

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

LIST E

SCI 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469) IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF EACH OF THE MANAGED INVESTMENT SCHEMES LISTED IN
SCHEDULE 1 OF THE ORIGINATING PROCESS AND IN ITS CAPACITY
AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT
SCHEME LISTED IN SCHEDULE 2 OF THE ORIGINATING PROCESS
First Plaintiff

MARK ANTHONY KORDA
Second Plaintiff

LEANNE KYLIE CHESSER
Third Plaintiff

AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 4 December 2009
Filed on behalf of: the Plaintiffs

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I, **MARK ANTHONY KORDA** of Level 24, 333 Collins Street, Melbourne, in the state of Victoria, Chartered Accountant, **MAKE OATH AND SAY** that:

- 1 I am, with Leanne Kylie Chesser, the liquidator of the First Plaintiff, Timbercorp Securities Limited (in liquidation) (**TSL**).

- 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true. I am authorised by Ms Chesser to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.

Personal background and experience

- 3 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391) (**KordaMentha**). I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Insolvency Practitioners Association of Australia and a member of the Institute of Chartered Accountants. Before founding KordaMentha in 2002, I had a 24-year career with the firm Arthur Andersen, during which I held the positions of Director of Corporate Finance, Managing Partner Asia Pacific Corporate Recovery Services Practice and Managing Partner Australia Accounting and Audit Practice. I was also a Member of the Australian Executive Committee and Board of Partners. I have been practising in the area of corporate insolvency and financial reconstructions for 20 years.

Voluntary Administration of Timbercorp Group

- 4 On 23 April 2009, we were appointed as voluntary administrators of TSL. Also on 23 April 2009, we, and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Clifford Stuart Rocke, were appointed as voluntary administrators of the 40 other Timbercorp group companies (together **Timbercorp Group**). All of the appointments were made by those companies pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**the Act**).

Liquidation

- 5 On 29 June 2009, at the second meeting of the creditors of the Timbercorp Group and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group, and TSL respectively. From 29 June 2009 we have been the liquidators of TSL.

Forestry Schemes

- 6 TSL is currently the responsible entity (**RE**) of 11 forestry schemes which are registered managed investment schemes (**MIS**) under Part 5C of the Act. In

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addition, there is one forestry scheme, the 1999 Timbercorp Eucalypts Double Rotation Private Offer, of which TSL is the manager which is not, and because it was only offered to sophisticated or professional investors, was not required to be, registered under Part 5C of the Act (**Private Offer Scheme**). I refer to these together as the "**Forestry Schemes**". The members of the Forestry Schemes are referred to in the documents as "**Growers**" and I adopt that terminology here.

- 7 The purpose of the Forestry Schemes is the cultivation of Eucalyptus trees for commercial wood production (**Trees**). The lease arrangements for the Forestry Schemes vary between the Forestry Schemes. Generally speaking the structure is that the landowner, either a Timbercorp Group company (**Internal Landlord**) or a third party landowner (**External Landlord**) leases land to TSL or Timbercorp Limited (in liquidation) (**TL**). The Growers sublease from TL or TSL allotments of land known in the Forestry Schemes variously as "woodlots" or "timberlots" (**Lots**).
- 8 Many of the Forestry Schemes have one or more projects, which relate to the timing of plantings or investment (i.e. early plantings or standard plantings) or the number of rotations (i.e. one rotations or two rotations) (**Projects**). For example the 2002 Timbercorp Eucalypts Project (ARSN 098 233 571) (**2002 Forestry Scheme**), the MIS, has two projects within it, the "2002 Eucalypts Early Project" and the "2002 Eucalypts Post June Project". The Growers are members of the 2002 Forestry Scheme but if they applied for Lots on or before 30 June 2002 the Grower was part of the "2002 Eucalypts Early Project" and if they applied for Lots on or after 1 July 2002 but before the expiry of the offered scheme, they were assigned to the "2002 Eucalypts Post June Project". Now produced and shown to me marked **MAK-1** is a list of all the Forestry Schemes and the projects within each Forestry Scheme.
- 9 Each of the Forestry Schemes is governed by a complex suite of documents including a constitution (except in the case of the Private Offer Scheme), agreements for the management of the Lots (often more than one per Forestry Scheme) (**Management Agreements**), leases and sub-leases (together "**Forestry Scheme Documents**"). The Forestry Scheme Documents state that the Growers own the Trees. Prior to 2003, interests in each Forestry Scheme were offered to Growers pursuant to a prospectus or, in the Forestry Schemes offered after 2003, a public disclosure statements (**Disclosure Document**).



- 10 TSL is hopelessly insolvent and was unable to continue managing the Forestry Schemes. Since our appointment we have therefore conducted an orderly informal winding up of the Forestry Schemes.

Sale of Forestry Assets to ABP

- 11 In September 2009, at the conclusion of a sale or recapitalisation process and as part of the informal winding up of the Forestry Schemes, we selected Australian Bluegum Plantation Pty Ltd ACN 139 400 623 (**ABP**) as the preferred purchaser of the assets used in the Forestry Schemes. ABP offered a total purchase price of \$345m (**Purchase Price**) (subject to certain adjustments). The Timbercorp Group vendor companies and their liquidators (**Sellers**) negotiated a sale and purchase deed with ABP (**SPD**). Now produced and shown to me marked **confidential exhibit MAK-2** is the SPD. I consider that the SPD should remain confidential as if bidders, External Landlords or the market are able to see SPD it may prejudice completion or if it does not reach full completion, it may prejudice any subsequent realisation. For example, some External Landlords are yet to consent to the assignment of the leases of their properties to ABP. The SPD contains sensitive information which, if released to those landlords, will prejudice our efforts to assign the outstanding leases to ABP.

Forestry Asset Sale Proceedings

- 12 On 29 September 2009, we filed an application for directions in respect of the Sellers' entry into the SPD (Supreme Court Proceeding SCI 2009 9299) supported by my affidavits (**Forestry Sale Proceedings**). Now produced and shown to me marked **MAK-3** is the amended originating process, my affidavit sworn 29 September 2009 (**First Affidavit**), and my affidavit sworn 30 September 2009 (**Second Affidavit**) filed in that proceeding (without exhibits).
- 13 The assets the subject of the SPD included the Trees of varying age and located in different areas of Australia, leasehold and freehold land in Victoria, South Australia and Western Australia, water licences, a forestry management business and TL shares in Plantation Pulpwood Terminals (ACN 103 498 960) (**PPT Shares**) (together "**Forestry Assets**"). The Forestry Assets are defined in the SPD in clause 1.1.



- 14 At paragraphs 15-30 of my First Affidavit, I explained the sale or recapitalisation process we had conducted in relation to the Forestry Assets and our decision to select ABP as preferred purchaser.
- 15 One of the issues in the Forestry Sale Proceeding was the condition precedent of the SPD that the securities over the assets used in the Forestry Schemes be released by the holders of those securities. The Commonwealth Bank of Australia (**CBA**) held securities over both the assets used in the Forestry Schemes and assets used in the Timbercorp Group administered MISs for the cultivation of olives (**Olive Schemes**). The CBA would not release its securities unless both the CBA olive facility and the relevant CBA forestry facility were repaid in full. ABP allocated \$126m of the Purchase Price, net of costs, to the discharge of the CBA securities over the Forestry Assets, namely all assets other than the Trees. The full amount required to discharge the CBA securities was however approximately \$152m leaving a shortfall of \$26m. To be able to fulfil the condition precedent of the sale to ABP, we needed to utilise \$26m of the \$197.7m ABP allocated to acquiring the Trees (**Tree Price**), an asset of the Growers, to discharge the CBA securities over the forestry assets the subject of the SPD.
- 16 On 30 September 2009, Pagone J heard the Forestry Sale Proceedings and gave a judgment and made orders and directions. Now produced and shown to me marked **MAK-4** are the transcript and Pagone's J orders and directions in the Forestry Sale Proceedings (**Pagone's J Orders**). He has not published his reasons for judgment.
- 17 Pagone's J Orders provided the necessary comfort to enable the Sellers to enter into the SPD with ABP. Pagone J directed that we were "acting reasonably and appropriately" in procuring TSL as RE of the Forestry Schemes to pay CBA from the proceeds of sale arising from the SPD "such amount as is required to cause the CBA to either release or assign all of its securities" over the Timbercorp Group companies.
- 18 Pagone's J Orders enabled us to pay out the CBA in full at settlement.

Execution and Settlement of SPD

- 19 On 30 September 2009, the Sellers executed the SPD with ABP.
- 20 On 2 November 2009, the SPD settled. The Purchase Price, less retentions (discussed in more detail below), the amount required to discharge the CBA



securities in full, other secured creditors (bond holders and plant and equipment lessors), and outstanding rent amounts on assigned leases was paid into a bank account named the "Forestry Settlement Clearing Account" held by TSL (**FSC Account**) with the Australia New Zealand Banking Group Ltd at the Royal Branch, 293 Collins Street, Melbourne, Victoria.

Purpose of this Application

- 21 We now seek directions regarding disbursement of those funds to Growers, less retentions, costs and rent (**Net Sale Proceeds**). The intended distribution to Growers of the Net Sale Proceeds are set out in a spreadsheet prepared by my staff (**Spreadsheet**). Now produced and shown to me marked **MAK-5** is the Spreadsheet.
- 22 The Spreadsheet is subject to final reconciliations of all amounts. The Spreadsheet is the best estimate available as at 4 December 2009 of the Net Sale Proceeds. Rather than wait until all amounts are finalised, we believe it is in the interests of Growers to distribute a proportion of Net Sale Proceeds on an interim basis prior to the Christmas vacation. The final distribution (possibly following further interim distributions) of the Net Sale Proceeds will be made following future releases of retention amounts, repayment of the secured facility advance and once the costs to complete the asset realisations are known.

Apportionment Issues

- 23 There are a number of reasons why the apportionment between the Growers might be considered controversial. These are:
- (a) TSL is the RE of multiple Forestry Schemes. In relation to each Forestry Scheme TSL owes the Growers a duty to act in their best interests. This may mean that TSL's duty is to maximise the return to Growers' in each Forestry Scheme. TSL cannot act to the detriment of any of the other Forestry Schemes however and therefore the duties to each Forestry Scheme may conflict with one another;
 - (b) The value ascribed to the Forestry assets, other than the Trees and the value ascribed to the Trees has been determined by a third party, ABP. The value

and apportionment between the Schemes or Projects is based on ABP's Tree Price and ABP's allocation;

- (c) In some Schemes there is a conflict between the Forestry Scheme Documents and the Disclosure Documents as to how proceeds from the sale of Trees are to be divided between the Growers in those Schemes. To be able to apportion the Net Sale Proceeds we were required to and have made a decision about how to divide the Net Sale Proceeds between the Schemes;
- (d) The Forestry Scheme Documents do not deal with the possibility, which has now arisen of a sale of the Trees before the end of the Forestry Scheme's intended lifespan. In apportioning the Net Sale Proceeds we have therefore treated the Forestry Schemes as if they have reached the end of their lives (even though they have not) and used the mechanisms in the Forestry Scheme Documents; and
- (e) We have to apportion costs between the Forestry Schemes fairly but it is not possible to quantify precisely what costs relate to which Forestry Scheme, particularly as some of the costs relate to work undertaken for the benefit of more than one Forestry Scheme. Our decisions regarding apportionment have been for good sound practical reasons, namely it is impossible to calculate these costs precisely on a scheme by scheme basis.

24 While some of the Growers are members of the Timbercorp Growers' Group and the Timbercorp Growers' Reference Group (**Growers' Groups**), represented by Clarendon Lawyers, there are approximately 11,400 Growers in the Forestry Schemes, many of whom are not represented.

25 The balance of this affidavit explains the Spreadsheet and issues that Growers may regard as controversial.

Proceeds per Lot Pooling - Conflict between Disclosure and Forestry Scheme Documents

26 The first issue of controversy is the mechanism by which we should share the Net Sale Proceeds between Growers within a Scheme. This controversy arises from inconsistencies between the Forestry Scheme Documents and the Disclosure Documents for the Forestry Schemes offered in 1998, 1999, 2000, 2001 and 2002.

- 27 Growers in the Forestry Schemes were allocated a specific Lot and owned the Trees on that Lot. However, as Trees were felled, the Trees and resulting wood (**Wood**) were intermingled with those of other Growers. The amount Growers received from the sale of the Wood was therefore pooled with other Growers.
- 28 The Disclosure Document for each Forestry Scheme set out how that pooling was to take place. In some instances, proceeds from the Trees and the resulting Wood were stated to be pooled across a specific Project (eg 2003 Eucalypts Early Plantings) and in others across the whole Scheme (eg 2004 Eucalypts). Now produced and shown to me marked **MAK-6** is the Disclosure Document for the 2002 Forestry Scheme by way of example. In 2002 Forestry Scheme Disclosure Document the pooling mechanism is described at page 18 and is said to be across the specific projects.
- 29 The concept of pooling is dealt with in the Management Agreements. For each Forestry Scheme, there is at least one Management Agreement. For those Schemes where there is more than one Project, there is a Management Agreement for each Project. Now produced and shown to me marked **MAK-7** is the Management Agreement for the "Early Project" for the 2002 Forestry Scheme by way of example of the type of clause that appears in the Management Agreements for each Forestry Scheme.
- 30 Each of these Management Agreements provides that a relevant Grower is entitled to receive a proportion of the aggregate purchase price payable to all relevant Growers for all Wood sold under the Management Agreement, calculated in accordance with the following formula:

$$\text{"GS} = \text{GW}/\text{TW}$$

where:

GS is the relevant Grower's share of the Net Sale Proceeds;

GW is the number of relevant Woodlots leased to the relevant Grower under the Sublease; and

TW is the total number of Woodlots leased to all the Growers under the Sublease."

- 31 This clause appears at page 8 of the 2002 Forestry Scheme, Early Project Management Agreement. As the formula depends on the number of Lots leased

under the sublease, pooling is determined by reference to the sublease. For those Projects or Schemes where there is only one sublease per Management Agreement, the pooling will work as contemplated in the Disclosure Document.

- 32 However, for some Projects and Schemes, there were multiple subleases relevant to a Management Agreement. Each sublease only refers to the Growers who have been allocated Lots on the land the subject of that sublease. For example, there may have been a separate sublease for each State in which Trees were located. In those cases, although the interpretation of the Management Agreement is unclear due to difficulties, amongst other things, with the definitions used, it appears that pooling would not work as contemplated in the Disclosure Document. Rather than pooling across the entire Project or Scheme, pooling may only occur across the sublease.
- 33 This would mean, for example, that Growers who had been arbitrarily allocated a Lot in Victoria, would only pool with other Victorian Growers, rather than with all Growers in the Project regardless of where their Lots were located. This would be contrary to the intention as set out in the relevant Disclosure Document.
- 34 In the Forestry Schemes offered from 2003 onwards, the Forestry Scheme Documents and the Disclosure Documents are consistent with one another. From 2003 onwards, both the Scheme Documents and the Disclosure Documents refer to pooling across Projects.

Notice of Pooling Issue

- 35 On 11 November 2009, our solicitors wrote to the Australian Securities and Investments Commission (**ASIC**) to inform them that we intended to distribute the Net Sale Proceeds in accordance with the mechanism in the Disclosure Document and invited its comment. Now produced and shown to me and marked **MAK-8** is the letter to ASIC of 11 November 2009.
- 36 On 13 November 2009, our solicitors spoke with Andrew Tregear of ASIC regarding the issue of pooling. I am informed by Jane Sheridan of ABL that Mr Tregear asked questions to enable him to better understand the issues but offered no concluded view on the issues raised in the letter of 11 November 2009.

Decision re Pooling

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- 37 We have decided to distribute the Net Sale Proceeds to Growers in accordance with the mechanism contained in the relevant Disclosure Document, rather than the Forestry Scheme Documents (to the extent that the mechanisms conflicted). We have decided to adopt this method because:
- (a) I have been told by Timbercorp management that before the Timbercorp Group went into administration, TSL had distributed Wood sale proceeds in accordance with the mechanism contained in the relevant Disclosure Document rather than the Forestry Scheme Documents to the extent that the mechanisms conflicted;
 - (b) The Growers invested in the Forestry Schemes on the basis of the information contained in the Disclosure Document and we are therefore of the view that it is appropriate for the Net Sale Proceeds to be distributed in accordance with the mechanism set out in the Disclosure Document.
- 38 The figure calculated for each Forestry Scheme or Project shown in the Spreadsheet is calculated according to the mechanism in the Disclosure Document. The Net Sale Proceeds are allocated to Growers according to either:
- (a) their membership of a Project where the Disclosure Document states that proceeds will be allocated by Project; or
 - (b) their membership of Scheme where there is only one Project in the Scheme.
- 39 The number of Lots shown in the second column of the Spreadsheet are the number of Lots per-Scheme or per-Project. The numbers in this column are taken from Timbercorp management Grower records as at 2 December 2009.
- 40 "NPA (ha)" in the next column is net planted area in hectares. This column is not used in the calculation of Net Sale Proceeds but is provided as a guide to the scale of each Scheme or Project.

ABP Apportionment of Tree Price

- 41 The total in the fourth column, "Global Offer Bid Value" is ABP's Tree Price. The Growers, through the Growers' Groups and by updates on the KordaMentha and Arnold Bloch Leibler websites, have been kept fully apprised of the Forestry Asset sale and recapitalisation process. The Growers' Groups were represented by



Clarendon Lawyers at the Forestry Sale Proceedings. Mr Bigmore QC for the Growers' Groups accepted that \$197.7m was a fair price for the surrender of Grower rights (pages 41 and 42, Transcript of Forestry Sale Proceedings exhibited as MAK-4 to this affidavit).

- 42 The amounts in the column "Global Offer Bid Value" is ABP's apportionment of the Tree Price between the Schemes and Projects. ABP allocated a value to the Trees on each piece of leased land. To calculate the apportionment of the Tree Price, we took the value ABP ascribed to Trees on each lease and allocated those amounts to the appropriate Scheme or Project. The value of the Trees in the various Schemes and Projects (as determined by ABP) vary according to a number of factors such as the age and growth rates of the Trees and the Trees' proximity to ports for export. We have accepted ABP's Tree Price and apportionment of that Tree Price as it is the market's valuation of the Trees, the result of a competitive bidding process.
- 43 The next column calculates the "Gross Bid per Lot". That is, the "Global Offer Bid Value" divided by the number of Lots in each Project or Scheme. Growers are entitled to this amount less retentions, rent and costs.
- 44 While the Tree Price in the SPD is \$197.7m, not all of that money has been received into the FSC Account as it is subject to retentions (pursuant to the SPD) and because \$26m is yet to be recovered from the sale of the assets used in the Olive Schemes. We do not consider that these retentions are controversial as they have already been the subject of Court scrutiny but we include a description of them to enable the Court and interested parties to understand how we have calculated the current Net Sale Proceeds.

Retention Account

- 45 Clause 8 of the SPD sets out a mechanism for adjusting the Purchase Price for any Forestry Assets that the Sellers cannot deliver to ABP (**Undelivered Assets**, as defined in clause 8.1(a)(i) of the SPD). ABP paid the amount calculated for Undelivered Assets prior to settlement into an escrow account (**Retention Account**). Following the delivery of previously undelivered assets to ABP by the Sellers, a release notice (as defined in clause 8.4 of the SPD) (**Release Notice**). A Release Notice is served on the ABP by the Sellers, setting out the amount to be drawn down from the Retention Account. Once the amount is agreed between ABP

and the Sellers, the relevant funds are released to the Sellers from the Retention Account to the FSC Account.

46 The sixth column on the Spreadsheet shows the amount on a per-Scheme or per-Project basis in the Retention Account. The total amount in the Retention Account as at 2 December 2009 is \$20,594,741 (**Retention Amount**). The Retention Amount consists of the value of a number of Undelivered Assets as at 4 December 2009. These include:

- (a) An adjustment in the Tree Price if the Sellers are unable to deliver the PPT Shares. ABP's Purchase Price was predicated on being able to buy the PPT Shares. These shares would give ABP an interest in a port facility and ABP would be able to ship wood chips on the terms previously agreed between the joint venture partners in PPT. If the PPT Shares are not delivered, the terms on which ABP can access the port may vary. A retention sum is included in the Retention Account to reflect the maximum difference between the Tree Price and the value of the Trees to ABP if ABP cannot acquire the PPT Shares and an interest in the port facility. On 12 October 2009, TL's joint venture partner brought Supreme Court of South Australia proceeding SCI 2009 1550 against TL seeking declaratory relief and specific performance in relation to the transfer of the PPT Shares. The matter has been listed for 4 December 2009 for the purpose of final orders being made. Until those orders are made we do not know whether this asset can be delivered;
- (b) The portion of the Tree Price assigned to the Private Offer Scheme. This is the unregistered MIS discussed in paragraph 6 above. The Tree Price apportioned to the Private Offer Scheme has been retained as TSL and TL have not as at the date of this affidavit disclaimed the Grower sub-leases in the Private Offer Scheme. I sent a letter to the Private Offer Scheme Growers dated 26 November 2009 notifying Growers of our intention to disclaim their sub-leases on 4 December 2009. Now produced and shown to me marked **MAK-9** is my letter to the Private Offer Scheme Growers dated 26 November 2009. I have not received any objections to the disclaimers proposed in my letter of 26 November 2009. We therefore intend to disclaim the Private Offer Scheme Grower sub-leases on 4 December 2009. The leases can then be delivered to ABP and the retained amount released from the Retention Account to the Sellers and added to the FSC Account; and

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(c) Leases between Timbercorp Group companies and individual landlords (**Farmer Landlords**). There are approximately 200 Farmer Landlords, many of whom have separate legal representation. The process of assigning the Farmer Landlord leases has been difficult, time consuming and is a continuing process. The balance of the Retention Amount is for those leases yet to be assigned. Trees on Farmer Landlord leases to the value of approximately \$9m are currently the subject of Release Notices. As they are assigned, they become delivered assets and their value is released from the Retention Account and added to the FSC Account.

47 On 20 November 2009 and 30 November 2009 we sent Release Notices to ABP with regard to further delivered assets. The Retention Amount in the Spreadsheet assumes that ABP will accept these Release Notices. That is, the Spreadsheet treats these amounts as having left the Retention Account and having entered the FSC Account. If however ABP varies the Release Notices, the Retention Amount may have to be varied and the initial distribution to Growers will be varied accordingly.

Secured Facility Account

48 The column named "Secured Facility Advance" refers to the use of \$26m that was part of the Tree Price, and would therefore have been payable to the Forestry Scheme Growers, but that was used to discharge the CBA securities (explained at paragraphs 15-16 above). We do not consider this controversial given the previous Court directions concerning this transaction but describe it hereunder to fully disclose to the Court all relevant facts.

49 The \$26m advance is secured for the benefit of the Forestry Scheme Growers but recovering the funds depends on the sale of the olive assets completing and the decision of the Court regarding the apportionment of the proceeds from that sale between the secured creditors and the Olive Scheme Growers.

50 On 12 October 2009, the olive asset owning Timbercorp Group companies and their liquidators (Ms Chesser, Mr Mentha and me) (**Olive Asset Sellers**) entered into sale and purchase deeds with Boundary Bend Limited (ACN 115 131 667) (**BBL**).

51 On 10 November 2009, the Olive Asset Sellers filed an originating process (SCI 2009 9998), supported by my affidavit (**Olive Affidavit**) and an affidavit of

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KordaMentha partner Andrew Malarkey, seeking orders and directions in relation to the sale to BBL. Now produced and shown to me marked **MAK-10** is the originating process and supporting affidavits (without exhibits). At paragraphs 96-106 of my Olive Affidavit I explain in some detail the application of \$26m of the Tree Price to the release of the CBA olive securities and the securities created to secure this advance.

- 52 On 11 November 2009, Croft J heard the Olive Asset Sellers' application and on 12 November 2009 made orders and delivered a judgment. Now produced and shown to me marked **MAK-11** is Croft's J judgment and orders and directions (the orders have not been sealed). Croft J ordered that the Olive Asset Sellers could enter into the agreements with BBL. He also ordered that the net proceeds of that sale are to be held on trust pending the hearing and determination of a proceeding to determine which person or persons have any rights to all or any part of the net proceeds (**Rights Proceeding**). The person or persons arguing for rights to the net sale proceeds will be the Olive Scheme Growers and the secured creditors. The ability to repay the Forestry Scheme Growers the "Secured Facility Advance" will depend firstly on the agreements with BBL reaching completion and secondly on the Court finding in the Rights Proceeding that the secured creditors are entitled to a sufficient portion of the sale proceeds to discharge the "Secured Facility Advance".
- 53 Until settlement and the conclusion of the Rights Proceeding the monies recorded in the "Secured Facility Advance" must remain a retained amount.

Total Retentions

- 54 The column headed "Total Retentions" is the sum of the Retention Amount (for the undelivered assets) and the Secured Facility Advance. The total retained amount as at 2 December 2009 is \$46,468,978 (**Total Retained Amount**).

Rent and Costs to Date

- 55 The next column, "Rent & Associated Costs - To Date", shows the amount of rent and costs already paid, apportioned between each Scheme or Project. The payment of these amounts is not controversial. The only potential source of controversy is the apportionment between the Schemes or Projects.
- 56 The rent referred to in this column was rent that TL or TSL owed to External Landlords for the period 1 July 2009 to the date of assignment. It was necessary for

TL or TSL to make these rental payments so that the External Landlords would assign the leases. The rent paid is charged against the Scheme or Project using the land, not on a pro rata basis.

- 57 The costs contained in this column include relatively minor interest, expenses and bank charges. These costs are charged to each Scheme or Project using the same proportions that APB used in assigning value to the Trees. For example, if 10% of APB's Tree Price is for "project x" then 10% of the costs will be borne by "project x". We consider that this is the most equitable way of apportioning the costs as it is impossible to quantify precisely the Schemes or Projects to which the costs relate.
- 58 The costs in this column also include the \$1.35m settlement of the proceedings against Plantation Land Limited (ACN 090 443 333) (**PLL**). These costs are only borne by the Projects or Schemes that leased land from PLL. This is discussed in more detail below.

PLL Dispute and Settlement

- 59 PLL is an External Landlord that leased land to TL or TSL (**PLL Leases**) and that was used in four of the Forestry Schemes:
- (a) 1999 Timbercorp Eucalypts Project (ARSN 085 827 872);
 - (b) 2000 Timbercorp Eucalypts Project (ARSN 091 172 093);
 - (c) 2001 Timbercorp Eucalypts Project (ARSN 094 392 000); and
 - (d) 2002 Timbercorp Eucalypts Project (ARSN 098 233 571).
- (together "**PLL Forestry Schemes**")
- 60 On 24 August 2009, PLL purported to terminate the PLL Leases for non-payment of rent by TL and TSL.
- 61 On 11 September 2009 and 14 September 2009 respectively, TL and TSL commenced Supreme Court proceeding 8870 of 2009 in Victoria and Supreme Court proceeding 9519 of 2009 in South Australia against PLL (**PLL Proceedings**). TL and TSL sought orders to the effect that the PLL Leases be reinstated or alternatively or be granted relief from forfeiture (amongst other relief).

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- 62 On 1 October 2009, SJ Ostwald Consulting Pty Ltd (ACN 083 505 524), a Grower, brought Supreme Court proceeding SCI 2009 9365 against PLL (**Grower Proceeding**). This proceeding sought orders to the effect of relief from forfeiture of the individual Grower sub-leases.
- 63 On 2 October 2009, Judd J made orders that the PLL Proceedings and Grower Proceedings be heard together.
- 64 On 26 October 2009, the parties to the PLL Proceedings and Grower Proceedings, and the legal representatives of the Growers' Groups held a settlement conference. We agreed to pay a sum to settle that proceeding (**Settlement Sum**). We recorded the agreement in a settlement deed dated 17 November 2009 (**Settlement Deed**). Now produced and shown to me marked **confidential exhibit MAK-12** is the Settlement Deed.
- 65 On 19 November 2009, we applied for directions that we were justified in procuring TSL and TL to pay PLL the Settlement Sum in full and final settlement of the PLL Proceedings as recorded in clause 4.4(a) of the Settlement Deed (**PLL Settlement**).
- 66 On 24 November 2009, Judd J ordered we were justified in entering into the PLL Settlement. The Court has not sealed those orders. Now produced and shown to me marked **MAK-13** are Justice Judd's unsealed orders.
- 67 The costs of the PLL Settlement are only borne by the PLL Forestry Schemes. The column "Rent & Associated Costs - To Date" therefore only apportions the costs of the PLL Settlement between the PLL Forestry Schemes. We consider this equitable as the Growers from the Schemes or Projects not leasing land from PLL have no relationship to this dispute or its settlement.
- 68 The column in the Spreadsheet headed "Settlement Clearing Account Balance" is the column "Global offer Bid Value" less the sum of the "Total Retentions" and "Rent & Associated Costs - To Date".

Costs Yet to be Paid or Incurred

- 69 The next three columns of the Spreadsheet show the costs incurred but yet to be paid and an estimate of future costs. These are:

- (a) Rent & Associated Costs to be Paid - this column is the amount required for making lease payments to Internal Landlords, rates, GST recoverable from lease payments and the \$1.5m paid in respect of plant and equipment to enable the sale of the Forestry Assets. The rent paid is charged against the Scheme or Project using the land, not on a pro rata basis;
- (b) Incurred Costs - To Be Paid - this column is to pay costs already incurred in relation to the Forestry Schemes by KordaMentha and its legal advisers (ABL and Corrs), as well as the overheads of the Timbercorp Group companies that have been incurred in realising the Forestry Assets (**Liquidators' & Advisers' Costs**). The remuneration component of the Liquidators' & Advisers' Costs has been approved by the Committee of Inspection of each of the relevant Timbercorp Group companies; and
- (c) Estimate to Complete - this column is an estimate only from 1 December 2009 to the conclusion of the liquidation for the Liquidators' & Advisers' Costs in relation to the Forestry Schemes. The actual costs will be fully reconciled prior to the final distribution to Growers.

(together "**Costs Columns**")

- 70 These costs are apportioned on the same basis of the costs already incurred (see paragraph 57). That is, the costs are apportioned to each Scheme or Project using the same proportions that APB used in assigning value to the Trees. The rental costs are against the Scheme or Project using the land, not on a pro rata basis.

Distribution to Growers

- 71 The column "Current Balance – After Costs" is the "FSC Account Balance" less the Costs Columns. 90% of the "Current Balance – After Costs" will be paid out in the initial distribution. Subsequent distributions will remit the balance of Grower entitlements including future Retention Account releases or Secured Facility Advance repayments. The retention of 10% in the account allows for a margin of safety given that some of the actual costs are not yet known.
- 72 The column "Initial Per Lot Distribution - 90% of Current Balance - After Costs" is therefore the calculation of the interim distribution we intend to make on a per Lot basis. The figures in this column are derived by taking 90% of the amount "Current Balance – After Costs" (assuming the "Current Balance - After Costs" for the

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particular Scheme or Project is greater than zero) and dividing it by the number of Lots. The current balance after costs in the Private Offer Scheme is not greater than zero, because of the retention of the value of the Private Offer Scheme (as discussed in paragraph above). We therefore do not intend to make an interim distribution for the Private Offer Scheme at this time.


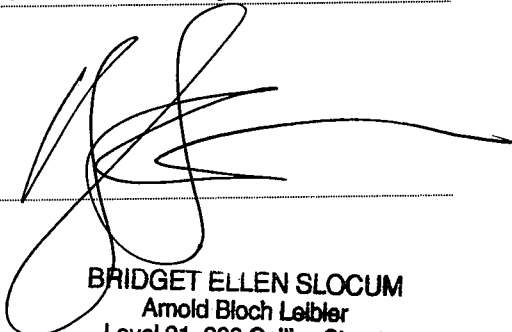
- 73 The final column calculates the dollar amount to be distributed which is calculated by multiplying the per Lot distribution by the number of Lots.
- 74 Where applicable Grower entitlements will be set off against amounts owing by Growers to Timbercorp Group companies, in accordance with the terms of the Forestry Scheme Documents.

Conclusion

- 75 We have apportioned the Net Sale Proceeds between the Growers in a way that we consider is fair and equitable. Where there are potential for controversies regarding the method of apportionment we have adopted the method we believe is in the best interests of the Growers of all the Forestry Schemes. When we have been unable to do so we have made full disclosure to the Court.
- 76 We consider that it would be in the best interests of the Growers to make an interim distribution before the Christmas vacation but believe that because of the potential for controversy, we require a direction under s 511 before we can do so.

SWORN in the State of Victoria
by **MARK ANTHONY KORDA** this
day of December 2009

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Before me:

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An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004