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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration),

Plaintiff,

- against -

AG FINANCIAL PRODUCTS, INC.,

Defendant.

Index No. 653284/2011

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant AG Financial Products Inc.[1] submits this memorandum in support of its motion for summary judgment under CPLR § 3212 on the remaining causes of action asserted by Plaintiff Lehman Brothers International (Europe) (in administration) ("Lehman International") and on Assured's counterclaims.[2]

PRELIMINARY STATEMENT

Assured terminated the 28 credit derivative transactions still at issue in this lawsuit (the "Transactions") in July 2009 after Lehman International's default deprived Assured of the benefit of its bargain, namely Assured's contractual entitlement to receive periodic fixed premium payments from Lehman International for each Transaction through maturity from a counterparty not subject to an insolvency proceeding. To calculate the amount owed between the parties upon early termination under the Market Quotation provision of the ISDA Master Agreement that governed each of the Transactions, Assured engaged Henderson Global Investors ("Henderson"), a preeminent investment advisory firm, to conduct an auction soliciting bids from leading market participants to enter into Lehman International's shoes in replacement derivative transactions with Assured. None of these participants, however, submitted bids.

The contract therefore granted Assured, as the non-defaulting party, the exclusive right to determine the termination amount based on its "Loss" in connection with the Transactions, along with the flexibility and discretion to choose among various approaches for calculating that "Loss." Assured chose to determine its Loss based on its "loss of bargain," as the contractual definition of Loss expressly entitled it to do. Specifically, Assured calculated the present value of the fixed premium payments that Lehman International would have been

[1] AG Financial Products Inc., together with its affiliate, Assured Guaranty Corp., is referred to herein as "Assured."

[2] The Court dismissed in its entirety Count One of Lehman International's complaint, which asserted a claim for breach of the implied covenant of good faith and fair dealing based on Assured's termination of nine credit derivative transactions in December 2008. See Decision/Order at 17, Mar. 12, 2013, NYSCEF No. 31 (hereinafter "Dismissal Order").

required to pay to Assured over the remaining duration of the Transactions, and deducted the amounts Assured expected to pay to Lehman International based on expected future shortfalls in principal or interest payments on the securities underlying the Transactions, which yielded a net termination amount payable to Assured by Lehman International of approximately $25 million. We now know how Assured's loss models have performed over the many years following termination, and they have proven to be remarkably accurate.[3]

Nevertheless, Lehman International has challenged the manner in which Assured conducted the auction and Assured's determination of Loss, and, in a display of considerable chutzpah, Lehman International seeks – based on its own default – a windfall payment from Assured of hundreds of millions of dollars of theoretical "losses" it never, in fact, suffered.[4] Both of Lehman International's remaining claims are fundamentally flawed: (1) there is no support for its allegations – which the record now shows to be baseless and illogical – that Assured breached the implied covenant of good faith and fair dealing in conducting the auction; and (2) Lehman International's breach of contract claim with respect to Assured's Loss calculation not only lacks any factual foundation, but also represents a blatantly improper attempt to rewrite the express contractual terms of the Transactions.

Recent case law makes clear that the proper standard for evaluating Assured's calculation of the termination amount is whether Assured acted in good faith and whether there was a rational basis for its calculation. Assured's determination of Loss necessarily satisfies this standard because Assured applied precisely the same methodology it used across its business to

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[3] Ex. 4, Goldin Report ¶ 33 ("[T]he actual performance of the Underlying Securities to date further confirms that Assured's predictions of *de minimis* loss (less than 1% of principal) were both reasonable and accurate.").

[4] Lehman International originally claimed it was entitled to "approximately $1.4 billion" in its Complaint; although, a portion of that amount was attributable to its claim challenging Assured's termination of nine additional credit derivative transactions in December 2008, which the Court has dismissed, the bulk of the reduction is due to the inability of Lehman International's experts even to attempt to defend the damages calculation on which Lehman International relied when it brought its Complaint.

calculate the amounts that it would have owed Lehman International under the Transactions (which is the only portion of its Loss calculation that Lehman International has challenged). Moreover, discovery has confirmed that Assured's calculations are also consistent with Lehman International's own candid internal assessments of the expected performance of these Transactions before it commenced this lawsuit.

Accordingly, the Court should grant Assured summary judgment on Counts Two and Three of Lehman International's complaint, and should award Assured judgment on its first and second counterclaims for breach of contract and for attorneys' fees and costs.

BACKGROUND

1. The Parties

Assured is a New York-based company that provides credit enhancement products to the structured finance and mortgage markets. Lehman International was an international financial services firm and the primary European broker-dealer for its parent company, Lehman Brothers Holdings Inc. ("LBHI"). On September 15, 2008, Lehman International filed for insolvency protection and entered into administration in the United Kingdom.

2. The Transactions

The parties entered into the 28 Transactions between 2005 and 2008. Under the Transactions, Lehman International purchased credit protection from Assured on senior tranches of various asset-backed securities. Fourteen Transactions referenced prime UK residential mortgages ("UK RMBS"); twelve Transactions referenced US corporate loans and debt obligations ("CLOs"); and two Transactions referenced subprime US residential mortgages ("ABX") (together, the "Underlying Securities").

At the time the parties entered into the Transactions, all of the Underlying Securities were AAA-rated senior notes. Ex. 5, Prager Dep. at 252:21-22. Consistent with its monoline business model, Assured underwrote the Transactions to a zero-loss standard, determining that the risk of credit loss on the Underlying Securities was extremely remote, Ex. 4, Goldin Report ¶¶ 17-18, 28-30, and it entered into the Transactions on a "hold-to-maturity" basis, i.e., with the intention to hold the Transactions through their maturity rather than trading the positions in the market. Id. ¶ 16 & n.12.

3. The Agreement

Each of the Transactions is governed by a standard form contract entered into between Lehman International and Assured on April 7, 2000,[5] based on a template published in 1992 by the International Swaps and Derivatives Association ("ISDA"), and a schedule thereto (together, the "Master Agreement"). Ex. 7, Master Agreement; Ex. 8, Schedule.[6] Each individual Transaction was executed under a separate confirmation (each, a "Confirmation" and, together with the Master Agreement, the "Agreement"). Exs. 9-36, Confirmations.

Fixed and Floating Payments: The Agreement provides that Lehman International, as protection buyer, would make periodic premium payments to Assured ("Fixed Payments"), see, e.g., Ex. 11, Confirmation (ARKLE 2006-2X 3A2) § 2, and Assured, as protection seller, would make payments to Lehman International upon the occurrence of credit events with respect to the Underlying Securities, i.e., if the obligors on the Underlying Securities failed to pay ("Floating Payments"), id. § 3. Assured's Floating Payment obligations for the UK

[5] The Master Agreement was originally executed between Lehman International and ACE Capital RE Overseas Ltd. These parties then executed a novation on December 11, 2001, whereby Assured assumed ACE Capital's rights and obligations under the Master Agreement. Ex. 6, Assignment, Assumption and Termination Agreement.

[6] Unless otherwise noted, all exhibits referenced herein are attached to the Affirmation of Kimberly J. Brunelle in Support of Defendant's Motion For Summary Judgment, dated February 22, 2016. All capitalized terms not defined herein have the meaning ascribed to them in the Master Agreement, as defined below.

RMBS and CLO Transactions were subject to a "Pay-As-You-Go" settlement structure, pursuant to which payments for interest shortfalls were due on a periodic basis, while payments for principal shortfalls were not due until the final maturity of the Transactions.[7] Id. § 4.

Collateral: Consistent with its monoline status, Assured did not assume any obligation to post collateral in connection with the Transactions, and the parties accordingly did not enter into a Credit Support Annex. See Ex. 4, Goldin Report at 17 & n.34.

Termination Provisions of the Agreement: The Agreement provides that either party may terminate the Transactions if an Event of Default enumerated in the Agreement occurs with respect to the other party. Ex. 7, Master Agreement § 6(a). The Master Agreement defines Events of Default to include events in which "[the party] seeks or becomes subject to the appointment of an administrator . . . for all or substantially all its assets." Id. § 5(a)(vii)(6).

In the event of an early termination, the Parties elected to calculate the termination amount using the "Second Method and Market Quotation" method. See Ex. 8, Schedule Part 1(f). The Agreement grants the Non-defaulting Party the exclusive right to calculate the termination amount, which depending upon the circumstances may be owed by the Defaulting Party to the Non-defaulting Party, or vice versa. Ex. 7, Master Agreement § 6(e)(1).

Under the "Second Method and Market Quotation" approach, the Non-defaulting Party must first attempt to calculate the termination amount using the Market Quotation method, pursuant to which the Non-defaulting Party must seek quotations from Reference Market-makers (defined as leading dealers in the relevant market) to step into the shoes of the Defaulting Party

[7] Thus, for the UK RMBS Transactions, whose legal final maturity spanned from 2021 through 2056, Assured would not owe payments for principal shortfalls in the underlying UK RMBS for between 13 and 48 years. Exs. 11-24, Confirmations (UK RMBS Transactions) § 1. Similarly, for the CLO Transactions, whose legal final maturity spanned from 2012 through 2020, Assured would not owe payments for principal shortfalls on the underlying CLOs for between 7 and 14 years. Exs. 25-36, Confirmations (US CLO Transactions) § 1. The ABX Transactions were similarly structured to the UK RMBS and CLO Transactions, except that Assured could be required to make floating payments based on principal shortfalls before final maturity in the event of an implied writedown. Exs. 9-10, Confirmations (ABX Transactions) § 4.

for a replacement transaction. See id. § 14 ("Market Quotation" definition). The Agreement requires the Non-defaulting Party to request quotations "as soon as reasonably practicable after the relevant Early Termination Date." Id. However, "[i]f fewer than three quotations are provided, it will be deemed that the Market Quotation . . . . cannot be determined." Id.

In that event, the Agreement requires the Non-defaulting Party to calculate its "Loss." Id. § 14 ("Settlement Amount" definition). The Loss definition, in its entirety, states:

> "Loss" means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(l) or (3) or 6(e)(ii)(2)(A) applies. Loss does not include a party's legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

Id.

4. Event of Default

On September 15, 2008, Lehman International entered into administration by order of the High Court Chancery Division of England and Wales, which constituted an Event of Default under the Agreement. Id. § 5(a)(vii)(6). On July 23, 2009, Assured notified Lehman International that its entry into administration constituted an Event of Default under the Agreement, and designated July 23, 2009 as the Early Termination Date for the Transactions. Ex. 37, Notice Designating an Early Termination Date.

5. Market Quotation

Assured engaged the assistance of a preeminent investment advisory firm, Henderson, to design and execute an auction of the Transactions "intended to satisfy the ISDA Market Quotation process." Ex. 38, Henderson Report at 2. Henderson prepared a list of potential bidders for Assured's consideration, taking into account the various requirements of the Market Quotation process, as well as the optimal investor base and number of financial institutions to solicit. Id. at 4. Henderson distributed a copy of Assured's standard non-disclosure agreement ("NDA") to eleven potential bidders in advance of the auction, each of which executed the NDA.[8] Id. at 4-5. Each of the potential bidders also received a bidding procedures letter that described the procedures and rules of the auction, and was based upon models that Henderson had used in prior auctions, including with some of the same bidders. Id. at 19-29. Assured ultimately solicited bids from ten financial institutions that had actively participated in the market for RMBS and CLOs, and credit default swaps ("CDS") on these instruments. Id.

Based on consultation with KPMG LLP ("KPMG"), which also assisted with the process, and Henderson, Assured decided to hold the auction on September 16, 2009, to allow sufficient time to select bidders, design the auction procedures and mechanics and provide the bidders adequate time to review the relevant information and perform diligence on the Transactions. Ex. 39, KPMG Report at 3-4. KPMG also advised that interest in the auction would be reduced in August due to the holiday period, during which time many of the banks' key decision-makers would be away. Id.

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[8] These were Barclays Bank plc ("Barclays"); Citibank Global Markets Limited ("Citibank"); Credit Suisse International ("Credit Suisse"); Deutsche Bank AG ("Deutsche"); HSBC Bank plc ("HSBC"); JPMorgan ("JPMorgan"); Merrill Lynch International ("Merrill Lynch"); Morgan Stanley & Co. International plc ("Morgan Stanley"); Nomura International plc ("Nomura"); Royal Bank of Scotland plc ("RBS"); and UBS AG ("UBS").

Despite Assured's diligent efforts to obtain quotations on the Transactions, none of the potential bidders chose to submit bids at the auction on September 16, 2009. See Ex. 38, Henderson Report at 2.

6. Loss

Because a Market Quotation could not be determined, see Ex. 7, Master Agreement § 14 ("Market Quotation" definition), Assured determined Loss for the Transactions based on its "loss of bargain" as expressly contemplated in the Agreement, i.e., the present value of the amount Assured would have been owed or would have been required to pay under the Agreement if both parties had continued to perform under the Agreement for its duration (which was consistent with Assured's business model). Specifically, Assured calculated its Loss to be the present value of the anticipated Fixed Payments – i.e., premium payments owed by Lehman International – minus the present value of the anticipated Floating Payments – i.e., any shortfalls in timely interest and ultimate principal payments on the Underlying Securities payable by Assured. See Ex. 40, Statement of Calculations at 4. Assured determined that the present value of expected future Fixed Payment amounts totaled $35,191,751.62, and that the present value of expected future Floating Payment amounts totaled $23,441,145.00. Id. Assured thus calculated its net Loss in connection with the Transactions to be $11,750,606.62 payable to Assured by Lehman International. Id. Annex B.

Assured further determined that Lehman International owed $13,049,366.23 in Unpaid Amounts to Assured. These Unpaid Amounts "consist[ed] of the aggregated Fixed Amounts that were due and unpaid as of the Early Termination Date plus interest from the respective due date of each such Fixed Amount through the Early Termination Date at the Applicable Rate." Id. Assured determined the termination amount based on the sum of its Loss

in connection with the Transactions (i.e., $11,750,606.62) and the Unpaid Amounts owed to it by Lehman International as of the Early Termination Date (i.e., $13,049,366.23). Id. Accordingly, on October 16, 2009, Assured delivered a Statement Pursuant to Section 6(d)(i) of the ISDA Master Agreement ("Statement of Calculations"), notifying Lehman International that it owed Assured $24,799,972.85 plus interest in connection with the Transactions (the "Termination Amount"). Id. at 5.

In calculating the anticipated Floating Payments, Assured applied the same methodology it used to determine regulatory loss reserves for the quarter ending September 30, 2009. Id. at 5. Consistent with its obligations as a regulated insurance company, Assured maintained an independent loss reserve process subject to multiple layers of oversight. Each quarter, its Reserve Committee – comprised of the Chief Executive Officer, Chief Financial Officer, President and Chief Operating Officer, Chief Actuary, Chief Surveillance Officer, General Counsel and Chief Accounting Officer – set and reviewed the loss reserve process and assumptions. Ex. 41, Assured Guaranty Ltd. 10-K 2009 at 18-19. The Reserve Committee determined assumptions, loss scenarios and probability weights that it believed to be reasonable based on past assumptions and current market information. Ex. 42, Rosenblum Dep. at 52:16-53:24. This methodology and process were further reviewed and approved by Assured's Audit Committee (comprised of senior directors), its Chief Actuary, Benjamin Rosenblum, and its independent auditor, PricewaterhouseCoopers.

Assured's loss reserve methodology formed the basis for its financial reporting: informing investors of financial performance and determining credit impairment for reporting under Securities and Exchange Commission and Maryland insurance regulations. The loss reserve methodology was also used to monitor the credit quality of transactions and to determine

whether transactions required increased surveillance or remedial action. Ex. 41, Assured Guaranty Ltd. 10-K 2009 at 18-19.

ARGUMENT

I. THE COURT SHOULD GRANT ASSURED SUMMARY JUDGMENT DISMISSING COUNT THREE OF THE COMPLAINT

Lehman International's claim for breach of the implied covenant of good faith and fair dealing in Count Three of its Complaint is premised on the demonstrably false allegation that Assured "acted to bypass the parties' selection of Market Quotation . . . by making the use of Market Quotation impossible." Ex. 1, Compl. ¶ 15. Specifically, Lehman International alleges that by requiring bidders to "sign confidentiality agreements and agree to burdensome bidding procedures," Assured "effectively discourag[ed] them from submitting bids." Id. There is no evidence in the record to support this claim, and it should be dismissed.[9]

A. There Is No Evidence That Assured Conducted the Market Quotation Auction in Bad Faith

As this Court has previously held, to the extent that a contract confers discretion on a party, the implied covenant of good faith and fair dealing "requires that the discretion not be exercised in bad faith so as to deprive the other party of the benefits of the contract." Dismissal Order at 3 (citing Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995)). However, "[n]o obligation can be implied . . . which would be inconsistent with other terms of the contractual

[9] The Court previously held that Lehman International cannot maintain its implied covenant claim based on alleged delay by Assured in declaring an Event of Default or in seeking quotations in the Market Quotation auction because, in each instance, Assured's actions were consistent with its express rights under the Agreement. See Dismissal Order at 9-10. Even if Lehman International had attempted to assert a claim for breach of contract based on Assured's timing in seeking quotations, that claim would fail as there is no evidence that Assured's selection of September 16, 2009 as the auction date was unreasonable. To the contrary, the record shows numerous rational, good faith bases for Assured's decision to hold the auction on that date, including because doing so allowed sufficient time for Assured and its advisors to select bidders and design the auction and for bidders to perform diligence on the Transactions, and because KPMG advised Assured that many key decision-makers at the relevant banks would have been on summer holiday during the month of August. See, e.g., Ex. 39, KPMG Report at 3-4; see also Ex. 43, Irvine Dep. at 66:17-67:8.

relationship." Id. (citing Murphy v. Amer. Home Prods. Corp., 58 N.Y.2d 293, 304 (1983)). After four years of discovery, the production of hundreds of thousands of pages of documents by Assured and Henderson, and depositions of twelve current and former Assured and Henderson employees, there is no evidence on which a reasonable fact finder could conclude that Assured acted in bad faith in designing or conducting the Market Quotation auction. See Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (N.Y. 1980) (citations omitted) ("[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to oppose a motion for summary judgment.). The undisputed facts show the very opposite: Assured and its counsel retained highly qualified independent firms, Henderson and KPMG, to advise on, design, and conduct an auction "intended to satisfy the ISDA Market Quotation process," Ex. 38, Henderson Report at 2, "the overall aim [of which] was to find a replacement counterparty to step into the shoes that Lehman [International] had left vacant." Ex. 44, Irvine Dep. at 47:3-47:5.

As an initial matter, Assured had a strong incentive to conduct a successful auction. As Michael DiRende, a managing director at Assured, explained, "We wanted a successful auction because a successful auction meant that proceeds went to [Lehman International's] estate and that [Assured would] continue on receiving our premium going forward." Ex. 45, DiRende Dep. at 197:25-198:6.

Consistent with this objective, in each aspect of the Market Quotation process where the Agreement provided Assured, as the Non-defaulting Party, with discretion, the undisputed evidence shows that Assured exercised that discretion in a manner that was reasonably calculated to increase the likelihood of a successful auction.

- The Agreement required Assured to seek "quotations from leading dealers in the relevant market, known as 'Reference Market-makers,' to 'step into the shoes' of

the Defaulting Party for a replacement transaction." Dismissal Order at 11. It is undisputed that Assured, in consultation with its advisors, solicited bids from numerous financial institutions that had actively participated in the market for RMBS and CLOs, and CDS on these instruments. Furthermore, in selecting bidders, "Henderson took into account the extent to which the Bidders had access to a wide and deep client investor base, as well as the Bidder's own potential appetite to invest in the Portfolio." Ex. 38, Henderson Report at 4; see also Ex. 46, Irvine Dep. at 63:17-21.[10]

- There is no evidence that Assured acted in bad faith in designing the auction procedures. Rather, Assured, together with Henderson, put into effect uniform procedures for all bidders that were consistent with market practice generally, including use of a standard non-disclosure agreement ("NDA") and commonly used procedures for the submission of bids at the auction. As Jim Irvine, the Head of Structured Investments at Henderson, who was primarily responsible for managing the auction, testified, [redacted] Ex. 48, Irvine Dep. at 83:8-13. Moreover, each of the potential bidders executed the NDA. Ex. 38, Henderson Report at 5.

- Similarly, the bidding procedures letter, which described the procedures and rules of the auction and which each of the bidders received, was based upon models used by Henderson in prior auctions, including with some of the same bidders. Ex. 38, Henderson Report at 19-29. Irvine testified that [redacted] Ex. 49, Irvine Dep. at 95:3-6; Ex. 50, Irvine Dep. at 104:13-16.

B. There Were Numerous Compelling Reasons Wholly Unrelated to the Design of the Auction for the Bidders To Choose Not To Submit Bids

Not only are Lehman International's allegations that Assured breached the implied covenant of good faith and fair dealing by "discourag[ing]" bidders from submitting bids illogical and contrary to the record, but they are also highly implausible given the extensive

[10] While the Market Quotation definition only requires that the Non-defaulting Party receive quotations from three leading dealers in the market, Henderson advised Assured to solicit additional bidders because it "recognis[ed] that identifying potential Bidders willing to enter into a transaction with a monoline insurer could be challenging" at that time. Ex. 38, Henderson Report at 4. [redacted] See Ex. 47, Irvine Dep. at 69:6-14.

record evidence that bidders had compelling reasons not to bid on the Transactions which were completely unrelated to the design of the auction. Specifically, Assured's expert Dr. Craig Pirrong has submitted an expert opinion – which Lehman International has not even attempted to rebut – that "[t]he absence of bids . . . reflected a lack of appetite to purchase protection on the specific high-quality underlying reference obligations at issue from a monoline insurer during the financial crisis."[11] Ex. 52, Pirrong Report at 39.

No fewer than six of the potential bidders expressly stated that they declined to submit bids based on an aversion to monoline credit risk generally or to facing Assured as a counterparty specifically. Id. at 40-41 (collecting relevant quotations). Further, as Dr. Pirrong has explained, this lack of appetite for the Transactions is consistent with market conditions during this period: "There continued to be a great deal of uncertainty in the financial markets in 2009, and most market participants viewed the monoline industry generally as posing significant potential credit risk." Id. at 40.

The absence of bids is also consistent with Lehman International's own internal assessment of the Transactions, as well as its inability to novate or obtain firm bids on the Transactions. Lehman International itself has repeatedly recognized that the non-standard documentation (i.e., the lack of collateral posting and the back-ended timing of Assured's payment obligations for principal shortfalls for the UK RMBS and CLO transactions) substantially eroded the potential value of these contracts.

First, shortly after certain of the UK RMBS Transactions were executed, Lehman's Global Head of Valuation Control, Neeraj Chopra – described by a current Lehman International employee as

[11] Assured's experts Harrison Goldin and David Prager concur: "Market participants' distaste for monoline exposure greatly decreased the value of financial guarantee insurance. The results of the auction held by Assured confirm this fact . . . ." Ex. 51, Goldin Rebuttal Report ¶ 72.

Ex. 53, Fraser Ker Dep. at 126:17-19 – instructed his colleagues to create a modified formula to value those Transactions because "the valuation formula Lehman generally applied to credit default swaps on asset-backed securities . . . was not an appropriate model to value the Assured Transactions" and "did not adequately account for the unique characteristics of the transactions." Ex. 54, Chopra Aff. ¶¶ 6-8. In addition to the non-standard documentation issues described above, Chopra noted the significance of "correlation risk," also known as wrong-way risk, on those Transactions – that is, the correlation between the highly-rated Underlying Securities defaulting (and therefore, payments being due from Assured on the Transactions) and Assured's default on its payment obligations. Id. at ¶ 7. Specifically, because the high quality reference obligations on which Assured provided protection were unlikely to experience substantial losses except in a severe and sustained economic crisis, there was a significant risk that if such a crisis occurred, the losses across Assured's portfolio would be so widespread that Assured would not be able to meet its obligations. See Ex. 51, Goldin Rebuttal Report at 33.

Second, See Ex. 55, Assured Guarantee – LBIE Swap Exposure Valuation and Alternatives. Lehman International concluded that Id. Eduardo Viegas, Head of the Valuation and Governance Team at Lehman International with oversight on the memorandum, conceded, Ex. 56, Viegas Dep. at 146:12-15.

Third,

See Ex. 57, Copley Dep. at 82:13-20; Ex 58, Radicopoulos Dep. at 194:5-6.

See Ex. 59, Rioja Finance: Summary of Indicative Terms and Conditions. Despite these efforts, Lehman International failed to find any interest in the market.

Fourth, [12] See Ex. 62, Copley Dep. at 148:18-20; Ex 63, Viegas Dep. at 220:8-14.

See Ex. 64, Pirrong Rebuttal Report at 10.

See, e.g., Ex. 65, J. Quintas Email (July 24, 3009) at 1; Ex. 66, J. Miles Email (July 29, 2009) at 1; Ex. 67, J. Miles Email (July 30, 2009).[13]

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[12] See Ex. 60, Viegas Dep. at 108:10-20. See Ex. 61, Viegas Dep. at 200:14-21

[13] Ex. 52, Pirrong Report at 33-34 ("An indicative bid, by definition, is merely an indication of pricing; it is not a price at which the bidder is willing to actually transact. Indicative bidders have little or no incentive to make commercially reasonable bids because they incur no cost or risk when bidding inaccurately, nor do they receive any benefit from bidding accurately. In addition, indicative bidders generally do not take into account counterparty credit risk, which is a key determinant of the value of bespoke CDS transactions . . . .").

Finally, [redacted]

[redacted] Ex. 68, Niculescu Rebuttal Report § 5.1; see also Ex. 69, Rahl Rebuttal Report ¶ 81.

II. THE COURT SHOULD GRANT ASSURED SUMMARY JUDGMENT DISMISSING COUNT TWO OF THE COMPLAINT

Lehman International has no support for its attempts in Count Two of the Complaint to challenge Assured's decision to determine its Loss based on a "loss of bargain" methodology or to dispute the reasonableness of Assured's calculation of the Loss amount.

A. Assured Did Not Breach the Agreement by Choosing To Determine Loss Based on Its "Loss of Bargain"

In the absence of a Market Quotation, it is undisputed that the Agreement required Assured to determine its Loss as a result of Lehman International's default. See Ex. 7, Master Agreement § 14 ("Settlement Amount" definition). Assured chose to determine its Loss based on its "loss of bargain" by calculating the amount necessary to place Assured in the same economic position it would have occupied if Lehman International had performed its obligations with respect to the Transactions. Lehman International challenges Assured's election of this methodology by arguing erroneously that the Agreement requires Assured to determine its Loss "by reference to market pricing information." Ex. 1, Compl. ¶ 6. The Agreement, however, includes no such requirement. To the contrary, the Agreement expressly confers on Assured, as the Non-defaulting Party, the exclusive right and discretion to choose among a variety of approaches for determining its Loss, including based on benefit-of-the-bargain damages.

"It is a fundamental principle that 'when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.'" Trans-Packers Servs. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 651711/2010, 2014 N.Y. Misc. LEXIS 3656, at *5 (N.Y. Sup. Ct. Aug. 11, 2014) (Friedman, J.) (citing Vermont

Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (N.Y. 2004)). Further, New York law is well settled that where "the parties' agreement is facially unambiguous," a party may not "introduce evidence of custom or practice to subvert the agreement's plain meaning." AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co., 10 A.D.3d 293, 295 (N.Y. App. Div. 1st Dep't 2004); see also Keiler v. Harlequin Enters. Ltd., 751 F.3d 64, 69 (2d Cir. 2014) ("[I]ndustry practice may not be used to vary the terms of [a complete and unambiguous] contract"); Nomura Asset Acceptance Corp. Alt. Loan Trust v. Nomura Credit & Capital, Inc., No. 653390/2012, 2014 N.Y. Misc. LEXIS 2905, at *29 (N.Y. Sup. Ct. June 26, 2014) (Friedman, J.) (rejecting extrinsic evidence in interpreting contract where the relevant provision was unambiguous).

The terms of the Loss provision in the Agreement here unambiguously grant Assured the exclusive right to determine its Loss in connection with the Transactions, and the flexibility to choose – at its sole discretion – how to calculate that amount:

- First, the provision defines the Non-defaulting Party's Loss as the "amount that party reasonably determines in good faith to be its total losses and costs." Ex. 7, Master Agreement § 14 ("Loss" definition) (emphasis added).
- Second, the Loss definition provides that the Non-defaulting Party may, "at [its] election . . . but without duplication," choose among various approaches to make that determination, including "loss of bargain," "cost of funding," and "loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position." Id.
- Third, the final sentence of the Loss definition flatly contradicts Lehman International's contention that Loss must be calculated by reference to market prices, stating: "A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets." Id. (emphasis added).

Thus, the Loss definition – agreed to without modification by the parties – expressly provides that Assured may elect to determine its Loss based on its "loss of bargain," as it did here, and

that Assured "need not[] determine its Loss by reference to" market pricing. Id.[14]

Lehman International's argument that Assured was contractually required to determine Loss based on market pricing not only lacks any textual foundation in the Agreement, but it has also been recently rejected by the United States Bankruptcy Court for the Southern District of New York. Faced with a nearly identical argument advanced by Lehman International's U.S. affiliates in Lehman Brothers Holdings v. Intel Corp., that court held:

> On the face of the ISDA Master's definition of "Loss," Intel [i.e., the Non-defaulting Party] has broad discretion in determining its Loss, so long as its methodology is reasonable and in good faith . . . . Further, there is nothing in the text of the definition of Loss that explicitly mandates any particular calculation method or otherwise modifies the plain meaning of that first sentence of the definition – that the non-defaulting party is permitted to calculate its loss reasonably and in good faith.

No. 08-13555 (SCC), 2015 WL 7194609 at *10 (Bankr. S.D.N.Y. Sept. 16, 2015).[15]

Furthermore, ISDA, the organization responsible for drafting and promulgating the 1992 Master Agreement, has confirmed that it specifically intended the Loss definition to provide this broad discretion and flexibility. In its User Guide to the 1992 Master Agreement, ISDA describes the Loss provision as "provid[ing] parties with greater flexibility in measuring their payments on early termination." Ex. 72, ISDA 1992 User Guide at 23 (emphasis added); see also Intel, 2015 WL 7194609 at *11 ("[T]he ISDA User's Guide makes clear that Loss is intended to provide parties flexibility in selecting a method to calculate their Early Termination Payments . . . ."). More recently, ISDA elected to file an amicus brief in Intel in response to the

[14] Lehman International's expert Cynthia Parker candidly testified in her deposition that [redacted] Ex. 70, Parker Dep. at 82:17 (emphasis added).

[15] Intel involved a Loss calculation under a 1992 ISDA Master Agreement on a forward share repurchase agreement. 2015 WL 7194609 at *1. Intel, as the Non-defaulting Party, determined its Loss based on its initial $1 billion investment in the repurchase of the shares, plus "unearned" interest. Id. The court rejected the argument put forth by Lehman International's U.S. affiliate that the Loss definition required Intel to value the transaction based on the fair market value of the shares at the time. Id. at *20.

"highly restrictive" interpretation of Loss advanced by Lehman International's U.S. affiliates, that Loss must be determined based on market pricing. ISDA (like the bankruptcy court) rejected that interpretation, explaining that "Loss was not intended to be a one-size-fits-all provision, and its misinterpretation as such would rob the provision of the important freedom it is intended to convey." Ex. 72, ISDA Amicus Brief at 4. Rather, "Loss is intended . . . to have an expansive meaning – and, most importantly, to allow parties to, within the scope of applicable law, craft a measure of damages suitable to their circumstances." Id. The Intel court adopted the views expressed by ISDA, holding that "the descriptions of Loss in the ISDA Master and the ISDA User's Guide are not consistent with a mandatory methodology for calculating Loss."[16] 2015 WL 7194609, at *15.

Nor is there any basis for Lehman International to challenge the "loss of bargain" methodology used by Assured here, which is based on well-established New York law defining "'benefit of the bargain' damages [as] the amount necessary to place the [non-breaching party] in as good a position as it would have been in had the [breaching party] fully performed the contract." Clarendon Nat'l Ins. Co. v. GWTA Ins. Servs., 00 Civ. 5620 (DLC) (THK), 2002 U.S. Dist. LEXIS 18817, at *10 (S.D.N.Y. Aug. 1, 2002); see also Sager v. Friedman, 270 N.Y. 472, 481 (N.Y. 1936) ("The measure of damages which flows from a breach of contract is the difference between the value of what has been received under the contract and the value of what would have been received if the contract had been performed according to its terms."); Boyce v.

[16] In essence, Lehman International asks the Court to ignore these authorities and to rewrite the Loss definition to eliminate the express, bargained-for contractual protections that the definition grants to Assured as the non-breaching party. The only basis that Lehman International provides for radically rewriting the contract is purported industry practice, [redacted] See Ex. 1, Compl. ¶ 6 (alleging that Assured "ignored the standard industry practice of relying on market prices to determine Loss"); Ex. 73, Rahl Report § 6, Yet, even if Lehman International could establish (which it cannot) that there was a fixed and uniform industry practice for determining Loss known to the parties at the time the contract was executed, black-letter law precludes Lehman International from using such "custom and practice" evidence to alter the express contractual terms. See, e.g., Keiler, 751 F.3d at 69; Nomura Asset Acceptance Corp. Alt. Loan Trust, No. 653390/2012, 2014 N.Y. Misc. LEXIS 2905, at *29.

Soundview Tech. Grp., Inc., 464 F.3d 376, 384 (2d Cir. 2006) ("[D]amages for breach of contract should put the [non-breaching party] in the same economic position he would have occupied had the breaching party performed the contract.") (internal citation omitted).[17]

Consistent with these well-settled principles, Assured determined its Loss by calculating the amount necessary to place it in the same economic position it would have occupied if Lehman International had performed its obligations under the Transactions through maturity. Specifically, Assured calculated the present value (as of the Termination Date) of the expected Fixed Payment amounts – i.e., periodic fixed premium payments that Lehman International would have owed to Assured under each of the Transactions. Assured then subtracted the present value (as of the Early Termination Date) of the expected Floating Payment amounts it would have owed Lehman International based on expected interest and principal shortfalls on the Underlying Securities, if any.[18] This approach of calculating the discounted present value of the net cash flows that would have been owed if Lehman International had performed its contractual obligations reflects precisely the benefit of the bargain that Assured lost as a result of Lehman International's default. It is thus consistent with both the language of the Loss definition, which explicitly permits Assured to determine its Loss based on its "loss of bargain," and with the underlying goals of the Loss definition, as articulated by ISDA.

In sum, there can be no factual dispute that Assured properly exercised its express rights under the Agreement by choosing to determine its Loss based on its "loss of bargain."

[17] A leading commentator likewise describes the "objective" of the Loss provision as "ascertain[ing] what amount is necessary to put that party in the position it would have been in if the terminated transactions had been fully performed . . . . [T]his is intended to mirror the overriding principle that applies at common law to the assessment of damages, i.e., to provide compensation for the claimants' loss." Simon Firth, Derivatives: Law and Practice 11.88 (2015).

[18] In accordance with the Agreement, Assured further determined that Lehman International owed $13,049,366.23 in Unpaid Amounts to Assured. These Unpaid Amounts "consist of the aggregated Fixed Amounts that were due and unpaid as of the Early Termination Date plus interest from the respective due date of each such Fixed Amount through the Early Termination Date at the Applicable Rate." Ex. 40, Statement of Calculations at 5.

B. There Is No Factual Dispute That Assured's Calculation of Its Loss of Bargain Meets the Contractual Requirements of Reasonableness and Good Faith

Lehman International's only conceivable basis for challenging Assured's determination of Loss is by establishing that no reasonable party could have calculated the loss of bargain in the particular way Assured did here. Yet there are no facts to support this challenge. The undisputed evidence demonstrates that Assured relied on the same methodology it regularly uses throughout its business to calculate expected losses on all of its transactions, that its calculations have proven remarkably accurate when compared with the actual performance of the Transactions in the years following Lehman International's default (in stark contrast to the unrealistic valuations proposed by Lehman International's expert), and that Assured's calculations are consistent with Lehman International's own contemporaneous internal loss projections. Nor is there anything in the record to suggest that Assured acted in bad faith in calculating Loss.

1. Any Calculation of Loss for Which There Is a Rational Basis Satisfies the Reasonableness Requirement in the Loss Definition

The text of the Loss definition, its structure (e.g., its inclusion of a non-exhaustive list of available methodologies), its interpretation by the courts, and the commentary by ISDA all make clear that the Loss definition is intended to provide the Non-defaulting Party with broad discretion and flexibility in determining its Loss. See supra Part II.A. Accordingly, courts have applied a highly deferential standard in evaluating whether a Non-defaulting Party has "reasonably determine[d]" its Loss. For example, Intel holds that "there is no single 'correct' methodology for calculating Loss" and that "non-defaulting parties are afforded discretion in choosing a method to calculate Loss, so long as such calculation is ultimately performed 'reasonably and in good faith.'" 2015 WL 7194609 at *10. Similarly, recent English case law "clearly establish[es] that [the Non-defaulting Party] is not required to comply with some

objective standard of care as in a claim for negligence, but, expressing it negatively, must not arrive at a determination which no reasonable non-defaulting party could come to." Fondazione Enasarco v Lehman Bros. Fin. S.A. [2015] EWHC 1307 (Ch) ¶ 53.

In short, courts apply "a test of rationality," id., upholding a Non-defaulting Party's determination of Loss so long as there is a rational basis for the calculation. This deferential standard is consistent with New York law on damages, which make clear that the non-breaching party need only provide a "stable foundation for a reasonable estimate of the damage incurred as a result of the breach," and "the burden of uncertainty as to the amount of the damage is upon the wrongdoer." Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 110-11 (2d Cir. 2007) (quoting Contemporary Mission Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (applying New York law)).

This highly deferential "reasonableness" standard is particularly appropriate in light of the broader commercial context in which ISDA Master Agreements are used. Professor Jeffrey Bruce Golden, one of the principal drafters of the 1992 ISDA Master Agreement, identifies "mitigating the risk of fact-specific disputes and the attendant risk of protracted litigation" as a key "commercial objective . . . in drafting the ISDA standard-form documents." Ex. 74, Golden Report ¶ 38. As he explains:

> This commercial objective certainly was, in my view, a fundamental rationale for the considerable discretion that the 1992 ISDA Master Agreement allows a non-defaulting party in calculating a payment (particularly when that party is called upon to determine its Loss for that purpose) once an Early Termination Date has been designated . . . . Setting specific fixing times or prices was not the game. Neither was searching for the "correct" or "perfect" (or even "best") answers. The goal was to stay within acceptable parameters based on the particular objectives of the parties. In 1992, this goal was reflected in the general terms of reasonableness and good faith. Assuming an outcome based on these principles, an early termination determination was expected to be conclusive. Whether a different result might also have been reached was irrelevant. The drafters intended to build into the definition of Loss a contractual privilege for the non-defaulting

> party to make its own determination, and we assumed that the situations when a court would interfere with the exercise of that contractual discretion would be extremely limited.

Id. ¶ 41 (emphasis added).

The drafters of the 1992 ISDA Master Agreement recognized the potential for difficulties in "discovering facts and confirming consensus in a global marketplace" with respect to the valuation of complex financial transactions and chose to increase certainty in the derivatives markets by creating a regime that affords "wide discretion [to] the non-defaulting party" and discourages "second guessing of a party that determines a settlement amount." Id. ¶ 39. Thus, both the drafters of the Agreement and the courts that have considered this issue agree that evidence that other parties (or experts) could have used different methodologies or assumptions is insufficient to challenge the reasonableness of the Non-defaulting Party's calculations as a matter of law.

2. Assured Reasonably Determined Its Loss by Using the Same Methodology that It Used To Calculate Losses in the Ordinary Course of Its Business

Neither Lehman International nor its experts dispute Assured's calculation of the first component of Assured's loss of bargain calculation, i.e., the value of the unpaid and future premium payments that Lehman International owed to Assured in connection with the Transactions, which total approximately $48 million.[19] Rather, Lehman International attempts to challenge as unreasonable the second component: Assured's calculation that it would have been contractually obligated to pay Lehman approximately $23.4 million based on expected interest and principal shortfalls on the Underlying Securities. To prevail on this challenge, Lehman International would need to establish that no reasonable party could have calculated the expected losses on the Transactions in the manner that Assured did here. See supra Part II.B.1. It is,

[19] Assured calculated the present value of the expected future premium payments owed by Lehman International as of the Early Termination Date using a discount rate of 6%. Ex. 40, Statement of Calculations at 4-5.

however, undisputed that Assured used precisely the same methodology to calculate the expected losses on the Transactions at issue here that it used to calculate expected losses on all of the transactions on its books, which it does regularly for multiple business, accounting and regulatory purposes in the ordinary course.[20] The very fact that Assured could – and did – use the identical methodology to calculate expected losses for transactions in a range of circumstances means that this methodology necessarily satisfies the "test of rationality" required under the Agreement.

Furthermore, a fuller examination of the record shows that Assured's use of this methodology not only had a rational basis, but also was eminently reasonable by any standard. Because Assured used this methodology to determine, among other things, its regulatory loss reserves, the methodology was subject to numerous layers of intensive scrutiny, including internally, by senior management, and externally, by its auditors and regulators. Specifically, each quarter, Assured reviewed observable performance data relating to the reference obligations it insured and updated the methodology and underlying assumptions it used to determine expected losses with respect to those obligations as needed.[21] Before being finalized, the methodology was reviewed and approved by each of the following: Assured's Loss Reserve Committee (comprised of senior executives) and Audit Committee (comprised of directors); its Chief Actuary, Ben Rosenblum, and its independent auditor, PricewaterhouseCoopers (which

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[20] See Ex. 75, Schozer Dep. at 288:4-289:2 ("[E]verything you do as an insurance company ... runs through the actuary reserving model . . . . And so there would never be a discussion about, oh, gee, what loss model to use because there's a process in place which has all losses, all reserves, all premiums, [and] everything else going through [it,] a very, very independent and highly controlled process."); id. (The calculation of Loss "would have been done [using] the same consistent methodology applied to any exposure the company had. . . . . Because the company as a fairly large regulated company[y] has a process on calculating these amounts which it does [on] an ongoing basis . . . ."). See also Ex. 76, Assured Guaranty Ltd 10-K 2008 at 203-204; Ex. 77, Assured Guaranty Ltd. 10-Q (Q2 2009) at 39.

[21] See, e.g., Ex. 78, Second Quarter Reserve Memo 2009.

also serves as the administrator of Lehman International).[22] Notably, both the actuary and independent auditor have duties of independence that require them "to evaluate the reasonableness of accounting estimates made by management, including its estimates of loan impairments and the associated allowance for loan losses." Ex. 80, SEC Staff Accounting Bulletin No. 102 at 3.

Assured also had a direct economic incentive to calculate expected losses as accurately as possible because it relied on this same methodology to evaluate and monitor the credit quality of transactions and determine which transactions required increased surveillance or remedial action. Moreover, modeling expected losses accurately is particularly critical to Assured's economic viability because of its hold-to-maturity business model.[23] As might be expected in light of these incentives, in calculating expected losses, Assured used assumptions that "were in line with those applied by other monoline financial guarantors for analyzing losses on these classes of securities, as well as guidelines promulgated by rating agencies." Ex. 4, Goldin Report ¶ 56.[24]

In short, the very fact that Assured applied its methodology uniformly across all of its transactions satisfies the reasonableness requirement, particularly in light of the rigorous process in place and Assured's compelling motivations – including compliance with its regulatory and statutory obligations and a direct economic incentive – to ensure that its

[22] Ex. 79, Prager Dep. at 14:22-15:11 ("We discussed the loss reserve process generally, the general way in which they went about preparing their assumptions, the process of reviewing and approving loss reserving, where they would first start at the managerial level, then make their way up to the more senior management what's called the loss reserve committee . . . then there would be an audit committee of the board of representatives or the board of directors. The chief actuary would sign off on the numbers. The auditors would review and sign off on the numbers.").

[23] Ex. 4, Goldin Report ¶ 16 & n.12.

[24] See id. at 47 (summarizing information regarding loss severity assumptions used by other monoline financial guarantors and rating agencies that would have been available to Assured in evaluating its own assumptions for the quarter ending September 30, 2009).

methodology for calculating expected losses was reasonable. None of these facts are disputed.

3. The Actual Performance of the Underlying Securities Further Confirms the Reasonableness of Assured's Loss Calculation and Exposes Flaws In Lehman International's Attempts To Challenge Those Calculations

Assured's experts Harrison Goldin and David Prager reviewed the Underlying Securities' performance and found that actual losses during the period of nearly six years following the Early Termination Date totaled less than 1% of the $5.7 billion of insured principal with 90% of that principal repaid. Ex. 4, Goldin Report ¶ 33. This is remarkably consistent with Assured's calculations, as those actual losses represent $35 million (discounted to July 2009 values) – less than a $12 million difference from the $23.4 million expected Floating Payments projected by Assured in its Statement of Calculations. Id.; Ex. 40, Statement of Calculations, Annex B; Ex. 81, Prager Dep. at 178:8-12. See Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 698 (1933) ("[Where] [e]xperience is then available to correct uncertain prophecy, [th]ere is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.").

See Ex. 82, Niculescu Report ¶ 17; Ex. 51, Goldin Rebuttal Report ¶ 24. Thus, if a counterparty had chosen to enter into replacement transactions based on

[25]

Ex. 83, Niculescu Dep. at 303:14-304:3. It is therefore unsurprising that market participants were unwilling to commit their capital to enter into such transactions based on Dr. Niculescu's model. In short, Dr. Niculescu's hypothetical pricing model generated results that are not only inconsistent with how the market, in fact, behaved when given an opportunity to bid on the Transactions but that are also wildly inconsistent with the actual performance of the Transactions.

Lehman International cannot rely on Dr. Niculescu's flawed model to raise a factual dispute regarding the reasonableness of Assured's Loss calculation for the additional reason that this model is premised on the erroneous misinterpretation of the Loss definition advanced by Lehman International's expert Ms. Rahl, namely that Loss requires the Non-defaulting Party to calculate

Ex. 83, Niculescu Report ¶ 14. As established above, the Loss definition does not require Assured to determine Loss by using a model to estimate the hypothetical cost of a replacement transaction.[26] This is especially true in circumstances such as these when a replacement transaction is not available in the real world. Put another way, Lehman International cannot use the "reasonableness" requirement in the Loss definition to rewrite the Agreement in a manner that would deprive Assured of its right to select a different methodology for determining Loss, such as its loss of bargain, particularly when that

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[26] See Ex. 84, Rahl Dep. at 113:4-22. Her opinion is further undermined by her previous advocacy of the use of a discounted cash flow model – similar to Assured's methodology here – to determine Loss. In Barclays PLC v. Devonshire Trust, Ms. Rahl opined that the mark-to-model valuation performed by Barclays – and akin to what Lehman International argues Assured should have used here – as the Non-defaulting Party, was commercially unreasonable in light of market dislocation in early 2009, and that Loss should instead be determined based on "projected real-world losses." [2013] ONCA 494, ¶¶ 232, 246 (Can. Ont. C.A.). Ms. Rahl testified in that case that "'[c]onsensus opinion about the appropriateness of various valuation techniques was being debated and reassessed in 2008 and 2009,'" id. ¶ 240 (quoting Ms. Rahl), and that it was reasonable to argue that the cash flow projection, standing alone, constitutes Loss. Id. ¶ 251.

methodology is expressly included in the definition. The fact that Dr. Niculescu's hypothetical pricing model yields a different result than Assured's Loss calculation is also therefore irrelevant as a matter of law.[27]

4. *Lehman International's Internal Analysis of the Transactions and Its "Back-to-Back" Transactions Further Confirm the Reasonableness of Assured's Loss Calculation*

Lehman International's own contemporaneous internal analysis of the Transactions flatly contradicts any argument that Assured's Loss calculation of approximately $25 million does not meet the contractual reasonableness requirement. [REDACTED] Ex. 85, P. Copley Email (June 30, 2009). [REDACTED]

[REDACTED] Ex. 86, L.

27 [REDACTED] See Ex. 51, Goldin Rebuttal Report ¶ 80.

Summerfield Email (Feb. 22, 2011).

See, e.g., Ex. 87, McPherson Dep. at 104:24-105:16.

See, e.g., Ex 88, McPherson Dep. at 75:13-21.

Ex. 86, L. Summerfield Email (Feb. 22, 2011).

Ex. 89, McPherson Dep. at 132:3-134:8. Lehman International cannot assert that Assured's Loss calculation does not meet the reasonableness standard of review

III. THE COURT SHOULD GRANT ASSURED SUMMARY JUDGMENT ON ITS COUNTERCLAIMS FOR BREACH OF CONTRACT AND FEES AND COSTS

For the reasons stated above, there can be no material factual dispute that Assured properly calculated its Loss in connection with the Transactions. Because Lehman International has failed to make payment to Assured for that Loss as required under the Agreement, Assured is entitled to summary judgment on its counterclaim for breach of contract and to an award of damages in the amount of $24,799,972.85 plus interest. Furthermore, Section 11 of the Agreement expressly requires Lehman International, as the Defaulting Party, to indemnify Assured for "all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by [Assured] by reason of the enforcement and protection of its rights under this Agreement." Assured is therefore entitled, as a matter of law, to summary judgment on its counterclaim seeking attorneys' fees and costs.[28]

CONCLUSION

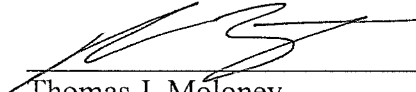
For the foregoing reasons, Defendant respectfully requests the Court grant Defendant's Motion for Summary Judgment in its entirety.

[28] Upon the granting of this counterclaim, Assured will submit evidence regarding the amount to which it is entitled.

February 22, 2016

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP



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