Claim No.: [ ]

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

B E T W E E N :

FSHC GROUP HOLDINGS LIMITED

Claimant

and

BARCLAYS BANK PLC

Defendant

ANNEX 1 - DETAILS OF CLAIM

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1. The Claimant seeks the rectification of two deeds (the 2016 Accession Deeds as defined below), executed by the parties on 18 November 2016, to reflect the common intention of the parties at the date of their execution (the **Claim**). The rectification sought is reflected in the deeds at Annex 2 to the Part 8 Claim Form (the **Rectified Deeds**).

2. The Defendant is joined in its capacity as Security Agent (the **Security Agent**) under the Finance Documents (defined below).

Key Facts Relevant to the Claim

The Acquisition of the Four Seasons Health Care group in 2012

3. Terra Firma Capital Partners Limited (**TFCPL**) is a private equity investment adviser. Amongst the entities it advises is Terra Firma Investments (GP) 3 Limited (**TFGP3**) (as general partner for and behalf of Terra Firma Capital Partners III, L.P (**Terra Firma**)).

4. On 29 April 2012, Elli Acquisitions Limited (**Elli Acquisitions**) (an indirect subsidiary of Terra Firma), acquired the share capital of FSHC (Jersey) Holdings Limited (the **2012 Acquisition**), the holding company of the Four Seasons Health Care group.

5. The key finance documents governing the 2012 Acquisition are:

   (1) a revolving credit facility agreement (now a term loan facility) dated 29 April 2012 (as amended and restated) between, amongst others, Elli Finance (UK) Plc and the Defendant (the **TL Facility Agreement** and the lenders, the **TL Lenders**);

   (2) a senior secured note indenture dated 28 June 2012 (as supplemented) (the **SSN Indenture** and the holders, the **SSN Noteholders**);

   (3) a senior note indenture dated 28 June 2012 (as supplemented) (the **SN Indenture** and the holders, the **SN Noteholders**); and

   (4) an Intercreditor Agreement dated 27 June 2012 (as amended and restated) (the **Intercreditor Agreement**, together with the TL Facility Agreement, the SSN Indenture and the SN Indenture, the **Finance Documents**).

6. On 6 July 2012, the Claimant entered into an intercompany loan (the **2012 Shareholder Loan**) agreement with Carmel VIII S.a.r.l (**Luxco 1**) (the **2012 Shareholder Loan Agreement**) as part of a series of inter-company loans (the **2012 Luxco Subordinated Shareholder Funding Loans**) by which shareholder funding was injected into the High Yield Bond Group (as defined below).

7. As a result of the Claimant entering into the 2012 Shareholder Loan, the Claimant was required to accede to the Intercreditor Agreement as a Shareholder Creditor (as defined in the Intercreditor Agreement). On 6 July 2012, the Claimant acceded to the Intercreditor Agreement as a Shareholder Creditor by way of a Creditor Accession Undertaking.

8. Pursuant to clause 10.6(b) (*Security: Shareholder Creditors*) of the Intercreditor Agreement, the Claimant, as a Shareholder Creditor, is required to grant security over its rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant on behalf of the TL Lenders, SSN and SN Noteholders (together the **Secured Parties**) (the **Shareholder Creditor Clause 10.6(b) Obligation**).

9. Failure to comply with the Shareholder Creditor Clause 10.6(b) Obligation would give rise to an Event of Default (following the expiry of a grace period) under clause 25.10 of the TL Facility Agreement if not remedied before the expiry of the grace period.

The High Yield Bond Group Restructuring

10. Since August 2015, Allen & Overy LLP (**A&O**) have been advising TFGP3 for and on behalf of Terra Firma (the indirect parent company of the Claimant), the Claimant and Elli Investments Limited and its subsidiaries (the **High Yield Bond Group**) in relation to a solution for the long-term capital structure of the High Yield Bond Group (the **High Yield Bond Group Restructuring**).

11. Following a query from TFCPL regarding the 2012 Luxco Subordinated Shareholder Funding Loans, despite searches of the documents provided to A&O by High Yield Bond Group companies, it became apparent that A&O could not locate a copy of a document granting security over the Parent's rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant.

12. In case a copy of such security document could not be located, A&O decided that documentation should be prepared to pledge the Parent's rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant to ensure that the Parent complied with the Shareholder Creditor Clause 10.6(b) Obligation and to avoid an Event of Default under clause 25.10 of the TL Facility Agreement.

13. The mechanism proposed by A&O to avoid an Event of Default under clause 25.10 of the TL Facility Agreement was the Claimant acceding to two security documents that had been entered into between, amongst others, Luxco 1 (as a Third Party Chargor/Security Provider) and the Defendant on 12 July 2012 namely:

    (1) a security assignment of intercompany receivables agreement (the **2012 First Ranking Intercompany Receivables Security Assignment**); and

    (2) a second ranking security assignment of intercompany receivables agreement (the **2012 Second Ranking Intercompany Receivables Security Assignment** together with the 2012 First Ranking Intercompany Receivables Security Assignment, the **2012 Intercompany Receivables Security Assignments**).

14. Drafts of two deeds (the **2016 Accession Deeds**) were prepared by A&O for the purpose of the Claimant acceding to the 2012 Intercompany Receivables Security Assignments in order to pledge its rights and interests under the 2012 Shareholder Loan Agreement only.

15. A&O contacted the Security Agent and asked them whether they had a copy of a document granting security over the Parent's rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant. The Security Agent and their legal advisers (Latham and Watkins LLP (**Lathams**)) checked their records and confirmed that they were also unable to locate such a document.

Execution of the 2016 Accession Deeds

16. Following this confirmation from the Security Agent and Lathams, A&O explained to the directors of the Parent that the Finance Documents required security over the Parent's rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant to have been documented and informed them that it could result in an Event of Default under the TL Facility Agreement if such documentation was not in place. Execution copies of the 2016 Accession Deeds were provided to the directors of the Parent and were executed on behalf of the Parent.

17. A&O consulted with the Defendant and explained that the Finance Documents required the Parent to grant security over its rights and interests under the 2012 Shareholder Loan Agreement in favour of the Defendant. A&O provided the Defendant with copies of the 2016 Accession Deeds executed on behalf of the Parent and other documentation relating to the 2016 Accession Deeds.

18. The Defendant, in turn, provided these documents to Lathams for their consideration. A&O discussed the 2016 Accession Deeds with Lathams and explained that the Parent had executed the 2016 Accession Deeds in order to comply with the Shareholder Creditor Clause 10.6(b) Obligation.

19. The Defendant executed the 2016 Accession Deeds on 18 November 2016.

Accord between the parties giving rise to a Common Intention

20. Prior to their execution, A&O had explained to the Defendant and Lathams that the purpose of the 2016 Accession Deeds was to ensure that the Parent complied with the Shareholder Creditor Clause 10.6(b) Obligation. In all the circumstances, it was implicit in this explanation that this constituted the sole purpose of the 2016 Accession Deeds. At no stage did the Defendant or Lathams indicate any objection to this stated purpose. In the premises, it is to be inferred that it was the common intention of the Claimant and Defendant that the sole purpose of the 2016 Accession Deeds was to ensure that the Parent

complied with the Shareholder Creditor Clause 10.6(b) Obligation, but that the Parent would not otherwise incur additional obligations or burdens beyond such compliance (the **Common Intention**).

21. The Common Intention between the parties is reflected, amongst other things, in the recitals of the 2016 Accession Deeds. In particular:

    (1) Recitals (C) and (B) of the respective 2016 Accession Deeds state that "*The [Claimant] has entered into an intercompany loan agreement with Carmel VIII S.à r.l, (the **Debtor**) dated 6 July 2012 (the **Shareholder Loan**). In accordance with the terms of an intercreditor agreement dated 27 June 2012 (as amended from time to time) (the **Intercreditor Agreement**), both the Debtor and the [Claimant] acceded to the Intercreditor Agreement as a Debtor and a Shareholder Creditor respectively"; and*

    (2) Recitals (E) and (F) of the respective 2016 Accession Deeds state that "*In accordance with the terms of the Intercreditor Agreement, the Additional Assignor* [the Claimant] *is required to pledge to the Security Agent* [the Defendant] *its rights and interests under the Shareholder Loan as security for the Secured Obligations."*

Failure of the 2016 Accession Deeds to reflect the Common Intention

22. During February 2017 it came to the attention of A&O that, as executed, the 2016 Accession Deeds would result in the Claimant acceding to obligations under the 2012 Intercompany Receivables Security Assignments that went beyond the Shareholder Creditor Clause 10.6(b) Obligation and would not accord with the Common Intention.

23. In particular, each of the 2012 Intercompany Receivables Security Assignments include the following additional obligations (the **Additional Obligations**):

    (1) Clause 2 (*Covenant to Pay*) which provides that, "*Each Assignor as primary obligor covenants with and undertakes to the Security Agent (for the benefit of itself and the other Secured Parties) that it will on demand pay the Secured Obligations when they fall due for payment*."

    (2) Clause 14.3 (*Primary liability of Assignor*) which provides that, "*Each Assignor shall be deemed to be a principal debtor and the sole, original and independent obligor for the Secured Obligations and the Charged Property shall be deemed to be a principal*

security for the Secured Obligations" (Clauses 2 and 14.3 together, the **Guarantee Obligation**).

(3) Clause 6.2 (*Holding Company Restrictions*) which provides that, " *No Assignor may carry on any business, own any assets, incur any liabilities or grant any Security other than:*

(a) ownership of shares in its Subsidiaries, intra-Group debit balances, intra-Group credit balances and other credit balances in bank accounts, cash and Cash Equivalent Investments but only if those shares, credit balances, cash and Cash Equivalent Investments are subject to the Transaction Security;

(b) the provision of administrative services (excluding legal services, but including the on-lending of monies to Restricted Subsidiaries in the manner described in paragraph (a) above and management services to its Subsidiaries of a type customarily provided by a holding company to its Subsidiaries and the ownership of assets necessary to provide such services;

(c) the entry into and performance of its obligations (and incurrence of liabilities) under the Transaction Documents to which it is a party;

(d) the granting of Transaction Security to the Secured Parties in accordance with the terms of the Secured Debt Documents;

(e) professional fees and administration costs in the ordinary course of business as a holding company;

(f) as contemplated by the Structure Memorandum;

(g) directly related or reasonably incidental to the establishment and/or maintenance of its or its Subsidiaries' corporate existence; or

(h) any other activities which are not specifically listed above (i) which are ancillary to or related to those listed above and which are customary for a holding company to undertake and (ii) which are de minimis in nature" (the **Holding Company Restrictions**).

No Intention of the Parties for the Parent to incur the Additional Obligations

24. Neither party intended for the Parent to incur the Additional Obligations nor would it have made commercial sense for the Parent to have incurred the Additional Obligations. At all times, the purpose of the 2016 Accession Deeds was solely for the Parent to fulfil the Shareholder Creditor Clause 10.6(b) Obligation.

25. At no stage before or after the execution of the 2016 Accession Deeds had the Parent discussed with, or instructed, A&O to agree to the Parent acceding to the Additional Obligations. At no stage was the idea of the Parent acceding to the Additional Obligations discussed with (or suggested to) representatives of the Defendant, Lathams, TFCPL or the Parent.

26. No party to the Finance Documents intended for the Parent to accede to the Additional Obligations. The Parent incurring the Additional Obligations was not part of the 2012 Acquisition:

    (1) none of the Finance Documents or the offering memorandum dated 14 June 2012 for the issue of the SSN and the SN (the **2012 Offering Memorandum**) contemplate the Parent on demand (or at all), paying the Secured Obligations when they fall due for payment:

        (a) the SSN Indenture and the SN Indenture identify the companies which are liable for the obligations set out in the relevant document (its **High Yield Bond Restricted Group**). The Parent is excluded from the High Yield Bond Restricted Group in both the SSN Indenture and the SN Indenture;

        (b) the TL Facility Agreement provides that the Guarantors (as defined in the TL Facility Agreement) are liable for the obligations of High Yield Bond Group companies under the TL Facility Agreement. The Parent is excluded from this definition of Guarantor because it sits outside of the High Yield Bond Group;

        (c) neither the SSN Indenture nor the SN Indenture requires the Parent to guarantee the liabilities of High Yield Bond Group companies under the SSN Indenture and the SN Indenture respectively; and

        (d) Luxco 1 and Carmel IX S.a.r.l (**Luxco 2**) are both parties to the 2012 Intercompany Receivables Security Assignments. Luxco 1 and Luxco 2 are

defined in the TL Facility Agreement as Third Party Chargors i.e. an "*entity that has provided Transaction Security over any or all of its assets in respect of the obligations of any of the Obligors under any of the Finance Documents, but is not a Guarantor*." Luxco 1 and Luxco 2 are also defined in the 2012 Offering Memorandum as Security Providers and not as Guarantors of the SSN or Guarantors of the SN; and

(2) none of the Finance Documents or the 2012 Offering Memorandum contemplate the Parent being bound by the Holding Company Restrictions. The Parent is excluded from the definition of Holdco included in the Finance Documents and the 2012 Offering Memorandum.

Relief Sought

27. In the premises the Claimant seeks:

(1) rectification of the 2016 Accession Deeds, in the form of the Rectified Deeds, to reflect the Common Intention of the Claimant and the Defendant at the time the 2016 Accession Deeds were executed; and

(2) such other relief as the Court thinks fit.