Made on behalf of:	**Applicant/Proposed Class Representative**
Name of witness:	**Adrian Mark Chopin**
Number of statement:	**4**
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**

FOURTH WITNESS STATEMENT OF ADRIAN MARK CHOPIN

I, **ADRIAN MARK CHOPIN,** of Bench Walk Advisors LLC, 5 Cheapside, London EC2V 6AA, **WILL SAY AS FOLLOWS:**

1. As explained in my first witness statement, dated 10 June 2020, I am a Managing Director of Bench Walk Advisors LLC (**Bench Walk**), the asset manager of Bench Walk Capital LLC (**Bench Walk Capital**), which, in turn, wholly owns Donnybrook Guernsey Limited (the **Funder**), through which Bench Walk is funding Mr Evans's proposed collective proceedings. I am authorised to make this statement on behalf of the Funder.

2. This is my fourth witness statement in these proceedings. I make this witness statement in response to the submissions of Michael O'Higgins FX Class Representative Limited (the **O'Higgins PCR**) on carriage dated 23 April 2021 (the **O'Higgins Carriage Submissions**) and the

fourth witness statement of Belinda Hollway dated 23 April 2021. I have also been provided with the Respondents' Joint CPO Rejoinder and have read paragraphs 65-67 therein. This section sets out arguments about the economic viability of opt-in collective proceedings, including by reference to my third witness statement. I respond to these arguments below.

3. I confirm that, unless otherwise stated, 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 are not within my own knowledge, I have indicated my sources of information or belief.

4. I also confirm that, for the avoidance of doubt, in giving this statement I do not disclose any information that is subject to legal professional privilege, nor is any waiver of such privilege intended by this statement.

5. I have maintained the definitions adopted in my first witness statement.

A. Impact of the O'Higgins Application on the Evans Application

6. In paragraph 58 of her fourth witness statement, Ms Hollway argues that, once the O'Higgins Application was filed, Bench Walk had the benefit of knowing that Therium had agreed to fund it and had therefore assessed the claim as likely to be financially worthwhile.

7. Whilst I cannot reveal the content of our privileged risk assessments, I would say that, as a matter of principle, the existence of a competing CPO application will always create additional risk since there would be a carriage dispute, which poses an additional hurdle to certification.

8. The other aspect of Mr Evans's funding arrangements affected by the O'Higgins Application was his ATE insurance arrangements. In this area, the O'Higgins PCR had a considerable advantage in filing its application first because, as Mr Evans discovered, it created difficulties for him to put in place insurance for his pre-CPO adverse costs exposure.

9. When the O'Higgins PCR took out its initial ATE insurance, there was no competing applicant that might affect its insurers' risk assessment. By contrast, when Mr Evans was seeking to put in place his ATE insurance, he was unable to secure cover for his pre-CPO adverse costs exposure due to the carriage risk. To resolve this issue, Bench Walk took on additional risk by providing Mr Evans with an indemnity in respect of his pre-CPO adverse costs exposure. I then sought to mitigate this risk to the Funder by taking out insurance in respect of the exposure under the indemnity. However, that insurance is not written by an A-rated insurer and it contains various exclusion clauses. In particular, the policy only provides cover if both Mr Evans's and the

O'Higgins PCR's applications fail. In other words, it does not cover the core risk that a CPO is granted in favour only of the competing applicant. That carriage risk is therefore borne entirely by the Funder. This is not a risk that Therium was required to take. In addition, because of the non-standard terms of that policy, Bench Walk has agreed to post £3 million in cash as security for costs in order to ensure the Proposed Defendants have sufficient comfort that they will be paid if Mr Evans's application is unsuccessful. Even if the insurance policy ultimately reimburses Bench Walk for any portion of that £3 million that is used to pay adverse costs, Bench Walk will still have suffered a real cost from having £3 million of capital tied up for an extended period and earning no return. Therium has not had to bear this extra cost.

B. Guarantee from Bench Walk Capital to Mr Evans

10. At paragraph 26 of the O'Higgins Carriage Submissions, it is argued that, while Bench Walk Capital has guaranteed the Funder's obligations, it does not need to keep itself adequately capitalised as it would do if it were a member of the ALF or bound by its code.

11. This argument does not appear to take account of clause 2.1(g) of the deed of guarantee between Bench Walk Capital and Mr Evans, by which Bench Walk Capital has agreed that it will "*maintain, at all times, access to undrawn capital commitments from its investors in an aggregate amount at least equal to the remaining undrawn funding commitment*".

12. Accordingly, Bench Walk Capital has a contractual obligation to Mr Evans to keep itself adequately capitalised. I am unclear what additional benefit would be afforded to Mr Evans if Bench Walk Capital were a member of the ALF. Nevertheless, I confirm that, if the Tribunal were to consider it desirable, Bench Walk Capital would be happy to give a written undertaking to the Tribunal to comply with paragraphs 9.4.1 and 9.4.2 of the ALF Code as if Bench Walk Capital were a member of the ALF and the Funder were its Associated Entity (as defined in the ALF Code).

C. The role of funding and insurance amounts in carriage disputes

13. I note that the O'Higgins PCR argues that the Tribunal should favour an applicant that is 'better' funded in carriage disputes, which I understand to mean one that has a greater amount in committed funding, and that has purchased more ATE insurance.

14. In a case such as this one, where funding arrangements are not contested for the purposes of certification, setting a precedent that the Tribunal should favour applicants in a carriage dispute

with more committed funding and more insurance would create a dangerous precedent for the regime. It would incentivise funders to engage in an arms race to commit unnecessarily large amounts of funding and to frontload costs by purchasing unnecessarily large amounts of insurance as early as possible. The more funding committed to individual cases, the greater will have to be their pricing, all else being equal, since – even if that money is never drawn – there are real opportunity costs to a funder from tying up large amounts of committed capital in any single case rather than putting money to work in other cases. This would be detrimental to the collective actions regime, which depends on the availability of funding at reasonable prices.

D. Economic viability of opt-in collective proceedings

15 I have reviewed paragraphs 65-67 of the Joint CPO Rejoinder, in which the Respondents make submissions about the economic viability of opt-in proceedings and refer to my third witness statement, which they say is a "*tacit recognition that opt-in proceedings may well be economically viable albeit on different terms*".

15. This mischaracterises my earlier statement. My point was that Mr Evans's funding structure was prepared specifically for opt out proceedings and therefore would not be viable for opt-in proceedings.

16. It is not possible for me to say, in the abstract, whether we would be able to fund an opt-in claim instead. However, I can confirm that adding a bookbuilding stage to the proceedings would inevitably add significant upfront expenditure to the case and therefore significantly increase the required budget, as I stated in my third witness statement.

17. In the past 3 years since I set up Bench Walk, I have funded five UK group claims of various kinds, and I am currently considering a further four such claims. I have funded, or am considering for funding, a number of group claims in other jurisdictions. I can confirm that book building in all these claims is one of the key considerations when a funder is assessing the risk. As a general rule for claims such as this one, the smaller the average size of each claimant's claim the harder it is to get those claimants to sign up because of inertia: the sign up process usually involves a significant upfront time investment by a claimant and its legal team including: (a) to ensure the claimant meet the conditions to join the claim; (b) to calculate, at least on a preliminary basis, the expected value of the claimant's claim; (c) to ensure that the terms of the funding are acceptable and sometimes to negotiate key commercial terms such as discounts to the funder's fee; and (d) to ensure that the claimant is adequately protected against the risk of

an adverse costs award.

18. For FX cartel claims, each claimant's claim is typically very small when compared to the size of that claimant's balance sheet (I understand from Mr Ramirez's evidence that the majority of class members would have a claim of less than GBP 16,000, regardless of whether they are large organisations or financial/non-financial institutions). I anticipate, therefore, that a large majority of corporate and financial institution class members' claims will be too small for them to overcome their initial inertia and/or to justify the upfront time investment required to sign up to the group. By way of example, on a shareholder group action that I funded recently, we had a discussion with one financial institution that was eligible to join our group. However, that potential claimant concluded that its claim size (which we had estimated to be very significantly in excess of GBP 16,000) was too small to justify the effort of signing up.

19. At paragraph 67 of the Joint CPO Rejoinder, the Proposed Defendants refer to Hausfeld's previous book building efforts and argue that the prospect of opting into an already certified claim will be a far more attractive proposition than group litigation in the civil courts. I think the Proposed Defendants have significantly underestimated the difficulties of re-initiating the book building process. In my experience, it is very difficult to re-engage potential claimants and persuade them to change their minds about a case after they have considered it and turned it down, especially when it dates back to events that took place almost a decade ago. I also agree with Anthony Maton's evidence that prospective class members will be concerned about their banking relationships. Based on my prior experience of efforts to book build for high profile group claims, I expect that many of them would not be willing to be seen to take active steps to participate in this litigation, since that might affect ongoing and future relationships with their banks. This would remain a strong disincentive against joining the claims on an opt-in basis.

20. The other issue affecting viability is timing. For a case as large and complex as this, I would expect a substantial period of bookbuilding to be required (without any guarantee of success) and, as I explained in my third witness statement, the funding would be structured so that the claims could not proceed unless an aggregate claim threshold were met. The process of validating each class member's claim, which I touch upon in paragraph 17 above, would also add significant time to the process. It is also worth noting that in my experience many prospective claimants delay making a decision whether to participate in a case until the very end of the bookbuliding process, in part because it costs them nothing to wait and see how the claim and the bookbuild develop (unless, for example there is some limitation or other deadline

that forces a decision). This delay in signing up adds further risk because the funder may have no certainty until near the very end of the bookbuild process as to whether or not the claim is economically viable. To mitigate some of these risks, and based on my experience of book building in other cases, I expect that an opt-in period for these proceedings would need to be very substantial in order to determine whether a viable overall claim can be built. This case has already been several years in the making and including an additional stage that is likely to be very lengthy makes the investment still less attractive.

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