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August 8, 2019

VIA ELECTRONIC MAIL

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: ***In re Lehman Brothers Holdings Inc.*****, No. 18-1079**

Dear Ms. Wolfe:

I am a pro-se movant in the above-referenced matter and am providing a final contribution to it in this letter.

I am very proud that the Case docket properly memorializes my highly useful work of the last ten months. I am also very heartened for the sake of our Country that the Case docket will continue to memorialize my highly useful contributions in perpetuity.

Today's letter includes an edited version of the amicus curiae brief that I proposed on June 25, 2019 and re-proposed on July 15, 2019. Please see pages i and 1-55 herein. Capitalized terms and acronyms have the same respective meanings in these pages A-C as in the proposed amicus curiae brief.

The edits to the proposed amicus curiae brief improve its clarity but do not alter content. I finalized the edits on July 30, 2019 as part of the required preparation to file the brief in the hoped-for event that the Court would accept it. Disappointingly, the Court denied my second motion to file the brief on August 6, 2019.

To be very clear: I am ***not*** asking the Court to consider my brief for a third time. Similarly, I am ***not*** using my status as a pro se movant to introduce additional material to the Court docket.

To be just as clear: I ***am*** reminding the Court that the proposed amicus curiae brief has from the outset contained analyses of the Bankruptcy's Court findings and decision which indicate that defendant-appellee Natixis may be in violation of one or more provisions of the US swap margin rules (the Prudential-Regulators-Swap-Margin-Rule and the CFTC-Swap-Margin-Rule,

respectively.) The potential violations pertain to the failure of Natixis to either: initiate daily, two-way exchange of variation margin with an amended Navient student loan ABS deal; or fully capitalize self-exposure under the associated flip-clause-swap-contract.

Please see Section V (***Don't Contort 219 Years of US Bankruptcy Law to Legitimize Crisis-Causing, Flip-Clause-Swap-Contract Craze of 2000-to-2007***), Subsection D (***Distinction with a Difference (and Unintended Consequence): Swap Agreement That Incorporates ABS Documents Activates Margin Posting***), pages 51-53.

Accordingly, I **am** copying staff of the Federal Reserve Bank of New York, the CFTC, Natixis, and Navient in this letter and delivering email.

Furthermore, the potential Natixis violations of US swap margin rules show that NRSRO credit rating agencies maintain inflated ratings of:

(1) Natixis;
(2) other swap dealers that are parties to flip-clause-swap-contracts with US issuers of ABS;
(3) ABS of US issuers that are party to a flip-clause-swap contract with Natixis; and
(4) all other ABS of US issuers that are parties to flip-clause-swap-contracts.

Accordingly, I **am** copying staff of the SEC Office of Credit Ratings and of the NRSROs DBRS, Fitch Ratings, Moody's Investors Service, and S&P Global in this letter and delivering email.

Also, the NRSRO Moody's Investors Service is obligated to enforce the Compliance Commitments that it, along with parent Moody's Corporation and affiliate Moody's Analytics, agreed to in the settlement with the US Department of Justice and the attorneys general of 21 states and of Washington, DC on January 13, 2017. Accordingly, I **have** delivered copies of this letter to the US Department of Justice contacts to whom the Moody's entities must report.

Finally, US Senator Joshua D. Hawley of Missouri was a signatory to the Moody's settlement in his former capacity as Attorney General of Missouri. Accordingly, I **am** copying Senator Hawley's Chief of Staff in this letter and delivering email.

Respectfully,

/s/William J. Harrington

William J. Harrington
Senior Fellow, Croatan Institute
Wikirating.org Experts Board — Structured Finance Topics

CC: Office of Inspector General, Federal Reserve Bank of New York
Office of Inspector General, US Commodity Futures Trading Commission

Press Relations, Natixis

Paul Hartwick, Vice President Communications, Navient

Jessica Kane, Director of Office of Credit Ratings, US Securities and Exchange Commission

Jon Riber, Senior Vice-President, DBRS

Mark Risi, Lead Analytical Manager, S&P Global

Kevin Duignan, Global Head of Financial Institutions, Fitch Ratings

Raymond McDaniel, Chief Operating Officer, Moody's Corporation

United State Attorney for the District of New Jersey, United States Attorney's Office for the District of New Jersey,
970 Broad Street, 7th Floor Newark, NJ 07102

Director, Consumer Protection Branch, U.S. Department of Justice
450 5th Street NW Washington, DC 20530

Kyle Plotkin, Chief of Staff for US Senator Joshua D. Hawley

PROPOSED BRIEF V2.0

(WJH Clean-Up Edits of July 30, 2019)

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 following pages)

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

AMICUS CURIAE WILLIAM J. HARRINGTON'S BRIEF

William J. Harrington
51 5th Avenue, Apartment 16A
New York, New York 10003
(917-680-1465)
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—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 CO ISSUER, 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 2007-1 COLLATERAL, 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., FREEDOM PARK CDO SERIES 2005-1 LLC, AS CO-ISSUER, G & F YUKICH SUPERANNUATION PTY LTD, GARADEX INC., GATEX PROPERTIES INC., GENERAL SECURITY NATIONAL 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 SERIES2006-2 LLC, AS CO-ISSUER, GREYSTONE CDO SPC, f/a/o THE SERIES2006-1 SEGREGATED PORTFOLIO, AS ISSUER, GREYSTONE CDO SPC, f/a/o THE SERIES 2006-2 SEGREGATED PORTFOLIO, AS ISSUER, GUOHUA LIFE INSURANCE CO. LTD., HAVENROCK II LIMITED, HHE PARTNERSHIPLP, JEFFERSON VALLEYCDO SERIES 2006-1 LLC, AS CO-ISSUER, JEFFERSON V ALLEY CDO SPC, f/a/o THE SERIES 2006-1 SEGREGATED P ORTFOLIO, AS ISSUER, JP MORGAN CHASE BANK, N.A., JP MORGAN SECURITIES, PLC, KINGS RIVER LIMITED, AS ISSUER, KINGS RIVER LLC, AS CO-ISSUER, KLIO II FUNDING CORP., KLIO II FUNDING LTD., KLIO III FUNDING CORP., KLIO III F UNDING LTD., KMCL CARROLL AND/OR THE HOLDERS OF AN ACCOUNT IN THAT NAME, LAKEVIEW CDO LLC SERIES 2007-1, AS COISSUER, LAKEVIEW CDO LLC, f/a/o THE SERIES 2007-2 SEGREGATED PORTFOLIO, AS CO-ISSUER, LAKEVIEW CDO SPC, f/a/o THE SERIES 2007-3 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 S EGREGATED 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., MONEY GRAMS ECURITIES 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, AS CO-ISSUER, PEBBLE CREEK LCDO 2007-2, LTD., AS ISSUER, PENN'S LANDING CDO LLC, AS CO-ISSUER, MODERN WOODMEN OF AMERICA, PENN'S LANDINGCDO 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., RUBYFINANCE 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, SOLARV 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., STAT E 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 NATIONALASSOCIATION, UNICREDIT BANK AG, LONDON BRANCH, UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (SA), VOX PLACE CDO LLC, VOX PLACE CDO LIMITED, WHITEHAWKCDO F UNDING, 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., P RINCIPAL LIFE INSURANCE COMPANY,

Defendants.

CORPORATE DISCLOSURE STATEMENT

I, William J. Harrington, am a private US citizen. I self-finance research advocacy to eliminate the type of priority payment provisions at issue in this litigation (the ***flip clause***), to fix Nationally Recognized Statistical Rating Organization (***NRSRO***) credit ratings, and to improve the capitalization and regulation of asset-backed securities and other structured finance debt (***ABS***) and derivative contracts.

I do this work fulltime without compensation.[1]

I have no commercial relationship with any party to the above-captioned case or any affiliate of any such party.

I have no financial or commercial interest in the above-captioned case, its outcome, or any implication thereof.

I am not employed by, or consult on a paid basis for, any entity.

I ***am*** a Key Expert on Structured Finance Topics for the Experts Board of Wikirating.org — a worldwide, independent, transparent, and collaborative

[1] No person contributed money or help to produce this brief.

organization for credit ratings. The Swiss nonprofit Wikirating Association operates the Wikirating platform.

I ***am*** affiliated as senior fellow with Croatan Institute — an independent, nonprofit, tax exempt **501(c)**(3), research institute.[2]

I have no other professional affiliation.

[2] Wikirating and Croatan Institute both post my work. (https://wikirating.org/ and http://www.croataninstitute.org/william-j-harrington, respectively.) For citations and excerpts, Harrington, William J., "Submission to the US Commodity Futures Trading Commission Re: RIN 3038-AE85 'Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants' (In the Event of No-Deal Brexit)," May 31, 2019. (https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2960.)

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STATEMENT OF INTEREST

I, William J. Harrington, investigate the capitalization and regulation of complex finance, publicly report findings, and disseminate them widely. My aim is to boost the sustainability of our financial system by improving price-making, reducing the likelihood of bailouts, and eliminating the flip clause.

The flip clause is the global ABS sector's:

1. best practice;
2. black hole;
3. Escher-staircase-to-nowhere;
4. foundation;
5. nifty lawyering;
6. original sin; and
7. quicksand.

Parties that refer to a flip clause in making payments under a swap contract (***flip-clause-swap-contract***) knowingly drafted it to fail. The plaintiff-appellant, defendants-appellees, and other ***crisis-causing entities*** routinely embedded ABS deals with flip-clause-swap-contracts, thereby wrecking our economy and undermining our Country.

Our Country, including the Court, needs disinterested, rigorous, and timely analyses of the crisis-causing flip-clause-swap-contract. I am the only person, human or corporate, who provides such analyses. No one else even tracks flip-clause-swap-contracts, whereas I have done so continuously since 1999.

No issuer establishes that a flip-clause-swap-contract protects ABS investors one tenth as effectively as a swap contract with daily, two-way exchange of variation margin.

No swap dealer such as defendant-appellee Natixis demonstrates that it robustly capitalizes the outsized exposure to its own credit profile in (fortunately, for our Country) shriveling portfolios of legacy flip-clause-swap-contracts. Nor does a swap dealer validate flip-clause-swap-contract capitalization against that of swap contracts that do not incorporate flip clauses.

No law firm produces an ironclad template for an enforceable flip-clause-swap-contract.

No auditor produces a protocol for valuing ABS of issuers that, respectively, are and are not parties to a flip-clause-swap-contract.

No NRSRO publishes a cogent flip-clause-swap-contract methodology or apportions the zero-sum exposures of a flip clause to the respective ABS and swap dealer ratings.[3]

No academician documents the extent to which flip-clause-swap-contracts and walkaway provisions stripped assets from the Lehman Brothers estate immediately after the bankruptcy filing.

Lastly, no industry group discusses the flip-clause-swap-contract without lying, parroting irrelevancies, or presenting "market information" that is alarmist, fatuous, and outdated.[4]

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[3] Gaillard, Norbert J. and William J. Harrington, "Efficient, commonsense actions to foster accurate credit ratings," *Capital Markets Law Journal* 11, No.1 (2016): 38-59. https://doi: 10.1093/cmlj/kmv064. Pages 38, 41-44, and 54-59. (https://academic.oup.com/cmlj/article-abstract/11/1/38/2366006?redirectedFrom=fulltext.) Also, Harrington, Bill, "Moody's DOJ Settlement Won't Stop Fake Rating Analysis & Derivatives Denial," *LinkedIn.com*, January 14, 2017. "The 800-page gorilla – rating methodologies are protected speech." (https://www.linkedin.com/pulse/moodys-doj-settlement-wont-stop-fake-rating-analysis-bill-harrington.)

[4] Harrington, William J. Electronic Letter to the CFTC "Re: Letter No. 17-52, No-Action," February 2, 2018 (***WJH-Corrections-to-CFTC-Letter-No-17-52***), pages 4, 5, 15, 23-26, 68, 94-110, and 114-116. (https://www.wikirating.org/data/other/20180203_**Harrington_J_William_31_Misrepresentations_in_CFTC**%20_**Letter_No_17-52**.pdf.)
Structured Finance Industry Group **(*SFIG*), "Motion for Leave to File Amicus Brief Re: Case 18-1079**," November 1, 2018. Page 1: "[T]he priority payment provisions . . . are central to the functioning of the securitization and swap markets." Page 2: "[T]his Court's decision will affect hundreds, if not thousands of derivatives transactions . . . at the heart

SUMMARY OF ARGUMENT

US Congress, markets, and regulators have consigned the flip-clause-swap-contract to the garbage heap of history. There, the contract rots away with aerosol sprays, trans-fats, asbestos tiles, and other toxic synthetics that poisoned users, producers, and our Country.[5]

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of the structured finance industry." **"Reply Brief in Support of Motion for Leave to File Amicus Brief Re: Case 18-1079**," November 20, 2018. Page 5: "[T]his Court's decision may affect the broader securitization industry, which accounts for trillions of dollars of transactions." **"Amicus Curiae SFIG's Brief in Support of Defendants-Appellees and Affirmance Re: Case 18-1079**," November 1, 2018. Page 1: Flip clause issues "are critical to the efficient functioning of securitization and swap markets." Page 10: "[A] CDO transaction, which has at its heart a swap transaction." Page 11: "[W]hen entering into CDO transactions, market participants . . . rightly expect that the swap agreement . . . (2nd Cir. 1998)." Page 15: A "narrow reading . . . would throw into doubt the viability of thousands of structured finance transactions . . . posing a systemic risk to the securitization markets." Pages 18-19: "[E]vents such as the UK Brexit vote . . . or the S&P downgrade of the US . . . resulted in substantial currency movements." Page 24: "Such provisions . . . facilitate liquidity in structured finance markets." Page 24: "[M]arket participants may become unwilling to participate in the structured finance market altogether. Striking the Priority Provisions would unravel thousands of transactions . . . and thereby undermine the stable operation of the structured finance markets, potentially triggering far broader repercussions to the economy . . . (2010)." Page 30: "[I]f the Bankruptcy Code were construed to invalidate ipso facto clauses . . . the impact on derivatives markets would be significant."

5 "The good news is that embedded swaps are less prevalent in U.S. deals." Adelson, Mark and Robbin Conner, "SFIG Vegas 2017 Conference Notes," March 11, 2017, (***Adelson-Conner-SFIG-2017***), page 20. (http://www.markadelson.com/pubs/SFIG-Vegas-2017-Conference-Notes.pdf.)

ARGUMENT

I. 2010: Congress Clearly Stated Its Intent to Fix ABS in Multiple Sections of the Dodd-Frank Act.

A. Financial Regulators *WILL* Impose Rigorous Margin Requirements on *ALL* Uncleared Swap Contracts (Sections 731 and 764).

The Dodd-Frank Wall Street Reform and Consumer Protection Act (***Dodd-Frank Act***) unequivocally directs seven financial regulators to adopt capital and margin rules for dealers of swap contracts.[6] Collectively, the regulators' rules must impose "capital requirements" and "initial and variation margin requirements on all swaps" and "all security-based swaps that are not cleared by a registered derivatives clearing organization." See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 731(e)(2), 124 Stat. 1704-5 and § 764 (e)(2), 124 Stat. 1786-87.[7]

Note the ***all*** in "***all*** swaps" and "***all*** security-based swaps." Congress expressed its clear and unambiguous intent in enacting § 731 and § 764. ***All*** regulators would formulate rigorous margin rules that would encompass ***all*** swap

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[6] The seven regulators, respectively: Board of Governors of the Federal Reserve Board System (***Federal Reserve***); Farm Credit Administration; Federal Deposit Insurance Corporation (***FDIC***), Federal Housing Finance Agency (***FHFA***), Office of the Comptroller of the Currency (***OCC***, and, the five regulators collectively, the ***prudential regulators***); US Commodity Futures Trading Commission (***CFTC***); and US Securities and Exchange Commission (**SEC**).

[7] (https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf.)

contracts, ***no exceptions!*** To ensure CFTC and SEC compliance, Congress curbed the agencies' "exemptive authority with respect to the swaps requirements of Dodd-Frank."[8]

B. NRSROs *WILL* Maintain Accurate Credit Ratings (Title IX, Subtitle C—Improvements to the Regulation of Credit Rating Agencies).

Congress plainly and clearly intended to end the ubiquitous NRSRO practice of inflating ABS credit ratings. See Dodd-Frank Act, Title IX, Subtitle C—Improvements to the Regulation of Credit Rating Agencies, 124 Stat. 1872-1890.[9]

The Congressional Finding on inflated ABS ratings and global chaos:

> The "ratings on structured financial products have proven to be inaccurate. This inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which

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[8] US Department of the Treasury, "A Financial System That Creates Economic Opportunities—Capital Markets, Report to President Donald J. Trump, Executive Order 13772 on Core Principles for Regulating the United States Financial System," October 2017, page 179. "Dodd-Frank amended CEA Section 4(c)(1) and Exchange Act Section 36(c) to limit the agencies' ability to exempt many of the activities covered under Title VII. Limitations on the exemptive authority with respect to the swaps requirements of Dodd-Frank was perhaps a measure to ensure that the agencies, while writing rules and implementing the new regulatory framework, did not unduly grant exemptions." (**https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL**.pdf.)

[9] Gaillard and Harrington, pages 46-48 describe Subtitle C provisions and SEC rule-making and exemption-issuing.

> in turn adversely impacted the health of the economy in the United States and around the world."

(Dodd-Frank Act, § 931, 124 Stat. 1872.)

Moody's corroborated the Congressional Finding when it settled with the US Department of Justice and the attorneys general of 21 states and Washington, D.C. on January 13, 2017. In the Statement of Facts, Moody's acknowledged having compromised pre-crisis ratings of collateralized debt obligations (***CDOs***) and residential-mortgage-backed securities (***RMBS***).[10]

Unfortunately for our country, the SEC has nullified a core provision — Dodd-Frank Section 939G, which imposed expert liability on NRSROs — since July 2010.[11] As a result, NRSROs continue to maintain wildly inflated ratings on ABS and on swap dealers that are party to a flip-clause-swap-contract.[12]

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10 US Department of Justice, "Justice Department and State Partners Secure Nearly $864 Million Settlement with Moody's Arising from Conduct in the Lead up to the Financial Crisis," *Announcement*, January 13, 2017. (https://www.**justice.gov**/opa/pr/j**ustice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising**.)

11 Harrington, William J., "Can Green Bonds Flourish in a Complex-Finance Brownfield?", *Croatan Institute Working Paper*, July 2018, (***Harrington-Croatan-Institute-Working-Paper-2018***), pages 9-12. (http://www.croataninstitute.org/publications/publication/can-green-bonds-flourish-in-a-complex-finance-brownfield.)

12 "SEC Charges Moody's With Internal Control Failures and Ratings Symbols Deficiencies," *Announcement*, August 28, 2018 (***SEC-Charges-Moody's-Re-675-RMBS&CLO-Rating-Errors-2018***). (https://www.**sec.gov**/news/press-release/2018-169.) Also, Harrington, Bill, "Moody's bets Germany will support Deutsche Bank derivatives above all

C. Issuers *WILL* Capitalize ABS as Advertised (Title IX, Subtitle D—Improvements to the Asset-Backed Securitization Process).

Congress plainly and clearly intended to end pre-crisis practices for assembling ABS. See the Dodd-Frank Act, Title IX, Subtitle D—Improvements to the Asset-Backed Securitization Process, 124 Stat. 1890-1898.

Congress could hardly have done otherwise, given that pre-crisis issuers were so adept at structuring blatantly undercapitalized ABS.[13] Many CDOs, including Big Horn Structured Funding CDO 2007-1, Broderick CDO III, Class V Funding III, and Lancer Funding II, incurred an event of default within a year of issuance.

Entering into a flip-clause-swap-contract was a main way that ABS issuers undercapitalized deals. The CDO of ABS model — buy ABS from issuers that likewise enter into flip-clause-swap-contracts — leveraged the undercapitalization game exponentially.[14]

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else," *Debtwire ABS*, 12 October 2016. (https://www.**debtwire.com**/info/**moody**%E2%80%99s-**bets-germany-will-support-deutsche-bank-derivatives-above-all-else**-%E2%80%94-analysis.)

13 SEC, "Citigroup to Pay $285 Million to Settle SEC Charges for Misleading Investors about CDO Tied to Housing Market," *Announcement*, October 19, 2011. (https://www.**sec.gov**/news/press/2011/2011-214.htm.)

14 Pauley, Justin and Dave Preston, "Wachovia CDO Research presents our summary of CDO Default Statistics," *Wachovia Structured Product Research*, December 31, 2008. "283 ABS CDOs [including nine that defendants-appellees issued] with a total aggregate issuance amount of

D. **Walkaway Clauses Are *NOT* Enforceable Against FDIC or FHFA (Section 210).**

"[N]o walkway clause shall be enforceable in a qualified financial contract of a covered financial company in default." (Dodd-Frank Act, § 210, 124 Stat. 1488.) ***The flip clause is a type of walkaway clause.***

> "WALKAWAY CLAUSE DEFINED . . . any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of the status of such party as a nondefaulting party in connection with the insolvency of a covered financial company that is a party to the contract or the appointment of or the exercise of rights or powers by the Corporation as receiver for such covered financial company."

(Dodd-Frank Act, § 210, 124 Stat. 1488.)

Congress was crystal clear in enacting § 210(c)(6)(F) ***Walkaway Clauses Not Effective***. A counterparty cannot exercise an option to "walkaway" from a "covered financial company" such as a government-sponsored entity (***GSE***) or insured depository institution when the company is in FDIC or FHFA receivership or conservatorship. ***In short, counterparties beware! An entity with a taxpayer backstop cannot barter it away via a walkaway clause.***

The non-enforceability of walkaway clauses advances the dual purposes of receivership / conservatorship — namely, preserving the assets of a

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> $295 billion . . . tripped their EOD triggers between October 2007 and Dec. 31, 2008.

covered financial company in default and limiting taxpayer losses. If walkaway clauses *were* enforceable, counterparties would immediately and simultaneously activate them and strip an already defaulted company of still more assets.

II. 2015 and 2019: Regulators Intentionally Kill the Flip-Clause-Swap-Contract in Implementing Dodd-Frank Mandate to Fix ABS.

A. Prudential Regulators, CFTC, and SEC Specify Daily, Two-Way Exchange of Variation Margin for Flip-Clause-Swap-Contracts.

> "Under regulatory margin requirements . . . subordination provisions may no longer be available to the SPV . . . The liquidity impact of the termination payment, if owed by the SPV to the counterparty upon termination of the swap, is mitigated by the posting of collateral by the SPV up to the termination date."[15]

In 2015, the prudential regulators and the CFTC implemented the clear Congressional intent for "initial and variation margin requirements," citing Dodd-Frank § 731 as impetus. In 2019, the SEC followed suit. The prudential regulators jointly adopted a capital and margin rule in October 2015.[16] The CFTC

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15 S&P Global Ratings, "Special-Purpose Vehicle Margin Requirements for Swaps-Methodologies and Assumptions," *Criteria*, October 7, 2017, paragraphs 34-35. (https://www.**standardandpoors**.com/ja_JP/delegate/getPDF;jsessionid=21CC87997D0D3192366EE23481A9C4D1?articleId=1930885&type=COMMENTS&subType=**CRITERIA**.)

16 Prudential Regulators, "Margin and Capital Requirements for Covered Swap Entities," 80 FR 74840, November 30, 2015 (***Prudential-Regulators-Swap-Margin-Rule***). (https://www.govinfo.gov/content/pkg/FR-2015-11-30/pdf/2015-28671.pdf.)

adopted a margin rule in December 2015.[17] The SEC adopted a capital and margin rule on June 21, 2019.[18]

The three rules obligate a dealer to include daily, two-way exchange of variation margin in a new swap contract with a "financial end user."[19]

> "Because financial counterparties are more likely to default during a period of financial stress, they pose greater systemic risk and risk to the safety and soundness of the covered swap entity."[20]

The three rules each reiterate that "financial end user" includes ABS issuers and that industry lobbying for an exemption was rejected.[21]

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17 CFTC. "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," 81 FR 636, January 6, 2016 (***CFTC-Swap-Margin-Rule***.) (https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2015-32320-1a.pdf.)

18 SEC, "Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers," *FR Publication Pending*, June 21, 2019 (***SEC-Swap-Margin-Rule***.) (https://www.sec.gov/rules/final/2019/34-86175.pdf.)

19 Under the Prudential-Regulator-Swap-Rule and the CFTC-Swap-Margin Rule, a "new" swap is one entered into or amended starting March 1, 2017. Harrington, Bill, "Existing ABS swaps also caught in swap margin net. *Debtwire ABS*. (August 12, 2016.) (https://www.**debtwire**.com/info/**existing-abs-swaps-also-caught-swap-margin-net**-%E2%80%94-analysis.)

20 Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74853.

21 For example, SEC-Swap-Margin-Rule, pages 204-205.

"The list also includes . . . securitization entities."[22]

"[S]tructured finance vehicles . . . are financial end users for purposes of the final rule."[23]

"The [Agencies / Commission] have not modified the definition of financial end user to exclude" structured finance vehicles.[24]

"The Commission is not excluding, as commenters urged . . . structured finance vehicles."[25]

> "[C]ommenters also requested that the [Agencies / Commission] exclude from the financial end user definition structured finance vehicles, including securitization" vehicles."[26]
>
> "[C]ommenters argued that covered swap entities . . . that enter a swap may be protected by other means—e.g., a security interest granted in the assets of a securitization SPV."[27]
>
> "These commenters urged the [Commission / Agencies] to follow . . . proposed European rules under which securitization vehicles would be

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22 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74853.

23 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 643 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74856.

24 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 643 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74857.

25 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 683.

26 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74856.

27 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640. **NB, *the facts in this Case obliterate the argument that the "security interest granted in the assets of a securitization" protects a dealer. A "security interest" in an asset that a flip clause has instantaneously reduced to $0.00 is meaningless.***

defined as non-financial entities and . . . not be required to exchange initial or variation margin."[28]

B. Former Moody's Derivatives Analysts Crack ABS Hall-of-Mirrors.

1. Two-Way Exchange of Variation Margin "*Defuses*" Flip Clause.

On May 12, 2015, a former Moody's colleague who practices US law and I led an hour teleconference on ABS and the flip-clause-swap-contract with the six respective prudential regulator and CFTC teams that were writing swap margin rules.

> "Mr. Harrington and Mr. Michalek expressed approval of the proposal's inclusion of ABS issuers as financial end-users and asserted that ABS issuers in all sectors should post full margin against their swap contracts" and with "the Agencies also discussed potential sources of systemic instability from ABS issuances and discussed whether margin requirements for ABS issuers would mitigate systemic risk."[29]

> "Commenters argue against an exemption from margin requirements for issuers of ABS. Commenters believe ABS issuers current practice

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28 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74857.

29 Federal Reserve, "Conference Call Between Staff of the Prudential Regulators and the U.S. Commodity Futures Trading Commission, William Harrington and Richard Michalek," *Announcement*, May 12, 2015 (***Former-Moodys-Derivatives-Analysts-Flip-Clause-Presentation-to-Prudential-Regulators-and-CFTC-2015***), Cover. (https://www.federalreserve.gov/newsevents/rr-commpublic/harrington-michalek-call-20150512.pdf.)

> for dealing with counterparty credit risk is inadequate by construction and presents a systemic risk."[30]

The CFTC-Swap-Margin-Rule memorialized the argument that my colleague and I successfully made.

> Commenters argued that obligating "ABS issuers to post full margin against all swap contracts would defuse commonly used 'flip clauses' and decrease the loss exposure of investors in ABS."[31]

Likewise, the SEC-Swap-Margin Rule also memorialized the argument that my colleague and I made. "A commenter specifically opposed exceptions for asset-backed security issuers."[32]

The daily, two-way exchange of variation margin ***"defuses"*** the flip clause by enabling both a swap dealer and an ABS issuer to terminate a swap contract without referencing the deal's priorities of payments. Moreover, the reason for termination becomes largely irrelevant because the party that is owed payment will hold collateral with market value that is at least equal to the previous day's swap valuation.[33] Crucially, both parties will have agreed all prior daily valuations since

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30 CFTC, "External Meetings: Conference Call with Mr. William Harrington and Mr. Rick Michalek," May 12, 2015. (https://www.**cftc.gov**/node/157371.)

31 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640. Also, Former-Moodys-Derivatives-Analysts-Flip-Clause-Presentation-to-Prudential-Regulators-and-CFTC-2015, page 7 (HTML page 8.)

32 SEC-Swap-Margin-Rule, page 204, footnote 569.

33 As an additional boon for financial stability, the daily, two-way exchange of variation margin also prevents a swap dealer from unilaterally depriving a

having entered the swap, i.e., they will have established a track record of mutually accepting both the termination valuation and the means of monetizing it.

2. ABS are *Non-Eligible Collateral*, Partly Because of the Flip-Clause-Swap-Contract.

"ABS issuers should not be permitted to post ABS as Margin."[34]

The Prudential-Regulators-Swap-Margin-Rule and the CFTC-Swap-Margin-Rule are more stringent than my colleague and I proposed. Both rules assign ***zero*** credit to private-label ABS and other non-eligible collateral in ***all*** instances.[35]

> The "final rule generally does not include ABS, including mortgage-backed securities, within the permissible category of publicly traded debt securities."[36]

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deal of collateral simply by paying an NRSRO to issue a no-downgrade letter. Smith, Corinne, "Counterparty conundrums: Issuers and investors adapting to swap dilemmas." *Structured Credit Investor*, April 13, 2013. (https://www.structuredcreditinvestor.com/ and, by permission, in Harrington, William J., "Electronic Letter to US Securities and Exchange Commission," February 2, 2014, pages 17-19, https://www.sec.gov/comments/s7-08-10/s70810-256.pdf.) In 177 instances, a dealer "successfully petitioned Moody's to be allowed to amend an existing derivative contract with an ABS transaction so as to avoid posting collateral." Also, Moody's Announcement, May 1, 2018 (https://www.moodys.com/research/**Moodys-No-Rating-impact-on-PELICAN-MORTGAGES-NO-3-following**--PR_383075.) "RBS will not take further action following the trigger breach, which constitutes 'other action' as remedial action under the swap documentation."

34 Former-Moodys-Derivatives-Analysts-Flip-Clause-Presentation-to-Prudential-Regulators-and-CFTC-2015, Cover.

35 Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74872.

36 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 666 and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74871.

The only eligible ABS collateral is that issued or fully guaranteed by the US government or certain GSEs, i.e., entities that do not enter into flip-clause-swap-contracts. [37]

The proposal by my former colleague and me also induced the SEC to institute a "ready market" test for complex finance debt posted as collateral.

> A "commenter recommended that the Commission [SEC] apply a 100% haircut to a structured product, asset-backed security, re-packaged note, combination security, and any other complex instrument. In response, the final margin rule requires margin collateral to have a ready market. This is designed to exclude collateral that cannot be promptly liquidated.[38]

III. US Issuers Shunned the Flip-Clause-Swap-Contract After 2008; Quit Cold Turkey in 2016; Issued Record Amounts in 2018!

"The good news is that embedded swaps are less prevalent in U.S. deals than . . . in European deals."[39]

Actually, the news is great! No US issuer of ABS has entered into any swap contract, neither one with daily, two-way exchange of variation margin nor a flip-clause-swap-contract, since January 2016. Nor is any US ABS issuer likely to

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37 Ibid. Also, CFTC-Swap-Margin-Rule, 81 FR, No. 3, 701-702 §23.156 Forms of margin, and Prudential-Regulators-Swap-Margin-Rule, 80 FR, 74870-2.

38 SEC-Swap-Margin-Rule, page 175-176, including footnotes 463 and 464.

39 Adelson-Conner-SFIG-2017, page 20.

enter into a swap in the foreseeable future, given that none has made the "significant structural change . . . to post and collect variation margin."[40]

The result? The ABS sector is thriving![41]

With respect to legacy US ABS deals, only 54 deals *with investment grade debt* are party to a flip-clause-swap-contract.[42] Moreover, a single company, the student loan company Navient, sponsors 34 of the 54 legacy deals. To the extent additional US deals are parties to a contract, they are most likely *pre-crisis, zombie* CDO and RMBS deals with debt that incurred downgrades to "C" or lower years ago.[43]

All 54 legacy deals with investment grade debt and a flip-clause-swap-contract are "private-label." ***GSEs that issue ABS such as Fannie Mae and Freddie Mac don't use the flip-clause-swap-contract.***

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40 CFTC-Swap-Margin-Rule, 81 FR, No. 3, 640.

41 Haunss, Kristen, "US CLO issuance sets new record with more than US$124 billion of volume," *Reuters*, December 12, 2018. (https://www.**reuters**.com/article/clo-record/refile-**us-clo-issuance-sets-new-record-with-more-than-us124bn-of-volume**-idUSL1N1YH1S5.)

42 WJH-Corrections-to-CFTC-Letter-No-17-52, pages 2-4. At least six of the 60 deals have terminated or run-off the respective flip-clause-swap-contracts.

43 For example, the 650 RMBS deals with USD 49 BN par cited in SEC-Charges-Moody's-Re-675-RMBS&CLO-Rating-Errors-2018.

Thirty-two of the 54 legacy deals closed in 2003–2008. Only 22 deals, including 14 Navient-sponsored deals, closed in January 2010–January 2016. Each of the 14 Navient-sponsored deals has a flip-clause-swap contract that is denominated in US dollars.

Of the remaining 20 Navient-sponsored deals that closed in 2003–2008, some have contracts that exchange US dollars for euros. ***Apart from Navient predecessor Sallie Mae, few sponsors used contracts that referenced currencies because they are exceptionally volatile.*** Since 2017, even Navient has gone to great lengths to retire currency contracts and liabilities. For three deals, the company simultaneously terminated the currency contract, called the euro-denominated tranche, and issued a US dollar tranche without a swap contract.[44]

Many US issuers of collateralized loan obligations (***CLOs***) ***do*** place a flip clause in the priority of payments ***without*** providing the capital, legal, and operational resources for the respective deals to exchange variation margin daily, i.e., to comply with the US swap margin rules. To-date, the CLOs have not entered

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[44] Moody's Announcements: October 20, 2017; February 2, 2018; and February 23, 2018. (https://www.moodys.com/research/**Moodys-upgrades-six-tranches-in-four-Navient-FFELP-securitizations**--PR_374267.) (https://www.moodys.com/research/**Moodys-upgrades-three-classes-of-notes-in-SLM-Student-Loan**--PR_378819.) (https://www.moodys.com/research/**Moodys-upgrades-two-classes-of-notes-in-SLM-Student-Loan--PR**_379894.)

swap contracts.[45] Instead, CLO investors such as Japanese banks mitigate exposures themselves.[46]

In short, US markets have consigned the flip-clause-swap-contract to the garbage heap of history. There, the contract rots away with aerosol sprays, trans-fats, asbestos tiles, and other harmful synthetics that poisoned users, producers, and our Country.

The flip-clause-swap-contract was central to the EU financial crisis.[47] Even so, EU issuers of RMBS and other ABS use the flip-clause-swap-contact under policy that the US has prudently rejected.[48] As evidence, the US economy habitually outperforms the EU.[49] Also, our social compact rejects bailing out financial companies again, whereas the EU tolerates public support for private entities.

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45 Harrington-Croatan-Institute-Working-Paper-2018, pages 25-27.

46 Tempkin, Adam, "Here's Why the Japanese Bid for CLOs Isn't Likely to Slow Soon," *Bloomberg Markets*, April 2, 2019. (https://www.**bloomberg.**com/news/articles/2019-04-02/**here-s-why-the-japanese-bid-for-clos-isn-t-likely-to-slow-soon**.)

47 Durden, Tyler and Marla Singer, "Is Titlos PLC (SPV) the Downgrade Catalyst Trigger Which Will Destroy Greece?" *Zero Hedge*, February 15, 2010. (https://www.**zerohedge.com**/article/**titlos-llc-special-purpose-vehicle-downgrade-catalyst-trigger-which-will-destroy-greece**.)

48 Harrington-Croatan-Institute-Working-Paper-2018, pages 18-21 and 35.

49 Timsit, Annabelle, "The euro-zone economy is back on familiar ground—slow, grinding growth," *Quartz*, February 7, 2019. (https://qz.com/1544961/**the-euro-zone-economy-is-back-on-familiar-ground-slow-grinding-growth/**.)

IV. 2017-2019: Congress and Regulators Hasten Dodd-Frank Demise of the Flip-Clause-Swap-Contract.

A. 2017: Regulators Prescribe "Singular" Event Against Lehman Repeat.

A "primary goal of the final rule—to avoid the disorderly termination of QFCs in response to the failure of an affiliate."[50]

> "The final rule facilitates the resolution of a large financial entity under the US Bankruptcy Code and other resolution frameworks by ensuring that the counterparties of solvent affiliates of the failed entity cannot unravel their contracts with the solvent affiliate solely based on the failed entity's resolution."[51]

In 2017, the Federal Reserve, the FDIC, and the OCC adopted respective rules that operate to prevent mass terminations of swaps and other "qualified financial contracts" (***QFCs***) with affiliates of a systemically important institution in receivership. Rule commentary repeatedly cites the Lehman bankruptcy as cautionary tale. *In-the-money counterparties activated terminations with LBHI or cross-default terminations with solvent Lehman affiliates*. *Out-of-the-money swap counterparties* ***with flip clauses*** *activated them*. *Out-of-the-money*

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50 Federal Reserve, "Restrictions on Qualified Financial Contracts of Systemically Important US Banking Organizations and the US Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement," 82 FR 42882, September 12, 2017, page 42907. (https://www.**federalregister**.gov/documents/2017/09/12/2017-19053/**restrictions-on-qualified-financial-contracts-of-systemically-important-us-banking-organizations-and**.)

51 Ibid., page 42883.

counterparties ***without flip clauses*** *suspended payments rather than terminating swaps, "reducing the liquidity available to the bankruptcy estate."*[52]

> Commenter: "[L]osses in the Lehman bankruptcy alone due to the ability of counterparties to close out QFCs and seize collateral destroyed millions if not billions of dollar . . . the exemption of QFCs from the automatic stay of the US Bankruptcy Code has effectively subsidized the cost of credit extended among QFC participants."[53]
>
> "This final rule is meant to help avoid a repeat of the systemic disruptions caused by the Lehman failure by preventing the exercise of default rights in financial contracts from leading to such disorderly and destabilizing severe distress or failures."[54]

The fix? No cross-default provisions in swap contracts!

> A "covered entity is prohibited from entering into covered QFCs that would allow the exercise of cross-default rights—that is, default rights related, directly or indirectly, to the entry into resolution of an affiliate of the direct party—against it."[55]

The QFC rules pave the way for at least a temporary "singular" event to benefit Country, institution in receivership, and non-terminating counterparties.

> "Title II of the Dodd-Frank Act's stay-and-transfer provisions would address both direct default rights and cross-default rights. But . . . no similar statutory provisions would apply to a resolution under the US Bankruptcy Code. The final rule attempts to address these obstacles to

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52 Ibid.
53 Ibid., page 42914.
54 Ibid., page 42883.
55 Ibid., page 42890.

> orderly resolution by extending the stay-and-transfer provisions to any type of resolution of a covered entity."[56]
>
> "The final rule is intended to yield substantial net benefits for the financial stability of the United States."[57]
>
> "The final rule should also benefit the counterparties of a subsidiary of a failed GSIB by preventing the severe distress or disorderly failure of the subsidiary and allowing it to continue to meet its obligations."[58]

Had the QFC rules been in place in 2008, no CDO could have terminated a flip-clause-swap-contract until the plaintiff-appellant (LBSF) entered bankruptcy. The "singular" event would have been a legal, market, and practical reality.

> "[T]o ensure that the proposed prohibitions would apply only to cross-default rights . . . the final rule provides that a covered QFC may permit the exercise of default rights based on the direct party's entry into a resolution proceeding.[59]

B. 2018: Congress Keeps *ALL* ABS Fixes; Reverses Other Dodd-Frank Provisions.

The 115th Congress (2017-2018) intentionally preserved ***all*** Dodd-Frank provisions that fix ABS, including those that kill the flip-clause-swap-

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56 Ibid., page 42903.
57 Ibid., page 42914.
58 Ibid., page 42904.
59 Ibid.

contract. In 2018, Congress enacted one bill that tweaked the Dodd-Frank Act and let a second bill, a wholesale reversal of the Dodd-Frank Act, die.[60]

President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. L. No. 115-174, S.2155) on May 24, 2018.[61] The act primarily eases Dodd-Frank restrictions on community and regional banks.

Had Congress intended to protect the flip-clause-swap-contract under US bankruptcy law, Congress would have passed the Financial Choice Act of 2017.[62] The bill would have eased the CFTC-Swap-Margin-Rule by exempting many swap contracts from margin posting.[63] The bill also would have amended US Bankruptcy Law so that Chapter 11 proceedings covered large financial institutions.[64]

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60 Shearman and Sterling, "First Major Dodd-Frank Reform Bill Signed Into Law," *Perspective*, May 25, 2018. (https://www.shearman.com/perspectives/2018/05/first-major-dodd-frank-reform-bill.)

61 (https://www.congress.gov/bill/115th-congress/senate-bill/2155.)

62 H.R. 10 - Financial Choice Act of 2017, 115th Congress. (https://www.congress.gov/bill/115th-congress/house-bill/10.)

63 Ibid., "Title VIII-Capital Markets Improvements, Subtitle C--Harmonization of Derivatives Rules."

64 Ibid., "Title I--Ending 'Too Big to Fail' and Bank Bailouts, Subtitle B--Financial Institution Bankruptcy."

C. 2019: CFTC Chairperson Gives Up on Exempting Flip-Clause-Swap-Contracts from Margin Posting.

On April 26, 2018, CFTC Chair Giancarlo co-published a White Paper that proposed to reverse many Dodd-Frank rules.[65] Giancarlo *did* make good on many proposals by ushering the respective rule reversals to adoption. However, a backdoor protection of the flip-clause-swap-contract that SFIG had long sought, a reinterpretation of "financial entity in the Commodity Exchange Act" to exempt "a variety of end users, including . . . special purpose vehicles," never materialized.[66] The reinterpretation would have exempted flip-clause-swap-contracts from the CFTC-Swap-Margin-Rule.[67]

V. Don't Contort 219 Years of US Bankruptcy Law to Legitimize Crisis-Causing, Flip-Clause-Swap-Contract Craze of 2000-to-2007.

A. Waterfall Seniority is Exceedingly Valuable to Swap Dealers Because It Ensures Even Zombies Pony Up.

With a flip clause, a swap dealer and an ABS issuer each pay a steep price (waterfall subordination) for a high value good (waterfall seniority).

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65 Giancarlo, J. Christopher and Bruce Tuckman, "Swaps Regulation Version 2.0," *CFTC White Paper*, April 24, 2018. (https://www.cftc.gov/sites/default/files/2018-05/oce_chairman_swapregversion2whitepaper_042618.pdf.)

66 Ibid., page 80.

67 CFTC staff discussed an exemption with SFIG many times in 2017. "WJH-Corrections-to-CFTC-Letter-No-17-52, pages 78-79 and 113-114.

The benefit to a swap dealer from waterfall seniority is immense because it protects swap assets in many circumstances, including when an ABS deal is in default. Conversely, the cost to ABS investors is also immense because senior payments to the dealer deplete cash that might otherwise repay interest or principal.

As examples, ***two crisis-era, defaulted deals stopped repaying respective ABS after having ringfenced cash for senior termination payments***.

(1) By February 2009, ***Ballyrock CDO ABS 2007-1 Limited*** had not paid "any classes of notes" since November 2008 because the deal was husbanding cash against a possible termination obligation to ***LBSF***.[68]

(2) After incurring an event of default on March 31, 2009, ***Cheyne CLO Investments I*** paid a large swap termination to ***Credit Suisse***. "Today's rating downgrades reflect the increased expected loss associated with each tranche due to the termination of T[otal]R[eturn]S[wap] transactions" with Credit Suisse.[69]

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68 "Moody's Announcement: March 4, 2010." (https://www.moodys.com/research/**Moodys-downgrades-the-ratings-of-two-classes-of-Notes-issued**--PR_195797.)

69 "Moody's Announcement: August 11, 2009." (https://www.moodys.com/research/**Moodys-downgrades-SF-CDO-notes-issued-by-Cheyne-CLO-Investments**--PR_184715.)

Similarly, ***waterfall seniority protects in-the-money flip-clause-swap-contracts that a dealer retains rather than terminates with a zombie deal***.

Indeed, dealers such as AIG, Bank of America, Barclays Bank, Bear Stearns Financial Products, Deutsche Bank, Goldman Sachs, JPMorgan, and Merrill Lynch preserved assets under most flip-clause-swap-contracts with zombie CDO and RMBS deals.[70] Each dealer maximized the value of a given flip-clause-swap-contract by allowing the deal to continue paying according to schedule rather than by terminating the contract and risking a fire-sale shortfall.[71]

In fact, waterfall seniority in even a zombie deal can determine whether a credit-impaired, flip-clause-swap-contract dealer remains solvent. LBSF shows how the flip to subordination can spur dealer insolvency and cut estate

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70 As examples, Barclays Bank and Deutsche Bank collectively had 37 high value, deeply in-the-money flip-clause-swap-contracts with 31 zombie RMBS deals. "Moody's Announcement: October 17, 2011." (https://www.moodys.com/research/**Moodys-takes-action-on-37-swaps-in-thirty-one-RMBS**--PR_228507.) (**NB,** Moody's "counterparty instrument rating" **minimizes** the potential that a swap dealer will incur waterfall subordination. Like the flip clause, the rating is circular and self-referencing. Gaillard and Harrington, footnote 23.)

71 Ibid. Regarding one of the 37 high-value, deeply in-the-money flip-clause-swap-contracts with a zombie RMBS deal, Moody's assigned the contract a counterparty instrument rating of Aa3 on November 29, 2010, five months after having downgraded a formerly Aaa-rated RMBS tranche to Ca on April 14, 2010. (https://www.**moodys.com/credit-ratings/ACE-Securities-Corp-Home-Equity-Loan-Trust-Series-2006-NC3-credit-rating-**715036579.)

assets.[72] Conversely, two other credit-impaired dealers, AIG and Merrill Lynch, remained solvent in part by taking extraordinary actions to preserve seniority (i.e., avoiding subordination) of deep-in-the-money contracts with distressed CDO and RMBS deals. Some actions — e.g., executing a credit support annex or paying a higher rated entity to guarantee performance viz-a-viz deals — appeared reasonable but were in fact entirely gratuitous because the contracts were so deeply-in-the-money to the respective dealers. The credit support annexes were gratuitous because the respective dealers could not possibly owe money to the respective deals. The performance guarantees by higher-rated entities were gratuitous because the dealers had no payment or performance obligations to guarantee viz-a-viz the deals.[73]

NRSROs issued the rating agency conditions (***RACs***) that effectuated each gratuitous dealer action.[74] In a particularly egregious instance, Fitch and Moody's each greenlighted an entirely circular scheme in which Merrill Lynch

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72 Fleming, Michael J. and Asani Sarkar, "The Failure Resolution of Lehman Brothers," *FRBNY Economic Policy Review 185*, December 2014, in toto, e.g., pages 179, 185, 186, and 188. (https://www.**newyorkfed**.org/medialibrary/media/**research**/epr/2014/1412flem.pdf)

73 Harrington, William J., "Submission to the US SEC Re: File Number S7-18-11, 'Proposed Rules for Nationally Recognized Statistical Rating Organization,'" August 8, 2011, pages 4, 27-29 (including footnote 7), 36, 40, 62-68, 70-71, and 73-74. (https://www.sec.gov/comments/s7-18-11/s71811-33.pdf.)

74 Gaillard and Harrington, Regarding RAC generally, pages 42-44, especially footnotes 40-43.

Derivative Products guaranteed the performance obligations of its Merrill Lynch guarantor.[75]

With other equally egregious RACs, *swap dealers took the action of "taking no action"* to remediate the credit impact on deals.[76]

B. Flip Clauses Are *Ipso-Facto* Provisions.

The decision by the United States Bankruptcy Court for the Southern District of New York (the ***Bankruptcy Court***) plainly shows that 100% of the flip clauses in 100% of the 44 CDOs *ipso facto* modified LBSF's rights by 100%.

> "***The amount of the proceeds of the liquidation of the Collateral was insufficient to make any payment to LBSF under the Waterfall after proceeds were paid pursuant to Noteholder Priority***."

(Memorandum Decision, Page 11. Emphasis added.)

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75 "Moody's Announcement: December 14, 2011." (https://www.moodys.com/research/**Moodys-Determines-No-Negative-Rating-Impact-Due-to-New-Guaranty**--PR_233539.)
Also, "Fitch Announcement: March 12, 2015." (**https://www.businesswire.com/news/home/20150312006588/en/Fitch-Rating-Impact-4-SF-Deals-Bank**.)
Also, "Moody's Announcement: April 3, 2012." (https://www.moodys.com/research/**Moodys-Determines-No-Negative-Rating-Impact-Due-to-Amendment-to**--PR_241278.)
Also, SEC, "Paul A. Gumagay, Office of Commissioner Louis A. Aguilar, Teleconference with William J. Harrington," *Memorandum*, June 30, 2014, page 1. (https://www.**sec.gov**/comments/s7-08-10/s70810-304.pdf.)

76 "Moody's Announcement: July 20, 2012." (https://www.moodys.com/research/**Moodys-No-Negative-Rating-impact-on-11-SF-CDOs-following**--PR_251415.)

In a cavalier aside, the Bankruptcy Court mulled an alternative reality in which flip clause activation might have benefited both CDOs and LBSF.

> Had "the proceeds of the sale of the Collateral been much greater than they were, LBSF may have even received a payment in connection with its purported 'in-the-money' position in the Swaps."

(Memorandum Decision, Page 26, Footnote 83.)

Indeed! Also, "money might grow on trees" if only "pigs had wings!"

The unfounded fantasy of greater proceeds is pie-in-the-sky musing that misses not only the forest for the trees, but also the whole eco-system! The instance in which a flip clause is activated — namely, the bankruptcy of a flip-clause-swap-contract dealer — is the same instance in which many financial markets, including seemingly unrelated ones, falter. Moreover, the larger the failed swap dealer and flip-clause-swap-contract portfolio, the larger the negative impact on markets.

The scale of the Lehman bankruptcy, compounded by the scale of the Lehman flip-clause-swap-contract portfolio, ensured that asset prices worldwide would plummet. There was no scenario, save a US government bail-out of Lehman Brothers, in which "the proceeds of the sale of the Collateral" would have "been much greater than they were."

C. Type 1 / Type 2: A Distinction *Without* a Difference.

Given the zero-sum stakes, the conditions for waterfall seniority must be construed as operational from the outset rather than as materializing only upon activation of a flip clause. LBSF drafted every flip-clause-swap-contract to enjoy the significant benefit of waterfall seniority from the outset and to permanently relinquish the seniority for a deeply subordinate position upon certain instances of its own credit impairment. Likewise, each ABS issuer knowingly agreed to the conditions that permanently relegated LBSF waterfall priority to a very subordinate place from a very senior one.

The same has always been the case for all flip-clause-swap-contract dealers globally. At the outset of each contract, a dealer drafts and agrees the potential for a flip to waterfall subordination from seniority.

The Bankruptcy Court formulated an entirely artificial, wholly contrived protocol in categorizing each of the 44 CDOs as either a Type 1 Transaction or a Type 2 Transaction.

Neither type contains "materially distinct types of language" (Memorandum Decision, Page 20.) Both types modified "LBSF's rights because of its default" (Memorandum Decision, Page 23.) Specifically, all 44 CDOs gave LBSF:

> "right to payment priority of a Swap termination payment (if it was 'in-the-money') that was fixed at the outset of the Transaction as the default option — meaning, LBSF had an automatic right to payment priority ahead of the Noteholders unless the conditions for an alternative priority was established."

(Memorandum Decision, Pages 20-21.)

Accordingly, the flip clauses in each Type 2 Transaction are *ipso facto* provisions just as the flip clauses in each Type 1 Transaction are *ipso facto* provisions. The flip clauses of each of the 44 CDOs, i.e., of both "Types," operated identically to those of the other 43 CDOs. To the extent that the "enforcement of the Priority Provisions in Type 1 Transactions effected an *ipso facto* modification of LBSF's rights," the enforcement of the Priority Provisions of the Type 2 Transactions did so, as well. (Memorandum Decision, Page 23).

There is no practical or theoretical instance in which a flip clause of any Type 1 Transaction would operate differently from a flip clause of any Type 2 Transaction. No flip clause in a Type 1 Transaction would activate without the flip clauses in all Type 2 Transactions also activating, and vice-versa.

Regulators and investors assessed the respective flip clauses of the 44 CDOs identically. Underwriters and issuers, including the plaintiff-appellant and most defendants-appellees, marketed the respective flip clauses of the 44 CDOs identically. NRSROs modeled the flip clauses of the 44 CDOs identically. NRSRO

methodologies neither specified, nor now recognize, a "toggle between two potential Waterfalls" that becomes "applicable upon Early Termination" (Memorandum Decision, Page 22).

Likewise, NRSROs that assigned a "counterparty instrument rating" to flip-clause-swap-contracts (apart from the respective ABS ratings) would have maintained identical ratings for the respective contracts in any Type 1 Transaction and any Type 2 Transaction, other contract provisions being similar.

D. Distinction *With* a Difference (and Unintended Consequence): Swap Agreement That Incorporates ABS Documents Activates Margin Posting.

> "Judge Peck's determination in BNY that section 560 did not apply relied in no small measure on a ruling that the priority provisions at issue in that case 'did not comprise part of the swap agreement,' and thus the provisions governing the liquidation were not a part of the swap agreement. The facts here are different . . . the Priority Provisions are either explicitly set forth in the schedules to the ISDA Master Agreements or are incorporated into such schedules from the Indentures."

(Memorandum Decision, Page 40.)

A flip-clause-swap-contract is irredeemably deficient irrespective of whether or not it incorporates ABS documents.

SLM Student Loan Trust 2003-7, a Navient-sponsored deal, demonstrates why. The deal exchanges dollars for euros under a flip-clause-swap-

contract with Natixis, which is subject to the Prudential-Regulators-Swap-Margin-Rule.[77] SLM 2003-7 amended governing documents in January 2019.[78]

If the flip-clause-swap-contract incorporates the amended documents, the flip clause may be binding, but so too is the Prudential-Regulators-Swap-Margin-Rule because it covers swaps that were amended on or after March 1, 2017. ***Accordingly, Natixis has continuously violated the Prudential-Regulators-Swap-Margin-Rule unless it and the deal have been exchanging variation margin daily contemporaneously since the amendment effective date.***

Conversely, if the flip-clause-swap-contract do not incorporate the SLM 2003-7 governing documents, the flip clause may be void per "Judge Peck's determination in BNY." A swap amendment could repair the flip clause, but that would also immediately activate the daily, two-way exchange of variation margin. Accordingly, Navient must write-off the deal's residual value. NRSROs must

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77 Moody's Announcement on SLM Trusts with CDC Ixis / Natixis as Flip-Clause-Swap-Contract Dealer: March 28, 2018. (https://www.moodys.com/research/Moodys-reviews-for-downgrade-three-classes-of-notes-from-two--PR_381201.)

78 Moody's Announcement: January 15, 2019. Navient amended SLM 2003-7 to "add the ability to purchase an additional 10% of the initial pool balance" and "establish a revolving credit facility that enables the trust to borrow money from Navient Corporation on a subordinated basis." (https://www.moodys.com/research/**Moodys-downgrades-one-class-of-notes-in-SLM-Student-Loan**--PR_393791.)

downgrade not only the deal's ABS, but ABS of every issuer that has not incorporated the relevant deal documents into a flip-clause-swap-contract.

E. Scrap 1992 Precedent: Swap Asset is *NOT* Mere "Unrealized Investment Gain."

> "A swap agreement provision denying an in-the-money defaulting party recovery is 'neither a penalty, a forfeiture, nor an unjust enrichment' because it merely requires a party to 'forego an unrealized investment gain.' *Drexel Burnham Lambert Prod. Corp. v. Midland Bank PLC*, No. 92 Civ. 3098, 1992 WL 12633422, at *2 (S.D.N.Y. Nov. 10, 1992)."

(United States District Court for the Southern District of New York, Opinion and Order, Page 16.)

The 1992 holding is bad precedent.[79] Simply put, an in-the-money swap contract ***is a real-world, real-time, real asset***. A swap dealer manages an in-the-money contract as a ***real asset*** in accounting, cashflow, and risk management. The global swap market operates with the understanding that a contract is always a real-world asset for one party and a corresponding real-world liability for the other

[79] Marchetti, Peter, "Amending the Flaws in the Safe Harbors of the Bankruptcy Code: Guarding Against Systemic Risk in the Financial Markets and Adding Stability to the System," *Emory Bankruptcy Developments Journal* 31, No. 2 (2015). Footnote 217: The "*Drexel* decision did not cite any supporting precedent, did not contain an extensive analysis of the conclusion it reached, and is of 'dubious precedential value.'" (http://law.emory.edu/ebdj/content/volume-31/issue-2/articles/amending-flaws-safe-harbors-guarding-systemic-markets-stability.html#section-6f8b794f3246b0c1e1780bb4d4d5dc53.)

party. No dealer would operate if in-the-money contracts were merely "unrealized investment gains" because all swap assets would be exposed to 100% write-down.

Eliminating an early termination payment due a defaulting party penalizes it 100% and, commensurately, gifts its counterparty a 100% windfall, i.e., 100% write-off of a real liability.[80]

Even NRSROs, which otherwise inflate ABS cashflows, debit them according to original swap schedule in simulations of dealer default.[81]

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80 Collins, Sean F., "Rights, Duties and Obligations of Counter-Parties Following Default Under Derivative Contracts," *Alberta Law Review* 42:1 (2004): 153-166, https://doi.org/10.29173/alr487. Page 165: "If the benefit derived from the non-defaulting party is grossly disproportionate to the damages suffered . . . the provision . . . can be construed as a penalty." (https://www.albertalawreview.com/index.php/ALR/article/view/487.)

81 Harrington, William J., Electronic Letter to the SEC, September 11, 2013, page 6. Dealer simulation is merely "a generic placeholder that exchanges payments with an ABS issuer" per original swap schedule. (https://wikirating.org/data/other/20130911_Harrington_J_William_ABS_Losses_Attributable_to_Securitization_Swaps.pdf.)

FEDERAL RULES OF APPELLATE PROCEDURE FORM 6

Pursuant to Fed. R. App. P. 32(g), I, the undersigned and "an unrepresented party," 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 6,987 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 2013 in 14-point font size, Times New Roman type style.

Dated: New York, New York
July 30, 2019

By: /s/

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