IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
CAPMARK FINANCIAL GROUP INC., *et al.*,	:	**Case No. 09-13684 (CSS)**
	:	**(Jointly Administered)**
Reorganized Debtors and Debtors in Possession.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING APPROVAL OF DEBTOR'S AMENDED CURE FOR ASSUMPTION AND ASSIGNMENT OF POOLING AND SERVICING AGREEMENT[1]

This matter is not as complicated as it initially seems. At heart, it is a contract dispute, the result of which falls in favor of the debtor.

NET1 Las Colinas LP ("NET1") borrowed money from a bank in connection with the acquisition of a commercial property. The loan was secured by the property and structured so that rental income would be the source for repayment of the loan and maintenance of the property. The bank hired a servicer that eventually became one of the debtors. Under the operative documents, NET1 was required to establish a lock box account to which all rental income was to be paid. The servicer would then take the deposits from the lockbox and manage the money through a series of waterfalls. One of the pools was the monthly funding in the approximate amount $130,000 (from October

[1]This is the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, which is applicable to this matter by virtue of Fed. R. Bankr. P. 9014. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are adopted as such. References to "*JPTM*" are to the Joint Pretrial Memorandum of the parties [Docket No. 2151].

2006 through September 2013) of a "rollover account" to cover expenses for construction or modification of tenant improvements and leasing commissions, lease cancellation fees, buy-out fees or a similar cost that may be incurred. After all of the pools were filled, any excess amounts remaining were transferred back to NET1 on a regular basis.

The debtor/servicer made a data entry mistake and failed to fund the rollover account from October 2006 to March 2009, which resulted in a deficiency of rollover funds in the amount of approximately $3.8 million. As a result of the mistake, the $3.8 million that should have been reserved was disbursed back to NET1 and subsequently to its investors. When the debtor discovered its mistake it started to withhold the $130,000 monthly reserve as well as an additional $50,000 per month to make up the deficiency. As a result, the current shortfall is approximately $2.6 million.

Now, it gets more complicated. In December 2005, shortly after the execution of the loan agreement between the bank and NET1, the bank transferred the loan to a securitization trust. The investors in the securitization are issued "Certificates," which are governed by the Pooling and Servicing Agreement, dated December 1, 2005 (the "PSA"). ACAS (as defined in the margin) is the "Controlling Class Certificateholder" and "Directing Certificateholder" under the PSA.[2]

At the time the loan was securitized into the pool, the debtor was the "Master Servicer" under the PSA. Upon securitization, the debtor, as Master Servicer, stepped into the shoes of the original lender and became "the new lender of record on behalf of

[2] "ACAS" means ACAS CRE CDO 2007-1, Ltd., ACAS CRE CDO 2007-1, LLC and certain of its affiliates.

the [C]ertificateholders." It was in the debtor's capacity as Master Servicer that it failed to withhold the rollover funds.

Now, the final step. In 2010, the debtors filed bankruptcy. As part of the bankruptcy, the debtor sought to sell its servicing business, including its role as Master Servicer under the PSA, to a third party – Berkadia Commercial Mortgage LLC ("Berkadia"). ACAS, on behalf of the Certificateholders, objected to the debtor's assumption and assignment of the PSA, asserting that the debtor had defaulted in failing to fund the rollover account. ACAS asserted that the proper cure amount should be the approximately $3.8 million that was not retained as rollover funds plus its attorneys' fees and costs.[3] ACAS's objection was resolved, in part, by the debtor's escrow of $3.8 million to be available to pay the amount, if any, the Court were to determine was required to cure any defaults under the PSA.

The debtor and ACAS then commenced litigation. NET1, which is not a party to the PSA, was not involved in the sale hearing nor the subsequent litigation. On the eve of trial, all of the parties, other than NET1, agreed to the following amended cure terms:

1. Debtor shall establish an escrow with an escrow agent for deposit of $2.6 million, *i.e.*, the difference between the required rollover account balance and the actual balance;

2. The escrow shall be held and payable as rollover funds only to the extent funds within the rollover account are insufficient;

3. Each month, the servicer shall continue depositing into the rollover account excess cash flow, if any, following disbursement of the other funds called for

[3] ACAS ignored for purposes of its objection the $50,000 in catch up payments that reduced the outstanding deficiency to $2.6 million.

under the loan documents (the result being that NET1 will not receive any disbursements until the rollover account is fully funded);

4. As the funds are added to the roll over account the escrow shall be released to the debtor on a dollar for dollar basis until the rollover account is fully funded and the escrow depleted;

5. The required balance in the rollover account shall not exceed the $3.8 million required by the documents; and

6. All parties other than NET1 shall exchange mutual releases with respect to claims under the PSA.

The debtor then filed a Notice of Amended Cure [Docket No. 2211] incorporating the terms described above. NET1 filed an objection to the Amended Cure asserting, among other things, that it had done no wrong, the deficiency in the rollover account was the fault of the debtor and not NET1, it has no obligation "to catch up" the balance, and the servicer has no authority to withhold the excess funds.

As stated above, at heart, this is a contract dispute that rises and falls on whether NET1 has defaulted under its loan agreement. If so, a cascade of contractual provisions results in the debtor having the power to use NET1's money to cure the debtor's default under the PSA. The Court finds that NET1 did default on its loan for failing to cause the rollover account to be funded. As a matter of contract and equity, NET1 cannot enjoy the windfall from its failure to fund the rollover account. As such, nothing in the Amended Cure improperly compromises NET1's rights, NET1's objection will be overruled, and the Amended Cure will be approved.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core

proceeding pursuant to 28 U.S.C. § 157(b)(2). This Court has the judicial power to enter a final order.[4] Adequate notice has been provided, and no other or further notice is required.

PROCEDURAL BACKGROUND

On October 25, 2009 (the "Petition Date"), Capmark Finance, Inc. ("Capmark") and numerous affiliates (collectively, the "Debtors") commenced a voluntary case under chapter 11 of title 11 of the United States Code in this Court.

On the Petition Date, the Debtors filed a motion seeking approval of the sale of Debtors' commercial mortgage servicing business ("MSB Business") and bid procedures and related scheduling in connection therewith (the "Sale Motion") [Docket No. 19]. On November 4, 2009, a hearing was held and the Court entered an Order approving bid procedures and a schedule for the sale of the MSB Business [Docket No. 147]. The proposed purchaser was Berkadia.

In connection with the Sale Motion, the Debtors filed a Notice of Assumption and Assignment, listing various executory contracts to be assumed and assigned to the purchaser, including the PSA. The notice listed a cure amount of zero ($0) for the PSA [Docket No. 19]. On November 20, 2009, ACAS filed an objection (the "ACAS Cure Objection") [Docket No. 286] to the proposed cure amount of $0.00, alleging that the cure amount should be $3,815,276.25 plus its attorneys' fees and costs (the "Contested Cure Amount"). Bank of America, as Trustee under the PSA, also filed an objection to the

[4] *See* p. 17 n. 9, *infra*.

Amended Cure amount on similar grounds (the "Trustee Cure Objection") [Docket No. 281].

On November 24, 2009, following a hearing, this Court entered an Order granting the Sale Motion and approving the sale of the MSB Business to Berkadia [Docket No. 341] (the "Sale Order"). On December 10, 2009, following a motion by ACAS for clarification of the Sale Order, the Court entered the Consent Order Supplementing Sale Order to Reflect Escrow Treatment of Unresolved Asserted Cure Amounts [Docket No. 496] (the "Supplemental Order"), which required the Debtors to establish an interest-bearing escrow account and deposit the full amount of the Contested Cure Amount equal to $3,815,276.25 into that account.

Subsequently, litigation relating to the Contested Cure Amount commenced between Capmark, as the debtor-assignor responsible for payment of cure amounts, and ACAS. Berkadia had replaced Capmark as Master Servicer upon the closing of the Sale, but since Berkadia was not obligated to pay cure amounts it was not part of the litigation. At this time, NET1 was not participating in the litigation related to Contested Cure Amount.

On February 19, 2010, this Court entered an Order Establishing Procedures for the Resolution of Disputed Cure Amounts Related to Sale of MSB Business [Docket No. 855]. December 14, 2010 was set as a trial date.

Immediately prior to trial, ACAS and Capmark reached an agreement with regard to the proposed Amended Cure. Capmark subsequently filed a Notice of

Amended Cure [Docket No. 2211] setting forth the agreement it had reached with ACAS, which is the matter before the Court.

FINDINGS OF FACT

Prior to the entry of a Sale Order by this Court on November 24, 2009, Capmark was the Master Servicer for the J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2005-LDP5 (the "Series 2005-LDP5 Certificates"). JPTM ¶ 1. ACAS is the Controlling Class Certificateholder and Directing Certificateholder of the Series 2005-LDP5 Certificates, as those terms are defined in the PSA. JPTM ¶ 2.

The PSA for the Series 2005-LDP5 Certificates, among other things, defines the Master Servicer's duties in servicing the pooled commercial loans. JPTM ¶ 3. According to Section 3.01(a) of the PSA, Capmark, as the Master Servicer, was required to:

> [D]iligently service and administer the Mortgage Loans…pursuant to [the PSA] on behalf of the Trust and in the best interest of and for the benefit of the Certificateholders… in accordance with applicable law, the terms of [the PSA] and…the terms of the respective Mortgage Loans.

JPTM ¶ 7.

Section 3.01 of the PSA provides that the Master Servicer "shall service the Mortgage Loans in accordance with the applicable Servicing Standards." JPTM ¶ 8. The PSA, in Section 3.01(a), also provides that Capmark, as the Master Servicer, must adhere to the "General Servicing Standard," which means that Capmark was required to service the Mortgage Loans in accordance with the higher of the following standards of care:

> (1) in the same manner in which, and with the same care, skill, prudence and diligence with which such Master Servicer…services and administers similar mortgage loans for other third party portfolios and (2) the same care, skill, prudence and diligence with which such Master Servicer…services and administers similar mortgage loans owned by such Master Servicer…with a view to the maximization of timely recovery of principal and interest on a net present value basis on the Mortgage Loans…and in the best interest of the Trust and the Certificateholders…giving due consideration to the customary and usual standards of practice of prudent institutional, multifamily and commercial mortgage loan services….

JPTM ¶ 9.

Pursuant to Section 3.02 of the PSA, Capmark was required to "make reasonable efforts to collect all payments called for under the terms and provisions of the Mortgage Loans …" JPTM ¶ 10.

Article VII of the PSA details actions taken by the Master Servicer that constitute "Events of Default." According to Section 7.01(a)(iii) of the PSA, it is a default of the PSA for the Master Servicer to fail "to observe or perform in any material respect any of its covenants or obligations contained in [the PSA]…." JPTM ¶¶ 13, 14.

Pursuant to a Loan Agreement dated September 21, 2005 (the "NET1 Loan Agreement"), NET1 borrowed $102 million (the "NET1 Loan") from the originating bank, Eurohypo AG, New York Branch (the "Originating Bank"). JPTM ¶ 17.

As of December 1, 2005, the Originating Bank contributed the NET1 Loan to a pool of commercial, multifamily and manufactured housing community mortgage loans that were securitized as part of the Series 2005-LDP5 Certificates. The NET1 Loan is the eighth largest loan in the pool of over 190 loans and at the time the PSA was entered into represented approximately 2.5% of the entire pool balance. After the NET1 Loan was

securitized, Capmark, as Master Servicer, stepped into the shoes of the Originating Bank and became "the new lender of record on behalf of the [C]ertificateholders." JPTM ¶ 25-27.

Section 6.5.1 of the NET1 Loan Agreement requires, among other things, that NET1 allocate on a monthly basis a certain portion of the rental income it receives from tenants to cover expenses for construction or modification of tenant improvements and leasing commissions, lease cancellation fees, buy-out fees or a similar cost that may be incurred (such funds, the "Rollover Funds"). JPTM ¶ 20.

Specifically, Section 6.5.1(a) of the NET1 Loan Agreement states:

> [C]ommencing on October 11, 2006 (such date being the 12th Monthly payment Date) up to an including September 11, 2013 (such date being the 95th Monthly Payment Date), *Borrower shall deposit* on each Monthly Payment Date the sum of $131,561.25….The aforesaid sums shall be held for construction or modification of tenant improvements and leasing commissions, lease cancellation fees, buy-out fees or a similar cost that may be incurred following the date hereof. Amounts deposited pursuant to this Section 6.5.1 are referred to herein as the "Rollover Funds."

JPTM ¶ 21. (emphasis added).

The Rollover Funds are additional collateral for the NET1 Loan. JPTM ¶ 24.

In connection with the NET1 Loan Agreement, NET1, the Originating Bank and Capmark's predecessor, as Agent, entered into a Cash Management Agreement dated September 21, 2005 (the "Cash Management Agreement"). The Cash Management Agreement sets forth a priority of payment distributions to be administered by the Agent, *i.e.*, the waterfall. When the NET1 Loan was securitized, Capmark stepped into

the shoes of the Agent in administering the Cash Management Agreement. JPTM ¶¶ 28-30.

Section 3.3(a)(v) of the Cash Management Agreement provides:

> [Capmark] shall withdraw all available funds on deposit in the Deposit Account on every Business Day of each calendar month and distribute such funds in the following amounts and order of priority:…(v) Then, funds sufficient to pay the Monthly Rollover Amount…for the next calendar month shall be deposited into the Rollover Account;… .

JPTM ¶ 34.

Pursuant to the Cash Management Agreement, NET1 is also obligated to cause the requisite sums to be deposited into the "Rollover Account" as set forth in Section 3.3.(a)(v). Section 2.1(e) of the Cash Management Agreement provides, in relevant part:

> … *Borrower shall deposit, or cause to be deposited*, the sums required to be deposited pursuant to the Loan Agreement for the payment of leasing commissions and tenant improvement expenditures, if any (the "Rollover Account") (emphasis added).[5]

Before Capmark became the Master Servicer for the NET1 Loan, Midland Loan Services was the interim servicer that first boarded the NET1 Loan into its loan servicing database. When Midland Loan Services was the interim servicer, it established a Rollover Account reserve for the time period it serviced the NET1 Loan. JPTM ¶¶ 35-36. When Capmark took over as Master Servicer, a significant portion of the loan review, analysis and conversion activity took place at a Capmark facility in Hyderabad, India. JPTM ¶ 38.

[5] This section is not cited in the JPTM. Nonetheless, all of the relevant agreements have been admitted into evidence. JPTM ¶ 76.

At the Capmark facility in Hyderabad, India, Capmark analyzed the data and boarded the NET1 Loan in Capmark's McCracken Strategy database (which is software that Capmark used to manage loan servicing). JPTM ¶ 39. Instead of entering the correct start date for the Rollover Account reserve, the Capmark employee inputting the data into the McCracken Strategy database coded the date incorrectly and mistakenly input the date as 2013 instead of 2006. JPTM ¶ 43.

As a result of Capmark's coding error, the Rollover Account was not coded to start funding until the year 2013 as opposed to the correct year of 2006. JPTM ¶ 45. The incorrect date in the McCracken Strategy database for the Rollover Account reserve was not corrected until February 25, 2009. JPTM ¶ 49. The correct Rollover Account reserve appeared on NET1 monthly invoice of March 2009. JPTM ¶ 50.

Because the Rollover Account reserve was improperly coded and the error was not discovered at the time of entry or at the time the investor made the inquiry, the Rollover Account was not funded from October 2006 to March 2009. JPTM ¶ 51. This resulted in a deficiency of Rollover Funds in the amount of $3,815,276.25, which was disbursed back to NET1 and subsequently disbursed to NET1's investors. JPTM ¶ 52.

Section 6.03(c) of the PSA provides that Capmark will "indemnify the Depositor, the Trustee and the Trust..., and hold them harmless, from and against any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, liabilities, fees and expenses that any of them may sustain arising from or as a result of any willful misfeasance, bad faith or negligence…" JPTM ¶ 11.

NET1's failure to deposit the requisite sums into the Rollover Account from October, 2006 through March, 2009 constitutes one or more Events of Default under the NET1 Loan Agreement (Section 6.5.1(a)) and/or Cash Management Agreement (Section 2.1(e)).

Section 10.1(a) of the NET1 Loan Agreement provides that an Event of Default (as that term is defined in the NET1 Loan Agreement) shall occur if:

> (xvii) … Borrower shall continue to be in Default under any of the other terms, covenants, or conditions of this Agreement … or
>
> (xviii) … if there shall be a Default under any of the other Loan Documents beyond any applicable cure periods contained in such Loan Documents …

"Loan Documents" is defined under the NET1 Loan Agreement as including, among other things, the NET1 Loan Agreement and the Cash Management Agreement. Following an Event of Default, the NET1 Loan Agreement provides the NET1 Loan servicer[6] (who stands in the shoes of the NET1 Loan lender) with discretion to apply NET1 Loan proceeds to NET1 Loan obligations. Specifically, Section 10.2(d) of the NET1 Loan Agreement provides, in relevant part:

> (d) Any amounts recovered from the Property or any other collateral for the Loan after an Event of Default may be applied by Lender toward … any other amounts due under the Loan Documents in such order, priority and proportions as the Lender in its sole discretion shall determine …

[6] Section 11.24(b) of the NET1 Loan Agreement provides that the NET1 Loan servicer "shall have right to exercise all rights of Lender and enforce all other obligations of Borrower pursuant to the provisions of this Agreement … and the other Loan Documents."

Sections 5.1 and 5.2 of the Cash Management Agreement provide that the Agent has a security interest in NET1's cash and accounts to secure all of NET1's obligations under all of the Loan Documents, and that the Agent can use any of that cash or collateral to satisfy any of NET1's obligations under the Loan Documents.

Section 6.5 of the Cash Management Agreement provides that NET1 irrevocably appoints the Agent as its attorney-in-fact during the continuance of an Event of Default to do anything in the name of NET1 that the Agent determines is necessary to "vest in Lender the rights and remedies provided for herein and to accomplish the purposes of this Agreement." That same section gives the Agent the right to perform any obligation of NET1 that NET1 fails to perform.

In the event of NET1's default of any of its obligations under the NET1 Loan Agreement, Section 7.1 of Cash Management Agreement provides that the Agent may "without notice to Borrower, except as required by law, and at any time or from time to time, charge, set-off and otherwise apply all or any part of the Collateral against the Obligations or any part thereof."

CONCLUSIONS OF LAW

Capmark's case rises and falls on whether its failure to fund the Rollover Account as required by the PSA and Cash Management Agreement gave rise to a default by NET1 under the NET1 Loan Agreement. While it seems counter-intuitive, that, in fact, was the result. That default by NET1 triggered a number of other provisions in the Loan Documents that resulted in Capmark having the authority to

cure its default under the PSA by authorizing its assignee to fund the shortfall in the Rollover Account.

The NET1 Loan Agreement is a contract between NET1 and the Originating Bank. Under the NET1 Loan Agreement, NET1 has an affirmative obligation to deposit the Rollover Funds. More specifically, "commencing on October 11, 2006 … up to an including September 11, 2013 *Borrower shall deposit* on each Monthly Payment Date the sum of $131,561.25 [with the amounts deposited to be referred] as the 'Rollover Funds.'"

The Cash Management Agreement is a contract between NET1, the Originating Bank and Agent. Under the Cash Management Agreement, Agent is required to establish a Deposit Account into which NET1 is to deposit its rental income as well as a Rollover Account into which the Rollover Funds were to be deposited.

Notwithstanding that it is Agent's obligation under the Cash Management Agreement to create the accounts, NET1 has an affirmative obligation under the contract to fund the Rollover Account. More specifically, "*Borrower shall deposit, or cause to be deposited*, the sums required to be deposited pursuant to the Loan Agreement for … the 'Rollover Account.'"

At the same time, under the Cash Management Agreement, it is Agent's, *i.e.*, Capmark's, obligation to manage the Deposit Account and cause the Rollover Funds to be transferred from the Deposit Account to the Rollover Account. This duty, however, does not supplant NET1's concomitant obligation "*to deposit or cause to be deposited*" the Rollover Funds into the Rollover Account.

As a result of Capmark's negligence (or even gross negligence) the Rollover Funds were neither deposited into the Rollover Account nor otherwise retained from October 2006 to March 2009. This resulted in a deficiency of Rollover Funds in the amount of approximately $3.8 million, which was subsequently reduced to approximately $2.6 million.

At all relevant times, NET1 deposited sufficient funds into the Deposit Account to pay the Rollover Funds into the Rollover Account. Despite the fact that Capmark failed to perform its independent obligations under the Cash Management Agreement to "withdraw all available funds on deposit in the Deposit Account on every Business Day of each calendar month and distribute such funds in the following amounts and order of priority:…(v) Then, funds sufficient to pay the Monthly Rollover Amount…for the next calendar month shall be deposited into the Rollover Account," NET1 had an *independent contractual duty* to fund the Rollover Account. NET1 reasonably relied on Capmark to manage the funds correctly but it was, nonetheless, an Event of Default under both the NET1 Loan Agreement and Cash Management Agreement for NET1 to fail to fulfill its independent duty.

NET1 argues that it was not an Event of Default for it not to cause the Rollover Funds to be deposited because it did not have the actual ability to do any more than make deposits into the Deposit Account managed by Capmark. All subsequent events were outside its control. The fact that NET1 contracted with Capmark to manage the funds in no way alters NET1's independent duty to "cause" the Rollover Funds to be

deposited in the Rollover Account. This is a duty that was negotiated between NET1 as borrower and the Originating Bank (the predecessor to ACAS).[7]

Now we turn to the PSA, a contract to which NET1 is not a party. There is no question that Capmark breached its obligations (either through negligence or gross negligence) under the PSA in failing to transfer $3.8 million in Rollover Funds from the Deposit Account to the Rollover Account. As asserted by ACAS, this is a default by Capmark that must be cured by fully funding the Rollover Account in order for Capmark to assume and assign the PSA to Berkadia.

Any proposed cure of defaults under the PSA relating to the present Rollover Account shortfall must ensure that the consequences of such defaults are "nullified." *In re Liberty Warehouse Assocs. Ltd. Pship.*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998). Such nullification of prior defaults must "restore the parties to the position they would have been in" had no such defaults occurred. *See In re DBSI, Inc.*, 405 B.R. 698, 705 (Bankr. D. Del. 2009).

How then does Capmark cure its default? More specifically where does Capmark get the money to cure the default? This takes us back to the NET1 Loan Agreement and the Cash Management Agreement.

Recall that NET1 defaulted under the NET1 Loan Agreement and Cash Management Agreement in failing to cause the Rollover Funds to be deposited in the

[7] NET1 cites to the Clearing Account Agreement between Agent, NET1 and Originating Bank as, in effect, trumping the NET1 Loan Agreement and the Cash Management Agreement. NET1 is incorrect. The Court finds that there is no relevant inconsistency among the documents. Nothing in the Clearing Account Agreement modifies NET1's obligations to cause the Rollover Funds to be deposited in the Rollover Account.

Rollover Account. The NET1 Loan Agreement and Cash Management Agreement both provide the servicer, *i.e.*, Capmark, with discretion to apply NET1 Loan proceeds to the NET1 Loan obligations. In other words, because NET1 is in default under the agreements, Capmark has the authority to transfer any and all of the funds deposited into the Deposit Account by NET1 to the Rollover Account.

The Amended Cure does nothing other than provide a mechanism for Capmark and its successor Berkadia to exercise the power available to them under the NET1 Loan Agreement and Cash Management Agreement to cure the defaults under the PSA. NET1 is not being made liable for Capmark's breach of the PSA. Indeed, the PSA isn't being applied to NET1 in any manner. The agreements under which the Amended Cure are being applied to NET1 are agreements to which NET1 is a party and the remedies being applied are those specifically contemplated by those agreements.[8]

NET1's arguments fail on equitable grounds as well. NET1 had an obligation to pay the Rollover Funds. Were the Court to allow NET1 to disregard that obligation would provide NET1 with a windfall to the detriment of the Debtors' estate. While it may be true that NET1 acted with pure heart and without knowledge of Capmark's failure, that is neither here nor there. NET1 is simply being restored to the position it

[8] New York law, which governs the Cash Management Agreement, recognizes the common law right of one contracting party to recoup from another money owed to it from the same transaction. *Nat'l Cash Register Co. v. Joseph*, 299 N.Y. 200, 203, 86 N.E.2d 561, 562 (1949). That right is enforced in bankruptcy proceedings. *Malinowski v. New York State Dep't of Labor (In re Malinowski)*, 156 F.3d 131, 133 (2d Cir. 1998).

was obligated to hold in the first place by remedies specifically provided for under it contracts.[9]

Finally, ACAS is seeking attorneys' fees and costs in connection with Capmark's cure of its default under the PSA.[10] ACAS correctly states that fees are recoverable as part of a cure claim if: (1) the executory contract specifically provides for their payment; and (2) the attorneys' fees sought are reasonable and related to the enforcement of contract rights consistent with Section 365 of the Bankruptcy Code. *In re Crown Books Corp.*, 269 B.R. 12, 15-18 (Bankr. D. Del. 2001). It goes on to argue that it is an intended third party beneficiary of the PSA and, thus, can recover its fees. Assuming (without deciding) that ACAS is an intended third party beneficiary, it is not entitled to its fees. ACAS has failed to cite to a specific provision under the PSA that provides for such payment. Thus, its request for payment of its attorneys' fees and cost as part of Capmark's cure of its defaults under the PSA will be denied.

[9] NET1 argues that the Court lacks judicial authority to enter a final order because the issue before the Court is a dispute between two non-debtors, *i.e.*, ACAS and NET1. NET1 is incorrect. There is no dispute that Capmark must cure its default under the PSA. The issue before the Court, however, is whether NET1 is obligated to fund the cure of that default under agreements *between it and Capmark*. Clearly, this is a core matter under both the statute and the Constitution. *Stern v. Marshall*, 131 S.Ct. 2594 (2011)

[10] ACAS is seeking its fees and costs from Capmark. ACAS is not seeking payment of its fees from NET1 directly or indirectly through the Cash Management Agreement.

CONCLUSION

For the foregoing reasons, the Court will approve and authorize the Amended Cure, deny ACAS's request for attorneys fees and costs and overrule NET1's objection. An order will be issued.

THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

Dated: January 31, 2013