

Party: Applicant
Witness: R. Downs
Statement No: 12
Exhibit: "RD12"
Date: 10 August 2017



No. 7942 of 2008 / CR-2008-000012 GR 2008-000012

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

**TWELFTH WITNESS STATEMENT
OF
RUSSELL DOWNS**

I, Russell Downs, of PricewaterhouseCoopers LLP ("**PwC**"), 7 More London Riverside,
London, SE1 2RT say as follows:

A. INTRODUCTION

1 I am a licensed insolvency practitioner and a partner in PwC, a professional services
firm at the above address. I am one of the administrators (the "**Administrators**") of
Lehman Brothers International (Europe) (in administration) ("**LBIE**").

- 2** My partners, Anthony Victor Lomas, Steven Anthony Pearson and Julian Guy Parr are the other Administrators of LBIE. We were appointed as such by orders of the High Court of England and Wales dated 15 September 2008, 2 November 2011 and 22 March 2013. I am duly authorised to make this witness statement on behalf of LBIE and the Administrators.
- 3** On 15 September 2008, Lehman Brothers Holdings Inc., the parent company of the Lehman Brothers group (the "**Lehman Group**") including both LBIE and Lehman Brothers Inc. ("**LBI**"), filed for bankruptcy. On 19 September 2008, the United States ("**US**") District Court for the Southern District of New York (the "**US Bankruptcy Court**") entered an order granting the application of the Securities Investor Protection Corporation for issuance of a protective decree adjudicating that the customers of LBI are in need of protection afforded by the US Securities Investor Protection Act of 1970 ("**SIPA**") and appointing James W. Giddens of Hughes Hubbard & Reed LLP ("**HHR**") as trustee (the "**LBI Trustee**"). The liquidation of LBI is presently pending in the US Bankruptcy Court before The Honorable Shelley C. Chapman (Case No. 08-01420 (SCC) (SIPA)).
- 4** I started working on the administration of LBIE (the "**Administration**") in late 2010 and took responsibility for, amongst other things, LBIE's relationships with its affiliates, including LBI, on a day to day basis. I was appointed as an Administrator in November 2011.
- 5** This witness statement is intended to provide factual background to the Court for the purposes of determining the application for directions (the "**Application**") issued by the Administrators on 5 September 2016 pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 to resolve a number of issues which arise in relation to claims Barclays Capital Inc. ("**Barclays**") has against LBIE and/or the Client Money Pool held by LBIE, having acquired such claims from LBI shortly after the collapse of the Lehman Group. Save where otherwise provided, capitalised terms have the meanings ascribed to them in the Application and in my tenth witness statement dated 5 September 2016 ("**Downs 10**").

- 6 There is now shown to me a paginated bundle of copy documents, marked "RD12" to which I refer in this witness statement. Unless otherwise stated, page references in this witness statement are references to pages of RD12.
- 7 I am giving this witness statement in my capacity as an Administrator of LBIE, and in circumstances where there are no individuals currently employed by PwC or LBIE who have direct knowledge of all relevant aspects of the factual background to the Application. The facts and matters stated in this witness statement have either been learned by me as a result of the work I have undertaken as one of the Administrators, or they have been provided to me by my partners and colleagues at PwC or employees of LBIE involved with the Administration, or by the Administrators' legal advisers, Linklaters LLP ("**Linklaters**"). In particular, I refer in this witness statement to information provided to me by:
- 7.1 Lisa Greenway, who prior to LBIE's entry into administration was an Executive Director and held senior positions in both the Lehman Brothers Finance Division and the Lehman Brothers Global Change Management Division with 16 years of experience. In December 2008, she was appointed as a Managing Director in the Administrators' Intercompany Team; and
- 7.2 Steve Nichols, who prior to LBIE's entry into administration was an Executive Director with 13 years of experience within the Lehman Brothers European Finance Team, holding senior positions within Product Control, Treasury and the Change Management function. He was re-appointed by the Administrators in March 2012.
- 8 Nothing that I say in this witness statement is intended to be a waiver of any privilege to which LBIE and/or the Administrators are entitled and no such privilege is waived.
- 9 I structure the remainder of this witness statement as follows:
- 9.1 **Section (B)** sets out factual information relating to the currency of Barclays' Unsecured Claim (which is the subject of Issue 16 of the Application);
- 9.2 **Section (C)** outlines information in relation to the LBI/LBIE Settlement and Barclays' involvement in that settlement;

- 9.3 **Section (D)** outlines LBIE's involvement in discussions relating to the LBI/Barclays Settlement;
- 9.4 **Section (E)** deals with amounts owed by Barclays to LBIE; and
- 9.5 **Section (F)** deals with procedural matters relating to this witness statement.

B. THE CURRENCY OF BARCLAYS' CLAIMS

- 10 This section is intended to provide factual information to the Court for the purposes of determining Issues 15 and 16 in the Application. Where necessary, I have relied on information provided to me by Lisa Greenway and/or Steve Nichols.
- 11 Issue 15 asks the Court to consider (in relation to Issues 10 to 14 and Issue 19) how the amount in respect of the LBI Payment should be calculated. In particular, if the Sterling Equivalent of the LBI Payment is to be taken into account, the Court is asked to determine whether this should be calculated based on the exchange rate prevailing at: (i) the Time of Administration; (ii) the time when Barclays received the LBI Payment; or (iii) some other time.
- 12 The formula proposed by the Administrators is set out in paragraphs 195 to 202 of the Administrators' position paper, filed and served on 20 January 2017 (the "**Administrators' Position Paper**"). The formula proposed by Barclays is set out in paragraphs 128 to 131 of Barclays' position paper, filed and served on 5 May 2017 ("**Barclays' Position Paper**"). Wentworth states in paragraph 67 of its position paper, filed and served on 5 May 2017 ("**Wentworth's Position Paper**"), that it has insufficient information to take a position on Issue 15. Although the formulae proposed by the Administrators and Barclays are different, they give the same result if Barclays' Unsecured Claim is denominated in USD and only give a different result if Barclays' Unsecured Claim is denominated in a non-USD currency. As such, it is necessary to determine the currency of Barclays' Unsecured Claim.

- 13** Issue 16 of the Application asks the Court to consider, in the event that Barclays has an Unsecured Claim in respect of the ETD Trades, what currency (or currencies) the Unsecured Claim is denominated in (prior to any conversion under Rule 2.86). The Administrators' position (as set out in paragraphs 203 – 206 of the Administrators' Position Paper) is that Barclays' Unsecured Claim is denominated in USD. Barclays concurs with this position (as set out in paragraph 127 of Barclays' Position Paper). Paragraph 67 of Wentworth's Position Paper states that Wentworth has insufficient information to take a position on Issue 16.

Reporting currency

- 14** As noted in paragraph 57 of Downs 10, the system in which ETD trading was recorded was known as "**RISC**". RISC was hosted at LBI in the US but LBIE had access to it in order to record and monitor ETD Trades. RISC was transferred from LBI to Barclays under the APA.
- 15** Each of the ETD Accounts was an account maintained in the RISC system. In any given RISC account, the value of open trades combined with the balances arising from closed trades generated a balance owing from one party to another. This would be updated on a daily basis.
- 16** RISC was a third-party proprietary platform, licensed to LBIE with an embedded USD reporting currency. Accordingly, all reports produced by the RISC system, including account balances, were in USD.
- 17** From LBIE's perspective, a reference currency was required for the purposes of netting the balances in any given RISC account and feeding the ETD balances into the Lehman Group general ledger. It was convenient that this currency was USD because both LBIE and LBI were USD functional entities, meaning reporting requirements between LBI and LBIE and external reporting by each entity (including in respect of LBIE's statutory accounts) was done in USD.

- 18** However, where there were underlying trades and balances in currencies other than USD (as was the case in the ETD Accounts), LBIE's foreign exchange exposure was managed by reference to those underlying currencies, rather than the USD figure contained in the Lehman Group general ledger.

The currencies in the ETD Accounts

- 19** A breakdown of the currency balances (comprised of both closed trades that gave rise to cash balances and open trades) for the ETD Accounts is set out in **Annex 1**.
- 20** Within each of the ETD Accounts, cash balances were recorded in the underlying currencies of the (closed) trades that gave rise to those balances. The system also recorded any open trades in each account and the values of those open positions, in their underlying currencies. As noted above, RISC also recorded the overall balance of each ETD Account in USD, which was calculated on a daily basis using the USD equivalents of any non-USD balances and any non-USD open trades. These USD equivalents were calculated using an FX rate close to the end of the US trading day.
- 21** One USD balance for each of the ETD Accounts (i.e. the overall USD balance arising from closed trades and the values of open trades in each such account), as recorded in RISC, was fed into the Lehman Group general ledger where the overall account balance (in respect of all forms of business) between LBI and LBIE was recorded. That overall balance was recorded in USD.
- 22** The RISC data was fed into the general ledger on or around the third or fourth business day after the month-end close using reversing journals. (Because of the onerous nature of the approval process necessary for the effecting of permanent journals to paydown intercompany balances, and because of the need for the relevant entities to understand their position *vis-à-vis* each other, reversing journal entries were made at the end of the accounting period which were subsequently reversed or cancelled out at the commencement of the following period.) This monthly feed to the Lehman Group general ledger was made after manual

accounting correction journals had been posted in RISC in order to correct any data integrity errors that had arisen during the relevant month and therefore prevent such errors from feeding into the general ledger. The feed of this data into the general ledger was therefore a manual rather than automatic process.

The currency of paydowns between LBIE and LBI in respect of the ETD Accounts

- 23** As a general matter (i.e. not just as regards the ETD business), where credit balances existed between LBIE and LBI they would, from time to time and depending on a number of factors, be "paid down" (i.e. reduced by way of a payment to the party in whose favour the credit balance stood).
- 24** In respect of the ETD Accounts, the Administrators have not been able to identify any paydowns of balances between LBIE and LBI. However, to the best of Lisa Greenway's knowledge, on an ad hoc basis (approximately once a year), the RISC team in New York passed permanent (as opposed to reversing) journals to pay down any realised profit and loss on the RISC accounts for trades that had closed out. The journals were passed in the underlying currency of the relevant balance, reflecting the real-world exposure between LBIE and the relevant exchange. For the avoidance of doubt, this process did not result in cash movements, rather it resulted in accounting entries which adjusted the amounts owed between LBIE and LBI.

Margining

- 25** In determining the currency of Barclays' claims in respect of the ETD Accounts, I understand it may be instructive to consider the currencies in which margin was called between LBIE and LBI in relation to such accounts, as the margin requirement reflects a consideration of what is owing in respect of such accounts.
- 26** As outlined in Annex 1 of Downs 10, the positions held in each of the ETD Accounts were denominated in a variety of currencies and traded through various exchanges. As between LBIE and each of the exchanges, the margin requirements depended upon the terms of the contract between LBIE and the exchange. Margin was called and settled daily in the functional currency of the relevant exchange.

- 27** I understand from Steve Nichols that, as between LBIE and LBI, all margin calls in respect of the ETD Accounts were made in USD, as follows:
- 27.1** a total balance was calculated for each currency in an account (for example, an amount would be calculated across all sterling trades and balances in that account);
 - 27.2** each non-USD currency total would then be converted to USD using the RISC end-of-day FX rate;
 - 27.3** the USD totals would then be netted to give the net margin call/excess for each ETD Account;
 - 27.4** the margin call/excess for the ETD Accounts would be totalled to give the margin call required across all the ETD Accounts;¹
 - 27.5** the resulting margin calls between LBIE and LBI were made in USD; and
 - 27.6** USD would be wired between LBI and LBIE to meet the margin call.
- 28** This practice applied even where LBIE made a margin call against LBI in response to a non-USD margin call made by an exchange against LBIE in relation to trades LBIE had placed on behalf of LBI. For example, accounts 066-022-07000 and 066-022-07003 (which largely contained EUR-denominated ETD products traded on the EUREX exchange) would be netted and margin called for by the EUREX exchange from LBIE in EUR. To the extent that LBIE had to make a corresponding margin call against LBI, such margin calls were always made in USD pursuant to the process outlined in paragraph 27 above.

Client Money Segregation

- 29** As noted in paragraph 54 of Downs 10, the 11 ETD Accounts are designated as follows:

¹ In practice, the combined margin calls were applied to account 066-022-08000.

- 29.1** 066-022-07000, 066-022-08001 and 066-022-08002, each maintained in relation to trading on behalf of LBI clients;
- 29.2** 066-022-08000, a combined account maintained in relation to both trading on behalf of LBI clients and LBI's proprietary ETD trading;
- 29.3** 066-022-07015, 066-022-07003 and 066-022-08004, each maintained in relation to LBI's proprietary ETD trading; and
- 29.4** 071-022-07100, 071-022-07101, 071-022-07102 and 071-022-07107, each maintained by LBIE's Korean branch.
- 30** The three accounts listed at paragraph 29.1 above were accounts in respect of which client money was segregated pursuant to the rules contained in the Client Assets Sourcebook issued by the (then) Financial Services Authority. The remaining eight ETD Accounts were not included in LBIE's client money segregation processes and accordingly no client money was segregated in respect of them.
- 31** All segregation of client money was calculated and effected in USD, irrespective of the currencies of the underlying trades.
- 32** The client segregation system which performed this segregation was run by LBIE in London.

Master Institutional Futures Customer Agreement

- 33** As far as LBIE is aware, there was no written contract in place between LBIE and LBI which governed the trading of ETDs. LBIE's trading (on behalf of clients) in ETDs would ordinarily be governed by a Master Institutional Futures Customer Agreement ("**MIFCA**"). During the course of the Administration the Administrators have expended considerable effort in seeking to locate all written contracts between LBIE and its affiliates. They have not located a MIFCA between LBIE and LBI and it was not unusual for ETD dealings between members of the Lehman Group to be undocumented.

- 34** However, the standard LBIE MIFCA (an example of which is included in Exhibit "RD12" at **pages 1 to 21**) is consistent with the default currency of LBIE's ETD trading being USD. For example:
- 34.1** clause 2 (Margin) provides that the Customer (as defined in the MIFCA) agrees to deliver all margin in USD unless otherwise agreed; and
- 34.2** clause 15 provides that:
- 34.2.1** where a Customer trades in a currency other than USD, the Customer is to bear the exchange rate risk as against USD; and
- 34.2.2** unless a Customer gives contrary written instructions, LBIE will debit and credit the Customer's account in USD.

C. THE LBI/LBIE SETTLEMENT

- 35** This section is intended to provide factual information to the Court for the purposes of determining Issue 13 in the Application, which asks the Court to determine whether: (i) the creation of the Dedicated Reserve; and/or (ii) the LBI Payment; and/or (iii) the Administrators' consent thereto; and (iv) any other action relating to the creation of the Dedicated Reserve and payment therefrom, itself constitute (a) an admission to proof; and/or (b) payment of a dividend by the Administrators of part of the Barclays Proof in an amount equal to such payment.
- 36** The Administrators consider that the Barclays Proof has never been admitted in part or in full at any time, and no dividend has ever been paid in respect of the Barclays Proof at any time (see paragraph 169 of the Administrators' Position Paper). Wentworth concurs with this position (see paragraph 66 of Wentworth's Position Paper). In paragraph 96 of Barclays' Position Paper, Barclays contends that *"[t]he LBI Payment was contemplated and agreed by the Administrators as capable of being payable to Barclays, and Barclays received part payment of this claim from LBI (as a result of arrangements previously made between the Administrators and*

LBI) before the Administrators purported expressly to admit, reject or otherwise deal with the Barclays Proof". Barclays argues that, in the event it decides to pursue the Unsecured Claim, the Court should deem the Administrators' actions to constitute an admission of at least the amount of the LBI Payment. Accordingly, Barclays contends that if it chooses to allocate the payment towards the Unsecured Claim, the Court should deem that: (i) the Administrators' actions constitute admission of the Barclays Proof; and/or (ii) the LBI Payment falls within the meaning of "those debts" for the purposes of Rule 2.88(7).

- 37** In order to determine Issue 13, I understand it would be helpful to outline further information in relation to the LBI/LBIE Settlement and, in particular, the creation of the Dedicated Reserve. Where necessary, I have relied on information provided to me by Lisa Greenway.

The LBI/LBIE Settlement

- 38** Paragraphs 20 to 32 of Downs 10 outline the factual background to the LBI/LBIE Settlement dated 21 February 2013, pursuant to which LBI agreed to establish the Dedicated Reserve. The Dedicated Reserve was to be made exclusively available for either:
- 38.1** making a payment to LBIE in the event that Barclays was able successfully to assert the "*Barclays LBIE ETD Claim*" (as defined in the LBI/LBIE Settlement) against LBIE, in accordance with Article 10.08(a)(A) of the LBI/LBIE Settlement; or
- 38.2** making a payment to Barclays, provided that LBI's obligation to hold the reserve would only be extinguished if (and to the extent that) such payment had the effect of reducing LBIE's liability to Barclays in respect of the "*Barclays LBIE ETD Claim*" in accordance with Article 10.08(c) of the LBI/LBIE Settlement.

Establishing the Dedicated Reserve

- 39** As noted in paragraph 25 of Downs 10, the LBI/LBIE Settlement was intended to effect a global resolution of disputes and a full and final release of all claims between

LBIE and LBI (subject to limited exceptions). Since LBIE's claims against LBI exceeded LBI's claims against LBIE, LBI received credit (in the form of a reduction of the amount owed by LBI's estate to LBIE) to reflect the value attributed for settlement purposes to the "*LBI/LBIE ETD Accounts*" (as defined in the LBI/LBIE Settlement).

40 In order to agree the value to be attributed to the "*LBI/LBIE ETD Accounts*", a significant reconciliation exercise was conducted between LBIE and LBI to agree and value the cash balances and the open trades in these accounts. The parties agreed that the value to be attributed to the "*LBI/LBIE ETD Accounts*" was approximately USD 777 million.

41 However, due to the ongoing dispute between LBI and Barclays over the ownership of the "*LBI/LBIE ETD Accounts*" there was uncertainty over the scope of LBI's release of claims against LBIE. In order to compensate LBIE for the risk that any claims with respect to the "*LBI/LBIE ETD Accounts*" might later be found to belong to Barclays rather than LBI (rendering LBI's global release partially ineffective and therefore resulting in underpayment to LBIE by LBI), LBI agreed to establish the Dedicated Reserve in the amount of USD 777 million.

42 The provision in the LBI/LBIE Settlement allowing LBI to pay Barclays the USD 777 million directly was included in LBI's initial draft of the LBI/LBIE Settlement.

Barclays' involvement in the LBI/LBIE Settlement

43 Barclays did not have any involvement in drafting the LBI/LBIE Settlement. However, on 3 April 2013, Barclays entered objections in the US Bankruptcy Court in relation to both:

43.1 the LBI Trustee's second motion for an order to approve the LBI Trustee's allocation of LBI estate assets (together with assets that may become available through the release of reserves or otherwise) to "customer property", submitted on 1 December

2011, Docket No. 4760 (as supplemented on 31 January 2013 and re-filed on 26 February 2013) (the "**Allocation Order**"); and

43.2 the motion pursuant to Federal Rule of Bankruptcy Procedure 9019 for an order approving the LBI/LBIE Settlement and expunging duplicative claims, filed on 26 February 2013 (the "**LBI/LBIE Settlement Order**"),

(the "**Objections**") (Exhibit "RD12" at **pages 22 to 37**).

44 In the Objections, Barclays contended that if the Allocation Order was to be granted in accordance with the LBI Trustee's motion, it should be modified to include three clauses (as outlined in Exhibit "RD12" at **pages 28 to 30**) which were designed to:

44.1 preserve the rights and defenses of the LBI Trustee and Barclays as against each other; and

44.2 ensure that the LBI Trustee reserved sufficient assets to ensure full recovery by Barclays in the event it prevailed on its claims in respect of the "*LBI/LBIE ETD Accounts*".

45 Similarly, as regards the LBI/LBIE Settlement Order, Barclays noted in the Objections that this "*should be modified accordingly, as appropriate, to ensure that, before any further distribution, the Trustee reserves sufficient assets to ensure full recovery by Barclays in the event it prevails on its claims in the pending litigation*" (Exhibit "RD12" at **page 23**).

Withdrawal of the Objections

46 Although LBI and LBIE were broadly agreeable to Barclays' requests, correspondence among the parties at the time evidences that there was some negotiation regarding the precise language to be included in the Allocation Order and the LBI/LBIE Settlement Order as a result of the Objections.

47 Agreement was eventually reached among the parties and Barclays proceeded to withdraw its Objections.

Final Orders

- 48** On 16 April 2013, the Allocation Order was issued by the US Bankruptcy Court (Exhibit "RD12" at **pages 38 to 46**). The LBI/LBIE Settlement Order was issued on the same day (Exhibit "RD12" at **pages 47 to 55**).

D. LBIE'S INVOLVEMENT IN THE LBI/BARCLAYS SETTLEMENT

- 49** This section is intended to provide factual information to the Court primarily for the purposes of determining whether LBIE is precluded from arguing that Barclays is not entitled to Statutory Interest in respect of the LBI Payment (addressed in Issues 17, 18 and 19 in the Application).
- 50** In the Administrators' Position Paper, it is argued that Barclays' acceptance of the LBI Payment and agreement to apply it towards the reduction of its claims against LBIE had the effect of reducing the amount for which Barclays might be able to prove and accordingly the amount of Statutory Interest which Barclays is entitled to receive. It is also noted that paragraph 5 of the LBI/Barclays Settlement does not allow Barclays to contract out of the mandatory effect of Rule 2.88(7) (see paragraphs 218 and 219 of the Administrators' Position Paper). In paragraph 64 of Wentworth's Position Paper, it is noted that Wentworth concurs with the Administrators' position.
- 51** Barclays contends that it would have become entitled to Statutory Interest prior to the LBI/Barclays Settlement and that the terms of the LBI/Barclays Settlement did not affect that. In paragraph 119(c) of Barclays' Position Paper, it is noted that: "*The Administrators... were directly involved in the negotiation of this contractual language and consented to the Stipulation and Order comprising the LBI/Barclays Settlement and the Order entered by the Court approving that settlement. Indeed negotiations between Barclays and the Administrators were prompted by the Administrators' threatened objection to the LBI/Barclays Settlement... The*

Administrators sought assurance that Barclays would not double-recover the \$777 million by also seeking that sum from LBIE, and Barclays, in turn, required the Administrators to agree that nothing in the LBI/Barclays Settlement (including the LBI Payment) would reduce or affect Barclays' claim to interest on the \$777 million. The parties made that agreement, and the Administrators should now be bound by that agreement". As such, Barclays contends that the Administrators should be directed by the Court, and/or are estopped from refusing, to pay Statutory Interest on the LBI Payment.

- 52** Barclays also relies on LBIE's involvement in the LBI/Barclays Settlement to support its position on:
- 52.1** Issue 10, in respect of which it is argued that the LBI/Barclays Settlement, to which the Administrators expressly consented, did not provide that the LBI Payment should be made towards a specific claim; and
- 52.2** Issue 12, in respect of which it is argued that the parties, with the consent of the Administrators, agreed in the LBI/Barclays Settlement that they did not intend the making of the LBI Payment to reduce the Barclays Proof.
- 53** In order to assist the Court, I have provided further information regarding LBIE's involvement in the LBI/Barclays Settlement below.

The LBI/Barclays Settlement

- 54** Paragraphs 33 to 42 of Downs 10 outline the factual background to the LBI/Barclays Settlement and provide an overview of the provisions relevant to the LBI Payment.
- 55** As noted in paragraph 35 of Downs 10, on the morning of 5 June 2015, LBI provided LBIE with "*near-final*" drafts of the LBI Trustee's motion for entry of an order pursuant to Federal Rule of Bankruptcy Procedure 9019 approving the LBI/Barclays Settlement (the "**Draft Order**") and the LBI/Barclays Settlement (the "**Draft Stipulation**") (together with the related motion papers) (Exhibit "RD12" at **pages 56**

to 98). Later that day, the LBI Trustee filed both the Draft Stipulation and the Draft Order with the US Bankruptcy Court.

56 I have outlined below the key correspondence between Linklaters (acting for LBIE) and HHR (acting for LBI) and Boies Schiller Flexner (UK) LLP ("**Boies Schiller**") (acting for Barclays) in relation to the LBI/Barclays Settlement. For ease of reference, in circumstances where the parties refer to enclosed revisions to the text of the Draft Stipulation and the Draft Order, I have inserted a footnote cross-referring to the relevant row in **Annex 2** where the parties' proposed amendments are set out in full. In circumstances where the parties have attached both clean and redlined versions of the Draft Stipulation and the Draft Order, only the redlined versions have been included in Exhibit "RD12".

Correspondence relating to the LBI/Barclays Settlement

57 On 9 June 2015, LBIE informed HHR that it was reviewing the court documents and its preliminary view was that the language did not sufficiently track the LBI/LBIE Settlement (Exhibit "RD12" at **pages 99 to 100**). On 15 June 2015, Linklaters sent HHR revised wording in respect of the Draft Stipulation (Exhibit "RD12" at **pages 101 to 115**).²

58 On 16 June 2015, HHR responded to Linklaters noting that the proposed language in respect of the Draft Stipulation was "*largely acceptable*" to the LBI Trustee and attached a redline showing some amendments (Exhibit "RD12" at **pages 116 to 130**).³

59 On the same day, Linklaters responded to HHR confirming that, on the basis of the amendments made to the Draft Stipulation (which were still subject to Linklaters'

² Please refer to row 1 of Annex 2 to review the proposed amendments.

³ Please refer to row 2 of Annex 2 to review the proposed amendments.

and LBIE's review), they were content for HHR to contact Boies Schiller to discuss the revised language (Exhibit "RD12" at **pages 131 to 133**).

- 60** On 18 June 2015, Boies Schiller emailed HHR (presumably in response to an email from HHR outlining the amendments to the Draft Stipulation) noting that they had considered the proposed changes and, whilst they did not believe that there was any basis for an objection or that any of the changes were necessary, they were willing to make certain changes to the Draft Stipulation in return for LBIE not filing any objections. A marked-up version of the Draft Stipulation was attached, showing changes in redline.⁴ HHR forwarded Boies Schiller's email, and the attachment, to Linklaters (Exhibit "RD12" at **pages 134 to 148**).
- 61** The following day, Linklaters sent Boies Schiller revised wording in respect of paragraph 5 of the Draft Stipulation (Exhibit "RD12" at **pages 149 to 162**).⁵ Boies Schiller responded on 22 June 2015 to note that Barclays was willing to agree to LBIE's proposed changes provided that LBIE was willing to re-insert the following sentence at the end of paragraph 5 of the Draft Stipulation: "*For the avoidance of doubt, nothing herein affects, waives, releases or reduces Barclays' claim against LBIE to interest relating to the \$777,000,000 referenced in this Paragraph, and nothing herein affects, waives, releases or reduces Barclays' LBIE ETD Claim against LBIE with respect to assets (and interest with respect thereto) in excess of the \$777,000,000 referenced in this Paragraph*" (Exhibit "RD12" at **pages 163 to 164**).
- 62** On 23 June 2015, Linklaters sent amendments to the language proposed by Boies Schiller for inclusion at the end of paragraph 5 of the Draft Stipulation (Exhibit "RD12" at **pages 165 to 166**).⁶ The amendments reserved LBIE's rights to defend Barclays' claims against LBIE to Statutory Interest relating to the USD 777 million and to assets in excess of USD 777 million. Linklaters also noted that it was

⁴ Please refer to row 3 of Annex 2 to review the proposed amendments.

⁵ Please refer to row 4 of Annex 2 to review the proposed amendments.

⁶ Please refer to row 5 of Annex 2 to review the proposed amendments.

important for the language agreed in respect of the Draft Stipulation to be reflected in the Draft Order.

- 63** Boies Schiller responded on the same day noting that the revisions to the Draft Stipulation were agreeable to Barclays, and confirming that they were also willing to have parallel changes made to the Draft Order (Exhibit "RD12" at **pages 167 to 169**). Linklaters responded attaching the final amendments to both the Draft Stipulation and the Draft Order (Exhibit "RD12" at **pages 170 to 209**). Two of the attached redlines showed changes against the versions of the Draft Stipulation and the Draft Order filed by the LBI Trustee on 5 June 2015 (Exhibit "RD12" at **pages 187 to 200** and **pages 201 and 209**).⁷
- 64** On 24 June 2015, Boies Schiller responded noting that all of the revisions, with two exceptions in the Draft Order, were acceptable to Barclays (Exhibit "RD12" at **pages 210 to 213**).⁸ In addition, Boies Schiller asked that the filing of the Draft Order and Draft Stipulation be delayed as much as possible so that Boies Schiller could ensure that they addressed changes relating to other objections. Linklaters forwarded these comments to HHR on the same day and noted that they were acceptable to LBIE (Exhibit "RD12" at **pages 214 to 217**). It was also noted that: "*[w]ith those changes, and subject to proofreading tomorrow, Barclays and LBIE are agreed on the Order language (insofar as it relates to LBIE/Barclays issues) and on the Stipulation*".
- 65** On 24 June 2015, HHR sent Linklaters and Boies Schiller the final versions of the Draft Stipulation and Draft Order in both clean and redlined against the versions filed on 5 June 2015, confirming that LBI had agreed to these versions (Exhibit "RD12" at **pages 218 to 243**). Linklaters and Boies Schiller were asked to confirm the same for both LBIE and Barclays, and were informed that a final minor change had been made to the proposed Draft Order.⁹

⁷ Please refer to row 6 of Annex 2 to review the proposed amendments.

⁸ Please refer to row 7 of Annex 2 to review the proposed amendments.

⁹ Please refer to row 8 of Annex 2 to review the proposed amendment.

- 66** On 24 and 25 June 2015, both Linklaters and Boies Schiller signed off on behalf of their respective clients (Exhibit "RD12" at **pages 244 to 248**). They subsequently approved minor variations to both the Draft Stipulation and the Draft Order, unrelated to claims against LBIE (Exhibit "RD12" at **page 249**).

Final versions

- 67** On 25 June 2015, LBI submitted amended versions of the Draft Stipulation and the Draft Order to the US Bankruptcy Court reflecting language discussed among LBI, Barclays and LBIE (Exhibit "RD12" at **pages 250 to 308**).¹⁰
- 68** On 29 June 2015, the US Bankruptcy Court entered an order approving the LBI/Barclays Settlement (Exhibit "RD12" at **pages 309 to 317**) and an accompanying stipulation and order setting out the terms of the LBI/Barclays Settlement in full (Exhibit "RD12" at **pages 318 to 330**).

E. AMOUNTS OWED BY BARCLAYS TO LBIE

- 69** Issue 9 of the Application asks whether, if Barclays has an Unsecured Claim, such claim is subject to any set-off against any sums owing by Barclays to LBIE. This section is intended to provide factual information to the Court in relation to whether there are, or have been, sums owing by Barclays to LBIE in respect of which any such set-off might apply.
- 70** In paragraph 97 of the Administrators' Position Paper, it is noted that no sums were owing by Barclays to LBIE at the date on which the Administrators gave their 2.95 Notice, which, in the Administrators' view, is the point at which mandatory set-off under Rule 2.85 takes effect. Paragraph 133 of Barclays' Position Paper notes that the Unsecured Claim is not subject to any type of set-off and that Barclays' position

¹⁰ Please also refer to row 9 of Annex 2 to review the amended language.

is the same as that of the Administrators on Issue 9. In paragraph 36 of Wentworth's Position Paper, it is noted that although Wentworth is currently unaware of whether other sums are owed by Barclays to LBIE, if there are such sums, then they are capable of being the subject matter of a set-off.

- 71** In order to assist the Court, I set out below further information as regards amounts owed by Barclays to LBIE.

Barclays' pre-administration indebtedness

- 72** LBIE had a relationship with certain entities in the Barclays group of companies pre-administration, however this did not include Barclays Capital Inc. (referred to throughout this witness statement as "Barclays"). Accordingly, the Administrators are not aware of any debts owing from Barclays to LBIE as at the date of administration or thereafter.

Client money owed by LBI to LBIE pre-administration

- 73** LBI held certain monies on trust for LBIE pre-administration, as referred to in a letter agreement between LBIE and LBI dated 19 June 2008 (Exhibit "RD12" at **page 331**). The monies related to Client Money balances segregated by LBI for LBIE clients conducting ETD trading in the United States and Asia through LBI, on RISC accounts numbered:

73.1 27980866 / 02280662;

73.2 27980766 / 02286607; and

73.3 27986266 / 02286662, (collectively, the "**LBIE Accounts**").

- 74** On 8 March 2012, following discussions between LBI, LBIE and Barclays, Sullivan & Cromwell LLP (acting for Barclays) confirmed in writing that:

74.1 LBI had transferred the LBIE Accounts to Barclays;

- 74.2** as per the Administrators' request (and provided LBIE and LBI were able to give certain confirmations), Barclays would return the amount owed in relation to the LBIE Accounts to LBIE; and
- 74.3** the LBIE Accounts were subject to the applicable rules of the United States Commodity Futures Trading Commission and the letter agreement between LBIE and LBI dated 19 June 2008,

(Exhibit "RD12" at **pages 332 to 337**).
- 75** On 15 March 2012, Barclays paid to LBIE USD207,479,057.74 in respect of the LBIE Accounts. LBIE accordingly added this sum to the pre-administration client money pool.

F. PROCEDURAL MATTERS

- 76** A copy of my witness statement will be served on Barclays and Wentworth via their solicitors.
- 77** A copy of my witness statement will also be provided to the Financial Conduct Authority.
- 78** The Administrators also intend to give notice of this witness statement to LBIE's other creditors via the PwC LBIE website, the website through which the Administrators regularly update LBIE's creditors on matters relating to the Administration.
- 79** The Administrators will, if appropriate, file further evidence in advance of the hearing of the Application in order to update the Court on any further developments in relation to the matters dealt with in this witness statement.

**Party: Applicant
Witness: R. Downs
Statement No: 12
Exhibit: "RD12"
Date: 10 August 2017**

STATEMENT OF TRUTH

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

Dated 10 August 2017



Signed:.....

RUSSELL DOWNS

**Party: Applicant
Witness: R. Downs
Statement No: 12
Exhibit: "RD12"
Date: 10 August 2017**

**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**

**TWELFTH WITNESS STATEMENT
OF
RUSSELL DOWNS**

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Tel: (+44) 20 7456 5469
Fax: (+44) 20 7456 2222

Solicitors for the Administrators

Ref: Nick Porter / Jared Oyston / Victoria
Bradshaw

Party: Applicant
Witness: R. Downs
Statement No: 12
Exhibit: "RD12"
Date: 10 August 2017

No. 7942 of 2008 / CR-2008-000012

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

EXHIBIT "RD12" TO

THE TWELFTH WITNESS STATEMENT OF RUSSELL
DOWNS

This is the exhibit marked "RD12" referred to in the Twelfth Witness Statement of Russell Downs dated 10 August 2017.



Signed