

IN THE HIGH COURT OF JUSTICE

No. 7942 of 2008

CHANCERY DIVISION

COMPANIES COURT



**IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL
(EUROPE) (in administration)**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

ORDINARY APPLICATION

TAKE NOTICE that Anthony Victor Lomas, Steven Anthony Pearson, Michael John Andrew Jervis, Dan Yoram Schwarzmann and Derek Anthony Howell of PricewaterhouseCoopers LLP, Plumtree Court, London EC4A 4HT ("**Administrators**"), the Joint Administrators of Lehman Brothers International (Europe) ("**LBIE**"), intend to apply to the Companies Court Judge on:

Date: 28/5/10

Time: TBC

Place: TBC

For directions pursuant to paragraph 63 of Schedule B1 and for orders as follows:

- Whether, on its true construction, Section 2(a)(iii) ("**Section 2(a)(iii)**") of both the ISDA Master Agreement, Multicurrency-Cross Border version, published in 1992 by the International Swaps and Derivatives Association, Inc. ("**ISDA**"), and the ISDA 2002 Master Agreement, published in 2002 by ISDA (each referred to herein as the "**Master Agreement**"), has the effect that, where one or more of the Events of Default listed in Section 5(a)(vii) of the Master Agreement (each a "**Bankruptcy Event of**

Default) with respect to LBIE has occurred and is continuing, the obligation which would otherwise arise on the other party (each a **Counterparty**) under Section 2(a)(i) (**Section 2(a)(i)**) of the Master Agreement to make each payment or delivery specified in each Confirmation to be made by it does not arise, notwithstanding that such Bankruptcy Event of Default might continue for all time.

2. Whether a Bankruptcy Event of Default with respect to LBIE will have occurred and will be continuing within the meaning of Section 2(a)(iii) throughout the following procedures and, if not, when such Bankruptcy Event will no longer be continuing:
 - (1) the continuing administration of LBIE, with its assets being distributed in accordance with paragraph 65 of Schedule B1 (**Schedule B1**) to the Insolvency Act 1986 (**IA 1986**) and/or Part 2 Chapter 10 of the Insolvency Rules 1986 (**IR 1986**);
 - (2) the winding up of LBIE pursuant to a winding up order, or a resolution of its members or the operation of paragraph 83 of Schedule B1, in each case immediately following LBIE's exit from administration;
 - (3) the coming into effect of a voluntary arrangement approved under Part I of the IA 1986, amounting to an arrangement or composition with or for the benefit of LBIE's creditors, either (a) at a time at which LBIE remains in administration or (b) immediately following LBIE's exit from administration;
 - (4) the coming into effect of a compromise or arrangement sanctioned under section 899 of the Companies Act 2006, amounting to an arrangement or composition with or for the benefit of LBIE's creditors, either (a) at a time at which LBIE remains in administration or (b) immediately following LBIE's exit from administration.
3. Whether, on the true construction of Section 2(a)(iii), the condition precedent that no Bankruptcy Event of Default with respect to LBIE has occurred and is continuing ceases to operate as a condition precedent to

each obligation of the Counterparty under Section 2(a)(i) at some time after the occurrence of such Bankruptcy Event of Default and, if so, in what circumstances it ceases so to operate.

4. Whether, if the effect of Section 2(a)(iii) is that each obligation of the Counterparty under Section 2(a)(i) remains subject to a condition precedent that no Bankruptcy Event of Default with respect to LBIE has occurred and/or is continuing, such provision is unenforceable and/or void on the grounds that:
 - (1) it has the effect, by reason only of the occurrence and/or continuation of a Bankruptcy Event of Default and/or LBIE's insolvency, of depriving LBIE of an asset or assets which would, but for Section 2(a)(iii), be available for distribution amongst its creditors; and/or
 - (2) it is inconsistent with section 107 of IA 1986, rule 2.69 of IR 1986, rule 4.181 of the IR 1986 and/or any other principle or rule of law which requires the assets of an insolvent company to be collected and distributed amongst its creditors *pari passu*; and/or
 - (3) it offends against the rule that a person cannot make it a part of his contract that, in the event of the insolvency of a counterparty, he is to get some additional advantage which prevents property being distributed on a *pari passu* basis; and/or
 - (4) it is otherwise contrary to public policy.
5. Whether, if the effect of Section 2(a)(iii) is that each obligation of the Counterparty under Section 2(a)(i) remains subject to a condition precedent that no Bankruptcy Event of Default with respect to LBIE has occurred and/or is continuing and such provision is enforceable, the Counterparty is entitled to prove under rule 2.72 of IR 1986 in respect of any obligations owed to it by LBIE notwithstanding the fact that the Counterparty has not performed any obligations that, but for the operation Section 2(a)(iii), would have been due from it.
6. Whether, if the effect of Section 2(a)(iii) is that the obligations of the Counterparty under Section 2(a)(i) have not and will not arise, LBIE is

entitled to restitution in respect of payments and/or deliveries made to the Counterparty before LBIE became affected by any Event of Default and, if so, in what circumstances or subject to what conditions does or will such an entitlement arise.

AND FOR

7. An Order that the Joint Administrators' costs of the Application be paid as an expense of the administration of LBIE.
8. Such further or other directions as the Court considers appropriate.

Dated:

Signed:

Administrators' Solicitors:

Position held:

..... 25 May 2010
.....
Linklaters LLP
Partner

Address for service: Linklaters LLP, One Silk Street, London, EC2Y 8HQ, Ref: Simon Firth / Andrew Hughes

It is intended to serve this Application on:

1. JFB Firth Rixson, Inc.
2. FR Acquisitions Corporation (Europe) Limited
3. Liberator Midco Limited
4. KP Germany Zweite GMBH

Notice of this Application will be given to the Financial Services Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS.

If you do not attend, the Court will make such order as it thinks fit

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Reference: Simon Firth / Andrew Hughes

Solicitors for the Administrators