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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (In administration),

Plaintiff,

-against-

AG FINANCIAL PRODUCTS, INC.,

Defendants.

INDEX NO. 653284/2011

MOTION DATE _____

MOTION SEQ. NO. 008

The following papers, numbered 1 to ____ were read on this motion.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☐ No

It is hereby ORDERED that the motion of defendant AG Financial Products Inc. for summary judgment is decided in accordance with the attached decision and order of today's date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7-2-18

Marcy Friedman, J.S.C.
MARCY S. FRIEDMAN

1. Check one: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration),

Plaintiff,

– against –

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Defendant.

Index No.: 653284/2011

DECISION/ORDER

This action arises out of a series of credit default swap transactions (CDS) under which plaintiff Lehman Brothers International (Europe) (LBIE) purchased credit protection from defendant AG Financial Products Inc. (Assured) on various reference bonds or securities (the Underlying Securities). LBIE alleges that Assured breached the agreements governing the transactions and the implied covenant of good faith and fair dealing when it terminated 28 of the transactions in July 2009 (the Transactions). Assured now moves for summary judgment dismissing the two remaining causes of action in the complaint.

BACKGROUND

The allegations of the complaint are summarized at length in this court's decision and order, dated March 12, 2013, determining Assured's motion to dismiss. (See Lehman Bros. Intl. [Europe] v AG Fin. Prods., Inc., 2013 WL 1092888, * 1 [Sup Ct, NY County, Mar. 12, 2013, No. 653284/11] [the MTD Decision].) After discovery, the following facts are not in dispute:

The 28 credit default swap Transactions remaining at issue in this lawsuit were entered into by the parties between 2005 and 2008.[1] (Joint Statement, ¶ 1.) Each Transaction is governed by three Agreements: a standard form Master Agreement between LBIE and Assured, dated April 7, 2000, which is based on a 1992 template promulgated by the International Swaps and Derivatives Association (ISDA Master Agreement or Master Agreement) (Aff. of Kimberly J. Brunelle [Counsel for Assured] [Brunelle Aff.], Exh. 7); a negotiated Schedule to the ISDA Master Agreement (id., Exh. 8); and a negotiated Confirmation for each Transaction. (Id., Exhs. 9-36.) These Agreements provided that LBIE, as protection buyer, would make premium payments to Assured (Fixed Payments), and that Assured, as protection seller, would make payments to LBIE upon the occurrence of credit events with respect to the Underlying Securities—namely, upon the failure of the obligors on the Underlying Securities to make timely payments of interest or principal (Floating Payments). (See e.g. Confirmation [ARKLE 2006-2X 3 A2], §§ 2-3 [Brunelle Aff., Exh. 11]; Def.'s Memo. In Supp., at 4; Pl.'s Memo. In Opp., at 4.)

Section 6 (a) of the ISDA Master Agreement authorized either party (in such case, the Non-Defaulting Party) to terminate a Transaction upon the occurrence of an Event of Default with respect to the other party (the Defaulting Party). The term Event of Default, as defined in the Master Agreement, includes that "[the Defaulting Party] seeks or becomes subject to the appointment of an administrator . . . for all or substantially all of its assets." (Master Agreement, § 5 [a] [vii] [6].) LBIE entered into bankruptcy administration on September 15, 2008. (Joint Statement, ¶ 4.) On July 23, 2009, Assured notified LBIE that its entry into administration

[1] "Fourteen of the Transactions reference senior tranches of asset-backed securities collateralized by prime UK residential mortgages ('UK RMBS'); eleven of the Transactions reference US corporate loans ('CLOs'); one Transaction references US collateralized debt obligations; and two reference portfolios of twenty asset-backed securities collaterized by subprime US residential mortgages ('ABX')." (Joint Statement, ¶ 2.)

constituted an Event of Default under the ISDA Master Agreement, and designated July 23, 2009 as the Early Termination Date for the Transactions.[1] (Id., ¶ 5.)

As the termination of the Transactions was based upon an Event of Default, the ISDA Master Agreement authorized Assured, as the Non-Defaulting Party, to calculate a termination payment. (See Master Agreement, § 6 [e] [i] [3].) Pursuant to Part 1 (f) of the Schedule, the parties had elected to use "Market Quotation and the Second Method" to calculate the payment. Under this methodology, depending on the circumstances, the termination payment may be owed by the Defaulting Party to the Non-Defaulting Party, or vice versa. (Master Agreement, § 6 [e] [i] [3].)[2]

The ISDA Market Quotation methodology required Assured to seek quotations from leading dealers in the relevant market, known as "Reference Market-makers." These quotations were to represent

> "an amount, if any, that would be paid to [Assured] (expressed as a negative number) or by [Assured] (expressed as a positive number) in consideration of an agreement between such party . . . and the quoting Reference Market-maker to enter into a transaction (the 'Replacement Transaction') that would have the effect of preserving for [Assured] the economic equivalent of any payment or delivery . . . by the parties under Section 2 (a) (i) in respect of such Terminated Transaction or group of Terminated Transactions [i.e., under the applicable Confirmation(s)] that would, but for the occurrence of the relevant Early Termination Date, have been required after that date. . . ."

[1] LBIE also terminated nine transactions in December 2008. In its decision determining Assured's motion to dismiss, the court dismissed LBIE's first cause of action, for breach of the implied covenant of good faith and fair dealing, based on these transactions. (2013 WL 1092888 at *5.)

[2] Section 6 (e) (i) (3) provides in this respect: "If the Second Method and Market Quotation apply, an amount will be payable equal to (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party."

(Id., § 14, "Market Quotation" Definition.) The Master Agreement states that, "[i]f fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transactions cannot be determined." (Id.)

The Master Agreement authorized Assured to use an alternative Loss method to calculate the termination payment in the event "a Market Quotation cannot be determined or would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result." (Id., "Settlement Amount [b]" Definition.) Loss is defined, in pertinent part, as "an amount [the Non-Defaulting 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 . . . [the] group of Terminated Transactions . . . , 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)." (Id., "Loss" Definition.) The Loss method requires that a Non-Defaulting Party "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," and expressly states that "[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.)

Following its notice to LBIE of an Event of Default, Assured engaged the assistance of Henderson Global Investors Ltd. (Henderson) to design and execute an auction of the Transactions "intended to satisfy the ISDA Market Quotation process." ("Auction of a Portfolio of CDS Transactions on Behalf of AG Financial Products, Inc." [Henderson Report], at 2 [Brunelle Aff., Exh. 38]; Joint Statement, ¶ 6.) Henderson contacted eleven potential bidders in advance of the auction, which was conducted on September 16, 2009. (Joint Statement, ¶¶ 8-9.)

None of the potential bidders submitted bids on the Transactions. (Id., ¶ 10.) Assured therefore took the position that it could not use the Market Quotation method and instead applied the Loss method.

On October 16, 2009, Assured delivered a Statement pursuant to Section 6 (d) (i) of the ISDA Master Agreement (Statement) notifying LBIE that it owed Assured $24,799,972.85 plus interest under the Master Agreement in connection with the termination of the Transactions. (Id., ¶ 11; Statement, at 5 [Brunelle Aff., Exh. 40].) Assured assertedly "calculated its Loss for each Terminated Transaction by subtracting the expected aggregate Floating Payment amounts under such Transaction [collectively, $35,191,751.62] from the present value of Fixed Amounts which would have come due on such Transaction after the Early Termination Date [collectively, $23,441,145.00]," for an amount of $11,750,606.62. (Statement, at 4.) Assured then added this amount to "the Unpaid Amounts owed by LBIE" under the Agreements—i.e., "the aggregate Fixed Amounts that were due and unpaid as of the Early Termination Date plus interest" ($13,049,366.23)—to reach the total $24,799,972.85 figure. (Id., at 5.)

LBIE filed this action on November 28, 2011. The remaining causes of action following this court's decision on Assured's motion to dismiss are the second, for breach of contract, and the third, for breach of the implied covenant of good faith and fair dealing, each of which is discussed in greater detail below. (See MTD Decision, 2013 WL 1092888, at * 7-8.)

ANALYSIS

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless

of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

MARKET QUOTATION PROCESS—THIRD CAUSE OF ACTION

The third cause of action, for breach of the implied covenant of good faith and fair dealing, is based upon the allegation that Assured "acted to bypass the parties' selection of Market Quotation to measure the termination payment by making the use of Market Quotation impossible." (Compl., ¶ 52.) LBIE pleads that Assured unduly "delayed its request for quotations," and insisted that Reference Market-makers agree to "burdensome bidding procedures, effectively discouraging them from submitting bids" for the Transactions at the Market Quotation auction. (Id.)

As discussed at greater length in this court's prior decision on the motion to dismiss, the implied covenant of good faith and fair dealing "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 benefits of the contract." (MTD Decision, 2013 WL 1092888, at * 2-3 [internal quotation marks and citation omitted].)

Assured contends that summary judgment is warranted on the implied covenant claim because LBIE can produce no evidence that it conducted the Market Quotation process in bad faith. (Def.'s Memo. In Supp., at 10-12.) According to Assured, the evidence shows that it hired

qualified and independent firms to design and conduct an auction intended to satisfy the ISDA Market Quotation process; that the uniform procedures it put in place for bidders were consistent with market practice; and that there were numerous reasons unrelated to the design of the auction and the bidding procedures for Reference Market-makers to choose not to submit bids, including market uncertainty and "an aversion to monoline credit risk generally or to facing Assured as a counterparty specifically" following the financial crisis.[3] (Id., at 12-13.)

LBIE, in opposition, identifies various purported flaws in Assured's design and execution of the auction process, including Henderson's "lack of relevant experience" in conducting an ISDA Market Quotation auction (Pl.'s Memo. In Opp., at 29); Assured's reservation of discretion not to accept bids (id., at 30); and Assured's insistence that potential bidders have an existing ISDA Master Agreement in place with Assured, which LBIE contends had the effect of excluding Nomura International plc (Nomura), the "most likely bidder." (Id., at 29, 10.)

The court finds that Assured makes a prima facie showing of entitlement to summary judgment on this cause of action, and that LBIE fails to identify an issue of fact requiring trial. Assured's motion is supported by a November 16, 2009 report from Henderson concerning the auction. (Brunelle Aff., Exh. 38.) The Henderson Report recounts, among other things, Assured's retention of Henderson "to design an auction . . . intended to satisfy the ISDA Market Quotation process" (id., at 2-3); the team's selection of bidders (id., at 4);[4] their development of a Bidding Procedures Letter setting forth the rules and timetable for the auction (id., at 7-8 &

[3] Assured further contends that the absence of bids was "consistent with [LBIE's] own internal assessment of the Transactions, as well as its inability to novate or obtain firm bids on the Transactions." (Def.'s Memo. In Supp., at 13.)

[4] The report states that, in determining the number and identity of potential bidders, Henderson considered various factors, including "avoiding the inclusion of too many Bidders, which can be counter-productive as Bidders may determine it not worth their resource," "the likelihood of potential bidders' willingness to take exposure to [Assured]," and "the requirement to obtain a sufficient number of bids from Reference Market-makers in order to determine a Market Quotation under the ISDA Market Quotation process." (Henderson Report, at 4.)

Appx. C); and the conduct and results of the auction (id., at 10-11). Jim Irvine, the Head of Structured Investments at Henderson, testified at his deposition that the "overall aim" in designing the Bidding Procedures Letter was "to ensure every chance of success of the auction," and to "create a document that the participants were broadly familiar with." (See Irvine Dep., at 95, Brunelle Aff., Exh. 49].) He further testified that the Letter was "based upon [bidding procedures letters] which Henderson had used in previous auctions it had conducted with a number of invited bidders." (Id.; Def.'s Memo. In Supp., at 12.)

Assured's motion is further supported by a detailed expert report. Craig Pirrong, whose expert qualifications are unchallenged by LBIE, has written and taught extensively on the subjects of derivatives and financial markets and has previously provided expert testimony in matters in which application of the ISDA Market Quotation method was at issue. (Pirrong Report, at 2-3 [Brunelle Aff., Exh. 52].) Pirrong submits that Assured, in conjunction with its advisors, "reasonably and appropriately designed and diligently conducted an auction to facilitate obtaining market bids for the terminated transactions."[5] (Id., at 1.) According to Pirrong, "neither the design nor the implementation of the auction were a reason for the lack of bids, and [] designing and carrying out the auction differently would not have resulted in [Assured] receiving sufficient bids to determine a Market Quotation under the 1992 ISDA Master Agreement." (Id.) Rather, Assured's inability to obtain bids from counterparties willing to enter

[5] More specifically, Pirrong takes the position, based on his review of the evidence provided to him, that Assured "retained knowledgeable, reputable, and capable advisors to design and carry out the auction"; "solicited participation from a relatively large number of financial institutions with extensive experience with CDOs and CLOs, and CDS on these instruments, as well as knowledge of current market conditions"; "provided participants with all of the information about the Transactions and the underlying reference obligations that they needed in order to value the positions being auctioned, and participants had access to information on Assured's credit risk"; "selected reasonable bidding procedures that were designed to achieve the auction's objectives, and provided adequate disclosure of these procedures to bidders"; and chose "[t]he timing of the auction . . . appropriately to maximize the likelihood of obtaining fully-priced bids." (Id., at 20-21.) Pirrong opines that "[t]he auction format was [] appropriately selected to increase proceeds and increase the likelihood of obtaining at least three bids to satisfy the requirements of the Market Quotation method." (Pirrong Report, at 32.)

into replacement contracts "was a result of a lack of appetite in the market for these products, combined with market concerns regarding monoline credit risk." (Id. at 1, 39-40.)

These opinions from Pirrong are supported by detailed reasoning, and by communications between Reference Market-makers and Assured or its agents concerning the auction. With respect to monoline credit risk, Pirrong explains that monoline insurers historically "have held relatively little capital compared to the net par amount of securities they guaranteed."[6] (Id., at 10.) "This low capital to net par ratio meant that monolines were highly leveraged, and thus, they were relatively vulnerable to withstanding losses on the guarantees they had issued should they ever have to make such payments." (Id., at 10, 40-42.) Moreover, although "monolines like Assured that underwrote CDS to a zero-loss model only wrote protection on the most senior and least risky of these securities," such protection "was still vulnerable to 'correlation risk,' also known as 'wrong-way risk.'" (Id., at 10-11, 42-43.) As explained by Pirrong:

> "By solely insuring high quality underlying reference obligations, a monoline would likely only be required to make payments on a particular CDS transaction under an extremely severe and nearly unprecedented widespread market downturn, which would similarly result in losses on the other highly rated reference obligations underlying its otherwise independent and unrelated CDS contracts, thus triggering its obligations to make payments on a portfolio-wide basis, and to such a degree that the monoline might be unable to pay all of them. Since all (or virtually all) of the securities guaranteed by monolines were exposed to the same risk of a severe economic downturn, all were vulnerable to loss at precisely the same time. Further, given the highly leveraged nature of monolines, such portfolio-wide losses could thus threaten the viability of a monoline, possibly preventing it from making any of its contractually obligated payments on its CDS transactions. In other words, a monoline would be least able to pay precisely when it was required to make a payment."

(Id., at 11-12.)

[6] Pirrong reports that "Assured maintained one of the larger ratios in the industry of approximately 1.3 percent [qualified statutory capital to net par outstanding] at the end of 2006." (Id.)

According to Pirrong, market participants in 2008 and 2009 were aware of these monoline credit risks. "For example, market participants would have been aware of the failure and/or restructuring of seven of the nine key players in the monoline industry between 2007 and 2009." (Id., at 12.) The credit ratings of most monolines were downgraded by ratings agencies during 2008 and 2009. (Id.) Also, "the credit spreads of the various monolines widened significantly during this time, reflecting doubts amongst market participants of the viability of the monoline business model." (Id., at 12-13.) "The resulting costs for financial institutions to consider, account for, and risk manage counterparty credit risk in connection with their derivatives transactions, which they were required to do under various legal, regulatory, and corporate governance mandates, made entering into new CDS with monolines prohibitively expensive." (Id., at 13.) As set forth in the Pirrong Report, six of the potential bidders for Assured's auction in 2009 referenced counterparty credit risk as one of the reasons they chose not to bid. (See id., at 40-41.)

As Pirrong also opines, "[t]wo elements within the contractual documentation—the absence of collateral posting and the back-ending of [Assured's] payment obligations—heightened the [credit and correlation] risks discussed above, providing another economic disincentive to potential counterparties." (Id., at 43.) The Transactions at issue, unlike many CDS contracts, "did not require [Assured] to post collateral." Accordingly, "potential counterparties would be left without any buffer in the event that [Assured] was unable to meet its contractual payment obligations." (Id., at 43-44.) In addition, Assured's payment obligations under the Transactions were "back-ended because [Assured] guaranteed only timely interest and principal at maturity (which in many cases could be as late as 2054), and consequently potential counterparties were exposed to the credit and correlation risks discussed above for longer periods

of time." (Id., at 44.) At least one potential bidder wrote to Henderson that the lack of collateral was a reason it was declining to participate in the auction. (Id.)

Finally, Pirrong explains that "the illiquidity in the market for the underlying reference obligations at the time of the auction and throughout most of the financial crisis" suppressed demand for the Transactions. (Id., at 44.) The inability of the potential bidders to obtain the reference obligations prevented them from effecting a "negative-basis trade," in which bidders "attempt[] to buy the assets from the market at a price, and buy protection of those assets from the monoline at a different price, and, therefore, lock[] in what they perceive[] to be a basis profit." (Id., at 44-45 [internal quotation marks and citation omitted].)

LBIE, in opposition, fails to counter this prima facie showing by Assured with evidence sufficient to raise a triable issue of fact regarding Assured's purported bad faith in designing and conducting the auction. Significantly, LBIE fails to cite any expert opinion in the record challenging, in any material respect, Pirrong's, opinion that the structure and design of the auction was reasonably calculated to increase the likelihood that the Market Quotation process would be successful.

The court rejects LBIE's contention that a triable issue of fact exists as to Assured's good faith because Henderson "had never before conducted an auction to satisfy the Market Quotation requirements of the ISDA Master" and "neither [Assured] nor its counsel provided Henderson with any guidance on whether the auction it designed complied with the terms of the Market Quotation provision." (See Pl.'s Memo. In Opp., at 29, citing Irvine Dep., at 32, 183-184 [Windels Aff., Exh. 27].) For the reasons detailed above, Assured makes a prima facie showing that Henderson was a qualified advisor and that the auction was designed to satisfy the Market Quotation requirements. LBIE merely speculates, without support in the record, that

Henderson's lack of prior experience specifically conducting an ISDA Market Quotation auction and Assured's alleged decision not to "guid[e]" its retained advisor through the auction process, caused problems with the auction and are indicative of Assured's bad faith. Such speculation does not suffice to create a genuine issue of material fact for trial. (See generally Dee Cee Assocs. LLC v 44 Beehan Corp., 148 AD3d 636, 641 [1st Dept 2017]; Weinberg v Sultan, 142 AD3d 767, 769 [1st Dept 2016].) LBIE also ignores the testimony of Henderson's Jim Irvine that in the period from 2008 to 2010, Henderson conducted at least six auctions involving complex financial instruments for major financial services firms. (Irvine Dep., at 32-35 [Brunelle Aff., Exh. 93].)

The court also rejects LBIE's contention that Assured frustrated the Market Quotation process through its insistence that any potential bidder have an existing ISDA Master Agreement in place with Assured. (See Pl.'s Memo. In Opp., at 29.) LBIE does not cite any expert opinion addressing the possible effect of this condition on the auction process. Assured's expert and Jim Irvine of Henderson, in contrast, submit that the condition "was reasonable because the existence of an ISDA Master Agreement indicated that the counterparty had previously demonstrated a willingness to transact with [Assured], whereas the absence of such an agreement suggested that the firm lacked a demand for products on which [Assured] wrote protections or was adverse to transacting with [Assured]." (Pirrong Report, at 25-26 [citing deposition testimony of Irvine].) Moreover, although this requirement of a pre-existing Master Agreement may have resulted in Nomura's withdrawal from the bidding process, LBIE has not submitted evidence that raises a triable issue of fact as to whether that withdrawal, or the exclusion of any other bidders without existing Master Agreements in place, had any effect on the auction. To the contrary, the record reflects that a representative of Nomura declined an invitation by LBIE a few weeks prior to the

auction to provide a firm bid for the Transactions, providing instead an "indicative . . . estimate" of what a potential "protection buyer might pay" for the Transactions. (See Email of Juan Quintas [of Nomura], dated July 28, 2009 at 9:50 AM [Brunelle Aff., Exh. 65].) Again, LBIE relies on speculation in contending that Assured's requirement that bidders have an existing ISDA Master Agreement in place prevented not only Nomura, but two other Reference Market-makers, from bidding at the auction.

LBIE's remaining arguments in opposition to this branch of Assured's motion are also unavailing. Even accepting LBIE's contention that emails from two bidders reflect confusion on the bidders' part concerning whether the prospective Replacement Transaction with Assured would be governed by the terms of LBIE's or the successful bidder's own pre-existing ISDA Master Agreement with Assured, the emails do not raise any inference that such confusion led any Reference Market-maker not to bid, let alone that Assured designed the auction in bad faith. (See Email from Jonathan McCormick [of Deutsche Bank], dated Sept. 10, 2009 at 7:02 AM [Windels Aff., Exh. 30]; Email from David Dehorn [of Barclays Capital], dated Sept. 14, 2009 at 7:39:05 PM [Windels Aff., Exh. 31].) LBIE also fails to support its contention that Assured's retention of discretion to accept or reject bids was inconsistent with the Market Quotation process or undertaken in bad faith. This contention is based principally upon a hypothetical statement made by LBIE's expert, Peter Niculescu, during his deposition.[7] LBIE does not submit any evidence showing that Assured's reservation of rights in this regard played any role whatsoever in any of the actual Reference Market-makers' decisions not to bid on the

[7] Niculescu stated during his deposition that "if I had been on a trading desk at [the time of the auction] facing a very active market with a considerable amount of trading volume and good liquidity and I had been approached by Henderson along with many other people with no assurance that a transaction would in fact occur and had been asked to spend a considerable amount of my scarce resources to perform valuations that I thought were unlikely to actually result in a transaction, I might well have found a reason to decline to bid with Assured." (Niculescu Dep., at 293 [Windels Aff., Exh. 43].)

Transactions. (See Pl.'s Memo. In Opp., at 30; see also Transcript of Oral Arg., at 16 [argument by Assured's counsel that "[o]ne of the options" open to a Non-Defaulting Party as part of the Market Quotation process "is to decide to buy it yourself"].)

As LBIE fails to raise a triable issue of fact as to Assured's good faith in the design and execution of the Market Quotation auction, the third cause of action will be dismissed. The second cause of action, for breach of contract, will also be dismissed to the extent that it duplicates the allegations and theories underlying the third cause of action.[8]

LOSS METHODOLOGY AND CALCULATION—SECOND CAUSE OF ACTION

The second cause of action for breach of contract—to the extent not duplicative of the third cause of action for breach of the implied covenant—is based upon the allegation that Assured breached the Agreements by "improperly calculat[ing] Loss without reference to any market information and in a manner that was commercially unreasonable." (Compl., ¶ 46.) Assured did not seek dismissal of the second cause of action on its prior motion to dismiss. The claim therefore was not addressed in a substantive manner in this court's decision on that motion. (See MTD Decision, 2013 WL 1092888, at * 1.)

Loss is defined in Section 14 of the ISDA Master Agreement (the Loss provision), in full, as follows:

> "'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

[8] The second cause of action, for breach of contract, is also based upon the allegation that Assured acted "to bypass Market Quotation . . . ." (Compl., ¶ 45.) As stated in the decision on the motion to dismiss, the breach of contract and implied covenant causes of action overlap in significant respects. (MTD Decision, 2013 WL 1092888, at *7.) The decision noted, however, that the third cause of action, for breach of the implied covenant, is based upon additional allegations as to Assured's conduct in designing the auction procedures. (Id., at * 8.) On this motion, LBIE does not appear to argue that it may maintain a breach of contract claim based upon Assured's conduct in connection with the Market Quotation process. (See Pl.'s Memo. In Opp., at 28-30.)

> 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)(1) or (3) or 6(e)(ii)(2)(A) applies.[9] 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."

Assured contends that it fully complied with the Loss provision when it "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 [LBIE] had performed its obligations with respect to the Transactions." (Def.'s Memo. In Supp., at 16.) "Specifically, Assured calculated the present value of the fixed premium payments that [LBIE] would have been required to pay to Assured over the remaining duration of the Transactions, and deducted the amounts Assured expected to pay [LBIE] 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 [LBIE] of approximately $25 million." (Id., at 1-2, 20.) Assured argues that the plain language of the Loss provision unambiguously confers upon it, "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" (id., at 16), and that the last sentence of the provision expressly permits it to select a methodology that does not

[9] These sections of the ISDA Master Agreement specify amounts to be paid upon Early Termination under differing methods.

reference market prices. (Id., at 17.) Assured further argues that evidence of industry custom or practice is not admissible to "subvert" this plain meaning. (Id.)

LBIE contends that the plain language of the Loss provision required Assured to calculate Loss reasonably and in good faith, and that market practice is appropriately considered in determining whether conduct is objectively reasonable. (Pl.'s Memo. In Opp., at 14.) According to LBIE, widespread market practice with respect to the ISDA Master Agreement Loss method is to calculate Loss using a "replacement cost approach." (Id., at 19 [capital letters omitted].) In other words, the Non-Defaulting Party calculates Loss "'based either on a market price or a good faith and commercially reasonable approximation of a price at which the transaction could be replaced in the market.'" (Id., at 19 [quoting the Expert Report of Leslie Rahl [Rahl Report], ¶¶ 58-59 (Windels Aff., Exh. 1)].) LBIE also contends that courts construing the Loss provision have "considered the structure of the ISDA Master Agreement and the close interplay between the Market Quotation and Loss provisions," and have "held, under what is termed the 'cross-check principle,' that a determination of Loss should achieve broadly the same result as Market Quotation." (Id., at 16.) LBIE argues that Assured's methodology for calculating Loss was contrary to market practice and that its calculations violate the cross-check principle, raising triable issues of fact as to the reasonableness of Assured's calculation and Assured's good faith. (Id., at 2-3.)

Determination of the branch of Assured's motion addressed to the second cause of action thus requires, as a threshold matter, interpretation of the definition of Loss in the ISDA Master Agreement. In particular, the court must determine the scope and degree of Assured's discretion under that provision and, in particular, whether Assured has discretion to calculate Loss without reference to market prices for a replacement transaction. The court must also consider the extent

to which evidence of market practice may be used to inform this court's interpretation of the Loss provision and/or to evaluate Assured's exercise of discretion in calculating Loss.

A. Interpretation of the Loss Provision and Assured's Discretion to Ignore Market Prices

In general, it is well settled under New York law that "written agreements are construed in accordance with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing." (Schron v Troutman Sanders LLP, 20 NY3d 430, 436 [2013] [internal quotation marks, brackets, and citation omitted].) Thus, "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." (W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 162 [1990]; accord Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004].) Extrinsic evidence "may not be considered when the intent of the parties can be gleaned from the face of the instrument." (Chimart Assocs. v Paul, 66 NY2d 570, 572-573 [1986].) "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation." (Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted]; see also Greenfield v Phillies Records, Inc., 98 NY2d 562, 569-570 [2002].) "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (W.W.W. Assocs., 77 NY2d at 163 [internal quotation marks and citation omitted]; accord Marin v Constitution Realty, LLC, 128 AD3d 505, 507 [1st Dept 2015], modified on other grounds 28 NY3d 666 [2017].)

As to industry custom and usage, in particular, there is substantial federal authority that New York law permits consideration of such evidence in connection with the threshold determination of whether a contractual provision is ambiguous, at least where the contract uses specialized terms. The Second Circuit has repeatedly held that, under New York principles of contract interpretation, "[a]n ambiguity exists where the terms of the contract 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" (Law Debenture Trust Co. of N.Y. v Maverick Tube Corp. (595 F3d 458, 466 [2d Cir 2010] [Law Debenture], quoting International Multifoods Corp. v Commercial Union Ins. Co., 309 F3d 76, 83 [2d Cir 2002]; Morgan Stanley Group Inc. v New England Ins. Co., 225 F3d 270, 275 [2d Cir 2000] [same]; see also Lightfoot v Union Carbide Corp., 110 F3d 898, 906 [2d Cir 1997] [same].) As further explained by the Second Circuit in Law Debenture, evidence as to custom and usage "is to be considered by the court where necessary to understand the context in which the parties have used terms that are specialized." (595 F3d at 466.)

In elucidating New York law, the Second Circuit has relied on the reasoning of Fox Film Corp. v Springer (273 NY 434), a 1937 decision of the Court of Appeals, which held that where the parties to a contract have employed "[t]erms in common use in a business or art" and have "a definite meaning understood by those who use them," but which "convey no meaning to those who are not initiated into the mysteries of the craft," the court "must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business. It must be made literate in a language in which it is now unschooled." (Fox Film Corp., 273 NY at 436-437, quoted at length in Law Debenture Trust Co., 595 F3d at 466.)

Contemporary New York cases have rarely cited Fox Film Corp. and do not appear to have cited Law Debenture. This court finds, however, that Law Debenture is in fact consistent with, and acknowledges, the general New York precept that, even in the context of a contract that uses specialized terms, the court must undertake a threshold inquiry to determine whether the agreement on its face is reasonably susceptible of only one meaning or, put another way, whether the meaning of a particular clause is unambiguous when read in the context of the entire agreement—in which event, extrinsic evidence will be unavailable in interpreting the contract. (595 F3d at 466-468.)

The New York Court of Appeals has recently held that an agreement "made in the context of a highly technical industry, which employs distinct terminology used by those in the business"—there, a lease for the production of oil and gas—"must be construed with reference to both the intention of the parties and the known practices within the industry." (Beardslee v Inflection Energy, LLC, 25 NY3d 150, 157 [2015], rearg denied 25 NY3d 1189].) Some intermediate appellate courts have also held, without always making an express prior finding of ambiguity, that undefined specialized terms may be construed in light of industry custom and usage. (See e.g. J.P. Morgan Inv. Mgt. Inc. v AmCash Group, LLC, 106 AD3d 559, 559-560 [1st Dept 2013] [holding on a summary judgment motion that in construing an undefined term—"listed on an organized securities market"—industry custom and usage may be considered where "it has been shown either that the parties are actually aware of the established usage of the term, or that the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it," and where "there is no question that the intention of the parties was to follow, rather than depart from, the particular industry custom at issue" (internal quotation marks and citation omitted)]; Zurakov v

Register.Com. Inc., 304 AD2d 176, 179 [1st Dept 2003] [holding that a triable issue of fact existed as to whether the plaintiff had the exclusive right to control his newly registered domain name, the Court reasoning that "the custom and usage of 'registration' of a domain name in the Internet context is certainly more relevant than the literal definition of 'registration' found in the dictionary"]; Harber Philadelphia Center City Office Ltd. v Tokai Bank, 281 AD2d 179, 180 [1st Dept 2001], lv denied 96 NY2d 713 [a rare case citing Fox Film Corp., and holding that the trial court properly considered expert testimony on the tax laws in construing tax terms used in the partnership agreement, "since the Partnership Agreement was plainly drafted with an eye to tax consequences"]; Last Time Beverage Corp. v F&V Distrib. Co., LLC, 98 AD3d 947, 951-952 [2d Dept 2012] [holding that industry custom and practice "is admissible to define an unexplained term," where the party proferring evidence of the custom and practice "show[s] either that the other party was actually aware of the trade usage, or that the usage was so notorious in the industry that a person of ordinary prudence in the exercise of reasonable care would be aware of it"].) [10]

[10] As discussed in the text, although contemporary New York appellate courts have not adopted the rule on consideration of industry custom, in precisely the form articulated in Law Debenture or Fox Film Corp., the rule is consistent with prevailing New York law. This court further suggests that application of the rule is particularly appropriate in a case like this, in which the parties have chosen to structure their transactions using the ISDA Master Agreement, a highly specialized standard-form commercial contract. As a federal court has observed in construing the ISDA Master Agreement, this Agreement "serves as the contractual foundation for more than 90% of derivatives transactions globally." (Matter of Lehman Bros. Holdings Inc. v Intel Corp. (2015 WL 7194609, at * 1, n 1 [SD NY, Sept. 16, 2015, Nos. 08-13555, 13-01340, Chapman, J.] [Intel].) A principal drafter of the ISDA Master Agreement has opined that judicial construction of the Agreement thus has the potential, through principles of stare decisis, to affect thousands of non-parties and millions of transactions in jurisdictions around the globe governed by precisely the same language. (See Jeffrey Golden, Interpreting ISDA Terms: When Market Practice Is Relevant, As Of When Is It Relevant?, 9 Capital Mkts. L.J. 299, 303-305 [2014]. [Windels Aff., Exh. 40].) For this reason, courts in New York and England, the two forums most commonly called upon to interpret the Agreement, have held that the Agreement should be "'enforced so as to promote legal certainty and hence, market stability.'" (See e.g. Intel, 2015 WL 7194609, at * 11 [quoting ISDA's objectives in drafting the 1992 Master, as described in an amicus brief filed by the organization, and holding that, "[t]o the extent [the parties] have adopted the ISDA standard forms, it is reasonable to infer that the parties have no quarrel with ISDA's" objective to promote consistency]; Anthracite Rated Invs. [Jersey] Ltd. v Lehman Bros. Fin. SA, [2011] EWHC [Ch] 1822, ¶ 114 [Eng.] [noting that the ISDA Master Agreement "is probably the most important standard market agreement used in the financial world," and that "it should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large numbers of parties using it should know where they stand"].) Judicial interpretation of the

There is also substantial authority that an objective standard of reasonableness applies to a contractual provision requiring performance of an obligation in a reasonable manner. (See generally MBIA Ins. Corp. v Patriarch Partners VIII, LLC, 842 F Supp 2d 682, 704-705 [SD NY, Feb. 6, 2012, No. 09 Civ 3255, Sweet, J.] [holding, under New York law, that a contractual obligation to use "commercially reasonable efforts" imposed "an objective standard of reasonableness rather than [the defendant's] mere subjective belief about what efforts [it] should take" to satisfy the obligation]; Christie's Inc. v SWCA, Inc., 22 Misc 3d 380, 383-384 [Sup Ct, NY County, Sept. 12, 2008, Ramos, J.] [holding that "the phrase 'reasonably determines' suggests that the parties intended a standard of objective reasonableness to apply"]; see also Restatement [Second] of Contracts, § 228.)

It is a basic tenet, applied across a wide range of legal issues, that the question of what is reasonable may require consideration of the facts and surrounding circumstances in the case. (See e.g. Zev v Merman, 73 NY2d 781, 783 [1988] [reasonable time for performance of contract]; People v Kreichman, 37 NY2d 693, 697 [1975] [reasonableness of search and seizure]; Caldwell v Village of Is. Park, 304 NY 268, 274 [1952] [duty of reasonable care]; Fulton County

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ISDA Master Agreement in a vacuum, without any consideration of industry practice, could lead to results that frustrate, rather than promote, ISDA's—and the parties'—objectives of certainty and market stability. While the case law does not support using industry custom to contradict or nullify unambiguous contractual provisions, where a true "market consensus has developed around the interpretation of" an ISDA Master provision, courts should exercise caution in departing from that consensus. (See Golden, 9 Capital Mkts. L.J. at 302 [noting that a market consensus has developed around the interpretation of many of the Master Agreement's provisions, and urging that in interpreting the Master Agreement, courts consider how market participants have historically dealt with the provisions and concepts in question].)

This court recognizes that New York does not endorse the California rule under which courts "preliminarily consider all credible evidence of the parties' intent in addition to the language of the contact," in order to determine the meaning to which the contractual language is reasonably susceptible, and thus to determine whether the contract is ambiguous. (See Greenfield, 98 NY2d at 574; Special Situations Fund III QP, L.P. v Overland Storage, Inc. (2017 WL 4517773, * 4 [Sup Ct, NY County Sept. 27, 2017 [this court's prior decision discussing California law on contract interpretation].) Preliminarily accepting evidence of industry custom and usage in construing a master contract in a highly specialized industry would not, however, implicate the concerns as to predictability raised by the California rule, nor invite unlimited extrinsic evidence, as evidence of market practice would not be admissible to aid in understanding a contractual term unless it was fixed and notorious. (See Law Debenture, 595 F3d at 466; J.P. Morgan Inv. Mgt. Inc., 106 AD3d at 559-560.)

Gas & Elec. Co. v Rockwood Mfg. Co., Inc., 238 NY 109, 113 [1924] [unreasonable interference with rights to use of water]; Schanck v Mayor, Alderman & Commonalty of the City of N.Y., 24 Sickels 444, 447 [1877] [reasonable rent].)

Consistent with this extensive body of law, the Appellate Division has held that "[i]n determining whether conduct is objectively reasonable, industry norms may be appropriately considered." (Hoag v Chancellor, Inc., 246 AD2d 224, 231 [1st Dept 1998].) In undertaking such an analysis, the court considers evidence of industry practice "not for the improper purpose of interpreting or varying an agreement without ambiguity, . . . but for the permissible purpose of providing guidelines for [an] unexplained term"—there, "unreasonably withheld." (See id. at 230-231; see also Bankers Trust Co. v J.V. Dowler & Co., Inc., 47 NY2d 128, 134 [1979], rearg denied 47 NY2d 1012 [holding that UCC term "commercially reasonable," by "virtue of its lack of further particularization . . . [,] invites consideration of accepted business practices," and that "[c]ustoms and usages that actually govern the members of a business calling day-in and day-out not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience"].)

For the reasons discussed further below, the court holds that, under these principles of contract interpretation, the ISDA Master Agreement is not ambiguous to the extent that it provides that Loss need not be calculated using market quotations in every case, but is ambiguous as to whether Loss, under the circumstances of this case, was "reasonably determine[d]."

As Assured correctly argues (Def.'s Memo. In Supp., at 18), "there is strong textual support for reading the definition of Loss as generally permitting non-defaulting parties . . . to select any methodology for calculating Loss, so long as such methodology is reasonable and in

good faith." (See Intel, 2015 WL 7194609, at * 11.) As explained by the Intel Court, which construed the identical ISDA Loss provision:

> "The first sentence of the definition of Loss makes clear that [Loss] will be 'an amount that party [i.e., the Non-Defaulting 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.' 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."

(Id., at * 10.)[11]

As is pertinent to this motion, not only is there "nothing in the text of the definition of Loss that explicitly mandates any particular calculation method" (id.), but the Loss provision unambiguously states that the Non-Defaulting 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." (Master Agreement, § 14, "Loss" Definition.) Given this plain and unambiguous language, the court cannot find that the Loss provision categorically prohibits a Non-Defaulting Party, like Assured, from calculating its Loss without reference to market prices.

Put another way, the Loss provision could not be clearer in stating that a party "may (but need not)" calculate Loss using market quotations of rates or prices. The phrase "need not" is

[11] Intel involved a failed forward share repurchase agreement, in which Intel made a pre-payment of $1 billion to a Lehman entity (LOTC), which in return was to deliver a fixed number of Intel shares to Intel one month later. LOTC delivered $1 billion of collateral to Intel to secure its obligations. (2015 WL 7194609, at * 1.) The transaction was documented pursuant to an ISDA Master Agreement, with modifications not here relevant. (Id.) As a result of the bankruptcy filing of various other Lehman entities, LOTC was unable to transfer the shares to Intel. Intel then terminated the transaction based on the bankruptcy filing by the guarantor Lehman entity—an Event of Default. (Id., at * 2, 5.) The issue before the Court was the proper calculation of the Early Termination Payment, with Intel claiming that it was entitled to the $1 billion pre-payment plus interest, and LOTC claiming that Intel was entitled only to the fair market value of the undelivered shares on the delivery date. (Id., at * 2.) In determining which of the parties' positions should prevail, the Court interpreted the ISDA Master Agreement Loss provision at issue here. (Id., at * 7, 9-10.)

not a technical or specialized term which is, or could be, rendered ambiguous by evidence proferred by LBIE on this motion (see infra at 25-27) that parties to ISDA Master Agreements have consistently elected to calculate Loss using market prices. Even a reasonably intelligent person cognizant of such a custom or practice could not read the final sentence of the Loss provision as providing that a Non-Defaulting Party's failure to calculate Loss based on market prices is a per se breach of contract. Rather, the ISDA Master Agreement must be read in light of its purpose, which is to promote legal certainty and predictability or market stability when applied to termination of a diverse array of derivative transactions in global markets. (See Intel, 2015 WL 7194609, at * 11 [quoting ISDA's Brief of Amicus Curiae In Support of the Brief of Defendant Intel].) The last sentence of the Loss provision should be read as an acknowledgment that there may, within this broad universe of transactions, be situations in which calculation of Loss using market prices may not be possible or would be unreasonable. The Loss provision thus by its terms affords the Non-Defaulting Party the discretion to make the determination as to whether use of market prices to calculate Loss is appropriate in a particular case.

This is not to say, however, that evidence of market practice with respect to the calculation of Loss is irrelevant to the ultimate question before the court—that is, whether the methodology Assured actually used to calculate its Loss was reasonable and applied in good faith. (See Intel, 2015 WL 7194609, at * 12 [concluding that "as a general rule, selecting Loss to calculate an Early Termination Payment affords the non-defaulting party discretion and flexibility in selecting the means for calculating its Loss, subject to such methodology being reasonable and in good faith"]; Barclays Bank plc v Devonshire Trust, [2013] OJ No 3691, ¶ 268 [Can Ont CA] [holding that "the ISDA Master Agreement requires a Non-Defaulting Party's

calculation of Loss to be reasonable and made 'in good faith.' It must also produce a commercially reasonable result"].)[12]

To hold, as this court does, that the Loss provision affords the Non-Defaulting Party discretion to calculate Loss without reference to market prices does not mean that the Non-Defaulting Party's decision to ignore market prices can never be unreasonable or undertaken in bad faith. Discretion can, after all, be abused. Assured has not shown that the last sentence of the Loss provision must be read as effectively removing the issue of use of market prices from the analysis of a Non-Defaulting Party's reasonableness and good faith. In contrast, LBIE has submitted evidence of market practice which raises a triable issue of fact as to whether Assured has "reasonably determine[d]" its Loss.

LBIE's market practice evidence includes reports from four experts, including Leslie Rahl, a former chair of the ISDA committee responsible for drafting the original ISDA Master Agreement, and Cynthia Parker and Evy Adamidou, two former senior executives at monoline insurers, each of whom opines that it is standard industry practice to calculate Loss using market

[12] Jeffrey Golden, who is cited by both parties and, as noted above, was an expert in the Intel case and a principal drafter of the 1992 ISDA Master Agreement, opines that the objective in affording the Non-Defaulting Party "considerable discretion" in calculating Loss, was to promote commercial certainty. Thus, "[s]etting 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." (Excerpts from expert report submitted by Golden in Intel, ¶¶ 40-41 [Brunelle Exh. 74] [fn omitted].) Golden also opines, however, that although the ISDA Master Agreement forms were drafted "to be clear and unambiguous to the greatest extent possible," there were instances in which it was necessary "to paint with a broader brush. When taking this approach, [the drafters] did so with the expectation that any ambiguities would be resolved by market participants in a commercially reasonable manner." (Golden, 9 Capital Mkts. L.J. at 303 [emphasis supplied] [Windels Aff., Exh. 40].)

Assured asserts that its calculation of loss of bargain must be upheld "so long as there is any rational basis for that calculation." (Def.'s Reply Memo., at 12.) In support of this contention, Assured relies principally on Fondazione Enasarco v Lehman Bros. Fin. S.A., (2015) EWHC (Ch) 1307 (Eng), ¶ 53. There, in the context of determining whether a Non-Defaulting Party's calculation of loss was valid under the 1992 ISDA Master Agreement Loss provision, using the Second Method and Loss methodology, the Court stated 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." This statement was apparently made in dicta and, in this court's opinion, is overbroad and inconsistent with New York law discussed above. (See supra at 19-22.)

prices to approximate the cost of a replacement transaction. (See Rahl Report], ¶¶ 5-6, 57 [Windels Aff., Exh. 1] ["Even though a 'Non-defaulting Party' calculating 'Loss' is not required [under the last sentence of the Loss provision] to obtain a quote from a leading dealer, market practice is that it will use market prices or market data in an appropriate way to arrive at a commercially reasonable determination of 'Loss'"]; Rebuttal Report of Peter Niculescu, ¶ 4 [Windels Aff., Exh. 33] ["Market prices reflect the equilibrium between demand and supply that includes a risk premium and in general will therefore diverge from subjective expectations of loss. The cost of a replacement transaction necessarily reflects those market factors. Market practice uses the cost of a replacement transaction to determine 'Loss'"]; Expert Report of Cynthia Parker, ¶¶ 8-9, 23 [Windels Aff., Exh. 34] ["It has been my experience, both at Ambac and other financial institutions where I have worked, that derivative transactions documented based on the ISDA Master Agreement standard dealer terms – Market Quotation/Loss and Second Method – are closed out on a mark-to-market basis. If no quotes are available in the market, a party would try to obtain other evidence of market prices to establish its loss, including through soliciting indicative quotes. This is standard market practice in the derivatives market"]; Expert Report of Evy Adamidou, ¶¶ 6-9, 13 [4]-[6] [Windels Aff., Exh. 35] ["Monoline insurers were aware of and concerned about the risks of having to make mark-to-market payments in relation to CDS" upon early termination, and reduced that risk by negotiating "walkaway" provisions—not included in the instant contract].)

The expert report of Leslie Rahl, formerly of ISDA, references a noteworthy example of counterparties using market prices to calculate Loss. According to Rahl, when the U.S. Lehman Brothers entities filed for bankruptcy in 2008, they agreed upon a framework to settle thousands of outstanding derivative transactions with other major securities dealers. This framework,

which was approved by the U.S. Bankruptcy Court for the Southern District of New York, "uses market prices and market-based information in order to calculate a settlement value for those transactions governed by the 'Loss' provision of the ISDA Master Agreement." (Rahl Report, ¶ 86.)

LBIE's evidence also includes a declaration of Eduardo Viegas, a director of PricewaterhouseCoopers LLP "assigned to support the LBIE Administration . . . . [with respect to] the valuing of fixed income assets and the collection of proceeds from terminated transactions." (Viegas Decl., ¶¶ 1, 12 [Windels Aff., Exh. 8].) Viegas declares that, since entering Administration, LBIE has terminated CDS with hundreds of counterparties, including terminations with 62 counterparties of CDS referencing asset-backed securities, under which the counterparties' determinations of termination payments were made using the Loss method or its substantial equivalent under the newest ISDA Master, the "Close-out Amount" method. (Id., ¶¶ 19, 22.) Viegas asserts that, although the various counterparties to these CDS transactions did not always disclose their methodologies for calculating Loss, LBIE identified only three instances in which counterparties calculated termination payments which deviated from its own market-derived calculations, and that LBIE ultimately settled with those parties for amounts consistent with or deviating only minimally from its own calculations. (Id., ¶¶ 23, 27-28.)

Where, as here, evidence is submitted that there may be a uniform or highly consistent practice of calculating Loss in a particular manner under similar circumstances, and the Non-Defaulting Party deviates from that practice, that deviation raises a genuine question of fact as to the Non-Defaulting Party's reasonableness or good faith in calculating Loss. Nothing in this decision should be read as holding that deviation from industry practice is determinative. There may, of course, be legitimate reasons for a Non-Defaulting Party to deviate from standard

practice in calculating Loss, especially during times of market turmoil. This decision should be read as holding only that evidence of departure by Assured, as the Non-Defaulting Party, from standard industry practice is a factor, among others, to be considered in assessing its reasonableness and good faith in calculating Loss.[13]

The Cross-Check Principle

This court's holding that a triable issue of fact exists as to whether Assured reasonably determined its Loss is supported by the so-called "cross-check principle." This principle, which was first articulated by the courts of England, posits that the Market Quotation and Loss methods of the ISDA Master Agreement are "aimed at achieving broadly the same result, so that the outcome derived from one may be usefully tested by way of cross-check by reference to the other." (See e.g. Anthracite Rated Invs. [Jersey] Ltd. v Lehman Bros. Fin. SA, [2011] EWHC [Ch] 1822, ¶ 116 [1] [Eng.] [Anthracite] [stating that this conclusion "has hardened into hornbook law"]; Brittania Bulk plc [in liquidation] v Pioneer Nav. Ltd., [2011] EWHC [Comm] 692, ¶ 44 [Eng.] [Brittania Bulk].) The cross-check principle is based upon the structure of the ISDA Master Agreement and, in particular, the interplay between the Market Quotation and Loss methods for calculation of termination payments. The two methods are interconnected, in that market quotations may be used to calculate Loss, and Loss may serve as a fallback method for calculation of a termination payment where the Market Quotation method fails or arrives at a commercially unreasonable result. As explained in Australia New Zealand Banking Group Ltd. v Societe Generale ([2000] CLC [CA] 833, ¶ 15 [Eng.]):

> "It is now common ground that the Market Quotation and Loss clauses aim at broadly similar, although by their nature not always precisely the

[13] This decision should also not be read as holding that evidence of market practice will always be admissible to determine the reasonableness of a Non-Defaulting Party's methodology for calculating Loss. As the Second Circuit has observed, "a contract may be ambiguous when applied to one set of facts but not another." (Morgan Stanley Group Inc., 225 F3d at 278.)

> same, results. The structure of the relevant ISDA terms (set out in the schedule) confirms this. There is a possibility of considerable overlap between the basis of calculation of the amount payable on one and the other basis. Quotations from market dealers may be used to determine loss under the Loss clause, while loss (as defined in the Loss clause) may be used under the Market Quotation clause to determine the settlement amount for any terminated transaction for which a market quotation 'cannot be determined or would not produce a commercially reasonable result.'"

(See also Brittania Bulk, [2011] EWHC [Comm] 692, ¶ 44 ["Given that the definition of the Settlement Amount expressly contemplates that, if a Market Quotation cannot be determined or would not produce a commercially reasonable result, the fallback position will be a calculation of Loss, it would be very odd if the two payment measures were not intended to achieve broadly the same result, in terms of the payments that have to be made either way by way of close out, on the termination of a transaction or series of transactions"].)[14]

Assured argues that the cross-check principle is not relevant to this case because the Market Quotation auction failed and there is consequently no Market Quotation result against which Assured's calculation of Loss can be compared. (Def.'s Reply Memo., at 8.) While it is true that the Market Quotation in this case was unsuccessful, this argument by Assured is misplaced. The purpose of Market Quotation is to secure a replacement transaction. (See ISDA

[14] The Intel Court considered the cross-check principle and found it to be "a well-reasoned principle," but not one applicable to the facts of the case. (2015 WL 7194609, at * 16.) In Intel, the parties elected to calculate a termination payment using "Second Method and Loss," under which the Non-Defaulting Party was not required, as an initial matter, to conduct an auction for market quotations. (See id., at * 6, 18.) In addition, the transaction at issue did not contemplate any performance or payment following the date on which the transaction had been terminated. (Id., at * 16.) The Court reasoned that the cross-check principle "was developed solely in the context of contracts for which deliveries or payments were to be made after the Early Termination Date," and that it was "reasonable to conclude that Loss and Market Quotation are intended to produce Early Termination Payments in broadly similar amounts when measuring the loss of payments or deliveries due after the Early Termination Date." (Id., at * 16, 18 [emphasis in original].)

Here, in contrast, the Transactions at issue obligated both LBIE and Assured to make payments in certain circumstances following the Early Termination Date. They also agreed to Loss as a fallback method in the event Market Quotation failed or produced a commercially unreasonable result. (See Master Agreement, § 14, "Settlement Amount" Definition, subdivision [b].)

Master Agreement, § 14, "Market Quotation" Definition.) The cross-check principle therefore stands for the proposition that a Non-Defaulting Party's Loss (however calculated) should generally be within the range of what the market would pay for a replacement transaction. If a Non-Defaulting Party's calculation of Loss is not within that range, a genuine question may be raised as to whether the Non-Defaulting Party's calculation of loss was reasonable.

Consideration of the cross-check principle in assessing whether Assured reasonably determined its Loss is appropriate here, as the parties agreed to use Loss solely as a fallback method in the event that the Market Quotation process failed to produce a Replacement Transaction. It would make no sense to hold as a matter of law that, because the Market Quotation process was unsuccessful, Assured was free to adopt a methodology that results in a termination payment completely divergent from the cost of replacing the Transactions.

The parties appear to agree that Market Quotation auctions often fail to produce replacement transactions, even in liquid markets. (See Def.'s Memo. In Supp., at 16; Niculescu Rebuttal Rep., ¶ 349 [Brunelle Aff., Exh. 68] ["'Market Quotation' frequently fails or is not even attempted by many different counterparties – even for the most liquid securities"]; Rahl Rebuttal Report, ¶ 81 [Brunelle Aff., Exh. 69] ["'Market Quotation' failed or was not provided at times in 2008 and 2009 even in the most liquid market sectors . . . ."].) The failure of the Market Quotation auction in this case does not necessarily mean that Assured was unable to replace the Transactions in the market, or that the price of a replacement transaction is impossible to estimate for purposes of applying the cross-check principle.

It is noted that, during the relevant period, LBIE received "indicative price quotes" from Citigroup and Nomura for the Transactions which deviate substantially from the amount of Loss calculated by Assured. (See Pl.'s Memo. In Opp., at 9; Email from John Miles [of Citigroup],

dated July 30, 2009 at 12:40 [Windels Aff., Exh. 23]; Email from Juan Quintas [of Nomura], dated July 28, 2009 at 9:50 AM [Windels Aff., Exh. 25].) Assured disputes the reliability of these indicative bids for purposes of estimating replacement cost. (See Def.'s Memo. In Supp., at 15 n 13, citing 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"].) At the very least, however, the significant discrepancy between the indicative bids and Assured's Loss calculation supports a finding that triable issues of fact exist as to whether the cross-check principle is capable of application to this case and, if so, whether Assured's calculation of Loss satisfies the test imposed by that principle.

Assured's Calculation of Loss

As previously noted, Assured calculated its Loss as the present value of the premium payments owed by LBIE over the remaining term of the Transactions (the Fixed Payments) minus the present value of the payments Assured estimated that it would have had to make to LBIE under the Transactions due to shortfalls in timely interest and ultimate principal payments on the Underlying Securities over the course of the term (the Floating Payments). (Def.'s Memo. In Supp., at 8; Assured's Statement, at 4-5 [Brunelle Aff., Exh. 40].) According to Assured's experts, under the Loss provision, "a reasonable economic estimate of the insurer's net gain or loss can be calculated as the present value of the expected excess of (a) its gain from being relieved of payments upon any default of the underlying securities over (b) its loss from no longer receiving premiums." (Amended Report of Harrison Goldin and David Prager, ¶ 53 [Goldin Report] [Brunelle Aff., Exh. 4]

Assured contends that the reasonableness of its methodology for calculating Loss is supported by the fact that Assured regularly used the same methodology to calculate losses "for multiple business, accounting and regulatory purposes in the ordinary course." (Def.'s Memo. In Supp., at 24.)[15] Assured further argues that the methodology is consistent with 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 under the contract. (See id., at 19.) According to Assured, "its calculations have proven remarkably accurate when compared with the actual performance of the Transactions in the years following [LBIE's] default" and are "consistent with [LBIE's] own contemporaneous internal loss projections." (Id., at 21.) As discussed above (supra at 25, n 12), Assured also contends that a "rational basis" standard is used to assess whether a Non-Defaulting Party's methodology to determine Loss is proper, and that its calculations satisfy this standard. (Def.'s Memo. In Supp., at 22.)

LBIE disputes that the methodology used by Assured was reasonable because it was also used to calculate Assured's regulatory loss reserves. Although LBIE contends that Assured's overall methodology was unreasonable (Pl.'s Memo. In Opp. at 25), LBIE also objects, more specifically, to the reasonableness of Assured's calculation of $23.4 million, as the amount it

[15] Assured's Statement represents that, in determining the expected Floating Payments, Assured "assessed the likelihood of the occurrence of a Credit Event and the related Floating Payments using the same methodology used by it in determining regulatory reserves for the quarter ending September 30, 2009 by [Assured's] Credit Support Provider, Assured Guaranty Corp." (Statement, at 5 & Annex B.) Assured explains that, as a regulated insurance company, it maintains an "independent loss reserve process subject to multiple layers of oversight." (Def.'s Memo. In Supp., at 9.) A Reserve Committee, comprised of senior executives of Assured, "determine[s] assumptions, loss scenarios and probability weights that it believe[s] to be reasonable based on past assumptions and current market information." (Id; Dep. of Benjamin Rosenblum [Assured's Chief Actuary and member of Reserve Committee], at 52-53 [Brunelle Aff., Exh. 42].) This process is then reviewed and approved by Assured's Audit Committee, which is comprised of Assured's senior directors, its Chief Actuary, and its independent auditor, PricewaterhouseCoopers. (Def.'s Memo. In Supp., at 9.) Assured states that this loss reserve methodology "form[s] the basis for its financial reporting: informing investors of financial performance and determining credit impairment for reporting under Securities Exchange Commission and Maryland insurance regulations." (Id.)

would have been contractually obligated to pay LBIE in Floating Payments as a result of interest and principal shortfalls on the Underlying Securities. LBIE contends that the assumptions used by Assured in performing its calculation were "deeply flawed." (Id., at 11, 25.) According to LBIE, Assured's assumptions "about the performance of the underlying pools of subprime residential mortgages, including the rate at which the mortgages would default, the extent of loss upon default, and the rate at which subprime borrowers would prepay their mortgages," were "unduly optimistic and have proven to be flatly wrong, raising serious questions about the reasonableness of [Assured's] Loss calculation . . . ." (Id. at 25.) LBIE disputes that the actual performance of the reference obligations is consistent with Assured's calculation of Loss (id., at 25-28), and that LBIE's own internal loss projections support the reasonableness of the calculation. (See id., at 24-25.)

The court rejects Assured's contention that its Loss methodology was reasonable as a matter of law because it was also used for other purposes in Assured's business, including the determination of its regulatory loss reserves. The parties' experts dispute whether loss projections made for other business purposes constitute a reasonable basis for the measurement of Loss within the meaning of the ISDA Master Agreement. (Rahl Report, ¶¶ 112-115; Goldin Report, ¶¶ 51-61.) The experts' reports on this issue are conclusory and their conflicting opinions raise issues of fact which cannot be resolved on this record.[16]

The parties' experts also sharply dispute the validity of Assured's assumptions in calculating Loss. LBIE submits evidence that particular assumptions made by Assured in

[16] Although a monoline insurer that adopts an unreasonable methodology for projecting future losses for regulatory reserve purposes may be expected to suffer serious consequences, Assured itself appears to have acknowledged that "'[t]he establishment of the appropriate level of loss reserves is an inherently subjective process involving numerous estimates, assumptions and judgments by management, using both internal and external data sources with regard to frequency and severity of loss.'" (Rahl Report, ¶¶ 112-113 [quoting from Assured's Form 10-K for 2007].) The significance of Assured's characterization of its process as "subjective" has not been adequately addressed by the parties on this record.

calculating its expected Floating Payments were unreasonable and out of line with the estimates of other market participants. In particular, LBIE's expert opines that Assured made assumptions about the default rates, loss severities, and prepayment rates in the years following the terminations that were more optimistic than those of other market participants, resulting in projected losses far below those of those other participants. (Niculescu Rebuttal Report, ¶ 200 [a]-[g] & Exh. 33 [chart comparing loss forecasts of Assured and other market participants]; Pl.'s Memo. In Opp., at 25-28.) Assured's experts opine that its assumptions were reasonable (Goldin Report, ¶¶ 56-60), and that its analysis of loss was consistent with those of other market participants and with that of LBIE on its own back-to-back trades on the terminated transactions. (Id., ¶¶ 56, 61.) Again, the experts' dispute raises a material issue of fact for trial.

The court also declines to hold on this record that Assured's methodology is reasonable because it is consistent with New York law on contract damages. There is persuasive authority that the ISDA Master Agreement's formulae for calculating termination payments "are not to be equated with, or interpreted rigidly in accordance with, the quantification of damages at common law for breach of contract." (Anthracite, [2011] EWHC [Ch] 1822, ¶¶ 116 [3], 117, 126; see also Intel, 2015 WL 7194609, at * 19 [holding, in connection with a contract to deliver securities, that the ISDA Second Method and Loss methodology represents "a fundamental departure" from calculating damages for breach of contract under New York law, and that "[t]his is because, among other things, an Early Termination Payment calculated under Second Method, unlike damages for breach of contract under New York or other common law, can express itself as a payment owed from the non-defaulting party to the defaulting party"].)

Assuming that New York law on contract damages nonetheless remains relevant in assessing whether a particular party's calculation of Loss was reasonable, the court holds that Assured has failed to show on this motion that its methodology was consistent with such law. "It has long been recognized that the theory underlying [breach of contract] damages is to make good or replace the loss caused by the breach of contract." (Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256, 261 [1998] [Brushton]; NY Jur 2d, Damages, § 32.) The general precept is that "damages are intended to place the injured party in the same position as if there had been no breach." (Brushton, 91 NY2d at 262.) Stated slightly differently, "[c]ontract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed." (Goodstein Constr. Corp. v City of N.Y., 80 NY2d 366, 373 [1992]; Sager v Friedman, 270 NY 472, 481 [1936], rearg denied 271 NY 617; see also Haig, NY Prac, Commercial Litig in NY State Courts, § 48:14 [4th ed 2017] ["Expectancy damages are damages sufficient to give the promisee the equivalent of the benefit of its bargain by awarding a sum that, to the extent possible, will put the promisee in as good a position as it would have been in had there been performance"]; Restatement [Second] of Contracts, § 347, comment a [same].)

Although Assured's methodology, as described above, appears on its face to be a reasonable method for calculating the value to Assured of the terminated Transactions, the court cannot conclude on the present record that it was a reasonable method for calculating Assured's loss of bargain. A problem with Assured's methodology is that it assumes that there was no possibility of a replacement transaction to mitigate the loss of value that Assured purportedly suffered as a result of the terminations. Assured does not address on this motion how, if a

replacement transaction was available to it, a calculation of Loss which fails to account for that availability could result in a reasonable approximation of its actual loss of bargain. (See Restatement [Second] of Contracts, § 347, comment b ["The injured party is limited to damages based on his actual loss caused by the breach. If he makes an especially favorable substitute transaction, so that he sustains a smaller loss than might have been expected, his damages are reduced by the loss avoided as a result of that transaction"]; see also Anthracite, [2011] EWHC [Ch] 1822, ¶ 117 [holding that the ISDA Master Agreement definition of Loss "reflects the principle . . . well established at common law, namely that where damages are sought for loss of bargain occasioned by the breach (leading to termination) of a commercial contract then, subject only to the availability of a market for the obtaining of a replacement contract, the cost of such a replacement contract as at the breach date is likely to prove the most reliable yardstick for measuring the Claimant's loss of bargain"].)

Alternatively, even assuming, without deciding, that Assured's methodology is facially consistent with New York law on contract damages, for the reasons stated above, LBIE raises a triable issue of fact as to whether Assured's application of the methodology—in particular, its projections of Floating Payments—was reasonable. (See supra at 33-34.)

Finally, the court cannot find on this record that Assured has demonstrated as a matter of law that the actual performance of the Underlying Securities, and LBIE's "internal analysis" of the Transactions and its back-to-back transactions, demonstrate the reasonableness of Assured's Loss methodology as a matter of law. (See Def.'s Memo. In Supp., at 26-29; Pl.'s Memo. In Opp., at 24-25.) As LBIE correctly argues, the ISDA Master Agreement requires that Loss be determined "'as of the relevant Early Termination Date,' not years later using hindsight." (Pl.'s Memo. In Opp., at 28.) Moreover, LBIE contends that actual losses on the Transactions will

likely be approximately four times larger than the losses projected by Assured in preparing its calculation. (Id.) Accordingly, even assuming that the ultimate performance of the Underlying Securities is relevant to the reasonableness determination, a question of fact exists as to whether the performance was consistent or inconsistent with Assured's calculation. A question of fact also exists as to whether LBIE's "internal analysis of the Transactions and its back-to-back transactions demonstrate that LBIE valued the Transactions in a manner consistent with Assured's calculation.

Surrounding Context

The context surrounding Assured's termination of the Transactions also supports the denial of Assured's motion. This context is summarized by LBIE's expert, as follows:

> "LBIE and [Assured] executed the Transactions between 2005 and early 2008 – well before the depths of the credit crisis of 2008 and 2009. By the time the Transactions were terminated in July 2009, the risk associated with each of [the] Reference Obligations underlying the Transactions had increased substantially. Consequently, there can be no serious dispute that the Transactions were significantly 'in the money' to LBIE as of July 2009, as LBIE would have been required to pay substantially more in July 2009 in order to receive the same level of credit protection on the underlying assets (i.e., Reference Obligations) than it had prior to the start of the credit crisis."

(Rahl Report, ¶ 107.)

As previously discussed, the parties elected in the Schedule to use the "Second Method" in calculating a termination payment. This election meant that the Non-Defaulting Party might be called upon to make a payment to the Defaulting Party in the event the Non-Defaulting Party derived a gain, as opposed to a loss, from termination of a Transaction. (See supra, at 3.) It cannot be disputed that, at the time of the terminations at issue, the financial crisis had significantly increased the prospect of shortfalls in timely interest and ultimate principal payments on the Underlying Securities. Indeed, LBIE submits evidence on this motion that it

contends demonstrates that ratings agencies and Assured itself believed, by January 2009, that the Transactions were "deeply in the money to LBIE" (see Pl.'s Memo. In Opp., at 7-8) or, put another way, that Assured would face significant CDS counterparty exposure to LBIE. (See Windels Aff., Exhs. 10-13.)

While there may be legitimate explanations for Assured's calculation of a termination payment to itself, these explanations are not clearly developed on the record of this motion. Under these circumstances, the court finds that the context surrounding the termination of the Transactions raises a genuine question of fact as to the reasonableness and good faith of Assured's calculation of its Loss.

It is accordingly hereby

ORDERED that the motion of defendant AG Financial Products Inc. (Assured) for summary judgment dismissing the claims asserted against it is granted to the following extent: the third cause of action (Breach of the Implied Covenant of Good Faith and Fair Dealing – July 2009 Transactions) is dismissed in its entirety, and the second cause of action (Breach of Contract – July 2009 Transactions) is dismissed solely to the extent that it is based upon Assured's conduct in connection with the Market Quotation auction.

This constitutes the decision and order of the court.

Dated: New York, New York
July 2, 2018

MARCY FRIEDMAN, J.S.C.