

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**COMPANIES COURT**

**No. 7942 of 2008**

**Before the Honourable Mr Justice Hildyard**

**Monday the 12<sup>th</sup> day of December 2016**

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

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN**

**(1) ANTHONY VICTOR LOMAS**

**(2) STEVEN ANTHONY PEARSON**

**(3) PAUL DAVID COPLEY**

**(4) RUSSELL DOWNS**

**(5) JULIAN GUY PARR**

**(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL  
(EUROPE) (IN ADMINISTRATION))**

**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**

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**GOLDMAN SACHS INTERNATIONAL'S  
PROPOSED ALTERNATIVE DECLARATIONS,  
AMENDING DECLARATIONS (ii), (iii), (vi) AND (viii) TO (xv)  
OF THE ORDER OF MR JUSTICE HILDYARD  
DATED 12 DECEMBER 2016**

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Issue 11 (paragraph 11 of the Application Notice)

- (ii) The expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the ISDA Master Agreement is the cost which the relevant payee is or would be required to pay in entering into a transaction to fund the relevant amount, whether an actual cost where the relevant payee does in fact enter into a fund-raising transaction or a hypothetical cost where it does not do so.
- (iii) The expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the ISDA Master Agreement includes the cost of entering into a transaction to raise equity funding to fund the relevant amount.
- (vi) The relevant “*cost*” is not limited to a formal obligation (whether actual or hypothetical) to pay a sum of money.
- (viii) A “*cost*” may be incurred if it is formally discretionary, provided that there is a commercial requirement to pay a sum in exchange for the relevant funding, or if legal or commercial detriments follow from the failure to make the payment.
- (ix) The requirement (whether an obligation or formally discretionary) to pay a sum of money must be incurred in obtaining the funding and as part of the bargain entered into to obtain such funding, or must be necessary in order to raise such funding, in order for it to be a relevant “*cost*”.
- (x) The relevant “*cost*” must be the cost of funding the relevant amount to address the cash shortfall caused by non-payment. It does not include the cost of funding some other amount for other or wider purposes. Notwithstanding the foregoing, a party that funds the relevant amount or would have funded the relevant amount from the proceeds of a larger fund-raising transaction may apportion part of that transaction to the relevant amount, and certify the cost of that funding on a pro-rata basis, for the purposes of establishing its “*cost...of funding*” under the definition of “*Default Rate*”.

- (xi) The relevant “cost” may include the cost of any fees paid or charges incurred as a necessary requirement to raise the funding to fund the relevant amount, including (without limitation) any fees paid to a funder as part of the price of funding the relevant amount, as well as any other applicable professional fees and underwriting charges.
- (xii) In order to constitute a relevant “cost”, a rate paid for the funds must not exceed that which the party raising the funds knows to be or which could be available to it in the circumstances pertaining to its business, having regard to the permitted object of the actual or hypothetical fund-raising transaction (to cover the relevant amount).

Issue 12 (paragraph 12 of the Application Notice)

- (xiii) For the purpose of establishing the “cost (*without proof or evidence of any actual cost*) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount”, such funds should (where relevant) be assumed to have recourse to the relevant payee’s unencumbered assets generally and not solely to its claim against LBIE.
- (xiv) The certifiable cost is the price which the relevant payee has paid, or would have to pay, to a counterparty to a transaction to raise a sum equivalent to the relevant amount taking into account all relevant circumstances, and is not the weighted average cost of all its funds.
- (xv) The relevant “cost” does not include any general impact on the cost of the relevant payee’s equity capital, attributable to raising a sum equivalent to the relevant amount.