

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT**

**IN THE MATTER OF  
LEHMAN BROTHERS INTERNATIONAL (EUROPE)  
(in administration)**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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**EXPERT OPINION OF PROFESSOR NEIL B. COHEN  
AS TO MATTERS OF NEW YORK LAW**

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## TABLE OF CONTENTS

- I. Expert's qualifications
  - II. Introduction and background
  - III. Report
  - IV. Statement regarding the expert's duty to the court
  - V. Statement of truth
- Annex A     Resume
- Annex B     Instruction letter

I, **Professor Neil B. Cohen**, of 250 Joralemon Street, Brooklyn, NY 11201, **WILL SAY** as follows:

**I. QUALIFICATIONS**

1. I, Neil B. Cohen, with an office at 250 Joralemon Street, Brooklyn, NY 11201, obtained a Bachelor of Science degree from the Massachusetts Institute of Technology in 1974, and was awarded the degree Juris Doctor, cum laude, by the New York University School of Law in 1977. After spending time in the private practice of law, I began my academic career on the faculty of Seton Hall University School of Law in 1979. After being awarded tenure by Seton Hall, I joined the faculty at Brooklyn Law School as a Professor of Law in 1985. I served in that position until 2003, when I became the Jeffrey D. Forchelli Professor of Law. I have twice served as Visiting Professor at Columbia University School of Law, most recently as the Joseph F. Cunningham Visiting Professor of Commercial and Insurance Law in 2009.
2. I am a Life Member of the American Law Institute and a member of the American Bar Association, the American College of Commercial Finance Lawyers (Regent 2001-2004, 2009-2012) and the International Academy of Commercial and Consumer Law. I am admitted to the New York Bar.
3. As an academic, I have taught and written on many areas of the law, but my primary work has been in the area of contracts and commercial transactions as governed by common law and the UCC. Of particular note, I am a co-author of two textbooks on contract law: Farnsworth, Sanger, Cohen, Brooks, and Garvin, *Contracts: Cases and Materials* (8<sup>th</sup> ed. 2013), and Farnsworth, Sanger, Cohen, Brooks, and Garvin, *Selections for Contracts* (2015). A complete list of my publications is set out in my resume.
4. I have held a number of professional appointments of national and international significance. In 1990, I was appointed by the American Law Institute to serve as the Reporter for the Restatement of Suretyship and Guaranty (which received final approval from the American Law Institute in 1995, and was published in 1996). In 1993, in recognition of my work on the Restatement, I was named as the American Law Institute's R. Ammi Cutter Reporter. From 1993 through 1998, I was a member of the drafting committee that prepared Revised Article 9 of the Uniform Commercial Code (the UCC), which has been enacted in every state. Most recently, from 2008 through 2010, I served as a member of the UCC Article 9 Joint Review Committee that prepared revisions to Revised Article 9, which also have been enacted in every state. Also, from 1996 through 2001, I served as the Reporter for the drafting committee that prepared Revised Article 1 of the UCC, and, from 1999 through 2003, was a member of the drafting committee preparing revisions to Article 2 of the UCC. I have served as the Director of Research of the Permanent Editorial Board for the Uniform Commercial Code since 1998.
5. I have been actively involved in the development of commercial law in the international sphere, as (a) a member since 1995 of the delegation of the United States

of America to the United Nations Commission on International Trade Law and its working groups on international contract practices and secured transactions, (b) a member of the Working Group of the International Institute for the Unification of Private Law (UNIDROIT) for its preparation of the UNIDROIT Principles of International Commercial Contracts (2010 and drafts for 2016 revisions), and (c) a member of the Working Group of The Hague Conference on Private International Law that prepared The Hague Principles on Choice of Law in International Commercial Contracts (2015).

6. In recognition of my contributions to the development of the law, I have received the John Minor Wisdom Award of the American Law Institute and the Homer Kripke Lifetime Achievement Award of the American College of Commercial Finance Lawyers. Both awards were presented to me in 2014.
7. A full copy of my resume is attached to this opinion as Annex A.

## II. INTRODUCTION AND BACKGROUND

8. I have been retained by Ropes & Gray International LLP, acting on behalf of CVI GVF (Lux) Master Sàrl, Hutchinson Investors, LLC, Burlington Loan Management Limited, and their relevant affiliates (together the **Senior Creditor Group**), to prepare this opinion to assist the Court in its consideration of the Lehman Brothers International (Europe) Waterfall II application. A copy of the instruction letter is attached to this opinion as Annex B. In producing this opinion, I have relied upon the materials provided with the instruction letter, as set out in paragraph 4.26 of the instruction letter.
9. The purpose of this opinion is to explain the principles of New York law relevant to the interpretation of the late interest rate provisions stipulated in certain ISDA Master Agreements (together the **Master Agreements**).
10. In producing this opinion I understand that my duty is owed to the Court and I understand that this duty overrides any obligation to the parties who have engaged me. I have complied with this duty and will continue to comply with it.
11. I also confirm that I am aware of the requirements of Part 35 of the Civil Procedure Rules, the Practice Direction to Part 35 and the Guidance for the Instruction of Experts in Civil Claims 2014.
12. The facts and matters, upon which my expert opinion is based, including relevant provisions and details of English law, have been provided to me by Ropes & Gray International LLP.
13. I have been informed that Waterfall II involves an application to the English High Court by the Administrators of LBIE on a number of questions that impact on the nature and extent of creditors' entitlements to a share in the surplus assets in LBIE's estate now that creditors' provable debts have been paid in full (the **Waterfall II Application**).
14. I have been informed that the following entities were selected as original respondents in the Waterfall II application:

- (i) Burlington Loan Management Limited, part of the Davidson Kempner group (**Burlington**);
  - (ii) CVI GVF (Lux) Master Sàrl, part of the CarVal group (**CVI**);
  - (iii) Hutchinson Investors, LLC, part of the Baupost group (**Hutchinson**);
  - (iv) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc. and the hedge funds King Street and Elliott (**Wentworth**); and
  - (v) York Global Finance BDH LLC (**York**).
15. I have been informed that Burlington, CVI and Hutchinson hold between them large exposures under swaps with LBIE documented under:
- (i) English and New York law governed ISDA Master Agreements;
  - (ii) French law governed Master Agreements; and
  - (iii) German law governed German Master Agreements.
16. I have been informed that Issue 19 of the Waterfall II application seeks to determine whether the answers to Issues 10 – 16 and Issue 18 (Issue 17 having been deleted) would be decided any differently as a matter of New York as opposed to English law. I have been informed that the relevant issues are:
- (a) Whether, on the true construction of the term “Default Rate” as it appears in the ISDA Master Agreement, the “relevant payee” refers to LBIE’s contractual counterparty or to a third party to whom LBIE’s contractual counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement (**Issue 10**).
  - (b) Whether the meaning that should be given to the expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” is capable of including:
    - (i) The actual or asserted cost to the relevant payee to fund or of funding the relevant amount by borrowing the relevant amount; and/or
    - (ii) The actual or asserted average cost to the relevant payee of raising money to fund or of funding all its assets by whatever means, including any cost of raising shareholder funding; and/or
    - (iii) The actual or asserted cost to the relevant payee to fund or of funding and/or carrying on its balance sheet an asset and/or of any profits and/or losses incurred in relation to the value of the asset, including any impact on the cost of its borrowings and/or its equity capital in light of the nature and riskiness of that asset; and/or

- (iv) The actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE (**Issue 11**).
- (c) If and to the extent that the “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund ... the relevant amount” includes a cost of borrowing:
  - (i) Should such borrowing be assumed to have recourse solely to the relevant payee’s claim against LBIE or to the rest of the relevant payee’s unencumbered assets?
  - (ii) If the latter, should the cost of funding include the incremental cost to the relevant payee of incurring additional debt against its existing asset base or should it include the weighted average cost on all of its borrowings?
  - (iii) Should such cost include any impact on the cost of the relevant payee’s equity capital attributable to such borrowing?
  - (iv) Is the cost to be calculated based on obtaining: (i) Overnight funding; or (ii) Term funding to match the duration of the claim to be funded; or (iii) Funding for some other duration? (**Issue 12**).
- (d) Whether the “cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount)” should be calculated: (i) by reference to the relevant payee’s circumstances on a particular date; or (ii) on a fluctuating basis taking into account any changes in the relevant circumstances (and if so, whether the benefit of hindsight applies when taking into account such changes), in each case, whether or not taking into account relevant market conditions (**Issue 13**).
- (e) Whether a relevant payee’s certification of its costs of funding for the purposes of applying the “Default Rate” is conclusive and, if not, to what it is subject. In particular whether, in order for a payee’s certification to be deemed conclusive, a relevant creditor is under any duty to act: (i) reasonably; (ii) in good faith and not capriciously or irrationally; or (iii) otherwise than in its own interests (**Issue 14**).
- (f) If the answer to Issue 14 is that the relevant payee’s certification of its costs of funding is not conclusive and one of the requirements (i) to (iii) set out in that question applies, where does the burden of proof lie in establishing, and what is required to demonstrate, that a relevant payee has or has not met such requirement? (**Issue 15**).
- (g) Whether only the relevant payee (in accordance with the meaning of such term determined pursuant to Issue 10), or another party (whether authorised by the relevant payee or not) can provide certification of the cost of funding and, if the former, what the position should be if the relevant payee is not capable of providing such certification (for example because it has been wound up or dissolved) (**Issue 16**).

- (h) Whether the power of a party under section 7(b) of the 1992 form ISDA Master Agreement to transfer any amount payable to it from a Defaulting Party under Section 6(c) without the prior written consent of that party included the power to transfer any contractual right to interest under that agreement (**Issue 18**).
17. I understand that on 21 November 2014, the High Court made an order that the Senior Creditor Group and Wentworth may adduce and rely upon expert evidence for the purposes of assisting the court with determining Issue 19. In preparing a report in relation to Issue 19, I understand that an expert on matters of New York law should consider the following questions (the **New York Law Questions**):
- (a) What principles of New York law are relevant when construing:
- (i) The following expressions when used in the context of the term “Default Rate” in the ISDA Master Agreement:
- (A) “*relevant payee*”; and
- (B) “*cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*”; and
- (ii) Sections 6(d)(ii) and 7(b) of the 1992 ISDA Master Agreement?
- (b) In construing a commercial document that contains standardised terms such as the ISDA Master Agreement, in what circumstances, if any, would a New York court consider market practice or understanding (and, if so, how, would “market” be defined) concerning the transaction so documented, and what significance would a New York court ascribe to the market practice or understanding?
- (c) What principles of New York law would a New York court apply to determine whether or not a practice is a market practice or an understanding is a market understanding?
- (d) What principles of New York law are relevant when considering:
- (i) Whether a relevant payee’s certification of its cost of funding for the purposes of applying the “Default Rate” is conclusive;
- (ii) If not, under what circumstances and on what bases can the Defaulting Party challenge the relevant payee’s certification of its cost of funding;
- (iii) How the cost of funding should be established in the event that the certifying party’s certification is successfully challenged; and
- (iv) In the event the relevant payee is not capable of providing or does not provide certification, who is entitled to provide certification of the cost of funding?

18. I understand that due to a change in Wentworth's position, questions (b) and (c) listed above are no longer relevant. Accordingly, this report does not consider those questions.
19. I have been provided with and considered the expert report of Robert Smith on Issue 19, filed on 26 June 2015 by Wentworth (the **Smith Report**). This report has been prepared in consideration of the New York Law Questions and by way of response to the Smith Report. To the extent that this opinion does not address a point raised by the Smith Report, this does not indicate my agreement or disagreement with that point.

### **III. REPORT**

20. In this Report, I identify and explain several general principles of New York contract law that are relevant to the questions put to me and more specifically address and discuss principles applicable to construing the term "relevant payee" and the phrase "cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount."
21. With respect to general principles of New York contract law, I note the overriding principle of freedom of contract, refer to general principles of contract interpretation, explain that extrinsic evidence of the parties' intent may be utilized only when their written contract is ambiguous, and discuss the implied covenant of good faith and fair dealing and the impact of that covenant on doctrines that might otherwise lead to avoidance of a contract.
22. With respect to construing the term "relevant payee," I opine that the rights of an assignee to the payment rights under the ISDA Master Agreements are determined by the law of assignment of payment intangibles under Article 9 of the New York Uniform Commercial Code (rather than by aphorisms derived from pre-UCC cases) and that Article 9 does not, itself, resolve the matter either way but, rather, refers to the underlying contract for resolution. The underlying contract, in turn, is interpreted under general principles of New York contract law.
23. With respect to the phrase "cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount," I express the view that a New York court would likely apply the certification clause as written, subject only to the implied covenant of good faith and fair dealing (which, as detailed in paragraphs 38-46, *infra*, would not give effect to a bad faith certification).
24. As to the meaning of "cost ... if it were to fund or of funding," I express the view that it would be determined under general principles of contract interpretation, taking account of the fact that the default interest provision is intended to remediate risk. Application of any interpretation of the phrase will, of course, be subject to the implied covenant of good faith and fair dealing.

## *General canons of construction*

### Freedom of contract

25. “Freedom of contract” is a key principle of New York contract law. Under New York law, it is the job of courts to enforce the agreement made by the parties rather than reform it; “Generally, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck.” *Grace v. Nappa*, 46 N.Y.2d 560, 389 N.E.2d 107, 415 N.Y.S.2d 793 (1979). “Unless statutory language or public policy dictates otherwise, the terms of a written agreement define the rights and obligations of the parties.” *BDC Finance L.L.C. v. Barclays Bank PLC*, 25 N.Y.3d 37, 43 (2015). “This Court may not make or vary the contract ... to accomplish its notions of abstract justice or moral obligation.” *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978). Accordingly, a New York court typically sees its task as that of enforcing the bargain made by the parties, especially in an arm’s length transaction involving sophisticated parties represented by counsel, rather than reforming the bargain because the court concludes that a party was improvident in agreeing to its terms.

### General principles of contract interpretation

26. I have been asked about the application of principles of New York contract law to the rather specific issues set out in subparagraphs (a) and (d) of paragraph 17. While the issues before this court are quite specific, the applicable principles of New York contract law are necessarily general. Those principles are set out here as a preliminary matter, and their application in the context of the questions posed to me is discussed as appropriate in subsequent portions of this report.
27. The basic principle of contract interpretation under New York law is quite simple – “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” *South Road Associates v. Int’l Business Machines Corp.*, 4 N.Y.3d 272, 277 (2005), quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004).
28. Of course, that basic principle works best when the meaning of the terms is clear. For cases in which the meaning is non-obvious or is disputed, the New York courts have developed a number of guiding principles.
29. As a general matter, as stated by the Court of Appeals in *Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 N.Y.2d 1 (1976), “due consideration must be given to the purpose of the parties in making the contract ... A fair and reasonable interpretation, consistent with that purpose, must guide the courts in enforcing the agreement.” Moreover, “it is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.” *South Road Associates*, 4 N.Y.3d at 277. See also *Matter of Riconda*, 90 N.Y.2d 733, 738 (1997). However, “[w]here a contract ... employs contradictory language, specific provisions control over general provisions.” *Green Harbour Homeowners’ Assn., Inc. v. G.H. Dev. & Constr., Inc.*, 14 A.D.3d 963, 965 (3d Dep’t 2005). Yet, a contract “should be interpreted in a way that reconciles all its provisions, if possible.” *Id.*

30. Additional guidance is provided by *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (2007): “Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms. The court should ‘construe the agreements so as to give full meaning and effect to the material provisions’. A reading of the contract should not render any portion meaningless. Further, a contract should be ‘read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.’” *Id.* at 324-25 [internal citations omitted]. See also *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) (“The rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect.”)

When extrinsic evidence may be considered in determining the intent of parties to a contract

31. The general rule on the interpretation of a clear and unambiguous contract under New York law was stated as follows in *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990): “A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.”
32. As the Court of Appeals has explained: “A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties’ intent is what they express in their written contract.” *Goldman v. White Plains Center for Nursing Care, LLC*, 11 N.Y.3d 173, 176 (2008) (internal citations omitted); see also *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). In construing a contract a court should be concerned “with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote. . .” *Raleigh Assoc. v. Henry*, 302 N.Y. 467, 473 (1951).
33. Under the four corners rule (as this principle is often referred to), if a term is ambiguous and its meaning is not revealed by examination of the written contract, extrinsic evidence of the parties’ intentions may be considered. In addition, in construing a contract a court may consider the surrounding circumstances at the time it is made, but only if the written contract is ambiguous. Importantly, extrinsic evidence is not admissible to create an ambiguity in an unambiguous contract. *W.W.W. Associates, Inc.*, 77 N.Y.2d at 163. See also *Brad H. v. City of New York*, 17 N.Y.3d 180, 186 (2011). (“Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous.”) (internal quotations omitted).
34. The question whether a written contract is ambiguous or unambiguous is a question of law for the court to resolve, *Greenfield*, 98 N.Y.2d at 569, *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998). As noted in the Smith Report at paragraph 17, the New York courts

have demonstrated a rather narrow view of what constitutes ambiguity, even when there is disagreement about the meaning of a contract.

35. Principles by which New York courts determine whether a contract is ambiguous have been stated in various ways. The Court of Appeals has stated that “a contract is not ambiguous if its words “have a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, and concerning which there is no reasonable basis for a difference of opinion.” *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d at 355.
36. A written contract’s silence on an issue does not give rise to an ambiguity. See *Greenfield*, 98 N.Y.2d at 573. Moreover, “an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.” *Trustees of Freeholders & Commonalty of Town of Southampton v. Jessup*, 173 N.Y. 84, 90 (1903).
37. No ambiguity exists when the understanding of one party to a contract “strain[s] the contract language beyond its reasonable and ordinary meaning” and the contract “is otherwise clear, unequivocal and understandable when read in connection with the whole contract.” *Bethlehem Steel Co. v. Turner Const. Co.*, 2 N.Y.2d 456, 459-60 (1957). A contract is not ambiguous because one party later takes the position that it intended a different interpretation. See, e.g., *Weening v. Modes Distex Inc.*, 2005 WL 6735437 (Sup. Ct. N.Y. Co. 2005) (“The language of a contract is not ambiguous simply because the parties urge different interpretations...”). See also *Law Debenture Trust Co. v. Maverick Tube Corp.*, 595 F. 3d 458, 467 (2d Cir. 2010) (“Language whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation . . .”).

#### The implied covenant of good faith and fair dealing

38. For over 80 years, New York courts have recognized a duty of good faith and fair dealing in contracts. In the seminal case of *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, (1933), the Court of Appeals stated that “in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.” *Id.* at 87. When New York adopted the Uniform Commercial Code over 50 years ago, the concept was brought forward to transactions within the scope of the New York Uniform Commercial Code (the “**New York UCC**”). New York UCC Section 1-304 (as recently renumbered) provides that all contracts within the scope of the New York UCC include a duty of good faith in their performance and enforcement.
39. While reference is frequently made to the implied covenant of good faith and fair dealing, the meaning of that phrase is not self-evident. (While the formulation of the covenant as one of “good faith and fair dealing” suggests that there might be two components – “good faith” and “fair dealing” – New York courts have consistently explained the duty as though it is a unitary concept.) Accordingly, many cases contain additional language elaborating on the nature of the covenant. The most common formulation – that the covenant “embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other

party to receive the fruits of the contract,” (*Moran v. Erk*, 11 N.Y.3d 452, 456 (2008), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002)) – can be traced back to language in *Kirke La Shelle*, *supra*.

40. Even that formulation is a bit opaque. As a result, the duty of good faith and fair dealing is often defined by its opposite – bad faith. “[A] breach of the covenant [of good faith and fair dealing] depends on a finding that the defendant acted with intent to deprive the plaintiff of his rights under the agreement to which the defendant was a party, or, if the same was brought about by conduct of the defendant in such reckless or neglectful disregard of plaintiff’s contract rights as to justify an inference of bad faith.” *Stevens v. Publicis, S.A.*, 50 A.D.3d 253, 255 (2008) (quoting *Pernet v. Peabody Engineering Corp.*, 20 A.D.2d 781, 782 (1st Dep’t 1964).
41. Courts have emphasized that they should not go beyond the contract in applying the covenant of good faith and fair dealing - “[A]lthough the obligation of good faith is implied in every contract, it is the terms of the contract which govern the rights and obligations of the parties.” *CIBC Bank & Trust Co. (Cayman) v. Banco Cent. Do Brasil*, 886 F. Supp. 1105, 1118 (S.D.N.Y. 1995) (quoting *National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 679 (Bankr. S.D.N.Y. 1991)<sup>1</sup>). The duty of good faith “cannot add to, detract from, or alter the terms of the contract itself.” *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp.2d 275, 306 (S.D.N.Y. 1998) (internal citation omitted). “The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that ‘would be inconsistent with other terms of the contractual relationship.’” *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, quoting *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 304 (1983). As another court noted, “[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights.” *National Union Fire Ins. Co. v. Xerox Corp.*, 25 A.D.3d 309, 310 (1st Dep’t 2006). Similarly, as another court explained, there is “tension between, on the one hand, the imposition of a good faith limitation on the exercise of a contract right and, on the other, the avoidance of using the implied

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<sup>1</sup> In the United States, general contract law is state law. Yet not all contract law decisions are state court decisions. Rather, in some cases, a contract dispute governed by state law will be resolved by the decision of a federal court. Most often, this is because the state law case is in federal court under the federal court’s “diversity jurisdiction,” under which suits between citizens of different states in the United States may be brought in federal court if the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332(a)(1). In such a case, the federal court deciding the state law case is required to apply the pertinent substantive law of the relevant state. Inasmuch as diversity cases are quite common, federal courts are frequently called upon to apply state substantive law. Thus, it is not surprising that a large number of court decisions applying New York contract law are rendered by federal courts rather than by state courts.

When a federal court renders a decision based on state law that decision is, of course, binding on the parties to the litigation. Moreover, as a decision by a court with jurisdiction over the matter, the decision has precedential value. As a formal matter, it is somewhat difficult to describe the nature of the precedential value of such a federal court decision because the federal court is outside the hierarchy of state courts and is neither inferior to those courts nor superior to them. In a sense, the federal court decision is analogous to the sort of situation common in cross-border disputes in which, under principles of conflict of laws, the court of one sovereign may apply the law of a different sovereign. Yet, as a practical matter, federal court decisions applying state contract law are quite persuasive, particularly when the federal court sits in the state whose law it is applying. As a result, such decisions are routinely treated as precedents and are often cited as statements of New York law by New York courts, including the Court of Appeals. See, e.g., *Quadrant Structured Products Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014) (interpreting contractual provision and citing federal court opinions along with state court opinions for propositions of New York contract law); *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 326 (2007) (same); *F.M.C. Const., LLC v. Heartland Dev. Corp.*, 886 N.Y.S.2d 67 (Table), 2009 WL 997451 at \*3 (N.Y. Sup. Ct. 2009) (same). See also *Summit Const. Servs. Grp., Inc. v. Act Abatement, LLC*, 935 N.Y.S.2d 499, 505-06 (N.Y. Sup. Ct. 2011) (“In considering the proper rule to apply, this Court has reviewed and considered the decisions of the federal courts sitting in diversity which have passed upon the question presented . . . While these federal decisions are not directly controlling, they are important authorities which may be considered in deciding a point of law on which there is a conflict among [New York] Appellate Division Departments.”).

covenant of good faith to create new duties that negate explicit rights under a contract.” *Richbell Information Services, Inc. v. Jupiter Partners, L.P.* (309 A.D.2d 288, 302 (1st Dep’t 2003)).

42. A formulation of the duty first stated in *Dalton v. Educational Testing Service* is sometimes seen as well. In *Dalton*, a case involving a contract of adhesion between the Educational Testing Service (which administers the most popular college entrance examinations) and an aspiring student, the Court of Appeals also observed that “where the contract contemplates the exercise of discretion, [the obligation of good faith and fair dealing] includes a promise not to act arbitrarily or irrationally in exercising that discretion.” *Dalton*, 87 N.Y. 2d at 389. This formulation of the duty is most often cited when the contract in question gives one party the discretion as to whether to take a particular action.
43. The existence of the implied covenant of good faith and fair dealing also serves to enable agreements to be upheld and enforced when there might otherwise be concerns that one party would be at the mercy of the other party’s whims. See, e.g., *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88 (1917) (Cardozo, J.), which responded to such a concern by concluding that the agreement in question, which did not explicitly require the other party to take any actions at all, was “instinct with an obligation” that the other party would use his best efforts. While *Wood* was decided before New York formally developed its contract doctrine of good faith, the case was later described by the New York Court of Appeals as standing for the proposition that “New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced.” See *Murphy v. American Home Products Corp.*, 58 N.Y.2d at 304. In matters governed by the New York UCC, New York law similarly uses the implied obligation of good faith to justify enforcement of agreements where there would otherwise be concern that one party would be at the mercy of the other party’s whims. For example, New York UCC Section 2-305, in affirming contracts in which one party is given the power to set the price, states that “[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith.” Similarly, output and requirements contracts have been saved from the concern that one party is at the mercy of the other party’s assertion of its output or requirements by New York UCC Section 2-306(1) (“A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded”).
44. In sum, the existence of the implied covenant of good faith and fair dealing not only constrains bad faith conduct by parties to a contract but also, by imposing that constraint, relieves pressure to save the other party from what might otherwise seem to be a one-sided arrangement.
45. If compliance with the covenant is raised as an issue in this case, the burden of persuasion will be on the party that asserts lack of compliance. *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d, 89 (2<sup>d</sup> Cir. 2007) (“[S]ince there is a presumption that all parties act in good faith, the burden of proving a breach of the covenant of good faith and fair dealing is on the person asserting the absence of good faith”).

46. Importantly, the implied covenant of good faith and fair dealing does not impose a duty on a party to act otherwise than in its own interests. See, e.g., *M/A-Com Security Corp. v. Galesi*, 904 F.2d 134, 136 (“the implied covenant does not extend so far as to undermine a party’s general right to act on its own interests in a way that may incidentally lessen the other party’s anticipated fruits from the contract”) (internal citations omitted); see also *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 408 (2006).

***What principles of New York law are relevant when construing the term “relevant payee” when used in the context of the term “Default Rate” in the ISDA Master Agreement***

47. The answer to this question is determined by a combination of New York statutory law governing assignment of rights to payment and New York common law principles of contract interpretation. As the analysis below demonstrates, the statutory law governing assignment of rights to payment supplants older general aphorisms about the effect of assignments and makes it clear that the meaning of the term “relevant payee” will be determined by general principles of contract interpretation and is not limited by the law of assignments.
48. The New York law of assignments determines, *inter alia*, the rights of an assignee of a right to payment. New York law is very supportive of the assignment of such rights, providing a broad rule of assignability and precise rules about the effect of assignment. With respect to assignability, New York General Obligations Law Section 13-101 provides that “Any claim or demand can be transferred [except for three situations not germane to this case].”
49. With respect to the effect of an assignment of a party’s right to payment under the ISDA Master Agreements, the controlling authority is Article 9 of the New York UCC. It is well known that Article 9 governs transactions in which a security interest in personal property secures an obligation such as the repayment of a loan, but the scope of Article 9 is broader. Article 9 also governs the outright sale of four types of payment rights: “accounts,” “chattel paper,” “payment intangibles,” and “promissory notes.” New York UCC Section 9-109(a)(3). In this case, the rights acquired by way of assignment are “payment intangibles” as that term is defined in New York UCC Section 9-102(a)(61). Further, because the assignees (as well as the intervening transferees, if any, from the original counterparties of LBIE) bought these payment rights, the transaction by which they were acquired was a sale of payment intangibles and, thus, within the scope of Article 9 of the New York UCC.
50. As to the effect of the sale of these payment intangibles to the assignees, it is frequently stated that an assignee of rights “stands in the shoes” of the assignor of those rights and has no greater rights than the assignor. The phrase that an assignee “stands in the shoes” of the assignor works as a loose aphorism, and is sufficient in some contexts, but it is not a precise statement of a legal rule. For a precise statement of the rights acquired by the assignee we must turn to the provisions of Article 9 of the New York UCC. In particular, New York UCC Section 9-404(a) states that...

Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:

(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

51. Examination of this statute reveals that, under UCC Section 9-404(a), “standing in the shoes” of the assignor (to use the metaphor of the common aphorism) has three elements: (i) the assignee is subject to all of the terms of the agreement between the assignor and the account debtor; (ii) the assignee is subject to defenses and claims in recoupment that arise under the same transaction that gave rise to the payment intangible; and (iii) the assignee is subject to any unrelated claims or defenses of assignor that arose before the account debtor received a notice of the assignment. Thus, the aphorism that the assignee “stands in the shoes” of the assignor must be understood as shorthand for the assignee being bound to the same contract as the assignor and being subject not only to defenses on the contract but also to unrelated claims of the assignor that arise before the account debtor is given notice of the assignment.
52. There is no issue here as to “defenses” and “claims” referred to in clauses (ii) and (iii) of UCC Section 9-404(a). Accordingly, under clause (i), the matter of whether the default interest rate mandated in the contracts in question is to be measured by the cost of funding of the original counterparty or by the cost of funding of the non-defaulting party’s assignee or other successor is determined by “all of the terms of the agreement between the account debtor [LBIE] and assignor [the original counterparties]” – in other words, the ISDA Master Agreements. Accordingly, it is the ISDA Master Agreements themselves, rather than any limitation imposed by the law of assignments of payment rights, that determines whether the “relevant payee” is the original counterparty or, rather, the current holder of the rights in question – the members of the Senior Creditor Group.
53. Thus, the New York UCC refers the matter to be resolved by general principles of contract interpretation. In his report, Mr. Smith stated that a New York court would be likely to find that the authorities he cited for the proposition that an assignee “stands in the shoes” of its assignor weigh against a construction of “relevant payee” that would enable an assignee to obtain a higher interest rate than its assignor. For the reasons set out in this report, however, I disagree with Mr. Smith’s statement insofar as it suggests that the New York law of assignments determines or suggests the answer to the interpretive question. As noted above, under New York law the assignee’s rights are subject to the terms of the assigned contract, and the law of assignments takes no position as to the proper interpretation of that contract.

54. When the terms of the assigned contract are applied in the context of enforcement of remedial provisions of that contract by the assignee, it is not the case that those terms will invariably generate the same measure of recovery as when applied in the context of enforcement by the assignor. For example, loan contracts routinely provide that (notwithstanding the so-called “American rule” for attorneys’ fees) a defaulting borrower must pay attorneys’ fees incurred in collection from the borrower in the event of the borrower’s default. In such a case, if the borrower defaults and an assignee to whom the lender’s rights have been assigned hires attorneys and institutes collection of the loan, are the attorneys’ fees owed to the assignee determined by somehow hypothetically ascertaining the fees that would have been charged by the lender/assignor’s hypothetical attorneys? I have never seen that argument made, and judicial decisions involving recovery of attorneys’ fees in the context of collection by an assignee do not even suggest that the fee recovery would be so limited (or that it would require proof of such facts as the hypothetical fees of the assignor’s hypothetical attorneys). See, e.g., *Pravin Banker Associates, LTD v. Banco Popular del Peru*, 912 F.Supp. 77 (S.D.N.Y. 1996) (dispute as to attorneys’ fees owed by obligor to assignee of original lender pursuant to an attorneys’ fee clause in loan agreement; the court’s analysis assumes that the fees are to be determined by the assignee’s cost of legal representation and neither party suggested that the fees be measured by the amount that would have been spent by the original lender). Similarly, in *Starobin v. Randolph Computer Corp.*, 689 F. Supp. 323 (S.D.N.Y. 1988), the contract in question called for a lessee to indemnify a lessor for attorneys’ fees. An assignee of the lessor sought recovery for attorneys’ fees, and the court concluded that, inasmuch as the contract provided that it was assignable, the lessee was liable under that clause. The court stated that “[the original lessor] transferred to BanCal its right to indemnification from ISC [the lessee], and ISC must indemnify BanCal for all of its expenditures arising out of this litigation”. *Id.* at 329.
55. The recovery of the assignee’s attorneys’ fees (rather than the hypothetical attorneys’ fees of the assignor) is accepted elsewhere as well. See, e.g., *Essex Ins. Co. v. Five Star Dye House, Inc.*, 137 P.3d 192 (Cal. 2006) (assignee of an insured who was injured by the bad faith conduct of his insurer, thus entitling insured to attorneys’ fees incurred to obtain policy benefits, stands in the shoes of its assignor and is entitled to recover the assignee’s attorneys’ fees) and *Searles Valley Minerals Operations, Inc. v. Ralph M. Parson Service Co.*, 120 Cal.Rptr.3d 487 (Cal. Ct. App. 2011) (applying *Essex* to contractual indemnity claim and holding that assignee from indemnitee stands in the shoes of indemnitee and can recover the assignee’s attorneys’ fees).
56. The opinions of the courts in *Essex* and *Searles* describe the California law of assignments in very similar terms to the descriptions in New York cases, including references to the aphorism of standing in the shoes of the assignor. I believe that New York courts would have decided these cases the same way.
57. The right to attorneys’ fees for enforcing one’s rights and the right to post-default interest are similar in that they do not constitute elements of the defaulting party’s satisfaction of its primary performance obligations under the contract but, rather, exist as remedial provisions to make the non-defaulting party whole in light of the negative consequences of the other party’s default.
58. Referring back to the language in New York UCC Section 9-404(a)(1), a court’s task in resolving this issue is identification and interpretation of the “terms of the

agreement between the account debtor and assignor” in accordance with the principles identified above. The resolution is not determined by the application of aphorisms about the effect of assignment.

*What principles of New York law are relevant when construing the term “cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount”*

59. I have been asked to consider the application of New York law to the contractual provision that references “cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount.”
60. There are two overlapping, but distinct, aspects to this question. One aspect is the meaning of that portion of the language referring to the standards applicable to certification by the relevant payee of the cost, without proof or evidence of actual cost. The second aspect relates to the meaning of “cost ... if it were to fund or of funding.”
61. With respect to standards for certification, the strong freedom of contract principles under New York law, described in paragraph 25, *supra*, under which the task of New York courts is to enforce the agreement of the parties rather than to reform it, should be recalled. See, e.g., *Grace v. Nappa*, 46 N.Y.2d 560, 565, (1979) (“Generally, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck.”); *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d at 355 (“This Court may not make or vary the contract ... to accomplish its notions of abstract justice or moral obligation.”) As stated previously, the import of this principle is that a court will strive to enforce the bargain made by the parties, especially in an arm’s length transaction involving sophisticated parties represented by counsel, rather than reform it merely because a court concludes that a party was improvident in agreeing to its terms.
62. The freedom of contract principle was itself sufficient for the United States District Court for the Southern District of New York when, applying New York law to a challenge to an interest determination based on the same contractual language that is the subject of this dispute, to state that “this argument, however, ignores the fact that the ISDA explicitly precludes an issue of fact contest with regard to the proper default rate with the phrases “without proof or evidence of any actual cost” and “as certified by it.” ISDA, § 14(d), at 14. Under New York law, the only possible route to avoid enforcement of this clause in the contract would be to suggest bad faith, fraud, gross negligence or contravention of public policy, which LBSF does not do.” *Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc.*, 2003 WL 21638214 at \*2 (S.D.N.Y. 2003). (For the reasons stated in footnote 1, *supra*, I do not minimize the practical precedential value of the *Finance One* opinion on the grounds suggested in paragraph 38 of the Smith Report.)
63. There does not appear to be an issue here with respect to fraud, gross negligence, or contravention of public policy, so the only relevant limitation relates to the implied covenant of good faith and fair dealing (referred to in shorthand form by the *Finance One* court as “bad faith”). Application of the duty of good faith and fair dealing

would not, however, involve the court substituting its judgment of an appropriate procedure for determining default interest for that of the enforcing creditors. Rather, it would mean that if LBIE were able to demonstrate that the certifications were not made in good faith (within the meaning of that duty developed in New York cases) those certifications would not stand. Such a demonstration would require more than a difference of opinion or a competing calculation. Rather, it would require a demonstration that the enforcing creditors' calculation and certification did not meet the standard of good faith and fair dealing. (For the meaning of the obligation of good faith and fair dealing, see paragraphs 38-46, *supra*.)

64. As noted previously the burden of persuasion with respect to good faith is on the party seeking to demonstrate that the other party has not acted consistently with the implied covenant.
65. In this regard, it should be noted that, unlike contracts that give a party the discretion to decide whether to take a particular action, the contractual language at issue here could be understood as language that does not confer such discretion on the non-defaulting party. Rather, it asks that party to make a factual determination, and provides a degree of deference ("without proof or evidence of actual cost") to that determination. Accordingly, if a New York court sees this contract as one that does not confer discretion of the sort at issue in *Dalton* and similar cases, the court would likely conclude that the gloss added to the "good faith" standard by *Dalton* is, by its terms, inapplicable to this contract. In that case, only the general standard of good faith and fair dealing would apply without any additional increment related to the exercise of discretion.
66. Similarly, principles of New York law under which a court will rewrite the precise language of the parties' contract to bring about a different result than would result from application of that language are limited to situations "where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part." *Jade Realty LLC v Citigroup Commercial Mtge. Trust 2005-EMG*, 20 N.Y.3d 881, 884 (2012). (See also the dissenting opinion of Judge Smith, concluding, instead, that doctrines allowing the correction of clear drafting errors should have been applied, and indicating that, had he been on the court, he would have likely dissented in a case on which the opinion of the court relies as well as another case).
67. In light of New York precedents, I believe that a New York court would likely apply the certification clause as written, subject only to the implied covenant of good faith and fair dealing.
68. Insofar as paragraph 36 of the Smith Report suggests that the implied covenant of good faith and fair dealing can be violated by conduct that does not violate the standard explained in cases such as *511 W. 232nd Owners Corp*, *Stevens v. Publicis*, and *Dalton*, I disagree. Certainly, New York contract and commercial law contains many doctrines under which particular actions of a party are constrained to a narrower range than simply acting in good faith, such as requirements of commercial reasonableness or the like. When doctrines that set such a higher standard apply, they are, of course, governing. See, e.g., New York UCC Section 9-610(b) ("Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable"); New York UCC Section 2-306(2) ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of

goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale"). But I am not aware of any doctrine of New York contract law applicable to the matters at issue in this case that constrains the parties' actions by reference to an additional and more stringent standard, such as an objective test of commercial reasonableness, that applies even to actions taken in good faith as that term is understood in New York law.

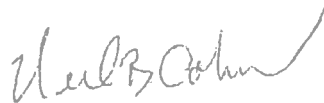
69. As for the meaning of "cost ... if it were to fund or of funding," it is my understanding that there is no assertion that the phrase in question is a term with a particular meaning based on market practice (a "usage of trade" or "custom and usage" as it might be put under New York law). Thus, the phrase must be given meaning by application of general principles of contract interpretation described in paragraphs 26-30, *supra*.
70. In interpreting the phrase in question in its context, it should be noted that the practice of charging a different (typically higher) interest rate after default of a financial obligation is understood as reflecting the higher post-default risk to the creditor. See, e.g., *In re 785 Partners LLC*, 470 B.R. 126, 131 (Bankr. S.D.N.Y. 2012) ("A higher default interest rate reflects the allocation of risk as part of the bargain struck between the parties ....") Accordingly, it is a remedial provision of sorts, and should be interpreted in that context, bearing in mind that any potential for abuse by the enforcing party in asserting a "cost ... to fund or of funding" is, of course, limited by the covenant of good faith and fair dealing.

#### **IV. STATEMENT REGARDING THE EXPERT'S DUTY TO THE COURT**

71. I have understood that I owe an overriding duty to the court to assist the court by providing objective, unbiased opinions within the areas of my expertise and that I should not assume the role of an advocate on behalf of the party from whom I receive instructions.

#### **V. STATEMENT OF TRUTH**

72. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.



Neil B. Cohen

Dated: July 24, 2015

# ANNEX A

**NEIL B. COHEN**  
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**Professional Employment**

Brooklyn Law School  
Brooklyn, New York

Professor of Law, 1985 - 2003

Jeffrey D. Forchelli Professor of Law, 2003 - present

Courses Taught: Contracts; Commercial Law; Secured Transactions; Sale of Goods; Payment Systems; Negotiable Instruments; Advanced Commercial Law; International Commercial Transactions; Conflict of Laws; International Credit Transactions; Constitutional Law; Corporations; Probability, Statistics, and Proof

Columbia University School of Law  
New York, New York

Visiting Professor of Law, Fall 1994

Joseph F. Cunningham Visiting Professor of Commercial and Insurance Law, Fall 2009

Seton Hall University School of Law  
Newark, New Jersey

Assistant Professor of Law, 1979 - 1982

Associate Professor of Law, 1982 - 1985

Awarded early tenure, 1984

Professor of Law, 1985

Fine & Ambrogne  
Boston, Massachusetts

Associate, 1977 - 1979

**Professional Honors**

American Law Institute

John Minor Wisdom Award, May 2014

American College of Commercial Finance Lawyers

Homer Kripke Lifetime Achievement Award, April 2014

**Professional and Scholarly Appointments**

Director of Research, Permanent Editorial Board for the Uniform Commercial Code, 1998 - present

Reporter, Uniform Commercial Code Article 1 (National Conference of Commissioners on Uniform State Laws and American Law Institute), 1996 - 2002

Reporter, Restatement of the Law, Third, Suretyship and Guaranty (American Law Institute), 1990 - 96 (R. Ammi Cutter Reporter, 1994 - 1996)

Member, Uniform Commercial Code Article 9 Joint Review Committee, 2008 - 2010

Member, Uniform Commercial Code Article 9 Drafting Committee, 1993 - 1998; Chair, Task Force on International Secured Transactions; Member, Committee on Consumer Transactions

Member, Uniform Commercial Code Articles 2 and 2A Drafting Committee (National Conference of Commissioners on Uniform State Laws and American Law Institute), 1999 - 2003

Member, United States Department of State's Advisory Committee on Private International Law, 2009 - present

Member, Hague Conference on Private International Law, Working Group on Choice of Law in International Commercial Contracts, 2009 - 2015 (Editorial Committee 2014 - 2015)

United States Delegate, Hague Conference on Private International Law, Special Commission on Choice of Law in International Contracts, 2012 - 2014

United States Delegate, UNCITRAL Working Group on Security Interests, 2002 - present; UNCITRAL Working Group on International Contract Practices, 1995 - 2001

Observer (on behalf of the American Law Institute), UNIDROIT Working Group for the Preparation of Principles of International Commercial Contracts, 2009 - 2011

Member, UNIDROIT Working Group for Preparation of Model Clauses invoking the UNIDROIT Principles of International Commercial Contracts, 2012 - 2013; Working Group on Long-Term Contracts, 2015 - present

Adviser, Principles of the Law of Software Contracts (American Law Institute), 2004 - 2009

Adviser, Uniform Manufactured Housing Act Drafting Committee (Uniform Law Commission), 2010 - 12

Co-Reporter, PEB Commentary No. 11 on Suretyship Issues in Article 3 (Permanent Editorial Board for the Uniform Commercial Code)

Consultant, Organization of American States, Secured Transactions Reform in Jamaica, July 2014 - present

**Publications – Books, Chapters, etc.**

Contracts: Cases and Materials (with E.A. Farnsworth, C. Sanger, R. Brooks and L. Garvin) (7<sup>th</sup> ed. 2008 and 8<sup>th</sup> ed. 2013)

Selections for Contracts (with E.A. Farnsworth, W. Young, C. Sanger, and R. Brooks) (2007, 2008, 2010, 2111, 2013 and 2015 eds.)

Hawkland Uniform Commercial Code Series (Revised Article 9) (with W. Hawkland and F. Miller) (2001)

Restatement of the Law, 3d, Suretyship and Guaranty (Reporter) (American Law Institute 1996)

Baseball and the American Legal Mind (with S.W. Waller and P. Finkelman) (1995)

What If the American Political System Were Different? (with H. Levine, J. Esberrey, T. Ferrell, J. Gentry, G. Jeansonne, & J. Pitney, Jr.) (1992)

Commercial Law (with G. McLaughlin), New York Law Journal (regular column, 1986 - 2007)

Commercial Law and Practice Guide (with B. Zaretsky and G. McLaughlin), Matthew Bender & Company (3 vols. 1991 & ann. supp. through 1996)

Breach by Seller or Lessor of Goods, in Commercial Damages: A Guide to Remedies in Business Litigation (C. Knapp ed. 1987 & ann. supp. through 1992)

Commercial Law Report (with G. McLaughlin) Matthew Bender & Company (monthly service, January 1987 - May 2005)

**Publications – Articles****Commercial Law**

Freedom of Contract vs. Free Alienability: An Old Struggle Emerges in a New Context, 46 Gonzaga Law Review 353 (2011) (with W. Henning)

Should UNCITRAL Prepare a Model Law of Secured Transactions? XV Uniform Law Review (Revue de Droit Uniforme) 325 (2010)

The Calamitous Law of Notes, 68 Ohio St. Law Journal 161 (2007)

Taking Democracy Seriously, 52 Hastings Law Journal 667 (2001)

The Revised UCC Article 9 Secured Transaction Simplification Experience, 105 Dickenson Law Review 213 (2001)

**Commercial Law (cont.)**

International Secured Transactions and Revised UCC Article 9, 74 Chicago-Kent Law Review 1191 (1999) (with E. Smith)

Internationalizing the Law of Secured Credit: Perspectives from the U.S. Experience, 20 University of Pennsylvania Journal of International Economic Law 423 (1999)

Harmonizing the Law Governing Secured Credit: The Next Frontier, 33 Texas International Law Journal 173 (1998)

Credit Enhancement in Domestic Transactions: Conceptualizing the Devices and Reinventing the Law, 22 Brooklyn Journal of International Law 21 (1996)

Subrogation: A Further Probing, 10 Letters of Credit Report 5 (1995)

Striking the Balance: The Evolving Nature of Suretyship Defenses, 34 William & Mary Law Review 1025 (1993)

Drafting Commercial Law for the New Millennium: Will the Current Process Suffice? 26 Loyola L.A. Law Review 551 (1993) (with B. Zaretsky)

Hidden Suretyship Issues in Revised Article 3, 1993 Commercial Law Annual 207

Suretyship Principles in the New Article 3: Clarifications and Substantive Changes, 42 Alabama Law Review 597 (1991)

Preliminary Report on a Restatement of Suretyship: A Report to the Director of the American Law Institute (ALI 1990)

"Value" Judgments: Accounts Receivable Financing and Voidable Preferences Under the New Bankruptcy Code, 66 Minnesota Law Review 639 (1982), reprinted in 1983 Corporate Counsel's Annual 981

Book Review, 10 Seton Hall Law Review 981 (1980) (reviewing J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, 2d ed. 1980)

**Medicine and the Law**

The Second Revolution in Informed Consent: Comparing Physicians to Each Other, 94 Northwestern Law Review 1 (1999) (with A. Twerski)

Comparing Medical Provider Performance: A First Look at the New Era of Medical Statistics, 58 Brooklyn Law Review 5 (1992) (with A. Twerski)

Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation, 1988 University of Illinois Law Review 607 (with A. Twerski), reprinted in 12 J. Prod. Liab. 133 (1989).

**Probability, Statistics and Proof in the Law of Evidence**

The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values, 33 Seton Hall Law Review 943 (2003)

Conceptualizing Proof and Calculating Probabilities: A Response to Professor Kaye, 73 Cornell Law Review 78 (1987)

The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence, 66 Boston University Law Review 563 (1986)

Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge, 60 New York University Law Review 385 (1985)

**Jurisprudence**

Taking Pop Ups Seriously: The Jurisprudence of the Infield Fly Rule, 82 Washington University Law Quarterly 453 (2004) (with S.W. Waller)

**Antitrust Law**

The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration, 62 Texas Law Review 453 (1983) (with C. Sullivan)

**Product Liability Law**

Resolving the Dilemma of Non-Justiciable Causation in Failure-to-Warn Litigation, 84 Southern California Law Review 125 (2010) (with A. Twerski)

**Memberships**

American Law Institute

American College of Commercial Finance Lawyers (Regent 2001 - 2004, 2009 - 2013)

International Academy of Commercial and Consumer Law

American Bar Association

**Education**

New York University School of Law, J.D., *cum laude*, 1977

Root-Tilden Scholar

Order of the Coif

Annual Survey of American Law (Articles Editor)

Massachusetts Institute of Technology, S.B., 1974

# **ANNEX B**



ROPES & GRAY  
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30 June 2015

Professor Neil Cohen  
Jeffrey D. Forchelli Professor of Law  
Brooklyn Law School  
250 Joralemon Street  
Brooklyn, New York 11201

Dear Professor Cohen

**Lehman Brothers Waterfall Application (No. 7942 of 2008) (the “Waterfall II Proceedings”)**

We are sending this letter on behalf of CVI GVF (Lux) Master Sarl, Hutchinson Investors, LLC and Burlington Loan Management Limited (together and with their relevant affiliates, the **Senior Creditor Group**). Its contents have been approved by their respective legal advisers (Freshfields Bruckhaus Deringer LLP, ourselves and Schulte Roth & Zabel International LLP). The Senior Creditor Group has authorised us to enter into this letter on their behalf, and we are authorised to bind the Senior Creditor Group to this letter.

The Senior Creditor Group would like to instruct you to act as an expert witness with respect to relevant matters of New York law in the Waterfall II Proceedings. The Waterfall II Proceedings are currently on foot in the Chancery Division of the High Court of Justice of England and Wales (the “**Court**”) before Mr. Justice David Richards. This letter sets out the terms of your appointment (should you choose to accept them), contains your instructions and highlights your duties. Please read it carefully as it contains important information and then sign and return a copy to us indicating your agreement to its terms. Please be aware that we do not act as your legal representative, nor does any legal adviser to any member of the Senior Creditor Group.

**1. NATURE OF APPOINTMENT**

- 1.1 Although you are instructed by the Senior Creditor Group as an expert witness, your overriding duty as an expert is to help the Court with matters within your expertise, and not to act as an advocate for the Senior Creditor Group. As outlined further in this letter, this means you must act with objectivity and independence in carrying out your instructions and are required to comply with the relevant provisions of the English Civil Procedure Rules (known as the **CPR**).
- 1.2 We enclose a copy of Part 35 of the **CPR (CPR 35)** and its companion Practice Direction (**PD 35**) together with a copy of the Guidance for the Instruction of Experts in Civil Claims 2014 produced by the Civil Justice Council (**Guidance**), which we hope you will find helpful in preparing your report. As much of this may be unfamiliar to you, please let us know if you do not understand any of these materials.

**2. YOUR OBLIGATIONS AS AN EXPERT**

- 2.1 By signing a copy of this letter you also agree that:

- (a) you are representing that you have the relevant qualifications and experience to provide expert evidence in relation to this matter (if this is not the case please let us know immediately);
- (b) you will use reasonable skill and care when carrying out your instructions;
- (c) when instructed to report to the Court, you will do so in compliance with the relevant requirements of the CPR and within any agreed time limit;
- (d) when ordered to meet with an expert for an opposing party, you will conduct such meeting in accordance with the CPR;
- (e) you will deal with written questions from an opposing party on any report you write within any time limit set by the court, any replies to such questions form part of your report or a supplemental report (as applicable);
- (f) you will deal with all other matters promptly and, where appropriate, within any time limits agreed by us or set by the Court;
- (g) unless otherwise agreed, you will prepare a report at a cost proportionate to the sums in issue;
- (h) you will make yourself available for court hearings, conferences and other meetings;
- (i) you will preserve the confidentiality of all information supplied to you by us or by any member of the Senior Creditor Group or their legal advisers (including information supplied to you before the date of this letter) except to the extent that they are included in your final report(s);
- (j) you have no conflict of interest in acting as an expert appointed by any member of the Senior Creditor Group in this matter (if and when further parties become involved in the dispute, we will inform you and you should confirm again (if applicable) that you do not have a conflict of interest);
- (k) you will assist us in identifying the issues which need to be addressed;
- (l) if required, you will participate in a discussion between you and the expert for Wentworth (and if applicable, the expert for the Administrators) to identify and discuss the expert issues in the proceedings; and where possible, reach agreed opinion on those issues;
- (m) if required, you will contribute to an experts' joint statement; and
- (n) if directed by the Court you will give evidence in court concurrently with the expert for Wentworth (and if applicable, the expert for the Administrators) in accordance with CPR 35.12.

2.2 If you consider that you need further direction from the Court to assist you with carrying out your functions as an expert, you may file a written request with the Court for directions. If you intend to file a request for directions, please discuss this with us as soon as possible.

2.3 If you think that your obligations and duties as an expert under the CPR conflict with these instructions, you may consider withdrawing from your role as an expert in these proceedings. If you are considering withdrawing from your role as an expert, please discuss this with us immediately.

- 2.4 If you do not comply with any of your obligations under the CPR, you could be faced with personal sanctions against you. These are described in the Guidance and we recommend you make yourself familiar with them.

### 3. COMPENSATION

- 3.1 We will agree with you the terms on which you will be compensated by the Senior Creditor Group in respect of your role as an expert witness.
- 3.2 You will provide us with an estimate of your fees and expenses if such an estimate is requested by the Court. You should be aware that the Court may limit the amount you are to be paid by reference to any estimate you give. It is important that you review your estimate regularly. If it seems likely that you may exceed your estimate, please let us know as soon as you become aware of this, and we will pass this information on to the Senior Creditor Group and, if necessary, the Court.
- 3.3 You should be aware of the overriding objective of the CPR that courts deal with cases justly and that you are under an obligation to assist the court in this respect. This includes dealing with cases proportionately (keeping the work and costs in proportion to the value and importance of the case to the parties), expeditiously and fairly.

### 4. INSTRUCTIONS

#### (a) *Background to the matter*

- 4.1 We set out below a brief summary of the context and procedural history of the Waterfall II Proceedings, the parties involved and the basis on which issues of New York law arise.

#### *Procedural History*

- 4.2 The Waterfall II Proceedings take the form of an application to the English court by the administrators (Administrators) of Lehman Brothers International (Europe) (LBIE) on a number of questions that impact on the nature and extent of creditors' entitlements to distributions of the surplus funds in LBIE's estate now that distributions on ordinary unsecured creditors' provable debts have been made in full, in an amount equal to the provable total of the unsubordinated claims.
- 4.3 LBIE, an English unlimited liability company, was the English operating entity of the Lehman Brothers group. It was placed into administration proceedings by the Court under the Insolvency Act 1986 on 15 September 2008. Since then the Administrators (partners of PricewaterhouseCoopers) have been engaged in, among other things, realising LBIE's assets for the benefit of its unsecured creditors and making distributions to them in the form of dividends on their claims. As of April 2014, distributions on all of the preferential and ordinary (i.e., unsubordinated) claims in the estate had either been made in full, in an amount equal to the provable total, or reserved for in full, and the Administrators have advised that there remains a substantial amount of funds (currently estimated at £6 – 7.5 billion) in the LBIE estate after settlement of such claims.
- 4.4 Rule 2.88(7) of the Insolvency Rules 1986 provides that the Administrators must first apply any surplus after the payment of all provable debts in the payment of post-petition interest on such debts. Rule 2.88(9) provides that the rate of post-petition interest due is the greater of the Judgments Act rate (8% simple) and the rate applicable to the relevant debt apart from the administration. Thus, rule 2.88(9) envisages that certain creditors may be entitled to a rate of greater than 8% simple if they can establish that they would have earned such higher rate on their debt absent the administration (e.g. under the contract giving rise to the debt).

- 4.5 In early 2013, the Administrators brought an application (the “Waterfall I Proceedings”) seeking to determine the relative ranking of (i) the claims of preferential and ordinary unsecured creditors to post-petition interest under rule 2.88(7) and (ii) a substantial subordinated debt claim owed to LBIE’s primary shareholder, LB Holdings Intermediate 2 Limited (in administration) (“LBHI2”). The Court ruled in a judgment handed down in March 2014 that the subordinated debt ranked behind claims to post-petition interest. The Court also ruled that creditors with underlying foreign currency claims who had not been paid in full in the relevant currency as a result of the mandatory conversion of their claims to sterling for the purposes of proof (and the subsequent depreciation of sterling against the relevant currency) were entitled to recover the balance from LBIE, and that such claims (“currency conversion claims”) ranked behind post-petition interest but before the subordinated debt. The Court also ruled that LBIE’s shareholders had a liability to make good any shortfall in the settlement of post-petition interest and currency conversion claims owed to ordinary unsecured creditors, and that no distribution on the subordinated debt (and thereafter to LBIE’s shareholders) could be made until such claims were settled in full. Such rulings were upheld by the Court of Appeal in a judgment handed down in May 2015. LBIE’s shareholders have sought leave to appeal to the Supreme Court with respect to that decision.
- 4.6 Assuming such leave is not granted or the Waterfall I rulings are otherwise upheld, the Administrators’ obligation will be to apply the surplus in payment first of the post-petition interest entitlements of preferential and ordinary unsecured creditors.
- 4.7 The Waterfall II Proceedings were commenced by the Administrators in June 2014 seeking determination by the Court of a series of issues relating to the calculation of post-petition interest entitlements and currency conversion claims, and whether such claims had been partly or wholly released by creditors as a result of stipulations entered into with the Administrators.
- 4.8 Given the number of issues requiring resolution, the Waterfall II application was divided into three parts (Parts A, B and C) to be heard separately. Part A (which primarily concerned the proper interpretation of rule 2.88) was heard in February 2015 and Part B (which primarily concerned questions relating to the potential release of claims) was heard in May 2015, and judgments are anticipated in respect of those hearings shortly. As detailed further below, Part C is scheduled to be heard in November 2015, and it is to that Part that these instructions relate.
- 4.9 Part C concerns, in essence, the interpretation and effect of the default interest provisions of certain standard form master agreements entered into by LBIE with creditors. As detailed further below, such agreements included 1992 and 2002 ISDA Master Agreements entered into under New York law, and it is to the Part C issues relating to such Agreements that these instructions relate.

*The Parties to Waterfall II*

- 4.10 The parties to the Waterfall II Proceedings are:
- (a) the Administrators (advised by Linklaters LLP), as applicants;
  - (b) Burlington Loan Management Limited, part of the DK group (**Burlington**) (advised by Schulte, Roth & Zabel);
  - (c) CVI GVF (LUX) Masters SARL, part of the CarVal group (**CVI**) (advised by Freshfields Bruckhaus Deringer LLP);
  - (d) Hutchinson Investors, LLC, part of the Baupost group (**Hutchinson**) (advised by Ropes & Gray International LLP);

- (e) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc., LBIE's primary shareholder entity LBH12 and the hedge funds King Street and Elliott (**Wentworth**) (advised by Kirkland & Ellis LLP);
  - (f) York Global Finance BDH LLC (**York**) (advised by Michelmores LP); and
  - (g) Goldman Sachs International (**GSI**) (advised by Cleary Gottlieb Steen & Hamilton LLP).
- 4.11 As mentioned above, Burlington, CVI and Hutchinson are together referred to as the "Senior Creditor Group" because they each hold material ordinary unsecured claims in the LBIE estate and are cooperating together to advance arguments that are in their mutual interests and those of similarly situated ordinary unsecured creditors (although not in any formal representative capacity). Such arguments include those that would maximise claims to post-petition interest in respect of claims based on default interest provisions in master agreements.
- 4.12 In this respect, the members of the Senior Creditor Group each own material claims arising under swaps with LBIE documented under English law-governed and New York law-governed 1992 and 2002 ISDA Master Agreements. (Certain of them also hold claims arising under French law governed FBF Master Agreements, AFB Master Agreements, AFTB Master Agreements and AFTI Master Agreements and German law-governed German Master Agreements, which give rise to separate issues on which other experts are instructed.)
- 4.13 In late 2013, Wentworth announced that it had, through a joint venture with LBH12 and its ultimate parent Lehman Brothers Holdings, Inc., acquired substantial economic interests in the subordinated debt owed by LBIE to LBH12 and LBH12's equity interests in LBIE. It is therefore arguing for positions that will minimise claims to post-petition interest (as well as currency conversion claims) so that more of the surplus will flow to the subordinated debt and equity. Wentworth's interests are thus directly adverse to those of the Senior Creditor Group. It has instructed former New York Court of Appeals Judge Robert Smith as an expert witness in respect of matters of New York law.
- 4.14 In the light of position papers filed to date, it is expected that the Senior Creditor Group and Wentworth will respectively present full arguments on the issues arising in Part C. By contrast, the Administrators have to date taken limited positions in relation to such issues, on the basis that they consider that relevant arguments will be advanced by either the Senior Creditor Group or Wentworth. They have however reserved the right to make arguments of their own, and to instruct expert witnesses (including in respect of New York law) if they consider it appropriate to do so.
- 4.15 It is also expected that GSI will present arguments on certain of the Part C issues, as GSI (which is also a creditor of LBIE in respect of swaps documented under an ISDA Master Agreement) was joined to the proceedings by order of the Court on 23 June 2015 and granted permission to participate with respect to Issues 11-14 and 27 on the same procedural timetable as the Senior Creditor Group. However, its right to participate is expressly limited to the submission of evidence and the making of arguments which do not duplicate those made by the Senior Creditor Group.
- 4.16 York has a special interest in Part A issues as an ordinary unsecured creditor in respect of a certain claim, and is not expected to take part in the Part C hearing.

The ISDA Issues

- 4.17 Issues 10 - 16 and 18<sup>1</sup> of the Waterfall II Proceedings concern the default interest provisions of the 1992 and 2002 ISDA Master Agreements, and implicitly seek the determination of such issues under English law.
- 4.18 As per the Application, Issues 10 - 16 and 18 concern:
- (a) Whether, on the true construction of the term “Default Rate” as it appears in the ISDA Master Agreement, the “relevant payee” refers to LBIE’s contractual counterparty or to a third party to whom LBIE’s contractual counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement (**Issue 10**).
  - (b) Whether the meaning that should be given to the expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” is capable of including:
    - (i) The actual or asserted cost to the relevant payee to fund or of funding the relevant amount by borrowing the relevant amount; and/or
    - (ii) The actual or asserted average cost to the relevant payee of raising money to fund or of funding all its assets by whatever means, including any cost of raising shareholder funding; and/or
    - (iii) The actual or asserted cost to the relevant payee to fund or of funding and/or carrying on its balance sheet an asset and/or of any profits and/or losses incurred in relation to the value of the asset, including any impact on the cost of its borrowings and/or its equity capital in light of the nature and riskiness of that asset; and/or
    - (iv) The actual or asserted cost to the relevant payee to fund or of funding a claim against LBIE (**Issue 11**).
  - (c) If and to the extent that the “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund ... the relevant amount*” includes a cost of borrowing:
    - (i) Should such borrowing be assumed to have recourse solely to the relevant payee’s claim against LBIE or to the rest of the relevant payee’s unencumbered assets?
    - (ii) If the latter, should the cost of funding include the incremental cost to the relevant payee of incurring additional debt against its existing asset base or should it include the weighted average cost on all of its borrowings?
    - (iii) Should such cost include any impact on the cost of the relevant payee’s equity capital attributable to such borrowing?
    - (iv) Is the cost to be calculated based on obtaining: (i) Overnight funding; or (ii) Term funding to match the duration of the claim to be funded; or (iii) Funding for some other duration? (**Issue 12**).
  - (d) Whether the “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” should be calculated: (i) by reference to the relevant payee’s circumstances on a particular date; or (ii) on a

<sup>1</sup> The original Issue 17 has now been deleted.

fluctuating basis taking into account any changes in the relevant circumstances (and if so, whether the benefit of hindsight applies when taking into account such changes), in each case, whether or not taking into account relevant market conditions (**Issue 13**).

- (c) Whether a relevant payee's certification of its costs of funding for the purposes of applying the "Default Rate" is conclusive and, if not, to what it is subject. In particular whether, in order for a payee's certification to be deemed conclusive, a relevant creditor is under any duty to act: (i) reasonably; (ii) in good faith and not capriciously or irrationally; or (iii) otherwise than in its own interests (**Issue 14**).
- (f) If the answer to Issue 14 is that the relevant payee's certification of its costs of funding is not conclusive and one of the requirements (i) to (iii) set out in that question applies, where does the burden of proof lie in establishing, and what is required to demonstrate, that a relevant payee has or has not met such requirement? (**Issue 15**).
- (g) Whether only the relevant payee (in accordance with the meaning of such term determined pursuant to Issue 10), or another party (whether authorised by the relevant payee or not) can provide certification of the cost of funding and, if the former, what the position should be if the relevant payee is not capable of providing such certification (for example because it has been wound up or dissolved) (**Issue 16**).
- (h) Whether the power of a party under section 7(b) of the 1992 form ISDA Master Agreement to transfer any amount payable to it from a Defaulting Party under Section 6(c) without the prior written consent of that party included the power to transfer any contractual right to interest under that agreement (**Issue 18**).

The requirement for New York law expert evidence

- 4.19 Issue 19 asks whether the answers to Issues 10 - 16 and 18 would be decided any differently as a matter of New York law.
- 4.20 On 9 March 2015, the Court made an order that the Senior Creditor Group, Wentworth and the Administrators (if so advised) each be permitted to rely on expert evidence of New York Law for the purposes of assisting the Court in determining Issue 19 (the 9 March Order).
- 4.21 The Court further ordered that in preparing a report in relation to Issue 19, an expert on matters of New York law should consider the following:
  - (a) What principles of New York law are relevant when construing:
    - (i) The following expressions when used in the context of the term "Default Rate" in the ISDA Master Agreement:
      - (A) "relevant payee"; and
      - (B) "cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount"; and
    - (ii) Sections 6(d)(ii) and 7(b) of the 1992 ISDA Master Agreement?
  - (b) In construing a commercial document that contains standardised terms such as the ISDA Master Agreement, in what circumstances, if any, would a New York court consider market practice or understanding (and, if so, how, would "market" be defined) concerning the

transaction so documented, and what significance would a New York court ascribe to the market practice or understanding?

- (c) What principles of New York law would a New York court apply to determine whether or not a practice is a market practice or an understanding is a market understanding?
- (d) What principles of New York law are relevant when considering:
  - (i) Whether a relevant payee's certification of its cost of funding for the purposes of applying the "Default Rate" is conclusive;
  - (ii) If not, under what circumstances and on what bases can the Defaulting Party challenge the relevant payee's certification of its cost of funding;
  - (iii) How the cost of funding should be established in the event that the certifying party's certification is successfully challenged; and
  - (iv) In the event the relevant payee is not capable of providing or does not provide certification, who is entitled to provide certification of the cost of funding?

4.22 Due to a change in Wentworth's position, questions (b) and (c) listed above are no longer relevant, as Wentworth is no longer running an argument that the phrase "cost of funding" has a particular market or trade usage. Accordingly, you will not be required to address such questions.

4.23 As you will note, it is not envisaged (notwithstanding the way Issue 19 is phrased) that expert evidence will be given as to relevant differences between New York law and English law. Rather, it is envisaged that expert evidence will be given on the relevant principles of New York law so that the Court can determine whether the application of such principles gives rise to any difference in result relative to the application of English law.

4.24 Consistent with the proper ambit of expert evidence as to foreign law on matters of contractual interpretation, it is envisaged that any evidence should identify relevant principles of New York law and the ways in which such principles are engaged having regard to the issues of interpretation in question, rather than constitute reasoned opinion evidence as to the answers to such issues of interpretation under New York law.

4.25 A copy of the 9 March Order is included in Annex V to this letter, and the questions outlined above can be found at Schedule B. Paragraphs 11 – 18 of the 9 March Order set out a timetable in respect of expert evidence of New York law to which the parties and their expert witnesses must adhere. This timetable is described at paragraph 4.29 below.

**(b) Documents provided**

4.26 We enclose the following documents to assist you in respect of these instructions:

- (a) the Waterfall II application, filed with the High Court of Justice on 12 June 2014 and the revised application dated 13 May 2015 (provided in Annex I);
- (b) the ninth witness statement of Tony Lomas, one of the Administrators, which sets out the background to the Application as well as the issues regarding the construction of Rule 2.88 of the Insolvency Rules 1986 (see paragraph 40 ff) (provided in Annex II);
- (c) the position papers of (i) the Senior Creditor Group and (ii) Wentworth and the revised position paper of Wentworth (provided in Annex III). Neither York nor the Administrators currently adopts any position on Issues 10 – 18, so accordingly we have not provided the

position papers prepared by those parties, and GSI's position paper on issues 10 – 14 and 27 is not yet available (it has until 24 July to file it);

- (d) the reply position papers of (i) the Senior Creditor Group and (ii) Wentworth (provided in Annex IV);
  - (e) the 9 March Order (provided in Annex V);
  - (f) a copy of each of the (i) 1987 Interest Rate and Currency Exchange Agreement; (ii) 1987 ISDA Interest Rate Swap Agreement; (iii) 1987 User's Guide to the Standard Form Agreements; (iv) 1992 ISDA Master Agreement; (v) 1992 ISDA User's Guide to the Master Agreement; (vi) 2002 ISDA Master Agreement; and (vii) 2002 ISDA User's Guide to the Master Agreement (each provided in Annex VI); and
  - (g) a copy of the expert opinion of Robert S. Smith as to matters of New York law, filed and served by Wentworth on 26 June 2015 (provided in Annex VII).
- 4.27 Please let us know if you have any questions in respect of these documents, or require any additional information.

(c) *Outline of expert process and scope of work*

4.28 A typical court process for expert witness evidence involves the following steps:

- (a) drafting and exchange of expert reports (which, as detailed further below, will happen sequentially in this instance, with Wentworth having gone first);
- (b) review of expert evidence served by the other parties;
- (c) drafting of expert reply reports which respond to issues raised by the other parties' expert witnesses in their first reports;
- (d) meeting of the parties' expert witnesses;
- (e) joint statements by the parties' expert witnesses;
- (f) drafting of a supplemental report by each party's expert witnesses if necessary; and
- (g) attendance at the court hearing.

4.29 In these proceedings, the following timetable has been set down by the Court:

- (a) The trial will commence on 9 November 2015 and is expected to run for 7-10 business days.
- (b) Ahead of this trial date, the court has ordered that the parties and their New York law experts comply with the timetable set out below. Each date specified is the deadline, that is the latest date on which the specified event may occur:
  - (i) **26 June 2015** Wentworth to file and serve reports of their New York law expert.
  - (ii) **24 July 2015** If and to the extent the Senior Creditor Group considers necessary, the Senior Creditor Group shall file and serve a report of its expert in New York law.

- (iii) **14 August 2015** If and to the extent Wentworth considers it necessary, Wentworth to file and serve a report of its expert in New York law in reply.
- (iv) **28 August 2015** The Administrators (if so advised) file and serve a report of an expert of New York law.
- (v) **4 September 2015** To the extent required, the New York law experts hold a discussion for the purposes of (a) identifying the issues, if any, between them; and (b) where possible, reaching agreement on those issues.
- (vi) **18 September 2015** To the extent required experts to prepare and file a Statement for the Court showing (a) those issues on which they are agreed; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.
- (vii) **25 September 2015** To the extent required, the parties shall be at liberty to file short supplemental expert reports of New York law.

4.30 If the matter proceeds to trial, you may have to present oral evidence to the court, be cross-examined on your evidence and attend when the other parties' expert witnesses give their evidence. In the event that you are called to give expert evidence orally in court, you could be required to attend court in London on any one or more of the trial days and we will not know which day until closer to the time.

4.31 There is a mechanism for parties other than the Senior Creditor Group to pose questions to you. We will let you know when this is the case. The CPR includes an express requirement for written questions put to experts about their reports to be "proportionate".

**(d) Your report**

*Contents and timing of the report*

4.32 As noted above, Wentworth filed and served its expert report on 26 June 2015. You are asked to review that report and prepare your report in reply (if and to the extent the Senior Creditor Group considers such a reply necessary) for filing on **24 July 2015**. Please note that any delay in producing your report may result in costs penalties or the court not admitting your evidence.

4.33 Your report should be addressed to the Court and not to the Senior Creditor Group.

4.34 You agree that any expert report you produce will include the additional information or statements set out below:

- (a) a statement that you understand your duty to the Court and have complied and will continue to comply with this duty;
- (b) a statement that you are aware of the requirements of CPR 35, PD 35 and the Guidance;
- (c) the substance of all material instructions from us, whether written or oral, on the basis of which your report was written (we will assist you with this as it is essential that this statement is as complete and as accurate as possible); and

- (d) a statement of truth in the following form:

*"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."*

- 4.35 In addition to the matters set out above, in order to comply with paragraph 3.2 of PD 35, your report should also contain the following:

- (a) details of your qualifications;
- (b) details of any literature or other material on which you have relied in making the report;
- (c) a statement on who carried out any examination, measurement, test or experiment which you have used for the report, giving the qualifications of that person, and saying whether or not the test or experiment has been carried out under your supervision;
- (d) where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinion, and reasons for your own opinion;
- (e) an indication of which of the facts stated in the report are within your own knowledge;
- (f) a summary of the conclusions reached; and
- (g) if you are not able to give your opinion without qualification, the qualifications.

Duties in preparing the report

- 4.36 In addition to your overriding duty to the Court, by signing a copy of this letter you will be agreeing to comply with PD 35 including the Guidance. In particular:

- (a) your evidence will be an independent product uninfluenced by the pressures of litigation (for example you would express the same opinion if you were given the same instructions by another party);
- (b) you must aim to assist the Court by providing an objective, unbiased opinion on matters within your expertise, and should not assume the role of an advocate;
- (c) you should consider all material facts, including those which might detract from your opinion (and your report should include reference to facts and materials which detract from your opinion as well as facts that support it);
- (d) when addressing questions of fact and opinion, you must be careful to keep the two separate. You must state clearly the facts (whether assumed or otherwise) upon which you base your opinions and you should have primary regard to these instructions. You must distinguish clearly between the facts that you know to be true and the facts that you assume;
- (e) you should make it clear when a question or issue falls outside your expertise and when you are not able to reach a definite opinion, for example because you have insufficient information; and
- (f) if, after producing a report, you change your view on any material matter, this change of view should be communicated to all the parties without delay and, when appropriate to the court, so let us know immediately if this is the case.

**5. GENERAL**

- 5.1 The terms of this letter and any non-contractual obligations arising out of or in connection with this letter shall be governed by English law. The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with the terms of this letter and the parties submit to the exclusive jurisdiction of the English courts.
- 5.2 Please inform us before accepting these instructions if you do not consent to any of the above. Please also let us know as soon as possible if any of your details set out above are incorrect or change.

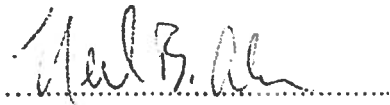
We look forward to working with you.

Yours faithfully

*Ropes & Gray Int'l LLP*

Ropes & Gray International LLP

I accept the instruction by the Senior Creditor Group as an expert in matters of New York law in connection with the Waterfall II Proceedings.

Handwritten signature of Neil B. Cohen in cursive, written over a dotted line.

Professor Neil Cohen

Date: 7 July 2015

**ANNEXURES**

*[provided in separate folder]*