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Case No: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant / Proposed Class Representative

-and-

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.P.R.L.

Respondents / Proposed Defendants

APPLICANT'S REPLY TO THE RESPONDENTS' RESPONSE TO THE APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER

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PART I: INTRODUCTION

1. Under Rule 77 of the Competition Appeal Tribunal Rules 2015 ("**the Rules**"), the Tribunal may make a collective proceedings order only:

    a. if it considers that the proposed class representative is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with Rule 78; and

    b. in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with Rule 79.

2. It appears from Mastercard's Response that, save for one point concerning an alleged conflict arising out of the funding arrangements (addressed in paragraph 138 below), it raises no objection to Mr. Merricks as class representative.

3. Instead, Mastercard directs its objections to the certification of the claims for inclusion in collective proceedings. It says that "…*certification should be refused in its entirety…*" (Part III of its Response), alternatively, that "…*certification of quantum issues should be refused…*" (Part IV of its Response), which is itself subject to an alternative of certification of compound interest being refused (in paragraph 113).

4. For convenience, in the following document the Applicant follows the structure of Mastercard's various arguments and deals with them in turn. However, by way of introduction, three points should be emphasised.

5. First, as Mastercard says in paragraph 2 of its Response, these are early days for the collective proceedings regime. This is a regime which is designed to give redress to exactly the sorts of individuals who are members of the proposed class. Mastercard itself says "…*it is common ground that an assessment of compensatory damages for each individual class member would be impracticable, indeed impossible…*" (paragraph 54, Response). Of course, this remark is entirely right: each such individual claim would involve assessing the volume of commerce by reference to an individual's detailed purchasing history (or so Mastercard would say), assessing the overcharge (what IFs were

charged in fact? what IFs, if any, would have been charged in the counterfactual?), assessing pass-on (according to Mastercard this exercise should be undertaken for each of the potentially hundreds or thousands of businesses from which that individual made a purchase during the relevant period). All that for, say, a few hundred pounds damages in total (which whilst still a meaningful sum for an individual, is a fraction of the cost involved in the process Mastercard says needs to be undertaken). This sort of approach is palpably "*impracticable, indeed impossible*" on an individual basis – just as Mastercard accepts. In truth, the only way that the individuals concerned can access *any* remedy for the damage that they have sustained as a consequence of Mastercard's proven infringement of competition law is through assessing the loss of all consumers who have all paid higher retail prices and aggregating that loss. This is the purpose of the new collective proceedings regime – and particularly opt-out cases. Whilst dealing with the many objections which Mastercard strews in the path of these proceedings, the Tribunal should, the Applicant suggests, have at the forefront of its mind the impossibility of individual proceedings and the fact that given limitation periods, this collective action is the only and last opportunity for consumers to get redress for Mastercard's proven infringement of competition law. Indeed, it is plain in light of the various factors in Rule 79 that an essential function of the collective proceedings regime is to provide a remedy for individuals in circumstances where otherwise there would be no practicable means of vindicating individual rights to compensation.

6. Secondly, rather than address all the factors in Rule 79, Mastercard focuses on whether the aggregate damages claimed (and their subsequent distribution) are sufficiently "*compensatory*" and, in particular, whether they can be assessed reliably. The Applicant deals fully with this series of objections below, but in a nutshell, the proposed aggregate damages award is entirely in keeping with conventional tortious principles. Both the underlying theory and the proposed means of quantifying loss are designed as accurately as possible to achieve compensation for the class, taking account of the size of the class and the time period covered by the claim. It is well established that, in compensating victims of torts, the English courts are well used to using a

"*sound imagination*" and "*broad axe*" and that their approach will be guided by the need to ensure an effective remedy and, above all, to do justice. This Tribunal should not deny UK consumers the right they have as a matter of both English and EU law to be compensated for damages caused by Mastercard's breach of competition law, just because the issues raised by this proposed collective proceedings are difficult and may require developments to be made to the common law to ensure the new collective regime can function.

7. Thirdly, and finally, a notable feature of the Response is to assert that the proposed claim is defective in certain respects and intimate various future applications to strike out parts of the proposed claim or persuade the Tribunal to determine preliminary issues. The Applicant responds that, since those issues are (quite properly) not raised for determination at this hearing, they should be discounted. It would not be appropriate, for example, for the Tribunal to take into account the limitation argument raised by Mastercard in Part V of its Response in circumstances where Mastercard has expressly accepted that this argument should not be determined at this hearing. A similar point applies to the submissions in respect of the domestic IFs, which Mastercard, apparently, "*does not ask the Tribunal to decide*" (paragraph 88) and yet sets out at considerable length. Mastercard has not yet pleaded its position in relation to these issues and so the Applicant is not in a proper position to respond. The Applicant also notes that, by contrast with most "conventional" litigation, there is in these proposed collective proceedings, a huge information asymmetry. The unsupported assertions of fact contained in the Response must be viewed in that light and the Applicant must be afforded the opportunity to test these assertions with the benefit of disclosure and witness evidence. The Applicant has demonstrated that he has a claim that is considered, plausible and well funded. Any well-founded issue raised by Mastercard or identified by the Tribunal can and will be resolved by the Applicant with the assistance of the Tribunal as the proposed collective proceedings progress.

8. In conclusion, the Applicant respectfully submits that the Tribunal should reject Mastercard's submissions and should grant his application for a collective proceedings order.

PART II: OUTLINE OF MR MERRICKS' REPLY

9. As explained above, this Reply mirrors the structure of Mastercard's Response, as follows:

10. The Applicant makes brief responsive submissions to Mastercard's Annex on the regimes in Canada, Australia and the United States in Annex A to this Reply. As Mastercard itself suggests, the proper interpretation of the UK regime is to be determined in accordance with domestic legislation. However, Mastercard makes certain assertions about those foreign regimes which are not accepted by the Applicant.

PART III: MASTERCARD'S CLAIM THAT CERTIFICATION SHOULD BE REFUSED IN ITS ENTIRETY

11. Part III of Mastercard's Response sets out its "*primary submission*" (paragraph 10, Response). That submission is that the CPO should be refused in its entirety, on the basis that:

    a. "…an award of aggregate damages in this case would be inimical to the compensatory nature of damages and impossible to assess on any reliable basis…" (paragraph 10(a), Response); and/or

    b. "…the proposed distribution mechanism to individual members of the class would also be inimical to the compensatory nature of damages as the amounts received by individuals would bear no reasonable relationship to their actual loss…" (paragraph 10(b), Response).

12. Both of these submissions are wrong and/or not germane to the current stage of the proceedings. In broad overview:

    a. the availability of an aggregate award of damages in the collective proceedings regime (including by way of express inclusion in the primary legislation) necessarily means that loss may lawfully be calculated on a class-wide basis "…*without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person*…" (emphasis added): see s.47C(2) of the Competition Act 1998;

    b. the Applicant entirely accepts that the class-wide loss should be calculated in line with conventional common law tortious principles (as modified by the statutory regime and/or by EU law) and this is the basis on which the Application proceeds. These common law principles include, of course, the principle of compensation. However, the common law, statutory and EU context includes other significant principles, such as the need to provide effective remedies and the need to do justice, if necessary at a broad level. There is also the need for the Tribunal to consider how the common law should be developed in the context of an entirely new collective action procedure that is aimed

at providing redress, inter alia, to very large classes of claimants. These principles – and their impact on how the issues of causation and quantum should be determined in this case – will be ventilated and extensively argued during the trial, if the CPO is granted. It is not necessary, appropriate or possible to resolve them now, at the very initial certification stage;

c. the Applicant's position is that seeking an aggregate award is entirely lawful and appropriate in the current context, in keeping with tortious principles and, specifically, (a) can be assessed on a reliable basis and (b) does bear a reasonable relationship to actual loss. However, even if judgment is ultimately against him on some of these points, there is nothing in the proposed collective proceedings which is, even arguably, so "*inimical*" to fundamental tortious principles, as applied in this context, that the CPO ought not to be granted. Mastercard is trying to shut out the proposed collective proceedings altogether using arguments which (i) are more appropriately determined at trial and (ii) if accepted at the CPO stage, would effectively emasculate the new legislative regime. The Applicant considers it of great importance that the Tribunal demonstrates that the regime can be seen to work for a mass consumer action. Not certifying now, because of alleged difficulties presented at this stage, all of which can be resolved (if they really exist) at a later stage - *after* there has been a pleaded Defence, and *after* the massive information asymmetry between the parties has been addressed – would send a very chilling message to other putative claimants under the new regime, and especially classes of consumer claimants;

d. Mastercard's complaints about the absence of a compensatory approach appear largely to be complaints about distribution because, as stated above, the quantification of loss suffered by the class as a whole is intended to be compensatory. As to distribution, of course, ideally, class members would each be compensated according to their exact loss. However, the *raison d'être* of the aggregate damages

regime is precisely that such individual calculation might be inappropriate or indeed impossible – with the archetypal example being none other than a mass consumer claim with modest *per capita* recovery, such as the current proposed proceedings. With this point firmly in mind, and cognisant also of the purpose of the Consumer Rights Act being to facilitate, *inter alia*, just such claims, the well-founded concern of the Applicant and his highly experienced claims administrator is that:

i. it is not possible or sensible now to formulate detailed distribution mechanisms, before it is even known:

   1 what the aggregate award may be; and

   2 what the final class size is, including the presence of opt-in and the number of opt-outs, as well as whether the Tribunal determines that there is a need for sub-classes; and

ii. the more complex and demanding the distribution mechanism, so as to seek to achieve greater compensatory provision at an individual level (for example, requiring receipts for purchases - to the extent that class members would even have receipts for items they purchased over 20 years ago), then:

   1 the less likely that class members will come forward to claim their share; and

   2 the more expensive and disproportionate the cost may be, even to the point of effectively disabling the prosecution of the claim altogether.[1]

[1] The Applicant is mindful that he needs to undertake a distribution process that is reasonable and proportionate, given that the costs of the distribution would be recoverable costs. It is all very well for Mastercard, at this early stage, to submit that the Applicant has not set out a way in which to achieve a perfect distribution of damages that reflects the individual loss of each of the 46 million class members. However, even if that were required and could be done (which the Applicant does

13. It is against this background that the Applicant and his claims administrator have, at the present stage, suggested that the aggregate damages will be allocated amongst the class members based on the number of years they were in the class, this being a reasonable proxy for the differing degree of damages class members will have suffered. However, the Tribunal, and indeed Mastercard, may rest assured that we all sing with one voice on this issue: distribution should be as compensatory as possible, taking into account countervailing factors (such as the claims process being straightforward and proportionate). Again, the Applicant's position is that there is no, even arguable, basis on which Mastercard can say that alleged concerns about distribution, arising in practice *after* an aggregate award has been made, should mean that the proposed collective proceedings should not even be certified.

14. Indeed, the statutory regime expressly envisages (see Rule 92) a process after the Tribunal has made an aggregate award, under which the Tribunal gives directions as to how the aggregate award should be distributed. Paragraphs 6.82 to 6.86 of the Tribunal's Guide to Proceedings (the "**Guide**") also make clear that this should take place after the aggregate award is made.

15. It will not have escaped the Tribunal's attention that the only party to gain, if Mastercard succeeds in its arguments, will be the proven wrongdoer. It is a real wolf in sheep's clothing; since the compensation cannot be individually perfect, so the argument goes, there should be no compensation at all - even though the legislation is intended to facilitate actions in just the current sort of circumstances. The clear public policy intention behind the introduction of the new collective action regime was to facilitate access to justice, particularly for consumers, not to create a new procedure that effectively operates in the same manner as the existing regime that has resulted in only one consumer claim (*Replica Football Kits*). The Applicant's approach emphatically does not envisage a restitutionary or disgorgement basis for damages (as alleged in paragraph 96, Response). To the contrary, it is expressly intended to provide, in a realistic and practicable manner, compensation to a class of victims of the

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not accept), the cost of doing so would run into many tens of millions of pounds and then Mastercard would, no doubt, assert that the costs are disproportionate.

proven illegal behaviour, which compensation they would not otherwise be able to obtain.

16. For ease of reference, the Applicant adopts the same structure below as Mastercard.

A: FUNDAMENTAL PRINCIPLES OF TORT LAW

17. In paragraphs 11-17 of its Response, Mastercard essentially submits that (i) the most appropriate domestic cause of action for follow-on damages claim is breach of statutory duty; (ii) it is a general principle that damages for torts are compensatory; but acknowledges that (iii) there is no need to prove exact loss, since damages can be assessed using a "*sound imagination*" and a "*broad axe*".

18. These propositions are uncontroversial so far as they go. However, they do not begin to paint the full picture.

19. *First*, the starting point is the primary legislation. Section 47C(2) CA 1998 expressly states that aggregate damages are permitted. This new feature of English law is unsurprisingly supported by the Rules, which are themselves made by way of statutory instrument, and by the Guide. The general principles of tort must be taken to be modified to the extent necessary to comply with, and indeed to further the purpose of, this new statutory regime.

20. *Secondly*, in the present context, the influence of EU law and the need to provide effective remedies for victims of breaches of fundamental EU law principles should be properly taken into account. By way of example, in paragraph 9 of the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU (2013/C 167/07), it says:

> "One consequence of the principle of effectiveness is that applicable national legal rules and their interpretation should reflect the difficulties and limits inherent to quantifying harm in competition cases. The quantification of such harm requires comparing the actual position of the injured party with the position this party would have been in without

the infringement. This is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement. Quantification of harm in competition cases has always, by its very nature, been characterised by considerable limits to the degree of certainty and precision that can be expected. Sometimes only approximate estimates are possible (FN: The limits of such assessments of a hypothetical situation have been recognised by the Court of Justice in the context of quantifying the loss of earnings in an action for damages against the European Community, see Joined Cases C-104/89 and C-37/90, Mulder and others v Council [2000] ECR I-203, 79)".

21. Similarly, the Damages Directive[2] provides in Article 17(1) that "…Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available…". At all points, the legislation and sub-legislation needs to be construed and applied so as to give proper effect to EU law.

22. Thirdly, in the hierarchy of common law principles there is, even above the compensatory principle, the principle of doing justice. As Lord Nicholls held in Attorney General v Blake [2001] 1 AC 268, having referred to the compensatory nature of damages and the words of Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 (cited in paragraph 14(a), Response), "…But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The Directive has not yet been transposed into English law but the Bill transposing the Directive into national law is expected to be passed before the Tribunal gives its judgment on the Application.

application of this principle would not do justice between the parties…" (pp. 278-279).

23. *Fourthly*, one example of when the compensatory principle may be flexed at common law is when a defendant asserts that a claimant's recoverable loss should be diminished by reference to receipts that it would not have received absent the tort (see e.g. *Parry v Cleaver* [1970] AC 1, in particular per Lord Reid at p. 13F and 14: "…*the common law has treated this matter as one depending on justice, reasonableness and public policy... It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer…*"). Another example is the well-known approach to assessing damages under *Wrotham Park* principles, namely, an objectively just, but entirely hypothetical, negotiation for release of a right which (at least) one party would never have negotiated about in fact.

24. *Fifthly*, in terms of proving quantum of loss, Mastercard is right to acknowledge that the law permits the use of a *"sound imagination*" and a "*broad axe*" (paragraph 15, Response) and also correctly identifies the principle that this approach is circumstance-specific (paragraph 16). As per Bowen L.J. in *Ratcliffe v Evan*s [1892] 2 QB 524 (at 532-533):

> "*In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry*.".

25. This principle has a long pedigree, with the leading case on the issue of certainty being *Chaplin v Hicks* [1911] 2 KB 786 CA. Although this was a breach of contract case, the Applicant suggests that the following words from Vaughan Williams LJ are of equal application here: "…*Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages…*" (pp. 792-793). For a recent application of this principle, see *Van der Garde v Force India Formula One Team Ltd* [2010] EWHC 2373 QB.

26. *Sixthly*, in footnote 5 of its Response, Mastercard submits that, where there is a lack of evidence, the court should err on the side of under-compensation, to "*give the defendants the benefit of any doubts*". However, the position is not nearly so simple. For example, in cases such as *Chaplin v Hicks*, and the many "loss of a chance" cases which have followed it, there has been no suggestion of such a principle. By way of further example, under the principle in *Armory v Delamirie* (1721) 1 Str 505, where the defendant is in control of (and does not provide) the relevant evidence, the presumption should be in the claimant's favour: see the recent endorsement of this principle in the phone hacking case *Gulati v MGN Ltd* [2016] 2 WLR 1217, in which it was not possible to determine how extensive the hacking had been since MGN had not retained the evidence. Arden LJ held, paragraph 107, that *"…Armory v Delamirie is an example of the ability of the law to prevent a person responsible for wrongdoing from escaping liability to his victim, without disturbing the general rule as to the conditions of liability. In this case, too, the judge was not prevented from making proper awards by the absence of records detailing the hacking and other wrongful activities. ... The principle of the rule of law is clear: in the words of Thomas Fuller, quoted by Lord Denning MR in Gouriet v Union of Post Office Workers [1977] QB 729, 762, reversed [1978] AC 435 , "Be you [n]ever so high, the law is above you".* Similarly, in solicitor's negligence cases, such as *Mount v Barker Austin* [1998] PNLR 493, Simon Brown LJ held that "…*generally speaking, one would expect the court to tend towards a generous assessment*

given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure…" (510).

27. In a very recent further example of direct relevance, in *Sainsbury's Supermarkets Ltd v Mastercard* [2016] CAT 11 (***"Sainsburys"***), the Tribunal held that it did not have data in respect of the MIF which applied to each type of card, and instead could only calculate blended rates (paragraphs (199(2), (201(3), (226(3)). There is no indication that it was suggested to the Tribunal that such blended rates should be set at a level which benefited the defendants, nor that the blending of the rates was an insufficiently reliable measure of quantum.

28. *Seventhly*, and in particular in respect of the principles which might be taken into account at the stage of distribution, it is instructive to look to the words of Arden LJ in *Devenish Nutrition Ltd v Sanofi-Aventis SA:*

> *"98 So far as the procedure for collective claims is concerned, there is experience in the personal injuries field on which an appropriate procedure could be based: see for example the collective action on vibration white finger against British Coal: AB v British Coal Corpn (Department of Trade and Industry) [2007] PIQR P93 , after which a collective compensation agreement, which required affected persons to submit their claims, along with medical evidence, through authorised solicitors to be compensated on the basis of an agreed damages formula, was introduced. But there may be special difficulties in this field due to the fact that consumers may not know that they have been victims of cartels or be unable to prove that they made any relevant purchase or have no incentive to bring any claim.*
>
> *...*
>
> 100 Mr Vajda in his reply referred to the collective action for the enforcement of violations of competition law. For example, after an investigation, the OFT fined JJB Sports for overcharging on England and Manchester United football shirts in 2000 and 2001. Following this ruling the Consumers' Association also brought an action on behalf of

the overcharged consumers, Consumer's Association v JJB Sports plc [2009] CAT 2. In a settlement agreed between the parties, approved by the Competition Appeal Tribunal by an order of Lord Carlile of Berriew QC dated 14 January 2008, JJB Sports agreed to compensate directly any customers who were parties to the action with £20. Other affected customers who were not parties to the association's action could, on production of the relevant replica shirt, reclaim either £10 if the label was still intact or £5 if it was not. These customers were required to have their replica shirts indelibly marked and sign a document waiving the right to further legal action against JJB Sports."

29. Accordingly, in the Applicant's submission, the legal arguments with which the Tribunal will be confronted as the collective proceedings progress are likely to be rather more sophisticated than might be inferred from Mastercard's submissions. In particular, the Applicant submits that the legislative intent behind the new collective proceedings regime is to provide effective redress where previously none has been available (as explored further below). The common law is more than sufficiently flexible to allow this objective to be met and, in particular, in the current proposed proceedings, to allow relatively low (*per capita*) value consumer actions to be brought successfully.

B: LEGAL FRAMEWORK FOR COLLECTIVE PROCEEDINGS

30. In paragraphs 18-25 of its Response, Mastercard sets out some of the provisions which relate to the bringing of collective proceedings. These references are accurate, so far as they go.

31. What Mastercard singularly fails to do, however, is recognise the legislative purpose behind the new regime. For example, paragraph 435 of the Explanatory Notes to the Consumer Rights Act says: "*The purpose of introducing opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law.*" The introduction of this regime was preceded by various pieces of consultation and research, which affirmed this same objective. For example, in "Private actions in competition law: a consultation on options for reform – government response" (January 2013) the government concluded that

"…*breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning that it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs - as well as acting as a further deterrent to anyone thinking of breaking the law…*" (p.6)

C: AGGREGATE AWARD OF DAMAGES

32. In paragraph 26-30, Mastercard sets out some of the provisions which relate specifically to aggregate awards of damages. The Applicant agrees with the interpretation placed on these provisions by Mastercard at paragraph 29 of its Response: the purpose of the power of the Tribunal to make aggregate awards is precisely to make an award in respect of loss that has been suffered *by the class as a whole*, rather than requiring each member of the class to prove the quantum of his/her loss. The Applicant's position is that all the members of the proposed class have suffered some loss; but so long as the loss suffered by the class as a whole is calculated in accordance with the law (including the principle of compensation), (i) there is no need for the loss suffered by each member of the proposed class to be quantified individually and (ii) after the CPO has been granted, and damages awarded, the Tribunal has full powers to direct a suitable method or methods of distribution. Individual calculation would defeat the very purpose of the statutory provisions permitting aggregate awards (especially in opt-out cases).

33. Notably, Mastercard notably does not refer to paragraph 6.83 of the Guide. It provides that:

> "*Typically, the defendant will not be involved in the process of determining how the award is to be distributed among the class. Accordingly, subject to submissions from any members of the class, the determination by the Tribunal as to the entitlement of the individual class members will not follow adversarial argument. The Tribunal will be concerned to ensure that the method proposed by the class representative is fair to the interests of all class members." (emphasis added)*

34. This paragraph indicates, in the Applicant's submission, that – so long as the aggregate award is calculated properly a process in which clearly Mastercard has an interest) – Mastercard has no direct interest in how that (properly calculated) award is ultimately distributed.

D:THE LAW ON PASS-ON

35. In paragraphs 31-35 of its Response, Mastercard relies on the Tribunal's judgment in Sainsbury's. The Applicant makes seven observations about that case.

36. *First*, Mastercard sought and continues to seek permission to appeal the judgment, including on the basis that the Tribunal's conclusions on pass-on were flawed (see paragraph 12 of the Ruling (Permission to Appeal) of 22 November 2016). The Tribunal having refused permission, Mastercard is now applying to the Court of Appeal (paragraph 35, Response).

37. *Secondly*, Mastercard's application for permission to appeal the Tribunal's conclusions in relation to pass-on in *Sainsbury's* are entirely unsurprising. Mastercard's case in open Court, and supported by Mastercard's own expert and factual evidence, was that there was pass-on of between 50-100%, and that it was closer to 100% than 50% (see the references in paragraph 107(e), Claim Form). Indeed, Mastercard maintains this same defence in all the other retailer merchant actions which are ongoing (not finding itself compromised in respect of this issue by reason of the judgment in *Sainsbury's*, despite apparently seeking to suggest that the Applicant should be so limited). On this pass-on issue, therefore, it seems that the Applicant and Mastercard will sing with one voice.

38. *Thirdly*, and in any event, on their proper construction the paragraphs in *Sainsbury's* which are relied on by Mastercard relate to pass-on as a defence. It is clear that the Tribunal believed that the legal test for establishing pass-on would be different in other contexts, not least since it held that there had been a 50% pass-on for the purposes of calculating interest (paragraphs 525-526, Judgment). Indeed, it expressly said that, "…*we consider that a substantial amount of the UK MIF – 50% - would have been passed on (albeit not in a*

manner which would have amounted to a "defence" of pass-on, for the reasons given at paragraphs 484-485)…" (paragraph 525(1), Judgment). It is surprising that Mastercard makes no reference to this further finding of the Tribunal in its Response.

39. *Fourthly*, the Tribunal held that, in order to benefit from pass-on "*as a defence*", the defendant needed to show that there existed another class of claimant, downstream of the claimants in the action, to whom the overcharge had been passed on and who were in a position to claim (*Sainsbury's* judgment, paragraphs 484(5) and 485). It is palpably unfair for Mastercard to rely on its own failure to meet this test, i.e. by failing to advance the proposed class as potential claimants, as a reason against allowing these proposed collective proceedings to be certified.

40. *Fifthly*, Mastercard relies on *Sainsbury's* for the conclusion that "…*it is plainly not appropriate to adopt a global approach for all the merchants in the UK as a whole…*" (paragraph 35, Response). This response is very curious; so far as the Applicant is aware, Mastercard is claiming complete pass-on (ironically, to members of the current proposed class) in all of the current merchant damages claims that it faces. These claims are made in a number of different sectors. Therefore, Mastercard appears in its defence of these various claims not to be drawing a distinction between different retail sectors so far as pass-on is concerned. If this is incorrect, then Mastercard will no doubt inform the Tribunal. In any event, the Applicant does not see how *Sainsbury's* has anything to say on this issue of global pass-on rates (since, necessarily, the Tribunal was considering pass-on for Sainsbury's only in that case). Moreover, the Applicant does not propose that a global approach be adopted for all merchants (and instead has suggested that it be approached sector by sector), unless such an approach is supported by the relevant expert.

41. *Sixthly*, neither the Applicant nor any member of the proposed class, was represented at, or is bound by, *Sainsbury's* in the proposed collective proceedings.

42. *Seventhly*, even if the Tribunal were to treat the *Sainsbury's* judgment as persuasive, that could only be so in relation to the particular circumstances of Sainsbury's supermarkets themselves and the facts of that case. However, that is a tiny fraction of the relevant VOC in these proposed proceedings.

E: THE CLAIM FORM

43. In paragraphs 36-38 of its Response, Mastercard correctly infers that, were the Tribunal to decide that loss for each member of the class should be quantified on an individual basis, the Applicant would not be able to proceed with the collective proceedings. As Mastercard itself acknowledges, in paragraph 54 of its Response, "…*it is common ground that an assessment of compensatory damages for each individual class member would be impracticable, indeed impossible…*" (emphasis added).

44. Paragraphs 39-44 of the Response purport to summarise the basic approach to calculation of loss proposed by the Applicant's experts. The Tribunal should, of course, bear in mind that the Expert Report submitted by the Applicant in support of this CPO Application is directed at the question of common issues. There is no obligation to provide such a report: Paragraph 6.13 of the Guide provides only that an expert report *may* be included to assist in identifying common issues. It is, therefore, inappropriate and unfair to criticise the Report for failing to constitute a detailed exposition of the Applicant's proposed case on quantum; it is far too early for that. Moreover, it is noteworthy that Mastercard has not sought to adduce any responsive expert report.

45. For the purpose of opining on common issues at this early stage (pre-Defence even), the Expert Report explains in brief outline that the proposed calculation of loss will require calculation of (i) the VOC, (ii) the Overcharge and (iii) pass-on rates (both from acquirers to merchants, and from merchants to consumers). In respect of pass-on from merchants to consumers, the proposal is to calculate a single, but not necessarily constant, weighted average rate of pass-on across the UK economy (paragraph 41).

46. Mastercard does not, in this part of its Response, refer to the Experts' preliminary proposals for reaching such a weighted average. These proposals

are set out in paragraph 6.2.3 and Appendix 3 of the Expert Report. Essentially, the Experts' preliminary view is that pass-on might be assessed across key sectors, in order to accommodate any differing rates. It appears to the Experts at this preliminary stage that this process will be assisted by available market studies, competition authority decisions, other research, and also by evidence and analysis available as a result of the ever increasing number of merchant damages claims that have been brought against Mastercard. This preliminary proposal is expanded upon below, where the Applicant addresses paragraphs 57-61 of the Response.

47. In paragraphs 42-43, Mastercard focuses on the statement that the Experts' view "…*at this preliminary stage prior to disclosure and the exchange of witness evidence…"* (paragraph 6.3.1) is that it is likely that there has been full pass-on. That is a view that they have quite reasonably and independently reached, including, it is to be noted, on the basis of Mastercard's own arguments, factual evidence *and independent expert testimony* in the merchants' damages claims brought against it. Mastercard says that it is surprising that, in this section of their report, the Experts do not refer to the Tribunal's conclusion in Sainsbury's relating to the pass-on issue, and say that "…*the failure of the Expert Report to make any reference to this finding of the Tribunal is a blatant disregard of the duty of independence owed by the experts to the Tribunal in this case…*". This allegation is serious, but unfounded. Mastercard is itself seeking to appeal against the Tribunals' conclusion in *Sainsbury's* in relation to pass-on. Mastercard's own position, and the position of its independent experts, in *Sainsbury's* was that there was a very high, even 100%, level of pass-on. Mastercard is also itself continuing to defend merchant claims, even after the handing down of the *Sainsbury's* judgment, on the basis that there has been significant to full pass-on of any damages to consumers. Moreover, the Applicant and his Experts are not bound by the conclusions in *Sainsbury's* on pass-on. Quite aside from the fact that the members of the proposed class were not parties to the *Sainsbury's* proceedings, the Tribunal's conclusion in that case came down to a question of law rather than of economics and on an issue that does not arise for the Applicant, namely, the legal hurdles for establishing pass-on "*as a defence*" i.e. from the position of a

Defendant. As already stated above, the Tribunal found that there had been 50% pass-on (in the interest section of the judgment) but held that this finding did not enable Mastercard to get over the relevant hurdle "*as a defence*".

48. Finally, in paragraph 44 in its Response Mastercard sets out two references in the Expert Report to many different businesses being involved in these proposed proceedings (paragraph 1.4.1(b)(i)), and to there being a variety of pass-on rates (paragraph 6.3.6). As explained above, the Experts have provided the Tribunal with an initial proposal for addressing any such differential rates. If Mastercard and its experts consider that these proposals are inadequate, they will have the opportunity to plead their objections in the Defence, and thus put those points in issue for trial. This matter is not one that should or can be determined now and cannot, therefore, be a basis for refusing to certify the proceedings. Mastercard has not even submitted an expert report. Moreover, it would be extraordinary to deny certification on pass-on grounds when the public, stated position of both parties, supported in each case by independent expert evidence, is that there has been very high, even 100%, pass-on of any overcharges from merchants on to final consumers. Further detail in respect of the treatment of pass-on is provided below.

F: ALLEGATION THAT AN AGGREGATE AWARD WOULD BE INAPPROPRIATE

49. In paragraphs 45-66 of its Response, Mastercard sets out its submission that an aggregate award would be inappropriate.

50. Mastercard starts, in paragraph 46, by setting out what an assessment of compensatory damages for each individual class member would require. These points are addressed in turn below. However, fundamentally, the Applicant's submission is that Mastercard is asking the wrong question. As Mastercard itself acknowledges at paragraph 29 of its Response, the very point of an aggregate award is that this can be done "…*without having to establish, and then add together, the loss suffered by each individual member of the class…*" Instead, loss is assessed on a class-wide basis. Under the legislation, the Applicant is perfectly entitled to assess loss on a 'top down' rather than a 'bottom up' approach, i.e. loss is essentially assessed by taking the overcharge, the volume of commerce and pass-on. It need not be assessed by

taking each individual's loss and then combining them. As stated above, in this case, it is entirely common ground that the latter approach is "*impossible*".

51. Taking each of the factors relied upon by Mastercard in turn:

    a. in paragraph 47, Mastercard submits that the rate of pass-on will vary between different categories of merchant and individual merchants within those categories. Whether this assertion is right or not (and it appears to be inconsistent with Mastercard's stance in the various retailer claims), this issue is patently better determined in common. There is nothing specific to an individual consumer on this point. In common with each other, consumers will have made purchases from a range of different categories of merchants and from a range of different merchants within those categories. Pass-on is an issue that can only realistically be determined in common;

    b. in paragraph 48, Mastercard submits that the rate of pass-on for each merchant is likely to have fluctuated over the 16 year claim period. This is mere assertion, but again, even if right, this issue is better determined in common since the fluctuation will have affected the class members in common;

    c. in paragraph 49, Mastercard submits that the loss suffered by each consumer would depend on his/her purchasing history. The Applicant acknowledges that this submission is right, if the claim were to be brought individually (although, even in those circumstances, the Tribunal should apply a broad axe where necessary). Of course, if individuals were to need to prove (as per paragraph 49) "…*which merchants they made purchases from, how much they purchased from those merchants and when, during the 16 year claim period, those purchases were made…*", then not even any individual claims (let alone these proposed collective proceedings) could realistically be pursued and Mastercard would in effect be immune from <u>any</u> challenge despite being a proven wrongdoer and despite itself taking the position

that the victims of the overcharge are the end consumers. It is for this reason that an aggregate award is not only appropriate but necessary.

d. in paragraphs 50-52, Mastercard submits that, when assessing the extent of any loss suffered by an individual consumer, account should also be taken of any benefit which s/he received as a result of the MIF. Mastercard argues that cardholders obtain benefits as a result of the MIF and that the loss suffered by Mastercard holders would have to take into account those benefits. In making this submission, Mastercard relies on *Hodgson v Trapp* [1989] AC 807 (which considers occasions on which receipts flowing from the tort should be deducted from damages, including by reference to *Parry v Cleaver*, referred to above at paragraph 23, with Lord Bridge summarising "…*In the end the issue in these cases is not so much one of statutory construction as of public policy...*" (823A)). The Applicant makes three points in response. First, the question whether higher MIFs do give rise to benefits to cardholders and, if so, what benefits, will be matters to be determined on the evidence. Second, the application of the legal principles invoked by Mastercard will be a matter for argument and cannot be determined at this stage (nor is Mastercard asking for it to be determined). Third, even if Mastercard turns out to be right on both the evidence and the law, then with the benefit of that evidence, the issue that it raises here is perfectly capable of being addressed via a reduction in the quantum awarded to the class as a whole (with, if appropriate, distribution being modified so that the reduction is then borne differentially). Whilst Mastercard presents this issue as being one that affects all Mastercard card holders, it actually only concerns credit card holders as rewards were not offered on debit cards. Alternatively, if appropriate, it could result in the formation of a sub-class for Mastercard credit card holders. The Applicant does not accept Mastercard's asserted conclusion that "…*once the value of such cardholders benefits is taken into account, it is likely to result in a finding that some class members will not have suffered any net loss…*" (paragraph 52, Response). This submission is, again, pure speculation.

On no sensible view should this argument about benefits (which remains to be determined following disclosure, factual and expert evidence, and legal submission) mean that the collective proceedings should not be certified.

52. Having agreed that assessment on an individual basis is "…*impracticable, even impossible…*" (paragraph 54), Mastercard submits that "…*[t]he crucial question is therefore whether an aggregate assessment of the loss suffered by the class as a whole is likely to be both practicable and sufficiently accurate to comply with the compensatory principle of damages…*" (paragraph 55).

53. Mastercard submits that the approach put forward in the Expert Report fails adequately or at all to answer that question. Notably, save for one paragraph repeating its complaints in respect of cardholder benefits (paragraph 62), Mastercard then focuses entirely on pass-on between merchants and consumers as being the supposed difficulty to the granting of a CPO (paragraphs 56-61). Accordingly, the Applicant takes the view that Mastercard accepts that, when it comes to the issues of assessing the affected volume of commerce and the amount to which the proposed class have been overcharged from Mastercard's infringement of competition law, these are matters that are common to the class.

54. In relation to pass-on, Mastercard submits that the proposed pass-on approach "…*will not lead to a quantum figure which bears any realistic relationship to the loss suffered by the class as a whole…*" (paragraph 61). As to this submission:

    a. in paragraph 61(a), Mastercard criticises the approach set out in Appendix 3 (which sets out claims against Mastercard which have been issued in various sectors), which the Experts say cover "…*at least 70% of all card activity*…" (paragraph 6.2.3). Mastercard's supposed objection is that "…*it cannot be assumed that that pass-on rates for the remaining 30% will bear any relationship to whatever figures might be estimated for the 70%...*" This objection attacks a straw man, because neither the Applicant nor the Experts claim that there is such a relationship. It is expressly acknowledged that further

evidence will be needed in respect of these sectors, whether by way of sector-specific reports, or by other claims being filed (which, in fact, has happened with businesses from new sectors bringing damages claims against Mastercard following the filing of the Application), or by seeking third party disclosure. Plainly, that stage has not yet been reached, and these issues simply do not arise at this stage as barriers to granting the CPO for the proceedings altogether;

b. in paragraph 61(b) and (c), Mastercard submits that it cannot be assumed that pass-on is consistent across sectors. Even assuming that this objection is right (and at the moment it is mere speculation and not consistent with Mastercard generally asserting full pass-on against all merchants that have brought claims against it, no matter the sector in which those merchants operate), the Applicant, and his Experts, suggest that care must be taken not to require a standard of proof which is unworkable and unnecessary. Assessing pass-on on an individual retailer by retailer basis would be disproportionate to the results which would be achieved and impracticable. In particular, the Applicant understands that during the claim period there were over 500,000 merchants that accepted Mastercard cards. Mastercard's submissions that pass-on needs to be assessed separately in respect of each of these merchants is a transparent attempt to derail this claim.[3] The Tribunal must, in the Applicant's submission, take a more pragmatic approach;

c. in paragraph 61(d), Mastercard submits that there is no realistic prospect of obtaining enough evidence **in** relation to pass-on. As to this assertion, the Applicant submits that:

   i. Mastercard's position is, designedly, a submission of defeat. It runs directly counter to the legal principles set out above, in which a

[3] If the logic of Mastercard's approach were right, it would mean that hundreds or thousands of merchants would require individual pass-on analysis even in a claim for damages brought by a single individual end-consumer (since most individuals will have bought overcharged goods/services from a large range of Mastercard-accepting merchants).

broad axe and sound imagination need to be deployed (not least given the statutory regime, EU law, and context of a follow-on action). It also ignores the ever increasing number of merchant claims in which Mastercard is asserting full pass-on without distinction and the consequential expanding body of evidence;

ii. if the Tribunal were to refuse to grant a CPO on this basis, rather than (at the least) allowing the Applicant and his Experts opportunity to seek to acquire evidence following substantial disclosure that satisfies the Tribunal, such an approach would be unfair and unjust. If, ultimately, the Applicant loses at trial, so be it - but it would be inappropriate to shut him out at this stage because of alleged evidential difficulties. The Tribunal is familiar with the fact that many long-running cartel damages claims face evidential difficulties, but the Tribunal does the best and most just job that it can, notwithstanding those difficulties.

55. Mastercard's objections reach their full throttle (surprisingly, given the limitation of their criticisms to two areas of calculation) in paragraph 63. This criticism is worth setting out in its entirety:

> *"…This is not a case in which all that is required is disclosure in order to allow the experts to produce a robust quantum figure; it is an exercise in impossibility. Assessing the loss of a class of 46.2 million consumers who purchased from a large majority of all the merchants in the UK over a 16 year period ending 8 years ago is unrealistic. The claim is too overblown to give any realistic prospect of a sufficiently reliable quantum figure for the class…" (emphasis added).*

56. This submission boils down to an allegation that this case falls the wrong side of the "*broad axe*". The Applicant does not agree. The claim can be assessed with sufficient reliability. With a "*sound imagination*", and with proper disclosure, factual evidence, and expert evidence, it will be possible for the Tribunal to do justice by reaching an aggregate figure with which it is satisfied for this new type of claim under the new legislation. This exercise may well be complex –

but it is precisely because of the wide scope of the claim, seeking compensation for the many victims who have been injured by Mastercard's proven illegal behaviour, that undertaking that sort of broad, aggregate analysis will be proportionate. The Applicant relies on the principles set out in paragraphs 17 to 29 above, in particular that the common law is context-specific and overall will seek to do justice, in the light of the new statutory regime and EU law. Just as the common law flexes in the face of public policy, or in the circumstances of *Wrotham Park*, or when facing loss of a chance claims, so it must (if needed) flex to allow the proposed class members to access effective relief under the new legislative regime. Those principles are of application to mass consumer claims, just as they are to other claims, and Mastercard cannot justifiably complain that alleged difficulties are created by the fact that it has caused loss to a very large number of victims.

57. In paragraph 64, Mastercard relies on paragraph 6.78 of the Guide, submitting that an aggregate award is more likely to be suitable "…*where there is a large class with largely identical individual claims*…" but that this is not the case here. Mastercard cites only part of the relevant sentence of the Guide. The full sentence reads: "…*This type of award is likely to be more suitable where its calculation can be made without information from the class members, such as where the defendant's records are sufficient, or where there is a large class with largely identical individual claims…" (emphasis added).* Accordingly, the Guide does not profess to give any more than indicative examples of situations where it may be likely to be suitable to make an aggregate award. For reasons set out in the CPO Application, an aggregate award is suitable in the circumstances of this case. Moreover, the collective proceedings *do* involve a large class, the individual claims *are* largely identical, and the defendant's records *are* largely sufficient. The very many class members are all consumers who bought goods and services from businesses in the UK and who, therefore, all paid inflated prices, and the aggregate award for the class is calculated in large measure using Mastercard's own records (and none from the individual class members).

58. In short, an aggregate award is patently suitable here. Indeed, one of Mastercard's principal difficulties is that, ostensibly, it is seeking to distinguish between aggregate awards and individual awards as if they were both live possibilities. Elsewhere, however, it expressly recognises that, if no aggregate award is available, then there is simply no way for any of the consumers to have their rights vindicated. An aggregate award is the only show in town. In the face of that reality, and mindful of the real prospect of forming a sufficiently reliable assessment of aggregate quantum, Mastercard's objections should not form the basis for the Tribunal refusing even to certify the CPO.

G: PROPOSALS FOR DISTRIBUTION TO INDIVIDUALS

59. As set out in paragraph 67 of Mastercard's Response, the current proposal is that "…*being conscious of the need to make the award of individual damages as compensatory as possible having regard to all the other factors, it is currently intended that each class member will be entitled to claim an amount for each year that s/he was in the class (with no further distinctions being made)…*".

60. As explained above, the purpose here is to balance the various competing demands of (i) being as compensatory as practicable, whilst (ii) promoting participation by victims in the class (and thus allowing for some, as opposed to no, compensation), and (iii) keeping costs and complexity proportionate. As also explained above, the Applicant is not wedded to the suggestion that distribution be determined based on the number of years that a class member was affected, let alone solely on such a basis. The Applicant, working with his Experts and claims administrators, considered many different options for how to undertake the distribution of damages and came up with the option currently presented. That is not to say that he does not have alternatives, which although were initially discounted because of concerns about proportionality and practicability, may prove to be possible depending on how matters develop. It may be the case that, at the distribution stage, different steps can be taken to strike the necessary balance in a slightly different way. In this regard, the question of proportionality will, plainly, be closely allied to the amount of the aggregate award ultimately made and the number of people in the class,

including opters-in and opters-out. It is to be borne in mind that, if the Applicant came up with a much more complex means of distributing any aggregate award of damages - with the consequence that the litigation budget was much larger, resulting in greater costs exposure for Mastercard – the Tribunal would be presented with criticism on the part of Mastercard that the costs are unreasonable and disproportionate. The Applicant is proposing a reasonable and proportionate outcome in terms of distribution, at this stage, whilst being mindful of the litigation costs. In short, the guiding, competing, principles are clear and it would be premature to deny the CPO now, thus precluding any resolution, ever, of where the correct balance should lie on the facts of this case.

61. Mastercard submits, in paragraph 68, that the currently proposed mode of distribution means that the Tribunal should refuse the CPO altogether. It appears to suggest that distribution should be on the basis of the individual consumer's purchasing history, including what s/he purchased, where s/he purchased and when s/he purchased, together with deductions for any individual benefits received. It is not even clear that approach would need to be taken, if each and every member of the class brought their own individual claim. Certainly, it is not necessary in the context of a collective consumer mass action.

62. In a nutshell, any such individualised approach would be antithetical to the very notion of an aggregate award of damages; this level of detail cannot be required because it would destroy the efficacy of the new legislative regime.

63. What Mastercard deprecates as a "*mechanical*" approach to distribution (paragraph 68) is, in fact, entirely in keeping with Rule 92, which foresees that a "*method or formula*" might be used to distribute damages.

64. In any event, as set out above, it is telling that the Guide does not foresee the defendants even being involved in the detailed questions of distribution. This approach is unsurprising. So long as the award of damages is correctly calculated *vis-a-vis* the class as a whole at an aggregate level, the defendant

has no interest in which class members receive which proportion of the pot as none of the aggregate damages will be returning to Mastercard.

65. In paragraph 69, Mastercard submits that there is "*another reason*" why the CPO should be refused. What follows does not, however, seem to constitute a discrete reason:

    a. in paragraph 70 Mastercard sets out part of the Epiq/Hilsoft Plan which relates to the requirement that class members will need to validate the claim;

    b. then, in paragraph 71, Mastercard submits that no criteria for distribution have been suggested. This submission is not correct (since it is currently proposed that distribution be based on the years that class members are within the class) and is, in any event, a point unrelated to claim validation. (Insofar as there is also a criticism of the alleged fact that some class members have suffered no loss, that criticism is not accepted. It is for Mastercard to plead out, and then prove, its defences that, for instance, countervailing benefits more than match the overcharge losses)

    c. in paragraph 72, Mastercard submits that there is a requirement that "…*the proposed distribution method should be "an appropriate means for the fair and efficient resolution of the common issues" pursuant to rule 79(2)(a) of the 2015 Rules…*". In fact, that rule, set out in full, is "…*whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues…*" (emphasis added). It does not require that the distribution method be subject to detailed scrutiny at this stage.

66. Mastercard complains that a fundamental issue is essentially being kicked off into the long grass (paragraph 73). This submission misunderstands the position. The Tribunal will be mindful that the Applicant has already done an enormous amount of work to get the proposed collective proceedings to this stage. There has been no defence from Mastercard, still less are the proceedings advanced into disclosure and evidence. Indeed, Mastercard had

the option to challenge any of the issues to which it now draws attention as a strike-out or summary judgment prior to the CPO hearing, but has properly chosen not to do so. As referred to above, many issues will quite properly affect the suitable distribution mechanism: class definition and thus number of members; opt-in and opt-out; duration of the claim; causation; pass-on; overall aggregate award. The suitable time for detailed concrete proposals on distribution is once these issues have at least become much clearer, even if not completely resolved.

H: FUNDING

Introduction

67. *This section replies to Mastercard's Confidential Annex on Funding Issues ("the Confidential Annex") found at pages 65-75 of Mastercard's Response.*

Confidentiality

68. Mastercard has invited the Applicant to indicate the parts of the Confidential Annex over which the Applicant wishes to maintain confidentiality. The only parts to which Mastercard refers and over which the Applicant wishes to maintain confidentiality are paragraphs 207 and 208 of the Response as well as the identity of the actual funding vehicle, which is a wholly owned subsidiary of Gerchen Keller Capital, LLC ("**GKC**"). Accordingly, in so far as this Reply refers to paragraphs 207 and 208, directly or indirectly, those parts of this Reply shall remain confidential. A significant development as to GKC's position as funder is that Burford Capital Limited ("**Burford**"), a leading global finance firm, has acquired GKC. Burford and GKC collectively are the two largest litigation finance players in the world.[4]

Overview of the funding issues

69. Before turning to the detailed, substantive points made by Mastercard, it is necessary to make some introductory remarks about the wider implications of Mastercard's challenges. In particular, it is important to consider more broadly the remuneration of third party funders, and the central role that they have in

[4] See paragraph 18, Annex B, Witness Statement of Ashley C. Keller.

ensuring and securing a workable and effective operation of collective proceedings under the 1998 Act as introduced by Schedule 8 to the 2015 Act).

70. As Mastercard rightly observes in paragraph 2 of its Response, "…*these are early days for the collective proceedings regime and it is important that solid foundations should be set in place to allow it to work effectively in the future…*" The Applicant agrees with this and notes that it is of particular relevance when it comes to securing solid and workable solutions for the funding of collective proceedings.

71. In short, third party funding is a necessary ingredient to the pursuit of these proposed collective proceedings. Doubtless, some form of such funding will also be required for most collective actions in the future. There is a very real danger that, without an ability to secure funding, many collective actions will not be capable of being brought at all. In those circumstances, the mechanisms and processes established by the 2015 Act to facilitate the resolution of claims of this nature will be left redundant. It is, therefore, imperative that, in interpreting and applying the 1998 Act and the Tribunal Rules, regard is had to the necessity of third party funding in this species of litigation.

72. The costs budgets of both sides to this claim (Mastercard has indicated that its costs will be in the same order as those of the Applicant: Response, paragraph 213) reveal that access to the Tribunal for the members of the proposed class in this case, and very likely future claimants in other cases, will simply not be possible without secure litigation funding arrangements in place. That reality necessarily requires a recognition by the Tribunal of (a) the costs of funding in cases of this kind and (b) the need to facilitate workable solutions to the remuneration of funders so as to enable claims to be brought and, thus, further the objectives of Parliament in delivering access to justice for individuals that suffer loss as a result of the infringement of competition law.

73. Mastercard's overarching challenge to the funding arrangements entered in to by the Applicant is that the statutory scheme does not permit the fees payable to a funder to be paid out of any unclaimed damages pursuant to section 47C(6) of the 1998 Act. (paragraph 194 of Response). The Applicant does not

accept Mastercard's contentions in that regard, but the profundity of the challenge highlights the significance of the arguments generally for the future operation of the new collective actions regime.

74. A full response to Mastercard's contentions is developed below but, suffice to note at this juncture, the unfeasible and highly unattractive alternative to that proposed by the Applicant is that the Funder somehow attempts to enter into a tied commercial arrangement with each and every claiming class member entitling the Funder to a deduction from recovered damages in consideration for the funding provided. As developed further below, such an impractical arrangement in an action of this type involving, as it does, many millions of claimants (if it could ever even actually be put in place) would fundamentally undermine and cut across the very purpose of s.47C(6) which was to place the interests of class claimants and their right to damages ahead of the interests of funders[5].

Relevant Statutory Material

The 1998 Act.

75. Sections 47B(4)-(7) of the 1998 Act state:

> *"(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.*
>
> *(5) The Tribunal may make a collective proceedings order only—*
>
> *(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and*

[5] This is not to say that it would not be possible in a claim involving a small number of accessible claimants able to agree individually a several liability to the funder in respect of the funder's reward; such reward being an agreed deductible from each claimant's damages.

(b) in respect of claims which are eligible for inclusion in collective proceedings.

(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

(7) A collective proceedings order must include the following matters—

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).”

76. Sections 47C(5) and (6) of the 1998 Act state:

“(5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.

(6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.” (emphasis added).

The 2015 Rules

77. Rule 78(2) & (3) "*Authorisation of the class representative*" states:

> *"(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—*
>
> would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
>
> (e) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—
>
> *…*
>
> *(c)whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—*

(I) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide" (emphasis added).

78. Rule 93(4)-(6) provides:

"(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.

(5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.

(6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity

designated in accordance with section 47C(5) of the 1998 Act(1) and a copy of that order shall be sent to that charity. (emphasis added)

79. Rule 104 provides:

"(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland, as appropriate, and include payments in respect of the representation of a party to proceedings under section 47A (claims for damages) or 47B (collective proceedings) of the 1998 Act(1), where the representation by a legal representative was provided free of charge." (emphasis added).

The Funding Terms

80. The litigation funder is GKC, operating through a wholly owned subsidiary ("**the Funder**"), the largest capital provider in the litigation finance industry worldwide. As foreshadowed in the introductory paragraphs above, on 14 December 2016 Burford publically announced that it had acquired GKC. Burford and GKC have committed more than $2 billion to investments since their respective inceptions.

81. As explained in paragraph 30 of the First Witness Statement of Mr. Merricks, prior to the Burford acquisition, GKC had over US$1.4 billion in assets under management and has agreed to provide the Applicant with funding up to £30 million (in addition to the £10 million in adverse costs cover) ("the Funding"). Mastercard correctly summarises the key terms of the Funding Agreement at paragraphs 179-183 of its Response.

82. A key component to the operation of the Funding Agreement and, therefore, to the pursuit of the proposed collective proceedings is the availability to the Funder of (i) the Transferred Costs Rights in the Costs Award and (ii) the Transferred Undistributed Proceeds Rights.

83. Mastercard does not take issue, and there would be no basis for doing so, with the basic principle that the Funder should be entitled to receive the benefits of

any Costs Award in respect of the Applicant's fees and expenses incurred in the proceedings. However, Mastercard does take issue with the Funder's entitlement to look to the "*proceeds*" of the undistributed/unclaimed[6] damages in order to secure its entitlement to the Total Investment Return (as defined in the Funding Agreement). For the reasons explained below, that objection is not sustainable.

84. Mastercard seeks to make a point of distinction about the operation of the Funding Agreement being different from what it describes as "…*the usual operation of third party funding arrangements*…" (paragraph 184 of Response). It is, indeed, the case that the structure of the Funding differs from what might be described as the conventional model. But this is a factor in the class's favour: the Funder has agreed completely to ring-fence the successful damages award in so far as it is collected by the class members. The Funder gets no part at all of these damages. Moreover, if all of the damages are distributed, there is nothing left from which to obtain any part of the Total Investment Return. As a result, the Funder is taking a very significant risk in the proposed collective proceedings, over and above the usual litigation risks that a funder faces. This laudable distinction with conventional arrangements hardly justifies criticism; it is a structure designed, in accordance with the statutory scheme and its original intentions, to ensure that the interests of the class members are put *ahead* of the Funder. It is difficult to see what legitimate complaint Mastercard could have of that intention.

85. Mastercard in making the distinction that it does in paragraph 184 evidently seeks to conjure up a negative image of the arrangement. However, the model employed by the Funder is entirely in accordance with Parliament's wishes. It seeks to achieve a fair balance between, on the one hand, ensuring that the successful class recovers its damages and, on the other, recognising that a funder may well have a legal and, indeed, moral expectation of priority in being compensated for the risks that it takes in entering into the funding agreement in

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6 The Funding Agreement uses the term "*undistributed*", as do the Rules, but the primary legislation uses the term "*not claimed*". The terms are synonymous and they, and "*unclaimed*", are used interchangeably in this part of the Reply.

advance of any dissipation of unclaimed funds to deserving charities (rule 93(6) of the 2015 Rules).

86. Parliament has expressly sanctioned the notion of legal costs, fees and other expenses incurred in connection with collective proceedings being paid from the undistributed damages pool. It should come as no surprise, therefore, to Mastercard that the Funding Agreement is largely dependent on payment from such undistributed damages pool.

87. The same point could equally be made in connection with the discharge of legal fees payable to solicitors conducting collective proceedings pursuant to a Conditional Fee Agreement; under the 2015 Rules, they too would be entitled to enter into such arrangements under which they were paid not by those who actually received damages, but effectively by those who did not. Such an approach is obviously radically different to that with which the Tribunal has been accustomed. Nevertheless, Parliament has taken account of modern realities (as to which, see further below) and deliberately sanctioned this alternative means of funding from undistributed damages, subject of course to the Tribunal being satisfied that it ought to make such a payment.

88. The situation absent this means of funding is worth considering. It would amount to the Funder having to (try to) put in place a direct claim for reimbursement through a first charge on the class members' individual recovered amounts. Leaving aside the obvious impracticalities, there is an objection in principle. The class is actually in a worse position under such a (conventional) funding arrangement. As explained by the Applicant in his First Witness Statement, his objective was to "…*get compensation back into the hands of each member of the proposed class*…", thus putting the interests of the proposed class first, over the interests of the Funder (paragraph 32).

89. Accordingly, perfunctory observations of the kind made by Mastercard at paragraph 184 of the Response really add little to the Tribunal's task in determining whether to grant the application for a Collective Proceedings Order.

90. Third party funding is a feature of modern litigation[7]. As observed by Lord Philips in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54], (Lord Phillips M.R.):

> *"Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case. If the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention."*

91. In the seminal case of *Arkin v. Borchard Lines Ltd* [2005] 1 WLR 3055 the importance of third party funding to the principle of *access to justice* was expressly recognised in limiting a third party funder's exposure to an adverse costs order to a sum equivalent to the amount of funding provided:

> *"39 If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied." (emphasis added).*

92. Extra-judicially, Sir Rupert Jackson remarked, in his Preliminary Report (May 2009) (the Jackson Preliminary Report) that:

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[7] Lord Justice Tomlinson, *Excalibur Ventures LLC v. Texas Keystone Inc* [2014] EWHC 3496, para. 1.

> *"[i]t is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice."*

93. In November 2007, the Office of Fair Trading (OFT) published its recommendations to facilitate private actions by businesses and consumers (OFT916, Private Actions in Competition Law: Effective Redress for Consumers and Businesses). To address the issue of funding, the OFT recommended that: *"third-party funding is an important potential source of funding…[and] should be encouraged"*.

94. In 2007, the Civil Justice Council of England and Wales (CJC), the civil advisory body of the jurisdiction, observed that, "…properly regulated Third Party Funding should be recognised as an acceptable option for mainstream litigation…"[8].

95. Sir Rupert Jackson also approved this means of funding for collective redress: "[i]f the claimants are advised that the proposed funding agreement is appropriate, and if the funders subscribe to the voluntary Code … this would be a proper means of funding many collective actions"[9].

96. As Professor Rachael Mulheron[10], observes in her paper "Third Party Funding and Class Actions Reform",[11] whilst the 1998 Act, s47C(8)[12] introduced a bar to

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8 The Funding of Litigation: Alternative Funding Structures (June 2007), at p.53, recommendation 3.

9 Jackson Final Report, Ch.33, at para.4.3. Burford is a member of ALF. GKC has voluntarily disclosed its proposed funding terms in line with the President's observations in Dorothy Gibson v. Pride Mobility Products Ltd [1257/7/7/16] 15 July 2016 Transcript at page 12, line 8.

10 A member of the Civil Justice Council of England and Wales (CJC), was a former member of the CJC/MOJ Working Parties on Contingency Fees and on Third Party Funding, and is a member of the Competition Appeal Tribunal (CAT) Class Actions Working Party, which was responsible for drafting the "Draft Tribunal Rules" applicable to Collective Proceedings and Collective Settlements in the CAT.

11 Law Quarterly Review [2015] 131 L.Q.R 291

12 "A damages-based agreement is unenforceable if it relates to opt-out collective proceedings."

lawyers entering into contingency style fee agreements (damages based agreements, "DBAs"), there is no prohibition against third party funders acting on a contingency style basis (as professional funders almost always do).

97. In his Lecture at Gray's Inn on 8 May 2013, "From Barretry, Maintenance and Champerty to Litigation Funding", Lord Neuberger described funding as "…the life-blood of the justice system…" and observed:

> *"In order for a state to remain inclusive it must not just express a commitment to the rule of law: it must provide effective mechanisms through which its citizens have genuine access to the courts. Only then can they begin to have equality before the law; only then can they hold the powerful to account; only then can they render their legal rights a true reality rather than words on paper. Where significant groups of citizens are financially unable to gain such access, one of the most important means by which inclusive societies prosper is missing or at best weakened. And as such, the potential for society to become extractive and, ultimately, to fail, markedly increases. If all members of society cannot gain genuine access to the courts, then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity."*[13].

98. None of the consultation papers in advance of the promulgation of Sch. 8 to the 2015 Act took issue with the role of third party funders in the pursuit of Collective Actions.

99. Parliament has left such matters for the parties themselves by way of commercial agreement but regulated, ultimately, through the valves of s.47B(4) of the 1998 Act (Collective Proceedings may only be continued if the Tribunal makes a collective proceedings order), s.47B(7) (Authorisation) and rule 78(2) and (3) of the 2015 Rules (Authorisation of the class representative).

13 Para 47

Funders' Rights To Recovery

100. It is uncontroversial that the Funder should have a right to the proceeds of any Costs Award (Section 2.1(a)).

101. The issue developed by Mastercard is that the Tribunal does not have power to make an order permitting unclaimed damages to be used to pay the Funder (paragraph 186 of Mastercard's Response). The argument appears to be based on a proposition that as the Funder's fees are not "*costs or expenses*" within the meaning of Section 47C(6), they cannot be the subject of an order under that section.

Primary reply

102. Section 47C(6) gives the Tribunal jurisdiction to order that all or part of any damages not claimed by the representative persons within a specified period be paid, instead, to the representative (here the Applicant) in respect of all or part of costs or expenses incurred by the representative in connection with the proceedings. The question for the Tribunal is how the words "*costs or expenses*" should be defined.

103. As a necessary part of any construction exercise, it will be necessary for the Tribunal to have regard to the intentions of the legislature: *R v Environment Secretary ex p. Spath Holme* [2001] 2 AC 349 at 397H and generally at 396-398 on statutory interpretation; see also the Court of Appeal in *Cranfield v Bridgegrove Ltd* [2003] 1 WLR 2441. It is submitted that the intention behind section 47C(6) was to grapple with and resolve what inevitably flowed from the nature of opt-out proceedings, namely, that (i) the funder will not have obtained any explicit permission from absent class members to take a portion of each class member's damages but that (ii) such victims nevertheless need to have access to an effective remedy for breach of their rights including, in this case, directly effective EU law rights.

104. An award of aggregated damages would not permit the representative claimant just to give away a portion of each class member's damages to a third party funder at the end of the case. Accordingly, some other mechanism for the distribution back to the funder of its financial reward had to be engineered by

the law makers. It is this conundrum[14] which convinced Parliament to permit a funder to recover its fees from unclaimed damages or on settlement sums if the Tribunal so orders. As Professor Mulheron observes:

> *"In any event, during the passage of Sch.8 through the House of Commons, the UK legislature saw fit to include, by way of amendment to the Bill, the following proposed s.47C(6) into the Competition Act 1998114:*
>
> > *"… the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."*
>
> *Hence, where the CAT so ordered, the success fee charged by a Funder, under an LFA with the representative claimant, would amount to a "cost or expense", and hence, constitute a second charge on the damages award—the first charge comprising the individual claims for damages by the class members."*

105. Professor Mulheron concluded her paper with these remarks:

> *"Hence, the compromise which s.47C(6) represents is a tangible demonstration of the "full compensation" principle that the UK Government has placed at the forefront of these reforms, and is a feature which distinguishes the Competition Law Class Action from the "US-style class action" which the Government was so keen to avoid. It is also likely that, given the anticipated take-up rates [i.e. the rates of actual distribution], Funders would ultimately receive due recompense for facilitating access to justice for the aggrieved victims of anti-competitive practices, by virtue of the second charge created by that provision."*

106. Thus, properly analysed, Mastercard's contentions as to the meaning of the word "*costs*" in rule 93(4), if correct, will entirely frustrate the will of Parliament

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[14] As it has been referred to: Third Party Funding and Class Actions Reform (supra)

by removing the right of a funder to look to the unclaimed damages in part settlement of his fees for funding a claim. This outcome is not only highly unattractive, given the purpose for which Rule 93(4) was clearly promulgated, but it is also flawed. It places an unjustified restrictive meaning on the words "*costs, fees and disbursements*" in Rule 93(4) which does not bear scrutiny.

107. The necessary ingredients of any order under s.47(C)6 are that:

    a. the fees concerned are "*costs or expenses*";

    b. that they were "*incurred"* by the representative;

    c. that they were incurred "*in connection with"* the proceedings.

108. As to the latter requirements:

    a. "*incurred*" - the Funder's fees are incurred by the Applicant. The Applicant is a party to the Funding Agreement ("*Seller*") and it is the Applicant who is liable to assign, convey, sell etc. the Transferred Costs Rights to the Funder and who agrees to use his best endeavours to ensure that the Funder ("*the Purchaser*") obtains the full benefit of the Transferred Undistributed Proceeds Rights. Further, it is the Applicant who, having secured payment of the Total Investment Return, agrees immediately to arrange for payment of the same to the Funder (Section 2.5 (c)).

    b. "*in connection with*" - the Funder's fees are and will be incurred in connection with the proceedings; the sole purpose of securing funding is to pursue the proceedings and the consideration for providing the Funding by the Funder is its entitlement to seek to be paid the Funder's fees – both Undistributed Proceeds and any Costs Awards amounting in total to the Total Investment Return.

109. *As to the first re*quirement – "*costs or expenses*" - the 1998 Act does not define what is meant by "*costs or expenses*" in Section 47C(6). Instead, the statutory scheme, through the rubric of section 47A (the ability to make claims for damages or any other claim for a sum of money), looks to the 2015 Rules for a

definition. The right to bring a claim under section 47A is expressly stated to be subject to provisions of the 1998 Act and the 2015 Rules.

110. The relevant rule is Rule 93(4) of the 2015 Rules:

> *"(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of* ***any*** *costs, fees or disbursements incurred by the class representative in connection with the collective proceedings."* (emphasis added).

111. "*Costs*" under Rule 104(1) are defined as "…*costs and expenses recoverable before the Senior Courts of England and Wales…"* Accordingly, "*costs*" under the 2015 Rules imports the definition of "*costs and expenses*" by reference to the costs and expenses recoverable before the Senior Courts of England and Wales. However, whilst that definition addresses the meaning of "*costs*" within Rule 93(4), it does not address the meaning of the other two items of expense identified as "*fees*" and "*disbursements*". The distinction is an important one. Under Rule 104 the Tribunal is empowered to make orders for "*costs*" as it thinks fit in its discretion: see Rule 104(2) as to the "*payment*" of costs. This rule concerns the Tribunal's jurisdiction to make "inter partes" costs awards taking into account the matters set out in Rule 104(4) (conduct etc.). Rule 104, thus, very much follows the map of the CPR and Part 44 in giving the Tribunal a broad discretion, taking into account common factors, and the principles of proportionality and reasonableness. Costs in this context are, though, different from the *"fees and disbursements"* which may be directed to be paid, not by a party to the proceedings as costs, but by the Tribunal's jurisdiction, under Rule 93(4), to direct that "*undistributed damages*" may be used to discharge other expenses.

112. The Tribunal's jurisdiction to direct payment of "*undistributed damages*" in satisfaction of the class representative's liability for "*costs, fees or disbursements*" incurred is, as the provision expressly acknowledges,

concerned not only with "*costs*" as defined by Rule 104, but also with "*fees*" and "*disbursements*".

113. "*Fees*" (and "*disbursements*") are not, therefore, "*costs*" within Rule 93(4). Nor are they "*costs*" for the purposes of Rule 104.

114. The rationale for making a distinction between "*costs*" in respect of the *inter partes* jurisdiction to make costs awards under Rule 104 and the addition of "*fees and disbursements*" under the jurisdiction of Rule 93(4), is that the jurisdiction under Rule 93(4) is much wider. The latter includes, for example, an ability to make an order for the payment out of the undistributed damages of costs which were not, in fact, allowed as between the parties following a detailed assessment of the *inter partes* costs pursuant to Rule 104(5), but which the Tribunal nevertheless considered to have been perfectly reasonably incurred by the Applicant on a solicitor and client basis.

115. It is to be noted that, in exercising its jurisdiction under Rule 93(4), the Tribunal may direct a "*determin[ation]*" of the amount to be paid: see Rule 93(5). This process is different from the "*detailed assessment*" provisions of Rule 104(5). This distinction reinforces the point that Rule 93(4) and Rule 104 are dealing with different costs jurisdictions.

116. It is not surprising that the jurisdiction concerning the *inter partes* liability for costs assimilates itself with the Civil Procedure Rules 1998. However, the Tribunal will note that there is no equivalent jurisdiction in the courts to allocate undistributed damages – whether as costs, fees or disbursements. In these circumstances, it is hardly surprising that such jurisdiction is not assimilated with, or limited by, the powers of a court.

117. There can be little argument that the fees of the Funder are "*fees*". The absence of any definition of "*fees*" in the 2015 Rules must result in the Tribunal ascribing a meaning to the word "*fees*" which reflects the natural and ordinary meaning of the word. It is also to be noted that "*any*" fees count for these purposes.

118. Giving the word "*fees*" its natural and ordinary meaning, it is impossible to contend that the fees charged by the Funder are not "*fees*". The Transferred Undistributed Rights Proceeds are expressly agreed to be part of the consideration for the Funder providing the Commitment (as defined) to fund the Litigation (as defined): see Funding Agreement, section 2.1.

Alternative reply

119. Furthermore, and alternatively, Mastercard's arguments centre on the meaning of "*costs*" within the rubric only of an *inter partes* recovery of costs before the Senior Courts. However, those arguments fail because they amount to an unprincipled restriction on the meaning of "*costs*" within CPR 44.1. The Civil Procedure Rules 1998 and, in particular, the costs rules of Part 44-46, also include the court's jurisdiction over solicitors and the amounts that solicitors can charge their own clients i.e. not *inter partes*. A reference to the words "*Solicitor and client costs*" in CPR 46.9 necessarily includes costs which are *not recoverable* as between the parties, but which are chargeable to the client and, therefore, *recoverable* by the solicitor. Such costs would include, for example, the amount of a contingency fee charged by a solicitor to a client under a DBA, or the costs of the funding element within a success fee. Both of these costs are "*funding costs*" and, importantly, are also unquestionably "*costs*" as defined by CPR 44.1.

120. It is to be noted in this regard that the definition of "*costs*" in CPR 44.1 is not exhaustive. As the rule states, "*costs include*…" The costs of funding fall within the definition of "*costs*" in the context of such being recoverable on a solicitor and client basis before the Senior Courts and/or pursuant to a contract in accordance with CPR 44.5 (see below).

121. There is, therefore, a disconnect in Mastercard's case. It seeks (without reason or explanation) to restrict the meaning of "*costs*" to those recoverable *inter partes* without paying any regard to the recoverability of costs as between a solicitor and client or between two contracting parties. "*Costs*" for the purposes of CPR 44.1 includes both categories. Accordingly, it is wrong to associate "*costs*" within Rule 104 of the 2015 Rules with only *recoverable inter partes costs*. Costs within CPR 44.1 include (i) the costs which are *recoverable* as

between solicitor and client, and are, therefore, *recoverable* before the Senior Courts as well as (ii) costs *recoverable* pursuant to a contract in proceedings before the Senior Courts, whether or not they are also recoverable *inter partes*.

122. Of particular relevance in this context, a point entirely overlooked by Mastercard, is the court's jurisdiction to assess costs payable pursuant to a contract pursuant to CPR 44.5. This rule provides the Senior Courts with jurisdiction over the costs payable pursuant to a contract. There is no reason in principle why the costs payable by a party to a litigation funder under a funding agreement could not be the subject of an assessment pursuant to CPR 44.5. The outcome would result in the court ordering the *recovery* of costs by one party to the contract to the other. Such costs, therefore, qualify as "costs" within the meaning of Rule 104 of the 2015 Rules.

123. There is no rule of law which prevents a solicitor from charging a client "*the costs of funding*". Indeed, to the contrary, solicitors charge clients funding costs within a DBA or a CFA success fee. The Senior Courts have jurisdiction to assess such costs and order the recovery of such costs pursuant to CPR 46.9.

124. Accordingly, on this alternative basis, the Tribunal does have the jurisdiction to make an order for "*costs*" pursuant to Rule 93(4) and direct, circumstances permitting, that all or part of any undistributed damages be paid to the Applicant in order to discharge the Applicant's outstanding liability and contractual commitments to the Funder in respect of seeking to obtain fees/Transferred Undistributed Proceeds Rights owing to the Funder in consideration for providing the Funding.

Costs of Funding as Recoverable Costs

125. The Applicant has already made the point that the costs of funding are recoverable costs within the meaning of "*costs*" in CPR 44.1, when considered in the context of disputes between solicitors and clients and under contracts. The word "*costs*" in CPR 44.1 cannot and does not exclude the costs of funding.

126. Mastercard's reference to it being "…*trite law that the costs of obtaining funding for litigation, as opposed to the actual costs of litigation, are not* [recoverable]…" is in fact wrong at three levels:

    a. first, historically, the courts have allowed the costs of funding to be recoverable;

    b. secondly, whatever may have been the position in the courts is irrelevant in the context of the very special, new jurisdiction that the Tribunal has under Rule 93(4), as opposed to the more general *inter partes* costs discretion under Rule 104;

    c. thirdly, "*recoverable*" in Rule 104 is not solely confined to "*recoverable between the parties*". It must also mean recoverable as between a solicitor and client and pursuant to a contract.

127. As to the first point, the assertion that the costs of funding litigation have always been irrecoverable is not accepted. The Court of Appeal in *KNE 1 Kos Ltd v. Petroleo Brasileiro SA* [2010] 2 CLC 19, held that a party was entitled to recover as costs (as opposed to damages) the costs of financing a guarantee obtained to provide security to protect the subject matter of an action.

128. Similarly, under CPR Part 25 and the provisions regarding security for costs, it is well established that the costs of raising security are recoverable as costs of the action, even though they are not "legal costs".

129. If the costs of raising finance to provide security / fortify cross undertakings as to damages, are recoverable as "*costs*" within section 51 Senior Courts Act 1981, as they are, then so too should the costs of putting up litigation funding to pursue a claim, especially where, absent that finance, access to justice and, in particular, access to the established Tribunal framework for resolving collective proceedings, will be denied.

130. At paragraph 193-194 of its Response, Mastercard discounts as irrelevant the decision of Sir Philip Otten (Arbitrator) and HHJ Waksman QC, sitting as a judge of the High Court, in *Essar Oilfields v. Norscot* [2016] EWHC 2361.

However, rather than being irrelevant, in fact, the case presents a useful parallel with the present case. The jurisdiction to make an award of costs under s.59 Arbitration Act 1996 included a discretion on the part of the Tribunal to award "*legal or other costs*". Section 59 provides:

> *"59 Costs of the arbitration.*
>
> *(1) References in this Part to the costs of the arbitration are to—*
>
> *(a) the arbitrators' fees and expenses,*
>
> *(b) the fees and expenses of any arbitral institution concerned, and*
>
> *(c) the legal or other costs of the parties."*

131. The reference to "*other costs"* is critical. It means that, just as in section 47C(6), the arbitration jurisdiction is not simply limited to "*legal costs*". Under the expanded jurisdiction, the arbitrators were able to award litigation funding costs. In the same way, in the context of section 47C(6) and Rule 93(4), "*costs*" is different from "*expenses*" i.e. different from "*fees and disbursements*". As in the case of arbitration, the Tribunal's jurisdiction is plainly greater than merely legal costs - and deliberately so for the policy reasons set out above. Accordingly, whether or not the cost of funding is or is not allowed to be recovered in court proceedings is irrelevant for the purposes of Rule 93(4).

132. Accordingly, it is wrong in principle for Mastercard to premise its arguments on cases like *Claims Direct Test Cases*, *Hunt v. RM Douglas* and *Motto v. Trafigura Ltd*, (paragraph 192 of its Response). These cases did not construe or apply Rule 93(4) and the meaning of "*fees*" within the 2015 Rules.

133. As to the second point, the authorities cited by Mastercard in paragraph 192 of the Response arise out of court proceedings, when applying the court's definition of "*costs*". These authorities have no bearing on the meaning of the word "*fees*" in Rule 93(4). Indeed, the cases cited have nothing to do with meaning of the word "*fees*" in Rule 93(4).

134. As to the third point, what is *recoverable* as costs is not confined to *inter partes* recovery. The costs of funding are *recoverable* as a cost between solicitor and client or between funder and funded. Accordingly, it is a cost capable of being recovered under Rule 93(4).

Consequences

135. For the reasons developed above, the Applicant does not accept Mastercard's appraisal of the consequences of its submissions, namely, that the Funder has the right to terminate the Funding Agreement pursuant to section 2.4(b)(iv). Unless and until the CAT disapproves, or provides any negative commentary regarding the Funding arrangements, the Funder has no basis on which to serve a termination notice on the grounds advanced by Mastercard (section 2.4(b)(iv)).

136. Moreover, for all of the reasons developed above, there is no basis on which the Tribunal would be entitled to disapprove or express negative commentary regarding the Funding Agreement. To the contrary, the Funding Agreement is a fine manifestation of the very purpose that Parliament had in enacting section 47C(6).

137. Mastercard is evidently keen to seek a ruling on whether or not the 2015 Rules entitle the Applicant to seek an Order that the Funder be paid its fees from unclaimed damages. The Applicant does not shy away from such a ruling but stands ready to address it should the Tribunal consider it necessary or desirable at the CPO hearing.

Alleged conflict of interest

138. Mastercard contends that the Applicant is in an irreconcilable conflict with the class as a whole (see paragraphs 200 – 204 of the Response). This contention is, with respect, obviously wrong.

139. First, the obligation on the part of the Applicant to seek the Tribunal's approval for the Total Investment Return to be paid from the undistributed damages is an obligation which arises out of a statutory entitlement to seek such an order pursuant to Rule 93(4). It would be very odd if the statutory scheme bestowed

upon the Applicant a right which he could never exercise because the right created an inherent conflict of interest arising from his status as Applicant.

140. Secondly, since an order under Rule 93(4) of the 2015 Rules can only be made in respect of "*undistributed damages*" and the decision whether to make such an order lies within the discretion of the Tribunal alone, there can simply be no question of any conflict arising.

141. In this regard, thirdly, Mastercard is simply wrong to assert that there is an "*obligation*" on the Applicant "…*to ensure that there is a sufficient amount of unclaimed damages so that the Funder will receive the Total Investment Return*…" that it ideally seeks (see paragraph 203 of the Response). Nowhere does any such obligation appear in the Funding Agreement. To the contrary:

a. section 3.2(g) gives the Applicant "…*sole control of the Litigation*…";

b. section 3.2(i) confirms that the Applicant will "… *bring and continue to pursue the Litigation in the exercise of his independent judgment in consultation with Litigation Counsel*…";

c. section 4.2 opens by stating that the Applicant *"…will maintain complete control of the Litigation*…";

d. section 4.2 further confirms that the Applicant has "….*no obligation to follow Purchaser's advice*…" even as regards settlements;

e. section 4.2(c) states that the Applicant will "…use his best endeavours to obtain an outcome in the Litigation that maximizes the amount of Proceeds and any Costs Awards…" and goes on to provide that the Applicant will seek to "…obtain approval for CAT to distribute Undistributed Proceeds and any Costs Award in accordance with this Agreement…" (emphasis added); and

f. the Applicant expressly confirms in his witness statement (Merricks 1) that:

"…the litigation funder has no influence or control over the litigation and so it will not be able in any way to influence the process by which damages are distributed or procure that some damages remain undistributed. My objective is to get compensation back into the hands of each member of the proposed class. I will look to implement, subject to the approval of the Tribunal, a process for the administration of any damages recovered by way of the Proposed Collective Proceedings, that seeks to enable each proposed class member to access their [sic] entitlement to the recovered damages…" (emphasis added) (paragraph 32).

142. Fourthly, and again closely related, appropriate checks and balances removing any risk of a conflict are entirely accommodated by Rule 93 itself:

"93.—(1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to—

(a) the class representative; or

(b) such person other than a represented person as the Tribunal thinks fit.

(2) Where the Tribunal makes an award of damages in opt-in collective proceedings, it may make an order as described in paragraph (1).

(3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify—

(a) the date by which represented persons shall claim their entitlement to a share of that aggregate award;

(b) the date by which the class representative or person specified in accordance with paragraph (1)(b) shall notify the Tribunal of any undistributed damages which have not been claimed;

(c) any other matters as the Tribunal thinks fit.

(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings."

143. Accordingly, an order could not be made or pursued by the Applicant under Rule 93(4) until such time as the Tribunal had first been notified that there are undistributed damages under Rule 93(3)(b). Moreover, no such order could be made without the Tribunal first having considered whether it is appropriate to make an order under Rule 93(3) – i.e. after a timeline by which all members of the class would be required to claim their damages and a date by which the Applicant would be required to notify the Tribunal of any undistributed damages. In these circumstances, the mechanism and process for collecting and distributing damages will be the subject of detailed Tribunal direction and control. The idea that the Applicant is somehow placed in a conflict in the event of him later seeking an order under Rule 93(4) in respect of damages that, nevertheless, still remain undistributed is fanciful.

144. The Applicant's interests here are in maximising damages for the class, as he states very clearly in his First Witness Statement. That objective sits entirely in harmony with the Applicant's professional history. That is the very reason why he has secured a Funding Agreement which ensures that the class's damages are ring-fenced from claims by the Funder unless and until they remain undistributed, and even then only by order of the Tribunal.

145. Furthermore, the position of the Funder is also very clear: see witness statement of Ashley Conrad Keller at Annex B to this Reply (the "Keller Statement"). In particular, the Funder's position is that it has no to right under the Funding Agreement to interfere in the conduct of the litigation; nor will it do so (Keller Statement, paragraph 11). Further, the Funder has entered into the Funding Agreement on the full understanding that it has no guarantee of an investment return (Keller Statement, paragraph 16).

146. The contention at paragraph 204 of the Response to the effect that the interests of a funder and claimants under a "conventional" funding model are aligned is also, with respect, wrong. Indeed, many commentators would suggest the very opposite. The great advantage of the Funding Agreement secured by the Applicant in this case is that the interests of the class claimants have been put ahead of the Funder (as implicitly required by the statutory regime), rather than behind the interests of the Funder which is the position under conventional third party funding models.

Adequacy of Adverse Costs Funding

147. Mastercard contends at paragraphs 205-215 of its Response that the Applicant has not established that he "…will be able to pay the defendant's recoverable costs if ordered to do so…", pursuant to rule 78(2)(d) of the 2015 Rules. Mastercard's submissions at paragraph 207 and 211 correctly rehearse the fact that, pursuant to the Funding Agreement, £10 million of adverse costs cover has been secured.

148. Mastercard blandly and boldly asserts that its own costs will exceed £10 million (paragraph 213 of Response). The Applicant's total legal costs are budgeted at £15.6 million. It is inevitable that the Applicant's costs will be larger than Mastercard's costs[15]. There is simply no basis for asserting, as Mastercard does, that its costs will be of the same magnitude.

149. It is submitted that £10 million is more than reasonable defence costs for Mastercard. There is no good reason why the Tribunal should approve any budget in excess of that (even when one is put forward). If a larger budget is put forward, then the issue will arise as to the possible need for costs

[15] E.g. the Applicant bears the burden of proof. Furthermore, Mastercard has already done much of the legal work and analysis, as well as much of the expert work – its expert reports in the retailer claims address overcharge and pass-on. It also ought already to have worked extensively on disclosure. Unlike individual consumers, Mastercard is very familiar with most if not all of the issues, having been fighting the claims in Brussels and Luxembourg for 14 years. This UK CAT claim should generate relatively marginal additional and new costs for Mastercard. The fact that Mastercard has changed law firms (compared to other and/or historic interchange litigation) is a matter for Mastercard, but the Applicant should not bear the costs of that firm getting up to speed and then Mastercard needing to manage and have two firms liaise and co-ordinate between the claims.

management or cost capping under the Rules. Accordingly, the £10 million cover for adverse costs satisfies the requirements of Rule 78(2)(d)16.

150. [Mastercard recites section 2.2 of the Funding Agreement but makes no submissions in respect of it. The Tribunal will note from Section 2.2 that the right to re-allocate does not include clause (a)(iv). It is not, therefore, clear what point Mastercard is seeking to make – CONFIDENTIAL].

Third Party Costs Order

151. In its final attempt to derail the pursuit of this claim, Mastercard seeks to draw the Tribunal into a debate about whether or not the Tribunal has jurisdiction to make a costs order against a third party funder. Quite what relevance this submission has to certification of the Applicant's position as representative for the proposed class is difficult to fathom.

152. Suffice to say that, even if the Tribunal did not have the jurisdiction to make a third party costs order against the Funder it would not be a ground on which the Tribunal could refuse to grant the CPO, or authorise the Applicant to represent the class. Whether or not authorisation or certification is granted cannot conceivably boil down to the Tribunal's jurisdiction to make third party costs orders. There is absolutely no warrant for such a contention in the legislation or the Rules.

153. If the Applicant is ordered to pay Mastercard's costs, the Funder has agreed to provide up to £10 million to satisfy such a liability. That is sufficient to satisfy the requirements of rule 78 of the 2015 Rules.

Conclusion

154. None of Mastercard's funding objections to the proposed certification of the Applicant as class representative have any merit. They should be rejected and the Funding arrangements approved.

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16 It is to be noted that the rule does not prohibit authorisation even if the Tribunal were satisfied that the Applicant could not pay all of Mastercard's legal costs. It is just one of five considerations to take into account.

I: LIABILITY – STRENGTH OF THE CLAIM

155. Mastercard submits that the Tribunal should take account of the strength of the claims in deciding whether to certify the proceedings17. It raises two arguments: first, that the loss flowing from domestic transactions was not caused by the Intra EEA MIFs and, secondly, that there are "…no viable claims in respect of UK domestic debit card interchange fees…"18.

156. The Applicant contends that the Tribunal should place no weight on these arguments. As Mastercard accepts, in paragraph 77 of its Response, there is no requirement in the Rules (or indeed in the statute or in the Guide) that the Tribunal should take the strength of the claims into account when deciding whether the claims are suitable to be brought in collective proceedings (of any type).

157. Mastercard suggests, however, that Rule 79(2), which states that the Tribunal should "…take into account all matters it thinks fit…", should include considering the strength of the claims.

158. Whilst the Applicant accepts that the Tribunal is not strictly precluded from having regard to the strength of the claims, such regard will rarely be appropriate. It is notable that the drafters of the Rules clearly had the strength of the claims in mind only as a possible consideration when assessing whether a claim should be opt-in or opt-out and not whether it should be certified as a collective action per se: see Rule 79(3). Moreover, under Rule 79(3), the consequence for proposed collective proceedings which may look weak at the early, pleading stage is that they proceed on an opt-in basis, not that the CPO is refused altogether. Accordingly, it would run contrary to the scheme, if the strength of the claims were routinely to be considered as a factor when determining, under Rule 79(2), whether the claims are suitable to be brought in collective proceedings at all.

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17 Mastercard does not appear to be advancing an argument that the collective proceedings should be certified, but only on an opt-in basis. In the event that it should advance such an argument, the Applicant's position is that Mastercard's arguments on the strength of the case should be disregarded in that context too for the same reasons set out at paras 157 to 159 below.

18 See paras 78-90 of the Response.

159. In any event, there is no basis on which the Tribunal can in this case properly place weight on Mastercard's two allegations about the strength of the claims. In particular:

a. Mastercard's allegations do not affect the entirety of the claims as Mastercard does not raise any arguments in relation to the portion of loss flowing from the direct application of the Intra-EEA MIFs – namely, transactions to which the cross-border MIF was applied. It follows that – even taken at their highest - Mastercard's allegations do not pose any obstacle to the grant of a CPO *in toto*;

b. more fundamentally, at a general level, Mastercard itself does not contend that its allegations should be explored by the Tribunal at the CPO hearing: see paragraph 88 of its Response. Quite the opposite, it simply asks the Tribunal to note that the question of whether there was any loss in relation to UK domestic MIFs "…*is far from clear cut…*". Mastercard had the option to apply for a strike-out or summary judgment on these issues but it deliberately chose not to do so. The reason – no doubt – that Mastercard does not seek determination of these two issues at this stage is because it would be impossible for the Tribunal to determine them now, not least of all because they raise complex questions of fact. It follows that the Tribunal is simply in no position to reach a view as to the merits of Mastercard's two allegations. Rather, the Tribunal ought to proceed on the basis of the claims as formulated in the CPO Application, which are pleaded as a follow-on action and must be taken as such for the purposes of assessing whether to grant the CPO;

c. more specifically:

i. as to the allegation made in relation to domestic MIFs (paragraphs 78-88), Mastercard's argument is one of causation as accepted by Mastercard at paragraph 88. Causation is highly fact-sensitive and will need to be explored on the basis of appropriate disclosure and evidence;

ii. as to the allegation made in respect of UK debit card MIFs (paragraphs 89-90), namely, that Solo debit cards should be excluded because they were subject to the same interchange fees as Maestro cards (which latter cards have always been excluded from the proposed claim, on the basis of the Applicant doing the best he can not to be over-inclusive relying on publicly available material), again, this is a factual point which requires exploration at trial. As the Applicant's solicitors set out in their letter dated 9 November 2016 (to which reference is made in paragraph 90, and in respect of which no response has been received), his understanding was that Solo debit cards operated under Mastercard's interchange network rules. If this understanding is contested, no doubt Mastercard will plead to the point in its Defence and the issue will be determined at trial.[19]

160. In conclusion, given their lack of relevance under the Rules and/or that the Tribunal is not in any position at this stage to determine the two allegations made by Mastercard (and is not being asked to do so), it would be wrong to take them into account when determining whether to grant the CPO.

J: ALLEGED INFLATED VALUE OF THE CLAIM

161. In paragraphs 91-94 of its Response, Mastercard sets out two further reasons why, it submits, the value of the claim is inflated. It is far from clear how these points have any relevance to the granting of the CPO. Mastercard does not appear to be asking the Tribunal to determine at this stage whether its arguments are well-founded (and the Tribunal is in no position to do so). In short, it is, therefore, inappropriate for the Tribunal to take Mastercard's two points into account when determining whether to grant a CPO.

162. In any event, the matters are raised by Mastercard as only going to the issue of quantum – Mastercard states expressly at paragraph 92 that there is an "… overstate[ment of] the value…" and at paragraph 94 that "…these considerations will materially reduce the value of the claim…" . The proper

[19] There is a mismatch in Mastercard's assessment of the value of this part of the claim: £400 million in §89 and £500 million in §90.

course is for Mastercard to plead out these matters in its Defence and for the Tribunal to determine them at trial which, of course, in a follow-on action, is the whole point of the trial. Neither point constitutes a proper basis for refusing to grant the CPO at the outset.

163. Without prejudice to the foregoing, the Applicant makes the following observations.

(a) Alleged inflated value of the Intra-EEA Claim

164. In paragraph 92, Mastercard complains about the approach set out in footnote 81 of the Claim Form. That footnote clearly explains that, "…due to limitations in the publicly available data…", the current calculation of VOC includes transactions made by class members when they were in other Member States (which overstates the VOC) and does not include transactions in the UK in which a foreign-issued Mastercard was used (which understates the VOC). The footnote concludes: "The proposed class representative believes these matters will be capable of being addressed following disclosure from the proposed Defendants".

165. Mastercard's complaint that the position in footnote 81 is unsatisfactory, because transactions outside the UK are not a good proxy for transactions within the UK, therefore misses the point. It is not proposed that this proxy should be used, since it is believed – as set out expressly in footnote 81 – that disclosure should provide the information necessary to form a more accurate calculation. The footnote simply and responsibly provides Mastercard with transparency about some uncertainty over a portion of the pleaded VOC, which uncertainty will need to be addressed later on in the proceedings.

166. As explained above, this matter is quintessentially one to be determined at trial following disclosure.

(b) Scope of the class

167. In paragraph 93, Mastercard says that "…*even assuming that 100% of the overcharge was passed-on in higher prices, a substantial proportion of purchases of goods and services in the period 1992 to 2008 would have been*

by people/entities which would be outside the scope of the proposed class…". The complaint is essentially that there is a mismatch between the amount of damages claimed and the people who are claiming them, as members of the class. More damages are claimed than are warranted by the members of the class, it is said. The suggestion is that the amount of the quantum claimed should, therefore, be reduced.

168. The Applicant contends that there are five key principles to bear in mind when assessing this 'mismatch' argument:

    a. *first*, it is of course correct that there must be material symmetry between the calculation of loss and the scope of the class that is claiming that loss. At present, loss is calculated on the basis that all the overcharge on the relevant Mastercard VOC transactions is properly recoverable by the members of the class, i.e. that all the overcharge incurred in respect of all the VOC, as passed on via all retail prices in the relevant merchants, has been paid by the class members as defined. If Mastercard succeeds in establishing that there is a material asymmetry between calculation of loss and the scope of the class, then (subject to what is said below), the Applicant fully accepts that the asymmetry should be addressed. Importantly, there are two conceptual methods of addressing any such asymmetry. Either one could adjust the aggregate calculation of damages (i.e. to exclude those prices/transactions which were, in fact, paid/transacted by non-class members) – as Mastercard contends. Alternatively, one could adjust the class definition (i.e. to include people or entities who are currently excluded from the class but who have suffered from paying overcharges that form part of the aggregate calculation of damages) – the opposite of what Mastercard contends. The Tribunal has ample powers in the Rules to perform these sorts of exercises as the collective proceedings progress, if and when the current allegations by Mastercard are actually made out;

    b. *secondly,* in fact, the most relevant mismatch at this stage of the proposed proceedings is the asymmetry of information and knowledge

between the two parties. Mastercard knows a vast amount about, and has considerable disclosure concerning, the sorts of issues that it raises at paragraph 93 e.g. how much of the aggregate pot of damages may relate to transactions carried out by businesses, as opposed to individuals. The Applicant and the class members do not have this knowledge or relevant disclosure. The proper and fair course, it is submitted, is for Mastercard to plead out its supposed objections at paragraph 93 in a Defence, and then to provide the disclosure and arguments that it wishes to advance in order to substantiate the reductions in the aggregate damages pot for which it contends. The Applicant will adduce counter-evidence, as appropriate, and then that evidence and those arguments can be tested at trial. What would be unfair, it is submitted, is the denial of the CPO on the basis of untried and untested assertions about alleged material mismatches between the aggregate pot of damages and the group of people claiming them;

c. *thirdly*, when defining the class, the Applicant was very conscious of paragraph 6.37 of the Guide, which requires that "…*it must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class... [This] sets the parameters of the claim by clearly delineating who is within the class and who is not... [C]lass definitions based on subjective or merits-based criteria (for example, "persons having suffered loss as a result of the defendant's conduct") should be avoided. Further, the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim*…" (emphasis added). The intention in the class definition proposed is (1) that it *does* delineate the class objectively and clearly, having regard to considerations of reasonableness and practicability, using "*parameters*" which are easily understood by potential class members and (2) that it *does not* either (a) simply identify all persons having suffered loss or (b) arbitrarily exclude certain victims without any reason (see paragraph 23(d), Claim Form). It is to be noted that, as soon as "*parameters*" are imposed upon a class (that would otherwise be 'all persons who have suffered loss'), so as to meet

the public policy considerations of certainty, practicability and clarity (to would-be class members), then those parameters will potentially have the effect of excluding some victims. There is an inevitable trade-off between the public policies at stake in this type of collective litigation. It is not appropriate to deny a CPO where the need to have regard to one set of relevant principles results in a slight flexing of other relevant principles;

d. *fourthly*, the Applicant's aim in defining the class has been sensibly and practicably to reflect the compensatory principle by seeking recovery for those victims most likely to have suffered loss and damages as a consequence of Mastercard's unlawful conduct. Accordingly, for instance (and as further referred to below), the class definition includes criteria of (i) 3 months' residence and (ii) being over 16 years old. As explained in paragraph 23(c) of the Claim Form, the purpose of these criteria is precisely to "…*focus on that category of consumers that are likely to have suffered most loss and damage…*"; *fifthly,* it is *inherent* in the nature of both opt-in and opt-out that there will in due course - that is, *after* a CPO has been granted - have to be adjustments to both (i) the aggregate damages value claimed, and (ii) the identities of the class members. Accordingly, it is no good objection in principle that these matters are not finally resolved as at the date of the CPO.

169. Bearing the five principles above in mind, the Applicant submits that the class definition is entirely appropriate. However, to be clea*r, should the Tribunal disagree now, or should it become apparent during the course of the* pr*oceedin*gs that *one or m*ore of Mastercard's arguments is well-founded, then it is of course possible for th*e* Applicant to seek to amend the class definition or for the Tribunal to revise the class, prior to the grant of the CPO or as the collective proceedings progress (see Rule 85) - using one or both of the conceptual approaches identified above. On no basis should it lead (as Mastercard suggests in paragraph 95) to the Tribunal refusing to certify the proposed collective proceedings *in limine*. The suggestion is absurd; it amounts to saying that, because there is an alleged mismatch in certain places when the

Applicant put in place (as he is mandated to do) "*parameters*", possibly resulting (if the allegations are one day made out) in there being some degree of overcompensation for the class members (which overcompensation is not accepted, given the ability to adjust the class or the damages pot), that means that the entire proceedings should be denied a CPO, with the definite result that no victim will ever receive *any* part of the compensation to which s/he is entitled. Given that the suggested mismatches are only a problem in the event that the Applicant has obtained an aggregate award of damages, that is, a finding that the class as a whole *has* suffered loss, the new legislative regime cannot be seen to be delivering justice to the class if it denies *all* recovery on the basis of this sort of argument.

170. Turning to the examples of excluded persons or entities set out in paragraph 93 of the Response, they are misconceived and/or immaterial in any event and can, therefore, be disregarded, certainly at the current certification stage:

    a. Paragraph 93(a): "*businesses, charities and government bodies or individuals purchasing in the course of business".* The class *deliberately* excludes purchases in the course of a business (including those by charities and government bodies) since the hypothesis of the claim as presented is that there has been 100% pass-on of any overcharges by such entities. Having passed on the overcharges, these entities have not suffered loss and, therefore, do not fall within the class of victims. Accordingly, there is no mismatch. Moreover, the class definition *does* include the ultimate, individual consumers who are downstream of these UK entities, since those individual UK consumers (of the outputs of UK businesses, government and charities) will have ultimately borne the material burden of the overcharge, with no possibility of their passing that burden on. Again, the class definition is faithful to the compensatory principle since it will capture the victims of the overcharges that are being claimed. Further, the VOC has been calculated by reference to transactions using *consumer* Mastercards only, not *corporate* or *commercial* Mastercards; accordingly, the VOC and overcharge analysis leading to the

aggregate damages possum claimed relates almost entirely to *retail* transactions (i.e. by individual consumers). It is very unlikely that any material part of that loss will have been borne by businesses or other persons outside the class because of the implausibility of businesses, government or charities made significant purchases at Mastercard-accepting *retailers*. Their transactions are much more likely to have been conducted at the *wholesale* level and/or by other procurement arrangements. At this certification stage, on the basis of the CPO Application as presented – which is not subject to any strike-out application by Mastercard on the ground of the Claimant's pass-on position being unsustainable – these responses dispose of the supposed objection at paragraph 93(a). In any event, if it should become apparent during the course of the litigation there is nevertheless some other asymmetry between the quantum claimed and the loss incurred by the class, then, at that stage, it would be perfectly possible to make appropriate adjustments to the quantum claimed. For example, one could seek to obtain from third party sources figures giving the proportion of retail (as opposed to wholesale) spend by businesses, compared to the proportion of consumer retail spend);

b. Paragraph 93(b): *"persons now deceased".* Again, this is not a point that should defeat certification. If the Tribunal considers that this is an asymmetry that needs to be addressed now rather than at the stage of determining quantum, this could be done by including estates within the scope of the class definition. An alternate option may be to seek to make an appropriate reduction to the quantum claimed in order to reflect the purchases made by persons now deceased. If any such reduction were the appropriate solution at a later stage this is not a matter that can be determined at this stage as it will be materially affected by Mastercard's limitation argument. If Mastercard succeeds in striking out the early part of the claim, this will have the effect of greatly reducing the alleged asymmetry.

c. Paragraph 93(c): *"anyone not resident in the UK for the required three month period, including tourists".* As to this objection, the Applicant has explained above that this criterion was intended to tighten the nexus between actually having suffered a loss and membership of the class, i.e. actually to serve the compensatory objective, not the reverse. It must be right that individuals with a meaningful period of residence will (a) most likely have suffered loss and (b) most likely have suffered greater loss than transient visitors. To include, say, a transit passenger at Heathrow who has bought a chocolate bar from a Mastercard-accepting retailer at duty-free (which would be the effect of dispensing altogether with a residence requirement) does not seem to the Applicant to be sensible or practicable (including as regards noticing requirements and their associated expense) or as faithful to the compensatory principle that Mastercard has placed such reliance upon in its Response. Moreover, the supposed 'overcompensation' attributable to this excluded group (i.e. the prices which were, in fact, paid by such people and which are included in the calculation of loss) is likely to be small – certainly there is no evidence at this stage presented to suggest otherwise. All of this said, if the Tribunal is so minded, the reference to three month residence can, of course, be removed/relaxed and then the supposed 'mismatch' disappears/reduces, although the practical consequences of any such adjustment is likely to be over-compensation for those that are brought into the class to the detriment of the currently constituted class (depending on the precise method of distribution of the aggregate damages pot). Some value judgments need to be made in formulating the class definition and the Applicant has sough to strike the correct balance;

d. Paragraph 93(d): *"purchases made by non-residents at UK retailers by mail order, telephone or online".* The drafting of this objection is not entirely clear, but the Applicant apprehends that the reference to non-residents here must also refer to the fact that on-line etc. purchasers will have paid the overcharge (when buying from UK businesses) but

are unlikely to meet the three month residence test. In other words, even though they have suffered loss, and even though transactions which relate to them are included within the quantum claimed, these individuals cannot/will not fall within the class definition because they cannot/will not meet the residency hurdle – and that is a 'mismatch'. (If the reference to "non-residents" only means non-residents at the domicile date, then, of course, they can opt-in – see response to paragraph 93(f) below.) On this understanding, the Applicant again (see previous sub-paragraph) refers to his objective to focus on those class members who have most likely suffered the most loss, in the expectation that the excluded group is likely to have borne only a very limited amount of the loss covered in the claim (and so over-compensation from the 'mismatch' will be minimal – a matter that the Tribunal cannot sensibly even begin to assess at the CPO stage). However, again, if the Tribunal wishes to so order, the three month residence criterion can be removed/relaxed;

e. Paragraph 93(e): "*individuals under 16".* In the Applicant's submission, this criterion is entirely appropriate, since such individuals are unlikely to have suffered loss on their own account (see paragraph 23(c)(i), Claim Form) and are, thus, not victims in their own right. Importantly, the losses sustained by overcharges on UK transactions carried out by under-16s are likely to have been ultimately born by UK adults who are themselves included in the class already. Accordingly, there is unlikely to be any material mismatch between loss and class here. To the contrary, the criterion faithfully reflects the compensatory principle;

f. Paragraph 93(f): "*anyone no longer resident in the United Kingdom, who will only be part of the claim on an opt-in basis".* This objection is curious. The Applicant has no choice over this criterion, since the statutory regime requires that non-residents at the domicile date need to opt-in. They fall within the class definition, but are not within the scope of the opt-out regime. Of course, it may come to pass that, *at a future point*, an issue arises in respect of whether the aggregate

damages claim needs to be reduced in some way, to correspond to the loss borne by class members who are now resident abroad and who have chosen not to opt in. However, that issue can only be decided (if it even arises and is material) after the opting-in process has taken place. What cannot be right in principle is to exclude such individuals from opting-in by currently carving loss borne by such people out of the claim (which seems to be the suggestion: "… *these considerations will materially reduce the value of the claim*…").

PART IV: MASTERCARD'S CLAIM THAT CERTIFICATION OF QUANTUM ISSUES SHOULD BE REFUSED

171. Mastercard submits in the alternative (to full dismissal) that the quantum is not a common issue and should not be certified. This submission is flawed both as a matter of principle and practicality. As explained above, the issue of pass-on from merchants to consumers is a common issue, even if it is established that pass-on rates vary as between merchants. As a practical matter, as Mastercard well knows, if quantum is excluded from the scope of the collective proceedings, then the proceedings cannot be taken forward. As Mastercard itself accepts in its Response, it would be "*impossible*" for individuals to prove their loss on an individual basis. There needs to be an aggregate award of damages, otherwise the collective proceedings are unsustainable and their very purpose would be defeated.

172. Accordingly, the suggestion (by implication at least) in paragraph 101 of Mastercard's Response that the issues of (i) pass-on from merchants to consumers, and (ii) proving individual loss by reference to purchasing history, could be carved out from the CPO should be rejected.

173. Compound interest (paragraphs 102-112, Response) is rather different, inasmuch as its exclusion from the collective proceedings would not be fatal to the proceedings going ahead. However, Mastercard's assertions that compound interest should be excluded in that way are groundless and would simply lead to increased costs and inefficiencies for the proposed class, Mastercard and the Tribunal. There could be millions of consumers that come forward and seek to have their interest claim determined by the Tribunal.

174. Mastercard submits that a claim for compound interest has to be pleaded and proved in the usual way (paragraph 104).

175. The Applicant's pleaded case on compound interest is at Claim Form paragraphs 114-115. It sets out two categories of class members: (i) those who effectively increased their borrowings to fund the overcharge and (ii) those who were in credit and, therefore, lost the benefit of some credit funds because those funds were used to fund the overcharge. Mastercard has raised no challenge to the adequacy of that pleading.

176. As to the proof required for compound interest, that is a question which merits full argument. The Tribunal, at paragraph 521 of its judgment in *Sainsbury's*, described how "*general evidence*" was sufficient to convince Males J that compound interest was appropriate in *Equitas Ltd v Walsham Brothers* [2013] EWHC 3264 (Comm). In that case, Males J said that "…*unless there is some positive reason to do otherwise, the law will proceed on the basis, at least in the commercial context, that a claimant kept out of its money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, even if adduced, may well be somewhat hypothetical and of little assistance…"* (paragraph 123).

177. It will, thus, be open to the Applicant to submit at trial that the same real-world analysis should be applied in respect of consumers, for whom bank interest rates are compounded (whether to their benefit or to their detriment) just as much as for businesses, and who necessarily needed to be less in credit, or further in debt, in order to fund the unlawful overcharge.

178. Mastercard sets out three reasons why, it submits, "…*the claim for compound interest is clearly unsuitable for certification as a common issue*…" (paragraph 110). None of them is right.

179. First, it asserts that the majority of the proposed class is unlikely to have suffered any compound interest losses at all. That is because, it submits, the overcharge "…*will simply have been absorbed in cash-flow by most consumers…*" (paragraph 110). However, it is by no means clear what this submission even means, nor is there any supporting reasoning or evidence to

justify such a conclusion. The members of the class paid unlawfully inflated prices, and will have funded this overcharge through either being in reduced credit, or increased debt. To that extent their "cash-flow" is affected - to their detriment - in either circumstance. Whilst it may seem to Mastercard that the sums involved are small *per capita*, that does not mean that they do not have associated victims. The fact of it being small *per capita* is precisely what makes the issue ripe and proper for determination on a class wide basis. The Applicant's task is to achieve maximum permitted redress for these victims from the proven wrongdoer. Compound interest is an important part of that task and not at all lightly to be dismissed.

180. Secondly, Mastercard submits that it is clear from the Claim Form that this issue is not common, by reference to the two suggested categories of loss. In particular, Mastercard claims that the types of loss "…*are very different in nature (i.e. charges for increased borrowing versus interest foregone on investments)…"* (paragraph 111). The Applicant does not agree; ultimately, both these types of loss are still principally interest rate losses. In any event, the Applicant fully acknowledges the possibility that sub-classes might need to be established in respect of this issue. In the Applicant's List of Issues (dated 25 November 2016), he said:

> *"It is conceivable that, as flagged in paragraph 5.5.2 of the Applicant's expert report, compound interest may require the establishment of smaller sub-classes (in particular by reference to those who borrowed money compared to those who were in credit). However, the Applicant's preferred course would be to treat this issue on an aggregate basis across the entire class (see paragraph 115, Collective Proceedings Claim Form). (To the extent that sub-classes may need to be established, the Applicant does not consider there would be any reason that he cannot represent any and all such sub-classes.)"*

181. In the Applicant's submission, it would be premature to form such sub-classes now, before any of the relevant evidence has been compiled and analyses performed. Nor would there be any efficiency in so doing. Even if sub-classes were formed, it would not impact the orders sought in the CPO Application,

namely, authorisation of the Applicant to be the class representative and granting of the CPO. The Applicant could represent both sub-classes without there being any conflict of interest. Should the Tribunal disagree, however, the right response would be simply to form the sub-classes suggested, rather than to refuse to allow this element of the claim to proceed.

182. Thirdly, Mastercard alleges that the loss profile of each member of the class would be radically different, depending on their own personal circumstances. This submission is the same as its complaints about individualised purchasing histories for each class member. Using a "*sound imagination*" and a "*broad axe*", it should be possible to form a suitably robust assessment of the aggregate compound losses caused to consumers by paying the unlawfully inflated prices, in a not dissimilar manner to the use of "*blended MIFs*" in *Sainsbury's*. If, ultimately, the Tribunal does not agree that this head of loss has been proved, then this element of the claim will fail and the proposed class will be awarded simple interest. However, there is no basis for the Tribunal refusing even to certify this element of the collective proceedings which, as stated above, is essential in order properly to compensate, and give an effective remedy to, those who suffered loss and damage as a result of Mastercard's proven infringement of competition law.

PART V: LIMITATION

183. Mastercard sets out its limitation argument at some length in Part IV of its Response. It is unclear why it has done so given that the parties have agreed that this issue should not be determined at the CPO hearing, a stance endorsed by the Tribunal at the first CMC in November 2016. The appropriate way for Mastercard to pursue this argument, assuming that the CPO is granted, is to plead it in the Defence and/or to make an application for it to be dealt with by way of strike out or preliminary issue. Once any such application is made, the Applicant will, of course, respond to it.

PART VI: DEFINITION OF THE CLASS

184. Mastercard suggests that the class definition should be amended "…*to reflect a clarification which has arisen in correspondence*…" (paragraph 129) because, it says, *"…the definition is ambiguous…"* (paragraph 133).

185. The Applicant submits that no such amendment is needed. First, there is no ambiguity. Secondly, this point will never arise in practice. Thirdly, if Mastercard is genuinely concerned by this point, the Applicant is happy to include a clarification in, for example, the CPO Notice itself that will be published should the Tribunal grant the CPO and in FAQs on the claim website.

186. First, as to the alleged ambiguity:

    a. the class definition is "*Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from* ***businesses selling in the UK*** *that accepted Mastercard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over".* (emphasis added)

    b. Mastercard submits that this phrase is ambiguous, because it might include purchases made outside the UK, so long as the business in question also sold within the UK (paragraph 133).

    c. The Applicant responds that this submission is not the natural meaning of the words. A non-lawyer reading the class definition in a straightforward and usual sense would not be led to ask themselves, for example, whether this includes purchases they made on holiday in Paris at Marks & Spencer, on the basis that Marks & Spencer is a business which sells in the UK.

187. Secondly, and critically, an individual would never have any cause to ask themselves this question, since, if they meet the other criteria of the class (in particular, residency in the UK for a continuous period of at least three months), they will not need to resort to purchases in Paris in order to fall within the class. Clearly, they will have purchased goods and/or services from a business selling

in the UK that accepted Mastercard at some point during their residency in the UK given the prevalence of businesses that accepted Mastercards. So Mastercard's point would never arise.

188. Thirdly, this point can be adequately dealt with by way of clarification in the FAQs which accompany the CPO. There is no need to amend the class definition.

189. Given the significant notification and publicity that has already been undertaken by the Applicant, both prior to, and after, the filing of the Application / Collective Proceedings Claim Form, the Applicant considers making any unnecessary change to the class definition of the kind proposed by Mastercard will actually be unhelpful and cause confusion.

PART VII: ORDER SOUGHT

190. The Applicant seeks an order that (i) the Tribunal grant his application for a collective proceedings order in respect of the proposed collective proceedings, and (ii) makes an award of costs in its favour.

PAUL HARRIS QC

Monckton Chambers

MARIE DEMETRIOU QC

VICTORIA WAKEFIELD

Brick Court Chambers

And also NICOLAS BACON QC

4 New Square

ANNEX A: OTHER JURISDICTIONS

A INTRODUCTION

191. Mastercard does not place any heavy reliance on comparative law but it does appear to suggest that the law in the United States, Australia and Canada contain features which support its arguments.

192. The Applicant does not accept that Mastercard has presented the Tribunal with a complete and impartial picture of the collective action regimes in those three jurisdictions. As the Applicant itself states (paragraph 136), the UK collective action regime must be interpreted and applied by reference to domestic legal principles. But in any event, the Applicant does not accept that these regimes support the objections to certification raised by Mastercard. On the contrary, there are many elements of those regimes which support the approach the Applicant is proposing to take in these proceedings

193. In overview:

a. Mastercard's annex attempts to downplay the Canadian regime. However, this is the most relevant regime for present purposes. As the Tribunal will know, evidence relating to the Canadian regime was taken into account when designing the UK collective actions procedure.[20] The Applicant considers that the proposed collective proceedings would clearly be certified under the Canadian regime.

b. The assertion by Mastercard that the proposed collective proceedings would be dismissed if it were brought in the United States or that an aggregate award of damages would be refused as a matter of United States law is incorrect for the reasons set out below. The proposed proceedings are not too remote and the proposed aggregate award would not lead to non-certification.

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20 For example, paragraph 194 of "Final Impact Assessment: Private Actions in Competition Law", it is said that "our best model is Canada, where we have by far the most data for a comparable opt-out system".

c. In relation to Australia, Mastercard's summary at paragraphs 152-161 of the approach of the Australian courts – even if correct – does not take the matter any further. Mastercard's conclusion in relation to Australia is that the case law demonstrates that "*the quantum of damages suffered by the group as a whole must be calculated by the existing law*" (paragraph 136(b)(ii)). But the Applicant's case is that the aggregate award of damages he seeks is calculated in accordance with principles of English tort law. Furthermore, there is no certification procedure in Australia.

d. What the three foreign regimes do demonstrate is that where there are plausible claims which are incapable of resolution individually, the law strives to provide some form of effective collective remedy.

B CANADA

1. Certification of Indirect Purchaser Class Proceedings in Canada

i. General Principles

194. The Applicant is generally in agreement with the principles of Canadian class proceedings law set out by Mastercard. Applying these and other Canadian legal principles to the facts of the present case leads to the conclusion that a Canadian court would certify the proposed collective proceedings.

195. Class certification in Canada is a purely procedural mechanism, and does not involve an assessment of the merits of the action.[21] Importantly, certification does not entail "*an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial*".[22]

196. Under Canadian law, it has now been clearly established that indirect purchasers (who are nearly always end-consumers) have a cause of action that can be asserted by way of class proceeding in competition claims, and the overall trend among Canadian courts has been to certify indirect purchaser

21 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §99.
22 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §105.

actions.[23] The Supreme Court of Canada has confirmed that concerns with multiple recovery, complexity and remoteness are insufficient bases to preclude indirect purchasers from advancing such actions.[24]

ii Applicable Evidentiary Standard

197. As noted by Mastercard in its Response, the evidentiary burden on Canadian claimants at the certification stage of a proposed class proceeding is low. The Supreme Court of Canada has unequivocally rejected the approach of requiring a robust analysis of the merits of an action at certification.[25] This lower evidentiary threshold is consistent with a recognition that a Canadian court is dealing with procedural rather than substantive issues at the class certification stage.[26]

198. Plaintiffs need only show "*some basis in fact*" for each of the various requirements for certification, other than the requirement that the pleadings disclose a cause of action.[27] This standard is notably lower than the standard of proof applicable in most other civil proceedings, where a claim must be established on a balance of probabilities.[28] The "*some basis in fact*" standard is not an inquiry into whether there is some basis in fact for the claim itself, but

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23 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, *rev'd* 2009 BCCA 503, *leave to appeal refused*, [2010] SCCA No 32; *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57; *Option Consommateurs v. Infineon Technologies AG*, 2008 QCCS 2781, *rev'd* 2011 QCCA 2116, *rev'd* 2013 SCC 59; *Fanshawe College of Applied Arts & Technology v LG Philips LCD Co.*, 2011 ONSC 2484, *leave to appeal granted on other grounds*, 2011 ONSC 6645 (Div Ct) [unreported], *affirmed* 2015 ONSC 7211 (Div Ct); *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682, *leave to appeal refused*, 2014 ONSC 4529 (Div Ct); *Irving Paper Ltd v Atofina Chemicals Inc*, [2009] OJ No 4021 (SCJ), *leave to appeal denied* 2010 ONSC 2705 (Div Ct); *Fairhurst v Anglo American PLC*, 2014 BCSC 2270.

24 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §60.

25 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §105.

26 *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682 at para. 66, *leave to appeal refused*, 2014 ONSC 4529 (Div Ct).

27 Section 5(1)(a) of the Ontario *Class Proceedings Act* requires that the pleadings disclose a cause of action. This criterion is assessed using the "*plain and obvious*" test that is applied on a motion to strike a statement of claim for failing to disclose a cause of action.

28 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §§99-102.

rather whether there is some basis in fact establishing each of the certification criteria.[29]

199. At the stage of considering class certification, Canadian courts will not weigh or resolve conflicts in evidence. Nor will they engage in "*finely calibrated assessments of evidentiary weight*".[30] This is particularly true when dealing with the evidence of expert economists in data-intensive competition cases.[31]

iii Commonality and Proof of Loss

200. In order to establish the commonality criterion, claimants are required to put forward evidence establishing that the proposed common issues are common to all class members. Although all members of the class must benefit from the successful prosecution of the common issues, they need not all benefit to the same extent.[32] It is not essential that all class members be identically situated *vis-à-vis* the defendant, and even a significant level of difference among class members does not preclude a finding of commonality. Indeed, if material differences among class members later emerge on the facts, "*the court can deal with them when the time comes*."[33]

201. Regarding proof of loss in a proposed indirect purchaser class action, expert evidence is necessary at the stage of class certification to establish that the overcharge was passed on to indirect purchasers, making the issue common to the class as a whole.[34] The requisite expert methodology will be accepted by the court provided that it is "*sufficiently plausible or credible*" to establish some basis in fact for proof of loss on a class-wide basis.[35] The methodology does not need to demonstrate harm to all class members, and it is sufficient if harm

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29 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §100.
30 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §102.
31 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57.
32 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §108
33 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §§109-112; *Dutton* at §54.
34 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §115.
35 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §118.

can be shown to some class members.[36] The threshold is a low one for claimants to establish.[37]

2. Aggregate Damages

202. Canadian courts frequently certify claims seeking an award of aggregate damages. The Court of Appeal for Ontario recently affirmed that "*aggregate damages are essential to the continuing viability of the class action*" as a procedural vehicle, and "*should be more the routine than the exception*." Where the requirements of section 24(1) of the *Class Proceedings Act* are satisfied, such a remedy "*is desirable…in order to make the class action an effective instrument to provide access to justice*."[38]

203. The availability of aggregate damages will be certified as a common issue provided that it will permit a determination of at least part of the relief to be granted to members of the class.[39] Courts have accepted that, in keeping with its policy-driven purpose, an award of aggregate damages is available as a vehicle for achieving a form of rough justice. Canadian courts can accordingly use the remedy to "*calculate the global damages figur*e", and can then "*find a way to distribute the aggregate sum to class members*" without undue concern for the fact that "*some class members who did not actually suffer damage will receive a share of the award*."[40]

204. The threshold for certifying the availability of aggregate damages as a common issue is a low one; a claimant must show "*a reasonable likelihood that the [statutory] preconditions…would be satisfied and an aggregate assessment*

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36 *Crosslink Technology Inc v BASF Canada,* 2014 ONSC 1682 at §66, *leave to appeal refused* 2014 ONSC 4529 (Div Ct).

37 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §§118-119.

38 *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at §§ 49 and 76, *leave to appeal discontinued*, [2016] SCCA No 79.

39 *Good v. Toronto Police Services Board*, 2016 ONCA 250 at §75, *leave to appeal refused*, [2016] SCCA No 255.

40 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at §49, *leave to appeal refused*, [2007] SCCA No 346

made if the plaintiffs are otherwise successful at a trial for common issues."[41] Once the issue is certified, the ultimate decision as to whether an award of aggregate damages should be made, and in what amount, is a matter left to the trial judge and is only considered after a finding of liability has first been made.[42]

205. The availability of aggregate damages has been certified as a common issue in Canadian class proceedings involving allegations of improper credit card fees and interest charged to consumers,[43] as well as in a recent British Columbia proceeding challenging the propriety of credit card fees charged to merchants, referred to above.[44]

C UNITED STATES

206. In relation to United States law, the Applicant submits in summary as follows:

a. US Federal law takes a different approach to EU and English law to claims by indirect purchasers; under the Sherman Act and the Clayton Act only direct purchasers can bring claims: see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Moreover, federal law does not permit pass through defences in direct purchaser claims: see *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). It follows that the approach of US federal law has very little light to shed on collective proceedings brought by indirect purchasers under the UK regime.

b. Mastercard contends that the test for standing in *Associated General Contractors v Carpenters* has been applied at state level (see paragraph 138 of Mastercard's Response). The Applicant contends

41 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at §44, *leave to appeal refused*, [2007] SCCA No 346; and *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at §§43-45, *leave to appeal refused*, [2008] SCCA No 15.

42 *Pro-Sys Consultants Ltd. v. Microsoft Corp*, 2013 SCC 57 at §134.

43 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at §§43-59, *leave to appeal refused*, [2007] SCCA No 346; and *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at §§26-53, *leave to appeal refused*, [2008] SCCA No 15.

44 *Watson v. Bank of America Corp.*, 2015 BCCA 362 at §174, *affirming but varying on other grounds,* 2014 BCSC 532.

that this is incorrect and the authority relied on by Mastercard at paragraph 138 of its Response, *Kanne and Sherman*" is a tying-in case which raises different considerations. In price-fixing cases, classes are often certified by state courts in relation to indirect purchaser actions.

c. On a proper analysis of the relevant case law, at the certification stage claims of aggregate awards of damages are certified even where some members of the class may not have suffered loss so long as there is a plausible mechanism for identifying such person at the appropriate time.

207. Mastercard first observes that potential claimants in the United States must satisfy the standing requirements set forth in *Associated General Contractors v. Carpenters*, 459 U.S. 519, 536-45 (1983), and that these standing requirements have been invoked by courts to dismiss so-called "*indirect purchaser*" claims by consumers related to Visa's and Mastercard's conduct alleged to have imposed supra-competitive prices on merchants that the merchants then allegedly passed through to consumers. See paragraph 137 – 139, Response.

208. *Associated General Contractors*, of course, arose in the context of the United States federal and state system. United States federal law (the Sherman Act and the Clayton Act) permits only direct purchaser claims and does not permit indirect purchaser claims, see, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); at the same time, United States federal law does not permit pass through defences in direct purchaser cases, see, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (rejecting as a matter of law the defence that indirect rather than direct purchasers were injured by the antitrust violation; except in certain limited circumstances, a direct purchaser suing for treble damages under paragraph 4 of the Clayton Act is injured by the full amount of the overcharge paid by it, and the defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge).

209. In the United States, indirect purchaser claims are solely within the purview of state laws that permit such claims. Indeed, some courts in the United States recently have questioned whether the standing requirements set forth in *Associated General Contractors* even apply to state antitrust laws that permit indirect purchaser claims. See, e.g.:

    a. In re Capacitors Antitrust Litig., 106 F.Supp.3d 1051, 1072 (N.D. Cal. May 26, 2015) ("The application of AGC to California state antitrust claims has recently become murky . . .");

    b. *Los Gatos Mercantile, Inc. v. E.I. DuPont De Nemours and Company*, 2015 WL 4755335, *19 (N.D. Cal. Aug. 11, 2015) ("[*T]he Court concludes that the AGC factors do not apply to the laws of twelve of the sixteen states implicated by Claim 1. As to those twelve states . . . the relevant authorities do not demonstrate an express adoption of AGC by the state's legislature, the state's highest court, or the state's intermediary court*.").

210. With respect to the United States cases concerning standing that Mastercard invokes (see paragraph 137 – 139, Response), it is notable that they do not involve price fixing (as Mastercard was found by the European Commission to have engaged in here) but rather allegations of so-called "tying" – namely, that Visa and Mastercard tied the purchase of credit card network services to the purchase of debit card network services, and thereby raised costs for merchants, which in turn were alleged to have been passed through to consumers.

211. Indeed, one of the cases cited here by Mastercard – *Crouch v. Crompton Corp.*, 2004 WL 2414027 (Sup. Ct. N.C., Oct. 28, 2004) (cited at footnote 40, Response) – explained that the fact the claims involved tying rather than price fixing contributed to what the court found to be the speculative nature of the alleged damages. The Court expressly observed: "*This is not a price fixing case. It is at bottom a tying case which carries additional proof problems affecting the speculative nature of damages to indirect purchasers.*"[45] See

45 Id. at *27.

also[46]: the case before the court was "*not a price fixing* case" but rather concerned "*illegal tying of credit and debit cards*"; "*Tying arrangements present unique damages issues*.".

212. Mastercard's discussion of United States law disregards the extent to which United States courts continue to uphold claims and certify classes in indirect purchaser consumer actions relating to price fixing, and do so over defendants' objections that the damages are too speculative.

    a. For example, in In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 583 (N.D. Cal. 2010), the defendants argued that "plaintiffs cannot show antitrust impact on a class-wide basis due to complex distribution channels, wide variations in purchasers' market power and negotiation abilities, changes in the TFT-LCD market over time, variation in panel specifications, and the value added to TFT-LCD products as they move through the supply chain"[47].In granting class certification, the court noted that "[n]umerous courts have held that variations in products and complexities in a distribution chain do not preclude an **estimation** of whether an overcharge impacted end purchasers." (emphasis added)[48]

    b. See also *Microsoft I-V Cases*, 2002-2 Trade Cas. (CCH) ¶73,013 at 88,561, 88,563, 2000 WL 35568182 (Cal. Sup. Ct. Aug. 29, 2000), where defendants had argued in an indirect purchaser consumer action that "*any overcharge reaching a consumer will be a function of so many variables . . . that the impact of any violation cannot possibly be considered collectively,*" the Court stated that it was "*not persuaded that a comprehensive analysis of the issues cannot be made within the context of properly managed trial proceedings*," including expert analysis.

213. In *In re Polyurethane Foam Antitrust Litigation*, 314 F.R.D. 226 (N.D. Ohio 2014), the Court similarly certified indirect purchaser classes over objections

46 Id. at 26.
47 Id., 267 F.R.D. at 598.47.
48 Id. at 603.

that it would not be possible to find a class wide overcharge. The Court observed, among other things, that it "*does not doubt that an alleged colluder could find an instance in which, in the short-term, a direct purchaser failed to pass on the amount of an antitrust overcharge. That fact alone cannot defeat an otherwise proper offer of generalized evidence of overcharge passthrough; it instead goes to the weight of the evidence offered to prove if passthrough in fact occurred, and the amount of that passthrough*".[49] As the Court explained in a section of the opinion entitled "*Antitrust Injury Can Be Demonstrated*":

> *"To review, Indirect Purchasers present generalized evidence that the flexible foam industry is a concentrated industry with high barriers to entry and contains many buyers for a fungible set of products. Indirect purchasers also present generalized evidence that Defendants had substantial excess capacity, and that demand for the relevant products declined substantially over the Class Period. Indirect Purchasers also show actual prices for the same products tended to move together over time, which is indicative of a pricing structure. They also present evidence of a substantial number of quarters in which a significant number of Defendants issued price increase letters announcing the same or similar percentage of price increase, and that these letters did not differentiate between local geographic markets in announcing prices. Finally, Indirect Purchasers offer Lamb's expert testimony, which contains a detailed examination of discovery material produced in this matter, corroborating Indirect Purchasers' understanding of Defendants' business. Lamb presents commonly-accepted regression models to measure the amount of overcharge suffered by direct purchasers, and then measures the extent to which that overcharge found its way through the distribution chain to indirect purchasers.*
>
> *Defendants' sustained attack of antitrust injury proof goes too far, reaching merits issues not bound up with Indirect Purchasers' predominance showing. See also In re Cathode Ray Tube (CRT) Antitrust Litig., 2013 WL 5391159, at *5 (N.D. Cal. 2013) ("Defendants*

[49] Id., 314 F.R.D. at 286.

> *argument . . . is essentially that [indirect purchaser plaintiffs] must be able to prove at the class certification stage that every single (or basically every single) class member was injured by Defendants' conduct. This contention is wrong.* ***The Court's job at this stage is simple: determine whether [indirect purchaser plaintiffs] showed that there is a reasonable method for determining, on a classwide basis, the antitrust impact's effects on the class members."). Lamb's averaging approach may have some weaknesses, but Indirect Purchasers have met their burden.****" (emphasis added)*

214. These certified indirect purchaser class actions also confirm that indirect purchaser claims remain generally robust under United States class certification law. To the extent Mastercard sets forth the criteria for class certification under United States Federal Rule of Civil Procedure 23 (see paragraphs 140 – 148, Response), Mastercard does not identify any criteria under Rule 23(a) or Rule 23(b) that could not be satisfied in the proposed collective proceedings that the Applicant seeks to bring in the Tribunal if those rules were to apply.

215. Rather, Mastercard focuses on the question of whether it is appropriate to demonstrate so-called "aggregate" or "classwide" damages: see paragraph 149 – 151, Response. Mastercard's presentation on this issue, however, sidesteps the clear mandate in recent United States case law that it is appropriate at the class certification stage to calculate damages on a classwide basis.

216. Mastercard's discussion of the U.S. Supreme Court's recent decision in *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 2016 WL 1092414 (Mar. 22, 2016) omits this important focus of the opinion:

    a. As a threshold matter, although *Tyson Foods* had petitioned the Supreme Court to address the question of whether "*a class may be certified if it contains 'members who were not injured and have no legal right to any damages*,'"[50] , in its merits briefing Tyson actual "concede[d] that '[t]*he fact that federal courts lack authority to*

[50] Id*, 2016 WL 1092414, at *12.*

compensate persons who cannot prove injury ***does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured***."[51] (emphasis added). Rather, according even to *Tyson*, the relevant question is whether the plaintiffs seeking class certification can "*demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages*."[52]

b. The Supreme Court in *Tyson* upheld certification of the class there, notwithstanding that the class included at least hundreds of uninjured members.[53] The Supreme Court expressly noted that there, where the class had been certified and the jury at trial had awarded an aggregate damages award to the class, the question of whether some "*methodology will be successful in identify uninjured class members*" was "*premature*" and "*appropriately to be addressed post-trial in the context of the proposed allocation plan for disbursal of the jury award*."[54]

c. Importantly here, the Supreme Court in *Tyson* rejected Tyson's request for a "*broad rule against the use in class actions of what the parties call representative evidence*" – that is, data that is sampled, averaged or aggregated by an expert.[55] The Court held that "*[a] categorical exclusion of that sort, however, would make little sense,"* explaining that *"[a] representative or statistical sample, like all evidence, is a means to establish or defend against liability*," and that "*[i]ts permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action*."

51 Id.
52 Id.
53 Id. at *7, 12-13.
54 Id. at *12.54.
55 Id. at *8.

d. The Supreme Court also noted that when defendants argue that an expert's study is "*unrepresentative or inaccurate*," that "*defense is itself common to the claims made by all class members.*" [56] The Supreme Court instructed that such a defense should be addressed "*as a matter of summary judgment, not class certification*." [57]

217. The various cases cited by Mastercard regarding antitrust standing predate *Tyson* and the foregoing appeals court rulings.

218. Certainly, the Court in *Tyson* observed, as Mastercard notes (see paragraph 151(a), Response), that the expert methodology used in that case to calculate class wide damages could also be used in an individual action on the same claims. Putting aside that the Supreme Court did not announce any general rule in this regard, Mastercard in any event provides no explanation of why here an overcharge analysis by the Applicant's expert could not similarly be used to calculate damages were an individual consumer claimant to seek damages resulting from Mastercard's competition law infringements. In fact, that is precisely what the Applicant's expert asserts, that the same methodology would be used for individual claims. That the necessary expert analysis is so costly, and not practicable for individual class members to fund, is a factor favoring class treatment of the claims.

219. Nor do the other cases Mastercard cites require a different approach. Taking each case in paragraph 151(b)-(d) of the Response in turn:

a. *Vista Healthplan v. Cephalon*, 2015 WL 3623005 (E.D. Pa. June 10, 2015) is a pre-*Tyson*, lower-court case concerning conduct that delayed introduction of a generic version of a brand-name drug—it is not a price-fixing case.[58] The Court found that in that particular context, the claimants had not identified any clear way to ascertain class membership in the first instance.[59] More generally, the court recognized that "*[c]ourts have held that proof of aggregate damages is*

56 Id. at *9.
57 Id.
58 Id. at *1.
59 Id. at *19.

appropriate in class actions," and that "*the jury is permitted* ***to calculate the actual damages suffered using a reasonable estimation, as long as the jury verdict is not the product of speculation or guesswork***." (emphasis added) [60]

b. In *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), another case involving alleged delay of a generic alternative to a brand-name drug, the court expressly observed that "*We do not think the need for individual [damages] determinations or inquiry for a de minimis number of uninjured members at later stages of the litigation defeats class certification.*" [61]

c. And in *Fleischman v. Albany Medical Center*, 2008 WL 2945993 (N.D.N.Y. July 28, 2008)—a horizontal employee wage-fixing case—the court rejected plaintiffs' proposed approach for calculating each class member's damages, because the proposal did not account for certain factors unique to the wage context, including among other things differences in particular employees' performance and their merit as employees. [62]The court did not say that individual damages concerns always prohibit class certification, and the court confirmed that all that is required for the finder of fact is "***a just and reasonable estimate***." (emphasis added) As that court noted, "*courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages*." [63]

220. Finally, United States courts do not require what Mastercard characterises as an "accurate" measure of classwide damages (paragraph 150(a) and 151, Response). In fact, the United States Supreme Court has stated that at the class certification stage, damage "*[c]alculations need not be exact*," *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (1426) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248 (1931)). As

60 Id. at *22.
61 Id. at *21.
62 Id. at *7.
63 Id.

the United States Supreme Court has explained, a defendant may not seek to avoid liability simply by claiming that the damages it caused are too difficult to calculate. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("*In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury* ***may make a just and reasonable estimate of the damage based on relevant data****, and render its verdict accordingly. In such circumstances 'juries are* ***allowed to act on probable and inferential as well as (upon) direct and positive proof****.' **Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim**. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain*." (emphasis added)).

D AUSTRALIA

221. In the time available, the Applicant has not carried out his own comprehensive survey of Australian law. However, taking Mastercard's summary of Australian law at its highest and assuming for these purposes that it is correct, it is surprising that Mastercard concludes at paragraph 136(b) of its Response that the "*the position in Australian Federal and relevant State law is consistent with Mastercard's submissions as to the proper interpretation of the UK measures*". In particular:

    a. First, Australia does not have a certification regime.

    b. Second, even if it is correct (which it may not be) for Mastercard to say that "*the quantum of damages suffered by the group as a whole must be calculated according to existing law"* (paragraph 136(b)(ii), this does not assist Mastercard as it is precisely the approach that the Applicant and his experts have adopted. Australian legislation permits aggregate awards of damages (s. 33Z(1) and (3) of the Federal Court of Australia Act 1976) so long can make a "*reasonably accurate assessment of the total amount to which group members will be entitled*". This is precisely what this proposed claim seeks to do; the Applicant submits that on his approach the Tribunal will, at trial, be in a position to make a

reasonably accurate assessment of the loss suffered by the class as a whole.

c. Insofar as Mastercard seeks to draw a distinction between Australian Federal law and state law, it is not clear why this assists. Even if State law does adopt a different approach, there is no reason to prefer that approach.

ANNEX B: WITNESS STATEMENT OF ASHLEY C. KELLER

IN THE COMPETITION APPEAL TRIBUNAL **Case Number: 1266/7/7/16**

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant / Proposed Class Representative

and

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Proposed Defendants

WITNESS STATEMENT OF ASHLEY CONRAD KELLER

I, **ASHLEY CONRAD KELLER**, of 353 N. Clark Street, Suite 2700, Chicago, Illinois 60654, United States of America, will say as follows:

1. I am the co-founder and Managing Director of Gerchen Keller Capital, LLC ("***GKC***"). One of GKC's wholly-owned subsidiaries entered into a third-party litigation funding agreement with the Applicant / Proposed Claimant, Mr. Walter Merricks, on 22 June 2016 (the "***Funding Agreement***") for the purpose of providing him with the necessary funds to pursue the proposed collective proceedings. Since entering into the Funding Agreement, GKC has agreed the sale of its business to Burford Capital ("***Burford***"). At the time of making this witness statement, the transaction has closed and the two businesses are in the process of being integrated. The acquisition of GKC by Burford does not in any way impact the Funding Agreement.

2. I make this witness statement in support of Mr. Merricks's Application for a Collective Proceeding Order. I am authorised by GKC and Burford to make this witness statement.

3. The facts and matters set out in this statement are within my knowledge unless stated otherwise, and I believe them to be true. Where I refer to matters of which I do not have personal knowledge, they are true to the best of my information and belief.

Background on GKC and its involvement in the Proposed Collective Proceedings

4. GKC is the world's largest investment firm focused solely on legal and regulatory risk. Employing a team of 20 professionals, GKC manages more than US$1.4 billion of assets for public pensions, financial institutions, non-profit foundations, university endowments, and select family offices. Among other things, GKC frequently serves as a third-party funder of complex litigation. GKC is a registered investment adviser with the United States Securities and Exchange Commission.

5. GKC has extensive experience evaluating class (collective) actions and antitrust (competition) claims in the United States. When approached with the opportunity to fund the proposed collective action, I considered on behalf of GKC the merits of Mr. Merricks's claim to represent UK consumers. As is customary for a substantial funding request, GKC's underwriting team also performed extensive diligence on the proposed collective proceedings. In light of the novelty of the United Kingdom's collective action regime, we also retained a well-regarded City law firm to advise us on the funding issues. I was at all times engaged in this process.

6. Upon concluding that the proposed collective proceedings and Mr. Merricks's position as a representative of the proposed class had substantial merit, I directly negotiated the Funding Agreement with Mr. Merricks.

The Funding Agreement and issues raised by MasterCard

7. The Funding Agreement was prepared taking account of three principal objectives: (i) to ensure that Mr. Merricks could vigorously represent the proposed class all the way through

to judgment if necessary, without divided loyalties; (ii) that upon success, whether by judgement or through a settlement, the class would have the opportunity to recover the fullest amount of compensation available to the class; and (iii) that GKC's Funding Agreement would comply fully with the Competition Act 1998 and the Competition Appeal Tribunal Rules 2015, and in so doing, give our investors the opportunity to obtain a fair and reasonable return on the substantial investment we are making in the proposed collective proceedings that reflects the considerable risk they would be undertaking both as a result of taking on a large and complex claim against a well-resourced multinational and also given the uncertainty of operating in a completely new legal regime. I note that the risk is large because we are funding the proposed collective proceedings on a "non-recourse" basis. That means that if the claim is not successful GKC can lose the entire investment in the proposed collective proceedings, which is very substantial at a figure of £43 million; a sum that is, to my knowledge, a record for a single piece of litigation. I believe that our Funding Agreement meets each of these objectives.

8. In undertaking this investment, I am genuinely excited about the opportunity to be at the forefront of the development of the new collective action regime. GKC believes in the policy objectives of access to justice underpinning the new regime and we are willing to put the capital of our investors on the line to see the regime develop. However, ultimately we are a business, and I and my colleagues at GKC needed to be satisfied that in taking these substantial risks and investing in the proposed collective proceedings, there was a prospect for our investors to make a reasonable return. GKC believes that Mr. Merricks, together with his team of legal and expert advisers, can succeed in the proposed collective proceedings, and recover an amount of damages that reflects the loss suffered by the proposed class. Based on our experience with class actions in the United States, I and my colleagues at GKC considered that there will likely be a proportion of any damages that Mr. Merricks may recover that will end up being undistributed, despite his best efforts to distribute the full amount. For this reason we consider the proposed collective proceedings to be a worthwhile financial investment.

9. I have read Mastercard's Response to the Application for a Collective Proceedings Order filed with the Tribunal on 30 November 2016 ("***Response***"), and, in particular, the Confidential Annex on Funding Issues. Mastercard makes three allegations in the

Confidential Annex on Funding Issues. I understand from Mr. Merricks's solicitors that the matters raised by Mastercard will be extensively addressed in Mr. Merricks's Reply that will be filed with the Tribunal on 15 December 2016.

10. I address in this witness statement Mastercard's contention that that the Funding Agreement creates a conflict of interest between Mr Merricks and the proposed class. I note that Mastercard also contends that the Funding Agreement is unlawful because the Tribunal has no power to award us any monies from the unclaimed damages. This is something I do not accept for the reasons that, I understand from Mr. Merricks's solicitors, will be set out in the Reply.

Mr Merricks has total control over the Proposed Collective Proceedings

11. A highly relevant factor in my approach to negotiations with Mr. Merricks was that GKC does not interfere in the conduct of the litigation, even in circumstances where, as here, we have made a very substantial commitment to a complex claim with significant uncertainties. In particular, GKC never interferes with a claimholder's decision-making process; and our financial support never restricts the claimholder's ultimate authority, including with respect to settlement decisions. We do not intrude upon the solicitor-client relationship, and we never insist on a right to approve any legal or strategic decisions. This is how we do business in all jurisdictions where we fund litigation, and I see this as an inviolable rule. Section 4.2 of the Funding Agreement makes this clear: "*At all times, [Merricks] will maintain complete control of the Litigation and any settlement decisions related thereto[.]*" This principle is vital to our position and reputation in providing litigation funding in all the jurisdictions in which we operate.

Drawing GKC's investment return from undistributed damages creates no conflict of interest

12. In my view, there is no basis to conclude that the Funding Agreement creates any conflict of interest between Mr. Merricks and the proposed class.

13. GKC did not set the overall budget for this matter, we provided the full amount that was requested.

14. I approached the terms of the Funding Agreement with the intention that they comply as strictly as possible (and as far as could be foreseen without established law and practice) with the Competition Act 1998 and the Competition Appeal Tribunal Rules 2015. In doing so, I was cognisant that GKC should place, and was placing, the interests of the proposed class ahead of the interests of our investors by agreeing that any payment to GKC will only be made if there are any unclaimed damages. This ordering of interests has been done by the Funding Agreement providing that GKC's return is to come only from unclaimed class proceeds. (See definition of "Total Investment Return").

15. Mastercard claims that in all cases Mr. Merricks is required to pay GKC its investment return. ("*[T]he [Proposed] Applicant is required to seek to ensure that the Total Investment Return is paid to the Funder. To do so, the [Proposed] Applicant* ***therefore has an obligation to ensure that there is a sufficient amount of unclaimed damages*** *so that the Funder will receive the Total Investment Return*" (emphasis added)). This claim is simply not true. Section 2.5(b)(i) of the Funding Agreement states that "*In the event that the Litigation is successful or a collective settlement is approved pursuant to Rule 94 of the CAT Rules, Seller will* ***use his best endeavours*** *to obtain orders from the CAT that (i) the Total Investment Return be paid to Purchaser…*" (emphasis added).

16. Indeed, we have entered into the Funding Agreement with the full understanding that we have no guaranteed investment return. In the event of success, Mr. Merricks must apply to the Tribunal under Rule 93(4) to award GKC an amount out of the undistributed damages. We will honour our obligations to Mr. Merricks and the proposed class and we want Mr. Merricks to be able to demonstrate to the Tribunal at the conclusion of the proceedings that he was able to conduct the proceedings in the way that he considered best and that he had the funding required to pursue the claim to a successful outcome. I believe that this is what will maximise the prospects of the Tribunal granting an application under Rule 93(4). GKC's commitment to Mr. Merricks and the class will already have been borne out by the time of such an application, and I trust that the Tribunal will find similarly and approve our investment return.

Positive confirmation of the funding arrangements

17. GKC has undertaken considerable risk in providing a landmark sum to Mr. Merricks and the proposed class. We have done this under a new regime where no precedent exists. It was of considerable concern to GKC at the time of negotiating the agreement that the Tribunal had not yet made findings regarding the structuring or terms of funding agreements for collective actions. Having taken legal advice, we have structured the Funding Agreement with strict attention to the law, the Tribunal's Rules and the principles underlying the new collective action regime. I believe that the Funding Agreement strictly complies with all applicable law and Rules. Should the proposed collective proceedings be certified and should they ultimately be successful in recovering damages for the class, I believe the Tribunal will recognise the important role that GKC played and acknowledge this by making an appropriate order for a payment to GKC out of any unclaimed damages. However, to the extent the Tribunal disagrees and identifies problems with GKC's involvement or with the Funding Agreement, I respectfully ask that the Tribunal make this known at the outset given the significant financial investment that we have committed to make.

Burford's acquisition of GKC

18. On 14 December 2016, it was announced that GKC had agreed to be acquired by Burford. Burford and GKC are the two largest litigation finance players in the world. Together, the firms have committed more than $2 billion to investments since their respective inceptions. Burford is a publicly traded company, with a listing on the London AIM Stock Exchange. As a result of this acquisition, GKC will have a direct presence in London at the existing Burford offices. As part of Burford, GKC will also now be a member of the Association of Litigation Funders, an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales.

19. As part of integration process, the GKC brand will be replaced with Burford. However, the entity that has contracted with Mr. Merricks will not change, so there will be no need for any alteration of the Funding Agreement. I will be taking up a senior management role within Burford as a Managing Director, and will continue to have responsibility and oversight of the

investment in the proposed collective proceedings. I can also confirm that Burford is as fully committed to Mr. Merricks and the proposed collective proceedings as GKC and I are. The acquisition of GKC will not impact the Funding Agreement, other than to now have the standout largest and most experienced litigation funder supporting the proposed collective action, with a presence in London.

Statement of Truth

I believe that the facts stated in this witness statement are true.

……

Ashley Conrad Keller

Dated: 15 December 2016