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Your reference	Our reference	Date
Netting Analyser Library	Mr JW Scholtz / Ms N Paige / Mr D de Villiers 2337442	8 January 2013

Dear Sirs

NETTING ANALYSER LIBRARY

You have asked us to give an opinion in respect of the laws of the Republic of South Africa ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an "**Agreement**") or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to "*this opinion*" are to the opinions given in paragraph 3.

1. Terms of Reference and definitions

1.1 This opinion is given in respect of persons that are:

1.1.1 companies incorporated under the Companies Act, 2008 (the "**Companies Act**");

1.1.2 banks governed by the Banks Act, 1990 (the "**Banks Act**");

1.1.3 mutual banks, the status of which is governed by the Mutual Banks Act, 1993 (the "**Mutual Banks Act**");

1.1.4 insurers, the status of which is governed by the Long-Term Insurance Act, 1998 ("**the Long-Term Insurance Act**") in the case of long-term insurers and the Short-Term Insurance Act, 1998 ("**the Short-Term Insurance Act**") in the case of insurers;

1.1.5 pension funds, the status of which is governed by the Pension Funds Act, 1956 (the "**Pension Funds Act**"); and

1.1.6 an individual resident in this jurisdiction or a partnership or *inter vivos* trust (including a charitable trust) established and located in this jurisdiction,

whether they are incorporated or formed under the laws of this jurisdiction or are incorporated or formed under the laws of another jurisdiction with a branch or branches located in this jurisdiction and insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.8) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 The opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are licensed "financial service providers" as defined in the Financial Advisory and Intermediary Services Act, 2002 and "authorised users" of the exchanges as defined in the Securities Services Act, 2004 (the "**Securities Services Act**"), where such financial service providers or authorised users are companies incorporated under the Companies Act, individuals resident in this jurisdiction or partnerships established and located in this jurisdiction.

1.3 The opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties that are government held corporations which are incorporated under or regulated by a specific statute, including, but not limited to,

South African Airways (Proprietary) Limited, Petroleum Oil and Gas Corporation of South Africa (Proprietary) Limited, Eskom, Telkom SA Limited, the Industrial Development Corporation of South Africa Limited and Transnet Limited.

1.4 The opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of hedge funds and private equity funds to the extent that such funds are structured as companies under the Companies Act (1.1.1), partnerships or *inter vivos* trusts (1.1.6).

1.5 A bank may be a public company incorporated under the Companies Act and registered under the Banks Act or may, in limited cases, be a statutory bank incorporated under and regulated by its own specific statute (such as, the Development Bank of Southern Africa Limited, the South African Reserve Bank and the Land Bank). This opinion does not cover banks which are incorporated under or regulated by a specific statute.

1.6 This opinion does not cover collective investment schemes as defined in the Collective Investment Schemes Control Act, 2002, an exchange, a clearing house or a central securities depository as defined in the Securities Services Act, a friendly society registered in terms of the Friendly Societies Act, 1956, or any person who or which deals with trust property as a regular feature of its business but which is registered in terms of any Act other than the Companies Act, or a scheme as defined in the Participation Bonds Act.

1.7 This opinion does not cover sovereign and public bodies (including provincial governments and municipalities) as, generally speaking, these entities do not have the capacity to enter into the Transactions.

1.8 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions ("**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.9 In this opinion letter:

1.9.1 "**Security Interest**" means the security interest created pursuant to the Security Interest Provisions.

1.9.2 "**Equivalent Agreement**" means an agreement:

1.9.2.1 which is governed by the law of England and Wales;

1.9.2.2 which has broadly similar function to any of the Agreements listed in Annex 1;

1.9.2.3 which contains the Core Provisions (with no amendments, or with Non-material Amendments); and

1.9.2.4 which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments).

1.9.3 References to the "**Agreement**" in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement.

1.9.4 "**Insolvency Proceedings**" means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement)."

1.9.5 A "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3.

1.9.6 "**Enforcement**" means, in the relation to the Security Interest, the act of:

1.9.6.1 sale and application of proceeds of the sale of Collateral against monies owed, or

1.9.6.2 appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions.

1.9.7 In other instances other than those referred to at 1.9.6 above, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.9.8 Terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears.

1.9.9 References to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments (as defined in 1.9.4).

1.9.10 Any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter.

1.9.11 Certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2.

1.9.12 Headings in this opinion letter are for ease of reference only and shall not affect its interpretation.

2. Assumptions

2.1 We assume the following:

2.1.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.

2.1.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.

2.1.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

2.1.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.

2.1.5 That the Agreement has been properly executed by both Parties.

2.1.6 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party.

2.1.7 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

2.1.8 That the Agreement accurately reflects the true intentions of each Party.

2.1.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.

2.1.10 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.

2.1.11 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.

2.1.12 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.

2.1.13 That, except with respect to our opinion at paragraph 3.1.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions may be located either within or outside this jurisdiction.

2.1.14 That any Security Interest created in accordance with the Security Interest Provisions in respect of Collateral that is located outside this jurisdiction is valid and enforceable under the law of the place where such Collateral is situated.

2.1.15 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.1.16 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. Opinions

3.1 On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinion.

3.1.1 **Valid Security Interest**

3.1.1.1 The Security Interest Provisions would create a valid security interest over the Collateral.

3.1.1.2 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

3.1.1.3 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the

right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.1.1.4 Following the exercise of the Firm's rights under the Security Interest Provisions, the Firm's rights in respect of the proceeds of realisation of the Collateral would rank ahead of the interests of the Counterparty any other person therein.

3.1.2 **Further acts**

No further acts, conditions or things would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.1.3 **Foreign Collateral Providers**

3.1.4 Moreover, the opinions given at paragraphs 3.1.1 and 3.1.2 also apply in respect of any Counterparty that is not established or resident in this jurisdiction, where any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions are located within this jurisdiction.

3.1.5 **Right of re-use**

3.1.5.1 With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

3.1.5.2 The opinion given at this paragraph 3.1.5 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. **Qualifications**

4.1 The opinions in this opinion letter are subject to the following qualifications:

4.1.1 **Choice of law**

4.1.1.1 We note that the Agreement will be governed by and construed in accordance with English law or the law of the State of New York.

4.1.1.2 Adhering to the fundamental principle of freedom of contract, the South African courts will, generally, give effect to the governing law clause in an agreement to determine the personal rights of the parties arising out of the contract. In ***Guggenheim v Rosenbaum*** 1961 (4) SA 21 (W), the court held that *"in our law the proper law of the contract is the law of the country which the parties have agreed or intended ... shall govern it ...".* (Also see ***Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*** 1986 (3) SA 509 (D)).

4.1.1.3 This general rule is, however, subject to the following exclusions:

4.1.1.3.1 South African courts will not enforce revenue and penal laws of a foreign state, either directly or indirectly;

4.1.1.3.2 South African courts will normally implement their own procedural rules;

4.1.1.3.3 the capacity of the parties to contract will be determined in accordance with South African law. The rationale for this is that a person lacking capacity to contract is incapable of agreeing that any other law should govern the validity and extent of his obligations;

4.1.1.3.4 South African courts may decline to follow the proper law of the contract, in circumstances where its recognition, or application, is considered to be contrary to South African "public policy". It is generally accepted that it would be contrary to public policy for a South African court to apply the law of the foreign jurisdiction when dealing with the insolvency of a South African

customer. Accordingly, in the event of the insolvency of the South African customer, a South African court handling the insolvency proceedings would apply South African law in determining the proof and ranking of creditors' claims against the assets of the insolvent estate and in distributing the assets of the insolvent estate in satisfaction of such claims;

4.1.1.3.5 although there is no South African authority on the issue of whether or not a South African court would uphold a contract which is valid and enforceable under English law but which requires performance of an act which is unlawful in South Africa, in all probability the South African courts would decline to do so; and

4.1.1.3.6 should the contracting parties choose a foreign governing law with the intention of evading the provisions of South African law, such a clause may be struck down on the basis that the parties have acted *in fraudem legis*. The parameters of this doctrine are, however, not clearly defined in South African law.

4.1.1.4 If a law other than South African law is chosen as the governing law of a contract, that law will be presumed to be the same as South African law until the contrary is proved by an expert.

4.1.1.5 Irrespective of the governing law of a collateral agreement, however, a South African court will apply the law of the place where the collateral is located (the *lex situs*) in determining issues relating to the creation, perfection and enforcement of an interest in that collateral.

4.1.1.6 In other words, under South African law, the security must comply with the requirements of the *lex situs* in order to be valid. If a governing law is chosen, the agreement will be interpreted in accordance with that law but the security will not be valid unless it also complies with the requirements of the *lex situs*. Accordingly, if the governing law permits transfer of title as security and South African law does not, the choice of law would be ineffective for this

purpose in respect of securities located in South Africa. If the securities are located outside South Africa, the validity of the transfer of title as security will be determined by the law of the place where it is situated.

4.1.1.7 The South African law principles according to which the location of collateral in the form of securities is determined are not always clear where more than one jurisdiction is involved. With regard to certificated securities, in general, the courts are likely to hold that the securities are located where the rights they evidence are enforceable. In the case of a debt, this would be where the debtor is. A possible exception is the category of securities that are constituted by or embodied in a document (such as a bill of exchange or bearer bond). In our view, however, the courts would probably apply the general rule in regard to these securities and would not look to the physical location of the security document. In respect of uncertificated securities, no importance attaches under South African law to the place where book entries are made and the general rule (that the security is located where the rights are enforceable) would probably apply.

4.1.1.8 In view of the uncertainty regarding the location of collateral under South African law, which may result in the law of South Africa or the other jurisdiction involved being applied depending on the circumstances of the case, it is prudent to ensure that the interests in the collateral are enforceable under the laws of all jurisdictions involved.

4.1.2 **Nature of the security interest**

4.1.2.1 We understand that the Collateral delivered by a Counterparty to a Firm under the Agreement will be subject to a security interest created by way of a first fixed charge in favour of the Firm.

4.1.2.2 Accordingly, it appears that the intention is initially to create a security interest in the nature of a pledge of the Collateral.

4.1.2.3 A pledge under South African law is perfected by delivery of the pledged property pursuant to the agreement that the property is to be held as security for the debt secured by the pledge. In order to deliver incorporeal property (such as securities) it is not strictly necessary to deliver a document or certificate which merely evidences the incorporeal (such as a share certificate), as opposed to a document which embodies or constitutes the incorporeal (such as a bill of exchange). However, because the fact that documentation evidencing the incorporeal has been delivered may be a decisive factor in proving the existence of the pledge, we recommend that delivery of all such documentation be taken by the Firm.

4.1.2.4 While special formalities are required for the hypothecation of immovable property (essentially, the hypothecation must be in writing and must be registered in the deeds registry), there are no equivalent registration requirements for the pledge of incorporeal movable property such as securities. A pledge over corporeal movable property may also be perfected (as an alternative to perfection by delivery) by way of the registration of a special notarial bond over the movable property in question. It is, however, not possible to register a special notarial bond over incorporeal movable property, such as securities.

4.1.2.5 The position of cash "pledged" as security is different from that of securities. Where cash is transferred to a creditor as security for a debt and is mixed with the cash of the transferee, ownership in that cash vests in the transferee and forms part of the latter's estate (Van der Merwe ***The Law of Things*** par 194). The transferor's right of ownership in the money is replaced by a personal right to repayment of the cash on the conditions set out in the collateral agreement. By contrast, where the cash is paid into a separate account in the name of the transferee but it is clear from the agreement between the transferor and the transferee that the account is held for the transferor and access to the account by the transferee is limited in terms of the agreement, it is arguable that the monies held in such separate

account do not form part of the transferee's estate (***McEwen NO v Hansa*** 1968 (1) SA 465 (A)).

4.1.2.6 Although the transfer of cash to a creditor as security is not a true security under South African law, it serves a similar function and is valid under South African law. Provided that the right to repayment of the cash collateral is made expressly conditional on fulfilment by the transferor of all its obligations under all transactions between the parties, on the insolvency of the transferor, the liquidator of its insolvent estate would be bound by this condition and would not be entitled to repayment of the cash collateral unless it first tendered performance of the insolvent estate's outstanding obligations. This achieves the same result as set-off.

4.1.2.7 The creation of a security interest by the Firm in the form of a pledge will, in our view, be valid under South African law, subject to our advice in paragraph 4.1.3 below in relation to the validity of any subsequent outright transfer of security, our advice below regarding the effect of a loss of possession of pledged securities under South African law.

4.1.3 **Recharacterisation / Rehypothecation**

4.1.3.1 We understand from the Agreement that the Firm will have the right, subject to its obligation to return assets equivalent to the Collateral to the South African customer, to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral (ie Collateral in the form of securities). To enable the Firm to utilise such Collateral, the securities in question will be released from the security interest created under or pursuant to the Agreement and transferred by the South African customer to the Firm. The full legal and beneficial right, title and interest in and to those securities will then vest in the Firm, who will have a contractual obligation to return equivalent securities to the South African customer.

4.1.3.2 Accordingly, it seems that where the Firm wishes to utilise any Collateral consisting of securities for its own purposes and for its own benefit, the intention is not to create a charge or other security interest over the transferred securities but to provide instead for an outright transfer of the title of the securities, subject to a conditional obligation to return equivalent securities.

4.1.3.3 There is no statutory or case law authority recognising a transfer of title as security in relation to collateral in a form other than cash under South African law. In fact, the academic writers doubt whether a transfer of title as security is possible under South African law in relation to collateral in a form other than cash (see, for instance, Van der Merwe ***Sakereg*** 689-90; Scott & Scott ***Wille's Law of Mortgage and Pledge*** 42-46;107).

4.1.3.4 There is, accordingly, a risk that, if challenged in a South African court, a transfer of title as security in respect of collateral in a form other than cash could be struck down as an invalid transfer. It is more likely, however, that a South African court would recharacterise such a transfer of title as a pledge.

4.1.3.5 If a transfer of title of securities effected pursuant to the Agreement was struck down by a South African court as an invalid transfer, the Firm would be required to return the securities to the South African customer.

4.1.3.6 If a transfer of title of securities effected pursuant to the Agreement was recharacterised as a pledge, the question whether such transfer would be held to have created a valid pledge would be answered with reference to the requirements for a valid pledge under South African law (refer to paragraphs 4.1.2.3 to 4.1.2.5 above).

4.1.3.7 Notwithstanding the above, if the securities in question are located outside South Africa, a South African court would recognise the validity of a transfer of title as security in respect of such securities if it

is valid according to the law of the place where the securities are situated. In this regard, we refer to paragraph 4.1.1 above.

4.1.3.8 Moreover, under the South African law of pledge, the pledgee is obliged to retain possession of the pledged property. The loss of possession of the pledged property by the pledgee will destroy the pledge, unless the new possessor agrees to hold possession as agent for the pledgee (***Zandberg v Van Zyl*** 1910 AD 302; ***Goldinger's Trustee v Whitelaw & Son*** 1917 AD 66; ***Oertel NO v Brink*** 1972 (3) SA 669; ***Vasco Dry Cleaners v Twycross*** 1979 (1) SA 603).

4.1.3.9 If the agreement of pledge provides, however, that, should the pledgee lose possession of the pledged property, there will arise in its place an obligation on the part of the pledgee to restore comparable property, or the cash equivalent thereof, to the pledgor on condition that the pledgor discharges its obligations to the pledgee in full, the pledgee would be entitled to withhold performance of its obligation to restore until the pledgor tenders performance of its own obligations.

4.1.3.10 Such a condition would be binding on the liquidator of the pledgor's insolvent estate because of the rule that a liquidator cannot enforce specific performance from the solvent party without first performing the outstanding obligations of the insolvent estate under the same agreement (***Bryant and Flanagan (Pty) Ltd v Muller*** 1978 (2) SA 807 (A)) and under any other agreement where the solvent party's rights under the first agreement are made conditional on performance by the insolvent of its obligations under the other agreement (***Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*** 1988 (2) SA 546 (A); ***The Government v Thorne and Another NNO*** 1974 (2) SA 1 (A)).

4.1.3.11 Accordingly, even if the pledge were invalid because of the loss of possession of the pledged securities, the Firm would not be required to return equivalent securities to the South African customer unless the customer (or its liquidator) had performed its own obligations.

4.1.4 **Insolvency Act**

4.1.4.1 Under South African law a pledgee's rights in pledged property would only rank below those of another creditor where the pledged property was the object of a previous pledge (or previous pledges) by the pledgor to another creditor or creditors.

4.1.4.2 In such case, in the event of the execution against the pledged property by the pledgee before the pledgor's insolvency or in the event of the pledgor's insolvency, the proceeds of the pledged property would first be applied to the satisfaction of the first pledgee (or bondholder's) claim. Thereafter, any surplus remaining would be paid to subsequent pledgees according to the extent of their claims and their ranking in time (see Joubert ***LAWSA*** vol 17 par 440).

4.1.4.3 Because it is not strictly necessary to deliver a certificate which merely evidences (as opposed to one which constitutes) a security in order to perfect a pledge of such security, it is conceivable that securities pledged or transferred under the Agreement may be the object of a previous pledge. There is, unfortunately, no way to confirm whether or not this is the case, although the South African customer will be in breach of the Agreement if the security interest does not constitute the first fixed charge on the Collateral.

4.1.4.4 Assuming that the securities pledged under the Agreement are not the object of a previous pledge, in the event of the South African Counterparty's insolvency, the Firm would be a secured creditor in respect of the pledged property. As a secured creditor, the Firm would have a right to payment of its claim "out of" the property by which its claim is secured: in other words, the Firm would be paid from the proceeds of the realisation of the property by the liquidator in the course of his administration of the South African Counterparty's insolvent estate. This right ranks higher than the right to payment of any other creditor of the estate.

4.1.4.5 Under South African law, on insolvency, the pledgor is divested of its entire estate (including the right of ownership in any personal rights which have been pledged as security) which vests in the Master of the High Court until a liquidator has been appointed and thereafter, in the liquidator.

4.1.4.6 At common law, movable property owned by the insolvent party at the date of liquidation of its estate or acquired thereafter which is situated in a foreign jurisdiction does not vest in the liquidator of the insolvent estate unless, at either such date, the insolvent is domiciled in the area of jurisdiction of the court handling the liquidation (see ***Trustee of Howse Sons & Co v Trustees of Howse Sons & Co*** *(1884) 3 SC 14 at 20;* ***Ep BZ Stegmann*** *1902 TS 40 at 47-8;* ***Herman NO v Tebb*** *1929 CPD 65 at 72,* ***Re Estate Morris*** *1907 TS 657 at 666;* ***Viljoen v Venter NO*** *1981 (2) SA 152 (W) at 155).*

4.1.4.7 South African private international law provides that a company is domiciled in the country in which it is incorporated.

4.1.4.8 Securities pledged under the Agreement would qualify as movable property under South African law and would, accordingly, in our view, vest in the liquidator of the South African customer's insolvent estate.

4.1.4.9 The Firm would then be required to realise the Collateral (other than cash) in accordance with the procedures set out in section 83 of the Insolvency Act, pay over the proceeds of realisation to the liquidator and prove its secured claim in accordance with section 44 of that Act. The liquidator is also entitled to a commission comprising a percentage of the proceeds of the realisation.

4.1.4.10 Under South African law, it is clear that parties may not contract in a manner that disturbs the distribution of the assets of an insolvent estate contrary to the provisions of the insolvency law (see ***Ex parte De Villiers and Another NNO: In Re Carbon Developments (Pty) Ltd*** 1993 (1) SA 493 (A); ***Lind v Lefdal's Pianos Ltd (in liquidation) and Others*** 1929 TPD 241).

4.1.4.11 Accordingly, the mechanisms set out in the Insolvency Act for the realisation of security and proof of claims must be followed and, to the extent that the Agreement departs from such provisions, it would not be enforced by a South African court.

4.1.5 **Additional Collateral**

4.1.5.1 We understand that the South African Counterparty will be required to deliver additional Collateral to the Firm from time to time pursuant to applicable margin requirements.

4.1.5.2 Under South African law, a pledge over a fluctuating pool of assets is recognised (provided that the requirements for the creation and perfection of a valid pledge are satisfied). Accordingly, in respect of additional Collateral pledged from time to time under the Agreement, provided the requirements for the creation and perfection of a valid pledge are met each time additional Collateral is delivered, the Firm will not need to take any further action to perfect the pledge each time additional Collateral is delivered. There is also nothing to prevent the South African Counterparty from transferring further Collateral under the Agreement.

4.1.5.3 In certain circumstances, however, an increase in the Collateral pledged or transferred under the Agreement may constitute a preference under the Insolvency Act to the extent of the increase.

4.1.5.4 In this regard, transactions which constitute dispositions without value (section 26), voidable preferences (section 29) and undue preferences (section 30) are voidable at the instance of the liquidator. A transaction may also be impeachable at common law under the *actio Pauliana*.

4.1.5.5 The term "*disposition*" is defined in the Insolvency Act to include "*any transfer or abandonment of rights to property [including] a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but [excluding] a disposition in compliance with an order of the court.*"

4.1.5.6 Section 26 of the Insolvency Act provides that where the trustee or liquidator of an insolvent estate proves that, at any time more than two years before such liquidation, the insolvent made a disposition of its property and that immediately after such disposition its liabilities exceeded its assets, the disposition may be set aside by the court at the instance of the liquidator if the liquidator also proves that such disposition was not made for value. The term "value" in this context means any kind of consideration and not merely money. It has been held by the South African courts that the question whether the insolvent received value for a disposition must be decided by reference to all the circumstances under which the transaction was made and that the value may inhere in the securing of a commercial advantage.

4.1.5.7 Section 29 of the Insolvency Act provides that if a disposition by the insolvent made within six months before the date of liquidation had the effect of preferring one of its creditors above another and, immediately after it was made, the liabilities of the insolvent exceeded the value of its assets, the court may set aside such disposition at the instance of the liquidator, unless the person in whose favour the disposition was made proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

4.1.5.8 If a debtor disposes of an asset at a time when his liabilities exceed his assets, with the intention of preferring one of his creditors above another and he is then sequestrated, the court may set aside the disposition under section 30 of the Insolvency Act.

4.1.5.9 Pre-insolvency alienations of property can also be set aside at common law under the *actio Pauliana* where the insolvent and the recipient of the alienation had the common intention of prejudicing the insolvent's other creditors in respect of the recovery of their claims.

4.1.5.10 Accordingly, pre-insolvency pledges and transfers of Collateral by the South African Counterparty will be protected, provided that they were

made for adequate value and were made more than six months before the commencement of the insolvency, or they were made within the six month period but were made in the ordinary course of business of the insolvent and without the intention to prefer the Firm.

There are no other material issues relevant to the issues addressed in this opinion letter which we draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully,

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This letter may be sent electronically without a signature. A signed copy will be sent on request.

Annexe 1

FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "Professional Client Agreement 2007")

2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")

3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")

4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")

5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")

6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")

7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")

8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")

9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly

contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

Annex 2

DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).

2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).

3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).

4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.

5. "**Core Provisions**" means:

5.1 with respect to all Equivalent Agreements, the Security Interest Provisions; and

5.2 with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.

6. "**Rehypothecation Clause**" means:

6.1 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

6.2 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

6.3 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and

6.4 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs 6.1 to 6.3 of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7. "**Security Interest Provisions**" means:

7.1 the "Security Interest Clause", being:

7.1.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***);

7.1.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***);

7.1.3 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***);

7.1.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***);

7.1.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***);

7.1.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***);

7.1.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***);

7.1.8 in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***);

7.1.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); and

7.1.10 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs 7.1.1 to 7.1.9 of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7.2 the "**Power to Charge Clause**", being:

7.2.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (***Power to charge***);

7.2.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (***Power to charge***);

7.2.3 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (***Power to charge***);

7.2.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (***Power to charge***);

7.2.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (***Power to charge***);

7.2.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (***Power to charge***);

7.2.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (***Power to charge***);

7.2.8 in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (***Power to charge***);

7.2.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (***Power to charge***); and

7.2.10 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs 7.2.1 to 7.2.9of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7.3 the "**Power of Sale Clause**", being:

7.3.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

7.3.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

7.3.3 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

7.3.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

7.3.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

7.3.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

7.3.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

7.3.8 in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

7.3.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***); and

7.3.10 in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs 7.3.1 to 7.3.9 of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7.4 the "**Power of Appropriation Clause**", being:

7.4.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (***Power of appropriation***);

7.4.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (***Power of appropriation***);

7.4.3 the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (***Power of appropriation***);

7.4.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (***Power of appropriation***);

7.4.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (***Power of appropriation***);

7.4.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (***Power of appropriation***);

7.4.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (***Power of appropriation***)

7.4.8 in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (***Power of appropriation***);

7.4.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (***Power of appropriation***); and

7.4.10 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs 7.4.1 to 7.4.9 of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7.5 the "**Lien Clause**", being:

7.5.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (***General lien***);

7.5.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (***General lien***);

7.5.3 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (***General lien***);

7.5.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (***General lien***);

7.5.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (***General lien***);

7.5.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (***General lien***);

7.5.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (***General lien***);

7.5.8 n the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (***General lien***);

7.5.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (***General lien***); and

7.5.10 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs 7.5.1 to 7.5.9 of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

7.6 the **"Client Money Additional Security Clause"**, being:

7.6.1 in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

7.6.2 in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

7.6.3 in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

7.6.4 in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

7.6.5 in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

7.6.6 in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

7.6.7 in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

7.6.8 in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

7.6.9 in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); and

7.6.10 in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs 7.6.1 to 7.6.9 of this definition (except insofar as variations may be required for internal cross-referencing purposes).

7.7 **"Two Way Clauses"** means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011

Annexe 3

Non Material Amendments

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.

4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.

5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.

6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

8. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.