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 SECOND AND FOURTH 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 Second and Fourth Defendants, and other defined terms are used consistently with those used in the Particulars of Claim;

1.2. Unless otherwise indicated, references to paragraph numbers are to paragraphs in the Amended Defence of the Second and Fourth 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. As to paragraph 2:

2.1. It is admitted and averred that Mrs Bryce-Gordon became sole shareholder and director in the Fourth Defendant on 4 July 2019, upon Mr Gordon's resignation as *de jure* director and his transfer of his shareholding to her.

2.2. It is admitted and averred that Mr Gordon was sole shareholder and director at all material times; in particular, at the point in time at which the Fourth Defendant acquired Ryefields Park in February 2016, which was purchased with funds that were the traceable proceeds of the Offshore Payments (which tracing link the Administrators do not understand the Defendants to deny). Mr Gordon's knowledge of the source of the funds, and their unlawfulness, at that point therefore falls to be attributed to the Fourth Defendant.

2.3. The relevance of Mrs Bryce-Gordon's state of mind is therefore denied. However, Mrs Bryce-Gordon's alleged lack of knowledge is in any event not admitted, and, insofar as it is relevant, the Defendants are required to prove the same.

3. Paragraphs 3-7 are noted.

4. As to paragraph 8:

4.1. It is denied that the Company provided lending services that were truly "*peer-to-peer*". 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 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.

4.2. Sub-paragraphs (a)-(b) are admitted

4.3. As to sub-paragraph (c), it is averred that the 70% figure pleaded is accurate as regards loans made on the Company's platform. The sub-paragraph is otherwise admitted.

4.4. Sub-paragraph (d) 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). It is averred that what the Directors "*intended*" to achieve is irrelevant to what, objectively, the proper construction of the contractual documentation is.

4.5. As to sub-paragraph (e) an interest rate of 12% was common, although from around 2017 onwards the average interest rate fell as the market became more competitive.

4.6. As to sub-paragraph (f), the precise profit ratio varied, but the figure of 5% pleaded is consistent with the Administrators' understanding.

5. As to paragraph 9, the relevance of the terminology used is unclear, but it is denied that the Company solely used the word lender to describe those who lent money on the Company's platform. For example, in an email to Liberty Marketing dated 30 December 2015, Mr Gordon stated that "[t]*he main goal is increasing investor numbers*" and repeatedly uses the word "*investors*" to describe lenders.

6. As to paragraph 11, it is admitted that the Company acted primarily as agent for the lenders, rather than being an intervening principal, after the change in documentation was effected.

7. As to paragraph 12, it was not alleged that the Company only generated revenue from fees paid by Borrowers. The paragraph is otherwise admitted.

8. As to paragraph 13, the figures pleaded broadly reflect the Administrators' understanding although the Administrators are unable presently to confirm that they are exactly correct. No admissions are made as to the accuracy of the Company's financial statements.

The Offshore Payments

9. Paragraphs 15-16 are not admitted and the Defendants are required to prove the same.

10. As to paragraph 17:

10.1. 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, 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.

10.2. 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.

10.3. 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, without the payment of corporation tax that was properly due.

10.4. 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 substantial credit line (alleged by the First and Third Defendants to extend to £10 million: see paragraph 37 of the First and Third Defendants' 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.

11. As to paragraph 18:

11.1. Paragraph 10.4 above is repeated.

11.2. Save for that in respect of control of the assets in sub-paragraph (c), none of the denials in paragraph 18 responds to allegations made by the Company. It is admitted that the Directors were not named as *de jure* directors of the Offshore Companies.

11.3. 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 paragraphs 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.

11.4. The Directors therefore did exercise effective control over the actions and/or assets of the Offshore Companies, and/or that they had effective control over the Offshore Companies' funds, and did exercise effective control over the actions of Argo, CAM, and Conduit Nominees, and/or of the assets of those entities.

11.5. 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. The obvious inference is that it is one of the Directors, most likely Mr Brooke, who accessed it.

12. As to paragraph 20:

12.1. The oddity of the Defendants' position (which is not admitted) that Mr Smith was paid an advance of £400,000, but then repaid some of that advance, thus *pro tanto* cancelling the effect of the advance, is noted.

12.2. Sub-paragraphs 10.1-10.3 above are repeated.

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

13. As to paragraph 21:

13.1. The figures pleaded broadly reflect the Administrators' understanding.

13.2. 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.

13.3. It follows that it is averred that the Company would have achieved (and in fact did achieve) the level of growth it achieved without Mr Smith's services.

13.4. The Administrators cannot plead to the averment that the growth alleged was "remarkable".

14. As to paragraph 22:

14.1. It is admitted that the Company sponsored Cowes week, but it is denied this decision was motivated by a desire to decrease reliance on Mr Smith, and denied that the Company was in any way reliant on Mr Smith as regards marketing or other matters.

14.2. It is denied that Mr Smith provided any genuine services, as alleged or at all. Alternatively, the services Mr Smith provided were negligible in value and extent.

14.3. It is denied that the collaboration agreement existed, and therefore denied that it was terminated.

15. As to paragraph 23:

15.1. The Administrators are officers of the court and will comply fully with all their disclosure obligations.

15.2. It is denied that the growth pleaded was attributable to Mr Smith at all, alternatively it is denied that Mr Smith made a more than negligible contribution to that growth.

15.3. As to sub-paragraph (a):

(1) 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.

(4) It is denied that lenders introduced by any channel other than the four marketing channels pleaded were introduced by Mr Smith. It is noted that, even on the Defendants' case, Mr Smith provided extensive marketing services, in return for which over £6m was paid in total, yet there is nothing that expressly records his having provided any such services, in contrast to other sources e.g. "*money.co.uk*".

(5) 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 if any contribution by Mr Smith has been provided by the Defendants or identified by the Administrators.

15.4. Sub-paragraph (b) is denied. Sub-paragraphs 10.1-10.3 above are repeated.

15.5. As to sub-paragraph (c):

(1) It is denied that the majority, or indeed any, of the investment liquidity derived from the active secondary market was provided by lenders introduced by Mr Smith or the Offshore Companies.

(2) It is not admitted that the existence of such a secondary market was fundamental to the Company's growth, and the Defendants are required to prove the same.

16. Paragraph 24 is denied. Sub-paragraphs 10.1-10.3 and 12.3 above are repeated.

17. As to paragraph 27:

17.1. The first sentence is admitted, and the Administrators did not allege otherwise in paragraph 17 of the Particulars of Claim.

17.2. It is admitted that statements were audited by Moore Stephens LLP in the years ending 31 December 2016 and 31 December 2017, and that the audit reports for FY2016 and FY2017 contained the statements alleged.

17.3. 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. Moore Stephens LLP's 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.

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

18. As to paragraph 28:

18.1. Sub-paragraph 28(a) is denied. The Administrators have found no evidence whatsoever of the marketing reports allegedly produced. Sub-paragraph 15.3 above is repeated.

18.2. Sub-paragraph 28(b) is denied. Mr Smith did not provide such leads. Insofar as the Directors and Mr Smith may have agreed the sums to be paid to Mr Smith and the Offshore Companies, it is denied that these sums were genuinely made in consideration of services rendered by Mr Smith, and denied that the consideration paid was assessed by reference to the value of services he provided.

18.3. As to sub-paragraph (c):

(1) 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 months were made, and on occasion fewer.

(2) It is denied that the Directors believed those sums represented a reasonable and proportionate level of remuneration for services provided to the Company by Mr Smith and/or the Offshore Companies, having regard to the value of the services actually provided to the Company. The Directors did not subjectively believe the level of remuneration provided was proportionate and reasonable having regard to the value of the services provided by Mr Smith (i.e. nil, alternatively negligible), and objectively it was not reasonable or proportionate.

18.4. As to sub-paragraph (d), no proper or adequate particulars have been provided of the alleged conversations and the Defendants are put to strict proof thereof. It is noted that despite these allegedly regular meetings with Mr Smith, and being allegedly party to a collaboration agreement with him, when Mr Gordon was asked in his interview with the Administrators on 22 October 2019 whether he had heard of Anthony Smith, he said that the name "*didn't ring a bell*".

18.5. Without prejudice to the foregoing, it is denied that, insofar as meetings were held as alleged, at such meetings it was confirmed that the agreed fixed fees continued to represent a reasonable and proportionate level of remuneration. The Directors and Mr Smith knew it was not, but it was agreed that the sums would be paid in any event because the Offshore Payments were not truly payments for the services of Mr Smith or his companies, but were payments that were ultimately for the benefit of the Directors without the payment of tax that would otherwise be owed.

18.6. As to sub-paragraph (e), 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.

19. As to paragraph 30, the Administrators maintain their allegation pleaded at paragraph 20 of the Particulars of Claim in full.

20. As to paragraph 31:

    20.1. It is noted that the Defendants are unable to provide an explanation of why it was that (as pleaded at paragraph 21 of the Particulars of Claim) Mr Brooke referred to Argo and Laurus as part of his "*trust*", or why it was that Mr Brooke (speaking of himself and Mr Gordon) stated "*we both have a trust offshore which we pay £100k per month into in the form of invoices.*"

    20.2. 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 Claimants' case that the Offshore Payments were in fact made for the Directors' benefit, but without the payment of tax that was due.

    20.3. 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.

    20.4. 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 and the purchase of assets and property. In fact, the 'loans' were transfers of sums that the Directors were not intended to be liable to repay.

21. As to paragraph 34, and to the Defendants' professed "*surprise*", it is not understood why the fact that the Company has assets means that it is not insolvent. The Company's liabilities and the expenses of the administration mean that there is anticipated to be a

significant shortfall between the sums owed to its creditors and the sums available for distribution thereto.

22. Paragraphs 35-39 are denied. The Offshore Payments were not made in consideration of services genuinely provided to the Company, but were made for the Directors' own benefit. Paragraphs 10.1-10.3, 11.3 and 18 above are repeated.

23. As to paragraph 40:

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

23.2. The Company's financial state at the dates of the Offshore Payments is not admitted, and the Directors are required to prove that, at the material times, the Company's insolvency was not probable and in any event that the Company's insolvency was not sufficiently likely that the defence of ratification was barred.

23.3. 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.

23.4. 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.

23.5. 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.

23.6. 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.

23.7. 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.

23.8. Further, 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 comprising the Offshore Payments, together with penalties and interest that have accrued on that liability. The Administrators calculate these sums amount in total to £5,041,515.

Proprietary Claims

24. As to paragraph 41-43, 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.

25. 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

26. As to paragraphs 44:

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

26.2. 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.

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

27. It follows that paragraph 45 is denied.

28. Paragraph 46 is denied. The Company's creditors as a whole are victims of the Offshore Payments.

Claims in respect of the Brankesmere Dividend

29. Paragraph 47B is noted; the Claimants do not bring a claim against the Second Defendant in respect of the Brankesmere Dividend.

30. As to paragraph 47E.2, it is denied that the Claimants have failed to account for the sums held by Lendy Provision Reserve Ltd:

(1) The June 2018 management accounts take account of these sums, in the line under the 'Bank' section, entitled 'Provision Fund' and containing entries in the sum of £1,992,430 as at June 2018.

(2) The same sums are also accounted for in the Company's 2017 Annual Accounts, under the "Amounts owed by group undertakings" section, which totals £3,317,469, and of which £1,992,437 comprise sums held by Lendy Provision Reserve Ltd.

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