



## Claim Form

12283682  
In the High Court of Justice  
Queen's Bench Division  
Mercantile Court  
Royal Courts of Justice

Fee Account No.

Claim No.

for court use only

LM-2016-000062

Issue date

09-05-16

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Go to [www.moneyclaim.gov.uk](http://www.moneyclaim.gov.uk) to find out more.

Claimant's name and address including postcode

Lycalopex (Dubai) Limited  
Office No. 1006, Level 10, Liberty House, Dubai International Finance Centre  
PO Box 31303, Dubai, United Arab Emirates



Defendant's name and address including postcode

Merrill Lynch International  
2 King Edward Street, London, EC1A 1HQ, United Kingdom

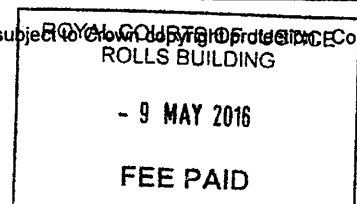
For further details of the courts [www.gov.uk/find-court-tribunal](http://www.gov.uk/find-court-tribunal).

When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

N1 Claim form (CPR Part 7) (05.14)

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#### Brief details of claim

The Claimant was incorporated for the purpose of carrying out various equity trading strategies, including high frequency trading. Initially, the Claimant wished to pursue a strategy of dividend arbitrage trading. The Defendant was appointed as the Claimant's prime broker under a prime brokerage agreement dated on or about 2 April 2012 (the "PBA"). Prior to entering into the PBA, the Defendant made a series of binding commitments to the Claimant regarding the trading strategy. In particular, the Defendant agreed to:

1. Deliver, through the trading strategy, \$15 million in profits to the Claimant during its first year of trading (i.e. during the 2012 dividend season).
2. Alternatively, use its best endeavours to deliver such profits, including by:
  - a. Providing the Claimant with up to \$1 billion of leverage for the purposes of the trading strategy; and/or
  - b. Treating the Claimant as a top-tier client and according it priority over the Defendant's stock loan portfolio of French stocks; and/or
  - c. Executing at least half of the trades from the Pre-Agreed Portfolio in full.

The Defendant breached those commitments. The profit the Claimant actually achieved from the trading strategy in that year was \$4,630,680. The Claimant has therefore suffered loss of \$10,369,320.

The Claimant therefore claims:

1. A declaration that a binding oral agreement was entered into by the parties on the terms of the February Profit Agreement (as defined in the Particulars of Claim), as subsequently varied on or about 18-19 April 2012;
2. Alternatively, a declaration that a binding oral agreement was entered into by the parties on or about 18-19 April 2012, on the terms of the April Profit Agreement (as defined in the Particulars of Claim);
3. Further or alternatively, a declaration that clauses 19 and/or 21(h) of the PBA do not satisfy the requirement of reasonableness and are ineffective and/or unenforceable by reason of section 3 of UCTA;
4. Damages in the sum of \$10,369,320;
5. Alternatively, such sum in damages as the Court shall see fit;
6. Interest on any damages awarded pursuant to section 35A of the Senior Courts Act 1981.

#### Value

The Claimant claims damages in the sum of \$10,369,320. As at 9 May 2016, the sum claimed is equivalent to £7,152,735.05 (using the Bank of England's Statistical Interactive Database daily spot exchange rates against sterling of £1 being equal to \$1.4497 on 5 May 2016)

You must indicate your preferred County Court Hearing Centre for hearings here (*see notes for guidance*)

Not Applicable

Defendant's  
name and  
address for  
service  
including  
postcode

Merrill Lynch International  
2 King Edward Street  
London  
EC1A 1HQ  
United Kingdom

£	
Amount claimed	7,152,735.05
Court fee	£10,000
Legal representative's costs	TBC
<b>Total amount</b>	<b>7,162,735.05</b>

Claim No.	
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Does, or will, your claim include any issues under the Human Rights Act 1998?      ☐ Yes ☒ No

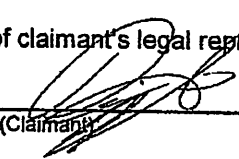
Particulars of Claim attached

**Statement of Truth**

\*I believe that the facts stated in these particulars of claim are true.

Full name STEPHEN CHARLES DIGGLE

Name of claimant's legal representative's firm \_\_\_\_\_

signed  Stephen Diggle position or office held DIRECTOR  
\*(Claimant) Director (if signing on behalf of firm or company)

*\*delete as appropriate*

Byrne and Partners LLP  
5<sup>th</sup> Floor, One Plough Place  
London  
EC4A 1DE

Tel: 44(0) 20 7842 1616  
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DX: 392 Chancery Lane  
Ref: YJ/AKZ/L10016-1

Claimant's or claimant's legal  
representative's address to which  
documents or payments should be sent  
if different from overleaf including (if  
appropriate) details of DX, fax or e-mail.

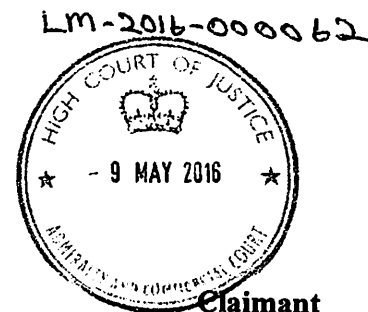
**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**MERCANTILE COURT**

**BETWEEN:**

**LYCALOPEX (DUBAI) LTD**



**-and-**

**MERRILL LYNCH INTERNATIONAL**

**Defendant**

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**PARTICULARS OF CLAIM**

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**PARTIES AND BACKGROUND**

1. The Claimant ("Lycalopex") is a limited liability company incorporated under the laws of the Dubai International Financial Centre ("DIFC") with registration number 1157. At material times, as set out further below, Lycalopex carried on the business of trading in securities, derivatives and other investments, from premises in the DIFC. Lycalopex was established as a joint venture between Tudor Investment Corporation ("Tudor") and Vulpes Investment Partners ("Vulpes"). Tudor and Vulpes are hedge fund managers with operations in (among other places) Asia.
2. The Defendant ("MLI") is a wholly owned, indirect subsidiary of the Bank of America Corporation ("BoA"), incorporated in England and Wales (with registration number 01009248) and with its registered office at 2 King Edward Street, London, EC1A 1HQ, United Kingdom. MLI provides financial services (including prime brokerage services) on a worldwide basis.

3. At all material times, the global banking and markets businesses of BoA (including MLI) have operated and marketed themselves under the name "*Bank of America Merrill Lynch*" ("BAML").
4. Lycalopex was established for the purposes of carrying out various equity trading strategies, including high frequency trading. In order to generate early profits and fund the growth of Lycalopex's business, Tudor and Vulpes intended that Lycalopex would start its operations by carrying out dividend arbitrage trading, with a view to benefitting from the double tax treaty (the "DTT") between France and the United Arab Emirates ("UAE"). It was agreed that Vulpes would take the lead in establishing and developing Lycalopex's business and that Tudor's role would be largely passive.
5. In order to facilitate its arbitrage trading and development of its longer term trading business, Lycalopex required the services and long term cooperation of a prime broker. In order to ensure that the costs of establishing and operating the business (which were expected to be substantial) would be covered, it was vital to select a prime broker who would be able to facilitate the intended business plan and make the initial upfront investment in the business worthwhile. MLI was selected for this role by Lycalopex in early 2012, in return for various binding commitments given by or on behalf of MLI as to the profits that would be generated from the arbitrage trading to be carried out by Lycalopex during its first year of operations. Lycalopex's claim is brought as a consequence of MLI breaching those commitments.

#### **THE DIVIDEND ARBITRAGE STRATEGY**

6. At all relevant times, France imposed withholding taxes on the payment of share dividends. Under the DTT, however, holders of French listed shares who were resident in the UAE were exempt from such withholding taxes and were entitled to receive the gross amount of any dividend paid. This differential tax treatment created the conditions for dividend arbitrage.
7. The mechanics of the dividend arbitrage strategy (the "DAS") intended to be carried out by Lycalopex were (in summary) as follows:
  - (1) First, at the start of each year or trading season, Lycalopex would agree with its prime broker what shares it would trade (and in which quantities). Prime brokers (such as

MLI) are typically able to offer and agree in advance specific quantities of selected shares because of their access to holdings of such shares via the stock 'loan' market. Prime brokers typically enter into arrangements each year with large equity holders that ensure the brokers will be able to borrow (and thereby have access to) desired quantities of selected shares for the year, enabling the brokers to earn profits from dealing in such shares before returning them to their original owners.

- (2) Second, prior to a chosen share's 'record date' (the date on which the right to payment of a declared dividend accrues to the registered owner of the share), the prime broker would sell a pre-agreed number of such shares to Lycalopex. At the same time, Lycalopex and the prime broker would enter into a hedge under which Lycalopex would sell the shares back to the prime broker, with an expiry date after the record date.
  - (3) Lycalopex would therefore hold the shares over the record date and receive (as registered holder of the shares) the dividend paid on the shares. As a UAE resident company, Lycalopex would be entitled to receive the amount of this dividend in full, without payment of withholding tax.
  - (4) The price receivable by Lycalopex under the futures contract would be set below the price paid to the prime broker to purchase the shares, but at a level such that the resulting shortfall would be offset by Lycalopex's receipt, as a UAE resident company, of the gross dividend.
  - (5) Overall, assuming the size of the dividend paid on the record date is, or is close to, that expected by the parties, Lycalopex would make a small profit. The prime broker would also make a small profit (representing the difference between its profit on the equity/futures trade with Lycalopex and its cost of borrowing the shares).
8. Under the DAS, it would be possible to determine in advance the level of profit capable of being generated from a given set of trades in specified shares, using estimates of likely dividends based on detailed analytical research. Certain factors could, nevertheless, influence Lycalopex's ability to obtain, in the event, the profits predicted at the beginning of a trading 'season':

- (1) Stock selection: some shares are considered more profitable than others because they pay, or are expected to pay, higher dividends. As a result, Lycalopex would face competition for such shares from other clients of the prime broker operating similar strategies to the DAS.
  - (2) Leverage: because the margins on each DAS trade would be relatively small, deriving substantial profits from the strategy would require Lycalopex to trade large volumes of the relevant shares. In addition to providing access to profitable shares, therefore, a prime broker would be required to provide financial leverage (or 'balance sheet') to Lycalopex. Lycalopex would also have to compete with other clients for the amount of leverage it could obtain from the broker.
9. When searching for a prime broker, therefore, Tudor and Vulpes (and after its incorporation, Lycalopex) sought a firm that could:
  - (1) Provide priority access to high yielding stocks; and
  - (2) Provide sufficient leverage to trade in the volumes required for the DAS to be significantly profitable.

#### **NEGOTIATIONS WITH BAML AND MLI**

10. Against the above background, in and after mid-2011, representatives of Tudor and Vulpes entered into discussions with senior representatives of BAML, including representatives acting for and on behalf of MLI, with a view to establishing a long term and multi-phase trading relationship. These discussions commenced prior to Lycalopex's incorporation and continued up to (and including) April 2012, when Lycalopex commenced trading. Particulars of the discussions are set out below.
11. Andrew Devonald and Grant Williams acted as agents and/or representatives of Tudor and Vulpes, and (after its incorporation) Lycalopex, in the discussions with BAML and MLI, as set out further below.

12. BAML was approached first because Mr Devonald knew Tak Sugahara (a BAML Managing Director based in Asia) and Gene Reilly (BAML's Head of Equity Trading in Asia). Further, Mr Devonald was aware from previous dealings with Mr Sugahara and Mr Reilly that they were very familiar with arbitrage trading strategies such as the DAS.
13. A preliminary meeting was held at Tudor's offices in Greenwich, CT, in or about mid-2011 between senior representatives of each of Tudor, Vulpes and BAML. More advanced discussions took place at a meeting in Hong Kong on 1 September 2011. This meeting (the "**September Meeting**") was attended by:
  - (1) From BAML: Peter MacDonald (then BAML's Vice Chairman for the Asia Pacific region), Mr Sugahara and Mr Reilly.
  - (2) From Tudor and Vulpes: Mr Devonald, Mr Williams and Stephen Diggle (the founder and principal of Vulpes).
14. At this meeting, Messrs Devonald, Williams and Diggle described their intention to establish an investment fund (the "**Fund**"; subsequently incorporated as Lycalopex) in the following way:
  - (1) The medium term aim for the Fund was to engage in high frequency trading on a substantial scale, having invested in the necessary technology and systems.
  - (2) The Fund would start trading with a relatively small amount of capital, pursuing a limited number of strategies in its first year, the object being to retain the returns generated and thereby enable the Fund to grow.
  - (3) The first strategy the Fund would implement would be the DAS, which could confidently be relied upon to generate significant short term profits.
  - (4) Vulpes and Tudor would each commit \$10 million of capital to the Fund and were seeking a 100% return on their investment over the 2012 dividend season (i.e. a total profit of \$20 million for the Fund), in order to fund the next phase of the Fund's operations.



- (5) This was a wholly achievable target, based upon estimates carried out by Tudor and Vulpes.
  - (6) Vulpes, Tudor and, once incorporated, the Fund, needed a firm commitment from BAML that it would, in return for the Fund agreeing to trade with BAML as its prime broker, achieve this profit target for the Fund.
15. In response, the BAML representatives confirmed at the September Meeting (together, the “September Commitments”) that:
- (1) BAML was keen to take on the Fund as a client, given that it would generate significant amounts of commission for BAML over a long period of time.
  - (2) They saw the proposed new relationship as a form of partnership or joint venture, and as a consequence BAML would treat the Fund as being within its top category of clients.
  - (3) Because BAML’s prime brokerage and trading teams were based within BAML’s subsidiary in London, MLI, trading and brokerage services would have to be provided to the Fund by MLI - and the mechanics of the relationship between the Fund and MLI would have to be negotiated and agreed with MLI.
  - (4) BAML (through MLI) would deliver the Fund’s desired \$20 million return through the DAS during the 2012 dividend season.
  - (5) In order to achieve this, MLI would allocate a basket of French stocks to the Fund from which it could select a pre-agreed portfolio in advance of the trading season.
16. Following the September Meeting, further meetings and discussions were held in late 2011 and January 2012 in order to introduce Mr Devonald and Mr Williams to relevant representatives of MLI. These representatives included:
- (1) Dan Smith, MLI’s Director of Prime Brokerage Sales.
  - (2) Paul Barham, a Vice President of MLI who managed MLI’s prime brokerage platform.

- (3) Monuhaar Ullah, who led the structured side of MLI's client service team.
  - (4) Chris Benge, a client services team member.
  - (5) Satuvatta Chakravorty, a member of MLI's trading team.
  - (6) Raj Patel of MLI's trading team.
  - (7) Angel Barenys of MLI's trading team.
17. On or about 3 January 2012, an application was filed with the DIFC for incorporation of Lycalopex as a company limited by shares, under the laws of the DIFC. Copies of Lycalopex's Memorandum and Articles of Association, and a Certificate of Status confirming the submission of an application to the DIFC for Lycalopex's incorporation, were provided to Mr Smith and Emma Howe of MLI by email on 17 January 2012.
18. On or about 26 and/or 27 January 2012, Mr Devonald and Mr Williams attended a series of meetings (the "**January Meetings**") with MLI representatives at MLI's offices in London. These representatives included Messrs Smith, Benge, Barham, Patel and Barenys, as well as representatives of MLI's internal legal and tax departments.
19. In the course of the January Meetings, the parties negotiated and agreed details for Lycalopex's first year of trading. In particular, in accordance with and/or in light of the September Commitments, MLI discussed and confirmed the following (the "**January Commitments**"):
- (1) Mr Benge and Mr Barham confirmed that:
    - (a) Lycalopex would be allocated \$1 billion of 'balance sheet' (i.e. financial leverage) by MLI;
    - (b) A portfolio of shares to be traded under the DAS would be pre-agreed with Lycalopex, in advance of the trading commencing (the "**Pre-Agreed Portfolio**");

- (2) Mr Patel and Mr Barenys confirmed that MLI would be able to generate a profit for Lycalopex from the DAS, but asked whether a 75% return rather than the 100% return originally proposed (i.e. a profit over the first year of \$15 million rather than \$20 million) would be acceptable. Mr Patel said words to the effect that: *"I can't do \$20 million, but I'll definitely get you to \$15 million"*. Mr Devonald and Mr Williams said they would consider this request and revert to Mr Patel and Mr Barenys. The same day, they sought and obtained approval for this reduced profit commitment. They relayed that approval to MLI the following day.
- (3) The MLI representatives confirmed that introduction of the Financial Transactions Tax ("FTT"), which it was then widely known the French Government was planning to implement, would not affect MLI's commitment to Lycalopex or its promise to generate an agreed amount of profit for Lycalopex over the first year.
20. On 2 February 2012, Lycalopex was incorporated. Its directors on incorporation were Mr Diggle and Mr Devonald. On 7 February 2012, Mr Devonald was substituted as a director by Adeel Khan. At all material times following Lycalopex's incorporation, Mr Devonald and Mr Williams were authorised to act as its agents, including for the purposes of negotiating the terms of Lycalopex's relationship with MLI.
21. Following Lycalopex's incorporation, Mr Devonald had further meetings and telephone discussions during February 2012 with MLI representatives regarding the trading relationship between Lycalopex and MLI. In particular, in or around the week of 20 February 2012, Mr Devonald attended meetings (the "**February Meetings**") at MLI's offices in London with various MLI representatives, including Messrs Benge, Barham and Smith as well as representatives of MLI's internal legal and tax departments. At the February Meetings, the parties discussed (among other things) futures terms, trade tenors, pricing and margins for the DAS.
22. During the course of both the telephone conversations Mr Devonald had with MLI representatives in February 2012 and the February Meetings, MLI representatives (including Mr Smith) reiterated the January Commitments given to Mr Devonald and Mr Williams, including that (i) Lycalopex would be allocated \$1 billion of 'balance sheet', (ii) a portfolio of

shares to be traded under the DAS would be pre-agreed with Lycalopex and (iii) a profit of US\$15 million would be generated for Lycalopex from the DAS in its first year of trading.

23. In the premises, the January Commitments (as confirmed and re-iterated to Mr Devonald in February 2012, as stated above) gave rise to a binding oral agreement between Lycalopex and MLI (the “**February Profit Agreement**”), under which MLI, in return for Lycalopex agreeing to trade with MLI as its prime broker, agreed to:

- (1) Deliver, through the DAS, \$15 million in profits to Lycalopex during its first year of trading (i.e. during the 2012 dividend season).
- (2) Alternatively, use its best endeavours to deliver such profits, including by:
  - (a) Providing Lycalopex with up to \$1 billion of leverage for the purposes of the DAS; and/or
  - (b) Treating Lycalopex as a top-tier client and accord it priority over LMI’s stock loan portfolio of French stocks; and/or
  - (c) Executing trades from the Pre-Agreed Portfolio in full.

#### **SUBSEQUENT EVENTS: 29 FEBRUARY 2012 – 19 APRIL 2012**

24. On or about 29 February 2012, Lycalopex (acting by Mr Khan) signed and returned to MLI a copy of a Prime Brokerage Agreement (“**PBA**”) between Lycalopex and MLI.

25. A further meeting was held in Hong Kong on or about 21 March 2012 between Mr Devonald, Mr Ullah and Mr Chakravorty to fine tune the detail and mechanics of the structure of the trading to be undertaken by Lycalopex with MLI (the “**March Meeting**”). At this meeting:

- (1) Mr Devonald explained to Messrs Ullah and Chakravorty how Lycalopex proposed to structure the trades, by taking long-term positions in the relevant shares, well in advance of the dividend announcement and record dates for each share.

- (2) Messrs Ullah and Chakravorty informed Mr Devonald that they did not have internal approval to implement such a structure, which would consequently need to be approved not only by MLI's New Products Committee but also its legal and tax departments, all of which could take months and result in Lycalopex missing the 2012 dividend season. They therefore suggested that Lycalopex adopt a different structure.
- (3) After discussion, it was agreed that the DAS would be implemented in the following way:
- (a) MLI would place stock which Lycalopex had previously notified MLI that it wished to purchase (i.e. stock from the Pre-Agreed Portfolio) with a third party broker for sale shortly before the record date.
  - (b) Lycalopex would contact that same broker immediately afterwards, to place an order to buy the stock that MLI had placed for sale with the broker; the broker would then use the stock placed by MLI to fulfil the Fund's purchase order (i.e. to 'cross' the trade).
  - (c) At the same time Lycalopex would place for sale with a different third party broker a futures contract in the same stock. Immediately afterwards MLI would place an order with that third party broker to buy futures contracts in the same stock, on precisely the same terms. The futures broker would 'cross' that buy order with the sell order placed by the Fund.
  - (d) In practice, the stock and futures leg of each trade would be pre-arranged in advance and executed virtually simultaneously. The price of the futures contracts would dictate the amount of arbitrage profit that would be earned on each trade.
- (4) The parties discussed the potential impact of the FTT. They considered obtaining approval of Lycalopex as a market maker or alternatively taking advantage of inter-group relief. Either route would have minimised the impact of the FTT upon Lycalopex's trading and profits. After discussion, it was agreed that establishment of

a second Dubai registered company would be the optimal route, so as to allow Lycalopex to benefit from inter-group reliefs.

26. Nothing said or agreed at the March Meeting altered the terms of the February Profit Agreement, as set out above.
27. The parties thereafter worked to finalise the details necessary to start trading, including agreement of the Pre-Agreed Portfolio. In particular:
  - (1) On or about 30 March 2012, a meeting was held between Mr Devonald, Mr Williams and MLI representatives at Vulpes' offices in Singapore, to discuss (among other things) trade files.
  - (2) By 12 April 2012, Lycalopex was established as live client on MLI's prime brokerage platform.
  - (3) By 16 April 2012, Lycalopex had finalised its basket of selected stocks for the Pre-Agreed Portfolio.
  - (4) Lycalopex engaged Link Asset Securities and ICAP as third party brokers to execute the pre-agreed shares and futures trades with MLI, in accordance with the DAS structure agreed at the March Meeting.
28. On or about 2 April 2012, MLI executed the PBA. Lycalopex will refer to the PBA at trial for its full terms, true meaning and effect.
29. Shortly before active trading was due to commence, a further meeting was held at MLI's offices in London on or about 17 April 2012, attended by Mr Devonald, Mr Bengé and Mr Smith, to discuss certain operational details. Shortly after this meeting, Mr Smith asked Mr Devonald to attend a meeting with Mr Patel the following day (18 April 2012).
30. On 18 April 2012, Mr Devonald met Mr Patel at MLI's offices in London. At this meeting (the **"18 April Meeting"**):

- (1) Mr Devonald was asked by Mr Patel whether, instead of trading in accordance with a pre-agreed schedule of shares, MLI could allocate to Lycalopex such shares as MLI had available at the end of each day during the dividend season.
  - (2) Mr Patel explained to Mr Devonald that this flexibility would help MLI commercially because it would allow MLI to trade shares that it had already borrowed and paid for.
  - (3) Mr Devonald stated that he thought that Lycalopex could be flexible in this way, providing that MLI delivered the agreed profit level of \$15 million. Mr Devonald said words to the effect that: *"We're arbitrage traders, stocks to us are just tickers, you just need to get us what you promised"*. In response, Mr Patel confirmed that his proposed alteration to the trading structure would not affect MLI's commitment to achieve a profit of \$15 million for Lycalopex, saying words to the effect that: *"I will deliver that, no problem"*. Mr Devonald told Mr Patel he would consider his proposal and revert.
31. After the 18 April Meeting, Mr Devonald discussed the revised trading structure proposed by Mr Patel with Mr Williams and sought approval for the revised structure. On or about 19 April 2012, Mr Devonald confirmed to Mr Patel that Lycalopex would be agreeable to half of the trading being based on the Pre-Agreed Portfolio and MLI having flexibility to base the remainder of the trading on shares it proposed to Lycalopex during the course of the dividend season. Mr Patel confirmed to Mr Devonald that MLI would proceed on that basis.
32. Lycalopex and MLI thereby agreed to alter the previously agreed trading structure, such that half of the trading was to be based on the Pre-Agreed Portfolio, MLI having flexibility to base the remainder on shares it proposed during the course of the dividend season. Save to this extent, nothing said or agreed at the 18 April Meeting altered or affected the terms of the February Profit Agreement.
33. References hereafter to the "February Profit Agreement" are to that agreement as varied on 18-19 April 2012, as set out above.
34. Further or alternatively, if (which is denied) the January Commitments, as confirmed and reiterated to Mr Devonald during February 2012, did not give rise to a binding February Profit Agreement, as stated above, a binding agreement to similar effect was made between Lycalopex

and MLI on or about 18-19 April 2012 by reason of the discussions between Mr Devonald and Mr Patel at and immediately after the 18 April Meeting, as set out above (the “**April Profit Agreement**”). More particularly, in the light of those discussions (which in turn followed the September, January, February and March Meetings), a binding oral agreement was made between Lycalopex and MLI under which MLI, in return for Lycalopex agreeing to trade with MLI as its prime broker, agreed to:

- (1) Deliver, through the DAS, \$15 million in profits to Lycalopex during its first year of trading (i.e. during the 2012 dividend season).
- (2) Alternatively, use its best endeavours to deliver such profits, including by:
  - (a) Providing Lycalopex with up to \$1 billion of leverage for the purposes of the DAS; and/or
  - (b) Treating Lycalopex as a top-tier client and according it priority over LMI’s stock loan portfolio of French stocks; and/or
  - (c) Executing at least half of the trades from the Pre-Agreed Portfolio in full.

35. Further and for the avoidance of doubt, in making the statements and giving the commitments, assurances and promises set out in paragraphs 10 to 34 above, the representatives of BAML and/or MLI referred to above had actual and/or apparent authority to make such statements and/or give such commitments, assurances and promises on behalf of BAML and/or MLI.

36. Shortly after the 18 April Meeting, Lycalopex sent to MLI its Pre-Agreed Portfolio of selected stocks for trading.

#### **THE TRADING CARRIED OUT BY LYCALOPEX WITH MLI**

37. In or about late April 2012, in performance of the February Profit Agreement (alternatively in performance of the April Profit Agreement), Lycalopex commenced trading with MLI in accordance with the DAS.



38. By 21 May 2012, with the majority of French share dividends still to be paid (the busiest part of the dividend season beginning in June), Lycalopex had generated a profit of \$1.6 million from its DAS trading with MLI.
39. Subsequent trading, however, was not as profitable as Lycalopex had anticipated and it became clear to Lycalopex that MLI was:
- (1) Selecting 'low profit' shares to trade with Lycalopex;
  - (2) Trading very few of the shares pre-selected by Lycalopex as part of the Pre-Agreed Portfolio; and
  - (3) Not providing Lycalopex with the leverage it had promised, with the result that the requisite volume of shares was not being traded so as to achieve the agreed profit level of \$15 million.
40. From about late May 2012 onwards, Lycalopex (by Mr Devonald) expressed concerns to this effect to MLI. By way of example:
- (1) On 1 June 2012, Mr Devonald complained to Mr Barenys that MLI was "*exercising a free option*" on Lycalopex;
  - (2) On 4 June 2012, Mr Devonald told Mr Barenys that he "*was expecting a portfolio which we knew we were getting. However hard you work we are not going to get there if we don't get a good allocation of high yielding stocks*".
41. Despite reassurances from Mr Barenys, Lycalopex's returns did not improve.
42. On 1 August 2012, France introduced the FTT. In line with the parties' March 2012 discussions regarding a possible new post-FTT trading structure, in mid-August 2012 a second Dubai entity, Saalib Investment (Dubai) Ltd, was incorporated as a wholly-owned subsidiary of Lycalopex (Luxembourg) Limited, the immediate parent of Lycalopex. Nevertheless, at around this time MLI refused to execute further DAS trades with Lycalopex on the purported basis that a suitable new trading structure could not be found to accommodate implementation of the FTT.

43. No further trades therefore took place during the 2012 dividend season, by the end of which Lycalopex had only achieved a profit from the DAS of \$4,630,680.
44. Lycalopex attempted, unsuccessfully, to make up for this shortfall by seeking to agree a new trading structure with MLI. In particular, at a meeting in Hong Kong on 12 October 2012, attended by Mr Reilly and Mr Sugahara of BAML, Mr Ullah of MLI and Mr Devonald (representing Lycalopex):
- (1) Mr Devonald presented two possible structures to mitigate any effect of the FTT.
  - (2) Mr Ullah and the BAML representatives said that it should be possible to put in place a new structure and that they would confirm in due course which of the two structures MLI preferred.
45. However, no such confirmation was ever forthcoming from MLI. In February 2013, Stu Hendel (Head of Prime Brokerage at BAML) informed Mr Devonald that MLI was terminating its relationship with Lycalopex. By an email dated 21 February 2013, Mr Hendel informed Mr Devonald that: *“As head of pb I would rather u find a different pb”*.
46. Lycalopex did not thereafter trade. Its total establishment and operational costs were approximately US\$8.8 million.

#### **BREACH OF THE FEBRUARY AND/OR APRIL PROFIT AGREEMENTS**

47. In the premises, MLI breached its obligation under the February Profit Agreement (alternatively the April Profit Agreement) to deliver, through the operation of the DAS, \$15 million in profits to Lycalopex during its first year of trading.
48. Alternatively, MLI breached its obligation under the February Profit Agreement (alternatively the April Profit Agreement) to use its best endeavours to deliver \$15 million in profits to Lycalopex during its first year of trading. Prior to completion of disclosure and service of experts reports herein, Lycalopex relies upon the following particular facts and matters:

- (1) Of the trades carried out between MLI and Lycalopex, fewer than half were of stocks pre-selected as part of the Pre-Agreed Portfolio.
- (2) When trading stocks it had unilaterally selected for Lycalopex, MLI chose to trade many relatively 'low profit' shares.
- (3) The profit margins generated by the trades carried out between MLI and Lycalopex were small, in some cases being less than 1%, and in no case exceeding 4%. These margins were considerably smaller than the range of margins ordinarily expected from dividend arbitrage trading of this kind.
- (4) MLI failed to provide Lycalopex with sufficient leverage and in particular did not allocate Lycalopex the full amount of \$1 billion of balance sheet promised as part of the February (alternatively April) Profit Agreement. As a result, MLI prevented Lycalopex from trading the volume of shares required to maximise its profits under the DAS.
- (5) MLI failed to work constructively with Lycalopex to adopt a revised post-FTT trading structure, notwithstanding the incorporation of a second Dubai based entity for this purpose.

#### **EXCLUSION CLAUSES UNDER THE PBA**

49. By clauses 19 and 21 of the PBA, Lycalopex purportedly gave a number of "*acknowledgments*" concerning its relationship with MLI and whether any representations were made by MLI prior to execution of the PBA. For the avoidance of doubt, these acknowledgments are not inconsistent with, and do not negate, the existence of the February and/or April Profit Agreements, nor do they estop Lycalopex from advancing a claim for breach of the February and/or April Profit Agreements. In particular, upon the true construction of the PBA:

- (1) Clause 19(a) does not apply because Lycalopex does not claim relief in respect of "*advice*" allegedly received from, or provided by, MLI or any other BoA affiliate.

- (2) Clause 19(b) does not apply because Lycalopex does not allege that MLI acted as “*a manager, a fiduciary or an adviser*”.
- (3) Clause 19(c) does not apply because Lycalopex does not contend that MLI ought to have had “*regard*” to any “*investment objectives, policies, guidelines or restrictions*” of Lycalopex. Rather, MLI was bound by the February and/or March Profit Agreements to achieve (or exercise best endeavours to achieve) a mutually agreed profit level from its trading with Lycalopex pursuant to the DAS. Such an agreement does not fall within the scope of clause 19(c).
- (4) Clause 19(d) does not apply because Lycalopex does not claim that the PBA gave rise to fiduciary or equitable duties on MLI’s part.
- (5) Clause 21(h) does not apply because Lycalopex does not allege to have entered into the PBA “*in reliance*” on a representation, warranty or other statement made by MLI.

50. Further or alternatively, if (which is denied) clauses 19 and/or 21(h) of the PBA purport upon their true construction to apply to and/or negate the existence of the February and/or April Profit Agreements, and/or estop Lycalopex from advancing a claim for breach of the February and/or April Profit Agreements, they are ineffective and/or unenforceable by reason of section 3 of the Unfair Contract Terms Act 1977 (“UCTA”). In the circumstances set out above:

- (1) The PBA, and in particular clauses 19 and/or 21(h) thereof, comprised standard written terms prepared by MLI. By entering into the PBA, Lycalopex dealt on MLI’s written standard terms of business.
- (2) Clauses 19 and/or 21(h) of the PBA do not satisfy the requirement of reasonableness, i.e. they were not fair and reasonable terms to be included in the PBA having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the PBA was concluded. Without prejudice to the generality of the foregoing, prior to disclosure and exchange of witness statements and/or experts reports, Lycalopex relies upon the following particular facts and matters:

- (a) The inequality of bargaining power between Lycalopex as an individual trading entity with limited capital and MLI as the prime brokerage subsidiary of a global banking and markets conglomerate, viz. BoA;
- (b) MLI's knowledge, by reason of the meetings and discussions set out above, that Lycalopex was relying upon MLI to obtain access to holdings of French listed shares for the DAS through MLI's influence and position in the stock-lending market;
- (c) MLI's agreement, prior to conclusion of the PBA, to deliver an agreed amount of profit to Lycalopex from the DAS in return for Lycalopex agreeing to trade with MLI, as set out above;
- (d) MLI's knowledge, by reason of the meetings and discussions set out above, that Lycalopex was relying upon MLI to deliver the agreed amount of profit to Lycalopex;
- (e) MLI's awareness that by virtue of the trading structure agreed with Lycalopex, as set out above, MLI and/or BoA would be in a position to profit from the DAS by arbitraging holdings of French listed shares which MLI and/or other BoA affiliates owned and/or controlled;
- (f) By the time of execution of the PBA, MLI knew that Lycalopex would not then be in a position to obtain an alternative trading partner to operate the DAS in time for the 2012 dividend season.

#### **LOSS AND DAMAGE**

51. As a result of MLI's breaches, Lycalopex lost the difference between the profit it was promised from the DAS by MLI for its first trading year, namely \$15 million, and the profit it actually achieved from the DAS in that year, \$4,630,680. Lycalopex has therefore suffered loss of \$10,369,320.

52. Alternatively, but for MLI's failure to use its best endeavours to achieve a \$15 million profit for Lycalopex, Lycalopex would have achieved profits of at least \$15 million from the DAS. Consequently, Lycalopex was deprived by MLI's breach of contract of further profit in an amount of \$10,369,320 or, alternatively, of the real or substantial chance of earning such further profit through the operation of the DAS.
53. Lycalopex's claim for damages is in US Dollars because the profit commitment under the February and/or April Agreements was expressed in that currency. As at 9 May 2016, the sum claimed is equivalent to £7,152,735.05 (using the Bank of England's Statistical Interactive Database daily spot exchange rates against sterling of £1 being equal to \$1.4497 on 5 May 2016).

**AND THE CLAIMANT CLAIMS:**

- (1) A declaration that a binding oral agreement was entered into by the parties on the terms of the February Profit Agreement, as subsequently varied on or about 18-19 April 2012;
- (2) Alternatively, a declaration that a binding oral agreement was entered into by the parties on or about 18-19 April 2012, on the terms of the April Profit Agreement;
- (3) Further or alternatively, a declaration that clauses 19 and/or 21(h) of the PBA do not satisfy the requirement of reasonableness and are ineffective and/or unenforceable by reason of section 3 of UCTA;
- (4) Damages in the sum of \$10,369,320;
- (5) Alternatively, such sum in damages as the Court shall see fit;
- (6) Interest on any damages awarded pursuant to section 35A of the Senior Courts Act 1981.


CRAIG ORR Q.C.

MEHDI BAIYOU

**STATEMENT OF TRUTH**

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

Full name STEPHEN CHARLES DIGGLE Position or office held DIRECTOR

Signed  (If signing on behalf of firm, company or corporation)

Dated 25 April 2016