UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LEHMAN BROTHERS HOLDINGS INC., et al., Debtors.	**Chapter 11** **Case No. 08-13555 (SCC)** **(Jointly Administered)**
LEHMAN BROTHERS HOLDINGS INC. and LEHMAN BROTHERS OTC DERIVATIVES INC., Plaintiffs, v. INTEL CORPORATION, Defendant.	**Adv. Proc. No. 13-01340 (SCC)**

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION INC.'S *AMICUS CURIAE* MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT INTEL CORPORATION'S MOTION FOR SUMMARY JUDGMENT

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The International Swaps and Derivatives Association, Inc. ("ISDA") submits this *amicus* memorandum of law in support of defendant Intel Corporation's ("Intel") motion for summary judgment as to the breach of contract claim asserted by plaintiffs Lehman Brothers Holdings Inc. ("LBHI") and Lehman Brothers OTC Derivatives Inc. ("LOTC") (collectively, "Lehman").

PRELIMINARY STATEMENT

ISDA is a global trade association representing leading participants in the derivatives industry. ISDA has worked since its inception to make global over-the-counter ("OTC") derivatives markets safer and more efficient. Chartered in 1985, ISDA is comprised of over 800 member institutions spanning 64 countries. Those members include a wide range of OTC derivative market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. Additionally, ISDA members also include key components of the derivatives market infrastructure, including exchanges, clearinghouses, and repositories, as well as law firms, accounting firms, and other service providers. ISDA has pioneered efforts to standardize documentation for derivatives in order to reduce the sources of risks in the derivatives and risk management business. Principal among these efforts has been the development of the ISDA Master Agreement, which serves as the contractual foundation for more than 90% of derivatives transactions globally, and distribution of market-specific definitional booklets that supplement the ISDA Master Agreement. Information about ISDA and its activities is available on ISDA's website: www.isda.org.

ISDA is the publisher of the 1992 Master Agreement ("ISDA Master") at issue here.[1] The ISDA Master, drafted for ISDA by its counsel as directed by its members, provides a comprehensive agreement structure governing OTC derivatives transactions from their inception through termination. It offers uniform terms with respect to, among other things, the mechanics of termination, including the calculation of a termination payment. Parties entering into an ISDA Master may make standard elections from among the uniform terms. In addition to standard elections, the ISDA Master permits variation of elected terms by agreement of the parties.

We believe the following description of underlying facts to be undisputed. In the instant case, LOTC entered into an ISDA Master with Intel (the "Master Agreement") generally governing the OTC derivatives relationship between LOTC and Intel. The Master Agreement included a schedule (the "Schedule") providing elective provisions and variations. For purposes of the transaction now in dispute, LOTC and Intel also entered into a confirmation (the "Confirmation") providing transaction-specific terms, including a credit support annex (the "Credit Support Annex"). Together, these transaction documents dictated that LOTC was to purchase Intel shares in the market and deliver them to Intel during a "quiet period" when Intel itself was otherwise prohibited by SEC regulations from transacting in its own shares. According to the terms of the agreement, Intel was to prepay $1 billion to LOTC on August 29, 2008 and, on the same day, LOTC was to post $1 billion in cash collateral to Intel. A month later, on September 29, 2008, LOTC was to deliver to Intel a combination of Intel shares and cash, according to a formula taking into account the volume-weighted average price (over time)

[1] The ISDA Master was published in 1992 in two parallel forms. The form used by the parties in this case was the "Multicurrency – Cross Border" form. It is this form that we reference throughout, unless otherwise specifically noted.

of Intel shares, whereby the sum of cash and the weighted value of shares delivered to Intel would equal $1 billion. LOTC defaulted and that delivery was never made.

The Master Agreement allows the parties to choose between two termination payment calculation mechanisms: Market Quotation and Loss. In the Confirmation, the parties elected Loss as the termination payment measure for the transaction agreed in the Confirmation. This altered the terms of the Master Agreement executed between the parties, which originally called for Market Quotation as the payment measure applicable to all transactions. Intel designated September 29, 2008 as the early termination date and determined its Loss to be the $1 billion it prepaid, along with roughly $2 million in interest on that amount. LOTC did not pay. Intel foreclosed in full on the $1 billion cash collateral that LOTC had posted. LOTC was in operation through these events, not filing for bankruptcy until October 3, 2008.

Lehman sued Intel in May of 2013 alleging that Intel wrongfully seized the $1 billion collateral. *See* Adversary Complaint at ¶1. According to Lehman, the market price of the aggregate number of Intel shares to have been delivered by LOTC, either on the termination date or at the close of Intel's quiet period, was far less than $1 billion. *Id*. at ¶¶ 21, 45. Therefore, according to Lehman, Intel's calculation of its Loss was not reasonable and in good faith as required by the definition of Loss in the Master Agreement. *Id*. at ¶ 46. Conversely, Intel contends that Loss does not mandate valuation determined by spot market price and its Loss calculation, based on the $1 billion that it prepaid, is plainly reasonable and in good faith, consistent with the language and intent of the Loss provision.

The Loss provision in the ISDA Master was carefully crafted as an alternative to Market Quotation, to allow flexibility in the determination of the Non-Defaulting Party's loss following early termination. Any reasonable, good faith calculation consistent with applicable law comports with the Loss definition. Limiting the universe of allowable methods under Loss to spot market pricing, which we understand is Lehman's goal, is incompatible with both the intent and the plain language of Loss. Furthermore, parties to an ISDA Master are free to pick and choose among standard terms and even to customize those terms as they see fit. Where the parties' agreement stipulates Loss, that agreement, and the principle of flexibility with which the ISDA Master Agreement and, specifically, the Loss definition are imbued, should be recognized. In short, Loss was not intended to be a one-size-fits-all provision, and its misinterpretation as such would rob the provision of the important freedom it is intended to convey.

STATEMENT OF INTEREST

ISDA respectfully submits this amicus brief to offer its perspective on the dispute now before this Court. ISDA does so not for the purpose of taking sides in the dispute between the parties, but to offer this Court ISDA's view on the history and purpose of particular provisions in transaction documents that ISDA drafts and publishes. Specifically, this case involves the interpretation of "Loss" under the 1992 ISDA Master Agreement. As described above, Lehman contends the Loss measure of damages has a highly restrictive meaning. Loss is intended, however, to have an expansive meaning — and, most importantly, to allow parties to, within the scope of applicable law, craft a measure of damages suitable to their circumstances.

ISDA's interest in this dispute, therefore, lies in ensuring that the fundamental flexibility within the Loss provision, specifically, and the ISDA Master, in general, are recognized. If the Court were to determine that Loss could be determined only by obtaining a spot market price, Loss would lose its flexibility and its intended benefits would be lost. Indeed, a precedent departing from the plain language and intended meaning of Loss could materially and negatively impact other parties to transactions governed by ISDA Masters, who could find that the terms of their respective agreements have effectively changed. Regardless of how the Court resolves this particular dispute, ISDA strongly urges the Court to reject the unduly restrictive reading of the Loss provision advanced by Lehman, which would threaten the very purpose for which Loss was intended.

ARGUMENT

I. Loss is a Flexible Determinant of Damages Bounded Only by its Own Terms and Applicable Law

A. Loss, By Its Terms, Includes All Reasonable, Good Faith Calculation Methods

The ISDA Master allows parties to choose between two "payment measures" that govern how the parties calculate termination payments upon an event of default under the agreement. *See* Master Agreement § 6(e). Those two payment measures are "Market Quotation" and "Loss." *Id*. In this case, the parties selected the Loss measure. *See* Confirmation. The ISDA Master Agreement also offers a choice between two "payment methods." The parties here selected the "Second Method." *Id.* Where, as here, the parties elect Loss and Second Method, the amount payable is "equal to the Non-Defaulting Party's Loss" and "[i]f it is a negative number, the Non-Defaulting Party will pay the absolute value of that amount to the Defaulting Party." Master Agreement § 6(e)(i)(4). In this case, Loss, however conceptualized, is positive and payable to the Non-Defaulting Party, Intel.

The Loss measure was intended to permit the Non-Defaulting Party to calculate its own complete, *actual* losses when Transactions governed by an ISDA Master Agreement are terminated. As the ISDA Master states, Loss means . . . "an amount that [a] party reasonably determines in good faith to be *its total* losses and costs (or gain . . .) . . . in connection with [a] . .

. Terminated Transaction[.]" Master Agreement § 14 (definition of "Loss") (emphasis added). How one establishes Loss is a matter of fundamental damages principles. Indeed, Loss "is a general indemnification provision." *User's Guide to the 1992 ISDA Master Agreements* (1993) at 25. An "indemnity" is a "duty to make good *any* loss, damage, or liability incurred by another." Black's Law Dictionary (9th ed. 2009) (definition of "indemnity") (emphasis added).[2]

Section 6(e)(i)(4) of the Master Agreement provides that it is the Non-Defaulting Party's Loss that will be determined if Second Method and Loss have been elected. *See* Confirmation for Loss election. The definition of Loss provides the Non-Defaulting Party with the right to select the method used to determine the amount payable. Specifically, the definition provides that

> "Loss" means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(1) or (3) or 6(e)(ii)(2)(A) applies. Loss does not include a party's legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not

[2] The appropriateness of the choice of Loss, with its indemnification characteristic, in the transaction in question is underscored by the fact that the Confirmation invokes the ISDA Equity Definitions. Those definitions expressly provide for Indemnification for Failure to Deliver. Specifically, they state that if a party fails to deliver shares as required in a derivatives transaction, "it will indemnify the other party on demand for any costs, losses or expenses (including the costs of borrowing the relevant shares, if applicable) resulting from such failure.") Equity Derivatives Definitions § 9.12.

> 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.

Master Agreement at §14.

Thus, the Non-Defaulting Party will calculate the termination amount pursuant to Loss to ensure that it is fully compensated. *Id*. The language of Loss provides a series of examples for calculating the Non-Defaulting Party's Loss, including loss of bargain, cost of funding and the loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position. *Id*. *See also 1992 User's Guide* at 23 (the addition of Loss to the 1992 ISDA Master Agreement "was made . . . to provide parties with greater flexibility in measuring their payments on early termination"). The word "including" in the Loss definition is understood in its typical, expansive sense, and not as limiting Loss to the enumerated methodologies. *See*, *e.g.*, *Willow Wood Rifle & Pistol Club, Inc. v. Town of Carmel Zoning Bd. of Appeals*, 496 N.Y.S.2d 548 (2d Dep't 1985) (noting, in the context of statutory interpretation, "[t]he word 'includes' is usually a term of enlargement, and not of limitation * * * it therefore conveys the conclusion that there are other items includable, though not specifically enumerated") (internal quotations omitted). Notably, the Loss definition expressly allows <u>but</u> <u>specifically</u> <u>does</u> <u>not</u> <u>require</u> the Non-Defaulting Party to calculate its Loss by referring to "quotations" or "prices" from one or more leading dealers in the relevant markets. Master Agreement at §14. In sum, the Loss definition , as quoted above, is permissive as to inclusiveness and manner of Loss determination, and the choices under the Loss definition belong to the Non-Defaulting Party, here, Intel.

That Loss is broadly inclusive is further made clear by the purposeful absence of a specific term from the Loss termination amount calculation that is included in the Market Quotation termination amount calculation. Section 6(e) of the ISDA Master governs both Loss and Market Quotation termination amount calculations. But Section 6(e) requires that "Unpaid Amounts," defined in essence as payables or deliverables due on or prior to early termination (but unpaid or undelivered), be counted in the calculation if and only if the parties are using Market Quotation. Section 6(e) does not reference Unpaid Amounts when the parties are using Loss. This is because Loss, unlike Market Quotation, allows a party to capture both retrospective and prospective losses. See Loss definition ("…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. Loss includes losses…in respect of any payment or delivery required to have been made…."). Market Quotation is a measure of value of a putative replacement transaction going forward from early termination. Market Quotation, as a market-value based determinant, is appropriately paired in the ISDA Master with a market-based determination of Unpaid Amounts. In short, Unpaid Amounts, as defined, is intended to be a companion to Market Quotation, but not to Loss. Loss, being "total losses", needs no such companion and the defined and constrained term "Unpaid Amounts" is not relevant to Loss.

This is not to say that Loss gives the determining party freedom without limits. The Loss definition requires the determining party to do so "reasonably and in good faith" and, if applying multiple measures of its loss, to do so "without duplication." Finally, the Loss definition inevitably must be read in conjunction with the governing law of the agreement, in this case New

York law. New York law of course provides multiple approaches to determining a disappointed purchaser's damages.

It is hard to imagine what, on the facts of this case, could be a more reasonable and good faith request than the request that the money paid be returned. It is a single request, without duplication, and, as described below, wholly consistent with New York law.

B. Consistent with New York Law Regarding Remedies in Breach of Contract Cases, Loss Permits Use of a Refund or Restitution Theory

New York law, like the Loss definition itself, offers a multi-faceted approach to damages for breach of contract. "[D]amages in breach of contract actions under New York Law generally consist of: (1) restitution interest, which represents any benefit which the non-breaching party bestowed upon the breaching party; (2) reliance interest, which represents any detriment which the non-breaching party suffered due to its reliance on the agreement; and (3) expectation interest, which represents any gain the nonbreaching party would have realized from the contract but for the breach." *Ainbinder v. Money Center Financial Group, Inc.*, No. 10 Civ. 5270, 2013 WL 1335997 (E.D.N.Y. Feb. 28, 2013) (internal quotations omitted). These interests may be served individually or collectively in any given case.

New York law allows a disappointed party to a contract, in a failure-to-deliver scenario, to recover the price paid for the undelivered goods or services, regardless of whether the disappointed party attempted to cover or claims other damages. For instance, Section 2-711 of the Uniform Commercial Code[3] provides, where a seller fails to make delivery, "the buyer may cancel and *whether or not he has done so may in addition to recovering so much of the*

[3] New York courts have applied Article 2 of the UCC by analogy to securities transactions. *G.A. Thompson & Co. v. Wendell J. Miller Mortgage Co.*, 457 F. Supp. 996, 998-99 (S.D.N.Y. 1978) ("Nevertheless, the courts, relying upon the Official Comment to section 2-105, have held that a buyer's remedies for breach of contract as set forth in Article 2 will apply to security transactions by analogy) (internal citations omitted").

price as has been paid…'cover' and have damages under the next section as to all the goods affected whether or not they have been identified to the contract." McKinney's Uniform Commercial Code § 2-711; *see also Dempsey v. Rosenthal*, 468 N.Y.S.2d 441 (N.Y. Civ. Ct. 1983) (holding that a buyer who received a non-conforming animal was entitled to a full refund of purchase price pursuant to § 2-711, despite not having attempted to cover). Indeed, a buyer may recover the purchase price under § 2-711 even when the cost of cover is less than the contract price. *See Allied Semi-Conductors Intern. Ltd. v. Pulsar Components Intern., Inc.*, 907 F. Supp. 618, 632 (E.D.N.Y. 1995) ("a covering buyer's damages are equal to the difference between the contract price and the '*presumably higher* cost of cover.') (emphasis in original) citing *Fertico Belgium v. Phosphate*, 517 N.Y.S.2d 465, 468 (1987).

Importantly, under UCC § 2-711, New York law allows a buyer in a non-delivery scenario to recover amounts pre-paid to the seller, even when the market price of those goods has decreased below the contract price, negating any expectation "damages." 2 Hawkland UCC Series § 2-713:1 provides an apt hypothetical: a buyer contracts to buy goods for $15,000, pre-pays $5,000 of the contract price, and the seller fails to deliver the contracted-for goods. *Id*. By the time of non-delivery, the market price has fallen from $15,000 to $12,000, so the buyer may actually save $3,000 via seller's breach, if the buyer later enters into a replacement purchase. The buyer has no recoverable contract damages based on market price alone, as he may now be in a better price position than he would have been upon fulfillment of the original contract. Nonetheless, the buyer is still entitled to a return of the $5,000 prepayment as provided in § 2-711(1). *Id.*; *see also Allied Semi-Conductors*, 907 F. Supp. at 632 (rejecting seller's argument that aggrieved buyer was entitled only to cost of cover, where price of parts had plummeted after the execution of the contract such that the market price dipped below the contract price, holding "[seller] cites no authority for the proposition that a breaching seller is entitled to retain a portion of the purchase price upon a buyer's proper rejection and return of defective goods in the event that the buyer covers its resale contract at a lower price than it paid to the breaching seller. In such a situation the aggrieved buyer sustains no cover damages as a consequence of the seller's breach and the seller's liability is limited to the purchase price paid as a matter of clear statutory mandate.").

Likewise, New York common law dictates that a non-breaching party in a contract action is entitled to the return of amounts paid. In *Ross University School of Medicine Ltd. v. Brooklyn-Queens Health Care Inc*., No. 09 Civ. 1410, 2012 WL 6091570 (E.D.N.Y. Dec. 7, 2012) *adopted in relevant part*, 2013 WL 1334271 (E.D.N.Y. Mar. 28, 2013), the plaintiff medical school contracted with the defendant health center, which was to provide a certain number of medical clerkships in exchange for, among other things, plaintiff's up-front prepayments totaling roughly $13 million. After the defendant medical center filed for bankruptcy and ceased operation, unable to provide the promised clerkships, the plaintiff brought suit for breach. *Id*. The court determined that the plaintiff was entitled to both the balance of prepayments made and the costs incurred in securing replacement clerkships. *See also McDonald's Corp. v. Robert A. Makin*, Inc., 653 F. Supp. 401, 403 (W.D.N.Y. 1986) ("it is against the law as well as sound morals to permit a party to a contract to repudiate the contract or his obligation under it, and at the same time retain the consideration that he has received"). As we understand the facts, LOTC has defaulted, yet seeks to retain the consideration it has received.

Many courts have recognized the appropriateness of restitution damages in contract actions. *See ATACS Corporation v. Trans World Communications*, 155 F.3d 659, 664 (3d Cir. 1998) (vacating an award of nominal damages and remanding to district court, "given the possibility of the plaintiff's proving reasonable restitution damages."); *see also* Restatement (Second) of Contracts § 373 (1981) ("[O]n a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance."); Restatement (Second) of Contracts § 373 cmt. b (" The clearest case occurs where the injured party has paid the full price in money for the performance that the party in breach has subsequently failed to render. To allow restitution of the sum paid in that case imposes no burden of measurement on the court and relieves it of the burden that it would have if damages were awarded of measuring the value to the injured party of the performance due from the party in breach."

In line with applicable law, the universe of available damage calculation methodology under Loss is not limited to market price, and a party determining its Loss may use refund or restitutionary theories.

II. Loss and Market Quotation Offer Different means of Determining Damages and May Produce Different Results

A. Evolution of ISDA Payment Measures

To understand both the distinction and the relationship between Loss and Market Quotation (a market-pricing mechanism), it is helpful to examine the evolution of ISDA payment measures. When ISDA, on behalf of the then-infant U.S. dollar interest-rate swap market, first attempted to standardize documentation, it produced three damages measures that parties might choose to use in calculating termination values upon early termination: "Agreement Value," "Indemnification," and "Formula." *See* Code of Standard Wording, Assumptions and Provisions for Swaps (1985) § 12.1(a), (d), (g). The Agreement Value measure embodied the concept of

Market Quotation, which obliged the determining party to calculate termination values based on quotations from reference market-makers. *Id.* §§ 12.1(a), 12.2(a). Indemnification embodied the concept of Loss, and was designed to "compensate the party for any losses and costs" that it incurred as a result of the early termination of a swap. *Id.* § 12.3; *see also id.* § 12.1(d). As its name suggests, Formula set forth a rigid set of mathematical equations into which a party would input certain data (*e.g.*, interest rates, discounted cash flows) to determine the termination amount. *Id.* §§ 12.1(g), 12.4.

Formula was discarded when ISDA published its first master agreement suite, the 1987 ISDA Master Agreements. These agreements were intended for the interest rate and currency derivatives markets; markets that were then perceived as having sufficient product liquidity and homogeneity to support the enforced use of Market Quotation. Even in 1987, however, it was recognized that Market Quotation would not serve well in all circumstances. Loss (formerly Indemnification) was a fallback to be used when a Market Quotation was not, or could not be determined (i.e., if fewer than three quotations were provided). In 1992, Loss became a full alternative to Market Quotation in the standardized documentation published by ISDA. By that time, the market was producing such transactional diversity that the 1992 ISDA Master Agreements had to recognize that Market Quotation would be inadequate for many kinds of transactions and that parties could freely choose Loss at the outset, or as a fallback if Market Quotation failed. In this case, the parties deliberately chose Loss to apply to the transaction in question.

B. Loss and Market Quotation May Produce Different Results

As the history and development of ISDA payment measures illustrates, ISDA recognized that these measures could *and should* produce different results in certain scenarios — results necessitated by an evolving derivatives market growing increasingly complex and variable. On one hand, "Market Quotation methodology requires the Non-Defaulting Party to obtain quotations from leading dealers in the relevant market, known as 'Reference Market-makers,' to 'step into the shoes' of the Defaulting Party for a replacement transaction." *Lehman Bros. Intern. (Europe) v. AG Financial Products, Inc*., 969 N.Y.S. 2d 804 (N.Y. Sup. Ct. 2013). In effect, Market Quotation is a means of establishing the spot market pricing that Lehman erroneously wishes to attribute to Loss. In Market Quotation, the precise methodology is set out at the onset of the transaction — it is presented, see Master Agreement § 6(e)(iv), as a pre-estimate of damages and, <u>if selected</u>, an exclusive measure. *See* User's Guide to the 1992 ISDA Master Agreements. Loss, on the other hand, "is a general indemnification provision…in which a party reasonably determines in good faith its total losses…and gains" after the fact. *Id*. at 25. Loss is a retrospective measure, allowing the Non-Defaulting Party to determine for itself, in any good faith and reasonable manner, its total losses and costs. *Id*. The expectation that distinctly different outcomes may result from use of the two payment measures is crystallized by the fact that Loss is the fallback measure when parties choose Market Quotation — "if fewer than three quotations are provided (*i.e.*, a Market Quotation cannot be determined) or a Market Quotation would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result, Loss will apply." *Id*. at 24. Not only is Loss available under the ISDA Master as a full-fledged alternative to be chosen by the parties at the beginning of their relationship, it is available as a fallback that will work when Market Quotation fails.

Some might try to blur the distinctions between Market Quotation and Loss by invoking dicta of an English court to the effect that the two damages calculational mechanisms are "intended to lead to broadly the same result." *Peregrine Fixed Income Ltd v. Robinson Dep't*

Store Plc, [2000] Lloyds Rep. Bank. 304 (Q.B.). This dicta is true generally only in the sense that both mechanisms are intended to lead to satisfactory resolutions in appropriate circumstances. Although this dicta may have been convenient in the case in which it was expressed, *Peregrine*, that case is totally inapposite[4] and has not even been mentioned by a U.S. court.

Where parties desire Market Quotation or "roughly the same result," they are free to choose Market Quotation, and if it fails, resort to Loss. Loss would allow a determining party to choose to continue to seek spot market pricing by less rigid means than Market Quotation. But where, as here and unlike in *Peregrine*, parties elect Loss at the outset of a transaction, they have demonstrated an intent to preserve a freedom of choice beyond a market price-bound liquidation measure.

In sum, Market Quotation is a payment measure guided by set procedures articulated at the inception of a transaction. This approach offers significant benefits, including ex ante certainty. Loss is a payment measure guided solely by good faith reasonableness and open to a universe of calculation methods that comport with this standard. It offers other significant benefits to parties, including ex post flexibility. To conflate these measures is to undermine the distinct benefits of both.

[4] The Non-Defaulting Party in *Peregrine* was obliged to pay on termination, not receive, both parties to the agreement were bankrupt and the parties had originally chosen Market Quotation, resulting in the propriety of the fallback to Loss, under these odd facts, being the main issue.

III. Parties to an ISDA Master Are Free to Choose Among Standard Options, as well as to Customize Terms, Including Through Amendment in a Confirmation with Respect to the Transaction Governed by the Confirmation

As the ISDA Master makes clear, parties are free to choose and customize standard contractual provisions, including by later negotiated amendments superseding earlier terms. *See* Master Agreement §1(b) ("In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Master Agreement (including the Schedule), such Confirmation will prevail for the purposes of the relevant Transaction").

ISDA embraced and facilitated this transaction-specific customization in an effort to accommodate a changing marketplace and transactions dependent upon flexibility. In the instant case, the parties negotiated both a Schedule and Confirmation for a prepaid forward share transaction. The parties' customized provisions shaped several key components of the transaction. Specifically, Intel was to remit a $1 billion prepayment to LOTC and LOTC was to post $1 billion in cash collateral. *See* Compl. at ¶2. The parties further agreed upon a share/cash delivery breakdown based on an agreed-upon metric — VWAP. *Id*. The parties embedded a whole security agreement in the Confirmation and defined Intel's "exposure" (which may be viewed as the amount at risk protected by provision of collateral) as $1 billion. *See* Confirmation at 10. In essence, Intel was purchasing an accommodation worth $1 billion to it, whereby it pre-arranged that during a specific period when Intel could not purchase its own shares, LOTC instead bought in shares valued on a specified averaging basis and delivered them to Intel. LOTC delivered nothing. In calculating its Loss, Intel could of course consider its

$1 billion investment as well as the consistent $1 billion "Exposure" valuation the parties had together given the transaction, which transaction was entirely unfulfilled.

IV. Timing of Loss Calculation

The parties agree that Loss is to be determined as of the relevant Early Termination Date, or if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. Intel determined and communicated its determination of Loss on the early termination date, in compliance with the definition of Loss, section 6(d)(i) of the Master Agreement.[5] LOTC's complaint appears to be to the effect that Intel should have used spot market share pricing either on the Termination Date or as of the first day Intel could once again, more than a month later, purchase its own shares as the basis for its Loss calculation. Putting aside the facts that Intel could not legally purchase its shares on the Termination Date and that Intel would have been subject to uncertainty and LOTC attack had it waited a month to value, LOTC's complaint rests on the erroneous proposition that spot market share pricing was the appropriate measure of Loss. As demonstrated above, this proposition is at odds with both the terms of the ISDA Master and New York law. To give effect to this proposition would be to inequitably allow a completely non-performing party in a purchase transaction to retain part of the purchase price. To do so would also destroy the intended breadth and flexibility of the definition of Loss.

[5] We observe that Intel sought performance from LOTC (which was still not in an insolvency proceeding) by notice on the contractual termination date, September 26, 2008. This notice both set out the calculation of deliverables and observed (and reserved on) the Event of Default caused by the earlier chapter 11 filing of Lehman Brothers Holdings, Inc. Intel did not declare LOTC in default until LOTC failed to perform on the September 29 settlement date. This action on Intel's part is wholly consistent with the terms of the ISDA Master (see section 6(a) with particular reference to use of the word "may" and the obvious contrast to agreements, unlike the one in this case, where Automatic Early Termination has been elected). Intel's forbearance also shows a preference on Intel's part for contract performance over default, a preference that should not be subject to unwarranted criticism.

CONCLUSION

For the foregoing reasons, amicus curiae the International Swaps and Derivatives Association, Inc. respectfully requests that the Court grant Intel Corporation's Motion for Summary Judgment.

Dated: New York, New York
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