EXHIBIT A

K&L|GATES

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October 6, 2009

Marc Barreca
D (206) 370-7815
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VIA EMAIL Locke.mcmurray@lehman.com

Lehman Brothers
1271 Sixth Avenue, 40th Floor
New York, NY 10020
Attn: Locke R. McMurray
Telephone: 212-526-7186

Re: ISDA Master Agreement between Lehman Brothers Special Financing Inc. ("LBSF) and Seattle Pacific University, dated as of October 16, 2000, together with Schedule, Credit Support Annex and Confirmation (the "Agreement')

Dear Mr. McMurray:

Since Seattle Pacific University ("SPU") delivered its notice designating an early termination date for the Agreement on September 18, 2009 (the "SPU termination notice"), we or SPU have been contacted and received the following correspondence from Lehman or the Derivatives Legal function for Lehman Brothers Holdings Inc. and its affiliate Lehman Brothers Special Financing Inc. (together "Lehman"):

- Letter from Satoko Koyama dated September 18, 2009 stating that the SPU termination notice "violates the Bankruptcy Code and is accordingly voidable at the election of Lehman" (the "Lehman September 18 Letter"), received by SPU on September 21, 2009.
- In response to the Lehman September 18 Letter, SPU sent a letter to you dated September 24, 2009 (the "SPU September 24 Letter", received by the Lehman mailroom at 9:39 am on September 25, 2009, signed for by Grant):
    - stating that SPU stands ready and willing to make a Termination Payment to Lehman, but requesting confirmation that the termination of the Agreement will not be voided by Lehman and that the Termination Payment will be treated as such;
    - including SPU's determination of the Termination Payment payable by SPU to Lehman in respect of the outstanding Transaction under the Agreement as of September 18, 2009 ($1,553,183.35), and detailing the Termination Payment in the attached Exhibit (the "Loss Calculation Exhibit");

  - noting that SPU has made ongoing payments to Lehman during 2009 even though Lehman has not performed its obligations as Calculation Agent under the Agreement except when prompted by SPU to provide a calculation and statement; and
  - stating that SPU stands ready and willing to make its most recent regularly scheduled payment but, again, Lehman has not performed its obligations as Calculation Agent and SPU has not received a statement.
- In response to the SPU September 24 Letter:
  - On September 25, 2009, Craig Kispert, Associate Vice President of Business and Finance of SPU, received a phone call from Rie Ando (riando@Lehman.com, (646) 333-9484) requesting copies of the exhibits referenced in the Loss Calculation Exhibit;
  - On September 25, 2009, Craig Kispert responded to Rie Ando by email asking whether Lehman is interested in terminating the Agreement (notwithstanding the Lehman September 18 Letter suggesting that it is Lehman's stance that SPU was not able to terminate the swap) and asking about the relevancy of the underlying exhibits to the Loss Calculation Exhibit except in connection with a termination;
  - SPU has not received a response to this email;
  - On September 28, 2009, SPU received your letter dated September 25, 2009 (the "Lehman September 25 Letter") stating that:
    - Lehman's records indicate that no valid termination notice has been delivered under the Agreement (not referencing the SPU termination notice);
    - That Lehman has determined that the Agreement may only be terminated with mutual consent of the parties;
    - Referencing the Metavante order and attaching the transcript of Judge Peck's remarks with respect to Metavante on September 15, 2009, including Judge Peck's holding with respect to that counterparty's failure to make periodic payment, but not referencing that SPU has made its periodic payments and not acknowledging SPU's notice that Lehman has failed to perform its responsibilities as calculation agent and provide statements to SPU for its September (and now October) payments; and
    - Stating that Lehman will hold SPU accountable for damages resulting from the stay violation including damages associated with Lehman's hedging activities.
  - On September 30, 2009, I received your letter dated September 29, 2009 the "Lehman September 29 Letter") stating:
    - Again that SPU's putative termination of the Transaction under the Agreement represents a violation of the automatic stay;
    - That Lehman is working with counterparties to settle open derivatives transactions on mutually agreeable terms;

- Asking for the exhibits specified in the Loss Calculation Exhibit as well as evidence of Market Quotations sought or received, details and evidence of replacement hedges and detailed backup for SPU's expenses, but not referencing Craig Kispert's email response to Rio Ando.

We take exception to references in the Lehman September 25 Letter to the Metavante failure to make periodic payments in light of SPU's continued performance of its obligations under the Agreement even during a period in which Lehman has failed to perform its responsibilities as Calculation Agent. We again put Lehman on notice of its failure to perform as Calculation Agent under the Agreement.

In light of this correspondence (copies of which are attached), we understand that Lehman believes that the SPU termination notice was not effective to terminate the Agreement, but that Lehman may be willing to terminate the Agreement through mutual consent. SPU has already provided its Loss Calculation Exhibit. Prior to SPU's providing information over and above the Loss Calculation Exhibit please provide Lehman's proposed termination amount.

We believe it may be beneficial to schedule a call to discuss these matters. SPU is interested in determining whether it will be productive to pursue a mutually acceptable termination or whether SPU should move the court for assumption or rejection of the Agreement.

I am available for a call on either Thursday or Friday, October 8, 2009 and October 9, 2009, respectively, at the following times: between 10:00 a.m. and noon, or 1:30 and 3:00 p.m. Seattle time. Please advise regarding your availability. Thanks.

Sincerely,

K&L Gates LLP

By
Marc Barreca

MLB:ved

Attachments

K:\2066686\00001\20922_MLB\20922L24FE

EXHIBIT B

K&L|GATES

K&L Gates LLP
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T 206.623.7580 www.klgates.com

October 16, 2009

Lehman Brothers
1271 Sixth Avenue, 40th Floor
New York, NY 10020
Attn: Locke R. McMurray
Telephone: 212-526-7186
Locke.mcmurray@lehman.com

Via Email

Re: ISDA Master Agreement between Lehman Brothers Special Financing Inc. ("LBSF) and Seattle Pacific University, dated as of October 16, 2000, together with Schedule, Credit Support Annex and Confirmation (the "Agreement')

Dear Mr. McMurray:

We spoke Monday morning regarding the Agreement between Seattle Pacific University and Lehman Brothers Special Financing Inc. As we discussed, you were going to determine whether Lehman is willing to propose a termination amount that would be acceptable to Lehman in connection with a mutual termination of the Agreement. You asked whether the University could provide the exhibits specified in the Loss Calculation Exhibit attached to the University's letter to you dated September 24, 2009. We have consulted with our client, and the University is willing to provide the supporting exhibits specified in the Loss Calculation Exhibit if Lehman will provide its proposed termination amount, together with its supporting calculations.

Please let us know if you are willing to proceed to exchange such documentation prior to the close of next week. Thank you.

Sincerely,

Stacey Crawshaw-Lewis
for Marc Barreca

EXHIBIT C

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 09-01258

Adv. Case No. 08-01743

Adv. Case No. 09-01242

Case No. 09-14884-jmp

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

NEUBERGER BERMAN, LLC,

Plaintiff,

-against-

PNC BANK, NATIONAL ASSOCIATION,

LEHMAN BROTHERS INC., AND LEHMAN

BROTHERS COMMERICAL CORPORATION,

Defendants.

- -x

1 -x
2 STATE STREET BANK AND TRUST COMPANY,
3 Plaintiff,
4 LEHMAN COMMERCIAL PAPER INC.,
5 -against-
6 Defendant.
7 -x
8 LEHMAN BROTHERS SPECIAL FINANCING INC.,
9 Plaintiff,
10 BNY CORPORATE TRUSTEE SERVICES, LTD.,
11 -against-
12 Defendant.
13 -x
14 In the Matter of:
15 LEHMAN RE LTD.,
16 Debtor.
17 -x
18 U.S. Bankruptcy Court
19 One Bowling Green
20 New York, New York
21 September 15, 2009
22 10:03 a.m.
23 B E F O R E:
24 HON. JAMES M. PECK
25 U.S. BANKRUPTCY JUDGE

1

2 RE: CASE NOS. 08-13555(JMP) and 08-01420(JMP)(SIPA)

3 HEARING re Interim Applications for Allowance of Compensation

4 for Professional Services Rendered and for Reimbursement of

5 Actual and Necessary Expenses [Docket No. 4839]

6

7 HEARING re Motion of Wells Fargo, NA for Relief from the

8 Automatic Stay [Docket No. 4640]

9

10 HEARING re Motion of Wells Fargo, NA for Relief from the

11 Automatic Stay [Docket No. 4671]

12

13 HEARING re Motion of Washington Mutual Bank f/k/a Washington

14 Mutual Bank, FA. For Relief from the Automatic Stay [Docket No.

15 4759]

16

17 HEARING re Motion of A/P Hotel, LLC for Relief from the

18 Automatic Stay [Docket No. 4950]

19

20 HEARING re Motion for Authorization to Assume an Interest Rate

21 Swap with MEG Energy Corp. [Docket No. 5012]

22

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2 HEARING re Debtors' Motion for Establishment of Procedures for
3 the Debtors to Transfer Their Interests in Respect of
4 Residential and Commercial Loans Subject to Foreclosure to
5 Wholly-Owned Non-Debtor Subsidiaries [Docket No. 4966]
6
7 HEARING re Debtors' Motion for Establishment of Procedures for
8 the Debtors to Compromise Claims of the Debtors in Respect of
9 Real Estate Loans [Docket No. 4942]
10
11 HEARING re Motion of Landwirtschaftliche Rentenbank for 2004
12 Examination [Docket No. 4800]
13
14 HEARING re Debtors' Motion for Authorization to Implement
15 Alternative Dispute Resolution Procedures for Affirmative
16 Claims of Debtors Under Derivative Contracts [Docket No. 4453]
17
18 HEARING re Debtors' Motion to Compel Performance of Metavante
19 Corporation's Obligations Under an Executory Contract and to
20 Enforce the Automatic Stay [Docket No. 3691]
21
22 HEARING re Motion of DnB Nor Bank ASA for Allowance and Payment
23 of Administrative Expense Claim and Allowing Setoff of Such
24 Claim [Docket No. 4054]
25

1

2 HEARING re Motion of William Kuntz, III for Review of Dismissal
3 of Appeal [Docket No. 1261]
4
5 RE: ADV. CASE NO. 09-01258:
6 PRE-TRIAL CONFERENCE
7
8 RE: ADV. CASE NO. 08-01743:
9 PRE-TRIAL CONFERENCE
10
11 RE: ADV. CASE NO. 09-01242:
12 Motion of BNY Corporate Trustee Services Limited to Stay
13 Further Proceedings Pending Disposition of its Motion for Leave
14 to Appeal the August 12, 2009 Order Denying BNY's Motion to
15 Dismiss and any Disposition of the Merits of that Appeal
16
17 RE: CASE NO. 09-14884-jmp
18 HEARING re Joint provisional liquidators' request that the
19 Court grant recognition of the company's Chapter 15 case as a
20 foreign main proceeding or, alternatively, as a foreign non-
21 main proceeding, and award the JPLs the requested associated
22 relief
23
24 Transcribed by: Clara Rubin
25 Pnina Eilberg

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1 that it has been presented and will make some judgments as to
2 the identity of the mediators in consultation with counsel for
3 the debtors and for the creditors' committee who have been so
4 active in developing these procedures.
5 I recognize that a lot of people who are in court at
6 this moment are here for the ADR procedures, and I'm going to
7 give people who want to leave an opportunity to leave. I'm
8 also going to give everybody an opportunity for a break. But
9 because of the congestion of this docket, I think I'm going to
10 go until 1 o'clock. So let's take a break for ten minutes, and
11 then resume, and then go until 1 o'clock and then break for
12 lunch. We're adjourned until then.
13 MR. GRUENBERGER: Thank you, Your Honor.
14 (Recess from 12:12 p.m. to 12:28 p.m.)
15 THE COURT: Be seated please. Number 11, Metavante.
16 MR. SLACK: Your Honor, Richard Slack from Weil,
17 Gotshal for the debtors. We're here on the debtors' motion to
18 compel performance of Metavante Corporation. As Your Honor
19 knows, two months ago we had argument, after fully briefing the
20 issue. Your Honor is in receipt of letters from both
21 Metavante's counsel and from the debtors, which I think
22 provides the status of where we are in terms of discussions,
23 which is, essentially, that the parties have not had
24 substantial discussions, as the letters which are docketed
25 state.

1 The debtors were requested to make a proposal to
2 resolve it, which we did. We have not received a proposal from
3 Metavante in the two months since the hearing, and Metavante
4 has not responded to our proposal that we've made.
5 Your Honor has mentioned Metavante a couple of times
6 today, and so Your Honor may have a plan for the conference,
7 but it is the debtors' position that this matter should be
8 considered and decided, at the Court's discretion, obviously.
9 THE COURT: Understood. I'm ready to rule today.
10 MR. ARNOLD: May it please the Court, mindful of that
11 comment, I want you to know why we wrote the letter, so that
12 you have in mind that parties do take into account the risks of
13 not settling, and you were quite clear at the hearing on July
14 14th that there was an opportunity for the parties to consider
15 resolving this matter.
16 For the Court's information, neither Lehman nor its
17 counsel have been obdurate, ornery, or in any fashion
18 unprofessional. Our dealings have been quite, to the contrary,
19 exceptional throughout the history of our relationships. I
20 reached out to counsel for the debtors to explain how it is
21 that an impending transaction which will close on October 1st
22 would, in my judgment, have a favorable impact on the
23 likelihood of this matter resolving consensually. That was the
24 singular purpose for us writing the letter to the Court. We
25 are not here today to reargue the motion. The Court heard

1 extensive oral argument. It has been well briefed. The issues
2 have come up again in, frankly, in other instances and motions
3 and adversary proceedings. I wanted the Court to know that it
4 was not by design, neglect or deliberately ignoring your
5 comments on July 14th that the settlement has not proceeded
6 further than it has. About a week ago we received a settlement
7 proposal. I am authorized to state by both Fidelity and
8 Metavante that post-closing of the merged entity we expect to,
9 and intend to, and will make a settlement proposal, but we're
10 also mindful that it hasn't been settled, and if it is the
11 Court's desire to rule on the matter today, we govern ourselves
12 accordingly. I just wanted the Court to know what I've done
13 since July 14th to try to move this matter on.
14 THE COURT: Okay. Thank you for that update.
15 MR. ARNOLD: Thank you, Your Honor.
16 THE COURT: The Metavante matter consumed the better
17 part of an afternoon's oral argument. My best recollection is
18 that we specially listed it on the afternoon before the July
19 omnibus hearing. Candidly, I don't recall why it was specially
20 listed all by itself, but it's just as well that it happened,
21 because it took a lot of time.
22 It's correct that I encouraged the parties to attempt
23 to resolve this consensually, and I appreciate the fact that
24 large enterprises, particularly those that are involved in
25 major transactions in which acquisitions are literally weeks

1 away from being consummated, may be distracted or may have
2 other priorities. But I also believe that when I suggested
3 that this be listed for the September 15th omnibus hearing it
4 was with the notion that, in effect, time would be up.
5 I'm also mindful of the fact that on today's calendar
6 a matter very similar to this, item 6, has been consensually
7 resolved, involving the payment of fifty percent more dollars
8 to the debtors than are at issue in this current dispute.
9 I am prepared to rule and will do so now. Recognize
10 that what I'm about to do will take some time and will probably
11 take us to the lunch hour. If there is anyone here who doesn't
12 want to hear the ruling in this case I'd like you to be free to
13 both leave, because I won't be offended, or, if at some point
14 during my rendition of this ruling you say to yourself this is
15 something I don't need to hear, you're also free to leave at
16 that point.
17 LBSF requests that the Court compel Metavante to
18 perform its obligations under that certain 1992 ISDA Master
19 Agreement dated as of November 20, 2007, defined as the "Master
20 Agreement". And that certain trade confirmation dated December
21 4, 2007, defined as the "Confirmation", and together with the
22 Master Agreement, the "Agreement".
23 The Master Agreement provides the basic terms of the
24 parties' contractual relationship and contemplates being
25 supplemented by trade confirmations that provide the economic

1 terms of the specific transactions agreed to by the parties.
2 Under the Master Agreement, Metavante and LBSF entered into an
3 interest rate swap transaction, the terms of which were
4 documented pursuant to the Confirmation.
5 LBHI is a credit support provider for LBSF's payment
6 obligations under the Agreement.
7 Due to declining interest rates the value of LBSF's
8 position under the Agreement has increased. As of May 2009,
9 under the payment terms of the Agreement, Metavante owed LBSF
10 in excess of 6 million dollars, representing quarterly payments
11 due November, 2008, February, 2009 and May, 2009, plus default
12 interest in excess of 300,000 dollars.
13 It is possible that due to current market conditions
14 and to the quarterly payment schedule prescribed by the
15 Agreement the amounts that Metavante owes to LBSF as of today
16 are even higher than those stated in the motion. Metavante has
17 refused to make any payments to LBSF. In fact, it has refused
18 to perform its obligations under the Agreement, as of November
19 3, 2008. Instead, Metavante claims that LBSF and LBHI, via the
20 filing of their respective Chapter 11 cases, each caused an
21 event of default under the Agreement.
22 Metavante argues that due to such events of default it
23 has the right, but not the obligation, under the safe harbor
24 provisions of the Bankruptcy Code, to terminate all outstanding
25 derivative transactions under the Agreement. Metavante also

1 maintains that it is not otherwise required to perform under
2 the Agreement.
3 The parties presented their arguments to the Court at
4 a hearing held on July 14, 2009. Notably at the hearing
5 counsel to Metavante stated that, quote, "the opportunity to
6 settle the matter", is a possibility. The reference in the
7 transcript is page 58, lines 18 to 19. The Court took the
8 matter under advisement and suggested that it be calendared for
9 the September 15, 2009 omnibus hearing for purposes of either a
10 bench ruling or a status conference on any progress the parties
11 may have made towards a resolution.
12 I want to make clear that I am proceeding with this
13 ruling because I view the letter described by counsel for
14 Metavante, which talked about a possible settlement
15 counterproposal occurring sometime after the closing of a
16 merger on October 1, as being an insufficient commitment to a
17 timely settlement.
18 On September 14, 2009 the Court received letters from
19 counsel to each of the parties. Counsel to Metavante requests
20 an adjournment to October 14. Counsel states that an
21 adjournment will facilitate the parties' settlement
22 negotiations but explains that Metavante may not make a
23 counterproposal to LBSF's September 5, 2009 settlement proposal
24 until after the proposed October 1, 2009 closing of a merger.
25 Counsel also suggests that an adjournment will allow the Court

1 to put the motion on the same track as two other motions
2 currently pending before the Court. Which motions, counsel
3 claims, raise similar issues to the motion? Counsel to LBSF
4 and LBHI maintain that inasmuch as Metavante has done nothing
5 since July 14, 2009 to settle this matter other than asking
6 LBSF and LBHI to make a settlement proposal, the parties are no
7 closer to settlement than they were at the hearing, and,
8 therefore, the status conference should go forward as planned.
9 While each of the matters reference by counsel to
10 Metavante may have overlapping issues with those presented in
11 the current dispute, each matter involves its own distinct set
12 of fats. Moreover, each of the two referenced matters is in
13 its infancy. No response has been filed in either one, which
14 may further delay resolution here.
15 This is a dispute that has been fully briefed and
16 argued and is ripe for determination. Moreover, I note that
17 the settlement that was achieved with MEG Energy that was
18 referenced this morning indicates that parties who are willing
19 to settle can, and do.
20 Under the Agreement LBSF is obligated to pay the
21 floating three month USD LIBOR BBA interest rate on a notional
22 amount of 600 million dollars, which notional amount declines
23 over time, beginning in May, 2010. Metavante, in turn, is
24 obligated to pay a fixed interest rate, 3.865 percent, on the
25 notional amount. The Agreement is set to expire on February 1,

1 2012. The Agreement defines event of default to include the
2 bankruptcy of any party or credit support provider. Under the
3 terms of the Agreement, upon an event of default the non-
4 defaulting party may designate an early termination date. Upon
5 termination a final payment is calculated and paid in order to
6 put the parties into the same economic position as if the
7 termination had not occurred.
8 In the instant case Metavante has refused to perform
9 under the Agreement on account of the event of default that has
10 occurred, and is continuing, on account of the bankruptcies of
11 LBSF and LBHI. Metavante has not, however, attempted to
12 terminate the Agreement. Instead, Metavante entered into a
13 replacement hedge covering the period from November 3, 2008
14 through February 1, 2010.
15 LBSF and LBHI argue that the Agreement is an executory
16 contract because material performance, specifically payment
17 obligations, remain due by both LBSF and Metavante. Under
18 Bankruptcy Code Section 365(a) a debtor in possession may,
19 "subject to the court's approval, assume or reject any
20 executory contract". The case law makes clear, however, that
21 while a debtor determines whether to assume or reject an
22 executory contract the counterparty to such contract must
23 continue to perform.
24 LBSF and LBHI further argue that the safe harbor
25 provisions do not excuse Metavante's failure to perform.

1 Indeed, the safe harbor provisions permit qualifying non-debtor
2 counterparties to derivative contracts to exercise certain
3 limited contractual rights triggered by, among other things, a
4 Chapter 11 filing. They're available, however, only to the
5 extent that a counterparty seeks to one, liquidate, terminate
6 or accelerate its contracts or two, net out its positions. All
7 other uses of ipso facto provisions remain unenforceable under
8 the Bankruptcy Code.
9 Notably, Metavante does not dispute that it has failed
10 to perform under the Agreement. Instead, Metavante argues that
11 the occurrence of an event of default under the Agreement gives
12 rise to its right, as the non-defaulting party, to terminate
13 under the safe harbor provisions. According to Metavante the
14 occurrence of an event of default does not, however, create the
15 obligation for it to terminate under the safe harbor
16 provisions. Metavante emphasizes the term, quote, "condition
17 precedent" set forth in Sections 2(a), 1 and 3 of the
18 Agreement, which subject payment obligations to the condition
19 precedent that no event of default with respect to the party
20 has occurred and is continuing.
21 Metavante argues that under New York State contract
22 law a failure of a condition precedent excuses a party's
23 obligation to perform. Metavante states that its unequivocal
24 right to suspend payments until the termination of the
25 Agreement is fundamental to the manner in which swap parties

1 government themselves. Metavante takes issue with LBSF and
2 LBHI in asking the Court to treat the Agreement like a garden
3 variety executory contract, arguing that it cannot be compelled
4 to pay because LBSF and LBHI cannot provide the essential item
5 of value Metavante bargained for, namely an effective
6 counterparty.
7 Metavante further argues on information and belief
8 that LBSF and LBHI also are in default under certain
9 unspecified indebtedness that allegedly may have created a
10 cross default under the Agreement, asserting, as a result, an
11 alleged need to engage in the discovery process.
12 It is clear that the filing of bankruptcy petitions by
13 LBHI and LBSF constitute events of default under the Agreement.
14 Specifically, Section 5(a)(vii) of the Agreement provides that
15 it shall constitute an event of default should a party to the
16 Agreement or any credit support provider of such party
17 institute a proceeding seeking a judgment of insolvency or
18 bankruptcy, or any other relief under any bankruptcy insolvency
19 law or similar law affecting creditors' rights.
20 Section 2(a)(i) and 3 of the Agreement, in turn,
21 subject payment obligations to the condition precedent that no
22 event of default with respect to the other party has occurred
23 and is continuing. It is also clear, however, that the safe
24 harbor provisions, primarily Bankruptcy Code Sections 560 and
25 561, protect a non-defaulting swap counterparty's contractual

1 rights solely to liquidate, terminate or accelerate one or more
2 swap agreements because of a condition of the kind specified in
3 Section 365(e)(1), or to "offset or net out any termination
4 values or payment amounts arising under or in connection with
5 the termination, liquidation or acceleration of one or more
6 swap agreements". That language comes from Section 560.
7 In the instant matter Metavante has attempted neither
8 to liquidate, terminate or accelerate the Agreement, nor to
9 offset or net out its position as a result of the events of
10 default caused by the filing of bankruptcy petitions by LBHI
11 and LBSF. Metavante simply is withholding performance, relying
12 on the conditions precedent language in Sections 2(a)(i) and
13 (iii) under the Agreement.
14 The question presented in this matter and the issue
15 that was argued by the parties at the hearing is whether
16 Metavante's withholding of performance is permitted, either
17 under the safe harbor provisions or under terms of the
18 Agreement itself. It is not.
19 Although complicated at its core the Agreement is, in
20 fact, a garden variety executory contract, one for which there
21 remains something still to be done on both sides. Each party
22 to the Agreement still is obligated to make quarterly payments
23 based on a floating or fixed interest rate of a notional
24 amount, it being understood that the net obligor actually makes
25 a payment after the parties respective positions are calculated

1 on a quarterly basis, in February, May, August and November of
2 each calendar year.
3 Under relevant case law it is clear that while an un-
4 assumed executory contract is not enforceable against a debtor,
5 see NLRB v. Bildisco & Bildisco, 465 US 513 at 531, such a
6 contract is enforceable by a debtor against the counterparty.
7 See McLean Industries, Inc. v. Medical Laboratory Automation,
8 Inc., 96 B.R. 440 at 449 (Bankr. S.D.N.Y. 1989). Metavante
9 relies on In re Lucre, Inc., 339 BR 648 (WD Mich.) for the
10 proposition that a debtor's uncured pre-petition breach of its
11 executory contract, here the event of default caused by the
12 bankruptcy filings of LBHI and LBSF, will, in and of itself,
13 justify continued nonperformance by the non-debtor
14 counterparty, and mere commencement of bankruptcy proceedings
15 and the imposition of the automatic stay does not empower the
16 debtor to compel performance from a non-debtor party.
17 The Court rejects the Lucre decision as nonbinding and
18 non-persuasive. While Metavante's argument for the events of
19 default caused by the bankruptcy filings of LBHI and LBSF do
20 create an obligation for it to terminate the Agreement under
21 the safe harbor provisions, that's a tenable argument. Its
22 conduct of riding the market for the period of one year, while
23 taking no action whatsoever, is simply unacceptable and
24 contrary to the spirit of these provisions of the Bankruptcy
25 Code.

1 First, inasmuch as the Bankruptcy Code trumps any
2 state law excuse of nonperformance, Metavante's reliance on New
3 York contract law is misplaced. Moreover, legislative history
4 evidences Congress's intent to allow for the prompt closing out
5 or liquidation of open accounts upon the commencement of a
6 bankruptcy case. Citation is to the Congressional history of
7 this, H.R. Rep. 97-420 at 1 (1982), as well as its stated
8 rationale that the immediate termination for default and the
9 netting provisions are critical aspects of swap transactions
10 and are necessary for the protection of all parties in light of
11 the potential for rapid changes in the financial markets.
12 Citation to the Senate Report number 101-285 at 1 (1990).
13 The safe harbor provisions specifically permit
14 termination solely, quote, "because of a condition of the kind
15 specified in Section 365(e)(1) that is the insolvency or
16 financial condition of the debtor and the commencement of a
17 bankruptcy case. See also In re Enron Corp., 2005. WL 3874285,
18 at *4, Judge Gonzalez's case, 2005. Noting that a
19 counterparty's action under the safe harbor provisions must be
20 made fairly contemporaneously with the bankruptcy filing, less
21 the contract be rendered just another ordinary executory
22 contract.
23 The Court finds that Metavante's window to act
24 promptly under the safe harbor provisions has passed, and while
25 it may not have had the obligation to terminate immediately

1 upon the filing of LBHI or LBSF, its failure to do so, at this
2 juncture, constitutes a waiver of that right at this point.
3 Metavante's references to defaults under certain
4 unspecified indebtedness that allegedly may have created a
5 cross default under the Agreement are of no moment. First,
6 Metavante failed to set forth the basis, either in its papers
7 or at the hearing, for its information and belief that such a
8 default may have occurred. Its assertion that such a default
9 may have occurred indicates that Metavante is not aware of any
10 such default, and, therefore, did not rely on that default in
11 its refusal to perform under the Agreement or lacks knowledge
12 of what that default may be.
13 Additionally, the argument that LBSF or LBHI may have
14 defaulted under other specified indebtedness, as that term is
15 defined in the Agreement, relies upon the financial condition
16 of bankruptcy debtors to withhold performance. That is also
17 unenforceable as an ipso facto clause that may not be enforced
18 under the Bankruptcy Code Section 365(e)(1)(A).
19 LBSF and LBHI are entitled to continued receipt of
20 payments under the Agreement. Metavante's attempts to control
21 LBSF's right to receive payment under the Agreement constitute,
22 in effect, an attempt to control property of the estate. See
23 In re Enron Corp., 300 B.R. 201 at 212 (S.D.N.Y. 2003),
24 recognizing that contract rights are property of the estate and
25 that therefore those rights are protected by the automated

1 stay.

2 This is a violation of the automatic stay imposed by
3 Code Section 362. Accordingly, for the reasons set forth in
4 LBSF's and LBHI's papers, for the reasons stated on the record
5 at the hearing and for the reasons stated on the record today,
6 pursuant to Bankruptcy Code Sections 105(a), 362 and 365,
7 Metavante is directed to perform under the Agreement until such
8 time as LBSF and LBHI determine whether to assume or reject.
9 That's the ruling of the Court.

10 MR. KRASNOW: Good afternoon, Your Honor. Richard
11 Krasnow, Weil, Gotshal & Manges, for the Chapter 11 debtors.
12 We are close to the end of this morning's agenda, but not quite
13 there as yet. The next item, Your Honor, is number 12. It is
14 the motion of DnB Nor Bank described in the agenda. Your
15 Honor, that matter has been fully submitted to the Court, fully
16 briefed, arguments held on November 5th, and today is the
17 scheduled status conference.

18 THE COURT: Okay. I'm ready to rule on that, but
19 given the hour I'm not going to take the time to do that now.
20 But we'll issue a short memorandum in due course. So as to not
21 create any undue suspense for those parties who are here in
22 connection with the DnB Nor matter, I am deciding that in favor
23 of the debtors and against DnB Nor, denying DnB Nor's motion
24 for allowance of an administrative expense claim, substantially
25 for the reasons set forth in the committee's papers.