UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-1079-bk

Caption [use short title]

In Re: Lehman Brothers Holding Inc.

Motion for: Structured Finance Industry Group to file Amicus Curiae brief in support of Defendants-Appellees

Set forth below precise, complete statement of relief sought:

The Structured Finance Industry Group seeks leave to file an Amicus Curiae brief in support of Defendants-Appellees

MOVING PARTY: Structured Finance Industry Group

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Lehman Brothers Special Financing, Inc.

MOVING ATTORNEY: David Y. Livshiz

OPPOSING ATTORNEY: William F. Dahill

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: Southern District of New York; Judge Lorna G. Schofield

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ David Y. Livshiz **Date:** 11/1/2018 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Plaintiff-Appellant,

—against—

BRANCH BANKING AND TRUST COMPANY, et al.

Defendants-Appellees

Case No. 18-1079

MOTION BY STRUCTURED FINANCE INDUSTRY GROUP
FOR LEAVE TO FILE AMICUS BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Structured Finance Industry Group, Inc. (***SFIG***) has no parent corporation and no publicly held corporation has any ownership interest in SFIG.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), the Structured Finance Industry Group, Inc. (***SFIG*** or the ***Proposed Amicus***) respectfully moves this Court for leave to file the brief attached hereto as Exhibit A (the ***Proposed Brief***) as amicus curiae in the above-captioned case in support of the Defendants-Appellees. In support of this motion, the Proposed Amicus states as follows:

1. SFIG is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG has over 350 members, including investors; issuers; financial intermediaries; accounting, law, and technology firms; rating agencies; servicers; and trustees. These members have diverse economic interests in the market for structured financial products but share a common goal of ensuring that agreements used to document securitization transactions are interpreted in accordance with their terms and that the law governing those transactions is applied in accordance with market expectations.

2. The validity and enforceability of the priority payment provisions at issue in this litigation (the ***Priority Provisions***) are central to the functioning of the securitization and swap markets in which SFIG's members participate. SFIG's members thus have an interest in ensuring that the Priority Provisions are enforced in accordance with their terms and , and preserving the

market expectation—well-grounded in the plain language of the Bankruptcy Code provisions at issue—that the Priority Provisions will be enforced even in the event of a bankruptcy. SFIG's members are therefore united in a belief that the decision of the United States Bankruptcy Court for the Southern District of New York (the ***Bankruptcy Court***) should be upheld, along with the decision of the United States District Court for the Southern District of New York (the ***District Court***, and, together with the Bankruptcy Court, the ***Lower Courts***) affirming the Bankruptcy Court's decision. Doing so would promote the certainty and predictability required for the orderly functioning of the financial markets.

3. SFIG respectfully submits that consideration of the Proposed Brief will assist the Court in deciding this appeal. The diversity of SFIG's membership provides SFIG with a wide-ranging and deep understanding of the economic and market realities surrounding the structured financial products involved in the current litigation, including the Priority Provisions. Indeed, members of the financial industry were involved in the drafting of the safe harbor provisions at issue here.[1]

4. Moreover, the outcome of this Court's decision will affect hundreds, if not thousands, of derivatives transactions, including currency and

[1] See H.R. Rep. No. 109-31, pt. 1, at 20 (2005) (Congress' expansion in 2005 of the safe harbor contained in 11 U.S. C. § 560 was "derived from the recommendations issued by the President's Working Group on Financial Markets and revisions espoused by the financial industry").

interest rate swaps, at the heart of the structured finance industry. Participants in this industry fully grasp the potentially devastating effects of this decision, as evidenced by the participation of industry organizations as amici before the Lower Courts.[2] SFIG's expertise in this industry provides insight into how these repercussions will be felt within the industry at large, beyond the parties named in this appeal.

5. Courts have found the participation of amicus curiae to be particularly appropriate where, as here, a case will have significant implications for an entire industry beyond the immediate parties before the court. See, e.g., Neonatology Assoc., Inc. v. Comm'r of Internal Rev., 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (noting that an amicus, including "trade and professional associations" with a "pecuniary interest" in the outcome, may provide "important assistance to the court" when they "explain the impact a potential holding might have on an industry") (collecting cases); Weininger v. Castro, 418 F.Supp.2d 553, 555 (S.D.N.Y. 2006) (briefing by an amicus with a pecuniary interest in the outcome appropriate when the underlying issues are "likely to engender reasonable expressions of public interest from a universe much larger than the adversaries in

[2] This participation contrasts sharply with the lack of industry participation in Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 882 (2018), a case on which the Plaintiffs-Appellants rely. In Merit, the Supreme Court noted that the decision's limited impact on the financial markets could be inferred from the lack of participation from the industry as amici. See Transcript of Oral Argument at 60:18-62:14, 138 S. Ct. 883 (2018) (Dkt. No. 16-784).

the instant action"). Accordingly, courts across the nation—including this very Court—have found SFIG's opinion on issues related to structured financial products helpful and granted SFIG's motions to appear as amicus curiae. See Order, Madden v. Midland Funding, LLC, No. 14-2131-cv (2d Cir. July 8, 2015), ECF No. 130; Permission to File Amicus Curiae Brief Granted, Yvanova v. New Century Mortg. Corp., No. S218973 (Cal. Apr. 23, 2015).

6. In view of the foregoing, the Proposed Amicus respectfully requests permission to file the proposed amicus curiae brief.[3]

Dated: November 1, 2018
New York, NY

Respectfully submitted,

/s/ David Y. Livshiz

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[3] SFIG has sought the consent of the Plaintiffs-Appellants and the Defendants-Appellees for the filing of an amicus brief in support of the Defendants-Appellees. The Defendants-Appellees, through their respective counsel, consented. The Plaintiffs-Appellants, through their counsel, did not consent. SFIG accordingly requests leave to file the Proposed Brief.

jill.serpa@freshfields.com

Attorneys for Proposed Amicus Curiae Structured Finance Industry Group, Inc.

PROPOSED BRIEF

18-1079-bk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: LEHMAN BROTHERS HOLDINGS INC.

Debtor.

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Plaintiff-Appellant,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE STRUCTURED FINANCE INDUSTRY GROUP'S BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Attorneys for Amicus Curiae Structured Finance Industry Group

—v.—

Branch Banking & Trust Company, Bank of America N.A., U.S. Bank National Association, 801 Grand CDO Series 2006-1 LLC, as CoIsuer, 801 Grand CDO SPC f/a/o the Series, 2006-2, as Isuer, 801 Grand CDO Series 2006-2 LLC, as CoIsuer, 801 Grand CDO SPC f/a/o the Series, 2006-1, as Issuer, ALTA CDO SPC, f/a/o the Series, 2007-1 Segregated Portfolio, as Issuer, ALTA CDO SPC, f/a/o the Series, 2007-2 Segregated Portfolio, as Issuer, ALTA CDO LLC, for Series 2007-1,, as CoIssuer, ALTA CDO LLC, for Series 2007-2,, as CoIssuer, Barton Springs CDO SPC, f/a/o The Series 2005-1 Segregated Portfolio, as Issuer, Barton Springs CDO SPC, f/a/o The Series 2005-2 Segregated Portfolio, as Issuer, Barton Springs CDO Series 2005-1 LLC, as Co Issuer, Barton Springs CDO Series 2005-2 LLC, AIG Taiwan Insurance Co. Ltd., American International Group, Inc., ANZ Investment Bank, ANZ Nominees Limited, Atlantic Central Bankers Bank, Balmoral Australia Pty Ltd., Banco de Credito del Peru, Basis Capital Pty Limited, Basis Pac-Rim Opportunity Fund, Belmont Park Investments Pty Ltd, Big Horn CDO 2007-1Collateral, Blue Mountains City Council, Blue Point CDO Series 2005-1 LLC, as Co-Issuer, Blue Point CDO SPC, f/a/o the Series 2005-1 Segregated Portfolio, as Issuer, BNY Mellon Corporate Trustee Services Ltd., Broderick CDO 3, Ltd., Carroll 2 CC/Carroll Holdings Company and/or the Holders of an Account in that Name, Catholic Development Fund for the Catholic Diocese of Bathurst, Cherry Hill CDO LLC for Series 2007-1, as CoIssuer, Cherry Hill CDO LLC for Series 2007-2, as CoIssuer, Cherry Hill CDO SPC, f/a/o the Series 2007-1 Segregated Portfolio, as Issuer, Cherry Hill CDO SPC, f/a/o the Series 2007-2 Segregated Portfolio, as Issuer, Cheyne CLO Investments I Ltd., Citicorp Nominees Pty Ltd., Citigroup Global Markets Inc., City of Albany, City of Swan, Class V Funding III, Corp., Class V Funding III, Ltd., Continental Life Insurance Company of Brentwood Tennessee, Copper Creek CDO LLC, as Co-Issuer, Copper Creek CDO SPC, f/a/o Series 2007-1 Segregated Portfolio, as Issuer, Country Life Insurance Company, Crown City CDO 2005-1 LLC, as Co-issuer, Crown City CDO 2005-2 Limited, as Issuer, Crown City CDO 2005-2 LLC, as CoIssuer, Deutsche Bank Trust Company Americas, Diversey Harbor ABS CDO, Inc., Diversey Harbor ABS CDO, Ltd., Eastern Metropolitan Regional Council, Elliott International, L.P., Euroamerica Asesorias S.A., Euroclear Bank SA/NV, First Northern Bank and Trust Company, Freedom Park CDO Series 2005-1 Limited, as Issuer, Fullerton Drive CDO Limited, as Issuer, Fullerton Drive CDO LLC, as Co-Issuer, Fulton Street CDO Corp., FreedomPark CDO Series 2005-1 LLC, as Co-Issuer, G & F Yukich Superannuation Pty Ltd, Garadex Inc., Gatex Properties Inc., General SecurityNational Insurance Company, Genworth Life and Annuity Insurance Company, Geometric Asset Funding Ltd., Goldman Sachs International, Goldman, Sachs & Co. LLC, Gosford City Council, Greystone CDO Series 2006-1 LLC, as Co-Issuer, Greystone CDO Series 2006-2 LLC, as Co-Issuer, Greystone CDO SPC, f/a/o the Series 2006-1 Segregated Portfolio, as Issuer, Greystone CDO SPC, f/a/o the Series2006-2 Segregated Portfolio, as Issuer, Guohua Life Insurance Co. Ltd., Havenrock II Limited, HHE Partnership LP, Jefferson Valley CDO Series 2006-1 LLC, as Co-Issuer, Jefferson Valley CDO SPC, f/a/o the Series 2006-1 Segregated Portfolio, as Issuer, JP Morgan Chase Bank, N.A., JP Morgan Securities, PLC, Kings River Limited, as Issuer, KingsRiver LLC, as Co-Issuer, KLIO II Funding Corp., KLIO II Funding Ltd., KLIO III Funding Corp., KLIO III Funding Ltd., KMCL Carroll and / or the Holders of an Account in that Name, Lakeview CDO LLC Series 2007-1, as Co Issuer, Lakeview CDO LLC, f/a/o the Series2007-2 Segregated Portfolio, as Co-Issuer, Lakeview CDO SPC, f/a/o the Series2007-3 Segregated Portfolio, as Issuer, Lakeview CDO SPC, f/a/o the Series 2007-1 Segregated Portfolio, Lakeview CDO SPC, f/a/o the Series 2007-2 Segregated Portfolio, as Issuer, Lancer Funding II Ltd., Lancer Funding II, LLC, Leeton Shire Council, Leithner & Company Pty Ltd, LGT Bank in Liechtenstein Ltd., Lifeplan Australia Friendly Society Ltd., Loreley Financing (Jersey) No. 15 Limited, Lower Murray Water, Lyndoch Living Inc., Magnetar Constellation Fund II Ltd., Magnetar Constellation Master Fund III Ltd., Magnetar Constellation Master Fund Ltd., Manly Council, Mariner LDC, Marsh & McLennan Companies, Inc., Stock Investment Plan, Marsh & McLennan Master Retirement Trust, MBIA Inc., MoneyGram Securities LLC, Morgan Stanley & Co. LLC, Morgans Financial Limited, Mulberry Street CDO, Ltd., National Nominees Limited, Nationwide Hybrid Mand/Nationwide SF Hybrid and/or the Holders of an Account in that Name, Nationwide Superannuation and/or the Holders of an Account in that Name, Natixis Financial Products LLC, Newcastle City Council, Ohio Public Employees Retirement System, OSDF, Ltd., Overseas Property Investment Corporation, Panorama Ridge Pty Ltd, Pantera Vive CDO LLC, as Co-Issuer, Pantera Vive CDO SPC, f/a/o the Series 2007-1, as Issuer, Parkes Shire Council, PCA Life Assurance Co. Ltd., Pebble Creek LCDO 2007-2, LLC, asCo-Issuer, Pebble Creek LCDO 2007-2, Ltd.., as Issuer, Penn's Landing CDO LLC, as Co-Issuer, Modern Woodmen of America, Penn's Landing CDO SPC, f/a/o the Series 2007-1 Segregated Portfolio, as Issuer, PHL Variable Insurance Company, Phoenix Life Insurance Company, Pinnacle Point Funding Corp., Pinnacle Point Funding Ltd., Putnam Dynamic Asset Allocation Funds-Growth Portfolio, Putnam Intermediate Domestic Investment Grade Trust, Putnam Stable Value Fund, Pyxis ABS CDO 2007-1 LLC, as Co-Issuer, Pyxis ABS CDO 2007-1 Ltd., As Issuer, Quartz Finance PLC, Series 2004-1, Restructured Asset Certificates with Enhanced Returns, Series 2005-21-C Trust, Restructured Asset Certificates with Enhanced Returns, Series 2006-1-C Trust, Restructured Asset Certificates with Enhanced Returns, Series 2007-4-C Trust, RGA Reinsurance Co., Ruby Finance PLC, f/a/o the Series 2005-1, Class A2A9, as Issuer, SBSI, Inc., SCOR Reinsurance Company, Securitized Product of Restructured Collateral Limited SPC, f/a/o the Series 2007-1 Federation A-1 Segregated Portfolio, as Issuer, Securitized Product of Restructured Collateral Limited SPC, f/a/o the Series 2007-1 Federation A-2 Segregated Portfolio, as Issuer, Securitized Product of Restructured Collateral Limited SPC, f/a/o the Series 2007-1 TABXSPOKE (07-140-100) Segregated Portfolio, Security Benefit Life Insurance Co., Sentinel Management Group Inc., Series 2007-1 TABXSPOKE (07-140-100) LLC, as Co-Issuer, Shenandoah Life Insurance Company, Shinhan Bank, SMH Capital Advisors, Inc., Solar V CDO LLC, as Co-Issuer, Solar V CDO SPC, f/a/o the Series 2007-1 Segregated Portfolio, St. Vincent De Paul Society Queensland, StabFund Sub CA AG, Standard Life Insurance Company of Indiana, Stanton ABS I p.l.c., Starling Strategies Ltd., State Street Bank and Trust Company, State Street Global Advisors, State Street International Ireland Limited, Stichting Shell Pensioenfonds, Stowe CDO LLC, as Co-Issuer, Stowe CDO SPC, f/a/o the Series 2006-1 Segregated Portfolio, as Issuer, Stowe CDO SPC, f/a/o the Series 2008-2-A Segregated Portfolio, as Issuer, Strategic Global (Putnam) Managed Trust, Structured Credit Opportunities Fund II, LP, Sunset Park CDO Limited SPC, f/a/o the Series 2004-1 Segregated Portfolio,as Issuer, Sunset Park CDO Limited SPC, f/a/o the Series 2004-2 Segregated Portfolio, as Issuer, Sunset Park CDO Limited SPC, f/a/o the Series 2004-4 Segregated Portfolio, as Issuer, Sunset Park CDO Limited SPC, f/a/o the Series 2005-5 Segregated

PORTFOLIO, AS ISSUER, SUNSET PARK CDO SERIES 2005-5 LLC, AS CO-ISSUER, SUNSET PARK CDO SERIES 2005-6 LIMITED, AS ISSUER,SUNSET PARK CDO SERIES 2005-6 LLC, AS CO-ISSUER, SUNSET PARK CDO-M LLC, AS CO-ISSUER, SUNSET PARK CDO-M LIMITED SPC f/a/o THE SERIES 2005-3 SEGREGATED PORTFOLIO, AS ISSUER, SUSQUEHANNA BANK, TAVARES SQUARE CDO LIMITED, TAVARES SQUARE CDO LLC, AS CO-ISSUER, TERWIN CAPITAL, LLC, BANK OF NEW YORK MELLON, N.A., BANK OF NEW YORK MELLON TRUST COMPANY, N.A., BANK OF NEW YORK MELLON, LONDON BRANCH, STOWE CDO SERIES 2006-1 LLC, AS CO-ISSUER, THE LIVERPOOL LIMITED PARTERNSHIP, THE WINTER GROUP, TIERRA ALTA FUNDING I LTD., TIERRA ALTA FUNDING I, CORP., TOPDANMARK EDB A/S, TRICADIA CREDIT STRATEGIES MASTER FUND, LTD., TRUSTEE U.S. BANK TRUST NATIONAL ASSOCIATION, UNICREDIT BANK AG, LONDON BRANCH, UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (SA), VOX PLACE CDO LLC, VOX PLACE CDO LIMITED, WHITEHAWK CDO FUNDING, LLC, WHITEHAWK CDO FUNDING, LTD., ZAIS INVESTMENT GRADE LIMITED II, ZAIS INVESTMENT GRADE LIMITED V, GOLDMAN SACHS & CO., VALEO INVESTMENT GRADE CDO LTD., SUNSET PARK CDO-M LLC, AS CO-ISSUER, ZAIS INVESTMENT GRADE LIMITED X,

Defendants-Appellees,

CITIBANK, N.A., PRINCIPAL LIFE INSURANCE COMPANY,

Defendants.

CORPORATE DISCLOSURE STATEMENT

The Structured Finance Industry Group, Inc. (***SFIG***) has no parent corporation and no publicly held corporation has any ownership interest in SFIG.

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STATEMENT OF INTEREST

The Structured Finance Industry Group, Inc. (***SFIG***) is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG has over 350 members from all sectors of the securitization market, including investors, issuers, financial intermediaries, accounting, law, and technology firms, rating agencies, servicers, and trustees. SFIG's core mission is to support a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. For more information, visit www.sfindustry.org.

SFIG's members have diverse economic interests in the various transactions to which they are parties. However, SFIG's members share the common goal of ensuring that agreements used to document securitization transactions are interpreted in accordance with their terms and applicable statutes, and that complex structured products can be quickly unwound in the event of a counterparty's bankruptcy. In particular, issues concerning the validity and enforceability of the payment priority provisions at issue in this litigation (the ***Priority Provisions***), and the treatment of those provisions in bankruptcy proceedings, are critical to the efficient functioning of securitization and swap markets. As such, SFIG and its members have a cognizable interest in preserving the market's expectation that the Priority Provisions are enforced by their terms, even in the event of a bankruptcy.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than SFIG, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT[1]

Lehman Brothers Special Financing Inc. (***LBSF***) appeals from the thorough and well-reasoned decision of the United States District Court for the Southern District of New York (the ***District Court***) which affirmed an equally thorough and well-reasoned decision of the United States Bankruptcy Court for the Southern District of New York (the ***Bankruptcy Court***, and with the District Court, the ***Lower Courts***) dismissing the Fourth Amended Complaint (the ***Complaint***). At the heart of the dispute are Priority Provisions governing the order of payment in connection with the liquidation of certain CDO transactions—provisions that are routinely included in structured transactions to which SFIG's members are parties.

Although LBSF crafted these deals, it now improperly attempts to cast these provisions as invalid ipso facto clauses, which they are not. LBSF's ipso facto argument fails both because the provisions in question did not modify LBSF's property rights and because any modification occurred well before LBSF filed for bankruptcy for the vast majority of these transactions. Allowing LBSF to utilize the Bankruptcy Code's anti-ipso facto provisions to rewrite its contracts would not only expand these statutes beyond any textual mooring, but would inject into the structured finance markets the very uncertainty that Congress sought to avoid.

1 Capitalized terms used but not defined herein have the meaning ascribed to them in the Complaint.

Even if this Court agrees with LBSF that the Priority Provisions constitute ipso facto clauses, affirmance is still required because such provisions are protected by the safe harbor of 11 U.S.C. § 560 (***Section 560***). LBSF's meritless attempt to eviscerate the scope of Section 560 is of deep concern to the structured finance industry, whose participants were involved in drafting Section 560 in the first place. Section 560's plain language evidences Congress' policy judgment that the certainty, finality, and stability of the financial system require that parties to swap transactions be allowed to exercise their contractual rights to terminate the transaction and liquidate their positions upon the bankruptcy of a counterparty, notwithstanding the Bankruptcy Code's anti-ipso facto provisions. Accepting LBSF's arguments to the contrary would not only undo more than a decade of this Court's precedent, it would undermine the stability of the securitization markets that provide necessary liquidity to the financial market and support economic growth.

LBSF's attempt to undermine the Bankruptcy Code's safe harbors by artificially de-linking the Priority Provisions from the swap agreements, contrary to the actual structure of CDO transactions and the entrenched expectations of market participants, is also meritless. LBSF seeks to avoid Section 560's safe harbor by arguing improperly that the Priority Provisions are not part of the swap agreements, and that the distribution of collateral according to the Priority

Provisions is neither part of a swap agreement's "liquidation," nor an exercise of the rights of "any swap participant" within the meaning of Section 560. But these arguments not only fly in the face of Section 560's plain language, but also ignore well-settled law that, as is usual in structured finance transactions, including the CDO transactions here, when multiple documents are used to execute a single transaction, they must be interpreted as a single contract.

Moreover, grafting counter-textual limitations onto Section 560, as LBSF suggests, would render inoperable payment priority provisions present in—and critical to the functioning of—nearly all structured financial products in the event of a market participant's bankruptcy. Nothing in the relevant transactional documents, the Bankruptcy Code, or the Supreme Court's recent decision in Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018) weighs in favor of such a potentially destabilizing result.

Given the importance of structured financial products to the broader U.S. economy, SFIG respectfully requests that this Court reject LBSF's effort to introduce needless uncertainty into these transactions, and affirm the Lower Courts' rulings.

ARGUMENT

I. The Lower Courts Properly Interpreted Section 560.

The Lower Courts correctly interpreted the "unambiguously sweeping text" of Section 560 to conclude that its "plain and controlling" meaning protects the Trustees' distribution of proceeds pursuant to the Priority Provisions. SA40-41.[2] This interpretation is not only consistent with the plain meaning of Section 560, see SA81 ("the most sensible literal reading of § 560 applies to the distributions at issue in this case"), it also accords with the Bankruptcy Code's "broad definition of swap agreements" (SA81), Congressional intent, and Second Circuit precedent. SA79-81; Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 339 (2d Cir. 2011) (safe harbors should be interpreted "by looking" to their "plain language").

Section 560 provides that:

> The exercise of any contractual right of any swap participant . . . to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365(e)(1) of this title . . . shall not be stayed, avoided, or otherwise limited by operation of any provision of this title . . . .

Section 560 was drafted, at the financial industry's urging and with its assistance, to protect participants in the financial markets, including the securitization markets, from the disruptive effects that could be caused if market participants could not unwind swap agreements upon the counterparties' bankruptcy.[3] As the District Court noted, Congress enacted Section 560 in 1990 to

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2 Citations to the Special Appendix are in the form "SA[pagenumber]"; to the Joint Appendix, "A[pagenumber]"; and to the Appellant's Brief, "Br.".

3 See Whyte v. Barclays Bank PLC, 494 B.R. 196, 200 (S.D.N.Y. 2013), aff'd, 644 F. App'x 60 (2d Cir. 2016) (analyzing the purpose of Section 546(g), another safe harbor for swap agreements enacted in the same

ensure that the "financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code," and to "address concerns regarding the volatility of the swap market." SA80 (quoting H.R. Rep. No. 101-484, at 1 (1990)).

In 2005, in culmination of a seven-year study initiated in response to the near-failure in 1998 of Long Term Capital Management, L.P. (***LTCM***),[4] Congress substantially expanded the scope of Section 560 by (a) including contractual acceleration and liquidation rights (previously the statute included only termination rights) and (b) expanding substantially the definition of "swap agreement" to include security agreements or other credit enhancements as protected components of the swap agreement. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 907(g), 119 Stat. 23; H.R. Rep. No. 109-31, at 20 & n.79 (2005). These amendments were a product of

legislation as Section 560); In re Bd. of Dirs. of Compania Gen. de Combustibles S.A., 269 B.R. 104, 113 (Bankr. S.D.N.Y. 2001) (In enacting the swap safe harbors, Congress sought to "stabilize United States domestic markets.").

4 See generally, Rhett G. Campbell, Financial Markets Contracts and BAPCPA, 79 AM BANKR. L.J. 697, 698 (2005) (attributing the 2005 amendments to the bailout of LTCM and noting that "'[h]ad termination not been available to the LTCM Fund's counterparties in the bankruptcy process, the uncertainty as to whether these contracts would be performed would have created great uncertainty and disruptions in these same markets, coupled with substantial uncontrollable market risk to the counterparties.'").

Congress working with the financial industry to enact measures designed to safeguard the financial markets from bankruptcy-related disruptions:

> These provisions are intended to reduce systemic risk in the banking system and financial market place. To minimize the risk of disruption when parties to these transactions become bankrupt or insolvent, the bill amends . . . the Bankruptcy Code, to allow the expeditious termination or netting of certain types of financial transactions. Many of these provisions are derived from the recommendations issued by the President's Working Group on Financial Markets and revisions espoused by the financial industry.

H.R. Rep. No. 109-31, pt. 1, at 20 (2005).

As Congress observed, this unidirectional evolution reflects the need "to keep pace in promoting speed and certainty in resolving complex financial transactions." H.R. Rep. No. 101-484, at 2 (1990). As Congress explained, and contrary to what LBSF suggests here, Br. 4:

> U.S. bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to . . . financial transactions could face heavy losses unless the transactions are resolved promptly and with finality.

H.R. Rep. No. 101-484, at 2 (1990).

The proper interpretation and application of Section 560 is of tremendous import to SFIG and its members. Since its enactment, market participants have relied on Section 560 to negotiate thousands of agreements worth hundreds of trillions of dollars.[5] Section 560 is key to market participants' reasonable expectation that, should their counterparty fall insolvent, they will be able to terminate their swap agreements and liquidate the underlying collateral. See 136 Cong. Rec. 13026, 13513 (June 6, 1990) (Sen. DeConcini) (The "swap provisions will . . . provide certainty for swap transactions and thereby stabilize domestic markets by allowing the terms of the swap agreement to apply notwithstanding the bankruptcy filing"). Absent the safe harbor, the bankruptcy of one participant could lead to an immense ripple effect with adverse consequences for the economy as a whole. See In re Enron Creditors Recovery Corp., 422 B.R. 423, 429 (S.D.N.Y. 2009) ("Congress opined that the safe harbor would prevent 'the insolvency of one commodity or security firm from spreading to other firms,' which could otherwise 'threaten the collapse of the affected industry.'" (quoting H.R. Rep. No. 97-420, at 2 (1982)).

In this case, the termination of the swap and the distribution of the collateral in accordance with the Priority Provisions is protected by the plain language of Section 560: the Priority Provisions are (i) the "contractual right[s]," (ii) of a "swap participant," (iii) exercised "to cause the liquidation," (iv) of "swap agreements . . . ." 11 U.S.C. § 560; SA44; SA84. LBSF, however, argues that the

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5 See International Swaps and Derivatives Association, ISDA Market Survey (2010), https://www.isda.org/a/6tiDE/isda-market-survey-results1987-june-2010.pdf.

Priority Provisions are not within the Scope of Section 560 because (i) they are not incorporated into the swap agreements, Br. 37-41; (ii) the meaning of "liquidation" in Section 560 does not include the distribution of the proceeds of the collateral underlying the swap agreement, Br. 31-37; and (iii) the Trustees were supposedly not exercising the rights of any swap participant, Br. 27-31. LBSF's arguments not only run counter to the statute's plain language, relevant precedent and legal history, but are at odds with market expectations and, if accepted, would undermine confidence in the stability and certainty of structured finance transactions—a result the safe harbors are designed to avoid.

A. The Priority Provisions are Contractual Rights Governing a Swap Agreement.

1. Standard Industry Practice and Black-Letter Law Require that the Indentures and Swap Agreements Be Construed as a Single, Integrated Document.

LBSF's argument that the Priority Provisions do not provide rights to any swap participants, see Br. 27, relies on LBSF's attempt to forge a non-existent wedge between the swap agreements and the Indentures. However, in each instance, the Indentures and the swap agreement were used to document a single integrated swap transaction, see SA48-50. This single swap transaction is documented in multiple contracts—a swap agreement, indenture, trust agreement, trust deed, and/or security agreement—that are used together by market participants to execute a CDO transaction, which has at its heart a swap transaction.

Therefore, when entering into CDO transactions, market participants—SFIG members included—rightly expect that the swap agreement and Indenture will be read together as a single integrated agreement. See This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998) ("Under New York Law, all writings forming part of a single transaction are to be read together."); Kurz v. United States, 156 F. Supp. 99, 104 (S.D.N.Y. 1957) (only "by construing the instruments together" can "the intent of the parties . . . be perceived and enforced.").[6] See also A1022 (ISDA Master Agreement); A961, A767, A980. For example, as is common to all CDO transactions in this case, in the 801 Grand transaction, both the Indenture and the swap agreements reference the CDO transaction on their face. Moreover, the first provision of the swap schedule, located immediately below the document title and emphasized in italics, incorporates all definitions in the Indenture that are not otherwise defined. See A980. In total, the 801 Grand CDO swap schedule references the Indenture 21 times. See id.

Thus, as the Bankruptcy Court found, all of the agreements documenting the swaps at issue must be read and interpreted together as a single contract. SA48. Indeed, "[t]his cannon of construction applies with particular

[6] See also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 30:26 (4th ed. 2010) (multiple documents effectuating a single transaction should be construed as a single agreement); Restatement (Second) of Contracts § 202 (Am. Law Inst. 1981) (same).

force in situations where," as here, "one document requires execution of the second to accomplish its purpose." Kurz, 156 F. Supp. at 104; MBIA Ins. Corp. v. Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., 2011 WL 1197634, at *6 (S.D.N.Y. Mar. 25, 2011) (agreements documenting CDO transactions constitute a single integrated agreement). As a result, the Priority Provisions are an integral part of a swap agreement and "cannot be viewed as 'ancillary' or 'unrelated' to the rights to terminate and liquidate a swap agreement." SA47. Rather, as the Bankruptcy Court correctly found, the Indentures—including the Priority Provisions—and the ISDA master agreements are "part and parcel" of the same transaction, SA48, and the same agreement.

2. The Priority Provisions Fall Clearly within the Bankruptcy Code's Definition of Swap Agreements.

LBSF's argument also fails because the Bankruptcy Code's "extremely broad" definition of "swap agreements" is plainly broad enough to include the Indentures and the Priority Provisions therein. In re Nat'l Gas Distribs., LLC, 556 F.3d 247, 253 (4th Cir. 2009). This is hardly surprising, given that the term "swap agreements" was designed by Congress to "protect[] all counterparties" to such agreements. Id.

First, "swap agreement" includes "any agreement, including the terms and conditions incorporated by reference in such agreement . . . ." 11 U.S.C. § 101(53B)(A)(i) (emphasis added). The Priority Provisions here are set forth in the Indenture and incorporated into the schedules to the ISDA Master Agreements by reference. See, e.g., A1335. Indeed, as LBSF admits, the swap schedules mandate that Issuers distribute the collateral "subject to" the terms of the Priority Provisions. Br. 39. Accordingly, the Priority Provisions are part of a "swap agreement" under the Bankruptcy Code.

Second, "swap agreements" include any "security agreement or arrangement or other credit enhancement related to any [swap] agreements." 11 U.S.C. § 101(53B)(A)(vi). Each Indenture creates a security interest in the collateral on the part of (i) the Noteholders and (ii) LBSF, as a swap counterparty, and provides for the order in which those security interests would be enforced. See A971, 835. Thus, as stated by the leading bankruptcy commentator, "the priority shifting provisions [a]re contained in the security arrangement for the subject swap agreement and, thus, [a]re a swap agreement under Bankruptcy Code section 101(53B)(A)(vi)." 5 Collier on Bankruptcy ¶ 560.02 at 560-6 n.2 (16th Ed. 2010).

Supporting this conclusion is the fact that Congress intentionally expanded the definition of "swap agreement" in 2005 to include security agreements, such as the Indentures here, to ensure that such security agreements, in and of themselves, qualify for the safe harbor's protection. See H. R. Rep. No. 109-31, at 128 (2005). Thus, Congress recognized that a security agreement is a key term of any swap agreement, and thus sought to "ensure[] that any such agreement . . is itself deemed to be a swap agreement, and therefore eligible as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code." See H.R. Rep. No. 109-31, at 107 (2005).

Interpreting the definition of "swap agreements" to include the Priority Provisions is also consistent with the legislative purpose of Section 560. Congress, with the input of financial institutions, enacted the safe harbor out of a "concern that if one of the parties to a swap agreement files for bankruptcy under the current Bankruptcy Code, the non-defaulting party is left with a substantial risk and . . . [this] could cause a rippling effect which would undermine the stability of the financial markets." <u>Interest Swap: Hearing on S. 396 Before the Subcomm. on Courts and Administrative Practices of the Senate Comm. on the Judiciary</u>, 101st Cong. 1 (1989) (Statement of Sen. Heflin, Member, S. Comm. Of the Judiciary). Analyzing swap agreements in isolation, without reference to the payment priority provisions incorporated into them, disregards Congress' recognition of the intertwined nature of financial arrangements, and threatens Congress' goal of ensuring that the bankruptcy of one entity does not result in uncertainty and instability in the financial system.

*   *   *

Against this combination of Section 560's plain language, legislative history, and an authoritative body of case law, LBSF points to <u>Merit</u>, Br. 25, to argue that this Court should interpret Section 560 narrowly and disregard its legislative purpose. This Court should decline LBSF's invitation. First, nothing in Merit supports LBSF's conclusion that the policy of promoting creditor recoveries is more important than the policy underlying Section 560—to protect against systemic risk to the financial markets. See Br. 5. To the contrary, in Merit, the Supreme Court expressly declined to "consider [the] statutory purpose" of the safe harbor at issue in that case. Merit, 138 S. Ct. at 893-94, 896-97. More fundamentally, Merit considered only whether a transfer of funds passing through a financial institution acting as an escrow agent was protected from avoidance by Section 546(e). Id. at 891. Thus, Merit has no relevance to the policies underlying Section 560, which, as explained, is designed to protect the rights of a swap participant to terminate and liquidate its positions upon the bankruptcy of its counterparty, or its counterparty's guarantor, and, in doing so, safeguard the orderly functioning of the financial markets.[7] In contrast, the narrow reading of Section 560 proffered by LBSF would throw into doubt the viability of thousands

[7] As the Supreme Court noted, Merit's limited impact on the financial markets could be inferred from the financial industry's decision not to participate in that case. See Transcript of Oral Argument at 60:18-62:14, 138 S. Ct. 883 (2018) (Dkt. No. 16-784) (noting lack of industry concern and participation by amici). Here, by contrast, industry organizations representing financial institutions have submitted amicus briefs to each of the Lower Courts, and, now, to this Court, warning of the danger posed by LBSF's proffered reading of Section 560.

of structured finance transactions similar to those here, posing a systemic risk to the securitization markets. Enron, 651 F.3d at 336 (disfavoring safe harbor reading that "would result in commercial uncertainty and unpredictability at odds with the safe harbor's purpose and in an area of law where certainty and predictability are at a premium").

B. "Liquidation" Includes Distributing the Liquidated Collateral.

Finding that the language of Section 560 is "plain and controlling on its face," the Lower Courts properly concluded that "liquidation" of swap agreements includes the distribution of the collateral pursuant to the Priority Provisions. SA42-48; SA82-84. LBSF tries to evade the plain meaning of "liquidation" by arguing that Section 560's use of the word does not extend to the Trustees' distribution of the Collateral proceeds. Br. 31-35. Both the plain meaning of the term and market realities require the rejection of LBSF's argument.

Because "liquidation" is not explicitly defined in the Bankruptcy Code, courts must interpret the word based on its "ordinary, contemporary, common meaning." See Perrin v. United States, 444 U.S. 37, 42 (1979). As the District Court explained, see SA82-83, legal, financial, and general dictionaries all define "liquidate" to include the payment of the proceeds of the liquidation. See, e.g., Black's Law Dictionary (10th ed. 2014) ("To determine the liabilities and distribute the assets"); Dictionary of Business and Economic Terms (5th ed. 2012)

("To liquidate often means to pay."). "Liquidation" also is defined to include the distribution of proceeds. See, e.g., Dictionary of Finance and Investment Terms (9th ed. 2014) ("Dismantling of a business, paying off debts in order of priority . . . .").

Applying the ordinary meaning of the term "liquidation" to the case at hand, "liquidation" of the swap agreement necessarily includes (i) selling the collateral in the market, (ii) determining the amounts owed to each party, and (iii) distributing those amounts to the respective parties. See Mich. State Hous. Dev. Auth. v. Lehman Bros. Derivative Prods. Inc., 502 B.R. 383, 393 (Bankr. S.D.N.Y. 2013) (***MSHDA***). As the Lower Courts explained, "the plain meaning of liquidate means to bring the swap agreement to an end by distributing the Collateral pursuant to the priority provisions." SA43, SA81.

And, although resorting to statutory history is unnecessary given Section 560's plain meaning, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989), defining "liquidation" to include distribution of collateral is consistent with Section 560's purpose of ensuring a quick unwinding of the transaction, thereby providing market participants with certainty, finality, and the ability to redeploy their assets as they see fit, notwithstanding that one party to the transaction (or its guarantor) is in bankruptcy. Indeed, as the District Court correctly noted:

> the § 560 safe harbor is not concerned with unliquidated or unascertained amounts and the need to ascertain them. Rather, § 560 is concerned with bringing swap agreements to an end and distributing the collateral.

SA83; see also, e.g., MSHDA, 502 B.R. at 394.

LBSF's interpretation of "liquidation" also flies in the face of the way the term is used in the market. Market participants understand the act of "liquidating" a position to include not only the sale of a position but the payment of the proceeds to the relevant party. See, e.g., Dictionary of Banking Terms (6th ed. 2012) ("When an obligation is paid off it is said to be liquidated.") (emphasis added). Indeed, if accepted, LBSF's interpretation would mean that the Trustees could convert the collateral to cash and also determine the share of the proceeds to which the Noteholders were entitled, but then would be unable to make any distribution to the Noteholders, possibly for years. Thus, LBSF's proposed interpretation is "nonsensical because it would nullify any protection that § 560 provides to swap agreements." SA83.

Nullifying Section 560's safe harbor and preventing swap participants from collecting on their debts would also expose the non-bankrupt party to the risk that its portion of the collateral will become devalued because of fluctuations in currency or interest rates. Currency movements of the past few years show that this risk is hardly speculative or theoretical, particularly where, as here, the value of the investors' transactions is measured in tens, if not hundreds, of millions. For example, geopolitical events such as the United Kingdom's Brexit vote in June 2016 or the S&P's downgrade of the United States' credit in August 2011, resulted in substantial currency movements.[8] An investor forced to bear currency risk during these times would have suffered substantial losses which could have been avoided if the collateral proceeds had been distributed and redeployed by the investor.

Accepting LBSF's interpretation of the term "liquidation" would undermine an "essential function[]" of the structured finance market to reduce the economy's vulnerability to such risk, and would undermine Congress' intentions in creating the safe harbors in the first place. See 136 Cong. Rec. 10414, 10422 (May 15, 1990) (Rep. Fish) ("The swap market serves essential functions today—including reducing vulnerability to fluctuations in exchange and interest rates."); S. Rep. No. 101-285, at 3 (1990) (Congress extends safe harbor protecting swap agreements "to minimize exposure to adverse changes in interest and currency exchange rates"); Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 322 F.3d 1039, 1050 (9th Cir. 2003) (Congress "sought to immunize the swap market from the legal risks of bankruptcy.").

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[8] See Exchange Rates: New York Closing Snapshot, WALL ST. J., http://online.wsj.com/mdc/public/page/2_3021-forex. html (select the "Find Historical Data" hyperlink; input the required date). A court can take judicial notice of the market's financial fluctuations. See Joffee v. Lehman Bros., Inc., 2005 WL 1492101, at *1 n.2 (S.D.N.Y. June 23, 2005).

C. The Safe Harbors Extend to the Actions of the Trustees.

LBSF is also incorrect that the Trustees were not exercising the rights of "swap participants" when liquidating and distributing the collateral. Br. 27-31. Section 560 provides that the Bankruptcy Code's anti-ipso facto provisions shall not limit (i) "any contractual right," (ii) "of any swap participant" (iii) "to cause the liquidation . . . of one or more swap agreements[.]" 11 U.S.C. § 560. As shown below, the Trustees' liquidation of the collateral meets each of these requirements.

First, the Issuers plainly are "swap participants," because each Issuer executed a swap agreement with LBSF. See 11 U.S.C. § 101(53C). This is not in dispute.

Second, the Issuers themselves had the right to terminate the swaps, sell the Collateral, and distribute the proceeds. As an initial matter, the Indentures conferred upon the Issuers (along with the Trustees) the right to terminate the swaps, sell the Collateral, and distribute the funds. See SA85.[9] The early termination provisions in the swap agreements also conferred upon the Issuers the right to terminate the transactions and distribute the Collateral upon an event of

9 For example, the Indenture for the 801 Grand CDO swap provides that if the swap transactions become subject to early termination due to an "an Event of Default or a Termination Event . . . the Issuer and the Trustee shall take such actions to enforce the rights of Issuer and the Trustee thereunder as may be permitted by the terms of such agreement and consistent with the terms hereof." SA49, SA85; see also, e.g. A914 (Amended and Restated Standard Terms for Indentures for the Series 2006-1 Segregated Portfolio of 801 Grand CDO SPC, § 10.1(c)).

default. See, e.g., A1313-15 (ISDA Mater Agreement, Freedom Park CDO Series 2005-1 Limited, § 6). The swap agreements also provide that the Issuers would distribute the Collateral "subject in any case to the Priority of Payment Provisions set out in the Indenture."[10]

These clear contractual clauses—each standing alone, but especially when considered together, as they must be—establish the Issuers' rights to sell the Collateral and distribute the proceeds pursuant to the Priority Provisions. Nevertheless, LBSF argues that these clauses gave rise only to the Issuers' obligation (and not their right) to do so. Br. 28-31. However, as the Lower Courts correctly noted, the Trustees' act of holding the collateral in trust to secure the Issuers' obligations to the Noteholders and LBSF necessarily gave rise to the Issuers' corresponding right to cause the Trustees to liquidate the collateral. See SA50, SA85-86.

Finally, the Trustees' act of liquidating and distributing the collateral pursuant to the Priority Provisions plainly qualifies as an exercise of the rights "of"

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[10] See, e.g., A971, (Schedule to the Master Agreement, 801 Grand CDO SPC, Part 5(i)) ("Notwithstanding anything in this Agreement or any Confirmation hereunder to the contrary, all amounts payable or expressed to be payable; by [the Issuer] on, under or in respect of its obligations and liabilities under this Agreement and any Confirmation hereunder shall be recoverable only from and to the extent of sums in respect of, or calculated by reference to, the Collateral that are received by [the Issuer] pursuant to the terms and conditions thereof and the proceeds of any realization of enforcement of any Collateral, subject in any case to the Priority of Payments set out in the Indenture.").

swap participants (i.e., the Issuers). The Issuers expressly assigned their rights as swap participants to the Trustees—including their rights to liquidate and distribute the collateral pursuant to the Priority Provisions—and LBSF consented to these assignments. See A16939-41 (Indenture pp. 1-3); A1601, 1618-19 (Indenture Terms §§ 7.7, 10.1). Thus, when the Trustees terminated the swaps, and subsequently liquidated and distributed the collateral pursuant to the Priority Provisions, they were exercising the express contractual rights of swap participants to cause the liquidation of a swap agreement, and such actions clearly are protected by the plain terms of Section 560.

II. The Transaction Documents Must be Enforced as Written to Ensure Confidence in the Structured Products Market.

Contracts documenting structured transactions, including swap transactions, are heavily negotiated by sophisticated participants, with particular attention paid to provisions dealing with termination, valuation, and payment obligations. If parties are able to alter deals by creating new rights for which they did not bargain, the structured finance market will become unpredictable and unstable, potentially undermining its viability, and with it, the health of the economy.

Here, it is indisputable that the parties bargained for the Priority Provisions, including terms that govern priority of liquidation and disbursement of the transactions' underlying collateral upon the event that LBSF or its parent, LBHI, initiated a case under the Bankruptcy Code. Under the facts here, there is no basis for LBSF to set aside, much less recover these liquidation payments. Moreover, ignoring the language of the contracts at issue, as LBSF suggests, would put the validity of thousands of transactions in doubt and, in turn, undermine the stable operation of the structured finance markets and engender much broader implications on the economy.

A. The Securitization Market Requires that Priority Be Predictable and Enforced as Drafted.

The inclusion of Priority Provisions in these heavily negotiated CDO transactions is unsurprising. LBSF and its affiliates (collectively, ***Lehman***) included these provisions because Lehman was more likely to find buyers for transactions if they were positively rated by a credit rating agency. See, e.g., In re Lehman Bros. Mortg.-Backed Sec. Litig., 650 F.3d 167, 171 (2d Cir. 2011) ("[M]any institutional investors must purchase investment-grade securities."); 12 C.F.R. Part 1 (limiting investment authority of national banks based on credit rating of investments).

Obtaining a high rating, however, required Lehman to delink its own default from the other risks underlying the transaction. See Francesca Campolongo et al., Quantitative Assessment of Securitisation Deals 9 (2012). Indeed, rating agencies have "required" that sponsors of structured transactions mitigate the risk of a swap-counterparty default. See, e.g., Standard & Poor's, Global Cash Flow and Synthetic CDO Criteria, Mar. 21, 2002, at 21 (requiring "mitigation of . . . counterparty risk . . . [S]olutions include subordinating the termination [payment] in the waterfall to the rated noteholders."); Rudolph Bunja & William May, Moody's Approach to Assessing Secondary Risks in Synthetic CDOs, Moody's Investors Service, Mar. 17, 2003, at 3 (assumption in evaluating synthetic CDOs is that "any termination payments due to the counterparty are either waived or subordinated as a result" of default). Lehman chose to mitigate that risk through the Priority Provisions.

Priority Provisions are similarly important to noteholders, who want to mitigate the risk that a swap counterparty will default. Stefan Bund et al., Counterparty Risk in Structured Finance Transactions: Hedge Criteria, Fitch Ratings, Aug. 1, 2007, at 12. Priority provisions help noteholders limit this risk by offering them structural seniority in the event of a counterparty default. Such provisions thereby increase the attractiveness of a product and, crucially, facilitate liquidity in structured finance markets.

Absent the certainty created by the Priority Provisions, market participants may become unwilling to participate in the structured finance market altogether. Striking the Priority Provisions would unravel thousands of transactions, turn market expectations on their head, and thereby undermine the stable operation of the structured finance markets, potentially triggering far broader repercussions to the economy. See Evan Jones et al., Lehman Bankruptcy Judge Prevents Trigger of CDO Subordination Provision Based on Credit Support Provider and Swap Counterparty Bankruptcy Filings, 127 Banking L.J. 338, 342-43 (2010) (if Priority Provisions are held unenforceable, this could have "broader implications for many market participants in terms of financing opportunities, risk mitigation and, for banks, capital requirements").

B. The Priority Provisions Are Not Ipso Facto Clauses Because LBSF Was Not Entitled to Payment under the Transaction Documents.

LBSF seeks to ignore the plain language of its contracts and to force a baseless interpretation of the Priority Provisions to artificially conclude that they are ipso facto clauses. However, market participants expect that their agreements will be honored as written and as required by applicable statutes. If courts accept LBSF's invitation to award a party rights nowhere to be found in its contracts or the Bankruptcy Code merely because it has become bankrupt, market participants, such as SFIG's members, will be unable to structure their affairs. This destabilizing result is precisely what decades of established precedents have sought to avoid. See, e.g., Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 467–68 (2d Cir. 2010) (contracts are to be interpreted to give effect to the parties' "expressed intentions").

Indeed, LBSF's unsubstantiated claim that the Priority Provisions "terminat[ed] or modifi[ed] LBSF's right to payment on swap termination, in violation of section 365(e)," see Br. 5, cannot be squared with the agreements or 11 U.S.C. § 365(e) (***Section 365(e)***). Section 365(e) states in relevant part that "any right or obligation under" an executory contract of the debtor "may not be terminated or modified, at any time after the commencement of the case solely because a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title." Based on this plain language, LBSF's appeal must fail if it cannot establish that its rights were modified as a result of LBSF's bankruptcy. LBSF cannot make that showing for at least two reasons.

First, although LBSF asserts, without any support, that it was "in-the-money" before application of the Priority Provisions, and that its "right to payment under the swaps was created long before" Lehman's bankruptcy, Br. 43, the transaction documents demonstrate that LBSF was entitled to be paid first only upon the occurrence of certain events that never transpired. Being "in-the-money" is not itself a right to payment under a contract; it is an accounting principle based on a present day projection of what payments the party might one day receive. Thus, LBSF's claim is based on a September 2008 guess as to how much it would have received when the transactions terminated. Given the duration of the deals—which generally lasted more than a decade, see, e.g., A528-30 (Offering Memorandum for the Series 2006-1 Segregated Portfolio of 801 Grand CDO

SPC)—it is, at best, speculation that LBSF ever would have become entitled to anything.

Moreover, as a purchaser of credit protection, LBSF was entitled to receive payments under the swaps only in certain circumstances: if (i) a specified number of Credit Events occurred and (ii) LBSF satisfied additional obligations. See SA24-25. LBSF ignores this inconvenient language; both its appeal and the Complaint are starkly devoid of any allegation that those additional conditions were satisfied at the time of termination. Thus, there is no basis to conclude that, upon termination, LBSF was entitled to be paid ahead of the Noteholders.

Second, the Type 2 Transactions—which account for 39 of the 44 transactions at issue—were structured such that LBSF was never entitled to be paid first, and thus no modification of LBSF's rights ever occurred. SA26-27. As the Bankruptcy Court correctly recognized, "the Priority Provisions in Type 2 Transactions create a toggle between two potential Waterfalls . . . ; which Waterfall would become applicable would remain unknown until an Early Termination occurred." SA26. Before the termination of the Type 2 Transaction, LBSF did not have a right to be paid first, and therefore that non-existent right could not have been modified. LBSF's brash attempts to devalue the contract language by dismissing it as "minor wording" choices runs afoul of the most basic principles of contractual interpretation, and should be rejected. Br. 42; Olin Corp.

v. Am. Home Assur. Co., 704 F.3d 89, 99 (2d Cir. 2012) ("'[T]he words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions.'").

Because LBSF's rights were not modified, the Priority Provisions did not function as ipso facto clauses, and therefore are facially outside the scope of the Bankruptcy's Code's anti-ipso facto provisions.

C. Even if the Priority Provisions Were Ipso Facto Clauses, They Did Not Modify Any Debtor's Rights in Violation of the Bankruptcy Code's Anti Ipso Facto Provisions.

Even if the Priority Provisions ipso facto modified LBSF's rights upon the filing a bankruptcy case, the Priority Provisions included in any swap agreements that were terminated before LBSF's bankruptcy filing did not run afoul of the Bankruptcy Code's anti-ipso facto provisions. As the Bankruptcy Court convincingly explained, Section 365(e), along with the Code's other anti-ipso facto provisions, invalidates only modifications of a debtor's rights that occur "after the commencement of the case." SA31. Therefore, any modification of LBSF's rights that occurred prior to LBSF's Petition Date cannot violate the Code's anti-ipso facto provisions.

Seeking to expand exponentially the plain meaning of Section 365(e), LBSF argues that the bankruptcy of its LBHI—its guarantor under the swap transactions—nearly three weeks prior to LBSF's own bankruptcy triggers application of the Code's anti-ipso facto provisions. In essence, LBSF's argument is that because there was some confusion at the start of Lehman's bankruptcy, this Court should assume that LBSF commenced bankruptcy proceedings at the same time that LBHI did. This is as nonsensical as it is dangerous. As the Bankruptcy Court explained, the phrase "the case" in Section 365(e) refers to only a single case, and cannot sensibly be interpreted to refer to any bankruptcy case beyond that of the debtor whose rights are allegedly being modified. SA33-35. Expanding the plain meaning of "the case" to include the bankruptcy filings of any number of affiliates related to the relevant debtor would severely undermine the financial market's "need for uniformly applicable and readily applicable substantive legal principles." SA33. This is particularly so where, as here, the justification for the deviation from statutory language is based on something as amorphous as the amount of planning that a debtor had prior to commencing proceedings. See Br. 51. Accepting the singular event theory would result in hopeless confusion as to when the ipso facto provisions of the Bankruptcy Code would and would not be triggered, making it impossible for market participants, such as SFIG's members, to order their affairs. This cannot, and should not, be.

In addition to LBSF's attempt to render senseless the plain meaning of Section 365(e), LBSF also asks this Court to modify the plain terms of the Transaction Documents by finding that LBSF's rights were modified only upon the Trustee's sale and distribution of the collateral, and not upon the termination of the swap agreements. Br. 46-49. However, as the Bankruptcy Court cogently explained, the plain terms of the Priority Provisions make it clear that the Noteholders obtained the right to be paid before LBSF when the swaps were rightly terminated due to the bankruptcy filing of LBSF's guarantor, LBHI. SA36-38. Therefore, any agreements that were terminated before LBSF's commencement of its Chapter 11 case necessarily do not fall within the purview of the Code's anti-ipso facto provisions which, as explained above, apply only after this commencement.

In sum, if the Bankruptcy Code were construed to invalidate ipso facto clauses triggered by affiliates or guarantors of the debtor, or to invalidate rights that were vested before the commencement of the debtor's case, the impact on derivatives markets would be significant. A party that terminates a swap agreement because of a guarantor's bankruptcy would face the risk that such termination would be unwound months or years later if the counterparty itself subsequently becomes bankrupt. As a result, the party could find itself unexpectedly exposed to the credit risk of the debtor, which the guarantee was intended by all parties to mitigate. Accepting LBSF's argument would thus be detrimental to the operation of derivatives markets, without any basis in the text or policy of the statute to support such a result.

CONCLUSION

For the foregoing reasons, the Court should affirm the Bankruptcy and District Courts' decisions.

Dated: New York, New York
November 1, 2018

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FEDERAL RULES OF APPELLATE PROCEDURE FORM 6
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Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that, based on the word counting device used in my computer program:

1. This brief complies with type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 29.1(c) because this document contains 6,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is less than one-half of the length of the principal brief as authorized in Local Rules 29.1 and 32.1.

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size, Times New Roman type style.

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