Party: Applicant / Proposed Representative
Witness: M O'Higgins
Number of Statement: Fourth
Exhibit: MOH12
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

FOURTH WITNESS STATEMENT OF MICHAEL O'HIGGINS

I, **MICHAEL O'HIGGINS**, of Michael O'Higgins FX Class Representative Limited, whose registered address is c/o Scott+Scott UK LLP, St Bartholomew's House, 90-94 Fleet Street, London, EC4Y 1DH, **WILL SAY**:

Introduction

1. I have previously provided three witness statements in relation to the above claim (the "**O'Higgins Application**" or the "**Claim**"): the first was dated 28 July 2019 and filed with the Competition Appeal Tribunal (the "**Tribunal**") on 29 July 2019 (my "**First Statement**"); the second was dated 28 January 2020 and filed with the Tribunal on 5 February 2020 (my "**Second Statement**"); and the third was dated 23 April 2021 and filed with the Tribunal on the same date (my "**Third Statement**"). This is my fourth witness statement in relation to the claim sought to be brought (the "**Proposed Proceedings**") and it is provided to the Tribunal by way of: (i) update on certain developments since my Third Statement; and (ii) response to points raised in the case documents filed by Mr Phillip Evans on 23 April 2021 in Case Number 1336/7/7/19 *Mr Phillip Evans v Barclays Bank PLC and Others* (the "**Evans Application**").

2. In this statement, I:

    a. Respond to comments from Mr Evans about our comparative professional experience;

    b. Outline my ongoing communications and engagement with the members of the proposed class that the O'Higgins Application seeks to represent (the "**Proposed Class**");

    c. Explain the rationale behind the scope of the Proposed Proceedings and the definition of the Proposed Class put forward in the O'Higgins Application and why I believe them to most accurately reflect and cover the damage suffered by those persons at the hands of the Proposed Defendants;

    d. Explain my approach to notification of the Claim and distribution of proceeds, including with reference to the litigation plan filed with the O'Higgins Application in July 2019 (the "**Litigation Plan**");

e. Provide an update in relation to the O'Higgins Application funding and budget, and some comments by way of comparison with the arrangements for the Evans Application; and

f. Provide further detail in relation to the respective approaches of the O'Higgins Application and the Evans Application regarding the transparency to the Proposed Class of the documents in the Proposed Proceedings.

3. As with my First, Second and Third Statements, 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., and vice versa.

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. Nothing in this statement is intended to waive any privilege.

My professional experience

5. In his second witness statement dated 23 April 2021 ("**Evans 2**"), Mr Evans provides further information as to his background in competition law. In his carriage submissions filed on 23 April 2021 (the "**Evans Carriage Submissions**"), Mr Evans states: "*while* [Mr O'Higgins] *has occupied a number of financial services roles and did chair the (now disbanded) Channel Islands Competition and Regulatory Authorities, it is submitted that he does not possess anything approaching the wealth of experience in running large scale in-depth competition investigations and litigation upon which Mr Evans can draw*".[1]

6. In my previous statements I provided detailed information about my relevant professional experience, which includes extensive experience managing complex projects involving large numbers of participants and very significant budgets. Although the Evans Carriage Submissions seek to downplay or dismiss this experience with bald assertions such as the

[1] Paragraph 144 of the Evans Carriage Submissions.

one excerpted above, I believe it speaks for itself and I do not seek to repeat information about my professional background here.

7. One point I am obliged (regrettably) to clarify, however, is what I believe is a misleading impression created in the Evans Carriage Submissions, specifically, the statement at paragraph 144 about the Channel Islands Competition and Regulatory Authorities ("**CICRA**") being "*now disbanded*" and certain statements in footnote 165.

8. In relation to the status of CICRA, the decision was taken in April 2020 that the competition authorities in Jersey and Guernsey would revert to operating as separate island regulators. This is reflected in the documents referenced in footnote 165 of the Evans Carriage Submissions. For the avoidance of doubt, CICRA was not been "*disbanded*" without replacement, or for any perceived issue with how it operated or as a result of my tenure as Chairman. Rather, a demerger (instigated by the Jersey Minister for Economic Activity) occurred so that Jersey and Guernsey reverted to having separate competition authorities and operating as autonomous jurisdictions from a regulatory perspective. The decision to demerge was met with "surprise" by the CICRA board.[2]

9. As confirmed in my Second Statement, I left my position as Chairman of CICRA at the end of 2019. The Jersey Chief Minister made it clear to the States of Jersey (the island's Parliament) in June 2019, when extending my first term by six months, that he would welcome my serving for a second term. By the autumn of 2019, I communicated my decision not to seek a second term and finished my extended term on 31 December 2019. For completeness, during my time as Chairman there was no discussion with the Jersey government of dissolving the pan-Channel Islands competition authority and reverting to two wholly separate authorities.

10. I am uncertain as to the relevance of the statements in footnote 165 of the Evans Carriage Submissions in relation to there being other members of staff at CICRA in addition to me as Chairman (i.e. a Chief Executive, two executive directors, two non-executive directors, and seven other members). I assume that Mr Evans also worked with, and had support from, colleagues in all his professional roles, including his role at Which?. In any event, I regard experience of working with and managing teams (both comparatively small

[2] CICRA Annual Report 2019, page 5: https://www.gcra.gg/media/598245/cicra-annual-report-and-accounts-2019.pdf.

teams as in the CICRA and very large teams as in my time at Price Waterhouse, PA Consulting and the Audit Commission) as helpful expertise for a class representative.

11. Mr Evans' evidence and the Evans Carriage Submissions focus heavily on Mr Evans' expertise in competition investigations. As explained in my previous statements (in particular, my First Statement), I am familiar and comfortable with competition law concepts from my previous roles, in particular with CICRA. Importantly, however, I do not believe that the role of class representative under the Tribunal's collective action regime should be limited to those with expertise in competition law. In preparing and bringing the O'Higgins Application, I have put together a highly experienced team of legal and economic experts who are specialists in competition law and economics, as well as the FX market. Likewise, Mr Evans has assembled his own team. It would set an unfortunate precedent for the regime if the proposed class representative in proceedings before the Tribunal were expected, or required, to have an extensive background in competition law to be deemed suitable. This would inhibit the vast majority of class members, including class members who are extremely well informed about the industry affected by the relevant anticompetitive conduct, stepping forward to be a class representative. In effect, it would make the role of class representative a 'closed shop' for those who have already worked in competition law. Moreover, I am aware from discussions with my legal team that nothing in the Tribunal's 2015 Rules (the "**2015 Rules**") requires such expertise.

12. In light of the foregoing, my position remains that I am the most suitable person to lead the Proposed Class (as sole director of the Proposed Representative) due to my extensive background in large-scale, high-value project management, my long career in the financial sector, and in particular my long-standing involvement in one of the sectors (the pensions sector) adversely affected by the cartels in the FX market found by the European Commission ("**FX Cartels**"). It is my respectful view that my career has been more aligned than Mr Evans' in terms of dealing and communicating with the people likely affected by the FX Cartels and understanding their businesses.

Communication with the Proposed Class

13. At paragraphs 11 to 17 of my Third Statement, I provided an overview of my extensive engagement with the Proposed Class since my Second Statement. By way of further

update, I have undertaken the following additional steps to publicise the Claim and to keep the class updated since 23 April 2021:

a. **Oxford University's Bonavero Institute of Human Rights' Conference**: Along with Belinda Hollway of Scott+Scott UK LLP ("**Scott+Scott**"), I was a speaker on the panel at the "Access to Justice and Class Actions in England and Wales" conference on 7 May 2021, at which I discussed these proceedings and what motivated me to bring them.

b. **Information about the expert work**: With the assistance of Scott+Scott and the experts, an article summarising – in layman's terms – the O'Higgins Application's proposed approach to the quantification of damages was uploaded to the claim website on 25 May 2021. Members of the Proposed Class may request copies of the expert reports themselves, and are encouraged to send any questions to the website's general information email address.

c. **Documents filed on 23 April**: As explained in my Third Statement, as part of communicating with the Proposed Class, I have made various case documents available on the claim website. I am committed to running the Claim transparently, but I am also conscious of my obligations under Rule 102 of the 2015 Rules. With that in mind, Scott+Scott wrote to the solicitors for the other parties to the litigation, to give them the opportunity to object to the publication of the submissions and evidence filed in reply to the Proposed Defendants' response, and in response to the Evans Application. These documents were made available on the claim website from 5 June 2021. I note for completeness that I took a similar approach in relation to the two decisions of the European Commission (the "**Commission**") in respect of the FX Cartels (the "**Settlement Decisions**"): Scott+Scott wrote to the Commission before making those Settlement Decisions available on the claim website (as they had not been published on the Commission's website).[3]

[3] I note that the Settlement Decisions are also available on Mr Evans' claim website, though I do not know if this was with the consent of the Commission.

d. **Interview with Pensions Expert**: On 10 June 2021 I conducted an interview with Pensions Expert, a subdivision of the Financial Times, which focusses specifically on the pensions sector.

14. As outlined in its Litigation Plan, the O'Higgins Application continues to use social media to promote the Claim. Given the likely profile of the Proposed Class, I took the decision to focus these efforts through LinkedIn. While it can be a useful way to create momentum behind consumer campaigns and create awareness of certain issues for the public at large, I do not believe members of the Proposed Class (or their representatives) would consider Twitter to be a source of reliable, professional information for an action of this type. This was the rationale for my decision not to use Twitter in particular as a source to promote the Claim.

15. I intend to continue to communicate regularly with members of the Proposed Class, including through the methods explained above, at paragraphs 11 to 17 of my Third Statement, and in the notice and distribution plan attached to the Litigation Plan.

The scope of the proposed collective proceedings and class definition

16. At paragraphs 55 to 58 of Evans 2, Mr Evans discusses the differences between the approaches of the O'Higgins and Evans Applications to the scope of the proposed collective proceedings and the proposed class definitions. Having worked with the legal and expert teams on the scope of the O'Higgins Application and in defining the Proposed Class, I have every confidence in the fact that the O'Higgins Application most closely matches and reflects the victims of the anticompetitive conduct of the Proposed Defendants as determined by the Commission in the Settlement Decisions.

17. In particular, the Settlement Decisions refer at recital (9) to three types of trading: immediate orders; conditional orders; and orders to execute a trade at a specific FX benchmark rate or fixing. The O'Higgins definition of the Proposed Class includes as Proposed Class members those who undertook all three types of trading, and I understand from my expert team that they are confident that their proposed methodology will capture losses flowing from all three types of trading.

18. By contrast, I understand from my legal and expert team that, critically, Mr Evans' proposed approach to calculating damages in the Proposed Proceedings does not cover

all of the types of transactions identified by the Commission in the Settlement Decisions, but only the first type – immediate orders. Specifically, the methodology put forward by Mr Evans excludes conditional orders (such as resting orders) and benchmark trades from the damages analysis, which fall within the Commission's second and third categories. The result of this is that a potentially significant number of the transactions undertaken by those affected by the Cartels will be excluded from the Proposed Proceedings using Mr Evans' proposed methodology.

19. Based on my discussions with my legal and expert teams, I am confident that the O'Higgins Application proposes the most appropriate and suitable damages methodology for the Proposed Class, as it more effectively 'covers the field' of losses caused by the Cartels. I also understand that this methodology is capable of capturing both what the Evans Application calls 'direct harm' and 'indirect harm', and therefore there is no need for two formal subclasses as proposed by Mr Evans, at least at this stage of the litigation.

20. Finally, in order to assist potential members of the Proposed Class in determining whether they (and their FX transactions) fall within the scope of the Claim, the legal team have, under my supervision, drafted further guidance notes. These guidelines do not replace the Proposed Class definition but provide examples to clarify the application of the definition in practical and easily comprehensible terms (exhibit **MOH12**).

Litigation Plan and distribution of the Claim

21. In Evans 2, Mr Evans explains his approach to the notification of the claim he seeks to bring and distribution of the proceeds. My response is as follows.

Communications with members of the Proposed Class

22. Mr Evans describes the steps he has taken to date to communicate with members of the Proposed Class. I have already done the same in my Third Statement, so I do not repeat that information here. I note, however, that Mr Evans and I have used many of the same channels of communication, such as a claim website, press releases, press interviews leading to articles, video interviews for the claim website, speaking at conferences, LinkedIn and email. We have also identified and communicated with many of the same organisations, such as national and international media, and investor relations organisations such as Institutional Shareholder Services Inc. (who first notified its

members of the O'Higgins Application on 5 August 2019, and has been keeping its members updated on an ongoing basis) and Institutional Protection Services. I anticipate that these organisations will work with whichever of the Proposed Representatives is selected to take the case forward.

23. It does not appear that Mr Evans has had any interaction specifically with members of the Proposed Class, whether members of the opt-out class or potential opt-in members. This is in contrast to my meetings with various funds' lawyers in Dublin in October 2019, my discussions with various pension funds at the Institutional Investors Conference in Berlin in February 2020 and my communications with my own contacts in the pensions industry (see my Third Statement at paragraphs 12, 13, 14(e) and 14(f)).

Litigation plan

24. I provided the Litigation Plan as exhibit MOH4 to my First Statement. As I explained in paragraphs 40 to 44 of that statement, the Litigation Plan was put together with the support of Scott+Scott and the highly experienced claims administration experts Epiq Class Action & Claims Solutions, Inc. ("**Epiq**"). Epiq are the claims administrator in the FX class action proceedings in the US and Canada.

25. I note Mr Evans' indication that he intends to file an updated litigation plan following certification. For the avoidance of doubt, like Mr Evans, I do not consider the Litigation Plan to be a static proposal. As stated in the Litigation Plan, the O'Higgins claim website and communication strategy are regularly being, and will continue to be, updated and adapted to take account of developments in the case, and if applicable to reflect any trends or common themes arising from the reactions of potential class members.

26. Indeed, I have already introduced other means of communicating with the Proposed Class, not set out in the Litigation Plan (or the notice and administration plan attached thereto) – for example, conducting webinars to allow class members to learn about and engage with the Claim during the period when people have been unable to attend face-to-face meetings because of the Covid-19 pandemic, and the other methods of communication set out in my previous witness statement.

27. A further example of its dynamic evolution is that the disclosure aspects of the Litigation Plan did not anticipate the document review exercise which the Tribunal ordered in the

O'Higgins Application in November 2019 (before Mr Evans' claim was filed). In those circumstances, the legal team under my direction worked closely with OpenText (the litigation support provider identified in the Litigation Plan) to develop a mechanism for processing and reviewing the contracts provided to determine in the limited time available what, if any, preliminary issues arose from the disclosure exercise.

28. I will continue to take this flexible approach in light of evolving circumstances and the needs of the Proposed Class members. My interpretation of paragraph 6.30 of the 2015 Guide is that the Tribunal considers the proposed class representative's litigation plan in the context of certification rather than at later dates. However, I am at the Tribunal's disposal in this regard and, if it would be of assistance, I would be happy to file an updated Litigation Plan following certification and/or periodically going forward.

Comments on Mr Evans' litigation plan

29. Paragraph 108 of the Evans Carriage Submissions refers to paragraph 5.5 of the Evans litigation plan to demonstrate the steps his claims administrator, Angeion, is taking to publicise the Evans Application allegedly beyond those taken by O'Higgins. I am advised by Scott+Scott, however, that Angeion's proposals do not, in fact, go beyond the proposals in the Litigation Plan and, importantly, are either unworkable or labour-intensive and expensive, making them seemingly impossible with the £180k of budget Mr Evans has available for pre-distribution claims administration. There is also no information in Mr Evans' witness statements or submissions about how much of this has been done already (and therefore whether it is workable in practice). Of the five sources of information for sending out notices:

    a. The first is referred to as an HMRC trade information database which lists of all operational importing and exporting companies in the UK, although the link provided appears to be no longer active. From Scott+Scott's searches, there is information available for companies which traded with non-EU countries from 2016 until 2021 (and EU countries from 2021 onwards).[4] If this is the database to which Angeion is referring, the list is likely to be hugely over-inclusive as many entities will not be class members and will be replicative as there are multiple entities in the same corporate group. Further, the data only appears to

[4] https://www.uktradeinfo.com/.

be from 2016 onwards, therefore (presumably) a reasonable proportion of class members will be missing and many others will be included who did not trade during the relevant period. Mr Evans has not explained what, if any, filtering he intends to apply or on what basis. Whether or not filtering is applied, the only way to make use of this data is to send hard copy notices to registered offices of companies registered with HMRC, with little or no visibility of what the companies do or the likely recipient. This would be a very costly exercise.

b. The second (investing.com), according to Mr Evans' litigation plan, has the business names and addresses of 1,600 mutual funds across the EU. Again, Mr Evans has not given any information on how he intends to use this. The only option would be to send hard copy post to all – or a subset of those members, with the attendant costs.

c. The third and fourth are lists of business names of (cumulatively) 540 investment businesses. Again, Mr Evans and Angeion fail to make any proposal as to what they intend to do with these names. Presumably, the only option would be to look up their details manually before posting a hard copy notice to the address found on a public register, which would be an expensive process.

d. The fifth is described as Angeion's proprietary list. I note that Epiq also has such a list, which it intends to use (see Epiq notice and administration plan paras. 4.6 and 9.4 within the Litigation Plan).

30. In light of these points, I believe that the Litigation Plan is at least as complete as that of Mr Evans, which has certain deficiencies in terms of the proposed plans compared with the stated budget.

Distribution

31. My proposal for the distribution of the Claim proceeds is set out in section J of the Litigation Plan.

32. At paragraph 92 of Evans 2, Mr Evans states that he intends to obtain an opinion in support of any collective settlement application from counsel or an independent expert. I can confirm that I will do the same. This is not just a matter in the Tribunal's Guide as Mr Evans appears to suggest: Rule 94(4)(c) of the 2015 Rules requires an application for

collective settlement to contain a statement that it is fair just and reasonable supported by evidence. As such, Mr Evans' statement appears superfluous.

33. At paragraph 94 of Evans 2, Mr Evans states his intention to instruct an appropriately qualified independent expert (QC or economist) to review and provide a neutral evaluation of the proposed distribution mechanism. Mr Evans does not identify who this person might be. As stated in the Litigation Plan,[5] I (on behalf of O'Higgins) have provisionally engaged Velador to assist Epiq with both the calculation and the distribution of damages (including any analysis of data) and may instruct additional third parties to assist as appropriate. Velador are the quantitative finance experts responsible for distribution of the settlement award in the US FX class action proceedings and so have an abundance of relevant experience. If at the time it appears appropriate, or if the Tribunal so requires, I will of course obtain a further opinion or opinions.

34. I note that the O'Higgins Application has budgeted – even after the reallocation of the budget discussed below and in the Fifth Witness Statement of Belinda Hollway ("**Hollway 5**") – £2.7 million to cover the costs of distribution, some of which I anticipate will be spent on evaluating any settlement or distribution and presenting it to the Tribunal with supporting evidence. The equivalent line item in the Evans Application budget is £450,000, which, in my view, demonstrates that Mr Evans' claim is underfunded to the potential detriment of the Proposed Class.

Transparency

35. At all times, I (as sole director of O'Higgins) have sought to act with openness and transparency. In Evans 2, Mr Evans appears to argue that he has taken a more transparent approach to the Proposed Proceedings than O'Higgins, with a focus on the availability of the funding and ATE documents. For the reasons set out at paragraph 46 of Hollway 5, I believe that the approach of the O'Higgins Application has been at least as open and transparent.

Funding and Budget

36. I am aware from reviewing the documents filed by Mr Evans on 23 April 2021 that he has produced an updated version of the budget for his claim, as he has had to call on

[5] See paragraphs 66 and 72.

£949,063 of additional funding from his funder, Donnybrook Guernsey Limited. This additional funding appears, from comments by Mr Evans and in the absence of further explanation, to have been provided on the condition that Mr Evans' solicitors defer all discounted fees under their 50% conditional fee agreement until the O'Higgins and Evans Applications are decided by the Tribunal.

37. I am in charge of the O'Higgins case budget and, as set out at paragraph 45 of my Third Statement, I have scheduled quarterly reviews with my legal representatives, including the Deputy Finance Director of Scott+Scott, to ensure I understand how expenditure is tracking against the budget.

38. I am aware that we were within budget for the pre-filing costs, having spent approximately 12% less up the point of filing than provided for in the original budget. However, the costs from filing to CPO are proving to be greater than anticipated at the time the budget was prepared, primarily – although not entirely – as a result of the Evans Application and consequent carriage dispute. As a result, the budget has been reviewed and certain amounts have been re-allocated from the post-CPO budget to the pre-CPO budget. Further details are set out in Hollway 5. She provides an updated budget which reflects this reallocation at BAH28. While certain amounts have been moved forward from their previous allocation in the post-CPO period, such amounts do not represent additional funding. For the avoidance of doubt, Therium have been content to re-allocate the agreed budget and I remain confident that there is sufficient funding for the remainder of the proceedings.

39. A key driver for this requirement to re-allocate has been the filing of the Evans Application and the subsequent carriage dispute. In particular, O'Higgins has been required to provide additional expert work in the pre-CPO phase (i.e. from Professor Bernheim) in circumstances where – but for the Evans Application – the O'Higgins Application planned to commission and adduce such evidence at a later stage in the proceedings. O'Higgins has therefore had to re-adjust its approach to the Claim; the same does not apply to Mr Evans. Indeed, notwithstanding the fact that Mr Evans knew that he was creating a carriage dispute, Mr Evans is having to request additional funding and to have his solicitors defer their (already discounted) fees. In addition, Mr Evans elected to include Mitsubishi UFJ Financial Group, Inc. as a defendant, which has the effect not

only of increasing the adverse costs exposure but also increasing the amount of work required (and therefore costs incurred) by Mr Evans and his legal team.

STATEMENT OF TRUTH

I believe that 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.

Signed: .....

Michael O'Higgins

Date: 11 June 2021

Party: Applicant / Proposed Representative
Witness: M O'Higgins
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FOURTH WITNESS STATEMENT OF MICHAEL O'HIGGINS
