

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	
	§	Chapter 11
	§	
BRAZOS ELECTRIC POWER COOPERATIVE, INC.,	§	Case No. 21-30725 (DRJ)
	§	
Debtor. ¹	§	
	§	

**BRIEF OF AMICI CURIAE
THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. AND
THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
WITH RESPECT TO DEBTOR'S AMENDED OBJECTIONS TO
CLAIMS OF SWAP COUNTERPARTIES**

(RELATES TO AMENDED OBJECTION DKT NOS. 2160, 2162, 2165, and 2167)

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October 11, 2022

¹ The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is: Brazos Electric Power Cooperative, Inc. (4729). Additional information regarding this case may be obtained on the website of the Debtor's claims and noticing agent at <http://cases.stretto.com/Brazos>. The Debtor's address is 7616 Bagby Avenue, Waco, TX 76712.

PRELIMINARY STATEMENT

1. The International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”), as amici curiae, submit this brief with respect to the amended objections (the “Amended Objections”) filed by debtor Brazos Electric Power Cooperative, Inc. (“Brazos” or the “Debtor”) to the proofs of claim (the “Proofs of Claim”) submitted by four dealers to terminated swaps with the Debtor: J. Aron & Company LLC; Morgan Stanley Capital Group Inc. (and Nut Tree Master Fund); MUFG Bank, Ltd. (f/k/a the Bank of Tokyo-Mitsubishi UFG, Ltd, New York Branch); and Wells Fargo Bank, N.A. (collectively, the “Dealers”).²

2. As discussed more fully below, ISDA is the leading trade association in the nation for parties transacting in the global, multi-trillion-dollar market for interest rate swaps and other derivatives. Indeed, ISDA created the “1992 ISDA Master Agreement” (along with a later iteration, the “2002 ISDA Master Agreement”) that provides the contractual foundation for substantially all uncleared interest rate swaps (including the four at issue in the Amended Objections), and many cleared interest rate swaps, as well as for many other types of derivatives products, including equity, credit, FX, commodity and energy derivatives. SIFMA, in turn, is the leading trade association in the nation for the securities industry in general. In those relatively rare cases that present issues that could affect not merely the parties to the particular dispute, but also the safe and efficient operations of the markets as a whole, ISDA or SIFMA will at times appear and submit an amicus brief so that the court can consider the dispute in its larger context. It is even more unusual for both ISDA and SIFMA to file a joint amicus brief. But the novel

² The Proofs of Claim are Stretto Claim Nos. 32, 199, 219 and 225. The Amended Objections are Dkt. Nos. 2160, 2162, 2165, and 2167. The Dealers’ Responses to those Objections can be found at Dkt. Nos. 2328, 2332, 2330, and 2322.

arguments advanced in this case by Brazos in objection to the Proofs of Claim raise issues of grave concern to both ISDA and SIFMA.

3. The Amended Objections are premised on a reading of the 1992 ISDA Master Agreement that is contrary to its plain wording and the intent of its drafter, ISDA. Worse still, that reading is inconsistent with the practice developed over decades in the swaps and derivatives industry. If accepted, Brazos' arguments could do irreparable harm to the critically important market for interest rate swaps (as well as to every other market for derivatives products) and introduce significant uncertainty for market participants. ISDA and SIFMA therefore are submitting this short brief in the hope that it will be helpful to the Court and reduce the risk that the Amended Objections, if sustained, could result in substantial mischief.

4. The brief is divided into three parts. Section I provides background on ISDA and SIFMA, on the swaps and derivatives industry, and on the 1992 ISDA Master Agreement. Section II addresses the Amended Objections and explains why the arguments offered there by Brazos fly in the face of both the text of the 1992 ISDA Master Agreement and basic principles of commercial law and practice. Finally, Section III describes the harm to the swaps market, and to the long-settled expectations of entities across the globe that hedge their interest rate risks every day by entering into swaps, that a ruling sustaining the Amended Objections could cause.

I. ISDA And SIFMA Have Played Leading Roles In Promoting A Well-Functioning, Multi-Trillion-Dollar Market For Interest Rate (And Other) Swaps, Including Through ISDA's Developments Of A Standard Agreement For Swaps.

A. Background on ISDA and SIFMA

5. ISDA and SIFMA are leading trade associations in the financial industry. ISDA is the global trade association representing participants in the derivatives industry. SIFMA

advocates for rules that permit America's capital markets to operate effectively and efficiently, to the benefit of all.

6. ISDA was chartered in 1985 and comprises more than 1,000 member institutions from 76 countries on six continents. Members include most of the world's major institutions dealing in and supporting the execution of privately negotiated derivatives, including exchanges, clearinghouses, and repositories, as well as many of the businesses, governmental entities and other end-users that rely on over-the-counter (OTC) derivatives to manage the market risks inherent in their economic activities. Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives market and risk management business.

7. Among ISDA's notable accomplishments is the standardization of derivatives documentation through ISDA's promulgation of the 1992 ISDA Master Agreement and its later iteration, the 2002 ISDA Master Agreement, and ISDA's creation of market-specific definitional booklets that supplement the Master Agreements. Drafted for ISDA by its counsel as directed by its members, the 1992 ISDA Master Agreement (like the 2002 ISDA Master Agreement) provides a comprehensive agreement structure governing over-the-counter derivatives transactions from their inception through termination. It offers uniform terms with respect to, among other things, the mechanics of termination, including the calculation of a termination payment. The Master Agreement's common set of terms has reduced credit and legal risk, enabling companies around the world to enter into interest rate swaps and other derivatives efficiently and with certainty regarding their rights and obligations.

8. Today, the 1992 ISDA Master Agreement (or the 2002 ISDA Master Agreement) forms the contractual foundation for more than 90% of uncleared derivatives transactions and many cleared derivatives transactions across the globe. Reflecting its success, the 1992 ISDA

Master Agreement remains in wide use, as the four interest rate swap transactions at issue here evidence, notwithstanding ISDA's development in 2002 of another iteration of the Master Agreement.

9. SIFMA, in turn, is the leading trade association for broker-dealers, investment banks and asset managers operating in the United States and global capital markets. On behalf of the industry's more than 650 securities firms, banks, and asset management companies employing more than one million employees, SIFMA advocates on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed-income markets and related products and services. In addition to the membership of individual securities firms and broker-dealers, SIFMA has several U.S.- and international-affiliated organizations, including the American Securitization Forum and the European Securitization Forum. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. Its mission is to promote policies and practices that work to expand and improve the efficiency of markets, and to foster the development of new products and services to create those efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry.

10. SIFMA's origins go back to 1912 with the founding of the Investment Bankers Association of America. Today, after the merger of multiple organizations, SIFMA represents the broker-dealers, investment banks and asset managers that provide access to the capital markets around the world. While the exact number is always changing, it is estimated that SIFMA serves clients that manage more than \$67 trillion in assets for individual and institutional clients, including mutual funds and retirement plans.

B. Interest Rate Swaps and the Market for Interest Rate Swaps and Other Hedging Transactions

11. Interest rate swaps play a critical role in today's global economy. They help market participants in all lines of business manage interest rate risk. For example, a company that has significant floating rate obligations and that is concerned that interest rates may increase can enter into a swap in which it agrees to exchange a cash flow payable over time and calculated based a fixed rate, reflecting current market conditions, for a cash flow payable over the same period but calculated based on a floating rate. Rather than swapping cash flows directly with another company, a corporation or other market participant will typically enter into a swap agreement with a dealer, which usually will act as the counterparty for its own account. *See* ISDA, *Economic Sanctions Programs & Derivatives* §§ 3.4, 4.1 (2019), <https://www.isda.org/a/wxyTE/ISDA-Whitepaper-Economic-Sanctions-Programs-Derivatives.pdf> ("ISDA White Paper").

12. In addition to interest rate swaps, other types of swaps and derivatives are in wide use in the financial markets. Like interest rate swaps, these derivatives help companies manage market risks based on, among other things, foreign exchange rates and commodity prices. *See* ISDA White Paper § 3.2.

13. Interest rate swaps and these other forms of derivatives serve many economically beneficial purposes. They allow companies to fix their cost of borrowing, alter their risk exposure, and hedge risks associated with cross-border trade or commodity prices. *See Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 322 F.3d 1039, 1043 (9th Cir. 2003); H.R. Rep. No. 101-484, at 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 225; ISDA White Paper § 3.1.

14. The derivatives market is enormous. Swaps and other derivatives transactions worth billions of dollars are traded, in some cases cleared, and settled every day. The market value of all derivatives is currently estimated to be about \$13 trillion—more than half the GDP of the United States. Bank of International Settlements, Statistical Release: OTC Derivative Statistics at End-June 2021, at 1 (2021), https://www.bis.org/publ/otc_hy2111.pdf. Nearly all of the world’s largest corporations use derivatives. *See, e.g.*, Press Release, ISDA, Over 94% of the World’s Largest Companies Use Derivatives to Help Manage Their Risks, According to ISDA Survey (Apr. 23, 2009), <https://www.isda.org/a/LeiDE/press042309der.pdf>. And many major financial institutions are swap dealers, meaning they are counterparties in a large number of swap and other derivatives transactions. *See* 7 U.S.C. § 1a(49)(A). The vast majority of non-cleared derivatives are governed by either the 1992 or 2002 ISDA Master Agreement. *See* ISDA White Paper § 3.5.

15. Because of the volume of derivatives agreements and transactions, and the interconnectedness of the major financial institutions involved in those agreements, disrupting the operation of the derivatives market could have far-reaching and devastating effects. ISDA White Paper § 3.2. Like other financial markets, the derivatives market depends on “certainty and predictability” with regard to the finality of the transactions. *See Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 336 (2d Cir. 2011).

16. It was for this very reason that ISDA promulgated the 1992 ISDA Master Agreement (and later the 2002 ISDA Master Agreement). The availability of standard, well-settled contractual terms for derivatives promotes certainty and confidence for contracting parties. In contrast, uncertainty regarding the rights and obligations of the parties to a derivatives agreement can destabilize the market, deter participation, and reduce market liquidity. That, in

turn, can undermine the ability of companies to engage in derivatives agreements in a cost-effective and confident manner.

17. Congress, as well, has recognized the importance of certainty in the derivatives market and the markets for other securities transactions, including in the context of bankruptcy proceedings. In 1990,³ Congress amended the Bankruptcy Code to add Sections 546(g) and 560 and the other safe harbor protections that allow a party to a swap to declare a default and terminate the swap if the counterparty files for bankruptcy and that protect against the risk of a claim to avoid payments made pre-petition by the debtor in connection with a swap. 11 U.S.C. §§ 546(g), 560. Congress intended these amendments “to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code.” H.R. Rep. No. 101-484, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 223.

18. It is against this backdrop that Brazos’ Amended Objections to the Dealers’ Proofs of Claims raise such alarm for ISDA and SIFMA.

II. The Amended Objections Are Contrary To The Plain Terms Of The 1992 ISDA Master Agreement, As Well As To Basic Principles Of Hedging And Other Commercial Transactions.

A. The Debtor’s Argument Flies in the Face of the Terms of the 1992 ISDA Master Agreement.

19. In light of the central role of the 1992 ISDA Master Agreement not only to the interest-rate swaps that give rise to the Proofs of Claim, but to the entire industry, Brazos’ Amended Objections are extraordinary. The Proofs of Claim arise out of four standard interest-rate swaps entered into pre-petition between Brazos and the Dealers. Each of those swaps is expressly governed by the 1992 ISDA Master Agreement. Under each, Brazos agreed to pay a

³ Bankruptcy: Swap Agreements and Forward Contracts, Pub. L. No. 101-311, 104 Stat. 267 (1990).

fixed rate of interest to the Dealer, and the Dealer agreed to pay a floating rate of interest to Brazos, with actual payments determined by applying those rates to an agreed notional amount. Interest rates declined between the date the parties entered into each of the four swaps and the date Brazos filed for bankruptcy (the “Petition Date”).

20. As is common with swaps, Brazos’ bankruptcy filing was an event of default—one that Congress has determined should be enforceable, notwithstanding the general rule against enforcement of so-called *ipso facto* clauses in bankruptcy, because of the importance of interest-rate swaps to the nation’s economy. 11 U.S.C. § 560. Exercising their rights under the swap agreements and the Bankruptcy Code, each of the Dealers declared an event of default and designated the Petition Date or a date shortly thereafter as the “Early Termination Date” under the parties’ swap agreement. Under each of the swap agreements, the future payment obligations under the swap were terminated, and replaced with an obligation on the part of Brazos to pay the Dealer a cash sum based on the value of the terminated transactions, a process known as close-out netting. The reason Brazos owed the termination payment to each of Dealers, rather than the reverse, is because, as noted, interest rates had declined.

21. Accordingly, each Dealer has a claim against Brazos in this chapter 11 case. The swap agreements specify how those claims are to be calculated. Each agreement requires the non-defaulting party (each Dealer here) to seek a quotation from four “Reference Market-makers” to step into the shoes of Brazos on the swap. If the non-defaulting party receives either three or four quotations, it is supposed to drop the highest and lowest quotation, and adopt or average the middle bid(s). If the non-defaulting party receives only two or fewer quotations, each agreement affords that party the discretion to calculate “its total losses and costs,” including by using any bids it has managed to obtain so long as doing so is reasonable and in good faith.

22. The Dealers followed these terms scrupulously. Three of them obtained at least three quotes and calculated their claims by using the middle bid(s). The fourth (J. Aron) was able to obtain only two quotes and, invoking the “loss provision,” averaged those two to calculate its claim.

23. Brazos does not dispute any of this. But it argues that the quotations the Dealers obtained were defective because Brazos’ obligations under its swaps did not at all times need to be fully collateralized, whereas the quotations the Dealers obtained were for “a hypothetical, *fully-collateralized* transaction.” *See, e.g.*, Dkt. No. 2162 (Amended Objection to Morgan Stanley Proof of Claim) ¶ 31; Dkt. No. 2165 (Amended Objection to MUFG Proof of Claim) ¶ 28; Dkt. No. 2167 (Amended Objection to Wells Fargo Proof of Claim) ¶ 27.

24. That argument flies in the face of the plain terms of the 1992 ISDA Master Agreement. It defines a “Market Quotation” to be one in which the “Reference Market-maker” takes account of any collateral that the non-defaulting party seeking the quotation (in this case, the Dealer)—the one “making the determination”—would be required to post to secure its “obligations,” not any collateral that the defaulting counterparty (in this case, Brazos) had posted or would have been required to post:

“Market Quotation” means, *with respect to one or more Terminated Transactions and a party making the determination*, an amount determined on the basis of quotations from Reference Market-makers. *Each quotation will be for an amount, if any, that would be paid to such party* (expressed as a negative number) *or by such party* (expressed as a positive number) *in consideration of an agreement between such party (taking into account any existing Credit Support Document with respect to the obligations of such party) and the quoting Reference Market-maker* to enter into a transaction (the “Replacement Transaction”) that would have the effect of preserving for such party the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) by the parties under Section 2(a)(i) in respect of such Terminated Transaction or group of Terminated Transactions

that would, but for the occurrence of the relevant Early Termination Date, have been required after that date.

1992 ISDA Master Agreement § 14, definition of “Market Quotation” (emphasis added).⁴

25. The key term— “such party”—plainly refers back to the “party making the determination”—in other words, the non-defaulting party, which in this case is each of the Dealers. Simply put, under the express terms of the agreement, the quotation provided by the Reference Market-marker must take account of any “Credit Support Document,” including any collateral, provided by “*such party*”—the non-defaulting party—“with respect to the obligations of such party” under the new, replacement swap; in contrast, the quotation need not take account of any Credit Support Document entered into by Brazos—the defaulting party—with respect to its obligations under the terminated swap.

26. These plain contractual terms are dispositive. With limited exceptions, none of which the Debtor argues applies, the Bankruptcy Code looks to state law to determine the allowance of creditor claims in bankruptcy. 11 U.S.C. § 502(b). “[T]he ‘basic federal rule’ in bankruptcy is that state law governs the substance of claims.” *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007) (citation and quotation omitted). If anything, this rule has even greater force when it comes to claims under swaps, a subject matter on which Congress has made clear that federal bankruptcy law should not restrict the parties’ state-law contract rights. 11 U.S.C. § 560.

27. Here, the Dealers and Brazos elected for the law of New York to control their swap agreements. Under that law, “[t]o determine the terms of a contract[,] a court must ascertain the parties’ intent based on the language they used.” *AIG Eur. (Netherlands), N.V. v. UPS Supply Chain Sols., Inc.*, 765 F. Supp. 2d 472, 479 (S.D.N.Y. 2011) (citing *Consarc Corp. v.*

⁴ A copy of the 1992 ISDA Master Agreement is attached hereto as Exhibit A.

Marine Midland Bank, N.A., 996 F.2d 568, 573 (2d Cir. 1993)). As a threshold matter, the court looks at “whether the contract is ambiguous.” *Sunbelt Rentals, Inc. v. Charter Oak Fire Ins. Co.*, 839 F. Supp. 2d 680, 687 (S.D.N.Y. 2012) (citing *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011)). “When a contract is unambiguous, it must be enforced according to the plain meaning of its terms.” *Sunbelt Rentals*, 839 F. Supp. 2d at 687 (internal quotation marks omitted).

28. That is the case here. The 1992 ISDA Master Agreement is clear that a “Market Quotation” provided by a Reference Market-maker needs to take account of the terms of any “Credit Support Document” that the non-defaulting party—the Dealer—has entered into or would need to enter into to secure the “obligations” of “such party” under the new, replacement swap, not the terms of any Credit Support Document that the defaulting party—Brazos—entered into to secure its obligations under its terminated swap.

B. The Amended Objections Make No Commercial Sense.

29. While the plain language of the 1992 ISDA Master Agreement is dispositive, that language also makes perfect sense. In contrast, Brazos’ contrary argument defies all logic.

30. *First*, the whole point of the Market Quotation is to determine how much a Reference Market-maker would pay, or would require the non-defaulting party to pay, to enter into a swap that would replace the Dealer’s terminated swap with Brazos and that would provide the non-defaulting party “the economic equivalent” of full “payment or delivery” by the defaulting party of the future cash flows that were required under the terminated swap. If the Reference Market-maker so replaced Brazos, it and the Dealer would be the two parties to the new swap, typically pursuant to an ISDA Master Agreement between them. In connection with such an agreement with the Dealer, the Reference Market-maker would logically care about

whether its agreement with the Dealer included a Credit Support Document and, if so, its terms—i.e., it would care how much collateral its counterparty, the Dealer, would be required to post during the term of the replacement swap. After all, interest rates could move and, if the replacement swap were ultimately terminated, the Reference Market-maker could be entitled to payment from the Dealer, which it would want to collect. But any Credit Support Document to which Brazos had been party in relation to its now terminated swap would be wholly irrelevant to the Reference Market-maker because Brazos would not be a party to the new, replacement swap between the Reference Market-maker and the Dealer.

31. *Second*, Brazos is arguing that each Dealer's claim, and Brazos' legal liability, should be reduced because Brazos had not provided full collateral at all times for its obligations under its terminated swap. That is not how an interest-rate swap works. Indeed, it is not how any commercial transaction works. Take, by way of example, a loan. A lender with \$10 million to loan can make a fully secured loan to an investment grade borrower, or it can loan the same amount on an entirely unsecured basis to a borrower that is below investment grade. In the latter case, the lender may be assuming greater collection risk, but it is owed the same amount—\$10 million. Similarly, from the standpoint of the borrower, it owes the same \$10 million whether it is investment grade and provided collateral, or it is below investment grade and provided no collateral. Indeed, if anything, a lender that makes a loan with less credit support and more collection risk will ultimately be entitled to be paid more, and the borrower that is below investment grade and providing no such credit support will be required to pay more, because the loan will carry a correspondingly higher interest rate payable by the borrower to compensate the lender for the greater collection risk.

32. Yet, Brazos’s argument is premised on the proposition that Brazos’ legal liability, and the Dealers’ claim, should be reduced, not increased, because Brazos provided less than complete credit support. That makes no sense. It would expose each of them to a double loss—its unsecured claim would be reduced, and it would likely collect less than the full amount of that reduced claim because Brazos is in bankruptcy and may well not be able to pay its general unsecured creditors in full.

33. Such an outcome would also be contrary to the plain terms of the 1992 ISDA Master Agreement. The definition of “Market Quotation” specifies that the quote to be provided by each Reference Market-maker is supposed to “have the effect of preserving for such party [the Dealer] the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent . . .) . . . that would, but for the occurrence of the relevant Early Termination Date, have been required after that date.” 1992 ISDA Master Agreement, definition of “Market Quotation.” The quotation thus must reflect the price for a swap in which the Dealer would receive the entire “payment or delivery” that Brazos was “required” to pay—that is, Brazos’s legal liability—not some reduced amount based on the extent of the collateral that Brazos happened to have posted at some point in time. In short, the quote is supposed to give the Dealer the same economics it would have received had Brazos never defaulted and paid everything it owed, without any reduction for any collection risk the Dealer might have faced.

34. *Third*, the Reference Market-makers are required under federal law to fully collateralize their swap obligations. In particular, swap dealers are required to collect and post margin with each other under Dodd-Frank rules implemented by the Commodity Futures Trading Commission. *See* 17 C.F.R. § 23.153. Yet, if Brazos were correct, each Dealer would have had

to request each Reference Market-maker to provide a bid for a swap that would not have been fully collateralized and that, accordingly, it would not have been legally permitted to execute.

III. The Debtors' Counter-Textual And Illogical Reading Of The 1992 ISDA Master Agreement Would Create Enormous Uncertainty And Unrest In The Swap Industry.

35. If the Amended Objections to the Proofs of Claim raised issues only of concern to the parties to these particular swap agreements (the Debtor and the Dealers), ISDA and SIFMA would not bother to submit this brief. But, unfortunately, that is not the case. The arguments made by Brazos to disallow (or at least reduce) the Proofs of Claim, if accepted, could undermine the stability of the market for interest rate swaps and indeed for all derivatives transactions governed by the 1992 ISDA Master Agreement. That is so for several reasons.

36. *First*, as discussed, this multi-trillion-dollar market, with billions of dollars in swaps and other derivative transactions executed daily, depends on the parties' confidence that the contractual terms are clear and understood by all. Companies in all lines of business (including electric generation and oil and gas exploration) regularly enter into such transactions to hedge their risks or for other business reasons. To do so effectively and efficiently, they need to be able to contract with certainty regarding their rights and obligations. The position advanced by Brazos in its Amended Objections would upset the market's settled expectations.

37. *Second*, as noted, the Debtor's argument would mean that a party entering into a swap would have to consider the possibility that if its counterparty became insolvent, it might face a double loss—both a reduction in that counterparty's legal liability and the risk that it would be unable to collect, in full, on even that reduced claim. That could affect the pricing and requirements for credit support, artificially skewing what are today established market practices.

38. *Third*, as also discussed, the Debtor's argument would mean that the non-defaulting party would need to seek a quote from a Reference Market-maker for a transaction (a swap that is not fully collateralized) that most Reference Market-makers cannot lawfully enter into under federal law. It is highly unlikely that a Reference Market-maker would provide such a quotation. Banks and other highly regulated financial institutions are not in the business of providing quotes for transactions they cannot lawfully perform.

39. Thus, Brazos' position could render one of the principal close-out mechanisms under the 1992 ISDA Master Agreement (as well as under the 2002 ISDA Master Agreement) inoperable. And, in the unlikely event that a Reference Market-maker were willing to provide a quote for a transaction it could not lawfully execute, the quote would not reflect the cost or gain to the non-defaulting party of entering into a replacement transaction that would have the effect of preserving for the non-defaulting party the economic equivalent of the legal obligations of the defaulting party to make payment or delivery under the terminated swap, as the quote is supposed to achieve.

40. In short, Brazos' argument, if accepted, would not only render ineffective the plain language of the 1992 ISDA Master Agreement. It would also threaten the stability and certainty of critical financial markets that depend, for their very existence, on such stability and certainty.

CONCLUSION

41. For the reasons set forth here, Brazos' Amended Objections should be denied and the Dealers' Proofs of Claim should be allowed.

Dated: October 11, 2022

Respectfully submitted,

/s/ Philip D. Anker

Philip D. Anker (*pro hac vice* admission pending)

Jeannette K. Boot (*pro hac vice* admission pending)

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of October, 2022, a true and correct copy of the foregoing *Brief of Amici Curiae the International Swaps and Derivatives Association, Inc. and the Securities Industry and Financial Markets Association With Respect to Debtor's Amended Objections to Claims of Swap Counterparties* was served upon all counsel of record using the Court's CM/ECF system.

/s/ Philip D. Anker _____

Philip D. Anker

EXHIBIT A

(Multicurrency — Cross Border)



International Swap Dealers Association, Inc.

MASTER AGREEMENT

dated as of

..... and

have entered and/or anticipate entering into one or more transactions (each a “Transaction”) that are or will be governed by this Master Agreement, which includes the schedule (the “Schedule”), and the documents and other confirming evidence (each a “Confirmation”) exchanged between the parties confirming those Transactions.

Accordingly, the parties agree as follows: —

1. Interpretation

- (a) **Definitions.** The terms defined in Section 14 and in the Schedule will have the meanings therein specified for the purpose of this Master Agreement.
- (b) **Inconsistency.** In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Master Agreement (including the Schedule), such Confirmation will prevail for the purpose of the relevant Transaction.
- (c) **Single Agreement.** All Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this “Agreement”), and the parties would not otherwise enter into any Transactions.

2. Obligations

- (a) **General Conditions.**
 - (i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.
 - (ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the manner customary for payments in the required currency. Where settlement is by delivery (that is, other than by payment), such delivery will be made for receipt on the due date in the manner customary for the relevant obligation unless otherwise specified in the relevant Confirmation or elsewhere in this Agreement.
 - (iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement.

(b) **Change of Account.** Either party may change its account for receiving a payment or delivery by giving notice to the other party at least five Local Business Days prior to the scheduled date for the payment or delivery to which such change applies unless such other party gives timely notice of a reasonable objection to such change.

(c) **Netting.** If on any date amounts would otherwise be payable:—

- (i) in the same currency; and
- (ii) in respect of the same Transaction,

by each party to the other, then, on such date, each party's obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by whom the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.

The parties may elect in respect of two or more Transactions that a net amount will be determined in respect of all amounts payable on the same date in the same currency in respect of such Transactions, regardless of whether such amounts are payable in respect of the same Transaction. The election may be made in the Schedule or a Confirmation by specifying that subparagraph (ii) above will not apply to the Transactions identified as being subject to the election, together with the starting date (in which case subparagraph (ii) above will not, or will cease to, apply to such Transactions from such date). This election may be made separately for different groups of Transactions and will apply separately to each pairing of Offices through which the parties make and receive payments or deliveries.

(d) **Deduction or Withholding for Tax.**

(i) **Gross-Up.** All payments under this Agreement will be made without any deduction or withholding for or on account of any Tax unless such deduction or withholding is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, then in effect. If a party is so required to deduct or withhold, then that party ("X") will:—

- (1) promptly notify the other party ("Y") of such requirement;
- (2) pay to the relevant authorities the full amount required to be deducted or withheld (including the full amount required to be deducted or withheld from any additional amount paid by X to Y under this Section 2(d)) promptly upon the earlier of determining that such deduction or withholding is required or receiving notice that such amount has been assessed against Y;
- (3) promptly forward to Y an official receipt (or a certified copy), or other documentation reasonably acceptable to Y, evidencing such payment to such authorities; and
- (4) if such Tax is an Indemnifiable Tax, pay to Y, in addition to the payment to which Y is otherwise entitled under this Agreement, such additional amount as is necessary to ensure that the net amount actually received by Y (free and clear of Indemnifiable Taxes, whether assessed against X or Y) will equal the full amount Y would have received had no such deduction or withholding been required. However, X will not be required to pay any additional amount to Y to the extent that it would not be required to be paid but for:—

(A) the failure by Y to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d); or

(B) the failure of a representation made by Y pursuant to Section 3(f) to be accurate and true unless such failure would not have occurred but for (I) any action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date on which a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (II) a Change in Tax Law.

(ii) **Liability.** If: —

- (1) X is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, to make any deduction or withholding in respect of which X would not be required to pay an additional amount to Y under Section 2(d)(i)(4);
- (2) X does not so deduct or withhold; and
- (3) a liability resulting from such Tax is assessed directly against X,

then, except to the extent Y has satisfied or then satisfies the liability resulting from such Tax, Y will promptly pay to X the amount of such liability (including any related liability for interest, but including any related liability for penalties only if Y has failed to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d)).

(e) **Default Interest; Other Amounts.** Prior to the occurrence or effective designation of an Early Termination Date in respect of the relevant Transaction, a party that defaults in the performance of any payment obligation will, to the extent permitted by law and subject to Section 6(c), be required to pay interest (before as well as after judgment) on the overdue amount to the other party on demand in the same currency as such overdue amount, for the period from (and including) the original due date for payment to (but excluding) the date of actual payment, at the Default Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed. If, prior to the occurrence or effective designation of an Early Termination Date in respect of the relevant Transaction, a party defaults in the performance of any obligation required to be settled by delivery, it will compensate the other party on demand if and to the extent provided for in the relevant Confirmation or elsewhere in this Agreement.

3. Representations

Each party represents to the other party (which representations will be deemed to be repeated by each party on each date on which a Transaction is entered into and, in the case of the representations in Section 3(f), at all times until the termination of this Agreement) that:—

(a) **Basic Representations.**

- (i) **Status.** It is duly organised and validly existing under the laws of the jurisdiction of its organisation or incorporation and, if relevant under such laws, in good standing;
- (ii) **Powers.** It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action to authorise such execution, delivery and performance;
- (iii) **No Violation or Conflict.** Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets;
- (iv) **Consents.** All governmental and other consents that are required to have been obtained by it with respect to this Agreement or any Credit Support Document to which it is a party have been obtained and are in full force and effect and all conditions of any such consents have been complied with; and
- (v) **Obligations Binding.** Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).

(b) **Absence of Certain Events.** No Event of Default or Potential Event of Default or, to its knowledge, Termination Event with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any Credit Support Document to which it is a party.

(c) **Absence of Litigation.** There is not pending or, to its knowledge, threatened against it or any of its Affiliates any action, suit or proceeding at law or in equity or before any court, tribunal, governmental body, agency or official or any arbitrator that is likely to affect the legality, validity or enforceability against it of this Agreement or any Credit Support Document to which it is a party or its ability to perform its obligations under this Agreement or such Credit Support Document.

(d) **Accuracy of Specified Information.** All applicable information that is furnished in writing by or on behalf of it to the other party and is identified for the purpose of this Section 3(d) in the Schedule is, as of the date of the information, true, accurate and complete in every material respect.

(e) **Payer Tax Representation.** Each representation specified in the Schedule as being made by it for the purpose of this Section 3(e) is accurate and true.

(f) **Payee Tax Representations.** Each representation specified in the Schedule as being made by it for the purpose of this Section 3(f) is accurate and true.

4. Agreements

Each party agrees with the other that, so long as either party has or may have any obligation under this Agreement or under any Credit Support Document to which it is a party:—

(a) **Furnish Specified Information.** It will deliver to the other party or, in certain cases under subparagraph (iii) below, to such government or taxing authority as the other party reasonably directs:—

(i) any forms, documents or certificates relating to taxation specified in the Schedule or any Confirmation;

(ii) any other documents specified in the Schedule or any Confirmation; and

(iii) upon reasonable demand by such other party, any form or document that may be required or reasonably requested in writing in order to allow such other party or its Credit Support Provider to make a payment under this Agreement or any applicable Credit Support Document without any deduction or withholding for or on account of any Tax or with such deduction or withholding at a reduced rate (so long as the completion, execution or submission of such form or document would not materially prejudice the legal or commercial position of the party in receipt of such demand), with any such form or document to be accurate and completed in a manner reasonably satisfactory to such other party and to be executed and to be delivered with any reasonably required certification,

in each case by the date specified in the Schedule or such Confirmation or, if none is specified, as soon as reasonably practicable.

(b) **Maintain Authorisations.** It will use all reasonable efforts to maintain in full force and effect all consents of any governmental or other authority that are required to be obtained by it with respect to this Agreement or any Credit Support Document to which it is a party and will use all reasonable efforts to obtain any that may become necessary in the future.

(c) **Comply with Laws.** It will comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform its obligations under this Agreement or any Credit Support Document to which it is a party.

(d) **Tax Agreement.** It will give notice of any failure of a representation made by it under Section 3(f) to be accurate and true promptly upon learning of such failure.

(e) **Payment of Stamp Tax.** Subject to Section 11, it will pay any Stamp Tax levied or imposed upon it or in respect of its execution or performance of this Agreement by a jurisdiction in which it is incorporated,

organised, managed and controlled, or considered to have its seat, or in which a branch or office through which it is acting for the purpose of this Agreement is located (“Stamp Tax Jurisdiction”) and will indemnify the other party against any Stamp Tax levied or imposed upon the other party or in respect of the other party’s execution or performance of this Agreement by any such Stamp Tax Jurisdiction which is not also a Stamp Tax Jurisdiction with respect to the other party.

5. Events of Default and Termination Events

(a) **Events of Default.** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an “Event of Default”) with respect to such party:—

(i) **Failure to Pay or Deliver.** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party;

(ii) **Breach of Agreement.** Failure by the party to comply with or perform any agreement or obligation (other than an obligation to make any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) or to give notice of a Termination Event or any agreement or obligation under Section 4(a)(i), 4(a)(iii) or 4(d)) to be complied with or performed by the party in accordance with this Agreement if such failure is not remedied on or before the thirtieth day after notice of such failure is given to the party;

(iii) **Credit Support Default.**

(1) Failure by the party or any Credit Support Provider of such party to comply with or perform any agreement or obligation to be complied with or performed by it in accordance with any Credit Support Document if such failure is continuing after any applicable grace period has elapsed;

(2) the expiration or termination of such Credit Support Document or the failing or ceasing of such Credit Support Document to be in full force and effect for the purpose of this Agreement (in either case other than in accordance with its terms) prior to the satisfaction of all obligations of such party under each Transaction to which such Credit Support Document relates without the written consent of the other party; or

(3) the party or such Credit Support Provider disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, such Credit Support Document;

(iv) **Misrepresentation.** A representation (other than a representation under Section 3(e) or (f)) made or repeated or deemed to have been made or repeated by the party or any Credit Support Provider of such party in this Agreement or any Credit Support Document proves to have been incorrect or misleading in any material respect when made or repeated or deemed to have been made or repeated;

(v) **Default under Specified Transaction.** The party, any Credit Support Provider of such party or any applicable Specified Entity of such party (1) defaults under a Specified Transaction and, after giving effect to any applicable notice requirement or grace period, there occurs a liquidation of, an acceleration of obligations under, or an early termination of, that Specified Transaction, (2) defaults, after giving effect to any applicable notice requirement or grace period, in making any payment or delivery due on the last payment, delivery or exchange date of, or any payment on early termination of, a Specified Transaction (or such default continues for at least three Local Business Days if there is no applicable notice requirement or grace period) or (3) disaffirms, disclaims, repudiates or rejects, in whole or in part, a Specified Transaction (or such action is taken by any person or entity appointed or empowered to operate it or act on its behalf);

(vi) **Cross Default.** If “Cross Default” is specified in the Schedule as applying to the party, the occurrence or existence of (1) a default, event of default or other similar condition or event (however

described) in respect of such party, any Credit Support Provider of such party or any applicable Specified Entity of such party under one or more agreements or instruments relating to Specified Indebtedness of any of them (individually or collectively) in an aggregate amount of not less than the applicable Threshold Amount (as specified in the Schedule) which has resulted in such Specified Indebtedness becoming, or becoming capable at such time of being declared, due and payable under such agreements or instruments, before it would otherwise have been due and payable or (2) a default by such party, such Credit Support Provider or such Specified Entity (individually or collectively) in making one or more payments on the due date thereof in an aggregate amount of not less than the applicable Threshold Amount under such agreements or instruments (after giving effect to any applicable notice requirement or grace period);

(vii) **Bankruptcy.** The party, any Credit Support Provider of such party or any applicable Specified Entity of such party: —

(1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (B) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter; (8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

(viii) **Merger Without Assumption.** The party or any Credit Support Provider of such party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer: —

(1) the resulting, surviving or transferee entity fails to assume all the obligations of such party or such Credit Support Provider under this Agreement or any Credit Support Document to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other party to this Agreement; or

(2) the benefits of any Credit Support Document fail to extend (without the consent of the other party) to the performance by such resulting, surviving or transferee entity of its obligations under this Agreement.

(b) **Termination Events.** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any event specified below constitutes an Illegality if the event is specified in (i) below, a Tax Event if the event is specified in (ii) below or a Tax Event Upon Merger if the event is specified in (iii) below, and, if specified to be applicable, a Credit Event

Upon Merger if the event is specified pursuant to (iv) below or an Additional Termination Event if the event is specified pursuant to (v) below:—

- (i) **Illegality.** Due to the adoption of, or any change in, any applicable law after the date on which a Transaction is entered into, or due to the promulgation of, or any change in, the interpretation by any court, tribunal or regulatory authority with competent jurisdiction of any applicable law after such date, it becomes unlawful (other than as a result of a breach by the party of Section 4(b)) for such party (which will be the Affected Party): —
- (1) to perform any absolute or contingent obligation to make a payment or delivery or to receive a payment or delivery in respect of such Transaction or to comply with any other material provision of this Agreement relating to such Transaction; or
 - (2) to perform, or for any Credit Support Provider of such party to perform, any contingent or other obligation which the party (or such Credit Support Provider) has under any Credit Support Document relating to such Transaction;
- (ii) **Tax Event.** Due to (x) any action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date on which a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (y) a Change in Tax Law, the party (which will be the Affected Party) will, or there is a substantial likelihood that it will, on the next succeeding Scheduled Payment Date (1) be required to pay to the other party an additional amount in respect of an Indemnifiable Tax under Section 2(d)(i)(4) (except in respect of interest under Section 2(e), 6(d)(ii) or 6(e)) or (2) receive a payment from which an amount is required to be deducted or withheld for or on account of a Tax (except in respect of interest under Section 2(e), 6(d)(ii) or 6(e)) and no additional amount is required to be paid in respect of such Tax under Section 2(d)(i)(4) (other than by reason of Section 2(d)(i)(4)(A) or (B));
- (iii) **Tax Event Upon Merger.** The party (the “Burdened Party”) on the next succeeding Scheduled Payment Date will either (1) be required to pay an additional amount in respect of an Indemnifiable Tax under Section 2(d)(i)(4) (except in respect of interest under Section 2(e), 6(d)(ii) or 6(e)) or (2) receive a payment from which an amount has been deducted or withheld for or on account of any Indemnifiable Tax in respect of which the other party is not required to pay an additional amount (other than by reason of Section 2(d)(i)(4)(A) or (B)), in either case as a result of a party consolidating or amalgamating with, or merging with or into, or transferring all or substantially all its assets to, another entity (which will be the Affected Party) where such action does not constitute an event described in Section 5(a)(viii);
- (iv) **Credit Event Upon Merger.** If “Credit Event Upon Merger” is specified in the Schedule as applying to the party, such party (“X”), any Credit Support Provider of X or any applicable Specified Entity of X consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and such action does not constitute an event described in Section 5(a)(viii) but the creditworthiness of the resulting, surviving or transferee entity is materially weaker than that of X, such Credit Support Provider or such Specified Entity, as the case may be, immediately prior to such action (and, in such event, X or its successor or transferee, as appropriate, will be the Affected Party); or
- (v) **Additional Termination Event.** If any “Additional Termination Event” is specified in the Schedule or any Confirmation as applying, the occurrence of such event (and, in such event, the Affected Party or Affected Parties shall be as specified for such Additional Termination Event in the Schedule or such Confirmation).
- (c) **Event of Default and Illegality.** If an event or circumstance which would otherwise constitute or give rise to an Event of Default also constitutes an Illegality, it will be treated as an Illegality and will not constitute an Event of Default.

6. Early Termination

(a) **Right to Terminate Following Event of Default.** If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, the other party (the “Non-defaulting Party”) may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, “Automatic Early Termination” is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

(b) **Right to Terminate Following Termination Event.**

(i) **Notice.** If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.

(ii) **Transfer to Avoid Termination Event.** If either an Illegality under Section 5(b)(i)(1) or a Tax Event occurs and there is only one Affected Party, or if a Tax Event Upon Merger occurs and the Burdened Party is the Affected Party, the Affected Party will, as a condition to its right to designate an Early Termination Date under Section 6(b)(iv), use all reasonable efforts (which will not require such party to incur a loss, excluding immaterial, incidental expenses) to transfer within 20 days after it gives notice under Section 6(b)(i) all its rights and obligations under this Agreement in respect of the Affected Transactions to another of its Offices or Affiliates so that such Termination Event ceases to exist.

If the Affected Party is not able to make such a transfer it will give notice to the other party to that effect within such 20 day period, whereupon the other party may effect such a transfer within 30 days after the notice is given under Section 6(b)(i).

Any such transfer by a party under this Section 6(b)(ii) will be subject to and conditional upon the prior written consent of the other party, which consent will not be withheld if such other party’s policies in effect at such time would permit it to enter into transactions with the transferee on the terms proposed.

(iii) **Two Affected Parties.** If an Illegality under Section 5(b)(i)(1) or a Tax Event occurs and there are two Affected Parties, each party will use all reasonable efforts to reach agreement within 30 days after notice thereof is given under Section 6(b)(i) on action to avoid that Termination Event.

(iv) **Right to Terminate.** If: —

(1) a transfer under Section 6(b)(ii) or an agreement under Section 6(b)(iii), as the case may be, has not been effected with respect to all Affected Transactions within 30 days after an Affected Party gives notice under Section 6(b)(i); or

(2) an Illegality under Section 5(b)(i)(2), a Credit Event Upon Merger or an Additional Termination Event occurs, or a Tax Event Upon Merger occurs and the Burdened Party is not the Affected Party,

either party in the case of an Illegality, the Burdened Party in the case of a Tax Event Upon Merger, any Affected Party in the case of a Tax Event or an Additional Termination Event if there is more than one Affected Party, or the party which is not the Affected Party in the case of a Credit Event Upon Merger or an Additional Termination Event if there is only one Affected Party may, by not more than 20 days notice to the other party and provided that the relevant Termination Event is then

continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.

(c) ***Effect of Designation.***

(i) If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

(ii) Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries under Section 2(a)(i) or 2(e) in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).

(d) ***Calculations.***

(i) ***Statement.*** On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.

(ii) ***Payment Date.*** An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment) in the Termination Currency, from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.

(e) ***Payments on Early Termination.*** If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Loss", and a payment method, either the "First Method" or the "Second Method". If the parties fail to designate a payment measure or payment method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. The amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.

(i) ***Events of Default.*** If the Early Termination Date results from an Event of Default: —

(1) ***First Method and Market Quotation.*** If the First Method and Market Quotation apply, the Defaulting Party will pay to the Non-defaulting Party the excess, if a positive number, of (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party over (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party.

(2) ***First Method and Loss.*** If the First Method and Loss apply, the Defaulting Party will pay to the Non-defaulting Party, if a positive number, the Non-defaulting Party's Loss in respect of this Agreement.

(3) ***Second Method and Market Quotation.*** If the Second Method and Market Quotation apply, an amount will be payable equal to (A) the sum of the Settlement Amount (determined by the

Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party.

(4) *Second Method and Loss*. If the Second Method and Loss apply, an amount will be payable equal to the Non-defaulting Party's Loss in respect of this Agreement. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party.

(ii) **Termination Events**. If the Early Termination Date results from a Termination Event: —

(1) *One Affected Party*. If there is one Affected Party, the amount payable will be determined in accordance with Section 6(e)(i)(3), if Market Quotation applies, or Section 6(e)(i)(4), if Loss applies, except that, in either case, references to the Defaulting Party and to the Non-defaulting Party will be deemed to be references to the Affected Party and the party which is not the Affected Party, respectively, and, if Loss applies and fewer than all the Transactions are being terminated, Loss shall be calculated in respect of all Terminated Transactions.

(2) *Two Affected Parties*. If there are two Affected Parties: —

(A) if Market Quotation applies, each party will determine a Settlement Amount in respect of the Terminated Transactions, and an amount will be payable equal to (I) the sum of (a) one-half of the difference between the Settlement Amount of the party with the higher Settlement Amount ("X") and the Settlement Amount of the party with the lower Settlement Amount ("Y") and (b) the Termination Currency Equivalent of the Unpaid Amounts owing to X less (II) the Termination Currency Equivalent of the Unpaid Amounts owing to Y; and

(B) if Loss applies, each party will determine its Loss in respect of this Agreement (or, if fewer than all the Transactions are being terminated, in respect of all Terminated Transactions) and an amount will be payable equal to one-half of the difference between the Loss of the party with the higher Loss ("X") and the Loss of the party with the lower Loss ("Y").

If the amount payable is a positive number, Y will pay it to X; if it is a negative number, X will pay the absolute value of that amount to Y.

(iii) **Adjustment for Bankruptcy**. In circumstances where an Early Termination Date occurs because "Automatic Early Termination" applies in respect of a party, the amount determined under this Section 6(e) will be subject to such adjustments as are appropriate and permitted by law to reflect any payments or deliveries made by one party to the other under this Agreement (and retained by such other party) during the period from the relevant Early Termination Date to the date for payment determined under Section 6(d)(ii).

(iv) **Pre-Estimate**. The parties agree that if Market Quotation applies an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of such losses.

7. Transfer

Subject to Section 6(b)(ii), neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that: —

- (a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and
- (b) a party may make such a transfer of all or any part of its interest in any amount payable to it from a Defaulting Party under Section 6(e).

Any purported transfer that is not in compliance with this Section will be void.

8. Contractual Currency

(a) **Payment in the Contractual Currency.** Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the “Contractual Currency”). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in a reasonable manner and in good faith in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Contractual Currency so received falls short of the amount in the Contractual Currency payable in respect of this Agreement, the party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency as may be necessary to compensate for the shortfall. If for any reason the amount in the Contractual Currency so received exceeds the amount in the Contractual Currency payable in respect of this Agreement, the party receiving the payment will refund promptly the amount of such excess.

(b) **Judgments.** To the extent permitted by applicable law, if any judgment or order expressed in a currency other than the Contractual Currency is rendered (i) for the payment of any amount owing in respect of this Agreement, (ii) for the payment of any amount relating to any early termination in respect of this Agreement or (iii) in respect of a judgment or order of another court for the payment of any amount described in (i) or (ii) above, the party seeking recovery, after recovery in full of the aggregate amount to which such party is entitled pursuant to the judgment or order, will be entitled to receive immediately from the other party the amount of any shortfall of the Contractual Currency received by such party as a consequence of sums paid in such other currency and will refund promptly to the other party any excess of the Contractual Currency received by such party as a consequence of sums paid in such other currency if such shortfall or such excess arises or results from any variation between the rate of exchange at which the Contractual Currency is converted into the currency of the judgment or order for the purposes of such judgment or order and the rate of exchange at which such party is able, acting in a reasonable manner and in good faith in converting the currency received into the Contractual Currency, to purchase the Contractual Currency with the amount of the currency of the judgment or order actually received by such party. The term “rate of exchange” includes, without limitation, any premiums and costs of exchange payable in connection with the purchase of or conversion into the Contractual Currency.

(c) **Separate Indemnities.** To the extent permitted by applicable law, these indemnities constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.

(d) **Evidence of Loss.** For the purpose of this Section 8, it will be sufficient for a party to demonstrate that it would have suffered a loss had an actual exchange or purchase been made.

9. Miscellaneous

- (a) **Entire Agreement.** This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.
- (b) **Amendments.** No amendment, modification or waiver in respect of this Agreement will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system.
- (c) **Survival of Obligations.** Without prejudice to Sections 2(a)(iii) and 6(c)(ii), the obligations of the parties under this Agreement will survive the termination of any Transaction.
- (d) **Remedies Cumulative.** Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.
- (e) **Counterparts and Confirmations.**
- (i) This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.
- (ii) The parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation shall be entered into as soon as practicable and may be executed and delivered in counterparts (including by facsimile transmission) or be created by an exchange of telexes or by an exchange of electronic messages on an electronic messaging system, which in each case will be sufficient for all purposes to evidence a binding supplement to this Agreement. The parties will specify therein or through another effective means that any such counterpart, telex or electronic message constitutes a Confirmation.
- (f) **No Waiver of Rights.** A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.
- (g) **Headings.** The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.

10. Offices; Multibranch Parties

- (a) If Section 10(a) is specified in the Schedule as applying, each party that enters into a Transaction through an Office other than its head or home office represents to the other party that, notwithstanding the place of booking office or jurisdiction of incorporation or organisation of such party, the obligations of such party are the same as if it had entered into the Transaction through its head or home office. This representation will be deemed to be repeated by such party on each date on which a Transaction is entered into.
- (b) Neither party may change the Office through which it makes and receives payments or deliveries for the purpose of a Transaction without the prior written consent of the other party.
- (c) If a party is specified as a Multibranch Party in the Schedule, such Multibranch Party may make and receive payments or deliveries under any Transaction through any Office listed in the Schedule, and the Office through which it makes and receives payments or deliveries with respect to a Transaction will be specified in the relevant Confirmation.

11. Expenses

A Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement or any Credit Support Document

to which the Defaulting Party is a party or by reason of the early termination of any Transaction, including, but not limited to, costs of collection.

12. Notices

(a) **Effectiveness.** Any notice or other communication in respect of this Agreement may be given in any manner set forth below (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated:—

- (i) if in writing and delivered in person or by courier, on the date it is delivered;
- (ii) if sent by telex, on the date the recipient's answerback is received;
- (iii) if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);
- (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or
- (v) if sent by electronic messaging system, on the date that electronic message is received,

unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Local Business Day.

(b) **Change of Addresses.** Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.

13. Governing Law and Jurisdiction

(a) **Governing Law.** This Agreement will be governed by and construed in accordance with the law specified in the Schedule.

(b) **Jurisdiction.** With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:—

- (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and
- (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force) nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction.

(c) **Service of Process.** Each party irrevocably appoints the Process Agent (if any) specified opposite its name in the Schedule to receive, for it and on its behalf, service of process in any Proceedings. If for any

reason any party's Process Agent is unable to act as such, such party will promptly notify the other party and within 30 days appoint a substitute process agent acceptable to the other party. The parties irrevocably consent to service of process given in the manner provided for notices in Section 12. Nothing in this Agreement will affect the right of either party to serve process in any other manner permitted by law.

(d) **Waiver of Immunities.** Each party irrevocably waives, to the fullest extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction, order for specific performance or for recovery of property, (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any such immunity in any Proceedings.

14. Definitions

As used in this Agreement:—

“Additional Termination Event” has the meaning specified in Section 5(b).

“Affected Party” has the meaning specified in Section 5(b).

“Affected Transactions” means (a) with respect to any Termination Event consisting of an Illegality, Tax Event or Tax Event Upon Merger, all Transactions affected by the occurrence of such Termination Event and (b) with respect to any other Termination Event, all Transactions.

“Affiliate” means, subject to the Schedule, in relation to any person, any entity controlled, directly or indirectly, by the person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, “control” of any entity or person means ownership of a majority of the voting power of the entity or person.

“Applicable Rate” means:—

- (a) in respect of obligations payable or deliverable (or which would have been but for Section 2(a)(iii)) by a Defaulting Party, the Default Rate;
- (b) in respect of an obligation to pay an amount under Section 6(e) of either party from and after the date (determined in accordance with Section 6(d)(ii)) on which that amount is payable, the Default Rate;
- (c) in respect of all other obligations payable or deliverable (or which would have been but for Section 2(a)(iii)) by a Non-defaulting Party, the Non-default Rate; and
- (d) in all other cases, the Termination Rate.

“Burdened Party” has the meaning specified in Section 5(b).

“Change in Tax Law” means the enactment, promulgation, execution or ratification of, or any change in or amendment to, any law (or in the application or official interpretation of any law) that occurs on or after the date on which the relevant Transaction is entered into.

“consent” includes a consent, approval, action, authorisation, exemption, notice, filing, registration or exchange control consent.

“Credit Event Upon Merger” has the meaning specified in Section 5(b).

“Credit Support Document” means any agreement or instrument that is specified as such in this Agreement.

“Credit Support Provider” has the meaning specified in the Schedule.

“Default Rate” means a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum.

“Defaulting Party” has the meaning specified in Section 6(a).

“Early Termination Date” means the date determined in accordance with Section 6(a) or 6(b)(iv).

“Event of Default” has the meaning specified in Section 5(a) and, if applicable, in the Schedule.

“Illegality” has the meaning specified in Section 5(b).

“Indemnifiable Tax” means any Tax other than a Tax that would not be imposed in respect of a payment under this Agreement but for a present or former connection between the jurisdiction of the government or taxation authority imposing such Tax and the recipient of such payment or a person related to such recipient (including, without limitation, a connection arising from such recipient or related person being or having been a citizen or resident of such jurisdiction, or being or having been organised, present or engaged in a trade or business in such jurisdiction, or having or having had a permanent establishment or fixed place of business in such jurisdiction, but excluding a connection arising solely from such recipient or related person having executed, delivered, performed its obligations or received a payment under, or enforced, this Agreement or a Credit Support Document).

“law” includes any treaty, law, rule or regulation (as modified, in the case of tax matters, by the practice of any relevant governmental revenue authority) and **“lawful”** and **“unlawful”** will be construed accordingly.

“Local Business Day” means, subject to the Schedule, a day on which commercial banks are open for business (including dealings in foreign exchange and foreign currency deposits) (a) in relation to any obligation under Section 2(a)(i), in the place(s) specified in the relevant Confirmation or, if not so specified, as otherwise agreed by the parties in writing or determined pursuant to provisions contained, or incorporated by reference, in this Agreement, (b) in relation to any other payment, in the place where the relevant account is located and, if different, in the principal financial centre, if any, of the currency of such payment, (c) in relation to any notice or other communication, including notice contemplated under Section 5(a)(i), in the city specified in the address for notice provided by the recipient and, in the case of a notice contemplated by Section 2(b), in the place where the relevant new account is to be located and (d) in relation to Section 5(a)(v)(2), in the relevant locations for performance with respect to such Specified Transaction.

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

“Market Quotation” means, with respect to one or more Terminated Transactions and a party making the determination, an amount determined on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party (taking into account any existing Credit Support Document with respect to the obligations of such party) and the quoting Reference Market-maker to enter into a transaction (the “Replacement Transaction”) that would have the effect of preserving for such party the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) by the parties under Section 2(a)(i) in respect of such Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have

been required after that date. For this purpose, Unpaid Amounts in respect of the Terminated Transaction or group of Terminated Transactions are to be excluded but, without limitation, any payment or delivery that would, but for the relevant Early Termination Date, have been required (assuming satisfaction of each applicable condition precedent) after that Early Termination Date is to be included. The Replacement Transaction would be subject to such documentation as such party and the Reference Market-maker may, in good faith, agree. The party making the determination (or its agent) will request each Reference Market-maker to provide its quotation to the extent reasonably practicable as of the same day and time (without regard to different time zones) on or as soon as reasonably practicable after the relevant Early Termination Date. The day and time as of which those quotations are to be obtained will be selected in good faith by the party obliged to make a determination under Section 6(e), and, if each party is so obliged, after consultation with the other. If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations shall be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transactions cannot be determined.

“Non-default Rate” means a rate per annum equal to the cost (without proof or evidence of any actual cost) to the Non-defaulting Party (as certified by it) if it were to fund the relevant amount.

“Non-defaulting Party” has the meaning specified in Section 6(a).

“Office” means a branch or office of a party, which may be such party’s head or home office.

“Potential Event of Default” means any event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default.

“Reference Market-makers” means four leading dealers in the relevant market selected by the party determining a Market Quotation in good faith (a) from among dealers of the highest credit standing which satisfy all the criteria that such party applies generally at the time in deciding whether to offer or to make an extension of credit and (b) to the extent practicable, from among such dealers having an office in the same city.

“Relevant Jurisdiction” means, with respect to a party, the jurisdictions (a) in which the party is incorporated, organised, managed and controlled or considered to have its seat, (b) where an Office through which the party is acting for purposes of this Agreement is located, (c) in which the party executes this Agreement and (d) in relation to any payment, from or through which such payment is made.

“Scheduled Payment Date” means a date on which a payment or delivery is to be made under Section 2(a)(i) with respect to a Transaction.

“Set-off” means set-off, offset, combination of accounts, right of retention or withholding or similar right or requirement to which the payer of an amount under Section 6 is entitled or subject (whether arising under this Agreement, another contract, applicable law or otherwise) that is exercised by, or imposed on, such payer.

“Settlement Amount” means, with respect to a party and any Early Termination Date, the sum of: —

(a) the Termination Currency Equivalent of the Market Quotations (whether positive or negative) for each Terminated Transaction or group of Terminated Transactions for which a Market Quotation is determined; and

(b) such party’s Loss (whether positive or negative and without reference to any Unpaid Amounts) for each Terminated Transaction or group of Terminated Transactions for which a Market Quotation cannot be determined or would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result.

“Specified Entity” has the meanings specified in the Schedule.

“Specified Indebtedness” means, subject to the Schedule, any obligation (whether present or future, contingent or otherwise, as principal or surety or otherwise) in respect of borrowed money.

“Specified Transaction” means, subject to the Schedule, (a) any transaction (including an agreement with respect thereto) now existing or hereafter entered into between one party to this Agreement (or any Credit Support Provider of such party or any applicable Specified Entity of such party) and the other party to this Agreement (or any Credit Support Provider of such other party or any applicable Specified Entity of such other party) which is a rate swap transaction, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap, equity or equity index option, bond option, interest rate option, foreign exchange transaction, cap transaction, floor transaction, collar transaction, currency swap transaction, cross-currency rate swap transaction, currency option or any other similar transaction (including any option with respect to any of these transactions), (b) any combination of these transactions and (c) any other transaction identified as a Specified Transaction in this Agreement or the relevant confirmation.

“Stamp Tax” means any stamp, registration, documentation or similar tax.

“Tax” means any present or future tax, levy, impost, duty, charge, assessment or fee of any nature (including interest, penalties and additions thereto) that is imposed by any government or other taxing authority in respect of any payment under this Agreement other than a stamp, registration, documentation or similar tax.

“Tax Event” has the meaning specified in Section 5(b).

“Tax Event Upon Merger” has the meaning specified in Section 5(b).

“Terminated Transactions” means with respect to any Early Termination Date (a) if resulting from a Termination Event, all Affected Transactions and (b) if resulting from an Event of Default, all Transactions (in either case) in effect immediately before the effectiveness of the notice designating that Early Termination Date (or, if “Automatic Early Termination” applies, immediately before that Early Termination Date).

“Termination Currency” has the meaning specified in the Schedule.

“Termination Currency Equivalent” means, in respect of any amount denominated in the Termination Currency, such Termination Currency amount and, in respect of any amount denominated in a currency other than the Termination Currency (the “Other Currency”), the amount in the Termination Currency determined by the party making the relevant determination as being required to purchase such amount of such Other Currency as at the relevant Early Termination Date, or, if the relevant Market Quotation or Loss (as the case may be), is determined as of a later date, that later date, with the Termination Currency at the rate equal to the spot exchange rate of the foreign exchange agent (selected as provided below) for the purchase of such Other Currency with the Termination Currency at or about 11:00 a.m. (in the city in which such foreign exchange agent is located) on such date as would be customary for the determination of such a rate for the purchase of such Other Currency for value on the relevant Early Termination Date or that later date. The foreign exchange agent will, if only one party is obliged to make a determination under Section 6(e), be selected in good faith by that party and otherwise will be agreed by the parties.

“Termination Event” means an Illegality, a Tax Event or a Tax Event Upon Merger or, if specified to be applicable, a Credit Event Upon Merger or an Additional Termination Event.

“Termination Rate” means a rate per annum equal to the arithmetic mean of the cost (without proof or evidence of any actual cost) to each party (as certified by such party) if it were to fund or of funding such amounts.

“Unpaid Amounts” owing to any party means, with respect to an Early Termination Date, the aggregate of (a) in respect of all Terminated Transactions, the amounts that became payable (or that would have become payable but for Section 2(a)(iii)) to such party under Section 2(a)(i) on or prior to such Early Termination Date and which remain unpaid as at such Early Termination Date and (b) in respect of each Terminated Transaction, for each obligation under Section 2(a)(i) which was (or would have been but for Section 2(a)(iii)) required to be settled by delivery to such party on or prior to such Early Termination Date and which has not been so settled as at such Early Termination Date, an amount equal to the fair market

value of that which was (or would have been) required to be delivered as of the originally scheduled date for delivery, in each case together with (to the extent permitted under applicable law) interest, in the currency of such amounts, from (and including) the date such amounts or obligations were or would have been required to have been paid or performed to (but excluding) such Early Termination Date, at the Applicable Rate. Such amounts of interest will be calculated on the basis of daily compounding and the actual number of days elapsed. The fair market value of any obligation referred to in clause (b) above shall be reasonably determined by the party obliged to make the determination under Section 6(e) or, if each party is so obliged, it shall be the average of the Termination Currency Equivalents of the fair market values reasonably determined by both parties.

IN WITNESS WHEREOF the parties have executed this document on the respective dates specified below with effect from the date specified on the first page of this document.

.....
(Name of Party)

.....
(Name of Party)

By:
Name:
Title:
Date:

By:
Name:
Title:
Date:

(Multicurrency — Cross Border)

ISDA®

International Swap Dealers Association, Inc.

SCHEDULE to the Master Agreement

dated as of

between and
("Party A") ("Party B")

Part 1. Termination Provisions.

(a) "Specified Entity" means in relation to Party A for the purpose of: —

- Section 5(a)(v),
- Section 5(a)(vi),
- Section 5(a)(vii),
- Section 5(b)(iv),

and in relation to Party B for the purpose of:—

- Section 5(a)(v),
- Section 5(a)(vi),
- Section 5(a)(vii),
- Section 5(b)(iv),

(b) "Specified Transaction" will have the meaning specified in Section 14 of this Agreement unless another meaning is specified here
.....
.....

(c) The "Cross Default" provisions of Section 5(a)(vi) will/will not * apply to Party A
will/will not * apply to Party B

If such provisions apply:—

"Specified Indebtedness" will have the meaning specified in Section 14 of this Agreement unless another meaning is specified here
.....

* Delete as applicable.

“*Threshold Amount*” means
.....

(d) The “*Credit Event Upon Merger*” provisions of Section 5(b)(iv) will/will not * apply to Party A
will/will not * apply to Party B

(e) The “*Automatic Early Termination*” provision of Section 6(a) will/will not * apply to Party A
will/will not * apply to Party B

(f) **Payments on Early Termination.** For the purpose of Section 6(e) of this Agreement: —

(i) Market Quotation/Loss * will apply.

(ii) The First Method/The Second Method * will apply.

(g) “*Termination Currency*” means, if such currency is specified and
freely available, and otherwise United States Dollars.

(h) **Additional Termination Event** will/will not apply*. The following shall constitute an Additional
Termination Event: —

.....
.....
.....
.....
.....
.....

For the purpose of the foregoing Termination Event, the Affected Party or Affected Parties shall be: — ...
.....

Part 2. Tax Representations.

(a) **Payer Representations.** For the purpose of Section 3(e) of this Agreement, Party A will/will not* make the
following representation and Party B will/will not* make the following representation: —

It is not required by any applicable law, as modified by the practice of any relevant governmental revenue
authority, of any Relevant Jurisdiction to make any deduction or withholding for or on account of any Tax
from any payment (other than interest under Section 2(e), 6(d)(ii) or 6(e) of this Agreement) to be made
by it to the other party under this Agreement. In making this representation, it may rely on (i) the accuracy
of any representations made by the other party pursuant to Section 3(f) of this Agreement, (ii) the
satisfaction of the agreement contained in Section 4(a)(i) or 4(a)(iii) of this Agreement and the accuracy
and effectiveness of any document provided by the other party pursuant to Section 4(a)(i) or 4(a)(iii) of
this Agreement and (iii) the satisfaction of the agreement of the other party contained in Section 4(d) of
this Agreement, *provided* that it shall not be a breach of this representation where reliance is placed on
clause (ii) and the other party does not deliver a form or document under Section 4(a)(iii) by reason of
material prejudice to its legal or commercial position.

(b) **Payee Representations.** For the purpose of Section 3(f) of this Agreement, Party A and Party B make the
representations specified below, if any:

(i) The following representation will/will not* apply to Party A and will/will not apply to Party B: —

It is fully eligible for the benefits of the “Business Profits” or “Industrial and Commercial Profits”
provision, as the case may be, the “Interest” provision or the “Other Income” provision (if any) of the
Specified Treaty with respect to any payment described in such provisions and received or to be received

* Delete as applicable.

by it in connection with this Agreement and no such payment is attributable to a trade or business carried on by it through a permanent establishment in the Specified Jurisdiction.

If such representation applies, then: —

“Specified Treaty” means with respect to Party A

“Specified Jurisdiction” means with respect to Party A

“Specified Treaty” means with respect to Party B

“Specified Jurisdiction” means with respect to Party B

(ii) The following representation will/will not* apply to Party A and will/will not* apply to Party B: —

Each payment received or to be received by it in connection with this Agreement will be effectively connected with its conduct of a trade or business in the Specified Jurisdiction.

If such representation applies, then: —

“Specified Jurisdiction” means with respect to Party A

“Specified Jurisdiction” means with respect to Party B

(iii) The following representation will/will not* apply to Party A and will/will not* apply to Party B: —

(A) It is entering into each Transaction in the ordinary course of its trade as, and is, either (1) a recognised U.K. bank or (2) a recognised U.K. swaps dealer (in either case (1) or (2), for purposes of the United Kingdom Inland Revenue extra statutory concession C17 on interest and currency swaps dated March 14, 1989), and (B) it will bring into account payments made and received in respect of each Transaction in computing its income for United Kingdom tax purposes.

(iv) Other Payee Representations: —

.....
.....
.....

N.B. The above representations may need modification if either party is a Multibranch Party.

* Delete as applicable.

Part 3. Agreement to Deliver Documents.

For the purpose of Sections 4(a)(i) and (ii) of this Agreement, each party agrees to deliver the following documents, as applicable: —

(a) Tax forms, documents or certificates to be delivered are: —

Party required to deliver document	Form/Document/ Certificate	Date by which to be delivered
.....
.....
.....
.....
.....

(b) Other documents to be delivered are: —

Party required to deliver document	Form/Document/ Certificate	Date by which to be delivered	Covered by Section 3(d) Representation
.....	Yes/No*
.....	Yes/No*
.....	Yes/No*
.....	Yes/No*
.....	Yes/No*

Part 4. Miscellaneous.

(a) **Addresses for Notices.** For the purpose of Section 12(a) of this Agreement: —

Address for notices or communications to Party A: —

Address:

Attention:

Telex No.: Answerback:

Facsimile No.: Telephone No:

Electronic Messaging System Details:

Address for notices or communications to Party B: —

Address:

Attention:

Telex No.: Answerback:

* Delete as applicable.

Facsimile No.: Telephone No.:

Electronic Messaging System Details:

(b) **Process Agent.** For the purpose of Section 13(c) of this Agreement: —

Party A appoints as its Process Agent

Party B appoints as its Process Agent

(c) **Offices.** The provisions of Section 10(a) will/will not* apply to this Agreement.

(d) **Multibranch Party.** For the purpose of Section 10(c) of this Agreement: —

Party A is/is not* a Multibranch Party and, if so, may act through the following Offices: —

.....
.....

Party B is/is not* a Multibranch Party and, if so, may act through the following Offices: —

.....
.....

(e) **Calculation Agent.** The Calculation Agent is, unless otherwise specified in a Confirmation in relation to the relevant Transaction.

(f) **Credit Support Document.** Details of any Credit Support Document: —

.....
.....
.....

(g) **Credit Support Provider.** Credit Support Provider means in relation to Party A,

.....
.....

Credit Support Provider means in relation to Party B,

.....
.....

(h) **Governing Law.** This Agreement will be governed by and construed in accordance with English law/the laws of the State of New York (without reference to choice of law doctrine) *.

* Delete as applicable.

(i) **Netting of Payments.** Subparagraph (ii) of Section 2(c) of this Agreement will not apply to the following Transactions or groups of Transactions (in each case starting from the date of this Agreement/in each case starting from *)

.....

.....

(j) **“Affiliate”** will have the meaning specified in Section 14 of this Agreement unless another meaning is specified here

.....

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Part 5. Other Provisions.

* Delete as applicable.