IN THE COMPETITION APPEAL TRIBUNAL **Case no. 1329/7/7/19**

IN THE MATTER OF PROPOSED COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998 RELATING TO FOREIGN EXCHANGE RATES

B E T W E E N : -

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant/ Proposed Representative

-and-

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(a company incorporated under the laws of the State of Connecticut, United States of America)
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(a national banking association incorporated under the laws of the United States of America)
(6) CITIGROUP INC.
(a company incorporated under the laws of the State of Delaware, United States of America)
(7) JPMORGAN CHASE & CO.
(a company incorporated under the laws of the State of Delaware, United States of America)
(8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(a national banking association incorporated under the laws of the United States of America)
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) NATWEST MARKETS PLC
(12) THE ROYAL BANK OF SCOTLAND GROUP PLC
(13) UBS AG
(a company incorporated under the laws of Switzerland)

Respondents/ Proposed Defendants

AMENDED COLLECTIVE PROCEEDINGS CLAIM FORM

INTRODUCTION AND SUMMARY

Introduction

1. This is an application by Michael O'Higgins FX Class Representative Ltd as proposed class representative (the "**Proposed Representative**") for a collective proceedings order under section 47B of the Competition Act 1998 (the "**1998 Act**") permitting these collective proceedings to continue.

2. The claims which it is proposed to combine in these collective proceedings are so-called "follow-on" claims under section 47A of the 1998 Act. They are claims for damages caused by the Proposed Defendants' breach of statutory duty in infringing Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**") and Article 53 of the Agreement on the European Economic Area ("**EEA Agreement**"), as determined by the European Commission (the "**Commission**") in two separate infringement decisions, both adopted on 16 May 2019, in Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express) (each a "**Settlement Decision**" and together the "**Settlement Decisions**"). The central finding of the Commission in the Settlement Decisions is that there were two cartels in the spot foreign exchange market. The first cartel involved all of the Proposed Defendants and operated between 18 December 2007 and 31 January 2013. The second cartel involved three of those undertakings (as well as Bank of Tokyo-Mitsubishi ("**BTMU**")) and operated between 14 December 2009 and 31 July 2012. The Commission therefore found that the anticompetitive conduct lasted from 18 December 2007 to 31 January 2013 (the "**Relevant Period**"). By the Settlement Decisions, the Commission imposed fines on the Proposed Defendants and BTMU totalling, after reductions for immunity, leniency and settlement discounts, some EUR 1.07 billion. The Thirteenth Defendant, UBS, received full immunity for revealing the existence of the cartels, thereby avoiding a further fine of approximately EUR 285 million.

3. As at the date of filing this Amended Collective Proceedings Claim Form, both Settlement Decisions are final in that no appeal is now possible, but the Commission has not yet released public versions of either Settlement Decision. However, the Proposed Representative has been provided with confidential versions of both Settlement Decisions by the Proposed Defendants (Annexes 2A and 2B), and also has

available to it the Commission's press release (the "**Press Release**") dated 16 May 2019 (Annex 2).

4. In addition to the investigation leading to the two Settlement Decisions, the Commission has been reported to be carrying out an ongoing investigation into a further "chatroom" cartel involving collusion in the foreign exchange market. This is described in the witness statement of Mr O'Higgins ("**O'Higgins1**") (at paragraph 18), which cites press coverage in which, in addition to the Proposed Defendants, Credit Suisse is named as being included in the Commission's investigations. Should a further infringement decision be adopted by the Commission, the subject matter of which is sufficiently closely related to the Settlement Decisions, it may be appropriate to re-amend this Amended Collective Proceedings Claim Form in order to bring that decision within its ambit. The Proposed Representative reserves its position in this regard.

Summary

5. As noted above, these Proposed Collective Proceedings seek to combine claims for damages as a result of the anticompetitive conduct of the Proposed Defendants in the foreign exchange (or "**FX**") market as determined in the Settlement Decisions.

6. The expert report of Professor Breedon (the "**Breedon Report**"), which accompanies this Amended Collective Proceedings Claim Form, provides an overview of the FX market including: the nature of FX trading; the different types of FX transactions; how FX prices are set; and FX benchmark rates. The Proposed Representative does not propose to repeat the entirety of what is said by Professor Breedon here but the following key points bear noting (paragraph references are to the Breedon Report):

   (1) The FX market is the market in which currencies are bought and sold. It is a global market: paragraph 2.2.

   (2) The vast majority of FX trading happens "over-the-counter" ("**OTC**"): paragraph 2.4.

   (3) Currencies are bought and sold in currency pairs. In a currency pair, each currency is valued relative to the other. The ratio that expresses that value is the exchange rate: paragraph 2.23.

(4) Spot rates consist of a "bid" and an "ask". The bid is the price or rate at which an FX dealer is willing to buy a given number of units of the base currency. The ask (also referred to as the "offer") is the price or rate at which an FX dealer is willing to sell a given number of units of the base currency (the first named currency in the currency pair): paragraphs 2.24 to 2.26.

(5) An FX dealer or "market maker" (a term explained further at paragraph 33(1) below) will earn a profit if the average price at which he/she buys a volume of a particular currency pair is lower than the average price at which he/she sells that currency pair. Dealers therefore seek to maintain a "spread" between their bid and ask prices. This is commonly referred to as the "bid-ask spread": paragraph 2.7.

(6) A "fix" is a published exchange rate reflecting the price of a currency pair at a moment in time, or calculated over a short interval of time, which is often used as a benchmark. Dealers may price transactions with their customers by reference to "fixes" or "benchmarks". Widely used fixes include those published by WM/Reuters and the Euro FX reference rates published by the European Central Bank (the "**ECB**"): paragraph 4.16.

7. The anticompetitive conduct that the Proposed Defendants were engaged in and which is the subject matter of the Settlement Decisions comprised the extensive and recurrent exchange of commercially sensitive information and trading plans in relation to ongoing FX trades, as well as the coordination of trading strategies with respect to FX spot trading (see the Three Way Banana Split Settlement Decision, recitals 47 and 101, and the Essex Express Settlement Decision, recitals 46 and 101). By the Proposed Defendants' own admission (these being Settlement Decisions), the commercially sensitive information exchanged related to outstanding customers' orders, bid-ask spreads, open risk positions, and other details of current or planned trading activities (see recitals 53-59 of both Settlement Decisions).

8. Participating traders, employed by each of the Proposed Defendants, were thereby enabled to exploit information received pursuant to the anticompetitive exchanges to make informed market decisions on whether to sell or buy the currencies they had in their portfolio, when and at what price. It also allowed traders to identify opportunities

for coordination, for example through a practice called "standing down", whereby some traders would temporarily refrain from trading activity to avoid interfering with the business of another trader within the chatroom (see recitals 62 and 63 of both Settlement Decisions).

9. This anticompetitive conduct was coordinated through interbank chatrooms. The Settlement Decisions refer to various Bloomberg chatrooms, via which the two separate infringements the Commission has identified were implemented: namely the *Three Way Banana Split* chatrooms and *The Essex Express* chatrooms.

10. The Proposed Representative seeks, by way of these Proposed Collective Proceedings, to recover damages on behalf of the victims of this sustained and systematic anticompetitive conduct. The global FX market is a vast one: Professor Breedon states in section 2 of his report that in April 2013, trading in the FX spot and OTC derivatives markets averaged USD 5.3 trillion per day, of which spot and outright forwards transactions accounted for USD 2.7 trillion per day (Breedon Report at paragraph 2.2). Professor Breedon has also undertaken preliminary loss calculations, for illustrative purposes only to assist the Tribunal with an approximate scope of the possible range of loss. These calculations indicate that the class which the Proposed Representative seeks to represent may have suffered losses ranging between USD 643.66 million and USD 2.574 billion (or between USD 811.55 million and USD 3.246 billion, when applying compound interest): see section 7 of the Breedon Report and specifically paragraphs 7.51 to 7.54 and Table 11.

11. As the Commission's Press Release and the Settlement Decisions themselves indicate (see recital 6 of each Decision), the Proposed Defendants' FX customers comprise a wide variety of persons, including asset managers, pension funds, hedge funds and major companies, as well as central banks.

12. It is on behalf of such customers of the Proposed Defendants, and the customers of other market-maker banks operating at the same time and in the same market as the Proposed Defendants, that these Proposed Collective Proceedings are brought.

13. The sole director and sole member of the Proposed Representative, Mr O'Higgins, has very substantial experience in the fields of financial services and regulation, with a particular interest in the pensions sector. He was until his term ended in December

2019 Chairman of the Channel Islands Competition and Regulatory Authorities and is currently Chairman of the Local Pensions Partnership. He was a non-executive director of HM Treasury from 2008 to 2014. He was also previously Chairman of The Pensions Regulator (between 2011 and 2014). He is bringing these proceedings in the public interest, and in the belief that, in the absence of a collective action, most of those whom he seeks to represent will not practicably be able to recover the losses they have suffered as a result of the Proposed Defendants' unlawful and anticompetitive coordination (see paragraph 27 of O'Higgins1).

Structure of this Amended Collective Proceedings Claim Form

14. The remainder of this Amended Collective Proceedings Claim Form is split into three parts, as required by Rule 75 of the Competition Appeal Tribunal Rules 2015 (the "**2015 Rules**") and paragraph 6.11 of the Tribunal's Guide to Proceedings (the "**Guide**"). Specifically:

    (1) Part I (pages 10 to 155 below) sets out the information and statements to comply with Rule 75(2).

    (2) Part II (pages 16 to 37 below) sets out the information and statements to comply with Rule 75(3)(a)-(e).

    (3) Part III (pages 38 to 58 below) sets out the information and statements to comply with Rule 75(3)(f)-(j).

15. This Amended Collective Proceedings Claim Form is also accompanied by the following documents:

    (1) Annexed to this Amended Collective Proceedings Claim Form are:

        (a) Draft collective proceedings order;

        (b) Commission Press Release dated 16 May 2019;

        (c) Three Way Banana Split Settlement Decision dated 16 May 2019 (confidential version);

(d) Essex Express Settlement Decision dated 16 May 2019 (confidential version);

(e) Table listing the other regulatory and tribunal decisions relating to the FX market and referred to in Part III of this Amended Collective Proceedings Claim Form;

(f) Table of currencies affected by the misconduct;

(g) US Commodity Futures Trading Commission Order against Citibank dated 11 November 2014;

(h) US Commodity Futures Trading Commission Order against HSBC dated 11 November 2014;

(i) US Commodity Futures Trading Commission Order against JPMorgan dated 11 November 2014;

(j) US Commodity Futures Trading Commission Order against RBS dated 11 November 2014;

(k) US Commodity Futures Trading Commission Order against UBS dated 11 November 2014;

(l) US Commodity Futures Trading Commission Order against Barclays dated 20 May 2015;

(m) US Commodity Futures Trading Commission document entitled "Examples of Misconduct in Private Chat Rooms";

(n) US Office of the Comptroller of the Currency Consent Order against Citibank dated 11 November 2014;

(o) US Office of the Comptroller of the Currency Consent Order against JPMorgan dated 11 November 2014;

(p) US Department of Justice Plea Agreement with Barclays dated 20 May 2015;

(q) US Department of Justice Plea Agreement with Citicorp dated 20 May 2015;

(r) US Department of Justice Plea Agreement with JPMorgan dated 20 May 2015;

(s) US Department of Justice Plea Agreement with RBS dated 20 May 2015;

(t) US Federal Reserve Order against Barclays dated 20 May 2015;

(u) US Federal Reserve Order against Citigroup dated 20 May 2015;

(v) US Federal Reserve Order against JPMorgan dated 20 May 2015;

(w) US Federal Reserve Order against RBS dated 20 May 2015;

(x) US Federal Reserve Order against UBS dated 20 May 2015;

(y) Swiss Financial Market Supervisory Authority report on UBS dated 12 November 2014;

(z) Financial Conduct Authority Final Notice against Citibank dated 11 November 2014;

(aa) Financial Conduct Authority Final Notice against Barclays dated 20 May 2015; and

(bb) US Federal Reserve Final Decision against Christopher Ashton dated 30 June 2016.

(2) The following evidence is also lodged in support of the application:

(a) the Breedon Report;

(b) First Witness Statement of Michael O'Higgins on behalf of the Proposed Representative ("**O'Higgins1**");

(c) Second Witness Statement of Michael O'Higgins ("**O'Higgins2**");

(d) First Witness Statement of Belinda Hollway ("**Hollway1**");

(e) Second Witness Statement of Belinda Hollway ("**Hollway2**"); and

(f) Witness Statement of Neil Purslow ("**Purslow1**").

(3) A copy of the notice referred to in Rule 81 (required by Rule 75(5)(c)) is annexed to the Litigation Plan that accompanies O'Higgins1.

PART I: RULE 75(2)

Rule 75(2)(a): the full name and address of the proposed representative

16. The Proposed Representative is Michael O'Higgins FX Class Representative Limited, whose company number is 12100525 and whose registered office is Scott+Scott UK LLP, St. Bartholomew House, 90-94 Fleet Street, London, EC4Y 1DH. As explained further below, the company's sole director and member is Mr Michael O'Higgins.

Rules 75(2)(b) and (c): the full name and address of the proposed class representative's legal representative and an address for service

17. The Proposed Representative's solicitors are Scott+Scott UK LLP. The address for service is: c/o Scott+Scott UK LLP, St. Bartholomew House, 90-94 Fleet Street, London, EC4Y 1DH (Attention: Belinda Hollway).

18. The Proposed Representative is content to accept service by email to the following email address: FXUK_Team@scott-scott.com.

Rule 75(2)(d): the name and address of each Proposed Defendant to the proceedings

19. The Proposed Defendants are all banks, or part of banking groups, which engage in FX transactions and which were named by the Commission as addressees of one or both of the Settlement Decisions. Each Defendant (or each banking group) is an undertaking for the purposes of Article 101 of the TFEU and Article 53 of the EEA Agreement.

20. In particular:

    (1) Barclays Bank PLC is a company registered in England and Wales under company number 01026167 with its registered office address at 1 Churchill Place, London, E14 5HP.

    (2) Barclays Capital Inc. is a corporation registered under the laws of the State of Connecticut, USA with business ID 0111952, whose registered business address is 745 Seventh Avenue, New York, NY 10019, USA.

(3) Barclays Execution Services Limited is a company registered in England and Wales under company number 01767980 with its registered office address at 1 Churchill Place, London, E14 5HP.

(4) Barclays PLC is a company registered in England and Wales under company number 00048839 with its registered office address at 1 Churchill Place, London, E14 5HP.

(5) Citibank N.A. is a national banking association incorporated under the laws of the USA, registered in the UK as an overseas company under company number FC001835 and UK establishment number BR001018, with its overseas company address at 388 Greenwich Street, New York, New York 10013, USA and its UK establishment office address at Citigroup Centre, Canary Wharf, Canada Square E14 5LB.

(6) Citigroup Inc. is a corporation registered under the laws of the State of Delaware, USA under file number 2154254, whose registered agent address is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801, USA.

(7) JPMorgan Chase & Co. is a corporation registered under the laws of the State of Delaware, USA under file number 691011, whose registered agent address is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801, USA.

(8) JPMorgan Chase Bank, National Association is a national banking association incorporated under the laws of the USA, registered in the UK as an overseas company under company number FC004891 and UK establishment number BR000746, with its overseas company address at 1111 Polaris Parkway, Columbus, Ohio 43240, USA and its UK establishment office address at 25 Bank Street, Canary Wharf, London, E14 5JP.

(9) J.P. Morgan Europe Limited is a company registered in England and Wales under company number 00938937 with its registered office address at 25 Bank Street, Canary Wharf, London, E14 5JP.

(10) J.P. Morgan Limited is a company registered in England and Wales under company number 00248609 with its registered office address at 25 Bank Street, Canary Wharf, London, E14 5JP.

(11) NatWest Markets Plc is a company registered in Scotland under company number SC090312 with its registered office address at 36 St Andrew Square, Edinburgh, EH2 2YB.

(12) The Royal Bank of Scotland Group plc is a company registered in Scotland under company number SC045551 with its registered office address at 36 St Andrew Square, Edinburgh, EH2 2YB.

(13) UBS AG is a public limited company incorporated under the laws of Switzerland with registration number CHE-101.329.561, which is registered in the UK as an overseas company under company number FC021146 and UK establishment number BR004507 (UBS AG London Branch) with its overseas company address at Aeschenvorstadt 1, 4051 Basel, Switzerland and its UK establishment office address at 5 Broadgate, London, EC2M 2QS.

Rule 75(2)(e): that the proposed class representative is making an application for a collective proceedings order

21. The Proposed Representative applies for a Collective Proceedings Order ("**CPO**").

Rule 75(2)(f): whether the application relates to proposed opt-in collective proceedings or opt-out collective proceedings

22. The application relates to proposed opt-out proceedings.

23. As set out below, any person who is domiciled in the UK and falls within the class definition will be included within the Proposed Class unless they opt out. However, the Proposed Representative further proposes that non-UK domiciled persons who meet the class definition be given the opportunity to opt in to the proceedings. The Proposed Representative's proposals in this regard are explained further at paragraph 49 below.

Rule 75(2)(g): whether the parties have used an alternative dispute resolution procedure

24. Since filing the Collective Proceedings Claim Form (in its unamended form), the Proposed Representative has indicated to the Proposed Defendants in correspondence that it would be willing to engage in alternative dispute resolution. No response has been received from the Proposed Defendants.

Rule 75(2)(h): that the proposed class representative believes the claims sought to be combined have a real prospect of success

25. The Proposed Representative believes that the claims which it is sought to combine in the collective proceedings have a real prospect of success.

26. As to liability, the Proposed Defendants' breaches of competition law have been conclusively established by the Settlement Decisions. It is noted that the Guide itself indicates that (for the purposes of Rule 79(3)(a)) "*where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength*". This topic is expanded upon at paragraph 49(1) below.

27. As to quantum, the breaches of competition law were committed in order to manipulate and obtain profit in the FX market – a market which, Commissioner Vestager observed when issuing the Settlement Decisions, is "*one of the largest markets in the world, worth billions of euros every day*". They are expected to have caused loss not only to the Proposed Defendants' customers but also to other persons who engaged in FX trading during the Relevant Period, including with major banks which are not addressees of the Settlement Decisions.

28. The Proposed Representative's proposal for quantification is explained further below, at paragraph 45, and is set out in detail in the expert report of Professor Breedon. Whilst the determination of quantum will ultimately be a matter for trial (following detailed disclosure, expert reports and factual evidence), the Proposed Representative nonetheless believes that class members have a real prospect of recovering a substantial award of damages in the Proposed Collective Proceedings.

29. The Proposed Representative notes the following features of the FX market and the collusion described by the Commission in the Settlement Decisions, which are discussed by Professor Breedon in his report, and which in his view make it likely that the collusive arrangements in which the Proposed Defendants participated will have led members of the Proposed Class to suffer substantial losses:

(1) The FX market is highly concentrated and the addressees of the Settlement Decisions collectively had, throughout the Relevant Period, significant market power: see Breedon Report at paragraphs 2.19-2.21. Their collective worldwide market shares during the Relevant Period ranged between 43% and 47%: see Table 2 of the Breedon Report.

(2) The FX market is susceptible to collusion because of its opacity. Unlike exchange-traded products such as listed shares, there is no centralised exchange or institution that collects and posts real-time trade information in the OTC FX market: see Breedon Report, paragraph 2.4. Market participants typically only have access to the details of their own OTC FX trading. Some market participants may also have certain information regarding the traded rates (but not volume or counterparty identities) of trades executed on electronic dealing platforms to which they subscribe.

(3) This information about the orders that each Proposed Defendant sees and trades on is therefore valuable and commercially sensitive. Absent anticompetitive conduct, no bank would willingly share it with its competitors. Banks commonly maintain express policies prohibiting disclosure of this type of information to outside parties. Because of their collusive and unlawful exchange of this commercially sensitive information, the Proposed Defendants enjoyed informational advantages over members of the Proposed Class. Knowledge of customers' identity, trading patterns, orders and positions helped the Proposed Defendants to predict, among other matters, the direction of market movements and future client orders. By sharing this information with other banks, the Proposed Defendants were better able to predict and exploit market movements and client behaviour than they would have been by acting unilaterally: see Breedon Report, paragraphs 4.3-4.10.

(4) This theory of harm is supported by the information that has become publicly available about the collusion as a result of regulatory action in the US, in particular: see Breedon Report, paragraph 4.12-4.20 and further Part III below.

30. For all these reasons, it is submitted that the claims sought to be combined in the Proposed Collective Proceedings have a real prospect of success.

PART II: RULE 75(3)(a)-(e)

Rule 75(3)(a): description of the proposed class

The class definition

31. The proposed class ("**Proposed Class**") is:

"*All persons (other than Excluded Persons) who during the period from 18 December 2007 to 31 January 2013 entered into one or more Relevant Foreign Exchange Transactions in the European Economic Area (other than as an Intermediary).*

For these purposes:

A. "Relevant Foreign Exchange Transaction" means any foreign exchange Spot and/or Outright Forward transaction involving a Relevant Currency Pair and entered into with a Relevant Financial Institution or on an ECN, but excludes:

(a) Transactions which are the subject of:

(i) the US class action and/or the releases under the settlements in case In re Foreign Exchange Benchmark Rates Antitrust Litigation, No. 1:13-cv-07789-LGS (S.D.N.Y.); and/or

(ii) the Canadian class actions and/or the releases under the settlements in cases CV-15-536174 (Superior Court of Ontario) and/or 200-06-000189-152 (Superior Court of Quebec).

(b) Transactions in respect of which (aside from the present Claim) there is ongoing litigation, or there has been a binding settlement, involving a person who would otherwise be a member of the present Class and covering conduct of the (Proposed) Defendants that is the subject of the present Claim.

B. "Spot" transaction means a single outright transaction involving the exchange of two currencies at a rate agreed on the date of the contract for value or delivery (cash settlement) typically within two business days.

C. *"Outright Forward" transaction means a transaction involving the exchange of two currencies at a rate agreed on the date of the contract for value or delivery (cash settlement) at some time in the future (more than two business days later). This does not include non-deliverable forwards (NDFs) or contracts for difference (CFDs).*

D. *For the avoidance of doubt, none of the following is to be considered a Spot or Outright Forward transaction:*

   (a) *Branch retail spot transactions (e.g. foreign currency purchases at the "travel money" desk in a bank);*

   (b) *Branch retail transfers of funds denominated in different currencies across any two accounts;*

   (c) *Electronic transactions using ATMs;*

   (d) *Transactions executed in a foreign currency on a credit, debit, prepaid or stored value card;*

   (e) *Spread betting.*

E. *"Relevant Currency Pair" means any currency pair including two of the following: Australian Dollar, British Pound, Canadian Dollar, Danish Krone, Euro, Japanese Yen, New Zealand Dollar, Norwegian Krone, Swedish Krona, Swiss Franc, US Dollar.*

F. *"Relevant Financial Institution" means one of the following banking groups:*

   (a) *ABN Amro*

   (b) *ANZ*

   (c) *Bank of America*

   (d) *Bank of America Merrill Lynch*

   (e) *Bank of New York Mellon*

(f) Bank of Scotland

(g) Bank of Tokyo-Mitsubishi UFJ / MUFG

(h) Barclays

(i) BNP Paribas

(j) Calyon

(k) Citigroup / Citibank

(l) Commonwealth Bank of Australia

(m) Crédit Agricole

(n) Credit Suisse

(o) Deutsche Bank

(p) Goldman Sachs

(q) HBOS

(r) HSBC

(s) Hypovereinsbank (HVB)

(t) ING

(u) JPMorgan Chase

(v) Lehman Brothers

(w) Lloyds Banking Group

(x) Lloyds TSB

(y) Merrill Lynch

(z) Morgan Stanley

(aa) National Australia Bank

(bb) Nomura

(cc) Rabobank

(dd) Royal Bank of Canada

(ee) Royal Bank of Scotland

(ff) Skandinaviska Enskilda Banken

(gg) Société Générale

(hh) Standard Chartered

(ii) State Street

(jj) Toronto Dominion

(kk) UBS

(ll) Unicredit

(mm) Westpac

G. *"ECN" means an electronic communications network that matches buy and sell orders for financial products including currencies.*

H. *A person "entered into" a Relevant Foreign Exchange Transaction where either:*

(a) The person was the direct contractual counterparty to the Relevant Foreign Exchange Transaction; or

(b) The person instructed or engaged an Intermediary to enter into a Relevant Foreign Exchange Transaction on its behalf (regardless of whether the Intermediary, rather than that person, was the direct contractual counterparty).

I. *A Relevant Foreign Exchange Transaction is entered into "in the European Economic Area" where the Relevant Foreign Exchange Transaction is priced*

and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area.

J. "Excluded Persons" means:

(a) Addressees of the European Commission decisions in Case AT.40135 – FOREX, their subsidiaries, holding companies, subsidiaries of those holding companies, and any entity in which any of the addressees has a controlling interest.

(b) Relevant Financial Institutions and entities forming part thereof.

(c) Officers, directors or employees of any of the companies referred to in (a), at any time since 18 December 2007.

(d) All members of the (Proposed) Defendants' and (Proposed) Representative's legal teams and all experts or professional advisors instructed by them in these proceedings.

(e) All members of the Tribunal panel assigned to these proceedings and any judge hearing any appeal in these proceedings.

K. "Intermediary" means broker and/or custodian engaged by another person to carry out a transaction."

Explanation of the class definition

32. The Proposed Class definition set out above is, in summary, intended to capture all the varieties of "*main customers*" of FX traders referred to in recital 6 of each Settlement Decision (the "**Proposed Class Members**"), such as asset managers, hedge funds and corporations (with the possible exception of market-maker banks, which are discussed further below).

33. The following may assist by way of explanation:

(1) The Proposed Class includes anyone (with certain exceptions) who entered into a Relevant Foreign Exchange Transaction with a Relevant Financial Institution. "Relevant Financial Institutions" means the banking groups listed in paragraph F

of the Proposed Class definition with the effect that the term encompasses both: (a) the Proposed Defendants and (b) other major "market maker" or "dealer" banks. As explained in the Breedon Report (in section 5), if the Proposed Defendants succeeded in moving the mid-price at any point in time, that is likely to have affected all FX transactions then being executed with other "market maker" banks. There is no agreed definition of "market maker" in the industry, although in practice the term and the parties to whom it applies are both well understood. In the absence of a single, clear definition, Professor Breedon has used the Bank of England's list of reporting dealers as a means of identifying such market maker banks: see the Breedon Report at paragraphs 4.28 to 4.30.

(2) It is possible that market maker banks that are not Proposed Defendants may have themselves suffered loss as a result of the cartels, at least when trading with the Proposed Defendants and when undertaking proprietary trading on their own account. Notwithstanding this, the market maker banks are, at least currently, excluded from the Proposed Class. This is for a number of reasons. First, such market maker banks are unlikely to have been harmed on transactions that they carried out in response to orders from customers (rather their customers will be the ones harmed): Breedon Report at paragraph 4.31. At present, it is not clear whether there would be a practicable method to distinguish between a market maker's proprietary trading and its trading in response to a customer's order. Second, market maker banks may have been harmed in different ways or to a different extent on transactions between themselves. Third, the Proposed Representative notes that certain of these market maker banks have been the subject of other infringement decisions in relation to their conduct on the FX market by public authorities or regulators around the world (see Part III of this Amended Collective Proceedings Claim Form, below) and, as noted above, certain of them may also be the subject of a further infringement finding by the Commission in due course (see paragraph 18 of O'Higgins1). Accordingly, it is considered that excluding market makers from the class tends to promote the homogeneity of the Proposed Class and ensures that there is likely to have been "common impact" within it, avoids duplicative claims for the same supra-competitive pricing, and avoids conflict of interest within the class. It may,

however, be appropriate to revisit the exclusion of all market maker banks on all transactions at a later date.

(3) A substantial number of transactions affected by the cartels during the Relevant Period will have been carried out by brokers or custodians engaged or instructed by another person to carry out the transaction. In some such cases, the broker or custodian may be the direct contractual counterparty to the transaction with the Relevant Financial Institution albeit that the broker/custodian would have entered into a "back-to-back" transaction with the ultimate purchaser and instigator of the FX transaction. In such cases, it is clear that the real economic loss caused by the cartels will be suffered by the person on whose behalf the transaction is carried out. Accordingly, the class definition seeks to exclude persons transacting "*as an Intermediary*" – i.e. as a "*broker and/or custodian engaged by another person to carry out a transaction*". It includes, as persons who have in substance "*entered into*" the Relevant Foreign Exchange Transaction, persons who have "*instructed or engaged an Intermediary to enter into a Relevant Foreign Exchange Transaction on its behalf (regardless of whether the Intermediary, rather than that person, was the direct contractual counterparty)*".

(4) A Relevant Foreign Exchange Transaction is, in summary, a spot or outright forward transaction. Spot transactions are specifically referred to in the Settlement Decisions (see recitals 4 and 5 of each Settlement Decision). The two types of transactions and the difference between them are explained in detail in the Breedon Report at paragraphs 2.30(a) to 2.30(b). As Professor Breedon further explains at paragraphs 2.32-2.34 of the Breedon Report, there are compelling reasons to think that an impact on spot FX trades would have impacted on outright forward trades, since the latter essentially comprise a spot trade combined with a swap (where the swap transaction adjusts for the interest rate differential and is used to extend the date on which the parties to a trade must exchange the relevant currencies).

(5) The definition of the Proposed Class excludes branch retail spot transactions (notably foreign currency purchases at the "travel money" desk in a bank). This is because the bid-ask spreads for such transactions are unusually wide. Consequently, it is very difficult to detect the effect of the cartels, if any, on

pricing in this category; to do so would likely require a different methodology. Furthermore, even if it were possible to detect and measure an effect, transactions of this type are for relatively small sums; it would be disproportionate to administer the payment of the very small compensation arising. See paragraph 4.34 of the Breedon Report.

(6) Similar reasons lie behind the exclusion from the definition of "Relevant Foreign Exchange Transactions" of branch retail money transfers between accounts in different currencies, electronic transactions using ATMs, and transactions executed in a foreign currency on credit, debit, prepaid or stored value cards. These types of transactions are not normally associated with the OTC format. A different calculation methodology might be required for such transactions if they were to be included in the scope of the definition. They are numerous and typically of relatively low value. Again, see paragraph 4.34 of the Breedon Report.

(7) It is noted that each of the Settlement Decisions contains a footnote recording that: "*The case does not concern FX spot e-commerce trading activity [within the meaning of / understood as] FX spot trades that are automatically booked by, or executed by either the relevant bank's proprietary electronic trading platforms or computer algorithms. These transactions take place without the intervention of any trader.*"[1] The footnote is unclear as to the precise extent of electronic trading which was excluded from the Commission's consideration of anticompetitve conduct. Nevertheless, it is the Proposed Representative's case that, regardless of the correct interpretation of that footnote, the pricing of all types of electronic trades was likely to have been affected in consequence of the conduct found in the Settlement Decisions. The definition of the Proposed Class therefore includes all such transactions. The Proposed Representative however recognises that empirical analysis may in due course reveal a variable effect and it may then become necessary to refine the definition and/or create sub-classes in this regard.

(8) Spread betting is excluded because spread bets are typically netted off against other customers' trades, and so those engaging in such transactions would be

[1] Three Way Banana Split Settlement Decision, footnote 6; Essex Express Settlement Decision, footnote 6.

harmed in a different way from the members of the Proposed Class. See paragraph 4.34(c) of the Breedon Report.

(9) As to the duration of the Relevant Period, this corresponds to the longer of the two infringements found by the Commission. Insofar as certain Proposed Defendants did not participate for the entire duration of the infringements (or only participated in one of the two cartels) this will be a matter for apportionment of liability as between the Proposed Defendants in due course.

(10) As to the identification of the affected currencies, the Settlement Decisions identify that eleven currencies were cartelised: the Euro, British Pound, Japanese Yen, Swiss Franc, US Dollar, Canadian Dollar, New Zealand Dollar, Australian Dollar, Danish Krone, Swedish Krona and Norwegian Krone. These eleven currencies comprise those commonly referred to collectively as the "G10" currencies, plus the Danish Krone. The Settlement Decisions make clear that the Commission has found that manipulation occurred in relation to currency pairs comprised of two of those eleven currencies (see, for example, recitals 45, 102 and 104 of the Three Way Banana Split Settlement Decision, and recitals 44, 102 and 105 of the Essex Express Settlement Decision, each of which refers to coordination occurring in respect of 55 combinations of the G10 currencies, albeit not necessarily all 55 combinations at the same time). In practice, however, and as explained in Professor Breedon's report at paragraphs 4.21-4.23 the fact that there was manipulation on each of those eleven currencies is likely to mean that the pricing of other currencies was also affected, possibly via the use of vehicle currencies. It follows that a trade may be affected by the anticompetitive conduct even if it does not involve the currencies identified by the Commission. Nevertheless, for purposes of methodological simplicity, and in view of the difficulties in identifying vehicle trades, the Proposed Class is for the time being restricted to transactions between two of the eleven identified currencies. In due course, it may become appropriate to expand the class in this regard to include further currency pairs.

(11) The Proposed Representative has expressly excluded from the Proposed Class transactions which are the subject of: (i) the US class action or settlement; and/or (ii) the Canadian class actions or settlements to avoid multiple recovery for the

same loss: see sections II and VI of Hollway1 for further explanation. For the same reason, there is also an exclusion for "*transactions in respect of which (aside from the present Claim) there is ongoing litigation, or there has been a binding settlement, involving a person who would otherwise be a member of the present Class and covering conduct of the (Proposed) Defendants that is the subject of the present Claim*".

Rule 75(3)(b): description of any possible sub-classes

34. At this stage, the Proposed Representative does not propose any sub-classes. The methodology proposed by Professor Breedon does not distinguish between transactions in a way which would give rise to a need for sub-classes. Professor Breedon's methodology seeks to estimate the average "cartel effect" for a given Relevant Foreign Exchange Transaction – i.e. whether, and if so to what extent, the price of Relevant Foreign Exchange Transactions was on average inflated during the Relevant Period as a result of the Proposed Defendants' anticompetitive conduct, as found by the Commission in the Settlement Decisions.

35. It is of course possible that sub-classes may in due course transpire to be appropriate if (for example) it appears that there are substantial differences in the likely impact of the cartels as between different groups of customers or transaction. However, such distinctions are not considered necessary or appropriate at this stage in the proceedings.

Rule 75(3)(c): an estimate of the number of class members and the basis for that estimate

36. It is difficult to estimate the size of the Proposed Class at this stage of proceedings. Nonetheless, the Proposed Representative's best estimate is that the class will be in the thousands or possibly the tens of thousands (see paragraph 27(a) of O'Higgins1).

Rule 75(3)(d): a summary of the basis on which the proposed class representative seeks to be authorised to act in that capacity in accordance with Rule 78

37. The Proposed Representative considers that it would be just and reasonable for it to act as class representative in these Proposed Collective Proceedings. O'Higgins1 addresses the particular considerations of Rule 78 of the 2015 Rules.

38. This section of the Amended Collective Proceedings Claim Form summarises the key points:

(1) First, the Proposed Representative will act fairly and adequately in the interests of the class members. As the 2015 Rules explain, this has to be assessed taking into account all the circumstances, including those listed at Rule 78(3). The Proposed Representative relies on the following matters as evidencing its ability to act fairly and adequately:

(a) The Proposed Collective Proceedings will be a high value, complex piece of litigation which is likely to take a number of years to reach a conclusion. In light of that, the Proposed Representative has been incorporated as a special purpose vehicle ("**SPV**"). O'Higgins1 explains the reasons for incorporating a SPV to act as the Proposed Representative. These include that it shields Mr O'Higgins himself from any personal financial risk which might be associated with bringing the proceedings; that it will safeguard the longevity of the Proposed Collective Proceedings since it allows for a clear succession mechanism which would be utilised in the unlikely event that Mr O'Higgins were to become unable, for whatever reason, to continue to act as director and member of the Proposed Representative; and that it has various accounting benefits. Further detail in relation to these matters is set out at paragraph 28 of O'Higgins1.

(b) The structure put in place for the SPV means that, in his role as sole director and member of the Proposed Representative, Mr O'Higgins will have complete control over the decisions of the SPV, including providing instructions to the legal advisers and experts of the Proposed Representative and taking the lead on publicising the Proposed Collective Proceedings: see paragraph 29 of O'Higgins1. As such, the Proposed Class will receive the full benefit of Mr O'Higgins' experience and expertise in the pursuit of compensation through the Proposed Collective Proceedings.

(c) Mr O'Higgins is well-suited to managing the Proposed Collective Proceedings, in particular due to his experience in competition law, his

experience in the field of financial services, and the numerous and varied positions of public responsibility which he has held:

(i) Mr O'Higgins spent almost a decade as a Partner at PA Consulting Group, during which time he was accustomed to running substantial projects, giving instructions and receiving and distilling large amounts of information.

(ii) From July 2016 to the end of 2019, he served as Chairman of the Channel Islands Competition and Regulatory Authorities and since 2015 he has served as Chairman of the Local Pensions Partnership. Between October 2006 and September 2012, he served as Chairman of the Audit Commission. Between January 2011 and March 2014, he served as Chairman of The Pensions Regulator. He was also a Non-Executive Director of HM Treasury from October 2008 to September 2014. This impressive range of roles, and breadth and depth of experience, means Mr O'Higgins is well equipped to understand the subject matter of these Proposed Collective Proceedings, and will be able to exercise appropriate oversight of the conduct of the proceedings and give full consideration to any matters on which his instructions are sought.

(iii) Mr O'Higgins has also made arrangements for a small group of advisers to be appointed, who will assist him in his role as director of the Proposed Representative: see paragraph 37 of O'Higgins1 and paragraph 6 of O'Higgins2. This group is to be led by Sir Christopher Clarke, a former Lord Justice of Appeal of the Senior Courts of England and Wales and current President of the Court of Appeal of Bermuda. Other members are Damian Mitchell (the founder and managing partner of DSquare Trading Limited, which is a high frequency and high volume FX trading company, who has over 30 years' involvement in trading FX and other products) and Ian Pearson (a former member of Parliament who was Economic Secretary to the Treasury from October 2008 to January 2010 and has extensive business and financial knowledge).

(d) Moreover, as O'Higgins1 and O'Higgins2 explain, the Proposed Representative has instructed a team of legal and expert advisers who, between them, have a wealth of experience in these matters. The Proposed Representative's solicitors (Scott+Scott UK LLP) comprise highly experienced competition litigators who have been involved in many of the leading competition law damages claims in England. Moreover, Scott+Scott Attorneys at Law LLP (an affiliate of Scott+Scott UK LLP) are acting as co-lead class counsel in the US class action relating to collusion in the FX market (the "**US Proceedings**"): see Hollway1. As Mr O'Higgins states (at paragraph 38 of O'Higgins1), it is expected that the experience of Scott+Scott Attorneys at Law LLP in the US Proceedings will add substantial value in the conduct of these proceedings. The counsel team instructed by the Proposed Representative is made up of Daniel Jowell QC, Gerard Rothschild, Charlotte Thomas and Emma Mockford, all of Brick Court Chambers, and all experienced in the competition litigation field, including in collective actions before the Tribunal. Specialist costs counsel has also been instructed (Nicholas Bacon QC of 4 New Square). Further, the Proposed Representative has retained several experts to work with it in relation to the Proposed Collective Proceedings, including: (i) Professor Francis Breedon, an FX market microstructures expert and Professor of Economics and Finance at Queen Mary University of London; and (ii) Reto Feller, a former currency trader and Consultant with Velador Associates, who provides industry expertise.

(e) The Proposed Representative has – under the direction of Mr O'Higgins and with the assistance of the legal advisers, experts and an experienced claims administration company – developed a comprehensive litigation plan, as required by Rule 78(3)(c) (the "**Litigation Plan**"). This is exhibited to O'Higgins1 and summarised at paragraphs 40-44 of the same. It includes: (1) a method for bringing the proceedings on behalf of the Proposed Class and for notifying the Proposed Class of the progress of the proceedings; (2) a procedure for governance and consultation which takes into account the size and nature of the Proposed Class; and (3) an estimate of and details of arrangements as to costs, fees or disbursements.

(f) The Proposed Representative has entered into a financing agreement with Therium Capital Management ("**Therium**") pursuant to which, in summary, Therium has committed to provide the Proposed Representative with an aggregate maximum amount of £29,375,043 to fund the costs of the Proposed Collective Proceedings subject to the claim reaching various procedural stages. A comprehensive budget has been agreed in connection with the funding arrangements. Copies of the funding agreement and budget (in respect of which confidential treatment is sought) appear as Exhibit NAP1 to Purslow1. Purslow1 also provides information about Therium's background and experience and explains the key provisions of the funding arrangements.

(2) Second, the Proposed Representative does not have, in relation to the common issues for the Proposed Class (which are outlined at paragraph 43 below), a material interest that is in conflict with the interests of class members. Neither the Proposed Representative nor its sole director, Mr O'Higgins, are members of the Proposed Class (not having entered into any Relevant Foreign Exchange Transaction during the Relevant Period) and the Proposed Representative is committed to managing the Proposed Collective Proceedings in the best interests of all class members (Mr O'Higgins being alive to the particular position of his advisor Mr Mitchell in this regard, as explained at paragraph 6(c) of O'Higgins2). As his witness statements make clear, Mr O'Higgins is acting in the public interest, following a lifetime of professional service in both competition law and business services, with a particular interest in the pensions sector.

(3) Third, the Proposed Representative will be able to pay the Proposed Defendants' recoverable costs if ordered to do so. As set out in paragraph 50 of O'Higgins1 and in the Litigation Plan (at paragraph 24), paragraph 10 of O'Higgins2 and Purslow1, the Proposed Representative has sufficient funding arrangements in place to ensure that he will be able to do so. Specifically, adverse costs cover of £26.5 million has been obtained, and an additional layer of £4 million is in the process of being formally incepted, which will bring the total cover up to £30.5 million. The Proposed Representative and its advisers consider this level of adverse costs cover to be more than adequate, taking into account:

(a) The amount of costs that the Proposed Representative has budgeted for his own legal and economic advisers and for which he has obtained third party litigation funding. As explained above, the Proposed Representative has secured third-party litigation funding from Therium for its own litigation costs and the costs associated with the administration of any aggregate award of damages ultimately obtained in the combined amount of £29,375,043.

(b) The fact that the Proposed Defendants will already have substantial knowledge of the factual and legal issues that will arise for determination in the Proposed Collective Proceedings, as a result of the Commission investigation, other regulators' investigations and the US Proceedings. This will mitigate the reasonable level of their legal costs, including in relation to disclosure.

(4) On 11 December 2019 (over 19 weeks after this application was filed) another applicant filed an application seeking approval to act as the class representative in respect of certain of the same claims (namely Phillip Evans). Based on the information available so far, the Proposed Representative remains confident that it is the most suitable applicant to act as the class representative, under Rule 78(2)(c). The Proposed Representative will make fuller submissions on this issue in due course and as directed by the Tribunal.

(5) Rule 78(2)(e) is not applicable as no injunction is sought.

Rule 75(3)(e): a summary of the basis on which it is contended that the criteria for certification and approval in Rule 79 are satisfied

39. Rule 79(1) sets out three requirements which must be satisfied in order for claims to be certified as eligible for inclusion in collective proceedings. Specifically:

(1) The claims must be brought on behalf of an identifiable class of persons;

(2) The claims must raise common issues; and

(3) The claims must be suitable to be brought in collective proceedings.

40. Each of those is addressed in turn below. The Proposed Representative contends that all three are met in the case of the present application.

An identifiable class of persons

41. The Proposed Class has been defined in such a manner as to allow for the ready identification of its membership. As per paragraph 6.37 of the Guide, the Proposed Representative has sought to frame the definition of the Proposed Class so that it is possible to say for any particular person, using an objective definition, whether or not that person falls within the Proposed Class. Paragraphs 32 to 33 above are repeated.

The claims raise common issues

42. The claims proposed to be combined in the Proposed Collective Proceedings raise numerous common issues – that is, per section 47B(6) of the 1998 Act, "*same, similar or related issues of fact or law*".

43. Specifically, the common issues comprise:

    (1) Whether the CAT has jurisdiction over the claims.

    (2) What relevant substantive law(s) is/are applicable to the claims.

    (3) What the relevant limitation period(s) is/are.

    (4) Whether and to what extent the infringements of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement identified in the Settlement Decisions had an impact on the price at which Relevant Foreign Exchange Transactions were concluded in the Relevant Period (the extent of the "**Price Impact**").

    (5) The aggregate volume of commerce affected by the Price Impact.

    (6) The rate of interest to be awarded to Proposed Class Members.

    (7) Whether interest should be awarded on a simple or compound basis.

44. The Proposed Representative contends that each of these is a common issue insofar as each is a "*same, similar or related issues of fact or law*", the resolution of which will advance the claims of every member of the Proposed Class.

45. Moreover, each of the issues formulated above is capable of being resolved on a common basis:

(1) The first three issues of jurisdiction, applicable law and limitation are legal issues which can be determined on a class-wide basis and without reference to the individual position of class members.

(2) The Breedon Report sets out a detailed and credible methodology for determining the extent (if any) of the Price Impact (issue 4). In particular, as section 6 of the Breedon Report explains, determining the extent of the Price Impact involves two principal steps:

(a) First, Professor Breedon will assess the impact that cartels found by the Commission in the Settlement Decisions had on pricing and therefore determine the extent of the difference (if any) between the prices charged for FX during the Relevant Period and following the Relevant Period. He will do this by comparing the per-trade revenue achieved by dealers during the Relevant Period with the per-trade revenue achieved by dealers after the end of the Relevant Period: see paragraphs 6.4 to 6.42 of the Breedon Report.

(b) Second, Professor Breedon will estimate the impact of the cartels on the spread. Different spreads will be calculated for different mid-prices and Professor Breedon will then undertake a series of regression analyses with the various spread metrics as dependent variables and with appropriate controls. This will enable him to measure the difference between spreads during and after the Relevant Period. Ultimately, this will generate a figure representing the average size of the manipulation across the Relevant Period (i.e. the Price Impact figure): see paragraphs 6.43 to 6.48 of the Breedon Report.

(3) There is substantial evidence that there will be sufficient data available at trial to which the methodology, as set out in the Breedon Report, will be applied. Professor Breedon sets out the data he will require at paragraphs 6.36 to 6.42 of his report. As he explains there, the key source of data for this analysis will be the trading records of market maker/dealer banks. The Proposed Representative

believes that this is information that will be in the possession of the Proposed Defendants and that can therefore be provided by way of disclosure. This belief is based, in large part, on experience in the US Proceedings. As Hollway1 explains very substantial amounts of data have been disclosed in the US (subject to a Protective Order) by the same banks who are the Proposed Defendants to these proceedings. Third party disclosure applications could be made against other banks (who are not Proposed Defendants) for their trading data or organisations which gather transactional data including Nex and Refinitiv. At the current time, it is difficult to say whether such third party disclosure applications will be needed but it is clear that this is another potential source of data, should it be required, for which there is funding.

(4) Professor Breedon further sets out a detailed and credible methodology for determining volume of commerce (issue 5). In particular, he proposes that this could be done by reference to the Proposed Defendants' data, which will enable him to calculate the overall volume and value of affected trades carried out directly by UK domiciled entities (and any other claimants who opt in) with the Proposed Defendants. From that he will be able to extrapolate to take into account umbrella trades: see paragraphs 6.51 to 6.55 of the Breedon Report.

(5) As to issues 6 and 7 (interest), the Proposed Representative does not set out a detailed methodology for the resolution of these matters at present. In its view, it is premature to do so before the issues of primary loss are resolved. As set out below, the Proposed Representative does claim compound interest, which it considers may well be capable of resolution in due course on a common basis across the class. Alternatively, it may be that sub-classes could be created for the purposes of determining the claims to compound interest if there are material differences as between class members in relation to (e.g.) the cost of money.

46. Whilst there is no legal requirement at the point of certification that common issues should predominate over individual issues, it is likely that they will do in the present claim. In particular, it is highly unlikely that the Tribunal will need to concern itself with individual issues arising out of pass-on defences. In this regard, it is important to note that many, if not most, of the Proposed Class (in particular, pension funds and hedge funds) will be 'end consumers' of the FX transactions and there could be no

pass-on in the form of higher prices to any customers and, accordingly, no pass-on that it would be appropriate to take into account in law. As regards other members of the Proposed Class (such as corporates) it is not realistic to suppose that the Proposed Defendants could factually establish a "sufficiently close causal connection" between a supra-competitive price for currency transactions paid by a corporate and an increase in that corporate's end prices. If such defences were raised and considered to be realistic they could, in any event, be dealt with by way of the creation of a suitable sub-class for those claimants with potential pass-on issues that could be resolved in due course.

The claims are suitable to be brought in collective proceedings

47. Third and finally, the claims are suitable to be brought in collective proceedings for the following reasons:

(1) First, collective proceedings are an appropriate means for the fair and efficient resolution of the common issues. As set out above, resolution of each common issue that the Proposed Representative has identified will advance the claim of every member of the Proposed Class, thereby reducing duplication in legal and factual analysis. Moreover, the common issues are also capable of being resolved on a common basis for the reasons explained at paragraph 45 above. Conversely, the likely size of the Proposed Class is such that it would be inefficient to require each claim to be brought individually (and, as further explained below, cost-prohibitive).

(2) Second, a comparison of the costs and benefits of continuing the Proposed Collective Proceedings clearly indicates that a CPO should be granted. Although the costs associated with the proceedings are substantial, the amounts which the Proposed Class collectively stands to gain by the proceedings are extremely substantial in the hundreds of millions even on Professor Breedon's lowest estimate as set out in section 7 of his report, such that the costs should properly be regarded as proportionate.

(3) As far as the Proposed Representative is aware, no separate proceedings have yet been commenced in respect of either of the Settlement Decisions. The Proposed Representative anticipates that for the majority of members of the Proposed Class, bringing a claim individually will not be worthwhile and will indeed be

impossible owing to the cost of advancing complex proceedings such as these and the costs risks faced by any party who attempts to sue several large banks. However, the Proposed Representative does note that one "stand-alone" FX claim has been brought in the High Court. Based on the publicly available High Court records, an amended claim form and particulars of claim were filed on 17 April 2019 with Claim No. CL-2018-000840. The claimants in that action are largely the same as those that opted out of the US Action described below (and are all represented by the same law firm). As set out in Hollway1 (at paragraph 26(a)), based on the publicly available information, it appears that only two of the claimants in those proceedings (out of nearly 200 claimants) are UK-domiciled entities who would automatically (i.e. without opting in) fall within the Proposed Class. It therefore remains the case that a collective action is required in order to enable the mass of UK-domiciled entities to recover their losses, as it was in the US; and to the extent that further non-UK-domiciled entities wish to bring claims, it will be convenient for them to do so by way of opting in to the present action.

(4) The claims are suitable for an aggregate award of damages, as explained in detail in the Breedon Report. The advantages of Professor Breedon's methodology include that it can accommodate gaps in the data on the claimant side, because it is possible to extrapolate an aggregate figure from the detailed transaction data which the Proposed Defendants will have in their possession and which they will have to provide, by way of disclosure in due course. The unique remedy of an aggregate award of damages that is available in collective proceedings will therefore enable victims of the Proposed Defendants' anticompetitive conduct to recover damages where they otherwise might not be able to.

(5) It does not appear to the Proposed Representative that there are any other means available for resolving the dispute. It does not appear to the Proposed Representative that alternative dispute resolution is likely to be a particularly fruitful avenue for exploration – at least at this stage of the proceedings. Nor would individual actions be a viable alternative for the reasons already given.

(6) The US Proceedings are a class action based upon collusion in the FX market in a similar period and relating to the same and other similar cartels in the FX market. The US Proceedings are described in greater detail in Hollway1. In summary, the

conduct alleged by the class related to the fixing of spreads by the defendant banks with the result that competition was reduced in the FX market and the spread artificially increased such that the defendant banks (i) bought currency at a lower price, (ii) sold currency at a higher price, (iii) and quoted less competitive spreads than they would have absent the collusion. By final judgments entered on 6 August 2018 by the US District Court for the Southern District of New York in the US Proceedings, fifteen of the sixteen banks/banking groups who were defendants in that litigation,[2] including those banking groups of each of the Proposed Defendants, agreed to pay a total of over USD 2.3 billion in civil settlements. The US Proceedings continue against a further banking group (Credit Suisse).

(7) As explained in section III of Hollway1, a Plan of Distribution has been approved in the US ("**US Plan of Distribution**"), notices were disseminated to potential US class members, their claims were assessed by administrators and some funds have already been distributed. The US Plan of Distribution and administrative scheme appears to provide a sound starting point for developing a distribution model for any aggregate damages which may ultimately be awarded in the Proposed Collective Proceedings. The US experience shows that it is perfectly possible to develop a workable and broadly compensatory method and system for distributing substantial amounts of damages to individual class members as a result of a similar infringement.

(8) In order to promote efficiencies and costs savings, the Proposed Representative has engaged the same claims administrator as used for the US Plan of Distribution. In due course it is hoped and expected that it will be possible to have access to some of the key documentation and data used in the US that is currently restricted by a protective order of the US Courts.

[2] The defendants who agreed to settle in the US Proceedings were the following financial institutions: Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; Barclays Bank PLC and Barclays Capital Inc.; BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc.; Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc.; Deutsche Bank AG and Deutsche Bank Securities Inc.; The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.; HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.; JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.; Morgan Stanley, Morgan Stanley & Co. LLC, and Morgan Stanley & Co. International PLC; RBC Capital Markets LLC; The Royal Bank of Scotland Group plc, The Royal Bank of Scotland PLC, and RBS Securities Inc.; Société Générale; Standard Chartered Bank; and UBS AG, UBS Group AG, and UBS Securities LLC.

The collective proceedings should be opt-out proceedings

48. Rule 79(4) provides that, in determining whether collective proceedings should be brought on an opt-in or opt-out basis, the Tribunal may take into account all matters that it thinks fit, including two further matters additional to those considered under Rule 79(2), which are pleaded to in paragraph 47 above. They are:

    (1) The strength of the claims (Rule 79(3)(a)); and

    (2) Whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover (Rule 79(3)(b)).

49. Both these considerations support the Proposed Representative's position that the Proposed Collective Proceedings should proceed on an opt-out basis, insofar as UK-domiciled persons are concerned. Specifically:

    (1) The Proposed Representative considers (as pleaded at paragraph 25 above) that the claims have a real prospect of success. Part III of the Amended Collective Proceedings Claim Form is relied on in this regard. As noted above, the Proposed Collective Proceedings seek to combine follow-on claims which "*will generally be of sufficient strength for the purposes of this criterion*" (per paragraph 6.39 of the Guide) because liability is already established in a manner which binds the Tribunal and the Proposed Defendants.

    (2) Just as it is impracticable for the proceedings to be brought on an individual basis, it is impracticable for proceedings to be brought (solely) on an opt-in basis. The inclusion of the opt-in element of the Proposed Class (i.e. those persons who are not domiciled in the UK but nonetheless choose to opt in to the proceedings) is possible and cost-effective to the extent that the proceedings are anyway being brought for the benefit of the opt-out element of the Proposed Class.

PART III: RULE 75(3)(f)-(j)

Rule 75(3)(f): a statement as to whether the claims are in respect of an infringement decision and, if so, whether that decision has become final

50. The Proposed Collective Proceedings are in respect of the Settlement Decisions adopted by the Commission on 16 May 2019.

51. Both Settlement Decisions are final since the time for appealing against them before the European Courts expired without an appeal having been brought.[3]

Rule 75(3)(g): a concise statement of the relevant facts, identifying, where applicable, any relevant findings in an infringement decision

52. The claims sought to be combined in these Proposed Collective Proceedings are follow-on claims. Nevertheless, it is relevant to appreciate that the findings of the Commission – as set out in the Settlement Decisions and summarised in the Press Release – are merely the latest in a series of findings by numerous regulatory authorities around the world in relation to anticompetitive collusion in the global FX market, between 2007 and 2013.

53. Tables listing the regulatory and tribunal decisions (including by way of settlement) of which the Proposed Representative is thus far aware, the co-conspirator banks to whom they are addressed, and the currencies which they specifically cite as being affected by the relevant misconduct, appear at Annexes 3 and 4 to this Amended Collective Proceedings Claim Form.

The Commission's investigation

54. The Commission's investigation into the FX market appears to have commenced in 2013 (see recital 20 of the Three Way Banana Split Settlement Decision and recital 18 of the Essex Express Settlement Decision). The two Settlement Decisions were issued on 16 May 2019.

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[3] Although Rule 75(3)(f) refers to the claim becoming final "*within the meaning of section 58A of the 1998 Act*", section 58A does not apply in the present case. Rather, by virtue of new Rule 119 and old Rule 31, old section 47(A)(8) applies. That section provides that: "*(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are– (a) the period during which proceedings against the decision or finding may be instituted in the European Court; and (b) if any such proceedings are instituted, the period before those proceedings are determined.*"

The Commission's findings

55. The Proposed Defendants' breaches of Article 101 of the TFEU and Article 53 of the EEA Agreement have now been conclusively determined by the Settlement Decisions. As explained at paragraph 33(9) above, each Settlement Decision relates to a different cartel in the spot foreign exchange market covering 11 currencies, namely: the Euro, British Pound, Japanese Yen, Swiss Franc, US Dollar, Canadian Dollar, New Zealand Dollar, Australian Dollars, Danish Krone, Swedish Krona and Norwegian Krone.

56. The first Settlement Decision concerns what the Commission has dubbed the *Three Way Banana Split* infringement. This relates to anticompetitive communications in three different, consecutive chatrooms, called "*Three way banana split*", "*Two and a half men*" and "*Only Marge*" (see the Three Way Banana Split Settlement Decision, recital 35). The infringement started on 18 December 2007 and ended on 31 January 2013 (recital 2 and Article 1). Each of UBS, Barclays, RBS, Citigroup and JPMorgan participated in the *Three Way Banana Split* infringement (see recital 3 and Article 1) through the following traders and for the following periods (recital 65):

Bank	**Trader**	**Entry**	**Exit**
Citigroup	[redacted]	18/12/2007	31/01/2013
Barclays	[redacted]	18/12/2007	07/07/2011
	[redacted]	20/12/2011	1/08/2012
RBS	[redacted]	18/12/2007	19/04/2010
JPMorgan	[redacted]	26/07/2010	31/01/2013
UBS	[redacted]	10/10/2011	31/01/2013

57. The second Settlement Decision concerns what the Commission has called the *Essex Express* infringement. This relates to anticompetitive communications in two chatrooms, called "*Essex Express 'n the Jimmy*" and "*Grumpy Semi Old Men*" (see the Essex Express Settlement Decision, recital 31). The infringement started on 14 December 2009 and ended on 31 July 2012 (recital 2 and Article 1). Each of UBS, Barclays, RBS and BTMU (now MUFG Bank) participated in it (recital 3 and Article 1) through the following traders and for the following periods (recital 65):

Bank	Trader	Essex Express	Grumpy Semi Old Men
UBS	[redacted]	14/12/2009 – 31/07/2012	
Barclays	[redacted]	14/12/2009 – 31/07/2012	08/09/2010 – 12/01/2011
	[redacted]	06/01/2011 – 31/07/2012	
RBS	[redacted]	14/09/2010 – 08/11/2011	16/09/2010 – 12/01/2011
BTMU	[redacted]	12/01/2011 – 12/09/2011	08/09/2010 – 12/01/2011

58. The infringements described in each Settlement Decision are (in all material respects) identical to one another. Thus, both Settlement Decisions describe how the infringements were implemented and carried out as follows:

(1) The participating traders "*participated in nearly daily communications*", as part of which "*they engaged in extensive, recurrent and reciprocal exchange of information … relating to different aspects of FX spot trading of G10 currencies*" (Three Way Banana Split Settlement Decision, recital 45; Essex Express Settlement Decision, recital 44).

(2) More particularly, the participating traders "*agreed to exchange – in private, mostly multilateral chatrooms and on an extensive and recurrent basis – certain current or forward-looking commercially sensitive information about their trading activities. This information exchange took place in accordance with a tacit underlying understanding that: (i) such information could be used to the traders' respective benefit and in order to identify occasions to coordinate their trading; (ii) such information would be shared within the private chatrooms; (iii) the traders would not disclose such shared information received from other chatroom participants to parties outside of the private chatrooms; and (iv) such shared information would not be used against the traders who shared it*" (Three Way Banana Split Settlement Decision, recital 47; Essex Express Settlement Decision, recital 46).

(3) This recurrent and extensive information exchange covered four different types of information and was prevalent throughout the periods of the cartels:

(a) **Open risk positions**: the traders exchanged "*information on open risk positions*" which consisted in "*the recurrent sharing of certain current or forward-looking commercially sensitive information on open risk positions with competitiors*" which could "*provide the participating traders with an insight into each other's potential hedging conduct*" (see recital 53 of both Settlement Decisions). By way of example, the Commission refers to conduct on the following dates, evidencing the regularity and extent of the anticompetitve activity:

(i) **Three Way Banana Split**: [redacted]

(ii) **Essex Express**: [redacted]

(b) **Outstanding customers' orders**: the traders exchanged information "*on outstanding customers' orders*" including "*stop-loss orders, take-profit orders, orders for the fix and immediate orders*". This included the participating traders "*frequently*" revealing "*certain current or forward*

looking commercially sensitive information on conditional orders, such as the size or the direction of the orders or the type of customer to other participating traders on an extensive basis. This eased the identification of opportunities for coordination among the participating traders. The recurrent update of knowledge of customers' confidential conditional orders placed with participating traders increased the likelihood of the traders successfully coordinating their trading activities for their own benefit" (see recitals 54 and 55 of both Settlement Decisions). By way of example, the Commission refers to conduct on the following dates, evidencing the regularity and extent of the anticompetitve activity:

(i) **Three Way Banana Split**:

- **Stop-loss**: [redacted]

- **Take-profit / orders for the fix**: [redacted]

[redacted]

- **Immediate orders**: [redacted]

(ii) **Essex Express**:

- **Stop-loss**: [redacted]

- **Take-proft / orders for the fix**: [redacted]

- **Immediate orders**: [redacted]

(c) **Other details of current or planned trading activities**: there was also "*recurrent disclosure … of certain commercially sensitive information on [the participating traders'] current and intended trading activity … which made it easier for participating traders to identify occasions to coordinate their trading activities*" (see recital 57 of both Settlement Decisions). By way of example, the Commission refers to conduct on the following dates, evidencing the regularity and extent of the anticompetitve activity:

(i) **Three Way Banana Split**: [redacted]

[redacted]

(ii) **Essex Express**: [redacted]

(d) **Bid-ask spreads**: participating traders also discussed "*existing or intended bid-ask spreads quotes of specific currency pairs for certain trade sizes*". Bid-ask spreads are "*an essential competition parameter in FX spot trading activity*" which "*affect the overall price paid by customers for trading currencies*" (see recitals 58 and 59 of both Settlement Decisions). By way of example, the Commission refers to conduct on the following dates, evidencing the regularity and extent of the anticompetitve activity:

(i) **Three Way Banana Split**: [redacted]

(ii) **Essex Express**: [redacted]

(4) In addition to, and as a result of, this extensive and recurrent information exchange, the Proposed Defendants also engaged in specific forms of coordination, including coordinating trading with a view to influencing the WMR or ECB fixes and "standing down". Standing down was a form of coordinated trading by which the participating traders declined to trade in ways that would damage each other's interest (see recitals 60-63 of both Settlement Decisions).

59. Through this information exchange and strategic coordination, the Proposed Defendants (and their co-conspirators) committed infringements of competition law under Article 101(1) of the TFEU and Article 53 of the EEA Agreement (see Article 1 and recitals 95 and 96 of each Settlement Decision). Each of the addressees participated for different periods, but the Settlement Decisions confirm that collusive trading was ongoing during the period between 18 December 2007 and 31 January 2013. The temporal involvement of each of the Proposed Defendants can be clearly seen from the bar chart which appears as Figure 4 in the Breedon Report.

Other publicly available information about the specific chatrooms identified by the Commission

60. The Proposed Representative will plead in further detail to the specific participation of each of the Proposed Defendants in each of the two infringements found by the

Commission, following disclosure by the Proposed Defendants during the course of these proceedings. Pending the provision of such information, the Proposed Representative pleads as follows in relation to the nature and extent of the Proposed Defendants' participation in the specific chatrooms which the Commission has identified in its Press Release as comprising the infringements.

The Three-Way Banana Split infringement

61. Further detail about the Three Way Banana Split chatrooms is provided in the Plea Agreements entered into between Barclays PLC, Citicorp, JP Morgan Chase & Co and The Royal Bank of Scotland PLC reproduced at Annexes 14 to 17 to this Amended Collective Proceedings Claim Form, where they are referred to as "*The Cartel*" or "*The Mafia*".[4] These Plea Agreements each record admissions of guilt by reference to a factual basis which includes the following text:

> "*In furtherance of the conspiracy, the defendant and its co-conspirators engaged in communications, including near daily conversations, some of which were in code, in an exclusive electronic chat room, which chat room participants, as well as others in the FX Spot Market, referred to as 'The Cartel' or 'The Mafia.' Participation in this electronic chat toom was limited to specific EUR/USD traders, each of whom was employed, at certain times, by a co-conspirator dealer in the FX Spot Market. The defendant participated in this electronic chat room through one of its EUR/USD traders*
>
> *[(Barclays:) from December 2007 until July 2011, and through a second EUR/USD trader from December 2011 until August 2012.]*
>
> *[(Citicorp:) from December 2007 until January 2013.]*
>
> *[(JPMorgan:) from July 2010 until January 2013.]*
>
> *[(RBS:) from December 2007 until April 2010]*.

[4] The connection is acknowledged in responses to Requests for Further Information filed in Commercial Court claim number CL-2018-000840 by the First Proposed Defendant (response 3 dated 20 December 2019), the Seventh and Eighth Proposed Defendants (response 3 dated 23 December 2019), the Twelfth Proposed Defendant (response 4 dated 23 December 2019), and the Thirteenth Proposed Defendant (response 4.2 dated 23 December 2019).

The defendant and its co-conspirators carried out the conspiracy to eliminate competition in the purchase and sale of the EUR/USD currency pair by various means and methods including, in certain instances, by: (i) coordinating the trading of the EUR/USD currency pair in connection with European Central Bank and World Markets/Reuters benchmark currency 'fixes' which occurred at 2:15 PM (CET) and 4:00 PM (GMT) each trading day; and (ii) refraining from certain trading behavior, by withholding bids and offers, when one conspirator held an open risk position, so that the price of the currency traded would not move in a direction adverse to the conspirator with an open risk position."[5]

The Essex Express infringement

62. The Essex Express chatroom is referred to in a Notice of Intent to Prohibit and Notice of Assessment of a Civil Money Penalty issued by the US Federal Reserve on 30 June 2016 against Mr Christopher Ashton[6] (a trader at Barclays) individually. That Notice relevantly provides as follows (at paragraphs 15-21):

"*15. In 2010, Ashton participated in two separate chat rooms with Japanese Yen traders from competitor banks. In January 2011, Ashton suggested combining the two chat rooms to facilitate the sharing of information. The combined chat room was named "Essex Express." During the relevant period, the Essex Express chat room included traders located in the United States.*

16. In the Essex Express chat room and its two precursor chat rooms, participants discussed and coordinated their trading strategies and shared confidential client information, including client identities, in contravention of Barclays' internal policies. In particular, Ashton and other chat room participants shared their expected trading positions for benchmark fixes, including the ECB and WM/R fixes, and coordinated their trading at the fixes.

17. For example, on November 30, 2010, Ashton and traders at two other banks had discussed in a precursor chat room to "Essex Express" their

5 Paragraphs 4(h)-(i).

6 Annex 26 (https://www.justice.gov/file/440496/download).

plans to buy the U.S. dollar/Japanese Yen currency pair ("USD/JPY") in connection with client fix orders received by their firms. Upon learning that the other traders were also buying at the fix, Ashton built his buy position from 306 million in Barclays client USD/JPY fix orders to more than 500 million by accepting additional orders from brokers and other market participants in attempt to influence the fix rate and potentially profit from his fix position, which also increased Barclays' risk of loss and exposure at the 4:00 p.m. WM/R fix. Ashton encouraged a trader at another bank to also build his position by accepting a 135 USD/JPY million buy fix order from a broker.

18. Based on information received from other chat room participants, Ashton began buying USD/JPY ahead of the fix and then transacted aggressively during the fix window in order to increase the ultimate fix rate. Ashton told other chat room participants that he bought "the messiest 300 ever at 75-78," meaning that he bought at successively higher prices in order to influence the fix rate.

19. In the 12 minutes leading up to the fix, Ashton bought 249 million USD/JPY, and the spot market price increased from 83.65 to 83.74. During the one-minute fix window, Ashton purchased an additional 254 million. During the first 30 seconds of the window, the price increased, in part from trading by Ashton and other chat room participants, from 83.74 to 83.77. Ashton then engaged in multiple, successive transactions at prices between 83.77 and 83.79, in keeping with his comment that he bought "the messiest 300 ever at 75-78."

20. Ashton would profit from his fix position on November 30, 2010 if he purchased USD/JPY to fill client fix orders at a lower average rate than the fix rate. By his "mess[y]" trading ahead of and during the early portion of the fix window, Ashton was able influence the fix rate. The WM/R fix rate on that date was 83.77. Ashton purchased more than 500 million USD/JPY at an average price of 83.70, making a profit of $444,000.

21. Following the fix, Ashton and the traders at the other banks congratulated each other on their coordinated trading at the fix and Ashton revealed that he had traded 300 million "the ugliest I cud" in an effort to move the fix price as high as possible:

Trader A: "what we reckon fix then 78"

Trader B: "i love u both" "like brothers"

Trader A: "77 fix"

Trader B: "boys well done" "top work"

Ashton: "well i bgt the ugliest 300 there i c[o]u[l]d haha"

Trader B: "hahahh"...

Ashton: "we delivered"

Trader B: "yup"

Ashton: "but i dont wanna kiss from u"

Trader B: "i love u both"

Ashton: "I just take a beer"...

Trader B: "my fixes made me 170 gbp"

Ashton: "lovely" "thats all u can ask"."

63. The Proposed Representative infers that this sort of exchange was typical of participants in the Essex Express chatroom, and indicates the type of collusion and information-sharing in which the Proposed Defendants were engaged during the Relevant Period.

Rule 75(3)(h): a concise statement of any contentions of law relied upon

64. The Proposed Representative relies upon the following contentions of law.

Governing law

65. The laws of England and Wales are applicable to all claims sought to be combined in the Proposed Collective Proceedings where the Relevant Foreign Exchange Transaction was entered into on or after 11 January 2009 by virtue of Article 6(3) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("**Rome II**"). Article 6(3) provides that:

> "*(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.*
>
> *(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.*"

66. Accordingly, the Proposed Representative can and does choose to base the claims of the Proposed Class Members on the law of England and Wales on the basis that England and Wales is among those markets directly and substantially affected by the Proposed Defendants' restriction of competition, as found in the Settlement Decisions. (Indeed, if relevant, the size and significance of the London FX market means that England and Wales is the market most affected by the Proposed Defendants' restriction of competition, with 34.6% of global trading taking place there in 2007, 36.8% in 2010 and 40.9% in 2013 (see Exhibits L, M and N to the Breedon Report).)

67. For Relevant Foreign Exchange Transactions concluded prior to 11 January 2009, the governing law (including for limitation purposes) is determined by Part III of the

Private International Law (Miscellaneous Provisions) Act 1995. The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur, and where elements of those events occur in different countries, the applicable law is that of the country in which the most significant event or elements of those events occurred. It is anticipated that for all, or at least most, members of the Proposed Class, the most significant events will have occurred in England.

Jurisdiction

68. The Tribunal has jurisdiction over the First, Third, Fourth, Ninth, Tenth, Eleventh and Twelfth Proposed Defendants, all of whom are UK domiciled, by virtue of Article 4 of EC Regulation 1215/2012 because persons domiciled in a Member State may always be sued in the courts of that Member State.

69. The Tribunal has jurisdiction over the Thirteenth Proposed Defendant by virtue of Article 6(1) of the Lugano Convention because a person domiciled in a State bound by that Convention may also be sued, where that person is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. If necessary, the Proposed Representative also relies on Article 5(3) of the Lugano Convention to found jurisdiction, in particular because the implementation by the Proposed Defendants of their collusive arrangements in the UK constituted substantial and efficacious acts contributing to the commission of the tort.

70. In respect of the remaining Proposed Defendants, all of which are addressees of one or both of the Settlement Decisions and are companies incorporated in the USA, permission to serve proceedings on them out of the jurisdiction was granted by order dated 16 August 2019, the Proposed Representative relying on grounds 3 and 9 in paragraph 3.1 of CPR Practice Direction 6B. In brief summary: (i) liability in respect of the infringements identified in each Settlement Decision being joint and several, all addressees of the decision are necessary or proper parties; (ii) all or a substantial part of the claim relates to loss sustained in the UK (in particular to the extent that members of the Proposed Class felt their loss in the UK) and/or acts committed in the UK (where

trading took place through London); (iii) the UK is the proper place to bring a collective claim against those Proposed Defendants because the other Proposed Defendants are domiciled in the UK, the claim is governed by English law, the claim relates entirely or principally to loss suffered by persons domiciled in the UK and claims elsewhere would give rise to the risk of irreconcilable judgments.

The binding nature of the Settlement Decisions

71. Pursuant to Article 16(1) of Regulation 1/2003 EC, the Settlement Decisions are binding in their determination that the Proposed Defendants engaged in two single and continuous infringements of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement.

72. The Tribunal cannot take a decision running counter to the Settlement Decisions. The Settlement Decisions will, when publicly available, be relied upon by the Proposed Representative for their full terms and effects.

Breach of statutory duty

73. The Proposed Defendants, by infringing Article 101(1) of the TFEU and Article 53(1) EEA Agreement, have breached their statutory duties in each of England and Wales, Scotland and Northern Ireland.

74. If and to the extent the governing law of any of the claims proposed to be combined in the Proposed Collective Proceedings is that of another Member State, the Proposed Representative will plead to the breach of that substantive law in due course. In all cases, however, the Proposed Representative anticipates that the breach of directly effective EU law committed by the Proposed Defendants will give rise to a cause of action.

Loss

75. As a foreseeable consequence of the Proposed Defendants' breach of statutory duty, the Proposed Class Members have, for the reasons explained in the Breedon Report, suffered loss and damage.

76. Pursuant to section 47C(2) of the 1998 Act, the Proposed Representative seeks an aggregate award of damages in these Proposed Collective Proceedings, to compensate for that loss. The Proposed Representative's proposed methodology for calculating that aggregate award is as set out in Breedon Report. The following points bear noting here:

(1) As a consequence of the infringements found by the Commission, the prices paid for Relevant Foreign Exchange Transactions by members of the Proposed Class were affected, regardless of who the counterparty was. This is because the infringement committed by the Proposed Defendants had the effect of moving the benchmark price for FX at any given point in time away from where it would have been absent the infringements. The Proposed Class Members are entitled to recover in respect of such "umbrella pricing".

(2) As explained above, the methodology proposed by Professor Breedon seeks to ascertain the average "cartel effect" per Relevant Foreign Exchange Transaction. Professor Breedon will then apply that average "cartel effect" to an overall volume of commerce figure. Accordingly, the aggregate award will be compensatory to the Proposed Class as a whole – that is, it will place the Proposed Class in the position they would have been in had the infringements identified by the Commission in the Settlement Decisions not occurred.

(3) The Proposed Representative has not, at this time, developed a detailed plan for distribution. However, as noted above, a Plan of Distribution has been approved in the US to distribute over USD 2.3 billion in settlements. In the Proposed Representative's view, the US Plan of Distribution and administrative scheme appears to provide a sound starting point for developing a distribution model for any aggregate damages which may ultimately be awarded in the Proposed Collective Proceedings. At a minimum, the US experience shows that it is perfectly possible to develop a workable and broadly compensatory method and system for distributing substantial amounts of damages to individual class members as a result of a similar infringement.

77. The Proposed Representative reserves the right to plead to other potential heads of loss or damage upon being provided with copies of the Settlement Decisions and/or

following further investigation, disclosure and/or the provision of responses to any requests for further information.

Joint and several liability

78. Each Proposed Defendant is jointly and severally liable with the other addressees of each of the Settlement Decision(s) to which it is subject for the breaches of statutory duty pleaded above.

Rule 75(3)(i): the relief sought in the proceedings, including: (i) where applicable, an estimate of the amount claimed in damages; and (ii) details of any other claim for a sum of money

An aggregate award of damages is sought

79. As set out above, the Proposed Representative claims an aggregate award of damages (including compound interest by way of damages[7]) on behalf of the Proposed Class.

80. As Professor Breedon makes clear in his expert report, he has not yet applied his proposed methodology to the Proposed Defendants' transaction data. The Proposed Representative is therefore unable to fully particularise the losses involved, at this stage of proceedings.

81. However, Professor Breedon has been able to provide a very rough estimate of the overall aggregate award at paragraph 7.24 to 7.50 of his report, by indicating the likely overall award that would be generated if different percentage cartel effects are, in time, found, and if different percentages of the FX trading through London are assumed to be by UK domiciled entities. Whilst this estimate must be taken as preliminary and indicative only, for the reasons given at paragraph 7.24 of the Breedon Report, the Proposed Representative nonetheless hopes that it will assist the Tribunal in understanding the likely quantum of these Proposed Collective Proceedings. Specifically, Professor Breedon estimates that an aggregate award could range between

[7] "*Compound interest is a necessary, and very familiar, fact of commercial life. As the Law Commission said in its Consultation Paper on 'Compound Interest' (2002, No 167), para 4.1, the obvious reason for awarding compound interest is that it reflects economic reality*.": *Sempra Metals Ltd v Her Majesty's Commissioners of Inland Revenue & Ors* [2008] 1 AC 561 at [41]. It is common knowledge (and the Proposed Defendants as participants in the FX market accordingly knew) that FX transactions were entered into (in particular) by investors who would reinvest any gains, and by businesses who were seeking to hedge risk and thereby avoid borrowing. The effect of lost revenues on the former would be lost investment returns. The effect on the latter would be increased borrowing costs. In each case, there is a loss which compound interest will compensate. As explained above, the Proposed Representative anticipates that it may well be possible to aggregate its claim for compound interest across the class. Alternatively, it may be that sub-classes need to be created for this specific aspect in due course.

USD 643.66 million and USD 2.574 billion (or between USD 811.55 million and USD 3.246 billion, when applying compound interest).

Interest

82. The Proposed Representative claims further interest on any damages awarded, pursuant to Rule 105(3), at such rate(s) and for such period(s) as the Tribunal deems fit.

Costs

83. The Proposed Representative further claims costs, pursuant to Rule 104.

Rule 75(3)(j): observations on the question in which part of the UK the proceedings are to be treated as taking place under Rule 18

84. Under Rule 18, the Tribunal may at any time determine whether any proceedings, or part of any proceedings, before it are to be treated, for all or any purpose as proceedings in England and Wales, or in Scotland or in Northern Ireland. In the present case, the Proposed Representative has said that the Tribunal should order that England and Wales is the appropriate forum (and the Tribunal has so ordered) given that, in particular:

    (1) As noted in numerous of the regulatory decisions referred to in Part III above, most of the FX traders who were directly involved in the FX manipulation that is at the heart of this case were based at the Proposed Defendants' London FX trading desks.

    (2) The Proposed Representative is incorporated, and its sole director is habitually resident, in England, as are the Proposed Representative's legal and expert teams.

    (3) The legal teams for the Proposed Defendants are believed to be located in England and Wales.

85. Alternatively, the Tribunal has the power to treat the Proposed Collective Proceedings, as proceedings taking place (concurrently and sequentially) in England and Wales, and in Scotland and in Northern Ireland and determine each of those parts of the Proposed Collective Proceedings in one location, namely London.

DANIEL JOWELL QC

GERARD ROTHSCHILD

CHARLOTTE THOMAS

EMMA MOCKFORD

Statement of truth

The Proposed Representative believes that the facts stated in this Amended Collective Proceedings Claim Form are true. I am duly authorised to sign this statement on behalf of the Proposed Representative.

Signed .....

Name Belinda Hollway

Position Partner

Dated 28 January 2020

LIST OF ANNEXES TO THE AMENDED CLAIM FORM

1. Draft collective proceedings order;

2. Commission Press Release dated 16 May 2019;

2a. Three Way Banana Split Settlement Decision dated 16 May 2019 (confidential version);

2b. Essex Express Settlement Decision dated 16 May 2019 (confidential version);

3. Table listing the regulatory and tribunal decisions;

4. Table of currencies affected by the misconduct;

5. US Commodity Futures Trading Commission Order against Citibank dated 11 November 2014;

6. US Commodity Futures Trading Commission Order against HSBC dated 11 November 2014;

7. US Commodity Futures Trading Commission Order against JPMorgan dated 11 November 2014;

8. US Commodity Futures Trading Commission Order against RBS dated 11 November 2014;

9. US Commodity Futures Trading Commission Order against UBS dated 11 November 2014;

10. US Commodity Futures Trading Commission Order against Barclays dated 20 May 2015;

11. US Commodity Futures Trading Commission document entitled "Examples of Misconduct in Private Chat Rooms";

12. US Office of the Comptroller of the Currency Consent Order against Citibank dated 11 November 2014;

13. US Office of the Comptroller of the Currency Consent Order against JPMorgan dated 11 November 2014;

14. US Department of Justice Plea Agreement with Barclays dated 20 May 2015;

15. US Department of Justice Plea Agreement with Citicorp dated 20 May 2015;

16. US Department of Justice Plea Agreement with JPMorgan dated 20 May 2015;

17. US Department of Justice Plea Agreement with RBS dated 20 May 2015;

18. US Federal Reserve Order against Barclays dated 20 May 2015;

19. US Federal Reserve Order against Citigroup dated 20 May 2015;

20. US Federal Reserve Order against JPMorgan dated 20 May 2015;

21. US Federal Reserve Order against RBS dated 20 May 2015;

22. US Federal Reserve Order against UBS dated 20 May 2015;

23. Swiss Financial Market Supervisory Authority report on UBS dated 12 November 2014;

24. Financial Conduct Authority Final Notice against Citibank dated 11 November 2014;

25. Financial Conduct Authority Final Notice against Barclays dated 20 May 2015; and

26. US Federal Reserve Final Decision against Christopher Ashton dated 30 June 2016.