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## Insolvency Act Application Notice

Case No: CR-2008-000026

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)**

**APPLICANTS**

AND

**LB GP No. 1 Limited (in liquidation)  
Lehman Brothers Holdings Inc.  
Deutsche Bank A.G. (London Branch)**

**RESPONDENTS**

This Application is made under paragraph 63 of Schedule B1 to the Insolvency Act 1986.

The Applicants are the Joint Administrators of Lehman Brothers Holdings Plc (in administration) of PricewaterhouseCoopers LLP, 7 More London Riverside, London, SE1 2RT.

The Respondents are:

1. LB GP No 1 Limited (In Liquidation)
2. Lehman Brothers Holdings Inc.
3. Deutsche Bank A.G. (London Branch)

The Application concerns: **Lehman Brothers Holdings Plc (in administration)**

This Application is made to: **Mr Justice Hildyard, the designated retained Judge in respect of Lehman Brothers matters.**

**Subject to the Court's wishes, it is suggested that the parties should liaise with each other and with the Court to seek to agree a date for an initial directions hearing in the application before Mr Justice Hildyard, with a time estimate of half a day.**

Is this application within existing insolvency proceedings? **YES**

The court reference number for the proceedings to which this application relates is: **CR-2008-000026**

### **Application**

The Applicants – the Joint Administrators of Lehman Brothers Holdings Plc (in administration) (“PLC”) (the “PLC Administrators”) - seek directions from the Court pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 on certain legal issues which are relevant to the priority and payment of future distributions to be made to PLC’s subordinated creditors (“the Priority Legal Issues”). By letter dated 22 November 2022, the PLC administrators sought the views of the proposed parties on the Priority Legal Issues, and it is clear from their responses that there is no consensus on those issues.

Any distributions to PLC’s subordinated creditors will be paid in accordance with the priority ruling of the Court of Appeal’s judgment of October 2021 ([2021] EWCA Civ 1523), which determined that the claim against PLC on the PLC Sub-Notes (“Claim D” as defined in paragraph 18 of Mr Justice Marcus Smith’s judgment of 3 July 2020 ([2020] EWHC 1681 (Ch))) takes priority over the claim against PLC on the PLC Sub-Debt (“Claim C” as defined in paragraph 15 of Mr Justice Marcus Smith’s judgment).

### **Priority Legal Issues as regards statutory interest**

The first three Priority Legal Issues arise in relation to the payment of statutory interest on the PLC Sub-Notes (Claim D), and are as follows:

- (1) Whether the principal amount of the PLC Sub-Debt (Claim C) falls to be paid in priority to statutory interest payable on the claim in respect of the PLC Sub-Notes (Claim D), or whether statutory interest payable on Claim D falls to be paid in priority to the principal amount of Claim C.
- (2) Whether statutory interest payable on the claim in respect of the PLC Sub-Notes falls to be calculated by reference to the face amount of the PLC Sub-Notes, or by reference to the discounted sum payable on that claim in accordance with Rule 14.44 of the Insolvency (England and Wales) Rules 2016.
- (3) Whether the applicable period for the purposes of the calculation of statutory interest on the claim in respect of the PLC Sub-Notes begins with the date on which PLC entered administration, or on the date on which, in accordance with the subordination provisions of the PLC Sub-Notes, the holder of the PLC Sub-Notes became entitled to submit proofs of debt in PLC’s administration in respect of that claim (and, if so, what that date is).

### **Priority Legal Issues as regards the ECAPS Guarantees**

Clause 2.11 of Deeds of Guarantee in favour of “Holders” (as defined in each Deed of Guarantee) (each one, an “ECAPS Holder”) of certain preferred securities issued by each of Lehman Brothers UK Capital Funding LP, Lehman Brothers UK Capital Funding II LP and Lehman Brothers UK Capital Funding III LP (the “ECAPS Guarantees”) provides:

“In the event of the winding-up of the Guarantor [ie PLC] if any payment or distribution of assets of the Guarantor of any kind or character, whether in cash, property or securities, including any such payment or distribution which may be payable or deliverable by reason of the payment of any other indebtedness of the Guarantor being subordinated to the payment of amounts owing

under this Subordinated Guarantee, shall be received by any Holders, before the claims of Senior Creditors have been paid in full, such payment or distribution shall be held in trust by the Holder, as applicable, and shall be immediately returned by it to the liquidator of the Guarantor and in that event the receipt by the liquidator shall be a good discharge to the relevant Holder. Thereupon, such payment or distribution will be deemed not to have been made or received.”

By order dated 24 July 2020, Mr Justice Marcus Smith declared by consent that any liability of PLC under the ECAPS Guarantees (referred to as “Claim E”) ranked for distribution after Claim D and Claim C.

The further Priority Legal Issues are as follows:

- (4) Whether clause 2.11 of the ECAPS Guarantees imposes upon the Holder (as defined therein) a trust in respect of any proceeds which have been distributed by PLC, which takes effect on receipt of those proceeds and requires such proceeds to be turned over to PLC. If so what are the circumstances in which such trust arises and in respect of what proceeds.
- (5) If PLC makes distributions on the PLC Sub-Notes but proceeds are thereafter turned over to PLC by the Holder pursuant to clause 2.11 of the ECAPS Guarantees, what is the resultant order of priority, as between the PLC Sub-Debt (Claim C) and the PLC Sub-Notes (Claim D), in respect of such sums received by PLC?

#### Costs etc

The PLC Administrators seek an order that their costs of and occasioned by the Application be paid as an expense of the PLC administration, and for such other orders as to costs and such other directions on the Application as the Court may think fit.

The Applicants will liaise with the other parties in due course to prepare a draft Order to assist the Court.

The evidence to be relied upon in support of this Application is the sixth witness statement of Edward John Macnamara dated 14 March 2023.

The names and addresses of the persons on whom it is intended to serve this Application are:

1. LB GP No 1 Limited (In Liquidation), c/o Bruce Mackay and Matthew Haw (joint liquidators), RSM UK Restructuring Advisory LLP, 9<sup>th</sup> Floor 25 Farringdon Street, London, EC4A 4AB;
2. Lehman Brothers Holdings Inc. of 110 East 42nd Street, Suite 820, New York, NY 10017; and
3. Deutsche Bank A.G. (London Branch) of Winchester House, Great Winchester Street, London EC2N 2DB


The Respondents’ legal representatives are:

1. LB GP No 1 Limited (In Liquidation) are represented by Charles Russell Speechlys LLP of Compass House, Lypiatt Road, Cheltenham, Gloucestershire, GL50 2QJ (ref Daniel Moore);
2. Lehman Brothers Holdings Inc. is represented by Weil, Gotshal & Manges (London) LLP of 110 Fetter Lane, London, EC4A 1AY (ref Mark Lawford);
3. Deutsche Bank A.G. (London Branch) is represented by Alston & Bird LLP of 4<sup>th</sup> Floor, Octagon Point, St. Paul’s, 5 Cheapside, London, EC2V 6AA (ref Philip Taylor).

The address for service for the Applicants is:

John Tillman and Crispin Rapinet  
Hogan Lovells International LLP  
Atlantic House, 50 Holborn Viaduct  
London, EC1A 2FG  
Tel. +44 (0) 20 7296 2000

Dated: 14 March 2023

Signed 

Solicitor for The Applicants

Name: John Tillman

Position Held: Partner, *Hogan Lovells International LLP*

**Endorsement by the Court**

This application will be heard:

Date .....

Time .....

Place .....

This application was issued at the Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL