

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11593 of 2013

First Applicants **KORDAMENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL LTD ACN 108 318 985 IN THEIR CAPACITY AS TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

AND

Second Applicant **KORDAMENTHA PTY LTD ACN 100 169 391**

AND

Third Applicant **CALIBRE CAPITAL LTD ACN 108 318 985**

AND

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

AND

Second Respondent **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461**

AND

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

CONFIDENTIAL AFFIDAVIT

SIMON MICHAEL VERTULLO of Level 14, 12 Creek Street, Brisbane in the State of Queensland, Accountant, states on oath as follows:

1. I am a partner of KordaMentha Pty Ltd (**KordaMentha**), one of the Applicants to this proceeding. I am authorised to swear this affidavit on behalf of the Applicants.

Page 1

Signed

Taken by

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

Piper Alderman
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
Ref: AKB.AKD.386376

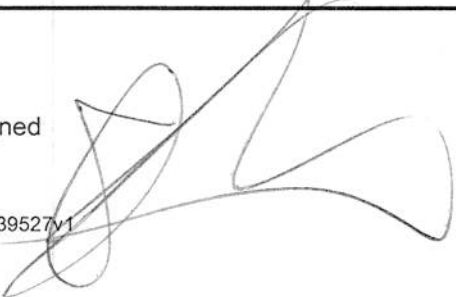
2. Except where otherwise indicated, I depose to the matters in this affidavit from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.
3. Throughout this affidavit, I make reference to various documents that are contained in a paginated bundle of documents exhibited to this affidavit and marked "**SMV-11**" (the **Third Exhibit**). The pages that I refer to, unless otherwise stated, are pages in the Third Exhibit.
4. I refer to my affidavit sworn 13 December 2013 in support of the present application (**my main affidavit**). This affidavit is supplementary to my main affidavit.
5. I request that this affidavit and the Third Exhibit be treated as confidential by the Court so that they are not to be available for inspection without an order of the Court.
6. During the Mediation referred to in my main affidavit, the New Trustees and Administrators entered into an agreement that was recorded in a document entitled "Heads of Settlement" (the **Handwritten Agreement**). A copy of the Handwritten Agreement is at pages 1-5 of the Third Exhibit.
7. As contemplated by the Handwritten Agreement, the New Trustees and Administrators have subsequently negotiated a draft formal Deed of Settlement (the **Deed of Settlement**). A copy of the draft Deed of Settlement is at pages 6-14 of the Third Exhibit.
8. The Settlement Amount which the New Trustees agreed to pay to the Administrators as referred to in paragraph 43 of my main affidavit is \$1,679,000.
9. Although the final negotiation of the Settlement Amount was not conducted on an item-by-item basis in relation to the Administrators' Indemnity Claim, I estimate that:
 - 9.1 the Settlement Amount reflects a reduction in the Administrators' claims for the LMA Expenses, Trustee Expenses and Trustee Out of Pocket Expenses (as referred to at paragraphs 35 and 36 of my main affidavit) of approximately \$330,000 or 35%; and
 - 9.2 the Settlement Amount reflects a reduction in the Administrators' claims for the items referred to in paragraph 41 of my main affidavit of approximately \$115,000.
10. The Administrators are to agree pursuant to clause 3.5 of the draft Deed of Settlement to pay the amount of \$244,000 to the New Trustees in satisfaction of a costs order made in proceeding BS2869 of 2013.

Page 2

Signed

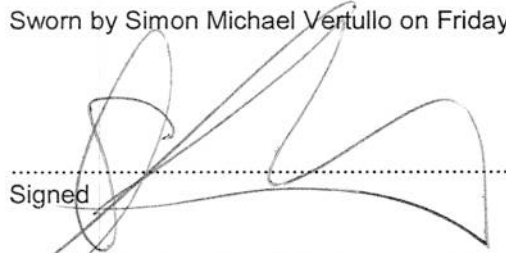
28739527v1

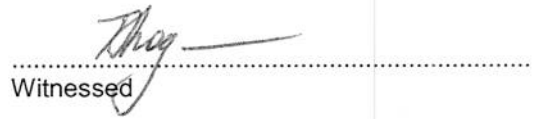
Taken by



11. The Administrators are also to acknowledge, in clause 3.4 of the draft Deed of Settlement, that the New Trustees have already paid the sum of \$110,246 to the Administrators as a partial payment of the Settlement Amount.
12. Under clause 3.2 of the draft Deed of Settlement, the New Trustees' obligation to pay the Settlement Amount to the Administrators is to be conditional upon the Supreme Court of Queensland making a direction pursuant to section 96 of the *Trusts Act 1973* (Qld) in terms encapsulating the operative provisions of the Deed.

Sworn by Simon Michael Vertullo on Friday 13 December 2013 at Brisbane in the presence of:


Signed


Witnessed

who certifies that the affidavit was read in the presence of the deponent who seemed to understand it, and signified that that person made the affidavit.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11593 of 2013

First Applicants **KORDAMENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL LTD ACN 108 318 985 IN THEIR CAPACITY AS TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

AND

Second Applicant **KORDAMENTHA PTY LTD ACN 100 169 391**

AND

Third Applicant **CALIBRE CAPITAL LTD ACN 108 318 985**

AND

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

AND

Second Respondent **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461**

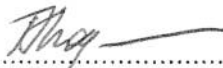
AND

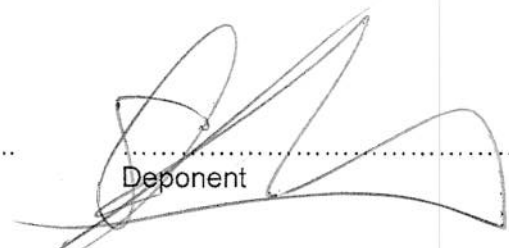
Third Respondent **THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND**

EXHIBIT CERTIFICATE

This is the Exhibit marked "**SMV-11**" referred to in the second affidavit of Simon Michael Vertullo sworn 13 December 2013.

Before me:


.....
Solicitor/Justice of the Peace


.....
Deponent

Affidavit of Simon Michael Vertullo
Filed on behalf of the Applicants
Form 46 (Rule 431)

Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
Ref: AKB.PS.MB.386376

INDEX TO EXHIBIT SMV-11

Description	Date	Page
Handwritten Agreement entered into by the Applicants and First Respondent	29 November 2013	1-5
Draft Deed of Settlement between the Applicants and First Respondent	n/a	6-14

RUSSELLS

MEMO	Matter		Page 1/
Client	Date	Start	Finish
Re		11. Phone In	12. Phone Out
Attending		13. Conf In	14. Conf Out
		24. Court Appearance	
From	To		

Heads of Settlement (BINDING)

- John Paulk + Ginette Muller (as former administrators of LMI Investment Management Ltd) ("The Administrators")
- Korda Mentha Pty Ltd + Calibre Capital as trustees of the LMI Managed Performance Fund ("The new trustees")

Background:

1. The Administrators have asserted a claim for remuneration, costs + expenses against the assets of the LMI Managed Performance Fund ("MPF");
2. The new trustees have disputed some of the items within the Administrators' claim.
3. Subject to the court making a direction that the new trustees are justified in making the payment provided for in this deed, the Administrators + new trustees have agreed to resolve the Administrators' claim for indemnity against the assets of the MPF on the terms of this deed.

RUSSELLS

MEMO	Matter		Page 2/
Client	Date	Start	Finish
Re		11. Phone In	12. Phone Out
Attending		13. Conf In	14. Conf Out
		24. Court Appearance	
From	To		

4. The Administrators + the new trustees will reduce the terms of the agreement struck to a formal deed to contain the usual terms contained w/in a deed of settlement.

Operative Provisions

1. Within 7 days of the Court making a direction pursuant to s. 96 of the Trust Act (Bld) 1973 on terms encapsulating the operative provisions of this deed the new trustees will pay to the Administrators an amount of \$1,679,000.00 in satisfaction of the Administrators' indemnity claim against the MPF. (The Administrators acknowledge having already been paid an amount \$110,246.00 in respect of this amount). The balance payable under this agreement being an amount of \$1,568,754.00.
2. The Administrators agree to pay to the new trustees the amount of \$244,000.00 in satisfaction of the costs order made in proceeding number 2869/2013. Such monies to be paid by way of cheque payable to Peter Holliman Trust Account.

RUSSELLS

MEMO	Matter		Page 3/
Client	Date	Start	Finish
Re		11. Phone In 13. Conf In 24. Court Appearance	12. Phone Out 14. Conf Out
Attending			
From	To		

within 7 days of receipt of the payment detailed in (1) above.

subject to compliance w/ 2 above,

3. The ~~trustee~~ new trustees release + discharge the Administrators in respect of the costs order made in proceeding number 2869/13 on 23 May 2013.

4. The new trustees hereby release the Administrators in respect of the claims for breach of trust + duty detailed in ~~the~~ ^{my} ~~letter~~ ^{to} ~~to~~ ^{of} Russell's of 23 August 2013.

5. The Administration hereby release the new trustees in respect of ~~the~~ ^{any} ~~claims made in the letter from~~ ^{to} ~~Russells to Peter Alderman~~ ^{that} ~~in respect of the allegation regarding the new trustees~~ ^{had been} ~~conduct in the administration of the MPF~~ ^{outside of} ~~the orders of the Queensland Supreme Court made~~ ^{on} ~~on~~ ^{23 May 2013.}

6. The application contemplated ^{new trustees will make} ~~by~~ ^{to} in 1 above w/in 7 days of the date of this document (unless otherwise agreed between the parties) with that application to be return on or before 20 December 2013 (subject to court + counsel availability).

RUSSELLS

MEMO		Matter		Page 4/
Client		Date	Start	Finish
Re		11. Phone In		12. Phone Out
Attending		13. Conf In		14. Conf Out
From		24. Court Appearance		

all reasonable

7. The parties will use ~~reason~~ *all reasonable* endeavours to enter into a formal deed ~~incorporating~~ *incorporating* the terms of this document ~~within 7 days of the do~~ *by 4pm (Gld)* on Wednesday, 7 December 2013.

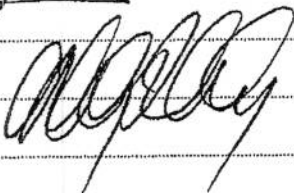
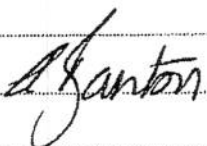
8. The Administrators agree that the terms of this agreement are in complete satisfaction of their ~~Indemnity claim~~ *Indemnity claim* against the MPF + no further claims ~~will be made for any further costs + expenses, by the Administrators.~~ *including future costs + expenses* ~~present to the Administrators' indemnity against the MPF including costs + expenses incurred to the date of this agreement.~~ *present to the*

9. The Administrators agree that they will meet their own costs, ~~incurred~~ *expended* w/ the court application to be made pursuant to clause 6 above.

10. The parties agree not to make any disparaging remarks concerning the other party in respect of their respective conduct in their roles as trustees of the MPF.

DATED: 29 NOVEMBER 2013

RUSSELLS

MEMO		Matter		Page 5/
Client		Date	Start	Finish
Re		11. Phone In 13. Conf In 24. Court Appearance		12. Phone Out 14. Conf Out
Attending				
From		To		
<u>Signed:</u>  ASHLEY JOHN TIPLARY SOLICITOR FOR THE ADMINISTRATORS, JOHN PARK & GINETTE MILLER  Amanda Bankton Solicitor for the New Trustee, Kordamentha Pty Ltd & Calibre Capital Pty Ltd.				

RUSSELLS

DEED OF SETTLEMENT AND RELEASE

DATED the

day of December, 2013

**JOHN PARK AND GINETTE MULLER AS
FORMER ADMINISTRATORS OF LM
INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) ACN 077 208 461**

AND

**KORDAMENTHA PTY LTD ACN 100 169 391
AND CALIBRE CAPITAL LTD ACN 108 318 985
AS TRUSTEES OF THE LM MANAGED
PERFORMANCE FUND**

The Russells contact for this document is
Mr Sean Russell on + 61 7 (07) 3004 8822

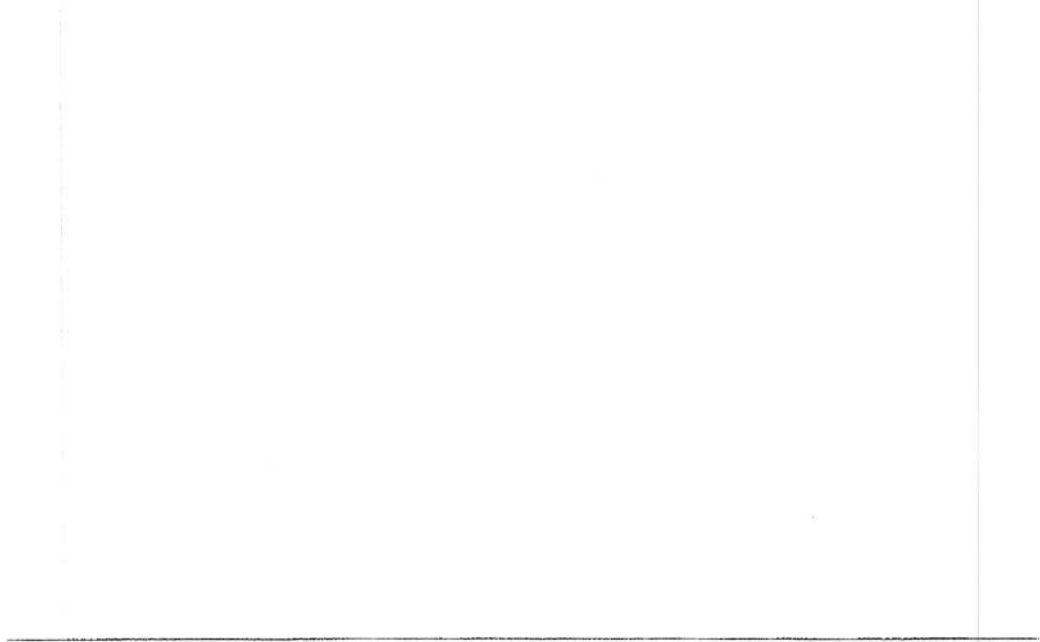
Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

TABLE OF CONTENTS

		Page
1.	DEFINITIONS	2
2.	INTERPRETATION	2
3.	SETTLEMENT AMOUNT	<u>22</u>
4.	RELEASE AND INDEMNITY	<u>36</u>
5.	OTHER MATTERS	<u>44</u>
6.	COSTS	<u>55</u>
7.	ENTIRE AGREEMENT	<u>55</u>
8.	FURTHER ASSURANCES	<u>55</u>
9.	GOVERNING LAW	<u>55</u>
10.	SEVERANCE	<u>66</u>
11.	WAIVER	<u>66</u>
12.	AMENDMENTS	<u>66</u>
13.	COUNTERPARTS	<u>66</u>



Time

NOW THIS DEED WITNESSES:

1. DEFINITIONS

- 1.1 When used in this Deed, the following terms shall have the following meanings unless the context otherwise requires:-

Action: the action commenced by the Administrators against the New Trustees by Claim No 9550 of 2013 issued by the Supreme Court of Queensland at Brisbane on 10 October, 2013.

Settlement Amount: \$1,679,000.00

2. INTERPRETATION

- 2.1 In this Deed, headings are for convenience only and shall not affect its interpretation. Except to the extent that the context otherwise requires:-

- (a) reference to any statute or statutory provision shall include any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such power;
- (b) words denoting the singular shall include the plural and vice versa;
- (c) words denoting individuals shall include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender shall include all genders;
- (e) references to parts, clauses, parties, annexures and schedules are references to parts, clauses, parties, annexures and schedules to this Deed as modified or varied from time to time;
- (f) references to any document, deed or agreement shall include references to such document, deed or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Deed or any other document, deed or agreement shall include its successors or permitted assigns;
- (h) all references to dates and times are to Brisbane time;

- 2.2 all references to "\$" and "dollars" are to the lawful currency of Australia.

- 2.3 The parties agree that the Recitals are accurate, that they shall abide by the Recitals, and that this Deed shall, if necessary, be construed by reference to the Recitals.

3. SETTLEMENT AMOUNT

- 3.1 Without any admission of liability, and in consideration of discontinuing the Action, the New Trustees have agreed to pay to, and the Administrators have agreed to accept, the Settlement Amount in full and final satisfaction of all claims, actions, demands (including without limitation any claims in respect of costs and interest) in respect of the Action and any claim for indemnity which the Administrators may have either now or in the future out of the assets of the MPF.
- 3.2 The Settlement Amount will be paid within seven days of a direction of the Supreme Court of Queensland made pursuant to section 96 of the *Trusts Act 1973* (Qld), in terms encapsulating the operative provisions of this Deed, taking unconditional effect.
- 3.3 The Administrators acknowledge and agree that:
- (a) entry into this Deed constitutes the resolution of the Administrators' lien as referred to in order 1(v) of the Orders of the Honourable Chief Justice de Jersey in Supreme Court Proceedings 3691 of 2013;
 - (b) the New Trustees are entitled to apply the money held by the New Trustees in payment of the Settlement Amount; and
 - (c) upon payment of the Settlement Amount the obligations imposed on the New Trustees by that order will be fully satisfied.
- 3.4 The Administrators acknowledge and agree that the New Trustees have already paid the amount of \$110,246.00 in partial payment of the Settlement Amount.
- 3.5 The Administrators agree to pay to the New Trustees the amount of \$244,000.00 in satisfaction of the costs order made in Supreme Court of Queensland Proceeding No. 2869 of 2013, such money to be paid by way of cheque payable to Piper Alderman's Trust Account within seven days of receipt of the payment set out in paragraph 3.1 herein.

4. RELEASE AND INDEMNITY

- 4.1 Subject to clause 4.3, the Administrators hereby release and discharge the New Trustees from all damages, actions or legal proceedings, suits, causes of action, claims (including without limitation any claims for costs, losses or expenses) or demands of any nature and howsoever arising that the Administrators or any associated entities or persons (including without limitation FTL Consulting (Australia) Pty Ltd), spouses or relatives, has now or may in the future have or but for the execution of this Deed could or might have had against the New Trustees for or in respect of:-
- (a) the Action;
 - (b) any matters the subject of the Action;

-
- (c) any right of the Administrators to be indemnified from the assets of the MPF for any fees, expenses and / or any other liabilities incurred, or to be incurred in the future, by the Administrators; and
- (d) any claim or allegation that the New Trustees' conduct in the administration of the MPF has contravened or been inconsistent with the orders of the Supreme Court of Queensland made in proceedings 3691 of 2013 on 23 May, 2013.
- 4.2 Subject to clause 4.3, the New Trustees hereby release and discharge the Administrators from all damages, actions or legal proceedings, suits, causes of action, claims (including without limitation any claims for costs, losses or expenses) or demands of any nature and howsoever arising that the New Trustees or any associated entities or persons, spouses or relatives, has now or may in the future have or but for the execution of this Deed could or might have had against the Administrators for or in respect of:-
- (a) the Action;
- (b) any matters the subject of the Action;
- (c) the costs orders made in favour of the New Trustees in Supreme Court of Queensland Proceeding No. 2869 of 2013 on 23 May, 2013 subject to compliance with clause 3.5 above; and
- (d) insofar as they relate to the Administrators, the claims for breach of trust and duty detailed in paragraphs 7-9, 11, 12, 17, 18, 55-57, 81 and 82 of Piper Alderman's letter to Russells dated 23 August, 2013.
- 4.3 The releases provided pursuant to this clause 4 do not release the parties from their obligations under this Deed.
5. **OTHER MATTERS**
- 5.1 The New Trustee will make an application seeking the direction contemplated in clause 3.2 herein within seven days of the date of this Deed (unless otherwise agreed between the parties) with that application to be returnable on or before 20 December, 2013 (subject to counsels' and the Court's availability).
- 5.2 The Administrators agree that the payment contemplated by this Deed is in complete satisfaction of their indemnity claim against the assets of the MPF and no further claims will be made on the MPF for any costs, expenses or liabilities incurred or to be incurred in the future by the Administrators.
- 5.3 The parties agree not to make any disparaging remarks concerning the other party in respect of their respective conduct in their roles as trustees of the MPF.
-

6. **COSTS**

- 6.1 Whether or not any of the transactions contemplated by this Deed are consummated, each party shall pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Deed, including the fees and disbursements of its lawyers and accountants.
- 6.2 The Administrators agree that they will meet their own costs and expenses associated with the application to the Court to be made pursuant to clause 5.1 herein.

7. **ENTIRE AGREEMENT**

- 7.1 This Deed constitutes the full and complete understanding between the parties with respect to the subject matter of this Deed. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions hereof or binding on the parties with respect to any of the matters to which this Deed relates. This Deed implements and replaces the binding heads of agreement between the parties dated 29 November, 2013, which is of no further effect.
- 7.2 Each of the parties hereby covenants and irrevocably acknowledges that it has not been induced to enter into this Deed by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Deed.
- 7.3 The provisions of Clauses 7.1 and 7.2 shall operate and remain in full force and effect, except in the case of fraud by another party to this Deed. No other fact, matter or circumstance including breach of the provisions of *The Australian Consumer Law* or of Part 2 of the *Australian Securities and Investments Commission Act 2001* or of Part 7.10 of the *Corporations Act 2001* by a party to this Deed shall interfere with or in any way derogate from the operation and effect of Clauses 7.1 and 7.2.

8. **FURTHER ASSURANCES**

- 8.1 Each party shall, from time to time at its own cost and expense, make, do and execute and cause to be made, done and executed all such acts, things, agreements, deeds, instruments, assurances and other documents as may be necessary, desirable or reasonably required by another party to perfect or give effect to the transactions or agreements contemplated or contained in this Deed.

9. **GOVERNING LAW**

- 9.1 This Deed shall be governed by and construed in accordance with the law of Queensland and each of the parties hereby submits to the non-exclusive jurisdiction of the Queensland Courts.

10. **SEVERANCE**

- 10.1 In the event that any term or provision of this Deed for any reason whatsoever is acknowledged by the parties, or is adjudged by a Court of competent jurisdiction or held or rendered by any competent Government authority to be invalid, illegal or unenforceable, such term or provision shall be severed from the remainder of the terms and provisions of this Deed and shall be deemed never to have been part of this Deed and the remainder of the terms and provisions of this Deed shall subsist and remain in full force and effect unless the basic purpose or purposes of this Deed would thereby be defeated.

11. **WAIVER**

- 11.1 No waiver by either party of any default in the strict and literal performance of or compliance with any provision, condition or requirement herein shall be deemed to be a waiver of strict and literal performance of and compliance with any other provision, condition or requirement herein nor to be a waiver of or in any manner release either party from strict compliance with any provision, condition or requirement in the future nor shall any delay or omission of either party to exercise any right hereunder in any manner impair the exercise of any such right accruing to it thereafter.

12. **AMENDMENTS**

- 12.1 No modification or alteration of this Deed shall be valid or binding upon any party unless made in writing and duly executed or signed on behalf of such party under its seal or by its proper officers or representatives or attorneys thereunto duly authorised or, in the case of an individual, by such party under his hand.

13. **COUNTERPARTS**

- 13.1 This Deed may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon the same instrument.

IN WITNESS WHEREOF this Deed has been executed by the parties.

EXECUTED BY JOHN RICHARD)
PARK as former administrator of LM)
Investment Management Limited)
ACN 077 208 461 (in liquidation) in the)
presence of:)
)
)
)
)
)

EXECUTED BY GINETTE DAWN)
MULLER as former administrator of LM)
Investment Management Limited)
ACN 077 208 461 (in liquidation) in the)
presence of:)
)
)
)
)
)

EXECUTED BY KORDAMENTHA)
PTY LTD ACN 100 169 391 as trustee of)
the LM Managed Performance Fund in)
accordance with section 127 of the)
Corporations Act 2001:)
) Director
)
)
)
)
) Director/Secretary

THE COMMON SEAL of CALIBRE)
CAPITAL LTD ACN 108 318 985 as)
trustee of the LM Managed Performance)
Fund in accordance with section 127 of the)
Corporations Act 2001:)
) Director
)
)
)
)
) Director/Secretary