Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 07, 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
	Case No.: 08-17820-MKN
LLV HOLDCO, LLC, Debtor.	Case No.: 08-17822-MKN
	Case No.: 08-17825-MKN
LAKE LAS VEGAS PROPERTIES, L.L.C., Debtor.	Case No.: 08-17827-MKN
	Case No.: 08-17830-MKN
LLV FOUR CORNERS, LLC, Debtor.	Case No.: 08-17832-MKN
	Case No.: 08-17835-MKN
NORTHSHORE GOLF CLUB, L.L.C., Debtor.	Case No.: 08-17837-MKN
	Case No.: 08-17841-MKN
P-3 AT MONTELAGO VILLAGE, LLC, Debtor.	Case No.: 08-17842-MKN
	Case No.: 08-17844-MKN
THE GOLF CLUB AT LAKE LAS VEGAS, LLC, Debtor.	Case No.: 08-17845-MKN
MARINA INVESTORS, L.L.C., Debtor.	
THE VINEYARD AT LAKE LAS VEGAS, L.L.C., Debtor.	Date: April 26, 2017
	Time: 11:00 a.m.
LLV VHI, L.L.C., Debtor.	

TCH DEVELOPMENT, L.L.C.,
Debtor.

TC TECHNOLOGIES, L.L.C.,
Debtor.

SOUTHSHORE GOLF CLUB, L.L.C.,
Debtor.

NEVA HOLDINGS, L.L.C.,
Debtor.

AFFECTS ALL DEBTORS.

SUPPLEMENTAL ORDER AND DECISION ON MOTION OF CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH FOR ORDER DIRECTING DISTRIBUTION OF PRE-PETITION LENDER NET LITIGATION PROCEEDS FOR APPLICATION TO INDEMNIFICATION OBLIGATIONS AND SETTING STATUS HEARING[1]

On March 30, 2017, the court entered its Memorandum Decision on the Motion of Credit Suisse AG, Cayman Islands Branch for Order Directing Distribution of Pre-Petition Lender Net Litigation Proceeds for Application to Indemnification Obligations ("Indemnification Decision") along with its order thereon ("Indemnification Order").[2] (ECF Nos. 3639 and 3640). On April

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned lead bankruptcy case or the minute entries by the clerk as they appear on the docket maintained by the Clerk of the Court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[2] In this Order, the court will use the same defined terms set forth in the Indemnification Decision, unless otherwise indicated. In particular, specific citations may be made to the following legal memoranda previously submitted by Credit Suisse: the "Reply of Credit Suisse to Opposition of the LLV Creditor Trust [to Indemnification Motion]," ECF No. 3498 (hereafter "Credit Suisse Reply"), the "Reply of Credit Suisse to LLV Creditor Trust's Sur-Reply to Reply of Credit Suisse to Opposition of the LLV Creditor Trust [to Indemnification Motion]," ECF No. 3546 (hereafter "Credit Suisse Sur-Reply Response"); and the "Closing Brief of Credit Suisse in Support [of Indemnification Motion]," ECF No. 3592 (hereafter "Credit Suisse Closing Brief"). Additionally, specific citations also will be made to the following legal memoranda previously submitted by the Creditor Trust: the "Opposition of the LLV Creditor Trust to [Indemnification Motion]," ECF No. 3458 (hereafter "Indemnification Opposition"); the "LLV Creditor Trust's Sur-Reply to Reply of Credit Suisse to Opposition of the LLV Creditor Trust to [Indemnification Motion]," ECF No. 3532-1 ("Sur-Reply"); and the "LLV Creditor Trust's Closing Brief in Response to the October 8, 2015 Hearing Argument on Credit Suisse's [Indemnification Motion]," ECF No. 3586 ("Creditor Trust Closing Brief").

20, 2017, as required by the Indemnification Order, a Joint Status Report ("Joint Report") was filed on behalf of the Creditor Trust as well as Credit Suisse. (ECF No. 3649). On April 26, 2017, a status hearing ("Status Hearing") was conducted.

At the Status Hearing, separate counsel appeared on behalf of the Creditor Trust and on behalf of Credit Suisse. Counsel for various Pre-Petition Lenders and counsel for Highland Floating Rate Opportunities Fund also appeared. Through the Joint Report as well as through counsel, the parties in interest requested clarification of various aspects of the Indemnification Order. Additionally, the parties requested entry of a determination of an issue that was reserved by the Indemnification Decision. After conclusion of the Status Hearing, the various requests were taken under submission.

DISCUSSION

Both the Indemnification Decision and the Indemnification Order were not clear on addressing the two-part process, nee "phases" for resolving the Indemnification Dispute. That process was described as follows:

> Resolution of the Indemnification Dispute is contemplated by the parties to be a two-part process. First, the parties seek a determination of whether the $7,929,000 of funds withheld pursuant to the Distribution Stipulation should be distributed to Credit Suisse for application to its indemnification claim made under the 2007 Credit Agreement. Second, if any funds are distributed, a further proceeding will be conducted to determine the amount paid from those funds on Credit Suisse's indemnification claim.

Indemnification Decision at 13:5-10 (emphasis added). This Supplemental Order will be the final say by this court on the implementation of these phases.

1. Phase One: Distribution to Credit Suisse.

The $7,929,000 of funds withheld pursuant to the Distribution Stipulation will remain in escrow with Verdolino & Lowey, P.C. ("V&L") until further order of this court. No funds may be distributed to Credit Suisse on the four Litigated Matters until the amount to be paid on Credit Suisse's indemnification claim, if any, for each of the Litigated Matters is determined under Phase Two.

The Distribution Stipulation filed on December 2, 2014, clearly acknowledged the existence of the Indemnification Dispute. The Indemnification Motion was filed by Credit

Suisse on March 13, 2015. The scheduling order on the Indemnification Motion was filed on March 25, 2015, setting the hearing on the motion to take place on August 10, 2015. For Credit Suisse to set a May 19, 2015, deadline for parties to object to its indemnification claims was presumptuous at best. Because the outcome of the Indemnification Motion had not been determined, the deadline self-selected by Credit Suisse was premature and incapable of providing adequate notice to the Pre-Petition Lenders. The Pre-Petition Lenders therefore are not barred from disputing the amount of Credit Suisse's claims in Phase Two.

Proposed procedures from the parties to determine the amount to be paid on each of the four Litigated Matters in accordance with Phase Two were requested by the Indemnification Order, but no proposals were received. The four Litigated Matters are in different procedural postures, however, as explained in the Joint Status Report. The FATCO and CBRE matters are completed, and the indemnification requests of Credit Suisse are minimal compared to the requests made in connection with the Claymore and Gibson matters. According to the Joint Status Report, the Claymore and Gibson matters resulted in diverse outcomes at trial and both outcomes are on appeal. There appears to be no reason why the parties cannot resolve the indemnification requests as to the FATCO and CBRE matters without necessarily proceeding to Phase Two. Settlement efforts as to those discrete matters are encouraged.

The Claymore and Gibson matters are more substantial, but proceeding to Phase Two on those indemnification claims arguably must await the outcome of the appeals. The parties are of course encouraged to resolve the Claymore and Gibson matters as well. Consensual resolution of the claims arising from all four matters no doubt would minimize or eliminate the time and expense of adopting and implementing a Phase Two procedure.

To foster efforts to resolve the Claymore and Gibson matters, both Credit Suisse and the real parties in interest, i.e., the Pre-Petition Lenders, including Highlands, have requested a ruling on the "inter-party indemnification" argument advanced by the Creditor Trust. If the argument prevails, Credit Suisse would be barred from seeking indemnification in connection

with the Claymore Litigation.[3] At the status hearing, counsel for all of the parties, including the real parties in interest, were given an opportunity to further brief the issue. All of them declined. The court, therefore, makes the following ruling as a supplement to the Indemnification Decision and the Indemnification Order.

2. Inter-Party Indemnification as to Claymore.

a. The Claymore Litigation.

As previously discussed, see Indemnification Decision at 23:7 through 24:26, the record before the court indicates that the Claymore Litigation was commenced on July 16, 2013 in the 134th Judicial District of Dallas County, Texas, by Claymore Holdings, LLC ("Claymore"), against Credit Suisse based on the 2007 Credit Agreement. Guy describes plaintiff Claymore as an entity created to be an assignee of the manager of a fund that participated in the 2007 Credit Agreement. Ellington attests that Highland Capital Management, L.P., provides services to various affiliates, including NextPoint Credit Strategies Fund and Highland Floating Rate Opportunities Fund. Both of these funds are Pre-Petition Lenders[4] and are the members of Claymore, which is the plaintiff in the Claymore Litigation. Ellington attests that the aforementioned funds own and control Claymore.[5]

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[3] There is no apparent dispute that Credit Suisse's indemnification request in connection with the Claymore Litigation is the largest of the requests in the four Litigated Matters. See Indemnification Decision at 27:18-24 & n. 21

[4] See Exhibit "A" to Distribution Stipulation.

[5] Siffer attests that he is a managing director of Credit Suisse Securities (USA) LLV and an authorized signatory for Credit Suisse AG, Cayman Islands Branch. Since March 2008, prior to the commencement of the Debtor's Chapter 11 proceeding, Siffer has had primary administrative responsibility for Credit Suisse in connection with the Debtors' real estate development project. Siffer attests that since entry of the order confirming the Debtors' Chapter 11 plan, neither he nor Credit Suisse as pre-petition agent received any written notice that any beneficiary of the Creditor Trust had transferred its interest to Claymore. He also attests that since entry of the order confirming the Debtors' Chapter 11 plan, neither he nor Credit Suisse as pre-petition agent received any written notice that any rights or obligations under the prepetition credit facility had been transferred to Claymore. Notwithstanding Siffer's testimony, it appears that a similar, if not, identical argument was raised by Credit Suisse in the Claymore Litigation, i.e., that the equity holders had not properly assigned their interests to Claymore. That argument apparently was rejected by the Texas trial court. See Sur-Reply at 9:15-25.

Guy attests that the Claymore Litigation alleges a conspiracy between Credit Suisse and CBRE to inflate the appraisals of the Debtors' property to induce lender participation. Guy attests that claims for breach of contract, breach of duty of good faith and fair dealing, fraud by non-disclosure, fraudulent inducement, aiding and abetting fraud, civil conspiracy, and unjust enrichment were alleged in the Claymore Litigation. Guy attests that Credit Suisse engaged in significant discovery and motion practice during the Claymore Litigation.

Guy attests that the Claymore Litigation proceeded to a jury trial in December 2014, only on the fraudulent inducement claims. He attests that after a two-week trial, the jury determined Credit Suisse to be liable for fraudulent inducement by affirmative representation, but not for fraudulent inducement by omission. Guy further attests that $40 million in damages was awarded, sixty-five percent of which was attributed to Credit Suisse.

Guy further attests that the remaining claims in the Claymore Litigation were the subject of a bench trial that was conducted between May 26, 2015 and June 9, 2015.

Ellington attests that a final judgment in the Claymore Litigation was entered on September 4, 2015, awarding damages to Claymore in the amount of $211,863,998.56, plus prejudgment interest in the amount of $75,644,154.22 ("Claymore Judgment").[6]

The Joint Status Report indicates that Credit Suisse appealed the Claymore Judgment on the merits to the Fifth Court of Appeals in Dallas, and Claymore cross-appealed regarding prejudgment interest. Briefing was completed in March 2017, and oral argument has not been scheduled.

b. The Inter-Party Dispute.

Because two Pre-Petition Lenders under the 2007 Credit Agreement own and control plaintiff Claymore, the Creditor Trust argued, and the real parties in interest agreed, that the

[6] It appears that Credit Suisse may have asserted in the Claymore Litigation a counterclaim for indemnification, but withdrew the counterclaim after the Claymore Judgment was entered. See Indemnification Opposition at 9:24 to 10:6; Sur-Reply at 10:1-17 & n.9. Whether claim preclusion principles bar Credit Suisse from pursuing the Indemnification Motion before this bankruptcy court is not addressed by this Order inasmuch as the Claymore Judgment remains on appeal.

indemnification claim of Credit Suisse in the Claymore Litigation is an "inter-party" dispute. As an inter-party dispute, the Creditor Trust maintains that indemnification of Credit Suisse for its legal fees and expenses incurred in defending the claims brought by Claymore as a party to the 2007 Credit Agreement is barred by New York law.[7] Although it apparently maintains that the two Pre-Petition Lenders, NextPoint Credit Strategies Fund and Highland Floating Rate Opportunities Fund, never gave notice of the transfer of their interests to Claymore, see note 5, supra, Credit Suisse argues that the prohibition of inter-party indemnification is not valid or appropriate under New York law.

As previously set forth in the Indemnification Decision, the introductory paragraph of the 2007 Credit Agreement identifies Lake at Las Vegas Joint Venture, LLC, as well as LLV-1, LLC, as the "Borrowers" under the agreement. See Indemnification Decision at 13:13-14. As also noted, Section 9.1D of the 2007 Credit Agreement is entitled "Participations" and states in pertinent part:

> Any Lender may at any time, ***without the consent of, or notice to, the Borrowers or the Administrative Agent***, sell participations to any Person...in all or a portion of such Lender's rights and/or obligations under this Agreement (including all or a portion of the Loans owing to it); provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, and (iii) the Borrowers, the Administrative Agent and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement.

2007 Credit Agreement at 109-10 (Emphasis added by bolded italics). The indemnification language in Section 9.2 of the 2007 Credit Agreement also was set forth in the Indemnification Decision, but bears repeating here:

> **B. Indemnification by the Borrowers.** Each of the Borrowers shall indemnify each Agent (and any sub-Agent thereof), the Fronting Bank, each Lender ***and each Related Party of any of the foregoing Persons (each such Person being called an "Indemnitee")*** against, and hold each Indemnitee harmless from, ***any and all losses, claims, damages, liabilities and related expenses, including the reasonable fees, charges and disbursements of any counsel for any Indemnitee*** (and fees and time charges for attorneys who may be employees of any Agent or any Lender),

[7] There is no dispute that the rights of the parties under the subject agreement are governed by New York law. See 2007 Credit Agreement at Section 6.

> ***incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of*** (i) ***the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or the consummation of the transactions contemplated hereby or thereby***, (ii) any Loan or the use of the proceeds therefrom, (iii) any actual or alleged presence or release of Hazardous Materials on or from any property, or any Environmental Claim related in any way to any Borrower or any of its Subsidiaries, ***or*** (iv) ***any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing***, whether based on contract, tort or any other theory (including, without limitation, under applicable laws relating to preference and fraudulent transfers and conveyances) ***and regardless of whether any Indemnitee is a party thereto, provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted solely from the gross negligence or willful misconduct of any Indemnitee.***

2007 Credit Agreement at 111-12. (Emphasis added by bolded italics; other bolding and underscoring in original).

By its express language, Section 9.2B imposes an indemnification obligation on Borrowers identified as two of the related Debtors in this bankruptcy proceeding: Lake at Las Vegas Joint Venture, LLC, and, LLV-1, LLC. Each of the beneficiaries of the Borrowers' obligation are identified as a Person known as an Indemnitee. As previously discussed, the hodgepodge of definitions set forth in the 2007 Credit Agreement, see Indemnification Decision at 14:18 to 15:5 & n.18, lead to the conclusion that both Credit Suisse and Claymore Holdings (and its equity holders) should be called an Indemnitee under Section 9.2B of the 2007 Credit Agreement.

As between a Borrower and an Indemnitee, the language imposes an obligation on the Borrower to indemnify the Indemnitee for reasonable fees, charges and disbursements incurred in connection with claims brought under the 2007 Credit Agreement. The Claymore Litigation, however, is not a claim between a Borrower under the 2007 Credit Agreement and a third party, but instead involves claims between parties, each of whom would be called an Indemnitee. Credit Suisse maintains that the attorney's fees, charges and disbursements that it incurred in defending the claims against Credit Suisse, brought in the Claymore Litigation, are somehow encompassed by a provision of the 2007 Credit Agreement entitled "Indemnification by the

Borrowers." Of course, the heading of that section has no substantive effect, see 2007 Credit Agreement at Section 9.14, but the language used in the heading is not inconsistent with the guiding principles of New York law that govern this dispute.[8]

The interpretation of contractual indemnification provisions was addressed by New York's highest court in Hooper Associates v. AGS Computers, 548 N.E.2d 903 (N.Y. 1989) ("Hooper"). Hooper involved an action by two parties to a computer supply and installation contract. The contract included a clause requiring the defendant to indemnify and hold the plaintiff harmless from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees arising out of breach of warranty claims, the performance of any services, and the like. The plaintiff sued for breach of contract and for indemnification for its attorneys' fees. The plaintiff prevailed at trial in both respects. On appeal, however, New York's highest court reversed the award of attorneys' fees under the indemnification clause. Because attorney's fees and costs generally are not awarded in litigation between parties absent a statute, court rule, or agreement between the parties, i.e., the so-called "American Rule" regarding attorney's fees,[9] the appellate court could not find such an agreement "unless the intention to do so is unmistakably clear from the language of the promise." Id. at 905 (emphasis added).[10]

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[8] Credit Suisse argues that there is no "inter-party" dispute because it is seeking indemnification from the Borrowers under Section 9.2B, rather than from Claymore. See Credit Suisse Sur-Reply Response at 12:3-19 and Credit Suisse Closing Brief at 10:4-14. Credit Suisse ignores, however, that both Credit Suisse and Claymore's equity holders are parties to the 2007 Credit Agreement, requiring a determination of the scope of Section 9.2B. Moreover, the Net Litigation Proceeds that are at the heart of the Indemnification Dispute otherwise might be sought by the Pre-Petition Lenders but for the indemnification claim advanced by Credit Suisse. Either way, both Credit Suisse and Claymore assert competing claims against each other as Indemnitees within the meaning of Section 9.2B.

[9] See Baker Botts L.L.P. v. ASARCO LLC, 135 S.Ct. 2158, 2164 (2015) ("'Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.'").

[10] Attached as Exhibit "3" to the Cruciani Declaration is a copy of an article entitled "Indemnification Between Contracting Parties" written in October 2000, by a partner of the law

The Hooper court juxtaposed indemnification based on claims directly between parties to the same contract, and indemnification of a party based on claims brought by third parties. 548 N.E.2d at 905. Where a contract gives rise to claims brought by a non-party, an indemnification clause represents the parties' contractual intention to allocate the risk and burden of defending and satisfying such claims. As the Hooper court observed: "It is not uncommon...for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way." 548 N.E2d at 904.

Hooper was a straightforward case involving two parties to the same contract. In that proceeding, the indemnity clause consisted of a simple paragraph, see Hooper, 548 N.E.2d at 903 n.1, and there were no third parties vying to be included. Moreover, the breach of contract action was directly between the only two parties to the contract. It was not difficult for the New York Court of Appeals to conclude that an intention to waive the American Rule was not "unmistakably clear" from the language of the indemnification clause at issue. Id. at 905 ("The clause in this agreement does not contain language clearly permitting plaintiff to recover from defendant the attorney's fees incurred in a suit against defendant. On the contrary, it is typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim.").

By contrast, Section 9.2B of the 2007 Credit Agreement is a run-on sentence of 284 words, additionally incorporating separate definitions and parenthetical references, that

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firm representing Credit Suisse in the four Litigated Matters. The Weppler Declaration was offered into evidence to authenticate the copy of the article, which once had appeared on the law firm website. See Indemnification Decision at 25:21-14. Credit Suisse has correctly argued that the views expressed in an article written by members of the law firm are not admissions attributable to the client. See Credit Suisse Reply at 11:3-15 & ns. 28 and 30. Ironically, only two weeks prior to the Status Hearing, an update to the article by the same author (and others) entitled "Clarifying the 'Unmistakable Clarity' Standard in Contractual Indemnity Provisions" was published. 85 U.S.L.W. 1391 (April 13, 2017). What both articles make unmistakably clear is that the unmistakable clarity standard set forth in Hooper remains good under the New York law applicable to the 2007 Credit Agreement.

charitably could be described as gobbledygook.[11] More important, the contrast of more and bigger words did not make Section 9.2B more clear than the indemnity clause in Hooper: there is no language in Section 9.2B at all stating that an Indemnitee, as carefully defined, can recover attorneys fees and costs when it sues another Indemnitee on the 2007 Credit Agreement. Rather, in broad brush strokes Section 9.2B refers to liabilities "incurred by or asserted against any Indemnitee" rather than liabilities incurred by or asserted between any Indemnitees. Similarly, Section 9.2B does not even refer to liabilities "incurred by or asserted against any Indemnitee" by a Borrower under the 2007 Credit Agreement. Finally, because Section 9.2B also refers to liabilities arising from "any actual or prospective claim, litigation, investigation or proceeding...regardless of whether any Indemnitee is a party thereto," the language naturally encompasses claims brought by parties other than a party to the 2007 Credit Agreement, i.e., by third parties. Thus, not only would the court be required to find it unmistakably clear that the parties to the 2007 Credit Agreement intended to waive the American Rule with respect to direct claims between a Borrower and any Indemnitee, but also that the intention was unmistakably clear with respect to direct claims between Indemnitees.

The conclusion that there is no unmistakably clear intention to waive the American Rule for direct claims is consistent with the application of Section 9.2B to third party claims. For some reason, however, Credit Suisse argues, inter alia, that Section 9.2B must apply to direct claims between the parties to the 2007 Credit Agreement because:

> [i]t is difficult to conceive of hypothetical third-party claims relating to "**the performance by parties hereto of their respective obligations hereunder**," the "**consummation of the transactions contemplated**" by the Pre-Petition Credit Facility, or "**the Loan**." (Section 9.2 B (emphasis added).) Who else, but a party to the Pre-Petition Credit Facility, would have standing to assert claims based on another party's failure to perform its obligations or the making of the Loan? This language must apply to intra-party claims to avoid rendering it meaningless.

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[11] See "Gobbledygook," Merriam-Webster Dictionary, Current Edition (2017), http://www.merriam-webster.com ("wordy and generally unintelligible jargon"). See, e.g., Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 130 n.3 (2008) (Scalia, J., dissenting) ("The Solicitor General proposes an equally gobbledygook standard: 'Reasonableness Under the Totality of the Circumstances,' a.k.a. '[r]eview...as searching...as the facts and circumstances warrant,' by which a reviewing court takes 'extra care' to ensure that a decision is reasonable. See Brief for United States as Amicus Curiae 22, 26.").

Credit Suisse Reply at 10:17-22 (emphasis in original). This seems to be an odd argument for Credit Suisse to advance, given that the FATCO Litigation appears to have been commenced by a plaintiff that was not a named party to the 2007 Credit Agreement (unless FATCO falls within the broad definition of a "Person" that would be called an "Indemnitee" under Section 9.2B). It also appears that the plaintiffs in the Gibson Litigation include purchasers of club memberships or residential units at the Lake Las Vegas Project, see Indemnification Decision at 22:16-20, who likely would not be parties to the 2007 Credit Agreement.[12] Credit Suisse clearly seeks indemnification for its attorney's fees incurred in connection with those Litigated Matters regardless of its apparent inability to conceive that the underlying claims would be asserted. Presumably, Credit Suisse's claims with respect to those matters are not meaningless. To argue in connection with the Claymore Litigation that Section 9.2B was intended to address only direct claims between the parties to the 2007 Credit Agreement, is contradicted by Credit Suisse's own indemnification claims.

At least one court has suggested that the New York Court of Appeal's requirement of "unmistakable clarity" actually creates a rebuttable presumption that an indemnification clause does not waive the American Rule. See Krys v. Aaron (In re Refco Inc. Secs. Litig.), 890 F.Supp.2d 332, 341 (S.D.N.Y. 2012); see also Credit Suisse Reply at 9:20 to 10:7. The evidentiary hearing on the Indemnification Motion was conducted on October 8, 2015, after the parties were permitted to take and complete discovery. (ECF No. 3341). In support of its Indemnification Motion, Credit Suisse submitted declarations from its bankruptcy counsel and its trial counsel in the Litigated Matters,[13] as well as one of its managing directors.[14] The

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[12] No one suggests that a project to develop 3600 acres around a man-made lake for the sale of high-end residential units would be free of claims such as those asserted in the Gibson Litigation.

[13] Credit Suisse's bankruptcy and litigation counsel testified concerning the four Litigated Matters, but neither of them testified that they participated in the negotiation of the 2007 Credit Agreement, or any prior versions of that agreement.

[14] Credit Suisse's director testified that he had primary administrative responsibility in connection with the Lake Las Vegas Project since March 2008. See Indemnification Decision at

Creditor Trust submitted declarations from its counsel, from counsel for Highland Capital Management, and from an employee of Credit Suisse's trial counsel. Only the declarations were offered and admitted into evidence, and neither Credit Suisse nor the Creditor Trust sought to cross-examine any of the declarants. Portions of the deposition testimony of Credit Suisse's managing director as well as the trustee of the Creditor Trust also were admitted into evidence. See Indemnification Decision at 19:2-4 and 21:24 to 27:7. None of the evidence introduced at the hearing addressed whether the parties to the 2007 Credit Agreement, or its previous versions, intended to waive the American Rule. If treated as a rebuttable presumption, the court concludes that Credit Suisse failed to meet its burden of proving that the parties intended to allow recovery of attorneys fees in connection with direct claims between the parties.[15]

Moreover, there is no separate provision in the 2007 Credit Agreement allowing a prevailing party in an action on the contract to recover reasonable attorney's fees and costs from the opposing party. Inclusion of an attorney's fees clause is the clearest way for parties to create a contractual exception to the American Rule. If, as Credit Suisse now apparently argues, Section 9.2B actually was intended to apply only to direct claims between the parties to the 2007 Credit Agreement, an attorney's fees clause rather than an indemnification provision would have been a more likely choice.

Having considered the written and oral arguments and representations of counsel, as well as the testimony and materials admitted into evidence, the court concludes that under New York law,[16] the indemnification language of Section 9.2B of the 2007 Credit Agreement does not

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24:4-6. It is not apparent that Credit Suisse's representative had any participation in the negotiation of the 2007 Credit Agreement, or any prior versions of that agreement.

[15] Treating the "unmistakable clarity" requirement as a rebuttable presumption is conceptually odd. Ordinarily, the introduction of evidence as to the parties' intention is limited to circumstances where the language of the subject contract is unclear. Moreover, the parol evidence rule ordinarily bars the introduction of evidence to alter the terms of a contract.

[16] Because the language of Section 9.2B fails as a matter of contract interpretation under Hooper, it is unnecessary to address whether Credit Suisse's assertion of an indemnity claim in connection with the Claymore Litigation would violate public policy. Compare Creditor Trust Closing Brief at 4:8 to 5:4, with Credit Suisse Closing Brief at 11:13-15 and 12:25 to 14:3.

apply to the Claymore Litigation. As a result, Credit Suisse is barred from seeking indemnification under Section 9.2B with respect to that Litigated Matter.

3. Phase Two: Determination of the Amount of Credit Suisse's Indemnification Claim.

In view of the foregoing, Phase Two will be limited to a determination of the amount of Credit Suisse's claim with respect to the FATCO Litigation and the CBRE Litigation. Its claim with respect to the Claymore Litigation is not encompassed by Section 9.2B of the 2007 Credit Agreement and the outcome of the appeal of the Claymore Judgment is immaterial. Credit Suisse's claim with respect to the Gibson Litigation must await the outcome of the appeal in that proceeding.

IT IS THEREFORE ORDERED that the Memorandum Decision on the Motion of Credit Suisse AG, Cayman Islands Branch for Order Directing Distribution of Pre-Petition Lender Net Litigation Proceeds for Application to Indemnification Obligations ("Memorandum Decision"), Docket No. 3639, is supplemented as provided in this Order.

IT IS FURTHER ORDERED that the Order on Motion of Credit Suisse AG, Cayman Islands Branch for Order Directing Distribution of Pre-Petition Lender Net Litigation Proceeds for Application to Indemnification Obligations, Docket No. 3640, is supplemented as provided in this Order.

Those public policy concerns appear to be encompassed by the "gross negligence and willful misconduct" exclusion appearing at the end of Section 9.2B. Because the Claymore Judgment is on appeal, it also is unnecessary to determine the meaning of the "solely from" language preceding the words "the gross negligence or willful misconduct of any Indemnitee," compare Credit Suisse Closing Brief at 12:15-24, with Creditor Trust Closing Brief at 3:20 to 4:7, nor to determine the party having the burden of proof on that issue. Compare Credit Suisse Closing Brief at 11:13 to 12:3 & n.18 with Creditor Trust Closing Brief at 4:4-7 & n.7. It is noteworthy that as a fallback position, Credit Suisse argues that the jury portion ($40,000,000) of the Claymore Judgment ($211,863,998.56) was based on a breach of contract while the remaining bench portion was based on tort theories. Credit Suisse, therefore, argues that the willful misconduct language of Section 9.2B of the 2007 Credit Agreement would not act as a basis to bar indemnification with respect to the jury portion of the Claymore Judgment. See Indemnification Decision at 28 n.22. The jury portion represents approximately 18.8 percent of the principal amount of the total Claymore Judgment, however, and the vast majority of Credit Suisse's claim to the $7,929,000 withheld under the Distribution Stipulation is based on the Claymore Litigation.

IT IS FURTHER ORDERED that Paragraph 3 of the Order Re: Revised Stipulation for Interim Distribution of Settlement Proceeds, entered December 3, 2014, Docket No. 3252, shall remain in effect until further order of this court.

IT IS FURTHER ORDERED that a status hearing **will be held on July 12, 2017, at 11:00 a.m.**, in Courtroom 2 of this Bankruptcy Court, to determine a mechanism to resolve the objections, if any, by the Pre-Petition Lenders identified in the Memorandum Decision, to the amount paid on the indemnification claims asserted by Credit Suisse AG, Cayman Islands Branch ("Credit Suisse") under Section 9.2 of the Amended and Restated Credit Agreement (originally dated May 4, 2005) dated as of June 22, 2007. A joint status report shall be filed by Credit Suisse and the LLV Creditor Trust no later than one week prior to the hearing.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

GARY CRUCIANI, ESQ.
MCKOOL SMITH
300 CRESCENT COURT, #1500
DALLAS, TX 75201

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