IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1336/7/7/19: **PHILLIP EVANS v BARCLAYS BANK PLC AND OTHERS**

Case No. 1329/7/7/19: **MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED v BARCLAYS BANK PLC AND OTHERS**

MR EVANS' SKELETON ARGUMENT
ON THE CARRIAGE DISPUTE
for the CPO hearing commencing on 12 July 2021

References: are to the electronic bundles in the form **[Bundle prefix / Tab / page number (if relevant)]**. Bundle prefixes are: (i) letters **A** to **H** for joint bundles; (ii) **"EV"** for the Evans CPO application bundle; and (iii) **"MOH"** for the O'Higgins PCR's CPO application bundle.

Defined terms for pleadings:

- Mr Evans' Written Submissions on the Carriage Dispute ("**Evans Carriage Submissions**") **[A/5]**

- Submissions of the O'Higgins PCR on the Carriage Issue ("**O'Higgins Carriage Submissions**") **[A/4]**

- Mr Evans' Reply to the Submissions of the O'Higgins PCR on the Carriage Issue ("**Evans Carriage Reply**") **[A/10]**

- Reply Submissions of the O'Higgins PCR on the Carriage Issue ("**O'Higgins Carriage Reply**") **[A/9]**

A. INTRODUCTION AND SUMMARY OF SUBMISSIONS

1. The carriage dispute is whether Mr Evans or the O'Higgins PCR is more suitable to act as class representative within the meaning of Rule 78(2)(c) of the Tribunal Rules.

2. Mr Evans respectfully submits it is him because he is best placed to promote the best interests of the proposed class members, and authorising him will also be fair to the Proposed Defendants.

3. Mr Evans' position is set out in detail in the Evans Carriage Submissions and the Evans Carriage Reply which explain, by reference to 14 relevant factors,[1] why Mr Evans' application should be preferred. In summary:

   (a) **Mr Evans has the better team.** Mr Evans respectfully submits that he is the stronger individual candidate, that he is assisted by the stronger consultative panel and that he has the better legal team. Most importantly of all, he has the better expert team. This provides a firm factual bedrock to his claim, especially in respect of the functioning of the market and causation. (***Section C***)

   (b) **Mr Evans has the better claims.** Mr Evans is proposing to advance stronger claims. His case theory and quantum methodology are sound and robustly based, materially more comprehensive and supported by a greater breadth and depth of expert evidence. (***Section D***)

   (c) **Mr Evans takes better decisions.** Mr Evans and his team have conducted a superior degree of case preparation. He took the initiative to obtain the Decisions from the Commission and prepared his CPO application in detail. Mr Evans' application was fully set out when filed, and it has required minimal amendment since then, unlike the O'Higgins PCR's application. (***Section E***)

   (d) **Mr Evans has a better prepared funding package.** Mr Evans has made better decisions about the level of funding and the level and terms of ATE insurance required and his funding arrangements provide better value for money in most scenarios. (***Section F***)

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[1] Mr Evans' proposed framework for the factors to be considered in a carriage dispute is set out in Evans Carriage Submissions, ¶¶20-26. **[A/5/9-12]**

B. LEGAL CONTEXT TO THE CARRIAGE DISPUTE

4. The overall task for the Tribunal in determining the carriage dispute is to authorise the person whom it considers would more effectively represent the **best interests of all proposed class members**. It should also arrive at a decision that is **fair to the Proposed Defendants**: Evans Carriage Submissions, ¶13. **[A/5/5]**

5. Mr Evans and the O'Higgins PCR rely on the Tribunal Rules, *Guide*, the Carriage Timing Judgment ([2020] CAT 9) and the Canadian case-law to identify the factors that may be relevant to the carriage dispute. However, they reach different conclusions as to the weight to be attributed to them. Mr Evans refers the Tribunal to the table annexed to his Carriage Reply, which compares the PCRs' positions on those factors. **[A/10/52-58]**

6. There are two key legal issues on which the PCRs join issue: (a) the extent of any "relative merits" analysis;[2] and (b) the relevance of the so-called "first-to-file" principle.[3]

7. Mr Evans submits that his position on these issues is to be preferred. As to relative merits, an assessment of which PCR would best advance the interests of the class must include consideration of which PCR is better placed to win. Victory is relevant to any litigant; and class members should be taken similarly to be interested in whether they are likely to win or not. Any other approach is profoundly unreal.

8. As to "first-to-file" principle, this is deeply flawed as a matter of policy. In particular, a first-to-file approach risks creating perverse incentives: it would encourage the filing of rushed applications, without undertaking the appropriate preparation in advance. That is contrary to the interests of the proposed class members, which are best served by judging competing PCRs on the quality of their applications and not the speed of their filing.

C. MR EVANS HAS THE BETTER TEAM

9. **As to Mr Evans as a proposed class representative,** it is submitted that there are four particular considerations that mark him out as the better PCR:

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2 See Evans Carriage Submissions, ¶¶15-16 and 28-32; **[A/5/6-7, 12-13]** O'Higgins Carriage Submissions**,** ¶11; **[A/4/8-9]** Evans Carriage Reply, ¶¶20-21; **[A/10/9-10]**; and O'Higgins Carriage Reply**,** ¶¶9-12 **[A/9/5-6]**.

3 See Evans Carriage Submissions, ¶¶177-187; **[A/5/67-69]** O'Higgins Carriage Submissions, ¶¶7-9; **[A/4/4-5]**; Evans Carriage Reply, ¶¶14-19; **[A/10/7-9]** and O'Higgins Carriage Reply, section B1 and ¶¶121-124. **[A/9/4, 43-44]**

(a) **Mr Evans' experience:**[4] Mr Evans has substantial, direct and relevant personal experience in both competition investigations and collective actions, derived from his roles at Which?; and as a Panel Member, later Inquiry Chair, at the CMA (formerly the Competition Commission). In the latter role, he managed investigations into a wide variety of sectors, which were often factually and legally complex. This role required him to direct multi-disciplinary teams of professionals, including legal and economic experts. Mr Evans is therefore well-versed in managing complex and substantial competition law projects.

(b) **Mr Evans' dedication to achieving collective redress:**[5] Mr Evans has been an advocate for collective redress in the UK for over 20 years. This action is his latest contribution; he has previously been involved in collective actions when he worked at Which?. He is "*committed to ensuring that the… Proceedings are run efficiently and effectively in the interests of the members of the Proposed Classes, and achieve their overall objective of recovering damages for the losses suffered*."[6]

(c) **Mr Evans has and will be open and transparent:**[7] Mr Evans says that it is "*very important to conduct the… Proceedings in the most transparent and accessible manner as possible in order to demonstrate to… the Proposed Classes how I intend to pursue these proceedings in their best interests*."[8] As such, he has shared as much information as possible regarding his CPO application, including claim documentation and details of his funding and insurance arrangements. He took his funding documents out of the Confidentiality Ring long before the O'Higgins PCR. Likewise, he was first to make all key claim documents available on his website.

(d) **Mr Evans has and will be engaged with class members:**[9] Mr Evans has taken a number of steps to communicate with the proposed classes. He has written articles, given video interviews and participated in conferences about this action and collective redress more generally. He has also implemented a multi-faceted communications strategy to maximise the chances that class members will be

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4 See Evans Carriage Submissions, ¶¶137-144 **[A/5/54-57]** and Evans 1, ¶¶36-57. **[EV/11/11-16]**

5 Evans 1, ¶¶29-33; **[EV/11/9-10]** Evans 2 ¶¶8-30. **[D/8/3-10]**

6 Evans 1, ¶32. **[EV/11/10]**

7 Evans 2, ¶¶66 and 81-82. **[D/8/19-21, 26-27]**

8 Evans 2, ¶63. **[D/8/18]**

9 See Evans 2, ¶¶60-75; **[D/8/18-25]** and Evans Carriage Submissions, ¶¶112-116. **[A/5/47-49]**

aware of his proposed proceedings. This included distributing the Joint Publicity Notice approved by the Tribunal via a number of bespoke mailing lists, and translating it into the 11 languages of the G10 currencies so as to ensure that it would reach and be understood by as many proposed class members as possible.

10. The O'Higgins PCR has sought to downplay Mr Evans' experience. It says that the suggestion that Mr Evans is better qualified because he was a CMA panel member and policy adviser is "*misguided*" because "*the role of the PCR is not to decide the case, or to supplant the team of lawyers and experts whom he instructs, but rather to direct and manage that team.*"[10] That suggestion is misconceived. Mr Evans' knowledge and experience means that he is well placed to understand the legal and factual issues that arise in this case, and to direct and manage his team accordingly.[11]

11. **As to Mr Evans' consultative panel:**[12] it has unrivalled strength and depth of knowledge and experience covering the issues relevant to these proposed proceedings:

    (a) **Lord Carlile of Berriew CBE QC (Lead panel member)**: Lord Carlile is a former Chairman of the Tribunal and was a part time judge for 28 years in the High Court. He is now a crossbench member of the House of Lords.

    (b) **Professor Joseph Stiglitz (markets and economic theory):** Professor Stiglitz is a Nobel Prize-winning economist, public policy analyst and a professor at Columbia University. His seminal contributions on various subfields of economics underpin some of the economic theories of the expert reports served on behalf of Mr Evans and the O'Higgins PCR.

    (c) **Mr David Woolcock (FX markets and trading):** Mr Woolcock has more than 30 years' experience in the FX market. He has held a number of senior FX industry roles including as the Vice Chair of the ACI Financial Markets Association's FX Committee. He is also a member of the Bank of International Settlements (**"BIS"**) Market Practitioners Group, which launched the FX Global Code in 2017.

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10 O'Higgins Carriage Reply, ¶79(3). **[A/9/30]**

11 As noted in Evans 1, ¶45. **[EV/11/14]**

12 See Evans Carriage Submissions, ¶¶147-148; **[A/5/57-58]** Evans 1, ¶¶58-63; **[EV/11/18]** and Evans 2, ¶¶76-80. **[D/8/26]** The terms of reference for Mr Evans' consultative panel, which includes full biographies of the members, is exhibited at PGE11 of Evans 2. **[D/8.6]**

(d) **Professor Philip Marsden (competition law and economics):** Professor Marsden is a Professor of Law and Economics at the College of Europe, Bruges. He is a competition and enforcement case decision-maker at various regulators, including the Bank of England and the FCA.

12. The consultative panel provide a wealth of experience and expertise to assist Mr Evans' decision-making if he were to be authorised as class representative.[13] He considers that it has already proved to be "*an invaluable source of support*" and he has "*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.*"[14]

13. **As to Mr Evans' legal team:**[15] they have the experience, resources and capability to advance the proposed proceedings in the best interests of the proposed classes. Mr Evans' solicitors (**"Hausfeld"**) have substantial experience in competition litigation both in the UK and Europe, having established its presence in London in 2009.[16] Like Mr Evans, Hausfeld has been committed to the development of the collective proceedings regime in the UK (and is instructed in three other current CPO applications).

14. The O'Higgins PCR has emphasised the experience of its US affiliate firm, Scott+Scott Attorneys at Law LLP (**"SSAAL"**), and its role as co-counsel in the US FX class action. Strikingly, its submissions focus far more on SSAAL's experience, as opposed to that of Scott+Scott UK LLP, which is the firm representing the O'Higgins PCR.

15. The O'Higgins PCR's reliance on SSAAL's experience is a red herring. SSAAL's general experience is irrelevant, since that firm neither acts for nor advises the O'Higgins PCR. Further, the specific experience of the US FX class action is a neutral factor between the PCRs, since Hausfeld's associate US firm, Hausfeld LLP, is SSAAL's co-counsel. Any institutional knowledge of that action which may be of assistance in these proceedings is available to both law firms.

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13 Evans 1, ¶59. **[EV/11/16]**

14 Evans 2, ¶79. **[D/8/26]** See also Evans 1, ¶¶62-63. **[EV/11/17-18]**

15 See Evans Carriage Submissions, ¶¶172-176; **[A/5/67]** Evans Carriage Reply, ¶¶98-104 **[A/10/39]**; and Maton 4, ¶¶73-91. **[D/9/26-29]**

16 For full details of Hausfeld's experience, see the firm profile in Maton 4, Exhibit AJM14. **[D/9.2]**

16. Finally, **as to Mr Evans' expert team:** they are highly experienced and well-placed to analyse the operation of FX markets, the impact of the infringements, and quantify aggregate damages. He emphasises two points in particular. First, he has instructed experts with a detailed understanding of the markets concerned, who are able to assist in understanding – and proving – the impact of the infringements:

    (a) **FX market microstructure:** Professor Dagfinn Rime is a Professor of Finance whose central research interest and primary area of expertise is FX market microstructure.[17] He has held notable external roles, such as external consultant to BIS for the 2010 and 2013 editions of the triennial survey of global FX markets.[18]

    (b) **FX markets and trading:** Mr Richard Knight is an expert in FX markets and trading with over 25 years of experience obtained via employment with major banks in various roles in FX sales between 1988 and 2013.[19]

17. The O'Higgins PCR is not in a position which is even close to equivalent.

18. Second, his econometric expert, Mr John Ramirez, has taken an approach which is detailed and sophisticated. Mr Ramirez confronts and answers complexities, whereas the O'Higgins PCR's experts appear to take a Panglossian approach which hopes that everything will work out in the end. Whereas the Evans' experts seek to do their very best to offer certainty, all the O'Higgins PCR's experts do when confronted by difficulty is to offer hope. In Mr Evans' submission, his experts' approach is plainly to be preferred.

D. MR EVANS HAS THE BETTER CLAIMS

19. The second reason why Mr Evans is the more suitable person to act as class representative is that he has advanced the stronger claims. Mr Evans has already explained in detail in ¶¶28-70 and 74-95 of his Carriage Submissions **[A/5/12-31, 33-42]** and in sections E and F of his Carriage Reply **[A/10/21-35]** the reasons why the claims he proposes to bring

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17 Professor Rime's work is cited by both the O'Higgins PCR's experts and the Proposed Defendants: see references cited in footnote 31 of Evans Carriage Submissions. **[A/5/15]**

18 Rime 1, ¶6. **[EV/9/4]**

19 It is understood that the O'Higgins PCR has instructed Mr Reto Feller of Velador Associates, who is described as a "*former FX trader*". Both Professor Breedon and Professor Bernheim confirm that they have relied on Mr Feller's expertise: Breedon 1, ¶1.6 **[MOH-B/0/11]**; Bernheim 1, ¶13 **[MOH-H/0/8]**. However, Mr Feller has not filed any evidence in support of the O'Higgins Application, and Professor Bernheim confirmed at the teach-in that Mr Feller is not a testifying expert: see transcript of the teach-in, page 52, lines 4-7.

are more sound and robustly based than those of the O'Higgins PCR. Below he focuses on five core superiorities of his approach.

20. **Proper distinction between direct and indirect harm:** both PCRs contend, *inter alia,* that the infringements caused harm on transactions with RFIs and/or the Proposed Defendants outside of their infringement periods (i.e. indirect or "umbrella" harm). As the Tribunal knows, in Mr Evans' case this is reflected in two separate classes (Class A having suffered direct harm, Class B having suffered indirect harm), whereas the O'Higgins PCR tries to wrap all of this up in a single class.

21. Whereas Professor Rime and Mr Ramirez identify differing theories of harm, methodologies and data sources for Class A and Class B, the O'Higgins PCR's experts approach is more broad-brush, apparently taking the view that there is no requirement of any commonality at all across a class in collective proceedings.

22. By way of example of their lack of detail, the O'Higgins PCR's experts have not properly grappled with how they would calculate indirect harm, especially on transactions with FX dealers other than the Proposed Defendants (**"Non-Defendant FX Dealers"**):

    (a) Breedon 1, Breedon 2 and Bernheim 1 do not identify any specific third-party data sources that could be used to calculate indirect harm on transactions with Non-Defendant FX Dealers. Breedon 1 merely refers in general terms to the possibility of third-party disclosure from FX dealers not involved in the cartels.[20]

    (b) In the absence of third-party data, Professor Breedon initially proposed to extrapolate from harm estimated using the Proposed Defendants' data to represent damages for the whole O'Higgins class.[21] That approach is flawed as it inappropriately assumes that any overcharge on transactions with the Proposed Defendants was the same as transactions with Non-Defendant FX Dealers (i.e. that direct and indirect harm was the same). That may not be the case as the ways in which the infringements caused direct and indirect harm are different.[22] It is also not a viable methodology given that transactions entered into with Non-Defendant

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20 Breedon 1, ¶6.51. **[MOH-B/0/68]** The O'Higgins PCR also does not take a concrete position on this issue in its Re-Amended Collective Proceedings Claim Form: see ¶45(3). **[MOH-A/0/32]** The same can be said of its Neutral Statement on the Merits: see ¶18.

21 Breedon 1, ¶¶6.54 and 6.59. **[MOH-B/0/68-69]**

22 See Evans Carriage Submissions, ¶¶37-39. **[A/5/16-18]**

FX Dealers represent around 50-60% of the O'Higgins PCR's class VoC. Such an approach would assume more class-wide harm than it actually measures.[23]

(c) Latterly, and in response to criticisms made by Mr Evans' experts, the O'Higgins PCR's experts have confirmed that, in the absence of third-party data, they would proxy indirect harm using the Proposed Defendants' transaction data for their non-infringement periods.[24] That is one of the approaches already identified in Ramirez 1, but only to compute harm on transactions with the Proposed Defendants outside of their infringement periods: Ramirez 1, section 6.2.1 **[EV/10/62-63]** However, using that data to calculate all indirect harm suffers from two notable flaws:

(i) First, it means that as participation in the infringements increases, there is a corresponding decrease in the amount of data available to proxy indirect harm. In particular, there will be portions of two years of the infringement period (2010 and 2011) where no data at all is available, because all of the Proposed Defendants were part of at least one of the infringements.[25]

(ii) Second, using the Proposed Defendants' data would still mean that the O'Higgins PCR's experts are assuming the harm suffered by up to 50-60% of the VoC covered by the O'Higgins class.

23. It follows that Mr Ramirez's proposed approach to calculating indirect harm (see sections 6.2.1-6.2.3 of Ramirez 1 **[EV/10/62-69]**) is far more comprehensive than that of the O'Higgins PCR's experts, and will result in a materially more accurate calculation, to the direct benefit of the members of the proposed classes.

24. **Credible and consistent quantum methodology:** Mr Ramirez proposes to measure the impact of the infringements via regression analysis using the dummy variable method.[26] His proposed methodology and available data sources are set out in detail in section 6 of Ramirez 1. **[EV/10/45-69]** His approach has remained clear, credible and consistent.

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23 Ramirez 2, ¶93. **[C/7/41]**

24 Breedon 3, ¶4.17; **[C/3/35]** Bernheim 2, ¶15. **[C/4/9-10]** Both Professor Breedon and Professor Bernheim seek to suggest this was also mentioned in their previous reports. Mr Evans disagrees.

25 See Table 1 in Ramirez 1. **[EV/10/7]**

26 Ramirez 1, section 6. **[EV/10/45-69]**

25. By contrast, the proposed quantum methodology proposed by the O'Higgins PCR's experts is obscure and has waxed and waned prior to the CPO hearing:

(a) Breedon 1 (produced on 28 July 2019 and amended on 28 January 2020) indicates that Professor Breedon proposes to use the dummy variable method.[27] That is in line with Mr Ramirez's proposed approach; whereas

(b) Bernheim 2 (dated 23 April 2021) apparently changes tack and introduces the possible use of a forecast methodology (also known as the "predictive approach").[28] This was also briefly mentioned in Bernheim 1 (dated 23 October 2020), for example at ¶91. **[MOH-H/0/34-35]**

26. Accordingly, there seems to be a tension as regards the methodologies proposed by Professor Breedon and Professor Bernheim for calculating loss to the proposed class. While both the dummy variable approach and the forecast methodology are generally accepted methodologies to estimate cartel overcharges,[29] the key issue is that it is now "*unclear what the proposed approach of Prof Breedon and Prof Bernheim is*."[30]

27. Professor Bernheim has suggested in his report that his forecast methodology is not different from that proposed by Professor Breedon.[31] However, the forecast methodology generally is viewed as being different to the dummy variable method. In short, while the two methodologies estimate overcharges via regression analysis, they are different:[32]

(a) The dummy variable method employs data from the infringement and non-infringement periods to estimate the overcharge; whereas

(b) The forecast methodology employs data from the non-infringement period only and uses that to predict the prices that would have prevailed during the infringement period, which can then be used to compute the overcharge.

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27 See section 6 of Breedon 1 **[MOH-B/0/53-69]** in particular ¶¶6.44-6.48 **[MOH-B/0/66-67]**. See also ¶5.22 of Breedon 3. **[C/3/52-53]**

28 Bernheim 2, section IV.B. **[C/2/25-33]**

29 European Commission Staff Working Document, Practical Guide. Quantifying harm in damages actions based on breaches of Articles 101 and 102, ¶¶71–72.

30 Ramirez 3, ¶43. **[C/10/19]**

31 Bernheim 2, ¶55. **[C/2/25]** Professor Bernheim conceded at the teach-in: "*sometimes people do talk about it as if it is an alternative approach*": Transcript, page 98, lines 22-23.

32 Ramirez 3, ¶¶40-43. **[C/10/18-19]**

28. Professor Bernheim's suggestion is also at odds with Professor Breedon's evidence, which refers to Bernheim 2 as providing "*further details regarding the alternative prediction/ forecasting model*" (emphasis added).[33] Similarly, the Proposed Defendants' have indicated that they understood Professor Bernheim to be suggesting the forecast model as an alternative to the dummy variable method.[34]

29. Proposing several quantum methodologies to address the same issue creates inefficiencies and needless complexity. Two methodologies are not better than one, when one is credible and workable. On the contrary, multiple methodologies are unlikely to advance the best interests of the proposed class members. It is also not a proportionate approach to bringing collective (or any) proceedings.[35]

30. For completeness, Mr Ramirez does not consider the forecasting approach would be superior to the dummy variable method.[36] He pointed out that one of the drawbacks of forecast models is that if there are factors which occur only in the infringement period which affect spreads, these may not be controlled for in the forecast methodology. Professor Bernheim appeared to accept this criticism at the teach-in, and consequently sought to pivot to a "*variant of the prediction approach*".[37] This is another example of the O'Higgins PCR chopping and changing its approach to estimating quantum.

31. **Appropriate exclusion of benchmark trades and limit/resting orders:** Mr Evans has correctly decided to exclude these trades from his proposed claim.[38] This is in the best interests of the proposed class members, as their inclusion is fraught with difficulties.

32. Mr Evans has explained the reasons for these exclusions in ¶¶79-85 of his Carriage Submissions. **[A/5/36-38]** The principal reason is that any impact of the infringements on these trades cannot be assessed on a class-wide basis. This is because some class

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33 Breedon 2, ¶3.44. **[C/1/27]**

34 Joint CPO Response, ¶136. **[A/1/64]**

35 This reinforces the concerns previously expressed by Mr Evans about the inefficiency of the O'Higgins PCR's decision to instruct two experts to address the same issue: see Evans Carriage Submissions, ¶¶231-236. **[A/5/84-87]**

36 Ramirez 3, section 5.1.3. **[C/10/21]**

37 See transcript, page 99, lines 23-25 and page 100, lines 1-20. That variant also appears to be the approach set out in the Neutral Statement of the O'Higgins PCR on the Merits at ¶26.

38 The Proposed Defendants agree with Mr Evans: see Joint CPO Response, footnote 92. **[A/1/32]**

members would obtain a benefit, whereas others may suffer loss: there would be "winners" and "losers" among the class members. Taking each type of trade in turn:

(a) **Benchmark trades:** these trades could be affected by the occasional coordinated trading conduct identified in the Decisions, which sought to influence the relevant benchmark rate.[39] Any instance of coordinated trading would simultaneously benefit some customers and harm others.[40] For example, if the benchmark rate for a currency pair were unlawfully increased:

(i) Customers with orders to buy at the benchmark rate would suffer loss (i.e. they purchased at a higher price as a result of the infringements); whereas

(ii) Customers with orders to sell at the benchmark rate would obtain a benefit (i.e. they sold at a higher price as a result of the infringements).

(b) **Limit/resting orders:** these orders may also be affected by coordinated trading conduct. To that extent, they would run into the difficulties just described. Insofar as these orders might also have been impacted by unlawful widening of spreads, another problem of "winners" and "losers" arises. There are a number of different ways in which limit/resting orders are executed, such that: (a) on some orders the customer may earn a spread, and would benefit from any widening of spreads; (b) on others, it may pay the spread, and would suffer harm; and (c) a further alternative is that no spread applies to certain orders, and they would be unaffected.[41]

33. There is, accordingly, a lack of commonality in respect of these types of trade. In particular, the interests of the "winners" and "losers" described above are not common: they are in conflict. Taking resting orders as an example: customers that earn a bid-ask spread would have an interest in showing that spreads were not widened, whereas customers that paid the spread have an interest in showing the opposite. It is therefore necessary and appropriate to exclude these trades from Mr Evans' proposed proceedings.

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39 See section 4.1.2.3 of the Decisions. **[EV/2/14-15]**; **[EV/3/14-15]** Benchmark trades cannot be affected by any widened spreads, since a spread is not applied to them: Evans Carriage Submissions, ¶80. **[A/5/36]**

40 Evans Carriage Submissions, ¶¶40-43 and 80. **[A/5/18-20, 36]**

41 Evans Carriage Submissions, ¶81. **[A/5/36-37]**

34. The O'Higgins PCR makes various criticisms of Mr Evans' proposed exclusion. None of them stand up to scrutiny:

(a) There is an evidential conflict in relation to how resting orders work (in particular between Professor Bernheim and Richard Knight). But Mr Knight plainly has the direct relevant expertise, and his evidence is to be preferred.

(b) It contends (relying on *Merricks*, and various US and Canadian decisions) that it is not necessary to show in collective proceedings that all class members have been harmed in a common or consistent way (or even at all).[42] But these cases in fact support Mr Evans' position. For example, in *Vivendi* (cited at ¶18(2)(b) **[A/9/11]**) the Court observed (in relation to Quebec law) "*[t]hus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.*" Because of the "winners" and "losers" problems identified above, success for some class members would result in failure for others.

(c) It argues that it is likely to be difficult to exclude limit/resting orders (but not benchmark trades) from his experts' analysis, because banks do not hold that data.[43] The O'Higgins PCR relies solely on the points made by the Proposed Defendants in the Joint CPO Response in this regard (which, in turn, relies on the Schofield Judgment). Mr Evans has already comprehensively addressed these concerns in ¶¶187-192 of his Reply to the Joint CPO Response **[A/3/51-53]** to which the Proposed Defendants (and seemingly the O'Higgins PCR) have no answer.

35. In fact, the approach of the plaintiffs in the US FX class action – in which, the Tribunal will recall, SSAAL are co-counsel - actually supports Mr Evans' approach. That is because they had excluded benchmark trades, limit and resting orders from their claims:[44]

> ""Benchmark trades" are trades that were entered into at a benchmark price. Such trades are expressly excluded from both the OTC Class and Exchange Class. "Resting orders" are orders that are placed in advance, directing the bank to execute a trade if and when the market price for a particular currency pair hits a specified level. Resting orders would not be impacted by a conspiracy to widen spreads in the spot market, because clients do not "pay the spread"

42 O'Higgins Carriage Reply, ¶18. **[A/9/10]**

43 O'Higgins Carriage Reply, ¶¶55-58. **[A/9/24]**

44 Schofield Judgment, pp.13-14.

> when they place resting orders. Because benchmark trades and resting orders cannot serve as a basis for liability in this case, the type of each transaction executed by class members is highly material to their claims."

36. Notwithstanding these issues, the O'Higgins PCR nevertheless intends to include these trades in its proposed proceedings, and portrays this as a virtue. Mr Evans disagrees, for the reasons given above. Moreover, as he has explained in ¶¶40-43 and 49-64 of his Carriage Submissions **[A/5/18-20, 22-28]** the O'Higgins PCR has not put forward a viable methodology for measuring harm on these types of transactions. In particular, its experts propose to measure harm using the realised spread as the dependent variable in the regression analysis. That methodology is practically and conceptually flawed. The key issue is that the realised spread is a measure of dealer revenue rather than customer trading costs. It is well-established that a claim for a restitutionary award (here, relating to dealer revenues) is not available in competition damages claims.[45]

37. **Mr Evans' longer list of RFIs ensures the widest possible redress for any indirect harm caused by the infringements:** Mr Evans' list of RFIs contains 16 additional banking groups compared with that of the O'Higgins PCR. That is because Mr Evans included participants in the Bank of England's submission to the BIS *Triennial Central Bank Survey of Foreign Exchange and Over-the-counter (OTC) Derivatives Markets* as a "*reporting dealer*".[46] It appears that the O'Higgins PCR did not do so, and therefore erroneously ignored or overlooked a number of institutions that were offering FX trading services in the UK during the period covered by the infringements.[47]

38. The main way in which the O'Higgins PCR seeks to paper over this issue is to cast aspersions in respect of the 16 additional RFIs. It suggests that they did not act as active FX dealers during the infringements.[48] That is wrong. Mr Evans relies upon the industry expertise of Mr Knight,[49] and Mr Ramirez's knowledge of the Euromoney survey data[50] to further demonstrate that 15 of the additional RFIs were active FX dealers at the

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45 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, at [42] (Arden LJ) and [156] (Tuckey LJ); that was also the view of Lewison J: [2007] EWHC 2394 (Ch) at [110].

46 Evans Carriage Submissions, ¶¶91-92. **[A/5/40-41]**

47 Evans Carriage Submissions ¶¶90-94; **[A/5/40-41]** Evans Carriage Reply, ¶¶65-73. **[A/10/22-25]**

48 O'Higgins Carriage Submissions, ¶46 **[A/4/19]**; Breedon 2, ¶5.8. **[C/1/40]** See also O'Higgins Carriage Reply, ¶¶64-67. **[A/9/26-27]**

49 Knight 3, section 2. **[C/8/5–6]**

50 Ramirez 3, section 4. **[C/10/15-17]**

relevant time.[51] Further, the O'Higgins PCR now appears to recognise the flaws in its approach, as it says that it is content to amend its list of RFIs to imitate Mr Evans.[52]

39. **Mr Evans' proposed class definition appropriately reflects the territorial scope of the infringements identified in the Decisions:** As explained at ¶¶87-95 of his Amended Collective Proceedings Claim Form **[EV/1/29-36]**, Mr Evans defined the criterion of "*transactions… entered into in the* [EEA]" carefully by reference to the terms of the Decisions. In a nutshell, a transaction is entered into in the EEA where: (a) the Proposed Defendant/RFI is located in the EEA; and/or (b) the class member is domiciled in the EEA. Those are clear, familiar and workable criteria.[53] The domicile of the class member is particularly important. This criterion ensures that FX transactions with either Proposed Defendants and/or RFIs that were not located in the EEA, but whose conduct is affected by the infringements, are covered. This mirrors the territorial ambit of the Decisions.[54]

40. The O'Higgins PCR's approach to defining this criterion is different. It is based on where a transaction is priced and/or accepted by the RFI: O'Higgins Re-amended Collective Proceedings Claim Form, ¶31. **[MOH-A/0/19]** This runs the real risk of under-compensation. That is because it excludes trades that were priced and/or accepted outside the EEA, even though conduct affecting those trades may be caught by the Decisions.

41. This flaw emerges clearly from ¶60 of the O'Higgins PCR's Carriage Reply. **[A/9/25]** It contends that a person that traded exclusively with a trader located in Tokyo should not be a class member as their trades fall outside the territorial scope of EU/EEA competition law. That is wrong as a matter of law. Jurisdiction may be asserted over a non-EEA person if their conduct is implemented in the EEA or it is foreseeable that their conduct would have an immediate and substantial effect in the EEA ("**jurisdictional criteria**").[55] It follows that the right to claim damages under EU/EEA competition law exists where one of the jurisdictional criteria is met and a customer domiciled in the EEA enters into a trade with either: (a) a Proposed Defendant, who was located outside the EEA but who

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51 The 16th RFI is Nationwide, which was a reporting dealer to the BIS Triennial Survey. This is why Mr Evans infers that it acted as an FX dealer: Evans Carriage Reply, footnote. 74. **[A/10/23]**

52 O'Higgins Carriage Reply, ¶67. **[A/9/27]**

53 Evans Carriage Submissions, ¶88. **[A/5/39]**

54 Evans Amended Collective Proceedings Claim Form, ¶93(b). **[EV/1/33-35]**

55 *iiyama (UK) Ltd & Ors v Samsung Electronics Co Ltd & Ors* [2018] EWCA Civ 220, [70], [95].

participated in one or both of the infringements; or (b) an RFI, who was located outside the EEA, but whose pricing was affected by the infringements.

E. MR EVANS TAKES BETTER DECISIONS

42. As observed by Ontario Court of Appeal: "*since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class*."[56]

43. Mr Evans submits that his application reveals a superior level of preparation and decision-making, which has and will yield benefits for the proposed classes. After taking the initiative to obtain copies of the Decisions directly from the Commission, he prepared his CPO application in detail and with care.[57] His experts set out comprehensive theories of harm and a viable quantum methodology. The consequence of this diligent preparation is that Mr Evans' application has required minimal amendment after it was filed.[58]

44. The O'Higgins PCR adopted a different approach. It rushed to be the first to file its CPO application. That approach suffers from two shortcomings:

    (a) The O'Higgins PCR encountered obvious difficulties in filing a CPO application without sight of the information contained in the Decisions: see ¶¶212-225 of Evans Carriage Submissions. **[A/5/77-81]**

    (b) It has sought to amend and supplement its case on multiple occasions thereafter. The Tribunal is referred to the summary of the O'Higgins PCR's attempts to supplement its application at ¶109 of the Evans Carriage Reply.[59] **[A/10/40-42]**

45. This approach is not conducive to safeguarding the interests of the class members. On the contrary, it exposes the shortcomings of endorsing a "first-to file" approach. Indeed, filing a CPO application prematurely, and seeking to supplement and/or amend it on multiple occasions thereafter, is undesirable and inefficient in equal measure. It should

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56 *Mancinelli v Barrick Gold Corporation* 2016 ONCA 571 at [52].

57 Evans Carriage Submissions, ¶¶197-208; **[A/5/72-76]** Evans Carriage Reply, ¶¶107-108. **[A/10/39-40]**

58 Evans Carriage Submissions, ¶¶206–208. **[A/5/75–76]**

59 See also Evans Carriage Submissions, ¶¶226-236; **[A/5/82-87]** Evans Carriage Reply, ¶25. **[A/10/11]**

not be encouraged. Rather, the regime should incentivise PCRs to prepare their CPO applications carefully and thoroughly, rather than filing in haste and amending at leisure.

46. The O'Higgins PCR's Carriage Reply explains that supplementation of its application has been necessitated by the carriage dispute.[60] The decision to instruct Professor Bernheim is said to be an example of this. Quite apart from the problems engendered by that decision,[61] it begs the question why the O'Higgins PCR did not put its best foot forward at the outset. The O'Higgins PCR had to be galvanised to do so by the carriage dispute. Mr Evans requires no such encouragement.

47. Finally, it is necessary to make clear, lest this point be raised again by the O'Higgins PCR, that Mr Evans' preparation was separate to the O'Higgins Application. He has prepared his own application and it is materially different. He has explained why the so-called "copycat" criticisms ring hollow.[62] On the other hand, the O'Higgins PCR appears to have no qualms in cherry-picking parts of Mr Evans' application when it suits.[63]

F. MR EVANS HAS A BETTER PREPARED FUNDING PACKAGE

48. The Tribunal has indicated that the PCRs' arrangements for funding the proceedings – and in particular their effect on the interests of the class members and the Proposed Defendants – may be a relevant consideration.

49. The O'Higgins PCR has placed great emphasis on its greater level of available funding and greater level of ATE insurance, but recent developments show that the former is in fact illusory and the latter has come at a level of cost which means that – alongside the greater outlay by the O'Higgins PCR's funder – the overall cost of the O'Higgins PCR's funding package is greater than Mr Evans' in most scenarios.

The O'Higgins PCR's Updated Budget

50. Having refused to provide an updated budget prior to filing of the reply carriage submissions,[64] the O'Higgins PCR has now produced an updated budget, which confirms

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60 O'Higgins Carriage Reply, ¶¶127 and 134(2). **[A/9/45, 47]**

61 Evans Carriage Submissions, ¶¶227-236; **[A/5/82-87]** Evans Reply Submissions, ¶¶79-86 and ¶109. **[A/10/28-31, 40-42]**

62 Evans Carriage Reply, ¶¶8-10, 26 and 32–33. **[A/10/3-6, 12, 14]**

63 O'Higgins Carriage Reply, ¶¶67 and 71. **[A/9/27]**

64 See Evans Reply Submissions, ¶37. **[A/10/15]**

that it has incurred very significant unbudgeted expenditure at the pre-CPO stage: the pre-CPO costs (including ATE deposit premiums) have increased by £3,488,800, which – since the overall budget has not increased – has had to be taken from the post-CPO budget: see **[D/7.1/2]**.

51. Ms Hollway attempts to explain this reallocation as involving either the bringing forward of expenditure which was anticipated post-CPO and/or reduction in pre-existing "headroom".[65] As to this:

    (a) It is not accepted that work required by the contract review arising from the Proposed Defendants' jurisdiction challenge would have been required in any event. Ms Hollway herself puts this no higher than something which *"we may well otherwise"* have done.[66]

    (b) Ms Hollway acknowledges that at least some of Bernheim 1 was prompted by the carriage dispute. In fact, that was its principal purpose.[67] Ms Hollway does not say that there was any "headroom" in the budget for this.[68]

    (c) It must be questionable whether the O'Higgins PCR anticipated spending almost £600,000 on travel to meet potential opt-in class members, which has been saved as a result of the Covid-19 pandemic.[69]

    (d) Otherwise, £1,953,000 has been taken from the previous budgets for disclosure and "notification and administration" (£1.8m from the latter).[70] That is a substantial amount of "headroom" to have incorporated into a budget which already included contingency provision.

52. It is submitted that the reality is that the O'Higgins PCR has been forced to make substantial savings in the post-CPO budget in order to maintain the same overall budget, thus increasing the risk of the post-CPO budget being insufficient.

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65 Hollway 5, ¶24. **[D/7/7]**
66 Hollway 5, ¶24(a). **[D/7/7]**
67 Evans Carriage Submissions ¶¶227-236 **[A/5/82]** and cf Hollway 5, ¶24(b). **[D/7/8]**
68 Hollway 5, ¶24(b). **[D/7/8]**
69 See Hollway 5, ¶24(c). **[D/7/8]**
70 Hollway 5, ¶24(d) **[D/7/8]**.

53. The same cannot be said of Mr Evans: while he has also incurred additional pre-CPO expenditure,[71] this has been accounted for through a combination of an increase in funding by his funder,[72] Hausfeld agreeing to defer payment of a substantial proportion of their fees[73] and some reallocation of what was a large contingency provision.[74]

54. Pressure on the O'Higgins PCR's budget is further increased by the fact that no express provision has been made for ATE deposit premiums. If Ms Hollway's evidence of the additional cost of AAE on the excess layers is accurate,[75] then the O'Higgins PCR will have to find £1.68m for additional deposit premiums upon certification.

55. The effect of this belated acknowledgement of a significant hole in the O'Higgins PCR's budget is to render the supposed benefit of the O'Higgins PCR's larger budget illusory. The O'Higgins PCR has a total of £16,243,820 available post-certification (subject to the distribution of the Advisory Committee costs between pre- and post-CPO), whereas Mr Evans has a total of £15,949,362 available. However, out of that £16,243,820, the O'Higgins PCR must find £1.68m of unbudgeted expenditure.[76] Further, while Mr Evans' budget provides for a general contingency of around £4.5m, the O'Higgins PCR's budget has a contingency of only £839,400. It is therefore likely to be commensurately harder for the O'Higgins PCR to make savings without eating into sums which are required to prosecute the claim.

Interests of the Class Members and Proposed Defendants

56. In the event that these proceedings are disposed of at trial, then the class members have no direct interest in the costs of the proceedings. Sums due to Mr Evans' lawyers, funder and ATE insurers will only be paid out of undistributed damages and subject in any event to the Tribunal's decision as to their amounts (Rule 93(4) of the Tribunal Rules).

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71 For many of the reasons given by Ms Hollway. In particular, the carriage dispute has taken longer and been more expensive to resolve than was originally anticipated, in part because of the O'Higgins PCR's actions in serving substantial additional evidence from a new expert.

72 Evans 2, ¶87. **[D/8/28]**

73 Maton 6, ¶13.

74 Maton 6, ¶11.

75 Mr Evans has doubts about this for the reasons set out in his comments on the O'Higgins PCR's Funding Statement.

76 Mr Evans notes that the evidence of Ms Hollway (Hollway 6, ¶13) and Mr Purslow (Purslow 3, ¶8) is that it might be possible to cover this expenditure by "recycling" inter partes costs or increasing the level of funding, but the primary intention is apparently to make savings elsewhere.

Similarly, if asked to approve a proposed collective settlement under Rule 94, the Tribunal's approval will extend to the distribution of the settlement sum. Nevertheless, insofar as the Tribunal wishes to compare the overall costs of the two PCRs, as set out below, Mr Evans' arrangements are the cheaper.

57. Minimising the sums which have to be paid out of undistributed damages is in the Proposed Defendants' interests as this facilitates settlement (which is also in the class members' interests). The Proposed Defendants also have an obvious interest in minimising costs. The class members and Proposed Defendants therefore share an interest in the PCR having the right amount of funding and ATE insurance, rather than an excess. This consideration favours Mr Evans rather than the O'Higgins PCR, which seeks to make a virtue of having more funding and ATE insurance for its own sake.

Comparison of the Two PCRs' Funding Arrangements

58. Mr Evans has undertaken a revised calculation of the amounts which would be payable out of undistributed damages with various levels of damages and various assumptions about the percentage take up of damages by the class members.[77] The equivalent calculations undertaken for the O'Higgins PCR as set out in exhibit BAH29 are unreliable for the reasons set out in Mr Evans' annotations to the O'Higgins PCR's Funding Statement. As set out there, a proper side by side comparison shows that Mr Evans' overall funding package is cheaper than the O'Higgins PCR's in the majority of situations (including all settlement scenarios for which figures have been calculated).

59. This is reflected in the fact that, on all assumptions about the level of take up of damages by the class members, the O'Higgins PCR needs to recover a larger percentage of the full value of the claim in order for all liabilities out of the undistributed damages to be fully satisfied as follows:

	Judgment		**Settlement**	
Take up of damages	**Evans**	**O'Higgins**	**Evans**	**O'Higgins**
35%	4.9%	7.3%	3.3%	4.5%
42.5%	5.9%	8.3%	3.9%	5.1%
50%	7.3%	9.5%	4.9%	5.8%

[77] Maton 6 ¶¶14-15 and exhibit AJM26.

60. A major factor in this difference is the cost of the O'Higgins PCR's ATE insurance. Not only has the O'Higgins PCR committed to taking out a level of insurance (apparently for the sake of it) which may prove to be unnecessary, but that insurance is significantly worse value than Mr Evans' ATE insurance. Mr Evans took out bespoke policies, which has meant that he will not need additional AAE, whereas the O'Higgins PCR appears to have acquired "off the shelf" policies, which have had to be supplemented by AAE at additional cost. The result is that the overall cost of the O'Higgins PCR's ATE insurance is 74.81% of the level of cover compared with 65.22% for Mr Evans.

61. Not only is Mr Evans' funding package generally cheaper overall, but pound for pound, the cost of funding by Bench Walk is cheaper than Therium's in the majority of outcomes (see Maton 6 ¶¶16-20 and exhibit AJM27).

62. Nevertheless, if the Tribunal considers that Therium's pricing structure is more advantageous for the class members, then Bench Walk is prepared to adopt Therium's structure (though this will be more expensive in many scenarios).[78]

G. CONCLUSION

63. For the reasons given above, and in the Evans Carriage Submissions and Evans Carriage Reply, it is submitted that Mr Evans is more suitable to act as class representative. When considering "to whom should I entrust these proceedings?", the Tribunal can be confident that Mr Evans has the better people, is advancing the better claims and will take better decisions. The Tribunal is invited to make a CPO in his favour accordingly.

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[78] Chopin 5, ¶9.