Party: Applicant / Proposed Representative
Witness: B A Hollway
Number of Statement: Fifth
Exhibit: BAH28-BAH30
Dated: 11 June 2021

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

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) NATWEST GROUP PLC
(13) UBS AG
(a company incorporated under the laws of Switzerland)

Respondents / Proposed Defendants

FIFTH WITNESS STATEMENT OF BELINDA ANNE HOLLWAY

I, **BELINDA ANNE HOLLWAY**, of Scott+Scott UK LLP ("**SSU**"), whose registered address is St. Bartholomew House, 90-94 Fleet Street, London EC4Y 1DH, UK, **WILL SAY**:

1. I am a partner in SSU, solicitors for the Applicant. I have previously provided four witness statements in relation to the above proceedings, which are brought on a collective, opt-out basis pursuant to section 47B of the Competition Act 1998 (the "**Proposed Collective Proceedings**"): the first dated 28 July 2019 ("**my First Statement**") and filed with the Competition Appeal Tribunal (the "**Tribunal**") on 29 July 2019; a second statement dated 28 January 2020 ("**my Second Statement**"); a third statement dated 31 January 2020 ("**my Third Statement**"); and a fourth statement dated 23 April 2021 ("**my Fourth Statement**").

2. As with my First, Second, Third and Fourth Statements, I make this statement in my role as the partner with carriage of the application by Michael O'Higgins FX Class Representative Limited ("**O'Higgins**") to bring the Proposed Collective Proceedings (the "**O'Higgins Application**").

3. I make this statement by way of evidence in support of the O'Higgins Application in its reply to the submissions and evidence filed by Mr Evans on 23 April 2021 (the "**Carriage Issue**").

4. I refer to Mr Evans' application, made in December 2019, as the "**Evans Application**".

5. Specifically, I will address the following:

    a. the O'Higgins revised budget;

    b. comparison between the O'Higgins and Mr Evans' revised budgets and their relative cost of funding;

    c. the work undertaken before May 2019;

    d. the respective timing and substance of the O'Higgins and Evans Applications and the subsequent amendments to them;

    e. the approach to transparency between the O'Higgins and Evans Applications; and

    f. an update on the US and other FX proceedings.

6. Except where I state to the contrary, I am able to state the matters in this witness statement from my own knowledge. As such, the facts contained in this witness statement are true to the best of my knowledge, information and belief, save where otherwise indicated, in which case I

identify the source of my information. Save to the extent I refer explicitly to work undertaken or proposed to be undertaken in relation to the Proposed Collective Proceedings, no waiver of privilege is intended by this statement.

7. There is now produced and shown to me a number of exhibits marked "**BAH28**" to "**BAH 30**" respectively which comprise true copies of the documents to which I will refer in this witness statement.

The O'Higgins Budget

8. When the O'Higgins Application was filed on 29 July 2019, it included a budget which showed Therium's funding commitment of £29,375,043[1] (the "**Original Budget**"), broken down into various categories and phases.

9. This overall funding commitment has not changed since the O'Higgins Application was filed. However, in response to various developments in the Proposed Proceedings, O'Higgins and Therium have agreed to reallocate funds previously assigned to the pre-filing phase and the post-CPO phase to the pre-CPO phase of the litigation. A copy of the revised O'Higgins budget, which was prepared with the assistance of Mr O'Higgins and Therium, is enclosed as exhibit **BAH28** (the "**Revised Budget**"). This budget was prepared taking into account the latest actual and anticipated expenditure information that was available up to 31 May 2021.

10. I explain below the reasons for, and some of the key aspects of, the Revised Budget.[2]

Pre-filing phase

11. The Original Budget allocated £1,206,600 (including VAT) for "Pre-Filing" costs. In fact, only £1,053,844 of this was spent in the pre-filing phase, i.e. this phase came in approximately 12.7% under budget. The remaining £152,756 which was not spent in the pre-filing phase has therefore been made available for the post-filing to CPO phase.

Post-filing to CPO phase – reason for increased costs

12. There were a number of developments in the Proposed Proceedings between the time it was filed and now that have led the O'Higgins Application to incur greater expenditure in the post-filing to CPO phase than was anticipated when the Original Budget was prepared. I address

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1 Which can be found at Exhibit NAP1 to Purslow 1.

2 At paragraph 165 of Mr Evans' submissions on carriage filed on 23 April 2021, Mr Evans stated that he "anticipates" that O'Higgins will provide an updated budget. There was subsequent correspondence between the parties in which we explained to Mr Evans' solicitors that such an updated budget would indeed be provided with this round of evidence.

the four most significant of these below: the carriage dispute; the length of time between filing and the CPO hearing; the contract review exercise; and increased ATE insurance premiums.

13. Firstly, the principal source of the additional work – and therefore additional costs – has been the carriage dispute precipitated by the filing of the Evans Application in December 2019. I identify below the main heads of additional work caused by the carriage dispute:

    a. Reviewing the Evans Application, including its supporting materials, and subsequent amendments.

    b. Preparing for the elements of hearings relating to the carriage dispute, in particular the preliminary issues hearing on 13 February 2020 at which submissions were made as to the appropriate time to resolve the carriage dispute and the CMC of 15 January 2021 (the "**January CMC**") at which the Canadian law matrices prepared by the Proposed Class Representatives ("**PCRs**") were presented and discussed.

    c. Liaising with Canadian counsel in relation to the relevant law on carriage disputes in that jurisdiction.

    d. Producing expert work at an earlier stage than was anticipated absent the carriage dispute, namely the first report of Professor Douglas Bernheim ("**Bernheim 1**") and the additional work required by the expert and legal teams to respond to Mr Evans' expert evidence.

    e. Liaising with Mr Evans' solicitors Hausfeld & Co. LLP ("**Hausfeld**") to agree the joint publicity notice published by 29 January 2021 in line with the Tribunal's order dated 15 January 2021 (the "**Order**").

    f. Preparing submissions and evidence in relation to the carriage dispute for the 23 April and 11 June 2021 filings.

    g. Correspondence with Mr Evans, both on topics specific to the carriage dispute and the overall general increase in the volume of correspondence occasioned by the involvement of another party.

    h. Publicity work to ensure that the O'Higgins and Evans Applications were clearly distinct for the sake of the Proposed Class, including working with Epiq on the claim website content in relation to the carriage dispute.

14. Unlike O'Higgins, Mr Evans knew at the time he prepared his original budget that he was entering into a carriage dispute and so would be exposed to the above costs.

15. Secondly, a further cause of additional expenditure has been the lengthy time period between the filing of the O'Higgins Application on 29 July 2019 and the listing of the CPO hearing just short of two years later on 12 July 2021.

16. The Original Budget was prepared in circumstances where we hoped to arrive at a CPO hearing within around 9 to 12 months of filing. Even absent the carriage dispute, at the time the O'Higgins Application was filed there was a lack of clarity in relation to the future developments in the Tribunal's collective action regime given the ongoing appeal process in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (Case 1266/7/7/16) ("***Merricks***"). MasterCard was granted permission by the Supreme Court to appeal the Court of Appeal's decision on 25 July 2019, a matter of days before the O'Higgins Application was filed. This caused considerable uncertainty as to how and whether the Tribunal would allow the Proposed Proceedings to move forward pending judgment in *Merricks* by the Supreme Court.

17. Our provisional views of how the Tribunal would manage collective actions pending *Merricks* were at that time informed to a large extent by its approach in the 'Boundary Fares'[3] proceedings, which were filed on 27 February 2019. By an order made on 4 June 2019, the Tribunal had refused to grant an application to stay the proceedings pending *Merricks*. Accordingly, it appeared that the Tribunal would permit other collective actions to proceed. However, following the Supreme Court's grant of permission for Mastercard to appeal, the Tribunal revised its position at a pre-hearing review on 23 September 2019, granting a stay of the "non-funding issues" pending judgment in *Merricks*.[4] This was, however, after the O'Higgins Application had been filed. This gives an idea of how the Tribunal and the litigants before it (including O'Higgins) were feeling their way through the potential repercussions of *Merricks*.

18. Although, in theory, the delay caused by the *Merricks* uncertainty should not necessarily have led to additional work (but simply to the same work taking place over an extended time period), the practical reality was that the elongation of the procedural timetable to take into account the Supreme Court's judgment led to additional expenditure being incurred. For example:

    a. **Additional hearings**: absent *Merricks*, funding would have been dealt with as part of the main CPO hearing. Instead, a hearing was scheduled for 13 February 2020 to deal with any funding related issues. Although these issues were ultimately resolved following

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3 *Justin Gutmann v London & South Eastern Railway Limited* (Case 1305/7/7/19); and (1) *Justin Gutmann v First MTR South Western Trains Limited, (2) Stagecoach South Western Trains Limited* (Case 1304/7/7/19).

4 See transcript of the hearing, page 22, lines 1 to 7.

extensive correspondence and submissions very shortly before the hearing, and the hearing itself was largely occupied with carriage dispute-related issues, there are inevitably lost efficiencies in preparing for and attending two hearings (one on funding, and the CPO hearing to commence on 12 July 2021) rather than one. Similarly, the third January CMC to agree a timetable following the Supreme Court's *Merricks* decision would not (necessarily) have been needed had a timetable been ordered at the first or second CMCs.

b. **Correspondence**: there was a considerable amount of correspondence between the parties and the Tribunal in relation to the anticipated timings for the handing down of the *Merricks* judgment and the potential impact this would have on the timetable, including the proposed 1 March 2021 listing for the CPO hearing.

c. **Communications with class**: additional expenditure was incurred in engagement with the Proposed Class during the extended procedural timetable.

19. Mr Evans, on the other hand, would have been aware at the time he filed the Evans Application that the Supreme Court had granted Mastercard's application to appeal, that *Merricks* would likely be heard in May 2020,[5] and that the Tribunal would not substantively progress the majority of issues relevant to the CPO Applications prior to the resolution of *Merricks*. Mr Evans' legal representatives were present in the Tribunal at the first CMC in the O'Higgins Application on 6 November 2019 when the Tribunal indicated that it would not hold the CPO Hearing until at least January 2021.

20. Thirdly, the contract review exercise ordered by the Tribunal on 6 November 2019 in response to the Defendants' jurisdiction challenges, was not anticipated at the time of filing. As set out in my Fourth Statement,[6] this involved SSU having to review 746 contracts between the Proposed Defendants and customers for spot and/or outright forward FX transactions. In addition to the costs of reviewing the contracts themselves, this exercise led to considerable correspondence between my firm and the Proposed Defendants' solicitors about the contracts themselves and the exercise. I set out details of the cost of this exercise at paragraph 24.a below.

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5 Among other routes to obtain this information, this was discussed at the Boundary Fares pre-hearing review in September 2019. See the comments of Mr Paul Harris QC at page 12, 16-19 of the transcript: "*given that although it's not yet been set down, it looks most likely that the appeal in Merricks before the Supreme Court will be May 2020, or thereabouts*." Mr Evans' solicitors also act (jointly with another firm) for the Claimant in Boundary Fares.

6 Paragraph 61.b.

21. Finally, an additional £98,000 (including insurance premium tax) was incurred to meet the costs of ATE insurance premiums over and above the Original Budget, as additional ATE insurance was obtained following the filing of the O'Higgins Application.

Revisions to the Original Budget

22. As a result of the unanticipated developments in the litigation, including in particular the four set out above, the O'Higgins Application has re-allocated certain expenditure from other phases of the Original Budget to the filing to pre-CPO phase of the Revised Budget. The amount of re-allocated expenditure is £3,641,556, of which £152,756 is the underspend on the pre-filing phase and the remaining £3,488,800 is taken from the various post-CPO phases, as explained below.

23. Before I explain the detail, it is important to note that the Original Budget was prepared to allow headroom – it was not a 'pared to the bone' budget. As I explained in my Fourth Statement, the budget represents my firm's best endeavours to prepare a realistic estimate at the time that funding was agreed and is not regarded as a target to hit.[7] This is confirmed by the approximately 12.7% underspend on the pre-filing work as compared to the amount provided for in the Original Budget. Accordingly, when making the reallocations discussed below, all have been facilitated by our (my, Mr O'Higgins' and Therium's) awareness that the Original Budget was designed to have some 'wriggle room' in each phase.

24. I explain below the sources of the reallocations and provide detail as to we chose those specific line items reallocate funds. All figures are inclusive of VAT:

    a. £205,000 from "Disclosure": Of direct relevance to this line item, we estimate that Scott+Scott and the counsel team incurred costs of approximately £52,000 in undertaking the contract review arising from the Proposed Defendants' jurisdiction challenge (time cost and review platform fees). I note that this task fell solely on O'Higgins, allowing Mr Evans to benefit indirectly from our work. Accordingly, at least this £52,000 can be moved forward from the budget for the disclosure phase of the litigation as we may well otherwise have expected to review these documents (or others like them) later in the litigation. We have also reallocated a further £153,000 from the budget for the Disclosure phase, taking advantage of anticipated headroom in Original Budget. £2,543,600 remains in the Revised Budget for disclosure.

[7] Paragraph 75 of my Fourth Statement. See also Mr O'Higgins' comments at paragraph 44 of O'Higgins 3.

b. £900,000 from "Experts reports": As indicated in the O'Higgins Application[8] and as further explained in the O'Higgins Application skeleton argument dated 11 January 2021 for the January CMC,[9] our client anticipated filing additional expert evidence at a later (post-certification) stage of the Proposed Proceedings. However, in light of the carriage dispute, the decision was taken to file Bernheim 1 prior to the CPO hearing. Accordingly, Professor Bernheim's work in familiarising himself with the matter, preparing his report complementing Mr Breedon's first report, and providing his responses to the Proposed Defendants, is all work that otherwise would have been done – and expenditure that would otherwise have been incurred - in the post-CPO phase. It is therefore appropriate to reallocate funds from the expert phase to the CPO phase. However, to the extent that both Professor Breedon and Professor Bernheim have produced reports responding to the Evans Application, this was unanticipated expenditure caused by the carriage dispute. Accordingly, we have reduced the budget for Expert Reports in the post-CPO phase by £900,000, which still leaves £1,905,600 in the Revised Budget. We have not at this stage sought to quantify how much of the experts' costs are attributable solely to responding to Mr Evans' expert work.

c. £583,800 from "Bookbuilding": As explained in my Fourth Statement,[10] the O'Higgins budget provides a specific line item for covering the costs of building a book of opt-in class members. The original budget assumed an extended period of time for this bookbuilding exercise, including travel to meet in person with potential opt-in class members. The onset of the Covid-19 pandemic has meant that such in-person contact has been effectively ruled out since early 2020, meaning that we have been able to call on some of this budget to cover other costs in the pre-CPO period. We have retained what we deem to be adequate amounts to cover bookbuild in the remainder of the Proposed Proceedings, in particular, the period for which the opt-in window will be open following the granting of a CPO. The Revised Budget still provides for £348,000 for bookbuilding following the reallocation. This can be contrasted with Mr Evans who, as I noted in my Fourth Statement, has no explicit budget for interacting with potential class members.

d. £1.8 million from "Notification and Administration": As indicated in my Fourth Statement,[11] O'Higgins' primary position is that the costs of administering the claims of the Proposed Class and distributing damages should be recoverable from – or paid directly by – the Proposed Defendants. Notwithstanding this position, we provided a generous

8 See paragraph 60 of the Litigation Plan, exhibited as MOH4 to O'Higgins 1.
9 See paragraph 18 of the O'Higgins skeleton argument.
10 Paragraph 76.b. of my Fourth Statement.
11 Paragraph 76.a. of my Fourth Statement.

allowance in the budget for the "back-end" of the Proposed Proceedings, including interim costs of claims administration such as paying for experts and settling invoices from Epiq for their work on building the claims administration platform, etc. Given this approach, we feel comfortable drawing on some of this fund at the pre-CPO phase. £3,031,500 remains in the Revised Budget for this line item. As noted in my Fourth Statement, the Evans Application budget has an equivalent line item of just £450,000.

25. For completeness, I note that both Mr O'Higgins and Therium have been kept informed of these reallocations throughout the process and are content with them.

26. O'Higgins does not currently anticipate needing to obtain funding beyond the £29,375,043 committed capital agreed with Therium. The O'Higgins Application remains, in my view, adequately funded for the entire Proposed Proceedings.

27. Notwithstanding my view, I also note that if O'Higgins is granted a CPO, O'Higgins will seek its costs from the other parties and would anticipate recovering a significant portion of those costs. Any costs recovered from the other parties could of course be channelled back into the post-CPO budget, returning the amount of money available for certain items back to the levels, or close to the levels, originally budgeted.

Comparison with the Evans Application budget

Amount of funding

28. In the second witness statement of Mr Evans dated 23 April 2021 ("**Evans 2**"), Mr Evans explained that Donnybrook Guernsey Limited ("**Donnybrook**") "*has agreed to provide Additional Action Costs of £949,063 to cover additional pre-CPO disbursement costs*" and that "[a]*ccordingly, the Funder's total pre-CPO commitment from £4,294,366 to £5,243,430 and its overall commitment under the LFA budget to £19,603,152*". [12]

29. Having addressed the reallocation process in relation to the Revised Budget, in this section I make some observations by way of comparison with the Evans Application updated budget:

    a. While O'Higgins has reallocated £3,641,556 (including VAT) from the post-CPO phase to the pre-CPO phase, Mr Evans has added an additional £949,063 to his budget. These additional funds are provided by Donnybrook, apparently on the proviso that Mr Evans' solicitors, Hausfeld, have deferred their (already discounted) fees. However, in addition (and excluding VAT), Mr Evans' solicitors' costs have increased from £2,109,675 million

[12] See paragraph 87 of Evans 2.

(only 50% to be charged pursuant to the CFA) to £6 million (all deferred pursuant to the 100% CFA – see 29d. below) and its barristers' costs have increased from £1,002,750 to £1,718,990 (prior to the application of CFA discounting). Accordingly, notwithstanding that Mr Evans knew at the time of filing that there would be a carriage dispute and had a better insight into the likely delays and additional work resulting from the Supreme Court's decision in *Merricks*, his original budget appears woefully inadequate for the pre-CPO phase. This calls into question the accuracy of his other budget estimates.

b. Even with the increase in the Evans Application budget of £949,063, the O'Higgins Application remains by some considerable distance the better funded. Evans' funding in total is now £19,603,152, while O'Higgins' funding is £29,375,043. While Mr Evans seeks to downplay this difference, the fact is that the O'Higgins Application provides the Proposed Class with a significantly greater level of security that there will be sufficient funds to run the case through to the end of trial than does the Evans Application.

c. While Mr Evans and his representatives talk extensively about transparency, the manner in which his new budget is presented actually makes a comparison with the previous version difficult to achieve. First, there is no indication from Mr Evans in his submissions or evidence as to either when the additional funding was first requested from Donnybrook or when the monies were paid to Mr Evans. Depending on the timeline, arguably, Mr Evans should have reported this additional funding sooner given Mr Evans' pre-CPO impecuniosity is a highly relevant fact to the Proposed Class. Second, I note that where there were previously multiple entries/line items for the pre-certification work, the revised budget merges these into a single "pre-CPO" phase. No explanation is provided as to why the revised Evans Application budget does not replicate the format of the original budget, or which aspects of or why the original Evans budget was so inaccurate.

d. In particular, as referred to above, the solicitors' fees budgeted for this phase have increased from £2,109,675 million to £6 million, although this £6 million appears to be deferred and contingent: if the CPO is decided in Mr Evans' favour, it appears that £3 million of this £6 million will immediately become payable.[13] However, it appears from our analysis of Mr Evans' revised budget that this £3 million sum is not accounted for in the total funding under the Evans Application LFA. Accordingly, it is not clear where the funding for this will come from and whether it should be deducted from the post-CPO phase of the litigation. The lack of information on this matter has rendered us unable to make a like-for-like comparison of the respective levels of the post-CPO funding of the two Applications.

[13] See paragraph 89 of Evans 2 and Maton 4, Exhibit AJM16, note 4 to the "Hausfeld and Counsel Fees" table.

However, it appears prima facie that either £3 million less will be available for the post-CPO phase than Mr Evans' budget indicates, or Mr Evans, in fact, requires an additional £3.6 million inclusive of VAT (or else, possibly, the difference between the reduced rates payable under the original budget pre-CPO (c.£1.05m plus VAT), and the £3.6m now payable, which amounts to a shortfall on solicitors' fees of c.£2.3m).

30. It is clear from the foregoing analysis that despite Mr Evans' various comments about "efficiency", the Evans Application is underfunded to such an extent that he is having to call in additional funding at the pre-certification stage and his lawyers are having to defer their (already discounted) fees until the Tribunal makes a decision as to the award of a CPO and resolves the carriage dispute. In addition, it is not clear how the deferred fees that are due to be paid following the granting of a CPO to Mr Evans would be accounted for within Mr Evans' post-CPO budget or whether additional funding would be needed. Further, the fact that that Mr Evans and Mr Chopin regard it as necessary to explain that Donnybrook is likely to agree to additional funding if needed[14] ought to be a warning sign in this regard and represents a risk to the Proposed Class.

Cost of funding

31. In the Fourth Witness Statement of Anthony John Maton dated 23 April 2021 ("**Maton 4**"), Mr Maton explains that "*Hausfeld has prepared a document which sets out the possible sums that may be sought by Mr Evans out of undistributed damages in respect of his unrecovered costs*".[15] The document is annexed as Exhibit AJM16 to Maton 4. In circumstances where (i) Mr Evans himself has asserted that "*the cost of the funding available to each of the PCRs is broadly similar and Mr Evans does not advance this as a significant point of distinction*"; and (ii) any recoveries come from undistributed damages, I do not consider Mr Evans' analysis to be particularly enlightening in the context of the carriage dispute.

32. Notwithstanding this, for completeness I attach at exhibit **BAH29** a document which endeavours to mirror AJM16 for O'Higgins, so that the Tribunal is able to make a "like-for-like" comparison with AJM16.

33. There is one difference between BAH29 and AJM16. We have added an extra line to the "Funder's Fee" tables to provide the cost of funding per each £1 funded for each of the O'Higgins. This figure is arrived upon simply by dividing the total funder return by the total funder outlay in each scenario. We have also undertaken this calculation for AJM16 and I

[14] Paragraph 88 of Evans 2 and paragraph 25 of the third witness statement of Mr Adrian Mark Chopin ("**Chopin 3**").

[15] Paragraph 39 of Maton 4.

provide at **BAH30** a version of AJM16 with this additional row added. This is additional detail is included to account for the different budget levels of the respective Applicants, and thus to give the Tribunal a clear view of the 'real' cost of funding. The reality is, of course, that conducting the litigation is likely to cost a similar amount, whichever PCR is permitted to proceed.

34. For the avoidance of doubt, in preparing BAH29, we have simply replicated the figures / assumptions (including the damages figures, cost recovery figures and distribution percentages) applied by the Evans Application when preparing AJM16, purely in the interests of ensuring a like-for-like comparison. The use of these figures is not to be taken as any form of endorsement, admission or concession by O'Higgins that any of these figures / assumptions represent a likely outcome to the litigation.

Funder confirmations

35. Finally in relation to funding, in Evans 2[16] and Chopin 3[17] certain confirmations are provided about the role of the Donnybrook in the Evans Application. For completeness, Mr Purslow provided materially the same statements in his first witness statement dated 28 July 2019 ("**Purslow 1**"): i.e. Therium – a highly reputable funder with a wealth of experience, including in collective actions before the Tribunal – has: (i) no conflicts of interest with the Proposed Class through the funding arrangements;[18] and (ii) no material say in the running of the Proposed Proceedings (whether in relation to settlement or otherwise), a matter which is reflected in the O'Higgins litigation funding agreement (the "**O'Higgins LFA**").[19] Unlike Donnybrook, Therium is also a founding member of the Association of Litigation Funders.[20]

Pre-May 2019 work

36. At paragraphs 209-211 of his Carriage Submissions dated 23 April 2021 ("**Evans Carriage Submissions**"), Mr Evans questions the inclusion of certain costs attributable to the period pre-May 2019. As I explained in paragraph 65a. of my Fourth Statement, there were a number of ways in which we and O'Higgins were able to prepare the detailed O'Higgins Application. The main lines of work were as follows:

16 See paragraphs 98-100.
17 See paragraph 29.
18 See paragraph 15.
19 See paragraphs 16 and 17.
20 See paragraph 10 of Purslow 1.

a. Familiarising the team of solicitors, counsel and experts with the FX market and the wrongdoing.

b. Reviewing publicly available material about FX regulatory investigations and litigation in other jurisdictions, including reviewing the numerous chats cited by the regulatory decisions or in litigation, which provided us with a detailed background understanding of the anti-competitive conduct by the Proposed Defendants.

c. Working with the experts on the case theory and damages methodology.

37. This work was a valuable investment on the part of the O'Higgins legal and expert teams that was then incorporated into the O'Higgins Application. When the European Commission ("**Commission**") published the press release on 16 May 2019, we were able to leverage off this preparatory work, which gave Mr O'Higgins and the team advising him sufficient confidence to bring the O'Higgins Application promptly, prior to obtaining copies of the Settlement Decisions. Our view, in discussions with Therium, was that this pre-May 2019 work was clearly relevant to the Proposed Proceedings and should therefore be reflected in the O'Higgins Original Budget (and subsequently in the Revised Budget).

38. Further, the pre-9 May 2019 period also includes work on contacts with members of the Proposed Class (including potential opt-in members) in relation, for example, to the background to the case, the proposed approach and the value of their individual claims. The final element assisted us and our expert team with finessing the damages methodology as it gave a greater understanding as to how potential members of the Proposed Class, for example, carried out FX trading, how they did it and how they stored their trading data. It is apparent from Mr Evans' 23 April 2021 filing that Hausfeld undertook similar work, which, Mr Maton explained in Maton 4 and valued at £739,941.25.[21] Although some of the pre-9 May 2019 work we conducted was in the context of exploring potential individual claims by the entities with whom we had contact, a view was taken (by us and Therium) that it was prudent to include these activities in the Original Budget as they were highly likely to be leveraged in the "bookbuild" phase in the Proposed Proceedings. Indeed, I believe that Mr Evans' omission of this work arguably provides a false picture of the Evans Application and, in particular, the budget. This is because Mr Evans will be benefiting from the earlier work that meant his team did not begin from a 'standing start' without accounting for it in his budget, giving him the opportunity to argue that he is more 'efficient' by excluding actual, realised costs.

[21] See paragraph 15 of Maton 4.

39. For completeness, O'Higgins does not at this stage take a position as to whether or not it will seek to recover all the costs of the pre-9 May 2019 work from the Proposed Defendants if the O'Higgins Claim is ultimately successful. O'Higgins' rights are fully reserved in this regard. At this stage I simply note that neither the Original Budget nor Revised Budget were prepared in the context of costs recovery from another party, but simply to show the funding made available to O'Higgins.

Timing of the Applications and Amendments

40. At paragraph 195b. of Mr Evans' submissions on carriage, it is asserted the "*the O'Higgins Application was filed prematurely, without sight of the Decisions. As a result, the O'Higgins PCR has been forced to amend and supplement its application on multiple occasions thereafter* [sic] *This has resulted in a lower-quality application which has required significant amendment on multiple occasions after it was filed, including so that it properly followed-on from the exact terms of the Decisions*."

41. By way of response, I note that this is simply a mischaracterisation for the reasons I set out in my Fourth Statement,[22] which I do not repeat here. In short, there was nothing "*premature*" about the timing of the O'Higgins Application, nor was the original filing "*lower-quality*", nor have the subsequent amendments been "*significant*".

42. Further, at paragraph 47 of Evans 2, Mr Evans states "*I understand from Hausfeld that the O'Higgins PCR was required to make substantial amendments to its application once it obtained the Decisions to ensure they were within the scope of the Commission's findings*". This is incorrect. As I explain below, the Claim Form has been amended twice and only on one of those occasions did the changes relate to the Settlement Decisions.

43. O'Higgins amended its Claim Form for the first time on 28 January 2020. These amendments were permitted in accordance with paragraph 7 of the Order of the Tribunal dated 6 November 2019 which allowed for amendments "*as a consequence of sight of the redacted Commission Decisions*". Notably, however, before any amendments were filed, the Proposed Defendants provided O'Higgins with fully un-redacted, confidential versions of the Settlement Decisions (the timing of the receipt of these confidential Settlement Decisions is set out in paragraphs 64 to 69 of BAH 3). In a single round of amendments, O'Higgins was able to incorporate relevant information from the Settlement Decisions into its pleadings. These amendments were not "*substantial*" and simply supplemented the Claim Form without the need for the O'Higgins Application to depart materially from anything in its original pleading. Additionally,

[22] See paragraph 65a. of my Fourth Statement.

O'Higgins used this opportunity to update its Claim Form to reflect certain developments that had taken place since the O'Higgins Application had been filed. These updates included providing information regarding the Advisory Committee Members, noting that a new counsel team member had been instructed, acknowledging that a copycat claim had been filed and reflecting a change in the name of our firm (from Scott+Scott Europe LLP to Scott+Scott UK LLP).

44. In contrast, I note that while Mr Evans had redacted, non-confidential versions of the Settlement Decisions at the time he filed his Application, Mr Evans then amended his claim form on 17 April 2020 to incorporate information from the confidential versions of the Settlement Decisions which he obtained once his litigation was on foot (i.e. nearly three months after O'Higgins had completed this process). In short, after one round of amendments both Applications incorporated the confidential Settlement Decisions. In my opinion, neither approach can be considered more meritorious nor more efficient than the other.

45. For completeness, I note that O'Higgins amended its Claim Form for a second time on 26 November 2020. These changes were very minor, however, and included adding Bernheim 1 to the list of documents lodged in support of the O'Higgins Application and making one update to reflect the increase in the amount of ATE cover obtained by O'Higgins. No substantive changes were made to the Claim Form at this time.

Transparency

46. At paragraph 65 of Evans 3, Mr Evans states "*given the complexity and the novelty of the Proposed Collective Proceedings, I have sought to share with the Proposed Class Members as much information as possible in relation to my CPO application, including relevant claim documentation and details of my funding and insurance arrangements*". The same is true of O'Higgins and the apparent attempts in Mr Evans' submissions and evidence (and throughout the Proposed Proceedings) to assert otherwise is simply a mischaracterisation of the position of the parties for the following reasons:

    a. **LFA:** According to Mr Evans, any member of his proposed classes has been able to requested a copy of the Evans Application litigation funding agreement (the "**Evans LFA**") since 16 September 2020. To be clear, however, the documents are not readily available on the Evans Application claim website. Following conversations with Therium, Mr O'Higgins instructed Scott+Scott to remove the O'Higgins Application litigation funding agreement (the "**O'Higgins LFA**") from the Joint Confidentiality Ring on 19 February 2021. The O'Higgins LFA is not available on the claim website for the reasons Mr

O'Higgins sets out in O'Higgins 3,[23] although members of the Proposed Class are at liberty to request a copy, and a detailed summary of the funding and ATE arrangements has been available on the claim website since September 2020[24]. At the time of writing, therefore, both LFAs are available to the public and on the same terms: i.e. members of the class(es) must write to the email address provided on the respective claim websites to request a copy.

b. **ATE policies:** a summary of the ATE arrangements for the O'Higgins Application is on the claim website. This summary contains the following wording: "*These arrangements consist of £33.5 million in ATE insurance cover, across five different layers of cover (from the "primary" to the "fourth excess" layer). All of the participating ATE insurers have an A- or better rating with major rating agencies. O'Higgins understands its ATE cover to be the highest ever procured by a claimant in UK collective proceedings and has been arranged at the cost of approximately £5 million in premiums, as budgeted for in Appendix 1 to the LFA*." In the case of the Evans Application (as with the Evans LFA), copies of Mr Evans' ATE policies are not "*in the public domain*"; rather an interested party must apply to obtain copies by emailing an enquiries address listed on the Evans Application claim website. In my view, Mr Evans' attempt to frame the difference in approach as an issue of transparency is misplaced for several important reasons:

    i. The information provided in the detailed summary on the O'Higgins Application claim website contains all of the key information relating to the ATE cover, including: (i) level of cover; (ii) insurer rating; and (iii) approximate cost of the premiums payable (as reflected in the O'Higgins budget in the LFA, which – as explained above – is available on request).

    ii. In the case of the O'Higgins Application, the Proposed Class has the benefit of £33.5 million in ATE cover; this represents over £10 million more than the protection offered by the arrangements made by Mr Evans. In circumstances where class members will not be exposed to any costs associated with the ATE insurance (i.e. because any premiums payable come from undistributed damages) due to the way the Tribunal's collective action regime is structured, I question both the necessity of, and any supposed benefit gained from, the precise wording of the ATE policies being available to them.

    iii. For completeness, the Proposed Defendants have had access to the ATE policies obtained for the O'Higgins Application, have reviewed them and have raised no

[23] See paragraph 41 of O'Higgins 3.
[24] See paragraph 40d. of O'Higgins 3.

objections. This position was confirmed to the Tribunal by Mr Nicholas Bacon QC at the hearing on 13 February 2019.[25]

Update on FX proceedings

US proceedings

47. As indicated in my previous statements, we have been following the FX proceedings in the US (the "**US Proceedings**") closely, including liaising with our US colleagues on the terms I explained at paragraph 84 of my Fourth Statement.

48. While Mr Evans appears to downplay the potential relevance of matter in the US Proceedings (including document produced through discovery),[26] O'Higgins is committed to using this fruitful resource for the benefit of the Proposed Class. The Evans Carriage Submissions state that the US discovery "*may turn out to be irrelevant*" to these proceedings because the US proceedings related to "*US domiciled entities and non-US domiciled entities to the extent that their FX trading was transacted through the US, all of which fall outside the scope of the Proposed Proceedings*."[27] However, this overlooks the facts that: (a) the Cartels were centred in London through communications between London-based FX traders; and (b) my US colleagues inform me that the disclosure they obtained in the US Proceedings included trading data from their defendant banks' London trading desks.

49. Indeed, our US colleagues have provided us with a copy of a filing made on 2 June 2021 in response to a motion for summary judgment brought by the defendant, Credit Suisse. As a part of that filing, our US colleagues submitted extracts of over 400 chats involving the banks implicated in the US Proceedings (for the avoidance of any doubt, we have only obtained materials that are publicly available pursuant to the directions of the US Court). Having reviewed those chat extracts, we have identified 299 examples of communications involving the Proposed Defendants, of which 73 involved only the Proposed Defendants in these Proceedings and at least 20 of which clearly took place in the Essex Express or Three Way Banana Split chatrooms (and with at least 9 in the Sterling Lads chat room, which we believe to be the subject of the remaining outstanding European Commission FX investigation). These extracts have further enhanced our understanding of the anticompetitive conduct, thus demonstrating the importance of our close alignment with our colleagues who are leading the US Proceedings.

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25 See page 62, lines 1-6 of the transcript of that hearing.
26 See, for example, paragraph 111 of the Evans Carriage Submissions.
27 Paragraph 111b. of the Evans Carriage Submissions.

50. The Evans Carriage Submissions also assert that Mr Evans' solicitors will be just as well-placed as SSU to seek disclosure through their US firm, Hausfeld LLP, who also act as co-lead counsel in in the US Proceedings.[28] As set out in My First Statement, Scott+Scott Attorneys at Law LLP originated the US Proceedings from the outset – subsequently inviting Hausfeld LLP to join it as co-lead counsel over a year after the US Proceedings were filed[29] – and had invested over double the number of hours in the US Proceedings as at the date on which final approval of the US settlements was sought.[30] I am informed by my US colleagues that they took the lead in the US Proceedings in terms of attorney hours, briefing, argument, discovery, and distribution of funds to the US class.

UK proceedings

51. We have been following developments in the ECU Group PLC's individual actions against Goldman Sachs,[31] Deutsche Bank,[32] RBS/NatWest,[33] Barclays,[34] Citibank[35] and HSBC[36]in relation to misconduct in relation to FX stop loss orders. Although the majority of these actions are at a relatively early stage, we are aware that the liability hearing is to take place in the week commencing 14 June 2021 in the *ECU Group v HSBC* action. To the extent that any judgment in any of these proceedings are relevant to the Proposed Proceedings, we will take them into account.

28 Paragraph 111a. of the Evans Carriage Submissions.
29 Paragraph 8a. to 8d. of my First Statement.
30 Paragraph 8o of my First Statement – Scott+Scott Attorneys at Law LLP had spent 74,625.2 hours on the US Proceedings to Hausfeld LLP's 34,949.50 hours.
31 FL-2020-000048 – *The ECU Group PLC v. Goldman Sachs International.*
32 FL-2020-000047 – *The ECU Group PLC v. Deutsche Bank AG*
33 FL-2020-000045 – *The ECU Group PLC v. NatWest Markets PLC.*
34 FL-2020-000049 – *The ECU Group PLC v. Barclays Bank.*
35 FL-2020-000046 – *The ECU Group PLC v. Citibank N.A. and Ors.*
36 CL-2017-000315 - *The ECU Group Plc v HSBC Bank Plc & Ors.*

STATEMENT OF TRUTH

I believe the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

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BELINDA ANNE HOLLWAY

Date: 11 June 2021

Witness: B A Hollway
Number of Statement: Fifth
Exhibit: BAH28-BAH30
Dated: 11 June 2021

Case no. 1329/7/7/19

IN THE COMPETITION APPEAL TRIBUNAL

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)
(5) 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) NATWEST GROUP PLC
(13) UBS AG
(a company incorporated under the laws of Switzerland)

Respondents / Proposed Defendants

FIFTH WITNESS STATEMENT OF BELINDA ANNE HOLLWAY
