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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

LEHMAN BROTHERS, INC.,

Debtor.

Case No. 08-01420 (JMP) (SIPA)

**OBJECTION OF LEHMAN BROTHERS INTERNATIONAL (EUROPE)
(IN ADMINISTRATION) TO TRUSTEE'S DETERMINATION OF CLAIMS**

October 31, 2011

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Lehman Brothers International (Europe) (in administration) (“**LBIE**”), acting by and through its Joint Administrators,¹ through its undersigned counsel, hereby objects to the determination of LBIE’s Omnibus Claim² and that portion of LBIE’s Failed Trades Claim³ relating thereto (together, LBIE’s “**Omnibus Claim**”) by James W. Giddens (the “**Trustee**”), as trustee for the liquidation of Lehman Brothers Inc. (“**LBI**”), as that determination is described in the Notice of Trustee’s Determination of Claim dated May 19, 2011 (the “**Letter of Determination**”). In support of its objection (the “**Objection**”), LBIE respectfully represents as follows:

PRELIMINARY STATEMENT

Like the Trustee, LBIE is itself a trustee of property and rights beneficially owned by others. In making this Objection LBIE is acting in accordance with its fiduciary and other obligations to its customers and other creditors.⁴ LBIE (together with its customers who have sought to make their own direct claims against LBI) is by far the largest claimant in this proceeding and, by LBI’s own figures, LBIE’s and its customers’ claims represent approximately

¹ By orders of the English High Court of Justice, Anthony Victor Lomas, Steven Anthony Pearson, Dan Yoram Schwarzmann, Michael John Andrew Jervis and Derek Anthony Howell were appointed as Joint Administrators of LBIE (collectively, the “**Joint Administrators**”) on September 15, 2008 and November 30, 2009.

² Claim Numbers 900005782 (filed Jan. 30, 2009), 900007955 (filed May 29, 2009) and 900008199 (filed Sept. 10, 2010). Based on instructions from Epiq, these claims were also submitted by mail, and the first two claims were subsequently assigned alternate claim numbers: 900005953 (filed Feb. 2, 2009) and 900007941 (filed June 1, 2009). Copies of the Claims are in the Trustee’s possession and will be made available on request to the Court and, subject to appropriate confidentiality protections, to other parties in interest.

³ Claim Numbers 900005783 (filed Jan. 30, 2009) and 900008003 (filed May 29, 2009). Based on instructions from Epiq, these claims were also submitted by mail and subsequently assigned alternate claim numbers: 900005951 (filed Feb. 2, 2009) and 000006027 (filed June 1, 2009). LBIE filed its Failed Trades Claim to protect its interests with respect to securities trades that were pending with LBI as of the date that LBIE entered administration in the U.K. The Trustee also issued a separate determination letter with respect to the Failed Trades Claim, denying the claim “except to the extent that the Failed Trades Claim was expressly allowed or the determination thereof deferred by the Trustee” in the Trustee’s other determination letters, including the Letter of Determination.

⁴ LBIE submitted an objection on August 1, 2011 (the “**House Objection**”) in respect of its own customer property held by LBI (the “**House Claim**”).

70% of the remaining disputed customer claims asserted against LBI.⁵ LBIE thus has a vested interest in the prompt and efficient resolution of the LBI estate and accordingly has been working intensively with the Trustee's advisors for the last two and a half years. While much progress has been made in understanding the facts underlying settlement activity during the week following LBIE's entry into administration, the Trustee issued the Letter of Determination without giving due consideration to the core legal and accounting principles that underlie LBIE's claim and to the contractual arrangements and operational procedures that prevailed prior to LBIE's administration. This has prevented the parties from making progress in achieving a mutually acceptable resolution of LBIE's claims.

LBIE disputes the Letter of Determination and therefore files this Objection to protect the interests of its customers, on whose behalf LBIE filed the Omnibus Claim seeking to recover up to approximately \$15.1 billion⁶ in customer property. Although the Trustee has partially allowed the Omnibus Claim and asserts that he will distribute up to \$8.3 billion on account of the claim, in reality the Trustee's Letter of Determination is incorrect because the cash and securities positions included therein bear little resemblance either to LBIE's SIPA entitlement on its customers' behalf or LBIE's customers' entitlements against it. Indeed, the Letter of Determination, if upheld, would result in *negative* determinations for numerous securities, in an aggregate amount of approximately \$1.2 billion as valued by the Trustee, including securities in which LBIE's customers have entitlements to long positions sub-

⁵ Trustee's Sixth Interim Report for the Period April 23, 2011 through October 21, 2011 [EFC No. 4657] (the "**Trustee's Sixth Report**") ¶¶ 23-34 (stating that of the approximately \$42 billion of disputed customer claims, approximately \$16.4 billion is attributable to LBIE on behalf of itself and its customers and approximately \$13 billion is attributable to direct claims filed by LBIE's customers, totaling approximately \$30 billion).

⁶ As described further below, *infra* ¶ 18, this amount may be reduced as a result of certain duplication both within the Omnibus Claim and with the House Claim, and recovery from other parties. LBIE is not seeking a double recovery.

custodied by LBI. This highly improbable result is not an accurate determination of LBI's books and records, and the Court should overturn the Letter of Determination and require the Trustee to allow the securities and cash to which LBIE is entitled on behalf of its customers.

For years prior to September 15, 2008, LBIE dealt with LBI both as principal for LBIE's own account and in a representative capacity for LBIE's customers with respect to their dealings in U.S. securities. Given the large volume of trading that took place daily between LBIE and LBI, the proper separation of assets held by LBI for LBIE's customers, which was effectuated through LBI's internal procedures, was essential to protect their interests (not to mention required by applicable regulations).

The normal interaction between LBIE and LBI was abruptly interrupted on September 15, 2008 (the "**Administration Date**"), when LBIE entered into administration and ceased clearing and settling trades.⁷ During the next five business days until the commencement of LBI's liquidation proceeding (the "**SIPA Proceeding**") pursuant to the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa-III (as amended, "**SIPA**") on September 19, 2008 (the "**Filing Date**"), LBI continued to settle trades both for LBIE's own account and for LBIE's customers. Whereas prior to the Administration Date LBI had properly maintained separate accounts for LBIE's customer assets, during the week of September 15, 2008 LBI appears to have settled trades without regard to whether securities or cash were properly allocated to LBIE's customer accounts, presumably because the procedures LBI had in place to satisfy its contractual and regulatory obligations were not fully observed during this week. LBI's apparent use of securities and cash without regard to their appropriate attribution underlies many of the errors in the Letter of Determination.

⁷ Similarly, Lehman Brothers Holdings, Inc. ("**LBHI**") and other affiliated entities commenced insolvency proceedings in their respective home jurisdictions.

The Trustee has perpetuated LBI's mistakes in "rolling forward" LBI's books and records from September 12, 2008 (the last date on which normal reconciliation processes were performed) to the Filing Date. As a result, the Letter of Determination violates SIPA because it does not accurately reflect what LBI's books and records should have shown as of the Filing Date.

In addition, the Trustee has imposed various conditions that are not authorized by SIPA, which, if allowed to stand, would (i) impair rather than facilitate the return of property to LBIE's customers, and (ii) render material portions of the \$8.3 billion illusory. Further, the Trustee's denial of LBIE's September 10, 2010 claim amendment is improper, and the Letter of Determination should take account of that amendment.

LBIE files this Objection to preserve LBIE's rights and entitlements on behalf of its customers, and respectfully requests that the Court (i) overturn the Letter of Determination insofar as it incorrectly reflects LBIE's SIPA entitlements on behalf of its customers; (ii) eliminate the restrictions the Trustee purports to impose on any distributions with respect to LBIE's entitlement; and (iii) award such other relief as this Court deems just and proper.

BACKGROUND

A. SIPA Background and the Parties' Claims Filing Agreement

1. On September 15, 2008, LBIE entered into administration in the United Kingdom pursuant to the English Insolvency Act (1986), and the English High Court of Justice appointed four PricewaterhouseCoopers LLP ("PwC") partners as Joint Administrators.⁸ The Joint Administrators are subject to the English High Court's jurisdiction in exercising their duties. The purpose of LBIE's administration is to achieve a better result for LBIE's creditors as a whole

⁸ A fifth PwC partner was appointed on November 30, 2009.

than would be likely if LBIE were wound up. Among LBIE's creditors are those persons who have claims against LBIE for property held by LBIE in trust for those claimants. Under applicable principles of English law, where LBIE is a trustee of property, LBIE has a duty to distribute that trust property, subject to applicable liens, to the relevant beneficiaries in accordance with their respective entitlements. The Omnibus Claim comprises claims for trust property that LBI was holding, or should have been holding, for LBIE on behalf of its customers.

2. On the Filing Date, the United States District Court for the Southern District of New York entered an order pursuant to SIPA placing LBI, a registered broker-dealer incorporated in the state of Delaware, into a liquidation proceeding and appointing the Trustee to administer and liquidate the assets of LBI.

3. On November 7, 2008, the Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**" or the "**Court**") entered an Order Approving Form and Manner of Publication and Mailing of Notice of Commencement; Specifying Procedures and Forms for Filing, Determination, and Adjudication of Claims; Fixing a Meeting of Customers and Creditors; and Fixing Interim Reporting Pursuant to SIPA [ECF No. 241] (the "**Bar Date and Claims Resolution Order**"), establishing January 30, 2009, as the last day for claimants to file customer claims in the SIPA Proceeding to be assured of receiving maximum protection under the statute.⁹ In that order, the Bankruptcy Court ordered "that the Trustee shall have the authority, as provided in section 78fff-2(b) of SIPA, to satisfy customer claims insofar as the claims agree with the Debtor's books and records, or are otherwise established to the Trustee's satisfaction, without further orders of this Court."¹⁰ The Bankruptcy Court also ordered that

⁹ The Bar Date and Claims Resolution Order established June 1, 2009 as the last day on which to file all other claims against LBI's estate. Bar Date and Claims Resolution Order at 4.

¹⁰ Id. at 2.

nothing in its order “shall prevent the Trustee from agreeing to procedures for intercompany claims as the Trustee may determine is in the best interests of the Estate.”¹¹

4. Like the Trustee, the Joint Administrators are overseeing a sizeable estate subject to very large claims flowing from the economic collapse of LBIE’s and other Lehman affiliates’ complex businesses. As of the Administration Date, LBIE had aggregate estate assets of more than £43 billion.¹² LBIE’s creditors include “trust assets” and “client money”¹³ claimants as well as approximately 5,800 potential general creditors.¹⁴ These potential creditors include numerous U.S. financial institutions and funds, which themselves have underlying clients.

5. LBIE and LBI utilized many of the same trading and records systems through integrated information technology (“IT”) data platforms. When it entered into administration, LBIE lost access to certain of the shared data and platforms, IT systems and resources that it relied upon to monitor and record its and its customers’ securities and cash positions. In particular, LBIE had no visibility into LBI’s clearance and settlement activity that took place during the week of September 15, 2008, could not see whether trades settled or failed or how LBI recorded that settlement activity in its books and records, and therefore could not determine the impact of that settlement activity on its customers’ positions. This made it extremely difficult for LBIE to identify its or its customers’ interests in U.S. securities that might be held or settled

¹¹ Id.

¹² Lehman Brothers International (Europe) in Administration, Joint Administrators’ Progress Report for the Period 15 March 2010 to 14 September 2010 at 15; Lehman Brothers International (Europe) in Administration, Joint Administrators’ Progress Report for the Period 15 September 2010 to 14 March 2011 at 10 (hereinafter the “**Joint Administrators’ Fifth Progress Report**”).

¹³ “Trust assets” and “client money” claimants refer to those claimants for whom LBIE was holding property or money in trust under applicable principles of English law. Trust assets and client money do not form part of LBIE’s general estate, and while they remain subject to the claimants’ proprietary interests, are not available for distribution to LBIE’s general creditors.

¹⁴ See Joint Administrators’ Fifth Progress Report at 27.

by LBI or by LBI's sub-custodians or to determine if they conformed to trade orders and settlement instructions given prior to LBIE's administration.

6. In light of these and other obstacles, on January 27, 2009, the Trustee, LBIE and the Securities Investor Protection Corporation ("SIPC") entered into an agreement (the "**Claims Filing Agreement**") concerning the "priority claims" by LBIE and its customers against LBI. A true and correct copy of the Claims Filing Agreement is attached hereto as **Exhibit A**. The Claims Filing Agreement recited that LBIE intended to file "an estimated omnibus claim . . . on behalf of its clients" and "an estimated claim . . . in respect of its house customer position." See Claims Filing Agreement at 1. The Claims Filing Agreement noted that, "notwithstanding LBIE's considerable efforts to retrieve and analyze as much data as possible, LBIE face[d] considerable difficulties in this regard, including missing or inaccessible records and IT data that complicate[d] the compilation of claims." Id. To this end, the Claims Filing Agreement provided:

The LBI Trustee and SIPC shall construe LBIE's right to supplement and amend the LBIE claims as broadly as permitted by applicable law . . . so that such supplements/or [sic] amendments shall relate back to the date of the originally filed claim to the maximum possible extent permitted by applicable law. Such supplements and amendments may, among other things, include amendments to the amount of such claim, the composition of assets underlying each claim, the legal grounds upon which such claim may be asserted or to correct any mistake relating to such claim.

Id. ¶ 9.

7. The Claims Filing Agreement also contemplated that LBI and LBIE would engage in a process to reconcile any differences in their respective records and specified that claim amounts agreed between LBI and LBIE during this reconciliation process "may amend and/or supplement amounts identified in the LBIE Claims." Id. ¶ 12.

B. Overview of the Operational Relationship Between LBIE and LBI¹⁵

8. Prior to entering into administration, LBIE was the principal Lehman affiliate engaging in trading and broker-dealer activities in Europe, whereas LBI fulfilled this role in North America. LBIE provided a wide range of financial services to its customers, including trading and brokering equity and debt securities and dealing in financial derivatives. LBIE's customers included a significant number of U.S.-managed financial institutions and investment funds.

9. LBIE was authorized and regulated by the Financial Services Authority ("FSA") in the U.K. and traded and settled securities in Europe and parts of Asia for its customers and affiliates, and for its own account. LBIE was not a registered broker-dealer in the United States. As a result, when LBIE or its customers sought to enter into U.S. securities transactions, LBIE settled through LBI, just as LBIE settled trades for LBI and its customers in respect of European securities transactions.

10. LBI cleared U.S. equity and debt securities for LBIE, and principally held those securities on LBIE's behalf in depots at the Depository Trust Company ("DTC"). LBI performed these functions for LBIE pursuant to an Undisclosed Clearing and Custody Agreement dated April 18, 2005 (the "**Clearing and Custody Agreement**"), a true and correct copy of which is attached hereto as **Exhibit B**. In accordance with the Clearing and Custody Agreement, LBI maintained several omnibus accounts on its books and records to facilitate LBIE's custody and clearing requirements for both its customers' positions and its proprietary positions. These accounts were identified as LBIE's "custody omnibus account," "charge omnibus account"

¹⁵ Movements of cash and securities between LBIE and LBI were extremely complex. The description set forth herein represents a simplified explanation of a common way in which such movements were recorded. LBIE does not intend to suggest that this description describes cash and securities movements in each and every instance and transaction or with respect to each and every customer.

(taken together, the “**Omnibus Customer Accounts**”), “title omnibus account” and “house omnibus account.”¹⁶ Assets in these accounts were generally held in a depot at DTC known as “**DTC 074**,” and, in accordance with the Clearing and Custody Agreement, “Customer Accounts” were meant to be separate and segregated.¹⁷ LBI and LBIE transacted with each other at arm’s length as regulated broker-dealers, each dealing with the other in general accordance with its policies and procedures and the regulatory regime to which it was subject.

11. The trading relationships between LBIE and its customers were documented under several types of agreements. Title Customers transferred title of their securities to LBIE (with LBIE undertaking to deliver equivalent securities to the Title Customer or its order as instructed). Charge Customers maintained title to purchased securities but conveyed to LBIE a right of use (again with LBIE undertaking to deliver equivalent securities to the Charge Customer or its order as instructed).¹⁸ In both cases, LBIE’s customers were required to maintain appropriate margin levels with LBIE, which fluctuated depending on such customers’ trading exposure. LBIE had recourse to the margin to cover amounts owing to it by its customers.

12. For Custody Customers, LBIE provided settlement and custody services only. LBIE did not have either title to or a right of use over securities it custodied for its Custody Customers.

¹⁶ These account types correspond to the trading of customers with varying legal rights and LBIE proprietary trading and affiliate positions. “**Charge Customers**” are LBIE’s prime broker clients who granted LBIE a charge, or lien, over the securities that LBIE traded for them. “**Custody Customers**” are certain of LBIE’s customers whose securities were held in safekeeping. “**Title Customers**” are prime broker customers that entered into agreements with LBIE under English law pursuant to which title to the customers’ securities was transferred to LBIE. The “**House Omnibus Account**” includes LBIE’s proprietary positions, including in respect of customer property associated with the trading activity of other Lehman affiliates in securities settled or transferred into LBI depots.

¹⁷ In addition, LBIE’s assets were also held in, without limitation, DTC depot 7312, DTC depot 0636 and certain non-DTC depots.

¹⁸ In general, LBIE’s contractual relationship with these customers provided LBIE with broad rights of use with respect to securities credited to a customer’s account. This meant that these customers generally granted LBIE permission to use securities in certain types of LBIE’s proprietary trading activity. In the ordinary course of LBIE’s business and in accordance with the rights of use granted to it by its customers, LBIE “lifted” or used securities that were deposited with it by its customers to support such proprietary trading activity, including in transactions with LBI, other Lehman affiliates and unaffiliated third parties.

13. LBIE facilitated trading activity for its customers by acting as principal, agent or prime broker, as applicable, to execute customer instructions to purchase long securities positions, to sell long securities positions, and to sell short securities positions or purchase securities to close out short securities positions.

14. When a customer instructed a short sale in U.S. securities, the securities to be sold would be delivered to the charge omnibus account prior to trade settlement. As between LBIE and its customer, on the trade date, LBIE credited cash to the customer's cash balance equal to the proceeds of the short sale and debited the customer's securities position to indicate that it owed an obligation to deliver equivalent securities to LBIE. On the settlement date, the securities would be delivered out of the charge omnibus account against receipt of the cash representing the sale proceeds. The Clearing and Custody Agreement required LBI to ensure that long positions in the same security that was the subject of a short sale held for any customer be segregated and not used to facilitate the short sale. See Clearing and Custody Agreement § 8.5.

15. When a customer instructed the close-out of a short position, on the trade date, LBIE made reversing entries in the customer's securities position and cash balance. On the settlement date, the purchased securities would be returned to LBIE.

16. When a customer instructed the sale of a U.S. security that was subject to LBIE's lift,¹⁹ securities were recalled into the charge omnibus account to ensure that securities would be available for settlement to take place in accordance with customer instructions. In this way, the securities of other customers, whose positions were not subject to LBIE's lift, were safeguarded.

¹⁹ See n. 18, supra, for an explanation of "lifts."

17. During the week of September 15, 2008, which the Trustee has described as “confused,”²⁰ it appears that the process of recalling lifted securities into the charge omnibus account to permit their sale or borrowing securities into the charge omnibus account to settle short sales did not occur. Instead, it appears that trades instructed on behalf of LBIE’s customers were settled using available securities, including the long positions of other LBIE customers that were being sub-custodied by LBI, without regard to preserving LBIE’s aggregate long customer account positions for the benefit of all of LBIE’s customers. While, without the benefit of discovery, LBIE cannot at this time explain precisely what happened during the week of September 15, 2008 with respect to the manner in which LBI settled and accounted for pending trades, the failure of the ordinary protections afforded to LBIE’s Omnibus Customer Accounts is evident in the Letter of Determination, which contains reduced and/or negative securities balances that do not match LBIE’s SIPA entitlement on behalf of its customers.

C. LBIE’s Omnibus Claim

18. LBIE filed its Omnibus Claim on January 30, 2009 (the “**Original Omnibus Claim**”), and, consistent with the Claims Filing Agreement, amended it thereafter on May 29, 2009 (the “**First Amended Omnibus Claim**”) and September 10, 2010 (the “**Second Amended Omnibus Claim**”). As depicted in the following chart, the Omnibus Claim comprises several components, each addressed to a separate aspect of the relationship and activity between LBIE and LBI:²¹

²⁰ See Motion for Order Approving Trustee’s Allocation of Property of the Estate, Oct. 5, 2009 [EFC No. 1866] (the “**Allocation Motion**”) ¶ 15. (“In addition, although the Trustee’s investigation of LBI’s customer protection compliance is ongoing, it is already clear that there were significant lapses in LBI’s compliance, particularly during the confused period immediately before and following the chapter 11 filing of LBHI on September 15, 2008”).

²¹ In its Original Omnibus Claim, LBIE included margin posted in connection with options trading cleared by the Options Clearing Corporation (the “**OCC**” and such amount, the “**OCC Margin**”) in both its cash claim and its commodities futures claim for protective purposes. To the extent that the OCC Margin has been allowed by the Trustee as a claim for cash in his Letter of Determination, LBIE reduces its claim for

	Omnibus Claim (\$m)
Cash items	
UBS O'Connor balances ²²	2,300
OCC Margin balances	1,260
Cash balances	946
Subtotal	4,506
Securities	
Customer securities ²³	10,202
MTS Collateral ²⁴	312
Subtotal	10,514
Commodity Futures	
OCC Net Options value	(61)
OCC Margin	1,260
Cash – Client Money ²⁵	147
Other	
OCC Margin Adjustment	(1,260)
Total	15,106

LBIE's Omnibus Claim asserts a customer claim by LBIE on behalf of its customers for cash and securities valued at approximately \$15.1 billion. The claim consists of a cash claim in the

cash related to commodities futures by like amount, i.e., from \$16.3 billion to \$15.1 billion. LBIE does not seek double recovery on any claim. In addition, LBIE's Omnibus Claim will not ultimately duplicate any aspect of the House Claim, even though certain items were included in both claims for protective purposes. LBIE, of course, has always recognized that it can recover only once for any item appearing in both claims and stands ready to reduce its Omnibus Claim to account for any portions of the Omnibus Claim that will be allowed and paid as a result of the House Claim and *vice versa*.

²² While the parties have referred to this balance as "UBS O'Connor," it represents the unpaid September 10, 2008 balance owing by LBI to LBIE in respect of prime broker related activity.

²³ The value of securities set forth herein includes approximately \$3.87 billion of securities asserted by LBIE in the Second Amended Omnibus Claim reflecting claims made by LBIE's customers against LBIE in its administration proceeding that LBIE does not recognize in its books and records. LBIE is in the process of engaging with its customers to seek to reduce this amount consensually to the maximum extent possible. To the extent that LBIE is able to reach agreement with its customers regarding the reduction of portions of this claim, LBIE intends to make corresponding reductions to its claim against LBI.

²⁴ MTS Collateral represents LBIE's estimate of the value of securities collateral held in safekeeping by LBI for LBIE that was posted by LBIE's customers to LBIE as security for their obligations under various swap agreements. Unlike other securities positions, MTS Collateral was valued as of September 12, 2008 based on available data.

²⁵ This amount relates to "client money" that was or should have been segregated in accordance with English law, which the Trustee has asserted concerns accounts transferred to Barclays Capital Inc. See Trustee's Sixth Report ¶ 29. LBIE is investigating this assertion. To the extent that LBIE is able to recover this outstanding balance from other sources, LBIE will reduce its claim against LBI.

amount of \$4.506 billion, a securities claim in the amount of \$10.514 billion and a claim for cash related to commodities futures positions of approximately \$147 million that was or should have been segregated in accordance with FSA rules regarding client money and LBI's agreement(s) with LBIE. Nearly all securities positions are valued as of the Filing Date in accordance with SIPA. Subject to adjustment for the impact of pending trades that were settled during the week of September 15, 2008, the securities positions set forth in the Omnibus Claim generally reflect LBIE's positions that should have been held in its Omnibus Customer Accounts for its customers as of the close of business on September 12, 2008, the last business day before the Administration Date and the last date on which the intercompany reconciliation was performed. The primary purpose of the Omnibus Claim is for LBIE to recover the cash and securities that were, or should have been, held or settled into LBI depots as of the Filing Date for LBIE's customers.

19. LBIE's Omnibus Claim implicates securities positions, cash balances and settlement activity relating to hundreds of underlying customers. Numerous, but not all, underlying customers of LBIE have filed direct claims against LBI in the SIPA Proceeding for their U.S. securities positions that were sub-custodied by LBI. As far as can be determined from public sources, the Trustee has denied these claims in almost all instances. However, many claimants have objected to that denial. Resolution of those objections is critical to achieving overall resolution of the LBI estate and distribution to LBI customers. The Trustee has publicly stated that he "hopes and expects that many or all" of the objections issued with respect to claims made directly by underlying LBIE customers "will be resolved through the allowed Omnibus

Customer Claim.”²⁶ If the “allowed Omnibus Customer Claim” were adjusted to reflect the relief sought in this Objection, then this aspiration would be far more likely to be achieved.

D. The Trustee’s Roll Forward of LBI’s Books and Records Leads to an Incorrect Letter of Determination

20. On his appointment, the Trustee inherited a set of books and records that was incorrect in significant respects because of, among other things, the settlement activities during the prior week.²⁷ The Trustee has devoted significant resources to rolling forward and restating LBI’s books and records to take account of this settlement activity, and since early 2009, LBIE and its advisors have worked intensively to provide information to the Trustee to permit the Trustee to understand the customer positions underlying the Omnibus Claim. Those efforts have involved, among other things, reconciling the settlement activity for approximately 6,000 securities in which LBIE’s customers have positions. LBIE’s and the Trustee’s efforts have been complicated by the existence of approximately 200,000 trades pending settlement for LBIE and/or its customers involving U.S. securities as of September 15, 2008.

21. On September 16, 2010, the Trustee issued an initial letter of determination prior to the completion of the roll forward of the securities balances. The initial letter of determination was materially incomplete; for example, it did not address the cash portion of the Omnibus Claim. Following the issuance of the initial letter of determination, LBIE and its advisors

²⁶ Trustee’s Sixth Report ¶ 34.

²⁷ See Allocation Motion ¶¶ 77-79 (“during the last week of LBI’s operation as a broker-dealer, its compliance systems were not able to cope with the drastic and abrupt changes in LBI’s financial condition and compliance obligations that occurred immediately before and after the chapter 11 filing of LBHI. . . . These problems were exacerbated by the discontinuance by . . . LBI’s primary clearing bank . . . of LBI’s real-time electronic access to the accounts LBI maintained [there] The inability to monitor these accounts impeded LBI’s ability to keep accurate, up-to-date records and to process settlements of *both customer and firm transactions* on a timely and automated basis, thereby giving rise to significant unreconciled items. Without access to this automated process, LBI was forced to rely on manual processes with greater susceptibility to human error . . .”) (emphasis added).

continued to work intensively with the Trustee and his advisors. On May 19, 2011, the Trustee issued the Letter of Determination.²⁸

22. Although the Trustee has purported to allow approximately \$8.3 billion²⁹ of cash and securities with respect to the Omnibus Claim, the Letter of Determination contains significant errors and does not correctly reflect LBIE's entitlements on behalf of its customers. At least some of the errors in the Letter of Determination appear to be attributable to the Trustee's misallocation of certain of those trades pending as of September 15, 2008. Significantly, of the approximately \$6.1 billion value of securities the Trustee has purported to allow, there is a very significant disconnect between LBIE's entitlement on behalf of its customers and the securities listed in the Letter of Determination.

E. Imposition of Conditions and Denial of the Second Amended Omnibus Claim

23. The Trustee has also imposed onerous conditions on the distribution of the allowed securities and cash reflected in his Letter of Determination, conditions that are not contemplated under SIPA. Specifically, the Trustee conditioned any distributions relating to the allowed portions of the Omnibus Claim on the Trustee's receipt of "a Declaration, Release and Assignment executed by LBIE *and each LBIE Client* entitled to receive a portion of such distribution." Letter of Determination at 4 (emphasis added). In addition, the Trustee allowed the cash claim for OCC Margin only insofar as such amounts will be distributed to LBIE Options

²⁸ As set forth in the Letter of Determination, the Trustee allowed in part and denied in part the Omnibus Claim. The Trustee allowed the Omnibus Claim in part as a customer claim for securities that the Trustee asserts have a value of approximately \$6.1 billion, to the extent set forth in a schedule appended to the Letter of Determination. The Trustee also allowed the Omnibus Claim as a customer claim for cash to the extent of (a) \$944,802,987.99, representing amounts held by LBI for LBIE customers covered by the Omnibus Claim in connection with the sale of securities; and (b) \$1,259,104,293.89, representing amounts held by LBI for LBIE customers (the "**LBIE Options Customers**") engaging in options transactions through the OCC.

²⁹ The Trustee has not provided his methodology to LBIE for ascribing value to the purportedly allowed portion of LBIE's Omnibus Claim for securities. LBIE and the Joint Administrators reserve all of its and their rights with regard to the appropriate value of the allowed Omnibus Claim for securities.

Customers in satisfaction of claims by those customers for amounts earned by them on options transactions or amounts provided by those customers to LBIE as margin for the options transactions, even though this is contrary to the SIPA “single customer pool” concept embodied in the definition of “customer property.” See 15 U.S.C. § 7811(4). The Trustee also denied the Second Amended Omnibus Claim in its entirety, notwithstanding the Claims Filing Agreement that he signed with LBIE and SIPC, or that the September 10, 2010 amendment relates back to LBIE’s previously filed claims in accordance with applicable law.

24. In connection with the negotiations between LBIE and the Trustee with respect to the Omnibus Claim, the Trustee extended the deadline for LBIE to respond to the Letter of Determination until October 31, 2011. Notwithstanding the timely filing of this Objection, LBIE remains fully committed to moving beyond discussion of facts underlying settlement activity only and engaging in constructive discussions to achieve a consensual resolution of the issues relating to denied or reduced components of the Omnibus Claim.

OBJECTION

25. SIPA defines a customer as “any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral, security, or for purposes of effecting transfer.” 15 U.S.C. § 7811(2).

26. Courts in the Second Circuit have uniformly acknowledged that the purpose of the “customer” provisions of SIPA is to protect the custody aspect of a claimant’s relationship with a broker-dealer, i.e., to protect those who have entrusted cash and/or securities to a broker-dealer for the purpose of engaging in securities transactions. See, e.g., In re Bernard L. Madoff Inv. Sec.

LLC, 654 F.3d 229, 236 (2d Cir. 2011) (concluding claimants were customers within the meaning of SIPA and noting the term “customer” includes those who have a claim on account of securities received, acquired, or held by the debtor) (citing ref’s omitted).

27. LBIE, in its representative capacity for its customers, delivered or caused to be delivered to LBI, in the ordinary course of its business as a broker-dealer, the cash and securities covered by the Omnibus Claim. This was for the purpose of effecting securities transactions, which is to say, for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral, security, or for the purpose of effecting transfer. The Omnibus Claim also includes LBIE’s customers’ claims to proceeds of securities sold. As such, LBIE, acting on behalf of its customers, fits squarely within the definition of “customer” under SIPA, and the Omnibus Claim should be, and indeed has been, afforded customer status.³⁰ As set forth below, there is no basis for the Trustee’s denials and reductions of components of the Omnibus Claim, for the unjustified conditions that the Trustee purports to impose, or for the unwarranted denial of the Second Amended Omnibus Claim.

I. THE TRUSTEE HAS INCORRECTLY DETERMINED THE SECURITIES AND CASH TO WHICH LBIE’S CUSTOMERS ARE ENTITLED

28. SIPA’s “net equity” definition makes clear that accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers. See 15 U.S.C. § 7811(11); Ravis v. Labriola (In re Investors Sec. Corp.), 6 B.R. 415, 418 (Bankr. W.D. Pa. 1980). Consistent with the statute, regulations promulgated by SIPC indicate that accounts held by the same person in different capacities will be deemed to be accounts of separate customers. See, e.g., 17 C.F.R. §§ 300.100-300.105.

³⁰ See The Trustee’s Position Statement Regarding Proprietary Claims of Lehman Brothers International (Europe) [ECF No. 4598] (the “**Position Statement**”) at p.16 n.14 (“And, importantly – as evidenced by the Trustee’s allowance of \$8.3 billion on LBIE’s Omnibus Claim – the Trustee does not dispute that an affiliated broker-dealer can make ‘customer’ claims on behalf of underlying public customers”).

29. LBIE filed its Omnibus Claim and its House Claim in different capacities, with its Omnibus Claim filed in a representative capacity on behalf of its underlying customers and its House Claim filed on its own behalf. SIPA is clear that, for purposes of calculating net equity, “accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.”³¹ Under SIPA, therefore, “net equity” must be determined on a customer-by-customer basis.

30. Moreover, to the extent that the Trustee’s roll forward of LBI’s books and records improperly allocated liabilities to the Omnibus Claim, the Trustee’s methodology was incorrect.³² In that regard, SIPA does not permit the Trustee to rely on erroneous books and records to discharge LBI’s obligations to its customers. See In re MV Sec., Inc., 48 B.R. 156, 160 n.5 (Bankr. S.D.N.Y. 1985) (citing 15 U.S.C. § 78fff-2(b)) (noting that “[t]he express recognition in SIPA that the debtor’s books and records may not be accurate for the purpose of establishing a customer account is particularly pertinent It is clear that [the SIPA debtor’s] failure to reflect the arbitration award on [claimant’s] account records would not, standing alone, justify the Trustee’s denial of customer status to [claimant’s] claim. Given that historically SIPA evolved at a time of severe back office problems in the securities industry resulting in substantial inaccuracies in account records, it is clear from 15 U.S.C. § 78fff-2(b) that Congress did not intend to base SIPC coverage solely on what the debtor’s books stated”).

³¹ 15 U.S.C. § 78lll(11); see also 17 C.F.R. § 300.100-300.105. Courts have held that an account of a husband and the joint account of the husband and his wife were separate customer accounts for this purpose under SIPA. See Ravis, 6 B.R. at 418. Likewise, the claims of one individual acting on his own behalf and simultaneously acting as trustee were each considered independent customer claims under SIPA. See In re First State Sec. Corp., 34 B.R. 492, 499 (Bankr. S.D. Fla. 1983).

³² The Trustee rightly anticipates LBIE’s Objection in this regard by including in the July 13, 2011 claim he submitted against LBIE approximately \$1.2 billion relating to short positions in LBIE’s Omnibus Customer Accounts that he had already deducted from LBIE’s Omnibus Claim in the Letter of Determination. The Trustee has indicated that these positions were included “as a precaution.” Trustee’s Sixth Report ¶ 61.

31. Under SIPA, the term “customer” includes “any person who has a claim against the debtor arising out of sales *or conversions* of such securities.” 15 U.S.C. § 7811(2) (emphasis added); see also Miller v. Dequine (In re Stratton Oakmont, Inc.), Nos. 01–CV–2812 RCC, 01–CV–2813 RCC, 2003 WL 22698876, at *3 (S.D.N.Y. Nov. 14, 2003). The term “customer property” includes “the proceeds of any such property transferred by the debtor, including property unlawfully converted.” 15 U.S.C. § 7811(4). “Conversion” is the wrongful possession or disposition of another’s property as if it were one’s own, or an act or series of acts of willful interference, in a manner inconsistent with another’s right, whereby the other person is deprived of the use and possession of the property. See e.g., Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 403-04 (2d Cir. 2006).

32. As is evident from the above authorities, LBIE’s allowed Omnibus Claim must include the value of any securities that should have been sub-custodied by LBI and any unauthorized use by LBI is of no effect in determining this net equity claim. LBIE is continuing to analyze the cash and securities balances between LBI and LBIE during the week of September 15, 2008 as it receives further information from LBI, and the full picture will likely become clear only through the discovery process. For the avoidance of doubt, LBIE objects to the securities and cash determinations in the Letter of Determination in their entirety and will set forth its position more fully in its submissions in response to the anticipated motion by the Trustee to uphold the Letter of Determination. But LBIE summarizes below certain of the more significant problems with the Letter of Determination that form the basis for this Objection. A significant proportion of the errors can be attributed to (i) the Trustee’s reduction of LBIE’s claim for securities attributable to alleged breaks in LBI’s and LBIE’s books and records originating from pre-administration activity (i.e., prior to the Administration Date) and (ii) the Trustee’s

misallocation of the impact of certain trades that were pending as of the Administration Date to LBIE's Omnibus Claim.

A. Incorrect Reductions to the Omnibus Claim Arising from Pre-Administration Settlement Activity

1. Treatment of Pre-Administration Sales of Short Positions

33. As described in paragraph 14 above, when LBIE executed a short sale of U.S. securities in accordance with customer instructions, the requisite number of securities to effect the sale needed to be transferred to the charge omnibus account prior to settlement. On occasion, the quantities of securities delivered to the charge omnibus account did not match the quantity to be sold short. Such discrepancies would routinely be resolved between LBI and LBIE without adverse impact on the positions of other LBIE customers, but that apparently did not occur in the Trustee's roll forward of LBI's books and records. The Trustee's reduction of LBIE's Omnibus Claim in respect of these discrepancies to the detriment of other LBIE customers who were not involved in such transactions, therefore, was erroneous.

2. Treatment of Pre-Administration Lift Return Fails

34. In addition, the Trustee appears to have reduced the securities portion of the Omnibus Claim on account of pre-administration sales of lifted securities that had settled as of September 15, 2008 but as to which there was a failure to return or record the return of equivalent securities to the charge omnibus account in anticipation of the settlement ("**Lift Return Fails**"). Such failures occurred even though the customer had been debited securities and credited cash on the trade date. Prior to the Administration Date, Lift Return Fails were corrected routinely, but without adverse impact on the positions of other LBIE customers.

35. Following September 12, 2008, LBI failed to carry out the ordinary procedures to remedy breaks in the lift return process, so that existing breaks that arose pre-administration

were not resolved. As a result, the Trustee has reduced LBIE's Omnibus Claim by the number of securities for which it appears returns were not recorded, to the detriment of other LBIE customers who held long positions in those securities. LBIE disputes both whether the securities in question in fact failed to return and the Trustee's reduction of the Omnibus Claim. To the extent that the Trustee has reduced the Omnibus Claim for pre-administration Lift Return Fails, the Letter of Determination is incorrect.

B. Incorrect Reductions to the Omnibus Claim Arising from Post-Administration Settlement Activity

1. Sales of Short Positions

36. The Trustee appears to have incorrectly reduced LBIE's allowed Omnibus Claim to the extent that securities in LBIE's Omnibus Customer Accounts were used to settle short sales of one LBIE customer, thereby prejudicing the claims of other LBIE customers whose securities were sub-custodied by LBI. During the week of September 15, 2008, LBI continued to settle short sales instructed by LBIE customers prior thereto, notwithstanding that the relevant security may not have been transferred to the charge omnibus account. The net effect of this activity is that the securities balances allowed in the Letter of Determination with respect to affected securities are inaccurate and significantly understated.

2. Sales of Lifted Securities

37. Further, sell orders relating to lifted securities instructed by LBIE customers that were pending as of the Administration Date were settled without a corresponding return of the lifted securities. It appears that in some instances, LBI settled existing sell orders related to lifted securities of one LBIE customer by using securities held on behalf of other LBIE customers. To the extent that LBI reduced the Omnibus Claim by lifted securities sold, and thereby decreased the long positions of customers who did not issue sell instructions regarding their securities, such

use was unauthorized. LBI's use of such securities should not be applied against LBIE's Omnibus Claim. The net effect of the Trustee's treatment of post-administration sales of lifted securities is that the securities balances allowed in the Letter of Determination with respect to affected securities are understated.

3. Purchases of Long Securities

38. When LBI executed trades pursuant to which a LBIE customer took a long position in a security, the Clearing and Custody Agreement specified that the obligation to pay for that long position was LBIE's, not LBIE's customer's. See Clearing and Custody Agreement §§ 3.3 (Clearance)(B), 8.3. LBI's books and records, in the ordinary course, thus would show securities allocated to LBIE's customers, and a cash receivable from LBIE itself. Contrary to this contractually mandated treatment, the Trustee has allocated to LBIE's customers, rather than LBIE itself, the costs of purchasing long security positions. As between LBIE and its customers, however, LBIE deducted the cost of the purchase from its customer's margin balance on the trade date. The net effect of the Trustee's treatment of the purchase of long securities is to charge LBIE's customer twice for the purchase of long securities. Thus, the cash balance allowed in the Letter of Determination is substantially understated.

4. Purchase of Securities to Close Short Positions

39. When a LBIE customer submitted an order to close an open short position, that would result in an instruction to buy securities equal to the number of securities that the customer owed to LBIE. On the trade date, the customer's cash balance would be debited with the cost of purchasing the securities, and the customer's short position with LBIE would be eliminated. On the settlement date, the securities would be delivered to LBIE to discharge the obligation of the customer.

40. Instead of reflecting such transactions as described above, in the Letter of Determination the Trustee has treated a purchase of a security to close a short position the same as the purchase of a long security, namely by increasing the securities balance and reducing the cash balance in a corresponding amount. This was erroneous. The purchase price of securities to close shorts should not have been deducted from the cash determination for the Omnibus Claim, while the corresponding securities should not have been added. This is consistent both with SIPA and with the outstanding entitlements of LBIE's customers, who, as of the trade date, already would have been credited with the return of securities in satisfaction of their outstanding delivery obligation to LBIE.

C. Selected Additional Errors in the Letter of Determination

41. As indicated herein, LBIE objects to the Letter of Determination in its entirety. In addition to the specific issues identified in sections I.A and I.B above that give rise to the errors in the Letter of Determination, LBIE objects to the Letter of Determination including to the extent to which:

- the Letter of Determination does not reflect securities and cash positions that are subject to LBIE's and LBI's continuing reconciliation efforts;
- the Letter of Determination does not credit the Omnibus Claim for cash redemptions, income earned and other corporate actions on LBIE's customer securities during the week of September 15, 2008, (i.e., before the Filing Date);
- the Trustee's methodology for allocating failed trades in particular securities to LBI's customers, LBI, LBIE's customers and LBIE prejudices LBIE's recoveries under the Omnibus Claim;
- evidence supplied by LBIE's customers contradicts the Trustee's determination of whether certain trades pending as of the Administration Date in fact settled or failed;
- the Letter of Determination relies on the incorrect designation of LBIE's customers as Title Customers rather than Charge Customers;

- the Letter of Determination incorrectly reflects the treatment of pending trades that LBIE's customers either successfully or unsuccessfully sought to cancel during the week of September 15, 2008; and
- it becomes apparent that the Trustee's reduction of certain portions of LBIE's opening cash balance have been incorrectly attributed to intercompany rather than customer-related activity.

42. In addition, LBIE reserves its rights with respect to the treatment of dividends, interest, and corporate actions after the Filing Date with respect to the securities that comprise LBIE's Omnibus Claim. LBIE understands that the Trustee anticipates filing a motion requesting the Court to approve a method of determining and distributing dividends and interest on customer property at a later date.³³

43. LBIE further reserves its right with respect to the Trustee's denial of LBIE's claims to securities on behalf of certain Lehman affiliates that LBIE asserted in both the House Claim and the Omnibus Claim without stating the nominal positions attributable to each such Lehman affiliate. LBIE reserves the right to withdraw these elements, or portions thereof, from the House Claim and reassert them in the Omnibus Claim and vice versa. In addition, LBIE reserves the right to reclassify any other amounts in the House Claim to the Omnibus Claim to the extent that such amounts more properly reflect amounts due from LBI in respect of LBIE customer activity. As noted, LBIE does not seek, and has never sought, a double recovery on any part of its claims, but intends simply to reserve its rights regarding the appropriate classification of its claims.

³³ See Trustee's Sixth Report ¶ 135.

II. THE TRUSTEE IMPOSED CONDITIONS ON THE ALLOWANCE OF A PORTION OF THE OMNIBUS CLAIM THAT ARE INCONSISTENT WITH SIPA

A. The Trustee Cannot Require LBIE to Obtain Releases from All of Its Underlying Customers

44. There is no basis under SIPA that permits the Trustee to impose as a condition of any distribution in respect of the Omnibus Claim a requirement that LBIE obtain a release from each of its underlying customers. This unjustified and unduly burdensome condition would impede, rather than facilitate, both LBI's ability to distribute funds to its customers and LBIE's ability to distribute recoveries to its customers.

45. Although SIPA permits the Trustee to require a "claimant" to execute a release, see 15 U.S.C. § 78fff-2(b), nothing in SIPA permits the Trustee to require a claimant to in turn obtain releases from others. Where LBIE makes a claim on behalf of its customers, to the extent a customer's positions are comprised in LBIE's claim, LBIE *is* the claimant. The Trustee has already implicitly agreed with this position by denying various direct claims of LBIE's customers against the LBI estate on the grounds that they are duplicative of claims properly brought on their behalf by LBIE. The Trustee thus may demand a release from *LBIE* (which LBIE is prepared to provide for itself), but nothing authorizes him to demand a release from LBIE's underlying customers.³⁴ Indeed, under SIPA, the Trustee's discretion is not unlimited and bankruptcy courts have imposed limits on trustees to the extent they have sought to impose overbroad conditions on claimants in exchange for participating in SIPA distributions. See A.R. Baron & Co. v. D.H. Blair & Co. (In re A.R. Baron & Co.), 280 B.R. 794, 802-04 (Bankr. S.D.N.Y. 2002) (noting that the SIPA Trustee overreached his statutory authority under SIPA by requiring SIPA claimants to execute assignment and release forms that purported to assign

³⁴ Based on LBIE's review of previous SIPA cases, the releases sought by the Trustee appear to be unprecedented.

claims against third parties to the Trustee and/or SIPC; the assignment provisions of Section 78fff-2(b) relate only to net equity claims).

46. To the extent the Trustee is able to properly rely on a release from LBIE, as claimant, rather than requiring a release from each of LBIE's underlying customers in relation to the return of specific, underlying assets, this would *assist* LBIE in actually using the allowed claim to satisfy its customers' entitlements, which, of course, is the Trustee's purported intention in requiring a release. As described in greater detail above, a significant shortcoming of the Letter of Determination is that it includes certain securities which do not correspond to underlying customer entitlements. Similarly, the Letter of Determination purports to include negative amounts in relation to other securities where there are underlying customer entitlements. In addition to correcting the Letter of Determination, the only way to enable LBIE to appropriately realize its allowed claim for the benefit of its customers is for the Trustee to accept a release from LBIE, which would provide LBIE the flexibility to use LBI distributions based on the Letter of Determination for the benefit of its customers on the basis of their proper entitlement, their instructions and their agreements.

B. The Requirement that OCC Margin Be Returned Only to LBIE Options Customers Has No Basis Under SIPA

47. Nor does SIPA authorize the Trustee's requirement that OCC Margin be distributed solely to LBIE Options Customers. LBIE filed the Omnibus Claim in a representative capacity, see 15 U.S.C. § 78fff-3(a)(5), and is entitled to recover the OCC Margin held for LBIE's customers without limitation as to how it will be distributed. The OCC Margin was posted in connection with customer activity, and, pursuant to the arrangements between LBIE and its customers governing securities option trades, LBIE advanced the margin on its customers' behalf. LBIE is plainly entitled to customer status with respect to the margin it posted. See 15

U.S.C. § 7811(2) (defining a customer as “any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person . . . as collateral security, or for purposes of effecting transfer.”); Madoff, 654 F.3d at 236. Upon recovery of the OCC Margin through the Omnibus Claim, the cash either will be distributed to LBIE’s customers for whom it was posted or, depending on the circumstances as between LBIE and each of the LBIE Options Customers, retained by LBIE to satisfy LBIE’s liens, subrogation rights, or each LBIE Options Customer’s other obligations to LBIE. LBIE is entitled to recover through the Omnibus Claim amounts related to its customers’ activity, even where LBIE may retain all or a portion of those amounts as provided in agreements between LBIE and its customers. Nothing in SIPA permits the Trustee to condition LBIE’s allowed claim on the method by which, or the pool of LBIE’s customers to which, LBIE will return the cash. Such a result would violate SIPA’s concept of a single customer pool, because it would effectively create a separate pool of property only available to certain customers.

III. THE TRUSTEE ERRED BY DENYING THE SECOND AMENDED OMNIBUS CLAIM IN ITS ENTIRETY

48. As with the September 2010 amendments to the House Claim, the Trustee appears to have denied LBIE’s Second Amended Omnibus Claim on timeliness grounds. This determination is clearly erroneous since the Trustee agreed to treat such amendments as timely and since, in any event, the claims asserted in the Second Amended Omnibus Claim relate back to the Original Omnibus Claim and therefore are timely filed.

49. In entering into the Claims Filing Agreement, LBI, LBIE and SIPC recognized and acknowledged that, following its entry into administration, LBIE no longer had access to

Lehman's IT systems and therefore could no longer ascertain the assets held by LBI for LBIE's customers. The Trustee and SIPC agreed that LBIE would file "an estimated omnibus claim . . . on behalf of its clients," and extended the otherwise applicable deadline for filing claims so that LBIE could file "supplements" or "amendments" to that estimated claim. Claims Filing Agreement at 1, ¶ 9. Specifically, the Trustee agreed that:

The LBI Trustee and SIPC shall construe LBIE's right to supplement and amend the LBIE claims³⁵ as broadly as permitted by applicable law . . . so that such supplements/or [sic] amendments shall relate back to the date of the originally filed claim to the maximum possible extent permitted by applicable law. Such supplements and amendments may, among other things, include amendments to the amount of such claim, the composition of assets underlying each claim, the legal grounds upon which such claim may be asserted or to correct any mistake relating to such claim.

Id. ¶ 9. The Claims Filing Agreement also contemplated that LBI and LBIE would engage in a process to reconcile any differences in their respective records and specified that claim amounts agreed between LBI and LBIE during this reconciliation process "may amend and/or supplement amounts identified in the LBIE Claims." Id. ¶ 12.

50. In the Position Statement the Trustee filed in response to the House Objection, the Trustee argues that because the Claims Filing Agreement only permitted amendments "as broadly as permitted by applicable law," LBIE's September 2010 amendments should be rejected because SIPA "prohibits late-filed claims." See Position Statement ¶ 60. To the contrary, the Trustee should be held to his express agreement and intention to extend that deadline. It is well established that parties can vary legal deadlines by agreement, including deadlines set by statute. See, e.g., European Am. Bank v. Benedict (In re Benedict), 90 F.3d 50, 54-55 (2d Cir. 1996) (allowing the extension of a deadline where the parties agreed to an extension and noting

³⁵ The "LBIE claims" are defined in the Claims Filing Agreement as including the estimated omnibus claim filed on behalf of LBIE's customers.

that statutory deadlines may be waived), quoting United States v. Locke, 471 U.S. 84, 94 n.10 (1985); see also In re Worldcom, 311 B.R. 151, 166 (Bankr. S.D.N.Y. 2004) (recognizing the extension of the bar date for a subset of proofs of claim in a Chapter 11 case). And here, the Trustee's agreement was authorized by the Bar Date and Claims Resolution Order, which provided "that the Trustee shall have the authority . . . to satisfy customer claims insofar as the claims agree with the Debtor's books and records, or are otherwise established to the Trustee's satisfaction, without further orders of this Court," and permitted the Trustee to agree to "procedures for intercompany claims as the Trustee may determine is in the best interests of the Estate."³⁶

51. Moreover, the Trustee should be equitably estopped from repudiating the Claims Filing Agreement. The purpose of the doctrine of equitable estoppel is to prevent a party from unfairly relying on an agreement only when it works to its advantage and repudiating it when it works to the party's disadvantage. See Bimota SPA v. Rousseau, 628 F. Supp. 2d 500, 505 (S.D.N.Y. 2009) (internal quotations omitted). Equitable estoppel may be invoked where (1) the word or deed of one party is (2) rightfully relied upon by another (3) so that the latter's position is changed to his injury and (4) a fraud or injustice would result if estoppel were not allowed. Roseview Farms, Inc. v. Pfister, 603 N.Y.S.2d 326, 328 (2d Dep't 1993). Equitable estoppel does not require the existence of fraud or an intent to deceive; it is enough if the party to be estopped would otherwise acquire an unfair advantage, regardless of whether that party intended no wrong. Robinson v. City of New York, 265 N.Y.S.2d 566, 570 (1st Dep't 1965). Here, LBIE rightfully relied upon the Claims Filing Agreement to file an estimated claim and subsequent

³⁶ Bar Date and Claims Resolution Order at 2.

“supplements” and “amendments” thereto, and the Trustee should not be permitted to benefit by repudiating the agreement at this late stage.

52. Further, the Trustee’s argument that the parties agreed in the Claims Filing Agreement to extend the deadline, but that the inclusion of the phrase “as broadly as permitted by applicable law” prevented the extension from becoming effective, would render key provisions of the Claims Filing Agreement meaningless. As noted above, under the Claims Filing Agreement, LBI agreed that supplements and amendments to LBIE’s Omnibus Claim could include, among other things, “amendments to the amount of such claim, the composition of assets underlying each claim, the legal grounds upon which such claim may be asserted or to correct any mistake relating to such claim.” Claims Filing Agreement ¶ 9. To deny *in toto* LBIE’s Second Amended Omnibus Claim on timeliness alone would render the permissive amendment provisions of the Claims Filing Agreement superfluous, which is contrary to well established contract principles under New York law. *See, e.g., Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) (citing *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988)) (“[u]nder New York law an interpretation of a contract that has ‘the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible’ . . . Rather, an interpretation that ‘gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.’”).³⁷

53. In any event, especially when viewed in light of the Claims Filing Agreement, the Second Amended Omnibus Claim was a proper amendment under traditional relation-back principles. In considering claims amendments, courts focus on whether the initial claim provided the trustee with reasonable notice of the later claim. *See In re McLean Indus. Inc.*, 121 B.R. 704,

³⁷ The Trustee’s position is also disingenuous inasmuch as he suggests he entered into an agreement with LBIE that he intended to have no effect.

708 (Bankr. S.D.N.Y. 1990). A claim that “relates back” to an earlier-filed claim will be deemed an amendment rather than a new claim, if it (i) corrects a defect of form in the original claim; (ii) describes the original claim with greater particularity; or (iii) pleads a new theory of recovery on the facts set forth in the original claim. See Integrated Res., Inc. v. Ameritrust Co. Nat’l Ass’n (In re Integrated Res., Inc.), 157 B.R. 66, 70 (S.D.N.Y. 1993). Once it is determined the proposed amendment relates back to the timely filed claim, amendment is liberally granted absent an overriding equitable concern. See McLean, 121 B.R. at 708.

54. The Claims Filing Agreement conclusively demonstrates that the Trustee understood LBIE to be making the broadest claim possible for all of its customers’ assets in LBI’s possession which LBI held or settled pursuant to the Clearing and Custody Agreement, whether or not each relevant customer or asset could be identified as of the time LBIE originally filed its Claims. The Agreement recites that LBIE “intends to file an estimated . . . claim . . . on behalf of its clients,” that “LBIE faces considerable difficulties . . . including missing or inaccessible records and IT data that complicate the compilation of claims,” and that “LBIE desires comfort regarding the sufficiency of the LBIE Claims to be filed on or before January 30, 2009 for the purpose of asserting and preserving LBIE’s and its clients’ rights in accordance with SIPA.” Claims Filing Agreement at 1. Moreover, demonstrating that the Trustee understood that LBIE was claiming as broadly as possible for all of its customers’ assets whether enumerated in the claim or not, the Trustee acknowledged not just that LBIE could “amend” its claim, but that LBIE could “supplement and amend” the claim, including by changing “the amount of such claim” and “the composition of assets underlying each claim.” Id. ¶ 9.

55. The Original Omnibus Claim in fact put the Trustee on notice that LBIE was claiming broadly for all assets held by LBI or settled for LBIE’s customers. Rather than simply listing

certain customers or assets for which claims were being made, the Original Omnibus Claim described the relationship between LBIE and LBI in detail, explaining that “LBIE had hundreds of prime brokerage and other customers that used LBIE to obtain exposure to a wide range of financial products,” and that “whenever LBIE’s customers sought to gain exposure to securities listed in the US or for their US assets to be held for safekeeping, LBI acted as LBIE’s primary custodian providing such clearing and custody services to LBIE and its clients.” The claim recited that LBI provided such services pursuant to the Clearing and Custody Agreement and a copy of the Clearing and Custody Agreement was attached to the claim. All of the assets identified in the Second Amended Omnibus Claim relate back to the Original Omnibus Claim and therefore are allowable as amendments.

56. Moreover, there is no overriding equitable concern that would justify disallowance of the Second Amended Omnibus Claim. In assessing whether there is an overriding equitable concern, courts consider (i) undue prejudice to the opposing party; (ii) bad faith or dilatory behavior on the part of the claimant; (iii) whether other creditors would receive a windfall were the amendment not allowed; (iv) whether other claimants might be harmed or prejudiced; and (v) the justification for the inability to file the amended claim at the time the original claim was filed. See Integrated, 157 B.R. at 70; McLean, 121 B.R. at 708. Of these five factors, the most influential consideration is whether the opposing party will be unduly prejudiced by the amendment. See Integrated, 157 B.R. at 70. Allowance of the Second Amended Omnibus Claim will not impose undue prejudice on LBI’s estate because the Trustee has been on notice since the filing of the Original Omnibus Claim of LBIE’s intention to claim for assets that were held or should have been held by LBI pursuant to the Clearing and Custody Agreement. Further, LBIE’s delay in filing the Second Amended Omnibus Claim was reasonable and largely based

on factors outside of LBIE's control given the unprecedented complexity of simultaneously administering its own estate and the claims against it while attempting to assess what claims it has against LBI, on the basis of incomplete information.³⁸

RESERVATION OF RIGHTS

57. LBIE hereby reserves all rights, privileges, remedies, and benefits with respect to the Omnibus Claim, including, without limitation, to seek factual discovery with respect to the issues raised in the Omnibus Claim, the Letter of Determination, or this Objection, and to file amended or supplemental objections and/or replies. Nothing herein shall be deemed or otherwise relied upon as a waiver of any of LBIE's rights, privileges, and remedies under applicable law. Without limiting the generality of the foregoing, no statement in this Objection is a waiver of any argument against, or admission of, any liability by LBIE, and to the extent, if any, that any liability in connection with the incorrect reductions in the Omnibus Claim or otherwise may be determined to be LBIE's, LBIE also reserves all its rights to recover and retain for its own account any associated assets. LBIE also reserves all of its rights to retain for its own account any recoveries through the Omnibus Claim including in respect of liens granted to it by its customers and subrogation and other rights in respect of its transactions with customers, including, without limitation, as to the OCC Margin and UBS O'Connor balances. LBIE intends to file detailed pleadings in the future in connection with a consensual briefing, discovery, and trial schedule to be agreed to with the Trustee and submitted to the Court for approval.

REQUEST FOR RELIEF

58. WHEREFORE, LBIE respectfully requests that this Court: (i) overturn the Letter of Determination insofar as it incorrectly reflects LBIE's customers' SIPA entitlements;

³⁸ LBIE does not control the IT systems necessary to quantify the MTS Collateral. LBIE filed this aspect of the Second Amended Omnibus Claim as soon as was practicable after gaining access to this data.

(ii) eliminate the restrictions the Trustee purports to impose on any distributions with respect to those entitlements; and (iii) award such other relief as this Court deems just and proper.

Dated: New York, New York
October 31, 2011

Respectfully submitted,

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