

Hearing date: March 25, 2010

Objections Date for Movants' Rule 60
Motions: January 29, 2010

Objections Date for Motion by Barclays Capital Inc.
to Enforce the Sale Order and Secure Delivery of All
Undelivered Assets: March 4, 2010

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

LEHMAN BROTHERS HOLDINGS INC., *et al.*,

Debtors.

Chapter 11 Case No.
08-13555 (JMP)
(Jointly Administered)

In re

LEHMAN BROTHERS INC.,

Debtor.

Case No. 08-01420 (JMP)

**MEMORANDUM OF BARCLAYS CAPITAL INC. IN OPPOSITION TO THE RULE 60
MOTIONS AND IN SUPPORT OF MOTION OF BARCLAYS CAPITAL INC. TO
ENFORCE THE SALE ORDER AND SECURE DELIVERY OF ALL UNDELIVERED
ASSETS**

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January 29, 2010

Barclays Capital Inc. (“Barclays”) hereby submits its response to the Rule 60 Motions filed September 15, 2009 by Lehman Brothers Holding Inc. (“LBHI” or “Debtor”), the Trustee appointed under the Securities Investors Protection Act (“SIPA”) by the Securities Investor Protection Corporation (“SIPC”) (the “Trustee”) for Lehman Brothers Inc. (“LBI”), and the Official Committee of Unsecured Creditors of LBHI (“Creditors’ Committee” or “Committee”) (LBHI, the Trustee, and the Creditors’ Committee referred to collectively herein as “Movants”) (LBHI and LBI referred to collectively herein as “Lehman”). In accordance with paragraph 1 of the stipulated amendment to the Scheduling Order dated October 27, 2009, this brief and its supporting materials are also submitted in support of Barclays’ affirmative motion to enforce the Sale Order and the Purchase Agreement, and to require delivery of certain Purchased Assets not yet delivered by Seller (the “Undelivered Assets”).¹

PRELIMINARY STATEMENT

1. The fall of Lehman in September 2008 sent shock waves throughout the financial markets, and helped trigger the worst financial crisis since the Great Depression. With the encouragement and support of the Federal Reserve Bank of New York (“New York Fed”), the Securities and Exchange Commission (“SEC”), SIPC, the SIPC Trustee, and other independent parties, Barclays agreed to purchase the assets of the failed Lehman business. The Purchase Agreement provided for Barclays to acquire “all of the assets” used in the “Business,” except specifically defined “Excluded Assets,” with the “Business” defined as:

the U.S. and Canadian investment banking and capital markets business of the Seller including the fixed income and equities cash trading, brokerage, dealing, trading and advisory business, investment banking operations, and LBI’s business as a futures commission merchant.

¹ Where not otherwise defined herein, capitalized terms shall have the same meaning as provided in the Sale Order and the Purchase Agreement.

2. The Court correctly approved this historic transaction (the “Sale”). In doing so, the Court helped provide some measure of stability to the growing panic throughout the world’s financial markets. The Court’s approval allowed the prompt transfer of over 72,000 customer accounts to Barclays, providing them with a solvent broker-dealer through which they could access their accounts, avoiding what might otherwise have been a “contagion” of even greater panic and uncertainty. It also preserved thousands of jobs. And, as the Court was told at the time, the Court’s approval maximized the value to the Lehman estates of the “wasting assets” that were sold – avoiding potential losses in the “hundreds of billions of dollars.”²

3. One year later — after the financial markets had stabilized — the Lehman Estates and the Creditors’ Committee filed motions asking the Court to modify its Sale Order and to rewrite the terms of the Purchase Agreement governing the Sale. The Movants do not challenge the fact that the Barclays acquisition was far better for the Lehman Estates and its creditors than the incalculable losses posed by an LBI liquidation. Instead, they claim the deal was too good for Barclays, and therefore ask the Court to rewrite the terms of the Sale.

4. Indeed, the Rule 60 Motions are nothing more than a blatant attempt to *breach* both the Sale Order and the Purchase Agreement. The Debtor and the Trustee owe Barclays billions of dollars of assets that are *specifically identified* in the Purchase Agreement. The Debtor effectively admits that the Purchase Agreement entitles Barclays to these assets, but now asks the Court to rewrite the agreement, so that the Lehman Estates may avoid their contractual obligations. The Trustee takes a slightly different, but equally audacious approach: he offers strained contractual interpretations, but then argues that if the Court rejects those interpretations,

² BCI Ex. 49 [Sept. 19, 2008 Hearing Tr.] at 102:3-103:11.

the Court must *nullify* the contract, and impose a new one — one which was never discussed or agreed to, and to which Barclays never would have agreed.

5. The Court should reject these extraordinary requests. They are based upon a series of distortions and fictions. They also contradict well-established legal doctrines that absolutely bar the Movants' claims. The Court does not need an evidentiary hearing. As a matter of law, it should reject the Rule 60 Motions, should enforce the plain terms of the Purchase Agreement, and should order delivery to Barclays of the Undelivered Assets.

Both Weil Gotshal And Lazard Stand By Their Presentation To This Court And Believe All Lehman Executives Acted In Good Faith.

6. The two professionals who asked the Court to approve the Sale on behalf of the Debtor — Harvey Miller of Weil Gotshal & Manges (“Weil Gotshal”) and Barry Ridings of Lazard — have reviewed the Debtor's Rule 60 Motion. They both *stand by their presentations to the Court* recommending approval of the Sale as the best deal for the estates. They also both believe the Lehman executives involved in the Sale *acted in good faith*.

7. Testifying on behalf of Weil Gotshal, Mr. Miller confirmed he had read the Rule 60 Motion filed by his client,³ confirmed that he stood by his presentation to the Court, and stated he had no basis for believing that anyone at Lehman acted in bad faith:

Q. Based on everything you know as of today, do you believe that your presentation to the Court on September 19 was fair and accurate and appropriate?

A. I believe that it was fair, accurate and appropriate based upon the information which we were given and the assumption that everyone at Lehman was acting in good faith.

Q. And have you found anything since then that has led you to believe that the information that you were given was inaccurate or that the people at Lehman were not operating in good faith?

A. No.

³ BCI Ex. 87 [Miller Dep. Tr.] at 56:4-9.

Id. at 59:18-60:7.

8. Mr. Ridings also confirmed he had read the Rule 60 Motion, and emphatically stood by his support for the Sale: “I believe today that there was no other alternative; that [the Sale] was the best alternative at the time.”⁴ He also testified he had no reason to believe anyone at Lehman acted in bad faith:

Q. Have you become aware of anything since that hearing that has led you to believe that the information you received from Lehman was inaccurate in any way?

A. I do not believe that Lehman gave me inaccurate information. They — in an unbelievable stressful period, they gave us whatever information they had. Remember, things were changing by the second.

Q. Do you have any reason to believe that those at Lehman who were dealing with Barclays that week were not acting in good faith?

A. I have no reason to believe that to be the case.

BCI Ex. 92 [Ridings Dep. Tr.] at 49:13-50:3.

9. Even the Debtor’s own CEO, Bryan Marsal, when asked whether he had any basis for believing anyone at Lehman breached their fiduciary duties in connection with the Sale, testified “I don’t have any evidence. I don’t have facts one way or the other.” BCI Ex. 84 [Marsal Dep. Tr.] at 76:15-16.

10. Everyone acted in good faith. The Movants complain that Barclays made employment offers to some of the top executives before the Closing, but the disinterested members of the Lehman Boards were told of this at the time, and approved the Sale.⁵ It was understood that Barclays had to retain Lehman’s top talent to keep the Business intact. Moreover, the lead Lehman negotiator, Bart McDade, would not discuss employment until after

⁴ BCI Ex. 92 [Ridings Dep. Tr.] at 13:2-4.

⁵ BCI Ex. 104 [Minutes of the Sept. 16, 2008 LBHI/LBI Board Meeting].

the Closing. He joined Barclays to help oversee the transition—but he never accepted a bonus. The Movants’ insinuations of “bad faith” are frivolous.

The Sale Was The Purchase Of The Assets Of A Business: It Was Neither Structured As A “Wash” Nor Represented To The Court To Be A “Wash.”

11. In requesting approval for the Sale, Weil Gotshal presented the Court with an Asset Purchase Agreement (“APA”) that made clear Barclays was acquiring “all of the assets” used in connection with the Business, other than specifically Excluded Assets. The APA did not provide total valuations for either the Purchased Assets or the Assumed Liabilities. It did provide initial estimates for many of the financial assets and liabilities in the trading portfolio, and these estimates showed Barclays was acquiring trading assets *in excess* of trading liabilities.⁶

12. The Debtor’s lawyers also presented the Court with a Sale Order which provided that to consummate the transaction, Barclays needed assurances that it was not taking on any liabilities to the Debtors (or anyone else) beyond those specifically set forth in the contract.⁷ Neither the Purchase Agreement nor the Sale Order makes any finding, representation, or warranty as to any agreed *valuation* of the assets being acquired, or the liabilities being assumed. They say nothing about the deal being a “wash.”

13. Yet the Movants base their Motions on the fictitious claim that the Sale was *required* to be a “wash” — with the values of the assets acquired by Barclays equal to the liabilities assumed by Barclays. That is false. Barclays never agreed to such a requirement, and never would have agreed to such a requirement.

⁶ See Fact Sect A(2), *infra*..

⁷ BCI Ex. 16 [Sale Order] at ¶ O (“Free and Clear Findings Needed by Purchaser”), ¶ P (“No Liability Findings Needed By Purchaser”), ¶ S (“No Successor Liability”) (finding that Barclays would not have “any liability or responsibility to the Debtors except as is expressly set forth in the Purchase Agreement.”) (underlining in original); *see also id.* at ¶¶ 4, 8, 10 (“The transfer of the Purchased Assets to Purchaser under the Purchase Agreement shall not result in . . . (iii) Purchaser, its affiliates, members, or shareholders, or the Purchased Assets, having any liability or responsibility to the Debtors except as is expressly set forth in the Purchase Agreement.”).

14. Again, both Mr. Miller and Mr. Ridings — the two advisers of the Debtor who recommended that this Court approve the Sale — rejected this “wash” concept out of hand. Mr. Miller denied that the Sale was presented to the Court as a “wash”:

Q. *Did Weil Gotshal ever tell the Court, directly or indirectly, that the deal was going to be a wash?*

A. *I don't believe so. I did not, certainly.*

Q. *Did you in fact believe that the deal was going to be a wash?*

A. *I hadn't — I did not hear the expression “wash” until very recently.*

BCI Ex. 87 [Miller Dep. Tr.] at 60:12-21 (emphasis added).

15. Mr. Ridings was equally dismissive of the Movants' assertion that the deal was somehow structured to be a “wash”:

Q. *Was the deal structured to be a precise wash Mr. Ridings?*

A. *I do not think it was structured that way.*

BCI Ex. 92 [Ridings Dep. Tr.] at 17:5-10 (emphasis added) (objections omitted).

16. Given that the transaction was negotiated on an emergency basis in the middle of a financial crisis, such a guaranteed “wash” result would have been impossible.⁸ Moreover, Barclays would not have agreed to it. It was important to both the Barclays Board and to its regulators that the transaction would, under Barclays' accounting, result in some measure of positive capital accretion. That result could of course not be guaranteed, but Barclays negotiated

⁸ When asked how the sale could possibly be structured as a wash in these circumstances, the Debtor's CEO could only state that Barclays could have had a “cushion” (a spread between assets and liabilities — as was in fact the case under the APA), and then for there to be a contractual “true-up” provision. There was no such contractual true-up provision. Indeed, the Court was expressly told that the only thing remotely close to such a provision was being *removed* from the agreement. BCI Ex. 49 [Sept. 19, 2008 Hearing Tr.] at 47:7-10.

in good faith to acquire assets and liabilities that it believed, as accounted for on *its* balance sheet, would result in some positive capital (or “negative goodwill”).⁹

17. Barclays made no secret of this. Two days before this Court was asked to approve the Sale, Barclays *publicly announced to the world*, in both a press release and a public conference call with analysts and investors, that it expected the deal to generate a day one accounting gain, and to result in a deal that would be “capital ratio accretive” in the amount of approximately \$2 billion (post tax). Before the Sale Hearing took place, that same public information was emailed to over two dozen senior Lehman executives, as well as to Lazard and the Committee’s advisors. There was nothing secret or even surprising about this fact. As Harvey Miller put it: “I assumed that Barclays was not making this acquisition for the purpose of taking a loss.”¹⁰

18. Barry Ridings was even more emphatic: “If Barclays lost money on this transaction, it would have been the end of the U.S. capital markets.”¹¹

19. The creditors took note of the Barclays expectation of an acquisition gain, and some of them objected to it. At the Sale Hearing, at least two creditors objected to the fact that Barclays was buying assets at a “discount” and a “fire sale” price.¹² This Court correctly rejected those objections, holding that Barclays was the only viable alternative to a potentially

⁹ It was hardly unusual for a distressed sale in the middle of the financial crisis to result in negative goodwill (or positive capital) on the acquisition balance sheet. In March 2008, JP Morgan purchased Bear Stearns for \$250 million, and initially recorded over \$10 billion of negative goodwill on the deal. Similarly, the Lloyds acquisition of HBOS generated over £11.2 billion of negative goodwill. See BCI Ex. 341 [Pfleiderer Report] at ¶ 120, Ex. 8.

¹⁰ BCI Ex. 87 [Miller Dep. Tr.] at 64:20-65:6.

¹¹ BCI Ex. 92 [Ridings Dep. Tr.] at 25:24-26:2.

¹² BCI Ex. 49 [Sept. 19, 2008 Hearing Tr.] at 173:24-174:8, 227:5-15.

“disastrous” liquidation, and that the public interest and the interests of the Estates were best served by an immediate approval.¹³

20. Indeed, Mr. Ridings reviewed the accounting gain recorded by Barclays on the Sale, and confirmed that it was not inconsistent with his understanding of the Sale. He also emphatically stood by his proffered presentation to the Court, and his conclusion that the Sale to Barclays was unquestionably superior to the catastrophic liquidation it avoided:

Again, my testimony was that [the Sale] was the highest and best alternative that we had, and the alternative was liquidation. *I was confident and remain confident that this transaction was better than a liquidation would have been.*

Id. at 65:10-15 (emphasis added).¹⁴

Movants’ Alleged “Secret Discount” Was Neither Secret Nor A Discount.

21. The Movants complain that there was a “secret discount” because the estimated “book value” of certain of the financial inventory set forth in the APA may have been less than the “marks” on Lehman’s books. This complaint is a gross distortion. By the week of September 15, 2008, the Lehman “marks” for many of its financial assets were stale and overstated. Barclays did not agree with those marks, and did not want to accept those marks and then have to take an immediate write down after the Sale. Thus, the “discount” described throughout the Movants’ Rule 60 Motions is not a discount *from* fair market value, but rather an attempt to adjust from stale Lehman marks *to* fair market value. As Harvey Miller testified in his deposition, “I wouldn’t call that a discount.”¹⁵

¹³ BCI Ex. 49 [Sept. 19, 2008 Hearing Tr.] at 248:8-251:3.

¹⁴ *See also id.* at 12:15-17 (absent a sale to Barclays, “the prices of securities would have dropped by enormous amounts”); *id.* at 13:2-4 (“I believe today that there was no other alternative; that [the Barclays sale] was the best alternative at the time.”).

¹⁵ BCI Ex. 87 [Miller Dep. Tr.] at 112:17-114:2.

22. In any event, there is *nothing* “newly discovered” about this. Harvey Miller testified that there was a “persistent theme” throughout the negotiations that “Lehman was always aggressive on its marks.”¹⁶ Likewise, Barry Ridings of Lazard testified that “it was my understanding that throughout the week Barclays had said that the marks were not appropriate; that they were too high because they were no longer market or stale.”¹⁷

23. There likewise is *nothing* “newly discovered” about the fact that certain Lehman finance executives described this discussion of the financial inventory as involving a “discount.” One of the key emails on which the Movants rely to show the alleged “secret discount” was sent to Lazard on September 17, 2008 — two days before the Sale Hearing at which Lazard appeared and testified in support of the Sale. As part of its “diligence,” Lazard reviewed and responded to the email. In deposition, Barry Ridings of Lazard confirmed he was “intimately involved” in the negotiations, testified that “[t]here were no secret discussions,” and agreed that “there’s nothing secret” about Barclays believing the Lehman marks were stale and overstated, since Barclays “said that all the time.”¹⁸

24. Despite the foregoing, the Debtor’s “special counsel” asserts that it was only during the 2004 discovery in August of 2009 that it was first “revealed” that Lehman understood the deal to involve a “five billion dollar discount” from the Lehman marks.¹⁹ That is *false*. Right after the Sale, Bryan Marsal made a presentation to the Creditors’ Committee which specifically described the Sale as involving the transfer of financial assets that had a “\$5.0 billion reduction” that was “negotiated” from “Lehman ‘stale’ marks.”²⁰ This was *the Debtor’s*

¹⁶ BCI Ex. 87 [Miller Dep. Tr.] at 34:10-20.

¹⁷ BCI Ex. 92 [Ridings Dep. Tr.] at 29:15-19.

¹⁸ BCI Ex. 92 [Ridings Dep. Tr.] at 31:10-16, 38:14-23, 39:11-17

¹⁹ LBHI Br. at ¶¶ 1-2, 5; BCI Ex. 52 [Dec. 11, 2009 Hearing Tr.] at 39:18-24.

²⁰ BCI Ex. 131 [Oct. 8, 2008 Report by Alvarez & Marsal to Creditors’ Committee] at p. 28.

internal description of the deal at the time of the Sale, as shared with the Committee. It was *not* discovered in August 2009.

25. Indeed, Mr. Philip Kruse, the corporate representative who testified on behalf of both LBHI and Alvarez & Marsal, *admitted* that there is *nothing new* about the alleged “\$5 billion discount” from Lehman’s marks. He was asked what the difference was between the “\$5 billion discount” described in the Rule 60 Motion, and the \$5 billion “reduction” from “Lehman ‘stale’ marks” referenced in the October 2008 Alvarez & Marsal presentation:

Q. And you recall there being a discount talked about in that motion?

A. Yes.

Q. Is that the same discount that’s referred to on page 28 [of the October 8, 2008 Alvarez & Marsal report], the \$5 billion reduction?

A. I believe it applies to the same pool of securities.

Q. *Is it different in any way?*

A. *Well, no.* Again, because it applies to the same group of securities, the repo collateral, I think it is the same concept being communicated.

BCI Ex. 81 [Kruse Dep. Tr.] at 142:21-143:13 (objections omitted) (emphasis added).

26. Mr. Kruse went on to claim that LBHI and Alvarez & Marsal did not pursue this issue at the time of the Sale because “we had different priorities.” *Id.* at 242:2-244:7. The lawyers for the Creditors Committee likewise admitted they discussed “an overall theme” of “a \$5 billion mismatch” with Weil Gotshal *before the Closing*.²¹ But the Committee’s financial advisers testified that they did not follow up because “*Barclays was good for the money*” and “*that’s not the type of thing that you would run to court with your hair on fire.*”²²

²¹ BCI Ex. 88 [O’Donnell Dep. Tr.] at 155:22-6; 157:4-24.

²² BCI Ex. 58 [Burian Dep. Tr.] at 178:2-180:10 (emphasis added).

27. Finally, the Movants falsely claim that Barclays received a \$5 billion discount through the “mechanism” of taking over the “repo” agreement that was in place between LBI and the New York Fed.²³ But it was the *New York Fed*, not Barclays or Lehman, which insisted that Barclays take over that repo position. There was nothing “secret” about it. Before the Sale was even approved, the New York Fed asked Barclays to advance *\$45 billion in cash* to LBI, and in exchange Barclays was supposed to receive securities that had previously been pledged to the New York Fed, and that were supposed to be worth approximately \$49.7 billion.

28. But Barclays never actually received \$49.7 billion in repo collateral. Close to 40 percent of the securities in the repo collateral that were actually transferred to Barclays (which was in substantial measure *different* from what the New York Fed had received, and from what Barclays had been promised) could not be valued by looking them up on a Bloomberg or similar terminal. They were illiquid and exceptionally difficult to value. The parties *knew* there was uncertainty as to these asset values, and *knew* that the stated “marks” were higher than the actual values. They also knew that the Purchase Agreement provided for “all” of these assets to be Purchased Assets.

29. Ultimately, it took Barclays months to properly value the illiquid assets it received, after which it concluded that the fair value for accounting purposes of *all* of the Purchased Assets received in connection with the repo transaction was approximately \$45.5 billion.²⁴ And that amount *overstates* what would have been realized in any attempted

²³ Committee Br. at ¶¶ 45-46; LBHI Br. at ¶¶ 95-104.

²⁴ That amount includes everything (cash and securities) Barclays received in the December 2008 Settlement between the Trustee, Barclays, and JPMorgan Chase, which was approved by the Court at the request of the Trustee.

liquidation of those *illiquid* assets during September 2008. Thus, the repo collateral did not contain a discount — secret or otherwise.²⁵

The Estimates For Compensation And Cure Payments Were Rough Estimates Of Potential Exposure — As Weil Gotshal Explained To The Court.

30. The Movants claim the estimates relating to the “cure” and “comp” liabilities were “inflated” because they exceeded the accruals on certain provisional LBI balance sheets. But that fact was shared *before the Sale Hearing* with Weil Gotshal, Lazard, and Alvarez & Marsal. Harvey Miller told the Court the numbers being provided were *estimates* of “*potential exposure*” not precise accruals. Mr. Miller confirmed this in deposition: “The figures on comp and also the figure on the assumption of executory contracts was always a very contingent figure. Thus, nobody knew what contracts were going to be assumed and how many employees Barclays would ultimately keep.”²⁶

The Alleged “Additional Assets” Were Defined As Purchased Assets In The Plain Text Of The Contract.

31. The “additional assets” about which Movants complain are described in *plain English* in the Clarification Letter, which Weil Gotshal helped draft, which Committee and Trustee professionals reviewed before the Closing, which was filed publicly in Court, and which the Debtor and the Trustee defended on appeal. The Clarification Letter plainly provided that Barclays was acquiring all assets used primarily in the Business that were not specifically excluded, including (a) all of the assets transferred to Barclays as part of its replacement of the New York Fed’s repo loan to LBI (the “Repo Collateral”); (b) all of the assets in LBI’s clearance

²⁵ Prior to the Sale Hearing, Lehman itself had independently reached a similar conclusion concerning the original Fed repo collateral — estimating that securities marked at \$50.6 billion were worth closer to \$45.5 billion. BCI Ex. 370 [Seery Decl.] at ¶ 7. Moreover, James Seery, a senior Lehman executive, emphasized to the Committee, *before the Sale Hearing*, the \$5 billion difference between the marks on the repo collateral and the amount of the repo loan. BCI Ex. 370 [Seery Decl.] at ¶¶ 5-6.

²⁶ BCI Ex. 87 [Miller Dep. Tr.] at 81:6-11.

boxes (“Clearance Box Assets”); (c) all of LBI’s exchange-traded derivatives and any property held to secure those derivatives (“ETD Margin” or “Margin”); and (d) \$769 million of securities from the Rule 15c3-3 account, *or* equivalent securities from outside of that account.²⁷

32. There was nothing “secret” about any of this. The Debtor and the Trustee have failed to honor their written and court-ordered obligation to deliver certain of these assets, and the Court should now order them to do so.

The Clarification Letter Was Clearly Approved By The Sale Order.

33. Recognizing that they cannot avoid their own clear agreement to the terms of the contract, the Movants try to argue that the contract governing this historic transaction — the contract they agreed to and defended on appeal — was somehow not “approved” by the Court. That is preposterous. *This Court issued a Sale Order approving the Sale.* That Sale Order approved the “Purchase Agreement,” which the Order defined as including both the APA and the Clarification Letter— *i.e.*, a “letter agreement” that “may be subsequently modified or amended or clarified.”²⁸ As the Court *was told* by Harvey Miller, there had been “major changes in the transaction,” and the changes “weren’t finalized until about a half hour ago.”²⁹ As the Court *was also told* by Weil Gotshal, those changes would be reflected in what Weil Gotshal called a “Clarification Letter.” The Court *was also told* that this letter was still being finalized.³⁰

34. Indeed, certain creditors objected to this lack of a “final” contract. One creditor objected at the Sale Hearing, arguing that the Court should not approve a sale governed by “a contract that’s not complete.”³¹ The Court correctly rejected those objections, and accepted the

²⁷ BCI Ex. 5 [Clarification Letter] at §§ 1(a)(ii), 8(ii).

²⁸ BCI Ex. 16 [Sale Order] at p. 1.

²⁹ BCI Ex. 49 [Sept. 19, 2008 Hearing Tr.] at 43:17-20.

³⁰ *Id.* at 48:8-10, 55:22-23.

³¹ *Id.* at 173:7-9.

arguments of the Debtor, the SIPC Trustee, and government regulators that expedited approval was absolutely necessary for the Estate and for “the national interest.”³² The Court then approved the Sale through an Order approving the contemplated but not yet finalized Clarification Letter referenced by Weil Gotshal.

35. Moreover, the Clarification Letter actually narrowed what was in the APA: it *narrowed* the overall definition of Purchased Assets, and it *removed* from the list of Purchased Assets certain assets that had been specifically identified in the APA, but that Lehman was unable to deliver. It then described the Purchased Assets referenced above, which the parties had identified and agreed upon *before* the Sale Hearing, and that were worth *less* than the estimated value of the removed assets.

36. The Clarification Letter also provided that, instead of acquiring “short positions” that would partially hedge the “long positions,” Barclays was to acquire an un-hedged portfolio, and was required to forgive its \$45 billion repo loan. In other words, under the Clarification Letter, *Barclays paid over \$45 billion in cash*, over and above the original “Cash Amount” contemplated by the APA. This massive cash outlay in the middle of the financial crisis substantially increased the risk for Barclays.

37. The Movants obviously all believed, correctly, that the Clarification Letter was approved. In his recent deposition, Mr. Miller confirmed that the Clarification Letter reflected the terms that were agreed before the Sale Hearing, and that it was clearly part of the Purchase Agreement approved by this Court, as specified in the Sale Order:

Q. And did this Clarification Letter represent, in substance, the deal that the Court had approved Friday night or early Saturday morning?

A. In my view, yes.

³² *Id.* at 61:9-13.

BCI Ex. 87 [Miller Dep. Tr.] at 48:19-49:15.

38. Mr. Miller further recalled there was actually a discussion after the Sale Hearing, but before the Closing, about going back to Court in connection with the Clarification Letter. The conclusion of that discussion was “it wasn’t necessary” to go back to the Court for further approval because the Clarification Letter “did not change the deal that was presented to the Court.” *Id.*

39. No one disagreed with Weil Gotshal’s conclusion. The Committee’s representatives told Mr. Miller: “Everything’s fine, and going forward, if it’s okay with you, it’s okay with us,” and “If you guys are satisfied with it, we’re satisfied.”³³

The Parties Did Not Agree Upon A Valuation Cap And Did Not Tell The Court There Was A “Valuation Cap.”

40. The Movants disingenuously claim that the Clarification Letter was somehow subject to a “valuation cap” on the value of the Purchased Assets Barclays was entitled to receive. This claim has no merit. Neither the APA nor the Clarification Letter contains any “valuation cap” or any representation or warranty as to the final value of the assets being acquired. The nature of the financial assets being transferred to Barclays — many of them illiquid structured securities that were extremely difficult to value in the financial crisis — would have made such representations or warranties untenable. No one ever agreed to a “valuation cap” or even discussed it. Again, Mr. Miller flatly rejected this recent invention of the Movants:

Q. Now, in this agreement, there are no values specified for any of the assets that are being transferred or the liabilities being assumed, correct?

A. I believe that’s correct.

Q. Why is that?

³³ BCI Ex. 87 [Miller Dep. Tr.] at 29:10-25, 101:13-102:5.

A. It was a purchase of the business and the assets that went with that business, to the extent not excluded.

Q. *And those – and those assets that were being purchased were being purchased irrespective of what their value was, correct?*

A. *Essentially, yes.*

BCI Ex. 87 [Miller Dep. Tr.] at 50:18-51:6 (emphasis added).

The Movants Are Simply Trying To Re-Trade The Deal Because Barclays Recorded A Gain On The Transaction.

41. In sum, there is no “new evidence,” there were no “secrets,” and there was no bad faith. At bottom, Movants are just complaining that Barclays got too good a deal. But they ignore the enormous risks Barclays took, and they distort the nature of the acquisition gain Barclays recorded.

42. Barclays acquired the assets of a Business that was rapidly disintegrating; that Business included financial assets that were constantly changing, in both identity and value, due to Lehman’s collapse and the crisis in the market; those assets were in many instances illiquid and carried stale marks; and the future of the Business was far from assured in the middle of the worst financial crisis in decades.

43. In that highly uncertain environment, Barclays intended, and publicly announced that the deal would have a day one accounting gain to provide some cushion against all the risks it was assuming.³⁴ Ultimately, as a result of taking those risks, Barclays announced a gain of \$4.1 billion on the acquisition.³⁵ The Acquisition Balance Sheet reporting that gain *includes* over \$3 billion of assets that the Lehman Movants have refused to deliver: thus, it is absolutely

³⁴ BCI Ex. 110 [Sept. 17, 2008 Investor Teleconference Tr.] at p. 2.

³⁵ See BCI Ex. 134 [Barclays Form 6-K] (announcing after tax gain of £2.2).

false for the Movants to suggest to the Court that Barclays is seeking billions of dollars of assets *over and above* the gain that has already been recorded.

44. Moreover, over \$2 billion of the Barclays accounting gain reflects intangible assets and other assets that were *not* financial trading assets, that would have been worthless to Lehman in a liquidation, and that Barclays is required to amortize against future earnings. The Movants do not challenge any accounting gain from these assets. The balance of the gain can be attributed to the net value in the exchange-traded derivatives, which represented a serious risk to Barclays, as they contain both liabilities and assets, and there was scarcely any reliable information about them prior to the Closing. Neither side knew if there was significant net value there, but both sides knew they were included in the Sale, along with all associated margin. They also knew these assets carried risks: indeed, they subsequently caused over \$800 million of losses to Barclays, which are not on the Acquisition Balance Sheet.

45. Thus, the accounting gain was *far from guaranteed*, given the uncertainty as to the values of the assets and liabilities in the deal. One thing *was* certain, however: had the deal turned out differently, such that the plain text of the Purchase Agreement caused Barclays to incur a loss because the assets were worth even less than feared, Barclays would not have had the right to come back to Court a full year later to ask for revised terms. The Movants should not have that right either. In addition to being grossly unfair and legally barred, the relief requested by Movants is contrary to public policy and decades of jurisprudence upholding the finality of bankruptcy sales: it would scare away future bidders in future bankruptcies, especially in a crisis, when those buyers are needed most.

* * *

46. In this brief, Barclays provides an exhaustive account of the facts relating to the Sale. That is provided in the interest of full disclosure and a complete record. But this dispute does not require an evidentiary hearing. It should be resolved summarily, *as a matter of law*.

47. *First*, the plain terms of the Purchase Agreement require immediate delivery to Barclays of the Undelivered Assets. The terms of the Purchase Agreement unambiguously entitle Barclays to those assets, and should be enforced. Indeed, the Debtor (who actually negotiated the contract) does not dispute the *meaning* of the contract — to the contrary, the *premise* of its Rule 60 Motion is that the plain terms of the Purchase Agreement entitle Barclays to the assets in question. As a matter of law, the Court should reject the strained contractual arguments of the Trustee, and order delivery of the Undelivered Assets.

48. *Second*, the law does not permit the extraordinary relief sought by the Movants. At the time of the Sale, the Movants *knew* the plain terms of the Clarification Letter. They *knew* that it provided for Barclays to acquire the entire Repo Collateral. They *knew* that the Repo Collateral had “marks” of over \$49 billion. They *knew* Lehman finance executives characterized the deal as involving a \$5 billion “reduction” or “discount” from “stale” marks. They *knew* the estimates of *potential exposure* for “cure” and “comp” were higher than the LBI accruals that were available. They *knew all of this* when they agreed to the terms of the Sale, and when the Lehman Movants sought this Court’s approval of this historic transaction (to which the Committee did not object).

49. Moreover, by November of 2008, they *knew* that the amount of Barclays’ actual cure payments was much less than estimated. The Lehman Movants then filed appellate briefs before the District Court advancing all of the positions Barclays argues here, including: (a) “Barclays acted in *good faith*”; (b) the Clarification Letter was *part of the approved Purchase*

Agreement; (c) “[a]ll relevant facts regarding the Sale were disclosed to the Bankruptcy Court”; and (d) “[t]he only transaction available was the proposal by Barclays.”³⁶ They maintained that position on appeal through the District Court’s affirmation of the Sale Order in March of 2009. They are barred as a matter of law from changing these positions now.

50. Moreover, in December of 2008, the Trustee asked this Court to approve a settlement between Barclays, the Trustee, and JPMorgan Chase (“JPMorgan”), in which the Trustee *told this Court* that in the repo transaction, “LBI was to provide Barclays with \$49.7 billion in securities in exchange for \$45 billion in cash,” and likewise told the Court that since Barclays had not received the full amount of that Repo Collateral, it was entitled to the settlement in order to “achieve the intended economic outcome” of that transaction, and because the securities in the Repo Collateral were “contemplated to be transferred in the purchase agreement.”³⁷ The Trustee’s representative admitted in deposition that when he asked the Court to approve this settlement, the Trustee did not know whether the full amount of the Repo Collateral (including what would be received in the settlement) exceeded the \$47.4 billion “valuation cap” the Trustee now seeks to impose upon Barclays. The Trustee said *nothing at all* to the Court about that alleged valuation cap when he asked the Court to approve the December settlement. Nor did the Debtor, nor did the Committee. For one simple reason: *none of them believed that such a valuation cap was part of the deal.*

51. The law does not permit the Movants to abandon their prior positions, and to launch a wholesale attack on Barclays to reclaim assets that they all knew were promised to Barclays in the Sale this Court approved. The mandate rule is an absolute bar to their claims:

³⁶ BCI Ex. 33 [LBHI Brief in Opposition to Bay Harbour Appeal] at pp. 9, 18, 23, 26.

³⁷ BCI Ex. 29 [Trustee’s Motion for Entry of Order Approving Settlement Agreement] at ¶¶ 7, 10; BCI Ex. 50 [Dec. 22, 2008 Hearing Tr.] at 22:3-6.

the District Court affirmed the Sale Order, and that mandate is the law of this case. In addition, the long-established legal doctrines of judicial estoppel, equitable estoppel, and waiver all exist precisely in order to prevent the kinds of *ex post* claims made by the Movants. There is no “new evidence” that could possibly justify evading these legal bars. Moreover, granting any of the relief Movants seek would set a terrible policy precedent that would discourage future potential acquirers of assets out of bankruptcy.

52. Neither Rule 60 nor the Bankruptcy Code can possibly support the claims made by Movants. Rule 60 does not permit the Court to rewrite the terms of a written contract. And the Bankruptcy Code provisions invoked by Movants have no application to a sale that was expressly approved by the Court. The Movants cite no case, and Barclays is not aware of one, where a Court has permitted a party to contend that a sale was “unauthorized” after that party obtained Court approval for the sale, agreed to the contract governing the sale, and successfully defended that contract on appeal.

53. As a matter of law, the Court should summarily deny the Rule 60 Motions, and order the prompt delivery of all Undelivered Assets to Barclays.