex. No. 42,¹⁹ which results in the amount of \$2,901,755²⁰ being
2 applied to the Pump Station Loan under the terms of the Plan, or, \$6,321,785²¹ being applied
3 under the terms of the CTA. The parties do not dispute that the application of the respective
4

5 ¹⁹ Ex. No. 42 was included in the joint exhibits initially stipulated into evidence by the
6 parties and previously was attached as Ex. No. 2 to the Cruciani Declaration.

7 ²⁰ The slight difference between the \$2,905,582 figure and the \$2,901,755 figure in the
8 exhibit apparently is due to final adjustments for certain expenses that took place between the
9 calculation dates. See Opposition at 16 n.64.

10 ²¹ The testimony from Credit Suisse's representative revealed an inconsistency between
11 Credit Suisse's demand amount reflected in the exhibit and the initial calculation understood by
12 the representative. Section 4.1(b)(ii)(A) of the CTA addresses payments from the Net Litigation
13 Proceeds out of the amounts between \$0 and \$3 million, and then from Net Litigation Proceeds
14 out of any amounts in excess of \$3 million. After reciting the words "between \$0 and \$3
15 million," the provision refers to "the lesser of (x) 10% of the Unsecured Beneficiaries Net
16 Litigation Proceeds Share and (y) the amount necessary to repay the obligations under the Pump
17 Station Loan in full." The \$6,321,785 amount set forth in the exhibit apparently is based on a
18 demand from Credit Suisse that the 10% calculation applies to the full amount of the Net
19 Litigation Proceeds (\$14,007,021 in the exhibit) rather than 10% of the amounts between \$0 and
20 \$3 million. In other words, from the first \$3 million of the Net Litigation Proceeds, Credit
21 Suisse apparently demanded that it receive approximately \$1.4 million rather than \$300,000.
22 The exhibit reflects that demand for the specific amount of \$1,400,702 initially under Section
23 4.1(b)(ii)(A), thereby reducing the balance owed on the Pump Station Loan to \$4,921,083. If,
24 instead, Credit Suisse receives \$300,000 initially, the remaining amount owed would be
25 \$6,021,785. From the \$11,007,021 balance of the Net Litigation Proceeds, the exhibit reflects
26 that Credit Suisse would receive \$4,921,083 under Section 4.1(b)(ii)(B), thereby being paid in
27 full. If, instead, Credit Suisse is paid \$300,000 initially, and its balance owed on the Pump
28 Station Loan is reduced to \$6,021,785, then it would receive under Section 4.1(b)(ii)(B), 50% of
the balance of the Net Litigation Proceeds (\$5,503,510) rather than the higher balance of the
Pump Station Loan. This would consume all of the remaining portion of the Net Litigation
Proceeds and Credit Suisse would then have a remaining balance of \$518,275 owed under the
Pump Station Loan. Because the Net Litigation Proceeds would be exhausted, the application of
Section 4.1(b)(ii)(C) reflected in the exhibit then would never occur.

At the evidentiary hearing, Credit Suisse's representative testified that he believed the
latter scenario was actually intended, i.e., where Credit Suisse would still have an unpaid balance
of \$518,275 on the Pump Station Loan. Under the Creditor Trust's view, Class 7 general
unsecured creditors would receive \$7,003,511 and Credit Suisse would be paid \$2,901,755 on
the Pump Station Loan. Under Credit Suisse's original demand, Class 7 general unsecured
creditors would receive \$3,842,618 (instead of \$7,003,511) and Credit Suisse would be paid
\$6,321,785. Under the scenario understood by Credit Suisse's representative, Class 7 general
unsecured creditors would receive \$3,551,404 (instead of \$7,003,511) and Credit Suisse would
be paid \$5,803,510.

1 methodologies appearing in that exhibit is generally accurate, but disagree on which
2 methodology actually governs.

3 THE EVIDENTIARY RECORD

4 Fifty-three exhibits were admitted into evidence. Four witnesses testified in open court
5 and were subject to direct and cross-examination.

6 A. The Exhibits Admitted.

7 Number	Date	Document	
8 1	12/31/2009	Email from Thomas Patterson, etc.	
9 2	1/8/2010	Email from Kaaran Thomas, etc.	
10 3	1/10/2010	Email from Jeremy Rosenthal, etc.	
11 4	1/10/2010	Email from Kaaran Thomas, etc.	
12 5	1/10/2010	Email from Mark Shinderman, etc.	
13 6	1/11/2010	Email from Kaaran Thomas, etc.	
14 7	1/11/2010	First Amended Chapter 11 Plan, etc.	
15 8	1/11/2010	First Amended Disclosure Statement, etc.	
16 9	1/14/2010	Email from Thomas Patterson, etc.	
17 10	1/22/2010	Email from Thomas Patterson, etc.	
18 11	1/27/2010	Email from Jeremy Rosenthal, etc.	
19 12	2/1/2010	Email from George Means, etc.	
20 13	2/1/2010	Email from Thomas Patterson, etc.	
21 14	2/1/2010	Exhibit E to Plan: Creditor Trust Agreement	
22 15	2/2/2010	Certificate of Service	
23 16	2/2/2010	Email from Kaaran Thomas, etc.	
24 17	2/9/2010	Email from Kaaran Thomas, etc.	
25 18	3/8/2010	Email from Thomas Patterson, etc.	
26 19	3/8/2010	Email from Jeremy Rosenthal, etc.	
27 20	3/10/2010	Email from Jeremy Rosenthal, etc.	
28 21	3/13/2010	Email from Jeff Resler, etc.	
	22	3/13/2010	Email from Jeremy Rosenthal, etc.
	23	3/14/2010	Email from Mark Shinderman, etc.
	24	3/16/2010	Excerpts from Notice of Submission, etc.

1	25	3/17/2010	Declaration of Service, etc.
2	26	3/26/2010	Third Amended Disclosure Statement, etc.
3	27	4/2/2010	Email from George Means, etc.
4	28	5/10/2010	Email from Jeremy Rosenthal, etc.
5	29	5/11/2010	Certificate of Service
6	30	5/11/2010	Email from Kaaran Thomas, etc.
7	31	6/25/2010	Third Amended Plan of Reorganization, etc.
8	32	6/25/2010	Exhibit Q to Plan: Pump Station Credit Agreement
9	33	7/1/2010	Findings of Fact and Conclusions of Law, etc.
10	34	7/1/2010	Order Confirming "Third Amended Plan, etc."
11	35	7/15/2010	LLV Creditor Trust Agreement
12	36	7/15/2010	Pump Station Credit Agreement
13	37	12/31/2012	First Amendment to Pump Station Credit, etc.
14	38	12/19/2013	Second Amendment to Pump Station Credit, etc.
15	39	7/31/2014	Third Amendment to Pump Station Credit, etc.
16	40	11/5/2014	Credit Suisse Loan to Falls Improvement, etc.
17	41	11/6/2014	Letter from Elizabeth Walker, etc.
18	42	11/10/2014	Creditor Trust Comparison of Pump Station, etc.
19	43	11/12/2014	Letter from Gary Cruciani, etc.
20	44	12/2/2014	Revised Stipulation for Interim Distribution
21	45	12/3/2014	Order re: Revised Stipulation, etc.
22	46	12/17/2014	Jury Charge, etc.
23	47	1/20/2015	Credit Suisse Loan to Falls Improvement, etc.
24	48	2/1/2010	Jeremy Rosenthal notes to [Draft] Committee Issues-Summary & Response (1/21/2010)
25	49	3/9/2010	Handwritten meeting notes of Jeremy Rosenthal
26	50	2/1/2010	Billing record of Thomas Patterson
27	51	2/3/2010	Email from Thomas Patterson, etc.
28	52	12/19/2009	Email from Thomas Patterson, etc.
	53	6/22/2010	Email from Jeremy Rosenthal, etc.

1 **B. The Witnesses.**

2 **1. Didier Siffer (“Siffer”).**²²

3 Siffer is a managing director of Credit Suisse Securities (USA) LLV and an authorized
4 signatory for Credit Suisse AG, Cayman Islands Branch. Since March 2008, prior to the
5 commencement of the Debtors’ Chapter 11 proceedings, Siffer has had primary administrative
6 responsibility for Credit Suisse in connection with the Debtors’ real estate development project.

7 Siffer’s direct testimony concerning the Pump Station Motion is set forth in the First
8 Siffer Declaration and Second Siffer Declaration. The Creditor Trust’s objections to portions of
9 the First Siffer Declaration were previously resolved. The Creditor Trust’s objections to
10 Paragraphs 4, 6, and 11 of the Second Siffer Declaration also were previously resolved, except
11 with respect to objections based on the parol evidence rule. The rule generally precludes the
12 admission of extraneous evidence, such as an oral agreement, to contradict or vary the terms of a
13 written agreement. See Kaldi v. Farmers Ins. Exch., 21 P.3d 16, 21 (Nev. 2001); Gumport v.
14 International Business Machines Corp., 89 F.3d 560, 568 (9th Cir. 1996). Siffer was subject to
15 cross-examination and re-direct examination at the evidentiary hearing.

16 Paragraph 4 of the Second Siffer Declaration states in pertinent part that Siffer
17 “personally insisted on and required, as part of Credit Suisse’s bargained for rights, (i) additional
18 security for the Pump Station Loan in the form of a collateral assignment of proceed . . . , and (ii)
19 the repayment in full of the Pump Station Loan from the repayment waterfall (as set forth in the
20 Creditor Trust Agreement) out of all classes of the Unsecured Beneficiaries Net Litigation
21 Proceeds (i.e., Classes 7, 8, and 9) recovered by the Creditor Trust, assuming sufficient
22 recoveries by the Creditor Trust. Thus, I personally (and Credit Suisse) bargained for and
23 expected that the source of repayment of the Pump Station Loan was a percentage of the
24 litigation recoveries by the Creditor Trust to be distributed pursuant to the waterfall provisions of
25 the Creditor Trust Agreement.” (Emphasis in original).

26
27 ²² During a break in Siffer’s cross-examination, he apparently had a discussion with his
28 counsel concerning his testimony. Counsel for the Creditor Trust objected, and the court
reserved any sanction to the end of the hearing. Because the conduct appears to have been an
isolated occurrence, no sanctions are imposed.

1 On cross-examination, Siffer clarified that his personal insistence on additional security
2 and for repayment out of the Net Litigation Proceeds due to Class 7 would have been expressed
3 to Credit Suisse's counsel and then conveyed to other parties.

4 Paragraph 6 of the Second Siffer Declaration states in pertinent part that "After further
5 discussion and negotiation with the Creditors' Committee regarding the collateral assignment of
6 the non-Pre-Petition Lender Net Litigation Proceeds as security for the Pump Station Loan,
7 Credit Suisse (at my direction) and the Creditors' Committee reached agreement that, as stated
8 above, no collateral assignment of proceeds or lien would attach to the Class 7 (General
9 Unsecured Claims) proceeds from recoveries of the Creditor Trust."

10 On cross-examination, Siffer again clarified that such discussions and negotiations took
11 place between counsel, and that the agreement regarding the scope of the collateral assignment
12 also was reached between counsel. Moreover, Siffer testified that he had no personal knowledge
13 of the who, when, or where an agreement was reached with counsel for the UCC that the Class 7
14 creditors' share of the Net Litigation Proceeds would be paid towards the Pump Station Loan.

15 Paragraph 11 of the Second Siffer Declaration states in full as follows: "I personally, and
16 Credit Suisse, relied on the repayment of the Pump Station Loan from the Unsecured
17 Beneficiaries Net Litigation Proceeds Share as detailed in the Creditor Trust Agreement in
18 agreeing to and entering into the Pump Station Loan. I personally, and Credit Suisse, never
19 agreed to nor intended that the repayment of the Pump Station Loan would be "capped" by the
20 amount of the additional security for the Pump Station Loan in the form of the collateral
21 assignment of proceeds of Class 8 and Class 9. I personally, and Credit Suisse, would never
22 have entered into the Pump Station Loan (assuming sufficient recoveries from the Creditor
23 Trust) absent expectations of full repayment of the Pump Station Loan." (Emphasis in original).

24 On cross-examination, Siffer clarified that he thought there was little likelihood that the
25 Net Litigation Proceeds, if any, would be sufficient to repay the Pump Station Loan. In the event
26 the Net Litigation Proceeds were sufficient, however, he emphasized that Credit Suisse was not
27 making a gift and intended for the Pump Station Loan to be repaid in full.

28

1 **2. Jeremy Rosenthal (“Rosenthal”).**

2 Rosenthal was one of counsel for one of the law firms representing Credit Suisse in these
3 Chapter 11 proceedings. Rosenthal’s direct testimony concerning the Pump Station Motion is
4 set forth in the Rosenthal Declaration. The Creditor Trust’s objections to Paragraphs 12, 13, and
5 15 of the Rosenthal Declaration were previously resolved, except with respect to objections
6 based on the parol evidence rule. Rosenthal was subject to cross-examination and re-direct
7 examination at the evidentiary hearing.

8 Paragraph 12 of the Rosenthal Declaration states in pertinent part that on February 1,
9 2010, Rosenthal “had a telephonic negotiation with Kaaran Thomas and Mark Shinderman
10 regarding the concerns of the Creditors’ Committee, including (i) the proposed collateral
11 assignment . . . , and (iii) repayment of the Pump Station Loan out of the Unsecured
12 Beneficiaries Net Litigation Proceeds Share. As part of those negotiations, we . . . (ii) confirmed
13 our prior agreement that the Pump Station Loan would be repaid out of the Unsecured
14 Beneficiaries Net Litigation Proceeds Share (i.e., holders of Allowed Class 7, 8 and 9 Claims)
15 according to the Creditor Trust Waterfall.” (Emphasis in original).

16 On cross-examination, Rosenthal testified that he has no notes or email messages
17 confirming the substance of the February 1, 2010, telephone negotiation, specifically an
18 agreement that Class 7 claimants, in addition to Class 8 and Class 9 creditors, would contribute
19 any portion of their Net Litigation Proceeds to repayment of the Pump Station Loan. He did
20 produce a draft document consisting of a table setting forth a summary and response as of
21 January 21, 2010, to issues raised by the UCC. (Ex. No. 48).²³ Rosenthal testified that his
22 handwritten notes to the document confirmed his belief that such an agreement had been reached
23 but acknowledged the notes might not be interpreted similarly by someone else. He reiterated
24 that he has no written communication to Debtors’ counsel informing the latter of such an
25 agreement.

26
27 ²³ The document appears to be a marked version of an earlier document that was emailed
28 by Debtors’ counsel on January 22, 2010 (Ex. No. 10), which describes at item 13.b., an
unresolved issue regarding repayment of the Pump Station Loan out of the Class 7 share of the
litigation proceeds.

1 Paragraph 13 of the Rosenthal Declaration states in pertinent part that “On the evening of
2 February 1, 2010, Thomas Patterson forwarded via email to counsel for the Creditors’
3 Committee, . . . and counsel for Credit Suisse (including me) multiple documents that consisted
4 of certain exhibits to the First Amended Plan, including the Creditor Trust Agreement The
5 Creditor Trust Agreement forwarded by Mr. Patterson reflected the agreement with the Creditors
6 Committee (reached by me, Mr. Thomas and Mr. Shinderman) including (i) retaining the
7 Creditor Trust Waterfall set forth in the First Amended Plan and First Amended Disclosure
8 Statement which continued to provide for the repayment of the Pump Station Loan out of the
9 Unsecured Beneficiaries Net Litigation Proceeds share (including the share allocated to holders
10 of Allowed Class 7 Claims) . . .”

11 On cross-examination, Rosenthal testified that counsel for the Debtors, either attorney
12 Patterson or attorney Guess, “streamlined” subsequent drafts of the Plan and the related
13 disclosure statements, to eliminate the payment requirement for Class 7 creditors because that
14 requirement already was contained in the CTA.

15 Paragraph 15 of the Rosenthal Declaration states in pertinent part that “On February 2,
16 2010, Kaaran Thomas sent an email to, among others, Thomas Patterson, Michael Tuchin (as
17 counsel for the Debtors) and me, identifying the Creditors’ Committee’s continuing issues with
18 the Plan and Creditor Trust Agreement. Consistent with the negotiated resolution finalized on
19 February 1, and as set forth in paragraphs 12 and 13, above, the Creditors’ Committee’s list of
20 issues did not include (nor did the Creditors’ Committee object to) (i) the Creditor Trust
21 Waterfall, including Credit Suisse’s right to repayment of the Pump Station Loan from the
22 Unsecured Beneficiaries Net Litigation Proceeds Share (i.e., the holders of Allowed Class 7, 8
23 and 9 Claims) . . .” (Emphasis in original).

24 On cross-examination, Rosenthal testified that the methodology for repayment of the
25 Pump Station Loan from the Net Litigation Proceeds was not discussed. He testified that he
26 attended another two-day meeting on March 9 and 10, 2010, that included an agenda of “open
27 issues” (Ex. No. 18), but did not include a discussion of the source of repayment of the Pump
28 Station Loan. Rosenthal testified that the agenda had been circulated by Debtors’ counsel prior

1 to the meeting. He produced a copy of his handwritten notes from the meeting (Ex. No. 48), and
2 testified that there was no discussion because the matter had been resolved.

3 Paragraph 23 of the Rosenthal Declaration states in pertinent part that “On March 17,
4 2010, Debtors filed a Notice of Submission of Redlined Changes to First Amended Plan of
5 Reorganization and First Amended Disclosure Statement Given that the extensively
6 negotiated Creditor Trust Agreement . . . now contained the detailed Creditor Trust Waterfall, as
7 well as the Security Interest Proceeds Mechanism for deposit of the Collateral Assignment of
8 proceeds to Credit Suisse (as Pump Station Lender), there was no further need for a detailed
9 distribution mechanism to be set forth in the Plan and, as such, it was removed . . .” (Emphasis
10 added).

11 On cross-examination, Rosenthal testified that it was his personal opinion that “there was
12 no further need” for a detailed distribution mechanism to be set forth in the Plan and that the
13 mechanism was removed for that reason. Rosenthal could not recall if any other person
14 informed him that they shared his opinion, nor could he locate a note, memo, or email
15 confirming such a shared opinion.

16 On cross-examination and re-direct, Rosenthal also testified that Credit Suisse made
17 significant concessions in order to implement the Plan, which were set forth in the TAD. He
18 testified that those concessions included, inter alia, forgiveness by Credit Suisse of a \$127
19 million debtor in possession postpetition credit arrangement, as well as a prepetition credit
20 facility. Rosenthal further referred to additional lien releases and other accommodations, as well
21 as the extension of additional financing such as the Pump Station Loan.

22 **3. David M. Guess (“Guess”).**

23 Guess was one of counsel for the Debtors involved in negotiating the terms of the Plan as
24 well as the CTA. Guess’s direct testimony concerning the Pump Station Motion is set forth in
25 the Guess Declaration. Credit Suisse’s objections to portions of the Guess Declaration were
26 previously resolved. Guess was subject to cross-examination, but no re-direct examination at the
27 evidentiary hearing.

28 Guess attests that on January 11, 2010, he received an email from counsel for the UCC

1 (Ex. No. 6), to which was attached a marked up version of the proposed Plan (Ex. No. 7). On
2 cross-examination, Guess could not confirm whether the email reflected comments that counsel
3 had received from members of the UCC.

4 Guess also attests that on April 2, 2010, he received an email from counsel for Credit
5 Suisse, to which was attached a commitment letter for the Pump Station Loan, including a term
6 sheet for that loan. (Ex. No. 27). Guess further attests that the term sheet did not provide for the
7 collateral assignment to Credit Suisse of the Class 7 claimants' share of the Net Litigation
8 Proceeds. Guess also attests that the term sheet did not provide that the Class 7 claimants' share
9 would otherwise be a source of repayment of the Pump Station Loan.

10 **4. Thomas E. Patterson ("Patterson").**

11 Patterson also was one of lead counsel for the Debtors involved in negotiating the terms
12 of the Plan as well as the CTA. Patterson's direct testimony concerning the Pump Station
13 Motion is set forth in the Patterson Declaration. Credit Suisse's objections to portions of the
14 Patterson Declaration were previously resolved. Patterson was subject to cross-examination and
15 re-direct examination at the evidentiary hearing.

16 Paragraph 4 of the Patterson Declaration states in pertinent part that on January 14, 2010,
17 Patterson sent an email to the Debtors' officers that included a table indicating that the UCC had
18 an issue with permitting a lien on the Net Litigation Proceeds. (Ex. No. 9). The paragraph also
19 states that "The proposed action to resolve that issue was, among other things, 'to confine
20 repayment in waterfall to LID Vendor [T-16 Improvement Vendor] and Phase II Landowner
21 Shares.'"

22 Paragraph 5 of the Patterson Declaration states in pertinent part that on January 22, 2010,
23 Patterson sent another email to counsel for the UCC and Credit Suisse that included a chart of
24 the UCC's issues regarding the Pump Station Loan. (Ex. No. 10). The paragraph also states that
25 chart reiterated the UCC's concern "whether it is appropriate for the CS [Credit Suisse]
26 repayment to come out of the litigation proceeds share for Class 7 creditors."

27 Paragraph 6 of the Patterson Declaration states in pertinent part that on February 1, 2010,
28 Patterson received from other counsel for Credit Suisse (George Means), an email that attached a

1 blacklined version of a term sheet, edited by counsel for Credit Suisse, for the Pump Station
2 Loan. (Ex. No. 12). The paragraph also states that the blacklined version reflected changes from
3 the prior term sheet reflecting that “the holders of Allowed General Unsecured Claims’ would
4 not collaterally assign their share of the Net Litigation Proceeds to Credit Suisse to provide
5 Credit Suisse an additional source of recovery on the Pump Station Loan.”

6 On direct examination,²⁴ Patterson testified that he never received any communications
7 regarding an agreement reached on February 1, 2010, between counsel for the UCC and Credit
8 Suisse, for the Net Litigation Proceeds of Class 7 creditors to apply to the Pump Station Loan.
9 He produced a copy of his time records from February 1 through February 5, 2010 (Ex. No. 50),
10 and testified that he did not have any notes or time records reflecting that he was advised of such
11 an agreement, either by counsel for the UCC or by counsel for Credit Suisse.

12 Patterson testified that had he known of such an agreement, he never would have sent an
13 email on February 3, 2010, to Credit Suisse’s counsel, as well as other parties, that included for
14 discussion, a revised draft plan of reorganization to be proposed solely by the Debtors. (Ex. No.
15 51).²⁵ He also testified that the revised draft eliminated any requirement that the Class 7
16 creditors make payments on the Pump Station Loan, and that the language would never have
17 been eliminated had he been informed that a contrary agreement had been reached with the UCC
18 and had been authorized by his clients.

19 Patterson also testified that he attended a meeting on March 9 and 10, 2010, where there
20 was no discussion of Class 7 creditors being obligated to repay the Pump Station Loan. He
21 explained that there was no discussion at that meeting because it was no longer an open issue.
22 Patterson testified that the Plan was not streamlined in favor of the language of the CTA, but
23

24 ²⁴ In addition to his direct testimony, Patterson was examined as a rebuttal witness
25 concerning the testimony of Rosenthal.

26 ²⁵ Rosenthal testified on cross-examination that he had no specific recollection of
27 receiving the February 3, 2010, email from Patterson, but did recall receiving a draft of a
28 proposed plan at some point that removed any repayment obligation of the Class 7 creditors. He
testified that the removal was consistent with the payment provisions in the CTA and with the
desire of the Debtors’ counsel to streamline the language of the Plan.

1 instead eliminated any requirement that Class 7 creditors pay the Pump Station Loan. Moreover,
2 he testified that the provisions in Section IV, D., 5., b. of the Plan for Class 8 and Class 9
3 creditors to collaterally assign the shares of the Net Litigation Proceeds to Credit Suisse simply
4 reflected the settlement agreements that those creditors previously executed. Patterson testified
5 that, in retrospect, efforts could have been made to conform the language in the Plan and the
6 CTA to eliminate the conflict in the distribution methodology for the Net Litigation Proceeds.

7 DISCUSSION

8 As reflected in the foregoing summaries of the testimony, this case involves well-
9 represented parties seeking opposite conclusions about the results of multiparty negotiations that
10 took place more than five years before the presentation of the instant Pump Station Dispute.
11 Unfortunately, some of the witnesses interpreted communications received from third parties
12 without ever presenting the actual testimony of the third parties.²⁶ None of the witnesses
13 presented were directly involved in all aspects of the relevant negotiations or in all of the actual
14 communications.²⁷ All of the witnesses relied on other people's versions of events or
15 understandings in addition to their own. Finally, witnesses or representatives for the same party

16
17 ²⁶ A glaring example was the reliance by Credit Suisse on a conference call that took
18 place on February 1, 2010, at which lead counsel for the UCC (Thomas) allegedly agreed
19 verbally, as to the joint proponent of the Plan, for the majority of the Net Litigation Proceeds to
20 be applied to the Pump Station Loan ahead of Class 7 unsecured creditors. Counsel for the
21 Debtors (Patterson), as joint proponent of the Plan, testified that he was unaware of any such
22 agreement being reached and in fact emailed on February 3, 2010, an amended draft Plan,
23 proposed solely by the Debtors, that excluded any such agreed terms. No testimony was ever
24 offered from any counsel for the UCC to confirm or deny that such a verbal agreement or
25 understanding had been reached at the February 1, 2010, conference call.

26
27 ²⁷ For example, Siffer testified that he was involved in and reviewed all of the business
28 aspects of the negotiations for Credit Suisse, but relied on counsel for all of the legal details.
Rosenthal testified that he was involved in negotiating and drafting the Plan, the CTA, the Plan
Confirmation Findings, and the Plan Confirmation Order, but does not know if he ever
communicated to Debtors' counsel that he reached a verbal agreement on February 1, 2010, with
counsel for the UCC. Guess testified that as one of the attorneys for the Debtors, he received an
email from the UCC's lead counsel regarding discussions with UCC members, but could not
confirm that the discussions took place because he did not participate. Patterson testified that he
was the day-to-day partner of the law firm representing the Debtors, but never received any
communications concerning any verbal agreement that Credit Suisse allegedly reached with the
UCC on February 1, 2010.

1 occasionally contradicted each other in the interpretation of their own evidence,²⁸ or simply
2 rejected out of hand the interpretations of others.

3 Despite these evidentiary gaps and disparate testimony, there appears to be agreement on
4 the following: (1) if the court finds that a conflict exists between the terms of the Plan and the
5 terms of the CTA, then the court must apply the terms of the Plan, and (2) if the terms of the Plan
6 apply, the application of the methodology set forth in Ex. No. 42 will accurately produce the
7 amount payable to Credit Suisse on the Pump Station Loan. For the reasons discussed below,
8 the court concludes that a conflict does exist, requiring the terms of the Plan to apply. Moreover,
9 because the Plan methodology reflected in Ex. No. 42 is accurate, no further amounts may be
10 distributed to Credit Suisse from the Net Litigation Proceeds.

11 **1. Conflicts between the Plan Terms and CTA Terms.**

12 The Pump Station Dispute obviously arises because of significantly conflicting results,
13 otherwise no one would bother. Equally obvious is that conflicting results alone are not
14 dispositive: Section 18.11 of the CTA refers to conflicts with the terms of the Plan, not to
15 conflicts with the results of the Plan. So the disparity in results that is reflected in Ex. No. 42 is
16 important, but not conclusive.

17 What is important is that Section IV, D., 5., b. of the Plan specifically addresses how the
18 remaining 20% of the Net Litigation Proceeds must be distributed to Class 7, Class 8, and Class
19 9 creditors, i.e., 50% pro rata to Class 7, 25% pro rata to Class 8, and 25% pro rata to Class 9.
20 By its terms, the proviso following that required distribution, i.e., “that if the Pump Station Loan
21 is outstanding or the T-16 Improvement MAC Payments have been made,” applies only to the
22 percentage shares of the Net Litigation Proceeds of Class 8 and Class 9 that would be collaterally
23 assigned to Credit Suisse to secure repayment of the Pump Station Loan. Up to that point,
24 Section IV, D., 5., b. is a distribution provision; after that, it is a security provision. Because
25

26 ²⁸ For example, Siffer testified that Section 4.1(b)(ii)(A)(i)(x) of the CTA meant that 10%
27 of the first \$3 million of the Net Litigation Proceeds would be applied rather than 10% of the
28 entire amount of the Net Litigation Proceeds. There appears to be no dispute, however, that
Credit Suisse has actually demanded the Creditor Trust to use the larger figure rather than the
more conservative calculation understood by its own principal.

1 these distribution and security provisions are required by these express terms of the Plan, the
2 language in Section IV, D., 7. of the Plan, i.e., “[t]o the extent not set forth in the Plan . . . the
3 rights of holders of beneficial interests in the Creditor Trust shall be governed by the provisions
4 of the Creditor Trust Agreement,” does not apply.

5 Credit Suisse maintains, however, that Section IV, D., 5., b. of the Plan does not set forth
6 the rights of holders of interests in the CTA because that language is incomplete. Instead, it
7 argues under Section 4.1(b)(ii)(B) of the CTA, the majority of the Net Litigation Proceeds above
8 \$3 million must be paid to satisfy the balance of the Pump Station Loan.²⁹ But to argue that the
9 Plan language is incomplete is nothing more than to object to the results: both methodologies
10 distribute the entire amount of the Net Litigation Proceeds. Thus, there is nothing incomplete
11 about the Plan language.

12 The additional language in Section 4.1(b)(ii)(B) of the CTA does not merely clarify the
13 terms of Section IV, D., 5., b. of the Plan, but actually changes the distribution methodology by
14 adding material terms that do not appear in the Plan. There is no dispute that without the terms
15 in the CTA, all of the Net Litigation Proceeds certainly would be distributed, but in different
16 amounts. Not surprisingly, an application of the changes set forth in the CTA favors Credit
17 Suisse. Therefore, the terms of the methodology set forth in the CTA do conflict with the
18 specific terms of the Plan. Under Section 18.11 of the CTA, the provisions of the Plan control.³⁰

19 **2. Consistency of the Plan Language with the Plan Confirmation Order and the**
20 **Plan Confirmation Findings.**

21 Section IV, D., 5., b. of the Plan also is consistent with the Plan Confirmation Order
22 entered by the court as well as the court’s findings of fact and conclusions of law accompanying

23
24 ²⁹ This viewpoint is advanced regardless of whether the demand reflected in Ex. No. 42
25 or the expectations of Credit Suisse’s representative are applicable. See discussion at note 21,
supra.

26 ³⁰ That the terms of the Plan would control the distributions from the Creditor Trust to
27 holders of claims in Class 7, Class 8, and Class 9 also appears to be consistent with Section 8.1
28 of the CTA. That section provides, in pertinent part, as follows: “Each Beneficiary’s right to
distribution from the Creditor Trust, which is dependent on such Beneficiary’s classification
under the Plan, shall be that accorded to such Beneficiary under the Plan.” CTA, § 8.1, at 18.

1 that order.³¹

2 Paragraph 25 of the Confirmation Order references both Section IV, D., 5., b. of the Plan
3 and Sections 4.1(b)(ii) and 4.3 of the CTA as the provisions under which each Phase II
4 Landowner and each T-16 Improvement Vendor has assigned “its respective interest” in certain
5 percentages of the first \$3 million of the Unsecured Beneficiaries Net Litigation Proceeds Shares
6 as well as the remaining amounts of the Unsecured Beneficiaries Net Litigation Proceeds Shares.
7 (These interests of the Phase II Landowners and the T-16 Improvement Vendors are then
8 referred to collectively in Paragraph 25 as the “Pump Beneficiaries’ Proceeds Share.”).
9 Paragraph 25 then provides that the assignment has been made to the Pump Station lender for the
10 “repayment in full of all obligations under the Pump Station Loan.” Thereafter, Paragraph 25
11 states that the “Pump Beneficiaries’ Proceeds Share shall be distributed by the Creditor Trust to
12 a controlled account in favor of the lender(s) for the Pump Station Loan as proceeds of its
13 security interest in the Pump Beneficiaries’ Proceeds Share.”

14 As previously discussed at note 16, supra, Class 7 specifically excludes the claims of
15 Phase II Landowners and T-16 Improvement Vendors. Paragraph 25 of the Confirmation Order
16 specifically addresses an assignment of the “respective interest” of both Phase II Landowners
17 and T-16 Improvement Vendors in their percentage of the Unsecured Beneficiaries Net
18 Litigation Proceeds Shares. This assignment by the Phase II Landowners and T-16 Improvement
19 Vendors apparently was intended to facilitate a security interest in the Pump Beneficiaries’
20 Proceeds Share that would be distributed by the Creditor Trust to a controlled account in favor of
21 the Pump Station Lender. Because the Pump Beneficiaries’ Proceeds Share is defined in
22 Paragraph 25 to include only the portions of the Unsecured Beneficiaries Net Litigation Proceeds
23 Shares held by the Phase II Landowners and T-16 Improvement Vendors,³² the controlled
24

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26 ³¹ As previously set forth in note 17, supra, the language of Section IV, D., 5., b. of the
27 Plan is mirrored in the version of the amended joint disclosure statement that was used to solicit
acceptance of the Plan.

28 ³² This is consistent with Section 4.3 of the CTA, which also refers to the Phase II
Landowners and T-16 Improvement Vendors as the “Pump Beneficiaries.”

1 account to which the Creditor Trust must distribute those shares also is limited to the funds of
2 the Phase II Landowners and T-16 Improvement Vendors.³³ Thus, Paragraph 25 of the
3 Confirmation Order does not conflict with the distribution methodology set forth in Section IV,
4 D., 5., b. of the Plan, nor the assignment language contained in Section 4.3 of the CTA. More
5 important, nothing in the Confirmation Order amends that distribution methodology set forth in
6 the Plan.

7 In its findings of fact and conclusions of law, the court specifically discussed the
8 feasibility of the jointly proposed Plan as required by Section 1129(a)(11) of the Code. A small
9 portion of that feasibility discussion addressed the repayment of the Pump Station Loan. See
10 Plan Confirmation Findings at 16:22 to 17:3. The court acknowledged the parties'
11 understanding that the Falls Trust would not be able to repay the Pump Station Loan. Id. at
12 16:22-24; 17:1-3.³⁴ Because of that inability, the court also found that the Debtors and Credit
13 Suisse had limited the repayment to “a subordinated repayment waterfall out of the Net
14 Litigation Proceeds otherwise payable from the Creditor Trust to the Phase II Landowners and
15

16 ³³ Although it limited the assignment to the portions of the Net Litigation Proceeds being
17 distributed to Phase II Landowners and T-16 Improvement Vendors under Section 4.3 of the
18 CTA, Credit Suisse apparently did not intend to “cap” the amount it would be repaid on the
19 Pump Station Loan. Because the amount distributed to Class 7, Class 8, and Class 9 creditors, as
20 well as to Credit Suisse for repayment of the Pump Station Loan, was dependent on the recovery
21 from the Adversary Proceedings, however, that intention was largely immaterial. None of the
22 parties intended to cap what they would be paid if the recovery was sufficient.

23 ³⁴ Credit Suisse emphasizes this point. On several occasions it has alluded to the
24 disclosure to all creditors of its agreement to make the Pump Station Loan as part of a settlement
25 of certain prepetition lender litigation, with full knowledge that the Falls Trust would not be able
26 to repay the loan. See TAD at 77:9-12 and 95:24-26. Settlements usually are made at arms
27 length, however, and entail agreements and concessions made by all sides. These disclosures
28 made in soliciting acceptance of the Plan, of course, do not eliminate the conflict between the
terms of the distribution methodology provided in the Plan and the terms of the distribution
methodology provided in the CTA. Indeed, a copy of the TAD, containing more than 675 pages,
was presented to Credit Suisse’s witness at the evidentiary hearing as a demonstrative exhibit.
Included as exhibits to that document were copies of the then-proposed TAP as well as the CTA.
Apart from the exhibits attached and prefatory pages, the text of the TAD itself was 199 pages.
Presentation of a physical copy of the TAD was almost comical because the big exhibit did little
to resolve whether there was a conflict in the distribution methodology terms between the Plan
and the CTA.

1 T-16 Improvement Vendors.” Id. at 16:26 to 17:1. This finding or conclusion also does not
2 conflict with the distribution methodology set forth in Section IV, D., 5., b. of the Plan.³⁵

3 **3. Consideration of Parol Evidence.**

4 As previously mentioned at 18 and 20, supra, certain portions of the Second Siffer
5 Declaration as well as the Rosenthal Declaration were admitted into evidence subject to
6 objections by the Creditor Trust based on the parol evidence rule.

7 Siffer’s testimony did not contradict the terms of Section IV, D., 5., b. of the Plan. If
8 there was any contradiction or variance at all, it was in the meaning of Section 4.1(b)(ii)(A) and
9 Section 4.3 of the CTA. He testified that the language for 10% of the Net Litigation Proceeds to
10 be paid to the Pump Trust Loan was intended to apply to the first \$3 million rather than the
11 entire amount of the Net Litigation Proceeds. Credit Suisse’s counsel, on the other hand,
12 apparently had insisted that the 10% requirement apply to the entire figure.

13 Rosenthal’s testimony also did not contradict the terms of Section IV, D., 5., b. of the
14 Plan, but instead explained Credit Suisse’s interpretation of Section 4.1(b)(ii)(A) and Section 4.3
15 of the CTA. Other than the suggestion that a lengthy plan, as well as even lengthier disclosure
16 documents, had been “streamlined” by counsel for the Debtors in favor of the language of the
17 CTA, Rosenthal’s testimony did not vary the terms of the Plan.

18 The perhaps unintended effect of Siffer and Rosenthal’s testimony was not to contradict
19 the terms of either the Plan or the CTA, but to demonstrate why there is an actual conflict
20 between the Plan and the CTA as to the methodology for distribution of the Net Litigation
21 Proceeds. The failure of the respective parties to resolve the conflict by conforming the
22 language of the Plan to the CTA, or vice versa, is easily explained by their apparently shared
23
24

25 ³⁵ Credit Suisse seems to take the position that the court’s findings of fact and
26 conclusions of law were not particularly meaningful, but served only to provide the basis for the
27 Plan to be confirmed under Section 1129. Credit Suisse’s representative even testified that the
28 findings concerning repayment of the Net Litigation Proceeds only from the Phase II
Landowners and T-16 Improvement Vendors was wrong because it was an incomplete statement
of “the deal.”

1 expectations that the Net Litigation Proceeds would be minimal.³⁶

2 But the cause of the parties' failure to resolve the obvious conflict between the
3 methodologies in the Plan and the CTA is their apparent mutual reliance on the concept of assent
4 through silence. Counsel for both Credit Suisse and the Creditor Trust argue for the presence as
5 well as the absence of an agreement reached with the UCC, based on whether the subject of the
6 agreement was ever discussed or raised at a later time. Remarkably, there are no notes, emails,
7 or other corroborative evidence that an agreement was ever reached, even though the parties
8 appear to have been painstaking in documenting every step along the way. Even more
9 remarkable is that there is no testimony from the missing party who would have been privy to the
10 key negotiation, i.e., counsel for, or representatives of, the UCC.³⁷ Equally unfortunate, neither
11 the Debtors, the UCC, nor Credit Suisse thought to conform the conflicting language because all
12 allegedly, or apparently, assumed that silence on an issue constituted assent.

13 Indeed, this approach has made its way into Credit Suisse's very argument in support of
14 its Pump Station Motion. In seeking to discount the significance of the omissions in the Plan
15 Confirmation Findings as well as the Plan Confirmation Order, Credit Suisse observes as
16 follows:

17 Nor can the silence of the Findings (Trust RJN Ex. 6) or Confirmation Order
18 (Trust RJN Ex. 7) be used as "evidence" to contradict the clear and unambiguous
19 terms of the Creditor Trust Waterfall – which expressly provides that the Pump
20 Station Loan will be paid from the agreed portion of the Unsecured Beneficiaries
Net Litigation Proceeds Share (i.e., the holders of Allowed Class 7, 8 and 9
Claims).

21 Credit Suisse Reply at 18 n.48. Throughout this proceeding, Credit Suisse has attempted to use
22 the alleged silence of the Plan proponents' counsel as evidence of a joint agreement to have

24 ³⁶ During the evidentiary hearing, the Creditor Trust's counsel was actually congratulated
25 by Credit Suisse for the extraordinary results achieved in the Adversary Proceeding.

26 ³⁷ The separate question, of course, is whether an agreement solely with the UCC would
27 have been binding on the Debtors as the proponent of a joint plan. That the Debtors' counsel
28 never received a communication from UCC's counsel advising the co-proponent that an
agreement was reached is somewhat telling. The court has no reason to question Rosenthal's
subjective belief that an agreement had been reached with the UCC, but there is no evidence in
the record that anyone else shared in that belief.

1 Class 7 creditors repay the Pump Station Loan from their share of the Net Litigation Proceeds.
2 Although the Creditor Trust arguably does the same in seeking the opposite conclusion, the
3 court's relevant finding in the instant matter is that a conflict between the distribution
4 methodologies does exist and that the Plan, therefore, controls.³⁸

5 Under these circumstances, the parol evidence objections to the testimony set forth in the
6 Second Siffer Declaration and the Rosenthal Declaration are now overruled.

7 **4. Equitable Considerations.**

8 At closing argument, the Creditor Trust suggested that Credit Suisse has engaged in a
9 variety of inequitable conduct, ranging from demanding more of the initial \$3 million of Net
10 Litigation Proceeds than even Siffer intended, to engaging in fraud in connection with the same
11 development project as reflected in a prior judgment. The Creditor Trust also argued that Credit
12 Suisse was attempting to impose an obligation on Class 7 creditors to repay the Pump Station
13 Loan when Credit Suisse's own witnesses acknowledged that Class 7 creditors received no
14 benefit from the loan. The Creditor Trust also maintains, among other things, that Credit Suisse
15 already was paid \$2,905,582 from the Net Litigation Proceeds, and seeks over \$3 million more,
16 even though it previously had engaged in wrongdoing.

17 In response, Credit Suisse emphasized the many concessions it had made in order to
18 facilitate confirmation and implementation of the Plan. It argued that the importance of the
19 concessions was explained in the TAD and that the parties' bargain is reflected in the CTA.
20 Credit Suisse ultimately suggested that the court should treat the Plan and the CTA as an

21
22 ³⁸ At closing argument, counsel for the Creditor Trust suggested that the court should
23 simply determine that Patterson is more credible than Rosenthal. While the suggestion that the
24 distribution language in a 75-page proposed plan was "streamlined" in favor of the distribution
25 language in the CTA seems farfetched under the circumstances, a credibility finding is possible
26 to make but completely unnecessary. It is clear that neither witness could testify as to whether
27 counsel for the UCC had reached a meeting of the minds with Rosenthal or anyone else.
28 Additionally, neither witness could testify as to the understandings of other parties to the
multiparty negotiations. Moreover, no witnesses from the other parties involved in the
negotiations were ever called to testify. While Patterson and Rosenthal may genuinely disagree
as to the intentions of their respective clients, both agree that the Plan controls in the event of a
conflict. Neither party is attempting to set aside the Plan nor the CTA, but both must abide by
them.

1 integrated document, and should receive at least the amount that would be appropriate under the
2 testimony of Credit Suisse's representative.

3 For the reasons already set forth, the court need not determine the impact of the equitable
4 considerations raised by the Creditor Trust. No one seems to dispute that Credit Suisse made
5 significant concessions to get the Plan confirmed, but no one suggests that the concessions were
6 altruistic. No one disputes that Credit Suisse is the subject of a separate judgment for wrongful
7 conduct in a matter related to the Debtors' bankruptcy proceedings. No one disputes that Credit
8 Suisse already has been paid over \$2.9 million on the Pump Station Loan from the Net Litigation
9 Proceeds. Exactly how these facts should affect the instant dispute, however, is uncertain.

10 As a legal matter, rather than an equitable determination, the court has concluded that
11 distribution methodology set forth in Section IV, D., 5., b. of the Plan is in conflict with the
12 distribution methodology set forth in Section 4.1(b)(ii)(B) of the CTA. To the extent Credit
13 Suisse seeks the benefit of the bargain set forth in the CTA, that document specifically provides
14 that the Plan controls. In short, Credit Suisse has received its bargain.

15 CONCLUSION

16 Based on the foregoing, the court concludes that Credit Suisse is entitled to the
17 distribution in the amount of \$2,905,582 previously paid from the Net Litigation Proceeds, with
18 the reserved amount of \$3,416,203 (and any accrued interest) available for distribution by the
19 Creditor Trust to Class 7 creditors. The Pump Station Motion therefore will be denied.

20 The foregoing discussion constitutes the court's findings of fact and conclusions of law
21 entered pursuant to FRBP 9014 and FRBP 7052, and FRCP 52. A separate order has been
22 entered contemporaneously with this Memorandum Decision.

23
24 Copies sent to all parties via CM/ECF ELECTRONIC FILING

25 Copies sent via BNC to:

26 GARY CRUCIANI, ESQ.
27 MCKOOL SMITH
28 300 CRESCENT COURT, #1500
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