

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

**IN THE MATTER OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION) (registered number 05957878)**

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

**BETWEEN**

**(1) THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)**

**and**

**(1) LEHMAN BROTHERS HOLDINGS SCOTTISH LP 3**

**(2) LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)**

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**Second Witness Statement of Derek Anthony Howell**  
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I, Derek Anthony Howell, of PricewaterhouseCoopers LLP ("PwC") of One Kingsway, Cardiff, CF10 3PW say as follows:

1. I am a consultant in the firm of PwC of the above address and I am one of the joint administrators of LB Holdings Intermediate 2 Limited ("LBHI2"). LBHI2 went into administration on 14 January 2009. My fellow administrators are Anthony Lomas, Steven Pearson, Guy Parr and Gillian Bruce. I am duly authorised by them to make this statement.
2. I make this statement in support of an application for directions to determine the priority of certain competing claims in the LBHI2 estate which I describe below. There is now produced and shown to me marked "DAH2" a bundle of true copy documents comprising (i) documents to which I

specifically refer below, (ii) other documents produced as a result of the search described at paragraphs 24-37 below, and (iii) documents produced by other parties during the correspondence described at paragraphs 38-40 below. References to page numbers later in this statement are references to this bundle.

### **The LBHI2 estate**

3. LBHI2 is the immediate holding company of Lehman Brothers International (Europe) ("LBIE"). As the court will be aware, LBIE was one of the main European trading arms of the Lehman Group. It went into administration on 15 September 2008.
4. LBHI2, having previously held almost all of the issued share capital in LBIE, now holds the whole of it. Its principal function was to make capital available to LBIE, including by way of subordinated loans. As at the commencement of LBIE's administration, LBHI2 had an unsecured claim of approximately £1.2 billion in respect of sums advanced to LBIE under three subordinated loan agreements made in November 2006. Copies of those subordinated loan agreements ("the LBIE Sub-Debt Agreements") appear at pages 1, 17 and 32. LBHI2 also had a separate unsecured unsubordinated claim against LBIE in the sum of approximately £38 million (subsequently adjusted downward and admitted at £36 million).
5. The LBIE Sub-Debt Agreements were in a form that was approved by the Financial Services Authority (and printed in the Interim Prudential Sourcebook (INPRU) which set out the financial resources requirements applicable to LBIE from 31 December 2006 until it entered administration) and which enabled the loans to qualify as Tier II loan capital. Broadly, the agreements provide that all LBIE's unsubordinated obligations must be paid prior to any sums being repaid to LBHI2 in respect of its claims under those agreements.
6. Subsequent to LBHI2 going into administration it entered into what is known as the "Wentworth transaction" with two funds, King Street Capital and Elliott Management Corporation. Stated shortly, the effect of the Wentworth transaction was that the parties pooled their various claims against the LBIE estate by assignment of the same into various special purpose vehicles, which are known as the Wentworth companies. In the case of LBHI2, it assigned (amongst other things) its claims under the LBIE Sub-Debt Agreements in return for an immediate substantial cash payment and a share in any future recoveries received by the Wentworth companies.
7. In 2013, a directions application was issued by the administrators of LBIE, LBHI2 and LBL on 14 February 2013 to determine whether, and/or in what order of priority, certain claims ranked for

payment from any surplus in the administration or subsequent liquidation of LBIE remaining after payment in full of ordinary unsecured creditors in respect of their proved claims, and the liability of LBIE's shareholders to contribute to LBIE's estate (the "Waterfall I" litigation). The Waterfall I litigation culminated with the handing down of the judgment of the Supreme Court on 17 May 2017. In economic terms, the effect of the judgment can be seen from the LBIE Joint Administrators' latest progress report dated 9 October 2017 at page 52), which gives an indicative financial outcome showing a surplus in the LBIE estate, after payment of secured and unsubordinated claims, of approximately £7.7 billion.

8. Two further directions applications had previously been issued addressing further issues in the LBIE estate (the "Waterfall II" litigation and the "Waterfall III" litigation). The Waterfall III application was dismissed by consent by order of Hildyard J on 6 September 2017. Certain elements of the Waterfall II litigation are presently subject to an application for permission to appeal to the Supreme Court and other elements are subject to an appeal to the Court of Appeal. The LBIE Joint Administrators estimate (in the 9 October 2017 Progress Report referred to above) that, if all existing Waterfall judgments are upheld on appeal, a surplus of approximately £2.4 billion will remain after payment of statutory interest to unsubordinated creditors, and will therefore be available for the repayment of the sums due under the LBIE Sub-Debt Agreements.
9. The LBIE Joint Administrators have in the meantime been attempting to develop a proposal which provides for the full and final settlement of predominantly all litigation, disputes and claims in respect of entitlements to the LBIE surplus and would allow for the payment of statutory interest and, potentially, the claims under the LBIE Sub-Debt Agreements. On 22 December 2017, by an announcement on their website, the LBIE Joint Administrators stated that they had made significant progress and gave a description of the proposal. A copy of the LBIE update appears at pages 91 to 96.
10. The means by which the proposal is to be put into effect is by the promotion of a scheme of arrangement which, amongst other things, will provide for:
  - the settlement of the remaining Waterfall II litigation;
  - payment of statutory interest to unsecured creditors; and
  - (in due course) a substantial payment in respect of the LBIE Sub-Debt Agreements.
11. If the proposal comes to fruition and a scheme is approved and sanctioned, LBHI2 is likely to be able to discharge all of the unsecured, unsubordinated claims against its estate in full, together with

statutory interest. It is then likely to have a substantial surplus available to pay its own subordinated creditors.

### **The subordinated liabilities of LBHI2**

12. LBHI2 has two groups of subordinated creditors:

- (a) Lehman Brothers Holdings plc ("LBH") in respect of the sums due under three subordinated loan agreements as follows ("the LBH Subordinated Loans");
  - (i) A long term subordinated loan facility agreement dated 1 November 2006 in the sum of \$4.5 billion;
  - (ii) A long term subordinated loan facility agreement dated 1 November 2006 in the sum of €3 billion; and
  - (iii) A short term subordinated loan facility agreement dated 1 November 2006 in the sum of \$8 billion.

Copies of the loan agreements appear at pages 995, 1010 and 1026 respectively. The total amount outstanding under the loan agreements is approximately \$2.2bn (excluding accrued interest).

- (b) Lehman Brothers Holdings Scottish LP3 ("SLP3"), a Scottish limited partnership, in respect of the sum of approximately \$6.1 billion due under floating rate notes issued pursuant to an offering circular dated 26 April 2007 ("the SLP3 Subordinated Notes"). A copy of the original offering circular appears at page 1069 and the original final terms and conditions are at 1072. The terms and conditions governing the SLP3 Subordinated Notes appear to have been amended in 2008 as explained below. I have not been able to locate a "final" version of the amended terms and conditions but a copy which I believe contains the final amended terms and conditions appears at pages 1295 to 1304.

### **The competing claims**

13. As I explain in more detail below, there is an issue as to the relative ranking of the LBH Subordinated Loans and the SLP3 Subordinated Notes. In terms of outcome:

- (a) If the SLP3 Subordinated Notes have priority over the LBH Subordinated Loans, LBH is unlikely to receive any return;

- (b) If the LBH Subordinated Loans have priority over the SLP3 Subordinated Notes, SLP3 is unlikely to receive any return;
- (c) If the SLP3 Subordinated Notes and the LBH Subordinated Loans rank *pari passu*, it is unlikely that either SLP3 or LBH will be repaid in full.

14. I understand that the issue as to priority turns upon the proper construction of the LBH Subordinated Loans and the SLP3 Subordinated Notes, and of course the proper construction of those documents is a matter for argument. I do not propose to rehearse those arguments but it may be of assistance if I identify here some of the potentially relevant terms of the LBH Subordinated Loans and of the SLP3 Subordinated Notes.

*The LBH Subordinated Loans*

15. Although LBHI2 was not a regulated entity, the loan agreements are all in the standard FSA form which was (as I have mentioned above) printed in the Interim Prudential Sourcebook (INPRU) dealing with capital adequacy rules (as explained in more detailed by Lewison LJ at paragraphs 28 to 32 of the Court of Appeal's judgment in *Waterfall I*, [2015] EWCA Civ 485).
16. Taking, by way of example, the €3 billion long term subordinated loan at page 1010, the subordination provision at clause 5 of Schedule 2 (page 1020) is in the following terms:

"5: *Subordination*

*(1) Notwithstanding the provisions of paragraph 4, the rights of the Lender 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 the Borrower and, being a partnership, the Borrower has not been dissolved) the Borrower being in compliance with not less than 100% of its Financial Resources Requirement immediately after payment by the Borrower and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that –*

- (i) Paragraph 4(3) has been complied with; and*
- (ii) The Borrower could make such payment and still be in compliance with such Financial Resources Requirement; and*

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

*(2) For the purpose of sub paragraph 1(b) above, the Borrower 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 the Borrower; and*

*(b) The Excluded Liabilities.*

*(3) Interest will continue to accrue at the rates specified pursuant to paragraph 3 on any payment which does not become payable under this paragraph 5.*

*(4) For the purposes of sub paragraph (1)(b) above, a report given at any relevant time as to the solvency of the Borrower by its Insolvency Officer in form and substance acceptable to the FSA, shall in the absence of proven error be treated and accepted by the FSA, the Lender and the Borrower as correct and sufficient evidence of the Borrower's solvency or insolvency.*

*(5) Subject to the provisions of sub paragraphs (6), (7) and (8) below, if the Lender shall receive from the Borrower payment of any sum in respect of the Subordinated Liabilities:*

*(a) When any of the terms and conditions referred to in sub paragraph (1) above is not satisfied; or*

*(b) Where such payment is prohibited under paragraph 4(3),  
the payment of such sum shall be void for all purposes.*

*(6) Any sum referred to in sub-paragraph (5) above shall be received by the Lender upon trust to return it to the Borrower.*

*(7) Any sum so returned shall then be treated for the purposes of the Borrower's obligations hereunder as if it had not been paid by the Borrower and its original payment shall be deemed not to have discharged any of the obligations of the Borrower hereunder.*

*(8) A request to the Lender for the return of any sum referred to in sub-paragraph (5) shall be in writing and shall be made by or on behalf of the Borrower or, as the case may be, its Insolvency Officer."*

16. The definitions in the agreement include:

*"Liabilities" means all present and future sums, liabilities and obligations payable or owing by the Borrower (whether actual or contingent, jointly or severally or otherwise whosoever."*

*"Senior Liabilities" means all Liabilities except the Subordinated Liabilities and Excluded Liabilities."*

*"Subordinated Liabilities" means all Liabilities to the Lender in respect of the Loan or each Advance made under this Agreement and all interest payable thereon."*

*"Excluded Liabilities" means Liabilities which are expressed to be and, in the opinion of the Insolvency Officer of the Borrower, do, rank junior to the Subordinated Liabilities in any Insolvency of the Borrower."*

#### *The SLP3 Subordinated Notes*

*(i) The original Terms and Conditions*

17. The subordination provision of the original Terms and Conditions was as follows:

*"3. Status and subordination*

*(a) The Notes constitute direct, unsecured and subordinated obligations of the Issuer and the rights and claims of the Noteholders against the Issuer rank pari passu without any preference among themselves. The rights of the Noteholders against the Issuer in respect of the Notes are subordinated in right of payment to the Senior Creditors (as defined below) and accordingly payment of principal in respect of the Notes is conditional upon the Issuer 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 immediately thereafter.*

*(b) For the purposes of Condition 3(a) above, the Issuer shall be "solvent" if (i) it is able to pay its debts as they fall due and (ii) its Assets exceed its Liabilities*

*(each as defined below) (other than its Liabilities to persons who are not Senior Creditors). A report as to the solvency of the Issuer by two directors of the Issuer or, if the Issuer is dissolved or being wound up, its liquidator, shall, in the absence of proven error, be treated and accepted by the Issuer and the Noteholders as correct and sufficient evidence thereof.*

*For the purposes of the above provisions:*

*"Senior Creditors" means creditors of the Issuer (i) who are unsubordinated creditors of the Issuer or (ii) who are subordinated creditors of the Issuer other than those with whose claims the claims of the Noteholders are expressed to rank pari passu and those whose claims rank, or are expressed to rank, pari passu with, or junior to, the claims of the Noteholders.*

*"Assets" means the unconsolidated gross assets of the Issuer and "Liabilities" means the unconsolidated gross liabilities of the Issuer, all as shown by the latest published audited balance sheet of the Issuer, but adjusted for contingencies and for subsequent events, all in such manner as two directors of the Issuer, its auditors or its liquidator (as the case may be) may determine.*

- (c) Subject to applicable law, no Noteholder may exercise, claim or plead any right of set-off, counterclaim or retention in respect of any amount owed to it by the Issuer arising under or in connection with the Notes and each Noteholder shall, by virtue of being the holder of any Note, be deemed to have waived all such rights of such set-off, counterclaim or retention."*

*(ii) The amendment of the Terms and Conditions*

18. I stated above that certain amendments appear to have been made to the subordination provisions in 2008. In this section of the witness statement, I will draw attention to certain material which appears to evidence the amendments and material which relates to the background to those amendments. This is not intended to be exhaustive, and it is possible that there may be issues between the parties as to the circumstances in which the amendments were made, and indeed as to their significance.

19. As to the evidence of the amendments, I refer to:



(a) an email from Sarah McMorrow, a Lehman Group employee, on 15 August 2008 stating that “We now have FSA consent” to the amendment of the “LB Holdings Intermediate 2 Limited Notes”, which I believe from the date and context to be a reference to the SLP3 Subordinated Notes, at page 1306;

(b) the minutes of a meeting of the directors of LBHI2 held on 28 August 2008, at which it was resolved that the SLP3 Subordinated Notes should be amended, at page 1292;

(c) a written extraordinary resolution of LBHI2 dated 3 September 2008, which records that LBHI2 has resolved to amend the terms and conditions of the SLP3 Subordinated Notes and that SLP3 “intends herein by way of written resolution to assent to the modification of the Conditions”, and whereby SLP3 “confirms that it is the registered holder of 100 per cent of the [SLP3 Subordinated Notes] and as such has the sole power to assent to any amendment or modification of the Conditions and does hereby assent to the modification of the Conditions which shall henceforth be in the form attached as Annex A to this Written Resolution”, and which is signed on behalf of SLP3 and LBHI2, at page 1294; and

(d) an email dated 3 September 2008 from Tom Grant, a senior associate at Allen & Overy LLP (which was instructed by Lehman in relation to the amendments) to Alan Tremlett of the Channel Islands Stock Exchange (where the SLP3 Subordinated Notes were listed), providing “a written resolution to amend the Conditions of [the SLP3 Subordinated Notes]”, together with resolutions recording the agreement of LBHI2 and “the sole investor”, that is SLP3, to the amendments, at page 1308.

20. There is a series of emails between Mr Grant and individuals at various Lehman group companies, in which the amendment of the SLP3 Subordinated Notes was discussed. Those emails start with an email from Mr Grant on 5 June 2008 (page 1218), to which are attached some amended conditions for the SLP3 Subordinated Notes.

21. So far as I am aware, there is no record of the instructions given to Allen & Overy in relation to the amendments. However, what seems to emerge from the documents is that the purpose or objective of the amendments was to provide flexibility by permitting the issuer to delay or defer payments on the SLP3 Subordinated Notes: see for example the email from Jackie Dolby, Head of European Corporate Tax & Planning for the Lehman group, to other Lehman employees dated 11 June 2008 at page 1220; the letter from Allen & Overy LLP to Ms Dolby dated 17 June 2008 at page 1270; and the minutes of the meeting of the directors of LBHI2 held on 28 August 2008, at which it was resolved that the SLP3 Subordinated Notes should be amended, at page 1292.

22. Although these documents do not explain the amendment to condition 3, there is also an email from Mr Grant dated 12 June 2008 at page 1224, to which was attached a further amended draft of the conditions including (for the first time) the amendments to condition 3 which states, "Deferral provisions introduce tax sensitivities. The amendments are designed to ensure these sensitivities are met", so it appears that the amendments to condition 3 were required as part of these amendments for tax reasons. As appears below, Stephen Miller, the partner at Allen & Overy with overall conduct of the matter, has confirmed his understanding that his tax colleagues were concerned to ensure that it was explicit that the solvency condition only operated outside of a winding up.

23. The amended subordination provisions provide as follows (with the amendments underlined):

*"3. Status and subordination*

(a) *The Notes constitute direct, unsecured and subordinated obligations of the Issuer and the rights and claims of the Noteholders against the Issuer rank pari passu without any preference among themselves. The rights of the Noteholders against the Issuer in respect of the Notes are subordinated in right of payment to the Senior Creditors (as defined below) and accordingly payment of principal and interest (including Arrears of Interest as defined below) in respect of the Notes is (subject as provided below) conditional upon the Issuer 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 immediately thereafter. The conditionality referred to above shall not apply where an order is made by a competent court, or a resolution passed, for the winding-up or dissolution of the Issuer (except for the purposes of a reconstruction, amalgamation, reorganisation, merger or consolidation on terms previously approved in writing by an Extraordinary Resolution of the Noteholders).*

*If any time an order is made by a competent court, or a resolution passed for the winding-up or dissolution of the Issuer (except for the purposes of a reconstruction, amalgamation, reorganisation, merger or consolidation on terms previously approved in writing by an Extraordinary Resolution of the Noteholders), there shall be payable by the Issuer in respect of each Note (in lieu of any other payment by the Issuer) such amount, if any, as would have been payable to the Noteholder, if, on the day prior to the commencement of the*

winding-up and thereafter, such Noteholder were the holder of one of a class of preference shares in the capital of the Issuer having a preferential right to a return of assets in the winding-up of the Issuer over:

- (i) the holders of all other classes of issued shares in each case for the time being in the capital of the Issuer; and
- (ii) The Notional Holders

on the assumption that such preference share was entitled to receive, on a return of assets in such winding-up, an amount equal to the principal amount of such Note together with Arrears of Interest (if any) and any accrued interest (other than Arrears of Interest).

For the purposes of the above provisions:

"Notional Holder" means any creditor of the Issuer whose claims against the Issuer on a winding-up are quantified as though they held a Notional Share.

"Notional Share" means any notional and unissued shares in the capital of the Issuer which have a preferential right to a return of assets in the winding-up of the Issuer over the holders of all other classes of issued shares for the time being in the capital of the Issuer but not further or otherwise.

The Notes are intended to have a right to a return of assets in the winding-up or dissolution of the Issuer in priority to the rights of the holders of any securities of the Issuer which qualify (or, save where their non-qualification is due only to any applicable limitation on the amount of such capital, would qualify) as Upper Tier 2 Capital or Tier 1 Capital (within the respective meanings given to such terms in the General Prudential Sourcebook published by the Financial Services Authority, as amended, supplemented or replaced from time to time).

- (b) For the purposes of Condition 3(a) above, the Issuer shall be "solvent" if (i) it is able to pay its debts as they fall due and (ii) its Assets exceed its Liabilities (each as defined below) (other than its Liabilities to persons who are not Senior Creditors). A report as to the solvency of the Issuer by two directors of the Issuer or, if the Issuer is dissolved or being wound up, its liquidator, shall, in the absence of proven error, be treated and accepted by the Issuer and the Noteholders as correct and sufficient evidence thereof.

For the purposes of the above provisions:

*"Senior Creditors" means creditors of the Issuer (i) who are unsubordinated creditors of the Issuer or (ii) who are subordinated creditors of the Issuer other than those with whose claims the claims of the Noteholders are expressed to rank pari passu and those whose claims rank, or are expressed to rank, pari passu with, or junior to, the claims of the Noteholders.*

*"Assets" means the unconsolidated gross assets of the Issuer and "Liabilities" means the unconsolidated gross liabilities of the Issuer, all as shown by the latest published audited balance sheet of the Issuer, but adjusted for contingencies and for subsequent events, all in such manner as two directors of the Issuer, its auditors or its liquidator (as the case may be) may determine.*

- (c) *Subject to applicable law, no Noteholder may exercise, claim or plead any right of set-off, counterclaim or retention in respect of any amount owed to it by the Issuer arising under or in connection with the Notes and each Noteholder shall, by virtue of being the holder of any Note, be deemed to have waived all such rights of such set-off, counterclaim or retention.*

#### **Factual Investigations**

24. My legal advisors, Dentons UK and Middle East LLP ("Dentons") have undertaken some targeted and proportionate forensic investigations to determine whether there are any documents which might throw light upon the background to the documents and, in particular, the issue of the SLP3 Subordinated Notes. They did this by way of:

- (a) searching the document database which had been created for the purposes of the Waterfall III litigation; and
- (b) making enquiries of Allen & Overy, legal advisers to LBHI2 in respect of the issuance of the SLP3 Subordinated Notes.

I explain below in some detail the searches of the document database that were carried out, in part to address an issue that has been raised in correspondence as to whether there is more relevant material than that which has been produced as a result of these searches and a subsequent manual relevance review carried out by Dentons. While it may be that an exhaustive search of all of the Lehman Group's records would unearth material that might relate to these matters, I believe that, in the circumstances set out below, the search and review process that has been carried out is sufficiently comprehensive.

#### ***Document review***

25. Prior to the collapse of the Lehman Group, it maintained an archive of all the books, records and systems of the various entities within the Lehman Group (the "Lehman Archive"). The Lehman Archive has been maintained post administration and, indeed, added to as the various Lehman insolvency office holders continue to archive material. It is difficult to estimate the total size of the Lehman Archive but it is likely to number in excess of 100 million documents. I understand from Dentons that, based on the experience of the process carried out by the solicitors for the Joint Administrators of Lehman Brothers Limited (in administration) ("LBL") in the Waterfall III litigation, a search of electronic documents in the Lehman Archive would take a minimum of two to three months, because it would be necessary to restore back-up tapes for identified custodians, arrange for data restoration, de-duplicate the data and search it and then import the resulting data into a review platform for it to be effectively reviewed for relevance. A search for hard copy documents in the Lehman Archive could take significantly longer to identify potentially relevant boxes. The time taken would also depend on whether the box description in the archive index was accurate. The time taken for review would, of course, depend on the number of documents to be reviewed.
26. I labour the above point to emphasise that searching through Lehman files is not a straightforward matter. However, it has been possible for Dentons to make use of the work carried out in the Waterfall III litigation to carry out a more proportionate search for documents relevant to the issues in this application. The 2006-7 restructuring of the Lehman Group which forms the background to this application was also relevant to Waterfall III. As part of the disclosure exercise in the Waterfall III litigation, the parties used an online data platform called 'Relativity' ("Relativity") to share electronic and hard copy documents contained in the Lehman Archive which they considered relevant to that application. Over 460,571 documents were uploaded onto Relativity by LBL, whose process for identifying relevant documents from the Lehman Archive is set out in the third witness statement of Michael John Andrew Jervis dated 27 May 2016 filed in the Waterfall III proceedings and is at pages 1316 to 1341, and further documents relevant to the Waterfall III application were uploaded by the other parties. A large number of potentially relevant documents are on Relativity. It is possible to carry out searches of Relativity by entering in search terms and date ranges. Mindful of the need to conduct targeted and proportionate searches, Dentons carried out searches of Relativity for documents of relevance to this application.

27. In total, Dentons carried out two searches (adopting very broad search terms):

First Search

28. Using a date range of 31 January 2006 to the present, Dentons searched Relativity using the following search terms:

- (a) "LBHI2"/"LB Holdings Intermediate 2" and "Allen" and "Overy"
- (b) "LBHI2"/"LB Holdings Intermediate 2" and "A&O"
- (c) "Offering Circular" and "LBHI2"/"LB Holdings Intermediate 2"
- (d) "Circular" and "LBHI2"/"LB Holdings Intermediate 2"
- (e) "Floating Rate Note" and "LBHI2"/"LB Holdings Intermediate 2"
- (f) "Floating Rate Note"
- (g) "FRN"

29. In total, the first search returned 8318 potentially relevant documents.

#### Second Search

30. Using a date range of 1 January 2004 to 31 December 2007, Dentons used the following search terms:

- (a) "Offering Circular" and "LBH"/or "Lehman Brothers Holdings plc"/ or "Lehman Brothers UK Capital Funding"
- (b) "Circular" and "LBH"/or "Lehman Brothers Holdings plc"/ or "Lehman Brothers UK Capital Funding"
- (c) "Floating Rate Note" and "LBH"/or "Lehman Brothers Holdings plc"
- (d) "FRN" and "LBH"/or "Lehman Brothers Holdings plc"
- (e) "Enhanced Capital Advantaged Preferred Securities"
- (f) "Preferred Securities" and "Lehman Brothers UK Capital Funding"

31. This search returned 2798 documents.

32. As part of its first search, Dentons also searched against the 'Nuix database'. Nuix is a platform for indexing, searching, analysing and extracting information from unstructured data (including emails, Word documents, and PDFs). It is my understanding from colleagues in PwC that Nuix was used by LBL to index millions of documents from the wider Lehman Archive as part of their investigations for the purposes of Waterfall III. The LBL team selected documents from the Lehman Archive that they deemed potentially relevant which were then added to the Nuix database. A subset of these documents were then uploaded to Relativity for further review. As part of its first search, Dentons initially searched against the 'Nuix database'. The following search terms were used using a date range of 31 January 2006 to the present:

- (i) "Offering Circular"
- (ii) "Circular"
- (iii) "Floating Rate Note"
- (iv) "FRN"
- (v) "Allen & Overy"

33. Any documents responding to these searches (990 documents) were imported into Relativity from the Nuix database for further review by Dentons.

34. Dentons have reviewed the documents returned by its two searches. The documents which it identified as being potentially relevant, together with a small number of documents provided to Dentons by Weil Gotshal & Manges (London) LLP (solicitors for LBHI and SLP3), were copied and supplied to LBHI, SLP3 and the liquidators of LBGP No 1 Limited on 3 November 2017. Subsequently, copies of the same documents were provided to Dechert LLP (acting for LBL) and Sidley Austin LLP (acting for Deutsche Bank AG). These documents have been included in the exhibit to this witness statement (at pages 97 to 1315) as I explained at paragraph 2 above.

#### *Dialogue with Allen & Overy*

35. In November 2016, Dentons contacted Allen & Overy to enquire about the background to the issuance of the SLP3 Subordinated Notes. Dentons' correspondence with Stephen Miller, the partner at Allen & Overy who worked on the matter at the time the notes were issued, is at pages 1342 to 1356. In his email of 22 November 2016, he confirmed that the amendments had been modelled on a previous deal for LBH. However, he could not recall any specific discussion of "layering" (which I understand to mean the relative priorities). Further, by an email dated 16 December 2016, he records that he could not recall why an amendment was made to permit payments in respect of the SLP3 Subordinated Notes to be deferred but recalled in relation to the subordination provision in the case of winding up that there were concerns expressed by his tax team who wished to make it explicit that the solvency condition did not apply in a winding up.

#### *Further Documents*

36. For completeness, I also refer to two further documents of which I am aware which were not supplied to LBHI, SLP3 or the liquidators of LBGP No 1 Limited on 3 November 2017, but which may be of relevance. These are

- (a) a PwC opinion dated 18 June 2007 in relation to the repayment by LBIE of subordinated debt owing to LBHI2 through the issuance of new preferred shares (page 1357); and
- (b) a Lehman e-mail chain entitled "LBIE Sub Debt Capital injection" (page 1394).

37. Both of these documents have been located in the exhibit to the witness statement of Julian Edward Jones dated 6 September 2013 which was filed in relation to the Waterfall I litigation.

#### **Correspondence between the parties and others**

38. On 3 November 2017, Dentons wrote to Weil Gotshal & Manges (London) LLP, solicitors for both LBHI and SLP3 and the liquidators of LBGP No 1 Limited, who potentially have a claim in relation to the LBH estate (at page 1399). At that juncture, the letter was written on behalf of both the LBHI2 estate and the LBH estate. The letter was copied to Charles Russell Speechlys LLP, solicitors for the liquidators of LBGP No 1 Limited. The purpose of the letter was to identify the potential key arguments in relation to the competing priority of the subordinated obligations.
39. Subsequently, the administrators of LBHI2 concluded that the interests of LBH and LBHI2 would be best served if those companies were separately represented. Accordingly, Hogan Lovells LLP were instructed in respect of LBH.
40. At pages 1405 to 1468 are the exchanges of open correspondence between the various legal advisors. In summary, their respective positions are:
- (a) SLP3 will say that the SLP3 Subordinated Notes are either senior to, or rank *pari passu* with, the LBH Subordinated Loans.
  - (b) LBH will say that the LBH Subordinated Loans rank senior to the SLP3 Subordinated Notes.
  - (c) LBGP No 1 Limited does not propose to express a view or otherwise participate in the LBHI2 application.
41. Dentons has also received correspondence from Sidley Austin LLP ("Sidleys") on behalf of Deutsche Bank AG, London Branch ("Deutsche Bank"). Deutsche Bank says that it has an indirect interest in this application as a creditor of LBH and takes the same position as LBH on the priority issue, namely that the LBH Subordinated Loans rank senior to the SLP3 Subordinated Notes (see Sidleys' letter of 22 February 2018 at page 1445A). Sidleys have also requested (by letter dated 2 February 2018 at page 1420) that Deutsche Bank be joined as a respondent to this application.



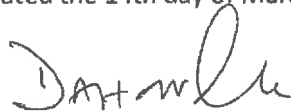
42. Dentons has received further correspondence from Dechert LLP ("Dechert") on behalf of the Joint Administrators of LBL. LBL request (see Dechert's letter of 20 February 2018 at page 1435) that LBL be joined as a respondent to this application, on the basis that LBL is the largest creditor in LBH's estate, so that the claims of creditors in LBL's estate will be materially impacted by the outcome of the application. Dentons understands that LBL would accordingly take the same position on the priority dispute as LBH, namely that the LBH Subordinated Loans rank senior to the SLP3 Subordinated Notes.
43. By letters dated 23 February to Sidley and to Dechert, Dentons stated that as there have been requests from both Deutsche Bank and LBL to be joined as respondents, if I and my fellow administrators of LBHI2 acceded to both requests, there would be three parties (LBH, Deutsche Bank and LBL) all seeking to advance the same argument, so that despite efforts to avoid duplication and manage costs, the proceedings would inevitably be more inefficient, time-consuming and costly. The proper test is to join as respondents the necessary and proper parties to the application, and they are LBH and SLP3. As Dentons stated, one can feel confident that LBH (represented by Hogan Lovells and Adrian Beltrami QC) will advance all appropriate arguments but any additional points could doubtless be provided by Sidleys or Dechert to Hogan Lovells. Accordingly, Dentons stated that I and my fellow administrators of LBHI2 do not consider it appropriate for Deutsche Bank or LBL to be joined as respondents to this application (and pointed out that it would of course be open to both those parties to apply to the Court to be joined after the application was issued if they considered it appropriate to do so).

### Conclusion

44. Accordingly, in the circumstances set out above, my fellow administrators and I seek directions from the Court determining the priority of the LBH Subordinated Loans and the SLP3 Subordinated Notes.

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

Dated the 14th day of March 2018



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Derek Anthony Howell