Made on behalf of:	**Applicant/Proposed Class Representative**
Name of witness:	**Phillip Gwyn James Evans**
Number of statement:	**2**
Exhibits:	**PGE6 – PGE12**
Date:	**23 April 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

Respondents/ Proposed Defendants

SECOND WITNESS STATEMENT OF PHILLIP GWYN JAMES EVANS

I, **PHILLIP GWYN JAMES EVANS,** of a private residential address in Bristol, United Kingdom, will say as follows:

Introduction

1. I am the proposed class representative in these Proposed Collective Proceedings, which I seek to bring as opt-out collective proceedings on behalf of two classes of persons who, between 18

December 2007 and 31 January 2013, entered into certain types of FX transactions in the European Economic Area, as set out in the Amended Collective Proceedings Claim Form.

2. This is my second witness statement in support of my application for a CPO. I have previously provided a witness statement dated 10 December 2019 ("**Evans 1**"). In this statement I address the following issues:

   a. First, I explain why (contrary to the Proposed Defendants' Joint CPO Response dated 26 February 2021 (the "**Joint CPO Response**")) my experience suggests that it would be neither practicable nor desirable to bring the Proposed Collective Proceedings on an opt-in basis.

   b. Second, I address matters that may be relevant to the question of whether I or the O'Higgins PCR would be the more suitable class representative pursuant to Rule 78(2)(c) of the Tribunal Rules (the "**Carriage Dispute**"), namely:

      i. the reasons why the scope of the claims that I propose to bring would be in the best interests of the members of the Proposed Classes;

      ii. the steps that I have taken to publicise, engage with and inform the members of the Proposed Classes about the Proposed Collective Proceedings; and

      iii. my proposals for safeguarding the distribution process and to maximise the payment of damages to the members of the Proposed Classes.

   c. Third, I provide an update on the steps taken to put in place adequate funding and insurance arrangements for the Proposed Collective Proceedings.

3. I confirm that unless otherwise stated, the contents of this witness statement are within my knowledge. The same is 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. In this second witness statement, I adopt the same defined terms as those used in Evans 1.

4. For the avoidance of doubt, I confirm that nothing in this witness statement constitutes, or is intended to constitute, a waiver of legal professional privilege. Where I state in this witness statement that my understanding is based on discussions with my legal representatives, I confirm, for the avoidance of doubt, that I do not waive legal professional privilege in this or any regard.

5. There is now produced and shown to me Exhibits **PGE6** – **PGE12** which I refer to below and which I exhibit to this statement.

The practicability of bringing the Proposed Collective Proceedings on an opt-in basis

6. In their Joint CPO Response, the Proposed Defendants suggest that the Proposed Collective Proceedings should only be certified, if at all, as opt in proceedings. I disagree with this suggestion. In this section of my witness statement, I explain why I do not believe that it would be practicable or desirable to bring the Proposed Collective Proceedings on an opt-in basis. I refer to my professional experience of large scale, multi-party proceedings during my senior managerial roles at Which? and at the Competition and Markets Authority (**CMA**), as well as my first-hand experience in running the Proposed Collective Proceedings.

My experience and perspective on collective redress

7. In Evans 1 at paragraphs 29 – 33, I described my strong support for an effective and affordable collective redress regime in the UK, having campaigned for the introduction of such a regime for well over 20 years.

8. My campaigning efforts were borne out of my experience as Which?'s Principal Policy Advisor responsible for all competition policy related matters from 1996 to 2005, a time when UK Competition law underwent significant reform, with the Competition Act 1998 and the Enterprise Act 2002. Calls for reform during this time were a consequence of a particularly ineffective collective redress regime, which made consumer redress unattainable and burdensome. In campaigning for reform, I hoped to bring about change which would benefit all – consumers, businesses – anyone who had suffered loss as a result of anticompetitive conduct. My role as a consumer advocate in competition cases was described in a publication by the Global Competition Review dated 15 July 2005 (exhibited at **PGE6**) which included quotes from representatives at law firms, Which? and from John Vickers, the then director general of the Office of Fair Trading ("**OFT**") who stated that, "*Phil has contributed enormously to the establishment of competition as a core consumer issue*".

9. In my capacity as Which?'s Principal Policy Advisor, I coordinated Which?'s response to the Government's White Paper on the Enterprise Bill (exhibited at **PGE7**) (the "**White Paper Response**"). I believe this document was submitted to the Government in response to the White Paper in the same or substantially the same form. In the White Paper Response, I highlighted that consumers' interests were invariably harmed by anticompetitive conduct, yet

they were left with no route to recompense nor recognition that their interests had been harmed. The White Paper Response highlighted that, whilst an action may have been theoretically possible, due to the cost and relatively small potential gain, consumers were effectively blocked from collectively seeking reparations for anticompetitive behaviour.[1]

10. Which? continued campaigning on behalf of consumers and businesses after I left my role as Principal Policy Advisor. In Which?'s response to the Government's consultation on private actions in competition law, Which? suggested the Government should focus on reforming the system to ensure that "*consumers and businesses affected are able to obtain redress that is fair, quick, low cost and efficient*", noting, in particular, that a hugely positive impact would be made if the system operated on an opt-out basis.[2]

11. During my time as Principal Policy Advisor at Which? I was involved in two cases that sought compensation for the victims of anti-competitive conduct: the first related to a cartel involving Volvo car dealerships and the second was a claim brought in the Tribunal against JJB Sports following the decision of the OFT to condemn a price fixing cartel for replica football shirts.[3]

Volvo car dealers

12. In 1999 the Director General of the OFT found that there had been a price-fixing cartel involving Volvo car dealers in England.[4] At the time, I was involved in Which?'s '*Rip-off Britain*' campaign[5], which highlighted high prices for new cars in the UK, and I gave several press interviews about the impact of the cartel. I recall that the Director General, John Bridgeman, wrote to Which? and suggested that we might want to look at the case. I do not remember the precise details of the letter, and I do not have a copy of it, but I recall that the Director General suggested that Which? might wish to consider how it could recover compensation on behalf of

1. Evans/Consumers; Association comments on productivity and enterprise: a world class competition regime, paragraph 8.
2. "Private actions in competition law: a consultation on options for reform", Which? Consultation Response, 24 July 2012,see here at PDF page 443.
3. I also discuss my experience regarding these collective proceedings in an interview with Anthony Maton (see paragraph 72 below) which is available on the claim website.
4. See Hansard, "Car Pricing", Volume 336: debated Wednesday 20 October 1998, Mr O'Neill at column 387. This is the same cartel that the same as Volvo-related cartel that was mentioned on page 45 of the Government White Paper of July 2001, which stated:

   "*Volvo dealers agreed not to allow any discounts on new cars bought by retail customers and to limit discounts to commercial customers to 2.5%. This cartel, which operated for varying periods during the late 1990's, was uncovered by the OFT just before the Act came into force. The OFT estimate that in the time the cartel was operating consumers may have paid £250 more than they should have for a vehicle*"

5. See press coverage by The Independent, '*Revealed: home truths about 'rip-off' Britain*', 4 September 1999 (a copy of this article can be accessed here).

its members. I believe the letter may have been written because Which? had been campaigning about over-priced cars.

13. I was keen to follow up the Director General's suggestion and find a way to seek compensation for the losses suffered by consumers as a result of the Volvo price-fixing cartel. Working with the Head of Legal at the time, the late Ashley Holmes, we reported (in the Which? magazine[6]) that a cartel had been active among Volvo car dealers in England and that we intended to explore options in order to seek compensation on behalf of Which? members. We wanted to inform our members about the case and encourage as many of them as possible to come forward and join our efforts to get the compensation they deserved for the harm they had suffered. In particular, we asked members to provide us with evidence of their purchases of new Volvo motor vehicles (such as invoices) from one or more of the car dealerships.

14. We decided to focus on members of Which? because our annual surveys of individuals' car purchases revealed that a greater proportion of Which? members owned Volvo cars than the greater population (see, for example, **PGE8**). We were also spurred on by the fact that Which? is a membership organisation and we felt obliged to assist our members to get their money back. We did not consider publicising our efforts beyond Which?'s members at that stage as we believed it would have been an expensive, impractical and time-consuming option unlikely to attract interest given the uncertainty about the outcome and what was entailed.

15. Notwithstanding our efforts to inform and reassure our members about the benefits of seeking compensation and emphasising that Which? members would not have to pay any money, only a small number of members came forward which, in turn, was an even smaller proportion of the overall number of individuals who would have lost money due to the cartel.

16. In the end we did all we could to help those Which? members who had come forward to obtain redress for price-fixing. We examined various options, including the possibilities of court proceedings, reaching an out-of-court settlement and various means of alternative dispute resolution. In particular, I recall that we considered the possibility of representative proceedings under the Civil Procedure Rule 19.6, although this was a procedural novelty at the time and carried adverse costs risks. In the end, Which? was able to settle with the Volvo car dealers before having to issue court proceedings.

[6] See, for example, extracts from Which?'s magazine, 'Volvo: price fixing again' at **PGE8**.

17. Although this was a positive outcome for those that came forward, I was acutely aware that this only represented a fraction of Which?'s affected members, let alone the broader base of affected consumers across the country who had been harmed by the cartel. I was frustrated that there was no cost-effective legal mechanism allowing proceedings to be pursued on behalf of a much larger group of those harmed by cartels. Had we initiated court proceedings using the opt-in procedures under CPR 19 for representative parties and for group litigation, then I expect only a small number of consumers affected by the Volvo price-fixing cartel would have joined the proceedings. I base this view on the fact that only a small number of Which? members who owned a Volvo car responded to Which?'s initiative to seek redress. Any legal action that might have been launched by those Which? members who had responded positively would have been relatively small in comparison with the number of people who had been affected by the cartel, and I do not believe that it would have ensured effective compensation for consumers. Nor do I consider that any such action would have deterred the car dealers from anti-competitive conduct. It was clear to me that there was a strong case for the UK to adopt a collective proceedings regime that would provide for those affected by anticompetitive conduct to be compensated for their losses.

Collective Redress Reform and the Enterprise Act 2002

18. As a result of this experience, I was strongly supportive of efforts at the time to reform collective redress. This was an opportune moment for reform given that, at the time, competition law was modernising to address hardcore cartels, criminalisation and director disqualifications. It was not long after the Volvo dealers case that I first met Michael Hausfeld (now Chair of Hausfeld LLP), who believed that the UK and other European legal systems would benefit from collective redress regimes, having seen the success of these regimes in countries such as the US and Canada. Over the next few years, I met with Michael and many other proponents of an effective regime for collective redress to discuss how the regime might be reformed. I participated in various conferences during which this issue was discussed, and I was a vocal advocate for reform.

19. Our campaign for reform of collective redress helped to bring about the introduction of section 47B in the Act, which was inserted by section 19 of the Enterprise Act 2002. The first incarnation of section 47B enabled proceedings comprising claims for damages under section 47A to be brought in a representative capacity by a specified body on behalf of a group of named individual consumers. It was a milestone in trying to make effective collective redress a reality. In its July 2001 White Paper, entitled "*A World Class Competition Regime*", the Government

explained that: "*private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators getting the compensation they deserve*".[7] As I noted in paragraph 9, in my capacity as Which?'s Principal Policy Adviser, I coordinated the White Paper Response to the Government's White Paper. In our response, we sought to highlight that UK consumers were let down by a weak, timid and ineffective competition regime which needed to be reformed to cater for effective collective redress. We urged the Government not to weaken the ambitions set out in the White Paper, as doing so would be seriously detrimental to the effectiveness of private actions.

20. In addition, we sought to draw the Government's attention to US law and procedure which already recognised the inherent efficiencies derived from class actions. We suggested that the Government consider the US 'fluid recovery doctrine' (often called *cy pres*, meaning to distribute damages to their next best use, typically to charitable causes) in order to effectively distribute unclaimed damages.

21. The Secretary of State was given the power to approve the organisations that would be permitted, subject to stringent criteria, to bring a representative claim under the old version of section 47B. Those criteria were that the applicant body must: be expected to act independently, impartially and with complete integrity; be able to demonstrate that it represents the interests of consumers; and be capable of bringing a claim on behalf of consumers. Which? satisfied those criteria and the Secretary of State made the following order: the Specified Body (Consumer Claims) Order 2005, which specified the Consumers' Association (now known as Which?) for the purposes of section 47B. In fact, Which? was the only body to be designated between June 2003 (when the original section 47B came into force) and October 2015 (when the Consumer Rights Act 2015 changed the legal landscape). This meant that Which? had first-hand experience of the old section 47B regime and a unique insight into its pros and cons.

22. Our hope and goal at the time was that Which? could bring representative claims under section 47B, aggregating individual claims so that litigation would be viable in circumstances where it would otherwise not be (for example, because the loss suffered by individual consumers was so small as to make litigation uneconomic). I had reservations at the time whether this regime would achieve this goal, given that it required each consumer to give his or her consent to

[7] A copy of the Government's White Paper, "A World Class Competition Regime" dated 30 July 2001, can be accessed here.

Which? bringing a claim on behalf of them. Nonetheless, I felt that the best way forward at the time was to use the regime as best we could and try to make it work for consumers. The fullness or otherwise of section 47B as a vessel for collective claims would then be a matter of debate in light of that experience. In April 2005, I drafted a briefing note for Which?, which referred to the complexities of the opt-in system and the importance of testing whether it could be used successfully in an appropriate case (page 5 of **PGE9**). I was already, by this stage, considering with my colleagues at Which? the replica football shirts case as a potential test case, which I discuss in paragraphs 23 – 30 below.

Replica football shirts

23. In 2003, the OFT found a complex web of arrangements amongst a shirt manufacturer, several retailers, including JJB Sports, and the licensors of replica football shirts in relation to the England shirts. The OFT found that JJB Sports (among others) had entered into price-fixing agreements in relation to club and England replica football kit.[8]

24. Which? had been looking for an appropriate case to bring under the new collective action regime and thought that the OFT's decision presented us with a good opportunity to bring Which?'s first collective action. It was a high-profile case, attracting a lot of interest in the press. The sale of replica football kits (especially shirts) in the style of the leading football teams is popular and a substantial business. Teams typically change their strip annually and there is significant attention focused upon the launch of a leading team's new strip. We hoped that this might help us to engage with consumers as football fans that had bought replica shirts and encourage them to come forward and participate in the claim.

25. At the same time, we knew that consumers who have suffered as a result of a breach of competition law may be simply unaware that they have suffered any loss. Even those consumers who might have been aware that they have suffered some loss would only have an incentive to seek redress where the amount of compensation that they are likely to obtain outweighs the financial and/or time-cost of bringing a claim. Where (as here) the loss per individual consumer would be relatively small (as we expected in this case), many consumers might consider it not worth their while to join in a representative claim, even if that involves relatively little effort on their part. In addition to those factors, which are of particular relevance to representative actions, the usual difficulties with any private claim – problems of evidence,

[8] Decision of the Office of Fair Trading (No. CA98/06/2003): Price-fixing of Replica Football Kit Case CP/0871/01) – 1 August 2003 (a copy of which can be accessed here).

proof of loss, causation and quantum, to name but four – would apply equally to this case. Nevertheless, we were committed to trying to uphold consumers' right to redress and to making the old section 47B regime work as well as it could. We therefore decided to bring a representative action against JJB Sports. This was the first– and only – time this mechanism was used.

26. As this was the first time that Which? had sought to make use of this procedure, it took several years to research, develop and prepare the claim. I started working on it shortly after the decision was published in August 2003 and I had left Which? (in 2005) by the time proceedings were launched in 2007. It is clear, however, from the notice placed on the Tribunal's website that Which? ultimately brought the claim on behalf of "*some 130 individual consumers*" who were listed in an appendix to the claim form. The notice of the claim also lists the remedies sought, which include compensatory damages, exemplary or restitutionary damages, and an account of profit.[9]

27. According to information that was published on Which?'s website, consumers who had joined the claim would each receive a payment of £20, and other consumers who had purchased one of the football shirts affected but had not joined the case could make a claim against JJB Sports for either £10 or £5, depending on whether they were able to produce proof of purchase and/or an affected shirt (with or without the label intact). It appears that JJB Sports agreed to compensate consumers who purchased affected shirts from other retailers involved in the same conspiracy and agreed to pay Which?'s legal costs of bringing the action. In January 2008, the Tribunal made an order formally bringing an end to the case.

28. Although a settlement was reached, I would not describe these proceedings as an example of a successful group action, because only 130 consumers opted in. This is despite a campaign by Which? to publicise the claim to consumers via newspapers, articles in Which?'s magazine for its members and in press interviews about the issue. Therefore, out of the approximately 1 million purchasers of football shirts who Which? estimated were affected, only a fraction received any compensation.[10]

29. Looking back, the Replica football shirt case (like the Volvo case before it) was severely hampered by the fact that they had to be brought as opt-in proceedings – this presented an

[9] A copy of the Tribunal's notice of claim can be accessed here.

[10] See press coverage by the Financial Times, '*JJB and Which? settle football shirt case*', 10 January 2008 (exhibited at **PGE10**).

important barrier to participation in the claim . The regime for each case was different – the Volvo case predated the section 47B mechanism used against JJB – but the problem in both cases was the same. They both illustrate the profound difficulty of launching claims in the absence of an opt out mechanism. While the low claim value per consumer was clearly a factor in the case against JJB Sports, it also proved difficult to enlist claimants in the Volvo case where the recoveries were greater than the JJB Sports case, Volvo made payments collectively totalling more than £50,000 to consumers (with some consumers receiving £1,440).[11] I have no doubt that it would have been possible to compensate a much greater number of consumers in both cases had the proceedings been brought on an opt-out basis. That is because all of the victims would have been included, except any who proactively opted-out.

30. While both of these cases were brought on behalf of individual consumers, in my view the same issues regarding participation in opt-in proceedings would arise in actions brought on behalf of businesses, as I explain further below.

Competition investigations and businesses

31. The old rules that I described above permitted representative actions to be brought on behalf of consumers only. This meant that businesses could not benefit from the original section 47B. Of course, some businesses might have been more willing and able to sue than individual consumers, but at the end of the day the action has to be viable, especially where the value of the claim is small compared to the costs of bringing the claim. As explained further below, it is important to recognise that in some cases the barriers that hinder consumers from seeking redress apply just as much to many businesses.

32. I have a long-standing interest in behavioural economics and its impact on competition policy. I have written and spoken frequently on the subject including talks at the OFT and the (then) Financial Services Authority. In addition to its importance in understanding consumer issues, I am interested in its behaviour of organisations and their decision-making processes.

33. One way in which I have gained first-hand experience of how businesses of all sizes engage with the implications of competition issues is in my capacity as a Panel Member and later an Inquiry Chair at the CMA between 2009 and 2017. As I explained in Evans 1 (at paragraphs 40 - 42), my role involved conducting investigations into a range of sectors across the UK economy. I gained

[11] See extract from Which?'s magazine, 'Inside Story', entitled "*Cash windfall for Volvo victims*" at page 2 of **PGE8**.

a good insight into how businesses of all sizes engaged with regulatory investigations and competition issues.

34. This experience underlined to me that the decision-making processes in organisations is usually very cautious. Businesses of all sizes were usually reluctant to participate in our investigations. Some of the reasons for this were: uncertainty about the outcome, a concern about implicating themselves or others and a preference to avoid committing upfront costs or resource required to participate taking precedence over any possible benefits of the process (as I explain in more detail below).

35. Another barrier to participation was nervousness about the implications for ongoing commercial relationships. It was always harder to persuade businesses to talk to you when you were investigating a significant customer or supplier, as they were worried about souring what may have otherwise been established, mutually beneficial relationships. In my experience, some businesses did not even want to be seen to be engaging in legal processes at all, as they were conscious that they might get a 'reputation' which could impact future commercial relationships they entered into. For example, the Grocery Code Adjudicator was established precisely because suppliers were reluctant to raise problems with their customers. It was common for businesses to require a 'compulsion letter', i.e. a letter from the CMA formally requesting that they produce information to support the inquiry, before they would provide us with information to assist with the CMA's investigations.

36. Based on my experience of dealing with businesses during my time at the CMA, I would expect businesses also to be reluctant to sue a long-standing counterparty for damages, given the potential damage this could cause to commercial relationships.

37. One obstacle to participation that I encountered at the CMA was that many businesses did not have an awareness of competition issues. I also recall that obtaining information regarding the McGill's Bus Services / Arriva Scotland West merger inquiry (paragraph 48(d) of Evans 1) was initially very difficult because there was a general lack of understanding among the businesses I spoke with regarding the relevant issues and the procedure. I recall that those businesses that did not have internal legal advisors were often more reluctant to become involved because of a general lack of understanding about competition issues. In the context of the Proposed Collective Proceedings, I anticipate that a similar problem may arise amongst members of the Proposed Classes who are unfamiliar with the legal framework around competition issues and collective proceedings (which remains a relatively new regime in the UK), do not have access to

their own internal legal teams, and are therefore reluctant to opt-in to the Proposed Proceedings as a result.

38. Another challenge that the CMA faced when dealing with businesses was that there was a wide range in the quality of information that businesses could produce in connection with a particular issue, or at all. Often businesses would not store information in a way or format that was easily accessible, and a lot of work had to be done by the CMA to make information useful so that we could understand what was taking place. I recall, for example, that this was a problem with the Northern Ireland rendering inquiry because many of the smaller firms and individuals we spoke with had not recorded many of the relevant events in writing.

39. Although the work I was doing at the CMA was inquisitorial rather than adversarial (as in court proceedings) I believe that the decision-making processes discussed above are likely to be very similar for businesses considering whether to participate in opt in collective proceedings. This is because the parameters for consideration are similar. When considering whether to assist with an investigation or opt into litigation proceedings, a business will need to: agree to engage with the process for (often) an undefined period of time; set aside management time to deal with matters arising from the process; and allocate resources to an appropriate person to manage the process on behalf of the business. These costs are borne by businesses engaging in legal processes regardless of whether they are inquisitorial or adversarial in nature, all of which will limit time and resources available for the business's primary activities. Based on my experience, in undertaking any cost benefit analysis of deciding whether to opt into ongoing litigation, businesses are inherently likely to be cautious and reluctant to commit resource where there is no certainty of outcome, and particularly if it imposes burdens on their organisation (especially in terms of management time and resource).

Opt-in proceedings would not be practicable in this case

40. I have read the fourth witness statement of Anthony Maton and the third witness statement of Adrian Chopin, which identify the practical difficulties of trying to bring the Proposed Collective Proceedings on an opt-in basis. I agree with Mr Maton's assessment that a significant proportion of the potential class members are likely to be disinclined to participate if they are required to opt in at the beginning of the proceedings. Mr Maton's assessment reflects my own experience of the difficulties Which? encountered in trying to sign up claimants in the matters involving Volvo and JJB Sports.

41. I am particularly concerned that if (as the Proposed Defendants suggest) the Proposed Collective Proceedings have to be brought on an opt-in basis, only a small sub-set of claimants would obtain any redress. Only those claimants that have the wherewithal to establish that they suffered loss that outweighs the costs, time and other drawbacks of opting in would do so. There is a real risk that the remainder of the Proposed Classes would be either unable or unwilling to opt in and, as a consequence, the Proposed Defendants would be able to retain part of any damages that might otherwise be payable to the class members. I do not think this would be a just outcome or desirable from a policy point of view.

42. By contrast, I deliberately choose to bring the Proposed Collective Proceedings on an opt-out basis in order to vindicate the right of all class members to compensation and to bring about the added public benefit of enhancing the incentives for compliance with competition laws. Further:

    a. Contrary to what the Proposed Respondents say in the Joint CPO Response, the class membership in this case encompasses businesses of all sizes from across the UK economy. As Mr Ramirez explains in his second report, it is likely to include thousands of small and medium sized businesses, alongside larger firms. It may also include individuals that traded FX.[12]

    b. Another important feature of the case is that a large proportion of the Proposed Classes may have smaller claims. Mr Ramirez estimates that more than half of the class members (approximately 24,000 or more) are likely to have claims valuing around £10,000 or less. I consider that this amount is likely to be insufficient to make opting into a claim worthwhile and practicable for many businesses, particularly given the costs and complexity of bringing proceedings to recover this amount as outlined in paragraphs 146 – 150 of the Amended Collective Proceedings Claim Form. Given that, as Mr Chopin explains in paragraphs 15 – 23 of his third witness statement, the funding structure for opt-in proceedings would require at least some of these damages to be paid to the Funder, the net benefit for these class members will be even less, which compounds the problem.

43. The picture that emerges is markedly different to the one painted by the Proposed Defendants: far from being attractive or practicable, I expect that majority of the members of the Proposed Classes would not opt into the claim. I am reinforced in that view by the fact that the Proposed

[12] See paragraphs 10,19 and 35 - 36 of Ramirez 2.

Defendants consider that claimants that opt-in will be expected to provide wide-ranging disclosure relating to various matters identified at paragraph 54 of the Joint CPO Response. The costs of retrieving, reviewing and providing this disclosure would further tip the scales in favour of abstaining, especially for class members with smaller claims.

44. Collective actions, properly implemented, have an important role to play in the enforcement of competition law in the UK. However, as has been demonstrated above, there are a number of practical and financial obstacles that would disincentivise a significant number of members of the Proposed Classes from opting into any collective proceedings. This would not provide an effective means of redress. Indeed, opt-in proceedings would likely act as a disincentive for the very persons (i.e., those with smaller claims) that the opt-out regime is most designed to recompense. Against this background, the policy objective behind opt-out procedures – improving access to justice for individual claimants – is an important one.

45. For the avoidance of doubt, I believe there are cases where opt-in collective proceedings are practicable and appropriate. I agree with the example of the Marine Hoses cartel given by Anthony Maton – opt-in actions make sense where there is a relatively small and homogenous class who are very easy to identify and the value of claim per class member is sufficiently large to make opting in worthwhile. However, as I have explained above, that is not the case for the Proposed Collective Proceedings.

Matters relevant to the Carriage Dispute

46. In the O'Higgins PCR's written submissions filed in advance of the CMC on 15 January 2021, it was argued that the Tribunal should determine the question of carriage by reference to the "*first to file*" principle and that, accordingly, because the O'Higgins PCR's application was filed before the Proposed Collective Proceedings, it is the more suitable proposed class representative. In particular, it suggested that the Tribunal ought to "*reward the initiative and investment of the first mover, which would otherwise be undermined by subsequent applicants free-riding on its work*".

47. Rewarding applicants for filing first would, in my view, set a bad precedent as it would encourage a race to the courthouse, leading to premature and lower quality claims. Furthermore, these arguments do not reflect the reality of this case. There was no '*free-riding*': our preparation work on the Proposed Collective Proceedings was well underway before the O'Higgins Application was filed and there are important differences in the scope of the two applications. Contrary to the O'Higgins Application, which was filed without sight of the

European Commission's Decisions, we obtained disclosure of the Decisions before the Proposed Collective Proceedings were filed. As a result, whilst I understand from Hausfeld that the O'Higgins PCR was required to make substantial amendments to its application once it obtained the Decisions to ensure they were within the scope of the Commission's findings, it has not been necessary to make any major substantive amendments to the Proposed Collective Proceedings since they were filed.

48. I believe that the primary consideration for choosing the more suitable proposed class representative is the person who is most able to act in the best interests of the Proposed Classes. With this in mind, the next section of my witness statement explains my early strategic decisions regarding the timing and scope of the Proposed Collective Proceedings and why I believe they were in the best interests of the Proposed Classes.

Timing of the Proposed Collective Proceedings

49. Given my longstanding interest in collective redress, I have been keen to act as a class representative and jumped at the chance to bring the Proposed Collective Proceedings. I saw it as an opportunity to bring an important case, to assist a large and important class of businesses from across the UK economy, and help to make a success of the opt-out regime. To that end, I instructed Hausfeld to prepare the proceedings since I have known the firm since it was founded in the UK in 2009, and its founder for a number of years before then they have extensive experience of competition litigation and acted as co-lead counsel in the US class action against similar misconduct in the FX market.

50. One of the key features of the Proposed Collective Proceedings is that they are follow-on claims. Based on my background in managing competition investigations, I knew how important it was to understand and rely upon a regulatory authority's findings of fact and infringement. I also recognised that in a case as complex as this, it would be crucial to ensure that our theory of harm was properly informed by and consistent with the full scope of the Commission's findings. I wanted to understand the precise scope of the infringements and be confident that our theory of harm was consistent with those findings *before* filing the proposed proceedings. The alternative would be to apply for a CPO before seeing the Decisions and run the risk that the claims would turn out to be inconsistent with the Commission's findings or require substantial amendments. Either way, I believed that this would have wasted time and costs, contrary to the best interests of the members of the Proposed Classes and could set a bad precedent for the collective action regime.

51. Unfortunately, the only information publicly available about the Commission's Decisions at the time my legal advisors and I were preparing the Proposed Collective Proceedings was the Commission's press release about the Decisions,[13] which provided only a brief outline of its findings. Accordingly, my priority was first and foremost to seek disclosure of the Decisions and, as I explained in paragraphs 25 – 28 of Evans 1, I instructed Hausfeld to make a formal request for copies of the Decisions under the Access to Documents Regulation by way of a letter to the Commission dated 5 July 2019.

52. The Access to Documents Regulation required the Commission to respond within 15 business days, so it seemed reasonable to expect that we would have the Decisions by the end of July 2019. Unfortunately, it ended up taking much longer than we anticipated and the Commission did not supply copies to us until 1 October 2019 (as described further in paragraphs 12 – 15 of Anthony Maton's first witness statement). Whilst this was extremely disappointing, we continued with our preparatory work on the claim whilst we were waiting for the Decisions to ensure that we would be ready to review them closely with our experts as soon as we received them.

53. I first found out about the O'Higgins Application when it was reported in the press on 29 July 2019 (the day it was filed). By this point, we had already completed substantial preparatory work on the claim. Given the difficulties we were having in obtaining copies of the Decisions from the Commission, it seemed extremely unlikely that the O'Higgins PCR had access to the Decisions. My understanding was therefore that the O'Higgins Application had been filed without reference to the Decisions. For the reasons I have given above, I did not believe this was a correct course of action because the application might not be properly based on the Decisions and would likely require substantial amendment.

54. The Proposed Collective Proceedings were filed on 11 December 2019, just over ten weeks after we received copies of the Decisions from the Commission. I believe that we acted as efficiently and expeditiously as possible in the circumstances as well as ensuring that the claim was properly based upon the infringements.

Scope of the Proposed Collective Proceedings

55. I am aware that certain criticisms have been made by the O'Higgins PCR regarding the scope of the Proposed Collective Proceedings. In particular, in section IV.C. of the expert report of

[13] The Commission's press release is at Annex 2 to the Amended Collective Proceedings Claim Form.

Professor Bernheim, dated 23 October 2020, he suggests that the Proposed Collective Proceedings do not capture the full impact of the infringements because it excludes benchmark trades and resting orders. These trades are included in the O'Higgins Application.

56. In Mr Knight and Professor Rime's second reports, they respond to these criticisms. I consider it is also important for me to comment, since the decision to exclude these types of transactions was taken by me, as the proposed class representative. Professor Rime explains in Section 5 of his second report that the impact of the Cartels on these types of transactions cannot be assessed on a class-wide basis. In view of these issues, I took the view that it would be inappropriate to include them within the class definition and that it would be in the best interests of the Proposed Classes as a whole to exclude them from the scope of the Proposed Collective Proceedings.

Two classes, rather than one

57. In contrast with the O'Higgins Application, the Proposed Collective Proceedings are divided into two classes, which reflect the two different types of harm that Professor Rime explained in his first report:[14]

    a. Class A includes all persons who were directly harmed by the cartels because they transacted with the Proposed Defendants while the Proposed Defendants participated in one or both of the Cartels.

    b. Class B includes all persons indirectly harmed through a general reduction in market competition and an increase in adverse selection risk. It therefore includes customers who transacted with FX dealers who did not participate in the Cartels and the Proposed Defendants during the periods when they did not participate in one or both of the Cartels.

58. Because it could not be assumed that the direct and indirect harm would be the same, I took the view that it was important to create two separate classes and develop separate proposals for measuring the overcharge to each of them. Professor Rime's second expert report explains why the two types of harm could result in a different overcharge to the classes.[15]

[14] The two types of harm are explained in section 5 of Professor Rime's first report.
[15] See Professor Rime's second report at section 5.

MUFG is included as a proposed defendant

59. Finally, unlike the O'Higgins Application, the Proposed Collective Proceedings include MUFG Bank, Ltd and Mitsubishi UFJ Financial Group, Inc. (together, "**MUFG**") as Proposed Defendants. The grounds for the claims against MUFG are already set out in paragraphs 43 – 48 of the Amended Collective Proceedings Claim Form and I repeat those points within this witness statement. I do not know why MUFG was not included as a proposed defendant in the O'Higgins Application. I believe it is appropriate to include it, because it was one of the addressees of the Commission's Decisions.

Notification of the Proposed Collective Proceedings to members of the Proposed Classes

60. As explained in Evans 1, I prepared, together with my legal advisors and Angeion Group (experts in the notice and administration aspects of collective proceedings) a Litigation Plan for the Proposed Collective Proceedings which incorporates the Angeion Plan. This was exhibited to Evans 1 at **PGE3**. The Litigation Plan addresses how I, my legal advisers and Angeion intend to manage the Proposed Collective Proceedings as effectively and efficiently as possible and in the interests of the Proposed Classes. The Litigation Plan also sets out my intended means of regular communication with the Proposed Classes.

61. Some of the tasks set out in the Litigation Plan will require revision as and when steps have been completed, and I intend to provide the Tribunal with an updated Litigation Plan following certification of the Proposed Collective Proceedings. I will also instruct Angeion to review the success of our efforts in publicising the Proposed Collective Proceedings and to consider any necessary changes to the Litigation Plan in light of their review. The updated version of the Litigation Plan will reflect any further amendments that are made following Angeion's review of publicity regarding the Proposed Collective Proceedings.

62. I summarise below the efforts that have been taken to date to implement the Litigation Plan and inform the members of the Proposed Classes about both the Proposed Collective Proceedings and the issues currently before the Tribunal.

63. I believe that it is very important to conduct the Proposed Collective Proceedings in the most transparent and accessible manner as possible in order to demonstrate to members of the Proposed Classes how I intend to pursue these proceedings in their best interests. I appreciate that, as this is a relatively new regime in the UK, for many members of the Proposed Classes this will not be something that they have encountered before. It is for this reason, as explained

below, that I, together with my legal advisors, have sought to ensure that members of the Proposed Classes are provided with clear, easily accessible and up-to-date information about these proceedings. My intention is to seek effective redress on behalf of the members of the Proposed Classes and do so in a fair and transparent manner.

Claim Website

64. At the time of filing the proceedings, I instructed Angeion to launch the dedicated claim website, www.fxclaimuk.com, which is discussed in further detail at paragraphs 5.10-5.16 of the Angeion Plan.

65. Per paragraph 5.14 of the Angeion Plan, I, with the assistance of my legal advisors and Angeion, have sought to provide regular updates to the members of the Proposed Classes, via updates to the claim website. Further, given the complexity and the novelty of the Proposed Collective Proceedings, I have sought to share with the Proposed Class Members as much information as possible in relation to my CPO application, including relevant claim documentation and details of my funding and insurance arrangements. Given the large quantity of information available, I have also sought to present information about the claim on the website in as user-friendly format as possible, including a FAQ section and a downloadable claim brochure which sets out the key features of the case in a short and digestible way.

66. By way of example:

a. **Claim documents**: on 12 May 2020, the majority of the documents that form part of my CPO application, including the Amended Collective Proceedings Claim Form, the Litigation Plan, the litigation budget ("**Costs Budget**") and relevant witness statements from me, and Hausfeld were made available for download on the claim website from the 'Claim Documents' page. The website also includes the non-confidential versions of the Decisions (which, as explained in Evans 1 (paragraph 27), were provided to me following a request pursuant to the EU Access to Documents Regulation (Regulation (EC) No. 1049/2001)). I understand from Hausfeld that similar documents were made available by the O'Higgins PCR via its claim website on or around 31 July 2020.

b. **Claim Brochure:** in addition, I consider that it is important to ensure the members of the Proposed Classes were provided with an accessible summary of the Proposed Collective Proceedings. Therefore I, together with my legal advisors, have prepared and made available on the claim website on 12 May 2020 a brochure which sets out key details of

the Proposed Collective Proceedings and provides an overview of my CPO application. Moreover, should the Proposed Class Members have questions or deem it appropriate to contact me or my legal advisors to discuss the Proposed Collective Proceedings, they are able to do so via the dedicated Contact Form on the claim website.

c. **Expert reports**: on 30 March 2021, the claim website was updated to inform members of the Proposed Class Members that all of the expert reports which were filed in support of my CPO application are available on request by emailing enquiries@fxclaimuk.com.

d. **Funding and ATE insurance documents**: some of my funding and ATE insurance documents were initially disclosed to the other parties into a confidentiality ring.[16] Having discussed with the Funder and the insurers, I removed these documents from the Joint Confidentiality Ring on 2 June 2020. I took this step in the interests of full transparency so that information regarding my funding and insurance arrangements could be made available to the Proposed Class Members on request (see paragraph 83 below). As such, as from 16 September 2020 anyone can request (unredacted) copies of my funding documents by emailing enquiries@fxclaimuk.com. This is explained in the 'Claim Documents' page of the claim website as well as in the FAQ section under FAQ 32. In addition, the witness statements which explain my funding and insurance arrangements (i.e. Evans 1, the second and third witness statements of Anthony Maton and the first and second witness statements of Adrian Chopin) are also available on the claim website. I understand from Hausfeld that a short summary document about the O'Higgins PCR's funding arrangements was made available on its claim website in September 2020, and that its LFA was removed from the Joint Confidentiality Ring on 19 February 2021. I understand that the O'Higgins PCR's insurance documents remain within the Joint Confidentiality Ring as at the date of my statement.

e. **Joint publicity notice**: on 4 February 2021, the claim website was updated with the joint publicity notice which was approved by the Tribunal in relation to the Proposed Collective Proceedings and the O'Higgins Application (the "**Joint Publicity Notice**"). Further, FAQs 8 and 31 on the FAQ page of the claim website were updated to inform the Proposed Class Members about the status of the Proposed Collective Proceedings and their legal rights and options to object to the two CPO applications and/or make written and/or oral submissions at the hearing, commencing on 12 July 2021. Those matters are also detailed

[16] The "**Joint Confidentiality Ring**" as defined in the Tribunal's directions order dated 18 March 2020.

in the Joint Publicity Notice. I explain further steps I have taken in order to publicise the Joint Publicity Notice in paragraphs 69-70 below.

Public Relations / Social Media

67. At the outset of the Proposed Collective Proceedings, I instructed a specialist legal public relations firm, Byfield Consultancy, to generate interest and earned media[17] by issuing notices and press releases regarding the developments in the Proposed Collective Proceedings to relevant national and international media. The purpose of this was to ensure that the Proposed Collective Proceedings were brought to the attention of as many members of the Proposed Classes as possible and to make them aware of the nature and aim of the proceedings. In September 2020, Byfield had to step down and I therefore instructed another public relations firm, Coast Communications Ltd, to ensure maximum publicity.

68. In addition, the following steps were taken shortly after filing the Proposed Collective Proceedings in order to publicise them as widely as possible:

    a. A press release was distributed to mainstream and financial services media in the United Kingdom, Denmark, France, Germany, Switzerland, Italy, the Netherlands, Norway, Spain, Sweden, Japan, South Korea and Hong Kong. The press release was also translated into those countries' native languages, being the languages of the countries of the G10 currencies covered by the Proposed Collective Proceedings. This was intended as a further step to ensure that as many members of the Proposed Classes as possible would become aware of the Proposed Collective Proceedings. On the first day, the press release was circulated to a target audience of 141.5 million readers.[18]

    b. The following dedicated social media accounts were established to enable direct communications with the Potential Class Members. These are updated on a reasonably regular basis:

        i. A LinkedIn 'Group' was established, entitled FX Claim UK; and

        ii. A Twitter account was also established under the same name.

[17] This is a term used to refer to publicity that is generated free of charge in relation to the promotion of a particular issue in the media. Earned media can include articles in the press (print and online), word of mouth, blogs, etc.

[18] This is the total combined readership of the media outlets to which the press release was issued.

c. The claim website has been updated on a regular basis to inform the Class Members about key events and developments in the Proposed Collective Proceedings. I note in particular the Status of the Claim page of the claim website which sets out a timeline of the significant events in the claim so far. This will continue to be updated as the claim progresses.

d. In addition, two further press releases were issued following the filing of the claim: the first was distributed to the press ahead of the first CMC which took place on 13 February 2020; and the second was distributed following the Tribunal's judgment in relation to the timing of the Carriage Dispute dated 6 March 2020.

Distribution of the Joint Publicity Notice

69. As explained in paragraph 66(e) above, the Tribunal has approved a Joint Publicity Notice to publicise the hearing of the Proposed Collective Proceedings and the O'Higgins Application. That notice also explains the legal rights and options of the Proposed Class Members to object to the two CPO applications and/or make written and/or oral submissions at the hearing, commencing on 12 July 2021. I consider it is very important that the Joint Publicity Notice is distributed as widely as possible, given its importance to the members of the Proposed Classes.

70. With the assistance of Coast, my legal advisors and Angeion, I have taken the following steps to ensure the Joint Publicity Notice is distributed as widely as possible:

a. A copy of the Joint Publicity Notice was placed on the claim website on 4 February 2021 (as mentioned above). A prominent link to the Joint Publicity Notice was placed on the homepage of the website, and together with explanatory text, the notice was also uploaded to the 'Claim Documents' page. Furthermore, the Joint Publicity Notice and an accompanying press release were translated into the 11 languages of the countries of the G10 currencies as to ensure that the Joint Publicity Notice would reach and be understood by as many members of the Proposed Classes as possible.

b. The Joint Publicity Notice was publicised on the FX Claim UK LinkedIn and Twitter pages.

c. The Joint Publicity Notice, together with a press release summarising its content, were distributed to 449 separate national and international media outlets, including financial services media contacts whose publications have a reach of approximately 18.9 million readers.

d. Information about the Proposed Collective Proceedings, together with a link to the Joint Publicity Notice, was sent by way of an update email to those who have registered their interest via the claim website. I am committed to providing regular updates to members of the Proposed Classes and to engage with them where appropriate to respond to any queries in relation to the claim.

e. The Joint Publicity Notice was sent directly to members of the Proposed Classes, including: 366 pension funds, hedge funds, mutual funds and other financial institutions compiled from various publicly available sources online; and 71 membership associations which comprised: (i) 52 associations identified in the Angeion Plan to include companies which are likely to have entered into FX transactions during the period covered by the infringements identified in the Decisions (namely, aviation, oil and gas, basic materials, industrial goods, health care, telecommunications, utilities and technology); and (ii) 19 other associations, identified through research conducted by Hausfeld, which included financial services entities.

f. In addition, I instructed Hausfeld to go further and contact three global firms (Institutional Shareholder Services Inc. ("**ISS**"), Institutional Protection Services ("**IPS**") and Financial Recovery Technologies ("**FPS**") which specialise in providing class action research and claims filing services exclusively for institutional investors in order to bring the Proposed Collective Proceedings to the attention of their clients, per the Angeion Plan. ISS, IPS and FRT have a large number of financial institution clients which they advise in relation to participation in potential investor actions, many of whom may be members of the Proposed Classes. I instructed Hausfeld to provide each of these firms with a summary of the Proposed Collective Proceedings together with the Joint Publicity Notice so that they could contact their respective clients and provide them with the information that will enable them to identify whether they are members of the Proposed Classes. I, together with my legal advisors and Angeion, will continue to seek to identify members of the Proposed Classes.

Articles

71. I have also sought to keep members of the Proposed Classes informed of recent developments that affect both the regime in general and the Proposed Collective Proceedings in particular. Specifically, I took the initiative to inform members of the Proposed Classes about the impact

of the landmark judgment of the Supreme Court in *Mastercard v Merricks*[19] ("the "***Merricks* Judgment**") and how it would create opportunities and obligations for those wishing to seek collective redress. To that end, I co-authored with David Lawne, one of the Partners at Hausfeld with oversight of the Proposed Collective Proceedings, the following articles:[20]

a. an article for Law.com which was published on 25 January 2021 and discusses the important milestone the *Merricks* Judgment marks for the regulation of financial markets;

b. an article for the Financial Director (an online magazine with a target audience of finance directors) which was published on 16 February 2021 and highlights the *Merricks* Judgment's potential impact on finance directors; and

c. an article for the Pensions Expert (the Financial Times' specialist title for UK workplace pension schemes) which was published on 17 February 2021 and discusses the potential implications of the *Merricks* Judgment on pension fund trustees.

72. Further, I was interviewed by Anthony Maton, Hausfeld Vice-Chair and London Managing Partner (who, together with David Lawne, has oversight of the Proposed Collective Proceedings) to discuss the *Merricks* Judgment, which has been publicised on the claim website, and on the FX Claim UK LinkedIn and Twitter pages.

Video Interview

73. I have recorded a video interview for the claim website about the Proposed Collective Proceedings with, Alison Steed, a finance journalist and broadcaster, and former deputy personal finance editor at the Daily Telegraph, together with Anthony Maton and David Lawne. Ms Steed's questions covered collective proceedings generally, the background to the Proposed Collective Proceedings, similar claims in other jurisdictions, the CPO hearing and how members of the Proposed Classes can get involved. I have also arranged for the interview to be publicised via the FX Claim UK social media accounts with the intention of providing members of the Proposed Classes with another source of information about the Proposed Collective Proceedings through an accessible medium.

[19] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.
[20] Copies of those articles are available on the claim website – please see here.

BIICL Panel Event

74. On 19 May 2021, I will be participating in a panel event hosted by the British Institute of International and Comparative Law, in conjunction with RBB Economics, and chaired by Rachael Mulheron, Professor of Law at Queen Mary University. I, together with my fellow panel members who have backgrounds in law and economics, will focus on the implications of the *Merricks* Judgment on the certification of collective actions and the future of the private enforcement of competition law.

Summary

75. Since the Proposed Collective Proceedings were filed, I have been determined to ensure that: the claim is publicised as widely as possible; and that I communicate with members of the Proposed Classes as effectively and transparently as possible. I hope that the above demonstrates this.

Consultative Panel

76. As explained in Evans 1 at paragraphs 58 – 63, prior to filing the Proposed Collective Proceedings, I appointed a consultative panel with specific expertise which I can draw upon where necessary in taking decisions during the course of the Proposed Collective Proceedings. The consultative panel originally comprised: Lord Carlile of Berriew QC CBE, a crossbench member of the House of Lords and former part-time judge of the High Court and Competition Appeal Tribunal; Professor Philip Marsden, Professor of Law and Economics at the College of Europe and Deputy Chair of the Enforcement Decision Making Committee of the Bank of England; and Phelim Keogan, a former leader of Fidelity International's global currency management operations and international treasury dealing capabilities. Mr Keogan stepped down from the panel on 22 November 2019, due to professional commitments, as I explained in paragraph 40 of Evans 1.

77. After Mr Keogan stepped down I, together with my legal advisors, have been looking for additional panel members (as explained in Evans 1, paragraph 60) to ensure that I have a wide range of relevant expertise on the panel. In December 2020, I was delighted to appoint David Woolcock as a member of the consultative panel. Mr Woolcock is a senior banker who initially worked as a FX dealer at HSBC, and subsequently worked as Head of FX at United Overseas Bank, Chief Dealer at the Co-operative Bank, Treasury Manager at Credit du Nord and a Director at Société Générale, before moving into specialist FX trading businesses. He has also held roles

as the Vice Chair of the Financial Markets Association's FX Committee and a member of the BIS Market Practitioners Group, which launched the FX Global Code in 2017. Mr Woolcock is currently a Director at Eurobase, an e-trading firm. He adds a wealth of expertise in FX trading, and has already proved to be a valuable member of the consultative panel.

78. In addition, I am pleased to report that Professor Joseph Stiglitz accepted my invitation to become the fourth member of the consultative panel on 24 March 2021. Professor Stiglitz is a Nobel Prize-winning economist, public policy analyst, and a professor at Columbia University. He is a former Senior Vice President and Chief Economist of the World Bank and is a former member and Chairman of the (US president's) Council of Economic Advisers. Professor Stiglitz shared the 2001 Nobel Prize with George Akerlof and Michael Spence for their analyses of markets with asymmetric information. Professor Stiglitz's seminal and fundamental contributions on various subfields of economics underpin some of the economic theories of the expert reports in these Proposed Collective Proceedings and those of the O'Higgins Application.

79. The consultative panel has proved to be an invaluable source of support for me. As I explained in paragraphs 58-63 of Evans 1, I have sought guidance from the panel to support my decision-making to ensure that my decisions are always taken in the best interests of the members of the Proposed Classes, thereby ensuring that they are adequately and appropriately represented. I believe that the additions of Mr Woolcock and Professor Stiglitz enhance the expertise of the consultative panel.

80. A copy of the updated terms of reference of the Consultative Panel, which includes full biographies of the members of the panel, including Mr Woolcock and Professor Stiglitz, are exhibited at **PGE11**.

Funding and Insurance of the Proposed Collective Proceedings

81. In Evans 1, I provided details about the arrangements I had put in place to finance the Proposed Collective Proceedings. Further information relating to my funding and insurance arrangements was provided in the second and third witness statements of Anthony Maton and the first and second witness statements of Adrian Chopin, a Managing Director of Bench Walk Advisors, on behalf of the Funder. As I explained above, in light of the novelty of the collective actions regime and the complexities of litigation funding and insurance, I have arranged for the key funding and insurance documents relating to my CPO application (i.e., LFA as amended on 8 July 2020, the litigation budget, the four ATE insurance policies and the latest version of the priorities deed dated 19 October 2020) to be made available to Proposed Class Members on request via the

claim website. These have been available as of 16 September 2020. As explained in paragraph 20 of the third witness statement of Anthony Maton, the only redactions applied to those documents are in respect of my personal address, save in respect of the updated version of the priorities deed where redactions have been applied in respect of the personal addresses of certain persons witnessing the deed.

82. I have taken this step in the interests of full transparency so that members of the Proposed Classes can be fully informed about the funding and insurance arrangements, including as to: how the Funder's fee has been calculated; the premia payable under the insurance policies; and the order of priority that the Funder, the insurers and my legal advisors (who act on a partial conditional fee agreements ("**CFA**") will be paid out of undistributed damages, subject to the Tribunal's permission.

Additional ATE insurance

83. At paragraph 79 of Evans 1, I explained that I intended to acquire additional ATE insurance after the Proposed Collective Proceedings were filed and more generally to keep ATE insurance under review throughout the proceedings. As explained in the second and third witness statements of Anthony Maton, since the filing of the Proposed Collective Proceedings, I have acquired an additional £13 million of ATE insurance. Accordingly, the total level of ATE insurance for adverse costs incurred after any CPO is made in my favour is £23 million.

84. While the Proposed Defendants have not yet provided any information in respect of their estimated costs to trial if my CPO application is approved, having discussed with my legal advisors I understand that £23 million should be sufficient adverse costs cover for the proceedings following certification, or at the very least for a significant part of them. Notwithstanding this, I will continue to keep the level of ATE insurance cover under review and, if necessary, will acquire additional ATE insurance to ensure that there remains adequate provision for the Proposed Defendants' recoverable costs.

85. I believe that the period following certification is a sensible stage of the proceedings to revisit whether it is necessary to acquire additional ATE insurance, as I would expect to have a better sense then of what the Proposed Defendants' recoverable costs to trial might be. I have discussed with the Funder, which has confirmed that it is fully supportive of any appropriate increases to the budget following certification to allow me to acquire additional ATE insurance. Accordingly, I anticipate that it would be straightforward to put in place further ATE insurance as and when appropriate.

Updated costs budget

86. As with the Litigation Plan, I view the costs budget as a 'living document' to keep under review throughout the proceedings and adjust as necessary to take account of any developments that would make it in the best interests of the Proposed Classes to vary it.

87. Under paragraph 5.7 of the LFA, I am entitled to request additional funding from the Funder (defined as 'Additional Action Costs' at paragraph 1.3 of the LFA). Taking into account developments in the Proposed Collective Proceedings that were not anticipated at the time of filing of my CPO application, including delays caused by the timing of the *Merricks* judgment and additional evidence in relation to carriage issues, the Funder has agreed to provide Additional Action Costs of £949,063 to cover additional pre-CPO disbursement costs, comprising the additional ATE insurance with IGI and HDI (which are described further in paragraphs 15-18 of Anthony Maton's third witness statement) and other disbursement costs. Accordingly, the Funder's total pre-CPO commitment from £4,294,366 to £5,243,430 and its overall commitment under the LFA budget to £19,603,152. An updated budget is exhibited at **PGE12.**

88. In view of the above increases agreed to by the Funder, I see no reason to believe that the Funder would not agree to any reasonable requests for Additional Action Costs, should this be necessary, and I note that Mr Chopin confirms in Chopin 3 that he expects to agree to any appropriate variations of the budget following certification.

89. At paragraph 73 of Evans 1, I explained that I had agreed a partial CFA with Hausfeld. Under the terms of the partial CFA, Hausfeld agreed that 50% of its fees would be payable up-front and that it would look for those fees to be advanced on my behalf by the Funder, and the remaining 50% of its fees would be payable upon success in the Proposed Proceedings, together with a 100% uplift on those deferred fees. In light of the increases to the pre-CPO costs that I have described above, Hausfeld has agreed to defer seeking payment of its discounted fees from the Funder until after certification.

Maximising the amount and distribution of damages

90. I attended the CMC on 15 January 2021. During that hearing, one of the Tribunal's members, Mr Paul Lomas, commented on the relationship between the funding arrangements of both applicants, the distribution mechanism for payment of any proceeds to Class Members, and the undistributed damages. Mr Lomas also stated that the Tribunal would need to understand the

structure of the funding arrangements and the incentives involved for the decision makers, and how those arrangements would play out through settlement or trial.

91. I have considered these comments carefully and I discussed them with my legal representatives. My objective in the Proposed Collective Proceedings is to maximise the compensation awarded to members of the Proposed Classes. This includes putting in place an effective and efficient distribution mechanism which maximises the number of persons which come forward to recover their share of any award of damages.

Settlement

92. I am aware from paragraph 6.98 of the Tribunal's Guide that evidence filed in support of an application for a proposed collective settlement order may include an opinion from Counsel or an independent expert (such as an economist) as to the merits of a proposed collective settlement. I confirm that in these circumstances I fully intend to obtain and submit such an opinion, which I believe adds an important safeguard to ensure that any agreed settlement is in the best interests of the members of the Proposed Classes.

Distribution of damages

93. I have given thought to additional potential mechanisms that might be put in place to ensure maximum transparency in the decision-making process for the proposed distribution of damages to the Proposed Classes after the Tribunal makes an aggregate award of damages.

94. I note that under Rule 92(2)(c) of the 2015 Rules, it is contemplated that the Tribunal may direct the appointment of an independent third party to determine a claim or dispute regarding the quantification of amounts which a person will receive out of an aggregate award of damages (but it is not a mandatory requirement). In that regard, I intend to instruct an appropriately qualified independent expert (such as a QC or economist) to play a role in enhancing the safeguarding mechanisms already in place in these proceedings. Once I, together with my legal and expert teams have designed a distribution mechanism, including a publicity plan, I intend to ask the independent expert to review and provide a neutral evaluation of the proposed distribution mechanism to ensure that it is as effective as possible before it is submitted to the Tribunal for approval. This role would involve identifying any shortcomings and actively proposing solutions to maximise the distribution of damages and ensuring maximum participation by the members of the Proposed Classes.

Funding arrangements

95. When considering the LFA, and prior to signing it, I carefully considered how I would ensure that it reflected the position that my primary obligation is to the members of the Proposed Classes and the importance of ensuring that my relationship with and obligations to the Funder did not interfere with my ability to act in their best interests. The Funder was in full agreement with this and the LFA makes clear that my obligations to the Funder are secondary to my obligations to act fairly and adequately in the best interests of the members of the Proposed Classes.

96. This is set out clearly in the LFA, which includes the following principal obligations that I must fulfil:

    a. to act fairly and adequately in the best interests of the members of the Proposed Classes at all times (Clause 3.1.2 and 15);

    b. to make Hausfeld and the Funder immediately aware of any issue which may compromise my obligations to the member of the Proposed Classes, in accordance with the CAT Rules (Clause 3.1.3);

    c. to prosecute the Proposed Collective Proceedings diligently (Clauses 3.1.6 and 15);

    d. to take any reasonable steps to maximise the amount of the Recovered Costs (Clause 3.1.9.8);

    e. to comply with the reasonable advice of Hausfeld and Counsel, and assist their professional conduct of the Proposed Collective Proceedings (Clause 3.1.7); and

    f. to use all reasonable endeavours, in accordance with the terms of the LFA, to achieve the recovery of claim proceeds as soon as reasonably possible and in the best interest of the members of the Proposed Classes (Clause 3.1.8).

97. The LFA also sets out my principal obligations to the Funder in Clause 3.1.9, but these obligations are expressly stated to be subject to my overriding obligations under Clauses 3.1.1 to 3.1.8 including sub-paragraphs (a) – (f) above. My obligations under Clause 3.1.9 include:

    a. to take all reasonable steps to minimise and control the costs of the Proposed Collective Proceedings (Clause 3.1.9.1);

b. insofar as it is in my control, to conduct the Proposed Collective Proceedings so as to minimise the quantum of any adverse costs and the likelihood of me, the Funder or the ATE insurers being liable to pay adverse costs (Clause 3.1.9.9);

c. to take any reasonable steps to maximise the amount of the costs recovered from the Proposed Defendants (Clause 3.1.9.8); and

d. following judgment or a settlement approval order, to take all reasonable steps to obtain an order that my full costs and expenses other than recovered costs can be paid from undistributed damages (Clauses 3.1.9.6 and 3.1.9.7).

98. Under Clause 14.1 of the LFA, I am not permitted to make, accept or reject an offer of partial or full settlement, or discontinue or make any material concession in the Proposed Collective Proceedings, whether through solicitors or counsel or otherwise, without:

a. providing the Funder with prior notification of the intention to take such a step;

b. having received reasonable advice from my solicitors or Counsel that it is reasonable to take such a step;

c. providing a copy of such advice (if any) to the Funder; and

d. having sought the Funder's opinion (Clause 14.1).

99. Although the Funder's opinion must be sought, the LFA does not provide the Funder with any right to approve or reject settlement offers, which remains entirely within my discretion based on the legal advice I receive. Where I receive advice from Hausfeld or Counsel that it is reasonable to make or accept an offer of partial or full settlement, but I fail to follow that advice, that failure will be treated as a material and irremediable breach of the LFA (Clause 14.3).

100. Accordingly, I do not believe that any conflict arises between the Funder's interests and my obligations to the members of the Proposed Classes. It is clear from the LFA that the interests of the members of the Proposed Classes are paramount and take precedence over any other interests.

101. If any dispute arises under the LFA and the parties cannot resolve it between them within 15 days of giving notice of the dispute to the other party, then either party may seek a binding opinion on such a dispute from a QC with appropriate expertise (Clause 22). The QC may then determine the dispute in question, and their decision is final and binding on the parties (Clause

22.9). This includes any disputes which might relate to settlements as well as any disputes arising if the Funder were to seek to exercise its termination rights. I believe this mechanism adds a further safeguard, because it allows an independent QC to resolve disputes arising under the LFA.

102. Furthermore, I have read the fourth witness statement of Anthony Maton which provides a clear explanation of the operation of the funding and ATE insurance arrangements (including the CFAs) and sets out some examples about the amounts that I might seek from the Tribunal to pay any unrecovered costs out of undistributed damages under Rule 93(4) or under a collective settlement approval order under Rule 94 of the 2015 Rules. I consider that, in each case, since the decision whether to make such an order lies within the discretion of the Tribunal alone, there could not be any conflict with the interests of the members of the Proposed Classes.

103. The scenarios document exhibited to Anthony Maton's fourth witness statement (exhibited at **AJM16**) shows that the level of undistributed damages would prove more than adequate to pay (if approved by the Tribunal) any of my unrecovered costs which remain at the conclusion of the proceedings, including the Funder's fee. They demonstrate that it is only if the aggregate damages recovery is a small fraction of the estimated claim value (less than 5% under a potential judgment scenario or less than 3% under a potential settlement scenario) where the sum that I would seek to be paid in respect of such costs might match the total level of undistributed damages. Notably, the scenarios demonstrate that it is feasible that a large share of any undistributed damages may be paid to charity. Whilst my primary responsibility is of course to the members of the Proposed Classes, it is a felicitous potential outcome of these proceedings that they might ultimately provide a broader public benefit.

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:

Dated: 23 April 2021