

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 471 OF 2009

BETWEEN:

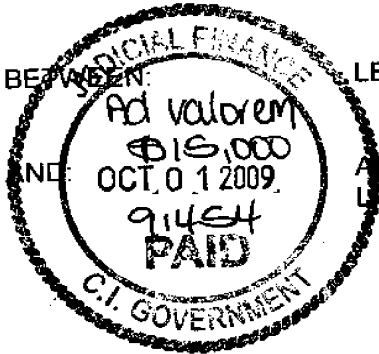
LEHMAN COMMERCIAL PAPER INC

PLAINTIFF

AND:

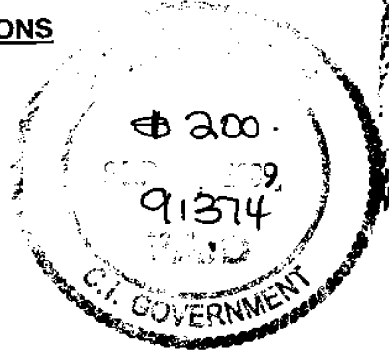
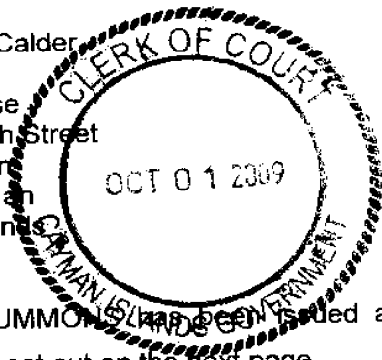
ANTHRACITE BALANCED COMPANY (36)  
LIMITED (IN VOLUNTARY LIQUIDATION)

DEFENDANT



WRIT OF SUMMONS

TO: Maples and Calder  
PO Box 309  
Ugland House  
South Church Street  
George Town  
Grand Cayman  
Cayman Islands



THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, PO Box 495GT, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 1st day of October, 2009

NOTE – This Writ may not be served later than 4 months beginning with the date of issue unless renewed by order of the Court.

**IMPORTANT**

Directions for Acknowledgment of Service are given with the accompanying form.

**STATEMENT OF CLAIM**

- 1 The Plaintiff (hereinafter "LCPI") is a company incorporated in Delaware, USA, whose registered office is at 748, Seventh Avenue, New York, New York.
- 2 The Defendant (hereinafter "ABCL") is a company incorporated in the Cayman Islands, whose registered office is at Strathvale House, North Church Street, PO Box 1109 GT, Grand Cayman, Cayman Islands. It is currently in voluntary liquidation.
- 3 Documents referred to herein will be referred to at trial for their full terms and legal effect.
- 4 By a document entitled "Class B Credit Facility" and dated 21 April 2005 as amended and restated on 18 September 2006 (the "**Credit Facility**"), LCPI (defined therein as the "Lender") advanced certain funds to ABCL (defined therein as the "Borrower"), and by these proceedings LCPI seeks the repayment of those funds together with interest.
- 5 The Credit Facility was entered into between LCPI and ABCL as part of a broader investment programme offered to investors pursuant to an Offering Circular dated 18 September 2006 entitled "*Anthracite Investments Cayman Limited Series 38 €200,000,000 Principal Protected Notes due 2019 linked to Anthracite Master Company (6) Limited*" (the "**Offering Circular**").
- 6 The Offering Circular set out the terms upon which an investment could be made by an investor into the Series 38 €200,000,000 Principal Protected Notes linked to Anthracite Master Company Limited (the "**Notes**"). The Offering Circular provided that:
  - 6.1 Anthracite Investments (Cayman) Limited (the "**Issuer**") would issue the Notes. The issuer is a special purpose company established, inter alia, for the purpose of issuing the Notes: page 1 and 12, Offering Circular;
  - 6.2 the net proceeds of the issue of the Notes (€200,000,000) were used by the Issuer to subscribe for 20,000 Class B redeemable preference shares of a par value of €0.01 issued at €10,000 each in ABCL: page 5, Offering Circular;

- 6.3 the Notes were designed to give investors an indirect financial exposure to the performance of the structured investment programme of the Class B shares in ABCL. ABCL's investment objective was to achieve capital appreciation of its assets and long term above average returns by investing in various Portfolio Funds representing different asset classes: page 5, Offering Circular;
- 6.4 the Principal Protection Agreement, made between the Issuer and Lehman Brothers Finance S.A, was intended to ensure that the Issuer would have sufficient funds to redeem all the outstanding Notes upon maturity at an amount equal to their principal amount: page 13, Offering Circular;
- 6.5 the Notes were secured by (i) a first fixed charge over the Class B redeemable preference shares in ABCL; and (ii) an assignment of the rights of the Issuer under, inter alia, the Principal Protection Agreement: page 1 Offering Circular;
- 6.6 the Credit Facility was entered into between LCPI and ABCL for the purpose of leveraging the investment of ABCL in respect of the Class B Shares in ABCL and to finance the payment of a special dividend of €17,000,000 on the Interest Payment Date falling due in April 2006: page 33, Offering Memorandum.

### **The Credit Facility**

- 7 Clause 23.1 of the Credit Facility provided that it shall be governed and construed in accordance with the laws of England.
- 8 By the Credit Facility it was provided that words and expressions contained therein should bear the same meaning as in the Offering Circular.
- 9 The Credit Facility defined the "*Facility*" as meaning "*the facility provided to [ABCL] for CPPI Leverage on the terms of this Agreement and excludes the Initial Interest Facility*".
- 10 The terms "*CPPI Leverage*" and "*Initial Interest Facility*" were not defined in the Credit Facility; neither were they defined in the Offering Circular. That latter document provided (at page 33):

*"On the Issue Date, [ABCL] entered into a credit facility with [LCPI], ..... which Credit Facility will be amended on 18 September 2006 for the purpose of leveraging the investment of [ABCL] in respect of the Class B Shares in Fund*

Shares (and any alternative fund selected after a Suspension Event) ("CPPI Leverage") and to finance the payment of the special dividend of €17,000,000 on the Interest Payment Date falling in April 2006 (the "Initial Interest Facility")."

- 11 The inclusion of the expression "CPPI Leverage" in quotation marks within the Offering Circular does not, in the circumstances, afford a definition of that expression. Neither does the inclusion of the expression "Initial Interest Facility" within quotation marks in the said Circular afford an accurate definition of the Initial Interest Facility.
- 12 On a true and proper construction of the Credit Facility, in accordance with English law, the Initial Interest Facility means the sum of €17,000,000, since:
  - 12.1 Clause 2.2 of the Credit Facility provided that the Initial Interest Facility was made available for up to €17,000,000;
  - 12.2 the Offering Memorandum refers to the payment of the special dividend of €17,000,000 as the "Initial Interest Facility". Paragraph 10 above is repeated;
  - 12.3 on 21 April 2005, LCPI advanced to ABCL the sum of €17,000,000; and
  - 12.4 ABCL used the sum of €17,000,000 advanced by LCPI to pay a special dividend in or about April 2006.
- 13 Clause 3.2 of the Credit Facility provided that, "*the Initial Interest Facility was used to finance the payment of the special dividend due on the Interest Payment Date falling due in April 2006 ("the Interest Advance")*".
- 14 Clause 5.4 of the Credit Facility provided that, "*the Borrower [ABCL] will satisfy its obligation to repay the Interest Advance and pay interest thereon, by paying Recovery Fees to the Lender [LCPI] and/or by the deduction from Note redemption proceeds and payment to the Principal Protection Provider of the Present Value of the Unpaid Recovery Fees*".
- 15 Clause 23.4 of the Credit Facility provided that, "*No person shall have any rights under this Agreement pursuant to the Contracts (Rights of Third Parties Act) 1999*".
- 16 Thus, pursuant to the Credit Facility and in accordance with English law, ABCL was obliged:

- 16.1 to repay the Interest Advance to LCPI; and
- 16.2 to pay interest on the Interest Advance to LCPI.
- 17 On the true and proper construction of the Credit Facility, in accordance with English law, and in the circumstances set out in paragraph 13 above, the Initial Interest Facility is to be equated with the Interest Advance.
- 18 Accordingly, pursuant to the Credit Facility and in accordance with English law, ABCL was obliged:
- 18.1 to repay the Initial Interest Facility to LCPI; and
- 18.2 to pay interest on the Initial Interest Facility to LCPI.
- 19 Clause 6.4 of the Credit Facility provided that, *"the rate of interest applicable to an Advance for an Interest Period shall be the rate per annum which is the aggregate of: (a) 0.75 per cent (the "Margin") and (b) one month EURIBOR"*.
- 20 Under the heading "Recovery Fee", the Offering Circular, at page 9, provided that:
- "the Balanced Company [defined therein as ABCL] has agreed to pay Lehman Brothers International (Europe) a recovery fee equal to 0.88 per cent per annum of the daily average principal amount outstanding on the Notes, accruing daily on a 30/360 basis and payable quarterly in arrear on 21 July 2005, 21 October 2005, 21 January 2006, 21 April 2006, 21 July 2006 and thereafter a fee equal to 0.79 per cent per annum of the daily average principal amount outstanding on the Notes, accruing daily on a 30/360 basis and payable quarterly in arrear on 29 February (or, if not falling in a leap year, 28 February), 29 May, 29 August and 29 November ..... in each year and on the Scheduled Determination Date (for the period up to the Scheduled Maturity Date) commencing in November 2006."*
- 21 The reference in the aforementioned paragraph to Lehman Brothers International (Europe) was an error. In the premises, it is averred that the reference to Lehman Brothers International (Europe) was intended to be a reference to LCPI since:

- 21.1 No agreement had been made between ABCL and Lehman Brothers International (Europe) in relation to the payment of recovery fees by ABCL to Lehman Brothers International (Europe);
- 21.2 by letter dated 21 April 2005 from ABCL to LCPI, ABCL agreed to pay to LCPI the recovery fees; and
- 21.3 the Plaintiff will further rely on the facts and matter pleaded at paragraph 24 below.
- 22 The Offering Circular also provided that, *"Interest will be paid, and principal repaid, on the Initial Interest Facility by the Balanced Company [ABCL] paying Recovery Fees to [LCPI] and/or by the deduction from Note redemption proceeds and payment to the Principal Protection Provider of the Present Value of the Unpaid Recovery Fees."*
- 23 Thus the Offering Circular shows a clear intention on the part of ABCL and LCPI that:
- 23.1 ABCL would repay the Initial Interest Facility to LCPI; and
- 23.2 ABCL would pay interest on the Initial Interest Facility to LCPI.

***The letter of 21 April 2005 as amended and restated on 18 September 2006***

- 24 By a letter dated 21 April 2005 as amended and restated on 18 September 2006, from ABCL to LCPI (the "**Recovery Fee letter**"), ABCL stated that:

*"In consideration of [LCPI] agreeing to grant the Initial Interest Facility to us in relation to the Series 36 €200,000,000 Principal Protected Notes due 2019 linked to Anthracite Master Company (6) Limited (the "Notes") issued by the Issuer whose proceeds are invested in our Class B Shares, we agree to pay you a fee equal to 0.88 per cent per annum of the daily average principal amount outstanding on the Notes, accruing daily on a 30/360 basis and payable quarterly in arrear on 21 July 2005, 21 October 2005, 21 January 2006, 21 April 2006, 21 July 2006 and thereafter a fee equal to 0.79 per cent per annum of the daily average principal amount outstanding on the Notes, accruing daily on a 30/360 basis and payable quarterly in arrear on 29 February (or, if not falling in a leap year, 28 February), 29 May, 29 August and 29 November ..... in each year and on the Scheduled Determination Date (for the period up to the Scheduled Maturity Date) commencing in November 2006."*

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€3,076,611.11 to LCPI denies any liability to repay the balance. Indeed ABCL appears to contend for a position whereby having received the Initial Interest Facility to make a payment of €3,076,611.11 to LCPI it is under no obligation to repay the balance.

37.3 the implied term is capable of clear expression; and

37.4 the implied term does not contradict any express term of the contract.

38 ABCL threatens to make a distribution of funds such that it will not be in a position to meet LCPI's claim. Unless, upon service of these proceedings, ABCL undertakes to refrain from making any distribution the effect of which would be to deprive it of funds to meet this claim until after the determination of these proceedings, LCPI reserves the right to apply for injunctive relief.

**AND THE PLAINTIFF CLAIMS**

- (1) Repayment of €13,858,505.23;
- (2) Interest in accordance with Credit Facility accruing at the daily rate of €1,632.73;
- (3) Alternatively an enquiry as to the amounts owing by ABCL to LCPI followed by payment of all such sums;
- (4) To the extent necessary, injunctive relief;
- (5) Interest pursuant to section 34 of the Judicature Law (2007 Revision), on such sums as are found due to the Plaintiff and for such rate and for such period as the Court thinks fit; and
- (6) Such further or other relief as the Court thinks fit.

*Walkers*

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**WALKERS**  
Attorneys at Law for the Plaintiff

This Writ is issued by Walkers, Attorneys at Law, Walker House, 87 Mary Street, George Town, Grand Cayman KY1-9001, for the Plaintiff whose address for service is care of its said Attorneys at Law.