

Witness Statement  
Lehman Brothers Holdings Plc (In Administration)  
G E Bruce  
Third  
"GEB3"  
15 March 2018

**CR-2008-000026**  
**(FORMERLY NO. 7943 OF 2008)**

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
INSOLVENCY AND COMPANIES LIST (CHD)**

**IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN:**

**THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)**

**Applicant**

**- and -**

**(1) LEHMAN BROTHERS HOLDINGS INC**

**(2) THE JOINT LIQUIDATORS OF LB GP No.1 LIMITED (IN LIQUIDATION)**

**(3) DEUTSCHE BANK A.G. (LONDON BRANCH)**

**Respondents**

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**THIRD WITNESS STATEMENT OF GILLIAN ELEANOR BRUCE**

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I, Gillian Eleanor Bruce, of 7 More London Riverside, London, SE1 2RT, will say as follows:

1. I am a director in the Business Recovery Services practice at PricewaterhouseCoopers LLP ("PwC").
2. I am a Chartered Accountant, and have specialised in insolvency and restructuring since 1991. I have been a licensed insolvency practitioner for 20 years.
3. Since 22 March 2013, I have been one of the joint administrators of Lehman Brothers Holdings Plc (In Administration) ("LBH", and the "LBH Administrators"). In recent years,

Hogan Lovells

I have had principal day-to-day responsibility for the conduct of LBH's administration in consultation with my fellow LBH Administrators as appropriate. Each of my fellow LBH Administrators is also a licensed insolvency practitioner from PwC. I am therefore familiar with LBH's affairs and am duly authorised to make this witness statement on the LBH Administrators' behalf.

4. I make this witness statement in support of the LBH Administrators' application for directions pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 in respect of certain legal issues which have arisen in the course of the administration.
5. In summary, there is a distinct prospect that LBH will in due course be in a position to make a partial distribution in respect of its subordinated debt obligations. However, a dispute has emerged as between the holders of LBH's subordinated debts as to the priority in which they should receive any such distributions *inter se*. Having taken appropriate legal advice on these questions (privilege in which is not waived), the LBH Administrators seek directions in order to determine the correct priority in which LBH's subordinated debt obligations should be paid, together with directions on certain consequential matters which relate to those subordinated debts. The determination of those issues will enable the LBH Administrators to make appropriate distributions on such debts to the extent of any funds which become available for that purpose.
6. Given the overlap between these issues and a similar issue which also requires determination within another of the Lehman Brothers administration estates (that of LB Holdings Intermediate 2 Limited (In Administration), "LBHI2" - see below), the LBH Administrators believe that it is in the interests of LBH's creditors for these issues to be determined now (as more fully set out at paragraphs 118 to 133 below).
7. As I explain in more detail later in this witness statement, there is a material overlap between the subordinated debt priority dispute within the LBH estate and the subordinated debt priority dispute which has arisen in the LBHI2 estate. That dispute is the subject of a parallel application by the joint administrators of LBHI2. Given that overlap, the LBH Administrators consider that it is most efficient in terms of cost and the use of Court time for these matters to be determined together. Further, given the duration of previous Lehman Brothers *Waterfall* applications, there is a risk of severe delay to the resolution of the matters in dispute within the LBH estate if they are not determined concurrently with the LBHI2 application, but instead have to be addressed following the final determination of that application.
8. I explain the identity and relevance of each named respondent to this application below. However, in summary, the LBH Administrators consider that each respondent has a material interest in the LBH subordinated debt obligations whose priority is disputed. The

LBH Administrators consider that each is therefore a proper and appropriate party to advance submissions to the Court on the correct approach to the central priority question, and thus an appropriate respondent.

9. I will refer in this witness statement to a paginated bundle of documents now shown to me and marked "GEB3". References to page numbers in this witness statement are to pages of GEB3, unless otherwise stated.
10. The facts and matters stated in this witness statement are either within my own knowledge, in which case they are true, or are based on information or documents which are available to me as an LBH Administrator, in which case they are true to the best of my knowledge, information and belief.
11. When I refer in this statement to being advised of certain matters, I do not intend to and do not thereby waive any privilege or analogous legal rights in such advice as I or the other LBH Administrators may have taken.
12. To assist in summarising the context, I refer to **page 1** which is a simplified chart of the main companies and fund flow routes relevant to this application, which may be of assistance to the Court.

#### **LBH's ADMINISTRATION**

13. LBH is an English-incorporated company within the Lehman Brothers group. It was placed into administration on 15 September 2008 alongside other English members of the Lehman Brothers group, including Lehman Brothers International (Europe) ("LBIE"). As the Court is aware, LBIE was the main Lehman Brothers trading entity in Europe, and its administration has involved substantial legal proceedings, including various strands of the *Waterfall* litigation.
14. Insolvency practitioners from PwC have been administrators of LBH since 15 September 2008. The purpose of the administration which is being pursued is the achievement of a better result for LBH's creditors as a whole than would be likely if LBH was wound up without first being placed into administration.
15. The term of LBH's administration has been extended on a number of occasions, most recently by an Order of the Court which extended the period of administration to 30 November 2020.
16. In the latter years of the Lehman Brothers group's operations prior to administration, LBH's role was principally as an intermediate holding company within the UK group structure. It did not trade as a banking or financial advisory institution, nor did it actively

trade with market counterparties. LBH was, however, involved in certain of the arrangements by which the Lehman Brothers group financed its affairs. Thus it was involved in the borrowing and lending of money to other group entities. Similarly, in a limited number of transactions which are relevant to this application, LBH was involved in steps by which finance was obtained by the Lehman Brothers group from market counterparties.

17. As a result of its role prior to administration, the vast majority of LBH's creditors by value are other companies within the Lehman Brothers group. Likewise, the vast majority of LBH's assets comprise debt obligations owed to it by other Lehman Brothers group companies.
18. In terms of returns to date, on 2 May 2014 the Court granted the LBH Administrators permission to make distributions to its unsecured, non-preferential (unsubordinated) creditors. LBH's administration therefore became a distributing administration. On 3 September 2014, LBH declared and paid a first interim dividend of 4.08 pence in the pound on admitted unsecured, non-preferential (unsubordinated) claims.
19. On 10 February 2016, LBH declared and paid a second interim dividend of 2 pence in the pound to its unsecured, non-preferential (unsubordinated) creditors.
20. On 6 September 2017, LBH declared and paid a third interim dividend of 62.963 pence in the pound to its unsecured, non-preferential (unsubordinated) creditors. This distribution followed, and was to a substantial extent facilitated by, the dismissal by consent of the *Waterfall III* litigation and the implementation of the so-called "Backstop" settlement transaction between various Lehman Brothers entities including LBH, which was sanctioned by the Court.
21. As a result of these distributions, LBH has now paid an aggregate interim dividend of 69.043% on the claims of its unsecured, non-preferential (unsubordinated) creditors, with those dividends totalling in excess of £705 million by value.
22. As at the date of this statement, LBH's admitted unpaid unsecured, non-preferential (unsubordinated) claims total approximately £317 million, and accrued but as yet unpaid statutory interest on these claims stands at approximately £750 million.

#### **LBH CASHFLOWS**

23. I have already mentioned in paragraph 17 above that the majority of LBH's creditors by value are other Lehman Brothers entities, and similarly the majority of its assets are claims against other Lehman Brothers entities. This means that the way in which

recoveries flow into and out of the LBH estate is more complex than for a typical insolvent company.

24. By way of one brief example, one of LBH's substantial unsecured (unsubordinated) creditors is another group company in administration called Lehman Brothers Limited ("**LBL**"). LBL's unsecured creditors include LBHI2. In turn, LBH is both an unsecured (unsubordinated) creditor of LBHI2, and a subordinated creditor of LBHI2 (this latter position being the one that leads to LBH's role in the LBHI2 application). These various claims between entities mean that, at least until each company has paid all of its unsecured (unsubordinated) creditors plus statutory interest in full, when LBH makes a distribution:
  - (a) part of the cash which LBH distributes flows to LBL;
  - (b) when LBL next makes a distribution, part of the cash which it has received from LBH flows to LBHI2; and
  - (c) when LBHI2 then makes its next distribution, part of that cash flows back to LBH.
25. This means that, in principle, when LBH makes a distribution to LBL, it is likely to receive part of that distribution back in due course from LBHI2. In addition to the example above, there are other instances when cash will, or could, flow in a circuitous fashion among Lehman Brothers group companies when particular distributions are made.
26. I mention this point to explain why it is not possible to predict with accuracy the amounts which might ultimately be available for LBH's creditors, including its subordinated creditors. Even if one makes certain assumptions about likely recoveries into LBH, the amounts which will ultimately be received by particular groups of LBH creditors will also depend upon the asset and creditor position of certain other group companies, and the way in which any distributions made by LBH in fact flow around the group at any particular time.

#### **FURTHER RECOVERIES INTO LBHI2**

27. As the Court is aware, one of the other Lehman Brothers UK group companies is an intermediate holding company called LBHI2, to which I referred in paragraph 6 above. That company entered into administration on 14 January 2009. I am also one of the joint administrators of that company alongside other PwC insolvency practitioners.
28. To maintain an appropriate independence and segregation of functions since it became clear that a Court process was likely to be needed on these issues, I act on behalf of the LBH Administrators in respect of the matters relevant to this application, and in relation to

LBH's position on the parallel application by the LBHI2 administrators. My colleague and fellow insolvency practitioner Derek Howell is separately acting in the interests of the LBHI2 administrators in respect of these two applications, and is making a witness statement in support of the LBHI2 application which I have seen in draft (as circulated by LBHI2's solicitors). Consistent with past practice in such matters on *Waterfall* disputes, I on behalf of the LBH Administrators and Derek Howell on behalf of the LBHI2 administrators are taking separate, independent legal advice on these matters.

29. I do not descend into the detail of LBHI2's position given it is addressed in Mr Howell's statement, save to note certain key matters. As the Court will be aware from prior *Waterfall* litigation, LBHI2's financial position has been closely entwined with that of LBIE, given LBIE's very substantial asserted contribution claim against LBHI2 in LBHI2's capacity as a LBIE shareholder and LBHI2's interest in the substantial subordinated debt claim against LBIE going the other way. These uncertainties meant that, from 2009 to August 2017, LBHI2 was not in a position to make any distributions to its creditors.
30. However, substantially facilitated by a combination of the UK Supreme Court's decision in *Waterfall I*, the dismissal by consent of *Waterfall III*, and the implementation of the "Backstop" transaction referred to above, on 6 September 2017 the joint administrators of LBHI2 declared and paid a first interim dividend. That dividend was the full 100 pence in the pound, plus a share of accrued statutory interest, to all unsecured, non-preferential (unsubordinated) creditors of LBHI2 whose claims had been admitted for dividend purposes.
31. Whilst LBHI2 has now paid all of its unsecured (unsubordinated) creditors in full together with some statutory interest, it retains a material financial interest in the LBIE administration. Indeed it is anticipated that LBHI2 will in the near future receive further material sums emanating from LBIE. LBHI2's interest in LBIE derives from LBHI2's interest in the so-called Wentworth joint venture<sup>1</sup>, which holds (amongst other things) a very substantial subordinated debt claim in LBIE.
32. In Mr Howell's witness statement, he draws attention to the LBIE administrators' progress report of 9 October 2017. In that document, the LBIE administrators recorded their estimate that if all existing *Waterfall* judgments were upheld on any remaining appeals, a surplus of approximately £2.4 billion would remain after payment of statutory interest to LBIE's unsubordinated creditors, and would therefore be available for the repayment of the sums due on its subordinated debt.

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<sup>1</sup> This is a joint venture previously entered into by the joint administrators of LBHI2, Elliot Management Corporation and King Street Capital Management.

33. In addition, as explained on the website maintained by LBIE's administrators, LBIE is planning to propose a Companies Act scheme of arrangement in the first quarter of 2018 (see **pages 2 to 4**). That scheme of arrangement, if it becomes effective, will be designed to resolve remaining litigation in the LBIE estate (including *Waterfall II*) and thereby facilitate material further distributions to LBIE's remaining stakeholders, including its subordinated creditors. The LBIE website records that certain key LBIE creditor groups have already committed to support the proposed scheme. Hence there is a good degree of optimism that it will receive the requisite voting support in order to become effective.
34. Mr Howell notes that if LBIE's proposed scheme of arrangement comes to fruition and the scheme is approved and sanctioned, the resulting projected recoveries to LBHI2 mean that LBHI2 is likely to be able to discharge statutory interest on its own unsecured (unsubordinated) claims in full, and is then likely to have a substantial surplus available to pay its own subordinated creditors (albeit that it will be insufficient to pay them in full).

#### **LBH's SUBORDINATED CLAIM AGAINST LBHI2**

35. I have described LBHI2's position because it provides relevant context to this application. As noted above, as and when it receives further material funds emanating from LBIE, it is anticipated that LBHI2 will be in a position to make a material part-payment on its subordinated debts.
36. LBHI2's subordinated creditors are:
- (a) LBH, in the sum of approximately US\$2.2 billion) (the "**LBHI2 Sub-Debt**") which remains outstanding under three subordinated loan facility agreements each dated 1 November 2006 between LBH as lender and LBHI2 as borrower (see **pages 5 to 52**); and
  - (b) Lehman Brothers Holdings Scottish LP3 ("**SLP3**"), in the sum of approximately US\$6.1 billion (the "**LBHI2 Sub-Notes**") which remains outstanding under an issuance of floating rate subordinated notes due 2017 issued by LBHI2 on 1 May 2007, as amended on 3 September 2008 (see **pages 53 to 72** for the relevant offering circular, and **pages 73 to 85** for the board resolution and agreement as to the amendments).
37. SLP3 is another company within the Lehman Brothers group, but it is under the control of Lehman Brothers Holdings Inc ("**LBHI**"). LBHI is the US parent company of the group which entered US Chapter 11 bankruptcy proceedings on 15 September 2008 and which has since been the subject of a Chapter 11 plan. SLP3 is advised by the same legal team (at Weil, Gotshal & Manges) as advises LBHI on these matters.

38. As more fully described in Derek Howell's witness statement in support of the parallel LBHI2 application, there is a dispute between SLP3 and LBH as to the correct priority in which LBHI2 should make payments on the LBHI2 subordinated debts described in paragraph 36 above.
39. The LBH Administrators have consulted appropriately with LBH creditors on this subject. It is LBH's position that the LBHI2 Sub-Debt ranks ahead of the LBHI2 Sub-Notes, and hence any funds available within LBHI2 to pay subordinated debts should first be paid to LBH in part payment of the LBHI2 Sub-Debt.
40. In contrast, SLP3's position is that the LBHI2 Sub-Debt and the LBHI2 Sub-Notes rank *pari passu* as between themselves (in which case there would be a payment to LBH in respect of the LBHI2 Sub-Debt, but, it is anticipated, not enough to enable LBH's unsecured (unsubordinated) creditors to be paid in full when statutory interest is taken into account), or that the LBHI2 Sub-Notes held by SLP3 rank ahead of the LBHI2 Sub-Debt held by LBH (in which case, it is anticipated, there would be no payment to LBH under the LBHI2 Sub-Debt).
41. In this witness statement, which is principally focussed on the LBH Administrators' own application, I do not go into the detail of LBH's arguments as to why LBH ranks ahead of SLP3 in the LBHI2 estate. In their parallel application, the LBHI2 administrators are seeking directions for the Court's determination of that priority question. The LBH Administrators will set out LBH's position on that dispute in detail at the appropriate time within that application. However, the existence and nature of that parallel LBHI2 application are important factors in the LBH Administrators' decision to make this application within the LBH estate, for reasons which I explain below.

#### **LBH's SUBORDINATED LIABILITIES**

42. As I explained above, LBH has paid approximately 69% of its admitted unsecured, non-preferential (unsubordinated) creditor claims by value to date, with remaining claims of that nature (including statutory interest) totalling approximately £1.1 billion.
43. Subject to prudent provisioning in the usual way for costs and expenses to the closure of the administration, it is presently anticipated that if LBH succeeds in establishing priority ahead of SLP3 in the LBHI2 estate, the projected recoveries to LBH (although they remain subject to various uncertain contingencies which could materially impact upon the outcome) would enable LBH to discharge its admitted unsecured, non-preferential (unsubordinated) creditor claims (plus statutory interest) in full. Such a projected recovery would also leave LBH with a realistic prospect of being able to make a part payment of its own subordinated debt. This would be an extremely positive development for LBH's



creditors and a prospect that seemed unlikely in the extreme in the early years of LBH's administration.

44. As explained in paragraph 26 above, in such a scenario the quantum of any payment which LBH may be able to make on its subordinated debt is not possible to predict with certainty, as it remains contingent upon a number of issues, including LBIE's ultimate surplus and payment to Wentworth and thus LBHI2, and the complex intra-group cashflows between LBHI2, LBH, LBL and others. However, the LBH Administrators consider a payment on LBH's subordinated debts to be a realistic prospect if LBH prevails in establishing priority over SLP3 within the LBHI2 estate. I am also conscious that parties continue to trade in Enhanced Capital Advantaged Preferred Securities (the relevance of which is explained below), and so I do not consider that it would be appropriate, given the uncertainties, to speculate on such possible returns in a witness statement which will appear on the LBH section of the PwC Lehman Brothers (public) website.
45. This emerging prospect of LBH being in a position to make a payment on its own subordinated liabilities led to a renewed focus on such liabilities, and efforts to identify the correct manner in which payments should be made on such liabilities if and when funds become available to do so. It is this question which lies at the heart of this application for directions.
46. In summary and as described more fully below, LBH's subordinated liabilities comprise:
  - (a) liabilities of in aggregate approximately US\$1.9 billion (the "**LBH Sub-Debt**") which remain outstanding under three subordinated loan facility agreements dated (in two cases) 30 July 2004 and (in one case) 31 October 2005, in each case between LBH as borrower and Lehman Brothers UK Holdings Limited ("**LBUKH**") as lender;
  - (b) liabilities of in aggregate approximately €790 million (the "**LBH Sub-Notes**") which remain outstanding under fixed-rate subordinated note issuances pursuant to offering circulars dated 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006, in each case with LBH as the issuer of the said notes and three Partnerships (which I discuss further below at paragraphs 64 onwards) as the creditors; and
  - (c) potentially, certain subordinated guarantee liabilities ("**LBH Subordinated Guarantee Liabilities**") incurred by LBH in connection with the LBH Sub-Notes transactions mentioned immediately above.

47. In summary, in exploring the subordinated debt issues with relevant stakeholders, it has become apparent that there is a dispute as to the correct priority ranking of LBH's own subordinated debts. The principal purpose of this application is to seek directions on the correct priority of LBH's subordinated debts so that payments can promptly be made on such debts in the event that LBH establishes priority over SLP3 within the LBHI2 estate and funds become available within LBH to make a payment on subordinated debts. It is the LBH Administrators' view that given the overlap of subject matter as between the priority disputes on the LBHI2 and LBH subordinated debts, it is most appropriate and cost-effective, and in the interests of LBH's creditors as a whole, for the Court to determine the LBHI2 and LBH applications together as part of a combined procedural process.

#### **THE LBH SUB-DEBT**

48. As explained in paragraph 46(a) above, the LBH Sub-Debt arises under three subordinated loan agreements originally entered into between LBH as borrower and LBUKH as lender (see **pages 86 to 128**). It is my understanding from the format and content of these subordinated loan agreements that they are based on a standard form for such documents provided for in the Interim Prudential Sourcebook: Investment Business (referred to as INPRU) which was published by the Financial Services Authority.
49. LBUKH was a further intermediate holding company within the Lehman Brothers UK group. It entered administration on 29 September 2008 and, again, insolvency practitioners from PwC were its administrators. I was one of the joint administrators of that company from 2013 onwards. The administration of LBUKH was completed towards the end of 2017, and the company was formally dissolved on 7 February 2018.
50. I exhibit at **pages 129 to 142** the LBUKH administrators' 18<sup>th</sup> and final progress report in respect of that company dated 24 October 2017 by way of further context as to its affairs (which is available, like all such progress reports, on the Lehman Brothers PwC website). I also exhibit at **page 143** a print out from the Companies House online service confirming LBUKH's recent dissolution.
51. In summary, on 2 May 2014, the Court granted LBUKH permission to make distributions to its ordinary unsecured, non-preferential (unsubordinated) creditors. On 4 September 2014, its administrators declared and paid a dividend of 100 pence in the pound to such creditors (of whom there were only a small number) in full and final settlement of their claims. The relevant creditors waived their rights to receive future distributions as part of those arrangements.

52. Having paid all unsecured (unsubordinated) creditors in full, a position was then reached where LBUKH's remaining assets were its outstanding claims of uncertain value against other Lehman Brothers entities, including the LBH Sub-Debt. The other work required in the administration of LBUKH was completed, and in effect the administration remained open simply in order to receive any recoveries which might be made on those extant claims, and in turn to pass any such recoveries over to LBUKH's sole subordinated creditor. In these circumstances, the LBUKH administrators and their legal advisers started to consider ways in which the LBUKH administration could be brought to a close to save continuing costs. The transfer of LBUKH's remaining assets to the subordinated creditor was a necessary part of any such process.
53. I should also note in this context that, during its administration, LBUKH asserted a guarantee claim against LBHI in respect of the LBH Sub-Debt, arguing that LBHI had guaranteed LBH's obligations. As part of a wider settlement entered into in October 2011 between various Lehman Brothers US entities and various Lehman Brothers UK entities (to which I refer in paragraph 114 onwards below), LBHI admitted LBUKH's guarantee claim in the lesser amount of approximately US\$609 million. Thereafter, LBUKH received approximately US\$185 million in dividends on that claim from LBHI pursuant to LBHI's distributions under its Chapter 11 plan. These points are briefly summarised within the LBUKH administrators' 18th and final progress report at **page 133**.
54. LBUKH's sole subordinated creditor was Lehman Brothers Luxembourg Investments S.A.R.L ("LBLIS"). Following CPR Part 8 Court proceedings which were determined by Mr Justice Henderson (whose judgment has the citation [2016] EWHC 617 (Ch)), it was confirmed that the LBUKH administrators were at liberty to make distributions to LBLIS as the subordinated creditor of LBUKH.
55. On 13 July 2016, I signed a proof of debt in my capacity as LBUKH's administrator asserting LBUKH's LBH Sub-Debt claim against LBH (see **pages 144 to 153**). On 22 July 2016, Derek Howell as LBH Administrator confirmed by letter the admission of that claim, but noted its subordinated status and pointed out – as was indeed the case – that based on then-current estimates, the LBH Administrators considered it unlikely that LBH would have sufficient funds to pay a dividend to its subordinated creditors, including LBUKH (see **page 154**).
56. On 5 August 2016, I on behalf of LBUKH executed a Deed of Transfer (see **pages 155 to 173**) whereby LBUKH transferred to LBLIS, by way of distribution *in specie* under Rule 2.71 of the Insolvency Rules 1986, various LBUKH claims which remained extant against other Lehman Brothers companies. That included a transfer to LBLIS of the LBH Sub-Debt claim (referred to in that document as the "PLC Subordinated Claim") and LBUKH's

guarantee claim against LBHI. LBHI was also a party to that Deed. This arrangement formed part of the LBUKH administrators' third interim dividend which was declared to LBUKH's subordinated creditor. This is recorded in the relevant notice of dividend which was issued (see **pages 174 to 175**), which explains that a relatively small further cash payment was made and LBUKH's other assets distributed *in specie* to the subordinated creditor.

57. These steps ultimately enabled the LBUKH administration to be drawn to a conclusion much sooner than would otherwise have been the case, and for LBUKH to be dissolved in an orderly fashion.
58. To the best of my knowledge, LBLIS was never the subject of UK insolvency proceedings. However, from a Notice of Assignment dated 30 November 2016 which I received as LBH Administrator (see **pages 176 to 180**), I understand that LBLIS assigned its remaining interest in the LBH Sub-Debt claim to Lehman Brothers UK Holdings (Delaware) Inc. By a further Notice of Assignment dated 19 April 2017 which I received as LBH Administrator (see **pages 181 to 183**), I understand that Lehman Brothers UK Holdings (Delaware) Inc then further assigned its remaining interest in the LBH Sub-Debt claim to LBHI.
59. Thus, my current understanding as LBH Administrator is that the holder of the claim in respect of the LBH Sub-Debt is now LBHI. It is for that reason that LBHI has been consulted as part of the process by which this application has been prepared, and why LBHI is named as a respondent to this application. As noted above, I also understand LBHI to be the party ultimately interested in the affairs and assets of SLP3, and both LBHI and SLP3 are using the same legal adviser team in respect of this application and the parallel LBHI2 application.
60. Without prejudice to any other provisions which the respondents to this application may consider relevant, by way of brief summary the subordination wording in each of the LBH Sub-Debt agreements is found in clause 5 (see **pages 94 to 95, 107 to 108, and 123 to 124**, respectively) and includes the following:

*"5 (1)... the rights of [LBUKH] in respect of the Subordinated Liabilities are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) of the Subordinated Liabilities is conditional upon -*

*(a) (if an order has not been made or an effective resolution passed for the Insolvency of [LBH] and, being a partnership, [LBH] has not been dissolved) [LBH] being in compliance with not less than 120%<sup>2</sup> of its Financial Resources Requirement immediately after payment by [LBH] and accordingly no such*

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<sup>2</sup> In the LBH Sub-Debt agreement dated 31 October 2005, this figure is 100%.

*amount which would otherwise fall due for payment shall be payable except to the extent that –*

*(i) paragraph 4(3) [concerning LBUKH's right to institute proceedings for LBH's Insolvency] has been complied with; and*

*(ii) [LBH] could make such payment and still be in compliance with such Financial Resources Requirement; and*

*(b) [LBH] being "solvent" at the time of, and immediately after, the payment by [LBH] and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that [LBH] could make such payment and still be "solvent".*

*(2) For the purposes of sub-paragraph 1(b) above, [LBH] shall be "solvent" if it is able to pay its Liabilities (other than the Subordinated Liabilities) in full disregarding -*

*(a) obligations which are not payable or capable of being established or determined in the Insolvency of [LBH]; and*

*(b) the Excluded Liabilities."*

61. In this context, "Liabilities" is defined as *"all present and future sums, liabilities and obligations payable or owing by [LBH] (whether actual or contingent, jointly or severally or otherwise howsoever)".*

62. In turn:

(a) "Subordinated Liabilities" is defined as *"all Liabilities to [LBUKH] in respect of each Advance made under this Agreement and all interest payable thereon";*

(b) "Senior Liabilities" is defined as *"all Liabilities except the Subordinated Liabilities and Excluded Liabilities"; and*

(c) "Excluded Liabilities" is defined as *"Liabilities which are expressed to be and, in the opinion of the Insolvency Officer of [LBH], do rank junior to the Subordinated Liabilities in any Insolvency of [LBH]".*

63. Other defined terms are set out in clause 1 of the LBH Sub-Debt agreements (see **pages 92 to 93, 105 to 106, and 120 to 121**, respectively).

## THE LBH SUB-NOTES

64. The LBH Sub-Notes arise under a series of transactions by which the Lehman Brothers group sought to raise capital for the group's business.
65. In summary, in each case LBH issued a series of subordinated notes to a limited partnership, and in each case the notes have a distant stated maturity date – namely dates in 2035 or 2036. Those notes were then held as an asset of the partnership. In each case LBH issued an offering circular in support of its note issuance.
66. The three limited partnerships (the "**Partnerships**") in question are:
- (a) Lehman Brothers Capital Funding LP;
  - (b) Lehman Brothers Capital Funding II LP; and
  - (c) Lehman Brothers Capital Funding III LP.
67. A common entity acted as "General Partner" in respect of each Partnership. That entity was an English-incorporated company called LB GP No.1 Limited ("**LB GP No1**"). As reflected in a public notice by its joint liquidators (see **pages 184 to 196**), LB GP No1 was struck off the Companies Register on 20 June 2010. However, that notice also records that it was then restored to the Companies Register by way of a Court Order following an application issued by Deutsche Bank A.G. (London Branch) ("**Deutsche**") on 20 June 2016, and then placed into liquidation following its restoration on 28 February 2017. Bruce Mackay and Matthew Haw of the accounting and restructuring firm RSM UK now act as its joint liquidators.
68. It is my understanding that, as the General Partner of each Partnership, LB GP No1 is the proper party to represent the interests of each Partnership, and to make such submissions on this application as it may consider appropriate in respect of the ranking of the LBH Sub-Notes which constitute the assets of each Partnership. That is why the Joint Liquidators of LB GP No1 are named respondents to this application, even though they have intimated their view that this application is premature (a point which I address below).
69. In turn, each Partnership itself issued its own securities to investors. In each case, there was an offering circular in respect of those securities which was separate from the offering circular which supported the LBH Sub-Notes which had been issued by LBH to the Partnerships. The securities issued by the Partnerships have come to be known generically as "ECAPS", I believe because at least some of those securities are titled Enhanced Capital Advantaged Preferred Securities.

70. I exhibit in this regard:

- (a) at **pages 197 to 219, 220 to 242, 243 to 265, and 266 to 289** the four offering circulars dated respectively 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006 under which LBH issued each series of subordinated notes (the LBH Sub-Notes) which came to be held, respectively, by the Partnerships (noting that the notes issued under the offering circulars dated 19 September 2005 and 26 October 2005 were stated to be consolidated into a single series); and
- (b) at **pages 290 to 343, 344 to 437, and 438 to 529** each offering circular or prospectus dated respectively 29 March 2005, 30 August 2005 and 20 February 2006 under which each of the Partnerships – Lehman Brothers Capital Funding LP, Lehman Brothers Capital Funding II LP and Lehman Brothers Capital Funding III LP, respectively – issued their 'ECAPS' to investors.

71. Since LB GP No1's restoration, I have had a substantial number of exchanges with its joint liquidators. As a result of those exchanges, I am aware that the joint liquidators have sought to communicate with the underlying holders of ECAPS, including by way of the notice which I referred to in paragraph 67 above and by further notices including those at **pages 530 to 543 and 544 to 550**. The Court will note that, as part of the joint liquidators' notice dated 1 December 2017, they made available to any interested parties the key contractual documents relating to the subordinated debt priority ranking dispute within each of the LBHI2 and LBH estates. Although I am not familiar with the details, I also believe that the joint liquidators have established a committee of ECAPS holders with whom they can consult appropriately as regards the interest and position of ECAPS holders.

72. In this context, I have also had substantial contact with representatives of Deutsche, who have approached me indicating that they are a substantial holder of ECAPS. As explained more fully below, Deutsche has taken an active interest and involvement in these matters. In these circumstances, the LBH Administrators consider it appropriate to include Deutsche as a respondent to this application, even though it has intimated its view that this application is premature (which I address below).

73. Without prejudice to any other provisions which the respondents to this application may consider relevant, by way of brief summary the subordination wording in each of the LBH Sub-Notes is found in condition 3 (see **pages 202 to 203, 224 to 225, 248, and 271 to 272**, respectively) and includes the following:

"(a) The [LBH Sub-Notes] constitute direct, unsecured and subordinated obligations of [LBH] and the rights and claims of the [Partnerships] against [LBH] rank *pari passu* without any preference among themselves. The rights of the [Partnerships] in respect of the [LBH Sub-Notes] are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) in respect of the [LBH Sub-Notes] is conditional upon:

(i) (if an order has not been made or an effective resolution passed for the Insolvency of [LBH]) [LBH] being in compliance with not less than 100 per cent. of its Financial Resources Requirement<sup>3</sup> immediately after such payment, and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that (a) Condition 3(d) or Condition 6(g), as the case may be, has been complied with; and (b) [LBH] could make such payment and still be in compliance with such Financial Resources Requirement; and

(ii) [LBH] being solvent at the time of, and immediately after, such payment, and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that the Issuer could make such payment and still be solvent.

(b) For the purposes of Condition 3(a) above, [LBH] shall be "solvent" if it is able to pay its Liabilities (other than Subordinated Liabilities) in full disregarding (i) obligations which are not payable or capable of being established or determined in the Insolvency of [LBH], and (ii) the Excluded Liabilities."

74. In this context, "Senior Liabilities" is defined as "all Liabilities except the Subordinated Liabilities and Excluded Liabilities".
75. "Liabilities" is defined as "all present and future sums, liabilities and obligations payable or owing by [LBH] (whether actual or contingent, jointly or severally or otherwise howsoever)" and "Excluded Liabilities" is defined as "Liabilities which are expressed to be and, in the opinion of the Insolvency Officer of [LBH], do, rank junior to the Subordinated Liabilities in any Insolvency of [LBH]".
76. "Subordinated Liabilities" is defined as "all Liabilities to the [Partnerships] in respect of the [LBH Sub-Notes] and all other Liabilities of [LBH] which rank or are expressed to rank *pari passu* with the [LBH Sub-Notes]".
77. Other defined terms are set out in condition 1 (see pages 200 to 201, 223 to 224, 246 to 247, and 269 to 270, respectively).

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<sup>3</sup> Which is defined by reference to relevant Financial Services Authority published rules, as are certain other provisions of the LBH Sub-Notes.



## THE LBH SUBORDINATED GUARANTEES

78. I have referred above to, and exhibited, the offering circular or prospectus by which each Partnership marketed ECAPS to underlying investors. In each case, that document explains that as part of the relevant transaction, LBH would also give a "Subordinated Guarantee". Each offering circular or prospectus then goes on to include a form of unsigned Subordinated Guarantee to be given by LBH as part of each transaction – see in particular **pages 317 to 322** in respect of Lehman Brothers Capital Funding LP, **pages 371 to 375** in respect of Lehman Brothers Capital Funding II LP and **pages 468 to 472** in respect of Lehman Brothers Capital Funding III LP.
79. To date, the LBH Administrators have not been able to locate copies of executed versions of those Subordinated Guarantees. However, at this time I have no specific reason to believe that those documents were not in fact executed as part of each ECAPS transaction, given the apparent intention that such documents would form part of the transaction suite of documents. Enquiries will be made of those involved in the original transactions to see if executed versions of these documents can be located.
80. Without prejudice to any other points which may be relevant as to whether LBH has any liability under any such Subordinated Guarantee, each of those forms of guarantee includes the following subordination wording:
- "... [LBH] agrees that its obligations hereunder constitute unsecured obligations of [LBH] subordinated in right of payment to Senior Creditors and will at all times rank:*
- (a) junior to all liabilities of [LBH] including subordinated liabilities (in each case other than any liability of [LBH] which constitutes or would, but for any applicable limitation on the amount of such capital, constitute Tier 1 Capital or which is referred to in (b) or (c) below and any other liability expressed to rank pari passu with or junior to this Subordinated Guarantee) (the "Senior Creditors");*
- (b) pari passu with Parity Securities, if any, issued by [LBH] and any guarantee or support agreement of [LBH] ranking pari passu with this Subordinated Guarantee and issued in respect of Parity Securities issued by [the Partnership] or any Subsidiary; and*
- (c) senior to the Junior Share Capital of [LBH]."*
81. In this context, "Junior Share Capital" is defined as "[LBH's] ordinary shares, together with any other securities or obligations of [LBH] expressed to rank junior to this Subordinated Guarantee and the Parity Securities."

82. In this context, "Parity Securities" is defined slightly differently in each Subordinated Guarantee, but in each case by reference to a similar approach:

*"... any non-cumulative preference shares, non-cumulative preferred securities (other than the [ECAPS issued under this transaction]) or other securities either (a) issued directly by [LBH] and ranking pari passu with [LBH's] obligations under this Subordinated Guarantee including the Sterling and US dollar non-cumulative preference shares of [LBH] outstanding or (b) issued by [the Partnership] or any Subsidiary or other entity and entitled to the benefit of this Subordinated Guarantee or benefiting from any other guarantee or support agreement from [LBH] ranking pari passu with this Subordinated Guarantee."*

For the second and third transactions, the definition ends with the following additional words:

*[Second transaction] "... which on the date hereof includes the [ECAPS issued in the first transaction]"*.

*[Third transaction] "... which on the date hereof includes the [outstanding ECAPS issued in the first and second transactions]"*.

83. Further, in the "Summary" section of each offering circular or prospectus, the following observations are made in respect of each Subordinated Guarantee: *"the Subordinated Guarantee will rank pari passu with the non-cumulative perpetual preferred securities or preference shares of [LBH] (whether or not in issue). The Subordinated Guarantee will not cover payments on liquidation of [the Partnership]. See 'Rights upon Liquidation' below."*

84. Likewise, in either the "Investment Considerations" or the "Risk Factors" section, in each case the following appears under the heading "No Limitation on Senior Debt":

*"The obligations of [LBH] under the Subordinated Guarantee will rank junior as to payments to all liabilities to creditors of [LBH] (including without limitation depositors, general creditors and subordinated debt holders) and claims of holders of senior ranking securities. In the event that [LBH] is wound-up, liquidated or dissolved, the assets of [LBH] would be available to pay obligations under the Subordinated Guarantee only after all payments have been made on such senior liabilities and claims...."*

85. As a result of these provisions, and having taken legal advice (privilege in which is not waived), the LBH Administrators consider that the LBH Subordinated Guarantee Liabilities appear to rank behind LBH's other subordinated debts.

86. Accordingly, in the LBH Administrators' 17<sup>th</sup> progress report dated 12 April 2017 (which, like all other progress reports is available on the LBH section of the PwC Lehman Brothers website, see pages 551 to 567), the LBH Administrators expressed the following views:

***"Guarantee creditors***

*As creditors are aware, LBH guaranteed the following Lehman Brothers Capital funds ("the Funds"):*

- *Lehman Brothers UK Capital Funding LP (ISIN: XS0215349357);*
- *Lehman Brothers UK Capital Funding II LP (ISIN: XS0229269856); and*
- *Lehman Brothers UK Capital Funding III LP (ISIN: XS0243852562).*

*Investors in the Funds are entitled to submit a claim against LBH for the amount they invested in each fund. However, the guarantee provided by LBH is subordinated to LBH's ordinary unsecured and other subordinated creditors.*

*The Administrators estimate that there is unlikely to be any surplus available to pay a dividend to creditors with guarantee claims.*

*The Administrators understand that certain investors in the Funds have taken steps to reinstate the general partner of the Funds, LB GP No 1 Limited ("LBGP"), with a view to providing a conduit to a potential subordinated claim into LBH.*

*The Administrators also understand that LBGP has been placed into creditors' voluntary liquidation. The liquidators are Bruce Mackay and Matthew Haw ("the Liquidators") of RSM Restructuring Advisory LLP, based at 25 Farringdon Street, London EC4A 4AB. Investors should contact the Liquidators with regard to potential claims."*

87. Since the publication of that report, no ECAPS holder or other party has come forward to suggest that they consider the above analysis to be incorrect, or to suggest that in fact the LBH Subordinated Guarantee Liabilities (if any) may not rank, or do not rank, behind the LBH Sub-Debt and the LBH Sub-Notes (irrespective of the correct priority ranking as between those latter two categories of obligation). However, as described further below, Deutsche's solicitors have reserved their position on this issue, so it is possible that this too will be a point of dispute.
88. Given Deutsche's position, the complexity of these matters and the connection between this issue and the priority dispute which exists in respect of the LBH Sub-Debt and the LBH Sub-Notes, the LBH Administrators considered it appropriate to seek a direction as

to the priority ranking of any liabilities which may exist under the Subordinated Guarantees as part of this application. It would not be in the interests of LBH's creditors for this application to proceed without addressing this issue, only to find at some later stage that the point was disputed and thus delayed the distribution of any available funds yet further.

#### EXCHANGES BETWEEN THE PARTIES

89. To provide context to the issues and the application, I refer briefly to certain open correspondence which has passed between the parties or would-be parties to date and may assist to illustrate the shape of the likely debate.
90. On 3 November 2017, Dentons UKMEA LLP ("**Dentons**") circulated a letter (see **pages 568 to 573**) setting out what it understood might represent points of dispute between relevant stakeholders within each of the LBHI2 and LBH estates, and inviting confirmation of parties' positions on those issues. That letter enclosed underlying materials relevant to the issues within both the LBHI2 and LBH estates, including the relevant contractual documentation which had been located and certain associated material such as emails and presentations which appeared to relate, to a greater or lesser extent, to the subordinated debt and priority questions. In the parallel LBHI2 application, Derek Howell has explained in some detail in his witness statements the searches undertaken and the manner in which those materials were collated.
91. At that stage, Dentons were acting for both the LBH Administrators and the LBHI2 administrators, and thus that letter was written on behalf of both estates. Shortly thereafter, as it became clear that Court proceedings on these issues were likely to be required, the LBHI2 administrators retained Dentons and the LBH Administrators took separate advice from Hogan Lovells International LLP ("**Hogan Lovells**").
92. Dentons' original letter was addressed to Weil, Gotshal & Manges (London) LLP ("**Weil Gotshal**"), who were known to act for LBHI and entities under common control with LBHI, including SLP3 (and still do). It was also addressed to Charles Russell Speechlys LLP ("**CRS**"), who were known to act for LB GP No1 through its joint liquidators (and still do).
93. Hogan Lovells informed the other parties that they had been instructed on behalf of the LBH Administrators by letter dated 27 November 2017 (see **pages 574 to 575**). In that letter, they requested (amongst other things) that Weil Gotshal and CRS confirm their respective clients' positions as to the potential points of dispute within the LBH estate, in order for the LBH Administrators to understand which issues were in fact in dispute.

94. On 13 December 2017, as LBH Administrator I received a letter from various institutions including Deutsche, who stated in that letter that they were ECAPS holders collectively holding around 51% of all ECAPS (see **pages 576 to 579**). That letter indicated a desire on the part of those parties that Deutsche, as a major direct holder of ECAPS, should be permitted to participate alongside the LBH Administrators as a party to the LBHI2 application for directions. Deutsche expressed the wish to argue in the LBHI2 application, alongside LBH, for the priority of the LBHI2 Sub-Debt held by LBH ahead of the LBHI2 Sub-Notes held by SLP3.
95. On 10 January 2018, CRS wrote to Dentons indicating that, at that point, LB GP No1 was not minded to participate in the LBHI2 application for directions (see **page 580**).
96. On 2 February 2018, Sidley Austin LLP ("**Sidleys**") wrote to Dentons, with a copy to Hogan Lovells, on behalf of Deutsche (see **pages 581 to 583**). That letter repeated Deutsche's previously expressed view that it wished to be a party to any application issued by the LBHI2 administrators.
97. On 8 February 2018, Hogan Lovells wrote to Sidleys (see **pages 584 to 585**) requesting that they set out Deutsche's position on the issues which appeared to exist between the parties within the LBH estate – namely, the relative priority of LBH's subordinated liabilities, and the manner in which LBH's liabilities on the LBH Sub-Notes should be quantified.
98. On 12 February 2018, Sidleys replied to that letter setting out their client's position on matters within the LBH estate (see **pages 586 to 589**). In addition to asserting the priority of the LBH Sub-Notes ahead of the LBH Sub-Debt, Sidleys raised certain new points of potential dispute within the LBH estate. They also argued that the LBH Administrators should not issue an application at this time in any event. That point was repeated in a further letter from Sidleys to Dentons dated 22 February 2018 (see **pages 590 to 591**), and I address it further below.
99. On 23 February 2018, Weil Gotshal confirmed in open correspondence its clients' positions on the issues apparently in dispute within each of the LBHI2 and LBH estates (see **pages 592 to 595**). In addition, they made clear their view that there were obvious efficiencies to the issues in each estate being dealt with together in parallel applications determined as part of the same process.
100. On 26 February 2018, Hogan Lovells wrote to all parties on the LBH Administrators' behalf (see **pages 596 to 600**). In that letter, Hogan Lovells set out, in summary terms, LBH's position in respect of the priority dispute within the LBHI2 estate. The letter went on to confirm that, having considered the recent exchanges between the parties, it remained

the LBH Administrators' view that the two contemplated applications of LBHI2 and LBH should indeed go ahead in parallel. As set out below, that remains the LBH Administrators' view. Hogan Lovells followed up that step by circulating a draft application notice in respect of the contemplated LBH application to all relevant parties on 2 March 2018 (see **pages 601 to 604**).

101. On 6 March 2018, Weil Gotshal wrote to Hogan Lovells providing their clients' comments on the draft application notice in respect of this application (see **pages 605 to 607**), to which Hogan Lovells replied on 8 March 2018 (see **pages 608 to 609**).
102. On 9 March 2018, Sidleys (on behalf of Deutsche) replied to Hogan Lovells' letter of 2 March 2018 providing their client's comments on the draft application notice in respect of this application (see **pages 610 to 615**), to which Hogan Lovells replied on 13 March 2018 (see **pages 616 to 617**). Sidleys then followed up with further clarification of Deutsche's position on certain points in a letter to Hogan Lovells (see **pages 618 to 625**) and in a letter to Dentons (see **pages 626 to 628**), each dated 15 March 2018.
103. On 13 March 2018, CRS also explained LB GB No1's position. They indicated that they considered that this application should be deferred, and should not be heard alongside the LBHI2 application. Subject to that position, they did, however, also provide comments on the draft application notice which had been circulated on 2 March 2018.

#### THE "PRIORITY" ISSUES

104. I do not rehearse in this statement the arguments which each of LBHI on the one hand (as the LBH Sub-Debt holder) and LB GP No1 and Deutsche (as those representing the interests in the LBH Sub-Notes and the LBH Subordinated Guarantee Liabilities on the other) may choose to advance in respect of their priority positions. Ultimately, the LBH Administrators are neutral as between the respondents as to the correct priority ranking of LBH's subordinated obligations – the LBH Administrators' interest in this application is to ensure that they are able to distribute in the correct order, and as expeditiously and cost-effectively as possible.
105. However, it is clear that there is a substantive dispute on this issue. LBHI, through Weil Gotshal's letter of 23 February 2018, asserts that the LBH Sub-Debt and the LBH Sub-Notes rank *pari passu*, or that the LBH Sub-Debt ranks ahead of the LBH Sub-Notes (see **page 593**). In contrast, Deutsche's stated position is that the LBH Sub-Notes rank ahead of the LBH Sub-Debt, or alternatively "*at the very least*" those respective debts rank *pari passu* (see Sidleys' letter of 12 February 2018 at **page 587**).

106. Similarly, LBHI's position is that the LBH Subordinated Guarantee Liabilities "*have either terminated altogether under their terms, or rank behind*" the LBH Sub-Debt and the LBH Sub-Notes (page 591). Deutsche has simply reserved its position on this point so far (page 587), and thus again this issue is not agreed among relevant stakeholders.

#### THE "DISCOUNTING" ISSUE

107. A further point of dispute within the LBH estate which has emerged from the exchanges between the parties is the question of discounting. As noted in paragraph 65 above, each of the LBH Sub-Notes has a long-dated maturity in either 2035 or 2036. Leaving aside the relative priority of the LBH Sub-Notes, the question arises as to how, if at all, the LBH Administrators should discount the face value of claims under the LBH Sub-Notes in this context.
108. LBHI's position - as the party whose claims (under the LBH Sub-Debt) compete with the LBH Sub-Notes - is that LBH's liabilities on the LBH Sub-Notes fall to be discounted for proving and distribution purposes in the manner prescribed by Rule 14.44 of the Insolvency (England and Wales) Rules 2016, on the basis that it is a mandatory provision (see Weil Gotshal's letter of 23 February 2018, at page 593]).
109. In contrast, Deutsche has argued in correspondence that "*claims in respect of the [LBH Sub-Notes] should either not be subject to any reduction or discounting, or alternatively be subject to discounting in a manner that is different to that set out in Rule 14.44 of the Insolvency Rules 2016*" (see page 587). That position was explained more fully in the note which accompanied Sidleys' letter to Hogan Lovells of 15 March 2018 (see pages 619 to 625).
110. As the Court will appreciate, given the very substantial period which remains until the stated maturity dates of the LBH Sub-Notes, the question of the correct approach to discounting could have a material effect on the correct quantification of these liabilities.
111. I should also note in this context that, in the last few days as this application was being settled, Sidleys on behalf of Deutsche have raised a further question which they appear to consider might bear upon quantification issues - this time in relation to the LBH Sub-Debt. The LBH Administrators have not yet had the opportunity to consider this issue fully as the gist of Deutsche's concern was only conveyed on 13 March 2018, and only mentioned briefly again in the note accompanying Sidleys' letter of 15 March 2008. However, my current understanding is that Deutsche may question whether the value of the LBH Sub-Debt claim against LBH falls to be reduced on account of the fact that, for example, when it held the LBH Sub-Debt, LBUKH received approximately US\$185 million from LBHI as guarantor in respect of the LBH Sub-Debt (see paragraph 53 above).

112. The LBH Administrators will be considering this issue in more detail, and no doubt inviting the more detailed positions of Deutsche and LBHI on it. However, particularly at a time when such further reflection and consultation has not taken place, the LBH Administrators do not consider that it represents a further question which should be asked of the Court at this time. It is not clear to us that there is or will be a genuine dispute between the parties on this issue. In this context, it is my understanding that at least in usual circumstances where one has a principal debtor and a guarantor, if both become insolvent, one is entitled to claim for the full amount of the debt against each and to receive dividends from each until (at least) such time as the amount of the full claim has been recovered, which is not presently the case in respect of the LBH Sub-Debt.

#### THE "RELEASE" ISSUE

113. In Sidleys' letter of 12 February 2018, an apparent issue of dispute between LBH stakeholders was raised for the first time. In that letter, Sidleys asserted that it was not necessary to address the priority of the LBH Sub-Debt because *"any liability in respect of the [LBH Sub-Debt] was released under a Settlement Agreement dated 24 October 2011 entered into by, amongst others, LBHI and LBH"* (see page 586).
114. Sidleys have now set out that position in greater detail in the note which accompanied their letter of 15 March 2018 (see pages 619 to 625). In summary, Deutsche relies in this context on the Settlement Agreement dated 24 October 2011, which became effective on 6 March 2012, and which was made (in summary) between various UK Lehman Brothers entities and various US Lehman Brothers entities to seek to resolve a host of intra-group issues. A copy of that Settlement Agreement appears at pages 629 to 767. Deutsche relies, amongst other things, on the release language within sub-section 8.02 of that agreement in support of an argument that LBHI has released any claims which it may have against LBH, including in respect of the LBH Sub-Debt.
115. On behalf of LBHI, Weil Gotshal has rejected any such suggestion of a release in their letter dated 23 February 2018 (see page 593). They point out that the LBH Sub-Debt was held by LBUKH at the time of that Settlement Agreement (see paragraphs 53 to 56 above), rather than being a claim of LBHI against LBH at that time. They therefore reject Deutsche's suggestion that the LBH Sub-Debt has been released, or indeed that it has been reduced through any other distributions against that debt (being a further point which Deutsche had alleged).
116. As I understand it, Deutsche also asserts that the terms of the Settlement Agreement preclude any asserted rights of subrogation, or equivalent, arising in favour of LBHI against LBH in respect of any guarantee payments made by LBHI to LBUKH on the LBH Sub-Debt. However, LBHI has not asserted any such subrogation-type claim against LBH



to date, and so it is not clear to the LBH Administrators that there is presently a genuine issue between the parties as regards the effect of the Settlement Agreement on any such subrogation-type claim.

117. I am advised (again, without waiving privilege) that argument on the "release" point is likely to turn on the correct interpretation of the release provisions within the Settlement Agreement. Whilst I appreciate that the Settlement Agreement is expressed to be governed by the laws of the State of New York and the US Bankruptcy Code (see sub-section 12.02 of that agreement), I am advised that this Court regularly interprets contracts which are subject to foreign (including US) law, and that this discrete question is capable of determination within the ambit of the present application. I should record in this context that, even though the Settlement Agreement is governed by New York law and provides generally for the jurisdiction of the US Bankruptcy Court, pursuant to section 12.01(i) "*... any actions or proceedings arising out of or relating to (i) ... claims against UK Administration Companies [which includes LBH] ... shall be within the exclusive jurisdiction of the English High Court, and ... the parties expressly consent and submit to the exclusive jurisdiction of such court ...*" (see page 675).

#### TIMING

118. I have referred above to the fact that Deutsche has argued that this application is premature, and ought not to be made at this time.
119. As I understand it from Sidleys' letter of 12 February 2018, their arguments include the fact that LBH cannot presently pay its subordinated debts and that there is no certainty that it will ever be able to do so - such that the questions raised by this application are "*currently academic*" (see page 588). They also argue that there is not a sufficient commonality of issues for there to be any material benefit in the LBH12 and LBH applications proceeding together, including because there are additional issues to be addressed by this application such as the "release" and the "discounting" issue. Finally, they have said that they consider that additional factual enquiry is needed in relation to LBH.
120. In this context, CRS have also raised a number of the points which Sidleys had also made, and additionally explained that LB GP No1's joint liquidators are focused on minimising costs wherever possible, such that they would not wish to incur costs in respect of this application at this time. Whilst the LBH Administrators have sympathy with that focus on costs, mindful of our obligations to LBH creditors to progress this administration we do not believe that the joint liquidators' concern in this respect outweighs the advantages of proceeding with this application now alongside the LBH12 application.

121. A number of the points raised by Sidleys have also been made to the LBH Administrators by Dechert LLP, the solicitors advising the joint administrators of LBL (the entity mentioned in paragraph 24 above). They have argued, amongst other things, that there is no certainty that LBH will have sufficient funds to pay any of its subordinated liabilities, and have questioned the degree to which the relevant contractual provisions and potentially relevant facts and circumstances relating to the LBH12 subordinated liabilities and the LBH subordinated liabilities in fact overlap. They have also pointed to the fact that certain additional issues are raised by this application, which are not raised in the LBH12 application.
122. Having reflected on those points carefully, the LBH Administrators' position remains that it is appropriate, and indeed in the best interests of LBH's creditors as a whole, for this application to be made at this time, and heard alongside and together with the LBH12 application. Whilst the LBH Administrators reserve their right to supplement these points as appropriate and in light of any further submissions from any other party arguing against this application going ahead, I seek to summarise the principal reasons for my views below.
123. First, I believe that there is now a realistic prospect of LBH reaching a position where it will be able to make a partial, but material, distribution to its subordinated creditors. It is true that that position is not guaranteed and depends upon LBH12 receiving further material sums from LBIE. However, given the consultation which will no doubt have preceded the LBIE administrators' decision to promote a scheme of arrangement, I believe that there is good reason to be optimistic that that scheme will receive sufficient support to become effective in the near future.
124. It is also true that LBH being able to make a distribution to its subordinated creditors would require, amongst other things, that LBH secure priority over SLP3 within the LBH12 application. However, I consider that LBH has a realistic prospect of securing that priority (as Deutsche and the joint administrators of LBL each vigorously argue). Whilst that is obviously controversial and a matter for the Court, it does not seem to the LBH Administrators that the present uncertainty on that issue favours a delay of the LBH application - particularly when the alternative is to have both those LBH12 issues and the related LBH issues dealt with together.
125. The LBH Administrators also consider that there are overlaps of substance between the subordinated debt priority disputes within the LBH12 and LBH estates. I am advised that such overlaps are more properly a matter for submissions, but the defined terms and subordination language used in the LBH12 and LBH subordinated debt documents have similarities, as well as each falling to be construed against the commercial context of the

funding arrangements and regulatory status of the Lehman Brothers group. I therefore believe that it will be more efficient as a matter of time and costs for both applications to proceed and be determined by the Court together.

126. I also note in this context that, in Sidleys' letter to Dentons of 15 March 2018, Deutsche advances (amongst other things) an argument that the funding and group structure of Lehman Brothers was intended to optimise the prospect that sufficient funds would be available at all material times to enable each of the Partnerships to make ECAPS distributions. As I understand it, Deutsche argues that that objective required the LBHI2 Sub-Debt to rank ahead of the LBHI2 Sub-Notes, and in turn for the LBH Sub-Notes to rank ahead of the LBH Sub-Debt (see **page 627**). Without at this stage expressing any views on the detail of such arguments, this sort of point illustrates the reason why the LBH Administrators consider that the LBHI2 application and this application should be heard together.
127. Likewise, and without prejudice to the LBH Administrators' position as to the degree to which factual evidence is likely to assist the Court (on which we do not yet have a firm position but are keen to consult with other parties), if there are to be directions for steps such as witness statements on these applications I believe it is likely to be the same or overlapping individuals who would have been involved in LBHI2's and LBH's subordinated debts prior to the Lehman Brothers group collapse.
128. Accordingly, I believe that it is likely to be cheaper and will promote consistency for both the LBHI2 and LBH applications to be heard together, rather than separately.
129. The LBH Administrators are also very concerned by the scope for severe delay in the event that the LBHI2 application were to proceed first, with any LBH application only proceeding once the outcome of the LBHI2 application is finally known. As the Court is well aware, previous Lehman Brothers *Waterfall* applications have taken considerable time and, given their scale and complexity, have typically been appealed to at least one higher court, sometimes more. There is every reason to suppose that the same would be true of this application and the parallel LBHI2 application.
130. The LBIE section of the PwC Lehman Brothers website indicates that the *Waterfall I* application was issued in February 2013. It was finally determined by the UK Supreme Court in May 2017.
131. The *Waterfall II* application was issued in June 2014, and the Court of Appeal delivered judgment on *Waterfall IIA and IIB* in October 2017. I understand that applications for leave to appeal to the Supreme Court were filed thereafter and, at present, *Waterfall IIC* is listed

to be heard by the Court of Appeal in July 2018 – all of course subject to the LBIE scheme potentially superseding those appeals, as referred to above.

132. In these circumstances, were the LBHI2 and LBH applications to proceed sequentially rather than together, there is a very real prospect of a delay of several years as compared to the point at which the answers to these key questions would be known if the applications proceed together. Even with both applications proceeding together, the time period involved to reach final determinations is likely to be considerable. Given the duration of the administration to date, the LBH Administrators are strongly of the view that it is not in the interests of LBH's creditors as a whole to expose those creditors to the risk of delay presented by a sequential approach, when set against the risk that relatively modest legal costs of the LBH application when heard alongside the LBHI2 application will be wasted if the LBHI2 application is not determined in LBH's favour.
133. As regards the suggested need for further factual enquiry in relation to the history of LBH's subordinated debt obligations, the LBH Administrators reserve their position pending further clarity as to the sorts of enquiries which any other party might suggest. I am advised that in any event, this would not be a reason to delay the application, but rather that the Court can give appropriate directions - including for proportionate disclosure and the opportunity for factual evidence to the extent considered appropriate - as part of the process by which the applications are determined. In this regard, I refer to the statements made by Derek Howell in his witness statement on the LBHI2 application, where he describes the investigations and document review which Dentons have conducted to date on behalf of both the LBHI2 administrators and the LBH Administrators to provide the parties with relevant context for these applications.

#### **WEBSITE**

134. Consistent with the approach adopted in relation to previous *Waterfall* applications, the LBH Administrators intend to place this witness statement and associated application notice on the part of the PwC Lehman Brothers website associated with LBH. In that way, any interested LBH stakeholders will be able to see and consider the directions which are being sought on this application. Likewise, whilst no doubt this step would have been taken in any event, the LBH Administrators will also expressly invite the joint liquidators of LB GP No1 to make their stakeholders, the ECAPS holders, aware of this application and of the related documents having been placed on our website.

**CONCLUSION**

135. For the reasons explained above, the Court is respectfully requested to give appropriate directions for the determination of the questions set out in the application notice which accompanies this witness statement.

**STATEMENT OF TRUTH**

I believe that the facts stated in this witness statement are true.



Gillian Eleanor Bruce

Dated this 15 day of March 2018

Witness Statement  
Lehman Brothers Holdings Plc (In  
Administration)  
G E Bruce  
Third  
GEB3  
15 March 2018

CR-2008-000026  
(FORMERLY NO. 7943 OF 2008)

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)  
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)  
Applicant

- and -

(1) LEHMAN BROTHERS HOLDINGS INC  
(2) THE JOINT LIQUIDATORS OF LB GP No.1 LIMITED (IN LIQUIDATION)  
(3) DEUTSCHE BANK A.G.

Respondents

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EXHIBIT GEB3

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This is the bundle of documents marked "GEB3" referred to in the course of the third witness statement of Gillian Eleanor Bruce dated 15 March 2018.

Witness Statement  
Lehman Brothers Holdings Plc (In  
Administration)  
G E Bruce  
Third  
GEB3  
15 March 2018

**CR-2008-000026**  
**(FORMERLY NO. 7943 OF 2008)**

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PLC (IN ADMINISTRATION)**

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1986**

**BETWEEN:**

**THE JOINT ADMINISTRATORS OF LEHMAN  
BROTHERS HOLDINGS PLC (IN ADMINISTRATION)**

**Applicant**

**- and -**

- (1) LEHMAN BROTHERS HOLDINGS INC**
- (2) THE JOINT LIQUIDATORS OF LB GP No.1  
LIMITED (IN LIQUIDATION)**
- (3) DEUTSCHE BANK A.G. (LONDON BRANCH)**

**Respondents**

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**THIRD WITNESS STATEMENT OF  
GILLIAN ELEANOR BRUCE**

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