Cutting Edge Issues in Bankruptcy

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I. Derivatives Issues in Lehman

The bankruptcy of Lehman Brothers Holdings Inc. ("LBHI") has provided a platform for the exploration of cutting edge questions concerning the operation of trading contracts, such as swaps, repurchase agreements, securities contracts and forward contracts, in the context of a bankruptcy case. Trading contracts are covered by the Bankruptcy Code's "safe harbor" provisions, which generally permit non-debtor counterparties to exercise contractual rights to terminate transactions, liquidate and apply collateral, and setoff mutual obligations, solely on account of the debtor's bankruptcy, without the need to obtain relief from the automatic stay. See 11 U.S.C. § § 555 (securities contract safe harbor), 556 (forward and commodities contract safe harbor), 559 (repurchase agreement safe harbor), 560 (swap contract safe harbor).

A. Close-out Amount

- Trading contracts generally provide for "full two-way payments" in the event that an event of default causes a contract to terminate prior to maturity. In general, when the non-defaulting party elects to terminate a contract on account of an event of default, that party is obligated to calculate an early termination amount. This calculation reflects the change in the relevant market between the date the contract was entered into and the date of termination. Market movements could result in a payment to either the non-defaulting party or the defaulting party.

- By way of example, if a swap calls for one party to pay a floating interest rate, tied to a recognized interest rate index, on a notional amount and calls for the second party to pay a specified fixed interest rate on the same notional amount, an increase in the interest rate curve will result in a payment due from the floating rate payer to the fixed rate payer.

- Under the 1992 ISDA Master Agreement, parties select one of two methods for calculating early termination amounts: Loss and Market Quotation.

  - Loss requires a party to reasonably determine its losses and costs in connection with the agreement.

  - Market Quotation requires a party to seek quotations from four leading dealers in the relevant market for the amount that would be payable

- The 2002 ISDA Master Agreement specified a new method for calculating early termination payments, “Close-out Amount”. Close-out Amount combines elements from Market Quotation and Loss and requires a good faith determination of losses and gains that would be realized from providing economic equivalent of material terms.

- On February 27, 2009, ISDA published the Close-out Amount Protocol. The Protocol amends all Master Agreements based on the 1992 form by replacing the Loss and Market Quotation provisions with the Close-out Amount provision of the 2002 ISDA Master Agreement. Parties may continue to use the Loss payment measure only by making the specified election in the Protocol Adherence Letter. *See* ISDA Close-out Amount Protocol, http://www.isda.org/.

- As a broker-dealer, Lehman signed the Close-out Amount Protocol, and a large volume of Lehman trades were with other broker-dealers, who also signed the Protocol. Accordingly, a large volume of Lehman trades will be subject to Close-out Amount, rather than Loss or Market Quotation.

- Close-out Amount is generally more favorable to the non-defaulting party and provides the party performing the calculation termination with greater flexibility and discretion.

- The proper interpretation of “close-out amount” has not yet been tested in court.

B. Suspension of Payment Under ISDA Master Agreement

- Lehman Brothers Special Financing Inc. (“LBSF”) and Metavante Corp. (“Metavante”) were parties to an interest rate swap transaction governed by a standard 1992 ISDA Master Agreement, and guaranteed by LBHI. Pursuant to the Master Agreement, the bankruptcy of either party or its credit support provider was an event of default and allowed the non-defaulting party to terminate all swap transactions under the Master Agreement.

- Metavante did not terminate the agreement, but instead entered into a replacement swap in October 2009 and suspended payments under the original swap agreement. Presumably, Metavante decided not to terminate in hopes that the market value of the swap transaction would move in its favor, thereby avoiding or reducing the termination payment it would be required to make to LBSF under the agreement.

- The Court held that a swap agreement that is not terminated is a normal executory contract, subject to section 365 of the Bankruptcy Code and the

C. Assumption and Rejection

- A non-terminated trading contract is executory. Thus, Lehman can assume and assign or reject trading contracts.

- Lehman obtained approval of a protocol streamlining the process for assumption and assignment of swaps.

  - The swaps may only be assumed and assigned if Lehman is successful in its argument that they were not effectively terminated previously. *In re Lehman Brothers Holdings Inc.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Sept. 17, 2009) (Docket No. 5209).

- A Debtor may attempt to realize the value embedded in an "in the money" contract by rejecting it.. However, rejection generally does not terminate an executory contract, but is merely a breach of the contract as of the day before the commencement of the bankruptcy case, resulting in a prepetition claim for damages. *See In re Lavigne*, 114 F.3d 379, 386-87 (2d Cir. 1997). Because the two-way termination payment provision is triggered by a termination, not merely a default, rejection may not succeed in unlocking the embedded value of a contract.

- Therefore, if the debtor wants to realize embedded value in a trading contract, assumption and assignment would appear to be the best method.

D. Setoff

- Section 553 of the Bankruptcy Code provides for the setoff of mutual prepetition debts.

- Many master agreements permit triangular or square setoffs, meaning that they allow a creditor to setoff amounts owed by it or its affiliates against debts owed to it by the debtor or its affiliates. Such provisions circumvent the requirement that only mutual debts may be setoff. This raises the question of whether triangular setoff pursuant to a safe-harbored trading contract can be enforced against a debtor.

- In a 2009 case, a Delaware bankruptcy court (the first bankruptcy court to address the issue) ruled that non-mutual setoff is impermissible, at least with respect to non-safe harbored contracts. *In re SemCrude, L.P.*, 399 B.R. 388 (Bankr. D. Del. 2009).

- The elimination of certain mutuality language from the safe harbor provisions pursuant to the 2005 and 2006 amendments to the Bankruptcy Code suggests that triangular setoff provisions in safe-harbored contracts may be enforceable. This issue has yet to be addressed by a court.

E. Ipso Facto Clauses and Swap Agreements

- BNY Corporate Trustee Services Limited ("BNY") serves as trustee under a Principal Trust Deed, which governs a multi-issuer secured obligation program. As part of that program, Saphir, a special purpose entity created by Lehman Brothers International (Europe), issued various series of credit-linked synthetic portfolio notes (the "Notes"), two series of which were held by Perpetual. Lehman Brothers Special Financing Inc. ("LBSF") entered into a swap agreement with Saphir. Collateral held in trust by BNY for the benefit of Saphir's creditors, including Perpetual and LBSF, backed the Notes. A Supplemental Trust Deed (together with all agreements underlying the Notes, the "Transaction Documents") governed each series of Notes. The Transaction Documents stipulated that they were subject to English law. The terms of the Transaction Documents included:

  - Upon LBSF default, payment priority reversed, subordinating Lehman's rights to those of Perpetual;

  - "Condition 44" modified calculation of an early redemption amount upon an LBSF default; and

  - Bankruptcy of LBSF or its credit support provider constituted an event of default, sufficient to trigger these provisions.

- Bankruptcy court holding;

  - The subordination provisions and Condition 44 are subject to Bankruptcy Code section 365 and 541, and are therefore unenforceable *ipso facto* clauses.

  - Because relevant terms were not contained within the four corners of the Swap Agreement, they were not subject to the Bankruptcy Code's safe harbor provisions which allow otherwise impermissible *ipso facto* clauses to be enforced in connection with the liquidation, termination or acceleration of swap agreements and certain other contracts. *See Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee*

- It remains an open question as to whether the safe harbor provisions would apply in any subsequent similar analysis where the relevant terms are contained in the swap agreement itself.

II. "Quick Rinse" Bankruptcies

The current cycle of bankruptcies has seen a faster track for corporate restructurings. Indeed, the President of United States described the potential bankruptcies of Chrysler and General Motors as a "quick rinse" anticipating the timely sale of those entities' assets within weeks of the bankruptcy filing.

- There are at least two principal reasons for these fast track bankruptcies:

  1) Debtors have been extremely overleveraged, leaving little for subordinated or unsecured creditors to fight over; *See generally* Westlaw Business Legal Currents, *Bankruptcy Risk: DIP Lenders Squash Others*, http://www3.gsionline.com/legalcurrents/Article_20090317_E2.asp?contactid=LearnWLCB (March 17, 2008), and

  2) Recent changes to the Bankruptcy Code, approved by Congress as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which shorten the time for cases, by among other things, limiting exclusivity to no more than 18 months. 11 U.S.C. § 1121(d).

- As cases have accelerated, Debtors have looked to at least two principal methods of shortening the time of a bankruptcy case:

  1) Asset sales pursuant to section 363 of the Bankruptcy Code; and

  2) "Prepackaged" chapter 11 plans.

A. Sales Pursuant to Section 363(b) of the Bankruptcy Code

An asset sale under section 363 of the Bankruptcy Code is an effective method for selling assets in a chapter 11 proceeding where there is urgency to complete a sale in order to preserve asset value.

- The debtor must demonstrate that a good "business reason" exists for the sale. Factors a court should consider in determining good business reason, include inter alia, (i) the value of the asset to be sold; (ii) the amount of time elapsed since the filing; (iii) the likelihood that a plan of reorganization will be proposed and confirmed in the near future; (iv) the effect on the proposed

- Asset sales may be accomplished pursuant to a private sale or a public auction. S*ee* Fed. R. Bankr. P. 6004(f)(1).

- Section 363 sales to be used for "melting ice cube" where asset value is declining precipitously. *See e.g. In re Equity Funding Corporation of America,* 492 F.2d 793, 794 (9th Cir. 1974), *cert. denied,* 419 U.S. 964 (1974) (finding of fact that because market value of asset was likely to deteriorate substantially in the near future, sale was in the estate's best interests).

1. Public Auctions

a. The Public Sale Process

- It is within the discretion of the trustee to determine whether a public auction or private sale is appropriate. *In re Alisa P'ship*, 15 B.R. 802, 802 (Bankr. D. Del. 1981). However, courts typically favor public auctions over private sales. *See generally In re Planned Sys., Inc.*, 82 B.R. 919, 923 (Bankr. S.D. Ohio 1988)).

- In order to protect sensitive information, before granting access, debtors typically require potential bidders to enter into confidentiality agreements.

- The process continues with the debtor's selection of an initial "stalking horse" bidder. The bid submitted by the stalking horse is then used as a platform for attracting competing bidders who are also seeking to acquire the assets being sold by the debtor. As consideration for the effort and expense incurred by the stalking horse and the benefits to the debtor in having secured an opening bid, the debtor often seeks to grant the stalking horse certain bidding protections that are triggered in the event that the debtor consummates the asset sale with a different bidder. These bidding protections include a breakup fee and/or an expense reimbursement for documented fees and expenses incurred. 3 Collier on Bankruptcy ¶ 363.02[6] (15th ed. rev. 2008).

b. Bidding Procedures

- Prior to auction, the Debtor establishes bidding procedures subject to court approval. Bidding procedures generally require, among other things, that bidders (i) post a good faith deposit; (ii) deliver a financial disclosure demonstrating that the bidder has the financial wherewithal to consummate the sale; and (iii) provide a purchase agreement including terms and conditions no less favorable than the agreement submitted by the stalking horse, and a purchase price that accounts for any payments that the debtor will

- Section 363(k) allows the court to authorize a secured creditor to credit bid its claims. *See* 11 U.S.C. § 363(k).

c. Sale Hearing

- To consummate a sale under section 363 of the Bankruptcy Code, the debtor must file a motion with the bankruptcy court seeking approval of the sale.

- The primary concern of a bankruptcy court in an asset sale is the maximization of the value of the asset sold. Therefore "[in] order to receive approval of a proposed sale of assets, the debtor will need to demonstrate to the bankruptcy court that the proffered purchase price is the highest and best offer." *In re Integrated Res., Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992).

- "An unsuccessful bidder usually lacks standing to challenge a bankruptcy court's approval of a sale transaction." *In re Colony Hill Assocs.*, 111 F.3d 269, 273-74 (2d Cir. 1997).

2. Case Study: Chrysler & GM

- In the fall of 2008, GM and Chrysler faced severe liquidity shortages triggered by rising gas prices, falling consumer demand and the global recession. By early 2009, the U.S. Treasury and the automakers each focused on a plan to sell the core assets of each company through a very quick sale in bankruptcy pursuant to section 363 of the Bankruptcy Code. In each case, the sale left the estate with only "bad" assets plus any purchase price. All "good" assets were transferred to New Cos.

- In Chrysler's case, the U.S. Treasury agreed to lend $2 billion to New Chrysler, a newly-created entity to be owned by Fiat, the UAW, the U.S. Treasury and Canada, which would bid this cash in exchange for Chrysler's assets. Old Chrysler would then distribute the sale proceeds to the bankruptcy estate in accordance with the Bankruptcy Code prior to sending this cash to its senior lenders for payment.

- In GM's case, the U.S. Treasury created New GM, a newly-created entity to be owned by the U.S. Treasury, the UAW and Canada, and contributed to New GM, Treasury and Canada's claims with respect to their prepetition and DIP loans. New GM would "credit bid" those claims in exchange for the core assets of Old GM.

- Chrysler completed its sale in 42 days after petition date, and GM after 41 days.

3. Courts Approved the Chrysler and GM Sales

- The Bankruptcy Court approved the Chrysler sale and clarified the law regarding section 363 asset sales in bankruptcy.
  - Not a sub rosa plan. The Bankruptcy court found, "the sale of assets is not a *sub rosa* plan of reorganization. The Debtors are receiving fair value for the assets being sold. Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders." *In re Chrysler LLC*, 405 B.R. 84, 97 (Bankr. S.D.N.Y. 2009)
  - Sale free and clear. The Bankruptcy Court also addressed the issue of selling free and clear of obligations and ruled that New Chrysler could buy free and clear from tort claims, as well as any potential state law successor or transferee liability claims. *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009)
  - Updated law. The approval of the sale was generally consistent with prior applicable law. *In re Chrysler LLC*, 405 B.R. 84, 87 (Bankr. S.D.N.Y. 2009)
- On Appeal, the Second Circuit upheld the Bankruptcy Court's decision. *In re Chrysler LLC,* 576 F.3d 108 (2d Cir. 2009). However, the Supreme Court vacated as moot the Second Circuit opinion. *Indiana State Police Pension Trust v. Chrysler LLC,* No. 09-285 2009 WL 2844364 (U.S. Dec. 14, 2009).
- The Bankruptcy Court approved the GM sale, primarily citing to the Second Circuit's ruling in favor of the Chrysler sale and noting the GM case was substantially similar. *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009). This matter is on appeal.

B. Prepackaged Bankruptcy

Prepackaged bankruptcies are a form of consensual chapter 11 restructuring that combines both out-of-court work outs and the structure of conventional bankruptcy. They are best utilized for overleveraged companies that do not require operational restructuring; particularly holding companies with no operations. Prepacks shorten the bankruptcy process. Prior to filing a chapter 11 petition, the debtor negotiates with key creditors to develop a chapter 11 reorganization plan. The debtor then files its chapter 11 petition and "first days" simultaneously with the reorganization plan and disclosure statement. The bankruptcy court will immediately set a hearing date to approve the disclosure statement and shortly thereafter schedule confirmation. Confirmation can be in as little as thirty to forty-five days from the commencement of the chapter 11 case.

1. Types of Prepackaged Chapter 11 Cases

- Fully Prepackaged - debtor solicits all classes entitled to vote prepetition.

- Partially Prepackaged - debtor solicits acceptances of a proposed plan from certain key creditors prior to commencing chapter 11 and solicits remaining creditors after the case is filed.

- Dual Track Approach - combines a traditional exchange offer and the solicitation of a prepackaged chapter 11 plan. If the debtor receives sufficient support for the exchange offer, no bankruptcy will be filed. If needed consents are not obtained, but enough acceptances to meet the bankruptcy code requirements, a chapter 11 plan is filed and the acceptances of the exchange offer are counted as votes in favor of the plan.

- Single Track Approach - negotiate and propose a plan and solicit acceptances with the intent of commencing a chapter 11 case.

2. Benefits of Prepackaged Bankruptcies

- By locking in the support of key constituencies before the commencement of a case in bankruptcy court, the company retains control over the length and nature of the proceeding, including the role of management in the restructured company.

- Debtors spend less time in bankruptcy and as a result there is less impact on the business by avoiding customer drain and avoiding competitive disadvantage that stems from filing a chapter 11 petition, reduced administrative expenses, and a high probability of obtaining successful chapter 11 plan because they already reached agreement with creditors.

3. Risks Associated with Prepackaged Bankruptcies

- Risks associated with prepackaged bankruptcies include: Court approval for the solicitation of votes; debtors do not receive the benefit of automatic stay protection during negotiations; debtors cannot reject executory contracts until after filing a chapter 11 petition; the process gives advance notice to creditors of debtor’s plan to file chapter 11 case and thus there is the possibility that creditors may not cooperate in negotiations and force an involuntary bankruptcy; unliquidated or contingent claims are difficult to determine outside of the chapter 11 case; problems with equity holders; and debtors may not have benefit of the Safe Harbor of the Bankruptcy Code or section 1145 exemption from registration.

- Must disclose consistent with applicable federal and state securities laws.

4. Consensual vs. Nonconsensual Confirmation

- All plans must meet confirmation standards such as feasibility test under section 1129(a)(11) of the Bankruptcy Code and the "best interest test" under section 1129(a)(7) of the Bankruptcy Code.

- Consensual Confirmation

  - This occurs when all impaired classes have accepted the plan. Section 1129(a) of the Bankruptcy Code requires that each class vote to accept the plan. Acceptance by a class of claims or interests requires the affirmative vote of more than 1/2 in number and 2/3 in amount of the total allowed claims voting in a particular class. 11 U.S.C. § 1126.

- Nonconsensual Confirmation

  - "Cramdown" under section 1129(b) of the Bankruptcy Code, requires the plan proponent to meet all of the requirements contained in section 1129(a) except the requirement that each class of creditors vote to accept the plan. Instead, the plan proponent must show that at least one impaired class has accepted the plan, that the plan does not discriminate unfairly and the plan meets the absolute priority rule. 11 U.S.C. § 1129(b).

5. Case Study: CIT Group Inc.

- CIT Group Inc. is a bank holding company that provides commercial financing, leasing products and management advisory services. Suffering from loses on subprime mortgages and tightening credit markets, prior to filing CIT had $71 billion in assets and $64.9 billion in debt. On November 1, 2009 CIT filed a prepackaged chapter 11 bankruptcy, and after only 5 ½ weeks, the plan was confirmed on December 8, 2009. *In re CIT Group Inc.*, Case No. 09-16565 (ALG) (Bankr. S.D.N.Y. Nov. 1, 2009).

- Summary of the Prepack Terms:

  - CIT sought a dual-track bankruptcy where the Offering Memorandum described both an out-of-court and bankruptcy restructuring with the out-of-court restructuring including more favorable terms.

  - CIT received insufficient votes for the out-of-court restructuring and was forced to cram down a prepackaged bankruptcy. The plan reduced the company's debt by eliminating $10.5 billion to $11 billion in unsecured debt. Senior bondholders received 70 cents of new Notes, plus new common stock. Subordinated Noteholders received new common stock and contingent value rights. Preferred stockholders received contingent value rights, and common stockholders received no recovery at all. *In re CIT Group Inc.*, Case

III. Roll-up DIP Loans

- In the current economic climate it has been difficult for debtors to secure DIP financing, thus lenders have proposed creative and sometimes onerous terms to make financing attractive including high interest rates, restrictive covenants, milestones, and roll-up of prepetition financing.

- Under a roll-up, the pre-petition debt is effectively "rolled-up" into the postpetition loan. Cash proceeds generated by the disposition of collateral securing the prepetition loan, such as inventory, are collected and applied over time to reduce the prepetition claim and at the same time, new advances under the postpetition facility are made, secured by liens on postpetition collateral. *See* 3 Collier on Bankruptcy ¶ 364.04[2][e] (15th ed. rev. 2008).

- Typically, roll-ups are an enhancement or incentive for a prepetition secured lender to make a "defensive" DIP loan to a debtor.

A. Standards for Roll-up

- Historically, roll-ups have been controversial, but in recent years have gained wider acceptance.

- In determining whether to approve the roll-up, the court must evaluate the existing lender's willingness to extend postpetition financing on terms more favorable than other proposed lenders, and the potential harm or prejudice to other creditors that may result. 3 Collier on Bankruptcy ¶ 364.04[1] (15th ed. rev. 2008); S*ee also, In re Course Group, Inc.*, 71 B.R. 544 (Bankr. E.D. Pa. 1987). Where the roll-up lender is fully secured prepetition, the harm or prejudice caused by the roll-up is likely small and likely acceptable.

- Where the existing lender in unsecured, the court is unlikely to approve roll-up, as the financing would convert unsecured claim into an administrative expense or secured claim, thus priming prepetition senior lenders. (e.g. if Lender A has a secured claim of $100, and Lender B has an unsecured claim of $60, if Lender B is the DIP lender, the court is unlikely to approve the roll-up of Lender B's $60 claim because it would give Lender B's unsecured claim similar or greater priority over Lender A's original secured claim.)

B. Case Study: Lyondell Chemical Co.

- On January 6, 2009 Lydonell Chemical Co. filed for bankruptcy. *In re Lyondell Chemical Co*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 6, 2009). Prior to bankruptcy, Lyondell's capital structure consisted of:

  - $12.2 billion Senior Secured Credit Facility;

  - $8.3 billion Interim Loan Facility ranking pari passu with all their existing and future senior indebtedness and senior to all current and future subordinated indebtedness;

  - $1.03 billion Senior Secured Inventory-Based Credit Facility; and

  - $1.3 billion secured and unsecured notes with differing maturity dates.

- As part of the Bankruptcy, Lyondell secured $8 billion in priming DIP Financing, consisting of:

  - $1.515 billion in revolving credit secured by receivables and inventory;

  - $3.25 billion in new secured term loans; and

  - A modified roll-up of $3.25 billion of existing senior secured debt.

    i. The rolled-up debt had liens junior to liens granted on account of new money under the DIP Financing.

    ii. The rolled-up debt will not have to be paid in cash in full on the maturity date of the DIP facility or on exit from chapter 11, provided that debtors use reasonable efforts to procure the same.

    iii. Debtors retain the right to stretch the payment of the rolled-up debt for five years.

In re Lyondell Chemical Co, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. March 1, 2009) (Docket No. 1002).

C. Case Study: VeraSun Energy

- VeraSun was an amalgamation of three different companies: ASA, VSE and US BioEnergey. On October 31, 2008, VeraSun filed for Bankruptcy. Prior to the bankruptcy VeraSun had total consolidated funded debt obligation of approximately $1.5 billion. *In re VeraSun Energy Corp*, Case No. 08-12606 (BLS) (Bankr. D. Del. Oct. 31, 2008). This included:

  - $81.7 million Revolving Credit Facility;

  - $210 million Senior Secured Notes;

  - $450 million Senior Unsecured Notes;

  - $266 million ASA Senior Credit Facility;

- $464 million AgStar Credit Facilities; and
- $90 million Marion Construction Loan.

- The debt from the different entities comprising VeraSun was not cross-collateralized, and thus prepetition lenders who provided DIP financing required in their credit agreements that funds were to be used exclusively for the assets in which they had a security interest.

- On December 4, 2008 the U.S. Bankruptcy Court granted approval for debtor-in-possession financing totaling $196.6 million.
  - $93 million in new loan commitments.
  - Roll-up $103 million of prepetition indebtedness held by participating prepetition lenders.
  - The proceeds of the DIP loan were to be used solely for the benefit of VSE.

In re VeraSun Energy Corp, Case No. 08-12606 (BLS) (Bankr. D. Del. Dec 4, 2008) (Docket No. 305).

- On February 5, 2009 the U.S. Bankruptcy Court granted approval for debtor-in-possession financing totaling $20 million.
  - The proceeds of the DIP loan were to be used solely for the benefit of ASA.
  - DIP loan did not contain roll-up provision.

In re VeraSun Energy Corp, Case No. 08-12606 (BLS) (Bankr. D. Del. Feb. 5, 2009) (Docket No. 613).

- On February 10, 2009 the U.S. Bankruptcy Court granted approval for debtor-in-possession financing totaling $11 million.
  - The DIP credit agreement contained a roll-up provision allowing for a roll-up equal to 50% of total postpetition commitment.
  - The proceeds of the DIP loan were to be used solely for the benefit of US BioEnergy.

In re VeraSun Energy Corp, Case No. 08-12606 (BLS) (Bankr. D. Del. Feb. 10, 2009) (Docket No. 636).

D. Case Study: LandSource

- On June 8, 2008 LandSource filed for bankruptcy. *In re Landsource Communities Development, LLC*, Case No. 08-11111 (KJC) (Bankr. D. Del. June 8, 2008). Prior to Bankruptcy, LandSource's outstanding debt included:
  - $960 million First Lien Credit Agreement,
  - $30 million of issued but undrawn letters of credit, and
  - $244 million Second Lien Credit Agreement.
- On July 19, 2008 the U.S. Bankruptcy Court granted approval for debtor-in-possession financing totaling $1.2 billion consisting of:
  - $135 MM in new senior secured revolving credit facility
  - New LC subfacility of up to $35 million.
  - New swingline facility of up to $10 million.
  - Roll-up of up $1 billion of prepetition obligations under the first lien credit agreement.

In re Landsource Communities Development, LLC, Case No. 08-11111 (KJC) (Bankr. D. Del. July 19, 2008) (Docket No. 306).