To: ISDA Credit Derivatives Determinations Committee (Americas)

Re: Issue Number 2019022501 (Bankruptcy Credit Event in respect of Windstream Services, LLC)

Date: March 13, 2019

We, an Eligible Market Participant, hereby submit this response in opposition to the challenge to the Supplemental List (the "**Challenge**") submitted by a market participant (the "**Challenger**") on March 11, 2019 with respect to the Challenged Obligations (as defined in the Challenge) of Windstream Services, LLC ("**Services**" or the "**Reference Entity**"). Capitalized terms used but not defined herein shall have the meanings assigned to them in the 2014 Credit Derivatives Definitions (the "**Definitions**") or the Challenge, as applicable.

INTRODUCTION

The Challenge is a transparent attempt to manipulate the auction by cutting by more than 56% the unsecured Deliverable Obligations on the Determinations Committee's first and second preliminary list and eliminating altogether the lowest priced Deliverable Obligations (about 30% of the unsecured universe). Far from upholding the integrity of the CDS market as it claims, the Challenge endeavors to jeopardize it. This effort should be denied.

The Challenge seeks to exclude the Aurelius Notes as Deliverable Obligations based on sheer speculation that the Bankruptcy Court might, at some indeterminate date, and at the conclusion of a process that has not yet (and may never be) started, impose the rare remedy of equitable subordination, based on an extreme theory that was emphatically rejected – and characterized as "border[ing] on frivolous" – in the very District Court decision the Challenge claims the Determinations Committee should follow. Reflecting its own flimsiness, the Challenge explicitly urges the Determinations Committee to take this unprecedented action without determining whether the Aurelius Notes will be equitably subordinated.

Nothing in the Definitions supports the proposition that obligations can be excluded even if they were already equitably subordinated, let alone if the prospect of such subordination is entirely speculative and runs counter to an existing court decision in this very situation. Given that the commencement of a bankruptcy is always – as it is here – filled with self-serving speculation and grandstanding about legal theories, the radical approach advocated by the Challenge would, if adopted, result in rampant attempts to exclude from delivery most if not all notes in virtually every bankruptcy situation. The Definitions, however, preclude this result, making clear that the deliverability of an obligation at auction must depend upon objective criteria set forth in the agreements governing the obligation at issue. Measured against this standard, both the Original Notes (including the Aurelius Notes) and the New Notes qualify for delivery at auction.

More specifically, the Challenge to the inclusion of the Aurelius Notes on the Supplemental List should be rejected for the following reasons:

- <u>First</u>, while the challenge to the Aurelius Notes is premised on the fact that they "*may* be subject to equitable subordination" (*see* Challenge at 1, emphasis added), <u>*no party has actually sought that rarely granted remedy, much less has such relief been*</u>

granted by a court. Moreover, there is no realistic possibility that equitable subordination would be imposed in this instance. Equitable subordination is routinely threatened in bankruptcy but very rarely granted. The Challenge does not cite a single precedent resembling the present circumstances (where the purported "wrongdoing" was a vindication of rights in court or the alleged ownership of credit protection). Services already made what amounts to the same argument – contending that Aurelius's alleged conduct in acquiring its notes "with the intention of manufacturing a default and then collecting on Credit Default Swaps" warranted application of the doctrine of "unclean hands"[1] – and the District Court rejected it out of hand in the very decision the Challenge insists the Determinations Committee should rely upon.[2] The Challenge provides no basis for believing that an argument the District Court found "borders on frivolous" (*id.*) will nevertheless be sufficient to justify the application of the extreme and rare remedy of equitable subordination.

- Second, even if the Aurelius Notes could be subject to equitable subordination in the hands of Aurelius, they would not be subject to subordination in the hands of CDS protection sellers taking delivery of the notes at auction. Under the very case law cited by the Challenger, such protection sellers, having committed no misconduct, would take Aurelius Notes free of any alleged personal disabilities of the seller. Were it otherwise, notes in virtually every bankruptcy case would be subject to infirmities burdening their free transfer. The Determinations Committee should lend no credence to the disruptive proposition that purchasers of notes in the market take responsibility for any misconduct of their predecessors in interest simply because of speculative and self-serving assertions.

- Third, the plain language of the Definitions refutes the Challenge. As discussed below, the Definitions make clear that only contractual subordination included in the terms of the instrument at the time of its issuance provides a basis for exclusion of a Deliverable Obligation, and the other provisions relied upon in the Challenge (principally, the definition of a "Prohibited Action") are simply inapposite.

In addition, the Challenge to the inclusion of the New Notes on the Supplemental List also fails. First, the Determinations Committee has already determined that the documentation governing the New Notes is sufficient to confirm the New Notes satisfy the Deliverable Obligation Characteristics, and the Challenge's erroneous interpretation of the District Court decision provides no basis for revisiting that decision. Second, for reasons discussed below, the presence (if any) of OID does not disqualify the New Notes as Deliverable Obligations.

Finally, in keeping with the External Review Panel's recently-articulated policy in Sears in favor of a construction of the Definitions that favors "greater liquidity through greater deliverability,"

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[1] *See* Windstream Services, LLC's Corrected Proposed Findings of Fact and Conclusions of Law, *U.S. Bank National Association v. Windstream Services, LLC*, Case No. 17-CV-7857 (JMF) (S.D.N.Y. June 18, 2018) [Dkt. No. 165], at ¶¶ 265-66 ("**Windstream's Proposed Findings of Fact and Conclusions of Law**").

[2] *See U.S. Bank National Association v. Windstream Services, LLC*, 2019 WL 948120, at *11, n.6 (S.D.N.Y. Feb. 15, 2019) ("Services also argues — albeit only halfheartedly — that the Trustee's and Aruelius's [sic] arguments are barred by the doctrine of unclean hands. . . . That argument borders on frivolous.") (the "**District Court Decision**").

the Determinations Committee should construe any ambiguity in the Definitions in favor of inclusion of the Challenged Obligations. Not only would the Determinations Committee's adoption of the Challenge dramatically reduce liquidity in this instance (as is the transparent purpose of the Challenge), it would surely do so in most future bankruptcy situations, by incentivizing writers of protection to urge the exclusion of most would-be deliverables based on every speculative legal theory circulating in the earliest days of the bankruptcy.

For these and other reasons set forth below, the Determinations Committee should reject the Challenge in its entirety and proceed to publish the Final List of Deliverable Obligations, including the Challenged Obligations.

ARGUMENT

I. The Original Notes Are Deliverable Obligations

1. The Speculative and Remote Possibility of Equitable Subordination Does Not Support the Challenge – Particularly Given the District Court's Opinion

a. The Challenge asks the Determinations Committee to exclude the Aurelius Notes on the basis of a hypothetical challenge to the priority of the Aurelius Notes that has not been brought, may never be brought, and would face virtually no chance of success. The Challenge, in effect, seeks to turn the straightforward, objective, process of identifying Deliverable Obligations into a subjective exercise in predicting the outcome of future litigation. Both because the hypothetical challenge in this case is so clearly frivolous and because of the far-reaching policy implications of adopting such an approach, the Determinations Committee should reject the Challenge.

b. To begin with, the possibility of equitable subordination of the Aurelius Notes remains entirely hypothetical. No party has challenged the Aurelius Notes, and the claims arising under those notes are presumptively valid. *See generally* 11 U.S.C. § 502(a).

c. Any claim for equitable subordination faces a very uphill battle. As the case law cited in the Challenge makes clear, "equitable subordination is a drastic and unusual remedy." *Enron Corp. v. Springfield Assocs., LLC (In re Enron Corp.)*, 379 B.R. 425, 434 (S.D.N.Y. 2007). While it is commonplace for equitable subordination to be threatened in bankruptcy, courts have granted that relief very rarely and never under circumstances resembling those alleged here (e.g., where the alleged "wrongdoing" consists of being vindicated in court or allegedly owning credit protection). The cases cited in the Challenge are easily distinguished.[3]

[3] *Madoff* and *Lightsquared* entailed misconduct far different than the Challenge alleges in the present situation. *See In re Lightsquared Inc.*, 511 B.R. 253, 352-53 (Bankr. S.D.N.Y. 2014) (dealing with equitable subordination of claims held by competitor of debtor that were purchased to benefit competitor to detriment of debtor and in violation of applicable credit agreement); *In re Bernard L. Madoff Investment Securities LLC*, 515 B.R. 117, 158 (Bankr. S.D.N.Y. 2014) (dealing with equitable subordination of claims held by beneficiaries and participants in Madoff Ponzi scheme).

d. Here, moreover, a claim for equitable subordination would be nothing more than a second attempt at an argument already made by Windstream *and rejected* by the District Court. In its proposed findings of fact and conclusions of law submitted in connection with the pre-bankruptcy litigation in the District Court, Services asserted that:

> "The complaint and Aurelius's counterclaims are barred by the doctrine of unclean hands because Aurelius acquired its Notes and directed the Trustee with the intention of manufacturing a default and then collecting on Credit Default Swaps it had purchased for the purposes of improperly profiting at the expense of Services, other Noteholders and third parties."

Windstream's Proposed Findings of Fact and Conclusion of Law ¶¶ 265-66.[4] The District Court emphatically rejected this unclean hands argument, concluding that it "borders on frivolous." District Court Decision at *11, n.6.

e. Finally, the Determinations Committee should be loath to embrace a rule under which mere threats of future litigation (or even the commencement of litigation, not yet resolved) would be sufficient to preclude an obligation from delivery into a CDS auction. The adoption of such a standard would incentivize writers of protection in most bankruptcy situations to seek to disqualify for delivery most if not all obligations, based on the myriad legal theories that are typically rampant at the outset of bankruptcy. The resulting free-for-all would make a mockery of the CDS auction process, introduce enormous uncertainty in the CDS marketplace, dramatically impede liquidity in the auction, and invite the worst sort of manipulative conduct. Even with far more time than it has between the publication of the preliminary list of Deliverable Obligations and the auction, the Determinations Committee would be ill-equipped to determine how a court would rule on this deluge of legal theories, or even to differentiate between the theories that are likely and unlikely to prevail in the melee yet to unfold in the bankruptcy case.[5]

f. In December 2017, the Determinations Committee concluded it could not find a Credit Event to have occurred in the absence of a judicial determination to that effect. *See* December 21, 2017 Determinations Committee Decision.[6] Applying the same standard here, the Determinations Committee should not conclude that any portion of the Original Notes are subject to equitable subordination when there has been no judicial determination (indeed, not even a complaint or other properly formulated request for relief) to that effect.

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[4] *See also* Windstream Services, LLC's Response to U.S. Bank N.A.'s and Aurelius Capital Master, Ltd.'s Proposed Conclusions of Law, *U.S. Bank National Association v. Windstream Services, LLC*, Case No. 17-CV-7857 (JMF) (S.D.N.Y. June 29, 2018) [Dkt. No. 178], at p. 2-3, p. 29 n.17.

[5] The absence of a viable standard is illustrated by the Challenger's position that "the Convened DC need not decide whether the Aurelius Notes will be equitably subordinated." Challenge at 12. If true – if the mere allegation of impropriety is sufficient to require exclusion of an obligation from the CDS auction – then any claim, no matter how frivolous, would require similar treatment.

[6] *Available at* https://www.cdsdeterminationscommittees.org/cds/windstream-services-llc-3/.

2. **Protection Sellers Taking Delivery at Auction Will Take Free and Clear of Any Potential Claims for Equitable Subordination**

   a. Even if the Original Notes were subject to equitable subordination in the hands of Aurelius, they would not be subject to such subordination in the hands of CDS protection sellers taking delivery of the notes at the Auction. To the contrary, the very case law cited in the Challenge makes clear that a buyer of a claim will generally take such claim free and clear of the personal disabilities of the seller. *See In re Enron Corp.*, 379 B.R. at 440-41 ("Congress did not intend section 510(c) to be applied to a transferee of a claim—who has not acted inequitably—merely because that claim was transferred, directly or indirectly, by a bad actor.").

   b. Ignoring the central holding of *Enron*, the Challenge selectively quotes language from the case suggesting that "purchasers of claims with actual notice of the inequitable conduct of the seller may be subject to equitable subordination based on their own misconduct." Challenge at 10 (quoting *Enron*). However, the Challenge ignores both requirements of this quote – that the purchasers have "*actual notice*" of misconduct (in this instance, there is nothing more than innuendo and speculation, about which not a shred of proof has been offered), and the purchasers have committed their "*own misconduct*" (which not even the Challenge stoops to suggest).

   c. Indeed, the protection sellers at a CDS auction are the quintessential example of an innocent purchaser for value. At the CDS auction, the protection sellers have no knowledge of the specific obligations they will receive nor from which counterparties they will receive them. This is precisely analogous to the situation identified by the court in *Enron* as falling within the exemption from equitable subordination. *See Enron*, 379 B.R. at 442 (noting that this "distinction is particularly imperative in the distressed debt market context, where sellers are often anonymous and purchasers have no way of ascertaining whether the seller (or a transferee up the line) has acted inequitably. . .").

3. **Under the Plain Language of the Definitions, Equitable Subordination Is Not a Ground for Excluding an Obligation from the CDS Auction**

   a. Even if the Aurelius Notes were subject to equitable subordination, this would not be a ground for excluding them from the CDS Auction. The Definitions make clear that only *contractual* subordination provides a basis for exclusion, and the other provisions relied upon in the Challenge are either inapposite or incorrectly and misleadingly described.

   b. To begin with, while the Challenge makes no mention of it, the Definitions actually do include a definition of "Subordination" and a Deliverable Obligation Characteristic of "Not Subordinated." *See* Definitions § 3.13(b). The term "Subordination," for these purposes, is defined narrowly to include only *contractual* subordination, and to specifically exclude subordination "arising by operation of law." *See id.* § 3.13(b)(i)(B) ("'Subordination' means, with respect to an obligation (the 'Second Obligation') and another obligation of the Reference Entity to which such obligation is being compared (the 'First Obligation'), a contractual, trust or similar arrangement providing that [the Second Obligation is subordinated to the First Obligation]."); *see also id.* (excluding subordination "arising by operation of law"). In other words, the drafters of the Definitions included a Deliverable Obligation Characteristic of "Not Subordinated," but chose *not* to insist that an obligation, to be considered "Not Subordinated," be free of the risk of equitable subordination. Also, the definition of "Subordination" requires that the existence of subordination be "determined as of the date as of which [the obligation] was incurred." *Id*. The Original Notes were issued in 2013, long before the events at issue here and long before Aurelius is alleged to have acquired the Original Notes.

c. Unable to avail itself of the "Not Subordinated" characteristic, the Challenger focuses instead on the definition of "Prohibited Action" in support of exclusion of the Original Notes. Reliance on this provision is also misplaced.

    i. First, if the drafters of the Definitions had intended to require that an obligation be free of the risk of equitable subordination, the most natural place to include that requirement would be in the Deliverable Obligation Characteristic of "Not Subordinated" and the definition of "Subordination." As discussed above, however, those provisions include no such requirement, and in fact, make clear that subordination "arising by operation of law" does *not* amount to "Subordination." *See* Definitions § 3.13(b)(i)(B), discussed above.

    ii. Second, the provisions addressing "Prohibited Actions," much like the definition of "Subordination," make clear that the determination of whether an obligation is a Deliverable Obligation or not must be made within the four corners of the contract itself. Section 3.8(a)(ii) of the Definitions, cited by the Challenger, provides that the "Outstanding Principal Balance" of an obligation must be calculated by, inter alia, "subtracting all or any portion of such amount which, pursuant to the terms of the obligation, [] is subject to any Prohibited Action." Definitions § 3.8(a)(ii). As this provision makes clear, the focus is not just on whether a "Prohibited Action" is present (a question addressed immediately below), but also on whether that "Prohibited Action" arises "*pursuant to the terms of the obligation*." Equitable subordination is, by definition, not prescribed by the terms of an obligation.[7]

    iii. Third, equitable subordination is not a "Prohibited Action" in any event. The definition of "Prohibited Action" is defined to exclude counterclaims or defenses based in the factors set forth in section 4.1(a)-(d) of the Definitions. Among those excluded credit events are "(b) any actual or alleged unenforceability, illegality, impossibility or invalidity with respect to any Obligations or, as applicable, any Underlying Obligation, however described." Definitions § 4.1. Also excluded is: "(c) any applicable law, order, regulation, decree or notice, however described, or the promulgation of, or any change in, the interpretation by any court, tribunal, regulatory authority or similar administrative or judicial body with competent or

[7] Moreover, a plain reading of section 3.8(a)(ii) makes clear that the amounts to be subtracted from the "Outstanding Principal Balance" of an obligation in accordance with that section are, naturally, those amounts by which the principal balance of the claim is actually reduced. The equitable subordination of a claim, however, has no effect on the amount of the claim, but only on its priority in bankruptcy.

apparent jurisdiction of any applicable law, order, regulation, decree or notice, however described." *Id*. An action in equitable subordination falls squarely within these exclusions, as it asserts an alleged unenforceability under applicable bankruptcy law with respect to an obligation (in particular, the obligation's stated priority). Thus, even if determined to be a counterclaim in some sense of the term (a proposition that is not supported by the authority cited in the Challenge[8]), such a counterclaim would be excluded from the definition of "Prohibited Actions" and therefore have no impact on the calculation of Outstanding Principal Balance.

d. In sum, the mere *allegation* that the Aurelius Notes *may be* subject to equitable subordination does not cause the notes to fail either the "Not Subordinated" test or the "Prohibited Action" test under the Definitions. Instead, as the plain language of each of these provisions make clear, the Definitions have sensibly embraced a standard that is explicitly confined to the four corners of the applicable debt documents and that disregards any override of those terms that may occur by operation of law or based on conduct or events occurring post-issuance – let alone a prediction of the outcome of potential future litigation.

II. <u>The New Notes Are Deliverable Obligations</u>

1. The Determinations Committee Has Twice Correctly Concluded that the New Notes are Deliverable Obligations

a. The Determinations Committee has already twice concluded that the New Notes are Deliverable Obligations, as reflected by its inclusion of those notes on the Initial List and Supplemental List of Deliverable Obligations. It can therefore be presumed that all relevant documentation, including the 2013 Indenture which the New Notes purport to be governed by, was available to the Determinations Committee. Moreover, although the Determinations Committee, in connection with the Initial List, invited submission of the second supplemental indenture and related note documentation for the New Notes, the presence of the New Notes on the Initial List shows this additional documentation was not considered necessary.[9]

b. The Challenge does not contend that any of the Deliverable Obligations Characteristics with respect to the New Notes are not satisfied; nor could it. As set forth in the affidavit in support of the Reference Entity's first day relief in bankruptcy, the New Notes are acknowledged by the Reference Entity as U.S. dollar-denominated general, unsecured senior obligations bearing interest at 6.375% maturing in 2023. *See* Declaration of Tony Thomas, *In re Windstream Holdings, LLC*, Case No. 19-22312 (Bankr. S.D.N.Y. Feb. 25, 2019) [Dkt. No. 27], at ¶ 27. They are thus (i) Not Subordinated; (ii) payable in U.S. dollars (the denomination specified in the Confirmations); (iii) Transferable, as absent specific restrictions on transfer, notes are freely transferable under applicable law; and

[8] The Challenger's citation to *Oberman v. Weiner (In re Crispo)*, 1997 WL 258482, at *10 (S.D.N.Y. May 13, 1997), is inapposite, as the court in that case had no occasion to determine whether or not the equitable subordination claim was properly considered to be a "counterclaim" for purposes of the Definitions (or, indeed, for any purpose, as it appears that the proper categorization or label of the claim was not an issue in dispute).

[9] Nevertheless, this additional documentation was provided to the Determinations Committee.

(iv) mature in less than 30 years, and therefore satisfy all applicable Deliverable Obligation Characteristics.

c. Rather than argue that the Deliverable Obligation Characteristics are not satisfied, the Challenge simply states that the Determinations Committee does not have adequate documentation with respect to the New Notes (an assertion inherently at odds with the Determinations Committee's determination to include the New Notes on both the Initial List and Supplemental List, and to remove the footnote that had appeared in the Initial List). In any event, the premise of the Challenger's argument in this regard is a strained and incorrect interpretation of the District Court's decision.

d. Contrary to the Challenger's assertion, the District Court did *not* determine that the New Notes are not governed by the 2013 Indenture, nor "make a binding decision that the New Notes are not obligations governed by the 2013 Indenture." That question was not at issue in the recent litigation, nor were holders of the New Notes even party to the litigation. Rather, the District Court simply held that the New Notes were not "Additional Notes" for purposes of determining whether the Reference Entity obtained the requisite consents to waive a prior default. *See* District Court Decision at *19-21.

2. The Potential Presence of OID Does Not Disqualify the New Notes as Deliverable Obligations

a. The Challenger asks the Determinations Committee to do what it has never done before: entirely exclude what would otherwise be Deliverable Obligations from a CDS auction simply because a bankruptcy court might one day conclude that those obligations have OID. Such an act by the Determinations Committee would be flatly at odds with the DC Rules and precedent.

b. DC Rule 3.3(h) specifically contemplates that in determining the Outstanding Principal Balance of an obligation, a convened DC may determine that the Outstanding Principal Balance may be less than par. This would be perfectly sensible where the contractual terms of the debt provide that upon acceleration holders are entitled to receive an "accreted amount" less than the face amount. In contrast, where (as here) the terms of the debt provide that the entire principal is due upon acceleration, the Definitions do not allow the Determinations Committee to disregard part of that principal by speculating about whether the Bankruptcy Court will eventually disallow some of that claim – let alone do so on a basis that (according to the Challenge itself) has "*no* precedent" and "is entirely unclear." Rule 3.3(h) provides that "the Convened DC shall be entitled to assume that no applicable laws will reduce or discount the size of the claim to reflect the original issue price or accrued value of such Deliverable Obligation unless it has evidence to the contrary." We believe (and the Challenge does not assert otherwise) that it would be unprecedented for a Determinations Committee to disqualify (or even reduce the amount of) an obligation of a reference entity (not having the contractual "accreted value" provision described above) simply because it might have OID for bankruptcy purposes. To the contrary, we understand that securities issued (or alleged to be issued) with OID generated in an exchange transaction were included in the auction with respect to CDS referencing Caesars Entertainment Operating Company

Inc. obligations. There are also a number of other instances where obligations issued with OID were included in the Final List of Deliverable Obligations, including General Motors, Visteon Corporation, and R.H. Donnelley Corp.[10]

c. The Definitions specifically contemplate that the Determinations Committee may set an Outstanding Principal Balance without regard to whether bankruptcy law may reduce the size of the claim as a result of OID, as the Determination Committee has done many times. As a result, CDS market participants regularly assume that there can be a difference between the Outstanding Principal Balance for auction purposes and the allowed amount of the claim in bankruptcy.

d. Even if the Determinations Committee deviated from past practice and tried to predict what the Bankruptcy Court will do in this instance, the Challenge itself cites to only two cases – *LTV Corp. v. Valley Fidelity Bank & Trust Co. (In re Chateaugay Corp.)*, 961 F.2d 378 (2d Cir. 1992) and *Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC, et al.),* 501 B.R. 549, 584-87 (Bankr. S.D.N.Y. 2013) – both of which *declined* to disallow any portion of the contractual claim based on OID in the underlying exchange transactions. While the Challenge attempts to distinguish those cases from the present circumstances, it admits that there "is no precedent" for that disallowance, and "it is entirely unclear" whether that disallowance will occur.

e. The Determinations Committee has taken pains to avoid predicting litigation outcomes. This is no more evident than with respect to the Reference Entity, where the Determinations Committee ruled in December 2017 that the contested acceleration of the Original Notes was not a Failure to Pay Credit Event. It would therefore be wholly inappropriate for the Determinations Committee to reverse course here and speculate on an outcome in a potential litigation in bankruptcy court, under circumstances for which there "is no precedent."

f. To add insult to injury, the Challenge asks the Determinations Committee not to reduce the deemed quantum of the New Notes (as it posits a Bankruptcy Court might do) but to disqualify the New Notes altogether. There is utterly no basis in the Definitions for the Determination Committee to take such a radical step, well beyond anything the Bankruptcy Court itself would entertain.

g. Finally, the Challenge makes much hay of public statements made by Aurelius and the Reference Entity highlighting the uncertainty with respect to the allowability of OID on the New Notes. Those statements were all made before Windstream's bankruptcy case began and were explicitly premised on the possibility that the venue for that case might be outside the Second Circuit. As subsequently occurred, Windstream filed for bankruptcy in the Second Circuit, indeed in the same District in which the *Rescap* decision was issued.

[10] The Challenger's position on OID, if accepted by the DC would lead to the absurd and untenable result that any obligation issued in an exchange transaction would not be deliverable in the auction unless both (i) the exchange was a par-par exchange (as was the exchange in *Chateaugay*) and (ii) the bankruptcy filing occurred in the Second Circuit and was thus bound by *Chateaugay*. That simply cannot be the case.

III. The Recent Sears Decision Supports Inclusion of the Challenged Obligations

a. The timing and nature of the Challenge suggest an attempt by a seller of CDS protection to manufacture a short squeeze by excluding Deliverable Obligations from the auction. Indeed, were the Challenge to succeed, more than 56% of the total unsecured obligations would be excluded from the auction. Naturally, these obligations are expected to be the cheapest to deliver Deliverable Obligations.

b. The External Review Panel recently recognized in connection with the Sears auction that the "commercial objective" underlying the drafting of the Deliverable Obligation Characteristics was "to cast a wide net to ensure greater liquidity through greater deliverability in order to avoid situations where no deliverables were available." Decision and Analysis of the External Review Panel of the U.S. Determinations Committee (DC Issue 2018101502), ¶ 3.[11] Consistent with this objective, to the extent there is any ambiguity in the Definitions, the Determinations Committee should construe them in such a way as to avoid the potential for a short squeeze.

CONCLUSION

In sum, for the reasons set forth herein, the Determinations Committee should reject the Challenge and conclude that the Challenged Obligations are Deliverable Obligations fit for inclusion on the Final List of Deliverable Obligations.

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We confirm that a copy of this submission may be provided to the members of any Credit Derivatives Determinations Committee convened under the DC Rules to consider the issues discussed herein, and that it may be made publicly available on the ISDA Credit Derivatives Determinations Committee website. We accept no responsibility or legal liability in relation to its contents.

[11] *Available at* https://www.cdsdeterminationscommittees.org/documents/2018/12/external-review-panel-decision-december-21-2018.pdf.