No 7942 of 2008

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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(as the joint administrators of the above named company)

Applicants

- AND -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À R.L

(3) HUTCHINSON INVESTORS LLC

(4) WENTWORTH SONS SUB-DEBT S.À R.L

(5) YORK GLOBAL FINANCE BDH, LLC

(6) GOLDMAN SACHS INTERNATIONAL

Respondents

REPLY POSITION PAPER TO GOLDMAN SACHS INTERNATIONAL ON BEHALF OF THE FOURTH RESPONDENT

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1. Goldman Sachs International ("GSI") adopts the same position[1] as the Senior Creditor Group ("SCG"). Wentworth relies on its revised position paper dated 7 May 2015. This further reply paper provides a brief response to certain points made in GSI's position paper, which response will be developed in written argument for the hearing of the Waterfall II application in relation to Part C. Unless the context requires otherwise, capitalised terms used but not otherwise defined herein are defined in the Waterfall II application dated 12 June 2014 (as amended pursuant to the order dated 9 March 2015).

2. The cost of funding language[2] within the definition of Default Rate in the ISDA Master Agreement must be seen in its context: it is defining a rate of interest to be paid on the amount due upon the close-out of transactions entered into pursuant to the ISDA Master Agreement, for the period such amount is outstanding.

3. The definition of Default Rate thus requires determination of the cost of obtaining funding in the Relevant Amount for a period. This implies that the amount funded is required to be repaid at the end of the period, which is an essential feature of borrowing, but not of equity. The Default Rate is concerned with the cost of borrowing the Relevant Amount for the period it is outstanding from the Defaulting Party.

4. The cost to an entity of funding its assets generally (c.f. paragraph 9(1)(b) of GSI's position paper), or funding its losses (c.f. paragraphs 7(3) and 9(1)(c) of GSI's

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[1] GSI is requested to clarify its position as regards the difference in its construction of the cost of funding language at paragraphs 8(3) and 8(4), on the one hand, and paragraphs 12(4), 13, 14, 15 and 16, on the other hand. GSI interprets the cost of funding language as, respectively, any cost that "*would*" have been incurred or any cost that "*could*" have been incurred. These formulations are inconsistent. GSI should clarify which it pursues.

[2] The same or similar cost of funding language appears in the definitions of Non-Default Rate and Termination Rate. The meaning which GSI and the SCG would give to that language makes no sense in the context of those definitions also.

position paper) is irrelevant to the definition of Default Rate. The fact that financial institutions fund their assets generally, and are so required for regulatory capital purposes, using broader sources of funding including equity, is equally irrelevant to the definition of Default Rate. The cost of funding assets, or of funding losses, is unrelated to the cost of funding the Relevant Amount for the period it is outstanding.

5. The lack of any connection – and the difficulty of forging any connection – between a financial institution's general funding activities and the funding of an unpaid amount under the ISDA Master Agreement is readily apparent from the facts in relation to GSI. In response to the amount of $15.8bn said to have been raised by way of preferred and ordinary stock detailed at pages 23-24 of GSI's position paper, Wentworth would highlight that:

(1) GSI did not issue any of the preferred or ordinary stock. The issuances were by Goldman Sachs Group, Inc ("GSGI"). Even if the cost of issuing equity was theoretically within the cost of funding language in the definition of Default Rate, it was not GSI that incurred that cost.

(2) GSGI issued $15.8bn of preferred and ordinary stock on 24 September 2008 ($10bn) and 14 April 2009 ($5.8bn). This cannot plausibly be said to have been raised to fund the cost of an unpaid amount of $86m, which represents the claim of GSI against LBIE under the 1992 ISDA Master Agreement.

(3) The capital ratios of GSGI were at all times far in excess of those required by regulators in the United States and Europe, as stated in GSGI's published accounts and filings with the Securities and Exchange Commission ("SEC"), for example its capital ratios (based on risk weighted assets) were:

As of Date	Tier 1 Capital Ratio	Total Capital Ratio
Nov 08	15.6%	18.9%
Dec 09	15.0%	18.2%
Dec 10	16.0%	19.1%
Dec 11	13.8%	16.9%
Dec 12	16.7%	20.1%
Dec 13	16.7%	19.9%
Dec 14	13.8%	16%

(4) The above information has been extracted from GSGI's 10-K filings with the SEC, specifically: 2009, pp.93-96; 2010, p.205; 2011, p.171; 2012, p.180; 2013, p.194; 2014, pp.203-204; and 2015, pp.194-196.

(5) As also therein reported, Federal Reserve Board regulations required bank holding companies such as GSGI to maintain a minimum tier 1 capital ratio of 4% and a minimum total capital ratio of 8%, which ratios relate to the internationally agreed Basel accords.

(6) As such neither GSGI nor GSI can plausibly assert that there is a connection between the funds so raised and LBIE's default against GSI in the amount of $86m. Indeed, GSI has filed claims in the estates of Lehman Brothers Holdings Inc. (as guarantor of a claim against LBIE under an ISDA Master Agreement) and Lehman Brothers Special Financing Inc, which indicate that its cost of funding was approximately 0.07% and 3.78% as asserted by the respective claims.[3]

(7) The natural and obvious inference is that GSGI raised funds of $15.8bn for use in its business generally and by reason of manifold business needs and ambitions:

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[3] The claims submitted were not on the basis of the Default Rate but on the basis of the Termination Rate. However, as regards the costs of funding language, the Termination Rate is identical to the Default Rate save that it does not add 1%.

(a) In its annual report for the year end 28 November 2008 (at p.28), GSGI stated that "this additional capital provides further funding to our business and we believe has improved investor perceptions with regard to our financial position."

(b) Similarly in the supplemental prospectuses for the ordinary shares issued GSGI explained (at p.2) that it was: "[t]o use the proceeds of the offering to provide additional funds for operations and for other general purposes." Additionally explaining (at p.2) that it was, in the case of the April 2009 offering, provided that it was allowed following stress tests, "to use the money raised to redeem stock issued to the US Treasury under the Troubled Asset Relief Program (TARP)".

6. The lack of any connection – and the difficulty of forging any connection – between a financial institution's general funding activities and the funding of an unpaid amount under the ISDA Master Agreement is, moreover, underlined by the vast sums at extraordinarily low rates GSGI and GSI has access to in the relevant period:

(1) GSI's costs of funds, as stated by S&P Capital IQ:

(a) in the period Q3 2008 to Q1 2015, did not exceed 3.1% (using the quarterly chart); and

(b) in the period 2008 to 2015 did not exceed 3.2% in 2008 (using the annual chart) and was for most of this period below 1%.

(2) Following the conversion of GSI's parent, GSGI, to a "bank holding company" after the collapse of Lehman Brothers, GSGI and GSI were able to access cheap funding from the Federal Reserve Bank of New York, as stated in GSGI's press release and the Federal Reserve's press release both dated 21 September 2008. There were a number of facilities available, for example:

(a) The primary credit facility for depositary institutions allowed borrowing at rates between 2.25% and 0.5% in the period 15

September 2008 to February 2010, with the rate being 0.75% thereafter.

(b) The primary dealer credit facility allowed borrowing at rates between 2.25% and 0.5% in the period 15 September 2008 to 18 February 2010.

(c) The single-tranche term repurchase programme allowed borrowing via a series of repo transactions at rates that range between 1.10% and 0.01%. Pursuant to this programme, in the period October to December 2008, GSGI and GSI borrowed a sum of about US$41bn at rates of between 1.10% to 0.01%.

7. The difficulties in establishing a sufficient link in practice between an entity's cost of raising funding for its assets/losses generally and funding the Relevant Amount for the period it is outstanding, involving (as the information pertaining to GSI illustrates) consideration of the motivation for raising funds in one way or another, suggest that the draftsman of the ISDA Master Agreement did not intend such complexities to play a role in the determination of the Default Rate. The natural construction is that the draftsman's focus was on the cost of borrowing the relevant amount for the period it was outstanding.

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6 August 2015