IN THE HIGH COURT OF JUSTICE **Claim No: BL-2020-000856**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

BETWEEN:

(1) LENDY LTD (IN ADMINISTRATION)

(2) MARK JOHN WILSON

(3) PHILLIP RODNEY SYKES

(4) DAMIAN WEBB

(The second to fourth claimants in their capacity as joint administrators of Lendy Ltd)

Claimants

-and-

(1) LIAM BROOKE

(2) TIM GORDON

(3) LP ALHAMBRA LIMITED

(4) RFP HOLDINGS LIMITED

Defendants

AMENDED REPLY TO DEFENCE OF THE FIRST AND THIRD DEFENDANTS

Amended pursuant to CPR r17.1(2)(b) by order of Deputy Master Arkush dated 28 October 2021

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1. In this Amended Reply:

   1.1. References to "**the Defendants**" are to be taken as references to the First and Third Defendants, and other defined terms are used consistently with those used in the Amended Particulars of Claim;

   1.2. Unless otherwise indicated, references to paragraph numbers are to paragraphs in the Amended Defence of the First and Third Defendants ("**the Defence**");

1.3. Save where expressly stated otherwise, each and every allegation in the Defence is denied; and

1.4. The allegations and claims made in the Amended Particulars of Claim are maintained; the fact that any such allegation is not repeated in this Amended Reply does not constitute an abandonment, in whole or part, of that allegation or claim.

2. Paragraphs 4-5 are not admitted and the Defendants are required to prove the same.

3. Paragraph 6 is not admitted, and the Defendants are required to prove the same, although the paragraph is consistent with the Administrators' understanding.

4. Paragraph 7 is not admitted and the Defendants are required to prove the same.

5. As to paragraph 8:

5.1. It is denied that the Defendants and Mr Smith entered into a collaboration agreement, insofar as it is alleged that that agreement was a genuine agreement under which it was intended that Mr Smith would, either personally or through companies controlled by him, provide genuine marketing services to the Company, in consideration of which the Company would pay him fees.

5.2. The Administrators have been unable to locate a copy of any document purporting to evidence such "collaboration agreement" and the Defendants have not provided a copy thereof. In the circumstances, the existence of a written document purporting to evidence a collaboration agreement alleged is denied.

5.3. Alternatively, insofar as such a document does exist, it can only be a sham document designed to disguise the true nature of the Offshore Payments, which were payments ultimately received by, and made for the personal benefit of, the Directors.

6. As to paragraph 9:

6.1. Paragraphs 5.2 and 5.3 above are repeated.

6.2. It is not admitted that £400,000 was in fact paid to Mr Smith as alleged, and the Defendants are required to prove the same. The Administrators note the contradiction between the Defendants' claims that (i) Mr Smith was willing to

loan the Directors a credit line extending to £10m (see paragraph 37.1 of the Defence), apparently without any security, because the Directors had no source of income from which to fund their living expenses and (ii) their alleged ability to raise and pay £400,000 to Mr Smith as an advance payment, the purpose of such a payment being to protect the recipient (i.e. Mr Smith) against credit risk.

6.3. As to sub-paragraph 9.3, it is denied that it was intended, at the time that the alleged collaboration agreement was allegedly made or at all, that Mr Smith would provide genuine business-generation services to the Company, and further denied that he in fact did so. Alternatively, to the extent that he did so, the value of his services was negligible, and bore no relation to the £400,000 allegedly paid to him, or the Offshore Payments.

7. As to paragraph 10:

7.1. No admissions are made as to the alleged payment of £400,000 to Mr Smith. It is noted that the Directors were apparently, on the Defendants' case, able to raise £400,000 to pay Mr Smith but unable to fund their own living expenses: see paragraph 37.1 of the Defence.

7.2. It is admitted that Mr Smith exercised ultimate legal control over the Offshore Companies. However, it is averred that, in practice, Mr Smith exercised his legal control over the Offshore Companies and/or over their assets in accordance with the Directors' instructions, consistent with Mr Brooke's description of the Offshore Companies as his "trust" (as pleaded in paragraph 21.3(3)(c)-(d) of the Particulars of Claim). The Offshore Payments made to the Offshore Companies were ultimately for the benefit of the Directors, who were the ultimate recipients of the funds.

7.3. The aforementioned averment is also consistent with the facts that:

(1) Delplane's investor account on the Company's platform gives its named representative as "*Antonio Delarosa*", who has the same date of birth and bank account (ending in -[redacted]) as Mr Gordon.

(2) Laurus's investor account on the Company's platform was accessed by an IP address (31.[redacted]) which the Administrators understand to be the Company's IP address as it is the same IP address used by a number of

members of the Company's staff. The obvious inference is that it is one of the Directors, most likely Mr Brooke, who accessed it.

8. As to paragraph 11:

8.1. Save for (iv) and (vii), none of the denials in paragraph 11 responds to allegations made by the Company. It is admitted that the Directors were not named as *de jure* directors of the Offshore Companies.

8.2. As to (iv) and (vii), it is averred that the Directors did exercise control over the actions and/or assets of the Offshore Companies, and/or that they had effective control over the Offshore Companies' funds.

8.3. It is further averred that the Directors did exercise effective control over the actions of Argo, CAM, and Conduit Nominees, and/or of the assets of those entities.

9. As to paragraph 12:

9.1. It is neither admitted that the £400,000 was in fact paid, nor that some of this amount (if paid to Mr Smith) was then advanced by Mr Smith to the Company.

9.2. The precise reason for operating a non peer-to-peer loan book is outside the Administrators' knowledge but the Administrators have no reason to doubt the reason given.

10. As to paragraph 13:

10.1. Sub-paragraph 13.1 is admitted.

10.2. The first sentence of sub-paragraph 13.2 is admitted. The 70% figure pleaded in the second sentence is admitted as regards loans made on the Company's platform.

10.3. Sub-paragraph 13.3 is not admitted. The proper construction of the loan contracts is not of direct relevance to this claim, but will in any event be determined in separate proceedings brought by the Administrators under paragraph 63 of Schedule B1 of the Insolvency Act 1986 (Claim CR-2019-BHM-000443). An interest rate of 12% was common, although from around 2017 onwards the average interest rate fell as the market became more competitive.

10.4. As to sub-paragraph 13.4:

(1) The first sentence is admitted.

(2) The precise profit ratio varied, but the figure of 5% pleaded is consistent with the Administrators' understanding.

11. Paragraph 15 is denied. A P2P Platform Operator is defined in the FCA's Glossary as "*a person carrying on an activity of the kind specified by article 36H(1) or 36H(2D) of the Regulated Activities Order.*" Article 36H(1) and (2D) of that Order[1] apply to "*Article 36H Agreements*", which are defined under Article 36H(4) as one under which the operator (i.e. the Company) "*does not provide credit, assume the rights (by assignment or operation of law) of a person who provided credit, or receive credit under the agreement.*" Under the contractual arrangements as described by the Defence, the Company both provided and received credit, and was therefore not exclusively a P2P Platform Operator by the FCA Glossary's definition of that term.

12. As to paragraph 16:

12.1. The averment that the Defendants "*continued to engage and collaborate with*" Mr Smith lacks particularity, is not understood, and cannot meaningfully be pleaded to.

12.2. However, it is denied that Mr Smith provided genuine business-generation services to the Company. Alternatively, to the extent that he did so, the value of his services was negligible, and bore no relation to the £400,000 allegedly paid to him as an advance, or the Offshore Payments.

13. As to paragraph 17:

13.1. Paragraphs 5.2, 5.3 and 6.3 above are repeated.

13.2. It is denied that there was either a variation or an oral contract, in the terms alleged or at all.

14. As to paragraph 18:

14.1. Paragraph 13 above is repeated.

[1] The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544).

14.2. It is denied that the Offshore Payments were reasonable remuneration for services rendered by Mr Smith, and denied that the sums paid were genuinely paid in consideration for such services. Rather, the Offshore Payments were made in order to enrich the Directors without the payment of corporation tax that was properly due.

15. Paragraph 19 is notably lacking in particularity. Paragraph 6.3 above concerning the services rendered by Mr Smith is repeated.

16. As to paragraph 20:

16.1. The figures pleaded reflect the Administrators' understanding.

16.2. It is denied that the growth pleaded was attributable to Mr Smith at all, alternatively it is denied that Mr Smith made a significant contribution to that growth.

17. As to paragraph 21, it is not admitted that the financial performance of the Company was "*particularly notable*" and the Defendants are required to prove the same.

18. As to paragraph 22:

18.1. The Administrators have found no evidence at all of business generated by Mr Smith or the Offshore Companies.

(1) It is unclear precisely what "database" is referred to, but examination by the Administrators of the Company's records has so far produced no evidence of business generation by Mr Smith. In particular, the Administrators have identified a spreadsheet on the Company's database that contains a column (Column Z) identifying the source of the Investor. Neither Mr Smith nor the Offshore Companies are mentioned at all.

(2) The Administrators have obtained a spreadsheet from SI Digital (responsible for the Company's IT support) that tracks the channel through which investors arrived at the Company's website. None of these channels appears to have any connection with Mr Smith or the Offshore Companies.

(3) The Administrators have analysed the identity of the broker (if any) responsible for loans agreed on the Company's platform since 2014. The

Administrators have been unable to identify a single loan for which Mr Smith or any of the Offshore Companies served as broker.

18.2. Had such services been genuinely rendered, and had the Offshore Payments been genuinely made in consideration of such services, one would expect a record to be kept of the precise extent of those services, in order that the Company could gauge Mr Smith's contribution accurately. The Administrators can find no such record.

18.3. The Administrators have also discovered that:

(1) In relation to at least one Invoice (from Laurus to the Company, dated 25 February 2015), the services rendered are described as "*Introduction of borrower via the Bridgebroker.co.uk website*".

(2) However, that website is a site that was run by Mr Gordon for the Company: in an email to Mr Brooke dated 11 March 2018 Mr Gordon included Bridgebroker.co.uk in a list of "*domains that Lendy effectively own and should take control over as part of my exit handover*".

(3) It is therefore denied that Mr Smith generated this revenue; rather, it was generated through a broking website under the Company's control. Nevertheless an Invoice of £100,000 was raised and paid.

18.4. It is denied that the majority of the Company's revenue and profitability for FY2014 and FY2015 was attributable to the work of Mr Smith. Paragraph 6.1 above is repeated.

19. As to paragraph 23:

19.1. It is admitted that the Company's contractual documentation changed in or around late 2015, and that under the altered documentation, the Company primarily acted as agent for the lenders.

19.2. The reason for this change is outside the Administrators' knowledge and is not admitted.

20. As to paragraph 24, the figures pleaded broadly reflect the Administrators' understanding.

21. As to paragraph 25:

21.1. It is not admitted that the Company attracted investment as alleged in April 2016 and the Defendants are required to prove the same.

21.2. It is denied that this was due to the work of Mr Smith at all, and further denied that the Company would not have achieved the success it did without the work of Mr Smith (if indeed he rendered any services at all).

21.3. The Defence notably fails to particularise any individual items of business that were allegedly attributable to Mr Smith's services, and nor have the Administrators been able to find any evidence of his services.

21.4. It is further noted that marketing services were provided to the Company by an entity called "Liberty Marketing", which (as would be expected for a company providing genuine marketing services) provided marketing reports to the Company, such as those dated March and April 2016 (i.e. during the period in which Offshore Payments were made and Mr Smith was allegedly providing services worth hundreds of thousands of pounds per month). No such or similar reports from Mr Smith, or any evidence of any contribution by Mr Smith has been provided by the Defendants or identified by the Administrators.

22. As to paragraph 26, it is admitted that the Company's financial statements recorded net assets and profits as alleged, but the accuracy of those financial statements is not admitted, and the contents of the financial statements are in any event is irrelevant to whether Mr Smith provided marketing services or not.

23. Paragraph 27 is not admitted and the Defendants are required to prove the same. Further, the reference to a valuation of £100m-150m being "*referred to*" is vague and the Claimants are unclear as to what precisely is being alleged.

24. Paragraph 28 is denied, for the reasons already given.

25. Paragraph 29 lacks proper particularity and the Defendants are in any event put to proof of the same.

26. As to paragraph 30:

26.1. It is denied that the Offshore Payments were made in discharge of sums that were genuinely owed in consideration of services rendered either by Mr Smith or the

Offshore Companies. Rather, the payments were made in order to benefit the Directors without the payment of corporation tax that was properly due.

26.2. It is denied that there was any genuine contract, and therefore denied that the same was amended as alleged or at all.

26.3. The Administrators cannot know whether Mr Brooke regarded it as material whether the Offshore Payments were made to Mr Smith personally or to companies controlled by him. However, the Payments were not made in exchange for services genuinely rendered, and did not amount to a discharge of sums genuinely owed.

27. Paragraph 31 is noted.

28. As to paragraph 32:

28.1. The Offshore Payments were procured and permitted by the Directors for their own benefit, and Mr Smith exercised control over the Offshore Companies and/or their assets in accordance with the Directors' wishes.

28.2. Insofar as paragraph 32 is inconsistent with sub-paragraph 28.1 above, it is denied.

29. As to paragraph 33, it is denied that the Offshore Payments were properly recorded in the Company's books and records. They were falsely recorded as genuine business expenses, when they were in truth payments (made pursuant to sham Invoices in order to evade corporation tax) that were ultimately for the benefit of the Directors, in breach of the Directors' fiduciary duties to the Company as pleaded at paragraph 27-28 and 30 of the Particulars of Claim.

30. As to paragraph 34:

30.1. The Administrators cannot know of discussions that may have taken place between the Directors and Mr Smith, either in the period from August 2014 to March 2015, or from April 2015 onwards, and the Defendants are put to strict proof thereof. Without prejudice to the foregoing, it is in any event denied that lenders were genuinely introduced or deposits genuinely raised by Mr Smith, and it is further denied that the sums paid to the Offshore Companies were genuinely assessed by reference to the true commercial value of the services provided (which was, in any event, nil).

30.2. It is admitted and averred that for a period of several months from April 2015 onwards, regular Offshore Payments of £100,000 each were made, some to Delplane and some to Laurus, although on some occasions more than two payments per month were made, and on occasion fewer.

30.3. It is denied that the sums paid were remuneration to Mr Smith in respect of introducing and Borrowers and Lenders respectively:

(1) The fact that in several months (for example, November and December 2015) three payments of £100,000 were made is inconsistent with the suggestion that Mr Smith would be paid £100,000 per month in respect of introducing Borrowers and Lenders respectively.

(2) Rather, these Payments were made for the ultimate benefit of the Directors.

(3) As to sub-paragraph 34.3, it is denied that Emporis provided the services alleged. The Administrators have been unable to find any evidence of non-UK lenders having been introduced to the Company by Emporis. It is also noted that in an email dated December 2015 to Liberty Marketing (a company that appears genuinely to have provided marketing services to the Company), Mr Gordon stated that the Company did not actively market outside the UK although around 10% of its investors came from outside the UK.

30.4. As to sub-paragraph 34.4:

(1) The first sentence is admitted.

(2) The alleged communications between Moore Stephens and the Directors during the audit process are outside the Administrators' knowledge and are not admitted.

(3) Whether Moore Stephens LLP was specifically satisfied (from information provided to them by the Directors or otherwise) as to whether the Offshore Payments were genuine is not admitted, but is in any event irrelevant. The Directors deliberately disguised the Offshore Payments.

(4) The letter from Mr Smith referred to omits the reality that Mr Smith exercised his control over the Offshore Companies and/or their assets in accordance

with the Directors' wishes, and that the Offshore Payments were ultimately received, in whole or in part, by and for the benefit of the Directors.

(5) It is admitted that the audit reports for FY2016 and FY2017 contained the statements alleged. However, the auditors' opinion is inadmissible and irrelevant as evidence regarding the factual question of whether the Offshore Payments were in fact made on the basis alleged by the Claimants.

(6) It is further noted that the collaboration agreement now alleged to have existed does not appear to have been provided to Moore Stephens LLP.

31. As to paragraph 35, it is denied that the Offshore Payments were properly recorded in the Company's books and records and subject to proper tax treatment: see paragraph 29 above.

32. As to paragraph 37:

32.1. It is denied that Mr Smith agreed to provide the Directors with a credit line. The averment is a (false) justification given by the Directors in order to attempt to explain the fact that substantial sums were transferred from Mr Smith to the Directors, which fact is consistent with the Administrators' case that the Offshore Payments were in fact made for the Directors' benefit.

32.2. It is noted that Mr Smith did not request any security for this extensive credit line, despite apparently having required the security of an advance of £400,000 for his alleged services, and noted that no explanation has been given of why it was that Mr Smith extended, in effect, extremely generous banking facilities to the Directors.

32.3. It is also noted that sums were 'loaned', on the Defendants' own admission, in the period 2014-2017, i.e. at least partly in a period during which the Company had, again on the Defendants' own case, made substantial profits. There is an obvious inconsistency between the stated rationale for the 'loans' as being to cover the Directors' living expenses at a time when they had no other sources of income, and the large revenue generated by the Company at a time at which sums were apparently still being 'loaned' to the Directors to cover their living expenses.

32.4. It is averred that the purpose of the payment cards was to enable the Directors to spend, for their own personal benefit, the sums paid under the Offshore Payments. It is denied that the Directors were under a genuine obligation to repay the same to Mr Smith, and denied that it was genuinely intended that the Directors would ever repay the sums spent. Insofar as paragraph 37 is inconsistent with this, it is denied.

33. As to paragraph 38:

33.1. The Directors were under no genuine obligation to repay these sums, and the Offshore Payments were ultimately intended to be used, and were in fact used, for their personal benefit (hence Mr Brooke's repeated reference to the Offshore Companies as forming part of his "trust": see paragraph 21.3(3)(c)-(d) of the Particulars of Claim).

33.2. Since the Offshore Payments were made for the Directors' personal enrichment, rather than in discharge of genuine business expenses, the impropriety lay in the fact that the Directors procured or permitted that the Offshore Payments be made (pursuant to false Invoices as part of a scheme to evade corporation tax), in breach of their fiduciary and statutory duties to the Company.

34. As to paragraph 39:

34.1. It is noted that the alleged loans have not been repaid, consistently with the Administrators' case.

34.2. It is denied that the Directors are under any genuine obligation to repay the sums spent, and any document produced showing allegedly outstanding indebtedness will be a sham designed to disguise the true nature of the transactions by which the Directors acquired these sums.

35. As to paragraph 40:

35.1. It is noted with surprise that Mr Brooke's explanation for his use of the term "*trust*" is, in effect, that he made a fraudulent misrepresentation to those with whom he was communicating (Zowie Sellen, whom the Administrators understand to be a mortgage broker working for ADN Financial Solutions Ltd, a

Portsmouth-based company that provides mortgage advice) in order to induce a lender to approve his application for a mortgage.

35.2. If the use of the word "*trust*" was strictly speaking inaccurate, it was used in layman's terms by Mr Brooke because the sums in question were sums that he had control of and which could be (and were) spent by him for his personal benefit. Mr Brooke's use of the word "*trust*", even in layman's terms, is not consistent with the notion that he was obliged to repay the sums in question.

35.3. As to sub-paragraph 40.2, it is denied that the sums received by Mr Brooke were received pursuant to a genuine loan agreement under which Mr Brooke was obliged to repay the sums received.

36. As to paragraph 41, for the reasons given above, it is denied that the sums received by the Directors were loans that the Directors were under a genuine obligation to repay.

37. As to paragraph 43:

37.1. It is denied that Mr Webb indicated that the Company was likely to be solvent and a distribution made to shareholders. No such statement was made.

37.2. The Administrators' view is that the Company is insolvent, as explained in their letter to the Defendants' solicitors dated 21 September 2020.

38. Paragraph 45 is denied. The Offshore Payments were not made in consideration of services genuinely provided to the Company, but were made for the Directors' own benefit.

39. Paragraph 46 is denied. Paragraph 38 above is repeated.

40. As to paragraph 47:

40.1. The ownership structure pleaded by the Defence is admitted.

40.2. It is denied that the breaches of the Directors were capable of being ratified:

(1) The Company could not lawfully have paid the Offshore Payments to the Directors yet treated the sums in question as an allowable loss for corporation tax. Since a company cannot ratify an act that it does not itself have power lawfully to do, it follows that the Company did not have the power to ratify the Directors' breaches.

(2) The breaches were in any event dishonest, and therefore cannot be ratified by the Company on grounds of public policy.

(3) Further still, the Defendants' case presupposes that at date of each of the Offshore Payments the Company was not insolvent and/or its insolvency was not likely or probable, as to which the Directors are put to proof. For the avoidance of doubt, it is denied that the Directors' breaches of duty were capable of ratification where the Company was insolvent and/or its insolvency was likely or probable.

40.3. It is in any event not admitted that, as is required for ratification to be established, the Company's membership actively applied its mind to the question whether to ratify the transactions, and the Defendants are required to prove the same.

40.4. It is not admitted that the Directors could have lawfully caused the Company to make equivalent payments to them in the form of dividends or remuneration and the Directors are required to prove the same and/or it is denied that any such dividends or remuneration would have been declared and/or paid.

40.5. In any event, the availability of such lawful alternative means is irrelevant:

(1) The Directors in fact caused the Company loss by causing or permitting the Company's funds to be paid away from the Company by means of the Offshore Payments; had it not been for the Directors' breaches of duty, the funds in question would have remained within the Company.

(2) Further or alternatively, the Directors' fiduciary duties to the Company required the Directors to act as custodians of the Company's property, which duties the Directors breached by causing or permitting the Offshore Payments to be made. The measure of the equitable compensation is the sum of the Offshore Payments, which were lost to the Company from the date of their payment.

40.6. Yet further it is in any event denied that the Directors would in fact have adopted such lawful means. The Directors, having taken a course of action designed to defraud the Company and HMRC, are unlikely instead to have chosen a lawful means of paying themselves these sums, and in so doing incurring a tax liability

(or causing the Company to incur a tax liability). It is noted that the Directors are unable to specify precisely what alternative means would have been adopted.

40.7. Further still, and in any event, the Directors remain liable to compensate the Company in respect of the losses the Company has suffered by reason of the unlawful means chosen; namely, the amount of the Company's corporation tax liability in respect of the sums that comprised the Offshore Payments, together with penalties and interest that have accrued on that liability. The Administrators calculate that these sums amount in total to £5,041,515.

Proprietary Claims

41. As to paragraph 50, it is noted that the sole basis for the denial of the proprietary claim is the allegation that the Offshore Payments were not made in breach of fiduciary duty.

42. For the reasons given above and in the Particulars of Claim, the Offshore Payments were so made, and therefore the Proprietary Claims must succeed.

Claims under s.423 of the Insolvency Act 1986

43. As to paragraphs 52-55:

43.1. It is denied that Mr Smith genuinely rendered any services to the Company.

43.2. Alternatively, to the extent that Mr Smith did render services to the Company, it is denied that the Offshore Payments were truly consideration for such services, and it is averred that the value of such services (if any) was significantly less than the value, in money or money's worth, of the Offshore Payments.

43.3. Paragraph 37.3 of the Particulars of Claim is repeated as to the purpose of the Offshore Payments.

43.4. The Company's creditors as a whole are victims of the Offshore Payments.

Claim in respect of the Brankesmere Dividend

44. As to paragraph 55C:

44.1. Paragraph 55C.1 is denied for the reasons set out above.

44.2. Paragraph 55.C.2 is denied. The remediation plan took effect by way of a 'buy-back', under which the Company was obliged to reimburse investors in respect of

the sums that had been identified as part of the remediation. The Defendants have not pleaded a means by which it is alleged that the cost to the Company of the remediation scheme fell to be reduced by reference to potential recoveries made on loans.

44.3. As to the email from Mr Hockenhull, this is of no relevance. The email simply provides a breakdown of the extent to which the loans for which investors were reimbursed were 'bad loans'. In any event, the Claimants' case is that the Company wrongly accounted for only £746,838.58. If Mr Hockenhull's email is to be read as suggesting that the Company need only have accounted for this much, he was wrong to do so.

TONY BESWETHERICK

PATRICK DUNN-WALSH

TONY BESWETHERICK

PATRICK DUNN-WALSH

STATEMENT OF TRUTH

I believe that the facts stated in this Amended Reply are true. I am authorised to make this statement on the Claimants' behalf. 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.

[redacted]

Mark John Wilson

27 January 2022

Served this 25th day of February 2021