HIGH COURT OF JUSTICE
07 Jul 2017
ADMIRALTY AND COMMERCIAL COURT
FL-2017-000002

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

FL-2017-000002

BETWEEN:

THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR AMCORE BANK, NA AND FOR THE OTHER FINANCIAL INSTITUTIONS IDENTIFIED IN SCHEDULE 2 HERETO
(incorporated under the laws of the United States of America)

Claimant

-and-

(1) BARCLAYS BANK PLC

(2) BANK OF SCOTLAND PLC
(sued in its own right, and also in its capacity as a representative and member of the British Bankers' Association)

(3) BBA TRENT LIMITED

(4) BBA ENTERPRISES LIMITED

(5) COÖPERATIEVE RABOBANK UA (FORMERLY KNOWN AS COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK BA)

(6) DEUTSCHE BANK AG
(sued in its own right, and also in its capacity as a representative and member of the British Bankers' Association)

(7) LLOYDS BANKING GROUP PLC
(sued in its own right, and also in its capacity as a representative and member of the British Bankers' Association)

(8) LLOYDS BANK PLC

(9) THE ROYAL BANK OF SCOTLAND PLC

(10) THE ROYAL BANK OF SCOTLAND GROUP PLC
(sued in its own right, and also in its capacity as a representative and member of the British Bankers' Association)

(11) UBS AG
(sued in its own right, and also in its capacity as a representative and member of the British Bankers' Association)

Defendants

PARTICULARS OF CLAIM

A. INTRODUCTION

1. These are the Particulars of Claim of the Federal Deposit Insurance Corporation (the "**FDIC**") in its capacity as receiver (the "**FDIC-R**") for the 39 receiverships listed in Schedule 2 to these Particulars of Claim (the "**Closed Banks**"), all of which Closed Banks were financial institutions chartered and headquartered in the United States (the "**US**") or its territories.

2. In these Particulars of Claim:

(1) References to "**USD LIBOR**" are to the London Interbank Offered Rate ("**LIBOR**") for US Dollars ("**USD**"), an interest rate benchmark which was published at all times material to this claim by Thomson Reuters at 12.00pm London time each business day on behalf of the British Bankers' Association (the "**BBA**").

(2) References to the "**Bank Defendants**" are to Barclays Bank PLC ("**Barclays**"), Bank of Scotland PLC ("**BoS**"; formerly known as HBOS PLC ("**HBOS**")), Coöperatieve Rabobank UA (formerly known as Coöperatieve Centrale Raiffeisen-Boerenleenbank BA) ("**Rabobank**"), Deutsche Bank AG ("**Deutsche**"), Lloyds Banking Group ("**Lloyds Group**"), Lloyds Bank PLC ("**Lloyds Bank**"), The Royal Bank of Scotland PLC ("**RBS**"), The Royal Bank of Scotland Group PLC ("**RBS Group**"), and UBS AG ("**UBS**"). Further particulars of the Bank Defendants are set out at paragraph 12.

(3) References to the "**BBA Parties**" are to the BBA, BBA Enterprises Ltd ("**BBA Enterprises**") and BBA Trent Ltd ("**BBA Ltd**").

(4) Without prejudice to the detailed pleading at paragraphs 34(2) and 34(5), references to the "**LIBOR Definition**" and the "**BBA Guidance**" are, respectively, to:

(a) The question which members of the relevant contributing panels of banks selected by the BBA to participate in the LIBOR-setting process were required to answer each working day in order to set LIBOR for a given currency and tenor, namely, "*[a]t what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11am?*" ; and

(b) The guidance published in mid-2008 by the BBA which amplified and supplemented the LIBOR Definition, and upon which contributor panel members' submissions were made conditional.

(5) The FDIC-R adopts the further definitions and abbreviations set out in Schedule 1 to these Particulars of Claim. Capitalised terms which are used in these Particulars of Claim are references to the definitions set out in Schedule 1 unless otherwise stated.

(6) Where reference is made to any document, communication, correspondence, written agreement, or transcript of evidence or testimony, the FDIC-R will rely at trial on the document etc. in question for its full terms and effect.

(7) The FDIC-R pleads its case as best it is presently able in circumstances in which the causes of action pursued arise out of secret and collusive conduct in which the Defendants (and other USD LIBOR Panel Banks) engaged, and much of which is currently outside of the knowledge of the FDIC-R. The FDIC-R accordingly reserves its right to amend these Particulars of Claim in due course following disclosure.

Summary of the FDIC-R's factual case and claims

3. Without prejudice to the more detailed particulars that follow, the FDIC-R's factual case is, in briefest summary, as follows:

(1) The Bank Defendants were, in 2007, some of the largest financial institutions in the world, with a joint market capitalisation as of 31 December 2007 of over $440 billion and a combined annual turnover of over $114 billion as of the same date. They were, together with other financial institutions which are already the subject of proceedings commenced by the FDIC-R in the US, members of the

BBA's contributing panel of banks for USD LIBOR (the "**USD Panel Banks**"), and were responsible for making daily submissions to the BBA, in order to set USD LIBOR, in accordance with the LIBOR Definition, and as supplemented by the BBA Guidance from mid-2008 onwards (see paragraphs 34(2) and 34(5) below). The LIBOR Definition was published by the BBA, including to the Closed Banks, and was also represented by the BBA to be the standard by which USD LIBOR was determined.

(2) In order to set USD LIBOR at the material times, the BBA required USD Panel Banks to make daily submissions of the rates at which they honestly perceived that they could borrow USD funds for the relevant tenor in accordance with the LIBOR Definition and the BBA Guidance. The upper and lower quartiles of USD Panel Banks' submissions for each tenor were then excluded pursuant to a so-called "trimming" process, and a mean average of the two central quartiles of submissions for each tenor was taken and published as USD LIBOR.

(3) USD LIBOR was the most widely referenced interest rate benchmark in the world, used by market participants globally (such as the Closed Banks) as a reference rate for adjustable (*i.e.* floating) rate loans and securities, derivatives and many other transactions. Accordingly, in 2008, the BBA itself described USD LIBOR as "*the world's most important number*", and estimated that around $10 trillion of loans and $350 trillion of interest rate swaps were tied to it.

(4) Since June 2012, regulators and courts around the world have found, and Panel Banks (including the Bank Defendants) have admitted, that LIBOR, and USD LIBOR in particular, was collusively and deliberately manipulated by Panel Banks for their own financial advantage through the provision of knowingly false rate submissions to the BBA as part of the LIBOR -setting process.

(5) In this regard, many hundreds of examples of manipulation across several currencies and tenors have been identified, including in relation to USD LIBOR. This has led to extensive regulatory sanctions, as part of which, findings and admissions have been made that Panel Banks (including the Bank Defendants)

regarded the LIBOR-setting process as "*a cartel*", "*a charade*", and "*a crock of rubbish.*"

(6) Such findings and admissions demonstrate that Panel Banks in general, and the Bank Defendants in particular, had the motive, opportunity and willingness to disregard their obligations and to manipulate LIBOR in their own interests. Several ex-Panel Bank employees have also been criminally convicted as a result of such wrongdoing.

(7) The FDIC-R's claim arises out of a particular form of the manipulation of LIBOR by the Bank Defendants, namely the sustained and material suppression of USD LIBOR from August 2007 to at least the end of 2009 (and possibly later) (the "**Suppression Period**"). This suppression was achieved through the practice of making artificially low USD LIBOR submissions that did not reflect the relevant Bank Defendant's honestly perceived cost of obtaining funds and did not comply with the LIBOR Definition, as supplemented by the BBA Guidance from mid-2008 onwards (hereafter referred to as "**Lowballing**"). That there was suppression during (at least part of) the Suppression Period is also supported by a body of economic and academic opinion, on which the FDIC-R relies.

(8) The Bank Defendants had incentives to Lowball their USD LIBOR submissions, including incentives which arose from or were enhanced by the financial crisis. These incentives included a desire to present a false picture of the financial health of the banks, and of the financial system, and to distort competition between at least Bank Defendants and non-Panel Banks in relation to their trading portfolios. These incentives were only capable of being realised by the Defendants or at least the Bank Defendants, if they acted collusively or in concert.

(9) The Bank Defendants' collusive and/or concerted suppression of USD LIBOR during the Suppression Period was participated in and/or facilitated by and/or directed by their trade association, the BBA, and by a committee of the Panel Banks, known as the Foreign Exchange and Money Markets Committee (the "**FXMMC**"), which purported to regulate LIBOR.

(10) Bank Defendants including Barclays, Deutsche, Lloyds Group and/or Lloyds Bank (through their subsidiary, BoS) and UBS have admitted to regulators including the US Department of Justice (the "**DOJ**"), the US Commodity Futures Trading Commission (the "**CFTC**") and the United Kingdom ("**UK**") Financial Conduct Authority ("**FCA**") (formerly the UK Financial Services Authority ("**FSA**")) that they made artificially low USD LIBOR submissions during the Suppression Period. Furthermore, Bank Defendants Barclays, Lloyds Group and/or Lloyds Bank (on behalf of BoS) and UBS have admitted that they made artificially low USD LIBOR submissions persistently during all or part of the Suppression Period in order to avoid negative publicity concerning such submissions. In this regard (and by way of example only):

(a) In August 2007, a Barclays senior manager instructed Barclays' USD LIBOR submitters to stay "*within the pack*" and be nearer to the suppressed rates of other Panel Bank Defendants instead of making USD LIBOR submissions that were consistent with the LIBOR Definition. Similarly, on 19 November 2007, a Barclays USD LIBOR submitter stated to a colleague that he had been asked "*to keep the libors within the group (pressure from above)*", and on 4 December 2007, a Barclays USD LIBOR submitter raised concerns with his colleagues about the way in which Barclays and other Panel Banks were making USD LIBOR submissions, stating that "*we are… being dishonest by definition and are at risk of damaging our reputation in the market and with the regulators.*"

(b) In August 2007, a UBS executive sent an email to a senior manager and others stating that "*it is highly advisable to err on the low side with fixings for the time being to protect our franchise in these sensitive markets.*"

(c) On 5 September 2007, a USD LIBOR submitter at UBS sent a message to a senior manager stating: "*[w]e are fixing on the low side of all other banks in the libor panel in the 4-12 [month] period by several [basis* *points] .... [as a] bank we are erring on the low side.*" Subsequently (in around late April 2008), UBS managers began instructing the submitters to make USD LIBOR submissions that would be "*in the middle of the pack*" of the other Panel Banks' submissions, and on 17 April 2008, a UBS LIBOR submitter sent a message to a colleague stating: "*[t]he guidance I got from my management with regard to libors is that we should aim to be in the middle of the pack.*"

(d) In October 2007, a senior Deutsche executive sent a directive to Deutsche's USD LIBOR submitter Michael Curtler ("**Mr Curtler**") instructing him to "*make sure our libors are on the low side for all [currencies].*"

(e) In a transcribed telephone call, a Lloyds Bank executive stated that Lloyds Bank would "*probably*" make USD LIBOR submissions that were five or ten basis points lower than the prior day, but "*realistically that's not real. If you get challenged on that, you can't tell – well, that's where that bank can raise money because we couldn't.*"

(f) On 6 May 2008, a senior manager at Lloyds Bank's subsidiary HBOS sent a message to his colleagues stating: "*[i]t will be readily apparent that in the current environment no bank can be seen to be an outlier. The submissions of all banks are published and we could not afford to be significantly away from the pack.*"

(g) On 26 September 2008, HBOS' USD submitter wrote to an employee of another financial institution (the identity of which has not been disclosed) that "*youll [sic] like this ive [sic] been pressured by senior management to bring my rates down into line with everyone else.*"

(11) Further evidence, which includes evidence from the regulatory findings and relevant criminal trials shows that, *inter alia*:

(a) By August 2007, the FXMMC had agreed that USD LIBOR submissions should be within five basis points of the median, and that submissions outside this range would be flagged and questioned.

(b) By late 2007, the BBA had discussed the apparent suppression of USD LIBOR with Panel Bank executives and had concluded that USD LIBOR "*clearly [wasn't] the rate at which banks lend to each other*", and that "*[d]ollar LIBOR [was] most out of line.*"

(c) In April 2008, having noted a "*general consensus*" that USD LIBOR was 20 to 30 basis points too low, the BBA devised and implemented an attempt to "*float the dollar rate slightly, gently, up*" by means of a "*co-ordinated action by a large number of Panel Banks.*" In doing so, the BBA implicitly acknowledged that: (i) the rate was too low; (ii) that it would be influenced by concerted action; and (iii) that the BBA was willing to direct, facilitate, or at least tolerate such action.

(d) Subsequently the BBA noted that USD LIBOR had "*improved*" but "*ha[d] not stayed there*". However, the BBA did not make public its conclusions that its own benchmark was being abused, or reveal its attempt to limit and conceal the suppression of USD LIBOR. Instead, it sought to mislead users of USD LIBOR, and of LIBOR more generally, including the Closed Banks, by reassuring them that there was no problem.

(e) Thus, on 10 June 2008 the BBA and the FXMMC published a consultation paper entitled "*Understanding the construction and operation of BBA LIBOR – strengthening for the future*" (the "**BBA/FXMMC Paper**"), which suggested that market concerns about LIBOR were related to "*misunderstandings and misperceptions*" on the part of users, and that LIBOR had "*fundamental transparency and accountability.*" A further statement was made in August 2008 that "*all contributing banks are confident that their submissions reflect their perception of their true costs of borrowing*" and that LIBOR was a "*fundamentally robust and accurate benchmark.*" The Defendants knew these assurances to be fundamentally untrue.

(f) In September 2008, the BBA noted that "*nobody was putting in real LIBOR rates.*" However, it does not appear to have taken any further action.

4. Accordingly, and also without prejudice to the more detailed particulars that follow, the FDIC-R, as receiver for and in the right of the Closed Banks, claims as follows:

(1) USD LIBOR was materially suppressed during the Suppression Period. It was not, as it was supposed to be, set in accordance with the LIBOR Definition as supplemented by the BBA Guidance from mid-2008 onwards (see paragraphs 34(2) and 34(5)) because it was not a mean average of the rates at which USD Panel Banks honestly perceived that they could obtain unsecured USD funds were they to do so by asking for and then accepting interbank offers in a reasonable market size just prior to 11.00am London time on any particular day (following the trimming of the upper and lower quartiles of submissions). Instead, on a sustained basis throughout the Suppression Period, USD LIBOR was a materially lower rate than it would have been, had it in fact been set in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards).

(2) The material suppression of USD LIBOR during the Suppression Period was the result of an agreement to which: (i) the Defendants or (ii) the Bank Defendants were parties, that the Bank Defendants would make artificially low (and false) LIBOR submissions to the BBA and/or would exchange commercially sensitive information about their USD LIBOR submissions (the "**Agreement**").

(3) Alternatively, insofar as there was no Agreement, the material suppression of USD LIBOR during the Suppression Period was the result of collusive and concerted action on the part of: (i) the Defendants or (ii) the Bank Defendants, that the Bank Defendants would make artificially low (and false) LIBOR submissions to the BBA and/or would exchange commercially sensitive

information about their USD LIBOR submissions (the "**Concerted Behaviour**").

(4) The Agreement and/or Concerted Behaviour of the Defendants was conducted in secret and not known to the FDIC-R, or any Closed Bank, during the Suppression Period. As a result of such secrecy, the FDIC-R does not know the identity of each of the parties to the Agreement or the Concerted Behaviour – including the extent to which all or a subset of the other USD Panel Banks (*i.e.*, the non-Defendant Panel Banks) were such parties – and reserves its right to amend these Particulars of Claim following disclosure.

(5) In this respect, the FDIC-R neither needs nor is required to allege or prove any misconduct on the part of any or all of the non-Defendant Panel Banks. However, if and to the extent that it is necessary to establish that any or all of the non-Defendant Panel Banks committed any wrongdoing, then the FDIC-R's case will be that on the balance of probabilities any such non-Defendant Panel Bank was a party to the Agreement and/or Concerted Behaviour alleged. The liability to the FDIC-R of any or all of the non-Defendant Panel Banks incorporated in the US, arising out of the conduct summarised above, is presently the subject of litigation before the US District Court for the Southern District of New York in Case No.: 1:14-cv-01757-NRB; MDL No. 2262 (the "**US Litigation**").

(6) Further or alternatively:

(a) the BBA Parties' daily publication of the USD LIBOR rate during the Suppression Period; and/or

(b) the BBA Parties' decision to be a party to the Agreement and/or Concerted Behaviour; and/or

(c) the BBA Parties' decision to be a party to and/or their participation in or facilitation of the agreements particularised at paragraph 74 below and reached between: (i) the BBA Parties and the FXMCC; and (ii) the Bank Defendants and/or any or all of the other Panel Banks as may also have been parties, each constituted decisions of an association of undertakings (collectively the "**Decisions**") within the meaning of Article 101(1) of The Treaty on the Functioning of the European Union ("**Article 101**") and/or Section 2 of Chapter I of the Competition Act 1998 (the "**Chapter I Prohibition**").

(7) The Agreement and/or Concerted Behaviour and/or Decisions constituted an infringement of Article 101 and/or the Chapter I Prohibition and thus an actionable breach of statutory duty. Without limitation, the Agreement and/or Concerted Behaviour and/or Decisions distorted competition by fixing the price and/or other trading conditions in markets for USD LIBOR-linked and other financial products in which, *inter alia*, the Bank Defendants and the Closed Banks participated as more particularly set out in sections E2 and E3 below.

(8) Further or alternatively, the Bank Defendants (see paragraph 12), the other USD LIBOR Panel Banks and/or the BBA Parties made various representations in relation to USD LIBOR submissions and USD LIBOR which they did not believe to be true, and which they intended a class of persons including the Closed Banks to rely on. The Closed Banks did rely on the Representations, including by entering into transactions in the US using or priced by reference to USD LIBOR, and by using USD LIBOR to calculate interest payable. The Closed Banks suffered loss as a result. The FDIC-R claims in this respect under US state laws in the tort of deceit (also referred to as fraudulent misrepresentation), and further alleges that by reason of the Agreement and/or the Concerted Behaviour, the BBA Parties and/or USD LIBOR Panel Banks, including the Bank Defendants, conspired to commit, and/or aided and abetted one another in committing, that tort.

B. PARTIES

B1. Claimant

5. The Claimant is the FDIC in its capacity as the receiver for the Closed Banks. The FDIC is an agency of the United States empowered to insure the deposits of depository institutions by virtue of the Federal Deposit Insurance Act (12 U.S.C. § 1811(a)).

6. Under the Federal Deposit Insurance Act (12 U.S.C. § 1811, *et seq.*), the FDIC acts in separate, and legally distinct, capacities: (i) the FDIC acts as a regulator and insurer of deposits of depository institutions; and (ii) upon appointment, the FDIC acts as receiver or conservator for failed insured depository institutions (12 U.S.C. § 1821(c)). By virtue of 12 U.S.C. §§ 1819, 1821(d)(2)(A)(i), the FDIC-R, in its distinct capacity as receiver, succeeds to all claims held by each failed depository institution for which it is appointed as receiver. The FDIC-R is empowered to pursue claims held by the Closed Banks, including the claims against the Defendants in this action.

7. When, as here, the FDIC-R is acting in its capacity as receiver for failed insured depository institutions, any recoveries made by the FDIC-R on claims of those institutions are for the individual receiverships (12 U.S.C. § 1821), rather than the United States Treasury.

8. The name of each Closed Bank, the jurisdiction in which it was headquartered, the date on which the FDIC was appointed as the Closed Bank's receiver, and the product markets in which the Closed Bank competed that are pertinent to the claims, are set out in Schedule 2.

9. At all material times, each of the Closed Banks was a participant (together with, *inter alia*, the Bank Defendants and other Panel Banks) in various markets for USD LIBOR linked financial products and other products as more fully particularised below.

10. Without limitation, the Closed Banks used and relied upon USD LIBOR in the following ways:

    (1) Using USD LIBOR in their risk management systems, which *inter alia* valued the banks' assets and liabilities.

    (2) Incorporating USD LIBOR as the benchmark interest rate in adjustable (*i.e.* variable) rate loans which they made to commercial and residential customers (ordinarily by charging the customer the prevailing USD LIBOR rate plus a specified percentage).

(3) Incorporating USD LIBOR as the benchmark interest rate in residential and commercial mortgages.

(4) Using USD LIBOR as a price discovery mechanism in pricing the interest rate for fixed rate loans to customers, *inter alia* by: (i) reference to the prevailing conditions in the USD LIBOR linked interest rate swap markets; (ii) by applying a formula, or otherwise taking USD LIBOR into account, so that the interest rate for the fixed rate loan would be at the current USD LIBOR swap rate plus a percentage; or (iii) as one of a number of factors in determining the interest rate, *i.e.* the price of fixed rate products.

(5) Incorporating USD LIBOR as the benchmark interest rate in so-called "*over-the-counter*" (*i.e.* bilaterally traded) ("**OTC**") and Exchange-Based derivatives contracts and other interest rate derivative products such as interest rate swaps, forward rate agreements, and interest rate options (including caps, floors and collars) ("**IRDs**"), and/or by agreeing to enter into such products on terms incorporating USD LIBOR.

(6) Using USD LIBOR as a price discovery mechanism in the sale and purchase of USD LIBOR-linked loans, or portfolios thereof (including securitisations), and of derivatives in the secondary market(s).

11. Schedule 2 to these Particulars sets out more detail in relation to the Product Markets in which each Closed Bank used USD LIBOR.

B2. The Defendants

The Bank Defendants

12. As set out above, the FDIC-R brings claims against the following nine defendant financial institutions (referred to as the Bank Defendants) in these proceedings:

(1) Barclays, a bank having its registered office at 1 Churchill Place, London E14 5HP.

(2) BoS, a bank having its registered office at The Mound, Edinburgh EH1 1YZ. BoS is sued in its own right and also in its capacity as a representative and member of the BBA.

(3) Rabobank, a Dutch bank with its registered office at Croeselaan 18, 3521 CB Utrecht, The Netherlands.

(4) Deutsche, a German bank with its registered office at Taunusanlage 12, 60325 Frankfurt, Federal Republic of Germany. Deutsche is sued in its own right and also in its capacity as a representative and member of the BBA.

(5) Lloyds Group, a bank with its registered office at The Mound, Edinburgh EH1 1YZ. Lloyds Group is sued in its own right and also in its capacity as a representative and member of the BBA.

(6) Lloyds Bank, a bank with its registered office at 25 Gresham Street, London EC2V 7HN.

(7) RBS, a bank with its registered office at 36 St Andrew Square, Edinburgh EH2 2YB.

(8) RBS Group, a bank with its registered office at 36 St Andrew Square, Edinburgh EH2 2YB. RBS Group is sued in its own right and also in its capacity as a representative and member of the BBA.

(9) UBS, a Swiss bank with its registered office at Aeschenvorstadt 1, 4051 Basel, Switzerland. UBS is sued in its own right and also in its capacity as a representative and member of the BBA.

13. At all material times, each of the Bank Defendants was either a USD Panel Bank – a member of the panel of 16 banks which contributed USD LIBOR submissions used to calculate USD LIBOR – or was responsible for the USD LIBOR submissions of a Panel Bank, save that:

(1) The publicly available information is unclear and contradictory regarding which of Lloyds Group, Lloyds Bank, and BoS was a Panel Bank (or were Panel Banks)

and/or responsible for USD LIBOR submissions on behalf of the relevant Panel Bank(s) during and/or throughout the Suppression Period. The FDIC-R has sought to clarify this in correspondence and will, if appropriate, amend its claim in light of the response received.

(2) The publicly available information is unclear and contradictory regarding which of RBS Group and RBS was a Panel Bank and/or was responsible for USD LIBOR submissions on behalf of the relevant Panel Bank during and/or throughout the Suppression Period. The FDIC-R has sought to clarify this in correspondence and will, if appropriate, amend its claim in light of the response received.

The BBA Parties

14. The BBA is and was during the Suppression Period the trade association for the UK banking sector. It is an unincorporated association and is sued in these proceedings via BoS, Deutsche, Lloyds Group, RBS Group, and UBS as representatives and members of the association (the "**Representative Parties**"). Throughout the Suppression Period the BBA owned "bbaLIBOR™", referred to herein as LIBOR.

15. BBA Enterprises is a company with its registered office at 105–108 Old Broad Street, London EC2N 1EX. BBA Enterprises is a wholly owned subsidiary of the BBA.

16. In late 2009, the BBA incorporated a new company, BBA LIBOR Ltd, now known as BBA Trent Ltd, and referred to herein as BBA Ltd. BBA Ltd was incorporated by the BBA to govern LIBOR and, following its incorporation, BBA Ltd took over responsibility for the day-to-day running of the benchmark.

17. The BBA, BBA Enterprises and BBA Ltd are collectively referred to herein as the BBA Parties.

18. The day-to-day business of the BBA Parties during the Suppression Period was run by the BBA's Chief Executive, Angela Knight ("**Ms Knight**"), who joined the BBA in 2007, and its Deputy CEO, Sally Scutt ("**Ms Scutt**").

19. John Ewan ("**Mr Ewan**") joined the BBA in 2005 as its LIBOR Manager. Mr Ewan was given the title of LIBOR Director in 2007. Mr Ewan was responsible for the day-to-day business of LIBOR, including USD LIBOR, and acted as secretary to the FXMMC (see further paragraphs 26 to 30 below).

20. Alex Merriman ("**Mr Merriman**") held responsibility at the BBA for LIBOR prior to Mr Ewan's appointment in 2005. Thereafter, he remained involved in the BBA's management of LIBOR and in 2008 was appointed Executive Director of the Capital Markets Team, a role which included oversight of LIBOR.

21. The BBA was governed by: (i) an Executive Committee comprising Ms Knight and Ms Scutt; (ii) a council (the "**BBA Council**") comprising Ms Knight, Ms Scutt and 21 members drawn from the BBA membership; and (iii) a board comprising Ms Knight and senior executives from 21 banks (the "**BBA Board**").

22. The BBA Council met twice per year before its abolition in 2014. Its remit was to manage strategic and reputational issues concerning the BBA and LIBOR.

23. The BBA Board met four times per year. The FDIC-R is not aware of the precise composition of the BBA Board (including its members and/or the represented banks) during the Suppression Period but, pending further disclosure, infers it included senior representatives of a number of USD LIBOR Panel Banks including the Bank Defendants.

24. Members of the BBA Council and/or BBA Board held office as representatives of the Panel Banks who employed them and in their capacity as employees or agents thereof. Accordingly:

(1) The relevant Panel Bank in respect of each individual is vicariously liable for their actions as members of the BBA Council and/or BBA Board.

(2) Their knowledge acquired as members of the BBA Council and/or BBA Board, as well as otherwise in the course of their employment, is to be attributed to the Panel Banks.

25. The BBA and/or the BBA Parties together with the Representative Parties and the other Panel Banks that were representatives and members of the BBA are an association of undertakings for the purposes of Article 101 and/or the Chapter I Prohibition.

The FXMMC

26. The FXMMC, a body without separate legal personality, was a committee of representatives of a number of banks (including the Panel Banks) which was, as the BBA set out in the BBA/FXMMC Paper, independent of the BBA.

27. The FDIC-R understands that a large number of the Panel Banks had a seat on the FXMMC. The FDIC-R is aware of at least the following members during the Suppression Period:

(1) Miles Storey ("**Mr Storey**") (Barclays' Head of Group Balance Sheet) as Chairman;

(2) Jon Wood ("**Mr Wood**") (HSBC Bank PLC's Head of Balance Sheet Management) as Chairman after Mr Storey;

(3) Mr Curtler (a senior trader and former Head of Global Finance at Deutsche who was subsequently convicted in the US on charges of wire fraud and conspiracy arising out of the manipulation of LIBOR) as Deputy Chairman;

(4) Clive Jones (Lloyds Bank's Head of Treasury Markets);

(5) Andrew Thursfield (Citibank's Head of European Risk Treasury);

(6) Ian Fox (HBOS' Head of Funding and Liquidity);

(7) Panagiotis Koutsogiannis (a senior trader at UBS who served as Head of Funding Management for UBS' Fixed Income, Currencies and Commodities Division ("**FICC**") from 2009, and who also acted as Treasurer of UBS's FICC Executive Committee);

(8) Mark Thomasson (a senior trader on RBS's Short Term Markets desk);

(9) Phil Rawlins ("**Mr Rawlins**") (HBOS' Senior Director of Money Markets); and

(10) Frederick Mouchel ("**Mr Mouchel**") (JP Morgan Chase & Co's ("**JP Morgan**") Managing Director of EMEA Treasury).

28. Members of the FXMMC held office as representatives of the Panel Banks who employed them and in their capacity as employees or agents thereof. As a result:

(1) The relevant Panel Bank in respect of each individual is vicariously liable for their actions as members of the FXMMC.

(2) Their acquired knowledge, and conduct as members of the FXMMC, as well as otherwise in the course of their employment, is to be attributed to the Panel Banks.

29. During the trial of Tom Hayes (the "**Hayes Trial**"), a former trader for defendant UBS who was convicted in 2015 on charges of conspiracy to defraud in respect of LIBOR manipulation ("**Mr Hayes**"), Mr Ewan gave evidence that:

(1) The FXMMC was "*a decision making body which oversaw the panel banks as contributors to or of the rates for LIBOR.*" The FXMMC met annually, but in the height of the financial crisis it met quarterly and had *ad hoc* meetings.

(2) The main issue considered by the FXMMC during the financial crisis was whether "*the definition of LIBOR meant that we could still set an accurate rate through this remarkable turmoil in the market.*"

(3) The FXMCC was "*made up of individuals, largely representatives of LIBOR rate-setting banks.*"

(4) The FXMMC was designed to provide practitioner advice on money market issues and LIBOR.

(5) The FXMMC had oversight of the membership of submitter panels and was the ultimate body that was responsible for issues of governance, scrutiny and surveillance of LIBOR generally.

(6) If Mr Ewan received a complaint about LIBOR, his first thought would be to call a member of the FXMMC, probably the Chairman, and ask his view as to

whether the issue was worthy of investigation. If the Chairman thought it was worthy of investigation, Mr Ewan would try to obtain the relevant information and present it in full to the FXMMC.

(7) The FXMMC was separate from the BBA, but its meetings were held at BBA premises, and Mr Ewan (as secretary) would take the minutes.

(8) The BBA had no "*seat or vote at any time.*"

(9) The BBA was "*absolutely not*" empowered to overrule, challenge or alter any decisions by the FXMMC.

30. As explained further below, the effect of the BBA and FXMMC structure and/or relationship was such that there were frequent discussions between Panel Banks (*inter alia* as members of the BBA and/or the FXMMC) about USD LIBOR submissions and the level at which USD LIBOR was set. Moreover, complaints about USD LIBOR submissions and/or the setting process would be made, in effect, to representatives of the very banks about which complaint was (or might) be made. This: (i) created a conflict of interest; and (ii) served to form, facilitate and/or maintain the Agreement and/or Concerted Behaviour and/or Decisions.

C. ESSENTIAL BACKGROUND

C1. LIBOR and the LIBOR-setting process

LIBOR and how it was set

31. The BBA's version of LIBOR was created in 1986. It is a benchmark reference rate and interest rate index that is also used as a price discovery tool. During the Suppression Period it was set each day at 11.00am London time in relation to 10 currencies (namely AUD, CAD, CHF, DKK, EUR, GBP, JPY, NZD, SEK and USD) and 14 maturities.

32. By the mid-2000s the London interbank market was an important source of cash for banks seeking to fund USD assets. The London interbank market enabled banks in need of cash to obtain USD deposits outside of the US ("**Eurodollars**"), either on an overnight basis or for fixed terms of different tenors.

33. During the Suppression Period, LIBOR was owned and administered by the BBA and overseen by the FXMMC.

34. For each currency and each maturity, LIBOR was during the Suppression Period set by a mathematical process based on submissions made by the relevant group of contributing banks ("**Panel Members**"). At all material times:

(1) Panel Members for each currency were selected annually by the FXMMC from volunteers who, based on the scale of their market activity, were purportedly active in the London market in the relevant currencies and in reasonable amounts and who would have the best and most accurate knowledge of interbank borrowing costs for each currency and tenor.

(2) In accordance with the LIBOR Definition, each Panel Member was required to submit to Thomson Reuters (acting as agent for the BBA and/or the BBA Parties) shortly before 11.00am London time on each working day, their answer to the question: "*[a]t what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11am?*" The BBA has described LIBOR as being based on the "*rate at which a bank could go into the London interbank money market and obtain funding...*"

(3) USD LIBOR was set for all tenors by excluding the top quartile and bottom quartile of Panel Bank submissions, and producing a mean average of Panel Bank submissions in the two central quartiles.

(4) Thomson Reuters then published the resultant number for each tenor (being the trimmed arithmetic mean of the two central quartiles of Panel Bank submissions) (referred to by the BBA and by market participants as the so-called daily LIBOR "fix" or "fixing") for all tenors and currencies on behalf of the BBA and/or the BBA Parties.

(5) From mid-2008 onwards, the LIBOR Definition was amplified and conditional upon the BBA Guidance, which provided as follows:

- "*The rate at which each bank submits must be formed from that bank's perception of its cost of funds in the interbank market.*

- *Panel banks are asked for their own rates, rather than the rate at which a hypothetical bank could borrow, which is the definition used by some other fixes.*

- *The fixings must represent rates formed in London and not elsewhere.*

…

- *The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.*"

(6) Further guidance provided that:

- "*In the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds.*

- *The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit.*

- *The area of the contributing bank that has the primary responsibility for managing that bank's cash will be solely responsible for the calculation and accuracy of the rate submitted.*"*…*

Market intelligence: Whilst a bank's LIBOR submissions are its own perception of where it could take funds, this is shaped by a wide number of factors. Contributor banks will be constantly in touch with clients and intermediaries and the information that they receive from them ***will naturally contribute to a bank's perception of its cost of funds. However, contributors should not ask intermediaries where they believe LIBOR rates will set on a given day and use this as a basis for submissions. This misses the point of a benchmark and is a circular process that would rapidly lead to inaccurate rates.***" *(Emphasis added.)*

The importance of LIBOR

35. As stated at paragraph 3(3), during, and after, the Suppression Period, LIBOR was viewed by the Defendants as the world's most important number. It was described as such by the BBA in May 2009.

36. As stated by the BBA and the FXMMC in the BBA/FXMMC Paper:

(1) LIBOR was by far the most widely referenced interest rate benchmark in the world, including in financial contracts that required an interest rate benchmark, and the primary benchmark for short-term interest rates globally. It had an

importance going beyond interbank lending and touching everyone from large international conglomerates to small borrowers.

(2) A large majority of floating rate securities and loans issued globally were tied to LIBOR and it was a critical reference rate in the interest rate derivatives market; this was particularly the case for USD LIBOR.

(3) LIBOR was of wider significance, including as a source of price discovery in related financial markets, including bonds, loans, derivatives, mortgages (including US mortgages) and foreign exchange contracts. LIBOR rates generally, and LIBOR submissions for individual Panel Banks, contained elements of premium for both credit and liquidity risks, and were therefore viewed as indicators of the financial health of individual Panel Banks.

(4) Around $10 trillion of loans and $350 trillion of interest rate swaps were tied to LIBOR as of June 2008.

(5) The way in which LIBOR was set and administered had an impact on the securities, loan and derivatives markets, which in turn had impacts upon price terms, other terms and outcomes of individual contracts.

37. The BBA's LIBOR FAQs published on its website, and which the FDIC-R believes to have been published on or around 31 October 2002, explained:

> "*It [LIBOR] is important because it is long established. It offers the largest range of international rates. It is a truly international reference rate. It has wide commercial use. It enjoys wide international dissemination. Its mechanism is transparent. It's important because of the credibility of providing a robust settlement rate of the credit quality of panel banks. It is important because the banks represented on the panel are active in the cash markets.*"

38. LIBOR was represented by the BBA and the Panel Banks to be a reliable benchmark because, *inter alia*, as stated and represented by the BBA and the FXMMC:

(1) For USD LIBOR, the Panel Banks captured a large majority of the activity that took place in the London markets and, indirectly, elsewhere in Europe.

(2) For USD as well as for other currencies, the BBA required Panel Members to make submissions based on the rates at which they honestly believed they could borrow, without reference to anyone else's actual or expected submissions. The BBA made those submissions public, rather than keeping them confidential (as in the case of the US Federal Reserve Board's (the "**US Federal Reserve**") H15 index) or seeking submissions by reference to the estimated borrowing rates of a hypothetical bank (as in the case of the EURIBOR index).

39. The widely intended, and known, uses of LIBOR as a benchmark and of LIBOR rates (especially USD LIBOR) during the Suppression Period included the uses set out at paragraph 10 above. The Closed Banks made use of LIBOR as set out at paragraph 10 above in *inter alia* the markets defined in section E2 below.

40. In the premises, during the Suppression Period, the use of and the integrity of the LIBOR benchmark and of LIBOR rates, including USD LIBOR, were of fundamental importance to both UK and international financial markets:

(1) As stated by the BBA in a Press Release dated 17 December 2008, LIBOR "*has always been relied on by the market as a reliable benchmark*" of borrowing costs.

(2) As stated in internal BBA documents, 50% of global swaps and "*a significant number of U.S. mortgage products*" were priced according to USD LIBOR rates.

(3) The Final Report of the Market Participants' Group dated March 2014 indicates that, as of 2013, nearly two thirds of US adjustable rate retail mortgages incorporated USD LIBOR rates, and 30%-50% of commercial mortgages and business loans in the US incorporated USD LIBOR as the interest rate benchmark.

(4) The BBA advertised LIBOR and solicited business in the US, including in the jurisdictions in which the Closed Banks were headquartered. In 2007, the BBA sought and obtained a trademark for LIBOR from the US Patent and Trademark Office (Registration No 3212218).

D. USD LIBOR SUBMISSIONS WERE (COLLUSIVELY) SUPPRESSED, AND THUS USD LIBOR WAS SUPPRESSED, BY THE DEFENDANTS

D1. USD LIBOR was suppressed during the Suppression Period

41. Throughout the Suppression Period, USD LIBOR was materially suppressed on a sustained basis. The Bank Defendants' USD LIBOR submissions were false in that they did not reflect the rates at which they honestly perceived they could borrow unsecured Eurodollar funds were they to do so by asking for and then accepting interbank offers in a reasonable market size just prior to 11.00am London time. This meant that USD LIBOR was not an accurate reflection of (at least) the Bank Defendants' cost of funds. Instead, on a daily basis throughout the Suppression Period, USD LIBOR was set on a sustained basis at a materially lower rate than the rate at which it would have been set, if it had been set in accordance with the LIBOR Definition, and (from mid-2008 onwards) the BBA Guidance.

42. The precise amount by which USD LIBOR was suppressed throughout the Suppression Period will be a matter for expert evidence and for determination at trial. The FDIC-R will rely on, *inter alia,* the difference between: (i) the Bank Defendants' (and/or the other Panel Banks) USD LIBOR submissions during the Suppression Period on the one hand; and (ii) on the other hand the actual cost of borrowing to the Bank Defendants (and/or the other Panel Banks) during the Suppression Period by reference to the cost of funds in transactions the Bank Defendants (and/or the other Panel Banks) in fact entered into, and/or expert evidence as to the Bank Defendants' (and/or other Panel Banks') actual (or likely) costs of borrowing in the interbank market (or markets) for the borrowing and lending of USD (the "**Interbank Market(s)**").

43. The precise length of the Suppression Period is not within the FDIC-R's current knowledge absent disclosure. At present, the FDIC-R believes that the Suppression Period spans August 2007 to at least the end of 2009 and potentially later, as there are indicators that the Suppression Period and/or the effects of the material suppression during the Suppression Period may have continued until around the end of 2011. In particular, the relationship between the Eurodollar Deposit Rate, an index published by

the US Federal Reserve (the "**Eurodollar Deposit Rate**"), and USD LIBOR changed fundamentally during the Suppression Period and did not return to its expected, pre-Suppression Period level (as compared with USD LIBOR) until the end of 2011. By way of further explanation:

(1) Prior to the Suppression Period, three month USD LIBOR was consistently a few basis points above the three month Eurodollar Deposit Rate published by the US Federal Reserve from 2002-2006.

(2) However, from around the start of the Suppression Period (*i.e.* around the summer of 2007), USD LIBOR rates fell below the Eurodollar Deposit Rate, sometimes dramatically, and remained below the Eurodollar Deposit Rate until late 2011.

(3) This supports the potential for the Suppression Period to have continued until around the end of 2011.

44. Pending disclosure of the Bank Defendants' (and the other Panel Banks') true cost of funding during the Suppression Period, the FDIC-R relies on the following sources as indicating material suppression of USD LIBOR during the Suppression Period:

(1) Regulatory findings against and admissions made by Panel Banks.

(2) Evidence given in the trials of traders and brokers accused (and in some instances convicted) of criminal offences connected with the manipulation of LIBOR.

(3) Economic and academic analysis indicating that USD LIBOR was suppressed during the Suppression Period.

Regulatory findings and admissions

45. The FDIC-R also relies on regulatory findings and admissions of sustained suppression, including findings and admissions relating particularly to the Bank Defendants.

(1) Each of the Bank Defendants (and some of the other Panel Banks) has been the subject of detailed investigations by at least the CFTC, the DOJ, the FCA (or its predecessor, the FSA), and/or the European Commission.

(2) The regulatory findings confirm that, specifically as regards material and sustained suppression, at least three of the Bank Defendants (namely, Barclays, UBS, and Lloyds Group and/or Lloyds Bank (through HBOS, now BoS) deliberately and on a sustained basis made artificially low LIBOR submissions in various currencies, most notably USD LIBOR, during the Suppression Period in order to avoid negative publicity concerning their own creditworthiness and/or to enhance their profitability. Furthermore, Deutsche was also found to have made artificially low USD LIBOR submissions during the Suppression Period. These artificially low submissions were intended to, and did in fact, materially suppress USD LIBOR rates during the Suppression Period. The regulatory findings suggest that these false USD LIBOR submissions were made at the direction of senior managers within the Panel Banks, and that the BBA Parties and the FXMMC were aware of and facilitated, and/or directed, this unlawful conduct.

46. By way of example only, regulatory findings and admissions concerning the deliberate Lowballing of USD LIBOR submissions (and in consequence the suppression or possible suppression of USD LIBOR) by UBS, Barclays, Deutsche and Lloyds Group and/or Lloyds Bank (through BoS), as well as the (non-Defendant) Citibank NA ("**Citibank**"), are set out in Schedule 3 to these Particulars of Claim.

47. These artificially low submissions were made in order to protect their reputations (including insofar as their creditworthiness and/or ability to access liquidity affected the same). Despite these admissions of Lowballing, two of these banks (Barclays and HBOS, now BoS) provided the highest USD LIBOR submissions during the last two weeks of September 2008. This supports an inference that other Bank Defendants and/or Panel Banks were still making artificially low USD LIBOR submissions at that time.

48. Given that at least the Bank Defendants were materially Lowballing their USD LIBOR submissions during the Suppression Period, it follows that USD LIBOR was materially suppressed during that period, even after accounting for the exclusion of the highest and lowest quartiles of submissions.

49. These investigations have also revealed that, at least, each of the Bank Defendants unlawfully manipulated and/or attempted to manipulate LIBOR rates in various

currencies, including USD LIBOR. The regulators have identified hundreds of examples of derivatives traders at Panel Banks (including the Bank Defendants) ignoring the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards) and routinely colluding with LIBOR submitters at other Panel Banks in order to manipulate USD LIBOR, and other LIBORs, for the benefit of their own derivatives trading positions. These findings, whilst not relating to Lowballing and the sustained suppression of USD LIBOR, demonstrate that the Bank Defendants, and other Panel Banks:

(1) Were able to manipulate LIBOR rates according to their own interests and were willing to disregard any legal restraints in so doing; and

(2) Exchanged commercially sensitive information about LIBOR submissions and agreed with each other as to the level of their LIBOR submissions.

Evidence in criminal proceedings

50. There is evidence from the criminal proceedings referenced previously regarding the deliberate Lowballing of USD LIBOR submissions by Panel Banks. That evidence is more fully set out in sections D2 and D3 below. The FDIC-R here relies on those matters set out in section D2 and D3, but also makes particular reference to various contemporaneous acknowledgments that USD LIBOR was too low, including:

(1) At a meeting convened by the Bank of England on 15 November 2007, attended by bank executives – including, the FDIC-R infers, Bank Defendants represented on the FXMMC – several bank executives noted that LIBOR looked artificially low, suggesting that banks might be understating their true borrowing costs to mask their financial problems.

(2) By 28 November 2007 Mr Ewan noted that he was receiving:

> "*[M]ore and more comments and queries on the levels at which rates are currently setting. These universally state that the rates are unrealistically low as the few offers of cash in the market are well above posted BBA LIBOR rates. Others comment that the BBA LIBOR rates do not correlate accurately with other market indicators.*"

(3) On 29 November 2007, Mr Storey expressed in a telephone call the concern that:

"*LIBORs are being set lower than they should be because in the aggregate banks are afraid to stick their heads above the parapet and post higher numbers because of what happened to us when we did, you get shot at.*" (Emphasis added.)

(4) At a BBA meeting on 30 November 2007, several attendees expressed concern that LIBOR fixings had been lower than the rates at which Panel Banks were actually borrowing in the interbank market.

(5) On 5 December 2007 (which was at an early stage of the financial crisis), Mr Ewan was tipped off by an individual at Gulf International Bank who informed him that a Panel Bank had offered to borrow money at 10 basis points above its LIBOR submissions.

(6) On 6 December 2007 Mr Ewan sent an email to the members of the FXMMC noting that: "*some committee members agree that the BBA LIBOR rates are currently setting below 'real' market rates but some do not feel that this is the case, at least as a general statement across all currencies*." He noted that he had information from two sources that Panel Banks had offered to take US dollars at 10 basis points above the rates they had submitted in the fixing process earlier in the day. He expressed the view that if this was true, it should not be allowed to continue.

(7) Prior to a meeting on 11 December 2007 between BBA officials and members of the FXMMC, Mr Ewan wrote that LIBOR "*clearly isn't the rate at which banks lend to each other.*" At the meeting it was said that "*Dollar LIBOR is most out of line.*"

(8) An internal BBA document dated 18 April 2008, noted "*[a] general consensus is that US dollar LIBOR is currently inaccurate by 20-30 basis points.*"

(9) At the Hayes Trial:

(a) Ms Scutt testified that the BBA knew from market intelligence it was receiving that LIBOR quotes in dollars were not accurate.

(b) Mr Ewan recognised that there was a conflict of interest between (i) the BBA's responsibility for ensuring that LIBOR was accurate and (ii) protecting the interests of the BBA's members who might be manipulating the rate in their own interest. That conflict of interest has also been recognised in the Wheatley Report, which was published following an independent review of LIBOR established by the UK Government.

(c) Mr Ewan admitted that on "*at least one occasion*" he had received a complaint about the manipulation of USD LIBOR but he did not seek to identify the relevant Panel Bank because of this conflict of interest.

(10) As stated in an internal BBA memorandum dated 9 April 2008 from Mr Ewan to Ms Knight and the BBA's Regulation team:

(a) The BBA had received a number of complaints, including from FXMMC members, of persistent suppression.

(b) Mr Ewan considered some of those complaints "*compelling*."

(c) There were "*often*" cases in which a bank would deal at 20 or 30 basis points higher than its daily LIBOR submission.

(d) The "*major issue*" faced by the BBA related to USD LIBOR.

Economist and academic analysis

51. Various economists and academics have concluded that USD LIBOR was suppressed during (at least part of) the Suppression Period. By way of example only:

(1) Youle (2015) concluded that, by reference to spreads on credit default swaps ("**CDS**"), after the financial crisis began in 2007, the USD LIBOR rate distorted downwards by eight basis points until October 2009 (that being the end of the period studied).

(2) Monticini and Thornton (2013) concluded that the evidence they reviewed was consistent with the underreporting of USD LIBOR rates by Panel Banks which had the effect of reducing the published one month and three month USD LIBOR rates.

(3) Frunza (2013) found that, by reference to US Constant Maturity Treasury Rates and CDS spreads, three month USD LIBOR was suppressed by a statistically significant amount as against what it (theoretically) should have been after July 2007 until the last quarter of 2008.

D2. The Suppression was the result of deliberately lowballed submissions by the Bank Defendants and the other Panel Banks

52. The material and sustained suppression of USD LIBOR during the Suppression Period was the result of, at least, the Bank Defendants deliberately Lowballing their USD LIBOR submissions, in that:

(1) On a sustained basis, at least the Bank Defendants made artificially low USD LIBOR submissions.

(2) The Lowballed submissions did not meet the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards) in that they were not the rates at which the submitting bank believed they could actually borrow in the Interbank Market if they were to do so, or at which they could or were in fact borrowing.

(3) Rather, the submissions were made at a rate that was materially lower than that at which the submitting bank could borrow and/or honestly believed they could borrow in the Interbank Market if they were to do so. USD LIBOR as set by the BBA Parties was in consequence suppressed as pleaded in section D1 above.

(4) The persistent making of such Lowballed submissions by at least the Bank Defendants throughout the Suppression Period could only arise via deliberate and co-ordinated decisions. It is not plausible to suggest that the Bank Defendants misstated their costs of borrowing in the Interbank Market for such a prolonged period other than intentionally and in a coordinated manner.

53. Pending disclosure, the FDIC-R relies on the regulatory findings concerning, and admissions made by, the Bank Defendants (and the other Panel Banks), and on evidence given in criminal trials as aforesaid. The best particulars the FDIC-R can currently

provide based on facts currently available to the FDIC-R are set out in the following paragraphs.

54. As regards the regulatory findings and admissions, paragraphs 46 and 49 above are repeated (including by incorporation Schedule 3 to these Particulars of Claim).

55. In addition to the regulatory findings and admissions, the FDIC-R also relies on the evidence from the criminal proceedings set out in section D1 above and D3 below. In this context it makes particular reference to the following:

(1) In the Hayes Trial, Mr Storey gave evidence that he said to Mr Ewan of the BBA in November 2007:

> *"I do believe that LIBORs are being set lower than they ought to be because in the aggregate banks are afraid to stick their heads above the parapet and post higher numbers because of what happened to us when we did, you get shot at."*

(2) The responses to Mr Ewan's email of 6 December 2007, set out at paragraph 50(6) above, show that FXMMC representatives of RBS, JP Morgan, BNP Paribas and BoS were of the view that at least certain banks were Lowballing LIBOR.

(3) At the meeting of 11 December 2007, Mr Storey expressed the view that posting "*real rates*" would mean that some banks would "*take a hit in the market*"; thus implying that Panel Banks were submitting false rates.

(4) A memorandum dated 27 March 2008 from Mr Ewan to Ms Knight and the BBA's Regulation team stated that there were "*often*" cases in which a Panel Bank would deal in the market at a rate 20 or 30 basis points higher than its daily submission.

(5) An internal BBA document dated 18 April 2008, which had noted the consensus that USD LIBOR was inaccurate, stated that Panel Banks were "*submitting their offered rate and then enter[ing] the market at a higher rate, LIBOR plus X basis points.*"

(6) In an email of 2 May 2008 to Panel Bank executives Ms Knight stated that there had been complaints about how certain Panel Banks' USD LIBOR submissions could not possibly reflect the rate at which they could borrow. The complaints about the rates were described by Ms Knight as suggesting that USD LIBOR was "*inappropriately low.*"

(7) On 8 August 2008, an HBOS Senior Manager circulated a presentation stating that the bank should be careful about its LIBOR submissions (*i.e.* being too high) to ensure that HBOS was not seen as a "*desperate borrower.*"

(8) In September 2008, Mr Merriman wrote to Ms Knight, Ms Scutt, and other BBA officials to report that he had "*rung around a few of the panel banks*" and that "*nobody was putting in real LIBOR rates and their rates were not a reflection of where people are funding themselves.*"

(9) On 16 July 2012, Barclays Chief Operating Officer Jerry Del Missier told the Parliamentary Select Committee inquiry that, in October 2008, he had been instructed by Barclays Chief Executive Bob Diamond to lower the bank's LIBOR submissions.

56. As set out below, at least the Bank Defendants had both individual and collective incentives to engage in Lowballing and to lower USD LIBOR with the result that USD LIBOR was, in fact, materially suppressed.

57. **Profit/portfolio incentive.** At least, each Bank Defendant had a common financial and profit-based incentive to collude to Lowball USD LIBOR submissions and in turn to cause USD LIBOR to be lower than it otherwise would have been. A lower USD LIBOR (and prior knowledge of the suppression of the rate) enabled the Bank Defendants (and any other bank parties to the Agreement or Concerted Behaviour) to adjust their trading positions and profit from downward movements in interest rates and/or from decreased borrowing costs. The FDIC-R is unable to give further particulars pending disclosure of the interest rate exposure of the Bank Defendants at the material times and/or the IRD positions held by them. However, without prejudice to the aforesaid:

(1) The FDIC-R anticipates that, following disclosure, it will be shown that at least the Bank Defendants were substantial net beneficiaries of the fall in USD LIBOR during the Suppression Period.

(2) At least the Bank Defendants had both large net interest rate derivative positions and the ability to influence USD LIBOR.

(3) If a bank had a net position of paying floating and receiving fixed interest rates on its interest rate swaps portfolio, it would benefit from a suppressed USD LIBOR since the bank's obligations on its floating payments would decrease, but its counterparties' obligations on the fixed payments would stay the same.

(4) However the profit incentive holds true regardless of the Bank Defendants' interest rate exposure and/or IRD portfolio composition at the beginning of the Suppression Period. This is because the known, collusive suppression of USD LIBOR gave the Bank Defendants (and any other bank parties to the Agreement or Concerted Behaviour) a competitive advantage by way of an asymmetry of information, in that at least the Bank Defendants knew that USD LIBOR was being (and would continue to be) suppressed. Such suppression was not known to and would not have been anticipated by the wider non-Defendant banks (or non-Panel Banks) market, which included the Closed Banks, which market was unaware of the Bank Defendants' influence on and manipulation of USD LIBOR. Such an advantage would have been particularly acute during the financial crisis, as interest rates would otherwise be expected (by parties unaware of the collusive suppression of USD LIBOR) to be high and/or to be volatile.

(5) The profit motivation to suppress USD LIBOR is a common incentive in that, although the extent of the incentive would have varied from bank to bank, it required collusive action if it was to be realised. This is because, to realise the incentive, it was necessary for: (i) a sufficient number of Panel Banks to Lowball their submissions in order materially to suppress USD LIBOR; and (ii) there to be sufficient agreement and/or concerted action for it to be known with reasonable certainty that the suppression would continue.

58. **Presentation of individual financial health.** To varying degrees, each Bank Defendant had an individual incentive to materially Lowball its own USD LIBOR submissions (and for USD LIBOR to be lowered) in order: (i) to present to other participants in the Interbank Market(s), to counterparties dealing with it in other markets, to governments and regulators, to consumers, and to the world at large that it was in a better financial position than was in fact the case; (ii) to obtain better borrowing terms as a consequence, especially at a time when liquidity was problematic and the costs of borrowing were increasing; and (iii) to improve their balance sheet accordingly. Further as to this:

(1) The rate at which the Bank Defendants could borrow (including in the Interbank Market(s)) is an indicator of their perceived creditworthiness and thus of their financial health. The lower a bank's individual USD LIBOR submission, the better its individual financial health will be perceived by counterparties and others, and thus the lower the rate at which it could borrow. Any Bank Defendant making submissions on the higher side, and being an outlier at the higher end, would be perceived as less creditworthy and would risk losing access to cash. As Ms Scutt put it in her evidence in the Hayes Trial, this was important "*in terms of the signals it gave to the market, in terms of creditworthiness and its own liquidity position*" (as individual Panel Bank submissions were published by the BBA, and identifiable).

(2) Being perceived as being in better financial health than was in fact the case would have benefited at least the Bank Defendants in that, *inter alia*:

(a) A perception of strong financial health makes a bank a more attractive counterparty in markets in which it participates as buyer and seller of financial products.

(b) It would have assisted with their liquidity and cost of funding, in that it made them more attractive institutions for deposit-taking from retail and commercial customers, and influenced the rate at which they were able to borrow and the level/type of collateral they would have had to offer in the Interbank Market(s) and other wholesale lending markets.

(c) It would have deterred or reduced public commentary about a bank being in poor financial health, assisted in maintaining the bank's share price (for those banks whose shares were publicly traded), and may have reduced potential regulatory scrutiny, including in respect of the prices at which Bank Defendants, including RBS Group, HBOS and Barclays' parent company, Barclays PLC, were able to raise new equity capital

59. **Collective incentive to prevent the scrutiny of individual banks by promoting the impression of collective financial health and stability.** The Defendants had a collective incentive for the Bank Defendants to collude on the level of their USD LIBOR submissions in order to present to the world at large a picture of collective health and stability of the Bank Defendants (and more generally the Panel Banks). The Bank Defendants had a collective incentive in avoiding one or more Bank Defendants being seen as an "*outlier(s)*" at the top end of the spectrum by making submissions individually which were significantly higher than the majority of other Panel Banks – either because their submissions were honest (thus exposing others at the lower end) or because they did not Lowball by a sufficient amount. Any such "outliers" would have been likely to result in particular scrutiny of individual Bank Defendants, thus causing financial problems for those banks as well as disrupting the continued collusive presentation of collective health and stability of the Bank Defendants (and the other Panel Banks). As Ms Knight noted in an email of 2 May 2008:

> *"I am well aware that the real concern can often be – and particularly at trading desk level – that if a bank posts a rate that is not in with the pack then it may get crucified in the press."*

60. Moreover, the Defendants also had a collective incentive in the Bank Defendants materially Lowballing their USD LIBOR submissions and USD LIBOR in order to present to the world at large that as a group they were in better financial health, and were more stable, than was in fact the case. The Bank Defendants, as collectively some of the largest banks in the global banking industry, had a collective incentive to do this in order to protect themselves from greater individual and collective scrutiny. Further as to this:

(1) The range of rates at which at least the Bank Defendants could borrow (including in the Interbank Market) would reflect USD LIBOR which, in turn should reflect

the perceived creditworthiness and thus the perceived financial health and stability of the Bank Defendants (together with the other Panel Banks). The rates at which the Bank Defendants could borrow should have taken into account, in particular, both the perceived credit risk and perceived liquidity risk of lending to such institutions at a given time. Absent suppression, individual bank USD LIBOR submissions, and USD LIBOR, would have been reflective of those factors.

(2) Because the Bank Defendants (and the other Panel Banks) represented a large segment of the global banking industry, USD LIBOR (to the extent it was based on honest USD LIBOR submissions) should have been a proxy, directly or indirectly, for the creditworthiness of a very significant part of the global banking industry.

(3) Accordingly, the lower the published USD LIBOR, the better the financial health and stability of that large part of the global banking industry (composed of the Bank Defendants (and the other Panel Banks)) would be perceived by counterparties, consumers, regulators, governments, and the press.

(4) That large segment of the global banking industry being perceived as being in better financial health and more stable than was in fact the case would have, amongst others, the following benefits to at least the Bank Defendants (and other Panel Banks), if not more widely:

(a) Decreased cost of funding and increased liquidity in at least that part of the industry.

(b) A reduced the risk of a run on the deposits of the Bank Defendants (and/or other Panel Banks).

(c) A reduced risk that the public would perceive the banking industry – or at least the large segment of the global banking industry consisting of the Bank Defendants (and other Panel Banks) – as being in poor financial health and/or being unstable. This reduced risk, in turn, would have assisted in promoting misplaced confidence by governments and the public regarding the stability of the global banking industry and, potentially, reducing the risk that the Bank Defendants and other Panel Banks would default on their obligations or face financial strain creating negative systemic and spill-over effects across the banking industry. For the Bank Defendants, this would in turn: (i) reduce the risk of regulatory intervention; and (ii) protect their share prices.

(5) These collective incentives were particularly important to the Defendants during the period when the global banking industry was in crisis and a large number of banks (including several of the Bank Defendants and the Closed Banks) failed, were taken into public ownership, and/or suffered significant losses.

61. **Collective action in order to maximise effect.** As regards all of the incentives listed above, the Defendants had a shared incentive to act collectively in the Bank Defendants Lowballing their USD LIBOR submissions in order to exert the necessary maximum effect on the daily USD LIBOR rate. If only one or a small number of Bank Defendants engaged in Lowballing, some or all of their submissions would be discarded as being in the bottom quartile, and therefore those submissions would not affect the rate materially, if at all. Acting together was necessary to materially move USD LIBOR to achieve the aims set out above.

62. **Collective action to ensure the materiality and stability of the suppression and in order to avoid detection.** The Defendants had an incentive to act collectively to ensure their aims of material suppression of USD LIBOR could be realised on an ongoing basis. They also had an incentive to act collectively to avoid detection of the Bank Defendants' collective Lowballing:

(1) They had an incentive to avoid one or more Bank Defendant being seen as "outliers" at either end of the spectrum by making submissions which diverged significantly from the majority of other Panel Banks. That could run risks including increased attention to that Bank Defendant's submission with such scrutiny potentially leading to that Bank Defendant (and/or others) being accused of making false USD LIBOR submissions.

(2) They had an incentive to collude and control the level of submissions to avoid USD LIBOR becoming transparently too low. Collective action allowed the Bank Defendants to ensure that this did not happen and to share the collective and individual benefits of Lowballing while limiting competition in this regard and therefore avoiding detection.

(3) Detection of this behaviour would lead to:

(a) Cessation of this behaviour, either as a result of regulatory action or threat thereof; and

(b) Substantial regulatory action, criminal prosecutions, and/or civil litigation against all those involved.

63. This collective action between the Defendants distorted competition in the Relevant Markets listed in Section E2 below.

64. **Collective incentive to protect the integrity/use of USD LIBOR as a benchmark.** The Defendants also had a collective incentive to protect the perceived integrity and extensive use of USD LIBOR as a benchmark:

(1) The Defendants had a vested interest in the continued use of USD LIBOR, in that they had (*inter alia*) large volumes of existing business and pricing and risk systems which were tied to USD LIBOR. There would, at least, have been significant cost and inconvenience in a change of benchmark.

(2) However, if the fact that USD LIBOR was being manipulated became widely known, there was a real risk that USD LIBOR would be supplanted, either as a result of regulatory action or market users looking to use other benchmarks for certain transactions.

(3) The Defendants all had a financial interest in USD LIBOR, which was licensed by the BBA for profit and had the potential to earn more money in the future.

(4) Further or alternatively, according to a press report published in the Wall Street Journal on 11 September 2012, in November 2008, in response to complaints

about LIBOR manipulation, the BBA “*drew up plans to license LIBOR to an independent third party that would pay a fee to administer the rate instead of the BBA.*” Panel Banks including the Bank Defendants however rejected the proposal because “*when BBA staffers pitched the idea to industry executives, they got the impression that big banks – which paid most of the BBA's bills through their membership fees – wanted LIBOR kept in-house so that they could continue to influence it, according to people familiar with the talks.*”

D3. The Suppression of USD LIBOR was the result of the Agreement and/or Collusive Behaviour and/or Decisions

65. The material suppression of USD LIBOR during the Suppression Period was the result of an agreement to which: (i) the Defendants or (ii) the Bank Defendants were parties, that the Bank Defendants would make artificially low (and false) LIBOR submissions to the BBA and/or would exchange commercially sensitive information about their USD LIBOR submissions (*i.e.* the Agreement defined at paragraph 4(2) above).

66. Alternatively, insofar as there was no Agreement, the material suppression of USD LIBOR during the Suppression Period was the result of collusive and concerted action on the part of (i) the Defendants or (ii) the Bank Defendants, that the Bank Defendants would make artificially low (and false) LIBOR submissions to the BBA and/or would exchange commercially sensitive information about their USD LIBOR submissions (*i.e.* the Concerted Behaviour, defined at paragraph 4(3) above).

67. Further or alternatively:

(1) the BBA Parties' daily publication of the USD LIBOR rate during the Suppression Period; and/or

(2) the BBA Parties' decision to be a party to the Agreement and/or Concerted Behaviour; and/or

(3) the BBA Parties' decision to be a party to and/or their participation in or facilitation of the agreements particularised at paragraph 74 below and reached between: (i) the BBA Parties and the FXMCC; and (ii) the Bank Defendants

and/or any or all of the other Panel Banks as may also have been parties, each constituted decisions of an association of undertakings within the meaning of Article 101 and/or the Chapter I Prohibition (i.e., the Decisions defined at paragraph 4(6) above).

68. The Agreement and/or Concerted Behaviour were conducted in secret and are not known to the FDIC-R or any Closed Bank during the Suppression Period. As a result of said secrecy, the FDIC-R does not know the identity of each of the parties to the Agreement or the Concerted Behaviour, including the extent to which all or a subset of the other USD Panel Banks (i.e. the non Defendant Panel Banks) were such parties – and reserves the right to amend these Particulars of Claim following disclosure. Therefore, the FDIC-R is currently unable to specify full particulars of the Agreement or Concerted Behaviour. Pending disclosure, the precise date and terms of the Agreement are outside the knowledge of the FDIC-R, as is whether or not the Agreement was express and whether the Agreement was a single agreement or a series of agreements.

69. The best particulars the FDIC-R can currently provide of the Agreement and/or Concerted Behaviour and/or Decisions are as follows:

(1) Throughout the Suppression Period, at least the Bank Defendants directly or indirectly (through and/or under the direction of the BBA and/or the FXMMC) agreed to fix and/or did fix USD LIBOR under the LIBOR -setting process as set out in paragraphs 31 to 34 above.

(2) Contrary to the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards) the submissions which were made by at least the Bank Defendants and which were used by the BBA in calculating the LIBOR rates under the LIBOR -setting process did not reflect the rate at which the submitting bank could borrow funds on the Interbank Market but instead were Lowballed and/or false in that they were not submitted in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards).

(3) These false, materially Lowballed submissions affected the USD LIBOR rates that were fixed and published by the BBA each London business day during the Suppression Period.

(4) The BBA nonetheless continued to, and did, publish USD LIBOR in knowledge of the Agreement and/or Concerted Behaviour and as if it were a true rate being published in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards). There were unlawful exchanges of information between at least the Bank Defendants via the BBA and/or FXMCC, or Thomson Reuters on behalf of the BBA, as pleaded at paragraph 74 below and which permitted and/or facilitated at least the Bank Defendants to co-ordinate their submissions.

(5) Although pending disclosure the FDIC-R does not have access to such communications, in light of the regulatory findings summarised at paragraphs 46 to 49 above, which revealed hundreds of examples of Panel Bank employees exchanging commercially sensitive information about LIBOR submissions, the FDIC-R believes that there were unlawful exchanges of such information directly between at least the Bank Defendants concerning the making of USD LIBOR submissions and/or the Lowballing of LIBOR submissions (in any currency), and/or further such communications indirectly via the FXMMC and/or the BBA Parties. The FDIC-R reserves its right to amend its pleadings in this respect following disclosure.

(6) On at least one occasion, in response to concerns that USD LIBOR may be being suppressed, the BBA and some or all of the Panel Banks colluded to "*float USD LIBOR up*" in order to conceal the fact that it was being suppressed.

(7) The BBA and the FXMMC, with the support of the Panel Banks, made false statements about the integrity and reliability of LIBOR (as set out in Section D4).

70. Pending disclosure, the FDIC-R relies on the following matters in support of the foregoing allegations that suppression of USD LIBOR was the result of the Agreement and/or Concerted Behaviour and/or Decisions.

71. First, the FDIC-R relies on the matters set out above that indicate that USD LIBOR was suppressed during the Suppression Period and that this was the result of deliberate Lowballing by at least the Bank Defendants. Further as to this:

(1) The material suppression of USD LIBOR could not have taken place had only a single Panel Bank suppressed submissions.

(2) The Lowballing was in fact extensive and appears to have been pervasive across at least the Bank Defendants such that it is implausible that it would occur in the absence of the Agreement or the Concerted Behaviour and it cannot be explained as coincidental parallelism.

(3) There was significant clustering of submissions by Panel Banks.

72. Second, each of at least the Bank Defendants had the incentives pleaded at paragraphs 57 to 64 above and knew or would have known that at least each other Bank Defendant possessed the same or materially the same incentives and were (whether pursuant to the Agreement or Concerted Behaviour) acting on those incentives by the Lowballing of USD LIBOR submissions in circumstances in which successfully doing so (and in a way which minimised the risk of detection) required collective action.

73. Third, at least each of the Defendants or the Bank Defendants had the opportunity to collude in the Lowballing of USD LIBOR. In particular:

(1) The BBA Parties and the FXMMC provided communications channels between the Bank Defendants and other Panel Banks facilitating and/or enabling such collusion and/or unlawful exchanges of commercially sensitive information.

(2) Such collusion was further facilitated by the fact that each Panel Bank's USD LIBOR submissions were made public on the day of submission, meaning that there was already a material degree of transparency which facilitated collusion and the ability of the Panel Banks to monitor each other's submissions. This problem was recognised when LIBOR was reformed in April 2013, when it was decided to withhold individual Panel Bank submissions for three months to make

"*it harder for banks to set their submissions purely in line with other Panel Banks.*"

(3) Panel Banks, including the Bank Defendants, in fact colluded with other such banks in the manipulation of LIBOR rate as made clear by the regulatory findings summarised at paragraphs 46 to 49 above.

74. Fourth, by and/or from August 2007, the BBA Parties and the members of the FXMMC reached a series of agreements *inter se* and with at least the Bank Defendants (and/or which were implemented by at least the Bank Defendants) with the aim of controlling and/or monitoring USD LIBOR submissions. In consequence and/or in any event, the BBA Parties and the members of the FXMMC knew of, acquiesced in and facilitated the Agreement and/or Concerted Behaviour and/or Decisions. Moreover the communications pleaded in the following subparagraphs demonstrate: (i) the existence of collusion in the suppression of USD LIBOR by the Defendants and (ii) the exchange of commercially sensitive information between competitors regarding the making of LIBOR submissions (in both cases whether by the BBA and/or FXMMC being a hub for said collusion and/or exchange of information or otherwise).

(1) Prior to the Suppression Period the BBA was aware of the likelihood of LIBOR manipulation and that it was in the collective interests of the Panel Banks to manipulate USD LIBOR:

(a) The BBA formed the view in 2005 that Panel Banks were making untruthful LIBOR submissions, although at that stage they were considered to be "*highballing*." Thus in Mr Ewan's 2005 annual review he noted a "*consensus*" that USD LIBOR rates were three to four basis points above the true cash rates. He wrote that "*[s]ome companies will quote rates to suit their current position. It has always been the way.*"

(b) Barclays' feedback in respect of the review was that "*the BBA should not step in to attempt to influence this.*"

(c) At a meeting between Bank of England officials and Mr Ewan, Mr Ewan reported that there was a market consensus that USD LIBOR was being set at three to four basis points above the actual market rate. He described this as a "*construct of the market as it is in the interests of the banks to have a higher LIBOR*" (emphasis added). Thus Mr Ewan recognised that LIBOR could be (and that point was being) manipulated to suit the interests of the Panel Banks.

(2) In August 2007, Mr Ewan wrote an email noting that it would be necessary to discuss "how best to defend ourselves against potential accusations that the current rates are not a genuine reflection of the market" (emphasis added).

(3) However, by August 2007, the FXMMC had agreed (and/or acted to enforce or monitor an agreement) that USD LIBOR submissions must be within five basis points of the median of all USD LIBOR submissions, regardless of the LIBOR Definition, and that submissions outside this range would be flagged and questioned. This served to implement and/or maintain the Agreement and/or Concerted Behaviour and/or Decisions. In order to do so:

(a) The FXMMC agreed to institute, and did institute, a "flagging system" to identify any USD LIBOR submissions outside of the agreed range before their submission.

(b) In the event that a Panel Bank submitted a USD LIBOR submission outside of the agreed range, the FXMMC privately contacted that Panel Bank directly to tell the Panel Bank what other Panel Banks had submitted (contrary to the LIBOR Definition as supplemented by the BBA Guidance from mid-2008 onwards). The Panel Bank would then usually re-submit its USD LIBOR submission so that it was within the range of all other Panel Banks.

(c) This system was implemented at the direction of the BBA *inter alia* in 2007, according to the evidence of Paul Robson ("**Mr Robson**"), a LIBOR submitter for Rabobank, in evidence in the criminal trial of Anthony Allen ("**Mr Allen**") and Anthony Conti ("**Mr Conti**") in 2015. Mr Allen and Mr Conti were subsequently found guilty on conspiracy and wire fraud charges in the US for participating in a scheme from 2006 to 2011 to manipulate, amongst other things, USD LIBOR to benefit Rabobank.

(i) Mr Robson's evidence was that he would on occasion receive telephone calls from Thomson Reuters to be told that Rabobank's submission was too low or too high and to be told the rate at which other Panel Banks had made their submissions in order that Rabobank's submission could be adjusted.

(ii) His evidence was that this was discussed at meetings of the BBA Steering Committee at which the BBA "*would talk about how many times they would have to call banks in order to get them to align their numbers with others.*"

(iii) He agreed that "*all the BBA seemed to care about was that panel banks would submit rates that were close to each other's rates*" and that this was "*an alignment process.* "

(d) Submissions which were out of line would also be notified after the event. For example in November 2008 when Peter Denton ("**Mr Denton**") of the BBA emailed Mr Allen, Mr Denton noted that two of Rabobank's daily submissions were "*flagged by our system*" and explained how certain of Rabobank's submissions on 18 November 2008 differed from those of other banks.

(4) In an interview with US federal investigators, Mr Robson stated that Rabobank's representative on the BBA's LIBOR Steering Group and Global Head of Liquidity and Finance informed its USD LIBOR submitters that, at the request of the BBA, they must keep USD LIBOR submissions "*nice and aligned with where everybody else is in the market.*"

(5) In response to his email of 6 December 2007 (pleaded at paragraph 50(6) above), Mr Ewan received a series of responses a number of which show that the Panel Banks were talking to each other (contrary to the LIBOR Definition as

supplemented by the BBA Guidance from mid-2008 onwards) about their fixings regularly:

(a) Paul Walker of RBS wrote:

> "*Citibank, UBS, Deutsche put in regular LIBORs way below the market. I called them on numerous occasions and was told sorry, 'Due to balance sheet we can't lend you but for internal business we're happy with our settings'.*"

(b) FXMMC Deputy Chairman Mr Mouchel responded:

> "*I can confirm several occasions when contributing banks were bidding the market at higher levels than their LIBOR contribution same time of the day.*"

(c) Martin Lawson of BNP Paribas suggested changing the LIBOR Definition, and mentioned a "*very large Swiss bank whose LIBORs are quoted by its interest rate swap desk.*"

(d) Mr Wood wrote saying: "*[y]ou don't want to be the first bank posting basis points over everyone else.*"

(e) On 6 December 2007 Mr Rawlins emailed Mr Ewan to say:

> "*I can confirm that there are banks setting LIBORs well below the level that they are paying in the market... The issue is particularly obvious in dollars.*"

(6) At a meeting on 11 December 2007 between BBA officials and members of the FXMMC, it was noted that "*Dollar LIBOR is most out of line.*" One Panel Bank reported that it had been told by a broker that its line of credit would be withdrawn if it made accurate LIBOR submissions.

(7) In an email following the meeting pleaded in the preceding subparagraph, Mr Ewan wrote:

> "*All also observed that right now posting a high LIBOR rate is interpreted by the market as meaning that you have a funding problem so no one will do so as it's a self-fulfilling prophecy.*
>
> *The one concrete conclusion was to get the FX & MM committee to meet in mid-January when the year-end has passed and when we're hopefully in calmer waters to think about the definition of LIBOR. It clearly isn't the rate at which banks lend to each other.*"

(8) The BBA and/or FXMMC's system of co-ordination (pleaded at paragraph 74(3) above) was referenced further in the 27 March 2008 memorandum from Mr Ewan. In it, he purported to set out potential (alternative) "*carrot*" and "*stick*" solutions to the problem of the perception of LIBOR Lowballing, both of which required coordination between the banks and with the former described as being "*Coordinated action by a large number of panel banks, directed from the most senior level.*"

(9) The BBA and/or FXMMC's system of co-ordination (pleaded at paragraph 74(3)above) was also used on at least one occasion to conceal the suppression of USD LIBOR by increasing the rate following expressions of concern in the market. Such a suggestion could not have been made, and the outcome would not have been possible, without the prior existence of the Agreement or Concerted Behaviour. On 16 April 2008, Mr Ewan and Mr Storey discussed the prospect of colluding to raise USD LIBOR in order to mask what had been going on. In a telephone conversation:

(a) Mr Ewan said:

"*I think there was recognition that this is one best dealt with quietly. It needs to be dealt with at a high level and so the board members are going to "have a word" with the people who do sort of quote the rates and also create the strategy and I think the idea was that it is unusual because it's not something that's connected to the credit crunch because dollars, because the euro and sterling don't show the same effect ... So the idea is to try and investigate if there is anything that makes dollars unique and if that's not the case see if we can gradually float the dollar rate slightly, gently, up.*"

(b) Mr Storey responded:

"*Just for me to understand... do we have to be careful about 'collusion'?*"

(c) Mr Ewan said:

"*My take on that, Miles, is that if we have a quiet conversation with a bank and then the next day their LIBOR quote jumps 20 basis points. I think a journalist would ask two questions, one, are you having trouble funding yourself, if not, two, were you effectively lying beforehand?*"

(10) Consistently with this, three month USD LIBOR increased by seven basis points on 17 April 2008 and a further seven basis points on April 18 2008.

(11) On 17 April 2008, Mr Merriman sent an internal email stating that "*we have done something positive to shake up the market, no matter what our colluding members think.*" He noted that "*This is exactly the story we thought they'd run and they missed the fact that 12-month dollars jump 20 basis points.*" Mr Ewan proposed that the email be "*completely deleted*" to prevent it from being accidentally leaked.

(12) In a document dated 18 April 2008, Mr Ewan wrote as follows:

> "*A general consensus is that US dollar LIBOR is currently inaccurate by 20-30 basis points while pound and euro is, within reason, reliably accurate. This is due to current market pressures leading banks to post artificially low rates to protect themselves, causing many to question US dollar LIBOR reliability.*
>
> *... Evidence shown to prove banks submitting their offered rate and then enter the market at a higher rate, LIBOR plus X basis points. Media attention has brought this into limelight....*
>
> *...Banks moving in pack mentality...*
>
> *....Triple A [rated] banks have higher submissions than lower rated banks which is not an anomaly...*
>
> *....Evidence shown to prove that banks are submitting their offered rate and then entering the market at a higher rate....*
>
> *....Underlying incentive to quote low....*
>
> *Favour treasury.*
>
> *Favour derivatives.*
>
> *Little to no accountability.*"

(13) In April 2008 Ms Knight wrote to the Board of the BBA:

> "*The BBA is receiving an increasing number of complaints from market participants that US dollar LIBOR is setting too low. The bank quoting a dollar rate is saying publicly this is the rate at which I can fund myself. If that bank then goes into the market and takes ones considerably above this rate it severely damages both credibility of LIBOR and the credibility of the quoting bank itself. The BBA LIBOR team has been told that such mismatches between what a bank quotes and then later deals at are happening frequently and the discrepancies are*

> *often 20 to 30 basis points. This affects US dollar LIBOR only but at all maturities.*"

(14) On 24 April 2008 Mr Ewan met with representatives of the New York Federal Reserve in New York. He was told that they had "*concerns*" about LIBOR. The Claimants infer that this related in particular to USD LIBOR.

(15) At a meeting on 25 April 2008, held at the Bank of England involving the BBA and senior executives of the Panel Banks including Jonny Cameron of RBS, there was a discussion of the need for Panel Bank to "*play USD LIBOR very straight.*" This did not happen.

(16) On 2 May 2008, Ms Knight sent an email to Panel Bank executives referring specifically to USD LIBOR, noting that following the recent board meeting:

> "*[T]he dollar LIBOR rate improved, and by this I mean that it drifted upwards to what was considered to be a more accurate market rate. However, unfortunately it has not stayed there... others tell us is not possible to borrow at a rate even near that of dollar LIBOR.*
>
> *In a nutshell they consider that the rates are inappropriately low and that in some instances they have given us the names of banks that posted one rate and subsequently borrowed at a materially higher rate .....*
>
> *I am well aware that the real concern can often be -- and particularly at trading desk level -- that if a bank posts a rate that is not in with the pack then it may get crucified in the press and there is of course a need for your treasury department to square their book each day. However, there is now a real issue.*"

(17) The FDIC-R believes that there were further relevant meetings on at least 19 May and 30 May 2008.

(18) In September 2008, Mr Merriman wrote to Ms Knight, Ms Scutt and others reporting that he had he had "*rung around a few of the panel banks*" and that "*nobody was putting in real LIBOR rates and their rates were not a reflection of where people are funding themselves.*"

(19) In a note of a meeting with officials from the New York Federal Reserve in the autumn of 2008, Mr Ewan recognised (and Ms Scutt testified in her evidence in the Hayes Trial) that there was not "*accurate unbiased quoting*" of USD LIBOR.

(20) The fact that LIBOR fixings were too low was also discussed in meetings of the Bank of England's Money Markets Liaison Group, which included representatives of the BBA including at least Mr Ewan. For example, the notes of a November 2007 meeting show that several members of the Money Markets Liaison Group considered that LIBOR fixings were lower than the actually traded interbank rate, and that this was discussed with Mr Ewan.

75. Fifth, the existence of the Agreement and/or Concerted Behaviour and/or Decisions is supported by the absence of any material (or public) complaints by the Bank Defendants or other Panel Banks or investigation of any complaints. More particularly:

(1) Given that the Panel Banks had (and would be expected to have had) differing degrees of creditworthiness, it would have been in the *prima facie* interests of the more creditworthy banks to complain publically about Lowballing and to seek to ensure that the LIBOR-setting process was untainted by Lowballing because this would demonstrate that they were more creditworthy than their peers. For example, as the only AAA-rated bank on the USD LIBOR panel during the Suppression Period, had Rabobank acted in its independent self-interest, it should have been motivated to ensure that all Panel Banks made accurate USD LIBOR submissions. Mr Ewan has stated in an internal communication that Rabobank's USD submissions should be "*miles away from someone like UBS*"; inferring that they were not in fact dissimilar.

(2) However, while certain individuals did from time-to-time point out in private that they believed that other Panel Banks were Lowballing (including in the emails set out at paragraph 74(5) above), those complaints were not made public and/or pursued by the BBA.

(3) The BBA Parties acquiesced in failing to investigate any complaints regarding LIBOR and USD LIBOR suppression, thereby maintaining the goals and/or efficacy of the Agreement or Concerted Behaviour and/or Decisions. Moreover, each of the Bank Defendants, as members of the FXMMC, approved the BBA/FXMMC Paper pleaded below at paragraph 78(2).

(4) That no Bank Defendant or Panel Bank sought to publically (or privately) ensure that the LIBOR-setting process was untainted as aforesaid during the Suppression Period and/or that the BBA Parties took no disciplinary decision as regards any Panel Bank in respect of the setting of USD LIBOR during the Suppression Period and/or that the BBA Parties implemented no such decision supports the inference that at least the Bank Defendants were acting collectively on the incentives pleaded above in preference to their *prima facie* individual interests.

76. Alternatively, insofar as the Lowballing began as independent and not concerted action on the part of individual Bank Defendants and/or other Panel Banks, by 2007 or 2008 it nonetheless had become Concerted Behaviour in that the BBA Parties and, the Bank Defendants knew that at least the Bank Defendants were Lowballing and/or turned a blind eye to the same and: (i) the Bank Defendants themselves Lowballed and/or continued to Lowball; and (ii) did not blow the whistle on what was occurring. The FDIC-R is not presently in a position to plead full particulars of such knowledge, but relies on the matters set out in these Particulars, including in particular the discussions at the FXMMC and the BBA.

D4. Statements made by the BBA about the integrity of LIBOR were false

77. The BBA and the FXMMC, with the support of the Panel Banks, made false statements during the Suppression Period which were intended to maintain confidence in the integrity and reliability of USD LIBOR. This was part of the Concerted Behaviour and/or Decisions and was designed to obfuscate and mask the persistent and material suppression of LIBOR.

78. Pending disclosure of all statements made by the BBA prior to and during the Suppression Period, the FDIC-R presently relies on the following false and misleading statements:

(1) On 16 April 2008, Mr Ewan told Bloomberg reporter Ben Livesey that the BBA would "*ban any member deliberately misquoting lending rates in the daily money market operations.*"

(2) The BBA/FXMMC Paper stated that:

(a) "*[T]he contributing banks are continuing to fix LIBOR at the rate their cash desks perceive they can raise cash in the specified currency.*"

(b) Suggestions that there might be "*herd behaviour*" between Panel Banks "*invites speculation and rumour mongering in the media.*"

(c) "*The sixteen banks currently on the panel represent a substantial majority of the transaction volumes in the London market.*"

(d) Nevertheless, "*the issue of whether the full range of institutions is being captured should be explored once again.*"

(e) "*... [T]he strength and popularity of LIBOR stem from its fundamental transparency and accountability.*"

(f) "*The BBA needs to correct a number of misunderstandings and misperceptions*" and it was important to improve "*educational outreach.*"

(g) "*Some entities seem to have made the assumption that LIBOR is a rate at which all could borrow.*"

(h) "*In illiquid markets and difficult markets aberrations will occur which, under more normal market circumstances, would be arbitraged out .... It is simply that the market is no longer offering a cost free arbitrage between been the FX swap and cash transactions.*"

(i) "*There are differences between USD LIBOR and other indices... as they are measuring different things using different methods.*"

(j) The LIBOR process was overseen by an "*independent committee of market participants, the Foreign Exchange and Money Market Committee.*"

(k) The BBA was strengthening the governance by the FXMMC "*to incorporate a tight scrutiny mechanism that will require any contribution discrepancies to be reviewed and justified.*"

(l) Under this mechanism the BBA would monitor and investigate discrepancies and bring them to the attention of the independent FXMMC (which would meet monthly). The FXMMC would then ask a Panel Bank to justify its submission and, if the Committee was not satisfied, warn or, in case of repeated offences, expel a bank from the relevant panel.

(3) The FDIC-R believes that the BBA/FXMMC Paper was circulated in advance to at least all members of the FXMMC (which included representatives of all Panel Banks) and also to senior executives at the Panel Banks.

(4) On 5 August 2008 the BBA published a preliminary feedback statement, stated to have been approved by the FXMMC, which concluded that "*all contributing banks are confident that their submissions reflect their perception of their true costs of borrowing, at the time at which they submitted their rates.*" It also said that LIBOR was a "*fundamentally robust and accurate benchmark*", and noted that the FXMMC was being advised on LIBOR's governance and scrutiny by Clifford Chance.

(5) In mid-December 2008 Ms Knight informed the press that: "*LIBOR has always been relied on by the market as a reliable benchmark which is also the most transparent. It is appropriate in this global downturn to ensure the continued robustness of this pillar of our financial architecture.*"

(6) At a LIBOR seminar in Zurich in December 2008, Mr Ewan said:

> "*Although the integrity of the US dollar LIBOR fixing process has been questioned by some market participants in the financial press, it appears that US dollar LIBOR remains an accurate measure of a typical creditworthy bank's marginal cost of unsecured US dollar term funding.*"

(7) In a press release dated 17 December 2008, the BBA stated that "*LIBOR has always been relied on by the market as a reliable benchmark*" of borrowing costs.

(8) On 19 June 2009, the BBA posted an item on its website, setting out that "*contributions must represent rates at which bank will be offered funds in London's money market*."

79. These statements created a false or misleading impression, and were known and intended by the Defendants and the BBA, the members of the FXMMC to do so, as set out in section F below.

E. BREACH OF ARTICLE 101(1) TFEU/SECTION 2 CA98

E1. Agreement, concerted practice, decisions of association of undertakings

80. The Agreement (whether or not express and whether one agreement or a series of agreements) constituted an agreement (or agreements) within the meaning of Article 101 and/or the Chapter I Prohibition.

81. Alternatively, the Concerted Behaviour constituted an agreement (or agreements) and/or a concerted practice within the meaning of Article 101 and/or the Chapter I Prohibition.

82. In the further alternative, the Decisions of the BBA pleaded at paragraph 74 above and/or the daily publication of USD LIBOR during the Suppression Period constitute decisions of an association of undertakings within the meaning of Article 101 and/or the Chapter I Prohibition.

83. The Agreement and/or Concerted Behaviour and/or the Decisions were a breach of Article 101 and/or the Chapter I Prohibition in that they:

(1) Had the object of preventing, restricting or distorting competition as more fully set out in the following subsections E2 and E3; and

(2) Were capable of affecting trade between Member States of the European Union; and/or

(3) Were capable of affecting trade within a substantial part of the UK.

84. Without prejudice to the fact that it is a matter for the Defendants to prove, the FDIC-R avers that there can be no objective justification for the Agreement and/or Concerted Behaviour and/or Decisions such as would qualify the Defendants for an individual exemption under Article 101(3) TFEU and/or section 9 of the Competition Act 1998. The contraventions of competition law summarised above and more fully particularised below are not capable of justification.

85. The Agreement and/or Concerted Behaviour and/or the Decisions are accordingly actionable breaches of statutory duty. The relevant statutory duties are directly enforceable in the United Kingdom pursuant to section 2 of the European Communities Act 1972.

E2. Relevant markets

86. The relevant markets for the purposes of the FDIC-R's claims will be the subject of evidence including expert evidence in due course and following disclosure. The following are the current best particulars the FDIC-R can provide at this time.

87. Throughout the Suppression Period, the Bank Defendants and the other Panel Banks were competitors in (amongst other markets) markets for the supply of products and services which reference interest rates (with USD LIBOR being of particular importance), including:

(1) The Interbank Market(s) for interbank funding and (insofar as not a part of the Interbank Market(s)) the neighbouring market(s) for wholesale funding in which the Panel Banks and Closed Banks (in competition) used money market brokers and other means to source commercial paper and funds for term deposits (the "**Wholesale Funding Market(s)**");

(2) The market(s) for retail deposits from corporate and individual customers (the **"Retail Deposit Market(s)"**);

(3) The origination, purchase, sale and on-sale (whether over the counter or on exchanges) of IRDs including interest rate hedging products, interest rate swaps,

forward rate agreements, and interest rate options (including caps, floors and collars) (the **"IRDs Market(s)"**);

(4) The origination of USD adjustable (*i.e.* variable) and fixed rate commercial and residential loans (the "**Lending Market(s)**") (and/or the "**Commercial Lending Market**(s)" and "**Residential Lending Market(s)**");

(5) The origination of USD adjustable/variable and fixed rate commercial and residential mortgages (the "**Mortgage Market(s)**") (and/or the "**Commercial Mortgage Market**(s)" and "**Residential Mortgage Market(s)**");

(6) The securitisation and/or on-sale/purchase of packages of USD adjustable/variable and fixed rate commercial and/or residential loans (the "**On-sale Lending Market(s)**"); and

(7) The securitisation and/or on-sale/purchase of packages of USD commercial and/or residential mortgages (the "**On-sale Mortgage Market(s)**").

The markets summarised at (4)-(7) above will be collectively referred to as the "**Product Markets.**"

88. The Lending Market(s) include adjustable/variable rate loans incorporating USD LIBOR as the reference rate (plus a margin), as well as fixed rate loans the price for which is determined (at least in part) by the then USD LIBOR rate and the lender's assessment of the expected forward USD LIBOR rates. The price at which packages of loans are bought and sold in the On-Sale Lending Market(s) is determined (at least in part) by the expected future return on the packaged loans and thus is affected by the parties' assessment of the expected forward USD LIBOR rates.

89. USD LIBOR is thus a material component of the price of products in the Lending Market(s) and On-Sale Lending Market(s).

90. The Mortgage Market(s) include commercial and residential mortgage products priced at a fixed or floating rate (and/or a combination thereof), which rate will be set by the lender based on the then USD LIBOR rate and the lender's assessment of the expected forward USD LIBOR rates. The price at which packages of mortgages are bought and sold in the

On-Sale Mortgage Market(s) is determined (at least in part) by the expected future return on the packaged mortgages and thus is affected by the parties' assessment of the expected forward USD LIBOR rates.

91. USD LIBOR is thus a material component of the price of many products in the Mortgage Market(s) and On-Sale Mortgage Market(s).

92. USD LIBOR is also the price or component of the price of products in the Interbank Market(s) and/or Wholesale Funding Markets(s) and/or functions as a recommended or minimum price in the Interbank Market(s) and/or Wholesale Funding Market(s). Further or alternatively: (i) the making of a USD LIBOR submission by a Panel Bank; and (ii) the setting of USD LIBOR constitute attempts (respectively on an individual and collective basis) to set a recommended price in the Interbank Market(s) and/or Wholesale Funding Market(s).

93. The geographic scope of the above (and any other relevant) markets will be a matter for expert evidence in due course. Pending such evidence, the FDIC-R's primary case is that the aforementioned markets are global markets.

94. Insofar as any such markets have a narrower geographic scope and/or are regional and/or national markets, said markets include either a market across the whole of the European Economic Area ("**EEA**") and/or a UK market (in addition to other regional and/or national markets for each product category such as a US market).

95. The Closed Banks participated in the Product Markets as set out in the table at Schedule 2 to these Particulars of Claim. They did so in competition with the Bank Defendants and Panel Banks and/or a subset thereof.

E3. Breach of Article 101 and/or the Chapter I Prohibition

96. The Agreement and/or Concerted Behaviour and/or Decisions amounted to breaches by the Defendants of Article 101(1) and/or the Chapter I Prohibition, in that they had as their object and/or effect the restriction and/or distortion of competition.

97. In particular, the suppression of USD LIBOR submissions in turn led to the suppression of USD LIBOR. The suppression of USD LIBOR fixed the price (and/or a material

component of price) of the products bought and sold in the Product Markets such that prices in the Product Markets were set at levels other than those that would have prevailed in the absence of the Agreement and/or Concerted Behaviour and/or Decisions.

98. Moreover, the Agreement and/or Concerted Behaviour and/or Decisions resulted in an informational asymmetry between market participants in the Product Markets. This was created as a result of the fact that at least the Bank Defendants knew: (i) in advance with a certain degree of proximity at what level USD LIBOR would be set; (ii) whether USD LIBOR on a given day was at an artificially low level (and approximately by how much) as a result of the manipulation; (iii) that USD LIBOR did not correspond to realities in the Interbank Market; (iv) that USD LIBOR would likely continue to be suppressed and as a result be artificially low going forward; and (v) that each Lowballing Bank Defendant's USD LIBOR submissions were not a true reflection of the rate at which it could raise funds in the Interbank Market, such that USD LIBOR was not a true reflection of the individual and collective creditworthiness of the Lowballing Bank Defendants; (some of) which were in fact less creditworthy and less financially stable than USD LIBOR represented them to be.

99. This informational asymmetry gave the Bank Defendants (and any other bank parties to the Agreement or Concerted Behaviour or Decisions) a competitive advantage when offering terms for products in the Product Markets (or in some of those markets) compared to their competitors (including the Closed Banks) and the IRDs Markets. The Bank Defendants were not pricing their products unilaterally and/or were in a position of collective competitive advantage over their counterparties for such products based on the collective Lowballing of USD LIBOR and misrepresentation to the world of their creditworthiness and stability.

100. Further, the parties to the Agreement and/or Concerted Behaviour and/or Decisions exchanged commercially sensitive information both as to the level of intended submissions on given days (see paragraph 74 above) and, more generally, as to the adoption of a policy of Lowballing and not making USD LIBOR submissions in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from

mid-2008 onwards). They accordingly did not determine independently the policy which they intended to adopt on the market.

101. The FDIC-R reserves its right to supplement and/or amend the above following disclosure and expert evidence.

E4. Causation and Loss

102. But for the aforementioned breaches of statutory duty, USD LIBOR would throughout the Suppression Period have been set at an honest, and higher, rate in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards).

103. The Closed Banks would accordingly have realised higher prices (and/or would have calculated and received higher interest on), and thus made greater returns in respect of, the USD LIBOR linked products they issued, held, and/or sold in:

(1) The Lending Market(s);

(2) The On-Sale Lending Market(s);

(3) The Mortgage Market(s); and

(4) The On-Sale Mortgage Market(s).

104. At present, the FDIC-R confines its claims to losses suffered in respect of the following products in the aforementioned markets:

(1) Adjustable/variable rate loans and mortgages held by the Closed Banks during the Suppression Period (*i.e.*, those whose tenor covered all or part of the Suppression Period (including those which were originated prior to the Suppression Period) and those that were originated during the Suppression Period);

(2) Fixed rate loans and mortgages issued/originated during the Suppression Period;

(3) Any securitised and/or packages of adjustable/variable rate loans and mortgages sold, held and/or on-sold during the Suppression Period;

(4) Any securitised and/or packages of fixed rate loans and mortgages that were sold, held and/or on-sold during the Suppression Period.

105. These losses caused by the reduction in the realisable prices were a direct and foreseeable consequence and effect of the Defendants' breach of statutory duty.

106. The FDIC-R is not at present able to quantify the losses suffered by the Closed Banks as, pending disclosure and expert evidence, it is not possible to quantify precisely the amount to which USD LIBOR was suppressed throughout the Suppression Period.

107. In broad terms, the Closed Banks' losses are their respective differences between the returns made on the adjustable/variable rate and fixed rate loans and mortgages issued and held and/or on-sold in the aforementioned markets and the returns that would have been made had USD LIBOR been set at its "true" (and higher) rate in accordance with the LIBOR Definition (as supplemented by the BBA Guidance from mid-2008 onwards).

F. TORT CLAIMS

F1. Governing Law

108. The governing law of the FDIC's tort claims is, pursuant to the Private International Law Miscellaneous Provisions Act 1995 and/or the Rome II Regulation, No 864/267 (EC):

(1) In respect of the claims relating to each Closed Bank, the law of the jurisdiction of the headquarters of each Closed Bank. The Closed Banks' headquarters are set out in Schedule 2 to these Particulars and are all in the US or its territories.

(2) Further or alternatively, the law governing each of the contractual arrangements in respect of which the Closed Banks suffered loss: being, to the best of FDIC-R's knowledge, in each case a state of the US or its territories.

F2. Representations

109. During the Suppression Period:

(1) Each Panel Bank expressly, alternatively impliedly, represented that its honest and accurate assessment of its USD borrowing costs under the LIBOR Definition, was the number set out in its US dollar submission (the "**Own Number Representation**").

(2) The BBA Parties and each Panel Bank expressly, alternatively impliedly, represented in respect of each daily USD submission that to the best of their knowledge and in good faith, the number representing the synthesised rate based on the Panel Banks' honest and accurate assessment of their USD borrowing costs in the London interbank loan market under the LIBOR Definition, was the number published as the daily USD LIBOR fix (the "**Collective Number Representation**").

(3) Each Panel Bank and the BBA Parties expressly, alternatively impliedly, represented that it was not intentionally participating in the suppression of USD LIBOR, either individually or as part of the Agreement or Concerted Behaviour (the "**No Suppression Representation**").

(4) Each Panel Bank and the BBA Parties expressly, alternatively impliedly, represented that to the best of its knowledge, no Bank Defendant was intentionally participating in the suppression of USD LIBOR, either individually or as part of the Agreement or Concerted Behaviour (the "**No Knowledge of Suppression Representation**").

110. Those representations were express in that, the numbers published as the Panel Banks' USD LIBOR submissions, and as USD LIBOR, must be read together with the LIBOR Definition. It was an express representation that the USD LIBOR submissions and the resulting USD LIBOR fix conformed to the definitions.

111. Further or alternatively, the representations were to be implied in that a reasonable person in the position of the Closed Banks, in the factual context set out herein, would have

understood the Panel Banks and/or the BBA Parties as implicitly representing these facts to be true.

112. Further, the BBA Parties, and each of the members of the FXMMC (and by them the Panel Banks whom they represented) repeated those representations in public statements, and further represented that they reasonably believed that:

(1) LIBOR was a robust and transparent benchmark which reflected the large majority of interbank lending activity in the London market.

(2) Suggestions that USD LIBOR was unreliable were likely to be attributable to factors other than deliberate suppression, including:

(a) Rumour-mongering in the media.

(b) Exceptional market circumstances.

(c) The USD LIBOR panel not comprising all financial institutions (so, for example, not reflecting the borrowing costs of small institutions which might be less creditworthy than the Panel Banks).

(d) A misunderstanding of the LIBOR Definition leading to inapposite comparisons, for example with borrowing costs in New York or with the cost of borrowing outside the London market or conversion into dollars.

(e) Inappropriate comparison with other indices.

(3) USD LIBOR was (or henceforth would be) subject to strong and independent governance.

(4) The BBA would in the future, and would have in the past, disciplined any Panel Bank making deliberately inaccurate submissions.

(the "**Robust Benchmark Representations**", and together with the Own Number Representation, the Collective Number Representation, the No Suppression Representation, and the No Knowledge of Suppression Representation, the "**Representations**").

F3. Representations were false

113. The Representations were false, and were known to be so, in that during the Suppression Period:

(1) Contrary to the Own Number Representation, the number reflecting at least each Bank Defendant's honest and accurate assessment of its USD borrowing costs in the London interbank loan market under the LIBOR Definition was a higher number than that submitted.

(2) Contrary to the Collective Number Representation, each of the BBA Parties and at least each of the Bank Defendants knew that the number which would have represented the synthesised rate based on the Panel Banks' honest and accurate assessment of their USD borrowing costs under the LIBOR Definition published as the daily USD LIBOR fix was a higher number than that published.

(3) Contrary to the No Suppression Representation, at least each of the Bank Defendants and the BBA Parties was in fact intentionally participating in the suppression of the USD LIBOR Fix, either individually or as part of the Concerted Behaviour.

(4) Contrary to the No Knowledge of Suppression Representation, at least each of the Bank Defendants and the BBA Parties in fact knew that Panel Banks were intentionally participating in the suppression of USD LIBOR, either individually or as part of the Concerted Behaviour.

(5) Contrary to the Robust Benchmark Representations, the BBA Parties, at least each of the Bank Defendants and the members of the FXMMC (and each of them) did not believe that:

(a) LIBOR was a robust and transparent benchmark which reflected competitively determined interest rates based on the large majority of activity in the London interbank loan market. They realised that it was in fact being manipulated so that it did not reflect activity in the London interbank loan market.

(b) The fact that USD LIBOR did not reflect the Panel Banks' true borrowing costs in the London interbank loan market was attributable to factors other than deliberate suppression. They knew that deliberate suppression was a crucial factor.

(c) USD LIBOR was (or henceforth would be) subject to strong and independent governance; or that the BBA would have disciplined any Panel Bank making deliberately inaccurate submissions. They knew that in fact governance was very weak – the BBA and FXMMC were controlled by the member banks and were subject to fundamental conflicts of interest, the BBA knew of, sanctioned and concealed LIBOR manipulation, the BBA did not have the resources or skills to investigate potential breaches, and even where breaches had been brought to its attention, it had not acted and did not intend to act in the future.

F4. Representations known to be false

114. At least the Bank Defendants and the BBA Parties (and each of them) knew that the Representations were untrue, or alternatively knew that they did not have a basis for the Representations or did not have confidence in them. That is inherent in the nature of the matters represented, which were all matters uniquely within the knowledge of each of the Bank Defendants and of the BBA Parties.

115. As to the BBA Parties' knowledge and the knowledge of the Bank Defendants, the FDIC-R does not have full information as to the communications within and between the BBA, the FXMMC and the Panel Banks. It will plead further following disclosure but at present relies on the matters pleaded in sections D2 to D4 above in particular at paragraph 74 and its subparagraphs.

116. The FDIC-R will rely on disclosure and all the evidence as to the extent of the Defendants' knowledge, but it is apparent from the above that the BBA Parties and the members of the FXMMC knew that:

(1) At least the Bank Defendants had both motive and opportunity to materially suppress USD LIBOR.

(2) At least the Bank Defendants were making artificially low USD LIBOR submissions. There was overwhelming market intelligence (including directly from Panel Banks themselves) which "*prove[d]*" that Panel Banks were systematically Lowballing their USD LIBOR submissions, and that the principal problem was with the USD LIBOR Panel and the fix.

(3) There was extensive discussion of this, including within and with the FXMMC and BBA, and with Panel Bank executives.

(4) Despite all this, only one Panel Bank was ever referred to and investigated by the FXMMC in relation to allegations of Lowballing, and none were disciplined.

(5) The BBA and the FXMMC were in a position of fundamental conflict, which rendered them unable and unwilling to act as effective overseers of the USD LIBOR Panel.

(6) Rather than reveal the problem to the market, they had made a concealed one-off attempt to "*float the dollar rate higher*" with a view to concealing the Agreement or Concerted Behaviour.

F5. Representations were expected to be relied upon by, or to influence, a class including the Closed Banks

117. The Representations were made with the intention or expectation that a class of persons, namely US and other financial institutions entering into arrangements of the type set out at paragraph 10 above, would rely on them, or be influenced by them in the ordinary course of business. Further or alternatively, the Defendants reasonably should have foreseen or had reason to expect that such a class of persons would rely on the Representations, or be so influenced by them.

118. In this regard the FDIC-R relies in particular on the matters set out in paragraphs 35 to 40 above.

F6. Closed Banks justifiably relied upon or were influenced by the representations

119. The Closed Banks justifiably relied upon and/or were influenced by the Representations in at least the following ways:

(1) Using USD LIBOR in their risk management systems, which *inter alia* valued the banks' assets and liabilities.

(2) In deciding whether and/or on what terms to enter into transactions including in the Lending Market(s); the On-Sale Lending Market(s); the Mortgage Market(s); and the On-Sale Mortgage Market(s).

(3) For example, in relation to such transactions:

(a) In incorporating USD LIBOR as a benchmark in adjustable/variable rate loans and mortgages.

(b) In deciding whether or not to include or exercise clauses entitling the Closed Bank to vary the interest rate and/or the applicable benchmark.

(c) In entering into IRDs, including interest rate swaps, forward rate agreements, and interest rate options, caps, floors and collars, and/or by agreeing to enter into such products on terms incorporating USD LIBOR.

(d) In calculating the price of fixed rate loans and mortgages to customers, to the extent that the Closed Banks used USD LIBOR to determine the fixed interest rate.

(e) In using USD LIBOR as a guide to pricing in the sale and purchase of USD LIBOR-linked loans, or portfolios thereof (including securitisations), and of derivatives in the secondary market.

(f) In calculating interest due on adjustable/variable rate loans and mortgages and other instruments or products linked to USD LIBOR from time-to-time during the Suppression Period, the Closed Banks used the daily published figures for USD LIBOR.

120. The Closed Banks' reliance in these respects was reasonable and justifiable given, in particular, the matters set out in section F5 above, including the business reputations and regulated status of the Panel Banks, the way in which LIBOR was held out as and was widely used as an appropriate benchmark for transactions of this kind and as a public good, and the asymmetry of information between the Panel Banks and the BBA Parties on the one hand, and the Closed Banks on the other. The Closed Banks were not in a position themselves to investigate or assess the truth of the Representations.

F7. Loss and Damage

121. As a result, the Closed Banks have suffered loss and damage in that, as set out in section E4 above, they would have realised higher prices (and/or would have calculated and received higher interest on), and thus made greater returns in respect of, the products set out therein.

F8. Aiding and abetting/conspiracy/joint tortfeasorship

122. By reason of the Agreement and/or Concerted Behaviour set out in section E above, the Defendants conspired with and/or aided and abetted one another, and the non-Defendant Panel Banks in relation to the torts to set out in this section F. Further or alternatively, they were joint tortfeasors. The behaviour of the Defendants, alone or in concert with the non-Defendant Panel Banks, resulted in indivisible injury to the Closed Banks. As a result each of the Defendants is jointly and severally liable for the whole amount of the loss arising from such torts.

G. QUANTUM

123. The FDIC-R is not presently able to quantify with precision the value of its claims in respect of the losses suffered by each of the Closed Banks. The basis of the FDIC-R's claim for damages for breach of statutory duty and/or in tort is as set out in sections E4 and F7 above.

124. The FDIC-R will seek an inquiry into damages as appropriate.

125. The FDIC-R also claims interest on all sums found due to it on a compound, alternatively simple basis in equity and/or under s.35A of the Senior Courts Act 1981 from such dates and at such rate as the Court thinks fit.

AND THE CLAIMANT CLAIMS:

(1) Damages as aforesaid;

(2) Interest as aforesaid;

(3) An inquiry into damages;

(4) Further or other relief.

SUE PREVEZER QC

MARIE DEMETRIOU QC

ALEX BARDEN

RICHARD BLAKELEY

MICHAEL BOLDING

Statement of Truth

I believe that the facts stated in these Particulars of Claim are true.

I am duly authorised to sign this statement.

Signed:

Name: Aaron M Forester

Position: Counsel - FDIC

Date: 7/7/2017