Made on behalf of:	**Phillip Evans (Applicant/Proposed Class Representative)**
Name of witness:	**Anthony John Maton**
Number of statements:	**5**
Exhibits:	**AJM18 – AJM19**
Date:	**11 June 2021**

IN THE COMPETITION APPEAL TRIBUNAL **Case Number: 1336/7/7/19**

BETWEEN:

PHILLIP EVANS **Applicant/Proposed Class Representative**

and

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

FIFTH WITNESS STATEMENT OF ANTHONY JOHN MATON

I, **ANTHONY JOHN MATON**, of Hausfeld & Co. LLP, 12 Gough Square, London, EC4A 3DW, **WILL SAY AS FOLLOWS:**

Introduction

1. I am a solicitor of the Senior Courts of England and Wales and Managing Partner of Hausfeld & Co. LLP in London ("**Hausfeld**"). I have previously provided four witness statements, dated 10 December 2019, 17 April 2020, 20 October 2020 and 23 April 2021, in support of Phillip Evans' application before the Tribunal for a Collective Proceedings Order ("**CPO**") to pursue collective proceedings on behalf of two classes of persons who entered into certain types of foreign exchange transactions in the European Economic Area between 18 December 2007 and 31 January 2013 (the "**Evans Application**"). Together with David Lawne, I am the partner at

Hausfeld with conduct of the Evans Application. I am duly authorised by Mr Evans to make this witness statement on his behalf.

2. Unless otherwise stated (in which case I give the source of information upon which I rely), the contents of this witness statement are within my own knowledge, and are true to the best of my knowledge, information and belief. Where the facts and matters referred to in this statement are not within my own knowledge, they are based on instructions, documents and information supplied to me in my capacity as a solicitor instructed by Mr Evans and are true to the best of my knowledge and belief. I adopt the defined terms used in my previous witness statements. I confirm that nothing in this witness statement constitutes, or is intended to constitute, a waiver of legal professional or litigation privilege.

3. There are now produced and shown to me **exhibits AJM18 – AJM19** to which I will refer in this witness statement.

Matters addresses in this witness statement

4. In this witness statement, I respond to certain factual matters raised in the O'Higgins PCR's carriage submissions and the fourth witness statement of Belinda Hollway dated 23 April 2021. I also respond to certain matters raised in the Proposed Defendants' Joint CPO Rejoinder dated 4 June 2021. I address the following:

   a. First, I respond to Ms Hollway's evidence regarding the respective timings of the two applications.

   b. Second, I respond to Ms Hollway's comments about Mr Evans' budget.

   c. Third, I respond to submissions made by the O'Higgins PCR about Mr Evans' funding and insurance arrangements.

   d. Fourth, I respond to Ms Hollway's evidence about the third Commission investigation and other relevant proceedings.

   e. Fifth, I respond to Ms Hollway's comments on the additional RFIs included in the Evans Application.

   f. Finally, I respond to the Proposed Defendants' comments in the Joint CPO Rejoinder on my third witness statement, in which I gave evidence about Hausfeld's previous efforts to build an FX group claim.

A. Priority of commencement

5. In Sections D and E of her statement, Ms Hollway places great emphasis on the work undertaken by the O'Higgins PCR before the Evans Application was filed and makes various allegations of free-riding against Mr Evans.

6. The suggestions of free-riding are unwarranted and unfounded. While paragraph 49 of Ms Hollway's witness statement says that it is important to bear in mind the context of the Evans Application, her account of the timing of work done is incorrect and incomplete. In particular, and as I explain further below, a considerable amount of the work to develop Mr Evans's case was already well underway before the O'Higgins Application was issued. Contrary to Ms Hollway's assertion at paragraph 58 of her fourth witness statement, none of that work had the (putative) "*comfort of knowing*" that the O'Higgins PCR had filed a claim. There is no basis for Ms Hollway's insinuation that Mr Evans was able to copy, or somehow use as a starting point, the publicly available elements of the O'Higgins Application to produce his own CPO application. On the contrary, as I explain in more detail below, Mr Evans and his legal team devoted significant time and resources to preparing the Evans Application on its own merits and before the O'Higgins Application was filed at the Tribunal.

7. Furthermore and in any event, Ms Hollway has exaggerated the relevance and importance of the snippets of information about the O'Higgins Application that were in the public domain prior to filing the Evans Application.

8. Finally by way of preliminary comment on the timing of the respective CPO applications, it is important to note that Mr Evans was the first to file a Collective Proceedings Claim Form which was based upon, and expressly pleaded to, the Commission's detailed findings as set out in the Decisions. Mr Evans filed his CPO application on 11 December 2019. By contrast, the O'Higgins PCR did not file its Amended Collective Proceedings Claim Form, which was revised to reflect the terms of the Decisions, until 48 days later on 28 January 2020. Mr Evans was able to file his CPO application when he did because he had already obtained non-confidential versions of the Decisions, which informed his pleadings and expert evidence.

9. Mr Evans took the initiative to seek disclosure of the Decisions some two months before the O'Higgins PCR sought disclosure and both applicants received the Decisions at around the same time. The fact that Mr Evans' application was filed later therefore made no difference to the pre-certification timetable, given that the O'Higgins PCR needed to amend its application. Moreover, Mr Evans' application as filed remains intact, subject to some minor amendments that were made following receipt of the confidential versions of the Decisions.

Mr Evans assembled the building blocks of his application from scratch and independently to the O'Higgins PCR

10. In Section D of Ms Hollway's fourth witness statement, she argues that, as "*first mover"*, there was "*considerable investment to be made, risks to be taken and challenges to overcome*" for the O'Higgins PCR, and "*no other action to copy or use as a starting point for developing the claim"*. Ms Hollway argues that "*the risks – in the form of the unknown – were disproportionately higher for O'Higgins than those faced by the Evans Application*'. Ms Hollway claims that this is evident in a number of ways discussed in paragraphs 51 to 57 of her fourth witness statement. I address each workstream in turn below.

11. The true position is that Mr Evans and his team had been engaged for a long time in building a robust case independently of the O'Higgins Application and before that application was filed on 29 July 2019. By way of summary:

    a. As regards the work to **build the legal case**, as I described in section A of my fourth witness statement, Hausfeld's London team had already spent more than four years investigating FX claims well before the O'Higgins Application was publicised. This exercise included research, inquiries, contacting potential claimants and investing more than 6,000 hours of fee earner time and £739,941.25 on instructing Counsel and experts. As a result of this work, we had a detailed understanding of publicly available information relating to the US class action, together with other relevant FX civil, criminal and regulatory proceedings in multiple jurisdictions. We also had significant experience of conducting legal analysis into potential FX cartel claims, including collective proceedings, and working with experts to estimate damages arising from unlawful conduct in the FX market. Further, we had discussed the claims with funders, including Adrian Chopin, with whom we had a first meeting as early as 2016 about the possibility of funding a UK FX claim. Mr Evans and the proposed classes stand to benefit from the experience and expertise derived from this earlier work without any impact on the budget or undistributed damages, as these costs are not included in recoverable costs or costs to be sought from undistributed damages.

    b. Hausfeld was aware of, and closely followed, the Commission's investigations into FX misconduct and we were aware that it was expected to confirm its findings in early 2019.[1]

[1] For example, it was widely reported that several banks were in settlement talks with the Commission as early as 2017 (exhibited at **AJM18**) and by 23 April 2019 it was reported that a final decision was under preparation (exhibited at **AJM19**).

In anticipation of a final decision, we began preparatory work for these proceedings in January 2019. I can confirm that our work encompassed all of the four broad areas identified in paragraph 52 of Ms Hollway's fourth witness statement. This preparatory work also benefited from our experience of working on other UK collective actions, including the *Trains* proposed collective proceedings. As at 29 July 2019, we had recorded more than 917 hours of fee earner time preparing the Evans Application. This time broke down as follows:

Fee Earner	**Sum of Hours**
Partners	236.1
Senior Associate/Counsel	241.4
Associate	339.4
Trainee/Intern	100.4
Total	**917.3**

c. Once the Commission's Decisions were announced on 16 May 2019, the essential elements of the claim could be identified, namely follow-on claims based on the Decisions to be pursued as collective proceedings seeking aggregate damages on behalf of a class of affected entities on an opt-out basis for UK domiciled class members and an opt-in basis for non-UK domiciled class members.

d. Our work also addressed the economic viability of the claims and **funding** and I confirm that it involved the same challenges and risks that Ms Hollway describes at paragraphs 54-55 of her fourth witness statement. Based on our work to build a credible legal case, an agreement was reached in principle with Mr Evans' funder in June 2019 that it would fund the Evans Application.

e. Turning to **pre-filing work**, in July 2019 Mr Evans instructed Hausfeld to make a formal request for disclosure of the non-confidential Decisions directly from the Commission under the Access to Documents Regulation. Also, by this time the key members of the team involved in the Evans Application were assembled and working on the Application. Thus:

   i. the core Counsel team at Brick Court Chambers had been instructed (Aidan Robertson QC, Victoria Wakefield QC and Aaron Khan);

   ii. all three of Mr Evans' main experts (Richard Knight, Professor Dagfinn Rime and John Ramirez) had also been retained;

iii. Mr Evans' original consultative panel had been constituted (comprising Lord Carlile, Professor Philip Marsden and Phelim Keogan); and

iv. we had begun working with Angeion (Mr Evans' claims administrator) to develop the Litigation Plan.

12. Accordingly, Mr Evans had concluded with his funder that the case was likely to be legally and economically viable and conducted extensive preparatory work, including appointing the key members of his team, within two months of the Decisions and before he or anyone else in the team had knowledge of another proposed FX collective action. He faced the same challenges, uncertainty and workload in building the case and acquiring funding that Ms Hollway describes for the O'Higgins PCR at paragraphs 50-56 of her fourth witness statement. However, once the O'Higgins Application was issued, he faced greater challenges putting in place his funding arrangements, as I describe below.

Funding issues had a minimal impact on the timing of the Evans Application

13. At Section E of Ms Hollway's fourth witness statement (paragraphs 64-72), she provides an account of the timing of the filing of the O'Higgins Application and comments on the timing of the Evans Application. At paragraph 72 she argues "*it is apparent…that the reasons for the substantial lag in time between the O'Higgins Application being filed and the filing of the Evans Application came down in no small part to issues with funding, as opposed to being solely driven by Mr Evans' desire to obtain copies of the Settlement Decisions prior to filing*."

14. This statement is incorrect. The finalising of Mr Evans' funding arrangements had a minimal impact on the timing of the filing of his application:

a. Following receipt of the Decisions from the Commission on 1 October 2019, Hausfeld wrote to the Tribunal to confirm that we expected to file the Evans Application by the end of November 2019.

b. At the end of November, there was a very short delay due to the need to finalise his funding arrangements. The application was subsequently filed on 11 December 2019, eight business days later than originally planned.

The relevant pre-filing steps of the Evans Application

15. In order to set out the factors which impacted upon the timing of Mr Evans' application, I summarise below the relevant pre-filing steps and the basis for seeking disclosure of the Decisions prior to filing his application:

a. Although the Commission's press release dated 16 May 2019 gave Mr Evans sufficient confidence in the viability of the claims to move forwards with preparing his application and for the funder to agree in principle to provide funding, it was not sufficiently detailed about the infringing conduct to fully plead a claim and properly formulate all the supporting elements of the claim such as the theory of harm, methodology for calculating damages and the class definition. Filing a placeholder or speculative application was not attractive to Mr Evans, because it would be necessary to replead the claims following disclosure of the Decisions, causing unnecessary delay and costs of pleading the claim twice over. Mr Evans explains these concerns at paragraph 50 of his second witness statement.

b. The Access to Documents Regulation provided a route for obtaining early disclosure of the Decisions within a prescribed time period (15 business days) without the need to issue proceedings and subsequently seek disclosure (with no guaranteed timeframe for disclosure). In particular, the General Court's decision in *Schenker AG v Commission* EU:T:2014:854 gave Mr Evans very strong grounds to obtain disclosure of non-confidential versions of the Decisions. Accordingly, he instructed Hausfeld to write to the Commission on 5 July 2019 seeking disclosure of the non-confidential Decisions.

c. Regrettably, there was some delay before the Commission provided the Decisions despite my firm's best efforts to expedite matters including filing a confirmatory application on 29 July 2019 and threatening to commence proceedings before the General Court in September 2019. I describe these efforts in more detail in paragraphs 12-15 of my first witness statement.

d. Mr Evans became aware of the O'Higgins Application when it was filed on 29 July 2019. This was the same day that my firm received a response from the Commission to Mr Evans' initial request for disclosure of the Decisions, and we made a confirmatory application for disclosure of the Decisions later that day. As Mr Evans explains in paragraph 53 of his second witness statement, it seemed extremely unlikely that the O'Higgins PCR had copies of the Decisions, given that on the same day DG Competition advised my firm that it was unable to supply copies.

e. Nevertheless, preparatory work continued on the Evans Application whilst the confirmatory application remained pending with DG Competition. I confirm that this pre-filing work encompassed all of the areas identified in paragraph 56 of Ms Hollway's fourth witness statement.

f. The Commission made its confirmatory decision giving access to both Decisions by a letter to my firm dated 30 September 2019. Following receipt of the Decisions the next morning, we provided copies to Mr Evans' experts and instructed them to consider the Decisions and devise their theory of harm and quantum methodology in light of the product, geographic and temporal scope of the decisions.

g. The first CMC in the O'Higgins Application was listed on the Tribunal's website in late October 2019 and on 4 November 2019 Hausfeld wrote to the Tribunal to put it on notice of Mr Evans' intention to file a CPO Application, including the expected filing date: "*Since obtaining the non-confidential versions of the Decisions, we have been finalising Mr Evans' Application and expect to be in a position to file imminently and, in any event, by the end of November 2019*". I and other members of Mr Evans' legal team subsequently attended the CMC.

h. At the end of November, there were some minor delays to the finalising of Mr Evans' funding arrangements, meaning that the revised target filing date was early December. I note that Ms Hollway appears to criticise the fact that Mr Evans' funding arrangements were not finalised until shortly before his application was filed. However, this is not unusual. For example, the O'Higgins PCR's LFA with Therium is dated 26 July 2019, which is three days before the O'Higgins Application was filed.

i. Hausfeld updated the Tribunal of this short delay in our letter dated 29 November 2019: "*in our [4 November 2019] letter, we stated that we expected to file that application by the end of November 2019. However, we are writing to inform the Tribunal that there will be a short delay in filing Mr Evans' application, which is due to the need to finalise certain aspects of Mr Evans' funding arrangements prior to filing the application. We expect these matters to be completed shortly, and to file the application no later than Friday 13 December 2019."* The Evans Application was subsequently filed on 11 December 2019.

<u>The timing of the O'Higgins Application</u>

16. At paragraphs 65-69 of her statement, Ms Hollway explains the reasons for the timing of the O'Higgins Application and in particular its decision to file without prior sight of the Decisions. She notes that claimants in follow-on claims may choose to commence proceedings without sight of the Commission decision and obtain it through the disclosure process. I presume that she is referring to High Court individual or group proceedings, such as the Air Cargo example

she provides.[2] Assuming so, I do not agree that such claims are an appropriate precedent for applications to pursue follow-on collective proceedings in the Tribunal, which require expert evidence properly based on infringement findings to support their methodology for quantifying aggregate damages.

The filing of the O'Higgins Application created significant hurdles for funding the Evans Application

17. At paragraph 58 of her fourth witness statement, Ms Hollway suggests that, before he filed his application, Mr Evans and his funder had the benefit of knowing that the claim was legally and financially viable and that Therium had assessed the claim as likely to be financially viable. I note that paragraph 15 of the O'Higgins PCR's carriage submissions assert that this gave Mr Evans "*a level of comfort that the O'Higgins PCR did not have when planning the O'Higgins Application*".

18. As I have explained above, Mr Evans had already approached his funder and obtained an agreement in principle to fund his claim before the O'Higgins Application was filed. Mr Evans and the funder were confident at an early stage that the claim was likely to be legally and economically viable. However, when the O'Higgins Application was filed, rather than providing comfort it created a significant hurdle for Mr Evans' efforts to put in place ATE insurance and required his funder to take additional risk, as I explain below.

19. ATE insurance is a fundamental part of the Evans Application, as Mr Evans is not able to meet any adverse costs orders given the scale of these proceedings. It was therefore a pre-requisite for filing his application and also a condition precedent of executing the LFA.

20. Due to the identity of the Proposed Defendants, many of the ATE insurers active in the UK are conflicted from participating in these proceedings. Market capacity was further depleted by the O'Higgins PCR when it took out its primary and first layers of ATE insurance in or around the end of July 2019, as they were spread across two syndicates comprising six insurers in total. In our discussions with the remaining market participants, it became clear that they were unwilling to insure Mr Evans' exposure to pre-CPO costs due to the carriage issue (i.e. the risk of being

[2] Ms Hollway mentions Air Cargo (in which I acted for the claimants) as an example of a follow-on claim that was filed without sight of the Commission decision and subsequently repleaded. However, it was not originally a follow-on claim. It was filed in 2008 on a standalone basis and later amended to take account of the Commission's decision adopted on 9 November 2010, following which the claim became a hybrid follow-on/standalone claim.

unsuccessful in the carriage dispute). The reason for this was the novelty of the carriage issue – there was no precedent for determining carriage in UK collective proceedings.

21. The outcome was that Mr Evans was unable, prior to filing, to obtain ATE insurance from an A-rated insurer in respect of his pre-CPO adverse cost exposure. This issue was resolved by his funder through the provision of a costs indemnity in respect of Mr Evans' exposure to pre-CPO adverse costs. The funder has taken out insurance in respect of its pre-CPO costs exposure. However, that policy is with an unrated insurer and contains various exclusion clauses which make it unfavourable for the funder. Mr Chopin explains this further in his fourth witness statement.

22. It is important to note that the O'Higgins PCR did not face this difficulty because, when it put in place its ATE insurance, there was no competing CPO application for its insurers to factor into their risk assessment. Nor would I expect this risk to be a material factor in the risk assessment undertaken by its insurers in respect of the excess layers put in place after the O'Higgins PCR became aware of Mr Evans' claim in November 2019, because those insurers are excess of £21 million, meaning that it is extremely unlikely that they would have any exposure to any pre-CPO costs.

23. These difficulties created a considerable amount of additional work in structuring Mr Evans' funding arrangements and required his funder to take a greater degree of risk than Therium. I also note that Hausfeld has agreed to defer its fees until after certification, so Hausfeld has therefore taken more risk than Scott+Scott (who are acting under a 50% partial CFA) at the pre-CPO stage of the proceedings. Accordingly, Ms Hollway's contention that the O'Higgins PCR has taken "*disproportionately higher risks"* is incorrect: on the contrary, the impact of the O'Higgins Application was to increase the risk for the Evans Application. Conversely, filing first gave the O'Higgins PCR an advantage because it had access to more insurers than Mr Evans and there was no competing application that might affect their interest in the case.

24. It is worth noting that Mr Evans' difficulties in obtaining pre-CPO adverse costs insurance were compounded by the O'Higgins PCR's decision to frontload its ATE insurance by acquiring a very significant level of cover at the pre-certification stage, thereby significantly reducing market capacity. It has taken out £33.5 million of insurance, at a cost of £5,474,000 (which accounts for more than half of its pre-CPO budget) in circumstances where its application has not yet been certified and the banks have not provided any information about their post-CPO costs. It is also notable that the O'Higgins PCR appears to have presented its case to insurers at an extremely early stage of building its case. For example, the policy commencement date in its

primary insurance policy is 10 December 2018, which is more than five months before the Decisions were announced by the Commission.

25. I believe that the practice of frontloading ATE insurance at the beginning of collective proceedings is unhelpful for the collective actions regime, because it encourages applicants to rush into acquiring unnecessarily high levels of ATE insurance as early as possible in an effort to corner the market and stifle the prospects of other applicants of putting in place adverse costs cover, regardless of their relative merits or ability to act in the best interests of the class. As Mr Chopin explains in his fourth witness statement, it also increases the upfront costs of collective proceedings, which reduces capacity in the funding market.

26. Further, the practical consequence of endorsing a first to file approach is that ATE insurers would be very unlikely to underwrite pre-CPO adverse costs exposure for any subsequent applicants. Given that adverse costs cover is an essential part of collective actions, it would require funders to take on this risk. This would create a significant disincentive for funders contemplating funding collective actions once the first application is filed. This would, in turn, reduce the chances that competing CPO applications would be pursued once the first one is filed, thereby depriving class members of the benefits of competition between PCRs. Carriage disputes, properly controlled, should foster healthy competition and work to the best interests of the classes they seek to represent by helping to contribute to the quality and robustness of proposed claims.

<u>The O'Higgins Application was not a precedent for the Evans Application</u>

27. At paragraph 59 of her statement Ms Hollway argues that Mr Evans had access to a "*significant amount of information from the publicly available elements of the O'Higgins Application*" and thereby benefitted from its work.

28. Ms Hollway has significantly underestimated the amount of preparatory work that went into the Evans Application. As I have explained above, Mr Evans had already put in place the key building blocks of his claim before the O'Higgins Application was filed. Further, Ms Hollway has exaggerated both the extent, and value, of the information that was available to Mr Evans before his application was filed. With the exception of its class definition, the documents comprising the O'Higgins Application were not available to Mr Evans prior to filing his application. He had no precedents for, and prepared from scratch, all of the key aspects of his CPO application including his Claim Form, the supporting evidence, the Litigation Plan and Angeion's notice and administration plan (the "**Angeion Plan**").

29. The O'Higgins PCR's class definition was the only document from its CPO application that was available to Mr Evans prior to filing his application. In addition, Mr Evans had access to the class definitions for the US and Canadian class actions. However, Mr Evans has adopted an entirely different approach to his class definition, including the use of two proposed classes rather than one and the exclusion of various transaction types that are included within the O'Higgins class definition. This reflects the fact that a considerable amount of care and attention went into Mr Evans' class definition, based on a different theory of harm and methodology to the O'Higgins Application.

30. Ms Hollway points to two other specific sources of publicly available information: (i) the Tribunal's summary of the O'Higgins Application; and (ii) the O'Higgins PCR's claim website. However, these were of very limited relevance to Mr Evans, as I explain below.

    a. The Tribunal's summary of the O'Higgins Application does nothing more than set out the essential requirements for the claim form and summarise the O'Higgins Application at a high-level. It was of limited interest to Mr Evans because he already had access to the Commission's press release and had already put in place the key elements of his claim.

    b. The O'Higgins PCR's website contained very limited information prior to December 2019. The FAQs simply provided a brief outline of the key features of the O'Higgins Application and therefore provided no information that was of particular use to the Evans Application. The website was also of limited value as a general precedent: Mr Evans' team were already well accustomed to preparing websites (including detailed FAQs) from their experience of working on other collective actions, including the *Trains* proposed collective proceedings.

<u>Initial procedural developments in the O'Higgins Application were of no or minor relevance to the Evans Application</u>

31. At paragraph 61 of her statement, Ms Hollway argues that Mr Evans benefited from procedural developments in the O'Higgins Application before the Evans Application was filed.

32. In relation to service, Ms Hollway argues that the service order in the O'Higgins Application gave Mr Evans "*full comfort*" that his application for service out of the jurisdiction would also be granted. However, this was never a concern for Mr Evans. There were strong grounds for serving the Evans Application out of the jurisdiction and it was not expected to be problematic.

33. In relation to jurisdiction, Ms Hollway incorrectly states that the Proposed Defendants have not raised any jurisdiction challenges in the Evans Application. In fact, the same Proposed

Defendants (and together with MUFG) have challenged jurisdiction in the Evans Application on a similar basis to the O'Higgins Application. Mr Evans had already formulated his position on jurisdiction before the O'Higgins PCR notified Mr Evans of its position. Accordingly, Mr Hollway's allegations that Mr Evans was able to 'free ride' on the O'Higgins PCR's work are incorrect. Specifically:

a. Most of the relevant Proposed Defendants (the Fifth to Fifteenth Proposed Defendants in the Evans Application) wrote to Mr Evans suggesting that their jurisdiction applications be determined after Mr Evans' CPO application had been determined. Mr Evans agreed with that proposal, subject to the caveat that an alternative approach might be appropriate if the O'Higgins PCR advised that it would seek to have a preliminary issue determined in respect of jurisdiction, as that issue might have been relevant to the Evans Application.

b. Hausfeld confirmed Mr Evans' position in relation to jurisdiction to Scott+Scott in a letter dated 23 January 2020, in which we also asked Scott+Scott to provide details of any preliminary issue application relating to jurisdiction that it might issue, in case it was relevant to the Evans Application. However, Scott+Scott refused on 30 January 2020, stating that "*in the event that our client seeks to have any preliminary issue determined at the impending hearing – the most appropriate course is for your client to seek directions from the Tribunal for the disclosure of such application. These directions should include provision for the treatment of Outer Confidentiality Ring material*."

c. Hausfeld responded to Scott+Scott on 31 January 2020 with our proposals for addressing Scott+Scott's confidentiality concerns. Scott+Scott provided its response in a letter to all parties on 5 February 2020 in which it indicated, for the first time, that the O'Higgins PCR did not consider that there was a "*worthwhile preliminary issue*" in relation to jurisdiction. In light of this, Mr Evans maintained his position that the jurisdiction challenges should be stayed or adjourned until after his CPO application was determined.

34. Finally, Ms Hollway also alleges that the first CMC in the O'Higgins Application, on 6 November 2019, provided Mr Evans with an "*opportunity to 'test the waters' to see if the Tribunal would give any indication as to how it would treat [his] application*".

35. I attended that hearing. The purpose of attending was to ensure that, if the Tribunal had any questions about Mr Evans' application during the hearing (arising from our letter to the Tribunal of 4 November 2019), his legal team would be available to assist. This seemed prudent, given the likelihood that the two applications would be case managed together. Ms Hollway is wrong

to suggest that there was any uncertainty about Mr Evans' intention to file his application. By that stage, a substantial amount of time had already been spent by Mr Evans and his team preparing his application. We had received the Decisions just over four weeks earlier and pre-filing work was significantly advanced. Mr Evans had no reason to believe that the Tribunal would respond negatively to the application, given that its rules expressly contemplate the possibility of competing CPO applications.

The O'Higgins PCR has benefitted from the Evans Application

36. Ms Hollway's allegations of free-riding against Mr Evans are particularly unfair because the O'Higgins PCR has benefitted from and in fact made substantial amendments to its CPO application in response to the Evans Application.

37. As I have noted above, the O'Higgins PCR has amended its application twice since the Evans Application was filed. Its second amendment was made on 23 October 2020 (more than 10 months after the Evans Application was filed) and supplemented its methodology through the introduction of a report from a new expert, Professor Bernheim.

38. The purpose and timing of the Bernheim report was explained in a letter from Scott+Scott to all parties dated 4 November 2020. It is clear from this letter that the O'Higgins PCR's decision to supplement its application with Professor Bernheim's evidence was made as a reaction to the Evans Application. It decided to supplement and refine its expert methodology by instructing a new expert who had the benefit of reviewing all of Mr Evans' expert reports (which had been available to the O'Higgins PCR since March 2020) whilst preparing his report and indeed was expressly instructed to assess the relative merits of the expert evidence served in the two applications. Notably, this report includes evidence on matters that were not addressed by Professor Breedon but had been addressed by Mr Evans' experts, such as pass-on.

B. Budget

39. At paragraph 76 of her fourth witness statement, Ms Hollway cites three factors which go to the difference in scale between Mr Evans' and the O'Higgins PCR's budgets: (i) distribution; (ii) dealing with opt-ins from outside the jurisdiction; and (iii) ATE insurance.

Distribution

40. According to Ms Hollway, the O'Higgins PCR has a budget of £3.7 million for the notice and administration of damages in the event of success. Ms Hollway goes on to say that the *"equivalent line item in the Evans Application budget is £450,000"*. This figure should actually

be £475,000 to include the £25,000 provisioned for associated PR costs. I do not know the O'Higgins PCR's underlying assumptions to determine how this figure has been arrived at, but £3.7 million is a very large estimate for a process that Ms Hollway acknowledges lacks any precedent in this jurisdiction. Indeed, it is clear from what Ms Hollway says at paragraph 76(a), and later at paragraph 76(a)(iii), that the O'Higgins PCR has decided to include a sizeable budget for the distribution stage of the proceedings having taken into account her firm's experience in the US proceedings, in which I understand from my US colleagues that the claims administration costs have been particularly high.

41. I am not convinced, however, that this is a sound enough basis for such a sizeable budget in these proceedings. Angeion – the firm handling Mr Evans' claim administration, including, in the event of success, distribution – has extensive experience in this area which is set out in Appendix 1 of the Angeion Plan and it has reached its estimates based on workstreams set out in the Angeion Plan.

42. Ms Hollway goes on to discuss three aspects of the process: notice, distribution, and verification and payment. Mr Evans' proposals in respects of each of these is set out in his Litigation Plan and the Angeion Plan, exhibited to Mr Evans' first witness statement at PGE3. They are more comprehensive than the O'Higgins PCR's plan via Epiq (the "**Epiq Plan**") – all, ostensibly, for a fraction of the cost of the Epiq Plan. Specifically:

    a. Notice: Paragraph 80 of Mr Evans' Litigation Plan, and the corresponding Section 8 of the Angeion Plan, provides for the preparation of a notice informing class members of their ability to claim and explaining the process for doing so. This 'Recovery Notice' will be issued and publicised to class members in various ways which are similar to those set out in the O'Higgins PCR's Litigation Plan (and the corresponding sections of the Epiq Plan). The Angeion Plan also includes provision for a call centre providing support to class members which does not seem to have been provided for in the Epiq Plan.

    b. Distribution: Similar to the Epiq Plan, the Angeion Plan, at Section 9, allows for both online and paper claim filing, using tools to facilitate a user-friendly interface for class members and to reduce the incidence of incomplete claims. The Angeion Plan also includes provision for the production and displaying of a video to explain the claim filing process, as well as (as above) a call centre to assist class members with the claims filing process.

    c. Verification and Payment: Similarly, both plans provide for robust claims validation and the effective facilitation of payments to class members. I understand from my US

colleagues that in the US proceedings a large proportion of the claims administration costs resulted from the outsourcing of various processes to third party providers. I can confirm that the estimated costs in Mr Evans' budget include the instruction of a third party expert to assist with the claim validation process should it be necessary.

43. It remains unclear how the O'Higgins PCR has arrived at the figure of £3.7 million for the notice and administration of damages in circumstances where the Angeion Plan matches and is in some cases more comprehensive than the Epiq Plan for a fraction of the cost.

44. Moreover, it is important to add that, should Mr Evans reach the distribution stage and require additional funding, I am confident that the funder would oblige. At paragraph 25 of Mr Chopin's third witness statement, he makes clear that, if we and Mr Evans reasonably believe it is necessary to increase the budget after certification, the funder will agree to make further funds available.

Opt-ins

45. According to Ms Hollway, the O'Higgins PCR has a budget of approximately £930,000 for communicating with potential class members from outside of the jurisdiction about the possibility of opting in to the claim. Again, with no breakdown of this figure, or the assumptions underpinning it, it is unclear how it has been reached. In my view, £930,000 seems to me to be a large estimate in circumstances where, for the reasons I set out in my fourth witness statement (in particular, that any class member required to opt-in is less likely to participate), I believe it is inherently less likely that a substantial proportion of the class members in the proceedings will be overseas domiciled class members opting in.

46. Ms Hollway claims that Mr Evans does not have a budget for communicating with potential opt-in class members about the possibility of opting-in to the claim. This is a mis-reading of the format of Mr Evans' budget. Mr Evans has not segregated separate sums for costs associated with opt-in class members in his budget. Instead, these costs are embedded within the budget. While not explicitly labelled in Mr Evans' budget, provision for this, as well as a substantial international PR and advertising campaign, is included within the £180,000 allocated to Angeion during the post-CPO notification stage. Mr Evans' extensive plan for communicating with both opt-out and opt-in class members, including interacting with class members, is discussed in his Litigation Plan and in more detail at paragraphs 6.1-6.31 of the Angeion Plan.

47. Paragraphs 7.6-7.8 of the Angeion Plan sets out the process for overseas domiciled class members to opt-in to the claim. Part of this process may require opt-ins to provide their FX

transaction data, in which case, per paragraph 88 of the first expert report of John Ramirez, we anticipate that Mr Ramirez will "*develop a structured data template which non-UK domiciled class members can populate with details of their qualifying transactions*". As explained at paragraph 43(b) of Mr Evans' Litigation Plan, "*to the extent class members are unable to provide transaction data, Mr Ramirez may be able to assist potential class members to identify their transaction records from the Proposed Defendants' transaction data in the event that it is disclosed in these Proposed Collective Proceedings*". Accordingly, these costs are included within the overall budgeted costs for Mr Ramirez and his team at Econ One (the total amount allocated to Econ One following certification is approximately £1.3 million).

48. Furthermore, as above, should Mr Evans require additional funding in respect of communicating and interacting with opt-in class members, I am confident that the funder would oblige.

ATE insurance

49. Ms Hollway draws attention to the fact that the O'Higgins PCR has budgeted more for ATE insurance: £5,376,000 compared with £4,803,000 in Mr Evans' budget. In fact, in accordance with the amended budget exhibited to Mr Evans' second witness statement, Mr Evans' updated budget for ATE insurance is £5,050,000, meaning that the difference between the budgets is £326,000 or approximately 6%.

50. I also note that (as mentioned above) at paragraph 25 of his third witness statement, Mr Chopin confirms that if it is necessary to increase the budget, the funder will be entirely supportive of the request and has already obtained "*in principle*" approval to make further funds available if and when required. Further, at paragraph 26 of his third witness statement, Mr Chopin confirms that he is "*highly confident that the Funder will provide any additional funding necessary following certification to ensure that sufficient ATE insurance remains in place throughout the remainder of the proceedings*". Accordingly, if it is necessary for Mr Evans to revise the budget to acquire additional ATE insurance, I am confident that he will be able to do so.

C. Mr Evans' funding arrangements

Amendment to Mr Evans' LFA

51. At paragraph 23 of the O'Higgins PCR's carriage submissions, it criticises a term of Mr Evans' LFA which provides that any additional funding obtained from another funder should not be less advantageous to Mr Evans than the terms of the existing LFA (clause 5.8). Mr Evans does not accept that this would impede his ability to obtain funding from a third party in the unlikely

event that it were necessary. However, he has in any event dispensed with this point by agreeing with his funder to remove this provision from clause 5.8 of his LFA. He is in the process of executing his amended LFA with the funder, which will be filed with the Tribunal shortly.

Anti-avoidance endorsements (AAE)

52. At paragraphs 41-43 of the O'Higgins PCR's carriage submissions, it is argued that the O'Higgins PCR has "*more robust anti-avoidance provisions*" than Mr Evans. The reason the O'Higgins PCR has AAE is because the Proposed Defendants issued a security for costs application against it on 29 May 2020, due to the existence of exclusion clauses in its insurance policies making them inadequate security for the Proposed Defendants' costs. The application was subsequently withdrawn after the O'Higgins PCR entered into an AAE in respect of its primary layer of insurance (£6 million) at a cost of more than £500,000.

53. Contrary to the submissions at paragraph 42 of the O'Higgins PCR's carriage submissions, Mr Evans' policies do not apply "*standard policy wording*": they are bespoke policies that have been carefully tailored to these proceedings following discussion and negotiation between Mr Evans and his insurers. His policies do not contain the same, broader, exclusion clauses that are found in the O'Higgins PCR's policies and the Proposed Defendants have not challenged the adequacy of Mr Evans' insurance policies as security for their costs.

54. Accordingly, Mr Evans' position is that his policies provide adequate security for the Proposed Defendants' costs and that it would be unnecessary and wasteful of costs for him to acquire AAE in the absence of any complaints about their adequacy. However, without prejudice to this position, and in case the Tribunal considers it necessary, Mr Evans is considering with his insurers whether any further anti-avoidance provisions might be added to his policies to remove any possible doubt.

Cost of funding

55. Finally, I note that at footnote 26 of the O'Higgins PCR's carriage submissions it is argued that the arrangements governing the order of payment of costs out of undistributed damages puts Mr Evans' funder in an "*advantageous position*" as against solicitors and Counsel. It is not clear to me what point is being made here, but I entirely reject any insinuation that the waterfall arrangements would have any bearing on the conduct of Hausfeld, the Counsel team or Mr Evans' conduct of the proceedings, or that it would influence the funder.

56. Moreover, the waterfall arrangements under the priorities deed only engage to limit the amounts payable under Mr Evans' funding agreements (including the LFA and CFAs) where the

amount authorised to be paid in respect of Mr Evans' costs is less than the amounts owed by Mr Evans under his funding agreements. In my fourth witness statement I exhibited a document setting out various scenarios for aggregate damages awards. It shows that for the level of Mr Evans' costs match the amount of undistributed damages, the aggregate damages award would be less than 5% of the estimated aggregate damages. Further, even in a scenario where the waterfall arrangements are engaged, the majority of the funder's fee is paid at a later stage in the waterfall than Hausfeld or Counsel. Accordingly, the chances that the funder would be in an "*advantageous position*" to the lawyers are extremely low.

D. Active monitoring of third EC investigation and other related proceedings

57. At section IV of Ms Hollway's fourth witness statement (paragraphs 78-85) she describes work undertaken by the O'Higgins PCR's team to monitor wider developments that might affect the case. In particular, she refers to correspondence between Scott+Scott and the Proposed Defendants and the Commission about the ongoing third Commission investigation into alleged FX misconduct.

58. I confirm that Hausfeld has been actively and closely monitoring the third Commission investigation throughout these proceedings, including during our preparatory work on the case. For example, paragraph 23 of Mr Evans' Amended Claim Form refers to press reports about the investigation and to a Defence filed in *Allianz Global Investors GmbH & Ors v Barclays Bank plc & Ors* which describes conduct that Mr Evans infers to be the subject of the investigation. We monitor all information in the public domain about the Commission's investigation and Mr Evans will seek the written consent of the Proposed Defendants or apply for the Tribunal's permission to re-amend the Amended Claim Form if the Commission adopts another infringement decision in respect of FX misconduct.

59. In section C of my fourth witness statement, I described Hausfeld's ongoing efforts to monitor other related FX proceedings:

    a. My firm is in contact with one of the law firms acting in the Canadian class action (Siskinds LLP), who amongst other things have provided us with copies of publicly available court documents from the Canadian proceedings.

    b. I confirm that we have corresponded with the claimants' solicitors, Quinn Emanuel Urquhart & Sullivan LLP, about the progress of the *Allianz* proceedings. In addition, we have monitored the progress of Allianz's appeal against the order of Teare J dated 18 March 2021. Allianz was granted permission to appeal on 28 May 2021 and its appeal is

due to be heard by 8 July 2022. Mr Evans will update the Tribunal of any further developments in that appeal.

c. My US colleagues have also been in contact with Maurice Blackburn, the law firm acting in the Australian FX cartel class action.

60. Through each of these relationships described above, my firm is able to actively monitor and promptly act upon any relevant public information from those proceedings that may be applicable to the case. We also continue to monitor the public domain information relating to the US proceedings.

E. Relevant Financial Institutions

61. In section V of Ms Hollway's fourth witness statement, she comments on the additional RFIs included in Mr Evans' class definition. Ms Hollway states correctly that Mr Evans' list of RFIs is derived from both the Bank of England's Foreign Exchange Joint Standing Committee ("**FXJSC**") semi-annual turnover surveys between 2007 and 2019 and the Bank of England's submission to the BIS Triennial Survey from 2016, whereas the O'Higgins PCR's list of RFIs is derived from FXJSC survey data only. As a result, Mr Evans' class definition includes 16 more RFIs than the O'Higgins class definition.[3]

62. Ms Hollway comments that it is not possible to confirm whether the additional RFIs included in the 2016 BIS Triennial Survey are FX dealers because "*the BIS Triennial Survey covers market makers in both FX and in OTC derivatives*" and "*it is impossible to determine if such banks would be market makers in both FX and OTC derivatives*". Professor Breedon, an expert instructed by the O'Higgins PCR, also asserts that the additional 16 RFIs are unlikely to act as active FX dealers in G10 currencies, although he provides no basis for this.[4]

63. Mr Evans' list of RFIs was compiled by reference to appropriate sources of data. It was concluded that a financial institution's inclusion as a reporting dealer in either the FXSJC survey or the BIS Triennial Survey was a reasonable basis for assuming that the institution was an FX

[3] Although there are in fact 18 more RFIs in Mr Evans' class definition than the O'Higgins PCR's class definition, Ms Hollway states at paragraph 91 of her fourth witness statement that two of these RFIs - Adam & Co and Coutts & Co – would be included in the O'Higgins Application as part of the RBS Group so "*in practice, therefore the difference between the respective class definitions relates to 16 banking groups*". Mr Evans does not dispute this statement.

[4] Breedon 2, paragraphs 5.7-5.9.

dealer.[5] Both surveys are used to compile important reports in the FX market.[6] In respect of the BIS Triennial Survey specifically, "*Reporting Dealers*", are defined as:[7]

> *"… mainly large commercial and investment banks and securities houses that (i) participate in the inter-dealer market and/or (ii) have an active business with large customers, such as large corporate firms, governments and non-reporting financial institutions; in other words, reporting dealers are institutions that are actively buying and selling currency and OTC derivatives from their own account and/or in meeting customer demand.*
>
> *In practice, reporting dealers are often those institutions that actively or regularly deal through electronic platforms, such as EBS or Reuters dealing facilities."*

64. These are contrasted with "*other financial institutions*" which are defined as:

> *"Financial institutions that are not classified as "reporting dealers" in the survey.*
>
> *These are typically regarded as foreign exchange and interest rate derivatives markets end users. They mainly cover all other financial institutions, such as smaller commercial banks, investment banks and securities houses, and, in addition, mutual funds, pension funds, hedge funds, currency funds, money market funds, building societies, leasing companies, insurance companies, other financial subsidiaries of corporate firms and central banks."*

65. Based on the evidence of Mr Knight in his third report and Mr Ramirez in his third report, there is credible evidence to demonstrate that, in addition to their status as reporting dealers in the BIS Triennial Survey, 15 out of the 16 were FX dealers during 2007-2013. The sixteenth RFI is Nationwide Building Society. We are not aware of any evidence that indicates that it is not an FX dealer.

66. In any event, Mr Evans' Litigation Plan contemplates that the RFIs will be directly contacted and asked to pass on the CPO Notice to their customers in the event that a CPO is granted in his favour.[8] During this process, Hausfeld, on behalf of Mr Evans, will correspond with Nationwide Building Society about its inclusion on the RFI list and advise Mr Evans on its response accordingly.

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5 Mr Knight comments on this at paragraph 127 of his first report.

6 Mr Knight describes the BIS Triennial Survey at paragraph 41-46 of his first report and comments on other sources of market wide data, including the FXJSC report at paragraphs 68-72 of his first report.

7 BIS Reporting Guidelines, p.9.

8 This is contemplated as part of the steps proposed by Angeion to make direct contact with class members at paragraph 6.5 of the Angeion Plan (Annex 1 to the Litigation Plan).

F. Economic viability of opt-in proceedings

67. At paragraph 67 of the Joint CPO Rejoinder, the Proposed Defendants comment on the evidence given in Section A of my fourth witness statement about Hausfeld's previous efforts to bookbuild for claims concerning FX misconduct and query the basis on which such claims were to be funded.

68. I can confirm that the claims were intended to be fully funded and insured so that the prospective claimants would have no costs outlay or adverse costs exposure. However, for the reasons given in paragraph 19 of my fourth witness statement, even with these proposed measures a large proportion of the potential claimants were still unwilling to commit and the combined claims of the 14 clients that instructed us were not of a sufficient size to bring a viable group claim, because it was not economically viable to fund.

STATEMENT OF TRUTH

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

Signed:

Date: **11 June 2021**