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

THE O'HIGGINS APPLICATION (Case no. 1329/7/7/19)

BETWEEN:-

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED
("THE O'HIGGINS PCR") **Applicant**

and

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(6) CITIGROUP INC.
(7) JPMORGAN CHASE & CO.
(8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) NATWEST MARKETS PLC
(12) NATWEST GROUP PLC
(13) UBS AG **Respondents**

and

(1) MUFG BANK LTD
(2) MITSUBISHI UFJ FINANCIAL GROUP INC. **Proposed Objectors**

THE EVANS APPLICATION (Case no. 1336/7/7/19)

BETWEEN:-

MR PHILLIP EVANS
("THE EVANS PCR") **Applicant**

and

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK N.A.
(6) CITIGROUP INC.
(7) MUFG BANK, LTD
(8) MITSUBISHSI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JP MORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) NATWEST GROUP PLC
(15) UBS AG **Respondents**

REPLY SUBMISSIONS OF THE O'HIGGINS PCR ON THE CARRIAGE ISSUE
dated 11 June 2021

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A. INTRODUCTION

1. These submissions by the O'Higgins PCR are served pursuant to paragraph 8 of the Tribunal's Order of 15 January 2021. They reply to the Evans PCR's Written Submissions on the Carriage Dispute dated 23 April 2021 (the "**Evans Carriage Submissions**"). Paragraph references are to the Evans Carriage Submissions unless otherwise indicated.

2. Save where expressly stated, the O'Higgins PCR maintains its case on the issue of whether the O'Higgins PCR or the Evans PCR would be "*the most suitable*" to act as class representative for the purposes of Rule 78(2)(c) (the "**Carriage Issue**"), as set out in its own submissions dated 23 April 2021 (the "**O'Higgins Carriage Submissions**"). Failure to address a point made by the Evans PCR should not be treated as an admission.

3. Having received the Evans Carriage Submissions, the O'Higgins PCR remains confident that it is the "*most suitable*" candidate for class representative. In particular:

   (1) The O'Higgins PCR's experts' proposed damages methodology captures all three of the affected categories of customer orders identified by the Commission Decisions, whereas the Evans PCR's experts' proposed methodology is unnecessarily limited, capturing only one affected category (customer immediate orders) and one type of loss (widening the spread) and in particular omitting to consider any damages at all arising from the manipulation of resting orders and the widespread practice of 'fixing the fix', both of which were major features of the cartels likely to have caused significant harm. (See further paragraphs 16-18 below, as well as paragraph 52 of the O'Higgins Carriage Submissions.)

   (2) The O'Higgins PCR's experts' proposed methodology is capable of implementation on the basis of data which will be available from the Proposed Defendants. The Evans PCR's experts, by contrast, propose to implement a methodology (requiring the exclusion of resting orders) which experience in the US proceedings with the database available there suggests will be unworkable (see further paragraphs 55-58 below); further, the Evans PCR's methodology generally depends on obtaining non-defendant data, which cannot necessarily be counted upon to be available in the quantity or quality required. (See further paragraph 27 below.)

(3) The O'Higgins PCR is better funded, has better ATE cover, and has made proper allowances for funding all parts of the case, including the management of non-domiciled opt-in claimants, and the costs of the distribution phase if necessary. (See further paragraphs 83-119 or sections K and L below, as well as paragraphs 36-43 of the O'Higgins Carriage Submissions.)

B. LEGAL FRAMEWORK

4. Although there is substantial common ground between the PCRs on the applicable legal framework for determining a carriage dispute, there are some noteworthy differences, which we now address.

B1. Priority of commencement

5. The Evans PCR – for obvious reasons – unduly relegates the factor which it labels as number 13 of 14 in its table at paragraph 21(e) – "*relative priority of commencement of the claim*".

6. Contrary to the Evans PCR's categorisation, that important factor is not fairly to be considered merely an aspect of "*the relative quality of the PCRs' legal teams*". Delay in filing may have nothing to do with the quality of the legal team. It is a highly relevant factor in the present case, where the Evans Application was filed no fewer than 135 days after the O'Higgins Application, for the reasons stated in section C of the O'Higgins Carriage Submissions and supported by the persuasive authority of Canadian law as explained at paragraph 8 of the O'Higgins Carriage Submissions. In particular, placing weight on the relative priority of the commencement of the claim promotes procedural economy and prevents the investment of the first mover from being undermined by subsequent applicants free-riding on its work.

7. In sum, the O'Higgins PCR bore the reputational risk of going first, organised counsel, funding and insurance and, in filing the initial claim, necessarily had to design and construct the claim from the ground up without the benefit of looking at someone else's blueprints.

B2. Case theory

8. It is common ground that "*case theory*", properly understood, may be a relevant factor in the proper determination of a carriage dispute. However, the Evans PCR overstates the importance of "*case theory*" as a relevant factor in the circumstances of the present case.

9. The O'Higgins PCR is confident that its case theory is superior – as explained in section C. Nevertheless, it is important that the Tribunal should understand the limits of the analysis of case theory which is conducted by Canadian courts when determining carriage disputes. (As the Tribunal will be aware, the UK Supreme Court affirmed in *Merricks* that the Canadian jurisprudence is "*persuasive in the UK*", in particular "*because of the substantial similarity of purpose underlying both their legislation and ours*" ([41]). The leading Canadian cases, in particular *Pro-Sys Consultants Ltd. v. Microsoft Corpn.* [2013] SCC 57, were described in some detail at [37]-[41] of Lord Briggs's leading judgment.)

10. The genesis of the new provisions of the Ontario Class Proceedings Act referred to in paragraph 29 of the Evans Carriage Submissions is the Report on Class Actions by the Law Commission of Ontario, which recommended the four criteria which now appear in that legislation and noted that the "*theory of the case*" and "*chances for success*" criteria:

> "*reflect the prevailing view of courts and plaintiff counsel about the appropriate criteria to decide carriage motions.*"[1]

11. As intimated in paragraph 30 of the Evans Carriage Submissions and the footnotes thereto, the prevailing view of the Ontario and other Canadian courts was and is to avoid adjudicating on the substantive merits of a proposed claim upon a carriage motion save in a clear case. As Molloy J stated in *Locking v. Armtec*:

> "*Clearly, it is inappropriate at the carriage motion stage to get into the likelihood of success on the substantive merits with respect to any given cause of action, or as against any given defendant. That level of scrutiny is not even appropriate at the certification stage*."[2]

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1 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (Final Report, July 2019), p. 27.

2 *Locking v. Armtec Infrastructure Inc.* 2013 ONSC 331 at [19].

12. Whilst, as the Evans PCR notes in footnote 28 of the Evans Carriage Submissions, other of Molloy J's dicta in that case suggest a wider degree of flexibility in the permissible level of analysis in Canada, the correct reading is Perell J's in the subsequent case of *Kowalyshyn v. Valeant*, namely that:

> "… *in* Locking v. Armtec Infrastructure*, the Divisional Court was not mobilizing the troops for a fulsome battle about the qualitative nature of the competing actions and about their relative likelihood of success. Rather, the Divisional Court affirmed the approach of* Setterington *that the qualitative analysis should be a limited and restrained analysis and one that does not speculate about which theory will win or about which theory is more likely to win.*"[3]

13. The limits reflect a sound policy to discourage the conversion of carriage disputes into elaborate and impractical mock trials giving the defendants ideas with which to strengthen their case against the proposed class in the ultimate claim. As Perell J (a Canadian judge with extensive experience of class actions, who in fact certified the FX class action in Canada[4]) observed:

> "*It is inappropriate for a court on a carriage motion to embark on an analysis of which claim is more likely to succeed because there is no meaningful objective measure to make the prediction. Moreover, in determining the likelihood of success should the court assume that the plaintiff will be able to prove the facts upon which his or her case theory depends? If not, what measure of probability should the court use for the likelihood of the plaintiff proving those facts? Should the court assume what defences the defendant will mount when the defendant has not pleaded but is benefiting by seeing the competing plaintiffs pick each other's cases apart?*"[5]

C. CASE THEORY

C1. Theory of harm

14. Paragraphs 33(a) and 34 to 43 of the Evans Carriage Submissions criticise the O'Higgins PCR's theory of harm.

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3 *Kowalyshyn v. Valeant* 2016 ONSC 3819 at [158].
4 *Mancinelli v Royal Bank of Canada* 2020 ONSC 1646.
5 *Ibid.* at [154], followed in *Strohmaier v. British Columbia* 2018 BCSC 1613 at [44].

(a) Direct vs. indirect harm

15. First, the Evans PCR says that the O'Higgins PCR does not sufficiently distinguish between effects on transactions entered into with the Proposed Defendants during their relevant infringement periods (which he terms "*direct harm*") and effects on other transactions (which he terms "*indirect harm*"). This criticism is misplaced:

    (1) Both forms of harm would be captured by the methodology which the O'Higgins PCR's experts propose to employ to estimate damages.

    (2) Further, as Professor Bernheim has explained, the O'Higgins PCR's sophisticated dummy variable method can accommodate the possibility that the cartels' effect varied across different types of transactions: paragraphs 92-93 of Bernheim 1.

    (3) The methodology proposed by the O'Higgins PCR's experts goes further than Mr Evans' experts' methodology. It will capture as many and more types of harm than the methodology proposed by the Evans PCR. That is because the Evans PCR's experts confine their analysis to an effective spread analysis. Professor Breedon (for the O'Higgins PCR) proposes to use *both* an effective spread methodology, as per Mr Evans' experts, and *also* a realised spread methodology. Analysis of realised spread has the ability to capture coordinated price manipulation, whereas analysis confined to effective spread will not.

    (4) It is simply not necessary to distinguish between so-called "*direct*" and "*indirect*" harm in order to calculate aggregate damages to the O'Higgins PCR's proposed class. For the purpose of calculating aggregate damages, one is looking to assess class-wide loss. The task is simply to identify damage caused by the cartels to the class as a whole. It might perhaps become necessary to distinguish between sub-categories within that proposed class at the stage of distribution of an aggregate damages award, if this is thought appropriate at that stage. However, that would be a separate exercise to be undertaken after analysis of the data and after trial of the claim against the Proposed Defendants. The Evans PCR's distinction between direct and indirect harm is likely to be too simplistic for that purpose. Whilst the O'Higgins PCR's experts consider that what the Evans PCR terms 'direct harm' may be less likely to have occurred, it is not possible to know before conducting

empirical analysis of the data. Unlike the Evans PCR, the O'Higgins PCR's methodology makes no assumptions in this regard.

(5) In sum, like the Evans PCR's proposal to have two classes, the proposal to distinguish between direct and indirect harm is premature, misapprehends basic mechanics of the FX market, and simply leads to complexity at this stage in the proceedings.

(b) Coordinated trading strategies

16. Secondly, the Evans PCR contends that the O'Higgins PCR is wrong to include harm caused by coordinated trading, on the alleged basis that it would be short-term in nature and only affect the specific customers that were transacting at the time of the conduct (see paragraph 36 of the Evans Carriage Submissions).

17. The Evans PCR is mistaken. For the Tribunal to accept his approach would deny recovery to victims of the cartels:

(1) The coordinated trading strategies concerned (collusive front-running, triggering of conditional price orders – such as resting orders – and benchmark manipulation) form a significant part of the findings in the Commission Decisions. See in particular recital (9) of each Decision which lists the three types of orders affected by the cartels:

"*The following three types of orders characterising the customer-driven trading activity (market making) of the participating traders are pertinent in the present infringement:*

(1) Customer immediate orders, to immediately enter trades for a certain amount of currency based on the prevailing market rate;

(2) Customer conditional orders, which are triggered when a given price level is reached and opens the traders' risk exposure. They only become executable when the market reaches a certain level (for example a stop-loss or take-profit order);

(3) Customer orders to execute a trade at a specific Forex benchmark rate or "fixing" for particular currency pairs, which in the current case only concerned the WM/Reuters Closing Spot Rates (hereinafter the "WMR fixes") and the European Central Bank foreign exchange reference rates (hereinafter the "ECB fixes")."

The Evans PCR's proposed methodology covers losses relating only to type (1) orders (and in consequence the Evans PCR's two proposed classes cover only spot and outright forward transactions, which are type (1) orders). The Evans PCR's proposed methodology excludes losses relating to types (2) and (3) customer orders – even losses caused in relation to such orders by widened bid-ask spreads, a type of loss which the Evans PCR's proposed methodology otherwise purports to measure.

The O'Higgins PCR's proposed methodology, by contrast, covers losses relating to all three types of customer orders – including not only losses caused by widened bid-ask spreads, but also losses caused in relation to types (2) and (3) customer orders by coordinated trading strategies.

The O'Higgins PCR's references to 'coordinated price manipulation(s)' and, 'coordinated trading strategies' include manipulations of types (2) and (3) customer orders.

(2) It does not follow from the allegedly "*transitory*" nature of the effects of coordinated price manipulations that the class-wide damages from these manipulations were small in aggregate. As the Commission Decisions note (recital (1)), the cartelists' collusive conduct and manipulations were carried out "*on an extensive and recurrent basis*". It follows, as Professor Breedon points out at paragraphs 2.8 and 4.8 to 4.9 of his third report ("**Breedon 3**"), that such conduct will have been likely to have had a pervasive and measurable effect on the entire market. Further, coordinated price manipulation appears to have been a particularly significant part of the cartelists' conduct. If these manipulations were widespread and pervasive, it is likely that such manipulations could produce substantial damages. This is liable to be the case notwithstanding their supposedly "*transitory*" nature when looked at individually. It is inappropriate (and not in the interests of the class) for the Evans PCR's experts to dismiss at the outset, before any disclosure is even obtained from the Respondents, the likelihood of being able to recover damages in respect of such widespread manipulations.

(3) Further, such substantial damages are likely overall to be shared between all members of the class: customers who trade fairly frequently will almost certainly

have suffered net harm from collusive front-running simply by the law of averages (as Professor Breedon explains at paragraph 4.10 of Breedon 3). There can exist only a tiny number of infrequent traders, if any, that could in principle have, by luck, been net beneficiaries of collusive front running (and of course those individuals may also have suffered other types of losses caused by the cartels). The possible presence of these individuals will not affect the class-wide calculation of damages, which will focus on net loss to the class, and can be addressed at distribution stage if it is really thought necessary.

(4) If the effect of coordinated price manipulations really were so transitory that it did not impact all transactions, the regression which the O'Higgins PCR's experts propose to conduct will appropriately weight the effect and accurately reflect its average magnitude in the estimate of the overall class-wide overcharge.

18. The Evans PCR's approach on this point seems to proceed on the mistaken assumption that in collective proceedings it must be positively demonstrated that all class members have been harmed in a common or consistent way; thus, at paragraph 40 of the Evans Carriage Submissions, emphasis is placed on the idea that harm caused by the infringements in the form of widened bid-ask spreads is the "*harm that would be common to the members of the proposed class*", while at paragraph 42 it is said that conduct such as collusive front-running and benchmark manipulation should be excluded because it "*would not have harmed all class members in a common or consistent way*". No authority is given to support the proposition that the class definition must be limited in this way. It is wrong as a matter of law:

(1) If this were a requirement in UK law, it would be a significant limitation on the operation of the UK collective proceedings regime. However, the leading case, *Merricks v. Mastercard* [2020] UKSC 51, [2021] Bus LR 25, contains no hint whatsoever of such a requirement; indeed, it positively disavows any requirement that there be any focus on individual claimants' losses when damages awards are calculated and distributed. Lord Briggs's judgment emphasises the need to quantify damages on a 'broad axe' basis in order to do practical justice and to vindicate claimants' rights against wrongdoers, not least having regard to "*the perception that anti-competitive conduct may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers*

[here, FX market participants] *who may bear the ultimate loss from misconduct which has already occurred*" (at [53]). It would run wholly counter to the tenor of his conclusions to insist on a formalistic requirement that every single class member have lost out in the same way.

(2) The Canadian jurisprudence (which, as noted, is treated as persuasive by the Supreme Court in *Merricks*) makes it clear that the so-called 'commonality' requirement does not import a requirement that every class member have suffered damages in a common or consistent way, or even at all:

(a) In *Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46, [2001] 2 SCR 534, the Supreme Court of Canada set out the so-called 'commonality' requirement as follows, at [40]:

"*Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.*"

(b) The Court has subsequently made clear that this requirement must be applied flexibly, and that the key element of it is the requirement that there be *no conflicting interests* as between members of the class. In *Vivendi Canada Inc. v. Dell'Aniello* 2014 SCC 1, [2014] 1 SCR 3, at [45]-[46], the Court said:

"*45. …* [I]*t should be noted that the common success requirement identified in* Dutton *must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.*

46. Dutton *and* Rumley *therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.*"

(our emphasis)

(c) As the Court also emphasised in *Vivendi* (see [4]), the question is whether certification would advance the resolution of the litigation with respect to all the members of the group. There is no requirement that the *answer* to the questions raised by the common issues be identical, or "*common or consistent*" to use the language of the Evans PCR.

(d) Indeed, the very teaching of *Microsoft*, the leading Canadian case (as noted by the UK Supreme Court in *Merricks*) is that it was necessary only to establish as a common issue at the certification stage that loss had been suffered *at the indirect purchaser level* – not that every single member of the class had suffered such loss. The Canadian Supreme Court explained this recently in *Pioneer Corp. v. Godfrey* 2019 SCC 42, 431 DLR (4th) 383, at [107]. The Supreme Court explained that certification of loss as a common issue did not presuppose a finding that all class members had in fact suffered loss. For example, if, at trial, the trial judge concluded that an identifiable subset of class members did not suffer a loss, then in that case the trial judge could exclude those members from participating in an award of damages, and make an aggregate award of damages in respect of the others ([120]).

(e) Further, as the Court elaborated in *Hollick v. City of Toronto* [2001] SCC 68, [2001] 3 SCR 158, at [19]-[21], all that is required at certification stage is that each class member have a "*colourable claim*", which requires that there be "*some rational connection between the class as defined and the asserted common issues*". This "*identifiable class*" requirement asks the putative representative to show that the class is defined sufficiently narrowly; however:

> "*The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue.*"
>
> (emphasis in original)

(f) It follows that, as a matter of law, a proposed class definition is not overbroad merely because it may include some persons who will not have a successful

claim against the defendants. Conversely, the Evans PCR's approach is arbitrarily narrow by its exclusion of harm caused by collusive front-running, because it excludes a large number of persons (and a very large quantum of losses) apparently simply because of the hypothetical possibility that an exceptionally lucky person may have profited rather than been harmed by the cartel (when in fact the likely scenario is that every class member was harmed overall owing to losses caused by both collusive front-running and by the other adverse selection costs described by Professors Bernheim and Breedon).

(3) It is possible that, in assuming that a "*common or consistent*" loss requirement applies, the Evans PCR is thinking of the standard applied by the US Supreme Court in *Comcast v. Behrend* 133 S.Ct. 1426 (2013), where the Court referred in passing to the "*requisite commonality of damages*" (fn 6).[6] However:

(a) As noted, it is the Canadian and not the American approach which the UK Supreme Court has affirmed as being persuasive in *Merricks*, based on the similarity of purpose of the underlying legislation.

(b) Even in the United States, there is variation of approach across circuits in relation to uninjured class members. However, the common approach is to proceed on the basis that a class may be certified even where it is possible that some class members may successfully have avoided injury altogether, and even where there are individual variations in damages across the class: *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014). If it cannot be presumed that all members of a class have been injured, this is something which should not in itself prevent certification, but can be addressed at trial if necessary: *In Re Asacol Antitrust Litigation* 907 F.3d 42 (1st Cir. 2018).

(c) Even that question does not arise here. Again, while one can posit the existence of an exceptionally lucky person who may have profited rather than been harmed by the cartel, this is in practice highly unlikely. For the reasons

[6] It is unclear why the Evans PCR, who claims that he wishes to "*set the tone*" for the UK collective actions regime (Evans 1, para. 33) is advancing a legal test which is so much more onerous than necessary.

already given, it can in practice be presumed that every single class member has been harmed. The question grappled with in cases such as *In Re Asacol* therefore does not even arise.

C2. Quantum methodology

19. Paragraphs 33(b) and 44 to 70 of the Evans Carriage Submissions criticise the O'Higgins PCR's quantum methodology.

(a) Use of realised half-spread as dependent variable

20. The O'Higgins PCR's experts propose to use both effective and realised spreads in their methodology. While using realised spread is their preferred methodology, they consider that it may be beneficial to adopt both approaches, as a comparison may allow them to decompose any measure of harm into pure spread widening and collusive front-running, which would help in understanding and interpreting the results.

21. By contrast, the Evans PCR proposes to use effective spreads exclusively, and eschews the use of the realised half-spread on the basis that he claims "*it does not measure customer trading costs*" but rather "*the FX dealer's net revenue*" (para. 58).

22. The Evans PCR is mistaken. As Professor Breedon explains at paragraph 4.21 of Breedon 3, although the realised spread can be thought of as a measure of dealer revenue per trade, the extra dealer revenue in this case "*is equivalent to the cost passed on to other market participants (either directly to the customer or indirectly to other non-informed traders)*". It is therefore an appropriate measure of harm. Whilst the effective spread is a fair measure of customer cost for a service which includes absorbing the price impact, it cannot be used to compare different services (one where the dealer bears the price impact and one where the dealer does not). Although the effective spread is the price the customer paid, the service provided is different as a result of collusion, and so the effective spread will tend to understate damages in this circumstance (see paragraph 4.22 of Breedon 3).

23. Realised spread is appropriate as a measure of the harm inflicted on the Proposed Class. By using <u>both</u> effective and realised spreads, Professor Breedon's methodology on behalf

of the O'Higgins PCR provides a potential path to capturing damages caused by collusive front-running and benchmark manipulation, provides a sensitivity test for each model, and also provides a basis to check the reliability of the models.

24. The Evans PCR's submissions seem to proceed on a confused basis about how it is actually proposed that effective and realised spreads be used.

25. First, at paragraph 62 of the Evans Carriage Submissions, the suggestion is made that using both the effective and realised spreads risks double-counting, and conversely if it is proposed to use only one at a time, it is necessary to devise an objective methodology which explains when one or the other is used. Professor Breedon addresses these points at paragraphs 4.12 to 4.15 of Breedon 3 and makes clear that these criticisms are quite misconceived. As he explains:

    (1) The effective and realised spread measures operate concurrently rather than cumulatively or alternatively, as the Evans PCR seems to assume: by applying them both, it is possible to ensure that the effects of both the widening of effective spread and the effects caused by coordinated price manipulation are caught.

    (2) Further, there is no question of the use of realised as opposed to effective spreads in any one case mistakenly identifying a smaller cartel effect, as the Evans PCR suggests, on the basis that the realised spread tends to be smaller than the effective spread. That is because the methodology proceeds by measuring *the difference in the spread itself* as between the cartel and benchmark period. Thus, as long as the realised spread is compared with the realised spread, or the effective spread is compared with the effective spread, a consistent cartel effect can be identified.

    (3) In fact, taking account of both measures (as opposed to only using realised spreads) may make it possible to decompose any measure of harm into pure spread-widening (affecting type (1) customer orders) and collusive front-running (affecting types (2) and (3) customer orders), which may help in understanding and interpreting the results when the methodology is applied to actual data.

    (4) Indeed, in the unlikely event that no coordinated price manipulation or collusive front-running occurred and all the harm was purely from spread-widening, then the

realised and effective spreads would converge on the same estimate, so that there is no downside in using both.

26. Second, at paragraphs 63-64 of the Evans Carriage Submissions, criticisms are advanced in relation to the time window proposed to be analysed by Professors Bernheim and Breedon in order to calculate the realised half-spread following a trade. The Evans PCR's criticisms are misplaced. The point made by both Professors Bernheim and Breedon (see paragraphs 80-82 of Professor Bernheim's third report ("**Bernheim 3**") and paragraphs 4.30-4.37 of Breedon 3) is simply that the time window needs to be long enough to identify the immediate impact of the trade – taking into account booking errors, a problem which has been considered in the US proceedings, as pointed out at paragraphs 4.32-4.33 of Breedon 3 – but not so long that it introduces unnecessary noise. The proper approach is to test a range of possible time windows empirically against the data once received to strike the right balance. In advance of seeing the data, it would be futile and arbitrary to pluck a number for a time window out of the air. The O'Higgins PCR's experts' approach is transparent and will be driven by the data.

(b) Methodology for calculating 'indirect harm'

27. At paragraph 68(a), the Evans PCR suggests that the O'Higgins PCR's methodology would be handicapped if it were unable to obtain data from third parties. However:

    (1) Importantly, non-defendant data are not essential in order for Professors Bernheim and Breedon to implement their methodology: see paragraphs 5.7 to 5.11 of Breedon 3 and paragraph 15 of Bernheim 3. Even if non-defendant data were unavailable, an estimate of what the Evans PCR calls 'indirect harm' could be obtained using trades in the defendant data from times when the specific defendant did not participate in the cartels according to the Commission Decisions. Professor Breedon observes in this regard that, if he were to receive data from all of the Proposed Defendants for the whole infringement period, over a quarter would fall into that category (see paragraph 5.10 of Breedon 3). This is, in practice, likely to prove a more effective and direct comparison than attempting to compare between defendant and non-defendant data. (For example, it is possible that non-defendants were in fact members of the cartels or involved in other anticompetitive conduct, albeit that only foreign regulators and not the Commission have identified them as

such, or that other complicating factors in the market or in the data sets make the comparison difficult.) It follows that the criticism advanced at paragraphs 68(b) and (c), to the effect that so-called indirect harm arising from transactions with non-defendant banks cannot be estimated without data from those banks, is misconceived.

(2) That criticism is also unrealistic. Taken to its logical conclusion, the Evans PCR's approach requires access to all data for all FX market makers across the cartel period, which is of course not available. There are, moreover, serious problems with the four main data sources which Mr Ramirez proposes to use that are set out at paragraph 67 of the Evans Carriage Submissions. These problems are outlined in paragraph 5.13 of Breedon 3, where Professor Breedon explains why he feels unable to depend on them. Other third-party data sources mentioned by Mr Ramirez in passing are unlikely to be fruitful sources of relevant data, as Professor Breedon explains at paragraph 5.14 of Breedon 3.

(3) The O'Higgins PCR does not deny that third-party disclosure is a possibility. To the extent that non-defendant data are available, they can obviously be used to corroborate the damages calculation arrived at using only defendant data. Professor Breedon explains the possible utility of non-defendant data at paragraph 5.15 of Breedon 3; Professor Bernheim does so at paragraphs 14-15 of Bernheim 3.

(4) In particular, as Professor Breedon explains at paragraph 5.7 of Breedon 3, and Professor Bernheim further explains at paragraphs 78-79 of Bernheim 3, they do not contemplate that any non-defendant data would be used in a wholly separate model. As suggested previously, a "*similar analysis*" could be applied in respect of such data once received, though it may be necessary to 'scrub' the data by applying preliminary adjustments to it before incorporating it into the model. All will depend on what the data looks like once received. The Evans PCR's attempts to suggest that there is some difference between the proposals of Professors Bernheim and Breedon in this regard (e.g. at fn. 89 of the Evans Carriage Submissions) are without foundation.

(c) Class size

28. The criticism of the O'Higgins PCR at paragraph 70(a) of the Evans Carriage Submissions for allegedly not providing a proper estimate of the class size is unfounded.

29. The O'Higgins PCR has provided an approximate estimate, sufficient for the pertinent purposes of understanding the scale of its proposed claim and formulating a plan for that claim: see paragraph 36 of its Amended Claim Form and paragraph 27(a) of O'Higgins 1.

30. The Evans PCR has provided estimates in the form of wide ranges, with the top of his ranges being double the bottom end, while expressly recognising that these estimates "*have a number of limitations due to a paucity of data on the number of customers who transact FX*" (Ramirez 2, paragraph 111, referring to Ramirez 1, paragraphs 69 and 71). This undermines any superficial air of precision or accuracy in his numbers. Both experts propose to rely on the Respondents' transaction data once received in order to refine their estimates.

31. Whilst the O'Higgins PCR stands by his estimate, it is acknowledged that the Tribunal is not presently in a position to assess which of these estimates is correct. Professor Breedon comments that "*a far more precise estimate could be produced after receipt of Respondent data and relevant third-party data*", at paragraph 5.40 of Breedon 3.

(d) Volume of commerce

32. The Evans PCR advances a similar criticism in respect of the PCRs' respective experts' volume of commerce calculations at paragraph 70(b) of the Evans Carriage Submissions. It is there suggested that the O'Higgins PCR's experts do not intend to compute volume of commerce in respect of transactions entered into with non-defendant banks (Relevant Financial Institutions), and that their market share data which Professor Breedon proposes to rely upon do not distinguish the location of the customer. That is a misplaced criticism, since Professor Breedon in fact does calculate a total volume of commerce for the whole opt-out class, and correctly identified the question of domicile as key for this purpose (see paragraph 7.47 and Table 11 of Breedon 1). Professor Breedon further explains his approach at paragraphs 5.24 to 5.34 of Breedon 3.

33. Such criticisms are in any event beside the point: it stands to reason that both PCRs' experts have only been able to conduct high-level estimates at this stage in the proceedings using such data as are publicly available. As Professor Breedon fairly notes, it is perfectly reasonable that he and Mr Ramirez might have taken into account different parameters at this stage (see paragraph 5.34 of Breedon 3). The Tribunal is not currently in a position sensibly to assess the accuracy of either estimate.

(e) Overcharge analysis

34. Paragraph 70(c) of the Evans Carriage Submissions demonstrates a misunderstanding as to how a multiple dummy variable model is estimated. It claims that the O'Higgins PCR's approach would require the "*estimation of millions of overcharge estimates*". In fact, the plan is to introduce dummy variables (interacted with a cartel dummy) to test if the cartel effect differs across key features such as time, currency pair, trade size, dealer identity and client type.

35. Whilst this could amount to a fairly large number of dummies, Professor Breedon's confident prediction is that it will be significantly fewer than one million, and probably fewer than one hundred: see Breedon 3, para. 2.17. Professor Bernheim goes into detail on how the model works and explains that the idea that one would use millions of cartel dummy variables, giving rise to a computational feasibility problem, rests on confusion about how the model works and an apparent lack of familiarity with econometric prediction methods: see paragraphs 59-63 of Bernheim 3. Indeed, as he notes at paragraph 63, his proposed approach has been applied in the US proceedings without apparent difficulty.

D. CLASS DEFINITION

D1. Content/weight to be accorded

36. The Evans PCR overlooks an important consideration in a carriage dispute in relation to class definition: the extent to which the definition would lead to loss going uncompensated.

37. At footnote 97 of the Evans Carriage Submissions, the Evans PCR states that "*the case law in the Canadian common law provinces does not contain a clear preference for a broader or narrower claim*." In fact, the reference work cited states: "*If additional causes of action are not fanciful or frivolous, and may provide a route to damages not available under a narrower claim, then the broader action may be preferable.*"[7]

38. Indeed, as set out at paragraph 18(2)(e)-(f) above, the Supreme Court of Canada has explained in *Hollick v. City of Toronto* [2001] SCC 68, [2001] 3 SCR 158, at [19]-[21], that the class definition should not be arbitrarily narrow. As there noted, the Evans PCR's class definition is arbitrarily narrow, in particular in in its exclusion of harm caused by collusive front-running and arising from customer order types (2) and (3) (as defined at paragraph 17(1) above): see further section D3 below.

D2. Two classes

39. The Evans PCR's proposed use of two classes is misguided for the reasons given in paragraph 47 of the O'Higgins Carriage Submissions.

40. The matters set out in paragraph 77 of the Evans Carriage Submissions do not, as there claimed, "*necessitate defining two classes*" at this stage. The O'Higgins PCR's approach allows for the possibility of creating sub-classes in due course, and/or taking into account differences between categories of class members at the distribution stage, should that become necessary.

D3. Excluded transactions

41. The Evans PCR wrongly excludes benchmark trades and resting orders from his class definition – despite their inclusion in the Commission Decisions from which the proposed claims follow on – whereas the O'Higgins PCR includes them.

42. The result of the Tribunal granting a CPO in favour of the Evans PCR would, therefore, be to deprive potential class members of the possibility of recovering damages for such transactions through collective proceedings.

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7 *Branch on Class Actions* (2nd ed., 2019), para. 5.160.

43. By contrast, the result of the Tribunal granting a CPO in favour of the O'Higgins PCR would be to allow potential class members that possibility. Of course, if that that aspect of the O'Higgins PCR's claim were subsequently to fail at trial then aggregate damages would not be recovered to that extent. However, the Evans PCR's approach would preclude the Tribunal from even trying that issue.

(a) Benchmark trades

44. The Evans PCR's proposal to exclude benchmark transactions means that his approach will fail to capture the impact of the cartels' coordinated trading strategies (e.g. front running) around the time of benchmark fixes.

45. The Evans PCR's principal reason for excluding benchmark trades is that they do not fit his preferred methodology, which uses effective spreads. He states at paragraph 80 of the Evans Carriage Submissions:

"*these trades were excluded because they typically do not involve the application of a bid-ask spread. Accordingly, such transactions would not be affected by the unlawful widening of bid-ask spreads, which is the subject of Mr Evans' proposed proceedings.*"

46. The position is expressed even more starkly at paragraph 170 of Rime 2:

"*since Mr. Ramirez's methodology measures the impact of the Cartels on bid-ask spreads, benchmark transactions should be excluded because bid-ask spreads do not apply to them*".

47. In other words, the Evans PCR approach is entirely circular. He is here saying that the Tribunal should exclude benchmark trades because his methodology is right, even though the appropriateness of his methodology is a point in issue. The O'Higgins PCR submits that it is a serious problem with the Evans PCR's methodology that it concerns itself only with bid-ask spreads.

48. It is recognised that the Evans PCR proceeds in paragraph 80 to state that he does not consider that the infringements identified in the Decisions would cause harm to benchmark trades that is capable of being computed on a class-wide basis. However, the O'Higgins PCR has demonstrated the contrary.

49. Because benchmark transactions match buy orders and sell orders at the same price (the fix rate), the quoted bid-ask spread and effective bid-ask spread is zero in these cases. Those are the measures on which the Evans PCR's experts focus. However, there can be no assumption that the realised bid-ask spread will be zero for benchmark transactions. The O'Higgins PCR's experts' methodology incorporates reliance on the realised spread. To the extent that paragraph 84(a) of the Evans Carriage Submissions raises objections to the use of the realised spread, these objections are misconceived for the reasons given in section C2(a) above. To the extent that the Evans Carriage Submissions there allege that coordinated trading strategies such as benchmark manipulation did not have class-wide effects, this is misconceived for the reasons given in section C1(b) above.

(b) Limit/resting orders

50. As to limit/resting orders, in paragraph 81 of the Evans Carriage Submissions, the Evans PCR recognises that "*at least some of these orders may have been affected by the infringements identified in the Decisions*". Despite this, he nevertheless chooses to exclude them from his proposed collective proceedings.

51. His first reason for their exclusion is: "*it would be difficult to identify whether, and if so how, these transactions would be affected by any widened bid-ask spreads resulting from the infringements*" (para. 81). He refers in particular to the evidence of his expert Mr Knight who identifies that in the case of some such orders (take-profit orders) the customer may earn (rather than pay) a bid-ask spread and so benefit from the infringements. However, as Professors Breedon and Bernheim explain (see paragraphs 37 to 40 of Bernheim 3, and paragraphs 3.17 – 3.18 of Breedon 3), those possibilities will be rare:

    (1) First, FX dealers are the primary market makers in FX trading. In a typical executed transaction, the customer pays the spread when its buy/sell order matches a dealer's ask/bid quote.

    (2) Second, Mr Knight says this concern only even applies in principle in respect of take-profit orders yet Mr Evans excludes all resting orders.

(3) Further, when a resting order is triggered on a voice trade or single bank trading platform, it is converted to a market order on which the customer pays the spread. Even if not charged the spread, a customer is likely to be hurt by collusive front-running (i.e. harm caused by coordinated price manipulation), as opposed to harm caused by widening the spread; as explained at paragraph 23 above, the O'Higgins PCR's experts' damages methodology will capture such harm, whereas the Evans PCR's experts' damages methodology will not.

52. In any event, the estimate of the overall cartel effect remains accurate even if it turns out that some of the included transactions resulted in a class member earning the spread. To the extent that customers made gains, the O'Higgins PCR's experts' regression analysis will accurately net out such 'benefits' and identify the overall net harm to the class caused by the cartels, which is the ultimate objective of the class-wide damages analysis. It is important that the harm arising from limit/resting orders be calculated, because limit/resting orders are identified by the Commission Decisions as having been impacted by the cartels (see paragraph 17(1) above) and indeed are particularly likely to have been impacted for the reasons given at paragraph 3.15 of Breedon 3, and as noted at paragraphs 45 to 46 of Bernheim 3.

53. The Evans PCR's second reason for excluding limit/resting orders is that "*harm may not be consistent across all transactions*" (para. 81). This is not a valid reason. Harm need not be consistent across a proposed class: see paragraph 18 above.

54. Mr Knight also refers to the idea that "*customers placing take-profit orders can be said to be providing liquidity to the market, in the sense that they are specifying a price at which they would be willing to enter into a Spot trade*" (paragraph 77). As Professor Breedon explains (at paragraph 3.18 of Breedon 3), this reasoning is confused. First, take-profit orders on voice trades or single bank platforms do not provide liquidity, but rather require banks to access liquidity, which is something quite different. Secondly, it is in any event unclear why this point means that such customers have not suffered cartel harm when the trade executes. Finally, this would, in any event, provide no basis for excluding stop-loss orders (in addition to take-profit orders).

(c) Practical problems with excluding benchmark trades and limit/resting orders

55. A fundamental problem with the Evans PCR's approach is that it is likely to be extremely difficult in practice for his experts to exclude limit/resting orders from their analysis. Banks and relevant financial institutions do not appear to hold the relevant data – see Joint CPO Response, paragraph 63:

> "*the Respondents do <u>not</u> hold data which enables these transactions to be reliably identified across the claims period.*"

56. To similar effect, Judge Schofield held in the US FX class proceedings:

> "*Identifying and excluding benchmark trades and resting orders cannot be accomplished through generalized proof. Rather, a fact-intensive individualized inquiry would be required -- for example, a review of the relevant communications between class members and Defendants. This would be an enormous undertaking.*"[8]

57. Professor Breedon endorses this conclusion in relation to resting orders and further criticises Mr Ramirez's reliance on an old academic article which considers an irrelevant data set, at paragraphs 3.20 to 3.22 of Breedon 3.

58. An additional practical issue is that, as a result of excluding certain types of trades, the Evans PCR will have only a partial picture of the effect of the cartels, including their effect on spreads. Recital (9) of each of the Commission Decisions identifies three types of orders pertinent to the infringements: (1) customer immediate orders; (2) customer conditional orders; and (3) customer orders to execute a trade at a specific FX benchmark rate or fixing (see paragraph 17(1) above). By excluding categories (2) and (3) from the proposed classes and therefore from their analysis, the Evans PCR's experts' understanding of how the cartels operated and their impact on spreads would inevitably be incomplete.

D4. Transactions entered into in the EEA

59. The O'Higgins PCR has proposed that a transaction falling within the class is entered into within the EEA when it is "*priced and/or accepted*" by the Relevant Financial Institution (or through the ECN) within the EEA. By contrast, the Evans PCR's test

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8 *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 407 F. Supp. 3d 422 (S.D.N.Y. 2019), p. 433.

proposes that a transaction is one where either (i) the Defendant or Relevant Financial Institution representative/sales desk/business unit entering into the transaction is located in the EEA or (ii) where the class member entering into the transaction is located in the EEA. Both tests are seeking to achieve the delicate task of including trades caught by the Commission Decision(s) and, as such, falling within the territorial ambit of EEA competition law. EEA competition law[9] applies only to agreements or concerted practices to the extent that they are "*implemented*" in the EEA[10] or have a "*foreseeable*", "*immediate and substantial effect*" on competition in the EEA.[11] Accordingly, insofar as a cartel is implemented in and proximately affects only markets outside the EEA it cannot fall within the ambit of a Commission decision.

60. On this basis, the second limb of the Evans PCR's test appears to be too wide for the reasons set out at paragraph 48 of the O'Higgins Carriage Submissions. In particular, a class member even if domiciled in the EEA would not be a proper class member if its trading was transacted exclusively with, for example, the Tokyo desk of their bank. This is because trades transacted in Tokyo would fall outside the territorial ambit of EEA competition law, since they would neither have been implemented in the EEA nor would they have been likely to have had a foreseeable, immediate and substantial effect on competition in the EEA: see, for example, *Unlockd Ltd. & ors. v. Google Ireland Ltd. & ors.* [2018] EWHC 1363 (Ch) at [37]-[42].

61. Paragraph 87 of the Evans Carriage Submissions makes two unfounded criticisms of the aspect of the O'Higgins PCR's class definition concerned with identifying whether a transaction is entered into in the EEA.

62. First, the Evans PCR observes that it "*may*" be difficult for class members to consistently identify where their transactions were priced and/or accepted. It is intended that class members will be assisted by the O'Higgins PCR providing potential class members with guidance notes, showing them how to apply the class definition to typical situations. Exhibited to O'Higgins 4 are certain draft guidance notes based upon the information currently in the O'Higgins PCR's possession. No doubt, it may be appropriate to refine these guidance notes further in due course.

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9 See the Commission's *Guidelines on the effect on trade* [2014] OJ C101/81 at [100].
10 Joined Cases 114/85 et al *Wood Pulp I* EU:C:1993:120.
11 Case C-413/14P *Intel Corp. v. Commission* EU:C:2017:632, at [49].

63. Secondly, the Evans PCR suggests that the application of the definition with respect to available data is unclear, at least in relation to the "*priced*" limb. He suggests that it is not presently clear whether FX dealers, such as the Proposed Defendants, would necessarily maintain data as to where a transaction is priced (traders might say 'quoted'). This is an odd observation for the Evans PCR to make given that his own Claim Form states:

"*It is anticipated that the Proposed Defendants' transaction records will indicate which sales desk serviced a particular transaction*"[12]

D5. Relevant Financial Institutions

64. As to paragraphs 90 to 94 of the Evans Carriage Submissions, the difference of 16 banking groups as between the lists of "*Relevant Financial Institutions*" generated by the two PCRs has been addressed at: (1) paragraph 46 of the O'Higgins Carriage Submissions; (2) paragraphs 86 to 92 of Hollway 4; and (3) paragraphs 5.7 to 5.9 of Breedon 2.

65. The difference appears to be a consequence of the Evans PCR additionally obtaining and using a list which the Bank of England considers confidential (and is no longer able to provide) of those who participated as "*reporting dealers*" in its 2016 submission to the BIS Triennial Central Bank Survey of Foreign Exchange and Over-the-Counter Derivatives Markets. Our underlining is to emphasise that the year (post-dating the cartel period) and the scope (non-FX OTC derivatives[13]) demonstrate that the Evans PCR's list is likely to be over-inclusive.

66. A real disadvantage of listing more Relevant Financial Institutions than is necessary is that such Relevant Financial Institutions and their affiliates are unable themselves to claim as victims. Accordingly, being over-inclusive has the potential unfairly to exclude legitimate class claimants (who are likely to be some of the larger victims of the cartels). By contrast, as Professor Breedon notes at paragraph 5.8 of his second report, the very reason why those dealers were excluded is that they were, in his opinion, unlikely to act

[12] Evans Claim Form, para. 92(a).
[13] e.g. those linked to interest rates or equities.

as active dealers in G10 currencies, and so the actual difference between the two lists in terms of volume of commerce is likely to be small.

67. If, however, the Tribunal considers (contrary to these submissions) that the Evans PCR's list is preferable or, more plausibly, that certain of the additional banking groups identified by the Evans PCR would be appropriately included, then the O'Higgins PCR is content to amend its list accordingly.

E. SCOPE OF CAUSES OF ACTION

68. As to paragraphs 96 to 100 of the Evans Carriage Submissions, the PCRs broadly agree. Paragraphs 10(10) and 69(2) of the O'Higgins Carriage Submissions are repeated.

F. LITIGATION PLANS

69. The PCRs' litigation plans are substantively similar.

70. In paragraph 107 of the Evans Carriage Submissions, the Evans PCR repeats his contentions regarding the relative quality of the PCRs' estimates of class size, which have been addressed in section C2(c) above. He does not identify any significant practical differences in the litigation plans which have resulted. In fact, the O'Higgins PCR's plan more appropriately reflects the likely class size in its budget for distribution of damages: see paragraph 76(a) of Hollway 4.

71. In paragraph 108 of the Evans Carriage Submissions, the Evans PCR notes that he has proposed to contact certain trade associations and three global class actions firms. Comparable activities which the O'Higgins PCR has in fact already conducted are referred to in O'Higgins 3 at paragraphs 14(e)-(f) and (j)-(k) and 16(b)-(c), while O'Higgins 4 confirms that the O'Higgins PCR continues to communicate with the proposed class through social media (paragraph 14), national and international media, and specialist investor relations organisations. Following certification, a bigger and more targeted campaign will commence to inform opt-in and opt-out class members about the proceedings; this can of course include contacting relevant trade associations and so on, and Mr O'Higgins notes that he is happy to consider the Evans PCR's proposals in relation to publicity and adopting any which seem suitable in his own Litigation Plan.

The most significant difference between the two PCRs is that the O'Higgins PCR has in fact already been in contact with and communicated with many members of the proposed class directly, whereas Mr Evans does not appear to have done this to anything like the same degree.

72. As to paragraph 109 of the Evans Carriage Submissions, the O'Higgins PCR is equally committed to transparency and there is no material difference in this regard between the PCRs' websites and publicity of documents, as Mr O'Higgins explains at paragraph 35 of O'Higgins 4. The Tribunal is invited to peruse the websites to form its own view. The Tribunal is also invited to read paragraph 46 of Hollway 5, which explains in detailed the transparent approach taken by the O'Higgins PCR generally and in respect of the O'Higgins litigation funding agreement and ATE policies in particular.

73. As to paragraph 111(b), the US discovery is most unlikely to prove irrelevant. Many of the chats disclosed in the US proceedings were from UK-domiciled traders. The disclosed trading data will include data for the London desks of the defendant banks in the US Proceedings (as noted at paragraph 48 of Hollway 5). In the standalone claim brought by Allianz Global Investors GmbH and others, the Commercial Court has ordered the defendant banks to disclose the US Department of Justice's data set and trade data produced to the plaintiffs in the US class action proceedings, which indicates its relevance to non-US proceedings.[14] As noted in paragraphs 59 and 60 of the O'Higgins Carriage Submissions, Scott+Scott originated and has led the US proceedings from the outset, and had the largest involvement by far in those proceedings in terms of attorney hours, briefing, argument, discovery, and distribution of funds to the class.

G. SELECTION OF DEFENDANTS

74. As to paragraphs 118 to 122 of the Evans Carriage Submissions, paragraphs 10(11) and 69(5) of the O'Higgins Carriage Submissions are repeated.

75. To the extent that disclosure may be needed from MUFG (which participated in only one of the cartels and for a period of barely more than one year), the Evans PCR rightly recognises in footnote 151 that there are well-recognised procedures to obtain this.

[14] Order in claim CL-2020-000736 dated 3 April 2020.

H. QUANTUM

76. As to the differences between the PCRs' preliminary estimates of the size of their proposed claims referred to in paragraphs 125 to 128 of the Evans Carriage Submissions, reference is made to paragraphs 5.41 to 5.45 of Breedon 3. As the Evans PCR notes, the estimates were only ever intended to provide a preliminary indication of the sizes of the claims advanced on behalf of the proposed classes, and it is inappropriate to place too much weight on them now.

77. It is noted, however, that Mr Ramirez's analysis summarised at paragraph 128 of the Evans Carriage Submissions confirm that the exclusion of types (2) and (3) transactions from the Evans PCR's class definition does have the effect of significantly reducing the quantum which is proposed to be claimed by the Evans PCR. Those sums represent net losses suffered by class members caused by the Proposed Defendants' cartels. It is in the interests of the class that attempts are made to recover such losses, as proposed by the O'Higgins PCR, and as explained in section D3 above.

I. PROSPECTS OF SUCCESS AGAINST DEFENDANTS

78. As to paragraphs 129 to 132 of the Evans Carriage Submissions, and the limits of the Tribunal's ability at this stage to determine prospects of success against the Proposed Defendants, section B2 above is repeated.

J. QUALITY OF PCRS

79. In paragraph 144 of the Evans Carriage Submissions, and footnote 165 thereto, the Evans PCR seeks to downplay the relative experience of Mr O'Higgins. In particular:

    (1) The Evans PCR observes that the Channel Islands Competition and Regulatory Authorities ("**CICRA**"), which Mr O'Higgins chaired, was disbanded in 2020. This is true, but has nothing to do with Mr O'Higgins and is simply a result of the devolution to each of the Channel Islands of its own individual competition regulator, as Mr O'Higgins explains at paragraphs 7 to 9 of O'Higgins 4.

(2) The Evans PCR refers to CICRA having had other staff. So, too, did the two bodies with which Mr Evans was associated – the CMA and *Which?*. However, unlike Mr Evans' association with those bodies, Mr O'Higgins was in charge.

(3) The suggestion that Mr Evans is better qualified because he was a CMA panel member and a policy adviser is misguided. The role of the PCR is not to decide the case, or to supplant the team of lawyers and experts whom he instructs, but rather to direct and manage that team.

80. Mr O'Higgins's extensive background in large-scale, high-value project management and his long career in the financial sector, and his particular interest in the pensions sector which is a key sector harmed by the cartels, makes the O'Higgins PCR conspicuously the better candidate.

81. As to the steps taken in relation to publicity mentioned at paragraphs 145 to 146 of the Evans Carriage Submissions, section F above is repeated.

82. As to the consultative panel available to the Evans PCR and described at paragraphs 147 to 148 of the Evans Carriage Submissions, paragraphs 55 and 56 of the O'Higgins Carriage Submissions are repeated in relation to the impressive panel assembled by the O'Higgins PCR.

K. FUNDING FOR OWN COSTS

83. Paragraphs 150 to 165 of the Evans Carriage Submissions address the PCRs' respective funding for their own costs.

K1. Content/weight to be accorded

84. A striking facet of the Evans PCR's submissions on funding arrangements is the attempt to argue that the factors rendering the O'Higgins PCR's funding arrangements superior (and plainly superior) to his should either be accorded little weight, or are, on closer inspection, disadvantages rather than advantages. This is most clearly evidenced by his submissions on the level of funding available to the O'Higgins PCR (c. £30m) versus the Evans PCR (c. £20m) under the respective LFAs. As a preliminary observation, these

submissions are of course inherently implausible and self-serving. They are necessitated by the difficult position in which the Evans PCR finds himself.

(a) Cost of funding

85. The O'Higgins PCR accepts that the cost of funding (including success fees and other contingent fees such us contingent ATE premiums) is not of direct concern to the class members, for the reasons identified by the Evans PCR at paragraph 152. In short, the class members will not pay that cost.

86. Nevertheless, the Evans PCR contends at paragraph 153 of his submissions that it may be relevant because "*a greater expected return requires a greater level of undistributed damages and there is the potential for that to affect judgements about how to pursue the claim … and the distribution of damages*". The point is made on several occasions and it is convenient to address it here. It is, with respect, a bold submission:

(1) It has no application in respect of Therium, which as an ALF founding member and a reputable and established commercial litigation funder, is committed to the ALF Code and its principles (see Purslow 1, paragraphs 8-10 and 15-16).

(2) It could only be a point of distinction between PCRs in respect of solicitors if the level of contingent fees payable were disparate (e.g. if one firm were on a full CFA and the other a 50/50 reduced rate CFA), or there was reason to think that the solicitor time required for one PCR's case was materially more than that required by the other. Here the solicitors are on equivalent funding arrangements, and there is no reason to think one claim would require materially more work than the other. Moreover, the O'Higgins PCR's counsel team do not stand to earn contingent fees at all.

(3) It is in any event unclear why this factor should be a disadvantage, as opposed to incentivising the robust pursuit of the claim for the maximum reward reasonably available.

(4) If by this submission the Evans PCR is implying that the O'Higgins PCR will be less likely to make robust efforts to seek to distribute any eventual settlement or judgment sum to the maximum number of class members possible, there is no basis

for such a bold allegation. The O'Higgins PCR is committed to maximising distribution to class members and has retained a highly experienced claims administrator (Epiq, which is the claims administrator responsible for the distribution of $2.3bn in settlements in the US Class Action) and set aside significant sums in the budget to do so.

(5) This point is therefore of no assistance to the Evans PCR in this case.

87. As to transparency (addressed at paragraph 154 of the Evans Carriage Submissions), both Applicants have made their funding arrangements available and on the same terms (see further below).

(b) Quantity of Funding

88. In paragraphs 155-156, the Evans PCR advances a number of arguments to avoid the obvious fact that a claim which is better funded is *prima facie* more likely to be in the best interests of the proposed class then one which is less well funded. To state the obvious, litigation of this type is complex, expensive and will be hard fought by extremely well-resourced and numerous defendants at every step. In the context of collective proceedings before the Tribunal where the proposed class does not have to bear the costs of any funding arrangements, the deeper the war chest, the better.

89. That is not to say that quantity of funding is the only relevant factor. Plainly, an otherwise deficient CPO application or carriage dispute contender should not prevail merely because it has more funding. On the other hand, absent such deficiencies, the availability of the deeper war chest is a significant benefit to the class and therefore a significant positive factor.

90. In those circumstances:

(1) As to paragraph 156(a): The spectre of one applicant "*buying*" success in the carriage dispute "*whether or not it was in other respects the most suitable candidate*" is illusory. It requires the Tribunal to be bamboozled by the availability of funding, into overlooking the fact that the applicant may be otherwise unsuitable. There is no reason to think this would happen, nor is it the case here.

(2) As to paragraph 156(b): The Evans PCR alludes to a "*perverse incentive to maximise rather than minimise the costs of the proceedings*". This point is misconceived and conflates two issues. Maximising available funding is not the same as maximising expenditure on costs. Mr O'Higgins and Ms Hollway have both given evidence that the budget represented Scott+Scott's best endeavours to prepare a realistic estimate at the time the funding was obtained, and is not a target to be achieved.[15] Further, the estimate contains "wriggle room" to cater for unanticipated costs; thus for example, the O'Higgins PCR underspent on the pre-filing phase by £152,756 (or 12.7% of the phase).[16]

(3) Paragraph 156(c) repeats (for the third time) the point made in paragraphs 153 and 156. This is a bad point as regards the interests of the class members for the reasons stated above. Moreover, it is a bad point as regards the interests of the Proposed Defendants for the reasons set out in the preceding sub-paragraph.

K2. Evaluation in the present carriage dispute

(a) Cost of funding

91. The O'Higgins PCR agrees with the statement at paragraph 157 that "*the cost of the funding available to each of the PCRs is broadly similar*". It is also agreed that there are certain scenarios in which the O'Higgins PCR's funding will be more expensive. Equally, however, there are certain scenarios in which the Evans PCR's funding will be the more expensive. At the time of its original submissions, the O'Higgins PCR had identified this issue and concluded (as the Evans PCR seems ultimately to contend) that it is not a significant point of distinction, for that very reason.

92. It bears repeating that to the extent that either funding package is 'more expensive', the expense is not borne by the proposed class.

93. The formulae for calculating funder returns are recorded in the respective LFAs and were summarised in paragraph 34 of the O'Higgins Carriage Submissions. They are not

[15] See: O'Higgins 3, para. 44; Hollway 4, para. 75; Hollway 5, para. 23.
[16] Hollway 5, para. 11.

repeated here. As to paragraph 160, where the Evans PCR contends that the O'Higgins PCR's funding costs "*can be seen to be greater*", this is denied:

(1) It cannot be assumed that simply because the O'Higgins PCR has an overall higher budget, it would spend more than the Evans PCR *to reach an equivalent stage* in the litigation. The budgets are estimates, and it can reasonably be expected that the actual tasks required (such as reviewing the Proposed Defendants' disclosure), as they turn out to be, would incur similar amounts of costs. Indeed, based on expenditure to date, the expectation is that the O'Higgins PCR's actual costs are likely to be lower.

(2) The O'Higgins PCR agrees that its funding is more expensive at "*lower levels of recovery*". If that point is to carry weight, it is necessary to identify the "*lower levels*" referred to, against the backdrop of claims pleaded at c. £2bn+. Assuming that taking the case to trial in fact costs each PCR the same amount by way of funder outlay (for the sake of argument, a rough midpoint between the budgets, of £25.5m), the Evans PCR's funding costs would exceed the O'Higgins PCR's when claim proceeds reached c. £250m.[17]

(3) To take an example, if the damages were £400m:

    (a) The O'Higgins PCR's 3x multiple of £76.5m would be exceeded by 20% of the £400m (£80m), so the total funder return would be £80m plus £25.5m repayment = £105.5m.

    (b) The Evans PCR's funder would be entitled to 2x the £25.5m = £51m, plus the greater of £25.5m and 20% of £400m (£80m), giving an overall return of £51m + £80m = £131m.

(4) This substantial disparity would dwarf the impact of the O'Higgins PCR percentage contingency fee being referable to recovered costs (the point made by the Evans PCR in paragraph 160(b)). Assuming (generously) a £20m costs

[17] At £250m of claim proceeds, the O'Higgins PCR's funders and the Evans PCR's funders would be entitled to approximately the same sum (£100m).

recovery on £25m of costs, 20% = £4m. On that basis the O'Higgins PCR's funding would cost £109.5m and Evans £131m.

(5) The Evans PCR would remain more expensive on this example even if the case settled immediately after the last tranche of the O'Higgins PCR's funding had *just* incepted (the point made at paragraph 160(a) of the Evans Carriage Submissions). On this footing, the figures in sub-paragraph (3)(a) remain as above. The figures in sub-paragraph (3)(b) would involve an outlay for the Evans PCR of £23m (being the maximum, £2.5m disparity in outlay that this issue could generate). That would still lead to an overall funder return of £126m for the Evans PCR against £105.5m for the O'Higgins PCR.

(6) As explained in Hollway 5,[18] the O'Higgins PCR has replicated the tables produced by the Evans PCR at AJM16,[19] using the same assumptions and scenarios.[20] The Funder's Fee table shows the total funder returns at various recovery points, but the gross returns are misleading because the PCRs are assuming significantly different budgets (i.e. the funder outlay). In order to remedy this, a further calculation has been included to show the cost, in each scenario, of each £1 of funding advanced. An equivalent similar table has been prepared using the AJM16 figures for the Evans PCR.[21] As can be seen by comparing the tables at BAH29 and BAH30, on this metric, the O'Higgins PCR's funding is cheaper in the majority of scenarios.

(7) These points are simply illustrative. It is possible to hypothesise various scenarios which create divergences between the costs of funding, and there are different ways of measuring that cost. The O'Higgins PCR maintains the position in his previous submissions: overall, the cost of funding between the two PCRs is similar.

94. As to transparency, the Evans PCR's submissions are – at best – a misrepresentation of reality.

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18 Hollway 5, paras. 32-34.
19 Exhibit AJM16 to Maton 4.
20 Exhibit BAH29 to Hollway 5.
21 Exhibit BAH30 to Hollway 5.

95. At paragraph 161, the Evans PCR states that he "*has placed all of his funding arrangements in the public domain.*" This gives the impression that anyone can simply download a copy of the Evans Application funding documents by visiting the website, which is not an accurate reflection of the situation. As is clear from paragraph 66(d) of Evans 2, since 16 September 2020 anyone with an interest in seeing them "*can request (unredacted) copies of* [the Evans PCR's] *funding documents by emailing enquiries@fxclaimuk.com*". With respect, a filter process involving a request that is – presumably – vetted by the Evans PCR's legal team is not the same as the documents being "*in the public domain*".

96. The O'Higgins LFA was removed from the Joint Confidentiality Ring on 19 February 2021. The O'Higgins LFA itself is not available on the claim website for the reasons given at paragraph 41 of O'Higgins 3, although actual members of the proposed class are able to request a copy of that document by contacting info@ukfxcartelclaim.com. More usefully to class members, a detailed summary of the O'Higgins' PCR's funding and ATE arrangements has been available on the claim website since September 2020, as paragraph 40(d) of O'Higgins 3 explains.

97. At the time of writing, therefore, both LFAs are available to the public on the same terms: i.e. members of the class(es) must write to the email addresses provided on the respective claim websites to request a copy.

(b) Quantity of funding

98. Under this heading, the O'Higgins PCR would repeat paragraphs 20-23 of the O'Higgins Carriage Submissions. In short, there is an important difference between a right to more funding (particularly when the litigation progresses beyond the initial stages and challenges emerge) and a hope that more funding will be made available.

99. Events since the submission of the original budgets have amply demonstrated that the Evans PCR's budget is too tight. It has already been substantially overshot, and the Evans PCR now (so it appears) lacks the funding to fulfil his own revised budget. By contrast, the O'Higgins PCR's budget was designed to contain enough wriggle room to adapt to events such as those which have in fact taken place. That is notwithstanding the fact that by the time the Evans PCR made his application (which was delayed while funding

arrangements were finalised)[22] and entered his LFA, he ought to have had a much clearer idea of the additional costs which would be occasioned by the inevitable carriage dispute and other factors.[23] The Evans PCR has also been able to benefit from seeing considerable publicly available information about the O'Higgins Application before issuing his own, thus potentially saving costs.[24]

100. This section addresses the Evans PCR's revised budget before turning to the O'Higgins PCR's revised budget.

101. The Evans PCR seeks to make a virtue of the fact that Donnybrook has already been called on to increase the level of funding available, and that it has done so to the tune of £949,063 "*to cover additional pre-CPO disbursement costs*" comprising additional ATE premiums and "*other disbursement costs*" (Evans 2, paragraph 87). The obvious point is that the Evans PCR's budget for the pre-CPO phase was inadequate.

102. The Evans PCR also reveals that in light of the increases to the pre-CPO costs, "*Hausfeld has agreed to defer seeking payment of its discounted fees from the Funder until after certification*".[25] This is a curious piece of evidence. It indicates that the Evans PCR's actual pre-CPO costs have exceeded the budget by more than the further funding of £949,063. That additional sum has been expended entirely on disbursements[26], and there would therefore appear to be a further shortfall in respect of the sums needed to pay Hausfeld's discounted fees.

103. An examination of the Evans PCR's revised budget confirms that the pre-CPO phase was very significantly under-budgeted. In the original budget the total costs (including IPT/VAT) up to and including the CPO Application Hearing were estimated at £6,646,810.[27] In the revised budget[28] the figure for the same phases £11,319,826 plus ATE insurance deposit premiums of £1,646,00 = £12,965,826. The Evans PCR expects to spend close to <u>double</u> what it budgeted for the pre-CPO phase. It should be noted that

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22 See Hollway 4, paras. 71 and 72.
23 See Hollway 5, paras. 13-19.
24 For example, the Evans PCR knew that the Tribunal would grant permission to serve out of the jurisdiction as it had done for the O'Higgins PCR, and had the benefit of the jurisdiction contract review carried out by the O'Higgins PCR's legal team. See Hollway 4, para. 61.
25 See Evans 2, para. 89.
26 See Evans 2, para. 87.
27 Arrived at by adding the Totals for each of phases 1-3.
28 Exhibit PGE12 to Evans 2.

it is misleading to compare the bold "*Total*" figures in the Evans PCR's original and updated budgets with one another since the "*ATE Insurance*" row in the updated budged has been moved to below the "*Total*" row and is excluded from it. The reason for this subtle but important modification is not clear, but it certainly does not promote transparency.

104. Further adding to the lack of transparency in relation to the Evans PCR's solicitors' fees, the amount budgeted for the pre-CPO phase has increased threefold, from £2,109,675 million to £6 million.[29] However, no explanation is provided for this dramatic increase and any attempt to anticipate or to work out this increase in the absence of any explanation is further hindered by the fact that the Evans PCR has adopted a different structure for his budget for the pre-CPO phase than the structure of the original budget. Specifically, where previously there were three separate sections covering this phase,[30] the Evans PCR's updated litigation budget now provides just one section, "*Pre-CPO*". The O'Higgins PCR submits that – far from promoting transparency – the Evans PCR's approach to his revised budget only leads to confusion, including for any class member with sight of the original and the revised Evans Application budgets.[31] In addition, as noted above, the Evans PCR states that the *reduced* rate fees of Hausfeld are now to be deferred until subject to a CPO being granted. The pre-CPO reduced rate fees are now said to be £3m, far in excess of the estimated £1.05m, but the funding available has not increased by a commensurate sum. The Evans PCR's budget is therefore deficient.

105. In a similar vein, the bottom right-hand corner of the Evans PCR's updated budget is again, misleading and not transparent. The total anticipated cost of the litigation in the budget is not £24,481,362 (as stated in the "*Total*" row), but £29,531,362 when ATE deposit premiums are included. This includes solicitor costs at undiscounted rates. The budget does not provide a figure for how much of the £29.53m would be needed during the course of the litigation. This cannot easily be calculated from the budget because it does not specify which of the fees have had VAT applied. However, the O'Higgins PCR believes it can identify the disbursements on which no VAT has been charged.[32] On that basis, total 'pay as you go' costs using the discounted solicitor rates given in AJM16,

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29 See Hollway 5, para. 29.d.
30 Entitled "*1. Claim Form & CPO Application*", "*2. First CMC*" and "*3. CPO Application Hearing*".
31 See Hollway 5, para. 29.c.
32 Being the fees of Mr Rime, Mr Ramirez, Mr Evans himself and 'misc expenses'.

inclusive of VAT, would be £22.76m. That is against available funding of £19.6m. On this basis, the Evans PCR is over £3.1m short of the funding needed to achieve his own budget.

106. None of this instils confidence that the remainder of the budget will be sufficient – a point already made in respect of the omission from the Evans PCR's budget of significant items (see O'Higgins Carriage Submissions, para. 36). The Evans PCR's submissions now also reveal the possible need to increase the budget to purchase more ATE insurance (see further below). There are other oddities about the updated Evans PCR budget. For example, the row of "*Total (excluding VAT)*" does not aggregate to the figure given in the "*Total Pre-Contingency*" column.

107. The fact that the Evans PCR's own pre-CPO budget was underestimated so substantially also undermines his assertion that the O'Higgins PCR's pre-CPO budget is "*indicative of inefficiency and wastefulness*" (an allegation in paragraph 165 which is in any event unparticularised and denied). See, in this regard, paragraph 29(a) of Hollway 5. The timing of the O'Higgins Application is addressed further below.

108. Turning to the O'Higgins PCR's own revised budget[33], it is accepted that the pre-CPO costs which will now be incurred will exceed the amount which had been estimated in that phase. There were good reasons for that, as explained in Hollway 5, paras. 12 to 21, not least the unanticipated carriage dispute, the long pre-CPO lead time and the contract review process. However, and importantly, this has not required an overall increase in the O'Higgins PCR's budget. This is partly because costs were saved in the pre-application phase which went under-budget,[34] and partly because significant expert evidence and disclosure work was brought forward into the pre-CPO phase, which will not now need to be done later.[35] Additionally, the O'Higgins PCR, its solicitors and its funders have reappraised later litigation phases and determined that some costs can be trimmed and reallocated. These matters are explained in detail in Hollway 5, paragraphs 22 to 27, and are not repeated here.

33 Exhibit BAH28 to Hollway 5.
34 See Hollway 5, para. 11.
35 See Hollway 5, para. 13.

L. FUNDING FOR ADVERSE COSTS

109. Paragraphs 166 to 169 of the Evans Carriage Submissions briefly address the PCRs' relative funding for adverse costs.

L1. Content/weight to be accorded

110. The Evans PCR's submissions seek to explain away and minimise the agreed fact that he has significantly less ATE insurance than the O'Higgins PCR (£23m v. £33.5m).

111. Once more, it bears repeating that the touchstone for determination of the carriage dispute is the best interests of the proposed class. In circumstances where the class does not ultimately pay for the ATE insurance, but where inadequate insurance may impair robust pursuit of claims, the O'Higgins PCR has the stronger application. In addition, fairness to the Proposed Defendants, albeit a secondary consideration, suggests that a higher level of ATE is desirable.

112. At paragraph 166, the Evans PCR makes much the same points which he made in relation to the availability of funding for own costs, which are equally flawed here.

L2. Evaluation in the present carriage dispute

113. At paragraph 167, the Evans PCR contends that the disparity between the cover available to the two PCRs should not be a material factor "*in circumstances where the Defendants do not allege that either PCR's ATE insurance is insufficient to be authorised as class representative*". This does not follow. The requirements for authorisation are not the same as the considerations for resolving a carriage dispute. In the latter context, the relative extent of ATE is a material factor. This is no doubt why the Evans PCR considers it relevant to argue, speculatively, that if the O'Higgins PCR is not authorised, the Evans PCR will acquire its ATE cover.

114. At paragraph 168, the Evans PCR then contends that the O'Higgins PCR's insurance program is more expensive than his own. As to that:

    (1) Once more, it bears emphasis that this expense is not borne by the proposed class. The Evans PCR does not (and could not fairly) suggest that ATE insurers seeking

payment of contingent premiums might somehow influence decision-making in the litigation. In those circumstances, it is unclear how this could be relevant to the interests of the proposed class at all.

(2) The Evans PCR's calculations are broadly correct.[36] The average total expense ratio for the respective programs is 65% for the Evans PCR and 69% for the O'Higgins PCR. However, this is not a like-for-like comparison as: (i) the O'Higgins PCR has an extra £10m of ATE cover; and (ii) the Evans PCR's calculation does not cover the cost of providing security for pre-CPO costs. At any rate it is unsurprising, given that the same risk is being insured, that the cost of each program is fairly similar.

(3) Further, the Evans PCR's position fails to account for the fact that the O'Higgins PCR brought its application first and had to convince ATE insurers to provide insurance in circumstances where there was a higher risk involved with providing such cover. The fact that the Evans PCR was able to acquire marginally better terms on an inferior level of ATE cover from a position where the insurers were aware that other insurers had been willing to back a first applicant ought therefore to be unsurprising.

(4) It should also be recalled that the Evans PCR did not acquire any pre-CPO ATE insurance, leading to the Proposed Defendants demanding, and ultimately obtaining, security for their pre-CPO costs. Thus, unless the Evans PCR's application is certified, his insurers (by contrast with the O'Higgins PCR's insurers) take no risk.

115. As to the Evans PCR's speculation in paragraph 169 that, if the O'Higgins PCR is not certified, the underwriting capacity freed up would move to the Evans PCR's claim:

(1) As with funding, it is plainly better for the proposed class to have a contractual right to ATE insurance than a hope that some will become available (along with the funding to buy it) in the future.

(2) The Evans PCR provides no evidence from anyone in the ATE market confirming this would in fact take place. Little weight can be placed on the hearsay evidence

[36] The maximum premium for the O'Higgins PCR's 1st excess layer is in fact £8,975,000 and not £9m.

of Mr Chopin since the Tribunal does not know what these conversations involved, or whether the suggestions from the market were challenged or tested by Mr Chopin. Further, there is no reliable evidence as to how much this additional ATE would cost.

(3) Other scenarios can be envisaged as at least equally likely. If the O'Higgins PCR were to lose the carriage dispute resulting in a sizeable ATE insurance pay-out, the market might take fright at this litigation. Further, if the Evans PCR does intend to acquire further ATE "*should this be necessary*" (i.e. on an 'as and when' basis, per paragraph 27 of Chopin 3 and paragraphs 84-85 of Evans 2) his bargaining position will likely be weaker than it would have been at the outset.

116. With less ATE insurance, the Evans PCR will be more vulnerable to the possibility of personal exposure in the event of large adverse costs orders that exceed his ATE cover. As such, the Evans PCR is liable to be less inclined (or perceived by the Proposed Defendants as less inclined) robustly to pursue the litigation without fear. In those circumstances the members of the proposed class are significantly better off under the O'Higgins PCR's ATE program than under that available to the Evans PCR.

L3. Transparency

117. The Evans PCR seeks – as he does with funding documents – to distinguish between the approaches of the two Applicants in relation to their respective ATE documents.[37] While repeated, the point is presented in a misleading way and, in any event, is without substance.

118. As with the Evans LFA, the Evans PCR's ATE arrangements are not "*in the public domain*"; rather, an interested party must apply to obtain copies. The decision to release the ATE policies to the proposed class and to the whole world by placing them online is not of course a decision which the O'Higgins PCR can take unilaterally. What it has done is to provide a detailed summary of the ATE arrangements for the O'Higgins Application on the claim website.

[37] See, for example, paragraphs 109, 116, 146 of the Evans Carriage Submissions.

119. The Evans PCR's attempt to frame the difference in approach as an issue of transparency is to misplaced for the following reasons:

(1) 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. Given this, it is not apparent – on any reasonable assessment – what further terms a potential member of the proposed class would be interested in that would necessitate access to the underlying documents.

(2) As explained above, 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 the Evans PCR. In circumstances where the proposed class will not be exposed to any costs associated with the ATE insurance (i.e. because any premiums payable come from undistributed damages), the O'Higgins PCR questions both the necessity of, and any supposed benefit gained from, the ATE policies being available to the classes the Evans PCR seeks to represent.

M. QUALITY OF PCRS' LEGAL TEAMS

120. The O'Higgins PCR's evidence on this topic is identified and summarised at section H of the O'Higgins Carriage Submissions.

N. PRIORITY OF COMMENCEMENT

121. The O'Higgins PCR fundamentally disagrees with the Evans PCR's exaggerated contentions that relative priority of commencement should be "*of very limited (if any) relevance*" (para. 178) and that "*the Tribunal should accord no weight at all to the fact that the O'Higgins PCR was first to file its CPO application*" (para. 188).

122. As to the law, paragraph 8 of the O'Higgins Carriage Submissions explaining the significant weight placed on the 'first-to-file' factor in Canada and Australia is repeated. As there explained, the position is significantly more nuanced than suggested by the Evans Carriage Submissions at paras. 184-187, with the 'first-to-file' factor being

accorded weight to varying degrees, even where a default rule in favour of the first to file is not applied.

123. As to the legal policy and its application to this case, section C of the O'Higgins Carriage Submissions is repeated. In particular, it is noted that an approach placing weight on the 'first-to-file' factor promotes procedural economy, rewards investment and prevents free-riding. It also rewards those individuals or entities who put their reputations on the line by going first. Stepping forward to sue some of the world's largest financial institutions is no small matter and will require (and has required) a great deal of the time and energy of Mr O'Higgins and the O'Higgins Application team. The O'Higgins PCR brought the Application in the public interest and in order to hold the Respondent cartelists to account. Doing so first, and without any blueprint to follow, was a bold endeavour. His investments and risk-taking on behalf of the proposed class members should be rewarded.

124. The overall effect of placing weight on the 'first-to-file' factor is to facilitate access to justice by preventing costly satellite carriage disputes for proposed class representatives who have the wherewithal and make the effort to file collective proceeding claims, which is in the interests of the collective proceedings regime and hence putative class members overall.

125. The suggestion in paragraph 187 of the Evans Carriage Submissions that the 135 days which elapsed between the filing of the O'Higgins Application and the filing of the Evans Application is "*only a short time*" is illusory. It is to be contrasted, for example, with the Ontario rule mentioned at paragraph 8 of the O'Higgins Carriage Submissions under which there is no right to initiate a carriage dispute where the second proceeding is commenced more than 60 days after the first.

126. The suggestion at paragraph 189 of the Evans Carriage Submissions that the original O'Higgins claim form required significant amendment is incorrect. As is clear from a red-line comparison, the changes were minimal; the O'Higgins PCR's references to decisions of other regulators (which were deleted at that point) reflect as much as anything the deep knowledge and understanding acquired by the O'Higgins PCR team about what was publicly known about the cartels before the O'Higgins Application was filed.

127. Similarly, paragraphs 195 to 208 of the Evans Carriage Submissions also seem to criticise the O'Higgins PCR for supplementing its application following its filing. Such supplementation has of course been necessitated by the carriage dispute itself. Had it not been for the carriage dispute, it would not have been necessary to (for example) instruct Professor Bernheim at this early stage. Instead, the O'Higgins PCR took the decision to bring forward the costs of instructing him, as Ms Hollway explains at paragraph 24(b) of Hollway 5. This very factor is an example of why it is helpful in the interests of the overall collective proceedings regime to place weight on the 'first-to-file' factor, since encouraging the initiation of carriage disputes is causative of additional costs which is not in the interests of either the collective proceedings regime or of class members.

128. As to the suggestion in paragraph 191 that the later filing of the Evans Application has not impacted on the progress of the Proposed Proceedings, this is merely happenstance. It would plainly have done so but for the Tribunal's policy of postponing the determination of CPO applications until after the Supreme Court's judgment in *Merricks*.

O. PREPARATION AND READINESS OF ACTION

129. The O'Higgins PCR respectfully submits that the care and quality of its preparations, set out in the submissions and factual and expert evidence filed on its behalf, speak for themselves. Specific points of comparison between the two PCRs have of course been addressed above and in the O'Higgins Carriage Submissions.

130. It is suggested in particular that the O'Higgins PCR's experts' superior methodology, as explained in section C2 above, demonstrates the O'Higgins PCR's generally more "*superior investigation and analysis*" and "*informed and sophisticated understanding*" of the issues to which these proceedings will give rise, to adopt the language from the Canadian caselaw mentioned at paragraph 193 of the Evans Carriage Submissions.

131. In particular, the O'Higgins PCR's experts have developed a sophisticated methodology which is capable of:

    (1) Addressing all three types of customer orders identified as having been affected by the Commission Decisions, and all types of cartel behaviour, including the manipulation of limit/resting orders and the widespread practice of 'fixing the fix',

both of which were particularly significant targets of the Proposed Defendants' cartel activity and were likely to have caused significant harm; and

(2) Being implemented only on the basis of data obtained from the Proposed Defendants, so that it is not necessary to rely on or assume that it will be possible to obtain data from third-party sources in order for the damages methodology to be workable (though, as explained above, the O'Higgins PCR's experts will of course consider and make use of such data if they become available).

132. The O'Higgins PCR further benefits from the intimate involvement of Scott+Scott in the US proceedings; as noted in paragraphs 59 and 60 of the O'Higgins Carriage Submissions, Scott+Scott has led the US proceedings from the outset and had the largest involvement by far in those proceedings. By contrast, the Evans PCR's apparent unfamiliarity with the US proceedings has meant that his experts have not avoided pitfalls which could have been avoided had the US proceedings been considered. The proposal to exclude damages caused in respect of limit/resting orders is one obvious example, it having already been concluded in the US proceedings that extracting such orders from the data is not possible, as explained at paragraph 56 above.

133. Finally, the O'Higgins PCR's superior funding and ATE insurance position, as set out in sections K and L above, place it in an excellent position to "*assume carriage of this proceeding forthwith*", recalling that this is high-stakes litigation against exceptionally well-funded counterparties such that the funding position is key. The O'Higgins PCR's ability to procure such funding itself reflects superior "*on-the-ground legal work*".

134. As to the points mentioned in paragraphs 195 to 236 of the Evans Carriage Submissions:

(1) Paragraphs 195 to 208 and 212 to 225 seek to place significant weight on the fact that the Evans PCR waited until he had access to the Commission Decisions before filing. As explained at paragraphs 126 to 127 above, these points are misplaced. The substantive changes made to the O'Higgins Application claim form post-filing to take account of the Commission Decisions have in fact been minimal, as explained in Hollway 5, paragraphs 40 to 45. It is in any event not understood what possible relevance these changes can have to the evaluation of the two proposed PCRs' claims as they stand now.

(2) Further, such supplementation as has occurred – in particular the decision to instruct Professor Bernheim prior to the grant of the CPO, rather than after, criticised at paragraphs 226 to 236 of the Evans Carriage Submissions – has been occasioned by the carriage dispute itself, as noted at paragraph 127 above. (The suggestion at paragraph 233(b) that there are differences between the positions taken by Professors Breedon and Bernheim is misplaced: the specific points mentioned are addressed at the relevant places above (see paragraphs 26 and 27) and the O'Higgins PCR's experts confirm that there is no such disagreement between them (see, in particular, paragraphs 72-82 of Bernheim 3).

(3) Paragraphs 209 to 211 criticise the inclusion of certain pre-filing costs in the O'Higgins PCR's budget. This point is irrelevant to the carriage dispute: the money has been spent, and if the Proposed Defendants wish to contend in due course that such costs are irrecoverable no doubt they will do so and the debate can be had at that point. In case relevant, Ms Hollway explains the valuable work which was done pre-filing at paragraphs 36 to 39 of Hollway 5, and noting that it is proper for transparency reasons to include all actual, realised costs in the budget, so as not to give a false impression of 'efficiency' by failing to include relevant costs.

P. PREPARATION AND PERFORMANCE AT CARRIAGE HEARING

135. As to paragraphs 237 and 238 of the Evans Carriage Submissions, paragraphs 10(8) and 69(4) of the O'Higgins Carriage Submissions are repeated.

Q. CONCLUSION

136. For all the above reasons, the O'Higgins PCR maintains its case that it is the most suitable PCR for the purposes of Rule 78(2)(c).

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11 June 2021