Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: First
Exhibits: MOH1-4
Dated: 28 July 2019

IN THE COMPETITION APPEAL TRIBUNAL **Case no. _____**

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

FIRST WITNESS STATEMENT OF MICHAEL O'HIGGINS

I, **MICHAEL O'HIGGINS**, of a private residential address in the UK, **WILL SAY**:

Introduction

1. I am the sole director and sole member of Michael O'Higgins FX Class Representative Limited, the proposed class representative (the "**Proposed Representative**") in relation to the above claim (the "**Claim**"). I make this statement in my role as sole director and sole member of the Proposed Representative and therefore as the individual with complete control over the Proposed Representative. As such, in this statement, references to the knowledge, conduct, etc. of the Proposed Representative are to be understood as being references to my own knowledge, conduct, etc.

2. The Proposed Representative proposes bringing the Claim before the Competition Appeal Tribunal (the "**Tribunal**") on a collective, opt-out basis under section 47B of the Competition Act 1998 (the "**Proposed Collective Proceedings**"). The Proposed Representative seeks to bring the Proposed Collective Proceedings on behalf of a class of persons who entered into foreign exchange ("**FX**") transactions, as defined in the Collective Proceedings Claim Form to which this statement relates (the "**Proposed Class**").

3. I make this statement in support of the Proposed Representative's suitability to bring the Claim and to act as representative for the Proposed Class in the Proposed Collective Proceedings, such representation being required under section 47B(2) of the Competition Act 1998, as amended by the Consumer Rights Act 2015 (the "**1998 Act**"). In seeking to bring the Claim, I have considered, and understand, the requirements of the 1998 Act, the Competition Appeal Tribunal Rules 2015 (the "**2015 Rules**"), and the guidance in the Competition Appeal Tribunal Guide to Proceedings 2015 (the "**2015 Guide**"), which I address further below.

4. 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.

5. There is now produced and shown to me a number of exhibits marked respectively "**MOH1**" to "**MOH4**", which comprise true copies of the documents to which I shall refer in this witness statement.

6. In this statement, I refer to: Proposed Defendants 1 to 4 as "**Barclays**"; Proposed Defendants 5 to 6 as "**Citigroup**"; Proposed Defendants 7 to 9 as "**JPMorgan**"; Proposed Defendant 11 to 12 as "**RBS**"; and Proposed Defendant 13 as "**UBS**".

Authorisation of the class representative: the UK collective action regime

7. I am informed by the Proposed Representative's legal advisers that the UK collective action regime is governed by the 1998 Act and the 2015 Rules, and that there are specific provisions addressing the authorisation of a class representative.

8. In particular, I understand that under section 47B(5)(a) of the 1998 Act it is a prerequisite for obtaining a collective proceedings order ("**CPO**") that the Tribunal should consider that the proposed class representative could be authorised to act as the representative in accordance with section 47B(8) of the 1998 Act.

9. I understand that Rule 78(1) of the 2015 Rules reflects the requirements of section 47B(8) of the 1998 Act, and provides that the Tribunal may authorise an applicant to act as the class representative:

    a. whether or not the applicant is a class member, but

b. only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.

10. I also understand that Rule 78(2) of the 2015 Rules sets out the considerations the Tribunal shall take into account in determining whether it is just and reasonable for a proposed class representative to act, in particular:

a. whether the applicant would fairly and adequately act in the interests of the class members;

b. whether the applicant has, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members; and

c. whether the applicant will be able to pay the defendant's recoverable costs, if ordered to do so.

11. I have read Rule 78(3) of the 2015 Rules, which outlines the factors the Tribunal shall take into account in determining whether a class representative would act fairly and adequately in the interests of class members, including:

a. whether the proposed class representative is a member of the class, and if so the proposed class representative's suitability for managing the proceedings;

b. if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body; and

c. whether the proposed class representative has prepared a plan for the proceedings which satisfactorily includes the matters stipulated in Rule 78(3)(c)(i) to (iii) of the 2015 Rules.

12. The 2015 Guide elaborates on Rule 78(3)(b) of the 2015 Rules (set out at paragraph 11(b) above), adding that there is a "*range of pre-existing bodies which could potentially seek to carry out the role of class representative, such as consumers' organisations, trade associations, law firms, third party funders or special purpose vehicles*". I set out in detail, at paragraphs 28 and 29 below, the reasons why a special purpose vehicle ("**SPV**"), i.e. the Proposed Representative, has been established for the purposes of bringing the Claim rather than me doing so directly.

13. I am not aware of any other person(s) seeking approval to act as class representative in respect of claims covering the same subject matter; as such I do not address Rule 78(2)(c) of the 2015 Rules in this statement.

14. In the remainder of this statement, I address the considerations outlined above in order to demonstrate to the Tribunal that the Proposed Representative meets the requirements and that it is suitable to be authorised as the class representative in the Proposed Collective Proceedings. In addition, I set out my credentials which I believe demonstrate that I am a suitable individual to act as sole director and sole member of the Proposed Representative.

Basis for the Claim: the FX cartels (the "FX Cartels")

15. The Claim seeks redress for harm suffered by the Proposed Class arising from the actions of a number of companies (including the Proposed Defendants) that were found by the European Commission (the "**Commission**") to have operated two separate cartels in the FX spot trading market, contrary to Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area.

16. The Commission published a press release on 16 May 2019 (the "**Press Release**"), which I have reviewed, relating to two settlement decisions it has

adopted (Case *COMP/40135 FOREX (ESSEX EXPRESS)* (the "**Essex Express Decision**") and Case *COMP/40135 - FOREX (THREE WAY BANANA SPLIT)* (the "**Banana Split Decision**") (collectively the "**Settlement Decisions**")). The Settlement Decisions are not yet publicly available. It is my understanding, based on the Press Release, that the Commission has made the following findings:

a. The Banana Split Decision related to anticompetitive conduct by Barclays, Citigroup, JPMorgan, RBS and UBS, and took place between 18 December 2007 and 31 January 2013 (each bank was involved for a different duration within that overall time period);

b. The Essex Express Decision related to anticompetitive conduct by Barclays, RBS, MUFG Bank (formerly the Bank of Tokyo-Mitsubishi) and UBS between 14 December 2009 and 31 July 2012 (RBS and Bank of Tokyo-Mitsubishi were not involved for the whole period); and

c. Barclays, Citigroup, JPMorgan, RBS, MUFG Bank (formerly the Bank of Tokyo-Mitsubishi) and UBS (together, the "**Addressees**") engaged in unlawful anticompetitive conduct. All of the Proposed Defendants are addressees of at least one of the Settlement Decisions.

d. Throughout the period between 18 December 2007 and 31 January 2013 (the "**Relevant Period**"), the Addressees participated in one or both of the Banana Split and Essex Express cartels in relation to the FX market. The cartelists exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through various online professional chatrooms. The Press Release explains that the commercially sensitive information exchanged in these chatrooms related to customers' outstanding orders, bid-ask spreads applicable to specific transactions, the Addressees' open risk positions and other details of current or planned trading activities. The information exchanges, following the tacit understanding reached

by the participating traders, enabled the Addressees to make informed market decisions on whether to sell or buy the currencies they had in their portfolios and when.

17. Further information in relation to the Settlement Decisions and the FX Cartels to which they relate is included in the Collective Proceedings Claim Form to which this statement relates.

18. I am also aware that further banks including Credit Suisse has been named as being included in the Commission's FX investigations. The available press coverage (exhibited at **MOH1**) suggests that the Commission may make findings in relation to a further infringement of competition law arising from similar facts.

19. Furthermore, I am aware that a number of other regulators around the world have fined, amongst others, the Proposed Defendants in relation to manipulation of the FX market. These investigations are addressed in Part III of the Collective Proceedings Claim Form.

The Proposed Collective Proceedings

20. The objective of the Proposed Collective Proceedings is to seek redress for the losses that the members of the Proposed Class suffered as a result of the FX Cartels.

21. I am told by the Proposed Representative's legal advisers that the Settlement Decisions conclusively establish the liability of the Proposed Defendants for the conduct covered in the Settlement Decisions and, thus, the focus of the Claim will be on the causation and quantification of the loss suffered by the Proposed Class as a result of the FX Cartels. I am further informed that it will be possible to seek to amend the Claim (more specifically, the Collective Proceedings Claim Form) at a later stage to include further information that is expected to become available on publication and/or disclosure of the Settlement Decisions, and/or arising from any further

decisions by the Commission in relation to additional anti-competitive conduct in relation to banks' FX trading.

22. The Proposed Representative's legal advisers inform me that, pursuant to Rule 79 of the 2015 Rules, the Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the Proposed Representative that the claims sought to be included in the Proposed Collective Proceedings:

    a. are brought on behalf of an identifiable class of persons;

    b. raise common issues; and

    c. are suitable to be brought in collective proceedings.

23. These points are addressed in the Collective Proceedings Claim Form to which this statement relates. However, I set out some further points below.

Identifiable class

24. The Proposed Class is defined in the Collective Proceedings Claim Form. Membership of the class essentially depends on entering into the relevant types of FX transactions (spot and outright forward) in the EEA during the Relevant Period, and being either domiciled in the UK or opting in. Engaging in an FX spot or outright forward transaction is a deliberate step which a person chooses to undertake and it is therefore a binary factual question as to whether or not a person undertook such an FX transaction. I believe that, generally, most entities which traded FX will have done so repeatedly, either as a fundamental part of their operations (e.g. investment funds) or as an ongoing ancillary task to a businesses' main operations (e.g. multinational corporations repatriating money to the UK from other jurisdictions), and will be well aware that they have done so. Members of the Proposed Class are therefore clearly identifiable.

Commonality

25. I have reviewed the expert report of Professor Francis Breedon of Queen Mary University of London (the "**Breedon Report**"), whom the Proposed Representative has instructed to work on the Claim. My consideration of the Breedon Report and the Claim in general has benefited from my extensive business and economics experience (as set out below). Based on my review, I believe that the Claim raises common issues (i.e. same, similar or related issues of fact or law) across the Proposed Class.

26. The issue of "commonality" is addressed in greater detail in the Collective Proceedings Claim Form and the Breedon Report. In brief summary, Professor Breedon explains: (a) the reasons why, in his view, it is likely that the FX Cartels distorted the market for FX spot and outright forward transactions with the effect that persons buying FX paid more, and those selling FX received less, than they would have in the absence of the FX Cartels; and (b) the detailed methodology he will apply at trial in order to prove and quantify that loss.

Suitability for collective proceedings

27. The Proposed Representative is applying to bring the Proposed Collective Proceedings as an opt-out collective action (so far as UK-domiciled claimants are concerned) on the basis that it is the most suitable way for a claim dealing with the relevant issues to be brought. I set out below the principal reasons for this belief:

    a. The Proposed Class is large. I note that in the first witness statement of Belinda Anne Hollway ("**Hollway1**"), a partner in the firm of solicitors instructed by the Proposed Representative, it is said that the initial distribution in the US Proceedings (discussed at paragraph 38 below and defined in her statement) has led to over 27,000 US class members having already been paid compensation. Based on these numbers from the US, it seems reasonable to estimate that the number

of members of the Proposed Class in the UK is likely to be in the thousands, if not the tens of thousands, and is likely to include pension funds, asset managers, hedge funds, multinational corporations and mutual societies who engaged in FX transactions. Whilst some of those entities will no doubt frequently engage in FX transactions and therefore have an extensive knowledge of the FX market, the Proposed Class is also likely to include members for whom FX transactions do not form a central part of their business and who therefore may not be aware of the existence of the FX Cartels and the implications of the FX Cartels for them. In the absence of the Proposed Collective Proceedings, these potential claimants may not even be aware that they have been harmed, let alone that they have a claim arising from the FX Cartels.

b. Even if very considerable resources were dedicated to attempting to communicate with all potential members of the Proposed Class to explain the Proposed Collective Proceedings to them and to invite them to opt in, many potential members would inevitably be overlooked in this process. By running the Claim on an opt-out basis, the Proposed Representative starts with a more inclusive approach that helps to catch as many members as possible without going to the very significant extra cost and administrative difficulty of seeking to build a class of opt-in claimants from the outset. This ought to have the effect of maximising the size of the Proposed Class from the start of the process. If the CPO is granted, resources can more efficiently be directed at communicating with the Proposed Class and providing them with a clear choice between remaining in the Proposed Class and so pursuing their rights at no risk and with all the benefits of membership of the Proposed Class or, alternatively, opting out.

c. The value of damages that would be recovered by certain members of the Proposed Class may be relatively modest, particularly in comparison to the volume of trading conducted and the complexity

and cost of litigating these claims, meaning that the cost of pursuing individual claims would outweigh the potential benefit.

d. In my experience, commercial parties may be reluctant to commence proceedings against key suppliers, such as the banks with whom they deal, for fear of damaging commercial relationships or wider reputational harm. The Proposed Representative's proposal to run the Proposed Collective Proceedings on an opt-out basis helps to overcome these perceived relationship risks by providing members of the Proposed Class with a more "indirect" means by which they can receive compensation for the harm they have suffered as a result of the FX Cartels without either pursuing an individual action or actively opting in to the Claim.

e. For the reasons provided above, it is unlikely to be easy to conduct this case on a fully opt-in basis, and doing so might not yield a sufficient number of represented claimants to make the cost of proceedings proportionate.

f. The Claim is suitable for an aggregate award of damages for the reasons described in the Breedon Report. Based on the experience in the US as described in Hollway1, it also appears that those damages can be fairly distributed to compensate the Proposed Class members for the losses suffered, and at a proportionate cost.

g. There are common issues to be determined, the cost and complexity of which would not be practicable for individuals, making opt-out collective proceedings appropriate for the efficient resolution of proceedings for Proposed Class members, the Proposed Defendants and the Tribunal.

h. As a follow-on claim with proven merits based on the US Action, the strength of the Claim justifies the greater complexity, costs and risk of opt-out proceedings.

Explanation of choice of claimant: the benefits of using an SPV

28. The Proposed Representative is an SPV, which is not a member of the Proposed Class and was incorporated specifically for the purposes of bringing the Proposed Collective Proceedings. As detailed at paragraph 12 above, the 2015 Rules and the 2015 Guide provide for an SPV to be a class representative. The benefits include:

    a. *Limitation of Liability*: I understand that, as with all litigation, the Claim involves a degree of financial risk including the potential for adverse costs to be awarded against the class representative. As set out in paragraphs 30 to 33 below, it is my goal that the victims of the wrongdoing identified in the Settlement Decisions are compensated for their loss, and I am sincerely committed to working to achieve that goal. I am not however prepared to bear the associated financial risk by risking my personal assets, as would be the case if I were personally the class representative. I regard it as more appropriate for this risk to be borne by an SPV, so long as it has appropriate funding and insurance. The funding and insurance arrangements made by the Proposed Representative are set out at paragraphs 45 to 50 below.

    b. *Succession*: The Claim is a high-value, complex piece of litigation which is being brought using the mechanisms of a nascent collective action regime and which is likely to take a number of years to reach a conclusion. Although my present intention is to continue to prosecute this case through to its conclusion and I have no reason to think I will not be able to do so, I believe it is best to ensure that there is a succession mechanism in place in the event that I am unable to continue to conduct the Claim, for example in the event of my incapacity or death. The Proposed Representative's Articles of Association (a copy of which is exhibited at **MOH2**) make provision for the appointment of a new director(s) and/or member(s) in these circumstances, by the Proposed Representative's solicitors. This

would allow the Proposed Representative to continue to represent the Proposed Class with the minimum of disruption, expense and administrative difficulty.

c. *Accounting*: The Proposed Collective Proceedings will involve the flow of significant amounts of money, including as a result of the funding arrangements entered into by the Proposed Representative with a third party funder (see paragraph 45 below). The SPV model makes it straightforward to maintain separate accounts and invoicing for the Proposed Representative. I believe this is less complicated from a fiscal and accounting perspective (including vis-à-vis my reporting to HMRC) and has greater transparency for the members of the Proposed Class than if the financial arrangements were in my name and thus theoretically potentially co-mingled with my personal financial affairs.

29. Although the Proposed Representative is an SPV, I am its sole director and sole member, and so have full control of the decisions and conduct of the Proposed Representative. In light of this, I set out below my reasons for wanting the Claim to be brought and the qualifications and experience which I believe qualify me to carry out this role.

My reasons for wanting the Proposed Collective Proceedings to be brought against the Proposed Defendants

30. My desire to bring collective proceedings against the Proposed Defendants through the Proposed Representative is driven by my experience in the pensions sector and my interest in competition law. The Proposed Collective Proceedings neatly combine both elements.

31. I believe strongly in responsible capitalism and economic regulation and consider that companies should be held to account when they break the rules. The Proposed Defendants have acted in a manner that has resulted in members of the Proposed Class being treated unfairly in their FX dealings.

They should be held directly accountable for their anticompetitive conduct by compensating the Proposed Class for their actions. My motivation is demonstrated by, and derived from, my extensive involvement in these fields (full details of my relevant professional experience are provided at paragraphs 34 to 36 below).

32. When I was approached about the opportunity to bring collective proceedings against the Proposed Defendants, it quickly became apparent to me that the skills and knowledge I have developed throughout my career and the issues at hand are very closely aligned. As I explain in further detail below, I have spent a great deal of time since retiring from full-time employment in 2006 in non-executive roles, the core mandate of which has been to serve the public. I see acting as sole director of the Proposed Representative as a rare and exciting opportunity for me to apply my experience in a new and important way, for the benefit of others.

33. Upon reading the Press Release, I was attracted to the idea of pursuing this Claim as a way of ensuring that the victims of the conduct are compensated for the harm they have suffered as a result of the clear wrongdoing on the part of the Proposed Defendants through their participation in the FX Cartels, in particular since those victims would be unlikely to recover at all if the Claim were not brought. Further, the opt-out nature of the Proposed Collective Proceedings offers the possibility of compensation to victims who – for whatever reason – might otherwise not bring individual private enforcement actions (see my comments at paragraph 27 above in this regard).

My suitability to act as the individual with control over the Proposed Representative

Experience

34. I believe that my career and experience to date demonstrate that I have the necessary knowledge and skills to ensure that the Proposed Representative

acts fairly and adequately in the interests of the class members. I exhibit at **MOH3** a copy of my CV, and set out below a summary of what I consider to be my most relevant experience:

a. I have a strong academic and practical background in economics. I read economics at Trinity College, Dublin and have a Master's Degree in Social Policy from the London School of Economics (following which I was awarded the Leon Research Fellowship). I have held various academic posts including at Harvard University, the London School of Economics, the Australian National University and the University of Bath. I held the role of Principal Administrator for the Employment and Social Affairs Division of the Organisation for Economic Co-Operation and Development, writing the core publication ("*The Future of Social Protection*") for the first ever Organisation for Economic Co-Operation and Development Ministers of Social Protection meeting in 1988. From 1991 to 1996 I was a partner at Price Waterhouse and from 1997 to 2006 was a managing partner of PA Consulting Group. My work at these consultancy firms focused on the UK Government and the public sector.

b. Following my retirement from full-time employment, I took up the role of Chairman of the Audit Commission, responsible for monitoring the finances and performance of local authorities in England, a role I held from 2006 to 2012. I then took up the role of non-executive Director and Chair of the Treasury Group Audit Committee of HM Treasury, a position I held from 2008 to 2014. Given these dates, this covered the period when HM Treasury, acting for Her Majesty's Government, invested heavily in supporting not simply individual banks, but the entire UK financial system. In light of this experience, it was disappointing to me to learn that certain of the banks who were the beneficiaries of this work were at the relevant time directly involved in the manipulation of FX transactions and causing loss to others.

c. I have a keen interest in and extensive knowledge of the pensions sector, having been Chairman of The Pensions Regulator, the UK regulator of work-based pension schemes, between January 2011 and March 2014. During my time at The Pensions Regulator I was involved in a number of complex initiatives, most notably the introduction of the auto-enrolment scheme in 2012 and the subsequent amendment of The Pensions Regulator's objectives (to include a new aim of maximising employers' compliance with their duty to enrol staff automatically into a qualifying pension scheme with a minimum contribution rate).

d. As part of these initiatives and in this role more generally, I worked with trustees, employers, pension specialists, and business advisors to ensure the protection of pension scheme members' benefits and to ensure that the pension schemes maintained the highest standards.

e. I subsequently took up the role of Chairman of the Local Pensions Partnership, a position which I still hold. The Local Pensions Partnership is an asset and liability management organisation, managing over £17 billion in assets, which has its origins in the public sector, having been set up by the London Pensions Fund Authority and the Lancashire County Pension Fund. Amongst other things, the partnership provides pension services to public sector funds such as pension funds for police and firefighter forces and local authorities.

f. In addition, I have significant experience of the investment sector. Between February 2010 and July 2019, I was involved (first as non-executive director between February 2010 and 2011 and later as Chairman) with the setting up and running of Calculus VCT plc, a successful venture capital trust fund. I also serve as Chairman of an Advisory Board to Yorkshire Fund Managers.

g. My work as Chairman of the Channel Islands Competition and Regulatory Authorities ("**CICRA**"), a role I took up in July 2016 and

continue to hold to this day, means I have a working knowledge of competition issues and the importance of economic regulation. CICRA has a wide range of functions including promoting competition in the telecommunications, postal services, electricity and port operations on the islands of Jersey and Guernsey. I note that CICRA has no jurisdiction over financial services; this sector is regulated by the Jersey Financial Services Commission and the Guernsey Financial Services Commission. Notwithstanding this, my experience with CICRA has given me a strong interest in ensuring that all markets, including financial services, operate fairly and competitively.

h. During my professional career, I have given evidence in legal proceedings and through this have an insight into how legal proceedings are conducted and the role of the client in litigation.

35. Through these roles, I have gained an understanding of the FX market and the use of this market by a variety of institutions for a variety of purposes. In particular, I understand that pension funds use FX trading both to facilitate investments in other jurisdictions and also to hedge their investment fund risk.

36. I understand fully the requirement for the Proposed Representative (and me as sole director of the Proposed Representative) to be suitably placed to manage the Proposed Class and the Claim. In terms of dedicating sufficient time to the role, my career has been defined by taking on and managing multiple projects and delivering successful results in each. I believe my CV reflects this and I have no concerns about my ability to invest the appropriate amount of time and energy into the Proposed Representative and the Claim.

37. Notwithstanding my personal management abilities, I recognise that it is important in any process to have a support network of people with complementary skills, experience and expertise. In light of this, I intend to

put together a small group of advisers to assist me in my role as director of the Proposed Representative, as necessary, in considering aspects of the Claim. The group is to be led by Sir Christopher Clarke, a former Lord Justice of Appeal of the Courts of England and Wales and current President of the Court of Appeal of Bermuda, with whom I have conferred in preparing the Proposed Collective Proceedings. I intend to add others to this group following the filing of the Claim. I believe that Sir Christopher, along with the other individuals to be added to this advisory group, will provide me and, by extension, the Proposed Representative with support and counsel which might be needed in relation to managing the Claim and thinking through potential issues in relation to the Proposed Class as the litigation develops.

38. In addition, the Proposed Representative is supported by a legal team with extensive experience both in competition law damages litigation and, importantly, collective and class action cases. Given that the Claim is to proceed as a collective action, I draw particular attention to the experience of Scott+Scott Attorneys at Law LLP (an affiliate of the Proposed Representative's solicitors) in class actions generally and specifically in relation to their role in the class action brought in the US against a large number of banks, seeking damages in relation to the manipulation of the FX market in the US. This experience has already been invaluable in preparing the Claim and, in particular, considering and putting together the Litigation Plan discussed at paragraphs 40 to 44 below. Further details of the US Proceedings and the success of that claim, which has so far achieved settlements of over $2.3 billion for the US Proceedings class, can be found inHollway1. For the avoidance of doubt, I have been informed by Scott+Scott Europe LLP that there is considerable material that is available to Scott+Scott Attorneys at Law that cannot be shared with Scott+Scott Europe LLP due to the confidentiality restrictions explained in Hollway1. Nevertheless, I know that Scott+Scott Attorneys at Law's guidance through

the publicly available material has been very helpful in preparing the Proposed Collective Proceedings.

No conflicts

39. To the best of my knowledge, I do not consider there to be any conflicts of interest between the Proposed Class and the Proposed Representative, or between the Proposed Class and me.

Litigation Plan

40. I understand from the Proposed Representative's legal advisers that, in deciding whether a party seeking authorisation as class representative would act fairly and reasonably on behalf of the Proposed Class, the Tribunal will take into account whether that party has prepared an adequate litigation plan for the collective proceedings. Rule 78(3)(c) of the 2015 Rules specifically provides that such a plan ought to include:

    a. a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings;

    b. a procedure for governance and consultation which takes into account the size and nature of the class; and

    c. any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the Proposed Representative shall provide.

41. A plan for the Proposed Collective Proceedings has been prepared, which I exhibit at **MOH4** (the "**Litigation Plan**"). It was prepared, not only with the assistance of legal advisers and experts, but also with the helpful input of claims administrator Epiq Class Action & Claims Solutions, Inc. ("**Epiq**").

42. Epiq is a claims administrator with extensive experience of handling class actions. Their expertise includes setting up and administering communication with class members, developing media and notice plan strategies, conducting demographic analyses to determine the most effective communication channels, designing, drafting and distributing notices, and developing and managing websites to disseminate case information to class members.

43. A particular reason why the Proposed Representative instructed Epiq is that Epiq is acting as claims administrator in the US Proceedings. This experience will be of great benefit to the Proposed Class as Epiq already has an understanding of the subject matter of the Claim and a familiarity with the types of entities included in the Proposed Class.

44. I respectfully consider that this plan meets the requirements of Rule 78(3)(c) of the 2015 Rules.

Third party funding arrangements and adverse costs cover

45. The Proposed Representative has entered into a litigation funding agreement dated on or around the date of this witness statement (the "**LFA**") with "**Therium**" (see the first witness statement of Neil Andrew Purslow for an explanation of the structure and the key provisions). Pursuant to the LFA, Therium has committed to provide the Proposed Representative with funding up to an aggregate maximum amount of £29,375,043 to fund the costs of the Claim, subject to the Proposed Collective Proceedings reaching various procedural stages.

46. I have reached an agreement with Therium that I shall be compensated for my reasonable time spent working on the Claim in my role as director of the Proposed Representative. This reflects my opportunity cost of working on this case rather than taking on additional paid consulting roles. The remuneration shall be paid by Therium to the Proposed Representative

pursuant to the terms of the LFA and subsequently paid to me by way of director's fees. Taking into consideration the nature of the case and my previous experience in consultancy and other roles, I have agreed an hourly rate of £400 in respect of such time spent working on the Proposed Collective Proceedings. The total amount I may receive is capped at £65,000 for any 12-month period (to be reviewed if the volume of work anticipated increases substantially). This is reflected in the budget attached to the LFA.

47. Under the terms of the LFA, and in return for its significant investment in funding the Proposed Collective Proceedings, if the Claim is successful and an award of damages is made to the Proposed Class, Therium would be entitled to receive both repayment of all sums invested, plus an additional sum (which is calculated as either a multiple of the funds committed to the Claim or, if greater, a percentage of the total value of the damages awarded by the Tribunal). Any such return to Therium would, of course, be subject to: (i) there being sufficient undistributed damages; and (ii) the approval of the Tribunal under section 47C(6) of the 1998 Act. I believe that the relevant terms of the LFA reflect the considered balance that has been struck between prioritising the interests of the Proposed Class in any award of damages and ensuring that the risk Therium is taking on in funding the Claim is rewarded in the form of a reasonable financial return.

48. The Proposed Representative's legal advisers have raised with me the judgment of the Court of Appeal in *Excalibur Ventures LLC & Ors -v- Texas Keystone Inc. & Ors* [2016] EWCA Civ 1144, the effect of which I understand is to require funders to assess and review claims in which they have an interest to ensure that they are brought on a proper and sound basis. For the avoidance of doubt, beyond what is necessary to satisfy the points addressed in *Excalibur*, Therium is to have no material influence or control over the running of the Claim or the Proposed Collective Proceedings. In particular, Therium will have no deciding say in relation to the manner in which any award of damages is to be distributed. The distribution

mechanism will be designed to ensure that any aggregate award of damages is made available to class members who claim their share of the compensation. Subject to the approval of this plan by the Tribunal, I will ensure that the Proposed Representative takes all reasonable steps to implement the distribution mechanism, ensuring that a proper process for the administration of any damages recovered by way of the Proposed Collective Proceedings is followed such that Proposed Class members are able to claim their entitlement to any recovered damages.

49. Whilst the Settlement Decisions give me confidence as to the prospects for the Proposed Collective Proceedings, pursuant to the consideration in Rule 78(2)(d) of the 2015 Rules, the Proposed Representative also has in place arrangements with a number of after-the-event insurers (the "**ATE Insurance**") to pay the recoverable costs of the Proposed Defendants in the event of a costs award in their favour. The ATE Insurance currently in place provides protection of up to £21 million against the risk of adverse costs. Additional ATE Insurance may be obtained in due course.

50. I am comfortable, based on my understanding of the terms of the Insurance Policies, that sufficient protection has been afforded against the risk that the Tribunal orders that the Proposed Representative should pay the Proposed Defendants' recoverable costs.

Conclusion

51. For the reasons set out above, I believe that the Proposed Representative meets the requirements for authorisation as class representative pursuant to section 47B of the 1998 Act and Rule 78 of the 2015 Rules. I respectfully request that the Tribunal authorises the Proposed Representative to perform this role in respect of the Claim.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed: .....

Michael O'Higgins

Date: 23 July 2019

Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: First
Exhibits: MOH1-4
Dated: 28 July 2019

Case no. _____

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)
(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

FIRST WITNESS STATEMENT OF MICHAEL O'HIGGINS
