

Party: Applicant / Proposed Representative  
Witness: N A Purslow  
Number of Statement: First  
Exhibit: NAP1  
Dated: 28 July 2019

**IN THE COMPETITION APPEAL TRIBUNAL**

Case no. \_\_\_\_\_

**B E T W E E N : -**

**MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED**

**Applicant /**  
**Proposed Representative**

**-and-**

**(1) BARCLAYS BANK PLC**

**(2) BARCLAYS CAPITAL INC.**

**(a company incorporated under the laws of the State of Connecticut, United States of America)**

**(3) BARCLAYS EXECUTION SERVICES LIMITED**

**(4) BARCLAYS PLC**

**(5) CITIBANK N.A.**

**(a national banking association incorporated under the laws of the United States of America)**

**(6) CITIGROUP INC.**

**(a company incorporated under the laws of the State of Delaware, United States of America)**

**(7) JPMORGAN CHASE & CO.**

**(a company incorporated under the laws of the State of Delaware, United States of America)**

**(8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**

**(a national banking association incorporated under the laws of the United States of America)**

**(9) J.P. MORGAN EUROPE LIMITED**

**(10) J.P. MORGAN LIMITED**

**(11) NATWEST MARKETS PLC**

**(12) THE ROYAL BANK OF SCOTLAND GROUP PLC**

**(13) UBS AG**

**(a company incorporated under the laws of Switzerland)**

**Respondents /**  
**Proposed Defendants**

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**FIRST WITNESS STATEMENT OF**  
**NEIL ANDREW PURSLOW**

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I, **NEIL ANDREW PURSLOW**, of Therium Capital Management Limited, whose registered address is 11 Staple Inn, London, England, WC1V 7QH, **WILL SAY**:

### **Introduction**

1. I am a solicitor with over 20 years' experience in private practice as in-house counsel and in litigation funding. I am a Director, Co-Founder, and Chief Investment Officer of Therium Capital Management Limited ("**TCML**").
2. TCML is a UK-based company, wholly-owned by Therium Group Holdings Limited ("**TGHL**"), which is registered in Jersey. TGHL and its related entities ("**Therium Group**") are in the business of providing litigation funding. Therium Group has a diverse investor base providing it with a stable capital platform for its funding activities. TCML is a litigation sub-advisor to Therium Group investment vehicles and advises the Therium Group on its funding of large-scale litigation and arbitration in the UK. Therium Litigation Finance Atlas AFP IC is a Jersey entity through which Therium Group funds litigation, including the above proceedings by the proposed class representative, Michael O'Higgins FX Class Representative Limited (the "**Proposed Representative**").
3. For ease, I will collectively refer to TCML, TGHL, and Therium Litigation Finance Atlas AFP IC and their affiliates as "Therium" in this witness statement.
4. I make this statement in the context of a claim proposed to be brought before the Competition Appeal Tribunal (the "**Tribunal**") on a collective, opt-out basis under section 47B of the Competition Act 1998 (the "**Proposed Collective Proceedings**" or "**Claim**"). The Proposed Collective Proceedings would be brought on behalf of persons who entered into certain relevant foreign exchange transactions in the period 18 December 2007 to 31 January 2013 (the "**Proposed Class**"). Further information about the Proposed Class is contained in the witness statement of the Proposed Representative and the Collective Proceedings Claim Form, which I understand will be filed at the same time as this statement.
5. I make this statement in my capacity as Chief Investment Officer of TCML and I am duly authorised by TCML to make this statement in order to outline the core terms of the funding arrangements between Therium and the Proposed Representative, including the arrangements entered into to allow the Proposed

Representative to meet any adverse costs order made by the Tribunal. The funding arrangements are contained in a litigation funding agreement between Therium and the Proposed Representative which is, or will be, dated on or around the date of this witness statement (the “LFA”). A copy of the LFA is exhibited to this witness statement marked “NAPI (Confidential Exhibit)”. Unless otherwise stated, defined terms used in this statement are adopted from the LFA.

6. In particular, in this witness statement I will:
  - a. outline the market leading position, experience, and financial strength, of Therium;
  - b. set out the key considerations which underpin the funding arrangements set out in the LFA; and
  - c. outline and explain the key terms of the LFA, including in relation to protection against adverse costs.
7. Except where I state to the contrary, I am able to state the matters in this witness statement from my own knowledge. As such, the facts contained in this witness statement are true to the best of my knowledge, information and belief, save where otherwise indicated in which case I identify the source of my information.

### **Therium**

8. Founded in 2009, Therium is one of the longest-established litigation funders in the world. In its 10-year history, Therium has funded claims valued at USD 36 billion. We have a track record of successfully investing across 17 different funds and we are active across five continents in litigation and arbitration finance. We have raised over USD 1.07 billion since 2009. Our latest funding round raised USD 430 million in 2019.
9. In 2018, Therium was ranked as a Tier 1 Litigation Funder in Chambers and Partners’ inaugural litigation support directory in the category “*Litigation Support Rankings: Litigation Funding in UK-Wide*” and in June 2019 was again ranked in Tier 1 of that same category. It is public knowledge that Therium is currently funding another collective action before the Tribunal, Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and others*.

10. Therium is a founding member of the Association of Litigation Funders of England and Wales (the “ALF”). Established in 2011 following a recommendation by the Civil Justice Council, the ALF is a self-regulatory body, dedicated to promoting best practice in the litigation funding industry. I have sat on the board of the ALF on behalf of TCML from 2013 to date. The ALF Code of Conduct (the “ALF Code”) imposes various requirements on its members, including the obligation on funders to maintain adequate financial resources at all times to meet their obligations and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. The ALF Code also governs what provisions a litigation funding agreement should (or should not) contain. Therium Litigation Finance Atlas AFP IC is an Associated Entity of TCML within the meaning of that term in the ALF Code. The ALF Code provides that members of the ALF will ensure that their Associated Entities are compliant with the ALF Code, including the maintenance of adequate financial resources to meet their funding obligations. TCML is therefore responsible for the compliance of Therium Litigation Finance Atlas AFP IC with the ALF Code.
11. In light of the foregoing, I am very confident that Therium will be in a position to meet all the commitments it has made to fund the Claim, as set out in the LFA.

**The funding arrangements for the Claim: key underlying considerations**

12. Amongst other requirements including those mentioned above, the ALF Code also governs what provisions a litigation funding agreement should (or should not) contain. On joining the ALF, all members, including Therium, are required to have their standard form funding agreement reviewed by the ALF’s counsel to ensure compliance with the ALF Code.<sup>1</sup> A version of Therium’s standard form litigation funding agreement (on which the LFA is based) is included as an appendix to a textbook on third party funding published by Oxford University Press.<sup>2</sup> The LFA does not materially differ from Therium’s standard form funding agreement in any respect that would render it non-compliant with the ALF Code.
13. In developing and agreeing the LFA, both I personally and Therium collectively were, of course, aware of previous cases that had been brought on a collective, opt-

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<sup>1</sup> For the avoidance of doubt, Therium does not, by confirming that this review took place, waive any privilege in relation to that view, including in relation to any advice provided.

<sup>2</sup> N. Rowles-Davies and J. Cousins QC, *Third Party Litigation Funding* (1<sup>st</sup> edn, OUP 2014) 221.

out basis pursuant to the regime in section 47B of the Competition Act 1998. In particular, we were very conscious of the terms of the decision made by the Tribunal in *Walter Merricks CBE v MasterCard Incorporated & Ors* [2017] CAT 16 (the “**Merricks CAT Judgment**”) and the Court of Appeal’s judgment on appeal [2019] EWCA Civ 674 (the “**Merricks COA Judgment**”) (together the “**Merricks Judgments**”). Further, as I explain above, Therium is currently funding the class representative’s proposed collective action in Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and others* before the Tribunal. Taking into account the foregoing, the LFA has been drafted: (i) to ensure compliance with the ALF Code; (ii) to ensure compliance with the guidance of the Tribunal set down in the Merricks Judgments; and (iii) drawing on Therium’s knowledge of, and experience in, collective action proceedings before the Tribunal.

14. In light of the Merricks Judgments, Therium is acutely aware of the risks associated with bringing collective, opt-out proceedings like the Claim. Of course, all litigation is associated with some risk, but it is clear that even obtaining a Collective Proceedings Order to allow substantive litigation to commence is a particularly complicated and multi-faceted process which can be expected to be contested. The funding arrangements set out in the LFA, including the return to which Therium is entitled pursuant to the LFA, are predicated on that risk analysis. Based on my experience of litigation funding, including in collective proceedings before the Tribunal, I believe the terms and obligations contained within the LFA to be market standard for significant litigation of this type.
15. When drawing up and entering into the LFA, Therium was also cognisant of the need to avoid any conflicts of interest. As experienced funders of litigation, Therium is aware of the interplay between litigation finance and the rules on champerty and maintenance. As a result, although the LFA makes a significant budget available to the Proposed Representative, the funding arrangements reflect the fact that the interests of the Proposed Class come first, and Therium will only receive any monies in addition to what is recovered from the Proposed Defendants if: (i) there are any unclaimed damages following distribution to the Proposed Class; and (ii) the Tribunal considers it appropriate to make such an order for payment to Therium.

16. Finally, I also wish to underline that Therium will have no control over the conduct of the Claim and so it will not be able in any way to influence the process by which damages are distributed or procure that some portion of damages remain undistributed. In this regard, pursuant to clauses 9.2 and 9.3 of the ALF Code, Therium has agreed that it will not “*take any steps that cause or are likely to cause the Funded Party’s solicitor or barrister to act in breach of their professional duties*” or “*seek to influence the Funded Party’s solicitor or barrister to cede control or conduct of the dispute to the Funder.*” In the interests of discharging its obligations to investors and protecting its investment, Therium will, however, maintain oversight of the Claim. Further, I note both my personal, and Therium’s institutional, knowledge of the judgment of the Court of Appeal in *Excalibur Ventures LLC & Ors v Texas Keystone Inc.* [2016] EWCA Civ 1144, in which the ALF intervened. That judgment requires funders to continually assess and review claims in which they have an interest to ensure that they are brought on a proper and sound basis, and offers guidance as to the role of a funder in English litigation.
17. I refer, in this regard, to the following provisions of the LFA:
- a. Clause 9.1, which provides that “*nothing in this Agreement entitles Therium to interfere in the conduct of the Claim and/or the Proceedings*”;
  - b. Clauses 9.2.7(a) and (b), which respectively require the Proposed Representative to “*keep Therium promptly informed of any significant developments in the Proceedings*” and to “*make a monthly summary report in such form as Therium may reasonably require to Therium regarding the overall progress and conduct of the Proceedings, the prospects of success of the Claim, the Costs incurred against the Project Plan and the expected exposure to adverse costs*”; and
  - c. Clause 9.7, which confirms that “*nothing in this Agreement shall permit Therium to override any advice given by the Solicitors or Counsel*” to the Proposed Representative.

**The LFA: outline**

18. I set out below the key provisions of the LFA. I note that Therium regards aspects of the LFA as confidential and commercially sensitive. For this reason, we have

asked the Proposed Representative to seek appropriate confidentiality protections prior to disclosing the LFA.

- a. **Jurisdiction and governing law** (clause 28): The LFA is governed by the law of England and Wales. Disputes under the LFA are ultimately to be determined in arbitration under London Court of International Arbitration Rules in London.
- b. **Total amount invested** (Schedule 1 and Appendix 1): Therium has committed £29,375,043 to fund all elements of the Claim, such amounts to be paid in tranches. The funding is structured in tranches for commercial reasons that relate to how Therium charges for provision of the capital necessary to comply with the ALF Code. Until tranches are formally incepted, they do not become Committed Funds, which means those funds would not be included for the purposes of calculating Therium's Contingency Fee should the case conclude before the full budget committed to the Claim is drawn. This is to the benefit of the Proposed Class, where (for example) the Claim settles early, because in certain scenarios Therium's Contingency Fee is calculated as a multiple of the Committed Funds. The alternative (i.e., having the full amount of funding as "Committed Funds" from the outset) could make the funding more expensive if the Claim settled early.

Pursuant to the Project Plan, which is set out at Appendix 1 of the LFA, the funding will cover, amongst other items, counsels' fees, the fees of the Proposed Representative's solicitors (Scott+Scott Europe LLP ("**Scott+Scott**")), and other disbursements (such as expert fees). Further, a portion of the committed capital of £29,375,043 has been allocated to pay premiums on the After The Event ("**ATE**") insurance policy that has been obtained by the Proposed Representative (as required by clause 8.1 of the LFA). An outline of the sums committed is contained at Schedule 1 of the LFA.

- c. **Termination provisions**: Any decision not to fund an additional tranche is subject to the provisions within clause 16 and the dispute resolution procedure contained within clause 27 of the LFA. Clause 16 allows Therium to terminate the LFA if it reasonably ceases to be satisfied as to the merits of the Claim or it reasonably believes that the Claim is no longer viable. This clause further

provides that Therium can only terminate the LFA if it obtains a legal opinion from an independent Queen's Counsel in which it is stated that the prospects of securing recovery are 51% or less. This type of clause is both typical for the industry and commercially important for any third party funder. Any privately paying client would consider whether to commit more money to a claim at various junctures, and a third party funder should be in no different position. This is consistent with the *Excalibur* decision referred to at paragraph 16 above, which makes clear that there is a positive obligation on funders to continually review the merits of cases they are funding. That being the case, the commercial reality is that Therium is providing the Proposed Representative with funding as an investment. If the Claim continues to have good prospects of success, Therium has no commercial reason to decline to incept subsequent tranches of funding; indeed it has every commercial reason to incept subsequent tranches of funding.

Clause 16.4 also allows Therium to terminate the LFA if it reasonably considers there has been a material breach of the LFA and the breach is not remedied within 20 days. Again, this type of clause is both typical and commercially important for a third party funder to include in a funding agreement. The Proposed Representative also has 20 days in which to remedy an alleged breach.

Any dispute in relation to termination is subject to the dispute resolution procedure at clause 27 of the LFA. This provides that in the event of a dispute between the Proposed Representative and Therium as to termination, a binding opinion from an independent Queen's Counsel shall be obtained.

It should also be noted that the termination provisions in the LFA mirror those permissible under the ALF Code, which states that a funding agreement "*shall not establish a discretionary right for a Funder...to terminate a LFA in the absence of the circumstances described in clause 11.2.*" Clause 11.2 provides for termination in the event a funder: (i) "*reasonably ceases to be satisfied about the merits of the dispute*"; (ii) "*reasonably believes that the dispute is no longer commercially viable*"; or "*reasonably believes that there has been a material breach of the LFA by the Funded Party*".

- d. **Therium's entitlement** (Schedule 1 and Appendix 3): If the Claim is successful, subject to there being sufficient undistributed damages, and subject to the approval of the Tribunal pursuant to section 47C(6) of the Competition Act 1998, Therium would be entitled to receive the following. First, repayment of all sums it had invested in the case pursuant to the LFA. Second, in respect of all tranches of funding ultimately incepted and therefore becoming Committed Funds (as discussed above), either: (a) the applicable multiple of the total Committed Funds across the tranches of funding incepted; or (b) if greater, a percentage of the total value of the damages awarded by the Tribunal, or under any settlement agreement that is reached between the parties, as set in greater and more precise detail in the LFA (the "**Contingency Fee**"). The applicable multiple upon which the Contingency Fee may be calculated increases incrementally dependent on the length of the period between the execution of the LFA and the date of payment to Therium of the Contingency Fee. Likewise, the applicable percentage upon which the Contingency Fee may be calculated increases incrementally and is driven by the total amount of damages ultimately awarded by the Tribunal or agreed between the parties by way of a settlement, before onward distribution to the Proposed Class. The effect of this structure is that members of the Proposed Class claiming their share of the damages will receive 100 per cent of their entitlement without deduction for the Contingency Fee, as intended by the Tribunal's Rules.

The sums due to Therium, to the ATE providers, and to Scott+Scott as the Proposed Representative's solicitors, in the event of a successful prosecution of the Claim, will be paid out in accordance with the terms of the Priorities Agreement, a copy of which is appended to the LFA. In executing the Priorities Agreement, the parties to it agree to the priority order of payment from recoveries achieved in the prosecution of the Claim set out therein, whether those recoveries are made by way of an award by the Tribunal or settlement. In the context of the Priorities Agreement, recoveries are confined to such amounts as the Tribunal may order. Therium's entitlements, and the entitlements of all other parties to the Priorities Agreement, automatically abate to the levels that the Tribunal may order (if it does so). The Priorities Agreement also sets out the arrangements to be followed in the event that: (i)

recoveries made by the Proposed Representative are insufficient to discharge in full the sums that are expected by the parties under the LFA and Priorities Agreement; (ii) there are surplus undistributed damages remaining after deduction of the sums due to all of the concerned parties to the Priorities Agreement; and/or (iii) any disagreements arise between the parties to the Priorities Agreement relating to the order and/or amounts of payment to be made.

19. Whilst Therium has every confidence in the LFA for the reasons I set out in this statement, I am aware of the fact that the funding arrangements Therium has entered into with the class representative in Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and others* (to which I refer at paragraphs 9 and 13 above) are currently being considered by the Tribunal and a judgment is anticipated in due course (the “**Trucks LFA judgment**”). I can confirm that Therium will review the Trucks LFA judgment when it is handed down by the Tribunal and consider whether, in light of the Trucks LFA judgment, it might be appropriate to work with the Proposed Representative to seek to amend certain provisions of the LFA. Therium’s rights are reserved in this regard.

**STATEMENT OF TRUTH**

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

Signed:  .....

**NEIL ANDREW PURSLOW**

Date: *28* July 2019

Party: Applicant / Proposed Representative  
Witness: N A Purslow  
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**MICHAEL O'HIGGINS FX CLASS  
REPRESENTATIVE LIMITED**

**Applicant /  
Proposed Representative**

and

- (1) BARCLAYS BANK PLC
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**Respondents /  
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**FIRST WITNESS STATEMENT OF NEIL  
ANDREW PURSLOW**

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