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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

IN RE: ) BK. NO: 19-40426-BTR  
)  
CFO MANAGEMENT HOLDINGS, )  
LLC )  
D E B T O R. )

\* \* \* \* \*  
TRANSCRIPT OF PROCEEDINGS  
\* \* \* \* \*

BE IT REMEMBERED, that on the 16th day of September,  
2020, before the HONORABLE BRENDA T. RHOADES, United States  
Bankruptcy Judge at Plano, Texas, the above styled and  
numbered cause came on for hearing, and the following  
constitutes the transcript of such proceedings as hereinafter  
set forth:



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P R O C E E D I N G S

COURTROOM DEPUTY: CFO Management Holdings, case 19-40426. Motion to compel discovery filed by CPIF Lending.

THE COURT: Appearances.

MR. BARRIE: Good afternoon, Your Honor. Michael Barrie on behalf of CPIF Lending.

MS. ROSS: Good afternoon, Your Honor. It's Judith Ross on behalf of the Trustee, David Wallace.

THE COURT: Okay. All right. Where are we?

MR. BARRIE: Okay, Your Honor. So this is a motion to compel. In June of 2019, the Trustee received an analysis from the Texas State Security Board, otherwise known as the TSSB, purportedly showing how investors' funds flowed into certain of the debtors. And this is a motion to compel to seek turnover of that document to the lender.

The Trustee, relying almost exclusively on this analysis, prepared, filed, and is currently prosecuting a plan on which a confirmation trial is about six weeks away that seeks to allow in full all of the investors' claims. And the Trustee also commenced a civil action against my client, seeking to avoid repaying a \$30 million plus obligation.

Our document requests issued over the summer in the contested matter on the plan and in the various adversary

1 proceedings in which the lender is a defendant, cover this  
2 analysis. In response to these document requests, the  
3 Trustee disclosed to us for the first time that he has had  
4 this analysis for about 13 months. He will not produce it to  
5 us. And in lieu of that, the Trustee had asked the Texas  
6 State Security Board for all of the backup supporting the  
7 TSSB analysis, which consisted of about 37,000 heavily  
8 redacted documents. Trustee obtained that. Gave it to the  
9 lender. And basically said to the lender, CPIF Lending, here  
10 you go. Go ahead and figure it out yourself, even though I  
11 don't have to.

12 No one disputes that this document is highly relevant  
13 to the contested matter on plan confirmation. No one  
14 disputes that this document is highly relevant to the  
15 adversary proceedings. No one disputes that this document is  
16 not a privileged document. Even the Trustee does not oppose  
17 turning this document over to us. But because it was given  
18 to her under a confidentiality and a direction not to turn it  
19 over, was forced to not turn it over.

20 Normally that's (inaudible word) analysis. But the  
21 TSSB and the Trustee, as a proxy for the TSSB, argue that the  
22 Texas State Regulations prevent disclosure. But this isn't  
23 true for a number of reasons.

24 The federal rules provide that parties may obtain  
25 discovery regarding any non-privileged matter that is

1 relevant to any party's claim or defense and is proportional  
2 to the needs of the case. The rules trump the State  
3 regulation in civil matters pending in federal court. The  
4 U.S. Supreme Court has made it clear long ago that judicial  
5 residence in a case cannot be advocated to the function of  
6 executive offices. And the 5th Circuit has agreed with  
7 noting that documents withheld based on a privilege is a  
8 determination that solely must be made by the Court.

9 Under these rules, the document must be produced.  
10 Relevancy and privilege are the only grounds for not  
11 producing. And all of the parties agree it's highly  
12 relevant. And all of the parties agree it is privileged.  
13 The report was voluntarily provided -- I'm sorry. All of the  
14 parties agree that it is not privileged. The report was  
15 voluntarily provided by the TSSB to the Trustee. And no  
16 claim of privilege is asserted. Only a claim of  
17 confidentiality. And in that claim of confidentiality, the  
18 TSSB and the Trustee rely on Texas State Regulations for  
19 which, or in which the word privilege exists nowhere.

20 The TSSB relies on this regulation for not producing a  
21 document. But the document doesn't say, this is privileged.  
22 And the regulation relied upon does not shield this document  
23 from disclosure to the litigants before Your Honor. The  
24 first sentence in the regulation states that this analysis  
25 would be deemed confidential, if it were held in the hands of

1 the TSSB, unless the Court orders otherwise. So in the hands  
2 of the TSSB the regulation says it is confidential, unless  
3 the Court says it's not. The second sentence says, that  
4 notwithstanding the confidential nature of the first  
5 sentence, the TSSB may share the documents, or its document,  
6 including this analysis, with another governmental agency or  
7 by extension, A Bankruptcy Trustee, without violating the  
8 first sentence.

9           Significantly, within those regulations there is no  
10 expectation of a continued confidentiality that is baked into  
11 it, once a document is shared with a third party. The  
12 regulation does not mandate a third party to keep the  
13 document confidential. Nothing in the regulations also  
14 regulate the Trustee. He is a federal officer before Your  
15 Honor. He is not bound by state regulations. So the  
16 regulations themselves do not state -- do not contemplate  
17 that once this is turned over to a third party, that there  
18 will be a (indecipherable word) of confidentiality.

19           So this is a question of fundamental fairness. The  
20 Trustee using this document to formulate his plan, to  
21 prosecute a lawsuit that seeks to equitably subordinate or  
22 avoid certain of the debtors' \$30 million obligation to my  
23 client, and instead of supplying the document, the Trustee  
24 says you can have the 37,000 pages of redacted backup that he  
25 didn't need to review himself, because he has this highly

1 relevant, non-privileged document. And it would be  
2 fundamentally unfair for the Trustee to enjoy this tactical  
3 advantage of basing -- of forcing Columbia Pacific to sift  
4 through 37,000 pages of heavily redacted documents that he,  
5 himself, did not even have to review. Oh, and by the way,  
6 plan confirmation is about six weeks away.

7 So, Your Honor, we ask the Court to compel the Trustee  
8 to turn over this highly relevant and non-privileged  
9 document.

10 Thank you.

11 MS. ROSS: Your Honor, this is Judith Ross on  
12 behalf of the Trustee.

13 Your Honor, the Trustee is agnostic on the issue of  
14 whether the documents are produced. There are a couple of  
15 reasons we are indifferent, other than the fact that the TSSB  
16 provided these documents to us under strict confidentiality  
17 requirement. I'm not in the habit of violating regulatory  
18 rules, or even regulatory prohibitions that are stated to me  
19 orally by a regulator. So we did what we were supposed to  
20 do, which was to inform opposing counsel that the documents  
21 existed. I don't even have much of a dispute with Mr. Barrie  
22 on the relevance, although I will note something, Your Honor.

23 This particular set of documents has not been produced  
24 to anybody in the litigation, except to the Trustee.

25 Candidly, the Trustee does not plan to use the documents in

1 connection with anything other than claims analysis. And  
2 furthermore, the main thing that these documents will do is  
3 to assist the plaintiff in the adversary proceeding between  
4 the plaintiff -- between the named plaintiff as against both  
5 the Trustee and against CPIF. And it will assist them, Your  
6 Honor, because we believe that it's going to prove that,  
7 ultimately, there may be some ability to trace the money that  
8 went through Phillip Carter's hands. But that's neither here  
9 nor there.

10 Mr. -- the Benesch Firm does not have these documents.  
11 But neither does the -- neither does Larry Levick, for the  
12 Committee, nor does the plaintiff in the case. So, as I  
13 indicated, we are agnostic, except that we have been asked by  
14 the TSSB not to produce it.

15 If you look at the statutory -- statute, we do cite in  
16 there the statutory provision, the rules under the Texas  
17 Securities Act that specify why we believe that we must  
18 comply with that procedure. I would also draw your attention  
19 to Your Honor, document 556 in which we attached to that  
20 document the declaration of Tina Lawrence of the TSSB that  
21 basically says that she views, believes that that report  
22 is -- let me read what it says here. The report should be  
23 withheld from production, as such information was only  
24 permitted to be shared with the Trustee in his capacity as  
25 Chapter 11 Trustee under the authority provided below. And

1 that the remaining TSSB documents should then bear an  
2 attorney's eyes only designation. So we've given them  
3 everything else, except this particular report. Which  
4 according to the TSSB is their work product. It's their  
5 internal accountant who has done a forensic analysis.

6 So bottom line, Your Honor, we will do whatever this  
7 Court tells us to do. And -- but we were not refusing to  
8 give it to them, in order to gain a tactical advantage. We  
9 are not giving it to them because we felt that we had an  
10 obligation not to do so, because of the TSSB directing us.

11 Thank you, Your Honor.

12 THE COURT: Okay. Has anybody requested these  
13 documents from the TSSB?

14 MR. BARRIE: Your Honor, we -- we did not  
15 request these documents from the TSSB. We didn't even know  
16 they existed, until about a few weeks ago when Ms. Ross  
17 called me and said, I have this document that's responsive  
18 and relevant, but I can't turn it over. With that being  
19 said, we served the motion to compel on the TSSB. Ms. Tina  
20 Lawrence filed an affidavit, which is really just a legal  
21 argument that Ms. Ross filed on her behalf a few days ago.  
22 They have the opportunity to be here and present the  
23 argument, and they have chosen not to come.

24 I guess one more other note is somebody must have asked  
25 TSSB for it on the plaintiff's side in the adversary and the

1 Trustee's side, unless the plaintiff's have -- I mean,  
2 Mr. Wallace, the Trustee, because Ms. Ross has the document  
3 and presumably Mr. Wallace has seen it. So I don't think it  
4 just got there without somebody asking for it. But it just  
5 seems a little unfair that the plaintiff/Trustee can have it  
6 and not the defendant.

7 MS. ROSS: Your Honor, I don't dispute that we  
8 asked for the document. That's not the issue. But the Court  
9 should know that, again, I want to reiterate that the  
10 plaintiff in the adversary proceeding against both the  
11 Trustee and against CPIF have asked for it too, and they have  
12 not received it. TSSB has refused to produce it to them.

13 If these documents are, in fact, produced to the  
14 Benesch Law Firm, we will have to produce them to everybody  
15 else in the adversary proceeding.

16 THE COURT: All right. Well, ordinarily under  
17 the disclosure and discovery rules matters that are not  
18 required to be produced under applicable state law, such as  
19 because of an attorney/client privilege or other recognized  
20 state privilege, may not be produced. And included within  
21 that, work product by counsel, for example. But it is the  
22 state law that governs what documents are -- what documents  
23 can or should be produced.

24 It seems to the Court that there is a state provision  
25 under Section 28 of the Texas Securities Act which provide

1 for the information to be confidential and limits who those  
2 documents can be disseminated to. I don't see that there's a  
3 compelling reason here why the movant, CPIF Lending, needs  
4 this information. This is the State's analysis with respect  
5 to State Securities laws and such. So I'm not quite sure  
6 that there is a compelling need for the documents.

7 MR. BARRIE: Your Honor, may I address that  
8 point?

9 THE COURT: Okay.

10 MR. BARRIE: So the Trustee has drafted a  
11 complaint and prepared a plan that basically the plan allows  
12 all of these investors' claims in full under the plan,  
13 because of the analysis. And if we don't have that and we're  
14 equitably subordinated, we're subordinated to those claims  
15 that the plan allows for. And so if we don't have this  
16 analysis, all we're stuck with are 37,000 pages of documents  
17 we just got a few weeks -- not even a few weeks ago before  
18 plan confirmation to see if that's a legitimate part of the  
19 plan and these all could be allowed. Somebody has to kick  
20 the tires on that.

21 Second, you know, the Trustee was able to draft her  
22 complaint and draft the plan relying on this analysis, not  
23 the 37,000 pages we have to start on square one. So, like,  
24 that's the equivalent of playing Shoots and Ladders and  
25 letting the Trustee start at square 98 where we're starting

1 at square 1 and we're playing the same game and the finish  
2 line is square 100. It's just not fair to make Columbia  
3 Pacific begin anew with this tracing analysis, when the  
4 Trustee has had it for over a year. We've had the 37,000 of  
5 bank documents for less than a week and a half and we're  
6 expected to have our analysis completed by plan confirmation  
7 on this in six weeks, but the Trustee has been able to start  
8 from the beginning. And, again, the --

9 THE COURT: I, frankly, don't see that you --  
10 that there's anything stopping you from objecting to those  
11 claims. And I, frankly, don't see that there is a  
12 requirement under any Bankruptcy Code that those claims have  
13 to be determined by then. When you object to their claims,  
14 you can object to their claims. And all of the issues  
15 related to the claims will have to be decided by this Court.  
16 And I don't have this analysis, or whatever the position the  
17 State wants to take about whether there's been violations of  
18 state law. Okay?

19 MR. BARRIE: Right. But the Trustee --

20 THE COURT: It is not the Trustee alone in  
21 bankruptcy that has the option of objecting to claims. It's  
22 not. All creditors have standing to object to claims.

23 MR. BARRIE: That's not what the plan  
24 provides, though.

25 THE COURT: I understand that's what the plan

1 provides. But that doesn't necessarily seclude you from  
2 doing whatever you think you need to do. The plan requires  
3 the necessary votes.

4 MR. BARRIE: Understood, Your Honor. It just  
5 feels that somebody has got a play book on how this is done  
6 and we just have, you know, nothing. It's just not a level  
7 playing field and just strikes me --

8 THE COURT: Well, I guess --

9 MR. BARRIE: -- fundamentally unfair.

10 THE COURT: Are the creditors who are  
11 asserting these claims, do they have a copy of this analysis?

12 MR. BARRIE: No. Their claims are technically  
13 allowed under the plan, unless the Court doesn't approve that  
14 provision of the plan or confirm the plan. But --

15 THE COURT: Again, do these other creditors  
16 have that analysis?

17 MR. BARRIE: I don't know if there's  
18 litigation where they would have asked for it. Maybe they  
19 do, maybe they don't. It's just, again --

20 MS. ROSS: They don't, Your Honor. They don't  
21 have them. And, in particular, if I may point out, the  
22 plaintiff acting on their behalf has, in fact, been begging  
23 the TSSB for this information, because he wants to be able to  
24 trace.

25 THE COURT: I understand.

1 MS. ROSS: And TSSB has refused to turn it  
2 over to him.

3 THE COURT: Okay. It seems to me that the  
4 playing field as between CPIF and the plaintiff is pretty  
5 level. Neither of them have the benefit of the State's  
6 internal analysis.

7 MR. BARRIE: So, then, can we make sure that  
8 we stipulate then, Your Honor, that the Trustee cannot assert  
9 any tracing claim against Columbia Pacific in any litigation?  
10 Because that would seem to me to be the only compromise that  
11 would begin to try to level this playing field. If they have  
12 to -- if there's any allegation that any money from the  
13 investors went to an asset that Columbia Pacific has the  
14 first mortgage on, then to me, it strikes me as unfair. But  
15 if the Trustee is not allowed to make any sort of tracing  
16 argument against Columbia Pacific, then I would agree that  
17 that's the only way a tracing (indecipherable word due to  
18 audio cutting out) not relevant to the litigation and we  
19 wouldn't be in that circumstance hamstrung by it.

20 THE COURT: You can argue that. But I'm not  
21 ordering it. I understand your position. It's just that I  
22 think that this discovery can be had differently without the  
23 benefit of the TSSB's analysis.

24 MR. BARRIE: Okay.

25 THE COURT: I understand you would like to

1 have it. But you need to -- both parties need to do it. And  
2 at some point in time, the parties are going to have to  
3 submit the evidence related to tracing, both parties.

4 MR. BARRIE: Yeah. But they have a play book  
5 to tell you how exactly to get there and we don't.

6 THE COURT: Well, I think then you'll be  
7 seeing these documents that prove it up one way or the other.  
8 That's it. The Court has ruled. The motion to compel the  
9 discovery is denied.

10 Ms. --

11 MR. BARRIE: Can we at least deny this without  
12 prejudice, in case --

13 THE COURT: Can you not interrupt me while I'm  
14 ruling?

15 MR. BARRIE: Sure. Sorry, Your Honor.

16 THE COURT: Ms. Ross, you'll submit an order  
17 to the Court consistent with the Court's ruling. If this  
18 issue becomes relevant later in some other context, I'll hear  
19 you. Okay?

20 MR. BARRIE: Thank you. I appreciate it.

21 THE COURT: Parties are excused and we're  
22 adjourned.

23 MS. ROSS: Thank you, Your Honor.

24 (End of Proceedings.)

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C E R T I F I C A T E

I, CINDY SUMNER, do hereby certify that the foregoing constitutes a full, true, and complete transcription of the proceedings as heretofore set forth in the above-captioned and numbered cause in typewriting before me.

/s/Cindy Sumner

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