

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691/2013

Applicants

KORDAMENTHA PTY LTD (ACN 100 169 391)

AND

**CALIBRE CAPITAL LTD (ABN 66 108 318 985) IN THEIR
CAPACITY AS TRUSTEES FOR THE LM MANAGED
PERFORMANCE FUND**

AND

First Respondent

**THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND**

AND

Second Respondent

**JOHN RICHARD PARK AND GINETTE MULLER IN
THEIR CAPACITY AS JOINT AND SEVERAL
LIQUIDATORS OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) ACN 077 208 461**

AFFIDAVIT

I, **SIMON MICHAEL VERTULLO** of Level 14, 12 Creek Street, BRISBANE QLD 4000, Partner,
say on oath:

1. I am a Partner of KordaMentha Pty Ltd ("**KordaMentha**") and am authorised to swear this affidavit on behalf of the Applicants. I am the person principally responsible for conducting the affairs of the LM Managed Performance Fund ("**the Trust**") at KordaMentha.
2. Except where otherwise indicated, I depose to the matters in this affidavit from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.

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Affidavit

Filed on behalf of the Applicants
Form 46 (Rule 431)

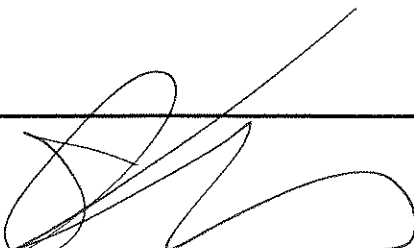
Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
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Ref: AKB.LG.ST.386376

3. Throughout this affidavit, I make reference to various documents that are contained in a tabbed and paginated bundle of documents exhibited to this affidavit and marked "**SMV-7**" ("**the Exhibit**"). The tabs that I refer to are the tabs within the Exhibit. I also make reference to various documents that are contained in a tabbed and paginated bundle of document exhibited to this affidavit and marked **SMV-8**. These documents are confidential and at the hearing of this application I will seek an order from the Court that this affidavit be sealed and not be available for inspection.
4. By order of this Court dated 12 April 2013:
 - 4.1 LM Investment Management Limited (Administrators Appointed) ("**LMIM**") was removed as trustee of the Trust ; and
 - 4.2 KordaMentha and its related entity Calibre Capital Ltd ("**the New Trustees**") were appointed jointly and severally as trustees of the Trust.
5. Following our appointment, the New Trustees took possession of certain books and records of the Trust, including books and records held and maintained by the Former Trustee and/or LM Administration Pty Ltd in respect of the Trust. Where I state below that documents were "among the books and records of the Trust," I refer to these books and records obtained by the New Trustees after our appointment.

BACKGROUND

The Trust

6. A copy of a constitution for the Trust dated December 2001 was among the books and records of the Trust. A true copy of this Constitution is at **tab 1** of the Exhibit.
7. A Deed Poll dated 25 November 2009 which substantially amended the constitution of the Trust ("**the Constitution**") was among the books and records of the Trust. Based on my review of the books and records of the Trust, these are the most recent amendments made to the constitution of the Trust. A true copy of the Constitution dated 25 November 2009 is at **tab 2** of the Exhibit.
8. Recital A of the Constitution states that LMIM, as Manager, was the trustee of the Trust ("**the Former Trustee**") as at the date of the Constitution.
9. The Trust has never been registered as a managed investment scheme under Part 5.9 of the *Corporations Act 2001* (Cth) ("**Corporations Act**"). On 8 November 2013, I caused my solicitors Piper Alderman to obtain a copy of a search of the Australian Securities and

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Investments Commission ("**ASIC**") register which records that the Trust is inter alia "not registered" A copy of the search appears at **tab 3** of the Exhibit.

10. The Former Trustee is the responsible entity of a number of other registered managed investment schemes, including the LM First Mortgage Income Fund ARSN 89343288 ("**FMIF**") and the LM Australian Income Fund ARSN 133497917 ("**AIF**"). On 13 November 2013, I caused Piper Alderman to obtain a copy of a search of the ASIC register for these funds which appear at **tabs 4 and 5** of the Exhibit.

Provision of services to the Trust by LM Administration Pty Ltd

11. A Service Agreement between the Former Trustee and LM Administration Pty Limited ("**LMA**") dated 1 July 2010 was among the books and records of the Trust. A true copy of this agreement is at **tab 6** of the Exhibit. I note that whilst the cover page to this agreement refers to 1 July 2010, the Commencement Date as specified in Schedule 1 is 1 July 2005.
12. A copy of the financial statements for the Trust and its controlled entities for the financial year ended 30 June 2012 ("**2012 Report**") was among the books and records of the Trust. A true copy of these financial statements is at **tab 7** of the Exhibit.
13. These financial statements:
 - 13.1 record that during that financial year the Trust paid \$11,368,182 in management fees to LMA (pages 3, 22 and 23 of the 2012 Report);
 - 13.2 state: "Administration and funds management services are provided to the Scheme on behalf of the Manager by LM Administration Pty Limited, as associate of the Manager. LM Administration Pty Limited is paid a management fee for these services directly from the Scheme assets..." (page 22 of the 2012 Report);
 - 13.3 record in the Consolidated Statement of Cash Flows: "Management fees paid/prepaid* (\$26,953,511)" (page 9 of the 2012 Report). The asterisk refers the reader of the 2012 Report to Note 12 for further information;
 - 13.4 record in Note 12 that the aggregate amount "receivable from" LMA was \$20,752,639, being "management and development management fees prepaid by the Scheme" (page 23 of the 2012 Report);
 - 13.5 record in Note (i) to Note 12: (page 23 of the 2012 Report): *"The Directors target a gradual paydown of this prepaid balance throughout the next financial year and as at the date of this report the balance has reduced to \$17.7 million. These*

amounts are included in prepayments of \$20,752,639 at 30 June 2012 (2011 \$5,167,310). No amounts are payable to related parties by the Scheme other than LM Administration Pty Ltd. The average monthly balance of prepayments during the year was \$16,989,994 (2011: \$3,617,404) which was non-interest bearing. This prepaid management fee will be recovered through LM Administration Pty Limited's Agreement to offset future payable management fees through the guarantee from a Director, Peter Charles Drake. This is documented and secured through a letter of undertaking outlining that the full balance is payable if LM Investment Management Ltd or its related entities are sold in part or in full. An external report from an independent firm engaged in November 2012 assessed this full security holding at \$107 million."

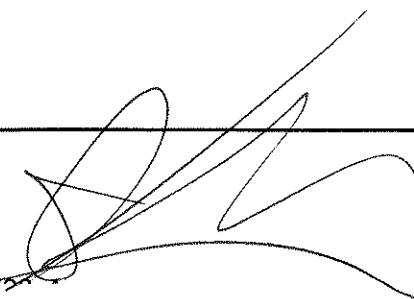
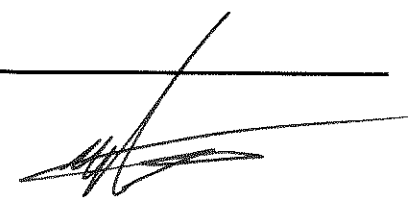
Appointment of Voluntary Administrators to LMIM

14. I caused Piper Alderman to obtain an historical company extract search of the records maintained by ASIC in respect of the Former Trustee. A true copy of this search dated 30 September 2013 is **tab 8** of the Exhibit.
15. As recorded in that search:
 - 15.1 on 19 March 2013, Ginette Dawn Muller and John Richard Park were appointed voluntary administrators of the Former Trustee ("**the Administrators**"); and
 - 15.2 on 1 August 2013, Ms. Muller and Mr. Park were appointed liquidators of the Former Trustee.
16. Clause 23.1 of the Constitution required the Manager of the Trust to resign if (relevantly) it became an externally administered body corporate, as defined in the *Corporations Act*.

Appointment of the Applicants as Trustees of the Trust

17. By orders of this Court dated 12 April 2013:
 - 17.1 LMIM was removed as trustee of the Trust; and
 - 17.2 the New Trustees were appointed jointly and severally as trustees of the Trust.

A true copy of these Orders is at **tab 9** of the Exhibit.

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18. Following our appointment, the New Trustees:
- 18.1 have taken possession of certain books and records of the Trust, including books and records held and maintained by the Former Trustee and/or the Second Respondent in respect of the Trust; and
 - 18.2 members of KordaMentha and I have reviewed these books and records of the Trust, carried out investigations, gathered information about the assets and liabilities of the Trust, and taken steps to assess the financial position of the Trust.
19. As part of that process, the work that my team and I undertook has included:
- 19.1 minimising any deterioration in asset values through maintaining properties subject to securities held by the Trust by, for instance, taking out insurance;
 - 19.2 establishing asset management and realisation strategies;
 - 19.3 realising certain assets of the Trust, particularly its major mortgage asset of \$255 million in relation to a development known as Maddison Estate. The security underlying this asset was sold on 2 September 2013. This is further discussed at paragraphs 54 to 74 below;
 - 19.4 entering into revised mortgage security arrangements in respect of certain assets, due to the inability of the Trust to provide ongoing funding;
 - 19.5 investigating and considering the previous operations of the Trust, including the historical application of investor funds and transactions involving related parties;
 - 19.6 investigating, commencing and progressing various potential legal actions to recover monies for the Trust, including various breach of trust claims against:
 - (a) the FMIF, a registered managed investment scheme that was also operated by LMIM as Trustee;
 - (b) the AIF, a registered managed investment scheme that was also operated by LMIM as Trustee;
 - (c) the Former Trustee; and
 - (d) directors of the Former Trustee;
 - 19.7 investigating various other potential legal actions;

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- (a) against the Trust's former auditors;
- (b) against valuers; and
- (c) recovery proceedings against Mr Peter Drake, a director of LMIM and owner and founder of the LM Group, to recover monies loaned to him by the Trust.

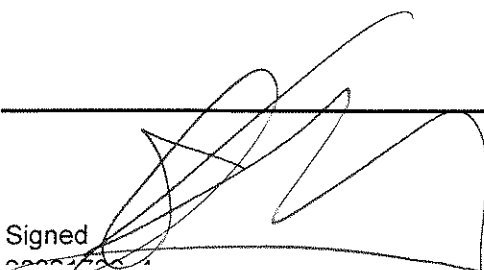
20. From my review of the books and records of the Trust and the New Trustees' investigations, I understand that:

20.1 due to its financial position and in particular problems with its cash flow, the Trust appears to have delayed redemption payments for the withdrawal of investments commencing some time prior to 12 May 2011. A Trust Update and Progress Report provided to investors dated 12 May 2011 was among the books and records of the Trust, and a true copy of it is at **tab 10** of the Exhibit ("**Progress Report**"). The Progress Report mentions that these delays occurred at the time of the "financial crisis", but I am uncertain as to what date is meant by this reference. The New Trustees have also received emails from investors during the course of our appointment which refer to delays in redemption payments, after requests were lodged for payment.

20.2 as described in my other affidavit sworn today (with respect to the books and records of the Trust), when the New Trustees were appointed, we were provided with access to a file transfer protocol set up by the Administrators. From this protocol, we were able to access the records maintained by the Trust in respect of the income/redemption payments made by the Trust ("**Payments Record**"). From these records, I instructed Amanda Smith of KordaMentha ("**Ms Smith**") to perform a limited search of this Payments Record to ascertain what payments were made to investors during the period 1 December 2012 to 19 March 2013. This copy of the results of this search is exhibited at **tab 12** of the Exhibit.

20.3 I also instructed Ms Smith to perform a search of the Payments Record to ascertain what the outstanding redemptions were as at 12 April 2013. A true copy of the findings is at **tab 32** of the Exhibit.

20.4 The Fund was closed by the Administrators on 19 March 2013. A Circular to Investors dated 24 March 2013 referring to this closure is at **tab 13** of the Exhibit.

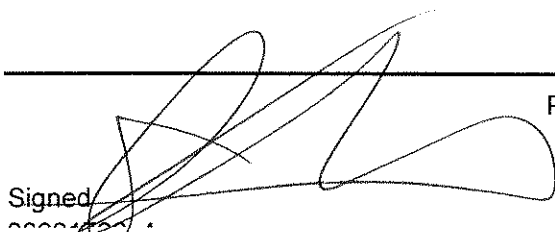
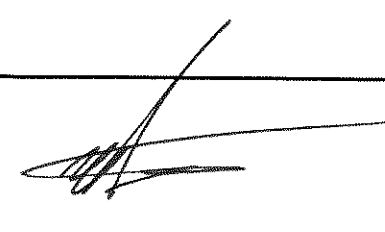
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Communications with investors since the New Trustees' appointment

21. Since our appointment, the New Trustees have sent a number of updates to investors in the Trust. The New Trustees also sent a separate update to investors' financial advisors.
22. At **tabs 14 to 17** of the Exhibit and **tabs 1 to 7** of the Confidential Exhibit "SMV8" are true copies of the updates to investors and circulars sent to all investors and to investors' financial advisers on the following dates. The documents were all sent to investors, save for the circular to Financial Advisers dated 6 June 2013 which the New Trustees only sent to investors' financial advisers.

Updates to Investors	Date	Tab of Exhibit
Update 1	15 April 2013	14
Update 2	30 April 2013	15
Update 3	1 May 2013	16
Update 4	2 May 2013	17
Update 5	7 May 2013	Confidential Exhibit "SMV-8" - Tab 1
Update 6	13 May 2013	Confidential Exhibit "SMV-8" - Tab 2
Update 7	17 May 2013	Confidential Exhibit "SMV-8" - Tab 3
Update 8	3 June 2013	Confidential Exhibit "SMV-8" - Tab 4
Circular to Financial Advisers	6 June 2013	Confidential Exhibit "SMV-8" - Tab 5
Update 9	5 July 2013	Confidential Exhibit "SMV-8" - Tab 6
Update 10	16 September 2013	Confidential Exhibit "SMV-8" - Tab 7

23. These updates set out in detail the financial position of the Trust and the actions that have been taken by the New Trustees from 12 April 2013 to 16 September 2013. The matters stated in these Updates and Circulars are, to my knowledge, true.

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Certain updates to investors and advisers which are confidential and/or commercially sensitive

24. I refer to the updates to investors dated 7 May, 13 May, 17 May, 3 June, 6 June, 5 July and 16 September 2013 and to the Circular to Financial Advisors dated 6 June 2013 (**"the Confidential Updates"**).
25. These Confidential Updates and the circular were provided to investors and financial advisers on a confidential basis, and were not made publically available as they include commercially sensitive information and may prejudice negotiations, asset realisations and potential litigation. For these reasons, these updates do not currently appear on the website that KordaMentha has maintained to communicate with investors. At the hearing of this application, the Applicants intend to seek orders that Exhibit SMV-8 be sealed, and that orders be made that Exhibit SMV-8 not be opened, other than by subsequent order of the Court.

WINDING UP THE TRUST

26. In a non-confidential portion of the update to investors dated 16 September 2013 (**September Update**), the New Trustees advised investors (inter alia) that:

"Under the MPF's constitution the trustees have an obligation to consider the winding down of the Fund, if it is considered inter alia that the Fund is unable to achieve its objectives. Other reasons supporting a winding down of the Fund include:

The overall financial position of the Fund;

The Fund is no longer in a position to accept/raise further funds due to its financial position;

The likely return to investors is a small percentage of the amount originally invested;

The future of the Fund only involves realising monies from existing mortgage assets or legal actions;

There are further investigations to be conducted regarding such legal actions with respect to the conduct of the former trustees, directors and related parties which are typically conducted as part of a wind down process.

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There are various claims against the Fund and a priority arrangement needs to be in place for the Fund assets, dealing with the claims of, and distributing monies, to investors.

Over the course of the next month, the trustees will consider the position of the Fund and if it is deemed by the trustee to be in the best interest of Unitholders, the trustees will consider a winding down application."

An extract of the September Update is at **tab 18** of the Exhibit.

27. Following the issue of the September Update, we have not received any correspondence from investors regarding the proposed winding up of the Trust requesting that the wind up not occur. Prior to the issue of the September Update, a small number of investors requested that the New Trustees raise funds to allow the property developments of the Trust to continue. However, for the reasons outlined in this affidavit, the New Trustees do not believe that this is a viable approach for the Trust.

Provisions of Trust Deed

28. The Trust Deed provides for the winding up of the Trust as follows:

"15.2 The Manager must wind up the Scheme in the following circumstances:

- (a) if the term of the Scheme as detailed in the Constitution has expired;*
- (b) the members pass an Extraordinary Resolution directing the Manager to wind up the Scheme;*
- (c) the Court makes an order directing the Manager to wind up the Scheme;*
- (d) the Members pass an Extraordinary Resolution to remove the Manager but do not at the same time pass an Extraordinary Resolution choosing a company to be the new Manager that consents to becoming the Scheme's Manager;*

15.3 (a) If the Manager considers that the purpose of the Scheme:

- (i) has been accomplished; or*
- (ii) cannot be accomplished,*

it may take steps to wind up the Scheme.

(b) If the Manager wishes to wind up the Scheme pursuant to Clause 15.3 (a), the Manager must give to the Members of the Scheme a notice in writing:

- (i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished;*
- (ii) informing the Members of their rights to take action under Division 1 of Part 2.4G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on an Extraordinary Resolution Members propose about the winding up of the Scheme; and*
- (iii) informing the Members that the Manager is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the Manager giving the notice to Members;*

(c) if no meeting is called within that 28 days to consider the proposed winding up, the Manager may wind up the Scheme."

29. I note that clause 15.3(b)(ii) refers to Division 1 of Part 2G.4 of the *Corporations Act*. This Part only applies to managed investment schemes registered under the *Corporations Act*. As stated in paragraph 9 above, the Trust is not a registered managed investment scheme under the *Corporations Act*.

30. Accordingly, I am aware that there is some doubt as to whether the mechanism contained in clause 15.3(b) of the Constitution can be used to wind up this unregistered managed investment scheme. In any event, the New Trustees consider that the following practical reasons do not favour calling a meeting of members under clause 15.3 of the Constitution.

Costs of Meeting

31. The costs of holding a meeting, based on my experience and professional judgement are estimated to be approximately \$250,000. An approximation of the breakdown of these costs, based on the steps that I expect that will need to be taken to hold this meeting, is set out below:

Task	Estimated Cost (\$) AUD
Preparation, review and distribution of detailed notice	95,000

and report to all investors	
Issue notice of meeting via email and post	6,000
Respond to correspondence and queries from investors regarding the notice	30,000
Arrange conference facilities (equipment hire)	12,000
Booking of facility to enable domestic investors to attend in person	2,000
Legal advice regarding meeting and investor issues	75,000
Meeting (including attendance and pre meeting preparation)	10,000
Post meeting follow up to investors	20,000
Total	250,000

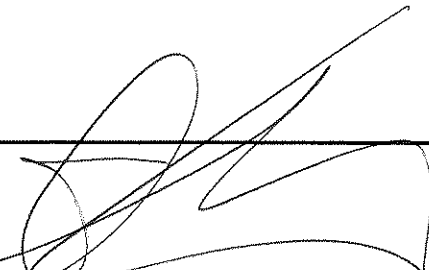
Practicalities

32. The books and records of the Trust record that the Trust has 4,525 foreign investors, comprising:
- 32.1 2,327 who are represented by a foreign financial adviser; and
- 32.2 2,198 direct foreign retail investors (that is, investors who are not represented by a financial adviser).
33. At **tab 19** of the Exhibit is a true copy of an extract of data from the Trust's records that Mr Steve Hannan, the Investment Services Manager of the Former Trustee ("**Mr Hannan**"), provided by email to Ms Smith on 4 October 2013. This extract lists all of the investors of the Trust identified by their investor ID and records, *inter alia*, their country of residence. This extract records that the Trust's foreign investors are located in a number of different countries in Europe, the Middle East, Asia and the Americas, encompassing many different time zones.
34. In addition, the Trust has a much smaller number of domestic (Australian) investors. There are 68 such investors. A further extract of the documents provided by Mr Hannan to Ms Smith, which is exhibited at **tab 20** of the Exhibit, records those investors resident in Australia, which can be seen as those investors which have "AUS" shown as their "ResidenceCountry".

35. In my view, whilst I have not previously held a meeting with investors from so many different geographic locations, it is likely to be difficult to arrange a meeting with all of these investors, particularly as:
- 35.1 it would be highly impractical to arrange a mutually convenient time for investors across the relevant time zones;
 - 35.2 it would be costly and logistically difficult to arrange a technology platform to enable the investors to participate and vote at the meeting, and the efficacy of such arrangements would depend on the technology available to the investors at their various locations around the world; and
 - 35.3 it would be difficult to co-ordinate questions and answers when up to 4,525 international investors are participating remotely through a technology platform.

Requirement for an "extraordinary resolution"

36. As set out above, clause 15.2(b) of the Constitution requires an "extraordinary resolution" of members. I am aware that:
- 36.1 this term is defined in clause 1.1 of the Constitution to have the same meaning as in the *Corporations Act*; and
 - 36.2 section 9 of the *Corporations Act* defines "extraordinary resolution", in respect of a registered scheme, to be a resolution that has been passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy).
37. I am aware that there is some doubt as to whether the mechanism contained in clause 15.3(b) of the Constitution can be used to wind up this Trust, as the Trust is an unregistered managed investment scheme, and therefore the definition contained in section 9 does not apply.
38. However, if any such meeting of members did not pass an extraordinary resolution to wind up the Trust, in light of the financial situation of the Trust, it is my professional opinion that the New Trustees would then be required to make a winding-up application to the Court in any event (the Court having the power to make such an order pursuant to clause 15.2(c) of the Constitution), with the costs of the meeting being wasted.

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The financial position of the Trust

39. As stated in paragraph 20.4 above, the Trust was closed on 19 March 2013.
40. As at 12 April 2013, the date of the New Trustees' appointment as trustees of the Trust, LMIM were in the process of, in their ordinary course of business, selling the underlying assets of certain mortgages, including with respect to properties known as Barly Wood, Lot 111 and Green Square. I am unaware as to whether any of the sales occurred during the period of voluntary administration.
41. In the following table, I summarise the position of the Trust as at 12 April 2013 (being the date of the New Trustees' appointment):
- 41.1 the Trust's cash position;
 - 41.2 the loans and other assets of the Trust, including the amounts of interest that had accrued on such loans as at the date of the New Trustees' appointment; and
 - 41.3 unit holder contributions.

Description	(AUD 'M)
Cash held on appointment	9.2
<i>Claims against cash held on appointment</i>	
Quarantined monies	(1.3)
Barly Wood – Disputed Amount	(1.2)
LM Bushland Beach	(1.3)
Voluntary Administrators – Lien and Indemnity	(1.6)
<i>Total claims on cash at appointment</i>	<i>(5.4)</i>
Net cash available on appointment	3.8

Outstanding loans and other assets	Book Value	Estimated Realisable Amount
Maddison Estate (high estimate)	255.0	1.5
Other Mortgages (high estimate)	200.0	7.0
Total Loans and Other Assets	455.0	8.5
Total of Cash, Loans and Other Assets		12.3
Unitholder Contributions		412.8

Description	(AUD 'M)
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Expected Unitholder Claims Net Surplus / (Shortfall) of cash, loans and other assets	(400.5)
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Cash held on appointment

42. Exhibited at **tab 21** are copies of the bank statements for the various bank accounts in the name of the Trust with HSBC and Suncorp Bank which confirm the cash position as at 12 April 2013. A summary of the cash position prepared by KordaMentha soon after the New Trustees' appointment is at **tab 21A** of the Exhibit. It is noted that in calculating the above cash balance of \$9.2 million I have converted foreign currency amounts into Australian Dollars for the purposes of my calculation.

Quarantined monies

43. The New Trustees have ascertained the amount with respect to the Quarantined Funds from, *inter alia*, a review of bank accounts, a review of the Constitution, the Information Memorandums (referred to later in this affidavit) and conversations between LMIM/FTI Consulting (Australia) Pty Ltd, and KordaMentha. A file note prepared by David Johnstone of KordaMentha dated 16 May 2013, which summarises KordaMentha's findings, is exhibited at **tab 22**.

Barly Wood – disputed amount

44. Exhibited at **tab 23** is a letter from LMIM to the Trust Company (PTAL) Limited ("**TrustCo**") dated 19 June 2013 which confirms that \$126,665.63 was transferred into an account named "Barley Wood Disputed Funds Account" and a letter from King & Wood Mallesons to the TrustCo dated 14 May 2013 which claims that \$1,208,124 was owing to the AIF.

Other Mortgages

45. In respect of the \$7 million of estimated realisable recovery for the "Other Mortgages", this figure was ascertained as at the date of appointment of the New Trustees.

The New Trustees' estimate of the likely recoveries

46. My investigations into the Trust's assets have shown that principally the Trust's activities consisted of making loans to borrowers. As security for these loans, it usually took mortgages over real property. The amounts due to the Trust from such loans, including both capital and interest, totals \$455 million. In the Trust's books and records, the New Trustees located some of the loan statements that record details of what was owing in respect of the "Other Mortgages" listed in the above table. Most of the loan statements were obtained from LMIM's 'composer' system which, to the New Trustees' knowledge, LMIM ceased using on or about 30 June 2011 (accordingly these statements are somewhat out of date). Since the appointment of the New Trustees, KordaMentha have obtained further material from the books and records of the Trust with respect to the "Other Mortgages". Exhibited at **tab 24** are copies of the loan statements held by the New Trustees that were obtained from LMIM's composer system. Exhibited at **tab 33** are copies of excel extracts from LMIM's record system which record the Trust's "Other Mortgages".
47. In relation to the loans and other assets of the Trust:
- 47.1 there are 19 real property mortgages held by the Trust, and one direct real property investment. Of the 19 mortgages of the Trust, 18 of these are in default. The mortgage not in default is referred to below in 47.4 below. Based on my current assessment, monies will only be recovered on five (5) of the mortgages of the Trust;
- 47.2 the Trust made most of these loans (in respect of which the 18 mortgages were taken) for the purpose of enabling the borrowers to undertake property developments on vacant sites. However, a number of these developments have not proceeded and the Trust held security at 12 April 2013 over seven (7) (including Maddison Estate) parcels of land that remained vacant;
- 47.3 for the five (5) loan assets where the value of the underlying asset is greater than the first mortgagee's loan such that the Trust will obtain some recovery, the New Trustees have been attempting to realise the Trust's position in an appropriate but timely manner to maximise the realisable value;
- 47.4 the one other loan asset where the value of the underlying asset is greater than the first mortgagee's loan (such that the Trust will obtain some recovery) is a property development being funded by a first mortgagee. This mortgage is not in default. The Trust is awaiting a return from this asset, which will be realised once the development is completed and sold, which I expect will occur in early 2015.

LIKELY RECOVERIES TO INVESTORS

48. I have compiled the following summary of the New Trustees' estimated asset recoveries, which summarises the analysis discussed below:

Estimated Asset Recovery (Before Costs and Expenses of Administration the Trust)	(AUD 'M)
Net Cash Available on Appointment	3.8
<i>Recovery from Loans</i>	
Maddison Estate Loan (Second Mortgage)	1.5
Other Loans and Assets	6.0 – 7.0
<i>Total recoveries from loans</i>	7.5 – 8.5
Total estimated recoveries (prior to Trust management costs)	11.3 – 12.3

49. The New Trustees have also identified potential legal claims against the Former Trustee and other parties. These claims are currently not quantifiable, and therefore I have omitted potential recoveries from legal actions from the table above.
50. The analysis I have set out in the table above does not include the fees, costs and expenses of the New Trustees. But even before the New Trustees' fees, costs and expenses are taken into account, it is clear that the Trust will suffer a material shortfall of monies and that unit holders' investments will not be repaid in full. The New Trustees presently estimate that the likely return to unit holders is less than 5 cents in the dollar.

"Net cash available"

51. The table set out in paragraph 48 above records "net cash available on appointment" of \$3.8 million.
52. When the New Trustees were appointed, the Trust's bank account contained total holdings of \$9.2 million (refer to **tab 21** and paragraph 42 above). However, the Trust only had net 'clear' cash available of \$3.8 million due to claims made by various parties against the Trust. I set out details of the claims against the Trust below.
53. I have summarised the Trust's cash position on appointment (12 April 2013), and the claims against these funds, in the table below:

Description	(AUD 'M)	Notes
Cash held on appointment	9.2	Total of all AUD and foreign currency accounts held at 12 April 2013
Claims against cash held on appointment		
Quarantined monies	(1.3)	See 'Quarantined monies' section below
Barly Wood – Disputed Amount	(1.2)	
LM Bushland Beach	(1.3)	The FMIF held 1 st Ranking Security interest over the MPF pursuant to security in relation to this property
Administrators – Lien and Indemnity	(1.6)	
Total claims on cash at appointment	(5.4)	
Net cash available on appointment	3.8	

“Maddison Estate” loan

54. The table set out in paragraph 48 above records estimated recoveries of \$1.5 million in respect of this asset.
55. The Maddison Estate development site is a 108 hectare residential development site, located at Nambucca Crescent, Rifle Range Road, Kiama and Trents Court, Pimpama, Queensland.
56. The land at the Maddison Estate development is owned by Coomera Ridge Pty Ltd. The developer of the site is Maddison Estate Pty Ltd. The land and the development were secured by a first ranking mortgage to Suncorp Metway Limited (“**Suncorp**”). Maddison Estate Pty Ltd is a related entity of LMIM and Mr Peter Drake. In this regard, Peter Drake is a shareholder of LMIM Asset Management Pty Ltd, which in turn is the shareholder of LM Coomera Holdings Pty Ltd, which holds all of the shareholding in Maddison Estate Pty Ltd.
57. The Trust indirectly held second ranking security over the land through a second ranking charge registered over Maddison Estate Pty Ltd, which in turn held a second ranking mortgage over the Maddison Estate development land. Accordingly, the security for the moneys lent by the Trust to Maddison Estate Pty Ltd ranked second behind Suncorp.

58. At the end of March 2013, the Fund was owed approximately \$255 million by Maddison Estate Pty Ltd, comprising \$113 million principal debt, with the remainder being interest and fees. A true copy of the loan statement as at 28 March 2013, which was among the books and records of the Trust, is exhibited at **tab 25** of the Exhibit.
59. Accordingly this loan was at the time, by far, the largest single asset of the Trust, constituting approximately 55% of the total amount of money invested by the Trust.
60. After the New Trustees' appointment, we obtained a valuation from LandMark White for the real property at Pimpama, the subject of the Maddison Estate project. A copy of this valuation (which remains in draft but I am assured is the valuer's position as at the date of the draft) is exhibited at **tab 26** of the Exhibit. This valuation, dated 20 May 2013, valued the land (site value) on an "as is" basis at \$17.5 million.
61. From my review of the books and records of the Trust and recent dealings with Mr David Kop, Associate Director of Suncorp ("**Mr Kop**") and Mr Derek Parker of Suncorp, I understand and verily believe that as at 11 July 2013, the total amount owed to Suncorp and secured by its first registered mortgage was \$19.9 million, with interest accruing on this amount at around \$220,000 per month.
62. In or around August 2013, the Sunland Group Ltd ("**Sunland Group**"), a well-known property developer listed on the Australian Stock Exchange, acquired the loan owed by Maddison Estate Pty Ltd from Suncorp and had Suncorp's first registered mortgage over the property at the development assigned to it. This transaction was announced in August 2013 and was settled on or about 2 September 2013. The New Trustees were not parties to this transaction.

Marketing process undertaken by the New Trustees

63. The New Trustees undertook an extensive marketing process in respect of the Maddison Estate project, to seek to retain some value for the Trust from this loan. The New Trustees commenced this marketing process in May 2013 (that is, prior to the Sunland Group's acquisition of the Suncorp mortgage referred to in paragraph 62 above).
64. There was some urgency to commence this marketing process, because:
- 64.1 the Suncorp loan was already in default;
- 64.2 interest was accruing on the Suncorp loan at default interest rates, of approximately \$220,000 per month; and

64.3 of the risk that Suncorp would enforce its first registered security and realise the Maddison Estate site, without the Trust having any degree of control over this process.

65. In relation to this process:

65.1 through the marketing process, the New Trustees initially called for expressions of interest regarding a restructuring or recapitalisation solution for the Maddison Estate project, which would allow the Trust's unit holders to share in any future development profits.

65.2 I had discussions with Mr Kop where he stated words to the effect of "*the bank (Suncorp) is seeking to exit the loan to Maddison Estate prior to 30 June 2013*". In light of this conversation, the New Trustees commenced a process to secure capital and development partners on the basis that without Suncorp's continued support of the Maddison Estate development, the Trust's unit holders were at a material risk of substantial loss.

65.3 This process was designed to secure a restructure and recapitalisation solution to address the Maddison Estates Project's three primary identifiable impediments, (which ultimately were impediments to the prospect of unit holder returns) namely:

- (a) repayment of the existing senior debt position;
- (b) exposure to issues afflicting the broader LMIM group, by virtue of the current ownership structure; and
- (c) access to working capital.

65.4 While the LandMark White valuation had not been received when the New Trustees first considered available options to the Trust, the New Trustees' best estimate was that if the Maddison Estate site was sold under prevailing conditions, the return to the Fund would be minimal, if not zero.

65.5 Despite some initial interest from various parties in respect of the restructuring or recapitalisation of the Maddison Estate project, all interested parties withdrew from negotiations during the due diligence phase.

66. In my view, the sale of Suncorp's first mortgage debt to Sunland Group (which occurred once the marketing process was underway) materially decreased the prospects of a recapitalisation. This was because interested parties seemed to assume that the Sunland

Group (a property developer) intended to develop the Maddison site itself. Accordingly, the New Trustees were forced to consider alternative transactions involving either:

66.1 a sale of the underlying land of Maddison Estate over which the Trust indirectly held security; or

66.2 a sale of the securities held by the Trust for the loan to Maddison Estate Pty Ltd.

Land sale

67. In the marketing process following their appointment, the New Trustees issued a proposal document to 16 parties. The New Trustees liaised in depth with 11 groups. A true copy of the proposal document dated June 2013 is exhibited at **tab 34**.

68. The New Trustees received conditional offers to purchase the land from three qualified parties, with prices ranging from \$21.4 million to \$24 million. Settlement terms were offered at between 90 days and 12 months, which were largely contingent on completion of due diligence.

69. In the New Trustees' view, an offer received at \$23 million from an experienced land developer, based on settlement within 90 days and subject to satisfactory completion of a 70 day period of due diligence, presented the unit holders with the best risk adjusted prospect of return from a land sale transaction.

70. The net proceeds from any settlement would have been subject to:

70.1 the first mortgagee's debt, which at that time stood at approximately \$19.9 million;

70.2 ongoing interest accruing on the first mortgagee's debt, estimated at approximately \$220,000 per month based on the current debt balance;

70.3 the first mortgagee's additional costs associated with the sale of its debt to the Sunland Group, and any potential subsequent enforcement action taken by Sunland Group such as a Receiver and Manager's appointment and marketing costs; and

70.4 the New Trustee' fees and costs associated with the realisation of the Maddison Estate securities, and their legal costs of any sale.

71. Taking into account these expected costs, the New Trustees anticipated a return to the Trust in the order of \$1.5 million, should the purchaser satisfactorily complete its due diligence and should the land sale proceed.

72. However, I emphasise that in my view, the sale of the first mortgagee's debt to Sunland Group introduced very significant uncertainty to the proposed sale to the abovementioned land developers, for the reasons set out at paragraphs 64 to 66 above. As stated therein, the offers received were all conditional upon satisfactory completion of due diligence.

Mortgage security sale

73. After the New Trustees received the offers set out in paragraph 67 above, the Sunland Group made an alternative offer to the New Trustees. This offer involved the Trust receiving \$500,000 upon settlement in consideration for release of the Trust's security.
74. This initial offer from Sunland Group was unacceptable to the New Trustees. Subsequently, Sunland Group increased its offer to \$1.5 million in cash up front with a potential additional return of \$500,000 contingent upon Sunland being able to obtain certain taxation benefits ("**the Sunland Transaction**"). On 12 November 2013, Sunland advised the New Trustees that the taxation benefits were not achievable and accordingly they would not remit the further \$500,000 to the Trust.

New Trustees' decision to enter into the Sunland Transaction

75. The New Trustees entered into the Sunland Transaction on Monday 2 September 2013. The New Trustees considered that the Sunland Transaction was the most attractive recovery option for unit holders of the Trust for the following reasons:
- 75.1 the Trust had insufficient capital to continue to fund the Maddison Estate development;
 - 75.2 no party was willing to participate with the Trust and/or unit holders in the development of the Project or fund any recapitalisation transaction;
 - 75.3 the valuation obtained by the New Trustees valued the property on an "as is" basis at less than the first mortgagee's debt;
 - 75.4 Sunland Group's offer was unconditional in relation to the initial \$1.5 million, affording certainty of return;
 - 75.5 Sunland Group's offer avoided costs associated with a land sale process, including, but not limited to, additional trustee and legal fees;
 - 75.6 Sunland Group's offer eliminated the significant and imminent risk of the first mortgagee enforcing its security, which (given the valuation of the land obtained by the New Trustees) would potentially lead to no return to the Trust; and

75.7 for all these reasons, the New Trustees expected that the Trust would receive an inferior net return from a land sale transaction, when compared to the Sunland Transaction.

“Other loans and assets”

76. The table set out in paragraph 48 above records projected recoveries from “other loans and assets” (apart from the Maddison Estate loan) of between \$6 million and \$7 million.

77. The table I have prepared below summarises these other loans and real property assets, excluding Maddison Estate.

78. It is important to note that the Trust owns only one asset (LM Bushland Beach) and otherwise just holds a number of registered mortgages over various assets. In relation to such registered mortgages the Trust, except with respect to one registered mortgage does not hold first registered mortgages as security for any loans. All the registered first mortgages (except for the one loan) over the various assets are held by other LM funds as security for loans made by those funds. A register of the assets held by the Trust as maintained by the Former Trustees as at 28 February 2013 is exhibited at **tab 27**.

(AUD M)	LM Bushland Beach ¹	Part recoverable Property Loans ²	No Recovery Property Loans ³	Previously Fully Provisioned Loans ⁴	Other Loans ⁵
Estimated Security Value	Confidential	23.5	14.0	4.0	-
Less First Mortgagee Facility Balance	1.3	(17.0)	(34.5)	(162.5)	(18.5)
Potential Security / Return to MPF	Confidential	6.5	Nil	Nil	Nil
MPF Facility Balance	Nil	36.0	59.5	23.5	24.5
Shortfall to MPF	Confidential	(29.5)	(59.5)	(23.5)	(24.5)

79. As the New Trustees are exploring various realisation strategies for each of the loans and/or assets, disclosure of commercially sensitive information such as the security value of individual loans and assets listed above, may adversely prejudice the outcome of the realisation process. As a result, the table above either withholds the estimated security value (for instance, LM Bushland Beach) or has grouped the estimated security value into

categories to prevent dissemination of the commercially sensitive information for each individual loan.

80. In this table:

- 80.1 "LM Bushland Beach" refers to real property owned by the Trust, which is located at Bushland Beach, Queensland. The Trust was loaned an amount which had accrued with interest to \$1.3 million by the FMIF, which was secured by a real property mortgage over the property and a charge over the Trust. Whilst the realisation of this land will provide a return to the Fund, before any recovery can be realised, the Trust has needed to repay the first mortgagee (the FMIF) its debt of \$1.3 million.
- 80.2 "Part Recoverable Property Loans" refers to three loans. Based on a review of the development feasibilities and the independent valuation reports, after the process of realisation of securities is completed, the New Trustees' best estimate is that these loans will return about \$6.5 million to the Trust.
- 80.3 "No Recovery Property Loans" refers to five loans. Whilst these loans are secured over real property assets, based on a review of the development feasibilities and the independent valuation reports, the New Trustees do not expect that the Trust will recover any funds from them, because the value of the first mortgagee's debt exceeds the realisable value of the property assets in each case.
- 80.4 "Previous Fully Provisioned Loans" refers to six loans. All these loans were previously fully provisioned by LMIM in its position as Former Trustee (that is, LMIM assessed that the Trust would not receive any return from them). They involve residential, commercial and industrial assets. Since our appointment as the New Trustees, I have instructed members of the property team of KordaMentha to confirm that the position taken by LMIM was accurate and I am informed that they are satisfied that it was.
- 80.5 "Other Loans" applies to four loans where security is held over assets with no apparent, or materially uncertain, value. Recovery of funds is entirely contingent on successful litigation and/or the making of claims against guarantees. To date, no recoveries have been received.

Legal actions

81. While the New Trustees have identified various potential legal claims against a number of third parties, it is too early in the recovery process to estimate any probable return to investors from these claims. Accordingly, the table set out in paragraph 48 above does not include any recoveries from such claims.
82. The New Trustees are considering potential claims against:
- 82.1 the Former Trustee;
 - 82.2 Directors of LMIM;
 - 82.3 Mr. Peter Drake, who (as is stated at page 5 of the 25 November 2009 information memorandum, discussed in paragraph 83 below) was the founder of the LM managed investment schemes. As the historical company searches for the Former Trustee and LMA show, he was also a director of both of these companies;
 - 82.4 other managed investment schemes of which LMIM was also the responsible entity, such as the FMIF and the AIF;
 - 82.5 the Trust's former auditors; and
 - 82.6 valuers who provided valuations of real property for the loans made by the Trust.

Trust unable to achieve its objectives

The purpose of the Trust

83. At **tab 28** of the Exhibit is a true copy of the Information Memorandum for the Trust issued 25 November 2009, which was among the books and records of the Trust.
84. The Information Memorandum provides information about the Trust and its objectives, including the following statement at page 8:

"The LM Managed Performance Fund was established in 2001 as an Australian income fund suitable for Australian and global investors... The investment objective for the Fund is to provide a steady income stream relevant to the risk return of the Fund. Non-Australian dollar investments in this Fund are hedged in the relevant currency against Australian dollar currency movements. The Fund currently invests in commercial loans, direct real property and cash. All assets in the Fund are in Australia."

85. At **tab 29** of the Exhibit is a true copy of the Information Memorandum for the Trust issued 22 February 2011, which was among the books and records of the Trust. It includes the following statement at page 8:

"The investment objective for the Fund is to provide a steady income stream relevant to the risk return of the Fund."

86. At **tab 30** of the Exhibit is a true copy of the Information Memorandum for the Trust issued 14 December 2012 ("**December 2012 IM**"), which was among the books and records of the Trust. It includes the following statement at page 4:

"Investment Objective: to provide investors with a competitive return by benefiting from the Fund's investment in commercial loans, direct real property and cash. Commercial loans include mortgages secured over real property (which are a type of debt instrument). Non-Australian dollar investments are either hedged in the relevant currency against Australian dollar currency movements or cash investments are held in non-Australian dollar currencies".

87. At **tab 31** of the Exhibit is a true copy of the Portfolio and Fund Update from LMIM dated 31 January 2012, which was among the books and records of the Trust. It states that:

"The investment objective has been met this month and for the entire history of the fund:

- to provide a steady income stream relevant to the risk return of the fund and to provide an investment unit with a stable price.*
- Investments in the fund can be hedged in the relevant currency against Australian dollar movements."*

The purposes of the Trust can no longer be achieved

88. In light of the financial position of the Trust as set out above, the New Trustees consider that the purposes of the Trust set out at paragraphs 83 to 87 above are no longer able to be satisfied, as:

88.1 the Trust is no longer able to provide an income stream to investors, because:

- (a) the Trust is not receiving any income from any of the loans made by the Trust. Interest continues to accrue on the loans made by the Trust, but the borrowers are not able to pay the interest accruing. The only loan that is not in default (as set out at paragraph 47.4 above) has interest

capitalised, and its anticipated outstanding total of principal and interest of approximately \$1.3m is due to be repaid in 2015;

(b) as stated in paragraph 50 above, the estimated return to investors is less than 5 cents in the dollar.

88.2 due to its financial position, it is extremely unlikely that the Trust would be able to raise more capital from new investors by issuing units in the Trust, given the losses the Trust has sustained to date.

89. The activities of the Trust are currently limited to:

89.1 recovering monies with respect to the loans and other assets of the Trust; and

89.2 undertaking legal proceedings for recovery of monies related to the losses of the Trust.

QUARANTINED FUNDS

90. I am informed by Jarrod Villani, a Director employed by KordaMentha, and verily believe that shortly after the New Trustees' appointment on 12 April 2013, the Administrators told him that they had "quarantined" certain monies held by the Trust ("**Quarantined Funds**"), and that further investigations were required to assess whether these funds should be returned to investors.

91. I am informed by David Johnstone, a Senior Executive Analyst employed by KordaMentha, and verily believe that:

91.1 on or about 18 April 2013 he attended a meeting with Francene Mulder, a director of the Former Trustee, in which she (relevantly) said to him words to the effect that:

(a) 8 March 2013 was the closure date of one of the Trust's foreign exchange facilities. This closure meant that the Trust would no longer be able to hedge foreign currency positions for new investments;

(b) on 8 March 2013 the directors of the Former Trustee agreed to stop accepting new investments in the Trust; and

(c) the Former Trustee did not notify any external party of the closure of the Trust, or notify its employees not to accept new investments in the Trust;

91.2 on or about 16 May 2013, he attended a meeting with Mr Hannan, in which he (relevantly) said to Mr Johnstone words to the effect that:

- (a) as soon as Australian dollar investments were received, the Former Trustee would match the investment to an Application Form and allocate units in the Trust;
- (b) if foreign currency investments were received, the Former Trustee would identify the foreign currency investment in the Trust's bank accounts with HSBC, match the investment to an Application Form received for units, and then hedge the investment;
- (c) once the hedge was in place, the Former Trustee would sweep the funds to an Australian dollar account and invest the funds; and

91.3 on or about 18 April 2013, he spoke with Virginia Battisson of the Former Trustee who said (relevantly) words to Mr Johnstone to the effect that from 9 March 2013, the Trust did not enter into any new hedges.

92. My investigations into this issue have shown that:

92.1 the Former Trustee received the Quarantined Funds from persons who both inadvertently transferred amounts into the Trust's bank accounts and from persons who wished to invest in the Trust. The Quarantined Funds were:

- (a) £420,940.74 (approximately AU\$627,239.96) received from Citigroup, which Citigroup transferred into the Trust's bank account by error. The Former Trustee had not received any application from Citigroup to invest in the Trust, and the transfer of money was an inadvertent banking error on Citigroup's part;
- (b) AU\$11,830 was received from prospective investors; and
- (c) €210,292.00, £127,381.54 and SEK74,000 (Swedish krona) received from prospective investors, which together total approximately AU\$625,000.00 (subject to currency fluctuations). These amounts of money remain in these currencies in the various bank accounts into which they were received, and the Former Trustee did not convert them into Australian currency;

92.2 the Former Trustee received the above Quarantined Funds both before and after the appointment of the Administrators to it on 19 March 2013. However, the

Former Trustee did not issue any units in the Trust to any of these prospective investors, either before or after the appointment of the Administrators on 19 March 2013.

93. Based on my investigations, the December 2012 IM was the last Information Memorandum issued by the Former Trustee in relation to the Trust.
94. At page 17, the December 2012 IM states:

"Initial Investment for Non-AUD Investments

On receipt of the initial investment amount, completed Application Form and appropriate Anti-Money Laundering verification documentation...the Manager will confirm receipt with the investor.

The non-AUD investment amount is held in the subscription account until the Manager exchanges the foreign currency into Australian dollars and simultaneously hedges the relevant currency using a hedging instrument chosen by the Manager.

All non-Australian dollar investments commence on the day the Manager settles the hedging instrument. For example, if the Manager receives the investment amount, properly completed Application Form and appropriate Anti-Money Laundering verification documentation for a 1 Year term on 15 March and the hedging instrument settles on 17 March the commencement date will be 17 March."

95. In the New Trustees' view, all monies received from the prospective investors should be returned to them, as:
- 95.1 pursuant to the terms of the December 2012 IM, their investments in the Trust never commenced, as the Former Trustee did not enter into any hedging instruments in respect of these funds; and
- 95.2 no units in the Trust have ever been issued to these prospective investors.
96. The New Trustees have repaid the amount received from Citigroup on or around 10 June 2013.
97. On or about 19 July 2013, I caused my solicitors Piper Alderman to write to the Former Trustee's solicitors Russells in relation to the proposed refund of the quarantined funds to the prospective investors. The letter from Piper Alderman to Russells and its attachment are confidential and subject to legal professional privilege and have therefore been

Signed

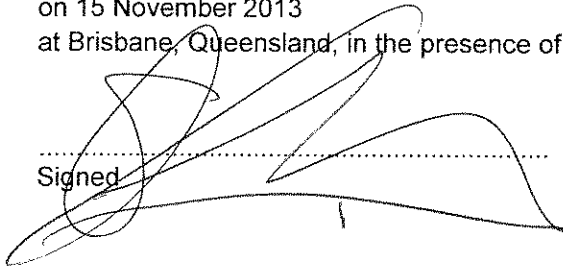
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included in the Confidential Exhibit. A true copy of this letter is at **tab 8** of the Confidential Exhibit "SMV-8".

98. By letter dated 20 August 2013, Russells replied to my instructing solicitors. The letter from Russells to Piper Alderman is confidential and subject to legal professional privilege and has therefore been included in the Confidential Exhibit. A true copy of this letter is at **tab 9** of the Confidential Exhibit "SMV-8".
99. Given this notification of dispute received from the Former Trustee, the New Trustees have quarantined the amounts received from the prospective investors in their nominated currency accounts, pending the Court's determination of this application.

Sworn by SIMON MICHAEL VERTULLO
on 15 November 2013
at Brisbane, Queensland, in the presence of:

Signed



Solicitor



Denis Beattie