

Witness Statement
Lehman Brothers Holdings Plc (In Administration)
E J Macnamara
Sixth
"EJM6"
14 March 2023

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

CR-2008-000026

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 -

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

Respondents

SIXTH WITNESS STATEMENT OF EDWARD JOHN MACNAMARA

I, Edward John Macnamara, of 7 More London Riverside, London, SE1 2RT, will say as follows:

1. I am a partner in the restructuring practice at PricewaterhouseCoopers LLP ("**PwC**"), and have been a licensed insolvency practitioner for over 13 years.
2. Since 16 July 2018, I have been one of the joint administrators of Lehman Brothers Holdings Plc (In Administration) ("**PLC**", and the "**PLC Administrators**"). In recent years, I have had principal day-to-day responsibility for the conduct of PLC's administration in consultation with my fellow PLC Administrators. Each of my fellow PLC Administrators is also a licensed

insolvency practitioner from PwC. I am familiar with PLC's affairs and am duly authorised to make this witness statement on the PLC Administrators' behalf.

3. I make this witness statement in support of the PLC Administrators' application for directions pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 in respect of certain issues which have arisen in the course of the administration (this "**Application**").
4. By way of brief context and as explained more fully below, the PLC Administrators anticipate that PLC will shortly be in a position to make an initial distribution in respect of its subordinated debts. They also anticipate that in due course, they are likely to be able to make one or more further distributions against subordinated debts, although the timing and amounts of any such distributions remain uncertain.
5. The priority of PLC's subordinated debts, as among themselves, has already been the subject of a Court directions application by the PLC Administrators which resulted in a judgment of the Court of Appeal in October 2021 (described further below). However, in consulting with relevant creditors as we moved towards making distributions on the subordinated debt in light of that judgment, it has become apparent that there are certain further points of controversy or disagreement as between different creditors in relation to subordinated creditor entitlements which the Court is asked to determine on this Application to facilitate the distribution process.
6. Those points relate to (i) the priority ranking of statutory interest payments under Rule 14.23 of the Insolvency (England and Wales) Rules 2016 on one of the subordinated debts; (ii) the correct method of calculation of such statutory interest; and (iii) the correct interpretation of a contractual clause contained within the ECAPS Guarantees (as defined in paragraph 27(c) below), which may have a bearing on the future funds available within the estate for distribution and their manner of distribution.
7. Having taken appropriate legal advice on these legal issues (privilege in which is not waived), the PLC Administrators considered it appropriate to seek directions on them in order to obtain clarity and facilitate an orderly distribution process. As part of this Application, the PLC Administrators also seek a direction that they be authorised to distribute in accordance with the Court's rulings on the said issues.
8. I explain the identity and relevance of each named respondent to this Application below.
9. I will refer in this witness statement to a paginated bundle of documents now shown to me and marked "**EJM6**". References in bold text to page numbers in this witness statement are to pages of **EJM6**, 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 which is available to me as a PLC Administrator, in which case they are true to the best of my knowledge, information and belief.
11. In making this statement, I do not intend to and do not thereby waive any privilege or analogous legal rights of the PLC Administrators.
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.

PLC'S ADMINISTRATION

13. PLC 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 will be aware, LBIE was the main Lehman Brothers trading entity in Europe, and its administration has involved substantial legal proceedings, including various strands of *Waterfall* litigation to determine aspects of the priority as between competing types of claims.
14. Insolvency practitioners from PwC have been administrators of PLC since 15 September 2008. The purpose of the administration which is being pursued is the achievement of a better result for PLC's creditors as a whole than would be likely if PLC was wound up without first being placed into administration.
15. The term of PLC'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 2025.
16. In the later years of the Lehman Brothers group's operations prior to administration, PLC'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 day to day with market counterparties. PLC 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, PLC 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 majority of PLC's creditors by value as at the administration date were other companies within the Lehman Brothers group. Likewise,

the majority of PLC's assets comprised debt obligations owed to it by other Lehman Brothers group companies.

18. In terms of creditor returns to date, on 2 May 2014 the Court granted the PLC Administrators permission to make distributions, since which point PLC's administration has been a distributing administration and various distributions have been made to its unsecured, non-preferential, unsubordinated creditors (the "**Unsubordinated Creditors**").
19. On 3 September 2014, the PLC Administrators declared and paid a first interim dividend of 4.080 pence in the pound on the admitted claims of the Unsubordinated Creditors.
20. On 10 February 2016, the PLC Administrators declared and paid a second interim dividend of 2.000 pence in the pound to the Unsubordinated Creditors.
21. On 6 September 2017, the PLC Administrators declared and paid a third interim dividend of 62.963 pence in the pound to the Unsubordinated Creditors.
22. On 13 September 2018, the PLC Administrators declared and paid a fourth interim dividend of 18.587 pence in the pound to the Unsubordinated Creditors.
23. On 15 March 2019, the PLC Administrators declared and paid a fifth interim dividend of 12.370 pence in the pound to the Unsubordinated Creditors, thereby discharging the principal amounts owed on the claims of the Unsubordinated Creditors in full. The total sum paid by way of these dividends to discharge 100% of principal on these claims was approximately £1,074.7 million.
24. PLC has also made partial distributions on the accrued statutory interest due on the claims of the Unsubordinated Creditors. To date, the PLC Administrators have caused it to make further interim distributions whereby PLC has paid 44.6% of that accrued statutory interest, totalling approximately £354.1 million.
25. As at the date of this statement, PLC's accrued but unpaid statutory interest on the claims of the Unsubordinated Creditors stands at approximately £439.8 million, which ranks ahead of PLC's subordinated creditors.

PLC'S SUBORDINATED LIABILITIES

26. To assist the Court, I briefly summarise PLC's subordinated debts to provide some further context for this Application.
27. PLC's subordinated liabilities comprise:
 - (a) liabilities of in aggregate approximately US\$1.9 billion (subject to the effect of the Court of Appeal's ruling in connection with the Partial Discharge, described at

paragraphs 29 to 34 below) (the "**PLC 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 originally between PLC as borrower and Lehman Brothers UK Holdings Limited ("**LBUKH**") as lender;

- (b) liabilities of in aggregate approximately €790 million at face value 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 PLC as the issuer of the said notes and in each case the notes being issued to one of three Partnerships which I discuss further below at paragraphs 35 to 42 onwards (the "**PLC Sub-Notes**"); and
- (c) any liabilities which may exist under certain subordinated guarantees (the "**ECAPS Guarantees**", as described at paragraph 43 to 45 below) which are understood to have been entered into by PLC in connection with the PLC Sub-Notes transactions mentioned immediately above.

28. The priority ranking of the three categories of subordinated liability described above, as among themselves, was determined by the Court of Appeal in the prior directions application to which I refer below, as were certain related issues.

THE PLC SUB-DEBT

- 29. As set out in paragraph 27(a) above, the PLC Sub-Debt arises under three subordinated loan agreements originally entered into between PLC as borrower and LBUKH as lender (see **pages 2 to 14, 15 to 27 and 28 to 44**).
- 30. LBUKH was an intermediate holding company within the Lehman Brothers UK group. It entered administration on 29 September 2008 and insolvency practitioners from PwC were its administrators. The administration of LBUKH was completed towards the end of 2017, and the company was formally dissolved on 7 February 2018.
- 31. Prior to the dissolution of LBUKH and, I believe, in the context of the LBUKH administrators seeking to bring the LBUKH administration to a close having paid all of its unsubordinated creditors in full, the LBUKH administrators transferred LBUKH's remaining assets (including the PLC Sub-Debt) to its sole subordinated creditor, Lehman Brothers Luxembourg Investments S.A.R.L ("**LBLIS**").
- 32. On 5 August 2016, LBUKH executed a Deed of Transfer (see **pages 45 to 63**) 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 PLC Sub-Debt claim (referred to in that document as the "PLC Subordinated Claim").

33. On 30 November 2016, I understand that LBLIS in turn assigned its remaining interest in the PLC Sub-Debt claim to Lehman Brothers UK Holdings (Delaware) Inc (see **pages 64 to 68**). On 19 April 2017, by a further Notice of Assignment (see **pages 69 to 71**), I understand that Lehman Brothers UK Holdings (Delaware) Inc then further assigned its remaining interest in the PLC Sub-Debt claim to Lehman Brothers Holdings Inc ("**LBHI**").
34. My understanding is that LBHI is accordingly a subordinated creditor of PLC and, as a result, is joined as a respondent to this Application. In this context, I note that LBHI was also an active participant in the prior directions application before the Court concerning the competing priority of PLC's subordinated liabilities, for the same reason.

THE PLC SUB-NOTES

35. The PLC Sub-Notes arise under a series of transactions by which the Lehman Brothers group sought to raise capital for the group's business.
36. In summary, in each case PLC issued a series of subordinated notes to a limited partnership, and in each case those 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 PLC issued an offering circular in support of its note issuance.
37. 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.
38. 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, which is now in liquidation ("**LB GP No1**"). As reflected in a public notice by its joint liquidators (see **pages 72 to 84**), 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 Restructuring Advisory LLP now act as its joint liquidators. (I address the position of Deutsche more fully below, but in summary, it is understood to be the beneficial holder of ECAPS issued by one or more of the Partnerships, and so is one of the parties with an

underlying, indirect economic interest in the PLC Sub-Notes by virtue of that ECAPS holding.)

39. 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 participate in this Application as the party which, in effect, holds the PLC Sub-Notes. I note that LB GP No1, acting by its liquidators, similarly represented the interests of each of the Partnerships in the previous Court directions application concerning the priority of the subordinated debts to which I have referred.
40. One point which I should note is that the terms of each issuance of PLC Sub-Notes did not include provisions whereby the Notes were accelerated in the event of an insolvency of PLC. In other words, despite PLC's entry into administration, PLC's liability under the PLC Sub-Notes continued to fall due in 2035 or 2036 (as appropriate) under the terms of each instrument. Although this was a point of controversy in the previous Court directions application, the Court confirmed in those proceedings that PLC's obligations under the PLC Sub-Notes are future debts to which the discounting mechanism in Rule 14.44 of the Insolvency (England and Wales) Rules 2016 applies. Whilst the precise amounts remain to be agreed as between the liquidators of LB GP No1 and the PLC Administrators, the PLC Administrators' current calculations indicate that the value of the claim on the PLC Sub-Notes, once discounting is applied pursuant to Rule 14.44, is approximately £188 million.
41. On or around the time of the issuance of the PLC Sub-Notes, 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 PLC Sub-Notes which had been issued by PLC to the Partnerships. The securities issued by the Partnerships have come to be known generically as "ECAPS" as at least some of those securities are titled Enhanced Capital Advantaged Preferred Securities.
42. I exhibit in this regard:
 - (a) at **pages 85 to 107, 108 to 130, 131 to 153 and 153 to 177**, the four offering circulars dated respectively 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006 under which PLC issued each series of subordinated notes (the PLC 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 178 to 231, 232 to 325, and 326 to 417**, 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.

THE PLC SUBORDINATED GUARANTEES

43. 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, PLC would also give a "Subordinated Guarantee" (an ECAPS Guarantee, as defined at paragraph 27(c) above). Each offering circular or prospectus then goes on to include a form of unsigned ECAPS Guarantee to be given by PLC as part of each transaction – see in particular **pages 205 to 210** in respect of Lehman Brothers Capital Funding LP, **pages 259 to 263** in respect of Lehman Brothers Capital Funding II LP and **pages 356 to 360** in respect of Lehman Brothers Capital Funding III LP.
44. To date, the PLC Administrators are aware of copy signed execution pages in respect of two out of the three ECAPS Guarantees. In each case, the front page of the relevant Guarantee and the execution page were preserved. These refer to the ECAPS Guarantees provided by PLC in respect of the transactions entered into with LB UK Capital Funding II LP (see execution pages at **pages 418 to 419**) and LB UK Capital Funding III LP (see execution pages at **pages 420 to 421**).
45. Although an executed copy of the third ECAPS Guarantee has not been located, as things stand the PLC Administrators have no specific reason to believe that the ECAPS transaction entered into with LB UK Capital Funding LP was not undertaken in accordance with its prospectus terms, in the same manner as the other two ECAPS transactions for which execution pages have been identified. In this regard I note that notwithstanding no execution pages having been specifically identified at that time, the previous Court directions application to which I have referred was issued and proceeded on the assumption that such ECAPS Guarantees were executed by PLC for the purposes of the Court providing guidance as to the priority of any liability which might ultimately be established under those ECAPS Guarantees.

THE PREVIOUS COURT APPLICATION

46. On 16 March 2018, the PLC Administrators issued an application for the Court's directions. That application was focused on certain questions concerning the respective priorities of PLC's subordinated liabilities as among themselves, as well as certain related questions.
47. On 24 July 2018, Mr Justice Mann ordered, amongst other things, that (i) the parties file and serve position papers setting out in detail their position in respect of each of the issues identified in the application, and (ii) the PLC Administrators' application be heard alongside

a parallel application for directions brought by the administrators of LB Holdings Intermediate 2 Limited (In Administration)("LBHI2") which raised similar but not identical issues. Those two applications proceeded and were heard together, both at first instance and on appeal.

48. On 11 January 2019, LBHI and Lehman Brothers Holdings Scottish LP 3 ("SLP3") (a party in the LBHI2 application) served a joint position paper in both applications (see **pages 422 to 456**). On 22 February 2019, LB GP No1 served its position paper in the PLC Administrators' application and Deutsche served a position paper in both applications (see **pages 457 to 477 and pages 478 to 508**). On 22 March 2019, LBHI and SLP3 served a joint reply position paper in both applications (see **pages 509 to 548**).
49. In very high level summary and without prejudice to the various detailed arguments advanced by the different parties, LB GP No1 and Deutsche argued that the PLC Sub-Notes ranked for payment in priority to the PLC Sub-Debt, whereas LBHI argued that those liabilities ranked *pari passu* as between themselves.
50. In respect of any liability which PLC might have on the ECAPS Guarantees, each of the parties ultimately agreed that any such liability ranked behind both the PLC Sub-Notes and the PLC Sub-Debt, whatever the ranking of those liabilities *inter se*. On this issue, LBHI had argued in its joint position paper that the ECAPS Guarantees had terminated, and in the alternative if they continued to subsist, ranked after the PLC Sub-Debt and after the PLC Sub-Notes (see paragraph 42 and following of that position paper, at **page 450**). In its position paper, Deutsche opposed LBHI's suggestion that the ECAPS Guarantees had terminated but agreed that they were subordinated to both the PLC Sub-Debt and PLC Sub-Notes (see paragraph 68 and following of that position paper, at **page 507**). LB GP No 1 was neutral on the termination point but agreed that the ECAPS Guarantees ranked behind the PLC Sub-Debt and PLC Sub-Notes (see paragraph 6.3 of that position paper at **page 458**).
51. In response to a letter from Hogan Lovells to the parties dated 7 May 2019 which, amongst other things, invited LBHI to clarify their position on the ECAPS Guarantees (see **pages 549 to 551**), on 14 May 2019 Weil Gotshal wrote to the parties on behalf of LBHI confirming that they "*do not consider it necessary for the parties to agree or the Court to decide whether the ECAPS guarantees have terminated. In circumstances where the parties agree that the PLC Guarantee Liabilities rank for distribution after each of the PLC Sub-Debt and the PLC Sub-Notes in any event, and PLC has insufficient funds to pay the PLC Sub-Debt and the PLC Sub-Notes in full, the question as to whether the ECAPS guarantees have terminated is moot*" (see pages **552 to 555**).

52. At the first instance hearing of the previous Court application, the parties accordingly sought a declaration, and the Court agreed and declared, that any liability of PLC under the ECAPS Guarantees ranked at a more junior level, after PLC's obligations on the PLC Sub-Notes and the PLC Sub-Debt.
53. At first instance, the applications were jointly heard before Mr Justice Marcus Smith between 11 November and 22 November 2019. A copy the Judge's judgment, dated 3 July 2020, will be included in the application bundle for this Application.
54. On 24 July 2020, Mr Justice Marcus Smith ordered (see **pages 556 to 559**) *inter alia* that:
- (a) *At paragraph 7: "The claims of LBHI under the PLC Sub-Debt rank for distribution pari passu with the claims of LB GP No 1 Limited (in liquidation) (as General Partner of, respectively, Lehman Brothers UK Capital Funding LP, Lehman Brothers UK Capital Funding II LP and Lehman Brothers UK Capital Funding III LP) ("GP1") under Fixed Rate Subordinated Notes issued by PLC pursuant to offering circulars dated 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006 (together the "PLC Sub-Notes")", and*
 - (b) *At paragraph 8: "The claims of GP1 under the PLC Sub-Notes are provable future debts, the quantum of which falls to be discounted under Rule 14.44 of the Insolvency (England and Wales) Rules 2016 (the "2016 Rules")."*
55. In addition to the above, Mr Justice Marcus Smith declared by consent that:
- "Any liability of PLC which might be established under guarantees given by PLC by Deeds of Guarantee in favour of "Holders" (as defined in each Deed of Guarantee) 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 in the context of the transactions referenced at paragraph 7 above rank for distribution after any liabilities in respect of each of the PLC Sub-Debt and the PLC Sub-Notes."*
56. In addition to the priority issues described above, the previous application brought by the PLC Administrators also addressed (i) whether the effect of certain release clauses in a settlement agreement entered into as of 24 October 2011 to which, amongst others, PLC and LBHI were party ("**Settlement Agreement**"), in combination with the transfer of LBUKH's assets including the PLC Sub-Debt (as set out in paragraphs 29 to 34 above) ultimately to LBHI had caused the claim under the PLC Sub-Debt to be released; and (ii) whether the claim under the PLC Sub-Debt fell to be reduced, discharged or diminished by virtue of the interaction of LBHI's claims under the PLC Sub-Debt with certain other

instruments ("the **Partial Discharge**" point). On 24 July 2020 Mr Justice Marcus Smith also declared that:

- (a) *At paragraph 5: "The claims of [LBHI] under [the PLC Sub-Debt] have not been released pursuant to [the Settlement Agreement];" and*
- (b) *At paragraph 6: "The claims of LBHI under the PLC Sub-Debt have not been reduced, discharged or diminished by virtue of any payments in respect of guarantee claims."*

57. On application by Deutsche and LB GP No1, Mr Justice Marcus Smith granted permission to appeal the finding at 54(a) above. On a further application for permission by Deutsche directly to the Court of Appeal, by Order dated 14 December 2020 the Court of Appeal granted further permission to appeal the Partial Discharge issue, though it refused permission to appeal the findings at paragraphs 54(b) and 56(a) above (see pages **560 to 561**).

58. On 20 October 2021, the Court of Appeal handed down judgment and, relevantly, allowed the appeal in respect of competing priority of the PLC Sub-Debt and the PLC Sub-Notes. A copy of the Court of Appeal judgment will be included in the application bundle for this application. On 21 October 2021 the Court of Appeal ordered (see **pages 562 to 568**) *inter alia* that the Order set out in paragraph 54(a) be varied to read:

*At paragraph 4: "The claims of LB GP No 1 Limited (in liquidation) (as General Partner of, respectively, Lehman Brothers UK Capital Funding LP, Lehman Brothers UK Capital Funding II LP and Lehman Brothers UK Capital Funding III LP) ("GP1") under Fixed Rate Subordinated Notes issued by PLC pursuant to offering circulars dated 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006 (together the "PLC Sub-Notes") rank for distribution in priority to the claims of LBHI under the PLC Sub-Debt (the "**Court of Appeal Priority Determination**")."*

59. In addition to the above, the Court of Appeal also ruled that the Order set out in paragraph 56(b) be varied to read:

"The liability of PLC under the PLC Sub-Debt has been reduced, including for the purposes of proof, by the amount of any payments made by LBHI as surety for PLC's liability in respect of such claims."

60. On 17 November 2021, LBHI and SLP 3 (a party in the LBHI2 directions application) made a joint application for permission to appeal, amongst other findings, the Court of Appeal Priority Determination made in the PLC directions application (see **pages 569 to 637**). On

8 August 2022, the Supreme Court refused LBHI and SLP 3 permission to appeal the Court of Appeal's findings (see **page 638**).

61. As a result of the Supreme Court's decision to refuse permission, the PLC Administrators intend to proceed by reference to the judgment and Order of the Court of Appeal and, in respect of issues which were not appealed or in respect of which the appeal was not allowed, the judgment and Order of Mr Justice Marcus Smith. Most pertinently for present purposes, that means proceeding on the basis that PLC's liabilities under the PLC Sub-Notes are future debts liable to discounting, and that those liabilities rank ahead of PLC's liabilities on the PLC Sub-Debt; which in turn rank ahead of any liabilities which may be established under any ECAPS Guarantees.

CURRENT FINANCIAL POSITION OF THE PLC ADMINISTRATION

62. I described in paragraph 25 above that at present, PLC continues to have liabilities of in excess of approximately £439.8 million towards unpaid, accrued statutory interest due to its Unsubordinated Creditors. Those amounts rank ahead of PLC's subordinated debt.
63. However, as I also noted in paragraph 4 above, the PLC Administrators consider it likely that they will be in a position to make an initial distribution against subordinated debt shortly, with the realistic potential for further distributions to come in due course. It was this expectation which previously caused the PLC Administrators to make the prior directions application to which I have referred, as well as this Application.
64. To provide some further context, in the PLC Administrators' progress report published to creditors (and available on the PLC section of the PwC website) dated 13 October 2022, the PLC Administrators indicated that the indicative estimate of potential outcomes for stakeholders in the PLC estate which they published on that website in April 2022 remained the latest such estimate. A copy of that April 2022 estimate appears at **pages 639 to 643**. Although it is important to stress that all such estimates are necessarily subject to change and cannot be relied upon by creditors, the Court will note that the PLC Administrators' 'Base Case' projected that in the region of £219 million might be available for distribution against PLC's subordinated liabilities, whilst the 'High Case' projected approximately £403 million being available against such liabilities.
65. The Court will appreciate from these estimations that answers to the issues raised by this Application are likely to facilitate the distribution process taking place in the correct manner.

THE EMERGENCE OF FURTHER ISSUES

66. Following the Supreme Court's decision to refuse permission to appeal in August 2022, the PLC Administrators have been considering the steps which would need to be taken to move

towards a distribution against PLC's subordinated debts. In the course of doing so, it became apparent to the PLC Administrators that whilst the previous directions application had resolved the fundamental priority question as between the various subordinated debts, the interested parties – principally LBHI and LB GP No1 – still had different views as to the correct way in which to approach various aspects of the distribution process in light of the Court of Appeal's ruling.

67. It emerged that the interested parties appeared to have different views about the correct way in which to approach the calculation of any statutory interest which might have accrued on the PLC Sub-Notes claim, and in turn the relative priority of any such statutory interest entitlement for payment. Further, it became apparent that LBHI considered that a provision within the ECAPS Guarantees, to which they drew attention, might impact the distribution process.

68. For this reason, on 22 November 2022, Hogan Lovells International LLP ("**Hogan Lovells**"), acting for the PLC Administrators, wrote to:

- (a) Weil Gotshal & Manges (London) LLP ("**Weil Gotshal**"), acting for LBHI;
- (b) Charles Russell Speechlys LLP ("**CRS**"), acting for LB GP No1; and
- (c) Alston & Bird (City) LLP ("**A&B**"), acting for Deutsche;

seeking to articulate what the PLC Administrators understood to be the points of controversy or potential controversy, and inviting each party to confirm its position on each of those issues. In each case, in the hope that it might assist the parties and seek to minimise the points actually in dispute, the letter explained the PLC Administrators' preliminary, then-current views on each issue as a proposed way forward. That letter also made clear that, if there were indeed points of dispute as to the correct approach, the PLC Administrators were minded to make this Application to seek to resolve those issues. A copy of that letter is at **pages 644 to 647**.

69. Substantive responses to that letter were received from each of the recipients, in the case of Weil Gotshal on 6 December 2022 (**pages 648 to 652**) and in the case of CRS and A&B, on 20 December 2022 (**pages 653 to 655 and pages 656 to 658**). In turn, as each of those substantive responses had been circulated only to Hogan Lovells, they in turn wrote to all three parties on 22 December 2022 providing copies so that all parties were then aware of the others' positions (**pages 659 to 660**). As explained further below, on each of the four issues which Hogan Lovells' letter anticipated might represent points of controversy, the substantive responses received indicated that LBHI on one side, and LB GP No1 and

Deutsche on the other, take opposing views as to the correct approach on each of the four issues in question.

70. Given the sums of money potentially involved in respect of each such issue and the PLC Administrators' concern to avoid making distributions in the face of express arguments from a stakeholder and its advisers that their approach is legally incorrect, the PLC Administrators considered it appropriate to take steps to progress (and ultimately make) this Application to ensure that the Court's guidance as to the correct approach was obtained. Given the length of time for which the PLC estate has already been open and the PLC Administrators' wish to move forward as quickly and efficiently as possible to progress matters, it was respectfully considered appropriate to make this Application at this stage given the time which such Applications can themselves take to be finally resolved.
71. Prior to making this Application, on 13 January 2023 Hogan Lovells wrote to the parties addressing certain points which had been raised in correspondence by that point, and enclosing the then-current draft of the proposed application notice in respect of this Application (**pages 661 to 668**). Substantive responses to that letter were received from each of the recipients, in the case of A&B on 17 and 23 January 2023 (**pages 669 to 670 and pages 673 to 678**), in the case of Weil Gotshal on 20 January 2023 (**pages 671 to 672**), and in the case of CRS on 31 January 2023 (**pages 681 to 683**). On 30 January 2023, Weil Gotshal responded to concerns raised in A&B's 17 and 23 January 2023 letters as to Deutsche's participation in the Application (**pages 679 to 680**), to which A&B in turn responded again on 6 February 2023 (**pages 684 to 686**) and CRS responded on 7 February 2023 (**page 687**). On the same date, Weil also responded to the substantive matters raised by CRS's letter of 31 January 2023 (**pages 688 to 690**). I do not seek to rehearse all of the points raised in this correspondence in this statement, but mention certain of them in this statement where relevant.
72. On 22 February 2023, Hogan Lovells wrote to the parties confirming that the PLC Administrators remained of the view that this Application was necessary (**pages 691 to 698**). That letter explained that, taking into account the parties' various recent observations, it was considered appropriate to amend certain of the proposed questions and the letter enclosed a revised draft of the application notice reflecting those proposed amendments. Hogan Lovells' 22 February 2023 letter also noted that, in light of the significant amount of time that had already been granted for the parties to consider and debate the issues in contention, the PLC Administrators proposed to finalise and issue this Application shortly.
73. CRS responded to that letter on 23 February 2023 requesting that the PLC Administrators not issue the Application until CRS had conferred with its counsel team (**page 699**). However, given the time which had elapsed and the opportunity which parties will have to

address the Court at any initial procedural hearing in this application, it was considered appropriate for the Application to be issued. On 14 March 2023, Hogan Lovells wrote to CRS, copied to the parties, confirming that the Application needed to be progressed and would not be delayed further (**page 705**).

THE ISSUES – STATUTORY INTEREST

74. I do not rehearse in this statement the arguments which each of LBHI, on the one hand, and LB GP No1 and Deutsche on the other, may seek to advance on the points which are understood to be disputed. The Court will have seen an outline of the issues from Hogan Lovells' letters to which I referred in paragraph 68, 71 and 72 above, and no doubt the interested parties will have provided detailed submissions on each issue by the time of any hearing of this Application. However, I briefly summarise the issues below to assist the Court.
75. As I have noted, the Court of Appeal has already found that the PLC Sub-Notes claim ranks ahead of the PLC Sub-Debt claim. However, there is disagreement over several aspects of the correct approach to statutory interest entitlement on the PLC Sub-Notes claim, as follows:
- (a) Whether the principal amount of the PLC Sub-Debt falls to be paid in priority to statutory interest payable in respect of the claim under the PLC Sub-Notes, or whether statutory interest payable in respect of the claim under the PLC Sub-Notes falls to be paid in priority to the principal amount of the PLC Sub-Debt.

LBHI contends that although the Court of Appeal has ruled that the PLC Sub-Notes rank in priority to its PLC Sub-Debt, that only applies to the principal of any PLC Sub-Notes claim and not to any statutory interest entitlement on that claim which arises under the Rules. Thus LBHI contends that if and insofar as PLC pays 100% of the principal on the PLC Sub-Notes claim, PLC should then make any subsequent distributions against the principal of the PLC Sub-Debt claim held by LBHI rather than making any payments towards statutory interest on the PLC Sub-Notes. LB GP No1 and Deutsche both contend that LBHI's position is incorrect, and that statutory interest on the PLC Sub-Notes should be paid before any payment against the PLC Sub-Debt.

- (b) Whether statutory interest payable in respect of the claim under 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 the PLC Sub-Notes in accordance with Rule 14.44 of the Insolvency (England and Wales) Rules 2016.

LB GP No1 and Deutsche contend that when calculating any statutory interest entitlement on the PLC Sub-Notes claim under Rule 14.23, such interest should be calculated on the face amount of such PLC Sub-Notes – ie the amount prior to discounting pursuant to Rule 14.44. LBHI, in contrast, contends that statutory interest is only to be calculated on the amount of the PLC Sub-Notes claim as discounted under Rule 14.44.

- (c) Whether the applicable period for the purposes of the calculation of statutory interest in respect of the claim under 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 a proof of debt in PLC's administration in respect of the PLC Sub-Notes (and, if so, what that date is).

Without descending into the detail of the argument, I understand that this point arises because of the suggestion that in order to give effect to subordination agreements, such agreements often expressly or impliedly restrict the point at which a subordinated creditor can submit a proof of debt in an insolvency – for example, that they should not do so until higher ranking claims have been paid or appropriately provided for. I understand LBHI's position to be that in respect of the PLC Sub-Notes, any statutory interest entitlement should only be calculated as accruing from the date on which LB GP No1 became entitled to submit proofs of debt in respect of those claims, rather than the date on which PLC entered administration. LB GP No1 and Deutsche, in contrast, contend that the correct 'start date' to calculate the statutory interest entitlement is the date on which PLC entered administration.

THE ISSUES – “CLAUSE 2.11”

76. LBHI has also raised a further issue which the PLC Administrators are concerned could impact the correct manner in which they should approach distributions against subordinated debt. Again, I seek only to summarise the issue in high level and neutral terms to assist the Court, without prejudice to any detailed explanations or arguments which any party may advance in due course.
77. I referred above to the fact that when PLC issued the PLC Sub-Notes to the Partnerships, the Partnerships in turn issued their own ECAPS notes to counterparties in the market. I also mentioned that as part of those ECAPS offerings, it appears that in each case PLC issued an ECAPS Guarantee, albeit that Mr Justice Marcus Smith has declared (and all parties agree) that any PLC liability on such guarantees would rank after both the PLC Sub-Notes and the PLC Sub-Debt.

78. The further, separate issue to which LBHI has recently drawn attention relates to clause 2.11 of the ECAPS Guarantee, which states the following (see **page 208** in respect of Lehman Brothers Capital Funding LP, **page 262** in respect of Lehman Brothers Capital Funding II LP and **page 359** in respect of Lehman Brothers Capital Funding III LP) ("**Clause 2.11**"):

"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."

79. In respect of the relevant definitions:

- (a) "Holders" is defined as: *"in respect of each Preferred Security [ECAPS], each person registered on the Register as the limited partner holding such Preferred Security at the relevant time, save that for as long as the Preferred Securities are registered in the name of a common depository (or of a nominee for a common depository) for Euroclear and Clearstream, Luxembourg, each person (other than Euroclear and Clearstream, Luxembourg) who is for the time being shown in the records of Euroclear and Clearstream, Luxembourg as the holder of an interest in any Preferred Securities (in which regard any certificate or other document issued by Euroclear or Clearstream, Luxembourg, as to the number of Preferred Securities standing to the account of any person shall be conclusive and binding for all purposes) shall be treated by the Issuer, the Guarantor and any Paying and Transfer Agent as the holder of Preferred Securities in a nominal amount equal to such interest for all purposes other than with respect to payments, the right to which shall be vested in the name of the person appearing as the relative limited partner in the Register";* and
- (b) "Senior Creditors" is defined in clause 2.9(a) of the ECAPS Guarantee as constituting *"liabilities of the Guarantor including subordinated liabilities (in each case other than any liability of the Guarantor 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)".

80. In their letters on behalf of LBHI dated 6 December 2022, 30 January 2023 and 7 February 2023 to which I refer in paragraphs 69 and 71 above, Weil Gotshal addressed this issue (see **pages 648 to 652, 679 to 680 and 688 to 690**). The Court is referred to those letters but in summary, I understand that LBHI contends that if PLC makes a distribution on the PLC Sub-Notes to the Partnerships or to LB GP No1 on the Partnerships' behalf, and then LB GP No1 causes the Partnerships to make a distribution on the ECAPS, the ECAPS Holder or Holders are then obliged by Clause 2.11 to hold any such sums which they receive on trust for PLC and return them to PLC. I also understand LBHI to contend that in such circumstances, those funds returned to PLC would then be available for PLC to pay the PLC Sub-Debt.
81. LB GP No1 and Deutsche disagree with LBHI's position on this issue, and have contended that this is not something which Clause 2.11 requires in such a scenario.
82. Again without in any way waiving privilege, the PLC Administrators have been considering this point since it was raised by LBHI and any implications which it may have for distributions on PLC's subordinated debts.
83. Initial consideration was given to whether an appropriate possible solution might have been for the PLC Administrators to hold back funds from distribution on the PLC Sub-Notes to give practical effect to any ultimate obligation for such funds to be returned to PLC under Clause 2.11 if LBHI's argument is correct. However, CRS on behalf of LB GP No1 in its letter dated 31 January 2023 (see pages **681 to 683**), and Weil Gotshal on behalf of LBHI in its letter dated 7 February 2023 (see pages **688 to 690**), each made clear that neither considered that PLC reserving in respect of any payment which would otherwise be made on the PLC Sub-Notes was an appropriate approach to the Clause 2.11 issue, even though each take opposing views on the substance of that issue. In those circumstances, and in circumstances where the PLC Administrators obviously wish to keep making distributions as and when they can and without delay to progress the administration of the estate, the proposed questions for the Court on this Application in respect of Clause 2.11 were updated.
84. The PLC Administrators are currently liaising with the Joint Liquidators of LB GP No1 to seek to agree the specific details of the PLC Sub-Notes claim in the hope that that debt can be admitted and agreed, and an initial distribution on it made.
85. The PLC Administrators seek the following directions from the Court in respect of Clause 2.11 on this Application:

- (a) 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.
- (b) 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 and the PLC Sub-Notes, in respect of such sums received by PLC?

THE IDENTITY OF THE “HOLDER”

- 86. The Court will appreciate from the definition of “Holder” quoted in paragraph 79(a) above that that definition is complex, and it appears that it can or may mean different things in different contexts. In particular, the words towards the end of that definition suggest that (paraphrasing) the “Holder” for the purposes of payment issues and who has the right to payment is *“the person appearing as the relative limited partner in the Register.”*
- 87. Whilst it appears from each ECAPS offering circular or prospectus that the name on the Register was originally that of Chase Nominees Limited as nominee for JP Morgan Chase & Co Bank, N.A (London Branch), the PLC Administrators understand that JP Morgan’s corporate trust business was acquired by the BNY Mellon Group and that the entity recorded in the Register is now an entity from that group, namely BNY Depository (Nominees) Limited.
- 88. Accordingly, Hogan Lovells wrote to BNY Depository (Nominees) Limited (“**BNY Depository**”) on 7 March 2023 to make them aware that this Application was shortly to be issued, and in particular to make them aware of the Clause 2.11 issue given its potential relevance to their role and obligations as “Holder”. A copy of that letter is at pages **700 to 704**, and a copy of it has been provided to each of CRS, Weil Gotshal and A&B. By that letter, BNY Depository has been asked to confirm its position on this Application and whether it wishes to participate or make any points on the Application.
- 89. At present, BNY Depository’s role is understood to be a transactional one, and we are not aware of it or the BNY Mellon Group having a real economic interest or investment in the ECAPS. As such, it may be that BNY Depository will consider that it does not have a particular view on this Application. Alternatively, it may consider that it does wish to participate or bring forward points given its position as a “Holder”. The PLC Administrators have made clear that they are open to the “Holder” being joined to this Application in due course if that appears likely to assist, and have reserved their position as to whether that

step should be taken pending confirmation of BNY Mellon's position. It is intended that the Court will be updated as to BNY Depository's position at any initial procedural hearing in this Application.

THE PLC ADMINISTRATORS' OVERALL POSITION

90. In principle, the PLC Administrators are neutral as to the correct approach to the above issues. Whilst Hogan Lovells' letter of 22 November 2022 (to which I have referred) sought to explain the PLC Administrators' then-current views on each of the issues, this was done to assist the parties and in the hope that a consensus on some or all of the issues might still emerge which would have obviated the need for, or narrowed, this Application. In circumstances where it now appears that the relevant interested parties remain in dispute on each issue, and appear to wish to argue their respective positions, the PLC Administrators' position on this Application is one of neutrality.
91. However, the PLC Administrators reserve their right to draw any points to the Court's attention to the extent that they consider that to do so is appropriate to protect their position as administrators, to assist the Court, or to ensure that the relevant arguments and any practical implications of them are properly ventilated.

WEBSITE

92. Consistent with the approach adopted in relation to previous *Waterfall* applications and the previous directions application in this estate to which I have referred above, the PLC Administrators intend to place this witness statement and associated application notice on the part of the PwC Lehman Brothers website associated with PLC. This is to allow any interested PLC stakeholders to 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 PLC Administrators also invite the joint liquidators of LB GP No1 to make ECAPS investors aware of this Application.

CONCLUSION

93. 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. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Name: Edward John Macnamara

Dated this 14th day of March 2023

Witness Statement
Lehman Brothers Holdings Plc (In
Administration)
E J Macnamara
Sixth
EJM6
14 March 2023

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)

Applicant

- and -

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

Respondents

EXHIBIT EJM6

This is the bundle of documents marked "**EJM6**" referred to in the course of the first witness statement of Edward John Macnamara dated 14 March 2023.

Witness Statement
Lehman Brothers Holdings Plc (In
Administration)
E J Macnamara
Sixth
EJM6
14 March 2023

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- and -

**(1) LEHMAN BROTHERS HOLDINGS INC
(2) LB GP No.1 LIMITED (IN LIQUIDATION)
(3) DEUTSCHE BANK A.G. (LONDON BRANCH)**
Respondents

**SIXTH WITNESS STATEMENT OF
EDWARD JOHN MACNAMARA**
