IN THE COMPETITION APPEAL TRIBUNAL

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

MR EVANS' REPLY TO THE RESPONDENTS' RESPONSE TO THE PCRS' FURTHER SUBMISSIONS ON THEORY OF HARM

A. INTRODUCTION AND SUMMARY

1. This is Mr Evans' Reply to the Respondents' Response to the further submissions served by each of the PCRs on 6 August 2021 (the **"Response"**). Those further submissions are referred to herein as the **"Evans Further Submissions"** and the **"O'Higgins Further Submissions"** respectively. Unless otherwise indicated below, Mr Evans adopts the defined terms used in the Evans Further Submissions.

2. Mr Evans' position, in summary, is that the claims he seeks to bring on behalf of the Proposed Classes are well-founded, properly pleaded as to all of the essential elements of his proposed causes of action (notwithstanding the present early stage of proceedings), and anchored in sound and robustly based expert evidence. On any view, his proposed claims are clearly of sufficient strength: (a) to pass any applicable strike out test; and (b) to be brought on an opt-out basis.

3. There is accordingly no basis for the Proposed Defendants' contention, advanced for the first time in the Response,[1] that Mr Evans has not demonstrated reasonable grounds, or a plausible basis, for his proposed claims.

4. Further, in the Response, the Proposed Defendants point to a number of alleged "*defects*" in the PCRs' cases on causation. Mr Evans' response to these points is three-fold:

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[1] The Proposed Defendants have not previously contended that the PCRs' claims do not satisfy any strike out / summary judgment threshold, nor have they brought any such application before the Tribunal. Instead, they have sought to contend that the PCRs' claims were not of sufficient strength to justify opt-out proceedings: see, for example, Joint CPO Response, ¶¶83-85 **[A/1/42-43]**; Joint CPO Rejoinder, ¶95 **[A/6/42]**; and Respondents' Joint Skeleton Argument, ¶69 **[AB/5/27]**. Further, during the hearing, MUFG's counsel observed "*[f]irst of all, as respondents, we do not seek to strike out these proceedings. That is not the level at which we challenge these claims.*": Transcript Day 3, page 164, lines 5-7 (emphasis added).

(a) First, they concern matters which are plainly unsuitable for summary determination. They are points which fall to be determined at trial. In particular, the Proposed Defendants' purported objections largely concern disputes as to the evidence of the PCRs' experts, yet these are made in circumstances where the Proposed Defendants have given no meaningful disclosure, and served no factual or expert evidence of their own. This is in spite of the fact that the points raised by the Proposed Defendants frequently concern matters which are squarely (and often uniquely) within their knowledge.

(b) Second, Mr Evans has previously explained why these points are not relevant to the question of whether his proposed proceedings should proceed on an opt-in or an opt-out basis: see Mr Evans' Reply to the Proposed Defendants' Joint CPO Response, ¶¶230-232 and 234-248 **[A/3/65-70]** and Mr Evans' Response to the Proposed Defendants' Joint CPO Rejoinder, ¶¶37-46 **[A/8/12-15]**. In short, the Proposed Defendants' far-reaching challenges to Mr Evans' proposed claims and his experts' analyses involve a detailed form of merits assessment that goes well beyond any high-level analysis foreseen or properly required by rule 79(3)(a) of the Tribunal Rules. It also runs directly contrary to the guidance on this issue contained in ¶6.39 of the Guide.

(c) Third, notwithstanding the above points, Mr Evans has addressed these criticisms and explained why they are without merit.

5. The remainder of this Reply is structured as follows:

(a) **Section B** responds to the Proposed Defendants' submissions on the applicable strike-out threshold; and

(b) **Section C** addresses the Proposed Defendants' unfounded criticisms of Mr Evans' theory of harm.

6. For the avoidance of doubt, Mr Evans does not seek to address each and every point raised by the Proposed Defendants in the Response. He should not be taken to accept those points which he does not address here. Instead, he joins issue with the Proposed Defendants and relies on the points previously made in his written and oral submissions. In particular, he relies upon the following documents (and material cited therein):

(a) Mr Evans' Reply to the Proposed Defendants' Joint CPO Response (the **"Evans CPO Reply"**) **[A/3]** (see, in particular, section V **[A/3/64-96]**);

(b) Mr Evans' Response to the Proposed Defendants' Joint CPO Rejoinder (the **"Evans Surrejoinder"**) **[A/8]** (see, in particular, section IV **[A/8/11-21]**);

(c) Mr Evans' Skeleton Argument on Certification **[AB/4]** (see, in particular, section E **[AB/4/13-17]**); and

(d) The Evans Further Submissions.

B. LEGAL OBSERVATIONS ON THE ISSUE OF STRIKE OUT AT THE CERTIFICATION STAGE

7. Mr Evans maintains his position regarding the legal principles concerning the issue of strike out at the certification stage: see Evans Further Submissions, ¶¶4-13. He rejects the suggestion (in ¶4 of the Response) that the purpose served by his submissions is unclear. In summary, he reiterates that:

(a) The certification process is not about, and does not involve, an assessment of the merits of the claims it is proposed to combine in collective proceedings, other than as part of a strike out or summary judgment assessment, or under rule 79(3);

(b) There is no requirement at the certification stage for the Tribunal to assess whether the Collective Proceedings Claim Form, or the underlying claims, would survive a strike out or summary judgment application. Accordingly, the Tribunal is invited not to consider this question; and

(c) Nevertheless, if the Tribunal were minded to consider this question of its own motion, it should find that Mr Evans' proposed claims comfortably satisfy the strike out threshold (and that they are of sufficient strength to be brought in opt-out proceedings: see ¶4(b) above).

8. Section A of the Response makes various submissions on the applicable strike out threshold. Mr Evans addresses three key aspects of those observations below.

9. First, the Proposed Defendants seek to suggest that point 7(c) of the Tribunal's Letter is "*entirely consistent with Merricks*" by relying upon the reasoning of the minority judgment of Lords Sales and Leggatt to the effect that "*class actions are a valuable tool*

for claimants but present real risks to prospective defendants if not properly controlled because of the potential for claimants to bring speculative claims for large amounts of money, imposing heavy costs on defendants…": Response, ¶4(a). They assert that "*[t]here is nothing in the majority judgment of Lord Briggs to suggest disagreement with this summary of the policy rationale underpinning class action regimes*": *ibid.* It is further suggested that such considerations are relevant to the Tribunal's approach to any strike out assessment: see Response, ¶¶4(b)[2] and (e)[3].

10. Those submissions are clearly wrong. Mr Evans has already explained why Lord Briggs (with whom Lords Kerr and Thomas agreed) disagreed with the minority's reasoning in this regard and it would accordingly be wrong in law to take those putative policy considerations into account: see Evans Further Submissions, ¶6. It is central to Lord Briggs' majority judgment that a claimant should face no greater hurdle when accessing the court in opt-out collective proceedings than he or she would face in individual proceedings: see, in particular, [45] of his judgment **[AUTH/34/18]**.

11. Second, the Proposed Defendants make the trite observation that competition claims must be properly pleaded: see Response, ¶¶4(b) and (c). As Bacon J summarised in *Forrest Fresh Foods Limited v Coca-Cola European Partners Great Britain Limited* [2021] CAT 29 at [26]:

> "In essence, a party's statement of case must allow the other side to know the case it has to meet, in order to ensure that the parties can properly prepare for trial and that unnecessary costs are not expended and court time wasted on points that are not in issue and which lead nowhere. Furthermore, and importantly, Particulars of Claim should set out "the essential facts which go to make up each essential element of the cause of action" (as opposed to the evidence supporting the claim)."

12. Mr Evans' case is that his proposed claims are properly pleaded, and it cannot credibly be suggested that the Proposed Defendants do not know the case they have to meet. On the contrary, their understanding of Mr Evans' proposed claims is demonstrated by the fact that they have made detailed submissions on their merits: see Section C of the Joint

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2 "*The burdensome nature of competition claims means that it is important that they are pleaded properly… This applies with particular force in applications for collective proceedings which combine multiple such claims and, as recognised in Merricks, are therefore particularly burdensome for defendants*." (emphasis added)

3 "*… if the PCRs' respective theories of harm, as pleaded, do not meet the applicable threshold for strike-out / summary judgment, then proper control of the opt-out procedure requires that they advance no further*." (emphasis added)

CPO Response **[A/1/42-70]**; ¶¶76-95 of the Joint CPO Rejoinder **[A/6/35-42]**; and section D of the Proposed Defendants' skeleton argument **[AB/5/27-59]**.

13. Third, ¶4(d) of the Response provides only a partial summary of the approach that the Tribunal should adopt on a strike out / summary judgment application.[4] The principles are summarised in [24] of *Forrest.* Mr Evans emphasises the following key propositions:

    (a) The core question on any strike out assessment is whether the claimant has a realistic as opposed to fanciful prospect of success. A realistic claim is one that carries some degree of conviction and is more than merely arguable.

    (b) In reaching its conclusion, the Tribunal must not conduct a mini-trial. It must also take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial.

    (c) The Tribunal should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

14. Mr Evans' case is that on any view his claims have a realistic prospect of success. As is confirmed by the Evans Further Submissions, his proposed claims are pleaded with proper and sufficient particularity, notwithstanding the current early stage of proceedings. His theory of harm is appropriately supported by the expert evidence of Professor Rime, whose views are, in turn, firmly grounded in the academic literature on FX market microstructure and draw upon the industry expertise contained in Mr Knight's reports. Moreover, Mr Evans has also identified the further evidence and disclosure that will be required in order to better understand the nature, scope and functioning of the infringements, and will enable his experts to develop their analysis of the adverse effect of the Infringements accordingly: see Summary of Mr Evans' Proposed Collective

[4] For completeness, Mr Evans notes that the references in the second sentence of ¶4(d) of the Response to [17], [19] and [21] of the Tribunal's judgment in *Stellantis N.V. & Ors* [2021] CAT 14 are not on point. Those paragraphs concern the Tribunal's assessment of a strike out / summary judgment application concerning a defence of mitigation of an overcharge by costs reduction and are not germane to the present case.

Proceedings (the **"Evans Neutral Statement"**) and material cited therein at ¶¶9, 10 and 20 **[AB/17/8-9, 18]**. A trial is needed to establish the facts and to resolve these matters.

15. By contrast, in sections B, C and D of the Response, the Proposed Defendants make a number of criticisms of the PCRs' theories of harm which are plainly not suitable for summary determination. On the contrary, they entail exactly the sort of mini-trial that is expressly disavowed by the case law. In the premises, Mr Evans invites the Tribunal to disregard the points in the Response and hold that his claims should not be struck out.

16. Without prejudice to Mr Evans' primary position that the points in the Response fall to be disregarded, he addresses them below in order to demonstrate that they are in any event unfounded. Before turning to those points, he makes three further preliminary observations:

    (a) The suggestion at ¶5 of the Response that the case law concerning knowledge asymmetry as between the parties does not assist the PCRs, because they have access to the Settlement Decisions, is misconceived. Mr Evans has explained that the Decisions only provide a short description of the infringements, and that further disclosure will be reasonably necessary in order to supplement his understanding:[5] see the extracts of the Evans Neutral Statement referred to in ¶13(c) above.

    (b) The Proposed Defendants have mischaracterised Mr Evans' case at ¶6 of the Response as being that "*the Tribunal's determination of whether there are reasonable grounds must await factual and expert evidence at trial*". Mr Evans has made no such suggestion. His case, as summarised in ¶7 above, is that there is no requirement for the Tribunal to consider whether his proposed claims satisfy any strike out or summary judgment test as part of the certification procedure. It is plainly right that: (a) rules 41 and 43 do not fall to be automatically applied in every competition claim; and (b) any decision to apply rules 41 and 43 to collective proceedings, where they would not be applied to a conventional competition claim, is contrary to the majority judgment in *Merricks.*

    (c) For completeness, Mr Evans notes that the Proposed Defendants seek to make much of alleged inconsistencies between his case and that of the O'Higgins PCR:

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5 Similar observations were made by Green J (as he then was) on the settlement decision at issue in *Peugeot S.A. and others v NSK Ltd and others* [2018] CAT 3, see [28]-[29].

see, for example, Response, ¶8. Those points will be addressed where they arise below. However, it should be noted that even if there are disparities between the PCRs as to their theories of harm, it does not follow that only one or the other claim can survive a strike out assessment, or (leaving carriage to one side) be certifiable on an opt-out basis. On the contrary, the question for strike out is not whether a claim will ultimately prevail, but rather whether it carries with it some degree of conviction and is more than merely arguable (see ¶13(a) above). Similarly, any merits assessment under rule 79(3) should be conducted at a high level: see ¶4(b) above. Those tests can be met by two mutually inconsistent claims. For the avoidance of doubt, Mr Evans' case is that both his claim, and that of the O'Higgins PCR, are capable of being certified as opt-out collective proceedings.[6] It follows that the sole question for the Tribunal to decide (leaving to one side the issues of compound interest, deceased persons and defunct companies, which have been deferred) should be which PCR is the more suitable to act as class representative pursuant to rule 78(2)(c) of the Tribunal Rules.

C. THE PROPOSED DEFENDANTS' UNFOUNDED CRITICISMS OF MR EVANS' THEORY OF HARM

17. This section addresses each of sections B to D of the Response in turn.

RESPONSE, SECTION B: THE TOPICS IDENTIFIED BY THE TRIBUNAL AT POINT 8 OF ITS LETTER OF 20 JULY 2021

18. Mr Evans joins issue with the Proposed Defendants' suggestion (in ¶7 of the Response) that he has not clarified his position on the three matters identified in point 8 of the Tribunal's Letter. Each of those points was expressly and clearly addressed in the Evans Further Submissions, and his responses were summarised in Section D. Nevertheless, he addresses the Proposed Defendants' misconceived criticisms of his responses below.

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[6] Save that, as the Tribunal is aware, the PCRs join issue as to whether certain trades (namely limit/resting orders and benchmark trades) should be included in those proceedings: see Mr Evans' Skeleton Argument on Carriage, ¶¶31-36 **[AB/3/11-14]** and Transcript Day 5, page 135, line 11 to page 148, line 10.

Market concentration and market power

19. The Proposed Defendants' objections to Mr Evans' case on market concentration and market power, set out in ¶¶8-23 of the Response, are broadly two-fold:

    (a) First, they claim that they did not have sufficient market power to cause spreads to widen across the market: Response, ¶¶9(b), 13(a) and 14-19; and

    (b) Second, they suggest that none of the theories of harm advanced by the PCRs can explain how the Infringements caused class-wide losses in circumstances where the participating traders and/or the Proposed Defendants did not (contrary to Mr Evans' case) have sufficient market power: Response, ¶¶13(b) and 20-23.

20. Mr Evans addresses each of those points below. However, as a preliminary point, he notes that the Proposed Defendants mischaracterise his case on the significance of market concentration at ¶8 of the Response. They say that "*Professor Rime's evidence for Mr Evans is that the FX market is "relatively unconcentrated"* and that "*that evidence is not reflected in the Evans Further Submissions which assert, in generic terms, that market concentration is relevant "insofar as it sheds light on the salient issue of the degree of market power"*". As to this:

    (a) The Proposed Defendants have selectively quoted from ¶74 of Rime 2 **[C/6/39]** in a way that takes Professor Rime's remarks out of context. When that paragraph is read in full, it is clear that the proper background to his remarks is as follows:

        (i) In response to the Proposed Defendants' contention (in ¶117(a) of the Joint CPO Response **[A/1/56]**) that they could not have market power since their combined market share did not exceed 50% during the period covered by the Infringements, Professor Rime explains that "*[t]he significance of market share, as a proxy for market power, cannot be assessed in isolation. It must be considered holistically, which includes considering market share in relative terms, when compared with the market share of other participants*" **[C/6/39]**.

        (ii) He then explains that the FX market is "*relatively unconcentrated*". But that is referring to the market concentration of the FX market in general. Indeed, immediately after this remark, Professor Rime proceeds to explain the

reasons why he considers that the Proposed Defendants would have sufficient market power as a result of the Infringements, given the relatively unconcentrated structure of the overall market.[7] In short, the critical point is that the combined market share of the Proposed Defendants participating in the Infringements is significantly larger than all other FX Dealers throughout the period of the proposed claims; with the exception of Deutsche Bank, the remainder of the market was fragmented and all of the other FX Dealers had single digit market shares. Indeed, the very fact that the remainder of the market was relatively unconcentrated, and characterised by a considerable number of smaller players, only serves to reinforce Mr Evans' position that the Proposed Defendants had sufficient market power.

(iii) Contrary to the Proposed Defendants' suggestion, that evidence is properly reflected in ¶39 of the Evans Further Submissions: see, in particular, sub-paragraphs (a) to (c) thereof.

(b) In any event, Mr Evans does not merely state that market concentration is relevant insofar as it sheds light on the issue of market power. His case is that market concentration is one of several factors that are relevant to the overall assessment of whether the Proposed Defendants have sufficient market power. ¶39 of the Evans Further Submissions explains clearly, by reference to Professor Rime's evidence, all of the factors Mr Evans relies upon in support of his position.

21. The Proposed Defendants also appear to suggest that Mr Evans' position runs contrary to that of the O'Higgins PCR, who describes the market as "*relatively concentrated*": see O'Higgins Further Submissions, ¶8(3). However, that alleged difference is more apparent than real. Both PCRs rely on the relative market shares of the Proposed Defendants compared with other FX Dealers in support of their position that the former had sufficient market power: see Evans Further Submissions, ¶39 and O'Higgins Further Submissions, ¶8(3). Accordingly, to the extent that there is any meaningful disparity

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7 "*In the context of the FX market, the service offered by FX dealers is homogenous and the market is relatively unconcentrated, with the largest FX dealer in the market during the period covered by the Cartels being Deutsche Bank, whose market share ranged between 12% and 19%, and all other [non-Proposed Defendant] FX dealers having a much lower market share (i.e. single digit percentages)… In these circumstances, a combined market share of between 23.9% - 48.0% for the Cartels is significant relative to other market participants and would give the Cartels sufficient degree of market power to sustain tacit coordination.*" **[C/6/39]**

between the PCRs' position on this issue, it merely concerns a difference in the PCRs' views as to the exact degree of concentration in the FX market.

The Proposed Defendants had sufficient market power

22. Turning to the Proposed Defendants' contention that they did not have sufficient market power, Mr Evans notes at the outset that the Proposed Defendants' case largely consists of unsubstantiated assertions as to their lack of market power. Moreover, Mr Evans has previously addressed similar arguments in Evans CPO Reply, ¶294(a) **[A/3/83-84]** and Evans Surrejoinder, ¶49 **[A/8/15-16]** and explained why they are unfounded.

23. The Proposed Defendants rely on three reasons in support of their position that they did not have sufficient market power.

24. The first reason is that the Proposed Defendants' combined market shares were below 50% and the market was relatively unconcentrated: Response, ¶15. However, Mr Evans has already explained that it is essential to consider relative market shares in assessing the existence of market power. His case is that the Proposed Defendants had sufficient market power when their combined market share is compared with other FX Dealers: see ¶20 above and Evans Further Submissions, ¶39.

25. The second reason is that the Proposed Defendants assert that they faced multiple rivals with the ability and incentive to quote for FX trades and transact with customers: Response, ¶¶16-18. In particular, the Proposed Defendants make the unevidenced assertion that "*banks with smaller market shares can expand their trading volume to attract additional customers, and so do not face capacity constraints. As such, they can compete effectively with rivals with larger market shares*": Response, ¶18.

26. However, the Proposed Defendants appear to ignore (or have no answer to) Mr Evans' case that many customers had a relationship with a single bank, and there are a number of important barriers to switching: see Evans Further Submissions, ¶¶44-46. Furthermore, the belated[8] and unsupported suggestion that banks do not face capacity constraints on FX trading is also misconceived. Mr Evans' experts consider that there may well be limits on banks' capacity to service additional trading. For example, they

[8] It appears to have been introduced for the first time in the Proposed Defendants' oral submissions: see Transcript Day 4, page 13, lines 12-25 to page 14, lines 1-3.

may be constrained by their overall risk appetite for FX trading, which may also need to be balanced with risk from other services. A marked increase in customers may also require a bank to make additional investments in staffing and infrastructure. In addition, there may be constraints which result from managing risk exposure to customers. Indeed, banks will typically screen new customers against a set of criteria (which, include, for example, creditworthiness criteria) and if a relationship is established, they may impose credit limits on their facilities: see Knight 1, ¶¶153, 155, 185 and 187. **[EV/8/54, 56, 62, 63]**

27. The third reason is that the Proposed Defendants contest that market shares are, in any event, the relevant metric. This contention is based on two misguided criticisms:

    (a) It is suggested that market shares are not an indication of the market power of the individual participating traders: Response, ¶19(a). However, Mr Evans' case is that the effects of the Infringements would not be limited to the participating traders: see ¶¶31-35 below and Evans Further Submissions, ¶37. In any event, this criticism rings hollow in circumstances where the Proposed Defendants have not provided any information relating to the volumes and revenues of their overall FX trading that were accounted for by the participating traders, including in response to questions from the Tribunal: see Transcript Day 4, page 17, lines 5-21.[9]

    (b) It is also contended that market shares reflect large volumes of E-Commerce Transactions which are concluded without trader involvement: Response, ¶19(b). However, for the reasons given in Evans Further Submissions, ¶¶70-72, and as is explained further at ¶¶56-65 below, Mr Evans' case is that those transactions would have been affected by the Infringements.

The relevance of market power to Mr Evans' theories of harm

28. The Proposed Defendants' second objection to Mr Evans' case on market concentration and market power is that his theories of harm do not explain how the Infringements

[9] Counsel for MUFG sought to suggest (without adducing any supporting evidence) that the proportion would be "*vanishingly small*" but subsequently confirmed that submission was made on behalf of MUFG only and that "*I am not able to generalise that to other banks*": Transcript Day 4, page 39, lines 18-24.

caused class-wide losses in circumstances where (contrary to Mr Evans' case) the participating traders and/or Proposed Defendants did not have sufficient market power.

29. Mr Evans has addressed this issue in ¶75 of the Evans Further Submissions. In summary:

(a) He accepts that a sufficient degree of market power is a necessary part of his case concerning tacit coordination of bid-ask spreads. Accordingly, it is a necessary part of his case as to the loss and damage caused to members of Proposed Class A and the first mechanism for loss and damage caused to members of Proposed Class B (i.e. less competitive market conditions resulting from that coordination). For the avoidance of doubt, he rejects the contention (at ¶21 of the Response) that tacit coordination "*cannot cause sustainable spread widening by the Respondent banks to customers given the effective competitive threat of rival banks*" [10]: see ¶¶25-26 above.

(b) A certain degree of market power is <u>not</u> a precondition for the second mechanism of loss and damage caused to Proposed Class B (i.e. increased adverse selection risks). This is because an increase in adverse selection risks can even be caused by a person with a limited degree of market power. Professor Rime has previously explained that adverse selection risk is a continuous variable, which means that it *increases* as the size of the informational asymmetry and the market power of the counterparty with the informational advantage increases: Evans Further Submissions, ¶¶63-64 and 66.[11] Nevertheless, he has also explained that the degree of market power held by the person(s) with the information advantage will be

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[10] The Proposed Defendants also suggest (in ¶¶21 and ¶29 of the Response) that the O'Higgins PCR agrees with this proposition, based upon ¶21 of the O'Higgins Further Submissions. Mr Evans does not understand the O'Higgins PCR to accept that proposition. Instead, its case appears to be that "*[w]hile a relatively small cartel (in terms of market share) <u>might</u> have difficulty profiting from a naked coordinated price increase due to competition from non-colluding rivals, the same strategy may be highly effective if the cartel members can also engage in strategies which raise their rivals' costs.*" (emphasis added) As such, the O'Higgins PCR does not appear to advance a concluded view on this issue. In any event, Mr Evans agrees that increased adverse selection risks constitute a further reason that the Proposed Defendants would widen, rather than tighten, their spreads as a result of tacit coordination: see Evans Further Submissions, ¶43(b). However, if and insofar as the O'Higgins PCR suggests that tacit coordination would not be sustainable without increased adverse selection risks based on the market structure at the time of the Infringements, he joins issue with that contention: see ¶51 below.

[11] See also Rime 1, ¶132: "*adverse selection is a cumulative risk, which is assessed by reference to the overall likelihood that a less-well informed counterparty will trade against a more informed counterparty and suffer trading losses because of the information asymmetry.*" **[EV/9/42]**

relevant to the extent and size of the increased adverse selection risks and, therefore, the extent of loss and damage: Evans Further Submissions, ¶75(b).

30. In addition, the Proposed Defendants assert that that Mr Evans' theory of harm relating to increased adverse selection risks depends on all non-Proposed Defendant banks "*experiencing frequent and persistent losses which were detectable*": Response, ¶23. That is misconceived. As Professor Rime explained in his evidence to the Tribunal: "*... it is important to remember that the cartel does not need to share what I call "tradeable information" continuously in order to have an adverse selection impact in the market. Adverse selection might arise if there are even quite infrequent events where some might have an information advantage that they utilise in their… own trading*": see Transcript Day 2, page 109, lines 17-25 to page 110, lines 1-4; and see further page 110, lines 14-25 to page 111, lines 1-7. In any event, the Proposed Defendants' assertions overlook the Commission's findings that the exchanges of commercially sensitive information in the chatrooms took place on an extensive and recurrent basis: see further ¶¶54-55 below.

Impact of the participating traders on the behaviour of the banks employing them

31. The Proposed Defendants' next set of arguments (in ¶¶24-28 of the Response) concern Mr Evans' case on the impact of the participating traders on the behaviour of other traders employed by the same bank. Mr Evans notes two points at the outset:

    (a) The Proposed Defendants have mischaracterised his case as to the importance of this issue in ¶24 of the Response. While they correctly state that Mr Evans' case as to how the participating traders could have influenced the behaviour of their banks is an important part of his case concerning the loss and damage suffered by Proposed Class A as a result of tacit coordination (and is therefore similarly relevant to his case concerning the loss and damage suffered by Proposed Class B as a result of less competitive market conditions), they do not acknowledge that he also says it is <u>not</u> a necessary part of his case concerning the loss suffered by Proposed Class B as a result of increased adverse selection risks: Evans Further Submissions, ¶76; see further ¶36(b) below.

    (b) They also point out that Mr Evans has not responded to their previous criticisms on this issue in the Evans Further Submissions: Response, ¶25. Mr Evans did not consider it necessary to do so. He has set out his case on those points in his previous

submissions; see, for example, Evans CPO Reply, ¶294(a) **[A/3/83-85]** and Evans Surrejoinder, ¶49 **[A/8/15-16]**.

32. Turning to the Proposed Defendants' arguments, ¶26 of the Response sets up the thesis that the participating traders could not credibly influence other traders because they "*would need to engage in frequent and granular two-way communications with* [every other trader] *over the entirety of the circa six year period of the Infringements*". That thesis is a 'straw man'. It is not what Mr Evans or his experts either say, or imply.

33. In the first place, the Proposed Defendants ignore the evidence of Mr Knight and Professor Rime that there are several potential ways in which the information shared as part of the Infringements could have been used to influence the decisions of other traders outside of the chatrooms. This evidence was clearly summarised at ¶37 of the Evans Further Submissions. In particular, the Proposed Defendants appear to have no answer to Professor Rime's view that "*commercially sensitive and confidential information that the participants in the Cartels learnt through the chatrooms could not be unlearned, and it would have been rational to take that information into account when speaking about pricing and trading strategy with colleagues*": Rime 2, ¶71 **[C/6/38-39]**. Professor Rime does not say that the participating traders must have engaged in a constant stream of bilateral communications with every other trader at all times around the world, nor does he suggest that the information shared with other traders would need to be granular in nature. Rather, he focuses on how the information or insights learned through the chatrooms could be taken into account in conversations about pricing and trading strategy on trading desks. The Proposed Defendants fail to grapple with these points.

34. Second, ¶26 of the Response appears to include a further misunderstanding of ¶37 of the Evans Further Submissions. Mr Evans does not say that the "*participating traders would have continually shared information with other traders in breach of the underlying understanding*" found by the Decisions.[12] In fact, quite the contrary, Mr Evans says that the traders may have been able to influence the pricing of other traders without sharing the information revealed in the chatrooms: see, for example, Evans CPO Reply, ¶294(a)

[12] Indeed, the Proposed Defendants do not cite Mr Evans' submissions or evidence in support of this contention.

[A/3/83-85]. He does not allege (and does not need to allege) that the participating traders breached the underlying understanding.

35. Likewise, the Proposed Defendants' stylised example of a trader dealing in EUR/GBP influencing another dealing in USD/JPY is misguided. As clearly explained at ¶37 of the Evans Further Submissions, the point is that the information exchanges would have informed the participating traders' approaches to discussions with other traders about relevant pricing for currency pairs. The Response conspicuously does not answer this point.

36. Next, ¶¶27-28 of the Response suggest that Mr Evans' theories of harm would not be sustainable if the participating traders were not able to influence other traders at their bank. In light of Mr Evans' case set out above and in the Evans Further Submissions, these points do not arise. However, for completeness, it is to be noted that:

    (a) For the avoidance of doubt, Mr Evans does not accept the suggestion at ¶27 of the Response that "*his tacit coordination claims cannot survive if he does not have reasonable grounds for alleging that the Respondent banks' spreads were widened on a bank-wide basis.*" It does not automatically follow that tacit coordination would be unsustainable in circumstances where (contrary to Mr Evans' case) the participating traders were not able (or were less able) to influence the spreads charged by their bank overall. In particular, it would be necessary to consider whether there is nevertheless sufficient market power for tacit coordination to be sustainable in those circumstances. For example, in the circumstances hypothesised by the Proposed Defendants, it may be that tacit coordination is nevertheless sustainable, but its effects are reduced. In any event, this is ultimately an empirical question which cannot be fully answered at this early stage of proceedings without a greater understanding of the nature, extent and functioning of the Infringements.[13]

    (b) ¶28 of the Response puts forward the bald proposition that Mr Evans' theory of harm based on increased adverse selection risk depends on "*a sufficient number of traders*" (emphasis original) at the Proposed Defendants having superior

[13] Mr Evans also notes that the Proposed Defendants were unable to assist the Tribunal with any information relating to the volume or value of trading accounted for by the participating traders; see ¶27(a) above.

knowledge to other dealers in the inter-dealer market. The Proposed Defendants cite no evidence or literature in support of that proposition. In any event, the proposition is wrong. Professor Rime has explained that adverse selection risk is a continuous variable: see ¶¶29(b) and 30 above. That being the case, the greater the number of better-informed counterparties and (as a corollary) less well-informed traders, the greater the size of the increased adverse selection risk.

Elasticity of demand

37. Turning next to the Proposed Defendants' arguments concerning elasticity of demand, at the outset, Mr Evans makes two preliminary comments that are central to the correct analysis of this issue, but which the Proposed Defendants have failed to appreciate:

(a) First, contrary to the suggestion at ¶¶30 and 32 of the Response, Mr Evans did not make a late allegation about elasticity of demand in the Evans Further Submissions. It is neither improper nor late for a PCR to address a matter that was specifically raised by the Tribunal at the CPO hearing. Nor were the Evans Further Submissions the first time that his experts addressed the issue of customers switching between banks: Professor Rime had addressed this very issue at the teach-in when describing how the FX market works: see Transcript of Teach-in, page 117.

(b) Second, Mr Evans wishes to make clear that elasticity of demand is not relevant to the increased adverse selection risks arising from the Infringements: cf Response, ¶31. That is because the increased adverse selection risks arising would affect all other FX Dealers, irrespective of price elasticity of demand. As explained in Evans Further Submissions, ¶¶65-66, increased adverse selection risks result in wider bid-ask spreads on the inter-dealer market. This would, in turn, result in wider bid-ask spreads being charged on trades with customers, because prices to customers are typically set at a mark-up to the inter-dealer prices. Indeed, the effect of wider spreads on the inter-dealer market is to increase the costs at which FX Dealers could buy and sell currency to service customer trades, and those costs would be passed on to customers. As a result, even price-sensitive customers wanting to switch would be confronted with other FX Dealers all facing higher adverse selection costs.

38. At the heart of the Proposed Defendants' response to Mr Evans' case that price elasticity of demand is relatively low is their contention (at ¶32 of the Response) that it is contradicted by the written evidence of Mr Evans' experts that spread-setting is a competitive endeavour. However, on closer examination of the written evidence referred to, it is clear that there is no such contradiction.

39. Mr Knight refers to the fact that traders take into account spreads quoted by the competition when setting their own spreads: Knight 1, ¶139(i) **[EV/8/49]**.[14] Likewise, Professor Rime refers to the fact that bid-ask spreads are one of the main ways that FX dealers compete with each other: Rime 1, ¶70 **[EV/9/26-27]**. Their evidence reflects the commercial and economic reality that traders are likely to take into account how their competitors are planning to behave on the market when determining their own behaviour. This reality does not, however, mean or imply that demand for FX transactions was (or was necessarily) highly price-elastic. Moreover, the fact that spread-setting takes into account competitors' likely responses tells one nothing about other factors which determine elasticity of demand, such as the opportunity for switching or the ability and incentive of different types of customers to switch between banks in response to wider bid-ask spreads. The Proposed Defendants appear to have mischaracterised, or misunderstood, what Mr Evans' experts say in their reports.

40. At ¶32(c) of the Response, the Proposed Defendants suggest that Professor Rime's "*equilibrium theory depends on customers switching to other providers in the face of widened spreads.*" If that is intended to be a reference to Professor Rime's equilibrium theory of harm concerning E-Commerce Trading, the Proposed Defendants' assertion is incorrect. On the contrary, that theory of harm is based upon customers switching methods of trading with the same dealer: see Evans Further Submissions, ¶71(b) and see further ¶¶61-65 below. In any event, Mr Evans has acknowledged that, as in most markets, the degree of price elasticity of demand will vary according to customer type. As such, there would be some price-sensitive customers that would have been able and willing to switch in response to a price rise. He has properly taken account of that in setting out his theories of harm: see Evans Further Submissions, ¶¶44-46 and 52.

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[14] "*Spreads quoted by the competition*" was one of nine factors mentioned by Mr Knight as informing spreads for a particular currency pair **[EV/8/48-49]**.

41. The other major argument of the Proposed Defendants is that the FX market is not "*dominated*" by customers with a relationship with a single bank (such as non-financial customers), as opposed to price sensitive financial customers, because the former account for only 13% of turnover, whereas the latter account for 48% of turnover: Response, ¶33. Mr Evans' answer is that the Proposed Defendants' argument is unsustainable for two independent reasons:

(a) In the first place, Mr Evans has not made the sweeping generalisations about the FX market attributed to him by the Proposed Defendants; for example, he has not claimed that the market is "*dominated*" by a particular type of customer. Instead, he has explained, in ¶¶44-46 of the Evans Further Submissions, the reasons why he considers that customers were generally not that responsive to changes in bid-ask spreads during the periods covered by the Infringements, such that any widened bid-ask spreads would not have been prevented or undermined by a sufficient number of customers switching between FX Dealers.

(b) In the second place, the Proposed Defendants' reliance on turnover is apt to mislead. In particular, it ignores the diversity of the Proposed Classes, and that there are a much greater number of non-financial customers, most of whom are SMEs: Ramirez 2, section 3.1.1 (and in particular ¶19) **[C/7/6-13]** and Ramirez 3, section 3.1 **[C/10/7-13]**. It also fails to appreciate that certain types of financial customers may well also face impediments to switching, for example if their FX trading requirements represent a relatively small part of its portfolio of banking services. While Mr Evans acknowledges (in ¶¶45-46 of the Evans Further Submissions) that there would be some price-sensitive customers, he maintains the position that many proposed class members were customers with a relationship with a single bank and did not switch that often: Evans Further Submissions, ¶44.

42. In the premises, Mr Evans maintains his position, supported by the evidence of Mr Knight and Professor Rime, that the price elasticity of demand for FX transactions was relatively low, and accordingly the contentions at ¶34 of the Proposed Defendants' Response (which consist of a further series of wholly unevidenced assertions) do not arise. Furthermore and in any event:

(a) It is important to keep in mind that there are degrees of price elasticity of demand. Accordingly, a higher degree of elasticity does not automatically mean that the

mechanisms Mr Evans relies upon do not "*survive*". Instead, there may still be insufficient elasticity to (say) prevent or undermine tacit coordination, but instead the effects of such coordination may be reduced; and

(b) As explained above, a high degree of elasticity of demand would not undermine Mr Evans' theory of harm relating to increased adverse selection risks: see ¶37(b) above. He joins issue with the Proposed Defendants' suggestions to the contrary, and he has further explained why he considers (contrary to ¶34(b) of the Response) that non-Proposed Defendant banks would widen their spreads as a result of increased adverse selection risks at ¶45(a) below.

RESPONSE, SECTION C: THE ALLEGED DEFECTS IN THE O'HIGGINS PCR'S CASE ON CAUSATION

43. Mr Evans does not address section C of the Response in detail since it relates to alleged defects in the O'Higgins PCR's case. However, this section includes three criticisms of the O'Higgins PCR's theory of harm relating to increased adverse selection risks, and it is unclear whether those points are also made against Mr Evans.[15] To avoid any confusion, Mr Evans briefly summarises his response to those criticisms below.

44. First, Mr Evans has already explained the reasons why (contrary to ¶¶36-39 of the Response), the Proposed Defendants' assertion that the participating traders could not have engaged in a sufficient volume of trades to create increased adverse selection risks, is unfounded: see ¶¶29(b) and 30 above.

45. Second, the Proposed Defendants suggest that the "*assumption that non-Respondent banks would widen spreads to their customers when faced with increased ASR is unsound*": Response, ¶40. The two reasons advanced in support of that position are unfounded:

(a) ¶40(a) of the Response makes the bare assertion that "*there are strong incentives for banks not to widen spreads to customers even in the face of a cost increase in the inter-dealer market given the competitive nature of the FX market*". Mr Evans

[15] Response ¶48, which addresses Mr Evans' theory of harm relating to increased adverse selection risks, makes certain observations which are expressed to be "*[i]n addition to the criticisms of the ASR theory of harm set out above*". It is unclear whether this is intended to be a reference to the matters set out in Section B and/or C of the Response.

has already explained why he considers that banks would have widened, rather than tightened, their bid-ask spreads as a result of increased adverse selection risks: see Evans Further Submissions, ¶¶65 and 67.

(b) ¶40(b) of the Response suggests that the practice of internalisation of FX trades breaks the chain of causation between the inter-dealer and the dealer-to-customer tiers of the market. That assertion is also misplaced. It ignores the point that prices to customers are typically set at a mark-up relative to the inter-dealer prices: see Knight 1, ¶¶138-139 **[EV/8/47-49]** and Rime 1, ¶¶189-191 **[EV/9/60-61]**. Accordingly, the link between the two tiers of the market remains even if the trade is internalised. Moreover, the trader may not know at the time of pricing the trade whether it will be able to offset that trade against another in the opposite direction. As such, its pricing would need to reflect the possibility that it may subsequently transpire that the trade cannot be internalised, in which case the trader may have to lay off that position in the inter-dealer market.

46. Third, ¶41 of the Response contends that the Proposed Defendants had the ability and incentive to maintain or narrow their spreads in response to any widening of spreads by non-Proposed Defendant banks. Mr Evans' case is that the Proposed Defendants would have charged wider spreads to their customers based on his direct theory of harm: see Evans Further Submissions, ¶¶26-46. For completeness, he also notes that Professor Rime has previously explained why (contrary to ¶41(a) of the Response) an information advantage on the part of the Proposed Defendants would be unlikely to lead to narrower spreads charged to their customers, as this would entail foregoing the benefit created by their advantage: see Rime 2, ¶¶49-50 **[C/6/24]**.

RESPONSE, SECTION D: THE ALLEGED DEFECTS IN MR EVANS' THEORIES OF HARM

47. As explained below, the Proposed Defendants' attempts to disparage Mr Evans' theories of harm are unfounded.

Tacit coordination

48. The Proposed Defendants raise three overarching points on Mr Evans' tacit coordination theory of harm.

49. First, the Proposed Defendants purport to summarise "*two key defects*" in his case on tacit coordination: Response, ¶44. Mr Evans rejects those alleged defects and relies on his case on these issues as summarised in the Evans Further Submissions:[16]

(a) ¶¶38-42 explain Mr Evans' case as to why the conditions for tacit coordination to be sustainable are present; and

(b) ¶37 sets out the reasons why he considers that tacit coordination of bid-ask spreads would not be limited to the conduct of the traders participating in the Infringements.

50. Second, ¶45 of the Response takes issue with two of the reasons Mr Evans gives in support of his position that the Proposed Defendants would have widened rather than tightened their spreads as a result of the Infringements. Those criticisms are based on a misunderstanding of Mr Evans' case:

(a) At ¶45(a) of the Response, it is asserted that Mr Evans is wrong to suggest that the increased revenue from a greater volume of trades would have to be very large to offset the revenue lost from narrowing spreads because "*what needs to be compared is the revenue realised when narrowing spreads (reduced revenue per trade multiplied by a higher volume of trades) with the revenue realised when widening spreads (increased revenue per trade multiplied by a lower volume of trades).*" This reasoning misses the point. Mr Evans' case, as set out ¶43 of the Evans Further Submissions, is that the benefits of tightening spreads (and thereby earning a reduced revenue per trade) in order to win more trades would be more uncertain and remote (and thereby less likely to materialise) than the gains from widening spreads (which would increase the profits on trades retained by the Proposed Defendants): see also Rime 2, ¶38 **[C/6/20]**. This is especially so given that price elasticity of demand for FX transactions was relatively low: see Evans Further Submissions, ¶44.

(b) At ¶45(b), the Proposed Defendants contend, in response to Mr Evans' position that tacit coordination of tighter spreads would be much less likely to be sustainable, that "*this wrongly assumes that tacit coordination is necessary to*

[16] Mr Evans has also addressed the Proposed Defendants' criticisms on these alleged defects in ¶¶19-42 above, and previously in Evans CPO Reply, ¶294 **[A/3/83]** and Evans Surrejoinder, ¶¶48-52 **[A/8/15-17]**.

achieve narrower spreads." This mischaracterises Mr Evans' case. He does not assume that tacit coordination is necessary to achieve narrower spreads. Instead, he was explaining the reasons why he considers that tacit coordination would lead to wider (rather than narrower) spreads. In particular, this point was made in response to the Proposed Defendants' own criticisms of the PCRs, made in previous submissions, that the PCRs had wrongly assumed that any coordination would have resulted in wider spreads quoted to customers, and that the Proposed Defendants may instead have narrowed their spreads: see Joint CPO Response, ¶¶94-98 **[A/1/48-49]** and the Proposed Defendants' skeleton argument, ¶¶85-86 **[AB/5/34]**. Mr Evans considers that suggestion to be misconceived, *inter alia* because tacit coordination of narrower spreads would be much less likely to be sustainable. In any event, the suggestion that the Proposed Defendants would have narrowed their spreads as a result of the Infringements is misconceived for the reasons given above and in the Evans Further Submissions.

51. Third, the Proposed Defendants suggest that Mr Evans' reference to increased adverse selection risks at ¶43(b) of the Evans Further Submissions "*indicates that Mr Evans' case on tacit coordination cannot stand on its own and is dependent on the ASR theory of harm, which is also unsound*": Response, ¶46. That criticism is misplaced. Mr Evans refers to the existence of increased adverse selection risks for other FX Dealers as one of the reasons that the Proposed Defendants would be able to sustain charging wider spreads to their customers. It does not follow that Mr Evans' tacit coordination theory of harm is dependent on the theory of harm relating to increased adverse selection risks. In fact, quite the contrary, Mr Evans has advanced other reasons that the Proposed Defendants would have widened their spreads, such as those addressed in ¶50 above, which would be sufficient to cause that widening even in the absence of increased adverse selection risks.

52. In any event, Mr Evans has addressed the Proposed Defendants' criticisms of his theory of harm relating to increased adverse selection risks in order to show that the suggestion that it is "*unsound*" is without merit: see ¶¶44-46 above and ¶¶54-55 below.

Less competitive market conditions

53. The Proposed Defendants raise two objections to Mr Evans' theory of harm concerning less competitive market conditions. Neither is well-founded:

(a) The first objection is that Mr Evans' theory of harm relating to less competitive market conditions should fail because it relies upon his tacit coordination theory of harm. However, this objection falls away for the reasons given above in support of his position that that theory of harm is sound.

(b) The second objection is based upon the unevidenced and unsupported assertion that even if there were tacit coordination by the Proposed Defendants, "*the further assumption that non-Respondent banks would widen spreads in response to a widening of spreads by the Respondent banks, is unsound… if the Respondent banks widened their spreads, non-Respondent banks would have an incentive to respond by maintaining or narrowing their spreads in order to win trades and acquire order flow / information.*" However, the Evans Further Submissions explain at ¶¶52-53 the reasons why Mr Evans considers that non-Proposed Defendant banks would have widened, rather than tightened, their spreads in response to less competitive market conditions. The Proposed Defendants do not address any of those points in the Response.

Increased adverse selection risks

54. At ¶48 of the Response, the Proposed Defendants provide an incomplete and inaccurate summary of the answers that Professor Rime gave at the CPO hearing regarding the types of commercially sensitive information which could be used to generate increased adverse selection risks. In particular, the suggestion that Professor Rime identified current or planned trading activities as the only category of information referred to in the Decisions[17] which would give rise to increased adverse selection risks is incorrect. Professor Rime explained as follows:

(a) In general terms, information which enables the recipient to infer a persistent future change in prices could give rise to increased adverse selection risk: see Transcript Day 2, page 57, lines 14-25 to page 58, lines 1-13; page 66, lines 9-19; and page 110, lines 14-25 to page 111, lines 1-12.

[17] The categories of information referred to in the Decisions are: (1) outstanding customers' orders; (2) open risk positions of the participating traders; (3) other details of current or planned trading activities; and (4) information on bid-ask spreads.

(b) As to the category of information relating to outstanding customers' orders (which comprises three particular types of order, namely: (a) immediate orders; (b) conditional orders; and (c) orders for the fix (or **"benchmark trades**"): see recital 55 to the Decisions **[EV/2/13-14; EV/3/13]**) he considers that customers' immediate orders could give rise to increased adverse selection risks: Transcript Day 2, page 59, lines 9-14; page 61, lines 6-10; and page 112, lines 4-6. Indeed, Professor Rime explained that he considered "*that source… will be the most important source for giving rise to adverse selection*": Transcript Day 2, page 59, lines 9-14. He also accepted that information relating to conditional orders and benchmark trades could not give rise to increased adverse selection risks: Transcript Day 2, page 59, lines 17-23.

(c) In relation to information concerning the open risk positions of the participating traders, Professor Rime explained that he interpreted this category "*primarily as a request from a dealer to other dealers to not stand in their way when they are doing risk management, inventory control.*" If that interpretation is correct,[18] then he considers this information could not give rise to increased adverse selection risks, because information relating to inventory control would have a temporary price impact: Transcript Day 2, page 111, lines 24-25 to page 112, lines 1-3.

(d) Information relating to current or planned trading activities could give rise to increased adverse selection risks "*to the extent that that is signalling that I have received the customer trade and want to speculate on it…*" Professor Rime went on to explain that *"[t]o the extent that that is signalling front-running, that would not give rise to adverse selection because front running has a temporary impact on prices.*": Transcript Day 2, page 112, lines 9-16.

(e) Information relating to bid-ask spreads does not give rise to increased adverse selection risks: Transcript Day 2, page 59, lines 4-7; and page 112, lines 17-19.

55. Accordingly, the premise upon which the Proposed Defendants contend that that "*only a limited subset of the commercially sensitive information exchanged in the chatrooms could generate increased [adverse selection risks]*" (Response, ¶48) is wrong. It is not

[18] This will become clear on a review of the chatroom transcripts, which will clarify the exact nature of the information exchanged.

supported by Professor Rime's evidence. Nor (in any event) is that contention relevant. If the Proposed Defendants are seeking to suggest that information which could give rise to increased adverse selection risks was shared on an infrequent basis, this does not assist them for two reasons:

(a) First, it ignores the Commission's findings that the exchanges of commercially sensitive information in the chatrooms took place on an extensive and recurrent basis. For example, recital 101 to the Decisions records that "*[t]he participating traders maintained a consistent pattern of nearly daily communications where they had extensive and recurrent information exchanges… They were under the assumption that, by behaving recurrently in such way, they were increasing the knowledge with which they operated on the market and the probabilities to seize opportunities to their benefit.*"[19] **[EV/2/23; EV/3/23]**

(b) Second, and in any event, even if (*quod non*) it were to transpire that information giving rise to increased adverse selection risks was exchanged on an infrequent basis, Mr Evans has explained that this would still be sufficient to give rise to harm to members of his Proposed Class B: see ¶30 above.

E-Commerce Transactions

56. Finally, the Proposed Defendants dispute the two mechanisms by which Mr Evans considers that bid-ask spreads on electronic trading platforms would have been affected by the Infringements. They are addressed in turn below.

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[19] Of course, the frequency with which each category of information was exchanged in the chatrooms will become clear upon disclosure of the chatroom transcripts. In any event, an indication of their frequency can be obtained from the footnotes to the Decisions, which identify examples of the different types of conduct by reference to chats taking place on a particular date. Mr Evans has compiled tables which identify those example dates in his Amended Collective Proceedings Claim Form: see, in particular, ¶210A (open risk positions) **[EV/1/85-86]**; ¶211A (outstanding customers' orders) **[EV/1/87-90]**; ¶213A (current or planned trading activities) **[EV/1/90-91]**; and ¶215A (bid-ask spreads) **[EV/1/92-93]**. It must, however, be stressed that these are examples of the infringing conduct only. In addition, it is to be noted that the Decisions record that information relating to current or planned trading activities (which Professor Rime considers could give rise to increased adverse selection risks: see ¶54(d) above) was disclosed on a "*recurrent*" basis: see recital 57 to the Decisions **[EV/2/14; EV/3/14]**.

Pricing inputs into trading algorithms

57. As a preliminary point, Mr Evans notes that the Proposed Defendants inaccurately summarise his case as to the first mechanism at ¶49(a) of the Response. They say Mr Evans' position is that ""*[T]o the extent*" *that inter-dealer spreads are an input into the computer algorithms, then they would affect spreads for E-Commerce Transactions*".

58. However, Mr Evans' case is not limited to inter-dealer spreads. ¶71(a) of the Evans Further Submissions states that "*[t]o the extent that <u>any inputs</u> into the pricing algorithms were affected by the Infringements, they would in turn have affected bid-ask spreads on electronic platforms. <u>In particular</u>, Professor Rime and Mr Knight consider it is likely that the pricing algorithms would have used prices on the inter-dealer market as an input…*" (emphasis added) This reflects the evidence of Professor Rime, who explains that a pricing algorithm "*may also be programmed to take account of other pricing data, such as wider market pricing on other platforms. Therefore, to the extent that those prices were also affected by widened bid-ask spreads as a result of the Cartels, this would also be reflected in the prices set by the algorithm*": Rime 1, ¶196. **[EV/9/63]**

59. ¶¶50-52 of the Response seeks to suggest that neither Mr Knight nor Professor Rime has offered "*any basis*" for Mr Evans' case that it is likely that inter-dealer spreads determine spreads on E-Commerce Transactions. The Proposed Defendants also appear to suggest that Mr Knight and Professor Rime's evidence on this issue has not been consistent. Those suggestions are groundless:

    (a) In their first reports, Mr Knight and Professor Rime explained the reasons why they considered that prices on the inter-dealer market would be one of the inputs into pricing algorithms: see Knight 1, ¶181 **[EV/8/61]** and Rime 1, ¶196 **[EV/9/62-63]**.

    (b) In their second reports, Mr Knight and Professor Rime properly accept that they cannot know for certain what inputs are used in each electronic platform, since this is proprietary information belonging to each FX Dealer. Nevertheless, they explained why, based on their expertise and having regard to the importance of information derived from the inter-dealer market, they consider it is likely that inter-dealer pricing would be used as an input to determine the prices on electronic platforms: see Knight 2, section 4.1 **[C/5/12-13]** and Rime 2, ¶¶99-102 **[C/6/48-49]**. This is in no way inconsistent with their previous reports: their clear view

throughout is that inter-dealer prices are likely to be an input into pricing algorithms.

60. It is regrettable that the Proposed Defendants have not advanced any positive case, or adduced any evidence, concerning the inputs used into their algorithms. As noted above, that information is uniquely within their knowledge, and yet they have not sought to assist the Tribunal or the parties on this matter.

The relationship between voice and electronic methods of trading

61. The second mechanism by which Mr Evans considers that bid-ask spreads on electronic trading platforms would have been affected by the Infringements is based on the economic principle of equilibrium: Evans Further Submissions, ¶71(b). This principle means that "*bid-ask spreads offered through different methods of trading (such as voice trading and electronic trading platforms) will, all other things being equal, remain consistent. This is because differences in bid-ask spreads will create changes in demand that will act to correct spreads back to equilibrium.*" For example, "*if the bid-ask spreads offered by a FX Dealer's electronic platform are perceived to be more competitive by its customers than voice trading, then some customers would choose to trade on the electronic platform rather than with voice traders. This increased demand on the platform would indicate that wider bid-ask spreads could be charged without losing customers*".

62. At ¶¶54-55 of the Response, the Proposed Defendants allege that there is a "*fatal error of reasoning*" in Professor Rime's evidence.[20] They suggest that "*the reverse is true: even if the spreads offered by voice traders did widen and drive demand to E-Commerce platforms, then that increase in liquidity would cause spreads for E-Commerce Transactions to narrow rather than widen.*"

63. However, it is the Proposed Defendants' own reasoning that is flawed, since it confuses liquidity and demand.

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[20] For completeness, Mr Evans notes that the assertions in ¶53 of the Response as to the factors which may exert a narrowing force on spreads on E-Commerce Transactions are wholly unevidenced. Professor Rime has nevertheless explained why he considers that they would not be sufficient to lead to market participants responding to an increase in demand by maintaining narrower spreads on E-Commerce Transactions: see ¶¶107-109 of Rime 2 **[C/6/51]**.

64. Changes in overall liquidity may well affect bid-ask spreads, since they impact on the amount of currency that may be available to trade at that time. As such, an increase in overall liquidity could result in narrower bid-ask spreads: see, for example, Knight 1, ¶139(e) **[EV/8/48]**. However, shifts in demand from one platform to another do not affect overall liquidity, and therefore would not have the effect of resulting in narrower bid-ask spreads as the Proposed Defendants suggest.[21]

65. It follows that the Proposed Defendants' objections to Mr Evans' second mechanism are unfounded. Further, and in any event, the Proposed Defendants' case is contradicted by their own acceptance that there is indeed a relationship between voice and electronic trades: see Joint CPO Rejoinder, ¶94 **[A/6/42]**.

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24 September 2021

[21] See also the exchanges between the Tribunal and counsel for MUFG at Transcript Day 4, page 36, line 19 to page 39, line 17.