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IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:	**Case Number: 1336/7/7/19**
PHILLIP EVANS	**Applicant / Proposed Class Representative**
- and -	
BARCLAYS BANK PLC & OTHERS	**Proposed Defendants**
(the "Evans Application")	
AND BETWEEN:	**Case Number: 1329/7/7/19**
MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED	**Applicant / Proposed Class Representative**
- and -	
BARCLAYS BANK PLC & OTHERS	**Proposed Defendants**
- and -	
MITSUBISHI UFJ FINANCIAL GROUP, INC. AND ANOTHER	**Proposed Objectors**
(the "O'Higgins Application")	

MR EVANS' REPLY TO THE SUBMISSIONS OF THE O'HIGGINS PCR ON THE CARRIAGE ISSUE

A. INTRODUCTION[1]

1. This is Mr Evans' reply to the Submissions of the O'Higgins PCR on the Carriage Issue (the **"O'Higgins Carriage Submissions"**), dated 23 April 2021.

2. By way of summary, Mr Evans' reply to the O'Higgins Carriage Submissions is as follows:

[1] In these written submissions, unless otherwise stated Mr Evans adopts the same defined terms as those used in his Written Submissions on the Carriage Dispute dated 23 April 2021.

a. The overarching consideration when comparing Mr Evans and the O'Higgins PCR, and their respective CPO applications is the best interests of the proposed class members. Mr Evans submits that he is best placed to advance and protect their interests. The putative "*central fact*" recalled in the introduction to the O'Higgins Carriage Submissions – that its Application was filed 135 calendar days before Mr Evans' Application – does not have any relevance to the best interests of the class members. Nor should it carry the weight the O'Higgins PCR seeks to place on it in resolving the carriage dispute.[2]

b. The O'Higgins Carriage Submissions seeks to portray the Evans Application as piggy-backing or free-riding on the O'Higgins Application, and goes so far as to suggest that Mr Evans has reproduced the work of the O'Higgins PCR.[3] This submission is unfair and unfounded. The true position is explained in ¶¶6-10 and in Section C below, which show that Mr Evans' work was original and materially different from the O'Higgins Application.

c. Finally, the O'Higgins PCR submits that to the extent there are substantive differences between the two applications its approach is "*clearly preferable and its funding is significantly greater and more robust.*" However, as is explained below, the supposed benefits of the O'Higgins Application do not stand up to scrutiny.

3. It follows that, for the reasons given in Mr Evans' Written Submissions on the Carriage Dispute (**"Mr Evans' Carriage Submissions"**), dated 23 April 2021, Mr Evans submits that he is the more suitable person to act as class representative for the purposes of Rule 78(2)(c) of the Tribunal Rules.

4. The structure of these submissions mirrors that of the O'Higgins Carriage Submissions, and addresses the points made in each section in turn. The fact that Mr Evans does not address a point in this Reply should not be taken to mean that it agrees with the O'Higgins PCR on that matter.

5. This Reply is also supported by the following witness statements and experts' reports upon which Mr Evans relies:

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2 See ¶¶14-19 and section C below.

3 O'Higgins Carriage Submissions, ¶3.

a. Mr Knight's third expert report dated 11 June 2021 (**"Knight 3"**);

b. Professor Rime's third expert report dated 11 June 2021 (**"Rime 3"**);

c. Mr Ramirez's third expert report dated 11 June 2021 (**"Ramirez 3"**);

d. Mr Maton's fifth witness statement dated 11 June 2021 (**"Maton 5"**); and

e. Mr Chopin's fourth witness statement dated 11 June 2021 (**"Chopin 4"**).

Preliminary comment: there are significant differences between the Applications

6. Mr Evans wishes to address at the outset a theme that pervades the O'Higgins Carriage Submissions, and its solicitor's supporting witness statement,[4] namely that Mr Evans has "*piggy-backed*" on the efforts of the O'Higgins PCR,[5] and that he "*largely reproduced the O'Higgins PCR's work when he… filed his own application.*"[6]

7. This suggestion is entirely unfounded. As one might expect, there is some overlap between the scope of the claims covered by each PCR's proposed proceedings. But that is the inevitable consequence of the proposed claims following on from the Decisions, which requires the PCRs to frame their claims by reference to the Commission's findings. That is why, for example, both PCRs contend that the infringements resulted in wider bid-ask spreads being charged on FX Spot Transactions and FX Outright Forward Transactions involving G10 currency pairs. This does not mean, however, that the two applications are identical or even substantially the same.

8. On the contrary, Mr Evans submits that the O'Higgins PCR has disregarded or overlooked a number of significant differences between the two Applications. In that regard, he draws attention to the following key points of distinction:[7]

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4 Fourth Witness Statement of Belinda Hollway dated 23 April 2021. (**"Hollway 4"**)

5 O'Higgins Carriage Submissions, ¶2.

6 O'Higgins Carriage Submissions, ¶3.

7 Mr Evans does not seek to summarise all of the differences between his proposed claims and that of the O'Higgins PCR in this list. Instead, he identifies the core points of distinction in order to demonstrate that any suggestion that he has replicated the work of the O'Higgins PCR is unfounded. Additional differences between the Applications (for example, in relation to the PCRs' approaches to developing and implementing their litigation plans) are covered in Mr Evans' Carriage Submissions.

a. **Class Definition:** there are four key differences in the class definitions proposed by each PCR:

i. **Two classes:** Mr Evans proposes to bring collective proceedings on behalf of two classes: (i) Class A encompasses the direct harm on transactions entered into with the Proposed Defendants during their infringement periods; and (ii) Class B encompasses the indirect harm caused by the infringements on transactions entered into with the Proposed Defendants (outside of their infringement periods) and/or other FX dealers (referred to in Mr Evans' class definition as Relevant Financial Institutions (**"RFIs"**)). By contrast, the O'Higgins PCR proposes just one class which is similar in its overall scope, and it does not presently propose any sub-classes.

ii. **Exclusions:** Mr Evans proposes to exclude Benchmark Trades, limit orders and resting orders from the scope of the claims covered by his Application, whereas the O'Higgins PCR proposes to include them.

iii. **Relevant Financial Institutions:** both PCRs include claims in respect of the indirect effects of the infringements, by including transactions entered into with entities forming part of certain RFIs listed in their respective class definitions. Mr Evans' list of RFIs includes 16 banking groups whose transactions are potentially affected by the infringements that are either ignored or overlooked by the O'Higgins PCR.

iv. **Definition of transactions entered into in the EEA:** while each PCR's proposed class (or classes in the case of Mr Evans' Application) is limited to transactions entered into in the EEA (as a consequence of the geographic scope of the infringements found by the Decision), Mr Evans takes a different approach from the O'Higgins PCR to defining this important criterion:

1. Mr Evans defines a transaction as entered into in the EEA where: (a) the Proposed Defendant or RFI is located in the EEA; and/or the class member is domiciled in the EEA.

2. The O'Higgins PCR defines a transaction as entered into in the EEA where it is "*priced and/or accepted by the Relevant Financial Institution*[8] *or through the [electronic communications network] within the [EEA]*".

b. **Proposed Defendants:** Mr Evans proposes to bring proceedings against all addressees of the Decisions, whereas the O'Higgins PCR does not include the MUFG entities.

c. **Theories of harm and methodologies for calculating damages:** there are four main differences in this regard:

i. **Direct vs indirect harm:** The experts instructed by Mr Evans propose separate theories of harm and methodologies for calculating harm to his Class A and Class B respectively, whereas the O'Higgins PCR proposes a single overall theory of harm and methodology for calculating harm to its proposed class.

ii. **Coordinated trading:** the O'Higgins PCR purports to include claims in respect of any harm that might have been caused by the Proposed Defendants' coordinated trading activities which sought to manipulate the price of currency pairs (and in particular via the practice of front-running, limit order triggering and benchmark manipulation). Mr Evans does not include any such claims in his proposed proceedings since any harm caused by coordinated trading activities is not capable of being computed on a class-wide basis.

iii. **Effective vs realised half-spread:** while both PCRs' experts propose to measure the impact of the infringements on the effective half-spreads applicable to FX transactions, the O'Higgins PCR's experts also propose to measure the impact on realised half-spreads, and appear to indicate a strong preference for the latter approach. The O'Higgins PCR's decision to try to measure the impact of the infringements on the realised half-spread is closely allied to its decision to include claims

[8] The O'Higgins PCR's definition of Relevant Financial Institutions includes the Proposed Defendants.

in respect of the Proposed Defendants' coordinated trading activities, as it considers an analysis based on the realised half-spread will enable it to compute the harm caused by that conduct. Mr Evans' experts do not use the realised half-spread because it cannot be used to measure harm to class members caused by the infringements identified in the Decisions. Moreover, use of the realised spreads is unlikely to be a workable methodology in practice.

iv. **Data sources:** while both PCRs' experts will principally use the Proposed Defendants' transaction data to measure the harm caused by the infringements, Mr Evans has identified other third party data sources which may assist in measuring the harm on transactions entered into with RFIs. He has confirmed that data would be commercially available.

9. In any event, the O'Higgins PCR's assertion that Mr Evans largely reproduced its work is not only contradicted by Mr Maton's account of the work done on Mr Evans' Application (as set out in section A of Maton 5) but also by the O'Higgins PCR's own case in relation to the carriage dispute that:

   a. There are "*some significant differences*" between the class definitions proposed in each application;[9]

   b. One of its experts, Professor Bernheim, has identified "*differences in four specific areas*" as between the case theories of the competing applications;[10] and

   c. There are "*material differences in the scope of the claims*".[11]

10. It follows from the foregoing that the O'Higgins PCR's attempts to mischaracterise Mr Evans' Application as a "copycat" claim are unwarranted and unfounded.

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9 O'Higgins Carriage Submissions, ¶44.

10 O'Higgins Carriage Submissions, ¶49.

11 O'Higgins Carriage Submissions, ¶69(1).

B. RELEVANT FACTORS IN A CARRIAGE DISPUTE

11. It is clear from Section B of the O'Higgins Carriage Submissions that both PCRs rely on broadly the same materials to identify the factors which the Tribunal should consider in resolving the carriage dispute, namely a combination of the Tribunal's Rules, *Guide*, the Carriage Timing Judgment and the approach adopted to carriage disputes in Canada[12]. However, they have reached different conclusions as to the weight to be accorded to those factors.

12. Mr Evans addresses the specific differences between the PCRs as to the weight to be accorded to a particular carriage factor where they arise in respect of the factors addressed below. In addition, this Reply encloses, as an annex, a table which compares the positions of each PCR as to the relevance of carriage factor.

13. This section addresses the two key points of principle where the PCRs join issue on the approach the Tribunal should adopt in determining a carriage dispute. They are: (a) the relevance of the so-called "first-to-file" principle; and (b) the extent to which the Tribunal should compare the relative merits and prospects of success of the competing claims.

The relevance of the first-to-file principle

14. Mr Evans has already explained in ¶¶177-187 of his Carriage Submissions why a first-to-file approach to determining carriage disputes in the UK's collective actions regime would be inappropriate.

15. By contrast, the O'Higgins PCR endorses the first-to-file principle, and suggests in particular that Canada and Australia recognise the relative priority of commencement as an important factor in determining a carriage dispute.[13]

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12 Save that the O'Higgins PCR does not appear to address the factors which are now considered in carriage disputes in Ontario following recent reforms to the Ontario Class Proceedings Act. Those factors are identified in Mr Evans' carriage submissions at ¶18(c) and form part of his proposed framework for the factors to be considered in a carriage dispute, which is set out in ¶¶20-26. By contrast, the O'Higgins PCR only mentions one part of those reforms, namely the deadline now imposed for the filing of overlapping class actions, as part of its submissions relating to the "*first to file*" principle: see ¶8 of the O'Higgins Carriage Submissions.

13 O'Higgins Carriage Submissions, ¶¶7–10.

16. While Mr Evans agrees that Canadian and Australian jurisprudence are persuasive authority for determining a carriage dispute,[14] he disagrees that either jurisdiction endorses the first-to-file principle as an "*important factor*" or suggests that the Tribunal should do so. In particular:

    a. The position in the Canadian common law provinces is that the best interests of the class is the overarching consideration, although a first-to-file principle can be one of several factors to consider.[15] This is consistent with Mr Evans' position.[16] While carriage disputes in Québec are generally resolved by their "*unique*" first-to-file rule, the true test in determining which action should proceed in Québec is nonetheless the "*best interest of the group*" of class members.[17]

    b. The position in Australia is that "*a first-in-time rule or presumption has never been favoured as a means of resolving which of the competing proceedings should proceed at all*".[18] The High Court of Australia has held that such an approach would be unworkable.[19] The Court has accepted that the order of filing is a relevant consideration: the greater the gap in time between rival proceedings, then "*perhaps the stronger the case for a stay of the subsequent set of proceedings, all other matters being equal*".[20]

17. Australian authority is also instructive for prioritising the best interests of the class in managing multiple class actions and describing the flaws of a first-to-file principle: [21]

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14 *Mastercard v Merricks* [2020] UKSC 51, at [42], although Mr Evans notes that Lord Briggs added that he based himself firmly on the true construction of the UK legislation: *ibid*.

15 Branch *Class Actions in Canada* (2nd ed, 2019) at ¶5.160.

16 Mr Evans' Carriage Submissions, ¶¶177–187.

17 *Ibid*, ¶5.139 and ¶ 5.150 and case-law cited.

18 *Wigmans v AMP Ltd* [2021] HCA 7 at [107].

19 *Ibid*, ¶86, citing Lord Templeman in *The Abidin Daver* [1984] AC 398 at 426, deprecating an ugly rush to the courtroom.

20 *Ibid*, [107]; ¶8 of the O'Higgins Carriage Submissions omitted to quote "*all other matters being equal*". The obvious implication is that the gap in time does not favour a stay where other matters are not equal.

21 *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143, at [18]; see similarly *Perera v GetSwift Ltd* (2018) 263 FCR 92 at 153, at [279] ("*The Court must strongly discourage a rush to the Court in large and complex class proceedings, carrying as it does the consequent risks of insufficient due diligence and the commencement of unmeritorious, or at least weak, cases*.")

> "Ordinarily, little weight should be given to the factor of reaching the Court first in circumstances where all courts should be astute to protect the best interests of all group members, not the desires of the promoters and managers of the litigation (in particular, the commercial funders and the lawyers) to be first to the filing gate. Beyond that broad recognition of the position of those involved, there are specific dangers involved in giving weight to first filing. It involves an encouragement for hasty preparation and lack of mature reflection. In some cases, mature reflection enables it to be appreciated that there is a need for preliminary discovery to assess the strength of a possible case. Further, commercial decisions about funding made in haste to get in first may interfere with decisions about the interests of group members. Haste may also lead to less focused pleading and preliminary analysis which may undermine, not reinforce, the policy objectives of modern dispute resolution and court statutes. Using such a first-is-best approach may deny the Court the ability to make a considered and balanced case management decision as to which action or actions proceed conformably with the interests of all group members and any properly considered prejudice of the respondent. This is not to countenance delay; it is to deprecate any approach where any real weight is given to the first-in-best-dressed approach for those promoting and managing this kind of litigation."

18. The 'first-in-best-dressed approach' should not resolve the present (indeed any) carriage dispute for these sound and cogent reasons given by the Federal Court of Australia.

19. It follows that for the reasons given above, and in Mr Evans' Carriage Submissions, there is no basis in either principle or precedent for imposing such a rule in the Tribunal. Rather, Mr Evans submits that the Tribunal should grant carriage to the person whose proposed action is better for the interests of the class and not the person who filed first.[22]

The need for a relative merits analysis

20. The O'Higgins PCR suggests that, if each claim passes the threshold for certification, "*it would be surprising if a further assessment of the merits to some higher level were appropriate for the purposes of the carriage dispute*". Such an assessment would, it says, be very difficult to square with the Supreme Court's judgment in *Merricks*.[23]

21. Mr Evans' position is that an assessment of the relative merits of the claims when determining carriage is in no way inconsistent with *Merricks*. On the contrary, it is one of the most important factors in determining the carriage dispute because the interests of

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22 This appears to be the fallback position of the O'Higgins Carriage Submissions, ¶9 which quotes a judgment of the Ontario Superior Court of Justice to this effect.

23 O'Higgins Carriage Submissions, ¶11.

the class will be best served by the stronger claim.[24] He underlines four points in this connection:

a. First, there was no carriage dispute in *Merricks*. The Supreme Court's judgment, therefore, does not address the role of an assessment of merits in this context.[25]

b. Second, if each PCR passes the threshold of certification, a relative merits assessment would enable the PCR with the greater prospects of success to have carriage. That outcome would, self-evidently, be in the best interests of the class.[26]

c. Third, the relative merits assessment does not require or imply a mini-trial. What is called for is the relative merits being duly taken into account. The merits are reviewed through the prism of the specific points made by the PCRs at this stage.

d. Fourth, the O'Higgins PCR's fear that applicants might file reams of evidence that far exceed the threshold for summary judgment due to a fear of being 'gazumped' is unfounded.[27] The relative merits is about the quality, not the quantity, of the claim and supporting evidence. It promotes access to justice. It is also conducive to PCRs preparing and filing the strongest case that they are able to.

C. PRIORITY OF COMMENCEMENT

22. As set out above, Mr Evans contends that this factor has very limited (if any) relevance in resolving the carriage dispute. Turning to the O'Higgins PCR's application of this factor to this case, it seems to be advancing five main contentions:

a. The class definition and case theory used in the O'Higgins Application were on its website and were largely replicated by the Evans Application.

b. The O'Higgins Application was viable and properly pleaded from the outset and has not since required major amendment.

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24 Mr Evans' Carriage Submissions, ¶5 and ¶72.

25 Mr Evans' Carriage Submissions, ¶16(a).

26 The interests of the class was rightly emphasised by the Tribunal in the Timing of Carriage Judgment [2020] CAT 9 at [26], [33] and [66].

27 The term 'gazumping' is tendentious. Nor does Mr Evans accept that the so-called 'second-mover' would necessarily be the one filing more detailed or more voluminous evidence than the applicant that is first to file. Each case would, inevitably, need to be assessed on its own facts.

c. The O'Higgins PCR was the 'first mover' that made considerable investment and took considerable risk. Mr Evans is said to have had the "*comfort*" of knowing that the O'Higgins Application was thought to be legally and economically viable.

d. The O'Higgins PCR suggests that Mr Evans would have found it easier to obtain funding in light of the filing of the O'Higgins Application.

e. Mr Evans had the "*benefit*" of three "*templates*", namely the summary of the O'Higgins Application placed on the Tribunal's website and the class definition and FAQs that were available on the O'Higgins PCR's website.

23. None of these contentions stands up to scrutiny. Mr Evans addresses each of them in turn below.

Mr Evans did not replicate the O'Higgins PCR's class definition and case theory

24. The allegation that Mr Evans copied the O'Higgins PCR's class definition and case theory is without merit. Mr Maton explains that his firm had done a lot of work – including on the proposed classes and devising a credible case theory – before the O'Higgins Application was filed.[28] The 'copy-cat' and 'free-rider' labels used by the O'Higgins PCR and Ms Hollway in her fourth witness statement are unwarranted and inapt. The true position is that Mr Evans and his team devoted considerable resources, time and effort to preparing a sound case that had a realistic prospect of establishing loss on a class-wide basis. This work was not parasitic on anything said or done by the O'Higgins PCR. The significant and material differences between the applications set out at ¶¶6-10 above show why the O'Higgins PCR is wrong to allege that Mr Evans' class definition and case theory are no more than replicas of the O'Higgins PCR.

The O'Higgins Application was premature and required significant amendment

25. The O'Higgins PCR contends that its CPO application was not premature and was properly pleaded from the outset. This contention is belied by the nature and extent of the amendments made to the O'Higgins PCR's collective proceedings claim form in January 2020 – over a month after Mr Evans had filed his CPO application which fully

[28] Maton 5, ¶11.

pleaded to the findings in the Decisions.[29] The amended pleading reveals that the currency pairs included in the O'Higgins PCR's claim could not be identified until the O'Higgins PCR had reviewed the Decisions.[30] Moreover, Part III of the O'Higgins PCR's claim form had to be substantially rewritten in order to rely upon the detailed findings of the Commission. At the same time the O'Higgins PCR removed a significant part of its pleaded case as filed with its CPO application.[31] These revisions show that the O'Higgins PCR is wrong to assert that its application "*has not since required major amendment*".[32]

Mr Evans made considerable investment in bringing his proposed proceedings

26. The O'Higgins PCR and Ms Hollway make much of the investment and risk incurred by the former. Mr Maton has explained, however, that Mr Evans and his team devoted substantial investment to preparing a legally and economically viable case.[33] Mr Maton describes the thorough, independent and meticulous way in which Mr Evans' team researched and prepared his CPO application well before the filing of the O'Higgins Application. That is why he took the initiative to petition the Commission to provide him with copies of the Decisions. It is also why Mr Evans has not needed to amend his claim form heavily since filing.[34] Mr Evans also notes that the timing of his CPO application has had no adverse effect upon the efficient case management of both proposed proceedings.[35]

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29 In this regard, the O'Higgins PCR's attempts (at ¶12 of the O'Higgins Carriage Submissions) to criticise Mr Evans for "*delay[ing] in issuing his Application until long after he received a copy of the Commission Decisions (which is on about the same time as the O'Higgins PCR obtained the Commission Decisions from the Proposed Defendants through this litigation)*" are unfounded: see Maton 5, ¶14.

30 O'Higgins Collective Proceedings Claim Form, ¶33E and ¶35(10).

31 Specifically, the O'Higgins PCR removed its case in ¶67ff of the O'Higgins Collective Proceedings Claim Form that had purported to rely on the findings of foreign regulatory authorities.

32 O'Higgins Carriage Submissions, ¶13.

33 Maton 5, ¶¶11-12

34 It was amended to take into account his review of the confidential versions of the Decisions.

35 Mr Evans' Carriage Submissions, ¶191.

The O'Higgins Application did not make it easier for Mr Evans to obtain funding

27. The O'Higgins PCR's suggestion that Mr Evans found it easier to obtain funding in light of its CPO application is not well-founded.[36]

28. Ms Hollway's evidence that the first party to file will generally face a greater challenge in obtaining third party funding[37] is not supported by evidence from a professional funder. Both PCRs were able to obtain funding without knowing of the other's claim.[38] Further, as Mr Maton explains, the existence of the O'Higgins Application made it harder for Mr Evans to obtain ATE insurance.[39]

29. Nor is there any evidence to support the O'Higgins PCR's assertion that *"funders would be more hesitant to support the first mover in any future proposed claim"* in the absence of a first to file principle.[40] When offering funding to the O'Higgins PCR, Therium could not have been confident that there would be no carriage dispute or of how such a dispute might be resolved. Funders and ATE insurers will simply judge each PCR's application on its merits and accept failure in the carriage dispute as one of the risks in the claim, as has in fact happened in these cases.

30. In the present case, neither PCR's funder was deterred by the absence of any first to file principle in choosing to fund their respective CPO applications.

31. If a first to file principle were adopted, then it would self-evidently be harder for subsequent applicants to obtain funding. This would be detrimental to class members for two reasons: (a) it is inherently undesirable that potentially better PCRs should be deterred or even prevented from filing applications just because someone else has filed a CPO application first; and (b) such a principle might encourage applicants to file prematurely in order to gain the advantage, potentially imperiling the wider interests of the class members.

Mr Evans' claim is original and materially different from the O'Higgins PCR

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36 O'Higgins Carriage Submissions, ¶15.

37 See Hollway 4, ¶54.

38 See Maton 5, ¶¶11(d) and 18 in relation to Mr Evans.

39 See Maton 5, ¶¶20-21.

40 O'Higgins Carriage Submissions, ¶18.

32. The O'Higgins PCR's claim that Mr Evans had the benefit of various 'templates' from which to work is contradicted by the following facts:

    a. Mr Evans' team had already done a lot of work before any of these (putative) templates were available in the public domain.[41]

    b. The templates were nothing of the kind. The Tribunal's summary of the O'Higgins collective proceedings claim form was just that: a three-page summary that adumbrated the elements of the proposed proceedings. Nor did the O'Higgins PCR's class definition or FAQs constitute 'precedents' (or anything close to precedents) for preparing another claim.[42]

    c. Far from bearing striking similarities with the O'Higgins PCR's claim and class definition, Mr Evans carefully crafted his own claim and proposed classes, which are materially different.[43] This is a virtue of Mr Evans' considered approach.

    d. The O'Higgins PCR itself seeks to draw attention to what it calls *"significant differences*" between the PCRs' respective class definitions.[44]

33. In the premises, Mr Evans maintains that his CPO application is sound, original and was filed in a timely manner. There is no basis either for the O'Higgins PCR's accusation of free-riding on its work or its suggestion that to grant carriage to Mr Evans "*would be crediting [Mr Evans] for taking the fruits of the O'Higgins PCR's work*." On the other hand, it would not be appropriate for the Tribunal to prefer the 'first mover' in circumstances where the first application had to be amended significantly thereafter.

D. FUNDING

Funding for Own Costs

Sufficiency of Budget

41 Maton 5, ¶28.

42 Maton 5, ¶¶29-30

43 See ¶8.a above.

44 O'Higgins Carriage Submissions, ¶44.

34. Mr Evans has already set out why the absolute quantity of funding available to a PCR should not be a greatly relevant, let alone determinative factor.[45]

35. In fact, developments in relation to the PCRs' budgets since their applications were commenced call into question the value of the comparison made by the O'Higgins PCR in any event. Mr Evans' budget has increased by around £1 million, so the comparison made in ¶20 of the O'Higgins Carriage Submissions is out of date. By contrast, the O'Higgins PCR's budget remains £29,375,043. This is surprising, because the O'Higgins PCR will have incurred costs in the pre-CPO phase which would not have been expected when the budget was set, in particular:

    a. the disclosure exercise undertaken in relation to Proposed Defendants' jurisdiction challenges in the O'Higgins Application following the hearing on 6 November 2019;

    b. the Proposed Defendants' application dated 29 May 2020 for security for costs against the O'Higgins PCR; and

    c. the carriage dispute.

36. In addition, the O'Higgins PCR has incurred ATE deposit premiums totalling £5,474,000 (including IPT and the cost of the anti-avoidance endorsements) against a budget of £5,376,000.[46]

37. If the O'Higgins PCR's overall budget remains the same despite these developments, then the implication is that the sums available post-CPO have been reduced to compensate. This is effectively conceded in Scott+Scott's second letter of 21 May 2021.[47] Since the Tribunal's and the class members' concern will be the sufficiency of post-CPO funding, the O'Higgins PCR's lack of transparency in this regard is a matter of concern. Mr Evans' solicitors have written to the O'Higgins PCR's solicitors to ask

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45 Mr Evans Carriage Submissions, ¶¶155 and 156.

46 Ms Hollway puts the O'Higgins PCR's expenditure on ATE insurance deposit premiums at £4,855,000: Hollway 4, ¶76(c). That figure is impossible to reconcile with the figures in the ATE policies and AAEs.

47 The letter refers to *"expenditure which was originally expected to be incurred post-CPO [being] incurred pre-CPO"*, but the implication that this is an issue of the timing of incurring of costs rather than the amount of costs cannot be right as the developments referred to in ¶35 above cannot have been expected to take place post-CPO or indeed at all.

for clarification and an updated budget. While the O'Higgins PCR has agreed in principle to provide an updated budget,[48] it has refused to provide one before 11 June 2021 and therefore in sufficient time for Mr Evans to able to refer to it in these submissions.[49] The only reason given for this is to allow the revised budget to be as up-to-date as possible in terms of actual expenditure. Given the overall size of the budget and the minimal difference a week or so might make to the incurred costs, it is submitted that this is not a sufficient justification for denying Mr Evans the opportunity to make fully informed submissions on a point which the O'Higgins PCR puts at the heart of its argument on carriage.

38. Further, despite placing great emphasis on the difference between the two PCRs' budgets, the O'Higgins PCR questions only two aspects of Mr Evans' budget in ¶36 of the O'Higgins Carriage Submissions. Those questions are answered below, but the fact that there is apparently no other area of Mr Evans' budget which the O'Higgins PCR regards as too low demonstrates the overall sufficiency of Mr Evans' budget.

39. Turning to the specific points made by the O'Higgins PCR: firstly, the O'Higgins PCR's budget of £3.7 million for distribution costs is compared to Mr Evans' budget of £450,000. Without knowledge of the assumptions underpinning the larger figure, it is impossible to tell whether this is a valid comparison. As Mr Maton explains, Mr Evans' figure comes from Angeion, a firm with a wealth of experience in these matters. Considering that the processes to be undertaken by Angeion for Mr Evans and Epiq for the O'Higgins PCR are essentially the same (save that the Angeion plan provides for a call centre providing support for class members), the O'Higgins PCR's budget is surprisingly high. This may be the result of use of a greater degree of outsourcing of the claims administration process than Angeion intends to employ or it may simply be an overestimate.[50] In any event: (a) the cost of distribution may be borne by the Proposed Defendants; and (b) even if further funding were required at this stage, with success by definition then having been achieved it is inconceivable that Mr Evans' funder would not provide the funding necessary to implement a proper distribution of damages, without

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48 See Scott+Scott's second letter of 21 May 2021.

49 See Scott+Scott's letters of 28 May and 2 June 2021.

50 Maton 5, ¶42(c).

which there could be no prospect of the Tribunal permitting payment out of undistributed damages.[51]

40. The O'Higgins PCR's second complaint about Mr Evans' budget is that there is no budget for non-UK domiciled opt-in class members. This is incorrect. Mr Evans has provision in his budget for such class members, although it is not separately identified. As Mr Maton explains,[52] the Angeion budget allows both the costs of distribution to such members and for a substantial international PR and advertising campaign. There is also express provision for communicating with opt-in as well as opt-out class members in both Mr Evans' own Litigation Plan and in the Angeion Plan.[53]

Reliability of Funding

41. With reference to ¶22 of the O'Higgins Carriage Submissions, Mr Evans has since served the third witness statement of Adrian Chopin, which makes clear the funder's willingness to make further funding available as necessary.

42. With reference to ¶23 of the O'Higgins Carriage Submissions, while this is a theoretical scenario, Mr Evans' funder will amend the LFA to remove the words *"provided that such funding shall not be offered on terms better than those offered to Funder, unless otherwise agreed by Funder"* from clause 5.8 of the LFA. An amended LFA reflecting this is being finalised and will be filed with the Tribunal shortly.[54] This is further evidence of the reasonable approach being taken by Mr Evans' funder to this litigation.

43. With reference to ¶¶24 to 26 of the O'Higgins Carriage Submissions, as the O'Higgins PCR notes, Bench Walk Capital LLC has guaranteed Donnybrook's obligations. However, the O'Higgins PCR is wrong to suggest that Bench Walk has made commitments which are less onerous than those provided for in the ALF Code.

44. Para 9.4 of the ALF Code obliges a funder to:

> "9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will:

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51 See Maton 5, ¶44.

52 Maton 5, ¶46.

53 *Ibid*.

54 See Maton 5, ¶51,

> 9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity:
>
> 9.4.1.1 to pay all debts when they become due and payable; and
>
> 9.4.1.2 to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.
>
> 9.4.2 maintain access to a minimum of £5m of capital or such other amount as stipulated by the Association
>
> …"

45. By clause 2.1(g) of the guarantee given by Bench Walk dated 17 July 2020, Bench Walk *"will maintain, at all times, access to undrawn capital commitments from its investors in an aggregate amount at least equal to the remaining undrawn funding commitment under the Agreement at that time (including after any amendment to the Agreement to increase the commitment amount under the Agreement). The Guarantor confirms that it has, in addition, received confirmation from its investors that they are also in a position to fund their commitments to the Guarantor including, without limitation, as required to enable the Guarantor to comply with its obligations under this Guarantee and the Agreement"*.

46. Thus, Bench Walk has (a) promised that it will at all times maintain access to enough funding to comply with all of Donnybrook's funding obligations for the entire case and (b) received confirmation from its investors that they can fund their commitments. These promises – which are backed up by the evidence of Mr Chopin[55] – on any view go at least as far as the provisions of the ALF Code quoted above.

47. In fact, they go further, because they are directly enforceable by Mr Evans, whereas the ALF Code affords no rights to the O'Higgins PCR. The O'Higgins PCR's reliance on Therium's membership of ALF means that it has been less transparent than Mr Evans in demonstrating the security of its own funding stream. The first witness statement of Mr Purslow does not explain what the source of funds is for the particular Jersey entity which is funding the O'Higgins PCR, namely Therium Litigation Finance Atlas AFP IC (**"TLFA"**). Mr Purslow speaks on behalf of Therium Capital Management Ltd

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55 See Chopin 1, ¶¶12-13.

(**"TCML"**), which is an advisor to Therium group investment vehicles and evidently not itself the source of funds.[56]

48. To satisfy any concern about the reliability of the O'Higgins PCR's funding, Mr Purslow relies solely on TCML's membership of ALF. However, the ALF Code does not provide for any sanction for a breach of its provisions. Were TLFA to default on its funding obligations, it appears that the O'Higgins PCR would have no recourse against any other entity. It is submitted that reliance on the ALF Code is not an adequate substitute for full transparency as to the source and reliability of funds.

49. Nevertheless, Bench Walk is willing to underline its commitment to ensuring that Donnybrook will comply with its obligations to Mr Evans by undertaking to comply with paras 9.4.1 and 9.4.2 of the ALF Code as if Bench Walk were a member of ALF and Donnybrook were its Associated Entity.[57]

50. With reference to footnote 26 to ¶32(2) of the O'Higgins Carriage Submissions, it is unclear what point is being made. If the implication is that the waterfall provisions might affect Mr Evans' or his lawyers' conduct of the proceedings, there is no basis for such a suggestion.[58] In any event, as the analysis in Maton 4 ¶¶39-44 shows, the possibility that the waterfall might result in any interested party not being fully paid is no more than theoretical.

Adverse Costs Cover

Amount of Cover

51. Mr Evans has already set out why a comparison of the extent of ATE cover possessed by each PCR should not be determinative of the carriage dispute.[59] Mr Maton provides further evidence of the effect on the ATE insurance market of one PCR attempting to corner the market, a practice which would be encouraged by favouring the PCR with more ATE cover in any carriage dispute.[60]

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56 See Purslow 1, ¶¶1-2.

57 Chopin 4, ¶12.

58 See Maton 5, ¶55.

59 Mr Evans' Carriage Submissions, ¶166.

60 Maton 5, ¶¶25-26.

52. The O'Higgins PCR suggests that a lower level of ATE cover could put Mr Evans in a weaker position when negotiating any settlement.[61] Apart from the fact that Mr Evans is committed to acting at all times in the best interests of the class members, this submission overlooks the fact that, in order to be and remain certified as suitable to be class representative, Mr Evans will have to satisfy the Tribunal that he *will* be able to pay the Defendants' recoverable costs.[62] The O'Higgins PCR's concern will therefore not arise.

53. Much the same can be said in response to the O'Higgins PCR's suggestion that Mr Evans would be more vulnerable to an application for security for costs. In any event, it is not clear how the O'Higgins PCR suggests that this is relevant to the carriage dispute, whether from the point of view of the class members or the Proposed Defendants.

Avoidance of Cover

54. The O'Higgins PCR submits that Mr Evans is in a more vulnerable position, because his ATE policies do not contain equivalent anti-avoidance endorsements (**"AAE"**) to those obtained by the O'Higgins PCR.[63]

55. As to this, firstly, the examples given by the O'Higgins PCR of situations in which the ATE insurers might theoretically avoid cover are far-fetched and do not demonstrate grounds for real concern. There is no reason why Mr Evans should do anything which might compromise his ATE cover.

56. Secondly, in any event, Mr Evans' ATE policies already contain a sufficient AAE. Clause 4.7 provides:

> "Save for the conditions in clause 4.2 'Fair presentation', the Insurer waives its right to rescind or avoid the Policy, on any reasons other than non-payment of Paid Premium (or the first instalment of thereof [sic] if the paid Premium is payable in instalments per the Policy Schedule) within the Due Date stated in the Policy Schedule".

57. The only right of avoidance which is thereby maintained is under clause 4.2.3 on a deliberate or reckless breach of the duty of fair presentation of the risk (other than cancellation under clause 4.8 for non-payment of premium or if the prospects of success fall below 51%). No complaint is made about this right to avoid, which reflects the

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61 O'Higgins Carriage Submissions, ¶39.

62 See Rule 78(2)(d) of the Tribunal Rules.

63 O'Higgins Carriage Submissions, ¶¶41-43.

avoidance rights of the O'Higgins PCR's insurers under the AAEs. This is likely to be why the Proposed Defendants have taken no point on the sufficiency of Mr Evans' ATE cover (a stark contrast with the concerns expressed by the Defendants over the terms of the O'Higgins PCR's ATE insurance, which resulted in its taking out the AAEs).

58. However, in case the Tribunal requires any additional AAEs to be put in place (which Mr Evans would respectfully submit is unnecessary), Mr Evans and his insurers, although content that the issue is already addressed, are considering whether any further AAE might be added to his policies so as to avoid any possible doubt.[64]

Conclusion on Funding

59. For the reasons given above, the attempt by the O'Higgins PCR to impeach Mr Evans' funding arrangements fall wide of the mark (and it is telling that none of the points is taken by the Proposed Defendants, for all the incentive that they have to take such points where viable). Mr Evans' funding arrangements, both in respect of his own costs and adverse costs, are robust, ample and fit for purpose, such that the Tribunal need have no hesitation in certifying him as an appropriate class representative.

E. CLASS DEFINITION

60. Section E of the O'Higgins Carriage Submissions begins with the contradictory assertions that Mr Evans has "*largely replicated the O'Higgins PCR's class definition*", yet "*there are some significant differences*" and therefore the O'Higgins PCR's version "*is to be preferred*".[65]

61. Mr Evans' Carriage Submissions explain, at ¶¶74-95, the reasons why his proposed class definition is more refined in comparison to that of the O'Higgins PCR. In particular, it properly reflects the scope of the class-wide harm caused by the infringements identified in the Decisions, and appropriately takes account of the salient differences between class members as to the direct and indirect harm caused by the infringements. It will therefore facilitate a more accurate assessment of the common issues which are raised by the

64 Maton 5, ¶54.

65 O'Higgins Carriage Submissions, ¶44.

claims. In short, the proposed class definition contributes to the materially better prospects of success of the Evans Application.

62. The O'Higgins PCR's submission that its class definition is to be preferred is based upon four criticisms of Mr Evans' proposed class definition. Each of them is misconceived.

63. First, the O'Higgins PCR criticises Mr Evans' proposed exclusion for Benchmark Trades, limit orders and resting orders,[66] suggesting that "*if a CPO were granted to the Evans PCR, those who suffered losses on such transactions would be denied the opportunity to recover those losses through collective proceedings.*"[67]

64. This submission fails to grapple with the reasons why Mr Evans proposes to exclude those transactions. While he does not dispute that some class members may have suffered losses as a result of the infringements when entering into these transactions, the fundamental problem is that such harm is not capable of being computed on a class wide basis.[68] It follows that including such transactions in collective proceedings is inappropriate.

65. Second, the O'Higgins PCR takes issue with Mr Evans' longer list of Relevant Financial Institutions (**"RFIs**"), relying on Professor Breedon's view that the additional 16 institutions[69] included on Mr Evans' list "*were unlikely to act as active Dealers in G10 currencies.*"[70] However, Professor Breedon cites no evidence or source of information in support of his view.[71]

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66 For the avoidance of doubt, Mr Evans does not agree with the O'Higgins PCR's suggestion in footnote 30 of the O'Higgins Carriage Submissions that there is no meaningful difference between resting orders and limit orders. Mr Knight has explained why that is incorrect: see Knight 3 ¶¶22-24 and 31-32

67 O'Higgins Carriage Submissions, ¶45.

68 See Mr Evans' Carriage Submissions, ¶¶40-43 and 79-85. See further ¶¶90-91 below.

69 Mr Evans accepts that the difference is 16 rather than 18 on the basis that Adam & Co and Coutts & Co would be included in the O'Higgins PCR's proposed claim as part of the RBS banking group, as he had already noted in footnote 119 of his Carriage Submissions.

70 Breedon 2, ¶5.8.

71 Similarly, while ¶¶91-92 of Hollway 4 notes that the O'Higgins PCR's legal representatives have also investigated this matter, they also do not appear to have identified anything to support Professor Breedon's assertion.

66. The additional 16 institutions were included in Mr Evans' list of RFIs on the basis that they participated 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*".[72] A reporting dealer is defined as:

> "... mainly large commercial and investment banks and securities houses that (i) participate in the inter-dealer market and/or (ii) have an active business with large customers, such as large corporate firms, governments and non-reporting financial institutions; in other words, reporting dealers are institutions that are actively buying and selling currency and OTC derivatives both for their own account and/or in meeting customer demand." (emphasis added)

67. This definition provides a clear basis for Mr Evans to consider that the additional RFIs included in his list acted as FX dealers during the period covered by the infringements.

68. In addition, Mr Evans' experts have provided further evidence which confirms that 15[73] out of the 16 additional RFIs were indeed active FX dealers the period covered by the infringements:

    a. Mr Ramirez has ascertained from survey data produced by Euromoney (covering the calendar years 2008, 2010 and 2012[74]) that 11 of the RFIs[75] served as FX dealers to UK customers during the years covered by the infringements.[76] Indeed, the survey data indicates that those RFIs transacted both FX Spot Transactions and FX Outright Forward Transactions in substantial volumes during that period.[77] As

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72 See Mr Evans' Carriage Submissions, ¶90, citing ¶99(b) of Mr Evans' Amended Collective Proceedings Claim Form and the sources cited therein.

73 Mr Evans has not identified any further information regarding the activities of the sixteenth RFI: Nationwide Building Society: see Maton 5, ¶65. Nevertheless, Mr Evans continues to rely on its inclusion as a reporting dealer in the BIS Triennial Survey as a reasonable basis to infer that it acted as an FX dealer. In any event, if a CPO is granted, Mr Evans anticipates all RFIs will be contacted and asked to pass on the notice of any CPO to their customers. Mr Evans will correspond with Nationwide about its inclusion on the RFIs list: Maton 5, ¶66.

74 As Mr Ramirez explains in ¶33 of Ramirez 3, the Euromoney 2009, 2011 and 2013 surveys correspond to the FX volumes in calendar years 2008, 2010 and 2012 respectively.

75 Danske Bank, Commerzbank, Canadian Imperial Bank of Commerce, Banco Bilbao Vizcaya Argentaria SA (BBVA), Macquarie Bank, Mizuho Financial Group, Sumitomo Mitsui Banking Corporation, Bank of Nova Scotia, Bank of Montreal, Bank of China and Svenska Handelsbanken.

76 Ramirez 3, section 4.

77 Ramirez 3, ¶35. Table 6 of Ramirez 3 indicates that the total volume of FX Spot and Outright Forward Transactions reported by respondents to the Euromoney survey which were attributable

Mr Knight explains in his first report, "*the Euromoney survey is conducted on an annual basis and polls major market participants (i.e. customers and banks) with a view to publishing information about volumes of trading and market shares of the major FX traders.*"[78] He therefore considers this to be an accurate and reliable basis for concluding that those institutions were FX dealers during the period covered by the infringements.[79]

b. This is corroborated by the evidence of Mr Knight in section 2 of Knight 3, in which he confirms that he was also familiar with a number of the RFIs identified in the Euromoney survey data, as they were FX dealers when he worked in the FX market, which included the period covered by the infringements.[80] He also confirms that another RFI (CIBC World Markets) was a fully owned subsidiary of another RFI (Canadian Imperial Bank of Commerce).[81]

c. In addition, Mr Knight considers that it is likely that three further RFIs[82] (i.e., in addition to those identified in the Euromoney data) would have been FX dealers, both based on publicly available information and/or because he is aware of individuals who have conducted FX business with those RFIs.[83]

69. It follows that the O'Higgins PCR's criticism of Mr Evans' longer list of RFIs is misplaced. On the contrary, it is the O'Higgins PCR's failure to include these additional RFIs in its own claim that constitutes a material defect in the O'Higgins Application. The

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to those 11 RFIs was $96,029 million for 2008, $75,764 million for 2010 and $273,805 for 2012. As Mr Ramirez explains at ¶35, on the basis of the Euromoney data, he has estimated that those 11 RFIs accounted for approximately 0.8% of the proposed classes' total FX Spot and Outright Forward Transaction volumes. If that share is applied to the preliminary VoC and damages estimates that Mr Ramirez presented in Ramirez 1, this indicates that "*the proposed Evans classes transacted GBP 920 billion with the Evans-only RFIs during the infringement period and that the estimated damages relating to this VoC is GBP 21.5 million (inclusive of compound interest) on those transactions.*" See Ramirez 3, ¶36.

78 Knight 1, ¶70.

79 Knight 3, ¶15.

80 Knight 3, ¶14. Mr Knight confirms the position in respect of Bank of Montreal, Canadian Imperial Bank of Commerce, Commerzbank, Macquarie Bank, Mizuho Corporate Bank, Sumitomo Mitsui Banking Corporation and Svenska Handelsbanken.

81 Knight 3, footnote 8.

82 Namely China Construction Bank, ICBC Standard Bank and Norinchukin Bank.

83 Knight 3, ¶16.

O'Higgins PCR has erroneously omitted a number of institutions that were offering FX trading services in the UK during the period covered by the infringements.

70. In this regard, it is to be noted that the O'Higgins PCR's approach runs contrary to the guidance on class definition provided in the Tribunal's *Guide* which states that "*the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim.*"[84] As presently formulated, the O'Higgins PCR's proposed class definition would arbitrarily exclude persons which had entered into relevant FX trades with the additional 16 RFIs without any clear basis for doing so. Those persons would be deprived of the opportunity to recover any losses suffered as a result of the infringements via collective proceedings.

71. In addition, the O'Higgins PCR's approach to RFIs ignores the important reasons that *it* gives for excluding RFIs as class members in its proposed proceedings. In its Re-Amended Collective Proceedings Claim Form, the O'Higgins PCR explains that "*it is considered that excluding market makers from the class tends to promote the homogeneity of the Proposed Class and ensures that there is likely to have been "common impact" within it, avoids duplicative claims for the same supra-competitive pricing, and avoids conflict of interest within the class.*"[85]

72. As the O'Higgins PCR did not identify the additional 16 RFIs in its class definition, they would in principle form part of its proposed class, thereby giving rise the very problems it has identified.

73. Accordingly, and for the reasons given in ¶¶90-94 of Mr Evans' Carriage Submissions, Mr Evans' approach of including a larger number of RFIs is to be preferred. It includes a number of additional institutions which acted as FX dealers in the UK during the infringement periods, thereby ensuring more effective redress for the alleged umbrella effects of the Proposed Defendants' conduct.

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84 See ¶6.37.

85 See O'Higgins Re-Amended Collective Proceedings Claim Form, ¶33(2).

74. Third, the O'Higgins PCR asserts that Mr Evans' decision to represent two classes "*seems likely to create a conflict*".[86] That assertion is without merit. The O'Higgins PCR has ignored Mr Evans' explanation as to why there is no such conflict:[87]

> "The Proposed Class Representative is aware that some class members may fall into both Class A and Class B. For the avoidance of doubt, there is no conflict of interest between these classes, as they comprise entirely separate sets of transactions and the theories of harm are consistent with one another." (emphasis original)

75. It is surprising that the O'Higgins PCR has sought to make this point given that the overall scope of its (one) class is said by it to be similar to Mr Evans' two classes. If the O'Higgins PCR were correct in its submission that there was an inter-class conflict in the Evans Application (which is not accepted), it would mean that the O'Higgins PCR's class would suffer from an even more serious intra-class conflict. The O'Higgins Carriage Submissions are silent as to that point – presumably because it has no answer.

76. Fourth, the O'Higgins PCR deprecates Mr Evans' definition of when a transaction is entered into in the EEA. It makes three points, none of which carry any force:[88]

    a. It is suggested that the definition is complicated. That is not the case. In short, a transaction is defined as entered into in the EEA where: (a) the Proposed Defendant or RFI is located in the EEA;[89] and/or (b) the class member is domiciled in the EEA. Those criteria can be readily understood and easily applied.[90] By contrast, the O'Higgins PCR's definition of when a transaction is entered into in the EEA, namely where the "*Relevant Foreign Exchange Transaction is priced and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area*" is inherently ambiguous.[91] In particular, it is far from clear how a class member would know where their transaction had been priced.

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86 O'Higgins Carriage Submissions, ¶47.

87 See Mr Evans Amended Collective Proceedings Claim Form, ¶77.

88 O'Higgins Carriage Submissions, ¶48.

89 A Proposed Defendant or RFI is located in the EEA "*where their relevant representative, sales desk or other business unit (such as an agency, branch or office) entering into the transaction is located in the [EEA]*."

90 See further ¶88 of Mr Evans' Carriage Submissions, which explains why each of those criteria are clear and workable.

91 See Mr Evans' Carriage Submissions at ¶87.

b. The O'Higgins PCR again resorts to assertion when it claims that Mr Evans' definition is over-broad. The O'Higgins PCR again fails to engage with ¶¶87-95 of Mr Evans' Amended Collective Proceedings Claim Form, which explains in detail how his definition was developed carefully by reference to the terms of the Decisions. Instead, the O'Higgins PCR simply presents two hypothetical examples of transactions which it says would be caught by Mr Evans' class definition. As to those:

   i. **Example 1:** "*a Chinese high net worth individual who happened to be passing through London (and therefore located there) when entering into an FX transaction with the China Construction Bank in Hong Kong*". This example would not fall within the scope of Mr Evans' proposed classes. The customer is not domiciled in the EEA (they are Chinese), and the RFI (in this case China Construction Bank), is not located in the EEA (it is located in Hong Kong).

   ii. **Example 2:** "*an Intermediary in New Zealand entering into an FX transaction on behalf of a Liechtenstein (and therefore EEA-domiciled) entity with ANZ in Auckland*". Mr Evans accepts that such a transaction would fall within his proposed classes on the basis that the class member was domiciled in the EEA. That is in particular because Mr Evans infers from the Decisions that members of his proposed classes located in the EEA are likely to have suffered harm as a result of the infringements identified in the Decisions when entering into FX transactions with a Proposed Defendant or RFI located outside of the EEA. The reasons for that plausible inference are explained in ¶93(b) of Mr Evans' Amended Collective Proceedings Claim Form.

c. Finally, the O'Higgins PCR suggests that Mr Evans' approach would be "*likely to cause significant difficulties for estimating the value of commerce*". As with its previous two criticisms, no explanation is given for this assertion. In any event, it is misconceived. Estimating the volume of commerce (**"VoC"**) for Mr Evans' proposed classes in respect of transactions entered into in the EEA will entail identifying the location of the Proposed Defendant/RFI entering into the transaction and the domicile of the class member. Mr Ramirez has set out his

methodology to ascertain this in section 5 of Ramirez 1. For completeness, it should be noted that estimating VoC under the O'Higgins PCR's own class definition would similarly require it to ascertain both the location of the Proposed Defendant/RFI entering into the transaction (as that would presumably be the location of where a transaction is accepted) and the domicile of the class member (since its opt-out class covers UK-domiciled class members only).

F. CASE THEORY

77. Mr Evans submits that case theory is one of the most important factors to consider in determining the carriage dispute.[92] The interests of the proposed classes will be best served by the PCR that puts forward the claim with the stronger case theory. For the reasons set out in ¶¶33-70 of his Carriage Submissions, Mr Evans' case theory has been formulated in greater detail, with greater precision and has materially better prospects of success.

78. By contrast, the O'Higgins PCR's position is that case theory will rarely be relevant in a carriage dispute.[93] The O'Higgins Carriage Submissions fail to deal with the fact that the best interests of the proposed classes will be served by the PCR advancing a stronger case theory.

The O'Higgins PCR's latest evidence on its proposed quantum methodology

79. Before turning to the substance of the O'Higgins PCR's submissions, Mr Evans addresses a point which arises from the recent evidence served by the O'Higgins PCR, which it would be relevant to consider in the assessment under this factor.

80. Mr Evans notes that there appears to be a conflict (or, at the very least, an inconsistency) between Breedon 2 and Bernheim 2 as regards the methodologies proposed by the O'Higgins PCR's experts for calculating harm to its proposed class.

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92 Mr Evans' Carriage Submissions, ¶28.

93 See the O'Higgins PCR's table of carriage factors at p.6 of the O'Higgins Carriage Submissions, which states that "*[t]his will rarely be a factor if it is the case that the competing carriers both meet the test for certification, because their case theories are then necessarily to be regarded as meeting the criteria for certification (and, as such, viable).*"

81. As Mr Ramirez observes, Bernheim 2 includes an extensive discussion of a forecast methodology (also known as the "predictive approach") for calculating harm,[94] which was briefly mentioned in Bernheim 1.[95] The forecast methodology is generally viewed as being different to the dummy variable method, which Mr Evans understands to be the proposed methodology put forward by Professor Breedon.[96] By way of summary, while the two methodologies estimate the overcharges by carrying out a regression analysis, they differ in their approach as follows:[97]

    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.

82. Professor Bernheim has suggested that his proposed forecast methodology is not different from that of Professor Breedon because he can adapt the dummy variable method in a way that will be equivalent to a forecast methodology.[98] However, his position is at odds with that of Professor Breedon, who refers to Professor Bernheim's approach as an alternative. For example, at ¶¶3.43-3.44 of Breedon 2, he observes:[99]

> "I discussed the proposed methodology to be used in the calculation of loss and specifically the regression analysis in Section 6 of my Amended First Report. Regression analysis is a method widely used by economists and statisticians. I am aware that it is also widely used in competition cases.
>
> In terms of the Respondents' comments regarding the nature of regression analysis, I am aware that Professor Bernheim's Response Report responds to these comments fully. In

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94 Ramirez 3, ¶40, referring to Bernheim 2, section IV.B.

95 See, for example, Bernheim 1, ¶91.

96 See, section 6 of Breedon 1. That is Mr Ramirez's understanding: see Ramirez 3, ¶43.

97 See further Ramirez 3, ¶¶40-43.

98 Bernheim 2, ¶55. Professor Bernheim suggests this can be achieved by using cartel dummy variables covering the shortest possible time period that the data can accommodate.

99 The Proposed Defendants also noted the methodology proposed by Professor Bernheim appeared to be different. See Joint CPO Response, ¶136: "*Professor Bernheim suggests that an alternative approach addressed to the multiplicity of variables changing over time would be to use a "prediction" or "forecasting" model, as was the case in the US litigation, but neither he nor Professor Breedon formulate a methodology by reference to that type of model and so it is not addressed further in this Response.*" This is also in line with Mr Ramirez's observations (noted above) that the two approaches are widely recognised as separate methodologies.

> addition, Professor Bernheim's Response Report also provides further details regarding the alternative prediction/ forecasting model discussed in Professor Bernheim's First Report. This alternative approach has certain advantages – particularly in cases where the collusion dummy is correlated with other changes in the market – though its use will depend on a number of factors such as data availability." (emphasis added)

83. Mr Ramirez notes that while the dummy variable approach and the forecast approach are generally accepted methodologies to estimate cartel overcharges, it is now "*unclear what the proposed approach of Prof Breedon and Prof Bernheim is*."[100] This lack of clarity and apparent inconsistency between the O'Higgins PCR's experts as to the methodology for calculating damages to the proposed O'Higgins class reinforces the concerns raised in Mr Evans Carriage Submissions about the inefficiency of instructing two experts to address the same issue.[101]

84. Furthermore, Mr Ramirez has identified practical concerns regarding the sheer complexity of the forecasting methodology Professor Bernheim proposes to adopt, and whether it would be computationally feasible in this case.[102] A particular concern is that Professor Bernheim's intention to use the forecasting approach through the use of dummy variables may have to estimate coefficients for *millions* of overcharge dummy variables.[103] Mr Ramirez questions whether this would be technologically feasible and, even if it would be, whether the results of any such analysis would be reliable.[104]

85. In any event, Mr Ramirez does not consider the forecasting approach is superior to the dummy variable method that he (and seemingly Professor Breedon) propose to adopt.[105] For example, one of the drawbacks of forecast models is that they may not perform well

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100 Ramirez 3, ¶43.

101 Mr Evans' Carriage Submissions, ¶¶231-236.

102 Ramirez 3, ¶¶44-47. Mr Ramirez also explains that Professor Bernheim's proposed approach is different to the way in which a forecast model is widely employed, which does not use any dummy variables at all. He notes that "*it is unclear why Prof Bernheim has suggested a seemingly more convoluted and computationally challenging route to developing a forecast methodology*": ¶47.

103 Ramirez 3, ¶44.

104 *Ibid*, referring to concerns raised in Ramirez 2, ¶147; Mr Ramirez refers to a 24-hour sample of inter-dealer transactions from Reuters, which suggested that the O'Higgins PCR's experts "*will need to estimate millions (or perhaps tens of millions) of overcharge coefficients*": Ramirez 3, ¶45.

105 Ramirez 3, section 5.1.3.

in dynamic markets.[106] Whereas dummy variables can be added to account for (say) any effects of the financial crisis of 2008 on spreads, the forecast approach may incorrectly treat such crisis-induced changes in spreads for cartel overcharges. The short point is that the dummy variable approach is more flexible in how it can account for changing market conditions.

86. In light of the foregoing, Professor Bernheim's new forecasting methodology only serves to increase the complexity and inefficiency of the proposed quantum methodology (or methodologies) in the O'Higgins Application, and is unlikely to advance the best interests of the proposed class members.

The O'Higgins PCR's submissions on the case theory factor

87. Mr Evans now turns to the points made in the O'Higgins Carriage Submissions in section E. In short, they do no more than repeat the comments made in section IV of Bernheim 1. Mr Evans has already addressed these points in detail in his Carriage Submissions. Therefore, he only summarises the key points below.

88. **Differences in relation to cartel analysis and mechanisms**:[107] the theory of harm is an important difference between the PCRs:

    a. ¶50(1) of the O'Higgins Carriage Submissions criticises Mr Evans' experts for missing the impact of cartel conduct that does not widen the effective spread (specifically, coordinated trading strategies such as front-running). This criticism is misplaced. Mr Evans has not missed the impact of this conduct. Rather, his experts have explained that any harm caused by coordinated trading cannot be properly or reliably computed on a class-wide basis.[108] It is relevant to add that, unlike Mr Evans' experts, the O'Higgins PCR has not proposed a workable methodology for calculating harm that takes account of the potential differences between the direct and indirect harm caused by the infringements identified in the Decisions.

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106 Ramirez 3, ¶52 and literature cited.

107 O'Higgins Carriage Submissions, ¶50.

108 Mr Evans' Carriage Submissions, ¶¶42–43.

b. ¶50(2) of the O'Higgins Carriage Submissions extols the alleged virtue of the flexibility of its experts' regression models with multiple dummy variables. This has already been addressed by both Mr Ramirez[109] and Professor Rime[110]. In any event, any such alleged flexibility does not address the concern which is summarised in ¶39 of Mr Evans' Carriage Submissions: the O'Higgins PCR has not put forward a workable methodology for calculating harm that takes account of the potential difference between *direct harm* (i.e. wider spreads on transactions with the Proposed Defendants) and *indirect harm* (i.e. other FX dealers charging wider spreads due to either reduced competitive pressure or increased adverse selection risk in the inter-dealer market). This is a material concern, because the direct and indirect harm caused by the infringements occurred in different ways and may well be different.[111] By contrast, Mr Evans has properly taken account of this by defining two separate classes and clearly explaining the (separate) theories of harm and methodologies for calculating harm to those proposed classes.[112]

89. **Spread measures**:[113] the O'Higgins PCR and Professor Bernheim seek to make much of Professor Breedon's proposed use of realised spreads. But Mr Evans submits that the use of realised half-spreads is flawed for two main reasons:

a. First, the realised half-spread is a measure of dealer revenue rather than customer trading costs and, as such, its use in a regression analysis will not assess the harm caused by the infringements on a class-wide basis.[114]

b. Second, the realised half-spread suffers from a number of conceptual and practical flaws, which, individually and cumulatively, detract from its use as a dependent variable in any reliable and workable regression analysis.[115]

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109 Ramirez 2, section 4.5.5.

110 Rime 2, section 7.3.

111 Rime 2, ¶¶118-121.

112 Mr Evans' Carriage Submissions, ¶¶76-78.

113 O'Higgins Carriage Submissions, ¶51.

114 Mr Evans' Carriage Submissions, ¶¶40–43 and 47(a).

115 Mr Evans' Carriage Submissions, ¶¶53–64.

90. **Excluded transactions**:[116] The O'Higgins PCR postulates that the widening of the bid-ask spread affected limit/resting orders and potentially also Benchmark Trades and that, therefore, these trades should fall within the claim. Mr Evans has eschewed such an approach for the reasons set out in ¶¶79–85 of his Carriage Submissions. In outline:

    a. Mr Evans proposes to exclude limit/resting orders because it would be difficult to identify whether, and if so how, these transactions would be affected by any widened bid-ask spreads resulting from the infringements. Further and in any event, while some of these orders may have been affected by the infringements, that harm may not be consistent across all transactions, and in fact some customers would have *benefited* from any widened bid-ask spreads.[117] Therefore, it would not be possible to identify and calculate the harm to these transactions on a class-wide basis.

    b. Similarly, Mr Evans proposes to exclude Benchmark Trades because any harm caused by the infringing coordinated trading strategies cannot be reliably measured on a class-wide basis.

91. In light of this, Mr Evans has properly excluded these transactions to ensure that the claim focuses on loss caused to customers that can be estimated on a class-wide basis.

92. **Regression modelling**:[118] Mr Evans submits that Mr Ramirez's proposed regression analysis is sound, robustly based on the data he has identified and tailored to the types of class-wide harm caused by the infringements. Mr Evans briefly addresses each of Professor Bernheim's four criticisms of Mr Ramirez's analysis (which the O'Higgins PCR simply repeats) as follows:[119]

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116 O'Higgins Carriage Submissions, ¶52.

117 See in particular Mr Evans' Carriage Submissions, ¶84(b) discussing Professor Bernheim's example of a resting buy order, which would have benefited from the infringements; see also Knight 2, sections 6 and 7.

118 O'Higgins Carriage Submissions, ¶53.

119 These criticisms have also been addressed in detail in section 4.5 of Ramirez 2.

a. **Use of the realised half-spread**: as explained in ¶89 above, the O'Higgins PCR's experts' proposal to use the realised half-spread as the dependent variable in the regression analysis is misconceived.[120]

b. **Cartel dummy variables**: the O'Higgins PCR has mischaracterised Mr Ramirez's approach as being confined to a single dummy variable. The correct position is that Mr Ramirez's method is designed to be flexible to account for the possibility that the overcharge to the members of the proposed classes may vary across (i) the type of FX instrument being transacted; and (ii) whether a Proposed Defendant or another FX dealer entered into the FX transaction. In any event, Mr Ramirez did not say or imply that he would not use multiple dummy variables within a single regression model. Rather, he said (correctly) that it is not possible to identify the precise explanatory variables appropriate for a regression equation at this stage. The O'Higgins PCR's claim that it has a more flexible approach is unfounded.

c. **Regression specification**: The O'Higgins PCR and Professor Bernheim express some concern that Mr Ramirez's proposed use of the logarithm on the effective half-spread is based on an assumption that may turn out to be inappropriate. Mr Ramirez explains in his second report that logging the dependent variable in a cartel overcharge model is both a common practice and a viable and accepted approach to measure class-wide harm.[121] Mr Ramirez addresses this at ¶191 on Ramirez 2 as follows:

> "… I do not dispute that the functional form of my regression equations may not be optimal, which cannot be determined without the proposed defendants' data, but it is a viable and accepted approach to measure class-wide harm in cartel actions. If, at later stages in the proceedings, I find that a change in the functional form results in a more robust analysis then I can adapt my approach accordingly to provide the Tribunal with a more accurate assessment of harm to the Evans classes. It is not possible at this stage in the proceedings to articulate a methodology that is viable and optimal given that the proposed defendants have not disclosed their transaction data. My first report articulates a viable methodology that will provide a reasonable assessment of harm that can be refined as appropriate later in the proceedings to improve its robustness."

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120 Mr Ramirez also responds to similar points made by Professor Breedon in section 5.2.2 of Ramirez 3.

121 Ramirez 2, ¶¶190–192.

d. **Number of regression equations**: The O'Higgins PCR claims that Mr Ramirez's use of multiple regression equations for estimating the harm to members of the proposed classes is inferior to Professor Breedon's use of a single equation approach. Mr Ramirez has addressed these claims in his second report.[122] The key point is that Mr Ramirez is clear that the multiple regression equations are appropriate and there will be sufficient transaction data to compute them.[123] He is equally clear that Professor Breedon's methodology does not seem to anticipate that he will include both the proposed defendants' transactions and non-defendant bank transactions in the same regression equation as presumed by Professor Bernheim.[124] This is problematic because his methodology does not take account of the differences between transactions in class A and class B.[125]

93. For the reasons set out above, as well as those set out in Mr Evans' Carriage Submissions, Mr Evans submits that he has advanced the case theory that has the better prospects of success and is more likely to be in the best interests of the proposed classes. Case theory is an important factor in a carriage dispute and it clearly favours Mr Evans in this case.

G. QUALITY OF PROPOSED REPRESENTATIVES

94. It is common ground that the relative quality of the PCRs is a relevant factor in determining the carriage dispute. It also appears to be common ground that it is an important factor.[126] Mr Evans attaches weight to this factor because the superior PCR will be best placed to act in the best interests of the proposed class members.[127]

95. Mr Evans respectfully submits that he is the stronger candidate to pursue the proposed collective proceedings on behalf of the proposed classes, given in particular that:

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122 Ramirez 2, ¶114. See further Ramirez 3 at section 5.2.1.

123 On the availability of data in this regard, see further Ramirez 3, ¶¶59-60.

124 Ramirez 2, ¶114(c).

125 Mr Evans' Carriage Submissions, ¶77.

126 See the table of carriage factors contained in the O'Higgins Carriage Submissions at p.5, which states, in respect of the "*Quality of the proposed representative plaintiffs*" factor, that it will usually be relevant in a carriage dispute, and adds that "*[i]t will generally be appropriate to consider the quality and conduct of the representatives who are proposed to represent the class.*"

127 Mr Evans' Carriage Submissions, ¶6 and ¶133.

a. Mr Evans has substantial, direct and relevant personal experience in collective antitrust litigation and managing competition investigations.

b. Mr Evans has demonstrated a long-standing commitment to making the regime for collective actions in the UK work well;[128] and bringing this action is his latest contribution to achieving collective redress.

c. Mr Evans has sought to be as open and transparent as possible with the proposed classes. He has written articles, given video interviews and participated in conferences about this action and collective redress more generally; all of which has been publicised on the claim website and the FX Claim UK LinkedIn and Twitter pages.[129]

96. Mr Evans' responses to the points made at ¶54 of the O'Higgins Carriage Submissions are as follows:

a. While Mr O'Higgins may have a strong personal belief in responsible capitalism and economic regulation, Mr Evans has said that "*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*."[130]

b. While Mr O'Higgins may have experience of running complex projects with large budgets in relation to investments/pensions, Mr Evans has extensive, first-hand experience of both managing large-scale competition inquiries and competition litigation, including the bringing of collective actions.[131]

c. Mr Evans has taken just as many steps as the O'Higgins PCR to communicate, engage with and update the members of the proposed classes on developments in the Proposed Collective Proceedings, including through interviews, articles, conferences, emails and social media.[132]

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128 Evans 1, ¶¶29–33 and Evans 2, ¶¶8–30.

129 Evans 2, ¶¶ 63–75.

130 Evans 2, ¶¶42.

131 For a summary of his experience see Mr Evans' Carriage Submissions, ¶¶137–142.

132 Evans 2, ¶¶60–75.

d. Mr Evans has explained why he brought the Proposed Collective Proceedings when he did.[133] He filed his claim in a form that was fit for purpose in December 2019, over one month before the O'Higgins PCR amended its proposed claims in light of the Decisions.

e. Mr Evans is equally, if not more, committed than the O'Higgins PCR to being open and transparent with members of the proposed classes. Mr Evans was the first to take all of his funding documents out of the Joint Confidentiality Ring, and to make all of the key claim documents available on his claim website.[134]

97. Mr Evans has appointed a consultative panel that has a unique blend of experience and expertise.[135] The panel members – Lord Alex Carlile of Berriew CBE QC, Professor Joseph Stiglitz, Professor Philip Marsden and Mr David Woolcock and – are as, if not more, qualified than the members of Mr O'Higgins' advisory committee.

H. QUALITY OF PROPOSED CLASS COUNSEL

98. As explained at ¶170 of Mr Evans' Carriage Submissions, the experience of the lawyers of the PCRs is plainly a relevant factor to be taken into account in a carriage dispute, since it goes to the quality of representation for the proposed class members. It is also expressly identified in ¶6.32 of the *Guide* as a factor that is likely to be relevant to the assessment of which PCR would be most suitable for the purposes of rule 78(2)(c) of the Tribunal Rules.

99. ¶¶172-176 of Mr Evans' Carriage Submissions explains the reasons why his legal team has the requisite experience, resources and capability to advance the proposed proceedings in the best interests of the class members. In particular, Mr Evans' solicitors (**"Hausfeld"**) have substantial and long-standing experience in competition litigation both in the UK and Europe, having established its presence in London in 2009.[136] Hausfeld has been committed to the development of the collective proceedings regime

133 Evans 2, ¶¶49–54.

134 Evans 2, ¶66(d) and ¶¶81–82.

135 Evans 2, ¶¶76–80.

136 That experience is detailed in Hausfeld's firm profile, exhibited to Maton 4 at Exhibit AJM15. Mr Evans also has a long standing relationship with Hausfeld as a result of his efforts to campaign for reform in the area of collective redress: see, for example, Evans 2, ¶18.

in the UK, and it is presently involved in a number of high-profile collective actions, including three CPO applications before the Tribunal.[137]

100. The O'Higgins PCR submits that its *"legal team are at least as well, if not better, qualified than the Evans PCR's team.*"[138] Although the O'Higgins PCR is represented by Scott+Scott UK LLP, the vast majority of the O'Higgins Carriage Submissions relating to this factor focus instead on the general experience of its US affiliate firm (Scott+Scott Attorneys at Law LLP), along with that firm's specific experience as co-counsel in the US FX class action. These points are of no assistance to the O'Higgins PCR in the present carriage dispute.

101. First, the general experience of Scott+Scott Attorneys at Law LLP (**"SSAAL**") is irrelevant, since it is understood that SSAAL does not act for (or advise) the O'Higgins PCR in its proposed proceedings. Indeed, Hollway 4 indicates that the "*core team*" which are said to have "*carriage of the O'Higgins Application*" are all UK-based lawyers employed by Scott+Scott UK LLP.[139] Therefore, submissions such as "*Scott+Scott Attorneys at Law LLP has filed 74 claims and obtained 38 settlements with an aggregate value of over $3.4 billion and an average of $91.3 million (the highest of the leading US antitrust firms)*"[140] and attempts to compare that with the amount secured in settlements by Hausfeld's US affiliate firm,[141] are nothing to the point.

102. Second, the specific experience of SSAAL as co-counsel in the US FX class action is a neutral factor in this carriage dispute. As explained in Mr Evans' Carriage Submissions, Hausfeld's associate US firm is also co-counsel in the US FX class action.[142] Accordingly, to the extent that any institutional knowledge is of any assistance in these

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137 Namely: *Justin Gutmann v London & South Eastern Railway*; *Consumers' Association v Qualcomm Inc.;* and *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd*.

138 O'Higgins Carriage Submissions, ¶62.

139 Hollway 4, ¶¶41 and 43. See also the Annex to Hollway 4, which provides the biographies of the O'Higgins PCR's UK-based "core team".

140 O'Higgins Carriage Submissions, ¶57.

141 Hollway 4, ¶32.

142 Mr Evans' Carriage Submissions, ¶176.

proceedings, it is available to both PCR's legal representatives[143]; attempts to rely on that knowledge therefore go nowhere.

103. In so far as the O'Higgins PCR's attempts to "play up" the experience of SSAAL in the US FX class action, by suggesting that Hausfeld is co-lead counsel "*because it was invited by Scott+Scott*" and that "*Scott+Scott's involvement has been by far the largest, having directed all aspects of the litigation and administration of its settlement, and having by 12 January 2018 spent 74,625 hours in the US Proceedings, compared with Hausfeld's 34,949 hours*",[144] these points are irrelevant points of alleged comparison for the purposes of the work done for – and the prospects of success of – the proposed proceedings in the UK.

104. The proper basis upon which to evaluate the experience of the lawyers of the competing PCRs is via a comparison between the legal representatives instructed in these proposed proceedings. On that basis, Mr Evans respectfully submits that such a comparison favours his Application.

I. PREPARATION AND READINESS OF THE ACTION

105. Mr Evans submits that case preparation should be an important factor in determining a carriage dispute. This is because the interests of the proposed class members will be best served by the claim which has been prepared in the more comprehensive manner.[145]

106. At ¶¶195-236 of his Carriage Submissions, Mr Evans explained that each of the PCRs has taken a substantially different approach to preparing and advancing their CPO applications, and this is one of the most important differentiating factors between them.

107. For Mr Evans' part, he prepared his CPO application in a rigorous and diligent way before it was filed, following his decision to seek disclosure from the Commission of the Decisions upon which his proposed claim is based. In particular:[146]

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143 Mr Evans also addressed this point in his Carriage Submissions, ¶111.

144 O'Higgins Carriage Submissions, ¶59.

145 Mr Evans' Carriage Submissions, ¶¶192-194.

146 Mr Evans' Carriage Submissions, ¶¶203-204.

a. His claim is pleaded comprehensively by reference to the terms of the Decisions, and takes full account of the infringing conduct identified therein.

b. He formulated all aspects of his claim, including his class definition, in full; and

c. The experts instructed by Mr Evans were able to consider the terms of the Decisions in providing their preliminary views on the direct and indirect harm caused by the infringements and a proposed methodology for calculating any damages. Mr Evans considers that the sound and robustly based expert evidence he has served is a significant strength of his Application. In particular, it demonstrates that he comprehensively investigated and carefully prepared the case he seeks to bring on behalf of the proposed class members.

108. Mr Evans submits that his careful and comprehensive preparation has given rise to an Application that is of higher overall quality,[147] which will directly benefit the members of the proposed classes. A particular advantage of Mr Evans' significant preparatory work is that his CPO Application has required minimal amendment after it was filed.[148] This is indicative of an efficient conduct of the litigation on behalf of the proposed classes, which plainly advances their interests.

109. By contrast, the O'Higgins Application was filed prematurely, without sight of the Commission's findings in the Decisions upon which its proposed claim was and is meant to be based. This resulted in a lower quality application, which the O'Higgins PCR then sought to amend and supplement on multiple occasions after it was filed. In particular:

a. The O'Higgins Application as filed on 29 July 2019 did not follow on from the Commission's findings contained in the Decisions. Indeed, its original Collective Proceedings Claim Form acknowledged that, having not obtained a non-confidential version of the Decisions, the O'Higgins PCR was constrained in the extent to which it could plead the infringements identified in the Decisions. Instead

147 For the reasons given in Mr Evans' Carriage Submissions under factors (1) to (5).

148 Those amendments are explained in Mr Evans' Carriage Submissions at ¶¶206-207.

it pleaded extensively by reference to findings of other regulatory authorities (which could not form the basis of the proposed follow-on action).[149]

b. Similarly, Professor Breedon had limited information upon which to adumbrate his theory of harm and proposed methodology.[150] The original version of his first report acknowledged that, in addition to the press release announcing the Decisions, he was provided with extracts from other regulatory decisions and, for the purposes of that report "*where the Other Regulatory Decisions provide additional detail in relation to the same type of conduct by the same banks and for the same time period as discussed in the Press Release, I have provisionally assumed that they refer either to the Anticompetitive Conduct as found by the Commission or to conduct which implemented that Anticompetitive Conduct.*"[151] As a result, the O'Higgins Application required significant amendments once the O'Higgins PCR had obtained the Decisions, so that it properly reflected their terms.[152]

c. The O'Higgins PCR was unable to identify fully its proposed class definition when filing its application. This is another facet of its prematurity; the O'Higgins PCR's class definition was only finalised once it had access to the Decisions;[153]

d. In October 2020, the O'Higgins PCR chose belatedly, and on an *ad hoc* basis, to further supplement its CPO application by seeking to introduce an expert report of Professor Bernheim, who the O'Higgins PCR had first retained in the summer of 2020.[154] Mr Evans has already explained why the O'Higgins PCR's decision to instruct a further expert and serve further expert evidence addressing the O'Higgins

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149 This is explained further in Mr Evans' Carriage Submissions at ¶¶212-219. The O'Higgins PCR was also not aware of the exact addressees of the Decisions when filing its CPO application, and was required to correct its application for permission to serve its Collective Proceedings Claim Form out of the jurisdiction once it was made aware that one of the Barclays entities was an addressee of only one of the Decisions: see ¶223.

150 See Mr Evans' Carriage Submissions at ¶¶224-225.

151 ¶3.11 of Professor Breedon's original report dated 28 July 2019.

152 Mr Evans' Carriage Submissions, ¶226.

153 This is explained further in Mr Evans' Carriage Submissions at ¶¶220-222.

154 See ¶2.6 of Scott+Scott's letter of 4 November 2020. The background to the O'Higgins PCR's decision to introduce Professor Bernheim's report is addressed further in ¶227 of Mr Evans' Carriage Submissions.

PCR's theory of harm and methodology of calculating damages is inefficient and uneconomical;[155] has created unnecessary overlaps between the matters addressed by those experts;[156] and has created areas of conflict between the experts' approaches which have not properly been resolved;[157] and

e. Finally, as noted in ¶¶79-86 above, the O'Higgins PCR again sought to supplement its CPO application via the evidence it served in April 2021. Specifically, Professor Bernheim provided further detail about his proposed use of a forecasting methodology for calculating harm to the proposed O'Higgins class. However, Professor Bernheim's preferred approach appears to conflict with (or at least be inconsistent with) that proposed by Professor Breedon, thereby exacerbating the concerns set out in the previous sub-paragraph.

110. This approach of filing a CPO application in order to be the first to file, and then seeking to supplement and/or amend it on multiple occasions thereafter, is undesirable and inefficient in equal measure. It does not advance the best interests of the proposed class members, and it should not be encouraged. Rather, the collective proceedings regime should incentivise prospective class representatives to prepare their CPO applications carefully and thoroughly, rather than acting in haste and amending at leisure.

111. The O'Higgins Carriage Submissions seek to downplay the importance of case preparation in a carriage dispute, suggesting that this will "*rarely be a significant factor if it is the case that the competing carriers both meet the test for certification, because their litigation plans etc are then necessarily to be regarded as meeting the criteria for certification.*" That is misconceived for the reasons given in ¶¶20-21 above.

112. It is perhaps because the O'Higgins PCR does not consider this factor to be significant in a carriage dispute that it does not set out a proper case on this issue. Instead, it simply cites four "*[e]xamples of the better preparation and readiness of the O'Higgins Application*".[158] However, each of those examples are unavailing:

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155 See Mr Evans' Carriage Submissions, ¶¶230-232, 234 and 236.

156 See Mr Evans' Carriage Submissions, ¶233(a).

157 See Mr Evans' Carriage Submissions, ¶233(b).

158 O'Higgins Carriage Submissions, ¶63.

113. First, the O'Higgins PCR makes much of the experience of Epiq, its claims administrator.[159] However, Mr Evans has also instructed a very experienced class action notice and administration company to assist with his proposed proceedings: Angeion Group (**"Angeion"**). As explained in the Notice and Administration Plan it has produced, Angeion has extensive experience of administering class and collective actions in the United States.[160] In particular, the management team at Angeion has collectively overseen more than 2,000 class action settlements and distributed over $10 billion to class members.[161] Accordingly, Angeion has the requisite skills and experience necessary to assist Mr Evans with the notice and claims administration aspects of these proceedings.

114. Second, the O'Higgins PCR relies on the fact that it has undertaken an exercise of reviewing a sample of contractual documents that were disclosed by the Proposed Defendants in the context of jurisdiction challenges made in the O'Higgins Application.[162] The advantage this is said to confer is set out in Hollway 4 as follows:[163]

> "On the basis of our review, O'Higgins concluded that the Jurisdiction Challenges were either entirely hypothetical and without any factual foundation or, at most, relevant to a numerically insignificant portion of the opt-out class. This conclusion was shared with the Proposed Defendants and Mr Evans in a letter sent by SSU on 5 February 2020. The Evans Application was therefore able to benefit directly from the work carried out by SSU on behalf of the O'Higgins Application in contesting the Jurisdiction Challenge. As far as I am aware, the Proposed Defendants have not brought a jurisdiction challenge application against Mr Evans. The result of this is that Mr Evans has been able to free ride directly on the work undertaken, and the costs incurred, by O'Higgins and his legal team in addressing the Jurisdiction Challenges, without having to invest any time or resources himself."

115. The suggestion that Mr Evans was able to "free ride" on the work undertaken by the O'Higgins PCR in addressing any jurisdiction challenges is unfounded. Moreover, Hollway 4 materially misstates what happened to the applications to contest jurisdiction issued in respect of the Evans Application (the **"Evans Jurisdiction Applications"**). The correct position is as follows:

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159 O'Higgins Carriage Submissions, ¶63(1).

160 That plan is exhibited to Mr Evans' first witness statement dated 10 December 2019 at Exhibit PGE3.

161 *Ibid,* ¶2.1.

162 O'Higgins Carriage Submissions, ¶63(2).

163 Hollway 4, ¶61(b).

a. In January 2020, Mr Evans had already received and reviewed the Evans Jurisdiction Applications and set out his position on them in correspondence. He explained that while he did not consider them to be well founded, he pragmatically agreed with the relevant Proposed Defendants that their respective Applications should be deferred until after his CPO application had been determined. [164]

b. Mr Evans was aware that the Tribunal had issued directions concerning similar jurisdiction challenges in the O'Higgins Application. In particular, he knew that the O'Higgins PCR had sought and obtained disclosure of a sample of contracts from the Proposed Defendants, and that it was required to indicate by 4 February 2020, whether it would seek to have any preliminary issue determined which arises out of that disclosure.[165] Mr Evans therefore informed the Proposed Defendants that, without prejudice to his primary position that the appropriate time to determine the Evans Jurisdiction Applications is after his CPO application has been determined:

    i. If the O'Higgins PCR seeks to have any preliminary issue determined, it seemed likely that: (a) any such issue may also be relevant to the Evans Jurisdiction Applications; and (b) therefore, the sensible course may be for the Tribunal to adopt the same approach in both the Evans Application and the O'Higgins Application; and

    ii. He would therefore write to the O'Higgins PCR seeking its agreement to provide him with any application for a preliminary issue to be determined. In the event that such an application is made, he may seek permission to make submissions on it.

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164 See Hausfeld's letters to Allen & Overy, Slaughter and May, Macfarlanes, Gibson Dunn and Herbert Smith Freehills, each dated 20 January 2020. In particular, those letters explained that: (a) Mr Evans considered that determining any jurisdiction challenge prior to a CPO being granted could be generative of wasted costs in the event that a CPO were not granted or were granted on the basis of amendments to the definition of his proposed classes; and (b) if Mr Evans were to obtain a CPO, it would then be incumbent upon the Proposed Defendants to properly particularise their jurisdiction challenges, and specifically to identify any exclusive jurisdiction and/or arbitration clauses which they allege would be applicable to the claims in these proceedings.

165 See ¶¶8 and 11 of the Tribunal's Order made on 6 November 2019.

c. Accordingly, Mr Evans wrote to the O'Higgins PCR on 23 January 2020[166] in order to inform the O'Higgins PCR of the Evans Jurisdiction Applications, and of his understanding that the substance of those applications was likely to be similar to those issued in respect of the O'Higgins Application. It follows that, contrary to the suggestion in Hollway 4, the O'Higgins PCR has been aware of the Evans Jurisdiction Applications at least from that date.[167] Mr Evans also explained that:

   i. His primary position was that the appropriate time for the Tribunal to hear the Evans Jurisdiction Applications would be after his CPO application has been determined. However, that position was subject to the approach that might be adopted by the O'Higgins PCR, in line with the observations summarised in ¶115.b above; and

   ii. Mr Evans therefore requested that if the O'Higgins PCR applied for any preliminary issue to be determined by the Tribunal, a copy of that application be provided to him.

d. The O'Higgins PCR initially did not agree to provide a copy of any such application.[168] However, it subsequently confirmed on 5 February 2020 that it did not intend to apply for any preliminary issue to be determined by the Tribunal.[169] It is therefore understood that the jurisdiction applications in the O'Higgins Application will be deferred until after its CPO application has been determined, as is the case for the Evans Jurisdiction Applications.

116. It follows that there is no basis for the suggestion that Mr Evans sought to "free ride" on the O'Higgins PCR's approach to the jurisdiction applications made in its proceedings.

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166 See Hausfeld's letter to Scott+Scott of 23 January 2020.

167 The O'Higgins PCR was also informed of this by those representing MUFG. See Herbert Smith Freehills letter to Scott+Scott on 27 January 2020, stating that: "*[c]ertain respondents to the Evans Application (including our clients) have filed applications contesting the jurisdiction of the Tribunal as regards certain transactions falling within the scope of the Evans Application on what we understand to be the same or similar grounds as the applications filed in respect of the O'Higgins Application.*"

168 See Scott+Scott's letter of 30 January 2020.

169 See Scott+Scott's letter of 5 February 2020.

117. It also follows that the O'Higgins PCR's approach did not in any way assist Mr Evans in contesting the Evans Jurisdiction Applications.

118. The true position is that Mr Evans had already decided upon his pragmatic position in respect of the Evans Jurisdiction Applications, which he had promptly relayed to the Proposed Defendants and the O'Higgins PCR. However, he considered that it was sensible to ascertain the O'Higgins PCR's response to the jurisdiction challenges in its proposed proceedings. That was sensible because it would enable the parties and the Tribunal to deal with the same or similar issues in a consistent and efficient manner. That was a constructive approach to efficient case management that accords with Rule 4(7) of the Tribunal Rules.

119. Third, the O'Higgins PCR makes the vague assertion that its "*legal team have proactively taken the lead on a number of important areas in the Proposed Collective Proceedings*".[170] The exact meaning of this suggestion is unclear. Mr Evans confirms that he has engaged diligently and extensively in all aspects of the Proposed Proceedings, and any suggestion to the contrary is groundless.

120. The only example given in support of the O'Higgins PCR's assertion, both in the O'Higgins Carriage Submissions, and in Hollway 4, concerns the "*efforts to obtain information from the European Commission in relation to the status of its third investigation into cartels in the FX sector.*"[171] However, neither the European Commission nor the Proposed Defendants provided the O'Higgins PCR with any insights about the status of the investigation. The O'Higgins PCR simply obtained information that is already available in the public domain.[172]

121. Mr Evans has also kept fully up to date in relation to those developments by reviewing material in the public domain. [redacted] OUTER CONFIDENTIALITY RING INFORMATION REDACTED [redacted] Mr Evans has fully pleaded his understanding of those matters in his Amended Collective Proceedings Claim Form, and has reserved his rights to amend his

170 O'Higgins Carriage Submissions, ¶63(3).

171 O'Higgins Carriage Submissions, ¶63(3). See also Hollway 4, ¶¶79-82.

172 The material obtained is also less extensive than that set out in Mr Evans' Amended Collective Proceedings Claim Form, as is explained further below.

claim in the event that the Commission issues further decisions concerning FX trading.[173] Accordingly, the respective PCRs' efforts to keep abreast of developments in ongoing investigations by the Commission is a neutral factor for the purpose of resolving the carriage dispute.

122. Fourth, the O'Higgins PCR claims that its legal team has established lines of communication with those involved in other related proceedings, including the Claimants' solicitors in the *Allianz* FX claims pending before the Commercial Court, and the lawyers acting in pending foreign class actions.[174] To the extent this point has any relevance in a carriage dispute, it is neutral as between the PCRs. Mr Evans' legal representatives have, naturally, also made contact with the Claimants' solicitors in *Allianz*,[175] and have established contacts with the firms acting in FX class actions in other jurisdictions such as Canada.[176]

123. It follows that each of the O'Higgins PCR's examples fall far short of establishing that it has the superior level of case preparation.

J. FEE AGREEMENTS

124. Mr Evans has already addressed a comparison of the PCRs' funding agreements in Mr Evans' Carriage Submissions ¶¶157-161.

125. Mr Evans agrees that the terms on which the PCRs have retained their lawyers are not a relevant point of distinction. Mr Evans has already put in evidence that Hausfeld are acting under a CFA under which 50% of the fees are deferred and a 100% success fee is payable on the deferred and contingent portion of the fees,[177] an identical arrangement to the O'Higgins PCR's.

K. OTHER FACTORS

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173 See ¶¶23-25.

174 O'Higgins Carriage Submissions, ¶63(4).

175 Maton 5, ¶59.

176 See Maton 4, ¶67 which refers to Hausfeld's contacts with Siskinds LLP, one of the firms acting in the Canadian FX action, and also Maton 5, ¶59.

177 Maton 4, ¶41(c).

126. Section K of the O'Higgins Carriage Submissions addresses (in rather brief terms) a number of other carriage factors which "*the O'Higgins PCR contends are of lesser relevance*" and yet it "*considers that it is at least as strong as the Evans PCR.*"[178] Mr Evans addresses each of those factors in turn.

127. Prospects of success: As to the substance of this factor, the O'Higgins PCR simply states that the "*superiority of the O'Higgins PCR's expert analysis has been described in section F above*".[179] Mr Evans has already explained why that contention is wrong in his corresponding section F above. In addition, the O'Higgins PCR suggests that it is "*premature, especially in light of the Supreme Court's judgment in Merricks… to make a detailed assessment of the prospects of success of either proposed claim.*"[180] Mr Evans submits that suggestion is wrong in principle and wrong as a matter of law for the reasons given in ¶¶20-21 above.

128. Scope of causes of action: Mr Evans agrees with the O'Higgins PCR that this factor has limited weight in the present carriage dispute, since both PCRs bring follow-on claims for damages based on the Decisions.[181] He also agrees that, contrary to the O'Higgins PCR's attempts to portray his CPO application as duplicative, "*there are material differences in the scope of the claims*".[182] However, for the reasons given in sections E and F above, and in Mr Evans' Carriage Submissions concerning the "case theory"[183] and "class definition"[184] factors, his approach is clearly to be preferred. In particular, Mr Evans' case theory and class definition are more sound and robustly based; more suitably tailored to the class-wide harm caused by the infringements identified in the Decisions; and therefore has materially better prospects of success.

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178 O'Higgins Carriage Submissions, ¶69.

179 O'Higgins Carriage Submissions, ¶69(1).

180 *Ibid.*

181 O'Higgins Carriage Submissions, ¶69(2). That is consistent with the position Mr Evans adopted in relation to factor 3 contained in the Evans Carriage Submissions: see ¶¶96-100.

182 O'Higgins Carriage Submissions, ¶69(2).

183 Mr Evans' Carriage Submissions, ¶¶28-70.

184 Mr Evans' Carriage Submissions, ¶¶71-95.

129. Disqualifying conflicts of interest: Mr Evans agrees with the O'Higgins PCR[185] that this factor does not appear to be relevant in the present carriage dispute.

130. Preparation and performance on a carriage motion: the O'Higgins PCR considers this factor should have limited weight in a carriage dispute as it would be "*invidious to draw comparisons under this heading.*"[186] Mr Evans disagrees: this is plainly a factor that could be taken into account when determining which claim would best advance the interests of the proposed class members, since (as with the factor relating to the experience of the lawyers of the competing PCRs) it may be relevant to the quality of their representation.[187] In any event, this factor would be a matter for the Tribunal to consider after the CPO hearing.

131. Selection of defendants: Mr Evans joins issue with the O'Higgins PCR's submission that "*[t]he omission of [the MUFG] defendants from the O'Higgins PCR's claim is of no practical import*". As explained in Mr Evans' Carriage Submissions, this should be a factor in his favour, albeit a relatively minor one, given that there are advantages associated with including MUFG in his proposed proceedings.[188]

132. Correlation of plaintiffs and defendants:[189] Mr Evans' Carriage Submissions combine this factor with the "selection of defendants" factor.[190] He agrees that, beyond the inclusion of MUFG in his proposed proceedings (which, for the reasons given above, is a point in his favour), this factor is otherwise not relevant.

133. Interrelationship of class actions in more than one jurisdiction: Mr Evans agrees with the O'Higgins PCR's view (set out in Section B of the O'Higgins Carriage Submissions) that this factor is a *"particularly Canadian consideration, relating to the jurisdictions of the courts of the different provinces of Canada. However, it might be relevant if separate class actions were brought in relation to England and Scotland, or in other relevant*

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185 O'Higgins Carriage Submissions, ¶69(3).

186 O'Higgins Carriage Submissions, ¶69(4). See also the O'Higgins PCR's table of carriage factors on p.6 of its Carriage Submissions, which marks this factor as rarely relevant, adding that "*[s]ave in a very clear case, it is not appropriate to engage in invidious comparisons.*"

187 Mr Evans' Carriage Submissions, ¶¶237-238.

188 See ¶122.

189 O'Higgins Carriage Submissions, ¶69(6).

190 Mr Evans' Carriage Submissions, ¶¶118-120.

jurisdictions."[191] Therefore, Mr Evans did not include this among his proposed list of factors that may be relevant to the determination of a carriage dispute.[192]

134. However, in section K of its Carriage Submissions, the O'Higgins PCR appears to use this factor as an occasion to shoehorn in another reference to SSAAL's experience of the US FX proceedings. Indeed, its sole contention in respect of this carriage factor is that it "*is only relevant in the present case to the extent of the connection of the Proposed Collective Proceedings with the US Proceedings, as to which the O'Higgins PCR's advantageous connections have been identified… above*."[193] This submission is misconceived for two reasons:

    a. There is no connection between the UK and US FX proceedings. Indeed, transactions which are included in the US proceedings are expressly excluded from Mr Evans'[194] and the O'Higgins PCR's[195] proposed class definition; and

    b. As Mr Evans has already explained in ¶¶102-103 above, the experience of the co-counsel in the US FX action (which includes Hausfeld's US affiliate firm, along with SSAAL), is a neutral factor between the PCRs.

L. CONCLUSION

135. For all the above reasons, Mr Evans respectfully submits that he is the more suitable class representative for the purposes of Rule 78(2)(c).

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191 See the O'Higgins PCR's explanation of the relevance of factor 17 in its list of proposed carriage dispute factors at p.8 of its Carriage Submissions.

192 See Mr Evans' explanation of this in footnote 18 of his Carriage Submissions, in which he explained that this factor "*reflects a particular feature of the Canadian system, whereby class actions can be brought in more than one province.*"

193 O'Higgins Carriage Submissions, ¶69(7).

194 Mr Evans' proposed class definition defines an "Excluded Transaction" as "*transactions which are included in the following proceedings… In Re Foreign Exchange Benchmark Rates Antitrust Litigation, filed before the United States District Court, Southern District of New York under case number 1:13-cv-07789-LGS*".

195 The definition of a "Relevant Foreign Exchange Transaction" in the O'Higgins PCR's class definition expressly excludes "*[t]ransactions which are the subject of... the US class action and/or the releases under the settlements in case In re Foreign Exchange Benchmark Rates Antitrust Litigation, No. 1:13-cv-07789-LGS (S.D.N.Y.)*".

CONFIDENTIAL INFORMATION REDACTED

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Annex – comparison of the PCRs' submissions on the relevance of the carriage factors

Explanatory notes

Mr Evans has prepared the table below in order to assist the Tribunal in identifying and comparing the PCRs' respective positions on the relevance of each of carriage factors in resolving the carriage dispute. It has been compiled by taking the table contained in the O'Higgins Carriage Submissions at pp.5-8 and adding two columns which identify: (a) the corresponding carriage factor in Mr Evans' Carriage Submissions; and (b) Mr Evans' position as to the relevance of those factors in resolving the carriage dispute.

In order to facilitate a proper comparison, Mr Evans has adopted the O'Higgins PCR's categorisation of factors as being usually, rarely, or never relevant. It is to be noted this is different to the categorisation in Mr Evans' Decision Matrix provided to the Tribunal on 13 January 2021, as this addressed the weight to be attributed to the carriage factors. Mr Evans does not address the weight to be attributed to the carriage factors in this table (because the O'Higgins PCR has not done so), but provides references to where this issue has been addressed in his Carriage Submissions.

This table solely addresses the carriage factors which have been identified by both PCRs. It is to be noted that Mr Evans' Carriage Submissions include two additional factors, namely: (a) Quality of the litigation plan (factor 4); and (b) Quantum (factor 6).

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
(1) Quality of the proposed representative plaintiffs	**Usually**: It will generally be appropriate to consider the quality and conduct of the representatives who are proposed to represent the class.	**Factor 8:** Quality of the Proposed Class Representatives	**Usually:** Mr Evans agrees with the O'Higgins PCR on this factor. *(See further Mr Evans' Carriage Submissions, ¶¶133-134).*
(2) Funding	**Usually**: It will generally be appropriate to consider which proposed carrier has better funding to prosecute the claim and to meet adverse costs awards (e.g. after-the-event insurance).	**Factor 9:** Funding arrangements **Factor 10:** Arrangements in respect of the Proposed	**Rarely:** once it is established that a PCR has funding and insurance arrangements which meet the requirements of Rule 78 of the Tribunal Rules, a detailed comparison of those arrangements is unlikely to assist in determining the carriage dispute. It would not be appropriate to favour the PCR

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
		Defendants' recoverable costs (including ATE insurance arrangements)	with the larger budget or with more ATE insurance, because this does not (or not necessarily) mean that PCR will best represent the interests of class members (which is an issue that must be assessed in the round). *(See further Mr Evans' Carriage Submissions, ¶¶150-156 (Factor 9) and ¶166 (Factor 10)).*
(3) Fee and consortium agreements	**Rarely**: Lawyers' fees will be relevant only if they would materially impinge on recovery by class members. Consortium arrangements will be relevant only where they arise.		**Rarely**: Mr Evans agrees with the O'Higgins PCR's position on this factor. *(See further Mr Evans' Carriage Submissions, ¶¶150-151 (Factor 9) and ¶166 (Factor 10)).*
(4) Quality of proposed class counsel	**Rarely**: Whilst it is necessary to ensure that the class counsel have relevant experience of competition litigation, it is not appropriate to descend to invidious comparisons.	**Factor 11:** Experience of the lawyers of the competing PCRs	**Usually:** this is clearly a relevant factor to resolving the carriage issue since it goes to the quality of representation for the proposed class members. *(See further Mr Evans' Carriage Submissions, ¶¶170-171).*
(5) Disqualifying conflicts of interest	**Rarely**: However, if there is such a conflict, this would be very significant.		**Rarely**: Mr Evans agrees with the O'Higgins PCR in respect of this factor.

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
			(See further Mr Evans' Carriage Submissions, ¶¶170-171).
(6) Relative priority of commencement of the action	**Usually**: At least where there is a significant gap between the dates of commencement – see O'Higgins Carriage Submissions, paragraph 8.	**Factor 12:** Relative priority of commencement of the action	**Rarely:** this should be of very limited (if any) relevance in determining a carriage dispute. PCRs should be judged on the quality of their applications (and thereby their ability to represent the proposed class members) and not the speed of their filing. *(See further Mr Evans' Carriage Submissions, ¶¶177-187).*
(7) Preparation and readiness of the action	**Rarely**: This will rarely be a significant factor if it is the case that the competing carriers both meet the test for certification, because their litigation plans etc are then necessarily to be regarded as meeting the criteria for certification.	**Factor 13:** Preparation and readiness of the action	**Usually**: this is a significant factor. It is self-evident that the interests of the proposed class members will be best served by the claim which demonstrates a more comprehensive degree of preparation. *(See further Mr Evans' Carriage Submissions, ¶¶192-194).*
(8) Preparation and performance on carriage motion	**Rarely**: Save in a very clear case, it is not appropriate to engage in invidious comparisons.	**Factor 14:** Preparation and performance at the hearing of the carriage dispute	**Usually:** this factor could be relevant in determining which claim would be in the best interests of the class members, since (as with the factor relating to the experience of the lawyers of the competing PCRs) it may be relevant to the Tribunal's

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
			views as to the quality of their representation. *(See further Mr Evans' Carriage Submissions, ¶¶237).*
(9) Case theory	**Rarely**: This will rarely be a factor if it is the case that the competing carriers both meet the test for certification, because their case theories are then necessarily to be regarded as meeting the criteria for certification (and, as such, viable).	**Factor 1:** Case theory	**Usually:** this is one of the most important factors in determining the carriage dispute. The interests of class members will be best served by the claim that has been prepared in the more comprehensive manner, with a stronger case theory, and therefore has greater prospects of success. *(See further Mr Evans' Carriage Submissions, ¶¶28-32).*
(10) Scope of causes of action	**Rarely**: This could only be a relevant factor if there is a significant difference (which is unlikely where both claims are follow-on claims from the same regulatory decision(s)). In circumstances where all of the causes of action in both claims meet the certification test then the causes of action would all be viable.	**Factor 3:** Scope of causes of action	**Rarely:** Mr Evans agrees that the scope of the causes of action is unlikely to be an important factor where (as here) both claims are follow-on claims based on the same decisions. The position may be otherwise for "standalone" claims. Differences between the scope of the respective claims, e.g. as to the nature and scope of the harm alleged to have been caused by the infringements, causation and damages, could be addressed either under

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
			this factor or the "case theory" or "class definition" factor. *(See further Mr Evans' Carriage Submissions, ¶¶96-98).*
(11) Selection of defendants	**Rarely**: This will only be a relevant factor if there are conspicuous or egregious problems with the selection of defendants by one party.	**Factor 5:** Selection of Defendants	**Rarely:** where PCRs propose to include different Defendants in their proposed proceedings, it would be relevant to consider whether there are any practical or procedural benefits for the proposed class members inherent in that choice. *(See further Mr Evans Carriage Submissions, ¶¶118-120).*
(12) Correlation of plaintiffs and defendants	**Rarely**: This will only be a relevant factor if there are not viable claims against each defendant. In circumstances where both claims meet the certification test in respect of all defendants then the causes of action would all be viable.		
(13) Class definition	**Usually**: It will usually be relevant to consider competing class definitions. However, it may not be possible to reach a clear adjudication on this at an interlocutory stage without delving too far into the merits.	**Factor 2:** Class definition	**Usually:** an assessment of the class definitions is directly relevant to the nature and scope of the claim that is brought on behalf of the proposed class members. It is therefore an important consideration in determining which claim best promotes and advances their interests. Mr Evans disagrees with the O'Higgins PCR's suggestion that it may not be possible to reach a clear adjudication on
(14) Class period	**Usually**: It will usually be relevant to consider competing class periods. However, it may not be possible to reach a clear adjudication on this at an		

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
	interlocutory stage without delving too far into the merits.		this factor without delving too far into the merits. On the contrary, an assessment of the relative merits of the claims is an important factor in determining the carriage dispute for the reasons given in ¶¶20-21 above. *(See further Mr Evans' Carriage Submissions, ¶¶71-73).*
(15) Prospect of success: leave and certification	**Never**, in circumstances where the carriage dispute is considered together with certification (rather than as a preliminary issue): This should never itself be a factor provided each claim reaches the strike out/summary judgment threshold required on certification.	**Factor 7:** Prospects of success against the Proposed Defendants	This factor would not arise where (as here) the issues of certification and carriage are determined together, since the question of carriage only arises in the event that both applications meet the threshold for certification.
(16) Prospect of success against the defendants	**Never**, in circumstances where the carriage dispute is considered together with certification (rather than as a preliminary issue): This should never itself be a factor provided each claim reaches the strike out/summary judgment threshold required on certification.		**Usually:** this factor should be considered as the overarching consideration for assessing the relative merits of the competing applications and in turn will determine which application best advances the interests of the proposed class members. Mr Evans disagrees with the O'Higgins PCR's suggestion that this factor would not

O'Higgins factor	O'Higgins position on relevance	Corresponding Evans factor	Evans position on relevance
			be relevant provided each claim reaches the certification threshold for the reasons given in ¶¶20-21 above. *(See further Mr Evans' Carriage Submissions, ¶¶129-131).*
(17) Interrelationship of class actions in more than one jurisdiction	**Rarely**: This is a particularly Canadian consideration, relating to the jurisdictions of the courts of the different provinces of Canada. However, it might be relevant if separate class actions were brought in relation to England and Scotland, or in other relevant jurisdictions.		**Not applicable**: Mr Evans considers this factor reflects a particular feature of the Canadian system, whereby class actions can be brought in more than one province: see Mr Evans' Carriage Submissions, footnote 18. However, he agrees with the O'Higgins PCR that it *may* be relevant, in an appropriate case, to consider the impact of separate collective proceedings in parts of the UK, or in other relevant jurisdictions. That does not arise in this case.